NATIVE LAW

VOLUME NO. 1(c)

JUNE TO NOVEMBER 1978

Prepared by

Ava Kanner
Under Contract to the
Department of Indian and Northern Affairs
Assisted by Jeffrey Ross

LIST OF VOLUMES

VOLUME	SUBJECT	PAGES
1.(a)	Aboriginal Rights	13-379
1.(b)	Aboriginal Rights	380-822
1.(c)	Aboriginal Rights	823-1593
	(Index)	1594-1602
2.	Reserve Lands	9-359
2.(a)	Reserve Lands	360-727
	Lands off Reserve - Crown as Trustee	743-986
	(Index)	728-738,987
3.	Taxation	5-237
	(Index)	238-241
4.	Hunting, Fishing, Trapping	11-600
4.(a)	Hunting, Fishing, Trapping	601-767
	(Index)	768-775
	Treaties	779-1110
	(Index)	1111
	Constitutional	1116-1424
	(Index)	1425-1427
5.	Band	5-163
	(Index)	164-166
6.	Civil Rights - Civil Status	6-237
	(Index)	238-240
	Family	245-543
	(Index)	544-548
7.	Liquor	6-154
	(Index)	155-157
	Traffic	160-223
	(Index)	224-226
	Other Offences	229-274
	(Index)	275
8.	Procedure	7-157
	(Index)	158-161
	Jurisdiction of Courts	164-186
	(Index)	187
9.	Case Résumés	5-281
	(includes alphabetical listing and page/vol. citation)	282-302

LIBRARY
INDIAN AND NORTHERN AFFAIRS
CANADA
JULY 18 1989
AFFAIRES INDIENNES ET DU NORD
CANADA
BIBLIOTHÈQUE

GUIDE TO USE

-- Volumes 1(a), 1(b), 1(c) - Aboriginal Rights

Table of Contents	p. 3, Vol. 1(a)
Subject Breakdown	pp. 5-12, Vol. 1(a)
Alphabetical Case Index	pp. 1594-1602, Vol. 1(c)

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

LIBRARY - BIBLIOTHÈQUE

E94 C36 1978 1c c.2
Canada. Circumpolar and Scie
Native law

TABLE OF CONTENTS

Volume 1 (c)

St. Catherine's Milling and Lumber Co. v. R., (1888) 14 App. Cas. 46; 13 S.C.R. 577; 13 O.A.R. 148; 10 O.R. 196 — 823

U.S. v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941) — 1003

Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515 (1832) — 1025

Calder v. A.G. of B.C. (1973) S.C.R. 313; (1971) 13 D.L.R. (3d) 64; (1970) 8 D.L.R. (3d) 59 — 1057

c) Compensation

United States v. Shoshone Tribe, 304 U.S. 111 (1938) — 1243

Choctaw Nation v. United States, 119 U.S. 1 (1886) — 1250

United States v. Klamatch and Modoc Tribes, 304 U.S. 119 (1937) — 1266

Otoe and Missouria Tribe of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1955) — 1272

Osage Nation of Indians v. United States, 97 F. Supp. 381 (Ct. Cl. 1951) — 1304

Sac and Fox Tribe of Indians of Oklahoma et al. v. U.S., 315 F. 2d. 896 (Ct. Cl. 1963) — 1350

Sioux Tribe of Indians v. U.S., 146 F. 229 (Ct. Cl. 1956) — 1361

Tlingit and Haida Indians of Alaska v. United States, 389 F. 2d 778 (Ct. Cl. 1968) — 1375

Miami Tribe of Oklahoma v. United States, 281 F. 2d 202 (Ct. Cl. 1960) — 1391

Upper Chehalis Tribe v. U.S., 155 F. Supp. 226 (Ct. Cl. 1957) — 1404

United States v. Northern Paiute Nation et al., 393 F. 2d 786 (Ct. Cl. 1968) — 1409

Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926 (Ct. Cl. 1959) — 1431

Crow Tribe of Indians v. United States, 284 F. 2d 361 (Ct. Cl. 1960) — 1465

Mowat v. Casgrain (AG. Can. v. A.G. Qué) (1897), 6 Qué. Q.B. 12 — 1482

United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946) — 1501

d) Extinguishment

Holden v. Joy, 84 U.S. 211 (1872) — 1526

Warner v. Joy, 84 U.S. 253 (1872) — 1541

Buttz v. Northern Pacific Railroad Co., 119 U.S. 55 (1886) — 1543

e) Treaties of Friendship

R. v. Isaac (1975) 13 NSR. (2d) 460, at p. 479 etc. — Vol. 4, p. 23

Re Paulette (1977) 2 SCR. 628; (1976) 2 WWR 193 — 651

f) "Lex Loci"

Campbell v. Hall (1774) 1 Cowp. 204 — 1551

Attorney Genral of Southern Nigeria v. Holt, (1915) App. Cas. 599 — 1562

Cook v. Sprigg, (1899) App. Cas. 572 (P.C.) — 1586

[PRIVY COUNCIL.]

J. C.* 1888

July 12, 13, 17, 19, 20, 24, 26; Dec. 12.

ST. CATHERINE'S MILLING AND LUMBER COMPANY . . . . . } DEFENDANTS;

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR ONTARIO } PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, s. 109—*Lands reserved to the Indians—Rights of the Province.*

Sect. 109 of the B. N. A. Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under sects. 108 and 117.

Attorney-General of Ontario v. *Mercer* (8 App. Cas. 767) followed.

By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories," as, not having been ceded to or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person.

In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing:—

Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of sect. 109.

Held also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.

APPEAL from a judgment of the Supreme Court, dated June 20, 1887 (Ritchie, C.J., Fournier, Henry, and Taschereau, JJ.,

* *Present:*—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR RICHARD COUCH.

Strong and Gwynne, JJ., dissenting), which affirmed a judgment of the Chancery Division of the High Court of Justice for Ontario (June 10, 1885).

The question in the appeal was whether certain lands admittedly situated within the boundaries of Ontario belonged to that Province or to the Dominion of Canada. The appellants cut timber on the lands, which are Crown lands, without authority from the Ontario Government, which accordingly sued for an injunction and damages. The appellants justified by setting up a licence from the Dominion Government dated 1st of May, 1883. The Courts in Canada decided in favour of the Province. The order of Her Majesty in Council granting special leave to appeal provided that the Dominion should be at liberty to intervene in the appeal.

The circumstances out of which the dispute as to title arose are set out in the judgment of their Lordships.

Sir *R. E. Webster*, A.G., and *Gore*, for the Attorney-General for the Dominion.

McCarthy, Q.C. (Canada), and *Jeune*, Q.C., for the appellants.

Mowat, Q.C. (*Attorney-General for Ontario*), and *Blake*, Q.C. (Sir *Horace Davey*, Q.C., and *Haldane*, with them), for the respondents.

Sir *R. E. Webster*, A.G., and *McCarthy*, Q.C., contended that the judgment of the Supreme Court should be reversed. It lay on the respondent to make good the title of the Province to these lands. Previous to the treaty of the 3rd of October, 1873, the lands in suit, and the whole area of which they formed part, were occupied by a tribe of the Ojibbeway Indians, who by that treaty ceded the whole area in manner as therein mentioned to the Government of the Dominion. The provincial Government were no party to this treaty, and it was admitted that no surrender had been made of Indian title except to the Dominion. Reference was made to the British North America Act, 1867, sect. 91, sub-sect. 24, which gives to the Dominion exclusive legislative authority over "Indians and lands reserved for the Indians" as compared with sect. 92, sub-sect. 5, which assigns "the manage-

J. C. 1888

ST. CATHERINE'S MILLING AND LUMBER COMPANY v. THE QUEEN.

ment and sale of public lands belonging to the Province, and of the timber and wood thereon" to the legislative authority of the Province. Also to sects. 109 and 117, and to *Attorney-General of Ontario* v. *Mercer* (1).

Documentary evidence was referred to, to shew the nature and character of the Indian title. It was contended that the effect of it was to shew that from the earliest times the Indians had, and were always recognised as having, a complete proprietary interest, limited by an imperfect power of alienation. British and Canadian legislation was referred to, to shew that such complete title had been uniformly recognised: see Royal Proclamation October 7, 1763, held by Lord Mansfield in *Campbell* v. *Hall* (2) to have the same force as a statute, under which the lands in suit were reserved to the Indians in absolute proprietary right; 43 Geo. 3, c. 138; 1 & 2 Geo. 4, c. 66; 17 Geo. 3, c. 7 (Quebec); 10 Geo. 4, c. 3 (Upper Canada); 7 Will. 4, c. 118; 2 Vict. c. 15, and 12 Vict. c. 9 (Upper Canada); 13 & 14 Vict. c. 74 (U. C.); 14 & 15 Vict. c. 51 (U. C.); 16 Vict. c. 91 (U. C.); 20 Vict. c. 26 (U. C.). The proclamation in 1763 was uniformly acted on and recognised by the Government as well as the legislature, and was regarded by the Indians as their charter. It was not superseded by the Quebec Act (14 Geo. 3, c. 83, imperial statute); but it was held by the Supreme Court of the United States to be still in force in 1823: see *Johnson* v. *McIntosh* (3). Reference was also made to *The Cherokee Nation* v. *The State of Georgia* (4) and *Worcester* v. *The State of Georgia* (5); *United States* v. *Clarke* (6); *Mitchel* v. *United States* (7); *The State of Georgia* v. *Canatoo*, reported in a note to Kent's Commentaries, vol. iii., p. 378; *Ogden* v. *Lee* (8); *Fellows* v. *Lee* (9); *Gaines* v. *Nicholson* (10); Chitty's Prerog. of the Crown, p. 29. Reference was also made to the case of *The Queen* v. *Symonds* (June, 1847), in Parliamentary Papers, 1860, vol. xlvii., p. 47 (Colonies New Zealand), where also there was said to be a report of a Select Committee of the House of Commons on the Treatment of the

(1) 8 App. Cas. 767.
(2) 1 Cowp. 204.
(3) 8 Wheaton, 543.
(4) 5 Peters, 1.
(5) 6 Peters, 515.
(6) 9 Peters, 168.
(7) 9 Peters, 711.
(8) 6 Hills, 546.
(9) 5 Denio, 628.
(10) 9 Howard, 356.

Aborigines in British Settlements. Also to a report in Appendix I. to Journals, House of Assembly, Canada, 1847, headed "Title to Lands and Tenure of Land."

The absolute title being in the Indians was ceded by them, subject to certain reservations, for valuable consideration to the Dominion, and the treaty to that effect did not enure to the benefit of the Province in any way. The Province could not claim property in the land except by virtue of the Act of 1867, and as regards that Act the lands did not belong to the Province prior thereto within sect. 109; they were not in 1867 public property which the Province could retain under sect. 117; they were not public lands of the Province within sect. 92, sub-sect. 5.

Mowat, Q.C., and *Blake*, Q.C., for the respondent, contended that both before and after the treaty of 1873 the title to the lands in suit was in the Crown and not in the Indians. The lands being within the limits of the Province, the beneficial interest therein passed to the Province under the Act of 1867, and the Dominion obtained thereunder no such interest as it claims in this suit. Even if they were lands reserved for the Indians within the meaning of the Act the Dominion gained thereunder only a power of legislating in respect to them, it did not gain ownership or a right to become owner by purchase from the Indians. Under sect. 109, whether reserved to the Indians or not the land goes to the Province subject to any interest on the part of the Indians. See also sect. 108 and sect. 91, sub-sect. 9. With regard to the alleged absolute title of the Indians to which the Dominion is said to have succeeded by treaty, no such title existed on their part either as against the King of France before the conquest or against the Crown of England since the conquest. Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or an equitable title in the ordinary sense. For instance, the Crown made grants of land in every part of British North America both before and after the proclamation of 1763 without any previous extinguishment of the Indian claim. The grantees in those cases had to deal with the Indian claims, but the legal validity of the grants themselves was undeniably recognised both in the Canadian and

827

J. C. 1888

ST. CATHERINE'S MILLING AND LUMBER COMPANY v. THE QUEEN.

the American Courts. As regards that proclamation it was argued that it was not intended to divest, and did not divest, the Crown of its absolute title to the lands, and the reservation, upon which so much argument has been rested, was expressed to last only "for the present and until Our further pleasure be known." Further, as regards the lands now in suit the proclamation was superseded by the Imperial Act of 1774, known as the Quebec Act, which added that land to the Province. It was not the intention of that Act to give to the Indians any new right over and above the interest which they possessed under the proclamation, and which was a mere licence terminable at the will of the Crown. With regard to the effect of purchases from the Indians, reference was made to *Meigs* v. *McClung's Lessee* (1) and *Clark* v. *Smith* (2).

With regard to the application of the British North American Act and the construction to be placed upon it, it was submitted that that Act should be on all occasions interpreted in a large, liberal, and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words. The general scheme, purpose, and intent of the Act should be borne in mind. The scheme is to create a federal union consisting of several entities. The purpose was at the same time to preserve the Provinces, not as fractions of a unit, but as units of a multiple. The Provinces are to be on an equal footing. The ownership and development of Crown lands and the revenues therefrom are to be left to the Province in which they are situated. As to legislative powers, it is the residuum which is left to the Dominion; as to proprietary rights, the residuum goes to the Provinces. Where property is intended to go to the Dominion it is specifically granted, even though legislative authority over it may already have been vested in the Dominion. It is contrary to the spirit of the Act to hold that the grant of legislative power over lands reserved for the Indians carries with it by implication a grant of proprietary right.

Sir *R. E. Webster*, A.G., replied:—

Upon the question whether the old province of Canada had any right to the lands in suit at the date of the Act of 1867 which

(1) 9 Cranch, 11 (2) 13 Peters, 195.

passed thereunder, certain legislative duties had been conferred on the province with regard to Indians, and a certain power of bargaining with regard to Indian lands; but no proprietary right had been given: see 2 Vict. c. 15 (U.C.), which was held to apply to unsurrendered lands in *The Queen* v. *Strong* (1), and *Little* v. *Keating* (2). There is a series of statutes which shews that prior to 1867 the Province had nothing but some slight legislative rights over the land: see 3 & 4 Vict. c. 35, s. 54; 12 Vict. c. 9; 13 & 14 Vict. c. 74; Cons. Stat. 22 Vict. (U.C.) c. 81; 23 Vict. c. 61, s. 54. The whole course of legislation before 1867 was that the proceeds of the Indian lands should be kept for the Indians, and not go to the Province. [LORD SELBORNE:—This is the first suggestion to that effect.] Reference was then made to the later Dominion Acts, 31 Vict. c. 42, ss. 6, 7, 8, 10, 11, especially 25; 39 Vict. c. 18; 43 Vict. c. 28. The Crown lands were dealt with by 23 Vict. c. 2; the Indian lands by 23 Vict. c. 151. Reference was made to *Fanvleck* v. *Stewart* (3); *Fegan* v. *McLean* (4), as shewing that the Indians had the right to cut and sell timber in the special reserves, and appropriate the proceeds.

1888
Dec. 12.

The judgment of their Lordships was delivered by

LORD WATSON:—

On the 3rd of October, 1873, a formal treaty or contract was concluded between commissioners appointed by the Government of the Dominion of Canada, on behalf of Her Majesty the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteaux tribe of Ojibbeway Indians, of the other part, by which the latter, for certain considerations, released and surrendered to the Government of the Dominion, for Her Majesty and her successors, the whole right and title of the Indian inhabitants whom they represented, to a tract of country upwards of 50,000 square miles in extent. By an article of the treaty it is stipulated that, subject to such regulations as may be made by the Domiuion Government, the Indians are to have right to pursue their avocations of hunting and fishing through-

(1) Upp. Can. Rep. 1 Ch. 392.
(2) 6 Upp. Can. Rep. Q. B. (O.S.) 265.
(3) 19 Upp. Can. Rep. Q. B. 489.
(4) 29 Upp. Can. Rep. Q. B. 202.

J. C. 1888

ST. CATHERINE'S MILLING AND LUMBER COMPANY v. THE QUEEN

out the surrendered territory, with the exception of those portions of it which may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes.

Of the territory thus ceded to the Crown, an area of not less than 32,000 square miles is situated within the boundaries of the Province of Ontario; and, with respect to that area, a controversy has arisen between the Dominion and Ontario, each of them maintaining that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty.

Acting on the assumption that the beneficial interest in these lands had passed to the Dominion Government, their Crown Timber Agent, on the 1st of May, 1883, issued to the appellants, the St. Catherine's Milling and Lumber Company, a permit to cut and carry away one million feet of lumber from a specified portion of the disputed area. The appellants having availed themselves of that licence, a writ was filed against them in the Chancery Division of the High Court of Ontario, at the instance of the Queen on the information of the Attorney-General of the Province, praying—(1) a declaration that the appellants have no rights in respect of the timber cut by them upon the lands specified in their permit; (2) an injunction restraining them from trespassing on the premises and from cutting any timber thereon; (3) an injunction against the removal of timber already cut; and (4) decree for the damage occasioned by their wrongful acts. The Chancellor of Ontario, on the 10th of June, 1885, decerned with costs against the appellants, in terms of the first three of these conclusions, and referred the amount of damage to the Master in Ordinary. The judgment of the learned Chancellor was unanimously affirmed on the 20th of April, 1886, by the Court of Appeal for Ontario, and an appeal taken from their decision to the Supreme Court of Canada was dismissed on the 20th of June, 1887, by a majority of four of the six judges constituting the court.

Although the present case relates exclusively to the right of the Government of Canada to dispose of the timber in question

to the appellant company, yet its decision necessarily involves the determination of the larger question between that government and the province of Ontario with respect to the legal consequences of the treaty of 1873. In these circumstances, Her Majesty, by the same order which gave the appellants leave to bring the judgment of the Court below under the review of this Board, was pleased to direct that the Government of the Dominion of Canada should be at liberty to intervene in this appeal, or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to take the first of these courses, and their Lordships have had the advantage of hearing from their counsel an able and exhaustive argument in support of their claim to that part of the ceded territory which lies within the provincial boundaries of Ontario.

The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on the 7th of October, 1763, shortly after the date of the Treaty of Paris, by which His Majesty King George erected four distinct and separate Governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British 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," it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or "until Our further pleasure be known," upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them. It was further declared "to be Our Royal will, for the present, as aforesaid, to reserve under Our

J. C. 1888

ST. CATHERINE'S MILLING AND LUMBER COMPANY v. THE QUEEN.

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 limits of the territory granted to the Hudson's Bay Company." The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lie.

The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and

pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

By an Imperial statute passed in the year 1840 (3 & 4 Viet. c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, inter alia, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united Provinces should be paid into the consolidated fund of the new Province. There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the British North America Act, 1867. Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering, and other purposes would have been the property of the Province of Canada. The case maintained for the appellants is that the Act of 1867 transferred to the Dominion all interest in Indian lands which previously belonged to the Province.

The Act of 1867, which created the Federal Government,

833

J. C. 1888

ST. CATHERINE'S MILLING AND LUMBER COMPANY v. THE QUEEN.

repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate Provinces, under the titles of Ontario and Quebec, due provision being made (sect. 142) for the division between them of the property and assets of the United Province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective Provinces included in the Union, on the one hand, and the Dominion, on the other. The conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

Sect. 108 enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the Provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of "lands set apart for general public purposes." It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use. The only other clause in the Act by which a share of what previously constituted provincial revenues and assets is directly assigned to the Dominion is sect. 102. It enacts that all "duties and revenues" over which the respective legislatures of the United Provinces had and have power of appropriation, "except such portions thereof as are by this Act reserved to the respective legislatures of the Provinces, or are raised by them in accordance with the special powers conferred upon them by this Act," shall form one consolidated fund, to be appropriated for the public service of Canada. The extent to

which duties and revenues arising within the limits of Ontario, and over which the legislature of the old Province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favour of the new provincial legislatures.

The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the revenues which provincial legislatures are empowered to raise by means of direct taxation for Provincial purposes, in terms of sect. 92 (2). The first of them, which appears to comprehend the whole sources of revenue reserved to the provinces by sect. 109, is of material consequence. Sect. 109 provides that "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." In connection with this clause it may be observed that, by sect. 117, it is declared that the Provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the Provinces; but it hardly admits of doubt that the interests in land, mines, minerals, and royalties, which by sect. 109 are declared to belong to the Provinces, include, if they are not identical with, the "duties and revenues" first excepted in sect. 102.

The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under

J. C. 1888

ST. CATHERINE'S MILLING AND LUMBER COMPANY v. THE QUEEN.

sect. 108, or might assume for the purposes specified in sect. 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the Provinces. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario* v. *Mercer* (1), where the controversy related to land granted in fee simple to a subject before 1867, which became escheat to the Crown in the year 1871. The Lord Chancellor (Earl Selborne) in delivering judgment in that case, said (2): "It was not disputed, in the argument for the Dominion at the bar, that all territorial revenues arising within each Province from 'lands' (in which term must be comprehended all estates in land), which at the time of the union belonged to the Crown, were reserved to the respective Provinces by sect. 109; and it was admitted that no distinction could, in that respect, be made between lands then ungranted, and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the union were in private hands, and did not then belong to the Crown. Their Lordships indicated an opinion to the effect that the escheat would not, in the special circumstances of that case, have passed to the Province as "lands;" but they held that it fell within the class of rights reserved to the Provinces as "royalties" by sect. 109.

Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario* v. *Mercer* (1) might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms

(1) 8 App. Cas. 767. (2) 8 App. Cas. 776.

of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91 (24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91 (24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Their Lordships are, however, unable to assent to the argument for the Dominion founded on sect. 92 (24). There can be no à priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

837

J. C.
1888
ST. CATHERINE'S MILLING AND LUMBER COMPANY v. THE QUEEN.

By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute, in order that it might be opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit, "to the Government of the Dominion of Canada," for the Queen and Her successors for ever. It was argued that a cession in these terms was in effect a conveyance to the Dominion Government of the whole rights of the Indians, with consent of the Crown. That is not the natural import of the language of the treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown. Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867.

These considerations appear to their Lordships to be sufficient for the disposal of this appeal. The treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that Province. The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario. Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government. There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.

Their Lordships will therefore humbly advise Her Majesty

J. C.
1888
ST. CATHERINE'S MILLING AND LUMBER COMPANY v. THE QUEEN

that the judgment of the Supreme Court of Canada ought to be affirmed, and the appeal dismissed. It appears to them that there ought to be no costs of the appeal.

Solicitors for appellants: *Johnston, Harrison, & Powell.*

Solicitors for Attorney-General for Ontario: *Freshfields & Williams.*

Solicitors for Attorney-General for the Dominion: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

J. C.*
1888
Nov. 28; *Dec.* 5.

PLOMLEY AND OTHERS . . . . . APPELLANTS;

AND

FELTON AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Mortgage—Proviso of Redemption—Construction—Reconveyance to be of Original Estates of Mortgagors.

Where in a deed of mortgage it was recited that the mortgagor was entitled under his father's will to a life estate in the hereditaments comprised in the said deed, with remainder to his children as tenants in tail general, with cross-remainders between them, and that for the purpose of increasing the mortgagee's security one of his daughters and her husband (parties thereto of the second part) had agreed to bar the estate tail in remainder vested in them, the reconveyance to be made to the mortgagors respectively according to their original respective estates and interests therein:—

Held, that, according to the true construction of the proviso for redemption, the parties were entitled to a re-conveyance of the estates as originally created by the will, and not as altered for the purposes of the mortgage.

APPEAL from an order of the Supreme Court (July 25, 1887), confirming an order of the Primary Judge in Equity (Nov. 16, 1885).

There were two questions in this appeal. One was whether a deed of mortgage, dated the 28th of February, 1859, and sufficiently set out in their Lordships' judgment, by which a tenant

* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, SIR RICHARD COUCH, and MR. STEPHEN WOULFE FLANAGAN.

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—Secs. 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."

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

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN

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.

"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

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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-

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

"advertently seated themselves upon any lands wi hin "the countries above described, or upon any other l nds "which, not having been ceded to or purchased b us, "are still reserved to the said Indians as aforesaid, forth- "with to remove themselves from such settlement s.

"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

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

"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 Pennepack 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.

846

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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.

850

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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 could 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.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

"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.

852

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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.

[The learned counsel read extracts from this case showing that the Indian title, so-called, w s 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 *Brown* 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.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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 submittted 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.

858

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

The Dominion, however, treated this as operating as an 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.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

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

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.

862

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Ritchie C.J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Ritchie C.J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

868

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

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

870

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

178 872

1887

ST. CATHARINES MILLING AND LUMBER CO v. THE QUEEN.

Strong J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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*).

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

876

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

878 880

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

882

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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-

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

888

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

1887

ST CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

"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

890

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

892

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

894

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

- 08896

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J

forth any authoritative declaration of the proper construction of the clause in question in the British North America 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.

899

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

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,

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

&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

106902

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

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.

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

908

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

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. 17, (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

903 910

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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.

912

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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-

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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 :—

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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-

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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-

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

928

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

Northwest 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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

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.*

[CHANCERY DIVISION.]

REGINA v. THE ST. CATHARINES MILLING AND LUMBER COMPANY.

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 defendants 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,

939

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 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 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

941

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 endeavour 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

(*a*) This opinion is set out *verbatim* in a footnote to the judgment *infra*.

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. Reference may be 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 recognised 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. 106; 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; *VanVleck* 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

(*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.

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.

June 10th, 1885. BOYD, 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

(*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.

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 populations that remained in the country became, by the terms of capitulation, the subjects of the King. So far as the latter were concerned, it was stipulated in the articles of capitulation concluded at Montreal (on 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 re-united 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 plantations, and the general prosecution of colonization. They were treated "justly and graciously," as Lord Bacon advised, but no legal ownership of the land was ever attributed to them. The Attorney-General in his argument called my attention to a joint opinion given by a "multitude of counsellors," about 1675, touching land in New York, while yet a province under English rule. (*d*)

(*d*) The opinion referred to was as follows :

Councells opinions concerning Coll. Nicholls pattent and Indian purchases.

The land called N. York & other parts in America now called N. East Jersey, was first discovered 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 Eliz. and after him by Henery Hudson in ye Reign of King James and also by the Lord Delaware and begun to be planted in ye year 1614 by Dutch & English ; the Dutch placed a Governour there bnt 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

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

Sr 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. Nicholls ye Dukes Govenr: Severall 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 Berckley & 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.

Answ. 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

949

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.

up Land but by ye Consent & Lycence of ye Govr or proprietors under ye princes title whose people made ye First Discovery & upon their Submitiou 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 heen & 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 & Christian 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 Convertiug 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 his 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 Proprietrs without a Confirmation from them upon the usuall terms of Other Plantations.

	Wm Leck	Jo. Holt
	Wm Williams	Wm Thomson
A true Coppy.	Jo. Holles	Richd Wallop
Garvin Lawrie.	John Hoyle	Hen. Pollexfen
Robt West		

The above printed extract is from Vol. xiii. of "Documents relating to the 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.

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

952

country within that Province without a written license from the Governor, and no person was allowed to trade without license in any part of the Province upon lands not granted by His Majesty.

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

See 953

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.

"In Upper Canada where at the time of the conquest the Indians were the chief occupants of the territory where they were all pagans and

uncivilized, it became necessary as the settlement of the country advanced to make successive agreements with them for the peaceable surrender of portions of their hunting grounds. The terms were sometimes for a certain quantity of presents, once delivered, or for an annual payment in perpetuity. * * These agreements * * sometimes contain reservations of a part of the land surrendered for the future occupation of the tribe. In other cases separate agreements for such reservations have been made, or the reservations have been established by their being omitted from the surrender, and in those instances consequently the Indians hold upon their original title of occupancy:" 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

955

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 Ojibbeway 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

957

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 the 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 gratulation 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 Mississaga 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

(*e*) Printed as App. 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.

959

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

A further outcome of the elaborate report published in 1847, was an Act "for the protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass 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 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

S80
963

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 therefor shall be paid to the Superintendent-General of Indian affairs for the use of the tribe of Indians for which such land is held in trust.

The legislation of Canada, since Confederation, also reflects very clear light upon what was understood by the Indian reserves. For instance, in 1868 it is declared that "all lands reserved for Indians, * * or held in trust for their benefit shall be deemed to be reserved and held for the same purposes as before 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 on reserves which have been sub-divided by survey with a view to their ultimate proprietorship, and consequent enfranchisement of the owner. And in 1876, 39 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

965

"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 out-standing 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 co-extensive 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 be 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

doc 967

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 possesssion 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 wilfully 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 goverment 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 1867 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 Ojibbeway branch of the great and wide-spread

Algonquin stock. Divided into thirty bands, they numbered, all told, some 2,600 or 2,700 souls. These only remained as representatives of the primitive possessors of 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 therein undisturbed and unlimited possession of all their hunting ranges, whereas the Act, though giving jurisdiction to the Dominion over all Indians, wild or settled, does not transfer to that government all public or waste lands of the Provinces on which they may be found at large.

The territorial jurisdiction of the Dominion extends only to lands *reserved* for them. Now it is evident from the history of "the reserves," that the Indians there are regarded no longer as in a wild and primitive state, but as in a condition of transition from barbarism to civilization. The object of the system is to segregate the red from the white population, in order that the former may be trained up to a level with the latter. The key-note of the whole movement was struck unmistakably in 1838, by Lord

Glenelg, in his instructions to Sir 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 set-

058971

tlement and development of the country, and so, sooner or later, to displace them. If, however, they elect to treat they then become, in a special sense, wards of the State, are surrounded by its protection while under pupillage, and have their rights assured in perpetuity to the usual land reserve. In regard to this reserve the tribe enjoy practically all the advantages and safeguards of private resident proprietors: *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

(*g*) All papers, treaties, &c., relating to this boundary dispute may be found either in the 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.

ST 973

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 re-adjustment 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

(*h*) See Statutes of 1872, D.

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 be allotted to it; no basis of acreage was to be fixed, but each nation should be dealt with separately.

In the event of any material increase or decrease thereafter of the numbers of a nation occupying a reserve, such reserve was to be enlarged or diminished as the case might be. "The extra land required by any

975

reserve shall be allotted from Crown lands, and any land taken off a reserve shall revert to the Province."

In a large part of the unsettled domain of British Columbia, as I gather from the blue books, the Indian title had not been extinguished. The last provision I have above quoted, was inserted in consequence of the contention of the Dominion that the quantity of land proposed to be assigned by the Local Government was inadequate even for the present necessities of the tribes, and that when land matters were involved the claims of the red-men were entirely subordinated to those of the whites.

Several deductions, 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 a 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.

A. H. F. L.

REGINA v. THE ST. CATHARINES MILLING AND LUMBER COMPANY.

Indian lands—Public ungranted lands—B. N. A. Act, secs. 109, 117.

Held, [affirming the judgment of BOYD, C.], that lands ungranted upon which Indians have been accustomed to roam and live in their primitive state, form part of the public lands, and are under the B. N. A. Act, now held in the same manner by that Province in which such lands are situate as before the Confederation of the several Provinces.

THIS was an appeal by the defendants from the judgment of Boyd, C. (10 O. R. 196), and came on for hearing before this Court on the 10th, 11th, and 14th of December, 1885.*

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

Mowat, Attorney General, *W. Cassels*, Q. C., and *Mills*, for the Crown.

The circumstances out of which this action arose, the points relied on, and authorities cited by counsel, are fully stated in the former report of the case.

April 20, 1886. HAGARTY, C. J. O.—For a clear understanding of the case before us we are very much indebted to the learned Chancellor for the very clear, full, and well-arranged statement with which he prefaces his judgment. The field to be travelled over is necessarily very extensive. He has mapped it out with so much care and perspicacity as to very much reduce the labors of subsequent investigators. We may fully accept his historical treatment of the subject from the earliest period down to the Confederation Act of 1867. The review of the authorities as to the true nature and extent of the alleged "Indian Title" may well warrant our full acceptance of the conclusion at which the learned Chancellor has arrived on this important branch of the case.

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

We have then to consider the effect of the Confederation Act, and to glance at the existing position of the vast territories then moulded into a new constitutional form by Imperial legislation.

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

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

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

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

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

Sec. 109. All lands, mines, minerals and royalties belonging to the several Provinces * * * at the Union, and all sums then due or payable for such lands, mines, mine-

rals or royalties shall belong to the several Provinces of * * * in which the same are situate or arise, subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same.

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

Schedules are attached to the Act as to provincial public works and property to be the property of Canada, such as canals, harbors, and including (No. 9) property transferred by the Imperial Government and known as Ordnance Property. No. 10. Armories, drill-sheds, etc., etc., and lands set apart for general public purposes. Another schedule specifies certain assets and properties which are to belong to Quebec and Ontario jointly.

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

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

12 Vict. ch. 9, (Canada,) 1849, declaring as to the foregoing Act, that it was to extend to all lands in that part of this Province called Upper Canada, whether surveyed or unsurveyed, etc., and whether such lands be part of those usually known as Crown Reserves, Clergy Reserves, School Lands, or Indian Lands, &c., whether held in trust for the use of

the Indians or of any other parties, &c., and it expressly repeals any limitation in the first section of the Act of 1839.

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

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

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

Sec. 3. All moneys or securities applicable to the support or benefit of the Indians, &c., and all moneys accrued, or hereafter to accrue from the sale of any lands reserved or held in trust as aforesaid, shall, subject to the provisions of this Act, be applicable to the same purposes, and be dealt with in the same manner as they might have been applied or dealt with before this Act.

Sec. 4 declared that no release or surrender of lands reserved for the use of Indians, &c., shall be valid except assented to by the chiefs (as directed) at a meeting in presence of an officer, duly authorised to attend by the Commissioner of Crown Lands, to be duly certified and returned to the Commissioner of Crown Lands.

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

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

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

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

Much has been changed by Dominion legislation since that period.

The subsequent Dominion legislation may be referred to as indicative of the views of the framers of the statutes.

In 1868, the 31 Vict. ch. 42, (D.), substitutes the Secretary of State as Superintendent General of Indian Affairs, and the learned Chancellor points out the language in which "lands reserved for Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purpose

as before this Act, and no such lands shall be sold, alienated, or leased until they have been released or surrendered to the Crown."

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

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

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

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

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

The Chancellor properly refers to the Dominion Act of 1876, as to the definition of "Reserve" declared by sub. 6, sec. 3, to mean any tracts of land "set apart by treaty or otherwise for the use or benefit of, or granted to a particu-

lar band of Indians of which the legal title is in the Crown but which is unsurrendered."

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

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

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

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

The main contest before us is, whether it did not thereby become part of the public domain of Ontario. The appellants have to contend, as they do, that inasmuch as the In-

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

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

985

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

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

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

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

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

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

987

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

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

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

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

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

It would require very strong authority to induce any Court to come to such a conclusion, and whatever dicta there may be in American text books or decisions in support of such a view, I think it is the first time that such a contention has been urged in a British Court of Justice. Nor do I think the decisions in the United States warrant any such conclusion. It was stated in *Fletcher* v. *Peck* arguendo, 6 Cranch 87, (Feb. 1810,) that the Indian title was a mere occupancy for the purpose of hunting. It is not like our tenure, they have no idea of a title to the soil itself. It is over-run by them rather than inhabited : citing *Vattel*, ch. 1, secs. 81 and 209, bk. 2 sec. 97; *Montesquieu*, bk. 18, ch. 18; *Smith's* Wealth of Nations, bk. 5 ch. 1. It is a right not to be transferred but extinguished. And Marshall, C. J., in delivering judgment, refers to the question

merely in this way: "The Court is of opinion that the nature of the Indian title, which is certainly to be respected by all Courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State." And in 1823, the same eminent Judge again discusses the question in an able and exhaustive judgment from which the learned Chancellor has made some extracts.

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

The learned Judge in the course of his able judgment referred to the exclusive power of the Crown to grant lands, though in the occupation of the Indians before the Revolution as being undoubted, and then adds: "The existence of the power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time in different persons or in different Governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." I am aware that there are to be found in some

of the United States decisions expressions which would seem to place the so-called Indian title on a higher footing, but I think that it is met by the extract I have made from Chief Justice Marshall's judgment "that an absolute title cannot exist at one and the same time in different persons or in different Governments," and that in truth the recognition of any right in the Indians has been on the part of the Government a matter of public policy determined by political considerations, and motives of prudence or humanity, and has not been a recognition of property in the soil capable of being transferred. That has always been the view taken of their rights in this country, and so far back as 1858 the late Sir John Robinson, in giving judgment in *Totten* v. *Watson*, very clearly enunciates the opinion that the Indians had no title even as regards *the lands reserved for them*, and which, as he expresses, "they are merely permitted to occupy at the pleasure of the Crown;" 15 U. C. R. 392,

Mr McCarthy contended that the principles upon which the Crown had been accustomed to deal with the Indians since the cession had been so well established, and so uniformly and continuously exercised as to have grown into a right. There is no question that the same humane policy which the Imperial Government pursued in reference to them has been faithfully observed by the old Province of Canada from the time that the jurisdiction passed to them, and I have no doubt will still be continued whether the jurisdiction be with the Provinces or the Dominion. All that we are at present concerned with is, that this right, whatever it may be, is not a title to the land, and that by the 109th section of the British North America Act, the lands being within the limits of that portion of the old Province of Canada which now constitutes the Province of Ontario, belong to that Province, subject to any trusts at the time of the passing of the Act existing in respect thereof and to any interest other than that of the Province to the same. Sec. 109 became necessary in consequence of Ontario and Quebec having previously to Confederation formed but

991

one Province, and on their becoming disunited it became necessary to assign to each the property each should have. Apart from this, the plain and obvious intent and spirit of the Act is, that all lands situate within a Province continued to belong to the Province, with the exception of those which were specifically transferred to the Dominion and set forth in a schedule, and, as if to place this beyond all question, Section 117 declares that the several Provinces shall retain all their respective public property not otherwise disposed of in the Act, subject to the right of the Dominion to assume any lands or public property required for fortifications or the defence of the country.

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

I certainly should not have thought of resorting to the Proclamation of 1763 for the definition of the words in question, which at the time of Confederation had acquired a well understood meaning which had been repeatedly recognized in the statutes and public documents of the Provinces, and in the first Act passed by the Dominion

Parliament upon the subject, they treated their jurisdiction as confined to such lands as had been reserved for Indians, or for any tribe, band or body of Indians or held in trust for their benefit, and eight years subsequently when they consolidated the laws respecting Indians, they passed interpretation clauses in which the terms "Reserve" and "Special Reserve," and "Indian lands" are thus clearly defined, viz.:

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

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

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

But I understand the learned counsel for the appellants to push his argument to the extent of saying that the Imperial authorities kept so jealous a control over the Indians and their affairs, that they would not have entrusted the Provinces with the power of treating for the extinguishment of their rights. The best answer to that argument is, that many years before Confederation those authorities had handed over the control of the Indians to the Provinces, and that the division of the Dominion and

993

Provincial powers was settled by delegates from the several Provinces, the Imperial Parliament having little more to do with the matter than to give legal effect to the agreement then arrived at by the delegates. The main feature of the scheme of division being to give to the Dominion power to legislate upon subjects of national interest, or matters common to all the Provinces, and to the Provinces power to deal with matters of a local or private nature. It was reasonable, therefore, that the power to legislate for Indians generally throughout the Dominion should be vested in the central authority, and that the same power should deal with the lands which the Provinces had reserved or set apart for them, but this power was expressly limited to such subjects. It would have been very unlikely that the delegates would have consented to place the power of legislation in reference to the large unorganised tracts of public lands like that in question in the hands of the Dominion. If then the lands in question passed, or to speak more accurately remained part of the Province of Ontario, it would seem to follow almost as of course that the Provincial and not the Dominion authorities were the parties and the only parties who could extinguish the so-called Indian title in the absence of any express power to the Dominion to deal with it. We were referred to the case of *Lenoir* v. *Ritchie*, 3 S.C.R. 376—more commonly known as the Great Seal case—as authority against the Lieutenant-Governor of a Province having power to deal with such a matter on behalf of Her Majesty. Whenever a case involving the grave issues which were presented for decision in that proceeding comes before us under similar circumstances we shall be bound to follow that decision, but I must respectfully decline to adopt the views expressed by some of the Judges in that case as to the limited powers of the Lieutenant Governors and of the Legislatures of the Provinces.

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

The 12th sec. provides that all the powers, authorities

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

If it had not been for the expression to be found in some judicial utterances placing within very narrow limits the powers of the executive of the Provinces, I should have thought it too clear for argument, that the powers formerly exercised by the Lieutenant Governors of the other Provinces, and by the Governor General of Canada in reference to provincial matters, including agreements or so-called treaties with the Indians for the extinguishment of their rights, and granting to them in lieu thereof certain reserves either for occupation or for sale, were now vested exclusively in the Lieutenant Governors. The view that has been sometimes expressed that they do not represent Her Majesty for any purpose, appears to me to be founded on a fallacy, and to be taking altogether too narrow a view of an Act, which is not to be construed like an ordinary Act of Parliament, but as pointed out in the *Queen* v. *Hodge*, is to be interpreted in a broad, liberal, and quasi political sense.

995

It is obvious that as the public lands are vested in the Queen, the Lieutenant Governor must have the power, in Her Majesty's name, to grant the same, or they cannot be granted at all, for the Governor General clearly has no such power, and it has always been assumed, without any express provision in the statute for making such grants in Her Majesty's name, that the power is vested in the Lieutenant Governor. There are several clauses of the British North America Act in which his power to act in the name of the Queen is expressly recognised, as for instance: section 82, which empowers him in the Queen's name to summon the Legislature: in sec. 72 the Lieutenant Governor of Quebec is authorized to appoint legislative councillors in the Queen's name; and the Provincial Legislatures create Her Majesty's courts of civil and criminal jurisdiction, the writs in which are issued in Her Majesty's name. And this view appears to have received the direct confirmation of the Privy Council in *Theberge* v. *Laudry*, in which the Judicial Committee refer to an Act of the Provincial Legislature (2 App. Cas. 108) as having been assented to on the part of the Crown, and to which therefore the Crown was a party. If then it is within the competency of the Legislature of Ontario to legislate for the management and sale of these lands as being public lands belonging to the Province, it would follow that they have the minor power of empowering the executive to make any agreement for the extinguishment of the so-called Indian right. And I am of opinion therefore that there is no force in the learned counsel's objection that the Governor General could alone, as the representative of Her Majesty, accept a surrender of that right from the Indians.

Another reason for assuming that the Provincial authorities are the proper parties to deal with it arises from the consideration that in the event of the tribes ceasing to exist, the lands which have been reserved to them, to use Sir John Robinson's language, "for occupation at the pleasure of the Crown," would revert to the Province. Although when once reserved the Dominion Parliament

has alone power to deal with their management, it could scarcely have been in the contemplation of Parliament that the Dominion should prescribe to the Provinces the extent or nature of the reserves.

The Dominion authorities assumed to make the treaty in question under the mistaken belief that the lands were beyond the confines of the Province and were consequently Dominion lands, which will account for the reservation of the right to the Indians still to occupy the vast tract outside their actual reserve for hunting and fishing until granted to settlers by the Dominion Government; which if the treaty is to be adopted in its integrity, would mean for all time to come, as the Dominion Government have no power to make such grants. Even if I did not think the language of the British North America Act, which I have quoted, clearly conferred upon the Provincial authorities the power to extinguish the Indian title, the same reasoning which compelled us to hold in *Leprohon* v. *Ottawa*, 2 A.R. 522, that the local Legislature had no power to tax the official income of a Dominion officer for Provincial or Municipal purposes, would compel us, in my opinion, to hold that the local Governments alone must be the judges of the extent to which lands belonging to them shall be set apart for the use or benefit of any tribe of Indians. If the Dominion Government have the power, being in its nature unlimited, it might, as was pointed out in that case, be so used as to defeat the Provincial power and control over these lands altogether.

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

997

sustained, and the judgment appealed from should consequently be affirmed.

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

I shall not attempt to follow the course of the arguments to which we have listened, or to deal with the historical evidence touching the recognition or disregard by European powers of the rights of the natives of the countries they discovered or conquered or seized on this continent, to which counsel on both sides appealed in aid of the views

they advocated. I have not failed to consider it attentively, and I am satisfied that to discuss it at any length would be only to traverse the same ground which has been gone over by the learned Chancellor in his very able and perspicuous judgment, without adding anything of importance to what he has said.

The general result of the historical evidence is, I think, as correctly and as concisely stated in *Story's* Commentaries on the Constitution of the United States as in any other work. I quote from section 6, of the author's abridged edition of 1833: "It may be asked, what was the effect of this principle of discovery in respect to the rights of the natives themselves. In the view of the Europeans it created a peculiar relation between themselves and the aboriginal inhabitants. The latter were admitted to possess a right of occupancy or use in the soil, which was subordinate to the ultimate dominion of the discoverers. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion. In a certain sense they were permitted to exercise rights of sovereignty over it. They might sell or transfer it to the sovereign who discovered it, but they were denied authority to dispose of it to any other persons, and, until such a sale or transfer, they were generally permitted to occupy it as sovereigns de facto. But notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil while yet in the possession of the natives, subject, however, to their right of occupancy; and the title so granted was universally admitted to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treatises of public law, it was a transfer of plenum et utile dominium." This view is evidently that of the Parliament of Canada as may be gathered from the Indian Act, 1880, where "Reserve" is defined as "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of

999

or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered."

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

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

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

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

Therefore to argue that lands reserved for Indians become, by force of the British North America Act, the property of the Dominion as against the Provinces in which the reserves are situated, is, in my judgment, to attribute to section 91 an effect not contemplated or intended by the framers of the Act, and certainly not the necessary result of the language of the section. The question of the ultimate ownership, as between the Dominion and the Provinces, of the ordinary Indian reservation may not be too speculative a question for discussion. It would become a practical question in the event of any such land ceasing to be required for the occupation of the tribe, or for application by way of sale or lease for its benefit, and falling in, as it were, for ordinary public uses; and it might become a practical question if it were attempted to dispose of the land or the timber on it for other uses than the benefit of the Indians. It does not at present appear to raise except on the assumption that the lands reserved for Indians, mentioned in section 91, include not only tracts within the definition of "Reserve" in the Indian Act, 1880, but also such lands as those which are the subject of this litigation.

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

1901

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

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

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

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

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

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

I agree that we must dismiss the appeal.

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

[Since carried to the Supreme Court.]

material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from "ordinary and necessary" expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn.

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or disposition of this case.

UNITED STATES, AS GUARDIAN OF THE HUALPAI INDIANS OF ARIZONA, *v.* SANTA FE PACIFIC RAILROAD CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 23. Argued November 12, 13, 1941.—Decided December 8, 1941.

1. Lands included in the grant made to the Atlantic & Pacific Railroad Company by the Act of July 27, 1866, were subject to any existing Indian right of occupancy until such right was extinguished by the United States through a voluntary cession of the Indians, as provided by § 2 of the Act. P. 344.
2. Indian occupancy necessary to establish aboriginal possession is a question of fact. P. 345.
3. "Indian title" exists where it is established as a fact that the lands in question were included in the ancestral home of a tribe of Indians, in the sense that they constituted definable territory occupied exclusively by that tribe as distinguished from being wandered over by many tribes. P. 345.

4. By the policy of the Government, the Indian right of occupancy is as sacred as the fee and can be interfered with or terminated only by the United States. P. 345.
5. Lands within the Mexican Cession were not excepted from this policy. P. 345.
6. A tribal claim to any particular lands need not be based upon treaty, statute, or other formal governmental action. P. 347.
7. In the matter of the extinguishment of Indian title based upon aboriginal occupancy, the power of Congress is supreme and its exercise is not open to inquiry by the courts. P. 347.
8. If the right of occupancy of the Walapai Indians to lands within the area granted to the Atlantic & Pacific Railroad Company in Arizona was not extinguished prior to the definite location of the railroad in 1872, then the grantee took the fee subject to the encumbrance of Indian title. On that date the title of the railroad attached as of July 27, 1866, the date of the Act. P. 347.
9. The Act of February 27, 1851, by extending the Indian Trade and Intercourse Act of June 30, 1834, over the Indian tribes in the Territories of New Mexico (then including Arizona) and Utah, exhibited the desire of Congress to continue in those Territories the general policy of the Government to recognize the Indian right of occupancy, but did not create such rights where they did not previously exist. P. 347.
10. The Act of July 22, 1854, which established the office of Surveyor General of New Mexico, etc., and the Act of July 15, 1870, which directed the Surveyor General of Arizona (then separated as a Territory from New Mexico) to ascertain and report upon land claims under the laws, usages and customs of Spain and Mexico for the information of Congress, did not extinguish any Indian title based upon aboriginal occupancy, such as may have been had by the Walapai Indians. P. 348.
11. The Act of March 3, 1865, which provided for setting aside a tract of land in Arizona as a reservation for certain tribes on the Colorado River, including the Walapais, was not intended, in default of their voluntary acceptance, to extinguish their right of occupancy of other lands. P. 351.

    Forcible removal of the Walapais to this Reservation in 1874 was not sanctioned by Congress and could not affect their right of occupancy over lands outside the Reservation.
12. The creation of the Walapai Indian Reservation in Arizona by Executive Order, January 4, 1883, at the request of the Walapais, and its acceptance by them, amounted to a relinquishment of any

tribal claims which they might have had to lands outside that Reservation, and that relinquishment was tantamount to an extinguishment by "voluntary cession," within the meaning of § 2 of the Act of July 27, 1866, *supra*. P. 357.

13. The United States is entitled to an accounting from the Railroad Company on behalf of the Walapais for any rents, issues and profits derived from leasing or use of lands in their Reservation which can be proved to have been occupied by the Walapais from time immemorial. P. 359.

114 F. 2d 420, affirmed, with a modification.

CERTIORARI, 312 U. S. 675, to review a decree affirming a decree which dismissed a bill, by the Government, seeking to establish the right of the Walapai Indians to lands claimed by the Railroad Company inside and outside of the Indians' Reservation, and for an accounting.

Mr. Nathan R. Margold, with whom *Messrs. Richard H. Hanna, William A. Brophy,* and *Felix S. Cohen* were on the brief, for the United States. *Assistant Solicitor General Fahy* filed a memorandum.

The term "Indian title" used in § 2 of the Act of 1866, had a well-understood meaning. It connoted the Indian possessory right based on aboriginal occupancy, whether or not that occupancy had been recognized by treaty, statute, or otherwise. *Johnson* v. *McIntosh,* 8 Wheat. 543; *United States* v. *Shoshone Tribe,* 304 U. S. 111. The Act applied within a roughly located area from Missouri to the Pacific Coast, and the term "Indian title" applied equally to all lands within that area and hence to all Indian rights of occupancy which then existed within that area. The provision had the same meaning and application with respect to lands in the Mexican Cession area as with respect to any other lands. *United States* v. *Candelaria,* 271 U. S. 432. The right was preserved and safeguarded until extinguished by the United States in conformity with the provisions of the Act. *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55.

This Court has consistently held that, in the absence of express language to the contrary, a federal grant of public lands does not constitute an extinguishment of Indian occupancy rights. *Johnson* v. *McIntosh, supra,* 574.

This Court has continuously recognized that aboriginal possession creates a possessory right legally enforceable against everyone except the United States. *Worcester* v. *Georgia,* 6 Pet. 515; *Mitchel* v. *United States,* 9 Pet. 711; *Choteau* v. *Molony,* 16 How. 203; *Holden* v. *Joy,* 17 Wall. 211, 244; *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55; *Cramer* v. *United States,* 261 U. S. 219.

This Court has consistently rejected attempts to exclude Indians of the Mexican Cession area from the benefit of rules generally applicable outside that area for the protection of Indian rights. *United States* v. *Joseph,* 94 U. S. 614; *United States* v. *Chavez,* 290 U. S. 357; *United States* v. *Sandoval,* 231 U. S. 28; *United States* v. *Candelaria,* 271 U. S. 432; *United States* v. *Kagama,* 118 U. S. 375; *Cramer* v. *United States, supra; Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110; *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 321.

Federal legislation applicable to the Walapai Tribe as well as to other tribes protects the Indian right of occupancy based on aboriginal possession. [Referring to numerous statutes.]

Except in the present case, no considered decision has ever been made by the Executive branch of the Government as to the relative rights of the Walapai Tribe and the respondent railroad.

Spanish and Mexican law was at least as generous in its recognition of the legality of Indian aboriginal occupancy as the law of the United States. Indeed, experts on this subject have concluded that the law of the United States, recognizing the occupancy rights of Indian tribes, was derived from Spanish sources. See *Johnson* v. *Mc-*

Intosh, 8 Wheat. 543, 573; *Worcester* v. *Georgia,* 6 Pet. 515, 546; *Choteau* v. *Molony,* 16 How. 203, 229; *Mitchel* v. *United States,* 9 Pet. 711, 759; *Carino* v. *Insular Government,* 212 U. S. 449.

Such rights of the Walapai Tribe as existed on July 27, 1866, have not been extinguished or abandoned. [Referring to the 1870 Act appointing a Surveyor General for Arizona; the temporary removal in 1874 of part of the Tribe to the Colorado River Reservation; the establishment of an Executive order reservation of the Walapai Indians in 1883; the 1925 Exchange Act.]

The United States and the Walapai Tribe have been deprived of a right to trial upon issues of fact, through a misapplication of the doctrine of judicial notice.

Messrs. Joyce Cox and *Max Radin,* with whom *Messrs. Charles H. Woods, Lawrence Cake,* and *Richard M. Fennemore* were on the brief, for respondent.

Messrs. Joe Conway, Attorney General of Arizona, and *Earl Anderson,* Assistant Attorney General, filed a brief on behalf of that State and Coconino, Mohave, and Yavapai Counties, Arizona, as *amici curiae,* in support of respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the court.

This is a suit brought by the United States, in its own right and as guardian of the Indians of the Walapai (Hualpai) Tribe in Arizona (28 U. S. C. § 41 (1), § 24 Judicial Code) to enjoin respondent from interfering with the possession and occupancy by the Indians of certain land in northwestern Arizona. Respondent claims full title to the lands in question under the grant to its predecessor, the Atlantic and Pacific Railroad Co., provided for in the Act of July 27, 1866, 14 Stat. 292. The bill sought to establish that respondent's rights under the grant of 1866

are subject to the Indians' right of occupancy both inside and outside their present reservation which was established by the Executive Order of President Arthur, January 4, 1883. The bill consists of two causes of action—the first relating to lands inside, and the second, to lands outside, that reservation. The bill prayed, *inter alia*, that title be quieted and that respondent "account for all rents, issues and profits derived from the leasing, renting or use of the lands subject to said right of occupancy" by the Indians. Respondent moved to dismiss on the ground that the facts alleged were "insufficient to constitute a valid cause of action in equity." The District Court granted that motion. The Circuit Court of Appeals affirmed. 114 F. 2d 420. We granted the petition for certiorari because of the importance of the problems raised in the administration of the Indian laws and the land grants.

Sec. 2 of the Act of July 27, 1866, the Act under which respondent's title to the lands in question derived,[1] provided: "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

Basic to the present causes of action is the theory that the lands in question were the ancestral home of the Walapais, that such occupancy constituted "Indian title" within the meaning of § 2 of the 1866 Act, which the United States agreed to extinguish, and that in absence of such extinguishment the grant to the railroad "conveyed

[1] Earlier cases involving this grant are *United States* v. *Southern Pacific R. Co.*, 146 U. S. 570; *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413; *Santa Fe Pacific R. Co.* v. *Lane*, 244 U. S. 492; *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197; *Santa Fe Pacific R. Co.* v. *Work*, 267 U. S. 511.

1009

the fee subject to this right of occupancy." *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 66. The Circuit Court of Appeals concluded that the United States had never recognized such possessory rights of Indians within the Mexican Cession [2] and that in absence of such recognition the Walapais had no such right good against grantees of the United States.

Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866. *Buttz* v. *Northern Pacific Railroad, supra.*

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer* v. *United States,* 261 U. S. 219, 227. This policy was first recognized in *Johnson* v. *M'Intosh,* 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester* v. *Georgia,* 6 Pet. 515; *Mitchel* v. *United States,* 9 Pet. 711; *Chouteau* v. *Molony,* 16 How. 203; *Holden* v. *Joy,* 17 Wall. 211; *Buttz* v. *Northern Pacific Railroad, supra; United States* v. *Shoshone Tribe,* 304 U. S. 111. As stated in *Mitchel* v. *United States, supra,* p. 746, Indian "right of occupancy is considered as sacred as the fee simple of the whites." Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Though the *Cramer*

[2] See Treaty of Guadalupe Hidalgo, 9 Stat. 922.

case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from "the original nomadic tribal occupancy." (p. 227.) Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson* v. *M'Intosh, supra,* not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations, including Spain,[3] that, like other rules governing titles to property (*United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 486–487) they should now be considered no longer open. Furthermore, treaties [4] negotiated with Indian tribes, wholly or partially within the Mexican Cession, for delimitation of their occupancy rights or for the settlement and adjustment of their boundaries, constitute clear recognition that no different policy as respects aboriginal possession obtained in this area than in other areas. And see *United States* v. *Kagama*, 118 U. S. 375, 381. Certainly it would take plain and unambiguous action to deprive the Walapais of the benefits of that policy. For it was founded on the desire to maintain just and peaceable relations with Indians. The reasons for its application to other tribes are no less apparent in case of the Walapais, a savage tribe which in early days caused the military no end of trouble.

[3] *Chouteau* v. *Molony, supra; Buttz* v. *Northern Pacific Railroad, supra; Cramer* v. *United States, supra; United States* v. *Shoshone Tribe, supra.* See Royce, Indian Land Cessions in the United States, 18 Publications of the Bureau of American Ethnology, Smithsonian Institution, Pt. 2 (1899) pp. 539–561, 639–643.

[4] Treaty of July 1, 1852, 10 Stat. 979 (Apache Nation); Treaty of October 7, 1863, 13 Stat. 673, 674 (Tabeguache Band of Utah Indians); Treaty of March 2, 1868, 15 Stat. 619, Act of April 29, 1874, 18 Stat. 36, Act of June 15, 1880, 21 Stat. 199 (Ute Indians); Treaty of June 1, 1868, 15 Stat. 667 (Navajo Tribe). For a schedule of Indian land cessions see Royce, *op. cit., supra* note 3, pp. 648 *et seq.*

Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U. S. at 229.

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz* v. *Northern Pacific Railroad, supra,* p. 66. As stated by Chief Justice Marshall in *Johnson* v. *M'Intosh, supra,* p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby,* 95 U. S. 517, 525.

If the right of occupancy of the Walapais was not extinguished prior to the date of definite location of the railroad in 1872, then the respondent's predecessor took the fee subject to the encumbrance of Indian title. *Buttz* v. *Northern Pacific Railroad, supra.* For on that date the title of respondent's predecessor attached as of July 27, 1866. *United States* v. *Southern Pacific R. Co.,* 146 U. S. 570; *Nelson* v. *Northern Pacific Ry. Co.,* 188 U. S. 108.

Certainly, prior to 1865 any right of occupancy of the Walapais to the lands in question was not extinguished; nor was the policy of respecting such Indian title changed. The Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, was extended over "the Indian tribes in the Territories of New Mexico and Utah" by § 7 of the Act of February 27, 1851, 9 Stat. 574, 587. The 1834 Act, which derived from the Act of July 22, 1790, 1 Stat. 137, made it an offense to drive stock to range or feed "on any land

belonging to any Indian or Indian tribe, without the consent of such tribe" (§ 9); gave the superintendent of Indian affairs authority "to remove from the Indian country all persons found therein contrary to law" (§ 10); made it unlawful to settle on "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe" (§ 11); and made invalid any conveyance of lands "from any Indian nation or tribe of Indians." § 12. The Act of 1851 obviously did not create any Indian right of occupancy which did not previously exist. But it plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal Government to recognize such right of occupancy. As stated by Chief Justice Marshall in *Worcester* v. *Georgia, supra,* 6 Pet. p. 557, the Indian trade and intercourse acts "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States."

The court below laid considerable stress upon the Act of July 22, 1854, 10 Stat. 308, as indicating that Congress recognized no rights of the Indians in Arizona and New Mexico other than those existing under Mexican law or created by reservations after the Mexican Cession. But we do not agree that, so far as the respondent's rights are concerned, that Act instituted a policy of non-recognition of Indian title. Nor do we think that it effected any extinguishment of that title.

The Act of 1854 established the office of Surveyor General of New Mexico. It donated land to certain qualified citizens (§ 2) with the exception, *inter alia,* of "military or other reservations." § 4. Unlike the Pre-emption Act of September 4, 1841, § 10, 5 Stat. 453, the 1854 Act did not extend only to "the public lands to which the Indian

title had been at the time of such settlement extinguished." It did provide, however, that "any of the lands not taken" under it should "be subject to the operation" of the Preemption Act. § 7. Moreover, the 1854 Act provided as respects the Territories of Nebraska and Kansas that the grants should extend only to lands "to which the Indian title has been or shall be extinguished." § 12.

From that it is argued that since Congress recognized Indian title in Nebraska and Kansas and under the Preemption Act but did not recognize it as respects the lands in this area, a shift of policy in the Mexican Cession was indicated. The issue here, however, is not between a settler claiming under the 1854 Act and the Walapais. Whether in such a case the 1854 Act should be construed as extinguishing any Indian title to land taken under it we need not decide.[5] Respondent does not claim under that Act and hence can derive no rights from it.

Some stress is likewise placed on § 8 of the Act of July 22, 1854, and on the Act of July 15, 1870, 16 Stat. 291, 304. The former required the Surveyor General for New Mexico "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico"; and to make a report "on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo . . . denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States." Such report was to be "laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona*

[5] The Act of 1854 is cited in Cohen, Handbook of Federal Indian Law (1941) p. 308, for the statement that, "Only where it was necessary to give emigrants possessory rights to parts of the public domain, has Congress ever granted tribal lands in disregard of tribal possessory rights."

fide grants, and give full effect" to the treaty. It was also provided that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act." The 1870 Act directed the Surveyor General for Arizona (which was separated as a Territory from New Mexico in 1863, 12 Stat. 664) "to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory under the laws, usages, and customs of Spain and Mexico." His report was to be "laid before Congress for such action thereon as shall be deemed just and proper."

These Acts did not extinguish any Indian title based on aboriginal occupancy which the Walapais may have had. In that respect they were quite different from the Act of March 3, 1851, 9 Stat. 631, passed to ascertain and settle certain land claims in California. Under § 13 of that Act "all lands the claims to which shall not have been presented" to the commissioners, appointed to receive and act upon all petitions for confirmation of land claims, "within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States." This Court passed on that Act in *Barker* v. *Harvey*, 181 U. S. 481. The plaintiff there claimed under two Mexican grants. The defendants were Indians who claimed a right of permanent occupancy; but they had not presented their claims to the commissioners within the time specified by § 13. This Court held that as a result of that failure their claims were barred. And see *United States* v. *Title Insurance & Trust Co.*, *supra*, 265 U. S. 472. That is to say, the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy. Since Congress had provided a method for extinguishment, its appropriateness raised only a political,

1015

not a justiciable, issue. The Acts of 1854 and 1870, unlike the Act of 1851, merely called for a report to Congress on certain land claims. If there was an extinguishment of the rights of the Walapais, it resulted not from action of the Surveyor General but from action of Congress based on his reports.[6] We are not advised that Congress took any such action. In its absence we must conclude that these Acts were concerned not with the problem of ascertaining the boundaries of Indian country but with the problem of quieting titles originating under Spanish or Mexican grants. For it should be noticed that § 8 of the 1854 Act contemplated confirmation by Congress of "*bona fide* grants."

This brings us to the Act of March 3, 1865, 13 Stat. 541, 559, which provided: "All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries." It is plain that the Indians referred to included the Walapais. The suggestion for removing various Indian tribes in this area to a reservation apparently originated with a former Indian agent, Superintendent Poston, who was a Territorial Representative in Congress in 1865. His explanation[7] on the floor of the

[6] The various reports of the Surveyor General are found in the annual reports of the Secretary of the Interior from 1855 through 1890, when the Court of Private Land Claims was constituted. Act of March 3, 1891, 26 Stat. 854. Sec. 15 of that Act repealed § 8 of the Act of 1854. Under § 13 of the 1891 Act it was provided: "No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place."

[7] Cong. Globe, 38th Cong., 2d Sess., March 2, 1865, p. 1320: "As superintendent of Indian affairs, I called the confederated tribes of the Colorado in council together. The council was attended by the principal chiefs and headmen of the Yumas, Mojaves, Yapapais, Hualapais, and Chemihuevis. These tribes have an aggregate of ten thousand

House of the bill, which resulted in the creation of the 1865 reservation, indicates that he had called a council of the confederated tribes of the Colorado, including the Walapais, and had told them that "they should abandon" their lands and confine themselves to the place on the Colorado river which was later proposed for a reservation. He entered into no agreement with them nor did he propose a treaty. He merely stated that if elected to Congress he would try to get Congress to provide for them. As stated by the Commissioner of Indian Affairs in 1864, "Assuming that the Indians have a right of some kind to the soil, Mr. Poston's arrangement proposes a compromise with these Indians, by which on their confining themselves to their reservation, and yielding all claims to lands beyond it, they shall, in lieu of an annuity in money or supplies,

---

souls living near the banks of the Colorado, from Fort Yuma to Fort Mojave. . . .

"But as the representative of the Government of the United States at that time, I did not undertake to make a written treaty with these Indians, because I considered that the Government was able and willing to treat them fairly and honestly without entering into the form of a written treaty, which has been heretofore so severely criticised in both Houses of Congress, and with some reason. These Indians there assembled were willing, for a small amount of beef and flour, to have signed any treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that Territory and confine themselves to the elbow in the Colorado river, not more than seventy-five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress, I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes. They desire to live as do the Pueblo Indians of New Mexico and

be furnished by government with an irrigating canal, at a cost estimated at something near $100,000, which, by insuring them their annual crops, will enable them to support themselves, independently of other aid by the government." [8]

We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home.[9] That

---

Arizona. Those Pueblo Indians live in settlements, in towns, in reservations, according to the wise policy of the Spanish Government, which colonized the Indians in reservations and made their labor valuable in building improvements for their own sustenance, for churches, and public improvements, and in that manner made them peaceable Indians, instead of having everlasting and eternal war with the people whom they had robbed of their land.

"These people having been citizens of the Mexican Government, are not, according to our theory, entitled to any right in the soil; and therefore no treaty with these Indians for the extinction of their title to the soil would be recognized by this Government. It is a fiction of law which these Indians, in their ignorance, are not able to understand. They cannot see why the Indians of the Northeast have been paid annuities since the foundation of this Government for the extinction of their title, while the Indians who were formerly subject to the Spanish and Mexican Governments are driven from their lands without a dollar. It is impossible for these simple-minded people to understand this sophistry. They consider themselves just as much entitled to the land which their ancestors inhabited before ours landed on Plymouth Rock as the Indians of the Northeast. They have never signed any treaty relinquishing their right to the public domain."

[8] Report of the Secretary of the Interior, Dec. 5, 1864, p. 165.

[9] Respondent also places some stress on the Act of April 20, 1871, 17 Stat. 19, in which Congress permitted respondent's predecessor to mortgage its property. But as stated in *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 753, "... title to lands is not strengthened

Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate* v. *Trapp*, 224 U. S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." And see *Minnesota* v. *Hitchcock*, 185 U. S. 373, 395–396. Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands if Congress would create a reservation. Furthermore, the Walapais did not accept the offer which Congress had tendered. In 1874 they were, however, forcibly removed to the Colorado River reservation on order from the Indian Department.[10] But they left it in a body the next year.[11] And it was decided "to allow them to remain in their old range during good behavior."[12] They did thereafter remain in their old country and en-

---

by giving a mortgage upon them; nor can the fact that it has been given throw any light upon the prior estate of the mortgagor." And see *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413, 430, where this Court in speaking of the purpose of the Act of April 20, 1871, said: "The original act being silent upon the subject of mortgaging the grant, there is reason to suppose that Congress passed the act for the purpose of resolving any doubts that capitalists may have entertained with respect to such power. The mortgagees, standing in the place of the mortgagor, had no greater rights than it had, and must be held to have known that they were taking an estate which was defeasible upon condition broken."

[10] Walapai Papers, S. Doc. No. 273, 74th Cong., 2d Sess., pp. 96–98. Though the Walapais were at peace with the whites prior to 1866 (*id.* p. 92) the killing of their head chief by a white led to hostilities which continued for a few years. *Id.* pp. 37–94.

[11] Walapai Papers, *op. cit.*, p. 104.

[12] Walapai Papers, *op. cit.*, p. 104.

gaged in no hostilities against the whites. No further attempt was made to force them onto the Colorado River reservation, even though Congress had made various appropriations to defray the costs of locating the Arizona Indians in permanent abodes (Act of March 3, 1865, 13 Stat. 541, 559; Act of July 27, 1868, 15 Stat. 198, 219; Act of July 15, 1870, 16 Stat. 335, 357), including the Colorado River reservation. Act of March 2, 1867, 14 Stat. 492, 515; Act of May 29, 1872, 17 Stat. 165, 188. On these facts we conclude that the creation of the Colorado River reservation was, so far as the Walapais were concerned, nothing more than an abortive attempt to solve a perplexing problem. Their forcible removal in 1874 was not pursuant to any mandate of Congress. It was a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited.[13] No forfeiture can be

[13] See Walapai Papers, *op. cit.*, p. 108. General Schofield reported on May 24, 1875, to the Adjutant General as follows:

"The Hualpai Indians have been our firm friends for many years, and our active allies whenever their services have been required against the hostile Apaches. In return for their fidelity they have been treated with great injustice and cruelty. They were forced to leave their homes in the mountains and go upon a reservation in the Colorado desert, where they have suffered from the extreme heat, to which they were unaccustomed, from disease, and from hunger.

"This was done in spite of the protest of the Military commanders who were familiar with the wants of these Indians and were anxious to repay by kind treatment the faithful services they had rendered. The Indians were bitterly opposed to this change, and it was only the great influence which Gen'l. Crook and Captain Byrne had acquired over them that enabled the removal to be made without war.

"The Indian Agent, having seen fit to relinquish the aid of this powerful influence, the effect was at once manifest in the return of the Hualpais to their former homes.

"I am decidedly opposed to the use of any coercive measures to force them back upon the Colorado reservation.

"The injustice and bad faith shown by the government toward the Hualpais and the Indians which Gen'l. Crook had collected upon the Verde reservation are calculated to undo as far as possible the

predicated on an unauthorized attempt to effect a forcible settlement on the reservation, unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read. Certainly, a forced abandonment of their ancestral home was not a "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866. *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413, 438–439.

The situation was, however, quite different in 1881. Between 1875 and that date there were rather continuous suggestions for settling the Walapais on some reservation.[14] In 1881 the matter came to a head. A majority of the tribe, "in council assembled," asked an officer of the United States Army in that region "to aid them and represent to the proper authorities" the following proposal:[15] "They say that in the country, over which they used to roam so free, the white men have appropriated all the water; that large numbers of cattle have been introduced and have rapidly increased during the past year or two; that in many places the water is fenced in and locked up; and they are driven from all waters. They say that the Railroad is now coming, which will require more water, and will bring more men who will take up all the small springs remaining. They urge that the following reservation be set aside for them while there is still

---

good work which Gen'l. Crook and his troops had accomplished with so much wisdom and gallantry. It is useless to attempt to disguise the fact that such treatment of the Indians is in violation of the just and humane policy prescribed by the President and a disgrace to any civilized country."

[14] Walapai Papers, *op. cit.*, pp. 113–131.

[15] Walapai Papers, *op. cit.*, pp. 134–135. For a strikingly close version of this episode as related in 1931 by a member of the Walapai tribe who was present at the conference in 1881 between the council of the tribe and the United States Army officer, see Walapai Papers, pp. 247–249.

time; that the land can never be of any great use to the Whites; that there are no mineral deposits upon it, as it has been thoroughly prospected; that there is little or no arable land; that the water is in such small quantities, and the country is so rocky and void of grass, that it would not be available for stock raising. I am credibly informed, and from my observations believe, the above facts to be true. I, therefore, earnestly recommend that the hereafter described Reservation be, at as early a date as practicable, set aside for them."

Pursuant to that recommendation, the military reservation was constituted on July 8, 1881, subject to the approval of the President.[16] The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883.[17] There was an indication that the Indians were satisfied with the proposed reservation.[18] A few of them thereafter lived on the reservation; many of them did not.[19] While suggestions recurred for the creation of a new and different reservation,[20] this one was not abandoned. For a long time it remained unsurveyed.[21] Cattlemen used it for grazing, and for some years the Walapais received little benefit from it.[22] But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims

[16] Walapai Papers, *op. cit.*, pp. 135–136.

[17] Walapai Papers, *op. cit.*, p. 146. As to the validity of a reservation established by Executive Order, see *United States* v. *Midwest Oil Co.*, 236 U. S. 459. *Spalding* v. *Chandler*, 160 U. S. 394. General Indian Allotment Act of February 8, 1887, 24 Stat. 388, § 1; 34 Op. A. G. 181, 136–189.

[18] Walapai Papers, *op. cit.*, p. 136.

[19] Walapai Papers, *op. cit.*, pp. 163, 165–168, 178, 198.

[20] Walapai Papers, *op. cit.*, pp. 151, 161–165.

[21] Walapai Papers, *op. cit.*, pp. 192, 196.

[22] Walapai Papers, *op. cit.*, pp. 179, 183.

to lands [23] which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866. The lands were fast being populated. The Walapais saw their old domain being preëmpted. They wanted a reservation while there was still time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. That would make the creation of the 1883 reservation, as an attempted solution of the violent problems created when two civilizations met in this area, illusory indeed. We must give it the definitiveness which the exigencies of that situation seem to demand. Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others. Cf. *Marsh* v. *Brooks*, 14 How. 513; *Shoshone Tribe* v. *United States*, 299 U. S. 476.

On January 23, 1941, the date of the filing of this petition for certiorari, respondent quitclaimed to the United States, under § 321 (b), Pt. III of the Interstate Commerce Act

[23] As distinguished from individual rights of occupancy, if any, as were involved in *Cramer* v. *United States*, *supra*, 261 U. S. 219, but which, not being in issue here, are not foreclosed or affected by the judgment in this case.

(Transportation Act of 1940, 54 Stat. 929, 954), all lands claimed by it under the Act of July 27, 1866, within the Walapai Indian Reservation. Since the decree below must stand as to the second cause of action and since by virtue of the quitclaim deeds the United States has received all the lands to which the first cause of action relates, the decree will not be reversed. It is apparent, however, that it must be modified so as to permit the accounting as respects lands in the first cause of action. It does not appear whether those lands were included in the ancestral home of the Walapais in the sense that they were in whole or in part occupied exclusively by them or whether they were lands wandered over by many tribes. As we have said, occupancy necessary to establish aboriginal possession is a question of fact. The United States is entitled to an accounting as respects any or all of the lands in the first cause of action which the Walapais did in fact occupy exclusively from time immemorial.[24] Such an accounting is not precluded by the Act of February 20, 1925, 43 Stat. 954, which authorized the Secretary of the Interior "to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation." The implication is that there may be some land within the reservation that is not subject to Indian occupancy. But that Act certainly cannot be taken as an extinguishment of any and all Indian title that did exist or as a repeal by implication of § 2 of the Act of July 27, 1866, requiring such extinguishment by "voluntary cession."

[24] In case of any lands in the reservation which were not part of the ancestral home of the Walapais and which had passed to the railroad under the 1866 Act, the railroad's title would antedate the creation of the reservation in 1883 and hence not be subject to the incumbrance of Indian title.

It was passed so that lands "retained for Indian purposes may be consolidated and held in a solid area so far as may be possible." [25] Such statements by the Secretary of the Interior as that "title to the odd-numbered sections" was in the respondent [26] do not estop the United States from maintaining this suit. For they could not deprive the Indians of their rights any more than could the unauthorized leases in *Cramer* v. *United States, supra.*

Hence, an accounting as respects such lands in the reservation which can be proved to have been occupied by the Walapais from time immemorial can be had. To the extent that the decree below precludes such proof and accounting, it will be modified. And as so modified, it is

Affirmed.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* FRANK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK.

No. 15. Reargued October 16, 17, 1941.—Decided December 8, 1941.

The attempt of a consolidated interstate carrier to escape liability for debts of a constituent, upon the ground that permission to assume such liability was never applied for or obtained under § 20a of the Interstate Commerce Act, although according to the state law under which the consolidation took place the liability was one which attached to the consolidated corporation upon its creation, can not be upheld in this case in view of a consistent and long-standing interpretation placed upon § 20a by the Interstate Commerce Commission, in relation to this particular carrier system, and with full knowledge of its affairs, as not requiring such

---

[25] H. Rep. No. 1446, 68th Cong., 2d Sess., p. 1. So far as appears there were no reconveyances under that Act. It apparently was, however, the occasion for precipitating the present litigation.

[26] *Id.* And see Walapai Papers, *op. cit.*, pp. 320–321.

principal in these transactions. His principals were in Europe; and to his discretion and superintendence they, of necessity, consigned the management of their property in this country. The long acquiescence, therefore, in the plan of the town, as returned by Woods, affords a strong presumption against the right asserted by the plaintiff below in this action.

The town was laid out in the spring or summer of 1784; no act was done by the proprietors showing any claim to the land in controversy until September, 1814, when the deed to Wilson was executed. Here is a lapse of about thirty years, within which no right is asserted by the Penn family, hostile to that which was exercised by the city, in the use of this ground, to the extent which its means en-**513*]** enable it to improve *and the public convenience seemed to require. A title which has remained dormant for so great a number of years, and while the property was used for public purposes, and necessarily within the knowledge of the agents of the proprietors, is now asserted under doubtful circumstances of right. In some cases a dedication of property to public use, as, for instance, a street or public road, where the public has enjoyed the unmolested use of it for six or seven years, has been deemed sufficient evidence of dedication. This lapse of time, connected with the public use and the determination expressed by the agent at the time the town was laid out to dispose of the whole of the manor, affords strong grounds to presume that no reservation of any part of the manor was intended to be made: and that the slip of land in controversy was not reserved. These were facts proper for the consideration of the jury in determining the fact of dedication. They were calculated to have a strong influence to rebut the presumptions relied on by the plaintiff in the court below.

If it were necessary, an unmolested possession for thirty years would authorize the presumption of a grant. Indeed, under peculiar circumstances, a grant has been presumed from a possession less than the number of years required to bar the action of ejectment by the statute of limitations.

By the common law the fee in the soil remains in the original owner where a public road is established over it: but the use of the road is in the public. The owner parts with this use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against anyone who obstructs the road.

In the discussion of this case, the same doctrine has been applied by the counsel for the defendant in error to the streets and alleys of a town, but in deciding the points raised by the bill of exceptions, it is not necessary to determine this question.

Where the proprietor of a town disposes of all his interest in it, he would seem to stand in a different relation to the right of soil, in regard to the streets and alleys of the town. **514*]** from *the individual over whose soil a public road is established, and who continues to hold the land on both sides of it. Whether the purchasers of town lots are not, in this respect, the owners of the soil over which the streets and alleys are laid as appurtenant to the adjoining lots, is a point not essentially involved in this case.

If the jury shall find that the ground in question was dedicated to the public as a street or highway, or for other public purposes, to the river, either at high or low water-mark, the right of the city will be established, and the plaintiff in the ejectment must consequently fail to recover.

Upon a deliberate consideration of the points involved in the case, this court are clearly of the opinion that the judgment of the Circuit Court was erroneous, and it is therefore reversed, and the cause remanded for further proceedings.

Cited—10 Pet., 713; 11 Pet., 52, 53; 12 Pet., 456; 9 How., 30, 31, 469; 14 How., 274; 1 McLean, 210, 289; 2 McLean, 381; 2 Story, 291.

---

*SAMUEL A. WORCESTER, *Plaintiff in Error*, [*515

v.

THE STATE OF GEORGIA.

Writ of error—practice—indictment for residing in Cherokee territory contrary to laws of Georgia—jurisdiction—rights of discoveries—relations of Indians to European nations, to the United States—legal status of the Cherokees—construction of treaties—act of Georgia contrary to federal Constitution, acts of Congress and treaties.

A writ of error was issued to "the judges of the Superior Court for the County of Gwinnett in the State of Georgia," commanding them to send to the Supreme Court of the United States, the record and proceedings in the said Superior Court of the County of Gwinnett, between the State of Georgia, plaintiff, and Samuel A. Worcester, defendant, on an indictment in that court. The record of the court of Gwinnett was returned, certified by the clerk of the court, and was also authenticated by the seal of the court. It was returned with, and annexed to, a writ of error issued in regular form, the citation being signed by one of the associate justices of the Supreme Court, and served on the Governor and Attorney-General of the State more than thirty days before the commencement of the term to which the writ of error was returnable.

BY THE COURT: The Judicial Act, so far as it prescribes the mode of proceeding, appears to have been literally pursued. In February, 1797, a rule was made on this subject in the following words: "It is ordered by the court that the clerk of the court to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court."

This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it.

The plaintiff in error was indicted in the Supreme Court of the County of Gwinnett in the State of Georgia, "for residing, on the 15th July, 1831, in that part of the Cherokee Nation attached by the laws of the State of Georgia to that county, without a license or permit from the Governor of the State, or from any one authorized to grant it, and without having taken the oath to support and defend the constitution and laws of the State of Georgia, and uprightly to demean himself as a citizen thereof, contrary to the laws of the said State." To this indictment he pleaded that he was, on the

13th July, 1831, in the Cherokee Nation, out of the jurisdiction of the court of Gwinnett County; that he was a citizen of Vermont, and entered the Cherokee Nation as a missionary under the authority of the President of the United States, and has not been required by him to leave it, and that with the permission and approval of the Cherokee Nation he was engaged in preaching the gospel: that the State of Georgia ought not to maintain the prosecution, as several treaties had been entered into by the United States with the Cherokee Nation, by which that nation was acknowledged to be a sovereign nation, and by which the territory occupied by them was guaranteed to them by the United States, and that the laws of Georgia, under which the plaintiff in error was indicted, are repugnant to the treaties, and unconstitutional and void, and also that they are repugnant to the Act of Congress of March, 1802, entitled "An Act to regulate trade and intercourse with the Indian tribes. The Superior Court of Gwinnett overruled the plea, and the plaintiff in error was tried and convicted and sentenced "to hard labor in the penitentiary for four years." Held, that this was a case in which the Supreme Court of the United States had 516*] jurisdiction by writ of error, under *the twenty-fifth section of the "Act to establish the Judicial court of the United States" passed in 1789.

The indictment and plea in this case draw in question the validity of the treaties made by the United States with the Cherokee Indians: if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege or exemption specially set up and claimed under them." They also draw into question the validity of a statute of the State of Georgia, "on the ground of its being repugnant to the Constitution, treaties and laws of the United States, and the decision is in favor of its validity."

It is too clear for controversy that the act of Congress by which this court is constituted has given it the power, and of course imposed on it the duty of exercising jurisdiction in this case. The record, according to the judiciary act and the rule and practice of the court, is regularly before the court.

The Act of the Legislature of Georgia, passed 22d December, 1830, entitled "An Act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians," &c., enacts that "all white persons residing within the limits of the Cherokee Nation, on the first day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years." The eleventh section authorizes the governor, "should he deem it necessary for the protection of the mines or the enforcement of the laws in force within the Cherokee Nation, to raise and organize a guard," &c. The thirteenth section enacts, "that the said guard or any member of them shall be, and they are hereby authorized and empowered to arrest any person legally charged with or detected in a violation of the laws of this State, and to convey, as soon as practicable, the person so arrested before a justice of the peace, judge of the superior, justice of inferior court of this State, to be dealt with according to law." The extraterritorial power of every legislature being limited in its action to its own citizens or subjects, the very essence of this act is an assertion of jurisdiction over the Cherokee Nation, and of the rights and powers consequent thereto.

The principle, "that the discovery of parts of the continent of America gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession," acknowledged by all Europeans, because it was the interest of all to acknowledge it; gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil, and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous right of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not effect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relations between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive *privilege in the particular [*517 place. The United States succeeded to all the claims of Great Britain, both territorial and political, but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport generally to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood.

Certain it is, that our history furnishes no exam

NOTE—*Indians and Indian tribes; status; amenable to what laws; rights of; what courts have jurisdiction over; power of congress over.* An Indian tribe or nation, occupying territory within the United States, cannot maintain an action in the United States courts. It is not a *foreign state* in the sense of the Constitution. Cherokee Nation v. Georgia, 5 Pet., 1.

Nor can such tribe be regarded as possessing such national character that they can claim immunity for homicide on the plea that it was committed in the course of legal war. Jim v. Washington Territory, 1 Wash. T., 76.

Cannot impose taxes on persons trading among them under the authority of the United States. 1 Op. Att. Gen., 645.

To be regarded for many purposes as a body politic within the Union, having the same general status as a territory. See Mackey v. Coxe, 18 How., 100.

Indians are not citizens of the United States but domestic subjects. The general statutes of naturalization do not apply to them. 7 Op. Att. Gen., 746.

Not "enemies." 4 Op. Att. Gen., 81.

Responsible for debts, according to the laws of the State in which they live. Lowry v. Weaver, 4 McLean, 82.

Half-breed Indians are Indians so long as they remain in their tribe. 7 Op. Att. Gen., 746.

The child of a white woman, and Indian father, is a white person. United States v. Sanders, Hemp., 483.

A white man, adopted into an Indian tribe, does not thereby become an Indian, so as to cease to be amenable to the laws of the United States, or to lose the right of trial in their courts. United States v. Rogers, 4 How., 567; S. C. Hemp., 450; United States v. Rugsdale, Hemp., 497; 2 Op. Att. Gen., 402, 693; 4 Op. Att. Gen., 258; 7 Op. Att. Gen., 174.

Congress has power to pass laws punishing Indians for crimes and offenses against the United States. United States v. Cha-to-kah-na-po-sha, Hemp., 27.

Jurisdiction of offenses in the Indian Territory by United States courts in Arkansas. United States v. Dawson, 15 How., 467; S. C., Hemp., 463; United States v. Ta-wan-ga-ca, Hemp., 304; United

ple, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The third article of the Treaty of Hopewell acknowledges the Cherokees to be under the protection of the United States of America, and of no other power.

This stipulation is found in Indian treaties generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

The general law of European sovereigns respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved practically no claim to their lands, no dominion [*518] over their persons. *It merely bound the nation to the British crown, as a dependent ally claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise.

The same stipulation entered into with the United States is undoubtedly to be construed in the same manner. They receive the Cherokee Nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first president.

So with respect to the words "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.

To the United States, it could be a matter of no concern whether their whole territory was devoted to hunting-grounds, or whether an occasional village, and an occasional corn field interrupted, and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The sixth and seventh articles stipulate for the punishment of the citizens of either country who may commit offenses on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The ninth article is in these words: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper." To construe the expression "managing all their affairs," into a surrender of self-government would be a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that Congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade; but cannot be true, as respects the management of all their affairs. The most important of these is the cession of their lands and security against intruders on them. Is it credible that they could have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made; or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and more interesting subject, to have devested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and [*519 comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the rela-

---

States v. Terrell, Hemp., 422; United States v. Starr, Hemp., 426; United States v. Sanders, Hemp., 483.

Indians have a right to the lands they occupy until that right is extinguished by voluntary cession to the government. Cherokee nation v. Georgia, 5 Pet., 1; Godfrey v. Beardsley, 2 McLean, 412.

But they are mere occupants; they do not hold a fee in the land of their original occupation, but only a usufruct, the fee being in the United States, or in some of the several States. United States v. Cook, 19 Wall., 591; Sparkman v. Porter, 1 Paine, 455; 8 Op. Att.-Gen., 275; Marsh v. Brooks, 8 How., 223; Mann v. Wilson, 23 How., 457; Godfrey v. Beardsley, 2 McLean, 412; Minter v. Crommelin, 18 How., 87; Beecher v. Wetherby, 5 Otto, 517; Langford v. United States, 12 Ct. of Cl., 338.

Indians not capable of pre-empting public lands of the United States. 7 Op. Att. Gen., 746.

Indian residing in the United States is not a "foreign citizen or subject," within sec. 2 of art. 3 of the Constitution; and cannot maintain a suit in the Circuit Court of the United States. Karrahoo v. Adams, 1 Dill., 344.

Congress may exercise municipal legislation over the Indian country. United States v. Tobacco Factory, 1 Dill., 264; United States v. Flynn, 1 Dill., 451; Dwight's case, 13 Op. Att. Gen., 546.

Indians, though belonging to a tribe which maintains the tribal organization, occupying a reservation within a State, are amenable to State laws for murder or other offenses against such laws, committed by them off the reservation and within the limits of the State. United States v. Yellow Sun, 1 Dill., 271; S. C., *sub nom.*; United States v. Sa-coda-cot, 1 Abb. U. S., 377.

The courts of the State alone have jurisdiction to try a white man for the murder of another, committed on the reservation of a tribe of Indians in that State. The national courts have no jurisdiction. United States v. Ward, 1 Woolw., 17; McCahon, 199; compare United States v. Stahl, McMahon, 206; 1 Woolw., 162.

Indian tribes, within territory of the United States, are independent political communities, and a child of one of such a tribe, is not born a citizen of the United States, although born within its territories. McKery v. Campbell, 5 Am. L. T. Rep., 407.

tions of peace and war, and ascertain the boundaries between them and the United States.

The treaty of Holston, negotiated with the Cherokees in July, 1791, explicitly recognizing the national character of the Cherokees, and their right of self-government, thus guaranteying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.

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

Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her Legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties; that, within their boundary, they possessed rights with which no State could interfere; and that the whole power of regulating the intercourse with them was vested in the United States.

520*] *In opposition to the original right possessed by the undisputed occupants of every country to this recognition of that right, which is evidenced by our history in every change through which we have passed, are placed the charters granted by the monarch of a distant and distinct region, parceling out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cession made of his claims, by the Treaty of Peace. The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain, at the Treaty of Peace, could cede only what belonged to his crown. Those newly asserted titles can derive no aid from the articles so often repeated in Indian treaties, extending to them, first, the protection of great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.

The act of the State of Georgia under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.

The acts of the Legislature of Georgia interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, is committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of Congress for regulating this intercourse and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation, with its permission, and by authority of the President of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away, while under guardianship of treaties guaranteying the country in which he resided and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief [*521 magistrate of the Union, those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried, and condemned, under color of a law which has been shown to be repugnant to the Constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgrace-

---

Congress has power to regulate the sale and prohibit the unlicensed sale of spirituous liquors in the "Indian country." United States v. 43 gallons of whiskey, 3 Otto, 188; United States v. Shawmux, 2 Sawyer, 364; United States v. Winslow, 3 Sawyer, 337; *Re* Carr, 3 Sawyer, 116.

What constitutes the "Indian country." Bates v. Clark, 5 Otto, 204; United States v. Seveloff, 2 Sawyer, 311; Waters v. Campbell, 4 Sawyer, 121.

Indians cannot cut timber off of lands occupied by them, for the purposes of sale only, but may, for improving the land or better adapting it for occupation, and when cut off for the latter purposes, may sell the same. United States v. Cook, 19 Wall., 591.

Rights of Cherokee tribe in their lands, and of "actual settlers" thereon. Langdon v. Joy, 4 Dill., 391; United States v. Reese., 8 Cent. L. J., 453.

Indians maintaining tribal relations are not subject to the criminal jurisdiction of United States courts for acts done by them within Indian country. The district court cannot try one Indian for murder of another, done in Indian country. *Ex-parte* Reynolds, 18 Alb. L. J., 8.

Federal courts not the courts of Kansas have jurisdiction of larceny committed in Fort Leavenworth military reservation. *Ex-parte* Hebard, 4 Dill., 380.

Probate courts of a State cannot administer upon the property or effects of Indians, members of a tribe which maintains its tribal relations, without the assent of the general government. United States v. Payne, 4 Dill., 387; Stroud v. Missouri R. R. Co., 4 Dill., 306.

ful punishment; if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the Constitution, laws, and treaties of his country.

THIS was a writ of error to the Superior Court for the County of Gwinnett, in the State of Georgia.

On the 22d December, 1830, the Legislature of the State of Georgia passed the following act:

"An Act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory.

"Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same that, after the 1st day of February, 1831, it shall not be lawful for any person or persons, under color or pretense of authority from said Cherokee tribe, or as headmen, chiefs or warriors of said tribe, to cause or procure by any means the assembling of any council or other pretended legislative body of the said Indians or others living among them, for the purpose of legislating (or for any other purpose whatever). And persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to indictment therefor, and, on conviction, shall be punished by confinement at hard labor in the penitentiary for the space of four years.

"Sec. 2. And be it further enacted by the authority aforesaid that, after the time aforesaid, it shall not be lawful for any person or persons, under pretext of authority from the Cherokee tribe, or as representatives, chiefs, headmen or warriors of said tribe, to meet or 522*] assemble as a council, assembly, *convention, or in any other capacity, for the purpose of making laws, orders or regulations for said tribe. And all persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to an indictment, and, on conviction thereof, shall undergo an imprisonment in the penitentiary at hard labor for the space of four years.

"Sec. 3. And be it further enacted by the authority aforesaid that, after the time aforesaid, it shall not be lawful for any person or persons, under color or by authority of the Cherokee tribe, or any of its laws or regulations, to hold any court or tribunal whatever, for the purpose of hearing and determining causes, either civil or criminal, or to give any judgment in such causes, or to issue, or cause to issue, any process against the person or property of any of said tribe. And all persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to indictment, and, on conviction thereof, shall be imprisoned in the penitentiary at hard labor for the space of four years.

"Sec. 4. And be it further enacted by the authority aforesaid that, after the time aforesaid, it shall not be lawful for any person or persons, as a ministerial officer, or in any other capacity, to execute any precept, command or process issued by any court or tribunal in the Cherokee tribe, on the persons or property of any of said tribe. And all persons offending against the provisions of this section, shall be guilty of a trespass, and subject to indictment, and, on conviction thereof, shall be punished by fine and imprisonment in the jail or in the penitentiary, not longer than four years, at the discretion of the court.

"Sec. 5. And be it further enacted by the authority aforesaid, that, after the time aforesaid, it shall not be lawful for any person or persons to confiscate, or attempt to confiscate, or otherwise to cause a forfeiture of the property or estate of any Indian of said tribe, in consequence of his enrolling himself and family for emigration, or offering to enrol for emigration, or any other act of said Indian, in furtherance of his intention to emigrate. And persons offending against the provisions of this section shall be guilty of high misdemeanor, and, on conviction, shall undergo an imprisonment in the penitentiary at hard labor for the space of four years.

*"Sec. 6. And be it further enacted [*523 by the authority aforesaid that none of the provisions of this act shall be so construed as to prevent said tribe, its headmen, chiefs or other representatives, from meeting any agent or commissioner, on the part of this State or the United States, for any purpose whatever.

"Sec. 7. And be it further enacted by the authority aforesaid that all white persons residing within the limits of the Cherokee Nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor for a term not less than four years; provided, that the provisions of this section shall not be so construed as to extend to any authorized agent or agents of the government of the United States or of this State, or to any person or persons who may rent any of those improvements which have been abandoned by Indians who have emigrated west of the Mississippi; provided, nothing contained in this section shall be so construed as to extend to white females, and all male children under twenty-one years of age.

"Sec. 8. And be it further enacted by the authority aforesaid that all white persons, citizens of the State of Georgia, who have procured a license in writing from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, to reside within the limits of the Cherokee Nation, and who have taken the following oath, viz.: "I, A. B., do solemnly swear (or affirm, as the case may be) that I will support and defend the constitution and laws of the State of Georgia, and uprightly demean myself as a citizen thereof, so help me God," shall be, and the same are hereby declared, exempt and free from the operation of the seventh section of this act.

"Sec. 9. And be it further enacted that his

excellency the governor be, and he is hereby authorized to grant licenses to reside within the limits of the Cherokee Nation, according to the provisions of the eighth section of this act.

"Sec. 10. And be it further enacted by the 524*] authority aforesaid *that no person shall collect or claim any toll from any person for passing any turnpike gate or toll bridge, by authority of any act or law of the Cherokee tribe, or any chief or headman or men of the same.

"Sec. 11. And be it further enacted by the authority aforesaid that his excellency the governor be, and he is hereby empowered, should he deem it necessary, either for the protection of the mines, or for the enforcement of the laws of force within the Cherokee Nation, to raise and organize a guard, to be employed on foot, or mounted, as occasion may require, which shall not consist of more than sixty persons, which guard shall be under the command of the commissioner or agent appointed by the governor to protect the mines, with power to dismiss from the service any member of said guard (on paying the wages due for services rendered) for disorderly conduct, and make appointments to fill the vacancies occasioned by such dismissal.

"Sec. 12. And be it further enacted by the authority aforesaid that each person who may belong to said guard, shall receive for his compensation at the rate of fifteen dollars per month when on foot, and at the rate of twenty dollars per month when mounted, for every month that such person is engaged in actual service; and, in the event that the commissioner or agent herein referred to should die, resign, or fail to perform the duties herein required of him, his excellency the governor is hereby authorized and required to appoint, in his stead, some other fit and proper person to the command of said guard; and the commissioner or agent, having the command of the guard aforesaid, for the better discipline thereof, shall appoint three sergeants, who shall receive at the rate of twenty dollars per month while serving on foot, and twenty-five dollars per month when mounted, as compensation whilst in actual service.

"Sec. 13. And be it further enacted by the authority aforesaid that the said guard, or any member of them, shall be, and they are hereby authorized and empowered to arrest any person legally charged with, or detected in, a violation of the laws of this State, and to convey as soon as practicable the person so arrested before a justice of the peace, judge of the superior or justice of inferior court of this State, to be 525*] dealt *with according to law; and the pay and support of said guard be provided out of the fund already appropriated for the protection of the gold mines."

The Legislature of Georgia, on the 19th December, 1829, passed the following Act:

"An Act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, DeKalb, Gwinnett, Hall, and Habersham, and to extend the laws of this State over the same, and to annul all laws and ordinances made by the Cherokee Nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the Act of 1828 upon this subject.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same, that from and after the passing of this act, all that part of the unlocated territory within the limits of this State, and which lies between the Alabama line and the old path leading from the Buzzard Roost on the Chattahoochee, to Sally Hughes's on the Hightower River; thence to Thomas Pelet's, on the old federal road; thence with said road to the Alabama line be, and the same is hereby added to, and shall become a part of, the County of Carroll.

"Sec. 2. And be it further enacted that all that part of said territory lying and being north of the last-mentioned line, and south of the road running from Charles Gait's ferry, on the Chattahoochee River, to Dick Roe's, to where it intersects with the path aforesaid, be, and the same is hereby added to, and shall become a part of, the County of DeKalb.

"Sec. 3. And be it further enacted that all that part of the said territory lying north of the last-mentioned line, and south of a line commencing at the mouth of Baldridge's Creek; thence up said creek to its source; from thence to where the federal road crosses the Hightower; thence with said road to the Tennessee line, be, and the same is hereby added to, and shall become part of, the County of Gwinnett.

"Sec. 4. And be it further enacted that all that part of the said territory lying north of said last-mentioned line, and south *of [*526 a line to commence on the Chestatee River, at the mouth of Yohola Creek; thence up said creek to the top of the Blue Ridge; thence to the headwaters of Notley River; thence down said river to the boundary line of Georgia, be, and the same is hereby added to, and shall become a part of, the County of Hall.

"Sec. 5. And be it further enacted that all that part of said territory lying north of said last-mentioned line, within the limits of this State, be, and the same is hereby added to, and shall become a part of, the County of Habersham.

"Sec. 6. And be it further enacted that all the laws, both civil and criminal, of this State, be, and the same are hereby extended over said portions of territory, respectively; and all persons whatever residing within the same, shall, after the 1st day of June next, be subject and liable to the operation of said laws, in the same manner as other citizens of this State, or the citizens of said counties, respectively; and all writs and processes whatever, issued by the courts or officers of said courts, shall extend over, and operate on, the portions of territory hereby added to the same, respectively.

"Sec. 7. And be it further enacted that after the 1st day of June next, all laws, ordinances, orders and regulations, of any kind whatever, made, passed or enacted, by the Cherokee Indians, either in general council or in any other way whatever, or by any authority whatever of said tribe, be, and the same are hereby declared to be, null and void, and of no effect, as if the same had never existed; and in-

all cases of indictment or civil suits, it shall not be lawful for the defendent to justify under any of said laws, ordinances, orders or regulations; nor shall the courts of this State permit the same to be given in evidence on the trial of any suit whatever.

"Sec. 8. And be it further enacted that it shall not be lawful for any person or body of persons, by arbitrary power or by virtue of any pretended rule, ordinance, law or custom of said Cherokee Nation, to prevent by threats, menances or other means, or endeavor to prevent, any Indian of said nation, residing within the chartered limits of this State, from enrolling as an emigrant, or actually emigrating or removing from said nation; nor shall it be lawful for any person or body of persons, by arbitrary power or by virtue of any pretended 527*] rule, *ordinance, law or custom of said nation, to punish, in any manner, or to molest either the person or property, or to abridge the rights or privileges of any Indian, for enrolling his or her name as an emigrant, or for emigrating or intending to emigrate, from said nation.

"Sec. 9. And be it further enacted that any person or body of persons offending against the provisions of the foregoing section, shall be guilty of a high misdemeanor, subject to indictment, and on conviction shall be punished by confinement in the common jail of any county of this State, or by confinement at hard labor in the penitentiary, for a term not exceeding four years, at the discretion of the court.

"Sec. 10. And be it further enacted that it shall not be lawful for any person or body of persons, by arbitrary power, or under color of any pretended rule, ordinance, law or custom of said nation, to prevent or offer to prevent, or deter any Indian headman, chief or warrior of said nation, residing within the chartered limits of this State, from selling or ceding to the United States, for the use of Georgia, the whole or any part of said territory, or to prevent or offer to prevent, any Indian, headman, chief or warrior of said nation, residing as aforesaid, from meeting in council or treaty any commissioner or commissioners on the part of the United States, for any purpose whatever.

"Sec. 11. And be it further enacted that any person or body of persons offending against the provisions of the foregoing sections, shall be guilty of a high misdemeanor, subject to indictment, and on conviction shall be confined at hard labor in the penitentiary for not less than four nor longer than six years, at the discretion of the court.

"Sec. 12. And be it further enacted that it shall not be lawful for any person or body of persons, by arbitrary force, or under color of any pretended rules, ordinances, law or custom of said nation, to take the life of any Indian residing as aforesaid, for enlisting as an emigrant; attempting to emigrate, ceding, or attempting to cede, as aforesaid, the whole or any part of the said territory; or meeting or attempting to meet, in treaty or in council, as aforesaid, any commissioner or commissioners aforesaid; and any person or body of persons offending against the provisions of this section, shall be 528*] guilty of *murder, subject to indictment, and, on conviction, shall suffer death by hanging.

"Sec. 13. And be it further enacted that, should any of the foregoing offenses be committed under color of any pretended rules, ordinances, custom or law of said nation, all persons acting therein, either as individuals or as pretended executive, ministerial or judicial officers, shall be deemed and considered as principals, and subject to the pains and penalties hereinbefore described.

"Sec. 14. And be it further enacted that for all demands which may come within the jurisdiction of a magistrate's court, suit may be brought for the same in the nearest district of the county to which the territory is hereby annexed; and all officers serving any legal process on any person living on any portion of the territory herein named, shall be entitled to recover the sum of five cents for every mile he may ride to serve the same, after crossing the present limits of the said counties, in addition to the fees already allowed by law; and in case any of the said officers should be resisted in the execution of any legal process, issued by any court or magistrate, justice of the inferior court or judge of the Superior Court of any of said counties, he is hereby authorized to call out a sufficient number of the militia of said counties to aid and protect him in the execution of this duty.

"Sec. 15. And be it further enacted that no Indian or descendant of any Indian, residing within the Creek or Cherokee nations of Indians, shall be deemed a competent witness in any court of this State to which a white person may be a party, except such white person resides within the said nation."

In September, 1831, the grand jurors for the County of Gwinnett in the State of Georgia, presented to the Superior Court of the county the following indictment:

"Georgia, Gwinnett County: The Grand Jurors, sworn, chosen and selected for the County of Gwinnett, in the name and behalf of the citizens of Georgia, charge and accuse Elizur Butler, Samuel A. Worcester, James Trott, Samuel Mays, Surry Eaton, Austin Copeland, and Edward D. Losure, white persons of said county, with the offense of 'residing within the limits of the Cherokee Nation without a license:' For that the said Elizur Butler, Samuel A. Worcester, *James [*529 Trott, Samuel Mays, Surry Eaton, Austin Copeland, and Edward D. Losure, white persons, as aforesaid, on the 15th day of July, 1831, did reside in that part of the Cherokee Nation attached by the laws of said State to the said county, and in the county aforesaid, without a license or permit from his excellency the governor of said State, or from any agent authorized by his excellency the governor aforesaid to grant such permit or license, and without having taken the oath to support and defend the constitution and laws of the State of Georgia, and uprightly to demean themselves as citizens thereof, contrary to the laws of said State, the good order, peace and dignity thereof."

To this indictment the plaintiff in error pleaded specially as follows:

"And the said Samuel A. Worcester, in his own proper person, comes and says, that this court ought not to take further coguizance of the action and prosecution aforesaid, because

he says, that, on the 15th day of July, in the year 1831, he was, and still is, a resident in the Cherokee Nation; and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee Nation, out of the jurisdiction of this court, and not in the County Gwinnett, or elsewhere within the jurisdiction of this court. And this defendant saith that he is a citizen of the State of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee Nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the said Cherokee Nation, and in accordance with the humane policy of the government of the United States for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment: and this defendant further saith, that this prosecution the State of Georgia ought not to have or maintain, because, he saith, that several treaties have, from time to time, been entered 530*] *into between the United States and the Cherokee Nation of Indians, to wit: at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d day of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington city on the 7th day of January, 1805; at Washington city, on the 22d day of March, 1816; at the Chickasaw Council House, on the 14th day of September, 1816; at the Cherokee Agency, on the 8th day of July, 1817, and at Washington city, on the 27th day of February, 1819; all which treaties have been duly ratified by the Senate of the United States of America, and by which treaties the United States of America acknowledge the said Cherokee Nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America, in reference to acts done within their own territory; and by which treaties the whole of the territory now occupied by the Cherokee Nation, on the east of the Mississippi, has been solemnly guaranteed to them; all of which treaties are existing treaties at this day, and in full force. By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several States composing the Union of the the United States; and it is thereby specially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a State, or from some one duly authorized thereto by the President of the United States; all of which will more fully and at large appear, by reference to the aforesaid treaties. And this defendant saith that the several acts charged in the bill of indictment were done, or omitted to be done, if at all, within the said territory so recognized as belonging to the said nation, and so, as aforesaid, held by them, under the guarauty of the United States: that for those acts the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said State; and that the laws of the State of Georgia, which profess to add the said territory to the several adjacent counties of the said State, and to extend the laws of Georgia over the said territory *and per- [*531 sons inhabiting the same, and, in particular, the act on which this indictment against this defendant is grounded, to wit: 'An Act entitled an Act to prevent the exercise of assumed and arbitrary power by all persons under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory,' are repugnant to the aforesaid treaties; which, according to the Constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect: that the said laws of Georgia are also unconstitutional and void, because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee Nation and the said United States of America, as above recited: also, that the said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee Nation, which, by the said Constitution, belongs exclusively to the Congress of the United States; and because the said laws are repugnant to the statute of the United States passed on the ——— day of March, 1802, entitled 'An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers:' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offense or offenses alleged in the bill of indictment, or any of them; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court, and the jurisdiction of the Superior Court of the County of Gwinnett was sustained by the judgment of the court.

The defendant was then arraigned, and pleaded "not guilty;" and the case came on for trial on the 15th of September, 1831, when the jury found the defendants in the indictment guilty. On the same day the court pronounced sentence on the parties so convicted, as follows:

*"*The State* v. *B. F. Thompson et al.* [*532 Indictment for residing in the Cherokee Nation without license. Verdict. Guilty."

"*The State* v. *Elizur Butler, Samuel A. Worcester et al.* Indictment for residing in the Cherokee Nation without license. Verdict, Guilty."

"The defendants in both of the above cases shall be kept in close custody by the sheriff of this county until they can be transported to the penitentiary of this State, and the keeper thereof is hereby directed to receive them, and each of them, into his custody, and keep them, and each of them, at hard labor in said penitentiary, for and during the term of four years."

A writ of error was issued on the application of the plaintiff in error, on the 27th of October, 1831, which, with the following proceedings thereon, was returned to this court:

"United States of America, ss.—The President of the United States to the honorable the judges of the Superior Court for the County of Gwinnett, in the State of Georgia, greeting:

"Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court for the County of Gwinnett, before you, or some of you, between the State of Georgia, plaintiff, and Samuel A. Worcester, defendant, on an indictment, being the highest court of law in said State in which a decision could be had in said suit, a manifest error hath happened, to the great damage of said Samuel A. Worcester, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

533*] *"Witness, the Honorable John Marshall, Chief Justice of the said Supreme Court, the first Monday of August, in the year of our Lord one thousand eight hundred and thirty-one. WM. THOS. CARROLL,

Clerk of the Supreme Court of the United States.

"Allowed by HENRY BALDWIN.

"United States of America to the State of Georgia, greeting:

"You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the Superior Court for the County of Gwinnett, in the State of Georgia, wherein Samuel A. Worcester is plaintiff in error, and the State of Georgia is defendant in error, to show cause, if any there be, why judgment rendered against the said Samuel A. Worcester, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

"Witness, the Honorable Henry Baldwin, one of the justices of the Supreme Court of the United States, this 27th day of October, in the year of our Lord one thousand eight hundred and thirty-one.

HENRY BALDWIN.

"State of Georgia, County of Gwinnett, set.—On this 26th day of November, in the year of our Lord eighteen hundred and thirty-one, William Potter personally appeared before the subscriber, John Mills, a justice of the peace in and for said county, and being duly sworn on the holy evangelists of Almighty God, deposeth and saith, that on the 24th day of November instant, he delivered a true copy of the within citation to His Excellency Wilson Lumpkin, Governor of the State of Georgia, and another true copy thereof he delivered, on the 22d day of November, instant, to Charles J. Jenkins, Esq., Attorney-General of the State aforesaid, showing to the said governor and attorney-general, respectively, at the times of delivery herein stated, the within citation. WM. POTTER.

"Sworn to and subscribed before me, the day and year above written. JOHN MILLS, J. P."

This writ of error was returned to the Supreme Court with *copies of all the [*534 proceedings in the Superior Court of the County of Gwinnett, as stated, and accompanied with certificates of the clerk of that court in the following terms:

"Georgia, Gwinnett County. I, John G. Park, clerk of the Superior Court of the County of Gwinnett and State aforesaid, do certify that the annexed and foregoing is a full and complete exemplification of the proceedings and judgments had in said court against Samuel A. Worcester, one of the defendants in the case therein mentioned, as they remain, of record, in the said Superior Court.

"Given under my hand, and seal of the court, this 28th day of November, 1831.

JOHN G. PARK, Clerk.

"I also certify that the original bond, of which a copy is annexed (the bond was in the usual form), and also a copy of the annexed writ of error, were duly deposited and filed in the clerk's office of said court on the 10th day of November, in the year of our Lord eighteen hundred and thirty-one.

"Given under my hand and seal aforesaid, the day and date above written.

JOHN G. PARK, Clerk."

The case of *Elizur Butler*, plaintiff in error, v. *The State of Georgia*, was brought before the Supreme Court in the same manner.

The case was argued for the plaintiffs in error by *Mr. Sergeant* and *Mr. Wirt*, with whom also was *Mr. Elisha W. Chester*.

The following positions were laid down and supported by *Mr. Sergeant* and *Mr. Wirt:*

1. That the court had jurisdiction of the question brought before them by the writ of error; and the jurisdiction extended equally to criminal and to civil cases.

2. That the writ of error was duly issued, and duly returned, so as to bring the question regularly before the court, under the Constitution and laws of the United States, and oblige the court to take cognizance of it.

3. That the statute of Georgia under which the plaintiffs in error were indicted and convicted was unconstitutional and void; because:

535*] *1. By the Constitution of the United States, the establishment and regulation of intercourse with the Indians belonged exclusively to the government of the United States.

2. The power thus given, exclusively, to the government of the United States had been exercised by treaties and by acts of Congress, now in force, and applying directly to the case of the Cherokees: and that no State could interfere, without a manifest violation of such treaties and laws, which by the Constitution were the supreme law of the land.

3. The statute of Georgia assumed the power to change these regulations and laws: to prohibit that which they permitted: and to make that criminal which they declared innocent or meritorious; and to subject to condemnation and punishment, free citizens of the United States who had committed no offense.

4. That the indictment, conviction, and sentence being founded upon a statute of Georgia, which was unconstitutional and void; were themselves also void and of no effect, and ought to be reversed.

These several positions were supported, enforced and illustrated by argument and authority

The following authorities were referred to: 2 Laws U. S., 65, sec. 25; Judiciary Act of 1789; *Miller* v. *Nicholls* (4 Wheat., 311); *Craig* v. *State of Missouri* (4 Peters, 400, 429); *Fisher* v. *Cockerell* (5 Peters, 248); *Ex parte Kearney* (7 Wheat., 38); *Cohens* v. *Virginia* (6 Wheat., 264); *Martin* v. *Hunter* (1 Wheat., 304, 315, 361); 1 Laws U. S., 488, 470, 472, 482, 484, 486, 453; Blunt's Historical Sketch, 106, 107; Treaties with the Cherokees, 28th Nov., 1785; 2d July, 1791; 26th July, 1794; 2d Oct., 1798; 3 Laws U. S., 27, 125, 284, 303, 344, 460; 12 Journ. Congress, 82; Blunt's Hist. Sketch, 113, 110, 111, 114; Federalist, No. 42; 1 Laws U. S., 454; *Holland* v. *Pack* (Peck's Rep., 151); *Johnson* v. *M'Intosh* (8 Wheat., 543); *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 16, 27, 31, 48); *Ware* v. *Hylton* (3 Dall., 199); *Hughes* v. *Edwards* (9 Wheat., 489); *Fisher* v. *Hamden* (1 Paine, 55); *Hamilton* v. *Eaton* (North Carolina Cases, 79); *M'Culloch* v. *State of Maryland* (4 Wheat., 316); 2 Laws U. S., 121; 3 Laws U. S., 460; 3 Laws U. S., 750; *Gibbons* v. *Ogden* (9 Wheat., 1).

536*] *Mr. *Chief Justice* MARSHALL delivered the opinion of the court:

This cause, in every point of view in which it can be placed, is of the deepest interest.

The defendant is a State, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the State of Vermont, condemned to hard labor for four years in the penitentiary of Georgia, under color of an act which he alleges to be repugnant to the Constitution, laws, and treaties of the United States.

The legislative power of a State, the controlling power of the Constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.

It behooves this court in every case, more especially in this, to examine into its jurisdiction with scrutinizing eyes, before it proceeds to the exercise of a power which is controverted.

The first step in the performance of this duty is the inquiry whether the record is properly before the court.

It is certified by the clerk of the court which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned, and is also authenticated by the seal of the court. It is returned with, and annexed to, a writ of error issued in regular form, the citation being signed by one of the associate justices of the Supreme Court, and served on the Governor and Attorney-General of the State more than thirty days before the commencement of the term to which the writ of error was returnable.

The Judicial Act (sec. 22, 25, 2 Laws U. S., 64, 65), so far as it prescribes the mode of proceeding, appears to have been literally pursued.

In February, 1797, a rule (6 Wheat. Rules) was made on this subject in the following words: "It is ordered by the court that the clerk of the court to which any writ of error shall be directed, may make return of the same by transmitting a true *copy of [*537 the record, and of all proceedings in the same, under his hand and the seal of the court."

This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it.

In the case of *Martin* v. *Hunter's Lessee* (1 Wheat., 304, 361), an exception was taken to the return of the refusal of the State court to enter a prior judgment of reversal by this court, because it was not made by the judge of the State court to which the writ was directed; but the exception was overruled, and the return was held sufficient. In *Buel* v. *Van Ness* (8 Wheat., 312) also, a writ of error to a State court, the record was authenticated in the same manner. No exception was taken to it. These were civil cases. But it has been truly said at the bar that, in regard to this process, the law makes no distinction between a criminal and civil case. The same return is required in both. If the sanction of the court could be necessary for the establishment of this position, it has been silently given.

M'Culloch v. *The State of Maryland* (4 Wheat., 316) was a *qui tam* action, brought to recover a penalty, and the record was authenticated by the seal of the court and the signature of the clerk, without that of a judge. *Brown et al.* v. *The State of Maryland* was an indictment for a fine and forfeiture. The record in this case, too, was authenticated by the seal of the court and the certificate of the clerk. The practice is both ways.

The record, then, according to the Judiciary Act, and the rule and the practice of the court, is regularly before us. The more important inquiry is, does it exhibit a case cognizable by this tribunal?

The indictment charges the plaintiff in error and others, being white persons, with the offense of "residing within the limits of the

Cherokee Nation without a license," and "without having taken the oath to support and defend the constitution and laws of the State of Georgia."

The defendant in the State court appeared in proper person, and filed the following plea:

"And the said Samuel A. Worcester, in his own proper person, comes and says that this **538***] court ought not to take further *cognizance of the action and prosecution aforesaid, because, he says, that on the 15th day of July, in the year 1831, he was, and still is, a resident in the Cherokee Nation; and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee Nation, out of the jurisdiction of this court, and not in the County Gwinnett, or elsewhere, within the jurisdiction of this court; and this defendant saith that he is a citizen of the State of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee Nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the said Cherokee Nation, and in accordance with the humane policy of the government of the United States for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment: and this defendant further saith that this prosecution the State of Georgia ought not to have or maintain, because, he saith, that several treaties have, from time to time, been entered into between the United States and the Cherokee Nation of Indians, to wit, at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d day of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington city, on the 7th day of January, 1805; at Washington city, on 22d day of March, 1816; at the Chickasaw Council House, on the 14th day of September, 1816; at the Cherokee Agency, on the 8th day of July, 1817; and at Washington city, on the the 27th day of February, 1819: all which treaties have been duly ratified by the Senate of the United States of America, and by which treaties the United States of America acknowledge the said Cherokee Nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the **539***] *United States of America, in reference to acts done within their own territory; and by which treaties the whole of the territory now occupied by the Cherokee Nation on the east of the Mississippi has been solemnly guaranteed to them; all of which treaties are existing treaties at this day, and in full force.

By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several States composing the Union of the United States; and it is thereby specially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a State, or from some one duly authorized thereto by the President of the United States; all of which will more fully and at large appear by reference to the aforesaid treaties. And this defendant saith, that the several acts charged in the bill of indictment were done, or omitted to be done, if at all, within the said territory so recognized as belonging to the said nation, and so as aforesaid, held by them, under the guarantee of the United States; that, for those acts, the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said State; and that the laws of the State of Georgia, which profess to add the said territory to the several adjacent counties of the said State, and to extend the laws of Georgia over the said territory and persons inhabiting the same; and, in particular, the act on which this indictment against this defendant is grounded, to wit, 'An Act entitled an Act to prevent the exercise of assumed and arbitrary power by all persons under pretext of authority from the Cherokee Indians, and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory,' are repugnant to the aforesaid treaties; which, according to the Constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconsitutional, void, and of no effect; that the said laws of Georgia are also unconstitutional and void, because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee Nation and the said United States of America, as above *recited; also, that the said laws of [***540** Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee Nation, which, by the said Constitution, belongs exclusively to the Congress of the United States; and because the said laws are repugnant to the statute of the United States, passed on the —— day of March, 1802, entitled 'An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier;' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offense or offenses alleged in the bill of indictment, or any of them; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court, and the prisoner, being arraigned, pleaded not guilty. The jury found a verdict against him, and the court sentenced him to hard labor in the penitentiary for the term of four years.

By overruling this plea, the court decided that the matter it contained was not a bar to

the action. The plea, therefore, must be examined for the purpose of determining whether it makes a case which brings the party within the provisions of the twenty-fifth section of the "Act to establish the judicial courts of the United States."

The plea avers that the residence charged in the indictment was under the authority of the President of the United States, and with the permission and approval of the Cherokee Nation. That the treaties subsisting between the United States and the Cherokees, acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America. That the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void. That the said act is also unconstitutional, because it interferes with, and attempts to regulate and control the intercourse with the Cherokee Nation which belongs exclusively to Congress, and, because, also, it is repugnant to the statute of the United States, entitled "An Act to regu-**541***] late *trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

Let the averments of this plea be compared with the twenty-fifth section of the Judicial Act.

That section enumerates the cases in which the final judgment or decree of a State court may be revised in the Supreme Court of the United States. These are, "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party under such clause of the said Constitution, treaty, statute or commission."

The indictment and plea in this case draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians; if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege or exemption, specially set up and claimed under them." They also draw into question the validity of a statute of the State of Georgia, "on the ground of its being repugnant to the Constitution, treaties and laws of the United States, and the decision is in favor of its validity."

It is, then, we think, too clear for controversy, that the act of Congress by which this court is constituted, has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them. We must examine the defense set up in this plea. We must inquire and decide whether the act of the Legislature of Georgia under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to the Constitution, laws and treaties of the United States.

*It has been said at the bar that the [***542** acts of the Legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the State, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.

If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded.

It enacts that "all white persons, residing within the limits of the Cherokee Nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labor for a term not less than four years."

The eleventh section authorizes the governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee Nation, to raise and organize a guard," &c.

The thirteenth section enacts, "that the said guard or any member of them, shall be, and they are hereby authorized and empowered to arrest any person legally charged with or detected in a violation of the laws of this State, and to convey, as soon as practicable, the person so arrested, before a justice of the peace, judge of the superior, or justice of inferior court of this State, to be dealt with according to law.

The extraterritorial power of every Legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee Nation, and of the rights and powers consequent on jurisdiction.

The first step, then, in the inquiry which the Constitution and laws impose on this court, is an examination of the rightfulness of this claim.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their *own laws. It is difficult [***543** to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found [illegible]

possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole, and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other Euro- **544*]** pean *governments, which title might be consummated by possession." (8 Wheat., 573.)

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from *sea to sea, did not enter the mind of any [***545** man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood.

The power of making war is conferred by these charters on the colonies, but defensive war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered, "for their several defenses, to encounter, expulse, repel, and resist, all persons who shall, without license," attempt to inhabit "within the said precincts and limits of the said several colonies, or that shall enterprise or attempt at any time hereafter the least detriment or annoyance of the said several colonies or plantations."

The charter to Connecticut concludes a general power to make defensive war with these terms: "and upon just causes to invade and destroy the natives or other enemies of the said colony."

The same power, in the same words, is conferred on the government of Rhode Island.

This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only "on just cause." The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war.

The charter to William Penn contains the following recital: "and because, in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves, as of other enemies, pirates, and robbers, may probably be feared, therefore we have given," &c. The instrument then confers the power of war.

These barbarous nations, whose incursions were feared, and to repel whose incursions the power to make war was given, were surely not considered as the subjects of Penn, or occupying his lands during his pleasure.

The same clause is introduced into the charter to Lord Baltimore.

*The charter to Georgia professes to [***546** be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, "at present waste and desolate." It

recites: "and whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which, in the late war by the neighboring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred: and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages."

These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not for conquest.

The charters contain passages showing one of their objects to be the civilization of the Indians and their conversion to Christianity—objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims, and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends. Instead of rousing their resentments by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards, were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning [*547] of *words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain with regard to the Indians were detailed by Mr. Stuart, Superintendent of Indian Affairs, in a speech delivered at Mobile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says, "lastly, I inform you that it is the king's order to all his governors and subjects to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands: but, as you know that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But, whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting-grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties *with your peo- [*548 ple will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them."

The proclamation issued by the King of Great Britain in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the King), as aforesaid, are reserved to the said Indians, or any of them.

The proclamation proceeds: "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 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 whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

"And we do further strictly enjoin and require all persons whatever, who have, either wilfully 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."

A proclamation issued by Governor Gage, in 1772, contains the following passage: "Whereas many persons, contrary to the positive orders of the king upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations, particularly on the Ouabache." The

proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and [*549] she *made treaties with them, the obligation of which she acknowledged.

This was the settled state of things when the war of our Revolution commenced. The influence of our enemy was established; her resources enabled her to keep up that influence, and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to Congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, Congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies."

The early journals of Congress exhibit the most anxious desire to conciliate the Indian nations. Three Indian departments were established, and commissioners appointed in each, "to treat with the Indians in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and everything which might excite hostility was avoided.

The first treaty was made with the Delawares, in September, 1778.

The language of equality in which it is drawn evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States.

"1. That all offenses or acts of hostilities, by one or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance.

"2. That a perpetual peace and friendship shall, from henceforth, take place and subsist between the contracting parties aforesaid, through all succeeding generations; and if either of the parties are engaged in a just and necessary war, with any other nation or nations, that then each shall assist the other, in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation," &c.

3. The third article stipulates, among other [*550] things, a free *passage for the American troops through the Delaware Nation; and engages that they shall be furnished with provisions and other necessaries at their value.

"4. For the better security of the peace and friendship now entered into by the contracting parties against all infractions of the same by the citizens of either party; to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders, by imprisonment or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties, and natural justice," &c.

5. The fifth article regulates the trade between the contracting parties, in a manner entirely equal.

6. The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States by their enemies, and from the imputation of which Congress was then peculiarly anxious to free the government. It is in these words: "Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion that it is the design of the States aforesaid to extirpate the Indians and take possession of their country; to obviate such false suggestion the United States do engage to guaranty to the aforesaid nation of Delawares, and their heirs, all their territorial rights, in the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware Nation shall abide by, and hold fast the chain of friendship now entered into."

The parties further agree that other tribes, friendly to the interest of the United States, may be invited to form a State, whereof the Delaware Nation shall be the heads, and have a representation in Congress.

This treaty, in its language and in its provisions, is formed as near as may be, on the model of treaties between the crowned heads of Europe.

The sixth article shows how Congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.

*During the war of the Revolution, [*551 the Cherokees took part with the British. After its termination, the United States, though desirous of peace, did not feel its necessity so strongly as while the war continued. Their political situation being changed, they might very well think it advisable to assume a higher tone, and to impress on the Cherokees the same respect for Congress which was before felt for the King of Great Britain. This may account for the language of the Treaty of Hopewell. There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.

The treaty is introduced with the declaration that "the commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions."

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? We may ask, further, did the Cherokees come to the seat of the American government to solicit peace; or, did the American

commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give," then, has no real importance attached to it.

The first and second articles stipulate for the mutual restoration of prisoners, and are of course equal.

The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power.

This stipulation is found in Indian treaties generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

The general law of European sovereigns, respecting their claims in America, limited the [*552 intercourse of Indians, in a *great degree, to the particular potenate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise.

The same stipulation entered into with the United States, is undoubtedly to be construed in the same manner. They receive the Cherokee Nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government is explained by the language and acts of our first President.

The fourth article draws the boundary between the Indians and the citizens of the United States. But, in describing this boundary, the term "allotted" and the term "hunting-ground" are used.

Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out." The actual subject of contract was the divid- [*553 ing line between the two nations. *and their attention may very well be supposed to have been confined to that subject. When, in fact they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed as indicating that instead of granting they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must, we think, be taken in the sense in which it was most obviously used.

So with respect to the words "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.

To the United States, it could be a matter of no concern whether their whole territory was devoted to hunting-grounds, or whether an occasional village, and an occasional corn field, interrupted and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The fifth article withdraws the protection of the United States from any citizen who has settled, or shall settle, on the lands allotted to the Indians, for their hunting-grounds; and stipulates that if he shall not remove within six months the Indians may punish him.

The sixth and seventh articles stipulate for the punishment of the citizens of either country, who may commit offenses on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The ninth article is in these words: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper."

To construe the expression "managing all their affairs," *into a surrender of self- [*554 government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that Congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the

violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

The treaty of Hopewell seems not to have established a solid peace. To accommodate the differences still existing between the State of Georgia and the Cherokee Nation, the Treaty 555*] of *Holston was negotiated in July, 1791. The existing Constitution of the United States had been then adopted, and the government, having more intrinsic capacity to enforce its just claims, was perhaps less mindful of high sounding expressions denoting superiority. We hear no more of giving peace to the Cherokees. The mutual desire of establishing permanent peace and friendship, and of removing all causes of war, is honestly avowed, and, in pursuance of this desire, the first article declares that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee Nation.

The second article repeats the important acknowledgment that the Cherokee Nation is under the protection of the United States of America, and of no other sovereign whosoever.

The meaning of this has been already explained. The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain.

This relation was that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.

The third article contains a perfectly equal stipulation for the surrender of prisoners.

The fourth article declares that "the boundary between the United States and the Cherokee Nation shall be as follows: beginning," &c. We hear no more of "allotments" or of "hunting-grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each; the ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed *that it shall be [*556 plainly marked by commissioners, to be appointed by each party; and, in order to extinguish forever all claim of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration the Cherokees release all right to the ceded land, forever.

By the fifth article, the Cherokees allow the United States a road through their country, and the navigation of the Tennessee River. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.

By the sixth article, it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it.

By the seventh article, the United States solemnly guaranty to the Cherokee Nation all their lands not hereby ceded.

The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport.

The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.

This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self-government, thus guarantying their lands; assuming the duty of protection, and of course, pledging the faith of the United States for that protection, has been frequently renewed and is now in full force.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our government Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest *a firm purpose to afford that protection [*557 which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

In 1819, Congress passed an Act for promoting those humane designs of civilizing the neighboring Indians, which had long been cherished by the executive. It enacts, "that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic: and for performing such other duties as may be enjoined, according to such instructions and rules as the President may give and prescribe for the regulation of their conduct in the discharge of their duties."

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it cannot be doubted that the general words of the act comprehend them. Their advance in the "habits and arts of civilization," rather encouraged perseverance in the laudable exertions still further to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. **558***] *Is this the rightful exercise of power, or is it usurpation?

While these States were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, Congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all. Congress, therefore, was considered as invested with all the powers of war and peace, and Congress dissolved our connection with the mother country, and declared these United Colonies to be independent States. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, Congress assumed the management of Indian affairs; first in the name of these United Colonies, and afterwards in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace by treaty were earnest and incessant. The confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to Congress and prohibited them to the States, respectively, unless a State be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted." This instrument also gave the United States in Congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not *members [**559** of any of the States; provided that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims produced representations to Congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two States, but recommends an accommodation, by liberal cessions of territory, or by an admission on their part of the powers claimed by Congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing Constitution. That instrument confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative pro-

ceedings, by ourselves, having each a definite
560* and well understood meaning. We *have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Georgia herself has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her Legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties; that, within their boundary, they possessed rights with which no State could interfere, and that the whole power of regulating the intercourse with them was vested in the United States. A review of these acts, on the part of Georgia, would occupy too much time, and is the less necessary because they have been accurately detailed in the argument at the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history in every change through which we have passed, is placed the charters granted by the monarch of a distant and distinct region, parceling out a territory in possession of others whom he could not remove and did not attempt to remove, and the cession made of his claims by the Treaty of Peace.

The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain, at the Treaty of Peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; and the settled doc-
561* trine *of the law of nations is that a weaker power does not surrender its independence—its right to self government, by associating with a stronger and taking its protection. A weak State in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states so long as self government and sovereign and independent authority are left in the administration of the state." At the present day, more than one State may be considered as holding its right of self government under the guaranty and protection of one or more allies.

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.

The act of the State of Georgia under which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity. Can this court revise and reverse it?

If the objection to the system of legislation lately adopted by the Legislature of Georgia in relation to the Cherokee Nation was confined to its extraterritorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates *the [*562 Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the President of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried, and condemned, under color of a law which has been shown to be repugnant to the Constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the Constitution, laws, and treaties of his country.

This point has been elaborately argued and, after deliberate consideration, decided, in the case of *Cohens* v. *The Commonwealth of Virginia* (6 Wheat., 264).

It is the opinion of this court that the judgment of the Superior Court for the County of Gwinnett, in the State of Georgia, condemning Samuel A. Worcester to hard labor in the penitentiary of the State of Georgia for four years, was pronounced by that court under color of a law which is void, as being repugnant to the Constitution, treaties, and laws of the United **563*]** *States, and ought, therefore, to be reversed and annulled.

Mr. Justice M'LEAN.

As this case involves principles of the highest importance, and may lead to consequences which shall have an enduring influence on the institutions of this country; and as there are some points in the case on which I wish to state, distinctly, my opinion, I embrace the privilege of doing so.

With the decision just given, I concur.

The plaintiff in error was indicted under a law of Georgia "for residing in that part of the Cherokee Nation attached, by the laws of said State, to the County of Gwinnett, without a license or permit from his excellency the governor of the State, or from any agent authorized by his excellency the governor to grant such permit, or license, and without having taken the oath to support and defend the constitution and laws of the State of Georgia, and uprightly to demean himself as a citizen thereof."

On this indictment the defendant was arrested, and, on being arraigned before the Superior Court for Gwinnett County, he filed, in substance, the following plea:

He admits that, on the 15th of July, 1831, he was, and still continued to be, a resident in the Cherokee Nation, and that the crime, if any were committed, was committed at the town of New Echota, in said nation, out of the jurisdiction of the court. That he is a citizen of Vermont, and that he entered the Indian country in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it. That he was, at the time of his arrest, engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the Cherokee Nation, and in accordance with the humane policy of the government of the United States for the improvement of the Indians.

He then states, as a bar to the prosecution, certain treaties made between the United States **564*]** and the Cherokee Indians, by *which the possession of the territory they now inhabit was solemnly guaranteed to them; and also a certain Act of Congress, passed in March, 1802, entitled "An Act to regulate trade and intercourse with the Indian tribes." He also alleges that this subject, by the Constitution of the United States, is exclusively vested in Congress; and that the law of Georgia, being repugnant to the Constitution of the United States, to the treaties referred to, and to the act of Congress specified, is void, and cannot be enforced against him.

This plea was overruled by the court, and the defendant pleaded not guilty.

The jury returned a verdict of guilty, and the defendant was sentenced by the court to be kept in close custody by the sheriff of the county until he could be transported to the penitentiary of the State, and the keeper thereof was directed to receive him into custody, and keep him at hard labor in the penitentiary, during the term of four years.

Another individual was included in the same indictment, and joined in the plea to the jurisdiction of the court, and was also included in the sentence; but his name is not adverted to, because the principles of the case are fully presented in the above statement.

To reverse this judgment, a writ of error was obtained, which, having been returned with the record of the proceedings, is now before this court.

The first question which it becomes necessary to examine is, whether the record has been duly certified, so as to bring the proceedings regularly before this tribunal.

A writ of error was allowed in this case by one of the justices of this court, and the requisite security taken. A citation was also issued, in the form prescribed, to the State of Georgia, a true copy of which, as appears by the oath of William Patten, was delivered to the governor on the 24th day of November last; and another true copy was delivered on the 22d day of the same month to the Attorney General of the State.

The record was returned by the clerk, under the seal of the court, who certifies that it is a full and complete exemplification of the proceedings and judgment had in the case; and he *further certifies that the original [***565** bond, and a copy of the writ of error, were duly deposited and filed in the clerk's office of said court, on the 10th day of November last.

Is it necessary, in such a case, that the record should be certified by the judge who held the court?

In the case of *Martin* v. *Hunter's Lessee*, which was a writ of error to the Court of Appeals of Virginia, it was objected that the return to the writ of error was defective, because the record was not so certified; but the court in that case said, "the forms of process, and the modes of proceeding in the exercise of jurisdiction, are, with few exceptions, left by the Legislature to be regulated and changed, as this court may, in its discretion, deem expedient." By a rule of this court, "the return of a copy of a record, of the proper court, annexed to the writ of error, is declared to be a sufficient compliance with the mandate of the writ. The record in this case is duly certified by the clerk of the Court of Appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return cannot prevail." (1 Wheat., 304.)

In 9 Wheat., 526, in the case of *Stewart* v. *Ingle et al.*, which was a writ of error to the Circuit Court for the District of Columbia, a *certiorari* was issued upon a suggestion of diminution in the record, which was returned by the clerk with another record; wherupon a

motion was made for a new *certiorari*, on the ground that the return ought to have been made by the judge of the court below, and not by the clerk. The writ of *certiorari*, it is known, like the writ of error, is directed to the court.

Mr. Justice Washington, after consultation with the judges, stated that according to the rules and practice of the court, a return made by the clerk was a sufficient return.

To ascertain what has been the general course of practice on this subject, an examination has been made into the manner in which records have been certified from State courts to this court; and it appears that, in the year 1817, six causes were certified, in obedience to writs of error, by the clerk, under the seal of the court. In the year 1819, two were so certified, one of them being the case of *M'Culloch* v. *The State of Maryland*.

566*] *In the year 1821 three cases were so certified; and in the year 1823 there was one. In 1827 there were five, and in the ensuing year, seven.

In the year 1830 there were eight causes so certified, in five of which a State was a party on the record. There were three causes thus certified in the year 1831, and five in the present year.

During the above periods, there were only fifteen causes from State courts where the records were certified by the court or the presiding judge, and one of these was the case of *Cohens* v. *The State of Virginia*.

This court adopted the following rule on this subject in 1797:

"It is ordered by the court that the clerk of the court to which any writ of error shall be directed, may make the return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand, and the seal of the court."

The power of the court to adopt this rule cannot be questioned; and it seems to have regulated the practice ever since its adoption. In some cases, the certificate of the court, or the presiding judge has been affixed to the record; but this court has decided, where the question has been raised, that such certificate is unnecessary.

So far as the authentication of the record is concerned, it is impossible to make a distinction between a civil and a criminal case. What may be sufficient to authenticate the proceedings in a civil case, must be equally so in a criminal one. The verity of the record is of as much importance in the one case as in the other.

This is a question of practice; and it would seem that, if any one point in the practice of this court can be considered as settled, this one must be so considered.

In the progress of the investigation, the next inquiry which seems naturally to arise, is, whether this is a case in which a writ of error may be issued.

By the twenty-fifth section of the Judiciary Act of 1789, it is provided "that a final judgment or decree in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, where is drawn in

567*]question the validity *of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed, in the Supreme Court of the United States."

Doubts have been expressed whether a writ of error to a State court is not limited to civil cases. These doubts could not have arisen from reading the above section. Is not a criminal case as much a suit as a civil case? What is a suit but a prosecution; and can any one suppose that it was the intention of Congress, in using the word "suit," to make a distinction between a civil prosecution and a criminal one?

It is more important that jurisdiction should be given to this court in criminal than in civil cases, under the twenty-fifth section of the Judiciary Act. Would it not be inconsistent both with the spirit and letter of this law, to revise the judgment of a State court, in a matter of controversy respecting damages, where the decision is against a right asserted under the Constitution or law of the United States; but to deny the jurisdiction, in a case where the property, the character, the liberty and life of a citizen may be destroyed, though protected by the solemn guarantees of the Constitution?

But this is not an open question; it has long since been settled by the solemn adjudications of this court. The above construction, therefore, is sustained both on principle and authority. The provisions of the section apply as well to criminal as to civil cases, where the Constitution, treaties, or laws of the United States come in conflict with the laws of a State, and the latter is sustained by the decision of the court.

It has been said that this court can have no power to arrest *the proceedings of a [*568 State tribunal in the enforcement of the criminal laws of the State. This is undoubtedly true, so long as a State court, in the execution of its penal laws, shall not infringe upon the Constitution of the United States, or some treaty or law of the Union.

Suppose a State should make it penal for an officer of the United States to discharge his duties within its jurisdiction; as, for instance, a land officer, an officer of the customs, or a postmaster, and punish the offender by confinement in the penitentiary; could not the Supreme Court of the United States interpose their power, and arrest or reverse the State proceedings? Cases of this kind are so palpable, that they need only to be stated to gain the assent of every judicious mind. And would not this be an interference with the administration of the criminal laws of a State?

This court have repeatedly decided that they have no appellate jurisdiction in criminal cases

from the circuit courts of the United States; writs of error and appeals are given from those courts only in civil cases. But, even in those courts, where the judges are divided on any point in a criminal case, the point may be brought before this court, under a general provision in cases of division of opinion.

Jurisdiction is taken in the case under consideration exclusively by the provisions of the twenty-fifth section of the law which has been quoted. These provisions, as has been remarked, apply indiscriminately to criminal and civil cases, wherever a right is claimed under the Constitution, treaties, or laws of the United States, and the decision, by the State Court, is against such right. In the present case, the decision was against the right expressly set up by the defendant, and it was made by the highest judicial tribunal of Georgia.

To give jurisdiction in such a case, this court need look no further than to ascertain whether the right, thus asserted, was decided against by the State court. The case is clear of difficulty on this point.

The name of the State of Georgia is used in this case because such was the designation given to the cause in the State court. No one ever supposed that the State, in its sovereign capacity, in such a case, is a party to the cause. **569*** The form of *the prosecution here must be the same as it was in the State court; but so far as the name of the State is used, it is a matter of form. Under a rule of this court, notice was given to the governor and Attorney-General of the State because it is a part of their duty to see that the laws of the State are executed.

In prosecutions for violations of the penal laws of the Union, the name of the United States is used in the same manner. Whether the prosecution be under a federal or State law, the defendant has a right to question the constitutionality of the law.

Can any doubt exist as to the power of Congress to pass the law under which jurisdiction is taken in this case? Since its passage, in 1789, it has been the law of the land; and has been sanctioned by an uninterrupted course of decisions in this court, and acquiesced in by the State tribunals, with perhaps a solitary exception; and whenever the attention of the national Legislature has been called to the subject, their sanction has been given to the law by so large a majority as to approach almost to unanimity.

Of the policy of this act there can be as little doubt as of the right of Congress to pass it.

The Constitution of the United States was formed, not, in my opinion, as some have contended, by the people of the United States, nor, as others, by the States; but by a combined power exercised by the people through their delegates, limited in their sanctions, to the respective States.

Had the Constitution emanated from the people, and the States had been referred to merely as convenient districts by which the public expression could be ascertained, the popular vote throughout the Union would have been the only rule for the adoption of the Constitution. This course was not pursued; and in this fact, it clearly appears that our fundamental law was not formed, exclusively, by the popular suffrage of the people.

The vote of the people was limited to the respective States in which they resided. So that it appears there was an expression of popular suffrage and State sanction, most happily united, in the adoption of the Constitution of the Union.

Whatever differences of opinion may exist as to the means *by which the Consti- [**570** tution was adopted, there would seem to be no ground for any difference as to certain powers conferred by it.

Three co-ordinate branches of the government were established—the executive, legislative and judicial. These branches are essential to the existence of any free government, and that they should possess powers, in their respective spheres, co-extensive with each other.

If the executive have not powers which will enable him to execute the functions of his office, the system is essentially defective; as those duties must, in such case, be discharged by one of the other branches. This would destroy that balance which is admitted to be essential to the existence of free government, by the wisest and most enlightened statesmen of the present day.

It is not less important that the legislative power should be exercised by the appropriate branch of the government, than that the executive duties should devolve upon the proper functionary. And if the judicial power fall short of giving effect to the laws of the Union, the existence of the federal government is at an end.

It is in vain, and worse than in vain, that the national Legislature enact laws, if those laws are to remain upon the statute book as monuments of the imbecility of the national power. It is in vain that the executive is called to superintend the execution of the laws, if he have no power to aid in their enforcement.

Such weakness and folly are in no degree chargeable to the distinguished men through whose instrumentality the Constitution was formed. The powers given, it is true, are limited; and no powers, which are not expressly given, can be exercised by the federal government; but, where given, they are supreme. Within the sphere allotted to them, the co-ordinate branches of the general government revolve, unobstructed by any legitimate exercise of power by the State governments. The powers exclusively given to the federal government are limitations upon the State authorities. But, with the exception of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the State governments can arrest or obstruct the course of the national power.

*It has been asserted that the federal [**571** government is foreign to the State governments, and that it must consequently be hostile to them. Such an opinion could not have resulted from a thorough investigation of the great principles which lie at the foundation of our system. The federal government is neither foreign to the State governments, nor is it hostile to them. It proceeds from the same people, and is as much under their control as the State governments.

Where, by the Constitution, the power of legislation is exclusively vested in Congress,

they legislate for the people of the Union, and their acts are as binding as are the constitutional enactments of a State Legislature on the people of the State. If this were not so, the federal government would exist only in name. Instead of being the proudest monument of human wisdom and patriotism, it would be the frail memorial of the ignorance and mental imbecility of its framers.

In the discharge of his constitutional duties, the federal executive acts upon the people of the Union the same as a governor of a State, in the performance of his duties, acts upon the people of the State. And the judicial power of the United States acts in the same manner on the people. It rests upon the same basis as the other departments of the government. The powers of each are derived from the same source, and are conferred by the same instrument. They have the same limitations and extent.

The Supreme Court of a State, when required to give effect to a statute of the State, will examine its constitution, which they are sworn to maintain, to see if the legislative act be repugnant to it; and if a repugnancy exist, the statute must yield to the paramount law.

The same principle governs the supreme tribunal of the Union. No one can deny that the Constitution of the United States is the supreme law of the land; and, consequently, no act of any State Legislature or of Congress, which is repugnant to it, can be of any validity.

Now, if an act of a State Legislature be repugnant to the constitution of the State, the State court will declare it void; and if such act be repugnant to the Constitution of the Union, or a law made under that Constitution, which is declared to be the supreme law of the land, is it not **572***] equally void? And, under such *circumstances, if this court should shrink from a discharge of their duty in giving effect to the supreme law of the land, would they not violate their oaths, prove traitors to the Constitution, and forfeit all just claim to the public confidence?

It is sometimes objected, if the federal judiciary may declare an act of a State Legislature void, because it is repugnant to the Constitution of the United States, it places the legislation of a State within the power of this court. And might not the same argument be urged with equal force against the exercise of a similar power by the Supreme Court of a State. Such an argument must end in the destruction of all constitutions, and the will of the Legislature, like the acts of the Parliament of Great Britain, must be the supreme, and only law of the land.

It is impossible to guard an investiture of power so that it may not, in some form, be abused: an argument, therefore, against the exercise of power, because it is liable to abuse, would go to the destruction of all governments.

The powers of this court are expressly, not constructively, given by the Constitution: and within this delegation of power, this court are the Supreme Court of the people of the United States, and they are bound to discharge their duties, under the same responsibilities as the Supreme Court of a State: and are equally, within their powers, the Supreme Court of the people of each State.

When this court are required to enforce the laws of any State, they are governed by those laws. So closely do they adhere to this rule, that during the present term, a judgment of a Circuit Court of the United States, made in pursuance of decisions of this court, has been reversed and annulled because it did not conform to the decisions of the State Court, in giving a construction to a local law. But while this court conforms its decisions to those of the State courts on all questions arising under the statutes and constitutions of the respective States, they are bound to revise and correct those decisions, if they annul either the Constitution of the United States or the laws made under it.

It appears, then, that on all questions arising under the laws of a State, the decisions of the courts of such State form a rule for the decisions of this court, and that on all questions arising under the laws of the United States, the decisions of this court *form a rule [***573** for the decisions of the State courts. Is there anything unreasonable in this? Have not the federal, as well as the State courts, been constituted by the people? Why, then, should one tribunal more than the other be deemed hostile to the interests of the people.

In the second section of the third article of the Constitution, it is declared that "the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

Having shown that a writ of error will lie in this case, and that the record has been duly certified, the next inquiry that arises is, what are the acts of the United States which relate to the Cherokee Indians and the acts of Georgia; and were these acts of the United States sanctioned by the federal Constitution?

Among the enumerated powers of Congress contained in the eighth section of the first article of the Constitution, it is declared that "Congress shall have power to regulate commerce with foreign nations, and among the Indian tribes." By the Articles of Confederation, which were adopted on the 9th day of July, 1778, it was provided that "the United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck, by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and management of all affairs with the Indians, not members of any of the States: Provided, that the legislative right of any State, within its own limits, be not infringed or violated."

As early as June, 1775, and before the adoption of the Articles of Confederation, Congress took into their consideration the subject of Indian affairs. The Indian country was divided into three departments, and the superintendence of each was committed to commissioners, who were authorized to hold treaties with the Indians, make disbursements of money for their use, and to discharge various duties designed to preserve peace and cultivate a friendly feeling with them towards the colonies. No person was permitted to trade with them without *a [***574** license from one or more of the commissioners of the respective departments.

In April, 1776, it was "resolved, that the commissioners of Indian affairs in the middle department, or any one of them, be desired to employ, for reasonable salaries, a minister of the Gospel, to reside among the Delaware Indians, and instruct them in the Christian religion; a schoolmaster to teach their youth reading, writing, and arithmetic; also a blacksmith, to do the work of the Indians." The general intercourse with the Indians continued to be managed under the superintendence of the continental Congress.

On the 28th of November, 1785, the Treaty of Hopewell was formed, which was the first treaty made with the Cherokee Indians. The commissioners of the United States were required to give notice to the executives of Virginia, North Carolina, South Carolina, and Georgia, in order that each might appoint one or more persons to attend the treaty, but they seem to have had no power to act on the occasion.

In this treaty it is stipulated that "the commissioners plenipotentiary of the United States in Congress assembled, give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions:"

1. The Cherokees to restore all prisoners and property taken during the war.

2. The United States to restore to the Cherokees all prisoners.

3. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other sovereign whatsoever.

4. The boundary line between the Cherokees and the citizens of the United States was agreed to as designated.

5. If any person, not being an Indian, intrude upon the land "allotted" to the Indians, or, being settled on it, shall refuse to remove within six months after the ratification of the treaty, he forfeits the protection of the United States, and the Indians were at liberty to punish him as they might think proper.

6. The Indians are bound to deliver up to the United States any Indian who shall commit robbery, or other capital crime, on a white person living within their protection.

575*] *7. If the same offense be committed on an Indian by a citizen of the United States, he is to be punished.

8. It is understood that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practiced on either side, except where there is a manifest violation of this treaty; and then it shall be preceded, first, by a demand of justice; and, if refused, then by a declaration of hostilities.

"That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have a right to send a deputy of their choice, whenever they think fit, to Congress."

The Treaty of Holston was entered into with the same people, on the 2d day of July, 1791.

This was a treaty of peace, on which the Cherokees again placed themselves under the protection of the United States, and engaged to hold no treaty with any foreign power, individual State, or with individuals of any State. Prisoners were agreed to be delivered up on both sides; a new Indian boundary was fixed, and a cession of land made to the United States on the payment of a stipulated consideration.

A free, unmolested road, was agreed to be given through the Indian lands, and the free navigation of the Tennessee River. It was agreed that the United States should have the exclusive right of regulating their trade, and a solemn guarantee of their land, not ceded, was made. A similar provision was made as to the punishment of offenders, and as to all persons who might enter the Indian territory, as was contained in the Treaty of Hopewell. Also, that reprisal or retaliation shall not be committed until satisfaction shall have been demanded of the aggressor.

On the 7th day of August, 1786, an ordinance for the regulation of Indian affairs was adopted, which repealed the former system.

In 1794 another treaty was made with the Cherokees, the object of which was to carry into effect the Treaty of Holston. And on the plains of Tellico, on the 2d of October, 1798, the Cherokees, in another treaty, agreed to give a right of way, in a certain direction, over their lands. Other engagements were also entered into, which need not be referred to.

Various other treaties were made by the United States with *the Cherokee Indians, [*576 by which, among other arrangements, cessions of territory were procured and boundaries agreed on.

In a treaty made in 1817, a distinct wish is expressed by the Cherokees to assume a more regular form of government, in which they are encouraged by the United States. By a treaty held at Washington on the 27th day of February, 1819, a reservation of land is made by the Cherokees for a school fund, which was to be surveyed and sold by the United States for that purpose. And it was agreed that all white persons, who had intruded on the Indian lands should be removed.

To give effect to various treaties with this people, the power of the executive has frequently been exercised; and at one time General Washington expressed a firm determination to resort to military force to remove intruders from the Indian territories.

On the 30th of March, 1802, Congress passed an Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

In this act it is provided that any citizen or resident in the United States, who shall enter into the Indian lands to hunt, or for any other purpose, without a license, shall be subject to a fine and imprisonment. And if any person shall attempt to survey, or actually survey, the Indian lands, he shall be liable to forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months. No person is permitted to reside as a trader within the Indian boundaries, without a license or permit. All persons are prohibited, under a heavy penalty, from purchasing the Indian lands; and all such purchases are declared to be void. And it is made lawful for the military force of the United States to arrest offenders against the provisions of the act.

By the seventeenth section, it is provided that the act shall not be so construed as to "prevent

any trade or intercourse with Indians living on lands surrounded by settlement of the citizen of the United States, and being within the ordinary jurisdiction of any of the individual States; or the unmolested use of a road, from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair said road." Nor was the act to be so construed as to prevent persons from traveling from 577*] Knoxville to Price's settlement,*provided they shall travel in the tract or path which is usually traveled, and the Indians do not object; but if they object, then all travel on this road to be prohibited, after proclamation by the President, under the penalties provided in the act.

Several acts, having the same object in view, were passed prior to this one; but as they were repealed either before, or by the Act of 1802, their provisions need not be specially noticed.

The acts of the State of Georgia, which the plaintiff in error complains of as being repugnant to the Constitution, treaties, and laws of the United States, are found in two statutes.

The first Act was passed the 12th of December, 1829, and is entitled "An Act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, DeKalb, Gwinnett and Habersham; and to extend the laws of the State over the same, and to annul all laws made by the Cherokee Nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the Act of 1828 on this subject."

This act annexes the territory of the Indians within the limits of Georgia to the counties named in the title, and extends the jurisdiction of the State over it. It annuls the laws, ordinances, orders and regulations, of any kind, made by the Cherokees, either in council or in any other way, and they are not permitted to be given in evidence in the courts of the State. By this law, no Indian, or the descendant of an Indian, residing within the Creek or Cherokee Nation of Indians, shall be deemed a competent witness in any court of the State to which a white person may be a party, except such white person reside within the nation. Offenses under the act are to be punished by confinement in the penitentiary, in some cases not less than four nor more than six years, and in others not exceeding four years.

The second Act was passed on the 22d day of December, 1830, and is entitled "An Act to prevent the exercise of assumed and arbitrary power, by all persons, on pretext of authority from the Cherokee Indians and their laws; and to prevent white persons from residing within 578*] that part of the *chartered limits of Georgia occupied by the Cherokee Indians; and to provide a guard for the protection of the gold mines, and to enforce the laws of the State without the aforesaid territory."

By the first section of this act, it is made a penitentiary offense, after the 1st day of February, 1831, for any person or persons, under color or pretense of authority from the said Cherokee tribe, or as headmen, chiefs or warriors of said tribe, to cause or procure, by any means, the assembling of any council or other pretended legislative body of the said Indians, for the purpose of legislating, &c.

They are prohibited from making laws, holding courts of justice, or executing process. And all white persons, after the 1st of March, 1831, who shall reside within the limits of the Cherokee Nation without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, or who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor; and, upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years. From this punishment, agents of the United States are excepted, white females, and male children under twenty-one years of age.

Persons who have obtained license, are required to take the following oath: "I, A B, do solemnly swear that I will support and defend the constitution and laws of the State of Georgia, and uprightly demean myself as a citizen thereof. So help me God."

The governor is authorized to organize a guard, which shall not consist of more than sixty persons, to protect the mines in the Indian territory, and the guard is authorized to arrest all offenders under the act.

It is apparent that these laws are repugnant to the treaties with the Cherokee Indians which have been referred to, and to the law of 1802. This repugnance is made so clear by an exhibition of the respective acts, that no force of demonstration can make it more palpable.

By the treaties and laws of the United States, rights are guaranteed to the Cherokees, both as it respects their territory and internal polity. By the laws of Georgia these rights are abolished; *and not only abolished, but an [*579 ignominious punishment is inflicted on the Indians and others, for the exercise of them. The important question then arises, which shall stand, the laws of the United States, or the laws of Georgia? No rule of construction, or subtlety of argument, can evade an answer to this question. The response must be, so far as the punishment of the plaintiff in error is concerned, in favor of the one or the other.

Not to feel the full weight of this momentous subject would evidence an ignorance of that high responsibility which is devolved upon this tribunal, and upon its humblest member, in giving a decision in this case.

Are the treaties and law which have been cited, in force? and what, if any obligations, do they impose on the federal government within the limits of Georgia?

A reference has been made to the policy of the United States on the subject of Indian affairs before the adoption of the Constitution, with the view of ascertaining in what light the Indians have been considered by the first official acts, in relation to them, by the United States. For this object, it might not be improper to notice how they were considered by the European inhabitants, who first formed settlements in this part of the continent of America.

The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted. And it is equally

clear that the range of nations or tribes, who exist in the hunter state may be restricted within reasonable limits. They shall not be permitted to roam, in the pursuit of game, over an extensive and rich country, whilst in other parts, human beings are crowded so closely together, as to render the means of subsistence precarious. The law of nature, which is paramount to all other laws, gives the right to every nation to the enjoyment of a reasonable extent of country, so as to derive the means of subsistence from the soil.

In this view, perhaps, our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory **580*]** *mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbors. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration.

This policy has obtained from the earliest white settlements in this country down to the present time. Some cessions of territory may have been made by the Indians, in compliance with the terms on which peace was offered by the whites, but the soil thus taken was taken by the laws of conquest, and always as an indemnity for the expenses of the war commenced by the Indians.

At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.

In some of the old States—Massachusetts, Connecticut, Rhode Island and others—where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government—the laws of the State have been extended over them, for the protection of their persons and property.

Before the adoption of the Constitution, the mode of treating with the Indians was various. After the formation of the confederacy, this subject was placed under the special superintendence of the United Colonies, though, subsequent to that time, treaties may have been occasionally entered into between a State and the Indians in its neighborhood. It is not considered to be at all important to go into a minute inquiry on this subject.

By the Constitution, the regulation of commerce among the Indian tribes is given to Congress. This power must be considered as exclusively vested in Congress, as the power to regulate commerce with foreign nations, to coin **581*]** money, to *establish post-offices, and to declare war. It is enumerated in the same section, and belongs to the same class of powers.

This investiture of power has been exercised in the regulation of commerce with the Indians, sometimes by treaty, and, at other times, by enactments of Congress. In this respect they have been placed by the federal authority, with but few exceptions, on the same footing as foreign nations.

It is said that these treaties are nothing more than compacts, which cannot be considered as obligatory on the United States, from a want of power in the Indians to enter into them.

What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.

Is it essential that each party shall possess the same attributes of sovereignty to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.

Under the Constitution, no State can enter into any treaty; and it is believed that, since its adoption, no State, under its own authority, has held a treaty with the Indians.

It must be admitted that the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the Supreme Court of the United States; and yet, having the right of self-government, they, in some sense, form a State. In the management of their internal concerns, they are dependent on no power. They punish offenses under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace. The exercise of these and other powers gives to them a distinct character as a people, and constitutes them, in some respects, a state, although they may not be admitted to possess the right of soil.

By various treaties, the Cherokees have placed themselves under the protection of the United States; they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not devest *them of the right [***582** of self-government, nor destroy their capacity to enter into treaties or compacts.

Every State is more or less dependent on those which surround it; but, unless this dependence shall extend so far as to merge the political existence of the protected people into that of their protectors, they may still constitute a state. They may exercise the powers not relinquished, and bind themselves as a distinct and separate community.

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "allotted," in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

The question may be asked, is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties?

The inquiry is not what station shall now be given to the Indian tribes in our country? but, what relation have they sustained to us, since the commencement of our government?

We have made treaties with them; and are those treaties to be disregarded on our part because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us?

The President and Senate, except under the treaty-making power, cannot enter into compacts with the Indians, or with foreign nations. This power has been uniformly exercised in forming treaties with the Indians.

Nations differ from each other in condition, and that of the same nation may change by the 583*] revolutions of time, but the *principles of justice are the same. They rest upon a base which will remain beyond the endurance of time.

After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force. Have the numerous treaties which have been formed with them, and the ratifications by the President and Senate, been nothing more than an idle pageantry?

By numerous treaties with the Indian tribes we have acquired accessions of territory of incalculable value to the Union. Except by compact, we have not even claimed a right of way through the Indian lands. We have recognized in them the right to make war. No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation, and not on individual offenders among them as traitors.

In the executive, legislative and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community—not a foreign, but a domestic community—not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation.

But, can the treaties which have been referred to, and the law of 1802, be considered in force within the limits of the State of Georgia?

In the act of cession made by Georgia to the United States in 1802, of all lands claimed by her west of the line designated, one of the conditions was, "that the United States should, at their own expense, extinguish, for the use of Georgia, as early as the same can be peaceably obtained, on reasonable terms, the Indian title to lands within the State of Georgia."

One of the counsel, in the argument, endeavored to show that a part of the country now inhabited by the Cherokee Indians, is within what is called the chartered limits of Georgia.

It appears that the charter of Georgia was surrendered *by the trustees, and that, [*584 like the State of South Carolina, she became a regal colony. The effect of this change was to authorize the crown to alter the boundaries, in the exercise of its discretion. Certain alterations, it seems, were subsequently made; but I do not conceive it can be of any importance to enter into a minute consideration of them. Under its charter, it may be observed that Georgia derived a right to the soil, subject to the Indian title, by occupancy. By the act of cession, Georgia designated a certain line as the limit of that cession, and this line, unless subsequently altered, with the assent of the parties interested, must be considered as the boundary of the State of Georgia. This line having been thus recognized, cannot be contested on any question which may incidentally arise for judicial decision.

It is important, on this part of the case, to ascertain in what light Georgia has considered the Indian title to lands generally, and particularly within her own boundaries; and also, as to the right of the Indians to self government.

In the first place, she was a party to all the treaties entered into between the United States and the Indians since the adoption of the Constitution. And prior to that period, she was represented in making them, and was bound by their provisions, although it is alleged that she remonstrated against the Treaty of Hopewell. In the passage of the intercourse law of 1802, as one of the constituent parts of the Union, she was also a party.

The stipulation made in her act of cession, that the United States should extinguish the Indian title to lands within the State, was a distinct recognition of the right in the federal government to make the extinguishment; and also that, until it should be made, the right of occupancy would remain in the Indians.

In a law of the State of Georgia, "for opening the land-office, and for other purposes," passed in 1783, it is declared that surveys made on Indian lands were null and void; a fine was inflicted on the person making the survey, which, if not paid by the offender, he was punished by imprisonment. By a subsequent act, a line was fixed for the Indians, which was a boundary between them and the whites. A similar provision is found in other laws of Georgia, passed before the adoption *of [*585 the Constitution. By an act of 1787, severe corporeal punishment was inflicted on those who made or attempted to make surveys, "beyond the temporary line designating the Indian hunting-ground."

On the 19th of November, 1814, the following resolutions were adopted by the Georgia Legislature:

"Whereas, many of the citizens of this State, without regard to existing treaties between the friendly Indians and the United States, and contrary to the interest and good policy of this State, have gone, and are frequently going over, and settling and cultivating the lands allotted to the friendly Indians for their hunting ground, by which means the State is not only deprived of their services in the army, but considerable feuds are engendered between us and our friendly neighboring Indians:

"Resolved, therefore, by the Senate and

House of Representatives of the State of Georgia in General Assembly met, that his excellency the governor, be, and is hereby requested to take the necessary means to have all intruders removed off the Indian lands, and that proper steps be taken to prevent future aggressions."

In 1817 the Legislature refused to take any steps to dispose of lands acquired by treaty with the Indians until the treaty had been ratified by the Senate; and, by a resolution, the governor was directed to have the line run between the State of Georgia and the Indians, according to the late treaty. The same thing was again done in the year 1819, under a recent treaty.

In a memorial to the President of the United States by the Legislature of Georgia in 1819, they say, "it has long been the desire of Georgia that her settlements should be extended to her ultimate limits." "That the soil within her boundaries should be subjected to her control, and that her police organization and government should be fixed and permanent." "That the State of Georgia claims a right to the jurisdiction and soil of the territory within her limits." "She admits, however, that the right is inchoate—remaining to be perfected by the United States, in the extinction of the Indian title; the United States *pro hac vice* as their agents."

The Indian title was also distinctly acknowledged by the Act *of 1796 repealing the Yazoo Act. [*586 It is there declared, in reference to certain lands, that "they are the sole property of the State, subject only to the right of the treaty of the United States, to enable the State to purchase, under its pre-emption right, the Indian title to the same;" and, also, that the land is vested in the "State, to whom the right of pre emption to the same belongs, subject only to the controlling power of the United States, to authorize any treaties for, and to superintend the same." This language, it will be observed, was used long before the act of cession.

On the 25th of March, 1825, the Governor of Georgia issued the following proclamation:

"Whereas it is provided in said treaty that the United States shall protect the Indians against the incroachments, hostilities, and impositions of the whites, so that they suffer no imposition, molestation, or injury in their persons, goods, effects, their dwellings, or the lands they occupy, until their removal shall have been accomplished according to the terms of the treaty" which had been recently made with the Indians.

"I have therefore thought proper to issue this, my proclamation, warning all persons, citizens of Georgia or others, against trespassing or intruding upon lands occupied by the Indians, within the limits of Georgia, either for the purpose of settlement or otherwise, as every such act will be in direct violation of the provisions of the treaty aforesaid, and will expose the aggressors to the most certain and summary punishment by the authorities of the State and the United States." "All good citizens, therefore, pursuing the dictates of good faith, will unite in enforcing the obligations of the treaty, as the supreme law," &c.

Many other references might be made to the public acts of the State of Georgia to show that she admitted the obligation of Indian treaties, but the above are believed to be sufficient. These acts do honor to the character of that highly respectable State.

Under the act of cession, the United States were bound, in good faith, to extinguish the Indian title to lands within the limits of Georgia, so soon as it could be done peaceably and on reasonable terms.

*The State of Georgia has repeatedly [*587 remonstrated to the President on this subject, and called upon the government to take the necessary steps to fulfill its engagement. She complained that, whilst the Indian title to immense tracts of country had been extinguished elsewhere, within the limits of Georgia but little progress had been made; and this was attributed either to a want of effort on the part of the federal government, or to the effect of its policy towards the Indians. In one or more of the treaties, titles in fee simple were given to the Indians to certain reservations of land; and this was complained of by Georgia as a direct infraction of the condition of the cession. It has also been asserted that the policy of the government, in advancing the cause of civilization among the Cherokees, and inducing them to assume the forms of a regular government and of civilized life, was calculated to increase their attachment to the soil they inhabit, and to render the purchase of their title more difficult, if not impracticable.

A full investigation of this subject may not be considered as strictly within the scope of the judicial inquiry which belongs to the present case. But, to some extent, it has a direct bearing on the question before the court, as it tends to show how the rights and powers of Georgia were construed by her public functionaries.

By the first President of the United States, and by every succeeding one, a strong solicitude has been expressed for the civilization of the Indians. Through the agency of the government, they have been partially induced, in some parts of the Union, to change the hunter state for that of the agriculturist and herdsman.

In a letter addressed by Mr. Jefferson to the Cherokees, dated the 9th of January, 1809, he recommends them to adopt a regular government, that crimes might be punished and property protected. He points out the mode by which a council should be chosen, who should have power to enact laws; and he also recommended the appointment of judicial and executive agents, through whom the law might be enforced. The agent of the government, who resided among them, was recommended to be associated with their council, that he might give the necessary advice on all subjects relating to their government.

*In the Treaty of 1817, the Cherokees [*588 are encouraged to adopt a regular form of government.

Since that time, a law has been passed making an annual appropriation of the sum of ten thousand dollars, as a school fund for the education of Indian youths, which has been distributed among the different tribes where schools had been established. Missionary labors among the Indians have also been sanctioned by the government, by granting permits to those who were disposed to engage in such a work, to reside in the Indian country.

That the means adopted by the general government to reclaim the savage from his erratic life, and induce him to assume the forms of civilization, have had a tendency to increase the attachment of the Cherokees to the country they now inhabit is extremely probable; and that it increased the difficulty of purchasing their lands, as by act of cession the general government agreed to do, is equally probable.

Neither Georgia nor the United States, when the cession was made, contemplated that force should be used in the extinguishment of the Indian title, nor that it should be procured on terms that are not reasonable. But, may it not be said, with equal truth, that it was not contemplated by either party that any obstructions to the fulfillment of the compact should be allowed, much less sanctioned, by the United States?

The humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling; and if the efforts made have not proved as successful as was anticipated, still much has been done. Whether the advantages of this policy should not have been held out by the government to the Cherokees within the limits of Georgia, as an inducement for them to change their residence and fix it elsewhere, rather than by such means to increase their attachment to their present home, as has been insisted on, is a question which may be considered by another branch of the government. Such a course might, perhaps, have secured to the Cherokee Indians all the advantages they have realized from the paternal superintendence of the government; and have enabled it, on peaceable and reasonable terms, to comply with the act of cession.

Does the intercourse law of 1802 apply to the 589*] Indians who *live within the limits of Georgia? The nineteenth section of that act provides "that it shall not be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States." This provision, it has been supposed, excepts from the operation of the law the Indian lands which lie within any State. A moment's reflection will show that this construction is most clearly erroneous.

To constitute an exception to the provisions of this act, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and within the ordinary jurisdiction of a State; not only within the limits of a State, but within the common exercise of its jurisdiction.

No one will pretend that this was the situation of the Cherokees who lived within the State of Georgia in 1802; or, indeed, that such is their present situation. If then, they are not embraced by the exception, all the provisions of the Act of 1802 apply to them.

In the very section which contains the exception, it is provided that the use of the road from Washington district to Mero district should be enjoyed, and that the citizens of Tennessee, under the orders of the governor, might keep the road in repair. And in the same section, the navigation of the Tennessee River is reserved, and a right to travel from Knoxville to Price's settlement, provided the Indians should not object.

Now, all these provisions relate to the Cherokee country; and can it be supposed, by anyone, that such provisions would have been made in the act if Congress had not considered it as applying to the Cherokee country, whether in the State of Georgia or in the State of Tennessee?

The exception applied exclusively to those fragments of tribes which are found in several of the States, and which came literally within the description used.

Much has been said against the existence of an independent power within a sovereign State; and the conclusion has been drawn that the Indians, as a matter of right, cannot enforce their own laws, within the territorial limits of a State. The refutation of this argument is found in our past history.

*That fragments of tribes, having lost [*590 the power of self-government, and who lived within the ordinary jurisdiction of a State, have been taken under the protection of the laws, has already been admitted. But there has been no instance where the State laws have been generally extended over a numerous tribe of Indians living within the State and exercising the right of self-government, until recently.

Has Georgia ever, before her late laws, attempted to regulate the Indian communities within her limits? It is true, New York extended her criminal laws over the remains of the tribes within that State, more for their protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But, even the State of New York has never asserted the power, it is believed, to regulate their concerns beyond the suppression of crime.

Might not the same objection to this interior independent power by Georgia have been urged with as much force as at present, ever since the adoption of the Constitution? Her chartered limits, to the extent claimed, embraced a great number of different nations of Indians, all of whom were governed by their own laws, and were amenable only to them. Has not this been the condition of the Indians within Tennessee, Ohio, and other States?

The exercise of this independent power surely does not become more objectionable, as it assumes the basis of justice and the forms of civilization. Would it not be a singular argument to admit that, so long as the Indians govern by the rifle and the tomahawk, their government may be tolerated, but that it must be suppressed so soon as it shall be administered upon the enlightened principles of reason and justice?

Are not those nations of Indians who have made some advances in civilization better neighbors than those who are still in a savage state? And is not the principle, as to their self-government, within the jurisdiction of a State, the same?

When Georgia sanctioned the Constitution, and conferred on the national Legislature the exclusive right to regulate commerce or intercourse with the Indians, did she reserve the right to regulate intercourse with the Indians within her limits? This will not be pretended. If such had been the construction of her own

powers, would they not have been exercised? **591***] *Did her senators object to the numerous treaties which have been formed with the different tribes who lived within her acknowledged boundaries? Why did she apply to the executive of the Union, repeatedly, to have the Indian title extinguished; to establish a line between the Indians and the State, and to procure a right of way through the Indian lands?

The residence of Indians, governed by their own laws, within the limits of a State, has never been deemed incompatible with State sovereignty until recently. And yet, this has been the condition of many distinct tribes of Indians, since the foundation of the federal government.

How is the question varied by the residence of the Indians in a territory of the United States? Are not the United States sovereign within their territories? And has it ever been conceived by anyone that the Indian governments which exist in the territories are incompatible with the sovereignty of the Union?

A State claims the right of sovereignty commensurate with her territory, as the United States claim it, in their proper sphere, to the extent of the federal limits. This right or power, in some cases, may be exercised, but not in others. Should a hostile force invade the country, at its most remote boundary, it would become the duty of the general government to expel the invaders. But it would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.

Is it incompatible with State sovereignty to grant exclusive jurisdiction to the federal government over a number of acres of land for military purposes? Our forts and arsenals, though situated in the different States, are not within their jurisdiction.

Does not the Constitution give to the United States as exclusive jurisdiction in regulating intercourse with the Indians as has been given to them over any other subjects? Is there any doubt as to this investiture of power? Has it not been exercised by the federal government ever since its formation, not only without objection, but under the express sanction of all the States?

The power to dispose of the public domain **592***] is an attribute *of sovereignty. Can the new States dispose of the lands within their limits which are owned by the federal government? The power to tax is also an attribute of sovereignty; but can the new States tax the lands of the United States? Have they not bound themselves, by compact, not to tax the public lands, nor until five years after they shall have been sold? May they violate this compact at discretion?

Why may not these powers be exercised by the respective States? The answer is, because they have parted with them, expressly for the general good. Why may not a State coin money, issue bills of credit, enter into a treaty of alliance or confederation, or regulate commerce with foreign nations? Because these powers have been expressly and exclusively given to the federal government.

Has not the power been as expressly conferred on the federal government to regulate intercourse with the Indians, and is it not as exclusively given as any of the powers above enumerated? There being no exception to the exercise of this power, it must operate on all communities of Indians exercising the right of self-government; and, consequently, include those who reside within the limits of a State, as well as others. Such has been the uniform construction of this power by the federal government, and of every State government, until the question was raised by the State of Georgia.

Under this clause of the Constitution, no political jurisdiction over the Indians has been claimed or exercised. The restrictions imposed by the law of 1802 come strictly within the power to regulate trade; not as an incident, but as a part of the principal power. It is the same power, and is conferred in the same words, that has often been exercised in regulating trade with foreign countries. Embargoes have been imposed, laws of non-intercourse have been passed, and numerous acts restrictive of trade, under the power to regulate commerce with foreign nations.

In the regulation of commerce with the Indians, Congress have exercised a more limited power than has been exercised in reference to foreign countries. The law acts upon our own citizens, and not upon the Indians, the same as the laws referred to act upon our own citizens in their foreign commercial intercourse.

*It will scarcely be doubted by any [***593** one that, so far as the Indians, as distinct communities, have formed a connection with the federal government by treaties; that such connection is political, and is equally binding on both parties. This cannot be questioned, except upon the ground that in making these treaties, the federal government has transcended the treaty-making power. Such an objection, it is true, has been stated, but it is one of modern invention, which arises out of local circumstances; and is not only opposed to the uniform practice of the government, but also to the letter and spirit of the Constitution.

But the inquiry may be made, is there no end to the exercise of this power over Indians within the limits of a State, by the general government? The answer is, that, in its nature, it must be limited by circumstances.

If a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a State would be proper, need not now be considered; if, indeed, it be a judicial question. Such a question does not seem to arise in this case. So long as treaties and laws remain in full force, and apply to Indian nations exercising the right of self-government within the limits of a State, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional.

The exercise of the power of self government by the Indians within a State, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government in the extinguishment of their title, and especially by the compact with the State of Georgia. It is a

question, not of abstract right, but of public policy. I do not mean to say that the same moral rule which should regulate the affairs of private life should not be regarded by communities or nations. But, a sound national policy does require that the Indian tribes within our States should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities.

At best they can enjoy a very limited inde-**594*]** pendence within *the boundaries of a State, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a State as a separate and independent community, may seriously embarrass or obstruct the operation of the State laws. If, therefore, it would be inconsistent with the political welfare of the States and the social advance of their citizens that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of State authority.

This state of things can only be produced by a co-operation of the State and federal governments. The latter has the exclusive regulation of intercourse with the Indians; and, so long as this power shall be exercised, it cannot be obstructed by the State. It is a power given by the Constitution and sanctioned by the most solemn acts of both the federal and State governments; consequently, it cannot be abrogated at the will of a State. It is one of the powers parted with by the States and vested in the federal government. But, if a contingency shall occur which shall render the Indians who reside in a State incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a State government to extend to them the *ægis* of its laws. Under such circumstances, the agency of the general government, of necessity, must cease.

But, if it shall be the policy of the government to withdraw its protection from the Indians who reside within the limits of the respective States, and who not only claim the right of self-government but have uniformly exercised it; the laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. So long as those laws and treaties exist, having been formed within the sphere of the federal powers, they must be respected and enforced by the appropriate organs of the federal government.

The plaintiff, who prosecutes this writ of error, entered the Cherokee country, as it appears, with the express permission of the President, and under the protection of the treaties of the United States and the law of 1802. He entered, not to corrupt the morals of this people, nor to **595*]** profit by their substance; but to *teach them, by precept and example, the Christian religion. If he be unworthy of this sacred office; if he had any other object than the one professed; if he sought, by his influence, to counteract the humane policy of the federal government towards the Indians, and to embarrass its efforts to comply with its solemn engagement with Georgia; though his sufferings be illegal, he is not a proper object of public sympathy.

It has been shown that the treaties and laws referred to come within the due exercise of the constitutional powers of the federal government; that they remain in full force, and consequently must be considered as the supreme laws of the land. These laws throw a shield over the Cherokee Indians. They guaranteed to them their rights of occupancy, of self government, and the full enjoyment of those blessings which might be attained in their humble condition. But, by the enactments of the State of Georgia, this shield is broken in pieces—the infant institutions of the Cherokees are abolished, and their laws annulled. Infamous punishment is denounced against them for the exercise of those rights which have been most solemnly guaranteed to them by the national faith.

Of these enactments, however, the plaintiff in error has no right to complain, nor can he question their validity, except in so far as they affect his interests. In this view and in this view only, has it become necessary, in the present case, to consider the repugnancy of the laws of Georgia to those of the Union.

Of the justice or policy of these laws it is not my province to speak; such considerations belonging to the Legislature by whom they were passed. They have, no doubt, been enacted under a conviction of right, by a sovereign and independent State, and their policy may have been recommended by a sense of wrong under the compact. Thirty years have elapsed since the federal government engaged to extinguish the Indian title within the limits of Georgia. That she has strong ground of complaint arising from this delay must be admitted; but such considerations are not involved in the present case; they belong to another branch of the government. We can look only to the law, which defines our power, and marks out the path of our duty.

Under the administration of the laws of Georgia, a citizen of *the United States [***596** has been deprived of his liberty; and, claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the Constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal of the local laws of many of the States in this Union, that being repugnant to the Constitution of the United States, and to the laws made under it, they can have no force to devest the plaintiff in error of his property or liberty.

Mr. Justice BALDWIN dissented, stating that in his opinion the record was not properly returned upon the writ of error, and ought to have been returned by the State court, and not by the clerk of that court. As to the merits, he said his opinion remained the same as was expressed by him in the case of *The Cherokee Nation* v. *The State of Georgia*, at the last term.

The opinion of *Mr. Justice* Baldwin was not delivered to the reporter.

This cause came on to be heard on the transcript of the record from the Superior Court for the County of Gwinnet, in the State of Georgia, and was argued by counsel; on consideration whereof, it is the opinion of this court that the act of the Legislature of the State of Georgia upon which the indictment in this case is founded, is contrary to the Constitution, treaties, and laws of the United States; and that the special plea in bar pleaded by the said Samuel A. Worcester, in manner aforesaid, and relying upon the Constitution, treaties, and laws of the United States aforesaid, is a good bar and defense to the said indictment, by the said Samuel A. Worcester; and as such ought to have been allowed and admitted by the said Superior Court for the County of Gwinnett, in the State of Georgia, before which the said indictment was pending and tried; and that there was error in the said Superior Court of the State of Georgia in overruling the plea so pleaded as aforesaid. It is therefore ordered and adjudged that the judgment rendered in the **597*** *premises by the said Superior Court of Georgia, upon the verdict upon the plea of "not guilty" afterwards pleaded by the said Samuel A. Worcester, whereby the said Samuel A. Worcester is sentenced to hard labor in the penitentiary of the State of Georgia, ought to be reversed and annulled. And this court proceeding to render such judgment as the said Superior Court of the State of Georgia should have rendered, it is further ordered and adjudged that the said judgment of the said Superior Court be, and hereby is reversed and annulled; and that judgment be, and hereby is awarded, that the special plea in bar, so as aforesaid pleaded, is a good and sufficient plea in bar in law to the indictment aforesaid; and that all proceedings on the said indictment do forever surcease; and that the said Samuel A. Worcester he, and hereby is henceforth dismissed therefrom, and that he go thereof quit without day. And that a special mandate do go from this court to the said Superior Court, to carry this judgment into execution.

In the case of *Butler*, Plaintiff in Error, v. *The State of Georgia*, the same judgment was given by the court, and a special mandate was ordered from the court to the Superior Court of Gwinnett County, to carry the judgment into execution.

Cited—11 Pet., 145; 3 Wall., 420; 5 Wall., 750, 760; 17 Wall., 237, 242, 247; 19 Wall., 593; 3 Otto, 193-196; 1 Abb. U. S., 383, 387; 1 Dill., 265, 276, 280, 347; 5 Dill., 390, 409; 2 Sawy., 132; Woolw., 20.

598*] *NATHANIEL CRANE, *Plaintiff in Error,*

v.

THE LESSEE OF HENRY GAGE MORRIS ET AL., AND OF JOHN JACOB ASTOR ET AL., *Defendant in Error.*

Nonsuit—presumption of execution and loss of lease—recital of one deed in another—estoppel—antemarital inchoate rights of husband in estate of wife—evidence—functions of court, of jury.

Upon a deliberate review of the questions of law discussed and decided in the case of Carver v. Jackson, ex dem. Astor (4 Peter's Rep.), the court are entirely satisfied with the opinion and judgment pronounced on that occasion.

The Circuit Court has no authority whatsoever to order a peremptory nonsuit, against the will of the plaintiff. This point has been repeatedly settled by this court, and is not now open for controversy.

The Circuit Court cannot be called upon, when a case is before a jury, to decide on the nature and effect of the whole evidence introduced in support of the plaintiff's case, part of which is of a presumptive nature, and capable of being urged with more or less effect to the jury.

An ejectment for a tract of land was tried upwards of seventy years after the date of a lease, recited to have been executed in a deed of release of the premises in dispute, but which lease was not produced on the trial. Under these circumstances, the lapse of time would alone be sufficient to justify a presumption of the due execution and loss of the lease, proper to be left to the jury.

The general rule of law is, that a recital of one deed in another, binds the parties and those who claim under them by matters subsequent. Technically speaking, such a recital operates as an estoppel, which works on the interest in the land, and binds parties and privies; privies in blood, privies in estate, and privies in law.

If the recital of a lease in a deed of release be admitted to be good evidence of the execution of the case, it must be good evidence of the very lease stated in the recital, and of the contents, so far as they are stated therein, for they constitute its identity.

That a husband, even before marriage, may, in virtue of the marriage contract, have inchoate rights in the estate of his wife, which, if the marriage is consummated, will be protected by a court of equity against any antecedent contracts and conveyances secretly made by the wife, in fraud of those marital rights, may be admitted; but they are mere equities, and in no just sense constitute any legal or equitable estate in her lands or other property, antecedent to the marriage.

The solemn probate of a deed by a witness upon oath before a magistrate, for the purpose of having it recorded, and the certificate of the magistrate of its due probate upon such testimony, are certainly entitled to more weight as evidence than the mere unexplained proof of the handwriting of a witness after his death. The one affords only a presumption of the due execution of the deed, from the mere fact that the signature of the witness is to the attestation clause; the other is a deliberate affirmation by the witness, upon oath, before a competent tribunal, of the material facts to prove the execution.

Whenever evidence is offered to the jury, which is in its nature *prima facie* proof, or presumptive proof, its character, as such, ought not to be disregarded; and no court has a right to direct the jury to disregard it, or to view it under a different aspect from that in which it is actually presented to them. Whatever *just influence it may [*599 derive from that character, the jury have a right to give it; and in regard to the order in which they shall consider the evidence in a cause, and the manner in which they shall weigh it, the law has submitted it to them to decide for themselves; and any interference with this right would be an invasion of their privilege to respond to matters of fact.

THIS case came before the court on a writ of error to the Circuit Court of the United States for the Southern District of New York.

In that court, the defendants in error instituted an action of ejectment to recover from the defendant a tract of land situated in the town of Carmel, in the County of Putnam, in the State of New York.

The title exhibited by the plaintiff on the trial in the Circuit Court was the same with that an abstract of which is given in the case of *Carver* v. *Jackson, ex dem. Astor et al.* (4 Peters, 1). It was founded on a patent from William III. to Adolph Philipse, dated 17th

NOTE.—*Recitals in deed, will, or other instrument, when binding on parties and privies; estoppel by.* Note to Carver v. Jackson, 4 Pet., 1.

Frank Calder *et al.*, suing on their own behalf and on behalf of All Other Members of the Nishga Tribal Council, and James Gosnell *et al.*, suing on their own behalf and on behalf of All Other Members of the Gitlakdamix Indian Band, and Maurice Nyce *et al.*, suing on their own behalf and on behalf of All Other Members of the Canyon City Indian Band, and W. D. McKay *et al.*, suing on their own behalf and on behalf of All Other Members of the Greenville Indian Band, and Anthony Robinson *et al.*, suing on their own behalf and on behalf of All Other Members of the Kincolith Indian Band *Appellants;*

and

Attorney-General of British Columbia *Respondent.*

1971: November 29, 30, December 1, 2, 3; 1973: January 31.

Present: Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Indians—Aboriginal title to lands—Territory occupied by Nishga Tribe—Extinguishment of title.

Crown—Sovereign immunity—Claim of title against Crown in right of Province—Absence of fiat of Lieutenant-Governor—Court without jurisdiction to make declaration requested—Crown Procedure Act, R.S.B.C. 1960, c. 89.

The appellants, suing on their own behalf and on behalf of all other members of the Nishga Tribal Council and four Indian bands, brought an action against the Attorney-General of British Columbia for a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory . . . has never been lawfully extinguished". It was agreed that this territory consisted of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal, all located in northwestern British Columbia. The action was dismissed at trial and the Court of Appeal rejected the appeal. With leave, the appellants then appealed to this Court.

Frank Calder *et al.*, poursuivant en leur propre nom et au nom de Tous les autres Membres du Conseil de la Tribu des Nishgas, et James Gosnell *et al.*, poursuivant en leur propre nom et au nom de Tous les autres Membres de la Bande Indienne Gitlakdamix, et Maurice Nyce *et al.*, poursuivant en leur propre nom et au nom de Tous les autres Membres de la Bande Indienne de Canyon City, et W. D. McKay *et al.*, poursuivant en leur propre nom et au nom de Tous les autres Membres de la Bande Indienne de Greenville, et Anthony Robinson *et al.*, poursuivant en leur propre nom et au nom de Tous les autres Membres de la Bande Indienne Kincolith *Appelants;*

et

Le Procureur Général de la Colombie-Britannique *Intimé.*

1971: les 29 et 30 novembre, 1er, 2 et 3 décembre; 1973: le 31 janvier.

Présents: Les Juges Martland, Judson, Ritchie, Hall, Spence, Pigeon et Laskin.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Indiens—Titre aborigène sur des terres—Territoire occupé par la tribu des Nishgas—Extinction du titre.

Couronne—Immunité du souverain—Revendication d'un titre contre la Couronne du chef d'une province—Aucune autorisation du lieutenant-gouverneur—La Cour est sans compétence pour faire la déclaration demandée—Crown Procedure Act, R.S.B.C. 1960, c. 89.

Les appelants ont engagé une poursuite, en leur nom et en celui de tous les membres du conseil de la tribu indienne des Nishgas et de quatre bandes indiennes, contre le procureur général de la Colombie-Britannique en vue d'obtenir une déclaration «suivant laquelle le titre aborigène, autrement dit titre indien, que les demandeurs détiennent sur leur ancien territoire tribal ... n'a jamais été juridiquement éteint». Il a été convenu que ce territoire consistait en 1,000 milles carrés dans la vallée de la Nass, l'Observatory Inlet, le Portland Inlet, le canal Portland et leurs environs, au nord-ouest de la Colombie-Britannique. L'action a été rejetée en première instance et en Cour d'appel. Les appelants ont obtenu l'autorisation d'appeler à cette Cour.

Held (Hall, Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Ritchie JJ.: The Royal Proclamation of October 7, 1763, which the appellants claimed applied to the Nishga territory and entitled them to its protection, had no bearing upon the problem of Indian title in British Columbia. The history of the discovery and settlement of British Columbia demonstrated that the Nass Valley, and, indeed, the whole of the Province could not possibly be within the terms of the Proclamation. The area in question did not come under British sovereignty until the Treaty of Oregon in 1846. The Nishga bands, therefore, were not any of the several nations or tribes of Indians who lived under British protection in 1763 and they were outside the scope of the Proclamation.

When the Colony of British Columbia was established in 1858, the Nishga territory became part of it. The fee was in the Crown in right of the Colony until July 20, 1871, when the Colony entered Confederation, and thereafter in the Crown in right of the Province of British Columbia, except only in respect of those lands transferred to the Dominion under the Terms of Union.

A series of proclamations by Governor Douglas between 1858 and 1863, followed by four ordinances enacted between 1865 and 1870, revealed a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title".

Under art. 13 of the Terms of Union, the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, were assumed by the Dominion Government. The recommendations of a Royal Commission in 1913 resulted in the establishment of new or confirmation of old Indian reserves in the Nass area. Although it was said that this was done over Indian objections, nevertheless the federal authority did act under its powers under s. 91(24) of the *B.N.A. Act*. It agreed, on behalf of the Indians, with the policy of establishing these reserves.

Also, the Government of the original Crown Colony and, since 1871, the Government of British

Arrêt: L'appel doit être rejeté, les Juges Hall, Spence et Laskin étant dissidents.

Les Juges Martland, Judson et Laskin: La Proclamation Royale du 7 octobre 1763 qui, selon les prétentions des appelants, s'applique au territoire nishga et leur donne droit à la protection fournie par celle-ci, n'a rien à voir avec le problème du titre indien en Colombie-Britannique. L'histoire de la découverte et de la colonisation de la Colombie-Britannique démontrent que la vallée de la Nass et, de fait, l'ensemble de la province ne pouvaient absolument pas être visées par la Proclamation. La région en question n'a été soumise à la souveraineté britannique qu'au moment de la conclusion du traité de l'Orégon en 1846. Par conséquent, les bandes nishgas ne faisaient pas partie de l'une des diverses bandes ou tribus indiennes soumises à la protection britannique en 1763 et n'étaient pas visées par la Proclamation.

Lorsque la colonie de la Colombie-Britannique a été établie en 1858, il est certain que le territoire nishga en faisait partie. La Couronne du chef de la colonie a été propriétaire jusqu'au 20 juillet 1871, jour de l'entrée de la colonie dans la Confédération, et la Couronne du chef de la province de la Colombie-Britannique est devenue alors propriétaire, sauf à l'égard des terres transférées au Dominion en vertu des conditions de l'Union.

Une série de proclamations du gouverneur Douglas entre 1858 et 1863, suivie de quatre ordonnances adoptées entre 1865 et 1870, révèlent une unité d'intention, soit l'exercice du pouvoir législatif et de la souveraineté absolue sur toutes les terres de la Colombie-Britannique, souveraineté incompatible avec tout intérêt contradictoire, y compris le «titre aborigène».

En vertu de l'art. 13 des conditions de l'Union, le soin des Indiens, et la garde et l'administration des terres réservées pour leur usage et bénéfice, ont été assumés par le Gouvernement fédéral. Les recommandations d'une Commission Royale de 1913 ont entraîné l'établissement de nouvelles réserves indiennes dans la région de la Nass ou la confirmation d'anciennes réserves dans cette région. Bien qu'on dise que cela s'est fait malgré les objections des Indiens, néanmoins, l'autorité fédérale a exercé son pouvoir en vertu de l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique*. Elle a accepté, pour le compte des Indiens, la politique consistant à établir ces réserves.

Le gouvernement de ce qui fut d'abord une colonie de la Couronne, et depuis 1871, le gouvernement de

Columbia had made alienations in the Nass Valley that were inconsistent with the existence of aboriginal title. Further, the establishment of the railway belt under the Terms of Union was inconsistent with the recognition and continued existence of Indian title.

In view of the conclusion reached as to the disposition of the appeal, it was not necessary to determine the point raised by the respondent that the Court did not have jurisdiction to make the declaratory order requested because the granting of a fiat under the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, was a necessary prerequisite to bringing the action and it had not been obtained. However, agreement was expressed with the reasons of Pigeon J. dealing with this point.

St. Catharines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46; *Johnson v. McIntosh* (1823), 21 U.S. 240; *Worcester v. State of Georgia* (1832), 31 U.S. 530; *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339; *United States v. Alcea Band of Tillamooks* (1946), 329 U.S. 40; (1951), 341 U.S. 48; *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, referred to.

Per Pigeon J.: Although sovereign immunity from suit without a fiat has been removed by legislation at the federal level and in most of the Provinces, this has not yet been done in British Columbia. Accordingly, the preliminary objection that the declaration prayed for, being a claim of title against the Crown in the right of the Province of British Columbia, the Court has no jurisdiction to make it in the absence of a fiat of the Lieutenant-Governor of that Province, should be upheld.

Lovibond v. Governor General of Canada, [1930] A.C. 717; *Attorney-General for Ontario v. McLean Gold Mines*, [1927] A.C. 185, applied.

Per Hall, Spence and Laskin JJ., *dissenting*: The proposition accepted by the Courts below that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer was wholly wrong. There is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation.

la Colombie-Britannique ont aussi passé des actes d'aliénation dans la vallée de la Nass, et qui vont à l'encontre de l'existence d'un titre aborigène. De plus, l'établissement de la ceinture ferroviaire, en vertu des conditions de l'Union, est incompatible avec la reconnaissance d'un titre indien et la continuation de l'existence de celui-ci.

Étant donné la conclusion formulée en cette affaire, il n'est pas nécessaire de statuer sur la question soulevée par l'intimé que la Cour ne serait pas compétente pour rendre l'ordonnance déclaratoire demandée parce qu'avant d'engager l'action, il fallait obtenir une autorisation en vertu du *Crown Procedure Act*, R.S.B.C. 1960, c. 89, et que celle-ci n'a pas été obtenue. Cependant, l'avis exprimé par le Juge Pigeon dans ses motifs doit être suivi.

Arrêts mentionnés: St. Catharines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46; *Johnson v. McIntosh* (1823), 21 U.S. 240; *Worcester v. State of Georgia* (1832), 31 U.S. 530; *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339; *United States v. Alcea Band of Tillamooks* (1946), 329 U.S. 40; (1951), 341 U.S. 48; *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272.

Le Juge Pigeon: Bien que l'immunité du Souverain contre les poursuites intentées sans autorisation a été enlevée par la loi, au niveau fédéral et dans la plupart des provinces, ce n'est pas le cas en Colombie-Britannique. Par conséquent, on doit accueillir l'objection préliminaire selon laquelle la déclaration demandée étant la revendication d'un titre contre la Couronne du chef de la province de la Colombie-Britannique, la Cour n'est pas compétente pour faire cette déclaration à défaut d'une autorisation du lieutenant-gouverneur de cette province.

Arrêts suivis: *Lovibond v. Governor General of Canada*, [1930] A.C. 717; *Attorney-General for Ontario v. McLean Gold Mines* [1927] A.C. 185.

Les Juges Hall, Spence et Laskin, *dissidents:* La proposition acceptée par les cours d'instance inférieure qu'après la conquête ou la découverte, les peuples aborigènes n'ont aucun droit à l'exception de ceux qui leur sont par la suite accordés ou reconnus par le conquérant ou le découvreur, est entièrement erronnée. Il existe une abondante jurisprudence confirmant que la common law reconnaît les droits aborigènes, à la possession et à la jouissance des terres des aborigènes dans des cas précisément analogues à la situation qui se présente en ce qui concerne les Nishgas.

Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question was the guarantee of Indian rights contained in the Royal Proclamation of 1763. The wording of the Proclamation indicated that it was intended to include the lands west of the Rocky Mountains.

Once aboriginal title is established, it is presumed to continue until the contrary is proven. When the Nishga people came under British sovereignty they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did the Parliament of Canada.

Further, on the question of extinguishment, the respondent relied on what was done by way of Acts, Ordinances and Proclamations by Governors Douglas and Seymour and the Council of British Columbia. However, as submitted by the appellants, if either Douglas or Seymour or the Council of the Colony of British Columbia did purport to extinguish the Nishga title any such attempt was beyond the powers of either the Governors or the Council and what, if anything, was attempted in this respect was *ultra vires*.

As to the pre-emption provision in the consolidating Ordinance of July 1, 1870, on which the Courts below chiefly relied in making the finding that the Indian title in British Columbia had been extinguished, it was obvious that this enactment did not apply to the Nishga lands on the Nass River. The Northwest boundary of the Colony in that area was still in dispute at the time.

On the question of jurisdiction, actions against the Crown in British Columbia are governed by the *Crown Procedure Act* and this Act provides for the petition of right procedure, which requires that a fiat be obtained as evidence of the consent of the Crown to the action. However, the petition of right procedure does not apply to proceedings seeking declaratory or equitable relief. Furthermore, the validity of what was done by Governors Douglas and Seymour and by the Council of the Colony of British Columbia was a vital question to be decided in this appeal and the Province could not be permitted to deny access

De plus, à l'appui de la revendication des Nishgas qu'ils ont un certain droit ou titre sur les biens-fonds en question se trouve la garantie énoncée dans la Proclamation Royale de 1763 au sujet des droits indiens. Le libellé de la Proclamation elle-même montre d'une façon passablement claire qu'elle devait inclure les terres à l'ouest des Rocheuses.

Une fois que le titre aborigène est établi, on présume qu'il demeure, jusqu'à preuve du contraire. Lorsque le peuple nishga a été soumis à la souveraineté britannique, il avait le droit de faire valoir son titre indien, comme droit juridique. Cela étant, ce droit ne pouvait pas être éteint par la suite sauf par cession à la Couronne ou par le pouvoir législatif compétent, et alors uniquement au moyen d'une loi précise. Les Nishgas n'ont pas cédé leurs terres et ni la colonie de la Colombie-Britannique ni la province, après la confédération, n'ont adopté une loi visant expressément à éteindre le titre indien; il en a été de même pour le Parlement du Canada.

De plus sur la question de l'extinction, l'intimé se fonde sur les lois, ordonnances et proclamations des gouverneurs Douglas et Seymour et du Conseil de la Colombie-Britannique. Par contre, les appelants soutiennent que si Douglas ou Seymour ou le Conseil de la colonie de la Colombie-Britannique, ont voulu éteindre le titre nishga, ils n'étaient pas compétents à cet égard et leurs tentatives, s'il en fut, étaient *ultra vires*.

Quant à la disposition de préemption que l'on retrouve dans la refonte de l'Ordonnance du 1er juillet 1870, sur laquelle se sont principalement fondées les cours d'instance inférieure pour conclure que le titre indien a été éteint en Colombie-Britannique, il est évident que cette disposition législative ne s'appliquait pas aux terres nishgas de la Nass. La frontière nord de la colonie dans cette région était encore en litige.

Sur la question de juridiction, en Colombie-Britannique, les actions contre la Couronne sont régies par le *Crown Procedure Act* et cette loi crée la procédure de la pétition de droit, qui requiert le consentement de la Couronne, établi par une autorisation de poursuivre. Cependant, la procédure de la pétition de droit ne s'applique pas aux procédures en vue d'obtenir un redressement déclaratoire ou d'«equity». De plus, la validité des actes des gouverneurs Douglas et Seymour et du Conseil de la colonie de la Colombie-Britannique est une question vitale sur laquelle il faut statuer dans le présent appel et la province ne peut

by the Nishgas to the Courts for the determination of that question.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Gould J. Appeal dismissed, Hall, Spence and Laskin JJ. dissenting.

T. R. Berger, D. J. Rosenbloom and J. M. Baigent, for the appellants.

D. McK. Brown, Q.C., and *A. W. Hobbs, Q.C.*, for the respondent.

The judgment of Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.—The appellants sue, as representatives of the Nishga Indian Tribe, for a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs . . . has never been lawfully extinguished". The action was dismissed at trial. The Court of Appeal rejected the appeal. The appellants appeal from both decisions.

The appellants are members of the Nishga Nation, which is made up of four bands: Gitlakdami, Canyon City, Greenville and Kincolith. They are officers of the Nishga Tribal Council and councillors of each of the four Indian bands. They are descendants of the Indians who have inhabited since time immemorial the territory in question, where they have hunted, fished and roamed. It was agreed for purposes of this litigation that this territory consisted of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal, all located in northwestern British Columbia. No other interest has intervened in this litigation to question the accuracy of this agreed statement of facts.

The Crown in right of the province has made certain grants in this territory, some in fee simple; in other cases rights of pre-emption, mineral and mining rights, petroleum permits,

[1] (1970), 74 W.W.R. 481, 13 D.L.R. (3d) 64.

pas être autorisée à empêcher les Nighgas de demander aux tribunaux de se prononcer sur cette question.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique[1], rejetant un appel d'un jugement du Juge Gould. Appel rejeté, les Juges Hall, Spence et Laskin étant dissidents.

T. R. Berger, D. J. Rosenbloom et J. M. Baigent, pour les appelants.

D. McK. Brown, c.r., et *A. W. Hobbs, c.r.*, pour l'intimé.

Le jugement des Juges Martland, Judson et Ritchie a été rendu par

LE JUGE JUDSON—Les appelants ont engagé des poursuites, en leur qualité de représentants de la tribu indienne des Nishgas, en vue d'obtenir une déclaration [TRADUCTION] «suivant laquelle le titre aborigène, autrement dit titre indien, qu'ils détiennent . . . n'a jamais été juridiquement éteint». L'action a été rejetée en première instance. La Cour d'appel a rejeté l'appel. Les appelants ont interjeté appel contre les deux décisions.

Les appelants sont membres de la nation nishga, composée de quatre bandes: Gitlakdami, Canyon City, Greenville et Kincolith. Ils représentent le conseil de la tribu des Nishgas et sont conseillers de chacune des quatre bandes indiennes. Ce sont les descendants des Indiens qui ont habité de temps immémorial le territoire en question, où ils ont chassé, pêché et erré en nomades. Aux fins du présent litige, il a été convenu que ce territoire consistait en 1,000 milles carrés dans la vallée de la Nass, l'Observatory Inlet, le Portland Inlet, le canal Portland et leurs environs, au nord-ouest de la Colombie-Britannique. Aucune autre partie n'est intervenue dans le présent litige en vue de contester l'exactitude de cet exposé des faits reconnus.

La Couronne du chef de la province a fait certaines concessions sur ce territoire, dont certaines en pleine propriété; dans d'autres cas, elle a accordé des droits de préemption, des droits

[1] (1970), 74 W.W.R. 481, 13 D.L.R. (3d) 64.

forestry rights and titles, and tree farm licences. However, the vast bulk of the area remains still unalienated.

No treaty or contract with the Crown or the Hudson's Bay Company has ever been entered into with respect to the area by anyone on behalf of the Nishga Nation. Within the area there are a number of reserves but they comprise only a small part of the total land. The Nishga Nation did not agree to or accept the creation of these reserves. The Nishgas claim that their title arises out of aboriginal occupation; that recognition of such a title is a concept well embedded in English law; that it is not dependent on treaty, executive order or legislative enactment. In the alternative they say that if executive or legislative recognition ever was needed, it is to be found in the Royal Proclamation of 1763, in Imperial Statutes acknowledging that what is now British Columbia was "Indian Territory", and in Royal instructions to the Governor of British Columbia. Finally, they say that their title has never been extinguished.

All these claims, at one point or another, were rejected in the judgments under appeal.

In the agreed statement of facts, the mode of life of the Indians is set out in rather bald terms. This description is amplified in the material filed at the hearing. I refer to *The Indian History of British Columbia*, chapter 8, by Wilson Duff, published in 1964:

> It is not correct to say that the Indians did not "own" the land but only roamed over the face of it and "used" it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they

d'exploitation des minerais, des droits miniers, des permis d'exploitation du pétrole, des droits et titres forestiers, et des permis de ferme arboricole. Toutefois, la majeure partie de la région n'a pas encore été aliénée.

Aucun traité ou contrat n'a été conclu entre la Couronne ou la Compagnie de la Baie d'Hudson et quelque représentant de la nation nishga, en ce qui concerne la région. Dans les limites de la région, il y a un certain nombre de réserves mais elles ne comprennent qu'une petite partie de l'ensemble des terres. La nation nishga n'a pas consenti à la création de ces réserves, ou ne l'a jamais acceptée. Les Nishgas allèguent que leur titre découle de l'occupation aborigène; que la reconnaissance de pareil titre est une notion bien établie en droit anglais; que le titre ne dépend pas d'un traité, d'une ordonnance du pouvoir exécutif ou d'une disposition législative. Subsidiairement, ils disent que si une reconnaissance par le pouvoir exécutif ou le pouvoir législatif était nécessaire, elle se trouve dans la Proclamation royale de 1763, dans les lois impériales reconnaissant que ce qui est maintenant la Colombie-Britannique était un «territoire indien», et dans les instructions royales au gouverneur de la Colombie-Britannique. Finalement, ils disent que leur titre n'a jamais été éteint.

Toutes ces allégations ont été, à un stade ou à un autre, repoussées dans les jugements *a quo*.

Dans l'exposé des faits reconnus, le mode de vie des Indiens est décrit en termes plutôt forts. Cette question est approfondie dans les documents produits à l'audition. Mentionnons l'ouvrage *The Indian History of British Columbia*, ch. 8, de Wilson Duff, publié en 1964:

> [TRADUCTION] Il n'est pas exact de dire que les Indiens n'étaient pas «propriétaires» des terres mais y erraient en nomades tout en les «utilisant»: Les systèmes de propriété et d'utilisation qu'ils imposaient sur les terres et cours d'eau étaient différents de ceux qui sont reconnus par notre système de droit, mais ils étaient néanmoins clairement définis et mutuellement respectés. Même s'ils n'ont pas subdivisé les terres et ne les ont pas cultivées, ils reconnaissaient la propriété des parcelles utilisées comme emplacements de

didn't subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping, and foodgathering. Even if they didn't sink mine shafts into the moutains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the Province was formerly within the owned and recognized territory of one or other of the Indian tribes.

The Nishga answer to government assertions of absolute ownership of the land within their boundaries was made as early as 1888 before the first Royal Commission to visit the Nass Valley. Their spokesman said:

David Mackay—What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land; we are not like white people who live in towns and have their stores and other business, getting their living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land.

village, endroits de pêche, de cueillette de baies et de racines, et à d'autres fins semblables. Même s'ils n'ont pas abattu les arbres des forêts, ils ont établi la propriété des parcelles utilisées pour la chasse, la chasse au piège et la cueillette. Même s'ils n'ont creusé aucun puits de mine dans les montagnes, ils étaient propriétaires des pics et des vallées aux fins de la chasse aux chèvres de montagne et de l'obtention de matières premières. A l'exception des régions arides et inaccessibles non encore utilisées, chaque partie de la province se trouvait auparavant dans les limites du territoire appartenant à l'une ou l'autre des tribus indiennes et reconnu comme tel.

La réponse des Nishgas aux revendications gouvernementales de propriété absolue des terres dans les limites de leur territoire a été formulée dès 1888 devant la première commission royale qui a visité la vallée de la Nass. Leur représentant a dit ce qui suit:

[TRADUCTION] David MacKay—Voilà ce que nous n'aimons pas à propos du gouvernement, il dit: «Nous vous donnerons des terres de telle superficie». Comment peuvent-ils nous les donner puisqu'elles nous appartiennent? Nous ne pouvons pas le comprendre. Ils ne les ont jamais achetées de nous ou de nos ancêtres. Ils n'ont jamais combattu et conquis notre peuple et pris les terres de cette façon, et malgré tout, ils disent maintenant qu'ils nous donneront des terres de telle superficie, nos propres terres. Ces chefs ne parlent pas à l'aveuglette, ils savent que les terres leur appartiennent; nos ancêtres ont possédé les terres de toute cette région depuis des générations; les chefs avaient leurs propres terrains de chasse, leurs pêches de saumon, et leurs cueillettes de baies; il en a toujours été ainsi. Ce n'est pas uniquement au cours des quatre ou cinq dernières années que nous connaissons ces terres; nous les connaissons depuis toujours et elles nous ont toujours appartenu; ce n'est là rien de nouveau, elles nous appartiennent depuis plusieurs générations. Si nous ne les connaissions que depuis vingt ans et que nous les réclamions, cela n'aurait aucun sens, mais elles nous appartiennent depuis des milliers d'années. Si quelque étranger venait ici et ne connaissait ces terres que depuis vingt ans et les réclamait, cela n'aurait aucun sens. Nous avons toujours vécu de ces terres; nous ne sommes pas comme les Blancs qui vivent dans les villes et ont leurs magasins et d'autres commerces, et vivent de cette façon; nous, nous avons toujours été à la merci des terres pour nous nourrir et nous habiller; ce sont ces terres qui nous fournissent les saumons, baies et fourrures nécessaires.

Any Canadian inquiry into the nature of the Indian title must begin with *St. Catharines Milling and Lumber Co. v. The Queen*[2]. This case went through the Ontario Courts, the Supreme Court of Canada and ended in the Privy Council. The Crown in right of the Province sought to restrain the Milling Company from cutting timber on certain lands in the District of Algoma. The company pleaded that it held a licence from the Dominion Government which authorized the cutting. In 1873, by a treaty known as the North-West Angle Treaty No. 3, the Dominion had extinguished the Indian title.

The decision throughout was that the extinction of the Indian title enured to the benefit of the Province and that it was not possible for the Dominion to preserve that title so as to oust the vested right of the Province to the land as part of the public domain of Ontario. It was held that the Crown had at all times a present proprietary estate, which title, after confederation, was in the Province, by virtue of s. 109 of the *B.N.A. Act*. The Indian title was a mere burden upon that title which, following the cession of the lands under the treaty, was extinguished.

The reasons for judgment delivered in the Canadian Courts in the *St. Catharines* case were strongly influenced by two early judgments delivered in the Supreme Court of the United States by Chief Justice Marshall—*Johnson v. McIntosh*[3], and *Worcester v. State of Georgia*[4]. In *Johnson v. McIntosh* the actual decision was that a title to lands, under grants to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773 and 1775, could not be recognized in the Courts of the United States. In *Worcester v. Georgia*, the plaintiff, who was a missionary, was charged with residing among the Cherokees without a licence from the State of Georgia. His defence

[2] (1885), 10 O.R. 196, affirmed (1886), 13 O.A.R. 148, affirmed (1887), 13 S.C.R. 577, affirmed (1888), 14 App. Cas. 46.

[3] (1823), 8 Wheaton 543, 21 U.S. 240.

[4] (1832), 6 Peters 515, 31 U.S. 530.

Dans toute étude canadienne sur la nature du titre indien, il faut d'abord considérer l'arrêt *St. Catharines Milling and Lumber Co. c. La Reine*[2]. Les tribunaux ontariens, la Cour suprême du Canada et finalement le Conseil privé ont été saisis de cette affaire. La Couronne du chef de la province cherchait à empêcher une compagnie d'abattre des arbres sur certaines terres du district d'Algoma. La compagnie a fait valoir qu'elle détenait un permis du gouvernement fédéral autorisant l'abattage. En 1873, par un traité connu sous le nom de Northwestern Angle Treaty No 3, le Dominion avait éteint le titre indien.

En toutes les cours, on statua que l'extinction du titre indien profitait à la province et qu'il n'était pas possible pour le Dominion de conserver ce titre de façon à enlever le droit immobilier dévolu à la province comme partie du domaine public de l'Ontario. On décida que la Couronne avait eu en tout temps un droit actuel de propriété qui, après la Confédération, avait été transmis à la province par l'effet de l'art. 109 de l'*Acte de l'Amérique du Nord britannique*. Le titre indien constituait une simple charge sur ce droit; après la cession des terres en vertu du traité, le titre indien avait été éteint.

Dans les motifs de jugement qu'elles ont rendus dans l'affaire *St. Catharines*, les cours canadiennes ont fortement été influencées par deux jugements antérieurs rendus par le Juge en chef Marshall en Cour suprême des États-Unis—les arrêts *Johnson v. McIntosh*[3], et *Worcester v. State of Georgia*[4]. Dans l'affaire *Johnson v. McIntosh*, il a de fait été décidé que le titre sur des biens-fonds en vertu de concessions à des particuliers faites par certaines tribus ou nations indiennes au nord-ouest de l'Ohio, en 1773 et 1775, ne pouvait pas être reconnu par les tribunaux américains. Dans l'affaire *Worcester v. Georgia*, le demandeur, un missionnaire, avait été accusé de résider parmi

[2] (1885), 10 O.R. 196, confirmé (1886), 13 O.A.R. 148, confirmé (1887), 13 R.C.S. 577, confirmé (1888), 14 App. Cas. 46

[3] (1823), 8 Wheaton 543, 21 U.S. 240.

[4] (1832), 6 Peters 515, 31 U.S. 530.

was that his residence was in conformity with treaties between the United States and the Cherokee nation and that the law under which he was charged was repugnant to the constitution, treaties and laws of the United States. The Supreme Court made a declaration to this effect. Both cases raised the question of aboriginal title to land. The following passages from 8 Wheaton, pp. 587-8, give a clear summary of the views of the Chief Justice:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy; and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

The description of the nature of Indian title in the Canadian Courts in the *St. Catharines* case is repeated in the reasons delivered in the Privy Council. I quote from 14 App. Cas. at pp. 54-5:

The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the

les Cherokees sans détenir un permis de l'État de Georgia. Comme moyen de défense, il a soutenu que sa résidence à cet endroit était en conformité des traités entre les États-Unis et la nation cherokee et que la loi en vertu de laquelle il avait été accusé allait à l'encontre de la constitution, des traités et des lois américaines. La Cour suprême fit une déclaration à cet effet. Dans les deux causes, il était question du titre immobilier aborigène. Les passages suivants de 8 Wheaton, pp. 587-8, constituent un résumé clair de l'avis du Juge en chef:

[TRADUCTION] Les États-Unis ont donc reconnu sans équivoque l'importante règle générale en vertu de laquelle les habitants civilisés détiennent maintenant ce pays. Ils détiennent et revendiquent le titre en vertu duquel il a été acquis. Ils soutiennent, comme tous les autres l'ont fait, que la découverte conférait un droit exclusif d'extinction du titre d'occupation indien, soit par achat soit par conquête, et conférait également le droit de souveraineté nécessaire, compte tenu des circonstances.

Le pouvoir qu'a maintenant le gouvernement américain de concéder des terres appartenait, au temps des colonies, à la Couronne ou à ses cessionnaires. La validité des titres conférés par les uns et les autres n'a jamais été contestée devant nos cours. Ce droit a été exercé uniformément sur le territoire possédé par les Indiens. L'existence de ce pouvoir doit anéantir tout droit pouvant le contredire, et le contrôler. Un titre immobilier absolu ne peut pas exister en même temps en faveur de différentes personnes ou de différents gouvernements. Un titre absolu doit être un titre exclusif, ou du moins un titre excluant tous les autres titres incompatibles. Toutes nos institutions reconnaissent le titre absolu de la Couronne, sous réserve uniquement du droit d'occupation indien; elles ont reconnu le droit absolu de la Couronne d'éteindre ce droit. Cela va à l'encontre d'un titre absolu et complet en faveur des Indiens.

La description de la nature du titre indien faite par les tribunaux canadiens dans l'affaire *St. Catharines* est reprise dans les motifs rendus par le Conseil privé. Je reproduis un passage du recueil 14 App. Cas. 54:

[TRADUCTION] Le territoire concerné a été occupé par les Indiens depuis le jour de la proclamation jusqu'en 1873. Au cours de cette période, les affaires indiennes ont été administrées successivement par la Couronne, par les gouvernements provinciaux, et (depuis

British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present", they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

There can be no doubt that the Privy Council found that the Proclamation of 1763 was the origin of the Indian title—"Their possession, such as it was, can only be ascribed to the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown."

I do not take these reasons to mean that the Proclamation was the exclusive source of Indian title. The territory under consideration in the *St.*

l'adoption de l'Acte de l'Amérique du Nord britannique, 1867) par le gouvernement fédéral. Ces autorités administratives ont toujours eu la même ligne de conduite à cet égard, savoir, que les Indiens ont été empêchés de conclure tout marché avec un sujet en vue de la vente du transfert de leur intérêt immobilier, et ont uniquement été autorisés à céder leurs droits à la Couronne par un contrat formel, dûment ratifié, lors d'une assemblée de leurs chefs ou dirigeants convoquée à cette fin. Les autorités administratives ont changé, mais il n'y a eu aucun changement depuis 1763 dans la nature de l'intérêt que les Indiens avaient sur les terres cédées par le traité. Leur possession peut uniquement découler des dispositions générales de la proclamation royale en faveur de toutes les tribus indiennes alors soumises à la suprématie et à la protection de la Couronne britannique. Dans les plaidoiries du gouvernement fédéral, il a été soutenu que dans la mesure où la proclamation édicte que les territoires ainsi réservés aux Indiens n'ont jamais été cédés à la Couronne ou achetés par la Couronne, les Indiens en sont demeurés les seuls propriétaires. Toutefois, cette déduction n'est pas conforme aux termes de l'instrument, qui montre que les Indiens avaient un droit personnel, de la nature d'un usufruit, dépendant du bon plaisir du Souverain. Les terres réservées sont expressément décrites comme étant les «parties de nos possessions et territoires»; il est déclaré que, selon le bon plaisir du Souverain, «pour le présent», elles sont réservées aux Indiens, pour qu'ils y chassent, sous la protection et la surveillance du Souverain. On a longuement et savamment parlé, au cours des plaidoiries, de la nature exacte du droit indien, mais Leurs Seigneuries estiment qu'il n'est pas nécessaire d'exprimer leur avis sur ce point. Il leur semble suffisant, aux fins de la présente cause, de dire que la Couronne a toujours eu un droit fondamental et suprême, sous-jacent au titre indien, et qui est devenu un *plenum dominium* dès que le titre indien a été cédé ou autrement éteint.

Il est certain que le Conseil privé a conclu que la Proclamation de 1763 était le fondement du titre indien: [TRADUCTION] «Leur possession peut uniquement découler de la Proclamation royale en faveur de toutes les tribus indiennes alors soumises à la suprématie et à la protection de la Couronne britannique.»

Je n'interprète pas ces motifs comme voulant dire que la Proclamation est l'unique fondement du titre indien. Le territoire en question dans

Catharines appeal was clearly within the geographical limits set out in the Proclamation. It is part of the appellants' case that the Proclamation does apply to the Nishga territory and that they are entitled to its protection. They also say that if it does not apply to the Nishga territory, their Indian title is still entitled to recognition by the Courts. These are two distinct questions.

I say at once that I am in complete agreement with judgments of the British Columbia Courts in this case that the Proclamation has no bearing upon the problem of Indian title in British Columbia. I base my opinion upon the very terms of the Proclamation and its definition of its geographical limits and upon the history of the discovery, settlement and establishment of what is now British Columbia.

Following the Treaty of Paris, General Murray was appointed the first Governor of Quebec. The Royal Proclamation, dated October 7, 1763, first recites that the Crown has created four distinct and separate governments, styled respectively Quebec, East Florida, West Florida and Grenada, specific boundaries having been assigned to each of them. The concluding recital reads 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.

The Proclamation then goes on to deal with a prohibition of the granting of warrants of survey or patents for lands; the reservation of lands for the use of Indians; the prohibition of purchase or settlement or taking possession of reserved lands without special leave and licence; directions to all who have either wilfully or inadvertently settled on reserved lands to remove them-

l'affaire *St. Catharines* se trouvait clairement dans les limites géographiques définies dans la Proclamation. Les appelants soutiennent entre autres que la Proclamation s'applique au territoire nishga et qu'ils ont droit à la protection fournie par celle-ci. Ils disent également que si elle ne s'applique pas au territoire nishga, leur titre indien doit encore être reconnu par les tribunaux. Il s'agit là de deux questions distinctes.

Je dois dire que je souscris entièrement aux jugements des cours de la Colombie- Britannique en la présente espèce statuant que la Proclamation n'a rien à voir avec le problème du titre indien en Colombie-Britannique. Je fonde mon opinion sur les termes mêmes de la Proclamation et sur la définition qui y est donnée des limites géographiques ainsi que sur l'histoire de la découverte, de la colonisation et de l'établissement de ce qui est maintenant la Colombie-Britannique.

Après le traité de Paris, le général Murray a été nommé premier gouverneur du Québec. Dans la Proclamation royale du 7 octobre 1763, il est déclaré tout d'abord que la Couronne a constitué quatre gouvernements distincts, appelés respectivement Québec, Floride orientale, Floride occidentale et Grenade, dont les frontières sont spécifiquement délimitées. Le dernier attendu est le suivant:

> [TRADUCTION] Attendu qu'il est juste, raisonnable et essentiel pour Notre intérêt et la sécurité de Nos colonies de prendre des mesures pour assurer aux nations ou tribus sauvages qui sont en relations avec Nous et qui vivent sous Notre protection, la possession entière et paisible des parties de Nos possessions et territoires qui ont été ni concédées ni achetées et ont été réservées pour ces tribus ou quelques-unes d'entre elles comme territoires de chasse.

Puis, la Proclamation mentionne l'interdiction d'accorder des permis d'arpentage ou des titres de propriété à l'égard des terres; la constitution de réserves à l'usage des Indiens; l'interdiction d'acheter, coloniser ou posséder des terres réservées sans obtenir d'abord une permission spéciale ou une licence à ce sujet; l'ordre donné à tous ceux qui en connaissance de cause ou par

selves; and the prohibition of private purchase from Indians of lands reserved to them within those Colonies where settlement was permitted, all purchases being directed to be made on behalf of the Crown, in public assembly of the Indians, by the Governor or Commander in Chief of the Colony in which the lands lie. Rather than attempt to paraphrase, I set out the precise text of the opening paragraphs of the Proclamation dealing with these matters. The full Proclamation with all its recitals is to be found in the Revised Statutes of Canada 1970, Appendices, pp. 123-129.

inadvertance se sont établis sur des terres réservées de quitter les lieux; et l'interdiction d'acheter privément des Indiens les terres qui leur sont réservées dans les limites des colonies où la colonisation est autorisée, tout achat effectué devant l'être par le gouverneur ou commandant en chef de la colonie où se trouvent les terres pour le compte de la Couronne et au cours d'une assemblée publique des Indiens. Plutôt que de tenter de paraphraser, je cite le texte exact des premiers alinéas de la Proclamation qui traitent de ces questions. La Proclamation intégrale et ses attendus se trouvent dans les appendices des Statuts revisés du Canada, 1970, aux pages 123 à 129.

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.

Nous déclarons par conséquent de l'avis de Notre Conseil privé, que c'est Notre volonté et Notre plaisir et nous enjoignons à tout gouverneur et à tout commandant en chef de Nos colonies de Québec, de la Floride Orientale et de la Floride Occidentale, de n'accorder sous aucun prétexte des permis d'arpentage ni aucun titre de propriété sur les terres situées au-delà des limites de leur gouvernement respectif, conformément à la délimitation contenue dans leur commission. Nous enjoignons pour la même raison à tout gouverneur et à tout commandant en chef de toutes Nos autres colonies ou de Nos autres plantations en Amérique, de n'accorder présentement et jusqu'à ce que Nous ayons fait connaître Nos intentions futures, aucun permis d'arpentage ni aucun titre de propriété sur les terres situées au-delà de la tête ou source de toutes les rivières qui vont de l'ouest et du nord-ouest se jeter dans l'océan Atlantique ni sur celles qui ont été ni cédées ni achetées par Nous, tel que susmentionné, et ont été réservées pour les tribus sauvages susdites ou quelques-unes d'entre elles.

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.

Nous déclarons de plus que c'est Notre plaisir royal ainsi que Notre volonté de réserver pour le présent, sous Notre souveraineté, Notre protection et Notre autorité, pour l'usage desdits sauvages, toutes les terres et tous les territoires non compris dans les limites de Nos trois gouvernements ni dans les limites du territoire concédé à la Compagnie de la baie d'Hudson, ainsi que toutes les terres et tous les territoires situés à l'ouest des sources des rivières qui de l'ouest et du nord-ouest vont se jeter dans la mer.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our

Nous défendons aussi strictement par la présente à tous Nos sujets, sous peine de s'attirer Notre déplaisir, d'acheter ou posséder aucune terre ci-dessus réservée, ou d'y former aucun établissement, sans

especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully 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.

It is clear, as the British Columbia Courts have held, and whose reasons I adopt, that the Nishga bands represented by the appellants were not any of the several nations or tribes of Indians who lived under British protection and were outside the scope of the Proclamation.

The British Columbia Courts have dealt with the history of the discovery and settlement of their province. This history demonstrates that the Nass Valley, and, indeed, the whole of the province could not possibly be within the terms of the Proclamation.

As to the establishment of British sovereignty in British Columbia in 1818 by a Convention of Commerce between His Majesty and the United States of America, the British Crown and the United States settled the boundary to the height of land in the Rockies, referred to in the Convention as the "Stoney Mountains". The boundary was the 49th parallel of latitude. The Convention provided for the joint occupancy of the lands to the west of that point for a term of ten years. This Convention was extended indefinitely by a further Convention in 1827.

The area in question in this action never did come under British sovereignty until the Treaty of Oregon in 1846. This treaty extended the boundary along the 49th parallel from the point of termination, as previously laid down, to the channel separating the Continent from Vancouver Island, and thus through the Gulf Islands to Fuca's Straits. The Oregon Treaty was, in effect, a treaty of cession whereby American claims were ceded to Great Britain. There was

avoir au préalable obtenu Notre permission spéciale et une licence à ce sujet.

Et Nous enjoignons et ordonnons strictement à tous ceux qui en connaissance de cause ou par inadvertance, se sont établis sur des terres situées dans les limites des contrées décrites ci-cessus ou sur toute autre terre qui n'ayant pas été cédée ou achetée par Nous se trouve également réservée pour lesdits sauvages, de quitter immédiatement leurs établissements.

Il est clair, comme l'ont décidé les cours de la Colombie-Britannique, dont j'adopte les motifs, que les bandes nishgas représentées par les appelants ne faisaient pas partie de l'une des diverses bandes ou tribus indiennes soumises à la protection britannique et n'étaient pas visées par la Proclamation.

Les cours de la Colombie-Britannique ont parlé de l'histoire de la découverte et de la colonisation de leur province. Cette histoire démontre que la vallée de la Naas et, de fait, l'ensemble de la province ne pouvaient absolument pas être visées par la Proclamation.

En ce qui concerne l'établissement de la souveraineté britannique en Colombie-Britannique, en 1818, par une convention commerciale entre Sa Majesté et les États-Unis d'Amérique, la Couronne britannique et les États-Unis ont déterminé que la frontière serait la ligne de faîte des Rocheuses, appelées dans la convention les «Stoney Mountains». La frontière était le 49e parallèle de latitude. La convention stipulait l'occupation conjointe des terres à l'ouest de cet endroit pour une période de dix ans. Cette convention a été prolongée indéfiniment par une seconde convention, datant de 1827.

La région en question dans la présente action n'a été soumise à la souveraineté britannique qu'au moment de la conclusion du traité de l'Orégon, en 1846. Ce traité prolongeait la frontière le long du 49e parallèle depuis le point terminal, déjà établi, jusqu'au chenal séparant le continent de l'île de Vancouver, puis, à travers les Gulf Islands, jusqu'au détroit de Juan de Fuca. Le traité de l'Orégon était de fait un traité de cession, les droits réclamés par les Améri-

no mention of Indian rights in any of these Conventions or the treaty.

As to establishment of the northern boundary of what became British Columbia, the Courts below relied on the evidence of Dr. Willard Ireland, Provincial Archivist, who had published a work on the evolution of the boundaries of the province. He begins with the Imperial ukase of the Czar, dated September 16, 1821, asserting exclusive rights of trade on the Pacific Coast as far south as the 51st parallel. There was opposition to this pretension immediately both from Great Britain and the United States. The United States proposed a tripartite treaty under the terms of which no settlements should be made by Russia south of 55 degrees, by the United States north of 51 degrees or by Great Britain north of 55 degrees or south of 51 degrees. The United States was prepared, if necessary, to accept the 49th parallel as the northern limit for its settlements. This proposal was rejected by the British Government, which preferred to negotiate separately with Russia and the United States. The discussions with Russia culminated in the Convention of February 28, 1825, which laid down a line of demarcation.

It was the opinion of Dr. Ireland that although the exact interpretation of these terms became a matter of serious dispute after Russian America was purchased by the United States, this Convention, broadly speaking, established the boundary as it exists today between Canada and Alaska. In other words, it determined the northern limit of British territory on the Pacific coast.

The Colony of Vancouver Island was established by the British Crown in 1849. James Douglas was appointed Governor in 1851. The Colony of British Columbia, being the mainland of what is now the Province, was established by the British Crown in 1858 and the same James Douglas was the first Governor of the Colony with full executive powers. Douglas remained

cains étant cédés à la Grande-Bretagne. On ne mentionnait les droits indiens dans aucune de ces conventions, non plus que dans le traité.

En ce qui concerne l'établissement de la frontière nord de ce qui est devenu la Colombie-Britannique, les tribunaux d'instance inférieure se sont fondés sur le témoignage du docteur Willard Ireland, archiviste de la province, qui avait publié un ouvrage sur l'établissement des frontières de la province. Il commence par l'ukase impérial du tsar, datant du 16 septembre 1821, et revendiquant des droits commerciaux exclusifs le long de la côte du Pacifique jusqu'au 51e parallèle, vers le sud. La Grande-Bretagne et les États-Unis se sont immédiatement opposés à cette prétention. Les États-Unis ont proposé un traité tripartite en vertu duquel aucune colonisation ne devrait être faite par la Russie au sud du 55e degré, par les États-Unis au nord du 51e degré ou par la Grande-Bretagne au nord du 55e degré ou au sud du 51e degré. Les États-Unis étaient disposés, si c'était nécessaire, à accepter le 49e parallèle comme limite nord de leurs colonies. Cette proposition a été repoussée par le gouvernement britannique, qui préférait négocier séparément avec la Russie et les États-Unis. Les pourparlers avec la Russie ont abouti à la convention du 28 février 1825, qui établissait une ligne de démarcation.

Le docteur Ireland est d'avis que bien que l'interprétation exacte de ses termes soit devenue par la suite une question litigieuse, après que l'Amérique russe eut été achetée par les États-Unis, cette convention, généralement parlant, établissait la frontière telle qu'elle existe actuellement entre le Canada et l'Alaska. En d'autres termes, elle déterminait la limite nord du territoire britannique sur la côte du Pacifique.

La colonie de l'île de Vancouver a été établie par la Couronne britannique en 1849. James Douglas a été nommé gouverneur en 1851. La colonie de la Colombie-Britannique, soit la partie continentale de ce qui est maintenant la province, a été établie par la Couronne britannique en 1858 et le même James Douglas a été le premier gouverneur de la colonie avec les pleins

Governor of both Colonies until 1864. On November 17, 1866, the two Colonies were united as one Colony under the British Crown and under the name of British Columbia. This Colony entered Confederation on July 20, 1871, and became the Province of British Columbia and part of the Dominion of Canada.

When the Colony of British Columbia was established in 1858, there can be no doubt that the Nishga territory became part of it. The fee was in the Crown in right of the Colony until July 20, 1871, when the Colony entered Confederation, and thereafter in the Crown in right of the Province of British Columbia, except only in respect of those lands transferred to the Dominion under the Terms of Union.

The political and social conditions prevailing in these two colonies are described in some detail in the reasons of Tysoe J.A.[5];

> Prior to the establishment of the territories of Vancouver Island and the mainland of British Columbia as British colonies they had been governed by the Hudson's Bay Company, of which company James Douglas was for some time the chief factor. It had been his responsibility to see to the orderly settlement of the lands and to control the native Indians, some tribes of which were of a warlike and aggressive nature. Douglas had to keep law and order. The responsibility continued to rest upon his shoulders after the establishment of the colonies and until executive councils were appointed, as in due course they were. Douglas had his difficulties with the Indians on Vancouver Island. In 1852 the white settlers with their children numbered only about one thousand and they were surrounded by an Indian population of nearly thirty thousand. On the mainland he had like troubles but in aggravated form. The territory was much larger and the discovery of gold exacerbated the situation. Vancouver Island had been the scene of an influx of foreigners and it was fear of this that led to the setting up of the Colony of Vancouver Island. On the mainland conditions in this regard were worse. Gold was first discovered on the Fraser River and this resulted in a great number of Ameri-

[5] 13 D.L.R. (3d) at pp. 80-1.

pouvoirs exécutifs. Douglas est demeuré gouverneur des deux colonies jusqu'en 1864. Le 17 novembre 1866, les deux colonies ont été réunies en une seule colonie, sous la Couronne britannique, sous le nom de Colombie-Britannique. Cette colonie est entrée dans la Confédération le 20 juillet 1871, et est devenue la province de la Colombie-Britannique et partie du Dominion du Canada.

Lorsque la colonie de la Colombie-Britannique a été établie en 1858, il est certain que le territoire nishga en faisait partie. La Couronne du chef de la colonie a été propriétaire jusqu'au 20 juillet 1871, jour de l'entrée de la colonie dans la Confédération, et la Couronne du chef de la province de la Colombie-Britannique est devenue alors propriétaire, sauf à l'égard des terres transférées au Dominion en vertu des conditions de l'Union.

Les conditions politiques et sociales de ces deux colonies sont décrites quelque peu en détail dans les motifs du Juge Tysoe[5]:

> [TRADUCTION] Avant l'établissement des territoires de l'île de Vancouver et de la Colombie-Britannique continentale à titre de colonies britanniques, ceux-ci étaient gouvernés par la Compagnie de la Baie d'Hudson dont James Douglas a été le premier agent durant quelque temps. Il avait été chargé de voir à la colonisation régulière des terres et à la surveillance des Indiens, certaines tribus étant de nature agressive et guerrière. Douglas était responsable du respect de la loi et du maintien de l'ordre. Cette tâche lui est demeurée après l'établissement des colonies jusqu'à ce que des conseils exécutifs soient nommés, ainsi qu'ils le furent en temps utile. Douglas éprouvait certaines difficultés avec les Indiens de l'île de Vancouver. En 1852, il n'y avait qu'environ mille colons blancs, compte tenu des enfants, et ils étaient entourés par une population indienne de près de trente mille personnes. Sur le continent, il y avait à peu près les mêmes problèmes mais ceux-ci étaient encore plus graves. Le territoire était beaucoup plus vaste et la découverte de l'or a aggravé la situation. L'île de Vancouver avait vu l'arrivée d'un afflux d'étrangers et c'est ce qui avait amené la création de la colonie de l'île de Vancouver. Sur le continent, la situation était encore pire à cet égard. L'or a d'abord été découvert

[5] 13 D.L.R. (3d) pp. 80-1.

cans from the California gold fields entering the territory. They were men who had "a hankering in their minds after annexation to the United States" and they did not have the same respect for the native Indians as did the British colonists. The first white child was born at Fort Langley on the mainland on November 1, 1857. The precious metal was the lure that brought the Kanakas from Hawaii in 1858, and it is said that in that year there were ten thousand men engaged in gold mining in the Colony of British Columbia. In the years 1859 and 1860 the mining population was being added to by small parties of men who had travelled overland from Eastern Canada. That was the commencement of a slow but steady stream of immigrants from beyond the Rocky Mountains. See Margaret Ormsby, "British Columbia" p. 145, and Cicely Lyons, "Salmon, our Heritage", pp. 80, 81, 82, 85. In the late fifties and early sixties roads were being built into the mining areas. Frequent clashes with the Indians occurred. As immigration increased Douglas became concerned about the danger of Indian warfare spreading into the interior from Washington territory and alarmed about the great hazard of disrespect for Imperial rights and law and order. The search for gold spread further and further north and east. White settlers were spreading out and some were encroaching upon the village lands and other occupied lands of the Indians. The need for protection to the Indians and protection to the settlers against the Indians increased immeasurably. Such protection and an orderly system of settlement became of paramount consideration. Douglas had these matters very much in mind in the year 1858 and in succeeding years.

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".

sur le Fraser et a attiré un grand nombre d'Américains des terrains aurifères de la Californie. C'étaient des hommes qui «nourrissaient l'espoir de voir l'annexion aux États-Unis» et ils ne respectaient pas les Indiens autant que les colonisateurs britanniques. Le premier nouveau-né blanc est né à Port Langley, sur le continent, le 1er novembre 1857. Le précieux métal a attiré les Kanakas d'Hawaï en 1858; on dit que cette année-là, dix mille hommes travaillaient dans les mines d'or de la colonie de la Colombie-Britannique. En 1859 et 1860, de petits groupes d'hommes venus par les terres de l'est du Canada se sont ajoutés à la population minière. Ce fut le commencement du flux lent mais continu d'immigrants venus de l'autre côté des Rocheuses. Voir Margaret Ormsby, «British Columbia», p. 145, et Cicely Lyons, «Salmon, our Heritage», pp. 80, 81, 82, 85. A la fin des années 50 et au début des années 60, des routes ont été construites jusqu'aux régions minières. Il y a eu de nombreux heurts avec les Indiens. A mesure que l'immigration s'accroissait, Douglas craignait de plus en plus que le danger de guerre avec les Indiens se propage dans l'intérieur depuis le territoire de Washington et que les droits impériaux de maintien de la paix et de l'ordre soient bafoués. La recherche de l'or s'est étendue de plus en plus loin vers le nord et vers l'est. Les colons blancs se dispersaient et certains d'entre eux empiétaient sur les terres des villages et les autres terres occupées par les Indiens. Le besoin de protéger les Indiens et de protéger les colons contre les Indiens s'est fait sentir d'une façon pressante. Pareille protection, ainsi qu'un système ordonné de colonisation, a pris une importance primordiale. Douglas s'est beaucoup penché sur ces problèmes en 1858 et dans les années qui ont suivi.

Je crois qu'il est clair qu'en Colombie-Britannique, le titre indien ne peut pas avoir pour origine la Proclamation de 1763, mais il reste que lorsque les colons sont arrivés, les Indiens étaient déjà là, ils étaient organisés en sociétés et occupaient les terres comme leurs ancêtres l'avaient fait depuis des siècles. C'est ce que signifie le titre indien et en l'appelant «droit personnel de la nature d'un usufruit», la solution du problème n'en devient pas plus facile. Ils affirment dans la présente action qu'ils avaient le droit de continuer à vivre sur leurs terres comme l'avaient fait leurs ancêtres et que ce droit n'a jamais été juridiquement éteint. Il ne peut faire de doute que ce droit était «dépendant du bon plaisir du Souverain».

It was the opinion of the British Columbia Courts that this right, if it ever existed, had been lawfully extinguished, that with two societies in competition for land—the white settlers demanding orderly settlement and the Indians demanding to be let alone—the proper authorities deliberately chose to set apart reserves for Indians in various parts of the territory and open up the rest for settlements. They held that this had been done when British Columbia entered Confederation in 1871 and that the Terms of Union recognized this fact.

As to Vancouver Island, we have before us a collection of dispatches between the Colonial Office and Governor Douglas in connection with the Indian problem that was confronting him. The first, dated July 31, 1858, contains an admonition that it should be an invariable condition in all bargains or treaties with the natives for the cession of lands possessed by them that subsistence should be supplied in some other shape. It is in the following terms.

July 31, 1858

I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. *This question is of so local a character that it must be solved by your knowledge and experience*, and I commit it to you, in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest. Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of civilization among the natives.

Les cours de la Colombie-Britannique ont été d'avis que ce droit, s'il a existé, avait été juridiquement éteint, qu'en présence de deux sociétés en concurrence relativement à des terres, les colons blancs demandant la colonisation ordonnée et les Indiens demandant qu'on leur laisse la paix, les autorités compétentes ont délibérément choisi de mettre à part des réserves pour les Indiens dans diverses parties du territoire et d'ouvrir le reste à la colonisation. Elles ont statué que c'est ce qui s'était fait lorsque la Colombie-Britannique est entrée dans la Confédération en 1871, et que les conditions de l'Union ont reconnu ce fait.

En ce qui concerne l'île de Vancouver, nous avons à notre disposition un certain nombre de missives entre le Colonial Office et le Gouverneur Douglas portant sur le problème indien auquel ce dernier avait à faire face. La première, en date du 31 juillet 1858, contient l'avertissement qu'une condition nécessaire de tout marché ou traité avec les aborigènes en vue de la cession des terres qu'ils possèdent sera que d'autres moyens d'existence devront leur être fournis. Elle se lit comme suit:

Le 31 juillet 1858

[TRADUCTION] Je dois vous recommander de considérer les moyens les meilleurs et les plus humanitaires de traiter avec les Indiens aborigènes. Notre pays serait fortement défavorable à l'adoption de quelque mesure arbitraire ou oppressive en ce qui les concerne. Vu l'éloignement, et compte tenu des moyens imparfaits à ma disposition pour être bien informé, j'hésite à donner maintenant quelque suggestion en vue d'empêcher les disputes entre les Indiens et les immigrants. *Cette question est d'une nature tellement locale qu'elle doit être résolue grâce à vos connaissances et à votre expérience*, et je vous en charge, étant entièrement convaincu que vous tiendrez pleinement compte des intérêts des aborigènes, comme le voudrait un esprit éclairé soucieux d'humanité. Je dois ajouter qu'une condition nécessaire, dans tout marché ou traité avec les aborigènes en vue de la cession des terres qu'ils possèdent, est que les moyens d'existence doivent leur être fournis de quelque façon, et surtout, que le gouvernement de Sa Majesté tient absolument à ce que vous envisagiez sans délai les meilleurs moyens à prendre en vue de diffuser les bienfaits de la religion chrétienne et de la civilisation parmi les aborigènes.

These dispatches are detailed and informative on both sides. They set out the difficulties and problems as they arose and suggestions for their solution. I quote from the last dispatch of the Governor, which conveniently summarizes his efforts:

Victoria, 25th March, 1861.

My Lord Duke,—I have the honour of transmitting a petition from the House of Assembly of Vancouver Island to your Grace, praying for the aid of Her Majesty's Government in extinguishing the Indian title to the public lands in this Colony; and setting forth, with much force and truth, the evils that may arise from the neglect of that very necessary precaution.

2. As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country.

3. Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case prior to the settlement of any district; but since that time in consequence of the termination of the Hudson's Bay Company's Charter, and the want of funds, it has not been in my power to continue it. Your Grace must, indeed, be well aware that I have, since then, had the utmost difficulty in raising money enough to defray the most indispensable wants of Government.

He then went on to point out the need for further purchases, totalling in all £3,000, and asked for a loan of this amount from the Imperial Government. The reply was that the problem was essentially local in character and the money would have to be raised in the Colony. The full reply is as follows:

Downing Street, 19th October, 1861

Sir.—I have had under my consideration your despatch No. 24, of the 25th of March last, transmitting an Address from the House of Assembly of Vancouver Island, in which they pray for the assistance of Her Majesty's Government in extinguishing

Ces missives nous donnent de nombreux détails et renseignements des deux côtés. Elles exposent les difficultés et problèmes existants et proposent des solutions. Je reproduis un passage de la dernière missive du gouverneur, qui résume bien les efforts de celui-ci:

Victoria, le 25 mars 1861

[TRADUCTION] Monsieur le Duc—J'ai l'honneur de vous transmettre une pétition de l'assemblée législative de l'île de Vancouver, demandant l'aide du gouvernement de Sa Majesté en ce qui concerne l'extinction du titre indien sur les terres publiques de cette colonie et exposant, avec beaucoup de force et de véracité, les maux qui peuvent survenir si cette précaution très nécessaire n'est pas prise.

2. Étant donné que la population indienne de l'île de Vancouver a des idées particulières au sujet de la propriété immobilière et que les Indiens se reconnaissent mutuellement leurs droits de possession exclusive sur certains districts, ils considéreraient sans aucun doute l'occupation de pareilles parties de la colonie par les colons blancs, sans l'approbation complète des tribus propriétaires, comme un préjudice national; il en découlerait un sentiment d'irritation contre les colons et peut-être du mécontentement contre le gouvernement, la paix de ce pays pouvant être compromise.

3. Connaissant leurs sentiments à cet égard, j'ai eu l'habitude, jusqu'en 1859, d'acheter les droits aborigènes sur les terres, dans chaque cas, avant de coloniser un district; mais depuis ce temps, par suite de l'extinction de la charte de la Compagnie de la Baie d'Hudson, et du manque de fonds, je n'ai pas pu continuer à le faire. De fait, vous devez sûrement savoir que depuis lors j'ai éprouvé énormément de difficulté à obtenir suffisamment de fonds pour subvenir aux besoins indispensables du gouvernement.

Puis, il signale la nécessité d'autres achats, s'élevant à la somme de £3,000, et demande un prêt correspondant au gouvernement impérial. On lui a répondu qu'il s'agissait essentiellement d'un problème de nature locale et que les fonds devaient être réunis par la colonie. La réponse complète se lit comme suit:

Downing Street, le 19 octobre 1861

[TRADUCTION] Monsieur.—J'ai pris connaissance de votre missive n° 24, du 25 mars dernier, transmettant une adresse de l'assemblée législative de l'île de Vancouver demandant l'aide du gouvernement de Sa Majesté en ce qui concerne l'extinction du titre indien

the Indian title to the public lands in the Colony, and set forth the evils that may result from a neglect of this precaution.

I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island; but the acquisition of the title is a purely colonial interest, and the Legislature must not entertain any expectation that the British taxpayer will be burthened to supply the funds or British credit pledged for the purpose. I would earnestly recommend therefore to the House of Assembly, that they should enable you to procure the requisite means, but if they should not think proper to do so, Her Majesty's Government cannot undertake to supply the money requisite for an object which, whilst it is essential to the interests of the people of Vancouver Island, is at the same time purely Colonial in its character, and trifling in the charge that it would entail.

The reasons for judgment next deal with a series of proclamations by James Douglas as Governor of the Colony of British Columbia. The first is dated December 2, 1858, and it is stated to be a proclamation having the force of law to enable the Governor of British Columbia to have Crown lands sold within the said Colony. It authorized the Governor to grant any land belonging to the Crown in the Colony.

The second proclamation is dated February 14, 1859. It declared that all lands in British Columbia and all mines and minerals thereunder belonged to the Crown in fee. It provided for the sale of these lands after surveys had been made and the lands were ready for sale, and that due notice should be given of such sales.

The third proclamation is dated January 4, 1860. It provided for British subjects and aliens who take the oath of allegiance acquiring unoccupied and unreserved and unsurveyed Crown land, and for the subsequent recognition of the claim after the completion of the survey.

sur les terres publiques de la colonie, et exposant les maux qui peuvent survenir si cette précaution n'est pas prise.

Je suis tout à fait conscient qu'il est extrêmement important d'acheter sans délai le titre aborigène sur les terres de l'île de Vancouver; mais l'acquisition du titre est une question d'intérêt purement colonial, et la législature ne doit pas s'attendre à ce qu'il incombe au contribuable britannique d'engager des fonds ou le crédit de la Grande-Bretagne à cette fin. Je recommanderais donc fortement à l'assemblée législative de vous permettre de vous procurer les fonds requis, mais si elle estime que ce n'est pas là une mesure appropriée, le gouvernement de Sa Majesté ne peut pas entreprendre de fournir l'argent nécessaire pour un objet qui, bien qu'essentiel en ce qui concerne l'intérêt des habitants de l'île de Vancouver, est en même temps d'une nature purement coloniale et d'une importance minime en ce qui concerne les frais qui en découleraient.

Les motifs de jugement traitent ensuite d'une série de proclamations de James Douglas en sa qualité de gouverneur de la colonie de la Colombie-Britannique. La première est datée du 2 décembre 1858; il est mentionné qu'il s'agit d'une proclamation qui a force de loi en vue de permettre au gouverneur de la Colombie-Britannique de vendre les terres de la Couronne dans les limites de ladite colonie. La proclamation autorisait le gouverneur à concéder toute terre appartenant à la Couronne dans la colonie.

La seconde proclamation est datée du 14 février 1859. Il y est déclaré que toutes les terres de la Colombie-Britannique ainsi que toutes les mines et tous les minerais s'y trouvant appartiennent à la Couronne en propriété absolue. La proclamation autorise la vente de ces terres, lorsque les levés seront terminés et que ces terres seront prêtes à être vendues, et prescrit qu'un avis de pareilles ventes, en bonne et due forme, doit être donné.

La troisième proclamation est datée du 4 janvier 1860. Elle autorise les sujets britanniques et les étrangers qui prêtent le serment d'allégeance à acquérir les terres de la Couronne inoccupées, non réservées et non arpentées, et prévoit la reconnaissance subséquente de leur droit, une fois l'arpentage terminé.

The fourth proclamation is dated January 20, 1860. It provided for the sale of certain lands by private contract and authorized the Commissioner of Land and all Magistrates and Gold Commissioners to make these sales at certain prices.

The fifth proclamation of January 19, 1861, dealt with further details of land sales.

The sixth proclamation, dated January 19, 1861, reduced the price of land.

The seventh proclamation, dated May 28, 1861, dealt with conditions of pre-emption and limited the right to 160 acres per person.

The eighth proclamation, dated August 27, 1861, was a consolidation of the laws affecting the settlement of unsurveyed Crown lands in British Columbia.

The ninth proclamation, dated May 27, 1863, dealt with the establishment of mining districts.

Then follow four ordinances enacted by the Governor by and with the consent of the Legislative Council of British Columbia. The first is dated April 11, 1865. It repeats what the proclamation had previously said, namely, that all lands in British Columbia and all mines and minerals therein, not otherwise lawfully appropriated, belong to the Crown in fee. It goes on to provide for the public sale of lands and the price; that unless otherwise specially announced at the time of the sale, the conveyance of the lands shall include all trees and all mines and minerals within and under the same (except mines of gold and silver). It also deals with rights of pre-emption of unoccupied, unsurveyed and unreserved Crown lands "not being the site of an existent or proposed town, or auriferous land or an Indian reserve or settlement under certain conditions."

La quatrième proclamation est datée du 20 janvier 1860. Elle autorise la vente de certaines terres par contrat entre particuliers et autorise le Commissaire aux biens-fonds ainsi que tous les magistrats et commissaires de l'or à effectuer ces ventes à certains prix.

La cinquième proclamation, datée du 19 janvier 1861, porte plus en détail sur les ventes de biens-fonds.

La sixième proclamation, datée du 19 janvier 1861, réduit le prix des biens-fonds.

La septième proclamation, datée du 28 mai 1861, porte sur les conditions de préemption et restreint ce droit à 160 acres par personne.

La huitième proclamation, datée du 27 août 1861, est une refonte des lois régissant la colonisation des terres de la Couronne non arpentées, situées en Colombie-Britannique.

La neuvième proclamation, datée du 27 mai 1863, porte sur l'établissement de districts miniers.

Puis, suivent quatre ordonnances adoptées par le Gouverneur avec le consentement du Conseil législatif de la Colombie-Britannique. La première est datée du 11 avril 1865. Elle reprend ce que la proclamation avait déjà dit, soit, que toutes les terres de la Colombie-Britannique ainsi que toutes les mines et tous les minerais s'y trouvant, non autrement attribués selon le droit, appartiennent à la Couronne en propriété absolue. D'autres dispositions portent sur la vente publique des terres ainsi que sur le prix; à moins qu'un avis contraire ne soit expressément donné au moment de la vente, le transfert des biens-fonds comprend tous les arbres ainsi que toutes les mines et tous les minerais s'y trouvant (à l'exception des mines d'or et d'argent). L'ordonnance traite également des droits de préemption sur les terres de la Couronne inoccupées, non arpentées et non réservées [TRADUCTION] «qui ne constituent pas l'emplacement d'une ville existante ou projetée, d'un terrain aurifère, d'une réserve ou colonie indienne, sous réserve de certaines conditions.»

The next ordinance, dated March 31, 1866, restricts those who may acquire lands by pre-emption under the ordinance of April 11, 1865. British subjects or aliens who take the Oath of Allegiance have this right but it does not extend without special permission of the Governor to companies or "to any of the Aborigines of this Colony or the Territories neighbouring thereto."

The third ordinance is dated March 10, 1869. It deals with the payment of purchase money for pre-emption claims.

The last ordinance is dated June 1, 1870, and is one to amend and consolidate the laws affecting Crown lands in British Columbia.

The result of these proclamations and ordinances was stated by Gould J. at the trial in the following terms. I accept his statement, as did the Court of Appeal:

> The various pieces of legislation referred to above are connected, and in many instances contain references *inter se*, especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

The same opinion is expressed in a letter dated January 29, 1870, from Governor Musgrave to the Colonial Office, which had received certain representations from the Aborigines Protection Society relative to the conditions of the Indians on Vancouver Island. He had a memorandum prepared by the Commissioner of

L'ordonnance suivante, datée du 31 mars 1866, apporte des restrictions quant à ceux qui peuvent acquérir des terres par préemption en vertu de l'ordonnance du 11 avril 1865. Les sujets britanniques ou les étrangers qui prêtent le serment d'allégeance ont ce droit mais il ne s'étend pas, du moins sans l'autorisation particulière du gouverneur, aux compagnies ou [TRADUCTION] «aux aborigènes de cette colonie ou des territoires voisins.»

La troisième ordonnance est datée du 10 mars 1869. Elle porte sur le paiement du prix d'achat, relativement aux droits de préemption.

La dernière ordonnance est datée du 1er juin 1870, et modifie, tout en les refondant, les lois régissant les terres de la Couronne en Colombie-Britannique.

Les conséquences de ces proclamations et ordonnances ont été énoncées par le Juge Gould, en première instance, dans les termes suivants. J'accepte sa conclusion, comme l'a d'ailleurs fait la Cour d'appel:

> [TRADUCTION] Les divers textes législatifs ci-dessus mentionnés sont reliés entre eux, et dans de nombreux cas, ils contiennent des renvois d'un texte à l'autre, particulièrement le nº XIII. Ils sont bien antérieurs au 19 novembre 1866, jour où il a été tenu pour certain que les terres délimitées se trouvaient dans les limites de la colonie de la Colombie-Britannique et étaient donc visées par la législation de la colonie en matière immobilière, le cas échéant. Les treize textes révèlent une unité d'intention, soit l'exercice du pouvoir législatif et de la souveraineté absolue sur toutes les terres de la Colombie-Britannique, souveraineté incompatible avec tout intérêt contradictoire, y compris «le titre aborigène, autrement dit titre indien», pour reprendre les termes de la déclaration. Les textes législatifs antérieurs au 19 novembre 1866 sont inclus, en vue de montrer le but de la législation connexe subséquente, qui visait indubitablement les terres délimitées.

La même opinion est exprimée dans une lettre datée du 29 janvier 1870 du gouverneur Musgrave au Colonial Office, qui avait reçu certains commentaires de la Aborigines Protection Society au sujet des conditions dans lesquelles vivaient les Indiens de l'île de Vancouver. Il fit préparer un memorandum par le commissaire

Lands and Works and Surveyor General, Mr. Trutch. When the Colony entered Confederation on July 20, 1871, Mr. Trutch was appointed its first Lieutenant-Governor. He had served as the Colony's chief negotiator, both in Ottawa and London, of the terms of entry into Confederation, and he had resided in the Colony since it was established in 1858. He said in part:

> The Indians have, in fact, been held to be the special wards of the Crown, and in the exercise of this guardianship Government has, in all cases where it has been desirable for the interests of the Indians, set apart such portions of the Crown lands as were deemed proportionate to, and amply sufficient for, the requirements of each tribe; and these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon.
>
> But the title of the Indians in the fee of the public lands, or of any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied. In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing to each tribe, as the progress of the settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agricultural and pastoral purposes.

The terms used in this letter bring to mind what was said on the subject of extinguishment of Indian title in *United States v. Santa Fe Pacific R. Co.*[6]:

> Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U.S. at 229.

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz v. Northern Pacific*

[6] (1941), 314 U.S. 339 at 347.

aux biens-fonds et travaux, également arpenteur général, M. Trutch. Lorsque la colonie est entrée dans la Confédération le 20 juillet 1871, M. Trutch a été nommé lieutenant-gouverneur. Il avait été le principal négociateur de la colonie, tant à Ottawa qu'à Londres, dans les pourparlers au sujet des conditions d'entrée de celle-ci dans la Confédération; il avait vécu dans la colonie depuis qu'elle avait été établie en 1858. Il dit, entre autres, ce qui suit:

> [TRADUCTION] En fait, on a considéré que les Indiens étaient les pupilles particuliers de la Couronne; en exerçant sa tutelle, le gouvernement a toujours mis de côté, lorsque le demandait l'intérêt des Indiens, les parties des terres de la Couronne qui étaient jugées appropriées et amplement suffisantes aux besoins de chaque tribu; ces réserves indiennes sont détenues par le gouvernement, en fiducie, pour l'usage et le bénéfice exclusifs des Indiens qui y résident.
>
> Mais le droit de propriété des Indiens sur les terres publiques, ou sur quelque partie d'icelles, n'a jamais été reconnu par le gouvernement; au contraire, il a expressément été nié. Aucune entente particulière n'a été conclue avec l'une quelconque des tribus du continent en vue de l'extinction des droits de possession revendiqués par les Indiens, mais on a jugé que leurs prétentions étaient pleinement satisfaites en laissant chaque tribu utiliser, selon les exigences de la colonisation du pays, des parcelles suffisantes aux fins de l'agriculture et de l'élevage.

Les termes de cette lettre nous rappellent les commentaires formulés dans l'arrêt *United States v. Santa Fe Pacific R. Co.*[6], au sujet de l'extinction du titre indien:

> [TRADUCTION] Il n'est pas vrai non plus, comme le soutient l'intimée, que tout droit tribal sur quelque terre particulière doit être fondé sur un traité, sur une loi, ou sur quelque autre acte positif du gouvernement. Comme il a été déclaré dans l'arrêt *Cramer*, «le fait que pareil droit d'occupation n'est pas reconnu par quelque loi ou autre acte gouvernemental positif n'est pas concluant.» 261 U.S., p. 229.

L'extinction du titre indien fondé sur la possession aborigène, est, bien sûr, une autre question. Le pouvoir du Congrès à cet égard est suprême. Les formalités, méthode et époque de l'extinction soulèvent des questions politiques et non des questions dont les

[6] (1941), 314 U.S. 339 à la p. 347.

Railroad. As stated by Chief Justice Marshall in *Johnson v. M'Intosh*, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher v. Wetherby*, 95 U.S. 517, 525.

To the same effect are the reasons delivered in the Privy Council in *Re Southern Rhodesia*[7].

The Terms of Union under which British Columbia entered into Confederation with the Dominion of Canada are also of great significance in this problem. These terms were approved by Imperial Order in Council dated May 16, 1871, which has, under s. 146 of the *B.N.A. Act*, the force of an Imperial statute. Article 13 reads:

13. 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 between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

On the question of reserves, it is convenient to mention at this point, though it is out of chronological order, the McKenna-McBride Commission, its Report and the Dominion legislation which followed on its recommendations.

[7] [1919] A.C. 211.

tribunaux peuvent être saisis. *Buttz v. Northern Pacific Railroad*. Comme l'a dit le Juge en chef Marshall dans l'arrêt *Johnson v. M'Intosh*, «le droit exclusif qu'ont les États-Unis d'éteindre» le titre indien n'a jamais été contesté. Que l'extinction se fasse par traité, par les armes, par achat, par l'exercice d'une souveraineté complète allant à l'encontre du droit d'occupation ou autrement, le caractère juste ou injuste de cette mesure ne peut pas être examiné par les tribunaux. *Beecher v. Wetherby*, 95 U.S. 517, 525.

Les motifs rendus par le Conseil privé dans l'arrêt *in Re Southern Rhodesia*[7], sont au même effet.

Les conditions de l'Union en vertu desquelles la Colombie-Britannique est entrée dans la confédération sont également très importantes à cet égard. Ces conditions ont été approuvées par le décret impérial du 16 mai 1871, qui, en vertu de l'art. 146 de l'*Acte de l'Amérique du Nord britannique*, a le même effet qu'une loi impériale. L'article 13 se lit comme suit:

[TRADUCTION] 13. Le soin des Indiens, et la garde et l'administration des terres réservées pour leur usage et bénéfice, incomberont au Gouvernement Fédéral, et une ligne de conduite aussi libérale que celle suivie jusqu'ici par le gouvernement de la Colombie-Britannique sera continuée par le Gouvernement Fédéral après l'Union.

Pour mettre ce projet à exécution, des étendues de terres ayant la superficie de celles que le gouvernement de la Colombie-Britannique a, jusqu'à présent, affectées à cet objet, seront de temps à autre transférées par le Gouvernement Local au Gouvernement Fédéral au nom et pour le bénéfice des Indiens, sur demande du Gouvernement Fédéral; et dans le cas où il y aurait désaccord entre les deux gouvernements au sujet de la quantité des étendues de terre qui devront être ainsi concédées on devra en référer à la décision du Secrétaire d'État pour les Colonies.

En ce qui concerne les réserves, il est bon de mentionner ici, même si l'ordre chronologique n'est pas suivi, la commission McKenna-McBride, son rapport et les dispositions législatives fédérales qui ont suivi les recommandations de la commission.

[7] [1919] A.C. 211.

The Commission was established in 1913 to settle all differences between the Dominion and the Province of British Columbia respecting Indian lands and Indian affairs generally in the Province. Seven years later, the recommendations of this Commission were followed by Dominion legislation, 1920 (Can. 2nd Sess.), c. 51. This legislation is entitled "An Act to provide for the Settlement of Differences between the Governments of the Dominion of Canada and the Province of British Columbia respecting Indian Lands and certain other Indian Affairs in the said Province." It recites the establishment of the Commission, the receipt of its report and recommendations as to lands reserved and to be reserved for Indians in the Province of British Columbia, and otherwise for the settling of all differences between the said Governments respecting Indian lands and Indian affairs generally in the Province.

Section 2 of the Act reads:

2. To the full extent to which the Governor in Council may consider it reasonable and expedient the Governor in Council may do, execute, and fulfil every act, deed, matter or thing necessary for the carrying out of the said Agreement between the Governments of the Dominion of Canada and the Province of British Columbia according to its true intent, and for giving effect to the report of the said Royal Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.

The recommendations of the Commission resulted in the establishment of new or confirmation of old Indian reserves in the Nass area. They are over thirty in number. Frank Calder, one of the appellants, says that this was done over Indian objections. Nevertheless, the federal authority did act under its powers under s. 91(24) of the *B.N.A. Act*. It agreed, on behalf of the Indians, with the policy of establishing these reserves.

In the Indian Department there exists a Nass River Agency that administers the area in ques-

La commission a été établie en 1913 en vue de régler tout différend entre le Dominion et la Colombie-Britannique au sujet des terres et des affaires indiennes dans la province. Sept ans plus tard, les recommandations de cette commission ont été suivies par des dispositions législatives fédérales, 1920 (Can. 2e Sess.), c. 51. Cette loi porte l'intitulé suivant: «Loi statuant sur la solution des différends entre les gouvernements du Dominion du Canada et de la province de la Colombie-Britannique relativement aux terres et à certaines autres affaires des sauvages de ladite province.» Dans le préambule, il est question de l'établissement de la commission, de la présentation de son rapport et des recommandations faites au sujet des terres réservées ou devant l'être, pour le bénéfice des Indiens de la Colombie-Britannique, et en outre, du règlement de tout différend entre lesdits gouvernements relativement aux terres et affaires indiennes de la province.

L'article 2 de la loi se lit comme suit:

2. Dans la pleine mesure où il peut le juger nécessaire et opportun, le Gouverneur en conseil peut faire, exécuter et accomplir tout acte, contrat, ou toute chose indispensable à l'exécution dudit traité entre les gouvernements du Dominion du Canada et de la province de la Colombie-Britannique, selon son esprit véritable, et pour donner suite au rapport de ladite commission royale, en tout ou en partie, et pour la revision et la solution entière et finale de tous les différends entre lesdits gouvernements concernant les terres et les affaires des sauvages de la province.

Les recommandations de la Commission ont entraîné l'établissement de nouvelles réserves indiennes dans la région de la Nass ou la confirmation d'anciennes réserves dans cette région. Il en existe plus de trente. Frank Calder, l'un des appelants, dit que cela s'est fait malgré les objections des Indiens. Néanmoins, l'autorité fédérale a exercé son pouvoir en vertu de l'art. 91, par. (24), de l'*Acte de l'Amérique du Nord britannique*. Elle a accepté, pour le compte des Indiens, la politique consistant à établir ces réserves.

Au ministère des Affaires indiennes, il existe une agence de la Nass qui administre la région

tion. The reserves generally correspond with the fishing places that the Indians had traditionally used. The Government of the original Crown Colony and, since 1871, the Government of British Columbia have made alienations in the Nass Valley that are inconsistent with the existence of an aboriginal title. These have already been referred to and show alienations in fee-simple and by way of petroleum and natural gas leases, mineral claims and tree farm licences.

Further, the establishment of the railway belt under the Terms of Union is inconsistent with the recognition and continued existence of Indian title. Article 11 reads:

11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and, further, to secure the completion of such railway within ten years from the date of the Union.

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia (not to exceed, however, twenty (20) miles on each side of the said line), as may be appropriated for the same purpose by the Dominion Government from the public lands in the Northwest Territory and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any

en question. Les réserves correspondent généralement aux lieux de pêche que les Indiens avaient traditionnellement utilisés. Le gouvernement de ce qui fut d'abord une colonie de la Couronne, et depuis 1871, le gouvernement de la Colombie-Britannique ont passé des actes d'aliénation dans la vallée de la Nass, et qui vont à l'encontre de l'existence d'un titre aborigène. Ces aliénations, précitées, étaient des ventes en propriété absolue, des baux d'exploitation du pétrole et du gaz naturel, des concessions de claims miniers et de permis de ferme arboricole.

De plus, l'établissement de la ceinture ferroviaire, en vertu des conditions de l'Union, est incompatible avec la reconnaissance d'un titre indien et la continuation de l'existence de celui-ci. L'article 11 se lit comme suit:

[TRADUCTION] 11. Le gouvernement de la Puissance s'engage à faire commencer simultanément, dans les deux années de la date de l'Union, la construction d'un chemin de fer du Pacifique aux Montagnes-Rocheuses, et du point qui pourra être choisi, à l'est des Montagnes-Rocheuses, jusqu'au Pacifique, pour relier la côte maritime de la Colombie-Britannique au réseau des chemins de fer canadiens, et de plus à faire achever ce chemin de fer dans les dix années de la date de l'Union.

Et le gouvernement de la Colombie-Britannique convient de transférer au Gouvernement fédéral, à la charge d'en disposer de telle manière que le Gouvernement fédéral le jugera à propos dans l'intérêt de la construction de ce chemin de fer, une étendue de terres publiques, sur tout le parcours de ce chemin de fer dans la Colombie-Britannique, ne devant pas excéder, néanmoins, vingt (20) milles de chaque côté de cette ligne, semblable à celle qui pourra être affectée au même objet par le Gouvernement fédéral à même les terres publiques des territoires du Nord-Ouest et de la province du Manitoba; pourvu que la quantité de terre qui pourra être possédée en vertu d'un droit de préemption ou d'une concession de la Couronne, dans les limites de l'étendue de terre dans la Colombie-Britannique qui devra être ainsi cédée et transportée au Gouvernement fédéral, sera remplacée au bénéfice du Gouvernement fédéral à même les terres publiques avoisinantes; et pourvu aussi que jusqu'au commencement, sous deux ans de la date de l'Union, comme il est dit ci-haut, de la construction de ce chemin de fer, le gouvernement de la Colombie-

other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

Britannique ne vendra ni n'aliénera aucune nouvelle partie des terres publiques de la Colombie-Britannique d'aucune autre manière qu'en vertu du droit de préemption, en exigeant de celui qui exercera ce droit qu'il tienne feu et lieu sur la terre qu'il réclamera. En considération des terres ainsi cédées pour aider à la construction de ce chemin de fer, le Gouvernement fédéral convient de payer à la Colombie-Britannique, à dater de l'époque de l'Union, la somme de 100,000 piastres par année, en versements semestriels et d'avance.

There was no reservation of Indian rights in respect of the railway belt to be conveyed to the Dominion Government.

Il n'y avait aucune réserve au sujet des droits indiens relativement à l'emprise de chemin de fer qui devait être cédée au gouvernement fédéral.

From what I have already said, it is apparent that before 1871 there were no treaties between the Indian tribes and the Colony relating to lands on the mainland. From the material filed, it appears that on Vancouver Island there were, in all, fourteen purchases of Indian lands in the area surrounding Fort Victoria. These are the ones referred to in the correspondence between James Douglas and the Colonial Office. In 1899, Treaty No. 8 was negotiated and certain tribes of northeastern British Columbia were grouped with the Cree, Beaver, Chipewyan, Alberta and Northwest Territories' tribes, and included in the treaty. The area covered by this treaty is vast—both in the Northwest Territories and northeastern British Columbia. There can be no doubt that by this treaty the Indians surrendered their rights in both areas.

Il ressort de ce que j'ai déjà dit qu'avant 1871, il n'existait aucun traité entre les tribus indiennes et la colonie au sujet des terres continentales. D'après les pièces produites, il semble que sur l'île de Vancouver, il y a eu en tout quatorze achats de terres indiennes dans la région du fort Victoria. Ce sont là les achats dont il est question dans la correspondance entre James Douglas et le Colonial Office. En 1899, le traité nº 8 a été négocié et certaines tribus du nord-est de la Colombie-Britannique ont été jointes, dans le traité, aux tribus Cree, Beaver, Chipewyan, et à celles de l'Alberta et des territoires du Nord-Ouest. La région visée par ce traité est vaste, tant dans les territoires du Nord-Ouest qu'au nord-est de la Colombie-Britannique. Il est certain qu'en vertu de ce traité, les Indiens ont cédé leurs droits dans les deux régions.

The appellants submit that this treaty constituted a recognition of their rights by the Dominion in 1899. Whether this involved a recognition of similar rights over the rest of the Province of British Columbia is another matter. The territorial limitations of the treaty and the fact that the Indians of northeastern British Columbia were included with those in the Northwest Territories may have some significance. But the answer of the Province is still the same—that original Indian title had been extinguished in the Colony of British Columbia prior to Confederation and that there were no Indian

Les appelants soutiennent que ce traité constituait une reconnaissance de leurs droits par le Dominion en 1899. La question de savoir si cela comportait une reconnaissance de droits semblables sur le reste de la Colombie-Britannique est une autre affaire. Les limites territoriales énoncées dans le traité et le fait que les Indiens du nord-est de la Colombie-Britannique ont été joints à ceux qui habitaient les territoires du Nord-Ouest peuvent avoir une certaine importance. Mais la réponse de la province demeure la même: le titre original indien avait été éteint dans la colonie de la Colombie-Britannique

claims to transfer to the Dominion beyond those mentioned in Article 13 of the Terms of Union.

In the United States an issue closely comparable with the one now before us was dealt with in three fairly recent cases in the Supreme Court. These case are: *United States v. Alcea Band of Tillamooks et al.*[8]; *United States v. Alcea Band of Tillamooks et al.*[9]; *Tee-Hit-Ton Indians v. United States*[10].

In these cases the Indians were claiming compensation for the taking of their lands outside their reserves and not covered by any treaty. The facts in the first *Tillamooks* case were these: After creating a Government for the Territory of Oregon by Act of 1848, Congress in 1850 authorized the negotiation of treaties with Indian tribes in the area. The official designated by the legislation concluded a treaty providing for the cession of Indian lands in return for certain money payments, and the creation of a reservation which by the very terms of its creation might be subject to future diminution. This treaty was only to be operative upon ratification. It was not submitted to the Senate until 1857 and it was never ratified. The reservation itself in subsequent years was reduced in size either by executive order or Act of Congress in order to open up more land for public settlement. Eventually, in 1894 Congress approved of the reservation as it then existed, *i.e.*, at its reduced size, and from then on did not take reservation lands without compensation.

The Tillamooks tribe brought action against the United States under an Act of 1935, which gave the Court of Claims jurisdiction to hear and adjudicate cases involving any and all legal and equitable claims arising under or growing out of the original Indian title, claims or rights in

[8] (1946), 329 U.S. 40.
[9] (1951), 341 U.S. 48.
[10] (1955), 348 U.S. 272.

avant la Confédération et il n'y avait aucun droit indien à transporter au Dominion à part les droits dont il est fait mention à l'article 13 des conditions de l'Union.

Aux États-Unis, une question à peu près semblable à celle dont nous sommes ici saisis a été traitée dans trois arrêts assez récents de la Cour suprême. Il s'agit des arrêts suivants: *United States v. Alcea Band of Tillamooks et al.*[8]; *United States v. Alcea Band of Tillamooks et al.*[9]; *Tee-Hit-Ton Indians v. United States*[10].

Dans ces affaires, les Indiens demandaient une indemnité par suite de la prise de leurs terres, situées en dehors de leurs réserves et non visées par quelque traité. Les faits de la première affaire *Tillamooks* sont les suivants: après avoir créé un gouvernement dans le territoire de l'Orégon par la loi de 1848, le Congrès, en 1850, a autorisé la négociation de traités avec les tribus indiennes de la région. Le représentant désigné par la loi a conclu un traité stipulant la cession des terres indiennes en contrepartie de certaines sommes d'argent, et la création d'une réserve dont la superficie pouvait, par les termes mêmes de l'acte, être diminuée par la suite. Ce traité ne devait entrer en vigueur qu'au moment de sa ratification. Il n'a été présenté au Sénat qu'en 1857, et n'a jamais été ratifié. Au cours des années qui ont suivi, la superficie de la réserve elle-même a été diminuée soit par ordonnance de l'exécutif soit par loi du Congrès, en vue de permettre la colonisation d'étendues plus vastes. Finalement, en 1894, le Congrès a approuvé la réserve existant alors, d'une superficie réduite; depuis lors, il n'avait pris aucune terre réservée sans indemnisation.

La tribu des Tillamooks intenta une action contre les États-Unis en vertu de la loi de 1935, qui rendait la Court of Claims compétente pour entendre et décider les causes portant sur tous droits juridiques et en «equity» découlant des titre, droits et prétentions originaux indiens,

[8] (1946), 329 U.S. 40.
[9] (1951), 341 U.S. 48.
[10] (1955), 348 U.S. 272.

the lands described in the unratified treaties. The judgment of the majority was that on proof of their original Indian title to the designated lands, and that their interest in these lands was taken without their consent and without compensation, the Tillamooks were entitled to recover compensation without showing that the original Indian title was ever formally recognized by the United States.

This was the first time that such a claim had been accepted and paid for in the United States. There had been previous cases where lands which had been reserved for Indians pursuant to treaty had been taken by the United States without the consent of the Indians. Such cases were *Shoshone Tribe of Indians v. United States*[11], and *United States v. Klamath and Moadoc Tribes of Indians*[12].

In *Shoshone* the Indians, by a treaty made in 1868, had a reservation set apart for their exclusive use. Ten years later the Commissioner of Indian Affairs settled another band of Indians on the reservation and from then on treated the two tribes as equal beneficiaries of the reservation. Acts of Congress subsequently adopted the policy initiated by the Commissioner. The Shoshones protested for a long time against this invasion of their rights, and eventually, in 1927, secured from Congress a jurisdictional Act which permitted them to claim compensation for the taking of an undivided one-half interest in their tribal lands.

In view of the subsequent developments in the *Tillamooks* and *Tee-Hit-Ton* cases, the basis of the award for compensation is of great interest. The Shoshones were awarded not only the value of their property rights at the time of taking, but also such additional amount as might be necessary to award just compensation, "the increment to be measured either by interest on the value or by such other standard as might be

[11] (1937), 299 U.S. 476.

[12] (1938), 304 U.S. 119.

relativement à des biens-fonds décrits dans les traités non ratifiés. La majorité décida que dès lors que l'on faisait la preuve de leur titre original indien sur les terres désignées, et que l'on établissait que leur intérêt dans celles-ci avait été éteint sans leur consentement et sans indemnisation, les Tillamooks avaient le droit d'obtenir une indemnité sans établir que le titre original indien avait déjà été positivement reconnu par les États-Unis.

C'était la première fois que pareille réclamation était accueillie et que les États-Unis payaient. Il y avait déjà eu des causes dans lesquelles des terres réservées aux Indiens en conformité d'un traité avaient été prises par les États-Unis sans le consentement de ceux-là; soit les affaires *Shoshone Tribe of Indians v. United States*[11], et *United States v. Klamath and Moadoc Tribes of Indians*[12].

Dans l'affaire *Shoshone*, les Indiens, par un traité conclu en 1868, avaient obtenu qu'une réserve soit mise à part pour leur usage exclusif. Dix ans plus tard, le commissaire des affaires indiennes établissait une autre bande d'Indiens sur la réserve; dès lors, il considéra les deux tribus comme bénéficiaires à part égale de la réserve. Des lois subséquentes du Congrès adoptèrent la ligne de conduite établie par le commissaire. Les Shoshones protestèrent longtemps contre cet empiétement sur leurs droits, et finalement, en 1927, ils obtinrent du Congrès une loi attributive de juridiction les autorisant à réclamer une indemnité pour la prise d'une moitié indivise de leurs terres tribales.

Étant donné ce qui advint dans les affaires subséquentes *Tillamooks* et *Tee-Hit-Ton*, le fondement de l'indemnité est d'un grand intérêt. Les Shoshones ont reçu non seulement la valeur de leurs droits de propriété au moment de la prise des terres, mais également tout montant additionnel nécessaire à une juste indemnisation, [TRADUCTION] «le montant additionnel devant être déterminé soit par l'intérêt sur la

[11] (1937), 299 U.S. 476.

[12] (1938), 304 U.S. 119.

suitable in the light of all the circumstances".

In the *Klamath* case, a similar award was made for the taking of part of their reserve.

The significance of the *Tillamooks* case is that the Court held that the principle of awarding compensation for the taking of Indian Reserves applied equally to claims arising out of original Indian title. The *ratio* of the majority appears in the following paragraph from the reasons of Vinson C.J.:

> Nor do other cases in this Court lend substance to the dichotomy of "recognized" and "unrecognized" Indian title which petitioner urges. Many cases recite the paramount power of Congress to extinguish the Indian right of occupancy by methods the justice of which "is not open to inquiry in the courts." *United States v. Sante Fe Pacific R. Co., supra* at 347. Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title. Furthermore, some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what petitioner would call "recognized" title; yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of "recognized" title. We think the same rule applicable to a taking of original Indian title. "Whether this tract . . . was properly called a reservation . . . or unceded Indian country, . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota v. Hitchcock*, 185 U.S. 373, 388-89 (1902).

Mr. Justice Black agreed with the majority in the result but was of the opinion that the legislation of 1935, which permitted the bringing of the action, also created the obligation on the

valeur, soit par tout autre critère approprié compte tenu de l'ensemble des circonstances.»

Dans l'arrêt *Klamath*, un jugement semblable a été rendu par suite de la prise d'une partie d'une réserve.

L'arrêt *Tillamooks* est important en ce sens que la Cour a décidé que le principe consistant à indemniser lorsqu'il y avait prise de réserves indiennes, s'appliquait également aux réclamations découlant d'un titre original indien. L'alinéa suivant des motifs du Juge en chef Vinson semble reproduire le raisonnement de la majorité:

> [TRADUCTION] Et les autres arrêts de cette Cour ne tiennent pas compte de cette dichotomie entre titre indien «reconnu» et titre indien «non reconnu» qu'invoque le requérant. Dans de nombreux arrêts, il est question du pouvoir suprême du Congrès d'éteindre le droit indien d'occupation par des méthodes dont le caractère juste ou injuste «ne peut pas être examiné par les tribunaux». *United States v. Santa Fe Pacific R. Co.*, précité, p. 347. A défaut d'une loi permettant la tenue d'une enquête judiciaire. ces termes ne sauraient être contestés lorsque des Indiens réclament une indemnité à la suite de la prise de leurs terres; mais ici, dans la loi de 1935, le Congrès a autorisé les tribunaux à se prononcer sur les réclamations découlant d'un titre original indien. De plus, dans certains arrêts, il est question du pouvoir illimité du Congrès relativement aux terres indiennes détenues en vertu de ce que le requérant appelle un titre «reconnu»; or, il ne fait pas de doute que, dès lors que les États-Unis autorisent des poursuites, il est possible d'obtenir une indemnité par suite de la prise forcée, sans indemnisation, de terres sujettes à un titre «reconnu». Nous croyons que la même règle s'applique à la prise d'une terre grevée d'un titre original indien. «Que cette parcelle . . . ait à juste titre été appelée une réserve . . . ou un territoire indien non cédé, . . . importe peu . . . le droit d'occupation des Indiens a toujours été considéré comme sacré; comme une chose qui ne doit pas être prise sans le consentement des Indiens et sans donner la contrepartie qui est convenue.» *Minnesota v. Hitchcock*, 185 U.S. 373, 388-89 (1902).

M. le Juge Black souscrivait à l'avis de la majorité quant à la décision à rendre mais il était d'avis que la loi de 1935, autorisant l'introduction d'une instance, créait également l'obli-

part of the Government to pay the Tillamooks for all lands for which their ancestors held an "original Indian title". Three judges dissented. They would have dismissed the claim for the reasons summarized in the following paragraph:

> As we are of the opinion that the jurisdictional act permitted judgment only for claims arising under or growing out of the original Indian title and are further of the opinion that there were no legal or equitable claims that grew out of the taking of this Indian title, we would reverse the judgment of the Court of Claims and direct that the bill of the respondents should be dismissed. Cf. *Shoshone Indians v. United States*, 324 U.S. 335.

The original *Tillamooks* case cannot be dealt with without its sequel, *United States v. Alcea Band of Tillamooks et al.*[13] In the interval the Court of Claims had heard evidence on the amount of recovery and had given judgment for the value of the lands as of 1855, plus interest from that date. On appeal to the Supreme Court, the award of interest was unanimously set aside. The ground for this decision was that the special jurisdictional Act of 1935 did not expressly provide for the payment of interest, the only exception to this rule being when the taking entitles the claimant to just compensation under the Fifth Amendment:

> Looking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under the Fifth Amendment. And, since the applicable jurisdictional Act, 49 Stat. 801 (1935), contains no provision authorizing an award of interest, such award must be reversed.

This, to me, amounts to an affirmance of the opinion of Mr. Justice Black, above noted, that the jurisdictional Act of 1935 created the obligation to pay. In the first *Tillamooks* case, the majority had clearly said that there was no difference between compensation for the taking of reserves (*Shoshone* and *Klamath*) and for

[13] (1951), 341 U.S. 48.

gation, pour le gouvernement, d'indemniser les Tillamooks à l'égard de toutes les terres sur lesquelles leurs ancêtres avaient détenu un «titre original indien». Trois juges étaient dissidents. Ils auraient rejeté la réclamation pour les motifs énoncés dans l'alinéa suivant:

> [TRADUCTION] Étant donné que nous sommes d'avis que la loi attributive de juridiction permet uniquement qu'un jugement soit rendu à l'égard de réclamations découlant du titre original indien, et que nous sommes de plus d'avis qu'il n'existait aucun droit juridique ou en «equity» découlant de la prise des terres sujettes à ce titre indien, nous infirmerions le jugement de la Court of Claims et ordonnerions le rejet de la demande des intimés. Cf. *Shoshone Indians v. United States*, 324 U.S. 335.

La première affaire *Tillamooks* ne peut pas être examinée sans l'autre, l'affaire *United States v. Alcea Band of Tillamooks et al.*[13], qui en fut la suite. Dans l'intervalle, la Court of Claims avait entendu les témoignages au sujet du montant de l'indemnité et accordé un montant équivalent à la valeur qu'avaient les terres en 1855, plus l'intérêt couru depuis lors. Lors de l'appel à la Cour suprême, le jugement relatif à l'intérêt fut infirmé à l'unanimité. Le motif à la base de cette décision était que la loi particulière de 1935 n'édictait pas expressément le paiement d'un intérêt, la seule exception à cette règle étant le cas où la prise autorise le réclamant à recevoir une juste indemnité en vertu du cinquième Amendement:

> [TRADUCTION] Si nous examinons les avis antérieurs en l'espèce, nous constatons qu'aucun ne dit que l'indemnisation est fondée sur une expropriation visée par le cinquième Amendement. Et, étant donné que la loi applicable, 49 Stat. 801, (1935), ne renferme aucune disposition autorisant l'attribution d'un intérêt, pareille attribution doit être infirmée.

A mon sens, cela équivaut à une confirmation de l'avis exprimé par le Juge Black, précité, que la loi attributive de juridiction de 1935 créait l'obligation de payer. Dans la première affaire *Tillamooks*, la majorité avait clairement dit qu'il n'existait aucune différence entre une indemnité découlant de la prise de réserves (arrêts *Shos-*

[13] (1951), 341 U.S. 48.

claims under original Indian title, and that both claims came under the Fifth Amendment. The second *Tillamooks* case receded from this position and held that the claim had to be dealt with under the legislation of 1935 and not under the Fifth Amendment.

The next case is *Tee-Hit-Ton Indians v. United States*[14]. The United States had taken certain timber from Alaskan lands which the Indians said belonged to them. They asked for compensation. In this case compensation claimed did not arise from any statutory direction to pay. The petition was founded on the Fifth Amendment and the aboriginal claim against the lands upon which the timber stood. The suit was one which could be brought as a matter of procedure under a jurisdictional Act of 1946 permitting suits for Indian claims accruing after that date. The Court held that the recovery in the *Tillamooks* case (329 U.S. 40) and (341 U.S. 48) was based upon a statutory direction to pay for the aboriginal title in the special jurisdictional Act for the purpose of equalizing the Tillamooks with the neighbouring tribes and not that there had been a compensable taking under the Fifth Amendment.

Again, I say this was, in effect, an adoption of the opinion of Mr. Justice Black in the *Tillamooks* case that the basis of recovery was statutory.

The relevant portion of the Fifth Amendment provides as follows:

> nor shall private property be taken for public use, without just compensation.

The finding of the Court in the second *Tillamooks* case was therefore that aboriginal title did not constitute private property compensable under the Amendment.

[14] (1955), 348 U.S. 272.

hone et *Klamath*) et celle découlant de réclamations en vertu d'un titre original indien, et que les deux réclamations étaient visées par le cinquième Amendement. Dans la seconde affaire *Tillamooks*, la cour n'a pas pris cette position et a décidé que la réclamation devait être décidée selon la loi 1935 et non pas selon le cinquième Amendement.

L'autre arrêt est celui rendu dans l'affaire *Tee-Hit-Ton Indians v. United States*[14]. Les États-Unis avaient pris le bois de terres boisées de l'Alaska, lesquelles, d'après les Indiens, appartenaient à ceux-ci. Les Indiens ont demandé une indemnité. En l'espèce, l'indemnité réclamée ne découlait d'aucune obligation légale de payer. La requête était fondée sur le cinquième Amendement et sur le droit aborigène grevant les terres sur lesquelles se trouvaient les arbres. La poursuite pouvait être engagée en vertu d'une loi de 1946 autorisant les poursuites ayant trait aux réclamations indiennes nées après cette date. La Cour décida que dans l'arrêt *Tillamooks*, (329 U.S. 40) et (341 U.S. 48), l'indemnité était fondée sur une obligation statutaire d'acquitter le titre aborigène visé dans la loi attributive spéciale, en vue d'accorder la même protection aux Tillamooks qu'aux tribus voisines, et non pas sur une prise de terres pouvant faire l'objet d'une indemnisation en vertu du cinquième Amendement.

Encore une fois, j'estime qu'on se trouvait ainsi à adopter l'avis exprimé par le Juge Black dans l'arrêt *Tillamooks*, soit que le fondement de l'indemnité se trouvait dans une loi.

Le passage pertinent du cinquième Amendement édicte ce qui suit:

> [TRADUCTION] et aucune propriété privée ne sera prise à des fins publiques sans une juste indemnisation.

Dans le second arrêt *Tillamooks*, la cour a donc conclu que le titre aborigène ne constituait pas une propriété privée pouvant faire l'objet d'une indemnisation en vertu de l'Amendement.

[14] (1955), 348 U.S. 272.

This position is spelled out in the *Tee-Hit-Ton* case. In the opinion of the Court, at p. 279, in discussing the nature of aboriginal Indian title, it is said:

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

We were not referred to any cases subsequent to *Tee-Hit-Ton* on the problem of compensation for claims arising out of original Indian title. The last word on the subject from the Supreme Court of the United States is, therefore, that there is no right to compensation for such claims in the absence of a statutory direction to pay. An *Indian Claims Commission Act* was, in fact, passed by Congress in 1946. I note the concluding paragraph in the reasons for judgment in *Tee-Hit-Ton*. In my opinion, it has equal application to the appeal now before us:

> In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.

Cette position est énoncée clairement dans l'arrêt *Tee-Hit-Ton*. Au sujet de la nature du titre aborigène indien, la cour exprime l'avis suivant, p. 279:

> [TRADUCTION] Il ne s'agit pas d'un droit de propriété, mais en quelque sorte, d'un droit d'occupation que le Souverain accorde et qu'il protège contre l'empiétement par des tiers; mais le souverain peut éteindre ce droit d'occupation et peut vendre les terres sans encourir d'obligation juridiquement exécutoire d'indemniser les Indiens.

A mon avis, en la présente espèce, l'autorité souveraine a décidé d'exercer sur les terres en litige une suprématie complète contraire à tout droit d'occupation de la tribu nishga lorsque, par une loi, elle a ouvert ces terres à la colonisation à l'exception des réserves mises de côté aux fins de l'occupation indienne.

On n'a invoqué aucun arrêt postérieur à l'arrêt *Tee-Hit-Ton* en ce qui concerne le problème de l'indemnisation résultant de réclamations fondées sur un titre original indien. Par conséquent, la Cour suprême des États-Unis a en dernier lieu décidé qu'il n'existe aucun droit d'indemnisation par suite de pareilles réclamations à défaut d'une obligation statutaire de payer. Le *Indian Claims Commission Act* a de fait été adopté par le Congrès en 1946. Je note le dernier alinéa des motifs de jugement rendus dans l'affaire *Tee-Hit-Ton*. A mon avis, il s'applique également à l'appel dont nous sommes ici saisis:

> [TRADUCTION] Étant donné l'histoire des relations indiennes en ce pays, la seule mesure à prendre, compte tenu de la croissance des États-Unis, serait que le Congrès fasse des contributions à l'égard des terres indiennes plutôt que de soumettre le gouvernement à l'obligation de payer la valeur au moment de la prise, avec intérêt jusqu'à la date du paiement. Notre conclusion ne se veut pas dure à l'égard des Indiens, mais elle laisse le Congrès, qui devrait avoir compétence en la matière, déterminer la ligne de conduite à établir en ce qui concerne les prestations d'extinction de l'occupation indienne sur les terres du gouvernement, et évite de faire de l'indemnisation fondée sur la valeur des terres un principe constitutionnel rigide.

For the foregoing reasons I have reached the conclusion that this action fails and that the appeal should be dismissed.

There is the further point raised by the respondent that the Court did not have jurisdiction to make the declaratory order requested because the granting of a fiat under the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, was a necessary prerequisite to bringing the action and it had not been obtained. While it is not necessary, in view of my conclusion as to the disposition of this appeal, to determine this point, I am in agreement with the reasons of my brother Pigeon dealing with it.

I would dismiss the appeal and would make no order as to costs.

The judgment of Hall, Spence and Laskin JJ. was delivered by

HALL J. (*dissenting*)—This appeal raises issues of vital importance to the Indians of northern British Columbia and, in particular, to those of the Nishga tribe. The Nishga tribe has persevered for almost a century in asserting an interest in the lands which their ancestors occupied since time immemorial. The Nishgas were never conquered nor did they at any time enter into a treaty or deed of surrender as many other Indian tribes did throughout Canada and in southern British Columbia. The Crown has never granted the lands in issue in this action other than a few small parcels later referred to prior to the commencement of the action.

The claim as set out in the statement of claim reads as follows:

WHEREFORE the Plaintiffs claim a declaration that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished.

The Attorney General of Canada, although given notice under the *Constitutional Questions*

Pour les motifs ci-dessus énoncés, j'en suis venu à la conclusion que l'action ne peut être accueillie et que l'appel devrait être rejeté.

L'intimé a soulevé une autre question: la Cour ne serait pas compétente pour rendre l'ordonnance déclaratoire demandée parce qu'avant d'engager l'action, il fallait obtenir une autorisation en vertu du *Crown Procedure Act*, R.S.B.C., 1960, c. 89, et que celle-ci n'a pas été obtenue. Bien qu'il ne soit pas nécessaire, étant donné la conclusion à laquelle j'en suis venu, de statuer sur ce point, je souscris aux motifs exprimés par mon collègue le Juge Pigeon à cet égard.

Je suis d'avis de rejeter l'appel et de ne rendre aucune ordonnance relativement aux dépens.

Le jugement des Juges Hall, Spence et Laskin a été rendu par

LE JUGE HALL (*dissident*)—Le présent appel soulève des questions ayant une importance vitale pour les Indiens du nord de la Colombie-Britannique et, en particulier, pour ceux de la tribu des Nishgas. La tribu des Nishgas persiste depuis presque un siècle à faire valoir un droit dans certains biens-fonds, à la suite de l'occupation immémoriale de ceux-ci par leurs ancêtres. Les Nishgas n'ont jamais été conquis et n'ont conclu aucun traité ou acte de cession, contrairement à plusieurs autres tribus indiennes à travers le Canada et au sud de la Colombie-Britannique. Avant l'introduction de l'instance, la Couronne n'avait jamais concédé les biens-fonds qui sont en litige, à l'exception des quelques petites parcelles dont il sera plus loin question.

La réclamation formulée dans la déclaration se lit comme suit:

[TRADUCTION] PAR CONSÉQUENT, les demandeurs réclament une déclaration suivant laquelle le titre aborigène, autrement dit titre indien, qu'ils détiennent sur leur ancien territoire tribal ci-dessus décrit, n'a jamais été juridiquement éteint.

Bien qu'un avis lui ait été donné en vertu du *Constitutional Questions Determination Act*,

Determination Act, R.S.B.C. 1960, c. 72, elected not to intervene in the action (ex. 3).

It was stated and agreed to by counsel at the hearing in this Court that Parliament had not taken any steps or procedures to extinguish the Indian right of title after British Columbia entered Confederation. The appeal was argued on this basis and on the representation of counsel that no constitutional question was involved.

Consideration of the issues involves the study of many historical documents and enactments received in evidence, particularly exs. 8 to 18 inclusive and exs. 25 and 35. The Court may take judicial notice of the facts of history whether past or contemporaneous: *Monarch Steamship Co. Ltd. v. A/B Karlshamms Oljefabriker*[15], at p. 234, and the Court is entitled to rely on its own historical knowledge and researches: *Read v. Lincoln*[16], Lord Halsbury at pp. 652-4.

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species. This concept of the original inhabitants of America led Chief Justice Marshall in his otherwise enlightened judgment in *Johnson v. McIntosh*[17], which is the outstanding judicial pronouncement on the subject of Indian rights to say, "But the tribes of Indians inhabiting this country were fierce savages whose occupation was war . . ." We now know that that assessment was ill-founded. The Indians did in fact at times engage in some tribal wars but war was not their vocation and it can be said that their

[15] [1949] A.C. 196.

[16] [1892] A.C. 644.

[17] (1823), 8 Wheaton 543, 21 U.S. 240.

R.S.B.C. 1960, c. 72, le procureur général du Canada a décidé de ne pas intervenir dans l'action (Pièce n° 3).

A l'audition devant cette Cour, les avocats ont affirmé et convenu que le Parlement n'avait pris aucune mesure en vue d'éteindre le titre indien après l'entrée de la Colombie-Britannique dans la Confédération. L'appel a été plaidé sur cette base et en se fondant sur la déclaration des avocats qu'aucune question constitutionnelle n'était en jeu.

L'examen des questions en litige comporte l'étude des nombreux documents historiques et textes législatifs versés au dossier, particulièrement les pièces 8 à 18 inclusivement et les pièces 25 et 35. La Cour peut prendre judiciairement connaissance des faits historiques, tant passés que contemporains: *Monarch Steamship Co. Ltd. v. A/B Karlshamms Oljefabriker*[15], p. 234; elle a le droit de se fonder sur ses propres connaissances historiques ainsi que sur les recherches qu'elle a faites à cet égard: *Read v. Lincoln*[16], Lord Halsbury, pp. 652-4.

Il faut aborder la question de l'appréciation et de l'interprétation des documents historiques et des textes législatifs versés au dossier en se fondant sur les recherches et connaissances actuelles sans tenir compte des anciens concepts formulés à une époque où la compréhension des coutumes et de la culture des aborigènes de notre pays était rudimentaire et incomplète et où l'on pensait qu'ils étaient sans cohésion, lois ou culture et constituaient de fait une espèce inférieure. Cette idée que l'on se faisait des premiers habitants de l'Amérique a amené le Juge en chef Marshall à dire, dans le jugement par ailleurs éclairé qu'il a rendu dans l'affaire *Johnson v. McIntosh*[17], jugement qui a fait autorité de façon éminente en matière de droits indiens: [TRADUCTION] «Mais les tribus indiennes habitant ce pays étaient composées de féroces sauvages dont l'occupation consistait à faire la guerre . . .» Nous savons maintenant

[15] [1949] A.C. 196.

[16] [1892] A.C. 644.

[17] (1823), 8 Wheaton 543, 21 U.S. 240.

preoccupation with war pales into insignificance when compared to the religious and dynastic wars of "civilized" Europe of the 16th and 17th centuries. Marshall was, of course, speaking with the knowledge available to him in 1823. Chief Justice Davey in the judgment under appeal, with all the historical research and material available since 1823 and notwithstanding the evidence in the record which Gould J. found was given "with total integrity" said of the Indians of the mainland of British Columbia:

> . . . They were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property.

In so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before.

The case was tried in part upon written admissions, including the following:

> 1. The Defendant admits that the Plaintiff Frank Calder is the President of the Nishga Tribal Council and that the Plaintiffs James Gosnell, Nelson Azak, William McKay, Anthony Robinson, Robert Stevens, Hubert Doolan and Henry McKay are the officers of the Nishga Tribal Council.
>
> 6. The Defendant admits that the bands referred to in paragraphs 2, 3, 4 and 5 of the Statement of Claim are the descendants of Indians who have inhabited since time immemorial the area delineated in the map annexed hereto and signed by counsel for the Plaintiffs and the Defendant.
>
> 7. The Defendant admits that the ancestors of persons referred to in paragraphs 2, 3, 4 and 5 of the Statement of Claim in this action had obtained a living since time immemorial from the lands and waters delineated in the map annexed hereto.

Paragraphs 6 and 7 constitute the basis of the claim founded on possession from time

que cette appréciation n'était pas fondée. Les Indiens ont de fait parfois participé à certaines guerres tribales, mais ce n'était pas là leur vocation et l'on peut dire que leur préoccupation guerrière était peu importante en comparaison des guerres religieuses et dynastiques qui ont ravagé l'Europe «civilisée» des 16e et 17e siècles. Les paroles du Juge Marshall étaient bien sûr fondées sur l'état des connaissances en 1823. Dans le jugement *a quo*, le Juge en chef Davey, ayant eu à sa disposition toute la recherche et tous les documents historiques depuis 1823 et malgré la preuve versée au dossier, qui, selon le Juge Gould, a été présentée [TRADUCTION] «avec une intégrité complète», a dit ce qui suit au sujet des Indiens de la Colombie-Britannique continentale:

> [TRADUCTION]. . . Au moment de la colonisation, ils formaient sans aucun doute un peuple très primitif, connaissant peu les institutions d'une société civilisée, et aucune de nos notions de propriété privée.

En formulant ce commentaire en 1970, il appréciait la culture indienne de 1858 en se servant des normes que les Européens avaient appliquées aux Indiens de l'Amérique du Nord deux siècles ou plus auparavant.

La cause a été entendue en partie sur la base de certaines déclarations écrites, y compris les déclarations suivantes:

> [TRADUCTION] 1. Le défendeur reconnaît que le demandeur Frank Calder est président du conseil de la tribu des Nishgas et que les demandeurs James Gosnell, Nelson Azak, William McKay, Anthony Robinson, Robert Stevens, Hubert Doolan et Henry McKay sont les représentants du conseil de la tribu des Nishgas.
>
> 6. Le défendeur reconnaît que les bandes mentionnées aux paragraphes 2, 3, 4 et 5 de la déclaration sont composées des descendants des Indiens qui ont habité de temps immémorial la région délimitée sur le plan ci-joint, signé par l'avocat des demandeurs et par celui du défendeur.
>
> 7. Le défendeur reconnaît que les ancêtres des personnes mentionnées aux paragraphes 2, 3, 4 et 5 de la déclaration produite au soutien de la présente action vivaient, de temps immémorial, des terres et cours d'eau indiqués sur le plan ci-joint.

Les paragraphes 6 et 7 constituent le fondement de la réclamation, basée sur la possession immé-

immemorial. Further admissions were made at the trial as follows:

> MR. BERGER: The Defendant has admitted that the plaintiffs are the officers of the Nishga Tribal Council and members of the Band Councils of each of the bands. The Defendant has also admitted that these bands are the descendants of Indians who have inhabited since time immemorial the area delineated in the map annexed hereto, prepared by Professor Wilson Duff of U.B.C., which has been signed by Counsel for the Plaintiff and Counsel for the Defendant. The Defendant also admits that the ancestors of the persons who are members of the band in the Naas River today had obtained a living since time immemorial from the lands and waters delineated in the map.
>
> The admissions of fact have been signed by my friend, Mr. Brown.

THE COURT: That will be exhibit 1.

The map referred to by Mr. Berger was received in evidence as ex. 2 and the lands in question in this action are those delineated in ex. 2. This is the map referred to in para. 6 of the admissions previously quoted.

All the area outlined in ex. 2 is now internationally recognized as being in Canada, but Canadian sovereignty over part (the greater part of Pearce Island) was not confirmed until the United States-Canadian boundary was fixed by the Alaskan Boundary Commission in 1903. This historical fact cannot be overlooked in considering whether, as the respondent alleges, the Indian right or title, if any, was extinguished between 1858 and when British Columbia entered Confederation in 1871.

The boundary line separating the Territory of Alaska from the Province of British Columbia was in doubt at the time of Confederation. This is borne out by a petition from the Legislative Assembly of British Columbia dated March 12, 1872, which reads in part as follows:

moriale. Lors du procès, d'autres déclarations ont été faites:

> [TRADUCTION] Me BERGER: Le défendeur a reconnu que les demandeurs sont les représentants du conseil de la tribu des Nishgas et sont membres des conseils de chacune des bandes. Le défendeur a également reconnu que ces bandes sont composées des descendants des Indiens qui ont habité, de temps immémorial, la région délimitée sur le plan ci-joint, dressé par le professeur Wilson Duff, de l'université de la Colombie-Britannique, et signé par l'avocat du demandeur et par celui du défendeur. Le défendeur reconnaît également que les ancêtres des membres de la bande vivant sur les bords de la Naas à l'heure actuelle, vivaient, de temps immémorial, des terres et cours d'eau indiqués sur le plan.
>
> L'exposé des faits reconnus a été signé par mon collègue, Me Brown.

LA COUR: Ce sera la pièce 1.

Le plan mentionné par Me Berger a été versé au dossier comme pièce nº 2 et les biens-fonds qui sont en cause dans la présente action sont ceux qui sont délimités dans la pièce nº 2. Il s'agit du plan dont il est fait mention au paragraphe 6 de l'exposé, précité.

Il est maintenant internationalement reconnu que toute la région délimitée dans la pièce nº 2 fait partie du Canada, mais la souveraineté du Canada sur une partie de cette région (la majeure partie de l'île Pearce) n'a été confirmée qu'au moment où la frontière canado-américaine a été fixée par la Alaskan Boundary Commission en 1903. Il faut tenir compte de ce fait historique en déterminant si, comme l'allègue l'intimé, le droit ou titre des Indiens, s'il en est, a été éteint entre 1858 et le moment où la Colombie-Britannique est entrée dans la Confédération en 1871.

La frontière séparant le territoire de l'Alaska de la province de la Colombie-Britannique n'était pas bien établie au moment de la Confédération. On trouve une confirmation de ce fait dans une pétition de l'assemblée législative de la Colombie-Britannique, datée du 12 mars 1872, laquelle se lit partiellement comme suit:

. . . inasmuch as the boundary line between the adjoining Territory of Alaska and the said Province of British Columbia has never been properly defined, and insomuch as it will materially assist in maintaining peace, order, and good government within the said Province, to have the boundary line properly laid down—to take such steps as may call the attention of the Dominion Government to the necessity of some action being taken at an early date, to have the boundary line properly defined.

This was followed by attempts to have the boundary line surveyed and there followed extensive communications between the Governments of the United States and of England but no definite action was taken to settle the boundary until a treaty was signed in Washington on January 24, 1903, setting up the Alaska Boundary Commission charged with fixing the boundary.

The appellant Calder described the area as follows:

Q. Can you tell his lordship whether the Nishgas today make use of the lands and waters outlined in the map, exhibit 2?

A. Put it this way, in answer to your question, from time immemorial the Nishgas have used the Naas River and all its tributaries within the boundaries so submitted, the lands in Observatory Inlet, the lands in Portland Canal, and part of Portland Inlet. We still hunt within those lands and fish in the waters, streams and rivers, we still do, as in time past, have our campsites in these areas and we go there periodically, seasonally, according to the game and the fishing season, and we still maintain these sites and as far as we know, they have been there as far back as we can remember.

We still roam these territories, we still pitch our homes there whenever it is required according to our livelihood and we use the land as in times past, we bury our dead within the territory so defined and we still exercise the privilege of free men within the territory so defined.

Q. Mr. Calder, do you know whether the Indian tribes that live in the area adjacent to the territory outlined in the map, exhibit 2, acknowledged the rights of the Nishga people within the territory?

A. Yes, we have a very friendly relationship within the neighbouring tribes to the extent the Nish-

[TRADUCTION] . . . étant donné que la frontière entre le territoire adjacent de l'Alaska et ladite province de la Colombie-Britannique n'a jamais été fixée d'une façon précise, et étant donné que la délimitation exacte de la frontière aidera considérablement à maintenir la paix, l'ordre et le bon gouvernement dans ladite province, de faire des démarches aux fins d'attirer l'attention du gouvernement du Dominion sur la nécessité de prendre des mesures le plus tôt possible en vue de fixer la frontière d'une façon précise.

On a ensuite tenté de faire le relevé de la frontière; puis, il y a eu de longs pourparlers entre les gouvernements américain et anglais, mais aucune mesure précise n'a été prise en vue de régler la question de la frontière jusqu'à ce qu'un traité ait été signé à Washington le 24 janvier 1903, en vertu duquel était créée la Alaska Boundary Commission responsable de la délimitation de la frontière.

L'appelant Calder a décrit la région comme suit:

[TRADUCTION] Q. Pouvez-vous dire à Sa Seigneurie si actuellement les Nishgas utilisent les terres et cours d'eau indiqués sur le plan, pièce 2?

R. Disons ceci en réponse à votre question, de temps immémorial, les Nishgas ont utilisé la Naas et tous ses affluents à l'intérieur des limites ainsi définies, les terres du Observatory Inlet, celles du canal Portland, et une partie du Portland Inlet. Nous chassons encore sur ces terres et nous pêchons dans les cours d'eau, ruisseaux et rivières, comme dans le passé, nous campons dans ces régions et nous nous y rendons périodiquement, suivant la saison, en suivant les saisons de chasse et de pêche, nous entretenons encore ces lieux, et, à notre connaissance, ils ont toujours été là.

Nous parcourons encore ces territoires, nous y campons encore chaque fois que cela est requis selon notre mode de vie, et nous utilisons les terres comme dans le passé, nous enterrons nos morts dans le territoire délimité et nous y exerçons encore le privilège des hommes libres.

Q. Monsieur Calder, savez-vous si les tribus indiennes qui vivent dans la région adjacente au territoire délimité sur le plan, pièce 2, ont reconnu les droits du peuple Nishga dans les limites de ce territoire?

R. Oui, nous avons des relations très amicales avec les tribus voisines, au point que les Nishgas sont

gas have even allowed historical rights within the area, like the famous candle fish.

Q. On the map there is a line circling part of the Naas River—
A. Just above Naas Bay. You are referring to this?

Q. No, I am referring to the circle, the dotted line that encircles the Naas River just above Naas Bay.
A. Yes.

THE COURT: That is where it encircles the Naas River?

THE WITNESS: Just above Naas Bay, above and opposite and below. Northeast, I should say, my lord.

MR. BERGER:

Q. Does that circle indicate the Ooligchan grounds?
A. Yes.

Q. Are the rights of any other tribes besides the Nishga people recognized there?
A. The Port Simpson people, the Tsimshian tribes have their own locations in which they have their supply of Ooligchans.

The area described by Calder covers all the lands outlined in ex. 2 other than a small parcel granted by the Government of British Columbia for the townsite of Stewart as well as tree farm license No. 1 and possibly some mineral leases and timber dispositions of indefinite duration. These parcels total but a fraction of the area in ex. 2. The appellants now make no claim in respect of these parcels but it will be noted that in paras. 19, 20 and 21 of the statement of claim the appellants allege as follows:

19. No part of the said territory was ever ceded to or purchased by Great Britain or the United Kingdom, and no part of the said territory was ever ceded to or purchased by the Colony of British Columbia.

20. No part of the said territory has been ceded to or purchased by the Crown in right of the Province of British Columbia and no part thereof has been purchased from the said Nishga tribe or the Plaintiffs or

allés jusqu'à reconnaître des droits historiques dans les limites de la région, par exemple le fameux poisson-chandelle.

Q. Sur le plan se trouve une ligne encerclant une partie de la Naas—
R. Juste au-dessus de la baie Naas. C'est ceci que vous voulez dire?

Q. Non, je veux dire le cercle, la ligne pointillée qui encercle la Naas juste au-dessus de la baie Naas.
R. Oui.

LA COUR: C'est là où elle encercle la Naas?

LE TÉMOIN: Juste au-dessus de la baie Naas, au-dessus, de l'autre côté et au-dessous. Au nord-est, je dirais, Votre Seigneurie.

Me BERGER:

Q. Ce cercle indique-t-il l'emplacement des pêches de Ooligchans?
R. Oui.

Q. Les droits des autres tribus, à part les Nishgas, sont-ils reconnus à cet endroit?
R. Les gens de Port Simpson, les tribus Tshimshian ont leurs propres emplacements où elles trouvent les Ooligchans dont elles ont besoin.

La région décrite par Calder englobe toutes les terres délimitées dans la pièce nº 2 sauf une petite parcelle concédée par le gouvernement de la Colombie-Britannique pour l'emplacement de la ville de Stewart de même que le permis de ferme aboricole nº1 et peut-être quelques baux miniers et aliénations relatives à l'abattage des arbres, d'une durée indéfinie. Ces parcelles ne représentent qu'une fraction de la région indiquée dans la pièce nº 2. Les appelants ne font ici aucune réclamation à l'égard de ces parcelles mais il est bon de noter qu'aux paragraphes 19, 20 et 21 de la déclaration, ils allèguent ce qui suit:

[TRADUCTION] 19. Aucune partie dudit territoire n'a été cédée ou vendue à la Grande-Bretagne ou au Royaume-Uni, et aucune partie dudit territoire n'a été cédée ou vendue à la colonie de la Colombie-Britannique.

20. Aucune partie dudit territoire n'a été cédée ou vendue à la Couronne du chef de la province de la Colombie-Britannique et aucune partie dudit territoire n'a été achetée de ladite tribu des Nishgas, des

any of them by the Crown or by any person acting on behalf of the Crown, at a public meeting or assembly or otherwise, or by any person whomsoever.

21. The Plaintiffs say that the Land Act and other statutes of the Province of British Columbia do not apply to the lands comprising the tribal territory of the Nishga tribe so as to confer any title or interest in the said lands unencumbered by the aboriginal title of the Nishga tribe, and that if the Land Act and other statutes of the Province of British Columbia have purported to purport to confer any title or interest unencumbered by the aboriginal title of the Nishga tribe, in any of the land comprising the tribal territory of the Nishga nation, the same are ultra vires the Province of British Columbia.

Paragraph 21 alleges that any disposition by the Province of British Columbia purporting to have been made under the *Land Act* or other statutes of the Province are *ultra vires* the Province and also by paras. 1 and 2 of the reply the appellants plead that all the proclamations and enactments set out and referred to in paras. 12 and 13 of the statement of defence were *ultra vires* the Colony of British Columbia and of the Province of British Columbia.

The nature of the title of the interest being asserted on behalf of the Nishgas was stated in evidence by Calder in cross-examination as follows:

From time immemorial the Naas River Nishga Indians possessed, occupied and used the Naas Valley, Observatory Inlet, and Portland Inlet and Canal, and within this territory the Nishgas hunted in its woods, fished in its waters, streams and rivers. Roamed, hunted and pitched their tents in the valleys, shores and hillsides. Buried their dead in their homeland territory. Exercised all the privileges of free men in the tribal territory. The Nishgas have never ceded or extinguished their aboriginal title within this territory.

which is actually a quotation from ex. 7.

demandeurs ou de l'un d'eux par la Couronne ou par quelque autre personne représentant la Couronne, lors d'une séance ou d'une assemblée publique ou autrement, ou par quelque personne que ce soit.

21. Les demandeurs affirment que le Land Act et les autres lois de la Colombie-Britannique ne s'appliquent pas aux biens-fonds comprenant le territoire tribal des Nishgas de façon à conférer quelque titre ou droit dans lesdits biens-fonds sans qu'ils soient grevés du titre aborigène de la tribu des Nishgas, et que si le Land Act et les autres lois de la province de la Colombie-Britannique visent à conférer quelque titre ou intérêt, sans que les biens-fonds soient grevés du titre aborigène de la nation nishga, dans l'un quelconque des biens-fonds comprenant le territoire tribal de la nation nishga, la province de la Colombie-Britannique n'était pas compétente pour adopter ces dispositions.

Le paragraphe 21 allègue que toute aliénation par la province de la Colombie-Britannique censée faite en vertu du *Land Act* ou d'autres lois de la province est *ultra vires*; de plus, aux paragraphes 1 et 2 de la réponse, les appelants prétendent que toutes les proclamations et dispositions législatives énoncées et mentionnées aux paragraphes 12 et 13 de la défense sont *ultra vires*, qu'elles aient été adoptées par la colonie de la Colombie-Britannique ou par la province de la Colombie-Britannique.

La nature du titre afférent aux droits que l'on fait valoir au nom des Nishgas a été exposée comme suit par Calder dans son contre-interrogatoire:

[TRADUCTION] De temps immémorial, les Nishgas de la Naas possédaient, occupaient et utilisaient la vallée de la Naas, le Observatory Inlet, et le Portland Inlet ainsi que le Canal Portland; dans les limites de ce territoire, les Nishgas chassaient dans les bois, pêchaient dans les cours d'eau, ruisseaux et rivières. Ils se déplaçaient, ils chassaient et dressaient leurs tentes dans les vallées, sur les grèves et sur les collines. Ils enterraient leurs morts dans le territoire qu'ils habitaient. Ils exerçaient tous les privilèges des hommes libres sur le territoire tribal. Les Nishgas n'ont jamais cédé ou éteint leur titre aborigène dans les limites de ce territoire.

Il s'agit en fait d'une citation tirée de la pièce nº 7.

When asked to state the nature of the right being asserted and for which a declaration was being sought, counsel for the appellants described it as "an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada." The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation. The issue here is whether any right or title the Indians possess as occupants of the land from time immemorial has been extinguished. They ask for a declaration that there has been no extinguishment. The precise nature and value of that right or title would, of course, be most relevant in any litigation that might follow extinguishment in the future because in such an event, according to common law, the expropriation of private rights by the government under the prerogative necessitates the payment of compensation: *Newcastle Breweries Ltd. v. The King*[18]. Only express words to that effect in an enactment would authorize a taking without compensation. This proposition has been extended to Canada in *Montreal v. Montreal Harbour Commission*[19]. The principle is so much part of the common law that it even exists in time of war as was made clear in *Attorney General v. DeKeyser's Royal Hotel*[20], and *Burmah Oil Co. v. Lord Advocate*[21]. This is not a claim to title in *fee* but is in the nature of an equitable title or interest, (see *Cherokee Nation v. State of Georgia*[22]) a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right.

[18] [1920] 1 K.B. 854.

[19] [1926] A.C. 299.

[20] [1920] A.C. 508.

[21] [1965] A.C. 75.

[22] (1831), 5 Peters 1, 30 U.S. 1.

Lorsqu'on lui a demandé qu'elle était la nature du droit que l'on faisait valoir et à l'égard duquel une déclaration était demandée, l'avocat des appelants l'a décrite comme étant [TRADUCTION] «un droit grevant le titre de la Couronne; un droit de la nature d'un usufruit; un droit tribal inaliénable, sauf à la Couronne, et pouvant s'éteindre uniquement par une disposition législative du Parlement du Canada.» Il n'est pas nécessaire de préciser la nature et l'étendue exactes du droit ou titre indien dans le présent litige. Il s'agit ici de déterminer si le droit ou titre que les Indiens ont en leur qualité d'occupants des biens-fonds depuis des temps immémoriaux a été éteint. Ils demandent une déclaration qu'il ne l'a pas été. La nature et la valeur précise de ce droit ou titre serait, bien sûr, une question essentielle dans tout litige pouvant survenir après l'extinction de ce droit ou titre à l'avenir, parce qu'en pareil cas, selon la common law, l'expropriation de droits privés par le gouvernement en vertu de la prérogative nécessite le paiement d'une indemnité: *Newcastle Breweries Ltd. v. The King*[18]. Seuls des termes exprès à cet effet dans une disposition législative autoriseraient une expropriation sans indemnisation. Cette règle a été appliquée au Canada dans l'arrêt *Montreal v. Montreal Harbour Commission*[19]. C'est un principe qui fait partie de la common law à un point tel qu'il existe même en temps de guerre, comme on l'a clairement décidé dans les arrêts *Attorney General v. DeKeyser's Royal Hotel*[20], et *Burmah Oil Co. v. Lord Advocate*[21]. La demande ne vise pas un titre de propriété en soi, mais plutôt, son objet est analogue à un titre ou droit en «equity», (voir *Cherokee Nation v. State of Georgia*[22]) à un usufruit et à un droit d'occupation de biens-fonds et de jouissance de fruits de la terre, de la forêt et de rivières et cours d'eau ne niant absolument pas le titre suprême de la Couronne reconnu par le droit des gens. Les Nishgas ne contestent pas non plus le droit qu'a la Couronne fédérale d'éteindre ce titre. Ils allè-

[18] [1920] 1 K.B. 854.

[19] [1926] A.C. 299.

[20] [1920] A.C. 508.

[21] [1965] A.C. 75.

[22] (1831), 5 Peters 1, 30 U.S. 1.

The essence of the action is that such rights as the Nishgas possessed in 1858 continue to this date. Accordingly, the declaratory judgment asked for implies that the *status quo* continues and this means that if the right is to be extinguished it must be done by specific legislation in accordance with the law.

The right to possession claimed is not prescriptive in origin because a prescriptive right presupposes a prior right in some other person or authority. Since it is admitted that the Nishgas have been in possession since time immemorial, that fact negatives that anyone ever had or claimed prior possession.

The Nishgas do not claim to be able to sell or alienate their right to possession except to the Crown. They claim the right to remain in possession themselves and to enjoy the fruits of that possession. They do not deny the right of the Crown to dispossess them but say the Crown has not done so. There is no claim for compensation in this action. The action is for a declaration without a claim for consequential relief as contemplated by British Columbia Marginal Rule 285 quoted later. However, it must be recognized that if the Nishgas succeed in establishing a right to possession, the question of compensation would remain for future determination as and when proceedings to dispossess them should be taken. British Columbia's position has been that there never was any right or title to extinguish, and alternatively, that if any such right or title did exist it was extinguished in the period between 1858 and Confederation in 1871. The respondent admits that nothing has been done since Confederation to extinguish the right or title.

guent qu'ils possèdent un droit d'occupation contre tous, sauf la Couronne, et que la Couronne n'a pas encore légalement éteint ce droit. L'essence de l'action vise à faire reconnaître que les droits que les Nishgas possédaient en 1858 se sont perpétués jusqu'à l'heure actuelle. Par conséquent, le jugement déclaratoire demandé implique le maintien du *statu quo*, et cela veut dire que si le droit doit être éteint, il faut que cela se fasse au moyen d'une disposition législative précise, en conformité du droit.

Le droit de possession revendiqué ne peut pas se prescrire, à l'origine, parce qu'un droit prescriptible présuppose un droit antérieur de quelque autre personne ou autorité. Étant donné qu'il est reconnu que les Nishgas ont possédé les biens-fonds de temps immémorial, ce fait nie la possibilité que quelque personne ait déjà eu ou revendiqué une possession antérieure.

Les Nishgas ne revendiquent pas la possibilité de vendre ou d'aliéner leur droit de possession, sauf à la Couronne. Ils revendiquent le droit de conserver la possession des biens-fonds et de jouir des fruits de ceux-ci. Ils ne nient pas le droit de la Couronne de les en déposséder, mais ils disent que la Couronne ne l'a pas encore fait. Ils ne réclament aucune indemnité dans la présente action. Il s'agit ici d'une action intentée en vue d'obtenir une déclaration judiciaire, mais on ne demande pas en plus un redressement propre à donner suite à la déclaration, comme le prévoit la règle marginale 285 de la Colombie-Britannique, citée plus loin. Toutefois, il faut reconnaître que si les Nishgas réussissent à établir un droit de possession, la question de l'indemnisation resterait à déterminer si des procédures en vue de les déposséder étaient ultérieurement engagées. La Colombie-Britannique prétend, elle, qu'il n'y a jamais eu de droit ou de titre à éteindre, et subsidiairement, que si quelque droit ou titre semblable a déjà existé, il a été éteint au cours de la période qui s'est écoulée entre 1858 et 1871, année de la Confédération. L'intimé reconnaît que depuis la Confédération, rien n'a été fait en vue d'éteindre le droit ou titre.

The appellants do challenge the authority of British Columbia to make grants in derogation of their rights, but because the grants made so far in respect of Nishga lands are so relatively insignificant the appellants have elected to ignore them while maintaining that they were *ultra vires*.

Unlike the method used to make out title in other contexts, proof of the Indian title or interest is to be made out as a matter of fact. In *Amodu Tijani v. Secretary, Southern Nigeria*[23], Lord Haldane said at pp. 402 to 404:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. *There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.* As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. *A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached.* But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. (*St. Catherine's Milling and Lumber Company v. The Queen* (1889), 14 App. Cas. 46.) But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate

[23] [1921] 2 A.C. 399.

Les appelants contestent le pouvoir de la Colombie-Britannique d'accorder des concessions en dépit de leurs droits, mais, étant donné que les concessions accordées jusqu'à maintenant sur les terres Nishga sont d'importance relativement minime, les appelants ont décidé de n'en pas tenir compte tout en soutenant qu'elles sont *ultra vires*.

Contrairement à la méthode utilisée en d'autres contextes en vue de déterminer s'il existe un titre, il faut prouver l'existence du titre ou droit des Indiens en se fondant sur des faits. Dans l'arrêt *Amodu Tijani v. Secretary, Southern Nigeria*[23], Lord Haldane a dit, pp. 402 à 404:

[TRADUCTION] En premier lieu, Leurs Seigneuries veulent faire remarquer qu'en déterminant la nature du titre des indigènes sur des biens-fonds non seulement au Nigéria du sud, mais en d'autres parties de l'Empire britannique, il est essentiel de se montrer extrêmement prudent. *On a tendance, parfois inconsciemment, à concevoir ce titre selon des termes ne s'appliquant bien qu'aux systèmes fondés sur le droit anglais. Mais il faut contrôler étroitement cette tendance.* Règle générale, dans les divers systèmes de droit aborigène à travers l'Empire on ne retrouve pas la distinction complète qui existe entre la propriété et la possession et avec laquelle les avocats anglais sont familiers. *Une forme très habituelle de titre chez les aborigènes est l'usufruit, simple restriction ou charge sur le titre radical ou final du Souverain, le cas échéant. Le titre du Souverain n'est alors qu'un pur intérêt juridique, auquel peuvent se joindre ou non des droits de propriété réels.* Mais cet intérêt est restreint par le droit de l'usager bénéficiaire, lequel ne prend pas nécessairement une forme précise analogue à un droit de propriété ou peut, lorsqu'il prend pareille forme, découler de l'introduction de la jurisprudence anglaise par simple analogie. Leurs Seigneuries ont déjà énoncé ailleurs des principes de ce genre, relativement au titre que les Indiens ont sur les réserves canadiennes. (*St. Catherine's Milling and Lumber Company v. The Queen* (1889), 14 App. Cas. 46.) Mais le titre des Indiens du Canada ne constitue aucunement le seul exemple de la nécessité de se débarrasser de la présomption que la propriété immobilière se subdivise naturellement en droits distincts, conçus comme créés en vertu de principes juridiques inhérents. Même lorsque le droit de propriété absolue

[23] [1921] 2 A.C. 399.

imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

(Emphasis added.)

The appellant Calder who is a member of the Legislature of British Columbia testified as follows:

Q. Are you on the band list?
A. I am.

Q. Would you tell his lordship where you were born?
A. I was born in Naas Bay, near the mouth of the Naas River.

Q. Where were you raised?
A. I was raised at Naas Bay and mostly at Greenville.

Q. Were your parents members of the Greenville Indian Band?
A. Yes they are.

Q. Going back beyond your own parents, are you able to say whether your forefathers lived on the Naas River?
A. Yes, they did.

Q. Now, Mr. Calder, are you a member of the Nishga Tribe?

est clairement reconnu comme étant de droit immobilier le plus complet en droit, il ne s'ensuit pas qu'en dehors de l'Angleterre, il puisse se fractionner. En Écosse, le fait de détenir un bien en viager ne comporte aucun titre de franche propriété; selon le droit écossais, il s'agit simplement d'une charge sur un droit de pleine propriété ne pouvant pas se diviser. En Inde, un principe à peu près identique s'applique. Il n'existe aucune division du droit de propriété en droits incorporels de propriété successifs et distincts, conçus comme existant indépendamment de la possession. En Inde, comme au sud du Nigéria, il faut avoir à l'esprit un autre aspect de la nature fondamentale du titre immobilier. Le titre même peut ne pas appartenir au particulier, contrairement à ce qui est presque toujours le cas dans notre pays, d'une façon ou d'une autre, mais peut appartenir plutôt à une collectivité. Pareille collectivité peut détenir un titre possessionnel à la jouissance commune d'un usufruit, et par certaines de ses coutumes accorder en même temps à chacun de ses membres la jouissance du bien-fonds, et même le droit de transmettre cette jouissance par cession entre vifs ou succession. Pour voir jusqu'à quel point ce droit a évolué, il faut dans chaque cas étudier l'histoire de la collectivité en question, ainsi que ses usages. Les principes abstraits établis *a priori* sont peu utilisés et sont plus souvent qu'autrement trompeurs.

(J'ai mis des mots en italique.)

L'appelant Calder, membre de la législature de la Colombie-Britannique, a témoigné comme suit:

[TRADUCTION] Q. Ëtes-vous sur la liste de bande?
R. Oui.

Q. Pouvez-vous dire à Sa Seigneurie où vous êtes né?
R. Je suis né à la baie Naas, près de l'embouchure de la Naas.

Q. Où avez-vous été élevé?
R. J'ai été élevé à la baie Naas, et surtout à Greenville.

Q. Vos parents étaient-ils membres de la bande des Indiens de Greenville?
R. Oui, ils le sont.

Q. Si l'on remonte à vos ascendants, pouvez-vous dire si vos ancêtres vivaient sur la Naas?

R. Oui, ils vivaient à cet endroit.

Q. Ëtes-vous membre de la tribu des Nishgas?

A. Yes, I am.

Q. What Indians compose the Nishga Tribe?

A. The Nishga Indians that live in the four inlets of the Naas River.

Q. What are the names of the four Indians?

A. Kincolith.

Q. Kincolith?

A. That's correct, Greenville, Canyon City and Aiyansh.

Q. Can you tell his lordship, Mr. Calder, whether all of the Indians who live in the four communities on the Naas River are members of the Nishga Tribe?

A. Yes, they are members of the Nishga Tribe.

Q. Do you include not only the men and women but the children as well?

A. Yes.

Q. What language do the members of the Nishga Tribe speak?

A. They speak Nishga, known as Nishga today.

Q. Is that language related to any other languages that are spoken on the North Pacific Coast?

A. It is not the exact—our neighbouring two tribes, we more or less understand each other, but Nishga itself is in the Naas River, and there is no other neighbouring tribe that has that language.

Q. What are the names of the two neighbouring tribes who have a limited understanding of your language?

A. Gitskan and Tsimshian.

Q. Do you regard yourself as a member of the Nishga Tribe?

A. Yes, I do.

Q. Do you know if the Indian people who are members of the four Indian bands on the Naas River regard themselves as members of the Nishga Tribe?

A. Yes, they do.

Q. Apart from their language, do they share anything else in common?

A. Besides the language they share our whole way of life.

. . . . . .

R. Oui, je le suis.

Q. De quels Indiens se compose la tribu des Nishgas?

R. Des Indiens nishga qui habitent les quatre anses de la Naas.

Q. Quels sont les noms des quatre?

R. Kincolith.

Q. Kincolith?

R. C'est exact, Greenville, Canyon City et Aiyansh.

Q. Pouvez-vous dire à Sa Seigneurie, monsieur, si tous les Indiens qui habitent les quatre agglomérations situées sur la Naas sont membres de la tribu des Nishgas?

R. Oui, ils le sont.

Q. Voulez-vous dire non seulement les adultes, de sexe masculin ou féminin, mais également les enfants?

R. Oui.

Q. Quelle langue les membres de la tribu des Nishgas parlent-ils?

R. Ils parlent le nishga, connu à l'heure actuelle, sous le nom de langue nishga.

Q. Cette langue s'apparente-t-elle à quelque autre langue de la côte nord du Pacifique?

R. Ce n'est pas tout à fait—les deux tribus voisines, nous nous comprenons plus ou moins, mais le nishga lui-même se parle sur la Naas, et aucune autre tribu voisine ne parle cette langue.

Q. Quels sont les noms des deux tribus voisines qui comprennent un peu votre langue?

R. Gitskan et Tsimshian.

Q. Considérez-vous que vous faites partie de la tribu des Nishgas?

R. Oui.

Q. Savez-vous si les Indiens qui sont membres des quatre bandes indiennes de la Naas considèrent qu'ils font partie de la tribu des Nishgas?

R. Oui, ils se considèrent tels.

Q. Indépendamment de leur langue, ont-ils autre chose en commun?

R. A part la langue, ils ont exactement le même mode de vie.

. . . . . .

Q. Now, Mr. Calder, I am showing you exhibit 2, which is a map Mr. Brown and I have agreed upon. Does the territory outlined in the map constitute the ancient territory of the Nishga people?

A. Yes, it does.

Q. Have the Nishga people, Mr. Calder, ever surrendered their aboriginal title to the land in exhibit 2?

A. They have not.

THE COURT: Isn't that what I have to decide?

MR. BERGER: I don't think the—

MR. BROWN: My friend can ask him what he knows. I think your lordship has summed it up correctly.

THE COURT: That earlier question you phrased, would you repeat it please?

MR. BERGER: The ancient territory of the Nishga people.

THE COURT: Your next question was objected to.

MR. BROWN: I don't object to it, if my friend is using his question in the sense of have there been documents or treaties under which they have surrendered some right. That is a legitimate fact, I think; I withdraw my objection to that extent.

MR. BERGER:

Q. You have told the court you were born and raised in the Naas Valley and you were a member of the Nishga Tribe. Are you in fact the President of the Nishga Tribal Council?

A. I am the elected President.

Q. Have you been President of the Nishga Tribal Council since 1955?

A. Yes, since its formation. I have been elected annually as President of the Council, yes.

Q. Are you acquainted with the territory outlined in the map, exhibit 2?

A. Yes.

Q. Have the Nishga people ever signed any document or treaty surrendering their aboriginal title to the territory outlined in the map, exhibit 2?

A. The Nishgas have not signed any treaty or any document that would indicate extinguishment of the title.

Gosnell, Chief Councillor of the Gitlakdamix band, said:

Q. Et maintenant, monsieur Calder, je vais vous montrer la pièce 2, un plan que Me Brown et moi-même avons reconnu. Le territoire indiqué sur le plan constitue-t-il l'ancien territoire des Nishgas?

R. Oui.

Q. Les Nishgas ont-ils abandonné leur titre aborigène sur le bien-fonds indiqué dans la pièce 2?

R. Non.

LA COUR: N'est-ce pas là ce sur quoi je dois me prononcer?

Me BERGER: Je ne crois pas que—

Me BROWN: Mon collègue peut lui demander ce qu'il sait. Je crois que la remarque de Votre Seigneurie est juste.

LA COUR: Pourriez-vous répéter la question antérieure s.v.p.?

Me BERGER: L'ancien territoire des Nishgas.

LA COUR: On s'est opposé à la question suivante.

Me BROWN: Je ne m'y oppose pas, si mon collègue utilise cette question pour déterminer s'il y a eu des documents ou des traités en vertu desquels ils ont abandonné quelque droit. C'est là une question légitime, à mon sens; je retire mon objection dans cette mesure.

Me BERGER:

Q. Vous avez dit à la Cour que vous étiez né et aviez été élevé dans la vallée de la Naas et que vous êtes membre de la tribu des Nishgas. Êtes-vous de fait président du conseil tribal des Nishgas?

R. J'ai été élu président.

Q. Êtes-vous président du conseil tribal des Nishgas depuis 1955?

R. Oui, depuis sa formation. J'ai été élu annuellement président du conseil, oui.

Q. Connaissez-vous le territoire indiqué sur le plan, pièce 2?

R. Oui.

Q. Les Nishgas ont-ils déjà signé quelque document ou traité abandonnant leur titre aborigène sur le territoire indiqué sur le plan, pièce 2?

R. Les Nishgas n'ont signé aucun traité ni aucun document indiquant que leur titre est éteint.

Monsieur Gosnell, premier conseiller de la bande Gitlakdamix, a témoigné comme suit:

Q. Mr. Gosnell, have the Nishga people ever signed any treaty or document giving up their Indian title to the lands and the waters comprised in the area delineated on the map Exhibit 2 which I am showing you?

A. No.

MR. BROWN: I think I can save my friend some trouble, I think the Attorney-General is prepared to say while denying there is such a thing as an Indian title in the area, that the inhabitants never did give up or purport to give up that right.

The witnesses McKay, Nyce and Robinson confirmed the evidence of Calder and Gosnell.

W. E. Ireland, Archivist for British Columbia, produced the private papers of Governor Douglas as well as despatches between the Secretary of State for the Colonies and Governor Douglas and many other historic documents, including the Nishga petition to the Privy Council in 1913. There were received in evidence extracts from testimony given at hearings of two Royal Commissions, the first being in 1888 when David MacKay, speaking for the Nishgas, said in part:

David Mackay—what we don't like about the Government is their saying this: "We will give you this much land". How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land; we are not like white

[TRADUCTION] Q. Le peuple nishga a-t-il déjà signé quelque traité ou document abandonnant son titre indien sur les terres et cours d'eau compris dans la région délimitée sur le plan, pièce 2. que voici?

R. Non.

Me BROWN: Je crois que je peux épargner certaines démarches à mon collègue, je crois que le procureur général est disposé à dire, tout en niant qu'il existe un titre indien sur la région, que les habitants n'ont jamais abandonné ou prétendu abandonner ce droit.

Les témoins McKay, Nyce et Robinson ont confirmé les témoignages de Calder et de Gosnell.

Monsieur W. E. Ireland, archiviste de la province de la Colombie-Britannique, a produit certains documents personnels du Gouverneur Douglas ainsi que des missives entre le secrétaire d'État pour les Colonies et le Gouverneur Douglas, de même que de nombreux autres documents historiques, y compris la pétition adressée par les Nishgas au Conseil privé en 1913. On a versé au dossier des extraits de témoignages donnés lors des auditions de deux commissions royales, la première remontant à 1888 lorsque David Mackay, parlant au nom des Nishgas, a dit entre autres ce qui suit:

[TRADUCTION] David Mackay—voilà ce que nous n'aimons pas à propos du gouvernement, il dit: «Nous vous donnerons des terres de telle superficie». Comment peuvent-ils nous les donner puisqu'elles nous appartiennent? Nous ne pouvons pas le comprendre. Ils ne les ont jamais achetées de nous ou de nos ancêtres. Ils n'ont jamais combattu et conquis notre peuple et pris les terres de cette façon, et malgré tout, ils disent maintenant qu'ils nous donneront des terres de telle superficie, nos propres terres. Ces chefs ne parlent pas à l'aveuglette, ils savent que les terres leur appartiennent; nos ancêtres ont possédé les terres de toute cette région depuis des générations; les chefs avaient leurs propres terrains de chasse, leurs pêches de saumon, et leurs cueillettes de fruits; il en a toujours été ainsi. Ce n'est pas uniquement au cours des quatre ou cinq dernières années que nous connaissons ces terres; nous les connaissons depuis toujours et elles nous ont toujours appartenu; ce n'est là rien de nouveau, elles nous appartiennent depuis plusieurs générations. Si nous ne les connaissions que depuis vingt ans et que nous les réclamions, cela

people who live in towns and have their stores and other business, getting their living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land.

At the second Royal Commission hearing in 1915 (the McKenna-McBride Commission), Gideon Minesque for the Nishgas said:

We haven't got any ill feelings in our hearts but we are just waiting for this thing to be settled and we have been waiting for the last five years—we have been living here from time immemorial—it has been handed down in legends from the old people and that is what hurts us very much because the white people have come along and taken this land away from us. I myself am an old man and as long as I have lived, my people have been telling me stories about the flood and they did not tell me that I was only to live here on this land for a short time. We have heard that some white men, it must have been in Ottawa; this white man said that they must be dreaming when they say they own the land upon which they live. It is not a dream—we are certain that this land belongs to us. Right up to this day the government never made any treaty, not even to our grandfathers or our great-grandfathers.

Wilson Duff, associate professor of anthropology at the University of British Columbia, testified as to the nature of the Nishga civilization and culture in great detail. The trial judge said of this witness and of Dr. Ireland: "Drs. Ireland and Duff are scholars of renown, and authors in the field of Indian history, and records", and on the question of credibility, he said:

I find that all witnesses gave their respective testimony as to facts, opinions, and historical and other documents, with total integrity. Thus there is no issue of credibility as to the witnesses in this case, and an appellate court, with transcript and exhibits in hand,

n'aurait aucun sens, mais elles nous appartiennent depuis des milliers d'années. Si quelque étranger venait ici et ne connaissait ces terres que depuis vingt ans et les réclamait, cela n'aurait aucun sens. Nous avons toujours vécu de ces terres; nous ne sommes pas comme les Blancs qui vivent dans les villes et ont leurs magasins et d'autres commerces, et vivent de cette façon; nous avons toujours été à la merci des terres pour nous nourrir et nous habiller; ce sont ces terres qui nous fournissent les saumons, fruits, et fourrures nécessaires.

A l'audition de la seconde Commission royale en 1915 (la Commission McKenna-McBride), Gideon Minesque, de la tribu des Nishgas, a dit ce qui suit:

[TRADUCTION] Nous n'avons aucun ressentiment, mais nous attendons uniquement que cette question soit réglée et cela, depuis les derniers cinq ans—nous avons vécu ici de temps immémorial—d'après les légendes, ces terres nous ont été transmises par nos ancêtres, et c'est ce qui nous blesse énormément, parce que les Blancs sont venus et nous ont enlevé ces terres. Je suis moi-même un vieil homme, et tout le temps que j'ai vécu, mon peuple m'a parlé de la crue des eaux, il ne m'a pas dit que je devais vivre ici, sur ces terres, quelque temps seulement. On nous a dit que certains Blancs, cela doit s'être passé à Ottawa; un Blanc a dit qu'ils doivent rêver lorsqu'ils disent que les terres sur lesquelles ils vivent leur appartiennent. Ce n'est pas un rêve—nous sommes certains que ces terres nous appartiennent. Jusqu'à maintenant, le gouvernement n'a conclu aucun traité, pas même avec nos grands-parents ou nos arrière-grands-parents.

Wilson Duff, professeur adjoint d'anthropologie de l'Université de la Colombie-Britannique, a témoigné longuement au sujet de la nature de la civilisation et de la culture nishgas. Le juge de première instance a dit ce qui suit au sujet de ce témoin et au sujet du docteur Ireland: [TRADUCTION] «Les docteurs Ireland et Duff sont des intellectuels reconnus, ils ont rédigé des écrits ayant trait à l'histoire indienne, et des dossiers». Quant à la question de la crédibilité, il a dit ce qui suit:

[TRADUCTION] Je conclus que tous les témoins ont respectivement déposé, relativement aux faits, opinions, et documents historiques ou autres, avec une intégrité complète. Par conséquent, aucune question ne se pose au sujet de la crédibilité des témoins en la

would be under no comparative disadvantage in evaluating the evidence from not having heard the witnesses in personam.

Dr. Duff is the author of vol. I of *The Indian History of British Columbia* published by the Government of British Columbia and admitted in evidence as ex. 25. Dr. Duff testified as follows, quoting from ex. 25 and related quotations applicable to the Nishgas:

Q. Did you, Professor Duff, in fact prepare for counsel the map that has been marked Exhibit 2 in this case?

A. Yes, I did.

Q. Are you familiar with the anthropological history of the Indian people who inhabited the area delineated in the map and the surrounding areas?

A. Yes, I am.

Q. Who has, since time immemorial, inhabited the area delineated on the map?

A. The Nishga Indians.

Q. Can you tell the Court what position the Indians in the areas adjacent to that delineated on the map took regarding the occupancy of the Nishga Tribe of that area?

A. All of the surrounding tribes knew the Nishga as the homogeneous group of Indians occupying the area delineated on the map. They knew of them collectively under the term Nishga. They knew that they spoke their own dialect, that they occupied and were owners of that territory and they respected these tribal boundaries of the territory.

Q. By the tribal boundaries do you mean the boundaries delineated on the map?

A. Yes.

. . . . .

Q. Now, are you able to tell the Court whether the Nishga Tribe made use of the land and the waters delineated on the map beyond the limits of the reserve that appear on this map in the McKenna-McBride report?

A. Yes.

présente espèce; une cour d'appel ayant à sa disposition les transcriptions et pièces ne serait comparativement pas dans une situation plus désavantageuse en ce qui concerne une appréciation de la preuve, même si elle n'a pas entendu personnellement les témoins.

Le docteur Duff est l'auteur du volume I de l'ouvrage intitulé *Indian History of British Columbia*, publié par le gouvernement de la Colombie-Britannique et versé comme pièce 25. Se fondant sur la pièce 25 et sur des citations connexes applicables aux Nishgas, le docteur Duff a témoigné comme suit:

[TRADUCTION] Q. Professeur, avez-vous de fait dressé, pour le bénéfice des avocats, le plan versé comme pièce 2 en la présente espèce?

R. Oui.

Q. Connaissez-vous l'histoire anthropologique des peuples indiens qui habitaient la région délimitée sur le plan et les régions voisines?

R. Oui.

Q. Qui a habité la région délimitée sur le plan de temps immémorial?

R. Les Nishgas.

Q. Pouvez-vous dire à la Cour quelle position ont pris les Indiens des régions adjacentes à celle qui est délimitée sur le plan, relativement à l'occupation de cette région par la tribu des Nishgas?

R. Toutes les tribus voisines savaient que les Nishgas formaient le groupe homogène d'Indiens occupant la région délimitée sur le plan. Ils les connaissaient collectivement sous le nom de Nishgas. Ils savaient qu'ils parlaient leur propre dialecte, qu'ils occupaient ce territoire et qu'ils en étaient propriétaires et ils respectaient les limites tribales du territoire.

Q. Par limites tribales, voulez-vous dire les limites indiquées sur le plan?

R. Oui.

. . . . .

Q. Pouvez-vous dire à la Cour si la tribu des Nishgas utilisait les terres et cours d'eau indiqués sur le plan, au-delà des limites de la réserve figurant sur ce plan dans le rapport McKenna-McBride?

R. Oui.

Q. Is there any significance to the location of the reserves on the Portland Canal and Observatory Inlet and the Nass River?

A. Yes, I think that I can say that in many cases these small reserves were located, for example, on the Portland Canal at the mouth of the tributary stream, at the mouth of a valley. The reserve is a small piece of land at the mouth of the stream which, to a degree, protects the Indian fishing rights to the stream.

Q. Now, prior to the establishment of these reserves what use would the Indian people have made of the areas which flow into the mouths of the streams and rivers?

A. The general pattern in these cases would be that the ownership of the mouth of the stream and the seasonal villages, or habitations that were built there, signify the ownership and use of the entire valley. It would be used as a fishing site itself and a fishing site on the river, but in addition to that the people who made use of this area would have the right to go up the valley for berry picking up on the slopes, for hunting and trapping in the valley and up to forest slopes, usually for the hunting of mountain goats. In other words they made use, more or less intensive use of the entire valley rather than just the point at the mouth of the stream.

Q. So that in the case of each of those Indian Reserves situated at the mouth of a stream use would have been made by the Indians—

MR. BROWN: Oh, would my friend not lead quite so much.

MR. BERGER: No, I won't. I won't pursue that matter, anyway.

Q. Now, in your book which has been marked as an exhibit you say on page 8:

> "At the time of contact the Indians of this area were among the world's most distinctive peoples. Fully one-third of the native population of Canada lived here. They were concentrated most heavily along the coastline and the main western rivers, and in these areas they developed their cultures to higher peaks, in many respects, than in any other part of the continent north of Mexico. Here, too, was the greatest linguistic diversity in the country, with two dozen languages spoken, belonging

Q. La situation des réserves sur le canal Portland, dans l'Observatory Inlet et sur la Naas a-t-elle une importance quelconque?

R. Oui, je crois pouvoir dire que souvent, ces petites réserves étaient situées. par exemple, sur le canal Portland, à l'embouchure de l'affluent, d'une vallée. La réserve est une petite partie de terrain à l'embouchure du cours d'eau qui, dans une certaine mesure, protège les droits de pêche indiens sur le cours d'eau.

Q. Avant l'établissement de ces réserves, comment les peuples indiens utilisaient-ils les régions voisines des embouchures des cours d'eau et rivières?

R. Règle générale, dans ce cas. le fait qu'ils étaient propriétaires de l'embouchure du cours d'eau et des villages saisonniers ou des habitations construites à cet endroit, voulait dire qu'ils avaient la propriété et l'usage de la vallée. On s'en servait comme endroit de pêche, c'était un endroit de pêche sur la rivière, mais de plus, les Indiens qui utilisaient cette région avaient le droit de remonter le cours d'eau pour cueillir des petits fruits sur les collines; pour chasser et piéger dans la vallée et jusque sur les pentes boisées, généralement pour la chasse aux chèvres de montagne. En d'autres termes, ils utilisaient d'une façon plus ou moins intense la vallée entière plutôt que l'emplacement situé à l'embouchure du cours d'eau.

Q. De sorte que dans chaque cas, en ce qui concerne les réserves indiennes situées à l'embouchure d'un cours d'eau, les Indiens auraient utilisé—

M^e BROWN: Mon collègue aurait-il l'obligeance de ne pas poser autant de questions suggestives?

M^e BERGER: D'accord. De toute façon, je ne poursuivrai pas sur cette veine.

Q. Dans votre ouvrage, versé comme pièce, vous dites, page 8:

> [TRADUCTION] «A l'époque du contact, les Indiens de cette région faisaient partie des peuples les plus typiques du monde. Un bon tiers de la population aborigène du Canada vivait ici. Il y avait une concentration plus importante le long de la côte et des principales rivières de l'Ouest; dans ces régions, leurs cultures ont évolué à un degré supérieur, à plusieurs égards, à celui de toute autre partie du continent, au nord du Mexique. Ici également, on retrouvait la diversité linguistique la

to seven of the eleven language families represented in Canada. The coastal tribes were, in some ways, different from all other American Indians. Their languages, true enough, were members of American families, and physically they were American Indians, though with decided traits of similarity to the peoples of Northeastern Asia. Their cultures, however, had a pronounced Asiatic tinge, evidence of basic kinship and long continued contact with the peoples around the North Pacific rim. Most of all, their cultures were distinguished by a local richness and originality, the product of vigorous and inventive people in a rich environment."

Would that paragraph apply to the people who inhabited the area delineated on the map, Exhibit 2?

A. Yes.

Q. The next paragraph reads:

"It is not correct to say that the Indians did not own the land but only roamed over the face of it and used it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they didn't subject the forest to wholesale logging, they did establish ownership of tracts used for hunting, trapping and food gathering. Even if they didn't sink mine shafts into the mountains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the province was formerly within the owned and recognized territory of one or other of the Indian Tribes."

plus importante du pays, deux douzaines de langues étaient parlées, elles appartenaient à sept des onze familles de langues parlées au Canada. A certains égards, les tribus de la côte différaient de tous les autres Indiens américains. Il est vrai que leurs langues faisaient partie des familles de langues américaines; physiquement, il s'agissait d'Indiens américains, malgré certains traits précis de similitude avec les peuples de l'Asie du nord-est. Toutefois, leurs cultures avaient une teinte asiatique prononcée, preuve d'une relation fondamentale et d'un contact prolongé avec les peuples vivant le long des côtes du nord de l'océan Pacifique. Leurs cultures se distinguent surtout par une richesse et une originalité locale, produit d'un peuple vigoureux et inventif habitant un environnement riche.»

Cet alinéa s'appliquerait-il au peuple habitant la région délimitée sur le plan, pièce 2?

R. Oui.

Q. L'alinéa suivant se lit comme suit:

[TRADUCTION] «Il n'est pas exact de dire que les Indiens n'étaient pas propriétaires des terres mais y erraient en nomades tout en les utilisant. Les systèmes de propriété et d'utilisation qu'ils imposaient sur les terres et cours d'eau étaient différents de ceux qui sont connus par notre système de droit, mais ils étaient néanmoins clairement définis et mutuellement respectés. Même s'ils n'ont pas subdivisé les terres et ne les ont pas cultivées, ils reconnaissaient la propriété des parcelles utilisées comme emplacements de village, endroits de pêche, de cueillette de petits fruits et de racines, et à d'autres fins semblables. Même s'ils n'ont pas abattu les forêts, ils ont établi la propriété des parcelles utilisées pour la chasse, la chasse au piège et la cueillette. Même s'ils n'ont creusé aucun puits de mine dans les montagnes, ils étaient propriétaires des pics et vallées aux fins de la chasse aux chèvres de montagne et de l'obtention de matières premières. A l'exception de régions arides et inacessibles non encore utilisées, chaque partie de la province se trouvait auparavant dans les limites du territoire appartenant à l'une ou l'autre des tribus indiennes et reconnu comme tel.»

Does that paragraph apply to the people who inhabited the area delineated on the map, Exhibit 2?

A. Yes, it does.

Q. Does it apply to the Nishga Tribe?

A. Yes, it does.

Q. Now, you have said that the paragraph that I have just read to you applies to the Nishga Tribe. Can you tell his lordship the extent of the use to which the Nishgas have put the lands and waters in the area delineated on Exhibit 2 and how intensive that use was?

A. This could be quite a long statement.

Q. Well, I think we can live with it.

A. And much of it has already been said. However, the territories in general were recognized by the people themselves and by other tribes as the territory of the Nishga Tribe. Certain of these territories were used in common for certain purposes, for example, obtaining of logs and timber for houses, and canoes, totem poles, and the other parts of the culture that were made of wood, like the dishes and the boxes and masks, and a great variety of other things, and the obtainment of bark, which was made into forms of cloth and mats and ceremonial gear. These would tend to be used in common.

Other areas weren't tribal territories, would be allotted or owned by family groups of the tribe and these would be used, different parts, with different degrees of intensity. For example, the beaches where the shell fish were gathered would be intensively used. The salmon streams would be most intensively used, sometimes at different times of the year, because different kinds of salmon can run at different times of the year.

The lower parts of the valley where hunting and trapping were done would be intensively used, not just for food and the hides and skins and bone and horn material that was used by the Indian culture, but for furs of different kinds of large and small animals which were either used by the Indians or traded by them.

Cet alinéa s'applique-t-il au peuple habitant la région délimitée sur le plan, pièce 2?

R. Oui.

Q. S'applique-t-il à la tribu des Nishgas?

R. Oui.

Q. Vous avez mentionné que l'alinéa que je viens de lire s'applique à la tribu des Nishgas. Pouvez-vous expliquer à Sa Seigneurie jusqu'à quel point les Nishgas ont utilisé les terres et cours d'eau de la région délimitée sur la pièce 2 et quelle était l'intensité de cette utilisation?

R. C'est là une explication passablement longue.

Q. Je crois que nous nous y soumettrons.

R. J'en ai dit déjà beaucoup à ce sujet. Toutefois, en général, les territoires étaient reconnus par les gens eux-mêmes et par d'autres tribus comme étant le territoire de la tribu des Nishgas. Certains de ces territoires étaient utilisés en commun à certaines fins, par exemple, l'obtention de bûches et de bois destinés à la construction d'habitations, de canots, de totems, et d'autres articles de culture indigène fabriqués avec du bois, comme les bols, les boîtes et les masques, et un grand nombre d'autres objets, ainsi que l'obtention de l'écorce, avec quoi l'on fabriquait des vêtements, des paillasses et des parures cérémoniales. Ces territoires étaient généralement utilisés en commun.

D'autres régions ne faisaient pas partie des territoires tribaux, elles étaient allouées à des groupes familiaux de la tribu, auxquels elles pouvaient appartenir, et elles étaient utilisées selon le cas plus ou moins intensément. Par exemple, les plages où se ramassaient les coquillages étaient intensément utilisées. Les cours d'eau à saumons étaient les plus utilisés, quelquefois à différentes époques de l'année, parce que différents genres de saumons peuvent s'y trouver à différentes époques de l'année.

Les régions inférieures de la vallée où l'on s'adonnait à la chasse et à la chasse au piège étaient intensément utilisées, non seulement pour se procurer des aliments et les cuirs, peaux, os et cornes utilisés dans la culture indienne, mais également pour se procurer divers genres de fourrures, provenant d'animaux gros ou petits, lesquelles étaient soit utilisées par les Indiens soit échangées par ceux-ci.

These people were great traders and they exploited their territories to a great degree for materials to trade to other Indians and later to the white man.

The farther slopes up the valleys, many of them would be good mountain goat hunting areas. This was an important animal for hunting. Other slopes would be good places for trapping of marmots, the marmot being equally important, and there are a great number of lesser resources, things like minerals of certain kinds for tools and lichen and mosses of certain kinds that were made into dyes. It becomes a very long list.

Q. Go ahead.

A. Now, in addition to this, the waterways were used for the hunting of sea animals as well as fishing of different kinds. They were used also as highways, routes of travel for trade amongst themselves and for their annual migration from winter to summer villages, and a great variety of minor resources from water, like shell fish of different kinds, fish eggs, herring eggs—there is a great list of such minor resources in addition.

Q. To what extent would the use and exploitation of the resources of the Nishga territory have extended in terms of that territory? Would it have extended only through a limited part of the territory or through the whole territory?

A. To a greater or lesser degree of intensity it would extend through a whole territory except for the most barren and inaccessible parts, which were not used or wanted by anyone. But the ownership of an entire drainage basin marked out by the mountain peaks would be recognized as resting within one or other groups of Nishga Indians and these boundaries, this ownership would be respected by others.

Q. Now, can you make any comparison between the area that is represented by the Indian Reserves in the map, in the third volume of the McKenna-McBride Report; can you make any comparison between that area represented by those reserves and the area of the whole Nishga territory that was used and exploited by the Nishgas before their confinement to reserves?

Ces peuples étaient de grands commerçants et ils exploitaient leurs territoires dans une grande mesure en vue de se procurer du matériel destiné aux échanges avec d'autres Indiens, puis avec l'Homme blanc.

Quant aux collines surplombant les vallées, plusieurs d'entre elles étaient de bonnes régions de chasse à la chèvre de montagne. Cet animal était abondamment chassé. D'autres collines étaient propices à la prise au piège des marmottes, la marmotte étant également abondamment chassée, il y avait un grand nombre de ressources d'importance moindre, tels que certains genres de minéraux destinés à la fabrication d'outils ainsi que le lichen et certains genres de mousses servant à la teinture. La liste devient très longue.

Q. Continuez.

R. De plus, les cours d'eau étaient utilisés aux fins de la chasse aux animaux de mer ainsi que pour différents genres de pêche. Ils étaient utilisés également comme voies ou comme routes commerciales et pour la migration annuelle des villages d'hiver aux villages d'été, et comme source d'une grande variété de ressources aquatiques de moindre importance, tels différents genres de fruits de mers, les œufs de poissons, les œufs de harengs—la liste de pareilles ressources de moindre importance est longue.

Q. Jusqu'à quel point l'utilisation et l'exploitation des ressources des territoires des Nishgas s'est-elle propagée, géographiquement parlant? S'est-elle uniquement propagée sur une partie restreinte du territoire ou partout sur celui-ci?

R. Dans une certaine mesure, elle s'est propagée dans l'ensemble du territoire, compte non tenu des régions arides et inaccessibles, que personne n'utilisait ou ne réclamait. Mais il était reconnu que la propriété de l'ensemble d'un bassin de drainage délimité par les pics montagneux allait à l'un ou à l'autre groupe des Nishgas et ces limites, cette propriété étaient respectées par les autres.

Q. Pouvez-vous établir quelque comparaison entre la région représentée par les réserves indiennes sur le plan, troisième volume du rapport McKenna-McBride; pouvez-vous établir quelque comparaison entre cette région représentée par ces réserves et la région englobant l'ensemble du territoire des Nishgas, utilisé et exploité par les Nishgas avant qu'ils soient renfermés dans des réserves?

A. Well, I think the comparison is simply here, and these are several tiny plots of land, whereas on the map the entire tract was used for some purpose or other with some greater or lesser degree of intensity.

Q. Well, by the map do you mean the map, Exhibit 2?

A. That's right, yes.

On cross-examination he said:

A. May I tell you the nature of my information on which I am working because I think this needs to be said?

THE COURT: Yes.

A. All right. I am, of course, familiar with the great bulk of the published material on the Indians of this area, some of which will be entered into evidence. I have myself discussed these matters with many Indians, both Nishga and their neighbours, but my main source of information is the great, abundant body of unpublished anthropological and historical material which was assembled in the National Museum of Canada by the anthropologist Marius Barbeau, who worked in this area between 1914 and the late '40's, and continued to assemble it until just a couple of years ago. He died this past year. Also, a Tsimshian gentleman who actually thought of himself as a Nishga chief, William Beynon who lived the greater part of his life at Port Simpson, who was an interpreter and assistant of Barbeau and other anthropologists and who, himself, until his death in 1967, recorded hundreds and hundreds of pages of anthropological information and family traditions and narratives having to do with the Nishga and the Gitksan people. I have had access to this great body of unpublished material. I spent a year at the National Museum working with it ten years ago and this has provided me with the detailed information upon which I can make these statements. Unfortunately I haven't worked it up into a publishable form as yet and it is such a vast body of material that I don't have it all at the tip of my tongue.

. . . . .

Q. Yes. Now, the fact is that the members of these bands did reside from time to time in communi-

R. Je crois que la comparaison peut s'établir simplement ici, il s'agit de plusieurs terrains minuscules, alors que sur le plan, l'ensemble de la parcelle était utilisé à une fin ou à une autre, d'une façon plus ou moins intense.

Q. Lorsque vous parlez du plan, voulez-vous dire le plan versé comme pièce 2?

R. C'est exact, oui.

Au contre-interrogatoire, il a dit ce qui suit:

[TRADUCTION]—R. Puis-je vous parler de la nature des renseignements que j'ai obtenus et sur lesquels je me fonde, étant donné qu'à mon sens, c'est là une question importante?

LA COUR: Oui.

R. Très bien. Bien sûr, je connais la majeure partie des documents publiés portant sur les Indiens de cette région, certains d'entre eux seront produits. J'ai moi-même discuté de ces questions avec de nombreux Indiens, tant avec des Nishgas qu'avec leurs voisins, mais mes renseignements sont principalement fondés sur l'abondante et l'importante documentation anthropologique et historique non publiée, recueillie au musée national du Canada par l'anthropologiste Marius Barbeau, qui a travaillé dans cette région de 1914 jusqu'à la fin des années 40, et qui a poursuivi son œuvre jusqu'à très récemment. Il est mort l'an dernier. De plus, je me suis fondé sur un Tsimshian, qui pensait réellement être un chef Nishga, William Beynon, qui a vécu la majeure partie de sa vie à Port Simpson; il était interprète et assistant de Barbeau et d'autres anthropologistes et il a lui-même, jusqu'à sa mort en 1967, recueilli des centaines de pages de renseignements anthropologiques, de traditions familiales et de contes ayant trait aux Nishgas et au peuple des Gitksan. J'ai eu accès à cette importante masse de documents non publiés. J'ai passé un an au musée national, j'y ai travaillé il y a dix ans, et cela m'a permis d'obtenir les renseignements détaillés sur lesquels je peux me fonder pour faire ces déclarations. Malheureusement, je ne les ai pas encore couchés sous une forme susceptible d'être publiée et il s'agit d'un ensemble tellement vaste de documentation qu'elle ne me vient pas toute à l'esprit en ce moment.

. . . . .

Q. Oui. De toute façon, les membres de ces bandes habitaient de temps en temps des agglomé-

ties and those communities would appear to have been within some of the present reserves?

A. Yes, that's right.

. . . . .

Q. Well, now, I was asking you as to what documentary or other evidence there was that justifies you in using the word "ownership". I suggest that that was a concept that was foreign to the Indians of the Nass Agency?

A. I am an anthropologist, sir, and the kind of evidence with which I work is largely not documentary evidence. It is verbal evidence given by people who didn't produce documents and it is turned into documentary form in anthropological and historical reports and in the reports of various Commissions.

Q. All right. Well, that is what I want now.

A. Yes, okay.

Q. I want you to state, so I can go and look them up, the documents you rely upon to support your statement, your use of the word "ownership", as "belonging" in the Indian concept.

A. Anthropological reports which I understand Mr. Berger is going to enter into the record, one of them by Philip Drucker, is a general book on the Indians of the Northwest Coast and it would use the term. Another is a book by Viola Garfield as to the Tsimshian Indians in general and in this sense it includes the Nishga which would use a concept of ownership.

Q. Now, are you suggesting that this is anything other than a tribal concept?

A. It includes the tribal concept and it is more besides, yes.

Q. Well, perhaps if my learned friend would give me the book you can indicate just what you mean. What was the book you referred to, Drucker?

A. Drucker or Docker.

MR. BERGER: Yes, I have it, my lord.

THE COURT: It is enmeshed in the toils of your papers, is that right?

MR. BERGER: That's right. I think those are two of them.

MR. BROWN:

Q. Would you indicate what you had in mind?

tions, et il semble que ces agglomérations se trouvaient dans les limites de certaines des réserves actuelles.

R. Oui, c'est exact.

. . . . .

Q. Je voulais vous demander quelle preuve documentaire ou autre justifie l'emploi du terme «propriété». Je présume que c'était là un concept étranger aux Indiens de la Naas?

R. Je suis un anthropologue, monsieur, et le genre de preuve à ma disposition est dans une large mesure d'origine non documentaire. Il s'agit de témoignages verbaux donnés par des gens qui n'ont produit aucun document; on la transforme sous forme de documents dans des rapports anthropologiques et historiques et dans les rapports de diverses commissions.

Q. Très bien. C'est là ce que je veux savoir.

R. Oui, d'accord.

Q. J'aimerais que vous nous disiez, de sorte que je puisse aller les consulter moi-même, sur quels documents vous appuyez votre déclaration, votre emploi du terme «propriété», compris comme «appartenant» selon le concept indien.

R. Sur des rapports anthropologiques, que Me Berger versera au dossier, si je comprends bien, l'un d'eux étant de Philip Drucker; il s'agit d'un ouvrage général sur les Indiens de la côte nord-ouest, ce terme s'y retrouve. Puis, il y a l'ouvrage de Viola Garfield traitant des Tsimshians en général, et dans ce sens cela comprend les Nishgas, utilisant un concept de propriété.

Q. Ainsi, est-ce que vous laissez entendre que c'est là toute autre chose qu'un concept tribal?

R. Il comprend le concept tribal, et plus encore, oui.

Q. Très bien, si mon savant confrère me donne l'ouvrage, peut-être pourrez-vous indiquer exactement ce que vous voulez dire. Quel ouvrage avez-vous mentionné, Drucker?

R. Drucker ou Docker.

Me BERGER: Oui, je l'ai Votre Seigneurie.

LA COUR: Il se trouve pris dans la masse de votre documentation, n'est-ce pas?

Me BERGER: C'est exact. Je crois qu'en voici deux.

Me BROWN:

Q. Pourriez-vous indiquer ce que vous aviez à l'esprit?

A. May I read it? Do you want me to read a section?

Q. Yes. Just direct our attention, will you, to the particular points?

A. This is Viola Garfield's book, "The Tsimshian, Their Arts and Music." On page 14—

THE COURT: Now, tell me something about the author first.

A. Yes. The authoress is an anthropologist who studied at the University of Washington in Seattle and who is still a professor of Anthropology there and who did her field work and much of her writing on the Tsimshian Indians. These would be primarily the Tsimshian, in the narrower sense of people who live at Port Simpson, now Metlakatla, but the concepts would apply to the Nishga as well.

On page 14 she writes:

"It was characteristic of the Tsimshian, as of other Northwest Coast Tribes, that exclusive rights to exploit the resource districts were claimed by kin. Lineages of the Tsimshian were the owners of rights to hunt, fish, pick berries or gather raw materials from geographically defined territory. Lineage properties were listed at an installation potlatch of a new head, hence were in his name. Lineage heads could and did designate certain areas as actually his and pass them on as private property to successors. This is the concept of ownership that—"

. . . . . .

Q. Well, the basis of any statement about ownership would lie in the fact that the Nishgas had exclusive possession of the area, it was unchallenged, isn't that true?

A. For the area marked on the map?

Q. Yes.

A. Yes.

Q. So that anyone has to be careful about what word you apply because of the legal implications and to speak of ownership simply because someone has an unchallenged possession is to confuse two things, would you not agree?

R. Puis-je le lire? Voulez-vous que j'en lise une partie?

Q. Oui. Veuillez ne vous reporter qu'aux points précis.

R. Il s'agit de l'ouvrage de Viola Garfield, «The Tsimshian, Their Arts and Music». A la page 14—

LA COUR: Parlez-moi tout d'abord de l'auteur.

R. Oui. Il s'agit d'une anthropologue qui a fait ses études à l'Université de Washington, à Seattle, et qui y est actuellement professeur d'anthropologie; le travail qu'elle a fait sur le terrain, et ses écrits, portent en majeure partie sur les Tsimshians. Il s'agit principalement des Tsimhians, au sens strict, soit le peuple qui habite Port Simpson, maintenant Metlakatla, mais les concepts s'appliquent également aux Nishgas.

A la page 14 elle écrit ce qui suit:

[TRADUCTION] «Un trait caractéristique des Tsimshians, ainsi que des autres tribus de la côte nord-ouest, c'est que les droits exclusifs d'exploitation des districts de ressources se revendiquaient par parenté. Certaines lignées des Tsimshians étaient propriétaires de droits de chasse, de pêche, de cueillette de fruits ou d'obtention de matières premières, dans un territoire géographiquement défini. Les propriétés des lignées étaient énumérées lors de la cérémonie potlatch, instituant un nouveau chef, elles étaient donc à son nom. Les chefs de lignées pouvaient désigner, et désignaient, certaines régions comme leur appartenant réellement, et pouvaient les transmettre à leurs ayants droit, à titre de propriété privée. C'est le concept de propriété qui—»

. . . . . .

Q. Toute déclaration au sujet de la propriété serait fondée sur le fait que les Nishgas avaient la possession exclusive de la région, elle n'était pas controversée, n'est-ce pas?

R. Vous parlez de la région indiquée sur le plan?

Q. Oui.

R. Oui.

Q. Ainsi, il faut être prudent quant au mot à employer à cause des implications juridiques et parler de propriété simplement parce que quelqu'un a une possession incontestée, c'est confondre deux choses, ne croyez-vous pas?

A. The point I was trying to make in the second paragraph that Mr. Berger read out was that although their concepts of ownership were not the same as our legal concept of ownership, they nevertheless existed and were recognized and that is the point I was trying to make.

Q. Well, anyway, you are unable to find any documentary evidence in support other than conclusions drawn by anthropologists?

A. And also verbatim statements by Indians at the various Commissions, and I think Mr. Berger is going to enter some of this.

MR. BERGER: They have been entered.

MR. BROWN: Yes.

Q. Well, in other words the Indians would speak of the fact that when they attended before a Commission, that they owned the land?

A. Yes.

Q. They would speak in those terms as "We" as a group.

A. Yes.

Q. "Own the land".

A. I think they would go beyond that and say, "And the chief owned that certain territory up Portland Inlet where we used to get this and that," and the whole list of things that I referred to before.

Q. Would one family defend its right like that against other families?

A. It could, yes.

Q. Well, is there evidence of that?

A. There are narratives to that effect, yes.

Q. In the Nishga Valley, in the territory you have marked off there?

A. Yes.

Q. Where? Can you point to that?

A. They are in the unpublished material that I have been referring to.

Possession is of itself at common law proof of ownership: Cheshire, *Modern Law of Real Property*, 10th ed., p. 659, and Megarry and Wade, *The Law of Real Property*, 3rd ed., p. 999. Unchallenged possession is admitted here.

Dr. Duff also went into the details of the Nishga system of succession to property based on a matrilineal line, showing that the Nishgas

R. Ce que j'essayais de dire au second paragraphe, que Me Berger a lu, c'est que bien que leurs notions de propriété n'aient pas été les mêmes que notre notion juridique de propriété, elles existaient néanmoins et étaient reconnues; c'est ce que j'ai tenté de faire comprendre.

Q. De toute façon, il vous est impossible de trouver quelque preuve documentaire à l'appui si ce n'est les conclusions qui ont été tirées par les anthropologues?

R. Et aussi les déclarations mot pour mot faites par les Indiens devant les diverses Commissions; je crois que Me Berger en produira certaines.

Me BERGER: Elles ont été produites.

Me BROWN: Oui.

Q. En d'autres termes, lorsqu'ils ont témoigné devant une Commission, les Indiens ont affirmé être propriétaires des terres?

R. Oui.

Q. Ils employaient le terme «Nous» en parlant d'un groupe.

R. Oui.

Q. «Sommes propriétaires des terres».

R. Je crois qu'ils allaient plus loin et disaient: «Et le chef était propriétaire d'un certain territoire en amont de Portland Inlet; c'est là que nous nous procurions telle et telle chose,» et toutes les choses dont j'ai déjà fait mention.

Q. Une famille aurait-elle défendu son droit de cette façon contre d'autres familles?

R. Oui, elle aurait pu le faire.

Q. Existe-t-il quelque preuve à cet effet?

R. Il existe des récits à cet effet, oui.

Q. Dans la vallée des Nishgas, sur le territoire que vous avez indiqué, là?

R. Oui.

Q. Où? Pouvez-vous me le montrer?

R. Ils sont dans la documentation non publiée dont j'ai parlé.

En common law, la possession elle-même est une preuve de propriété: Cheshire, *Modern Law of Real Property*, 10e édition, 659, et Megarry and Wade, *The Law of Real Property*, 3e édition, page 999. Ici la possession incontestée est reconnue.

Le docteur Duff a également longuement parlé du système successoral des Nishgas, fondé sur la filiation utérine, et laissant voir que

had a well developed and sophisticated concept of property. Regarding the general state of development and sophistication of the culture of the Nishgas, he testified, quoting from his book as follows:

Q. I will go on to something else for the time being, then. Now, at page 17 of your book you say in the last paragraph:

> "There were some incipient or tentative groupings of tribes into larger units. In some cases clusters of closely related tribes bore collective names; for example, Cowichan."

And you mentioned some others,

> "In other cases such a cluster was acknowledged to be closely interrelated but had no joint names; for example, the Haida of Cumshewa, Skedans and Tanoo. A number of descriptive names for regional groups have appeared in print so often that they have become established by usage; for example, Upper Thompson, Lower Kootenay, Northern Kwakiutl, and Coast Tsimshian. Though not native names, these have been included in the table. These larger groupings had no internal organization, with two interesting exceptions. After the establishment of Fort Rupert the Southern Kwakiutl Tribes arranged themselves in a definite order of rank in order to control their ceremonial relations and potlaching organizations, and after the establishment of Port Simpson the nine Lower Skeena Tsimshian Tribes did much the same thing."

Now, is that what we are talking about, the organization of these groups for potlaching purposes?

A. Which groups?

Q. Well, what you are talking about there was this organization of family groups basically related to the potlaching arrangements.

A. The potlaching was the mechanism by which the family groups maintained their relative ranking, yes.

Q. Yes.

A. Within the tribes.

Q. Now, you say, going back to page 16:

les Nishgas auraient une notion de propriété bien établie et élaborée. Au sujet de l'état général de développement et d'évolution de la culture nishga, mentionnant des passages de son ouvrage il a fait le témoignage suivant:

[TRADUCTION] Q. Pour le moment, je parlerai donc d'autre chose. A la page 17 de votre ouvrage, vous dites, au dernier paragraphe:

> «Le groupement des tribus en cellules plus importantes a été entrepris ou tenté, dans une certaine mesure. Des groupes de tribus étroitement reliées portaient parfois des noms collectifs, par exemple, Cowichan.»

Vous en mentionnez d'autres:

> «Dans d'autres cas, il était reconnu que pareil groupe comportait des liens de parenté étroits mais n'avait aucun nom commun; par exemple, les Haida de Cumshewa, Skedans et Tanoo. Un certain nombre de noms descriptifs de groupes régionaux apparaît si souvent dans les écrits que ces noms sont devenus sanctionnés par l'usage; par exemple, Upper Thompson, Lower Kootenay, Northern Kwakiutl, et Coast Tsimshian. Ce ne sont pas là des noms aborigènes, mais ils font partie de la liste. Ces groupements plus importants n'avaient aucune organisation interne, à deux exceptions près. Après l'établissement de Fort Rupert, les tribus Southern Kwakiutl se sont hiérarchisées d'une façon précise, de façon à pouvoir diriger leurs relations cérémoniales et l'organisation des potlachs; après l'établissement de Port Simpson, les neuf tribus Lower Skeena Tsimshian ont fait à peu près la même chose.»

Est-ce bien là ce dont il est présentement question, l'organisation de ces groupes aux fins des potlachs?

R. De quels groupes?

Q. Bien, ce dont vous parliez, l'organisation de groupes familiaux reliée fondamentalement aux potlachs.

R. Les potlachs constituaient le mécanisme par lequel les groupes familiaux conservaient leur hiérarchie respective, oui.

Q. Oui.

R. A l'intérieur des tribus.

Q. Si nous revenons à la page 16, vous dites:

> "On the Northern Coast, where kinship ties were most rigidly defined, matrilineal households or lineages were the basic units that united in each locality to form tribal groups, which usually assembled for part of the year in a common village."

Now, was that a characteristic in the Nishga groups, and if so, where did they assemble in a common village?

A. There was no single common village in which all of the Nishga groups assembled at any one time.

Q. No, I didn't understand that from the councillors. Now, you say:

> "Among the Tsimshian these tribes hardened into firmly knit political units (this was somewhat less the case among the Gitksan, Niska—"

Now, those two peoples we are talking about, the people within the area you have delineated, are they not?

A. The Gitksan are just outside of the area and the Nishga are inside the area.

Q. Yes. So Niska means Nishga there?
A. That is correct, yes.

Q. And is that a correct statement, that this was somewhat less the case among the Nishga?
A. Yes, that is correct.

and reverting to the question of ownership, he said, quoting with approval from Drucker, a well known American anthropologist:

Q. Yes, please.
A. This is the chapter on social and political organization of the peoples of the North Pacific Coast. The section that is relevant here concerns the localized groups of kin. The localized groups of kin define who lived together, worked together and who jointly considered themselves exclusive owners of the tracts from which food and other prime materials were obtained.

Q. Jointly considered themselves, is that the word?

> «Sur la côte nord, où les liens de parenté étaient définis d'une façon très rigide, les groupes à filiation utérine étaient les cellules fondamentales qui s'unissaient dans chaque agglomération en vue de former des groupes tribaux, qui, habituellement, se rassemblaient en un village conmun, durant une partie de l'année.»

Était-ce là une caractéristique des groupes nishgas, et dans l'affirmative, où se rassemblaient-ils en un village commun?

R. Il n'existait aucun village commun et unique où tous les groupes nishgas se rassemblaient en même temps.

Q. Non, c'est bien ce que j'ai compris en écoutant les conseillers. Vous ajoutez:

> «Chez les Tsimshian, ces tribus se sont consolidées en cellules politiques compactes (ce n'était pas tout à fait le cas, chez les Gitksan, Niska—»

Là, ces deux peuples dont nous sonmes en train de parler, ceux qui habitaient dans la région que vous avez délimitée, n'est-ce pas?

R. Les Gitksan habitent dans la région immédiatement voisine à celle-ci et les Nishgas habitent la région même.

Q. Oui. Ainsi, le terme Niska signifie Nishga, ici?
R. C'est exact, oui.

Q. Est-ce là une affirmation exacte, que ce n'était pas tout à fait le cas chez les Nishgas?
R. Oui, c'était exact.

revenant à la question de la propriété, il a dit ce qui suit, en citant à son appui Drucker, anthropologue américain bien connu:

[TRADUCTION] Q. Oui, je vous prie.
R. C'est le chapitre sur l'organisation sociale et politique des peuples de la côte du nord du Pacifique. Le paragraphe ici pertinent porte sur les groupes de parenté localisés. Les groupes de parenté localisés déterminaient quelles personnes devaient habiter ensemble, travailler ensemble et quelles personnes devaient se considérer conjointement propriétaires exclusifs des terrains où se procurer leur nourriture et les autres produits essentiels.

Q. Ils se considèrent conjointement propriétaires. est-ce bien le terme?

A. Jointly considered themselves, yes.

The whole group owned not only lands and their produce but all other forms of wealth, material treasures and intangible rights usually referred to as privileges, names for persons, houses, canoes, houseboats and even for dogs and slaves. I emphasize the phrases that I wanted to emphasize there.

Q. So that there was a form, again, of a communal approach?

A. In that sense.

Q. Yes.

A. It belonged to the group, yes.

Q. Thank you.

A. And on page 49, the last eight or so lines, this is dealing with wealth in these cultures and I quote:

"Distinctive of North Pacific Coast culture is the inclusion of natural resources and items of wealth; the foodstuffs, the materials for dress, shelter and transport and the places from which these things were obtained. Each group regarded the areas utilized as the exclusive property of the group. Group members used habitation sites, fishing grounds, clam beaches, hunting and burying grounds, that is in the sense of getting buried, forest areas where timber and bark were obtained through right. Outsiders entered by invitation or in trespass.

"Bounds were defined by natural landmarks with a precision remarkable for people with no surveying equipment."

THE COURT: Read me the last sentence again, please.

"Bounds were defined by natural landmarks with a precision remarkable for people with no surveying equipment."

Now, these are the only two specific specimens in this book.

MR. BROWN:

R. Ils se considèrent conjointement propriétaires, oui.

L'ensemble du groupe était propriétaire non seulement des terres et de leurs ressources mais également de toute autre forme de richesse, biens tangibles et droits incorporels habituellement connus sous le nom de privilège, noms de personnes, habitations, canots, bateaux-maisons et même chiens et esclaves. Je mets l'accent sur les phrases sur lesquelles je voulais mettre l'accent.

Q. De sorte qu'encore une fois il y avait un certain aspect communautaire?

R. En ce sens-là.

Q. Oui.

R. Les biens appartenaient au groupe, oui.

Q. Merci.

R. A la page 49, aux huit dernières lignes ou à peu près, il est question de la richesse dans ces cultures, et je cite:

[TRADUCTION] «Un aspect distinctif de la culture de la côte du nord du Pacifique, c'est l'inclusion des ressources naturelles et des biens matériels; les produits alimentaires, le matériel destiné à l'habillement, au logement et au transport et les endroits où l'on se les procurait. Chaque groupe considérait que les régions utilisées lui appartenaient exclusivement. Les membres du groupe utilisaient le lieu des habitations, les emplacements de pêche, les plages à pétoncle, les terrains de chasse et les cimetières, là ou l'on procédait aux enterrements, les régions forestières où l'on se procurait le bois et l'écorce de plein droit. Les étrangers s'y trouvaient soit sur invitation, soit par suite d'un empiétement.

«Les limites étaient définies par des points de repère géographiques, avec une précision remarquable pour des gens n'ayant aucun matériel d'arpentage.»

LA COUR: Relisez la dernière phrase, je vous prie.

«Les limites étaient définies par des points de repère géographiques, avec une précision remarquable pour des gens n'ayant aucun matériel d'arpentage.»

Ce sont là les deux seuls exemples précis dans cet ouvrage.

Me BROWN:

Q. Thank you. Now, what is he discussing there? Is he discussing a particular group?

A. He is discussing the Northwest Coast groups in general, of which the Nishga are one.

An interesting and apt line of questions by Gould J. in which he endeavoured to relate Duff's evidence as to Nishga concepts of ownership of real property to the conventional common law elements of ownership must be quoted here as they disclose that the trial judge's consideration of the real issue was inhibited by a preoccupation with the traditional *indicia* of ownership. In so doing, he failed to appreciate what Lord Haldane said in *Amodu Tijani, supra*:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.

The trial judge's questions and Duff's answers were as follows:

THE COURT:

Q. I want to discuss with you the short descriptive concept of your modern ownership of land in British Columbia, and I am going to suggest to you three characteristics (1) specific delineation of the land, we understand is the lot.

A. Yes.

Q. Specifically delineated down to the lot, and the concept of the survey; (2) exclusive possession against the whole world, including your own family. Your own family, you know that, you want to keep them off or kick them off and one can do so; (3) to keep the fruits of the barter or to leave it or to have your heirs inherit it, which is the concept of wills. Now, those three characteristics—are you with me?

A. Yes.

Q. Specific delineation, exclusive possession, the right of alienation, have you found in your anthropological studies any evidence of that

Q. Merci. De quoi est-il en train de parler? Parle-t-il d'un groupe particulier?

R. Il parle des groupes de la côte du nord-ouest en général, dont les Nishgas font partie.

Il importe de faire mention ici de la série de questions intéressantes et pertinentes posées par le Juge Gould; il tentait d'établir un rapport entre le témoignage du docteur Duff au sujet des notions nishgas de propriété immobilière et les éléments conventionnels de propriété en common law; ces questions montrent qu'en examinant la véritable question, le juge de première instance était influencé par les critères traditionnels de propriété. Ce faisant, il a omis de tenir compte des commentaires formulés par Lord Haldane dans l'arrêt *Amodu Tijani* (précité):

> [TRADUCTION] En premier lieu, Leurs Seigneuries veulent faire remarquer qu'en déterminant la nature du titre des indigènes sur les biens-fonds, non seulement au Nigéria du sud, mais en d'autres parties de l'Empire britannique, il est essentiel de se montrer extrêmement prudent. On a tendance, parfois inconsciemment, à concevoir ce titre selon des termes ne s'appliquant bien qu'aux systèmes fondés sur le droit anglais. Mais il faut contrôler étroitement cette tendance.

Les questions du juge de première instance et les réponses du docteur Duff sont les suivantes:

[TRADUCTION] LA COUR:

Q. J'aimerais examiner avec vous la brève notion descriptive de la propriété moderne des biens-fonds en Colombie-Britannique; je vais vous proposer trois caractéristiques: (1) la délimitation exacte du bien-fonds, c'est-à-dire du lot.

R. Oui.

Q. Une délimitation sous forme de lot, la notion d'arpentage; (2) la possession exclusive vis-à-vis de tous y compris sa propre famille. Vous savez bien qu'en ce qui concerne sa propre famille, on veut l'éloigner ou la renvoyer et on peut le faire; (3) la conservation des fruits du bien-fonds, ou la transmission à ses héritiers, c'est-à-dire la notion de testament. Ces trois caractéristiques—me suivez-vous?

R. Oui.

Q. La délimitation précise, la possession exclusive, le droit d'aliénation, au cours de vos études anthropologiques, avez-vous recueilli quelque

concept being in the consciousness of the Nishgas and having them executing such a concept?

A. My lord, there are three concepts.

Q. Yes, or a combination of them.

A. Could we deal with them one at a time?

Q. Yes, you can do it any way you like. You deal with it.

A. Specific delineation, I think, was phrased by Dr.—

Q. Touched upon by landmarks.

A. Physical landmarks, physical characteristics. The exclusive occupation did not reside in an individual. It rested in a group of people who were a sub-group of the tribe.

Q. The third one was alienation.

A. The owners in this sense had certain rights of alienation. They could give up the tract of land, lose it in warfare, but in practice it would not go to anybody outside of the tribe, that is, a tract of Nishga land might change hands but it wouldn't go to other than a Nishga family.

Q. So am I correct in assuming that there are similarities in the Nishga civilization in the first two characteristics, but not the third? All that alienation means, of course, is that you can sell it to anybody you like?

A. Yes.

Q. Generally speaking, I mean, that is, what it does. Two of the three the Nishga Tribe—I don't want to put words in your mouth, now, I want you to tell me. I don't want to tell you anything.

A. Delineation but not by modern surveying methods.

Q. Of course, I understand, yes.

A. Exclusive ownership resting not in an individual.

Q. Possession or occupancy, not ownership?

A. Oh, I see. Possession or occupancy resting in a specific group rather than an individual. The right of alienation, which in practice would leave the land within the same tribe. It was limited.

preuve de cette notion dans l'esprit des Nishgas; appliquaient-ils pareille notion?

R. Votre Seigneurie, il y a trois notions.

Q. Oui, ou une combinaison des trois.

R. Pourrions-nous ne parler que d'une notion à la fois?

Q. Oui, faites comme vous voulez. C'est vous qui en parlez.

R. La question de la délimitation précise, si je ne me trompe, a été traitée par le docteur—

Q. Il s'agissait de points de repère.

R. De points de repère physiques, de caractéristiques physiques. Le droit d'occupation exclusive n'était pas exercé au niveau de l'individu. Il l'était au niveau du groupe, qui était un sous-groupe de la tribu.

Q. La troisième notion est celle de l'aliénation.

R. En ce sens, les propriétaires avaient certains droits d'aliénation. Ils pouvaient céder la parcelle de terre, la perdre au cours d'une guerre, mais en pratique elle n'était jamais transmise à une personne qui n'était pas membre de la tribu, c'est-à-dire qu'une parcelle de terre nishga pouvait changer de mains mais seulement en faveur d'une famille nishga.

Q. Donc, est-ce que je comprends bien si je présume qu'il existe des ressemblances dans la civilisation nishga en ce qui concerne les deux premières caractéristiques, mais non pas en ce qui concerne la troisième? Tout ce que la notion d'aliénation comporte, bien sûr, c'est qu'une personne peut vendre son bien à n'importe qui?

R. Oui.

Q. Généralement parlant, c'est ce que ça comporte. En ce qui concerne deux des trois notions, la tribu Nishga—je ne veux pas mettre les mots dans votre bouche, je veux que vous me le disiez vous-même. Je ne veux rien vous dire.

R. La notion de délimitation existait mais on n'employait pas les méthodes modernes d'arpentage.

Q. Bien sûr, je comprends, oui.

R. La propriété exclusive non pas au niveau de l'individu.

Q. La possession ou l'occupation, pas la propriété?

R. Oh, je comprends. Le droit de possession ou d'occupation était celui d'un groupe précis plutôt que d'un particulier. Le droit d'aliénation, qui conservait en pratique les terres à l'intérieur même de la tribu. Il était restreint.

Q. Could the group having exclusive occupancy select within the tribe, if they chose, another group to whom they wanted to either, to use the modern word, convey it, or would that go by general communal habit, custom or even law?

A. The group could do the thing you suggest. For example, in some cases the chief of a group might convey a property to his son, which would not be the normal way; it would be to his nephew in the normal way.

Q. Yes.

A. And that would, on rare occasions, be accepted.

Q. Always subject to the acceptance of what, the tribe?

A. The tribe, yes.

. . . . .

RE-EXAMINED BY MR. BERGER:

Q. His lordship put to you three characteristics of modern day real property concepts. Having regard to the territory of the Nishga Tribe outlined on the map, Exhibit 2, can you say whether or not there would have been specific delineation of that area in the sense in which it was put to you by his lordship?

A. Of the boundaries of that area?

Q. Yes.

A. Yes.

Q. What would the means of delineation have been?

A. As Dr. Drucker has described them here, landmarks.

Q. By landmarks. Do you mean the mountain tops?

A. Yes, geographical locations.

Q. Now, his lordship put to you the notion of exclusive possession. As regards the territory delineated on the map, Exhibit 2, the Nishga territory, what would have been the application of that concept if it had any in the time before the coming of the white man?

A. It would be recognized by all as Nishga territory. They would exercise exclusive possession of it.

MR. BERGER: I have no further questions.

THE COURT: I have some more now.

Q. Le groupe qui avait le droit d'occupation exclusive pouvait-il choisir, à l'intérieur de la tribu, s'il le désirait, un autre groupe auquel il voulait soit, pour employer un terme contemporain, céder les terres, ou cela dépendait-il d'une coutume ou d'un usage général de la communauté ou même de la loi?

R. Le groupe pouvait faire ce que vous suggérez. Par exemple, dans certains cas, il se pouvait qu'un chef de groupe transmette un bien à son fils, mais ce n'était pas la façon normale de procéder; normalement, il l'aurait transmise à son neveu.

Q. Oui.

R. C'était là, rarement toutefois, un fait accepté.

Q. Toujours sous réserve de l'acceptation de qui, de la tribu?

R. De la tribu, oui.

. . . . .

INTERROGÉ DE NOUVEAU PAR Me BERGER:

Q. Sa Seigneurie vous a énoncé trois caractéristiques des notions modernes de propriété immobilière. Compte tenu du territoire nishga délimité sur le plan, pièce 2, pouvez-vous dire si cette région était délimitée d'une façon précise, selon le sens proposé par Sa Seigneurie?

R. Les limites de cette région?

Q. Oui.

R. Oui.

Q. Quels étaient les modes de délimitation?

R. Comme le docteur Drucker les a décrits ici, les points de repère.

Q. Par des points de repère. Voulez-vous dire les pics des montagnes?

R. Oui, des emplacements géographiques.

Q. Sa Seigneurie vous a expliqué la notion de possession exclusive. En ce qui concerne le territoire délimité sur le plan, pièce 2, le territoire nishga, quelle aurait été l'application de cette notion, le cas échéant, avant l'arrivée de l'Homme blanc.

R. Tous le reconnaissaient comme étant le territoire nishga. Ils en avaient la possession exclusive.

Me BERGER: Je n'ai plus de questions à poser.

LA COUR: Nous en poserons quelques-unes.

Q. I will give two more characteristics of ownership, the right to destroy it at your own whim, if you like, and the other, that the exclusive possession should be of indeterminable time, that is, cannot be terminated by a person's life, that is, can be passed on to one's heirs. That makes five. Now, you have dealt with three. Now, the right to destroy at whim, set fire to your own house; these matters you have been dealing with, would a group within the Nishga have the right, if the buildings at the mouth of a certain river had been in their exclusive use some time and they will say, "Let's set fire to it," would the tribe prohibit that?

A. I would think that they would have that right.

Q. You would think they would have that right?
A. Yes.

Q. Now, what about the duration of the right, not to destroy, but the right of exclusive ownership, would it go to their heirs?
A. Yes.

Q. Or go back to the tribe for distribution?

A. In theory it belongs within that kinship group through time, with no duration in theory. It always remains with that same kinship group.

Q. That is the matrilineal line?
A. Yes.

THE COURT: Thank you.

In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore, the burden of establishing that their right has been extinguished rests squarely on the respondent.

What emerges from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law having, in the words of Dr. Duff, "developed their cultures to higher peaks in many respects than in any other part of the continent north of Mexico". A remarkable con-

Q. Je vous donnerai deux autres caractéristiques de la propriété, le droit de détruire son bien à son gré, si on le désire, et l'autre, la possession exclusive est d'une durée illimitée, c'est-à-dire qu'elle ne peut pas se terminer par la mort d'une personne, qu'elle peut être transmise aux héritiers. Il y a donc cinq caractéristiques. Vous avez parlé de trois de ces caractéristiques. Passons au droit de détruire à son gré, de mettre le feu à sa propre maison; en ce qui concerne ces questions dont vous avez traité, un groupe faisant partie des Nishgas aurait-il le droit, si les constructions à l'embouchure d'une rivière avaient été utilisées exclusivement par lui depuis un certain temps, et s'ils s'étaient dit: «Mettons-y le feu,» la tribu l'aurait-elle interdit?
R. Je crois qu'ils en auraient eu le droit.

Q. Vous croyez qu'ils en auraient eu le droit?
R. Oui.

Q. En ce qui concerne la durée du droit, non pas celui de détruire, mais le droit de propriété exclusive, était-il transmis aux héritiers?
R. Oui.

Q. Ou revenait-il à la tribu, en vue d'une distribution?
R. En théorie, il appartient à ce groupe familial, avec le temps, sans durée déterminée en théorie. Il appartient toujours à ce même groupe familial.

Q. C'est-à-dire en ligne maternelle?
R. Oui.

LA COUR: Merci.

En énumérant les critères de propriété, le juge de première instance n'a pas tenu compte du fait que la possession même est une preuve de propriété. Par conséquent, *prima facie*, les Nishgas sont propriétaires des terres qu'ils ont possédées de temps immémorial et, par conséquent, il incombe carrément à l'intimé d'établir que leur droit a été éteint.

Des témoignages ci-dessus rapportés, il ressort que de fait, les Nishgas forment et ont formé, de temps immémorial, une entité culturelle distincte possédant des notions aborigènes de propriété, propres à leur culture, et pouvant être énoncées en termes de common law, étant donné que, pour reprendre les paroles du docteur Duff: «leurs cultures ont évolué à un degré supérieur à plusieurs égards, à celui de toute

firmation of this statement comes from Captain Cook who, in 1778, at Cape Newenham claimed the land for Great Britain. He reported having gone ashore and entered one of the native houses which he said was 150 feet in length, 24 to 30 feet wide and 7 to 8 feet high and that "there were no native buildings to compare with these north of Mexico". The report continues that Cook's officers were full of admiration for the skill and patience required to erect these buildings which called for a considerable knowledge of engineering.

While the Nishga claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here.

Strong J. (later C.J.C.) in *St. Catharine's Milling and Lumber Company v. The Queen*[24], said at p. 608:

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

[24] (1886), 13 S.C.R. 577.

autre partie du continent au nord du Mexique». On trouve une confirmation remarquable de cette affirmation grâce au capitaine Cook qui, en 1778, à Cape Newenham, a revendiqué les terres au nom de la Grande-Bretagne. Il raconte qu'il a mis pied à terre et est entré dans l'une des habitations aborigènes qui, apparemment, mesurait 150 pieds de longueur, 24 à 30 pieds de largeur et 7 à 8 pieds de hauteur et que: [TRADUCTION] «il n'existait pas de constructions aborigènes comparables à celles-ci au nord du Mexique». Cook ajoute que ses officiers étaient éblouis par l'habileté et la patience requises dans la construction de ces édifices, qui demandaient des connaissances approfondies de génie.

La revendication nishga n'a jamais fait l'objet d'un litige, mais il existe une abondante jurisprudence confirmant que la common law reconnaît les droits aborigènes, à la possession et à la jouissance des terres des aborigènes dans des cas précisément analogues à la situation qui se présente ici en ce qui concerne les Nishgas.

Dans l'arrêt *St. Catharine's Milling and Lumber Company c. The Queen*[24], le Juge Strong (devenu par la suite Juge en chef de cette Cour) a dit ce qui suit, page 608:

[TRADUCTION] Dans les Commentaires du chancelier Kent et dans certaines décisions de la Cour suprême des États-Unis, nous retrouvons des comptes rendus très détaillés et précis relativement à la ligne de conduite en question. *En bref, il s'agit de la reconnaissance par la Couronne d'un titre de la nature d'un usufruit, que les Indiens ont sur toutes les terres qui n'ont pas été cédées. Ce titre, même s'il n'est peut-être pas possible d'en donner une définition juridique exacte, suffisait néanmoins à protéger les Indiens en ce qui concerne l'utilisation et la jouissance absolue de leurs terres, même si, en même temps, ceux-ci ne pouvaient pas les aliéner validement autrement qu'en faveur de la Couronne elle-même, qui détenait le titre suprême, en conformité du droit anglais en matière de propriété immobilière.* Comparativement aux précédents que je mentionnerai un peu plus loin, je crois que cette brève affirmation doit être considérée comme une description exacte des principes sur lesquels la Couronne s'est invariablement fondée en ce qui concerne les terres indiennes, du moins depuis

[24] (1886), 13 R.C.S. 577.

affairs in North America, being as such responsible directly to the crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments, down to the year 1867, when the confederation act constituting the Dominion of Canada was passed. So faithfully was this system carried out, that I venture to say that there is no settled part of the territory of the Province of Ontario, except perhaps some isolated spots upon which the French Government had, previous to the conquest, erected forts, such as Fort Frontenac and Fort Toronto, which is not included in and covered by a surrender contained in some Indian treaty still to be found in the Dominion Archives. These rules of policy being shown to have been well established and acted upon, and the title of the Indians to their 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.

(Emphasis added)

1756, année de la nomination de Sir William Johnston par le gouvernement impérial au poste de surintendant des affaires indiennes en Amérique du Nord; en cette qualité, il devait directement répondre à la Couronne, par l'intermédiaire d'un des secrétaires d'État, ou des Lords of Trade and Plantation, et a donc remplacé les gouvernements provinciaux, jusqu'en 1867, année de l'adoption de la loi sur la confédération, constituant le Dominion du Canada. Ce système a été appliqué si fidèlement, que je m'aventurerai à dire qu'il n'existe aucune partie colonisée du territoire de la province de l'Ontario, sauf peut-être quelques endroits isolés où le gouvernement français avait, avant la conquête, érigé des forts, comme le fort Frontenac et le fort Toronto, qui ne soit pas cédée dans quelque traité indien que l'on pourrait encore retrouver dans les archives du Dominion. Étant donné qu'il a été démontré que ces principes directeurs étaient bien établis et appliqués, et que le titre des Indiens sur leurs terres non cédées a été reconnu par la Couronne dans la mesure ci-dessus mentionnée, il peut sembler inutile de rechercher les motifs sur lesquels il était fondé.

(Les italiques ont été ajoutés.)

and at p. 610:

The American authorities, to which reference has already been made, consist (amongst others) of passages in the commentaries of Chancellor Kent, (Kent's Commentaries 12 ed. by Holmes, vol. 3 p. 379 *et seq.* and in editor's notes.) 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*, 8 Wheaton 543, *Worcester* v. *State of Georgia*, 6 Peters 515, and *Mitchell* v. *United States*, 9 Peters 711, 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 recognize it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America.* Chancellor Kent, referring to the decision of the Supreme Court of the United States, in *Cherokee*

A la page 610:

Les précédents et textes de doctrine américains, dont nous avons déjà fait mention, consistent, entres autres, en certains passages des commentaires du chancelier Kent (Kent's Commentaries, 12e éd., par Holmes, vol. 3, pp. 379 et suivantes; et aussi les notes de l'éditeur) dans lesquels toute la doctrine des titres indiens est étudiée d'une façon détaillée et élaborée, et en plusieurs décisions de la Cour suprême des États-Unis, dont trois, *Johnston* v. *McIntosh*, 8 Wheaton 543, *Worcester* v. *State of Georgia*, 6 Peters 515, et *Mitchell* v. *United States*, 9 Peters 711, peuvent être choisies à titre d'arrêts faisant autorité. *La valeur et l'importance de ces précédents et textes n'est pas simplement qu'ils démontrent que la même doctrine que celle qui a déjà été énoncée relativement au titre que les Indiens ont sur les terres non cédées, s'applique aux États-Unis, mais, fait encore beaucoup plus important, que tous, sans exception, indiquent qu'elle remonte à une époque antérieure à la révolution et reconnaissent qu'elle est la continuation des principes juridiques ou directeurs en matière de titres indiens qu'avait alors établis le gouvernement britannique, et qui sont par conséquent identiques à ceux qui ont également continué à être*

Nation v. *State of Georgia*, 5 Peters 1, says:—

> "The court there held that the Indians were domestic, dependent nations, and their relations to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied until that right should be extinguished by a voluntary cession to our government, 3 Kent Comms. 383."

(Emphasis added.)

. . . . .

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 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

reconnus et appliqués en Amérique du Nord britannique. Le chancelier Kent, se reportant à la décision de la Cour suprême des États-Unis dans l'affaire *Cherokee Nation* v. *State of Georgia*, 5 Peters 1, dit ce qui suit:

> [TRADUCTION] «Dans cette cause-là, le tribunal a décidé que les Indiens formaient des nations indigènes, dépendantes; quant à nous, leurs relations ressemblaient à celles d'un pupille envers son tuteur; ils avaient un droit indiscutable sur les terres qu'ils occupaient jusqu'à ce qu'ils éteignent ce droit en cédant de plein gré les terres à notre gouvernement, 3 Kent Comms. 383.»

(Les italiques ont été ajoutés.)

. . . . .

Il ressort donc qu'aux États-Unis, la ligne de conduite traditionnelle, datant de l'époque coloniale, relativement aux Indiens et à leurs terres, a produit des règles juridiques bien établies, et a eu pour résultat que les terres possédées par les Indiens sont, jusqu'au moment de leur cession, considérées comme leur propriété de plein droit, en ce qui concerne la possession et la jouissance, même si ceux-ci ne peuvent pas les aliéner; en d'autres termes le *dominium utile* est reconnu comme appartenant aux Indiens et étant réservé à ceux-ci, bien qu'il soit considéré que le *dominium directum* relève de l'État américain. S'il en est ainsi en ce qui concerne les terres indiennes américaines, conservées aux Indiens par l'observation constante d'une ligne de conduite particulière reconnue par les tribunaux américains comme ayant initialement été appliquée par la Couronne de la Grande-Bretagne, comment est-il possible de présumer que le droit puisse, ou plutôt ait pu, au moment de la confédération, être moins favorable aux Indiens dont les terres étaient situées dans les limites du dominion de la Couronne britannique, fondatrice de cette doctrine avantageuse suivie de si près aux États-Unis depuis l'époque des gouvernements coloniaux? *Par conséquent, lorsque nous considérons la chose eu égard au Canada, la pratique constante a été de reconnaître le titre indien comme pouvant être éteint uniquement par suite d'une cession à la Couronne.* Je soutiens que s'il n'y avait eu aucun texte législatif énonçant expressément cette règle à titre de règle de droit positif, nous devrions, comme les tribunaux américains l'on fait, décider que cette règle était néanmoins une règle non écrite de la common law, que les cours étaient tenues d'appliquer comme telle, et par conséquent, que le 24e paragraphe de l'article 91, ainsi que l'article 109 et le 5e paragraphe de l'article 92 de l'acte de l'Amérique du Nord britannique, doivent tous être interprétés

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.

(Emphasis added.)

. . . . . .

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 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; . . . . .

Strong J., with whom Gwynne J. agreed, was dissenting in the case but the dissent was on the question of whether the Dominion or Provincial government acquired title when the Indian title was extinguished as it had been in that case by treaty. The majority held that the Crown in the right of the Province became the owner and Strong and Gwynne JJ. held that the Dominion became the owner. However, on the point of Indian title there was no disagreement between the majority and minority views. Ritchie C.J. for the majority agreed substantially with Strong J. in this respect, saying at pp. 559-60:

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

comme si ces droits territoriaux des Indiens étaient strictement des droits juridiques dont il fallait tenir compte et qu'il fallait considérer lorsque la propriété et les droits de propriété ont été partagés entre les gouvernements fédéral et provinciaux au moment de la confédération.

(Les italiques ont été ajoutés.)

. . . . . .

Résumons ces arguments, qui me paraissent des plus convaincants, en disant qu'au moment de la confédération, les Indiens, par suite d'une coutume et d'un usage constants reconnus par la Couronne, étaient considérés comme détenant un certain droit de propriété sur les terres non cédées qu'ils occupaient aux fins de la chasse; que cet usage a évolué en une règle de common law applicable aux colonies américaines ou que pareille règle venait du droit des gens et avait de cette façon été appliquée en droit colonial aux nations indiennes; que le droit des Indiens était uniquement de la nature d'un usufruit et ne pouvait pas être aliéné, sauf par cession à la Couronne, propriétaire suprême des terres;. . . . .

Dans cette cause-là, le Juge Strong, à l'avis duquel souscrivait le Juge Gwynne, était dissident, mais uniquement sur la question de savoir si c'est le gouvernement fédéral ou le gouvernement provincial qui acquiert les terres lorsque le titre indien est éteint comme il l'avait été dans ce cas-là par traité. La majorité a décidé que la Couronne du chef de la province était devenue propriétaire, alors que les Juges Strong et Gwynne ont décidé que c'était le gouvernement fédéral qui était devenu propriétaire. Toutefois, en ce qui concerne le titre indien, les Juges se sont entendus à l'unanimité. Le Juge en chef Ritchie, qui parlait au nom de la majorité, a souscrit en gros à l'avis du Juge Strong à cet égard, disant aux pages 559 et 560:

[TRADUCTION] Je suis d'avis que toutes les terres non octroyées de la province d'Ontario appartiennent à la Couronne, comme faisant partie du domaine public, *sous réserve du droit d'occupation indien, lorsque ce droit n'a pas été légalement éteint*; lorsque pareil droit d'occupation a été légalement éteint, les terres appartiennent d'une façon absolue à la Couronne, et par conséquent à la province d'Ontario. Je crois que la Couronne est propriétaire de toutes les terres non octroyées, les Indiens ayant uniquement un droit d'occupation, et la Couronne détenant le titre juridi-

exclusive right to extinguish the Indian title either by conquest or by purchase . . .

(Emphasis added.)

The *St. Catharine's Milling* case was affirmed in the Privy Council[25]. The judgment was given by Lord Watson who, in referring to Indian aboriginal interests, said at p. 54:

It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. *There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.*

(Emphasis added.)

The case most frequently quoted with approval dealing with the nature of aboriginal rights is *Johnson v. McIntosh*[26]. It is the *locus classicus* of the principles governing aboriginal title. Gould J. in his reasons said of this case at p. 514:

The most cogent one of these is the argument based upon a classic and definitive judgment of Chief Justice Marshall of the United States, in 1823, in the case of *Johnson v. McIntosh*, (1823) 8 Wheaton, p 541, wherein that renowned jurist gave an historical account of the British Crown's attitude towards the rights of aboriginals over land originally occupied by

[25] (1888), 14 App. Cas. 46.

[26] (1823), 8 Wheaton 543, 21 U.S. 240.

que sous réserve de ce droit, avec le droit absolu exclusif d'éteindre le titre indien soit par conquête soit par achat . . .

(Les italiques ont été ajoutés.)

L'arrêt *St. Catharine's Milling* a été confirmé au Conseil privé[25]. Le jugement a été rendu par Lord Watson qui, en parlant des droits aborigènes indiens, a dit ce qui suit, p. 54:

[TRADUCTION] Dans les plaidoiries du gouvernement fédéral, il a été soutenu que dans la mesure où la proclamation édicte que les territoires ainsi réservés aux Indiens n'ont jamais «été cédés» à la Couronne «ou été achetés par» la Couronne, les Indiens en sont demeurés les seuls propriétaires. Toutefois, cette déduction n'est pas conforme aux termes de l'instrument, qui montre que les Indiens avaient un droit personnel, de la nature d'un usufruit, dépendant du bon plaisir du Souverain. Les terres réservées sont expressément décrites comme étant «les parties de nos possessions et territoires»; il est déclaré, que, selon le bon plaisir du Souverain, «pour le présent» elles sont réservées aux Indiens, pour qu'ils y chassent, sous la protection et la surveillance du Souverain. *On a longuement èt savamment parlé, au cours des plaidoiries, de la nature exacte du droit indien, mais Leurs Seigneuries estiment qu'il n'est pas nécessaire d'exprimer leur avis sur ce point. Il leur semble suffisant, aux fins de la présente cause, de dire que la Couronne a toujours eu un droit fondamental et suprême sous-jacent au titre indien, et qui est devenu un plenum dominium dès que le titre indien a été cédé ou autrement éteint.*

(Les italiques ont été ajoutés.)

L'arrêt *Johnson v. McIntosh*[26], est celui qui est le plus souvent mentionné avec approbation, lorsqu'il est question de la nature des droits aborigènes. C'est l'exposé classique des principes régissant le titre aborigène. Dans ses motifs, le Juge Gould a parlé de cette cause-là comme suit, p. 514:

[TRADUCTION] L'argument le plus connu est celui qui est fondé sur le jugement classique et définitif qui a été rendu par le Juge en chef Marshall des États-Unis, en 1823, dans l'affaire *Johnson v. McIntosh*, (1823) 8 Wheaton, p. 541 et dans lequel ce juriste renommé a donné un aperçu historique de l'attitude de la Couronne britannique envers les droits des

[25] (1888), 14 App. Cas. 46.

[26] (1823), 8 Wheaton 543, 21 U.S. 240.

them, and an enunciation of the law of the United States on the same subject.

and on p. 518 he said:

For more than 150 years this strong judgment has at various times been cited with approval by such authorities as the House of Lords (*Tamaki v. Baker* [1901] A.C. 561 at 580); the Supreme Court of Canada (*St. Catherine's Milling v. The Queen* (1886) 13 S.C.R. 577, Strong, J. at 610); Court of Appeal for Ontario, (in the same case, (1886)—13 O.A.R. 148, Burton, J.A., at 159-160); Ontario High Court, Chancery Division (in the same case, 10 O.R. 196, Boyd, J., at 209); Court of Appeal for British Columbia (*White and Bob*, supra p. 230); Supreme Court of New Brunswick (*Warman v. Francis* (1958)—20 D.L.R. (2d) 627, Anglin, J., at 630).

Chief Justice Marshall said in *Johnson v. McIntosh*:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no

aborigènes sur les biens-fonds initialement occupés par ceux-ci et a exposé le droit applicable aux États-Unis à cet égard.

et à la page 518 il a dit ce qui suit:

[TRADUCTION] Durant plus de 150 ans, ce jugement convaincant a plusieurs fois été mentionné avec approbation par des instances aussi célèbres que la Chambre des Lords (*Tamaki v. Baker* (1801) A.C. 561, p. 580); la Cour suprême du Canada (*St. Catherine's Milling v. The Queen* (1886) 13 R.C.S. 577, M. le Juge Strong, p. 610); la Cour d'appel de l'Ontario, (dans la même affaire, (1886)—13 O.A.R. 148, M. le Juge d'appel Burton, aux pp. 159 et 160); la Haute Cour de l'Ontario, Chancery Division (dans la même affaire, 10 O.R. 196, M. le Juge Boyd, p. 209); la Cour d'appel de la Colombie-Britannique (*White and Bob*, précité, p. 230); la Cour suprême du Nouveau-Brunswick (*Warman v. Francis* (1958)—20 D.L.R. (2e) 627, M. le Juge Anglin, p. 630).

Dans l'arrêt *Johnson v. McIntosh*, le Juge en chef Marshall a dit ce qui suit:

[TRADUCTION] Lorsqu'elles ont découvert cet immense continent, les grandes nations européennes étaient pressées de s'approprier autant de territoires qu'il leur était possible. Sa vaste étendue offrait tout ce que pouvait désirer l'ambition et l'esprit d'entreprise de chacun; le caractère et la religion de ses habitants fournissaient une justification permettant de les considérer comme un peuple que le génie supérieur européen pouvait regarder de haut. Les potentats du vieux-monde n'ont éprouvé aucune difficulté pour se convaincre qu'ils compensaient amplement les habitants du nouveau continent en leur offrant la civilisation et le Christianisme en échange de leur indépendance absolue. Mais, comme ils étaient tous à la recherche du même objectif ou à peu près, il a été nécessaire, en vue d'éviter des décisions contradictoires et des guerres, d'établir un principe que tous reconnaîtraient comme constituant le droit en vertu duquel le droit d'acquisition, qu'ils revendiquaient tous, devrait être régi entre eux. Ce principe était que par la découverte, le titre était dévolu au gouvernement dont les sujets avaient fait la découverte ou sous l'autorité duquel la découverte était faite, et ce, vis-à-vis de tous les autres gouvernements européens, ce titre pouvant être rendu parfait par la possession.

L'exclusion de tous les autres pays européens conférait nécessairement à la nation qui faisait la découverte le droit exclusif d'acquérir les terres des aborigènes et d'établir des colonies. Il s'agissait là d'un

Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. *They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion*; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

(Emphasis added.)

It is pertinent to quote here what Norris J.A. said of *Johnson v. McIntosh* in *R. v. White and Bob*[27], at pp. 212-13:

. . . The judgment in *Johnson v. McIntosh, supra,* was delivered at an early stage of exploration of this continent and when controversy as to those rights was first becoming of importance. Further, on the consideration of the subject matter of this appeal, it is to be remembered that it was delivered only five years after the Convention of 1818 between Great Britain and the United States (erroneously referred to by counsel as the *Jay Treaty*) providing that the northwest coast of America should be free and open for the term of ten years to the vessels, citizens, and subjects of both powers in order to avoid disputes

[27] (1965), 52 W.W.R. 193.

droit qu'aucun Européen ne pouvait entraver. C'était un droit que chacun faisait valoir pour lui-même, tout en reconnaissant ce droit aux autres.

Les relations qui devaient exister entre découvreur et aborigènes devaient se régler entre eux. Les droits ainsi acquis étant exclusifs, aucun autre pouvoir ne pouvait s'interposer.

Dans l'établissement de ces relations, on n'a, en aucun cas, entièrement omis de tenir compte des droits des aborigènes; mais ces droits se sont trouvés nécessairement restreints dans une large mesure. *On reconnaissait que les aborigènes étaient les occupants de plein droit des terres, et pouvaient juridiquement et légitimement demeurer en possession de celles-ci, et les utiliser à leur gré;* mais leurs droits à la souveraineté complète, en leur qualité de nations indépendantes, ont été nécessairement diminués, et leur pouvoir de disposer des terres en faveur de n'importe qui a été nié en vertu du principe initial de base selon lequel la découverte conférait à ceux qui l'avait faite un titre exclusif.

Les différentes nations européennes respectaient le droit d'occupation des aborigènes, qu'ils pouvaient exercer à leur gré, mais elles revendiquaient la propriété suprême; elles revendiquaient et exerçaient, par suite de ce droit suprême, un pouvoir d'octroyer les terres, alors que celles-ci étaient encore en possession des aborigènes. Ces octrois ont été interprétés par tous comme accordant au cessionnaire un titre, sous réserve uniquement du droit d'occupation indien.

(Les italiques ont été ajoutés.)

Il est bon de mentionner ici les commentaires que le Juge d'appel Norris a faits à propos de l'arrêt *Johnson v. McIntosh* dans l'arrêt *R. v. White and Bob*[27], pp. 212 à 213;

[TRADUCTION] . . . Dans l'affaire *Johnson v. McIntosh* (précitée) le jugement a été rendu à une époque où l'exploration de ce continent et la controverse au sujet de ces droits ont commencé à prendre de l'importance. De plus, en examinant la question dans le présent appel, il faut se rappeler que ce jugement a été rendu cinq ans seulement après la convention de 1818 conclue entre la Grande-Bretagne et les États-Unis (appelée à tort par l'avocat le *traité Jay*), qui prévoyait que la côte nord-ouest de l'Amérique devrait être une zone libre et ouverte, durant 10 ans, en faveur des navires, citoyens, et sujets des deux

[27] (1965), 52 W.W.R. 193.

between the powers. The rights of Indians were naturally an incident of the implementation of a common policy which was perforce effective as applying to what is now Vancouver Island and the territory of Washington and Oregon, all of which were then Hudson's Bay territories. For these reasons and because the judgment in *Johnson v. McIntosh* was written at a time of active exploration and exploitation of the West by the Americans, it is of particular importance.

The dominant and recurring proposition stated by Chief Justice Marshall in *Johnson v. McIntosh* is that on discovery or on conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it.

Chief Justice Marshall had occasion in 1832 once more to adjudicate upon the question of aboriginal rights in *Worcester v. State of Georgia*[28]. He said at pp. 542-4:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws*. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science,

[28] (1832), 6 Peters 515, 31 U.S. 530, 8 L. ed. 483.

puissances, en vue d'éviter toute dispute entre celles-ci. Les droits des Indiens formaient naturellement une question connexe en ce qui concerne l'application d'un principe directeur commun s'appliquant nécessairement à ce qui est maintenant l'île de Vancouver et les États de Washington et d'Oregon; tous ces territoires étaient alors la propriété de la Compagnie de la baie d'Hudson. Pour ces motifs, et étant donné que le jugement dans l'affaire *Johnson v. McIntosh* (précitée) a été rendu à une époque où les Américains exploraient et exploitaient activement l'Ouest, cet arrêt est particulièrement important.

La proposition principale, celle qui revient toujours et qui a été énoncée par le Juge en chef Marshall dans l'arrêt *Johnson v. McIntosh*, est qu'au moment de la découverte ou de la conquête, les aborigènes des nouvelles terres étaient reconnus comme les occupants de plein droit des terres et pouvaient juridiquement et légitimement demeurer en possession de celles-ci et les utiliser à leur gré, mais leurs droits à la souveraineté complète en qualité de nations indépendantes se sont trouvés nécessairement diminués et leur pouvoir de disposer de ces terres à leur gré en faveur de n'importe qui a été nié en vertu du principe initial de base selon lequel la découverte ou la conquête conféraient un titre exclusif.

Dans l'affaire *Worcester v. State of Georgia*[28], le Juge en chef Marshall a eu l'occasion en 1832 de se prononcer de nouveau sur la question des droits aborigènes. Il a dit ce qui suit pp. 542-4:

[TRADUCTION] L'Amérique, séparée de l'Europe par un vaste océan, était habitée par un peuple différent, divisé en nations distinctes, indépendantes l'une de l'autre et vis-à-vis du reste du monde; *elles avaient leurs propres institutions et se gouvernaient elles-mêmes en vertu de leurs propres lois*. Il est difficile de comprendre que les habitants d'une partie du globe pouvaient avoir des revendications originales légitimes de suprématie sur les habitants de l'autre ou sur les terres qu'ils occupaient; ou que celui qui découvrait des terres acquérait des droits sur le pays découvert, droits qui annulaient les droits préexistants de ceux qui en avaient antérieurement eu la possession.

Après être demeurée chez elle durant des siècles, l'Europe, guidée par la science nautique, a mené,

[28] (1832), 6 Peters 515, 31 U.S. 530, 8 L. ed. 483.

conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.

Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?

But power, war, conquest, give rights, which after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for anyone of them to grasp the whole, and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession".

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements upon it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, *but could not affect the rights of those already in possession, either as*

grâce à son esprit d'entreprise, certains de ses fils aventuriers au nouveau monde. Ils ont trouvé celui-ci en la possession d'un peuple qui avait fait peu de progrès dans le domaine agricole ou industriel et qui vivait surtout de la guerre, de la chasse et de la pêche.

En naviguant le long de la côte et en mettant à l'occasion pied à terre, ces aventuriers ont-ils acquis, pour le compte des divers gouvernements auxquels ils appartenaient ou qui leur avaient donné une commission, la propriété légitime des terres situées entre l'Atlantique et le Pacifique; ou ont-ils légitimement soumis les nombreux peuples qui occupaient celles-ci à leur autorité? Ou encore, la nature ou le grand créateur de toutes choses ont-ils conféré aux agriculteurs et industriels ces droits sur des chasseurs ou pêcheurs?

Mais la puissance, la guerre, la conquête, confèrent des droits qui, après la possession, sont reconnus par tous et qui ne peuvent jamais être contestés par ceux sur lesquels ils s'exercent. Nous passons à l'état actuel des choses après avoir jeté un coup d'œil sur leurs origines, le rappel de ces origines pouvant éclairer les prétentions actuelles.

Les grandes puissances maritimes de l'Europe ont découvert et visité différentes parties de ce continent presque à la même époque. Il s'agissait d'un objet trop immense pour que l'une d'entre elles puisse le saisir dans son ensemble et les intéressés étaient trop puissants pour se soumettre aux prétentions exclusives ou déraisonnables d'un seul potentat. En vue d'éviter de sanglants conflits, qui auraient pu avoir des conséquences désastreuses pour chacun, les nations européennes ont dû établir quelque principe que tous reconnaîtraient et qui déciderait des droits respectifs de chacun. Ce principe, comme le suggère l'état actuel des choses, est le suivant: «que par la découverte, le titre était dévolu au gouvernement dont les sujets avaient fait la découverte ou sous l'autorité duquel la découverte s'était faite, et ce, vis-à-vis de tous les autres gouvernements européens, ce titre pouvant être rendu parfait par la possession».

Ce principe, reconnu par tous les Européens, parce qu'il était dans l'intérêt de tous de le reconnaître, conférait donc inévitablement à la nation qui faisait la découverte le droit exclusif d'acquérir les terres et de les coloniser. C'était un principe exclusif qui interdisait toute concurrence entre ceux qui en avaient convenu; ce n'était pas un principe qui pouvait annuler les droits antérieurs de ceux qui ne l'avait pas reconnu. Ce principe réglementait chez les Européens le droit conféré par la découverte, *mais il ne pouvait avoir aucune influence sur les droits de ceux qui*

aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

(Emphasis added.)

See also Chancellor Kent in his *Commentaries on American Law*, (1889), vol. 3, p. 411.

The view that the Indians had a legal as well as a just claim to the territory they occupied was confirmed as recently as 1946 by the Supreme Court of the United States in the case of *United States v. Alcea Band of Tillamooks*[29] In that case it was held that the Indian claims legislation of 1935 did not confer any substantive rights on the Indians, that is, it did not convert a moral claim for taking their land without their consent and without compensation into a legal claim, because they already had a valid legal claim, and there was no necessity to create one. The statute simply removed the necessity that previously existed for the Indians to obtain the consent of the Government of the United States to sue for an alleged wrongful taking. The judgment is based squarely on the recognition by the Court of "original Indian title" founded on their previous possession of the land. It was held that "the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title". Vinson C.J. said at p. 45:

The language of the 1935 Act is specific, and its consequences are clear. By this Act Congress neither admitted or denied liability. The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one.

[29] (1946), 329 U.S. 40.

possédaient déjà les terres, soit en leur qualité d'occupants aborigènes, soit en leur qualité d'occupants par suite d'une découverte préhistorique. Ce principe conférait un droit exclusif d'achat mais ne fondait pas ce droit sur le refus de reconnaître le droit de vente du possesseur.

(Les italiques ont été ajoutés.)

Voir également le chancelier Kent dans ses *Commentaries on American Law*, (1889), vol. 3, p. 411.

L'opinion que les Indiens pouvaient juridiquement et légitimement faire valoir leurs droits sur le territoire qu'ils occupaient a été confirmée récemment, en 1946, par la Cour suprême des États-Unis dans l'arrêt *United States v. Alcea Band of Tillamooks*[29]. Dans cette cause-là, il a été décidé que la loi sur les droits indiens de 1935 ne conférait aucun droit fondamental aux Indiens, c.-à-d. qu'elle ne transformait pas un droit moral, découlant de la prise de leurs terres sans leur consentement et sans indemnisation, en un droit juridique, parce qu'ils avaient déjà un droit valide et juridique, et qu'il n'était pas nécessaire de créer pareil droit en leur faveur. La loi libérait simplement les Indiens de l'obligation d'obtenir le consentement du gouvernement américain s'ils voulaient engager des poursuites à la suite d'une dépossession illicite. Le jugement est carrément fondé sur la reconnaissance par la Cour du «titre indien original» découlant d'une possession antérieure des terres. Il décide que [TRADUCTION] «les Indiens ont, en ce qui concerne l'indemnisation, une cause d'action découlant de la dépossession forcée des terres qu'ils détiennent en vertu d'un titre indien original». Le Juge en chef Vinson a dit p. 45:

[TRADUCTION] La loi de 1935 est rédigée en termes clairs, et les conséquences de celle-ci sont claires. Par cette loi, le Congrès n'a ni reconnu ni nié une obligation. La loi annule les obstacles découlant de l'immunité souveraine et de la prescription et édicte que les tribunaux statueront sur les revendications désignées. On ne crée pas quelque nouveau droit ou cause d'action. On ne transforme pas une revendication simplement morale en une revendication juridique.

[29] (1946), 329 U.S. 40.

It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign. This title was deemed subject to a right of occupancy in favour of Indian tribes, because of their original and previous possession. It is with the content of this right of occupancy, this original Indian title, that we are concerned here.

As against any but the sovereign, original Indian title was accorded the protection of complete ownership but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. However, it is now for the first time asked whether the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title.

. . . . . .

A contrary decision would ignore the plain import of traditional methods of extinguishing original Indian title. The early acquisition of Indian lands, in the main, progressed by a process of negotiation and treaty, the first treaties reveal the striking deference paid to Indian claims, as the analysis in *Worcester v. Georgia, supra*, clearly details. It was usual policy not to coerce the surrender of lands without consent and without compensation. *The great drive to open western lands in the 19th century, however, productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title. In 1896, this Court noted that "nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government". Marks v. United States,* 161, U.S. 297, 302 (1896). *Something more than sovereign grace prompted the obvious regard given to original Indian title.*

(Emphasis added.)

The same considerations applied in Canada. Treaties were made with the Indians of the

Il a été décidé depuis longtemps que par suite de la découverte, le titre sur les terres occupées par les tribus indiennes était dévolu au souverain. Ce titre était réputé être assujetti à un droit d'occupation en faveur des tribus indiennes, découlant de leur possession initiale antérieure. C'est de l'étendue de ce droit d'occupation, de ce titre indien original, qu'il est question ici.

Vis-à-vis de tous sauf le souverain, le titre indien original était protégé comme un droit complet de propriété mais il était sujet aux actes du souverain, qui avait le pouvoir exclusif d'éteindre le droit d'occupation à son gré. L'extinction de ce droit par un acte souverain était complète et laissait les terres libres des droits indiens. Les parties ne pouvaient pas contester la justice ou la légitimité des méthodes employées en vue d'éteindre le droit d'occupation. Les Indiens eux-mêmes ne pouvaient pas empêcher la prise de leurs terres tribales ou l'extinction de leur titre. Toutefois, on se demande ici pour la première fois si les Indiens ont une cause d'action, en ce qui concerne l'obtention d'une indemnité, par suite de la dépossession forcée des terres qu'ils détiennent en vertu de leur titre indien original.

. . . . . .

En décidant le contraire, on méconnaîtrait la valeur évidente des méthodes traditionnelles d'extinction du titre indien original. Dans l'ensemble, au début, l'acquisition des terres indiennes s'est faite au moyen de pourparlers et de traités; les premiers traités révèlent l'importance frappante qui a été accordée aux droits indiens, comme l'analyse de l'arrêt *Worcester v. Georgia*, précité, le montre clairement. La ligne de conduite établie consistait à ne pas obtenir une cession forcée des terres, sans le consentement des Indiens et sans indemnisation. *Toutefois, le grand effort qui a été fourni au 19e siècle en vue de coloniser l'Ouest, et qui a été à l'origine de marchés conclus sans scrupule, n'a pas entièrement remplacé la pratique établie qui consistait à éteindre le titre indien original par suite de pourparlers. En 1896, cette Cour a fait remarquer que:* [TRADUCTION] *«presque toutes les tribus et bandes indiennes dans les limites territoriales des États-Unis ont conclu quelque traité avec le gouvernement.» Marks v. United States* 161, U.S. 297, 302 (1896). *Ce n'est pas uniquement par une bienveillance souveraine que l'on a de toute évidence tenu compte du titre indien original.*

(Les italiques ont été ajoutés.)

Les mêmes considérations s'appliquent au Canada. Des traités visant d'énormes parcelles

Canadian West covering enormous tracts of land. See Kerr's *Historical Atlas of Canada* (1961), p. 57 (map no. 81). These treaties were a recognition of Indian title.

In *Re Southern Rhodesia*[30], Lord Sumner said at p. 233:

In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." *On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.*

(Emphasis added.)

Chief Justice Marshall in his judgment in *Johnson v. McIntosh* referred to the English case of *Campbell v. Hall*[31]. This case was an important and decisive one which has been regarded as authoritative throughout the Commonwealth and the United States. It involved the rights and status of residents of the Island of Grenada which had recently been taken by British arms in open war with France. The judgment was given by Chief Justice Mansfield. In his

[30] [1919] A.C. 211.

[31] (1774), 1 Cowp. 204, 98 E.R. 1045.

de terrains ont été conclus avec les Indiens de l'Ouest canadien. Voir le *Historical Atlas of Canada* (1961), p. 57 (carte n° 81) de Kerr. Ces traités constituaient une reconnaissance du titre indien.

Dans l'arrêt *Re Southern Rhodesia*[30], Lord Summer a dit ce qui suit, p. 233:

[TRADUCTION] De toute façon, il fallait démontrer que les droits, quels qu'ils aient été, faisaient partie de la catégorie des droits de propriété privée, de sorte qu'il faille présumer qu'au moment de la conquête, à défaut d'une confiscation expresse ou d'une loi d'expropriation subséquente, le conquérant les a respectés et a renoncé à les restreindre ou modifier.

Il est toujours difficile d'apprécier quels étaient les droits des tribus aborigènes. Certaines tribus sont tellement au bas de l'échelle, en ce qui concerne leur organisation sociale, qu'il est impossible de concilier leurs usages et notions de droits et d'obligations avec les institutions ou les notions juridiques d'une société civilisée. On ne peut établir aucun pont. Il serait vain d'attribuer à pareils peuples quelque apparence de droits connus dans notre système juridique et de les transposer dans nos notions de droits aliénables de propriété. En l'espèce, en vertu d'une succession créée par fiction, chaque individu deviendrait un propriétaire foncier «plus riche que l'ensemble de la tribu». *D'autre part, il existe des peuples aborigènes dont les notions juridiques, bien qu'elles aient évolué différemment, sont à peine moins précises que les nôtres. Lorsqu'elles ont été étudiées et comprises, elles ne sont pas moins exécutoires que des droits découlant du système anglais.*

(Les italiques ont été ajoutés.)

Dans le jugement qu'il a rendu dans l'affaire *Johnson v. McIntosh*, le Juge en chef Marshall s'est reporté à l'arrêt anglais *Campbell v. Hall*[31]. Cette dernière cause était importante et décisive; elle a été considérée comme faisant autorité dans le Commonwealth et aux États-Unis. Il y était question des droits et du statut des résidents de l'île de Grenade, dont les Britanniques s'étaient récemment emparée à la suite d'une guerre ouverte avec la France. Le juge-

[30] [1919] A.C. 211.

[31] (1774), 1 Cowp. 204, 98 E.R. 1045.

reasons he said at p. 1047:

A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:

A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.

The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.

The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in *Calvin's case*, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Crusades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.

The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a

ment a été rendu par le Juge en chef Mansfield Dans ses motifs, il dit, p. 1047:

[TRADUCTION] Il a été question en détail de propositions, et de nombreux précédents ont été mentionnés à ce sujet, les deux parties semblant être entièrement d'accord; ces propositions sont de fait trop claires pour être contestées. En énonçant certaines de ces propositions, que nous estimons passablement claires, nous serons amenés à constater plus nettement quelle est la première question et de quoi il en ressort. J'énoncerai les propositions d'une façon générale; la première est la suivante:

Tout pays conquis par les forces britanniques devient un dominion du Roi, du chef de la Couronne; par conséquent, il est nécessairement assujetti à l'assemblée législative, au Parlement de la Grande-Bretagne.

Deuxièmement, les habitants conquis, lorsqu'ils ont reçu la protection du Roi, deviennent ses sujets et doivent être universellement considérés comme tels, et non pas comme des ennemis ou des étrangers.

Troisièmement, les actes de capitulation en vertu desquels le pays est abandonné, et les traités de paix en vertu desquels il est cédé, sont sacrés et inviolables, selon l'intention réelle qui y est manifestée.

Quatrièmement, le droit et le gouvernement législatif de chaque dominion régissent toutes les personnes et tous les biens qui s'y trouvent; c'est d'eux que dépend toute question qui s'y pose. Ceux qui achètent, vivent ou engagent des poursuites dans ce dominion se soumettent au droit de l'endroit. L'Anglais qui se trouve en Irlande, à Minorque, à l'Isle de Man ou sur des plantations n'a aucun privilège distinct de celui des autochtones.

Cinquièmement, les lois du pays conquis demeurent en vigueur tant qu'elles ne sont pas modifiées par le conquérant: l'exception absurde faite en ce qui concerne les païens, dont il est fait mention dans l'affaire *Calvin*, montre l'universalité et l'ancienneté de la maxime. Cette distinction ne pouvait pas exister avant l'ère chrétienne; c'est très probablement là une des conséquences de l'enthousiasme délirant qui existait à l'époque des croisades. En la présente espèce, l'acte de capitulation stipule et convient expressément qu'ils continueront à être régis par leurs propres lois, jusqu'à ce que Sa Majesté fasse connaître son bon plaisir.

Sixièmement, la dernière proposition est la suivante: si le Roi (et lorsque je parle du Roi, je veux toujours dire le Roi seul, sans le Parlement) a le pouvoir de modifier les anciennes lois et d'introduire

conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects, and so in many other instances which might be put.

A fortiori the same principles, particularly Nos. 5 and 6, must apply to lands which become subject to British sovereignty by discovery or by declaration.

It is of importance that in all those areas where Indian lands were being taken by the Crown treaties were negotiated and entered into between the Crown and the Indian tribe on land then in occupation. The effect of these treaties was discussed by Davey J.A. (as he then was) for the majority in *White and Bob* as follows at p. 197:

It was the long-standing policy of the Imperial government and of the Hudson's Bay Company that the Crown or the Company should buy from the Indians their land for settlement by white colonists. In pursuance of that policy many agreements, some very formal, others informal, *were made with various bands and tribes of Indians for the purchase of their lands*. These agreements frequently conferred upon the grantors hunting rights over the unoccupied lands so sold. Considering the relationship between the Crown and the Hudson's Bay Company in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard Ex. 8 as a mere agreement for the sale of land made between a private vendor and a private purchaser. In view of the notoriety of these facts, I entertain no doubt that Parliament intended the word "treaty" in sec. 87 to include all such agreements, and to except their provisions from the operative part of the section.

(Emphasis added.)

The Crown appealed *White and Bob* to this Court. Cartwright J. (as he then was) delivered

de nouvelles lois dans un pays conquis, cette législation étant subordonnée, c.-à-d. qu'elle dépend de son propre pouvoir au Parlement, il ne peut apporter aucun changement en contravention des principes fondamentaux: il ne peut pas exempter un habitant du Dominion en question; par exemple, des lois commerciales ou de l'autorité du Parlement, ou lui accorder des privilèges exclusifs; on peut donner bien d'autres exemples.

A fortiori, les mêmes principes, particulièrement les cinquième et sixième principes, doivent s'appliquer aux terres assujetties à la souveraineté britannique par découverte ou par déclaration.

Il importe de noter que dans toutes les régions où des terres indiennes ont été prises par la Couronne, des traités ont été négociés et conclus par la Couronne et les tribus indiennes occupant ces terres. L'effet de ces traités a été examiné par le Juge d'appel Davey (alors juge puîné), au nom de la majorité, dans l'arrêt *White and Bob*, p. 197:

[TRADUCTION] Le gouvernement impérial et la Compagnie de la Baie d'Hudson ont eu depuis longtemps comme ligne de conduite d'acheter les terres indiennes en vue de la colonisation par les Blancs. En conformité de cette ligne de conduite, de nombreuses ententes, dont certaines comportaient beaucoup de formalités et d'autres pas, *ont été conclues avec diverses bandes et tribus d'Indiens en vue de l'achat de leurs terres*. Ces ententes conféraient fréquemment aux cédants des droits de chasse sur les terres inoccupées ainsi vendues. Compte tenu des relations entre la Couronne et la compagnie de la Baie d'Hudson en ce qui concerne la colonisation de ce pays, et des principes directeurs du gouvernement impérial et de la Compagnie manifestés dans ces ententes, je ne puis considérer que la pièce 8 est une simple entente en vue de la vente de terres, conclue entre un vendeur particulier et un acheteur particulier. Étant donné la notoriété de ces faits, je ne doute aucunement que le Parlement entendait, en employant le terme «traité» à l'article 87, viser toute pareille entente et excepter les dispositions de celle-ci de l'application de la partie opérante de l'article.

(Les italiques ont été ajoutés.)

La Couronne a interjeté appel de l'arrêt *White and Bob* à cette Cour. Le Juge Cartwright (alors

the oral judgment of the Court dismissing the appeal as follows[32]:

Mr. Berger, Mr. Sanders and Mr. Christie. We do not find it necessary to hear you. We are all of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Exhibit 8, was a "treaty" within the meaning of that term as used in s. 87 of the *Indian Act* [R.S.C. 1952, c. 149]. We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* [R.S.B.C. 1960, c. 160] was excluded by reason of the existence of that treaty.

In *Attorney General for Quebec* v. *Attorney General for Canada*[33], Duff J. (as he then was) speaking for the Privy Council said at p. 408 that the Indian right was a "usufruetuary right only and a personal right in the sense that it is in its nature inalienable exeept by surrender to the Crown."

The aboriginal Indian title does not depend on treaty, executive order or legislative enactment. Sutherland J., delivering the opinion of the Supreme Court of the United States in *Cramer v. United States*[34], dealt with the subject as follows:

The fact that such right of occupancy finds no recognition in any state or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. *Broder v. Natoma Water & Min. Co.* 101 U.S. 274, 276, 25 L. ed. 790, 791, furnishes an analogy. There this court, holding that the Act of July 26, 1866, 14 Stat. at L. 251, chap. 262 #9, Comp. Stat. #4647, 9 Fed. Stat. Anno. 2d ed. p. 1349, acknowledging and confirming rights of way for the construction of ditches and canals, was in effect declaratory of a pre-existing right, said: "It is the established doctrine of this court that rights of . . . persons who had constructed canals and ditches . . . are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the Act of 1866. We are of opinion that the section of the Act which we have quoted was rather a voluntary *recognition of a pre-EXISTING RIGHT OF POSSESSION*, constituting a

[32] 52 D.L.R. (2d) 481.

[33] [1921] 1 A.C. 401.

[34] (1923), 261 U.S. 219.

juge puîné) a rendu le jugement oral de la Cour qui rejetait l'appel comme suit[32]:

[TRADUCTION] Mes Berger, Sanders et Christie. Nous ne jugeons pas nécessaire de vous entendre. Nous sommes tous d'avis que la majorité de la Cour d'appel a eu raison de conclure que le document, pièce 8, était un «traité» au sens où ce terme est employé à l'art. 87 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149. Nous croyons par conséquent que dans les circonstances de l'espèce, l'application de l'art. 25 du *Game Act* [R.S.B.C. 1960, c. 160] était exclue par suite de l'existence de ce traité.

Dans l'arrêt *Attorney General for Quebec v. Attorney General for Canada*[33], le Juge Duff (alors juge puîné), parlant au nom du Conseil privé, a dit, page 408, que le droit indien est un [TRADUCTION] «droit de la nature d'un usufruit seulement et un droit personnel en ee sens que, par sa nature, il est inaliénable, sauf par eession à la Couronne.»

Le titre aborigène indien ne dépend d'aueun traité, ni d'aueune ordonnanee du pouvoir exécutif ou disposition législative. Le Juge Sutherland, rendant jugement au nom de la Cour suprême des États-Unis dans l'affaire *Cramer v. United States*[34], a dit à ee sujet ee qui suit:

[TRADUCTION] Le fait que pareil droit d'occupation n'est pas reconnu par quelque acte étatique ou autre acte gouvernemental positif n'est pas concluant. Dans les circonstances ici présentes, le droit découle d'une ligne de conduite gouvernementale établie. L'arrêt *Broder v. Natoma Water & Min. Co.* 101 US 274, 276, 25 L. ed. 790, 791, nous fournit un exemple analogue. Dans cette cause-là, cette Cour, en décidant que la loi du 26 juillet 1866, 14 Stat. at L. 251, chap. 262 #9, Comp. Stat. #4647, 9 Fed. Stat. Anno. 2e éd. p. 1349, reconnaissant et confirmant certains droits de passage en vue de la construction de fossés et de canaux, était déclaratoire d'un droit préexistant, a dit ce qui suit: «Il a été établi par cette Cour que les droits des . . . personnes qui avaient construit des fossés et des canaux . . . sont des droits que le gouvernement avait, par son comportement, reconnus et encouragés et qu'il était tenu de protéger, avant l'adoption de la loi de 1866. Nous sommes d'avis que l'article de la loi que nous avons cité constitue une

[32] 52 D.L.R. (2d) 481.

[33] [1921] 1 A.C. 401.

[34] (1923), 261 U.S. 219.

valid claim to its continued use, than the establishment of a new one."

The Court of Appeal in its judgment cited and purported to rely on *United States v. Santa Fe Pacific Ry. Co.*[35]. This case must be considered to be the leading modern judgment on the question of aboriginal rights. In my view the Court of Appeal misapplied the *Santa Fe* decision. This becomes clear when the judgment of Douglas J. in *Santa Fe* is read. He said:

Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which unless extinguished survived the railroad grant of 1866. *Buttz v. Northern Pacific Railroad* [119 U.S. 55].

. . . . . .

Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Though the *Cramer* case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from "the original nomadic tribal occupancy." [261 U.S. p. 227]. Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson v. McIntosh*, 8 Wheat. 543, not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations including Spain, that like other rules governing titles to property (*United States v. Title Ins. & T. Co.* 265 U.S. 472, 486-487) they should now be considered no longer open.

[35] (1941), 314 U.S. 339.

reconnaissance de plein gré *D'UN DROIT DE POSSESSION PRÉEXISTANT*, autorisant toute revendication valable en vue de la continuation de l'exercice de ce droit, plutôt que l'établissement d'un nouveau droit.»

Dans son jugement, la Cour d'appel s'est reportée à l'arrêt *United States v. Santa Fe Pacific Ry. Co.*[35], et a voulu se fonder sur cet arrêt. Il faut considérer que cette cause est celle qui fait actuellement autorité en matière des droits aborigènes. A mon avis, la Cour d'appel a mal appliqué la décision rendue dans l'affaire *Santa Fe*. C'est ce qui ressort clairement du jugement que le Juge Douglas a rendu dans l'affaire *Santa Fe*. Il a dit ce qui suit:

[TRADUCTION] L'occupation requise en vue d'établir la possession aborigène constitue une question de fait à décider comme toute autre question de fait. S'il était établi que les terres en question faisaient partie de la patrie ancestrale des Walapais ou étaient comprises dans celle-ci, en ce sens qu'elles constituaient un territoire définissable occupé exclusivement par les Walapais (par opposition aux terres sur lesquelles erraient de nombreuses tribus), les Walapais avaient un «titre indien» qui, s'il n'a pas été éteint, a continué d'exister malgré la concession ferroviaire de 1866. Arrêt *Buttz v. Northern Pacific Railroad*, [119 U.S. 55].

. . . . . .

Quels qu'aient pu être les droits des Walapais en vertu de droit espagnol, dans l'arrêt *Cramer* il est présumé que les terres dans les limites de la cession mexicaine n'étaient pas exceptées de la ligne de conduite qui voulait que le droit d'occupation indien soit respecté. Dans l'arrêt *Cramer*, il était question du problème du droit d'occupation d'un particulier d'origine indienne, mais cette Cour a déclaré que pareille occupation ne devait pas être traitée différemment de «l'occupation originale par les tribus nomades» [261 U.S. p. 227]. La présomption que le droit de possession aborigène serait respecté dans les limites de la cession mexicaine n'était peut-être pas requise aux fins d'une décision stricte de l'affaire, tout comme les généralités énoncées dans l'arrêt *Johnson v. McIntosh*, 8 Wheat. 543. Mais pareilles généralités ont été si souvent et si longuement réitérées, en ce qui concerne les terres qui avaient anciennement été sous la souveraineté de diverses nations européennes, dont l'Espagne, que, comme les autres règles régissant les titres de biens-fonds (*United States v. Title Ins. & T. Co.* 265 U.S. 472, 486-487), elles ne devraient plus être considérées comme contestables.

[35] (1941), 314 U.S. 339.

. . . . .

Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any state or other formal governmental action is not conclusive." 261 U.S. at 229.

It is apparent also that the Court of Appeal misapprehended the issues involved in *United States v. Alcea Band of Tillamooks*[36]. This is clear from the judgment of Davis J. in *Lipan Apache Tribe v. United States*[37]. In that case it was argued unsuccessfully that affirmative recognition by Texas prior to entering the Union was essential to any legal assertion of Indian title. The Court said:

On this motion to dismiss we must accept the factual allegation that the claimant tribes had used and occupied designated lands in Texas to the exclusion of other peoples for many years. Such continuous and exclusive use of property is sufficient, unless duly extinguished, to establish Indian or aboriginal title. See, *e.g.; Sac and Fox Tribe v. United States* 179 Ct. Cl. 8, 21-22 (1967) and cases cited. We know that, prior to the creation of the Republic of Texas in 1836, the previous sovereigns, Spain and Mexico (and France to some extent), did not cut off the aboriginal rights of the Indians within their territories on the North American continent. The Supreme Court has clearly indicated that lands formerly under Spanish, Mexican or French sovereignty are not to be treated differently, for purposes of determining Indian titie, from other property within this nation. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345-46 (1941). In each instance, Indian possession, when proved, must be accorded proper respect. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 571, 574, 592 (1823); *Mohave Tribe v. United States*, 7 Ind. Cl. Comm. 219, 260-61 (1959), *Washoe*

[36] (1946), 329 U.S. 40.

[37] (1967), 180 Ct. Cl. 487.

. . . . .

Il n'est pas vrai non plus, comme le soutient l'intimée, que tout droit tribal sur quelque terre particulière doit être fondé sur un traité, sur une loi, ou sur quelque autre acte positif du gouvernement. Comme il a été déclaré dans l'arrêt *Cramer*, «le fait que pareil droit d'occupation n'est pas reconnu par quelque acte étatique ou autre acte gouvernemental positif n'est pas concluant». 261 U.S. p. 229.

Il est également évident que la Cour d'appel a mal compris les questions qui étaient en jeu dans l'affaire *United States v. Alcea Band of Tillamooks*[36]. C'est ce qui ressort clairement du jugement que le Juge Davis a rendu dans l'affaire *Lipan Apache Tribe v. United States*[37]. Dans cette cause-là, il a été soutenu sans succès que la reconnaissance positive par le Texas, avant de devenir membre de l'Union, du titre indien, était essentielle en ce qui concernait toute revendication juridique de celui-ci. La Cour a dit ce qui suit:

[TRADUCTION] Eu égard à cette requête en vue d'obtenir le rejet, nous devons accepter l'allégation de fait que les tribus réclamantes avaient utilisé et occupé durant de nombreuses années les terres désignées au Texas et ce, à l'exclusion de tout autre peuple. Pareille utilisation continue et exclusive est suffisante, à moins que le droit n'ait été dûment éteint, en vue d'établir le titre indien ou aborigène. Voir, par exemple, *Sac and Fox Tribe v. United States*. 179 Ct. Cl. 8, 21-22 (1967) et les arrêts qui y sont mentionnés. Nous savons qu'avant la création de la République du Texas en 1836, les souverains précédents, l'Espagne et le Mexique (et dans une certaine mesure, la France) n'ont pas éteint les droits aborigènes des Indiens dans les limites des territoires qu'ils possédaient en Amérique du Nord. La Cour suprême a clairement indiqué que les terres qui étaient auparavant sous la souveraineté de l'Espagne, du Mexique ou de la France ne doivent pas être traitées différemment, en ce qui concerne la question du titre indien, des autres terres de la nation. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345-46 (1941). Dans chaque cas, la possession indienne, lorsqu'elle est

[36] (1946), 329 U.S. 40.

[37] (1967), 180 Ct. Cl. 487.

Tribe v. United States, 7 Ind. Cl. Comm. 266, 288 (1959).

The Claims Commission has found, however, that, even if the claimants had once possessed aboriginal title to the lands, that right of occupancy was lost after 1836 when Texas became an independent country. The Commission appeared to believe that the survival of aboriginal title depends upon affirmative recognition by the sovereign and that the Republic "did not accord the Indian(s) the right of occupancy . . ."; without such a right to lands in Texas, at the time of annexation, the tribes failed to prove a necessary element of their cause of action and were barred from recovery.

To the extent that the Commission and the appellee believe that affirmative governmental recognition or approval is a prerequisite to the existence of original title, we think they err. Indian title based on aboriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned. *United States v. Santa Fe Pac. R.R.*, supra, 314 U.S. at 345, 347. It is "entitled to the respect of all courts until it should be legitimately extinguished . . .". *Johnson v. McIntosh*, supra, 21 U.S. (8 Wheat.) at 592. See *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 405, 420, 439 (1832); *Mohave Tribe v. United States*, supra, 7 Ind. Cl. Comm. at 262.

The correct inquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights. Extinguishment can take several forms; it can be effected "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . .". *United States v. Santa Fe Pac. R.R., supra*, 314 U.S. at 347. While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. *In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the [claimants'] rights" in their property, Indian title continues. Id.* at 353.

(Emphasis added.)

établie, doit être dûment respectée. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 571, 574, 592 (1823); *Mohave Tribe v. United States*, 7 Ind. Cl. Comm. 219, 260-61, (1959), *Washoe Tribe v. United States*, 7 Ind. Cl. Comm. 266, 288 (1959).

La Claims Commission a conclu, toutefois, que même si les réclamants avaient déjà possédé un titre aborigène sur les terres, ce droit d'occupation a été éteint en 1836, lorsque le Texas a acquis son indépendance. La Commission semblait croire que le maintien du titre aborigène dépend d'une reconnaissance expresse du souverain et que la République «n'avait pas accordé aux Indiens un droit d'occupation . . .»; à défaut de pareil droit sur les terres du Texas, au moment de l'annexion, les tribus avaient omis de prouver un élément nécessaire à l'égard de leur droit d'action et n'étaient pas recevables à obtenir un recouvrement.

Pour autant que la Commission et l'intimé croient que la reconnaissance ou l'approbation expresse du gouvernement est une condition nécessaire à l'existence du titre original, nous estimons qu'ils se trompent. Le maintien du titre indien fondé sur la possession aborigène ne dépend pas d'une reconnaissance souveraine ou d'une acceptation expresse. Une fois qu'il est de fait établi, il demeure tant qu'il n'est pas éteint ou abandonné. Arrêt *United States v. Santa Fe Pac. R.R.*, précité, 314 U.S., 345, 347. Il a «droit au respect de toutes les cours tant qu'il n'est pas légitimement éteint . . .». Arrêt *Johnson v. McIntosh*, précité, 21 U.S. (8 Wheat.) p. 592. *Voir Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839): *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 405, 420, 439 (1832); *Mohave Tribe v. United States*, précité, 7 Ind. Cl. Comm. p. 262.

Nous devons en fait nous demander non pas si la République du Texas a accordé ou octroyé aux Indiens certains droits, mais si elle a éteint leurs droits d'occupation préexistants. L'extinction peut se faire sous diverses formes; elle peut se faire «par traité, par les armes, par achat, par l'exercice d'une suprématie complète niant le droit d'occupation ou autrement . . .». Arrêt *United States v. Santa Fe Pac. R.R.*, précité, 314 U.S. p. 347. Le choix du mode d'extinction est une prérogative gouvernementale, mais l'acte (ou les actes) réel(s) d'extinction doit être clair et sans ambiguïté. *A défaut d'une «indication claire et expresse» dans les dossiers publics que le souverain «voulait éteindre tous les droits des réclamants» sur leurs biens, le titre indien demeure.* Id., p. 353.

(Les italiques ont été ajoutés.)

Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed. Treaty No. 8 made in 1899 was entered into on behalf of Queen Victoria and the representatives of Indians in a section of British Columbia and the Northwest Territories. The treaty was ratified by the Queen's Privy Council in Canada. Certain statements in the treaty are entirely inconsistent with any argument or suggestion that such rights as the Indians may have had were extinguished prior to Confederation in 1871. The treaty reads in part:

And whereas the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan, and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the Said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors for ever, *all their rights, titles and privileges whatsoever, to the lands included within the following limits,* that is to say . . .

. . . . . .

And also the said Indian rights, title and privileges whatsoever to all other lands wherever situated in the North-West Territories, British Columbia, or in any other portion of the Dominion of Canada.

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

(Emphasis added.)

If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?

Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question is the guarantee of Indian rights contained in the Proclamation of 1763. This Proclamation was an Executive Order having the force and effect of an Act of Parlia-

A coup sûr, les traités canadiens, conclus si solennellement par la Couronne, étaient destinés à éteindre le titre indien. Quel autre objectif pouvaient-ils avoir? S'ils n'étaient pas destinés à éteindre le titre indien, il s'agissait d'une farce monumentale, ce qu'il ne faut pas présumer. Le traité nº 8 de 1899 a été conclu par la reine Victoria et les représentants des Indiens d'une partie de la Colombie-Britannique et des territoires du Nord-Ouest. Le traité a été ratifié par le Conseil privé de la Reine au Canada. Certaines déclarations figurant dans le traité sont entièrement incompatibles avec quelque argument ou présomption que les droits que les Indiens ont pu avoir ont été éteints avant l'entrée de la Colombie-Britannique dans la Confédération en 1871. Le traité se lit partiellement comme suit:

[TRADUCTION] Et considérant que lesdits Commissaires ont négocié un traité avec les Cree, les Beaver, les Chipewyan et d'autres Indiens habitant le district ci-après défini et décrit, et que celui-ci a été accepté et conclu par les bandes respectives aux dates mentionnées ci-dessous, lesdits Indiens CÈDENT, REMETTENT ET ABANDONNENT PAR LES PRÉSENTES au Gouvernement du Dominion du Canada, pour le bénéfice de Sa Majesté la Reine et de ses ayants droit à perpétuité, *tous leurs droits, titres et privilèges, quels qu'ils soient, sur les terres comprises dans les limites suivantes,* soit . . .

. . . . . .

Ainsi que lesdits droits, titres et privilèges indiens, quels qu'ils soient, sur tous les autres biens-fonds situés dans les territoires du Nord-Ouest, en Colombie-Britannique ou dans quelque autre partie du Dominion du Canada.

Pour appartenir à Sa Majesté la Reine et à ses ayants droit à perpétuité.

(Les italiques ont été ajoutés.)

S'il n'existait aucun titre indien en Colombie-Britannique en 1899, pourquoi le traité a-t-il été négocié et ratifié?

De plus, à l'appui de la revendication des Nishgas qu'ils ont un certain droit ou titre sur les biens-fonds en question se trouve la garantie énoncée dans la Proclamation de 1763 au sujet des droits indiens. Cette Proclamation était une ordonnance du pouvoir exécutif ayant l'effet

ment and was described by Gwynne J. in *St. Catharine's Milling* case at p. 652 as the "Indian Bill of Rights": see also *Campbell v. Hall*. Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories. It follows, therefore, that the *Colonial Laws Validity Act* applied to make the Proclamation the law of British Columbia. That it was regarded as being the law of England is clear from the fact that when it was deemed advisable to amend it the amendment was effected by an Act of Parliament, namely, the *Quebec Act* of 1774.

In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests. Its effect was discussed by Idington J. in this Court in *Province of Ontario v. Dominion of Canada*[38], at pp. 103-4 as follows:

> A line of *policy* begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown.
>
> *That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.*
>
> In these surrendering treaties there generally were reserves provided for Indians making such surrenders

[38] (1909), 42 S.C.R. 1.

d'une loi du Parlement et elle a été décrite par le Juge Gwynne dans l'arrêt *St. Catharines Milling*, p. 652, comme étant la «Déclaration des droits indiens»: voir également *Campbell v. Hall*. Sa force de loi est analogue au statut de la Magna Carta, qui a toujours été considérée comme étant la loi à travers l'Empire. Elle était une loi qui s'appliquait chaque fois que l'Angleterre prenait en main la souveraineté sur les terres ou territoires nouvellement découverts ou acquis. Par conséquent, il s'ensuit que le *Colonial Laws Validity Act* s'est appliqué de façon à donner effet à la Proclamation en Colombie-Britannique. Il est clair qu'elle était considérée comme faisant partie du droit anglais, étant donné que lorsqu'il a été jugé recommandable de la modifier, cela s'est fait par une loi du Parlement, soit, l'*Acte de Québec* de 1774.

En ce qui concerne cette Proclamation, on peut dire qu'alors que les autres nations exploratrices ont montré une indifférence impitoyable à l'égard des droits aborigènes, l'Angleterre a adopté une attitude remarquablement éclairée envers les Indiens de l'Amérique du Nord. La Proclamation doit être considérée comme un document fondamental sur lequel il faut se fonder en statuant sur les droits originaux. Son effet a été étudié par le Juge Idington, en cette Cour, dans l'arrêt *Province of Ontario c. Dominion of Canada*[38], pp. 103-104:

> [TRADUCTION] Une *ligne de conduite* pleine de prudence, d'humanité et de justice adoptée par la Couronne britannique pour qu'elle soit observée dans tout marché éventuel conclu avec les Indiens à l'égard des droits qu'ils pourraient penser avoir a été énoncée dans la Proclamation royale de 1763, qui créait, à la suite du traité de Paris conclu la même année, entre autres, un gouvernement distinct pour le Québec, cédé par ce traité à la Couronne britannique.
>
> *Cette ligne de conduite, suivie par la suite par les représentants de la Couronne, a entraîné la conclusion de nombreux traités en vertu desquels les Indiens acceptaient de céder les droits qu'ils étaient censés avoir sur la région désignée dans pareils traités.*
>
> Dans ces traités de cession, on stipulait généralement la création de réserves pour les Indiens qui

[38] (1909), 42 R.C.S. 1.

to enter into or be confined to for purposes of residence.

The history of this mode of dealing is very fully outlined in the judgment of the learned Chancellor Boyd in the case of *The Queen v. St. Catharines Milling Co.* 10 O.R. 196, affirmed 13 O.A.R. 148.

(Italics added.)

The question of the Proclamation's applicability to the Nishgas is, accordingly, relevant in this appeal. The point has been before provincial Courts in Canada on a number of occasions but never specifically dealt with by this Court.

It is necessary, therefore, to face the issue as one of first impression and to decide it with due regard to the historical record and the principles of the common law.

The judges of the Court of Appeal of British Columbia have disagreed on this important question. Norris J.A. in *White and Bob* dealt exhaustively with the subject at pp. 218 to 232 of his reasons, saying in part at p. 218:

The royal proclamation of 1763 was declaratory and confirmatory of the aboriginal rights and applied to Vancouver Island.

For the British, the proclamation of 1763 dealt with a new situation arising from the war with the French in North America, in which Indians to a greater or less degree took an active part on both sides, and, incidentally, from the Treaty of Paris of 1763 which concluded the war. The problem which then faced the British was the management of a continent by a power, the interests of which had theretofore been confined to the sea coast. As exploration advanced, the natives of the interior and the western reaches must be pacified, trade promoted, sovereignty exercised and justice administered even if only in a general way, until such time as British settlement could be established. It was a situation which was to face the Imperial power in varying degree and in various parts of the continent until almost the close of the 19th century. In the circumstances, it was vital that aboriginal rights be declared and the policy pertaining

effectuaient pareilles cessions, réserves auxquelles ils avaient accès ou auxquelles ils étaient confinés, à des fins résidentielles.

L'historique de cette façon de procéder est exposé en détail dans le jugement que le savant chancelier Boyd a rendu dans l'affaire *The Queen v. St. Catharines Milling Co.* 10 O.R. 196, confirmé 13 O.A.R. 148.

(Les italiques ont été ajoutés.)

La question de la possibilité d'appliquer la Proclamation aux Nishgas est par conséquent pertinente dans le présent appel. Certaines cours provinciales canadiennes ont été saisies de cette question à diverses reprises; mais elle n'a jamais été spécifiquement traitée par cette Cour.

Il est donc nécessaire de répondre à cette question pour la première fois et de la décider en tenant dûment compte des dossiers historiques et des principes de la common law.

Les juges de la Cour d'appel de la Colombie-Britannique n'étaient pas d'accord sur cette question importante. Dans l'arrêt *White and Bob*, le Juge d'appel Norris a examiné cette question d'une façon exhaustive, aux pp. 218 à 232 de ses motifs; il a dit en partie ce qui suit, p. 218:

[TRADUCTION] La proclamation royale de 1763 reconnaissait et confirmait les droits aborigènes et s'appliquait à l'île de Vancouver.

En ce qui concerne les Britanniques, la proclamation de 1763 traitait d'une nouvelle situation découlant de la guerre qu'ils avaient faite aux Français en Amérique du Nord et à laquelle les Indiens avaient plus ou moins activement participé, d'un côté ou de l'autre, et, incidemment, du traité de Paris de 1763, qui mettait fin à la guerre. Les Britanniques ont alors eu à faire face à l'administration d'un continent par une puissance dont les intérêts étaient jusqu'à alors limités à la région côtière. Au fur et à mesure des explorations, les aborigènes de l'intérieur et de l'Ouest ont dû être pacifiés, le commerce a dû être encouragé, la souveraineté a dû être exercée et la justice administrée, ne serait-ce que d'une façon générale, jusqu'à ce que les Britanniques puissent coloniser des régions. C'est une situation à laquelle la puissance impériale a dû plus ou moins faire face en diverses parties du continent jusque vers la fin du 19e

thereto defined. This was the purpose and the substance of the royal proclamation of 1763. The principles there laid down continued to be the charter of Indian rights through the succeeding years to the present time—recognized in the various treaties with the United States in which Indian rights were involved and in the successive land treaties made between the Crown and the Hudson's Bay Company with the Indians.

concluding correctly that the Proclamation was declaratory of the aboriginal rights and applied to Vancouver Island. It follows that if it applied to Vancouver Island it also applied to the Indians of the mainland. Sheppard J.A., with whom Lord J.A. agreed, held that the Proclamation did not apply to Vancouver Island. This Court upheld the majority judgment but did not deal with the question of whether or not the Proclamation extended to include territory in British Columbia.

In the judgment under appeal, Gould J. accepted the views of Sheppard and Lord JJ.A. in preference to that of Norris J.A. In my view the opinion of Sheppard J.A. in *White and Bob* was based on incomplete research as to the state of knowledge of the existence of the land mass between the Rocky Mountains and the Pacific Ocean in 1763.

In *R. v. Sikyea*[39], at p. 66, Johnson J.A. said:

The right of Indians to hunt and fish for food on unoccupied crown lands has always been recognized in Canada—in the early days as an incident of their "ownership" of the land, and later by the treaties by which the Indians gave up their ownership right in these lands. McGillivray, J.A. in *Rex v. Wesley*, [1932] 2 WWR 337, 26 Alta LR 433, 58 CCC 269, discussed quite fully the origin, history and nature of the right of the Indians both in the lands and under the treaties by which these were surrendered and it is unnecessary to repeat what he has said. It is sufficient to say that these rights had their origin in the royal proclamation that followed the *Treaty of Paris*

[39] (1964), 46 W.W.R. 65.

siècle. Dans ces conditions, il était crucial que les droits aborigènes soient reconnus et que la ligne de conduite y afférente soit définie. C'était là le but et le fondement de la proclamation royale de 1763. Les principes qui y ont été énoncés ont continué par la suite à être la charte des droits indiens, jusqu'à l'époque actuelle—ils ont été reconnus dans divers traités avec les États-Unis visant les droits indiens et dans les traités subséquents visant certaines terres et conclus entre la Couronne ou la Compagnie de la Baie d'Hudson et les Indiens.

le juge a conclu avec raison que la Proclamation reconnaissait les droits aborigènes et s'appliquait à l'île de Vancouver. Par conséquent, si elle s'appliquait à l'île de Vancouver, elle s'applique également aux Indiens du continent. Le Juge d'appel Sheppard, à l'avis duquel le Juge d'appel Lord a souscrit, a décidé que la Proclamation ne s'appliquait pas à l'île de Vancouver. Cette Cour a confirmé le jugement majoritaire mais ne s'est pas prononcée sur la question de savoir si la Proclamation allait jusqu'à comprendre les terres situées en Colombie-Britannique.

Dans le jugement *a quo*, le Juge Gould a adopté les vues des Juges d'appel Sheppard et Lord plutôt que celles du Juge d'appel Norris. A mon sens, l'avis que le Juge d'appel Sheppard a exprimé dans l'affaire *White and Bob* était fondé sur une documentation incomplète quant à la connaissance que l'on avait de l'existence des terres situées entre les Rocheuses et le Pacifique en 1763.

Dans l'arrêt *R. v. Sikyea*[39], p. 66, le Juge d'appel Johnson a dit ce qui suit:

[TRADUCTION] Le droit qu'ont les Indiens de chasser et de pêcher en vue de se procurer leur nourriture sur les terres inoccupées de la Couronne a toujours été reconnu au Canada—au début, à titre de droit connexe à leur droit de «propriété» sur les terres, puis, par les traités en vertu desquels les Indiens ont cédé leur droit de propriété sur ces terres. Dans l'arrêt *Rex v. Wesley* [1932] 2 WWR 337, 26 Alta LR 433, 58 CCC 269, le Juge d'appel McGillivray a examiné passablement en détail l'origine, l'historique et la nature du droit que les Indiens ont sur les terres et en vertu des traités dans lesquels ils ont cédé celles-ci; il est inutile de reprendre ce qu'il a dit. Il suffit de dire

[39] (1964), 46 W.W.R. 65.

in 1763. By that proclamation it was declared that the Indians

> ". . . 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."

The Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the proclamation, and it is doubtful, to say the least, if the Indians of at least the western part of the Northwest Territories could claim any rights under the proclamation, for these lands at the time were *terra incognita* and lay to the north and not "to the westward of the sources of the river which fall into the sea from the west or northwest," (from the 1763 proclamation describing the area to which the proclamation applied). That fact is not important because the government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson Bay Company, as having an interest in the lands that required a treaty to effect its surrender.

This Court expressed its agreement with the views of Johnson J.A. in *Sikyea v. The Queen*[40], at p. 646, where, speaking for the Court, I said:

> On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal, [*supra*]. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

The wording of the Proclamation itself seems quite clear that it was intended to include the lands west of the Rocky Mountains. The relevant paragraph reads:

> 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

[40] [1964] S.C.R. 642.

que ces droits ont pour origine la proclamation royale qui a suivi le traité de Paris en 1763. Par cette proclamation, il était déclaré que les Indiens devaient être assurés de

> «. . . la possession entière et paisible des parties de nos possessions et territoires qui ont été ni concédées ni achetées par Nous, et ont été réservées pour ces tribus ou quelques-unes d'entre elles comme territoires de chasse.»

Les Indiens habitant les terres de la Compagnie de la Baie d'Hudson n'étaient pas visés par la proclamation; il est pour le moins douteux que les Indiens de la partie ouest des territoires du Nord-ouest au moins, puissent revendiquer quelque droit en vertu de la proclamation, étant donné que ces terres, à cette époque, étaient *terra incognita* et étaient situées au nord et non pas «à l'ouest de la source des fleuves qui se jettent dans la mer à partir de l'ouest ou du nord-ouest,» (citation de la proclamation de 1763 décrivant la région à laquelle s'appliquait celle-ci). Ce fait importe peu parce que le gouvernement canadien a considéré que tous les Indiens du Canada y compris ceux qui habitaient sur des terres réclamées par la Compagnie de la Baie d'Hudson, avaient un intérêt sur les terres et que la cession de cet intérêt devait se faire par traité.

Cette Cour a souscrit à l'avis du Juge d'appel Johnson, dans l'arrêt *Sikyea v. La Reine*[40], p. 646, dans lequel, parlant au nom de la Cour, j'ai dit ce qui suit:

> [TRADUCTION] Eu égard à la question fondamentale ici en jeu, je souscris aux motifs et aux conclusions du Juge d'appel Johnson en Cour d'appel, (1964) 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65. Il a parlé en détail et avec exactitude des questions importantes, compte tenu de leur contexte historique et juridique; je n'ai rien d'utile à ajouter à ce qu'il a déjà écrit.

Le libellé de la Proclamation elle-même montre d'une façon passablement claire qu'elle devait inclure les terres à l'ouest des Rocheuses. L'alinéa pertinent se lit comme suit:

> [TRADUCTION] Nous déclarons de plus que c'est Notre plaisir royal ainsi que Notre volonté, de réserver pour le présent, sous Notre souveraineté, Notre protection et Notre autorité, pour l'usage desdits Indiens, toutes les terres et tous les territoires non compris dans les limites de Nos trois gouvernements ni dans les limites du territoire concédé à la Compa-

[40] [1964] R.C.S. 642.

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;

The only territories not included were: (1) Those within the limits of the three new governments; and (2) Within the limits of the territory granted to the Hudson's Bay Company. The concluding sentence of the paragraph just quoted, "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;" shows clearly that the framers of the paragraph were well aware that there was territory to the west of the sources of the rivers which ran from the west and northwest.

Sheppard J.A. in *White and Bob* founded his opinion that the Proclamation did not extend to the lands west of the Rockies in part upon the statement that in 1763 the areas of British Columbia west of the Rockies were *terra incognita*. Such a view is not at all flattering to the explorers and rulers of England in 1763. The knowledgeable people in England were not unaware that the Russians were by 1742 carrying on a fur-trading business with the natives of what we now know as the Alaskan Panhandle. In 1721 a Dane, Captain Bering, under orders from the Emperor of Russia, had sailed from Kamtschatka to determine if Asia and America were joined or separate. He did determine that the two continents were separate, and in so doing gave his name to Bering Strait. Arctic explorers from Europe and England had been trying to find the fabled Northwest Passage for a considerable time prior to 1763; amongst them Frobisher in 1576-8 and Hudson prior to his disappearance in 1610. The Hudson's Bay Company had been operating in the area west of Hudson Bay and to the Rockies for almost a century prior to 1763, and although it was 30 years more before Alexander Mackenzie crossed the Rockies to the Pacific, the thought of so doing had intrigued explorers for many years. Anthony Hendry for Hudson's Bay Company travelled to the Rockies by way of the Red Deer River in 1754 and into the mountains in

gnie de la Baie d'Hudson, ainsi que toutes les terres et tous les territoires situés à l'ouest des sources des rivières qui de l'ouest et du nord-ouest, vont se jeter dans la mer;

Les seuls territoires non compris étaient les suivants: (1) ceux qui se trouvaient dans les limites des trois nouveaux gouvernements; et (2) ceux qui se trouvaient dans les limites du territoire concédé à la Compagnie de la Baie d'Hudson. La dernière phrase de l'alinéa précité, «ainsi que toutes les terres et tous les territoires situés à l'ouest des sources des rivières qui de l'ouest et du nord-ouest vont se jeter dans la mer;» montre clairement que ceux qui ont rédigé l'alinéa étaient bien au courant qu'il y avait des terres à l'ouest de la source des fleuves qui coulent depuis l'ouest et le nord-ouest.

Dans l'arrêt *White and Bob*, le Juge d'appel Sheppard a fondé son avis que la Proclamation ne visait pas les terres à l'ouest des Rocheuses en partie sur la déclaration qu'en 1763 les régions de la Colombie-Britannique situés à l'ouest des Rocheuses étaient «*terra incognita*». Pareil avis n'est du tout flatteur pour les explorateurs et les dirigeants de l'Angleterre en 1763. Les gens bien informés en Angleterre n'ignoraient pas que dès 1742 les Russes exploitaient un commerce de fourrures avec les aborigènes de la région qui constitue l'enclave de l'Alaska. En 1721, un Danois, le capitaine Béring, sous les ordres de l'Empereur de Russie, avait navigué depuis le Kamtchatka, en vue de voir si l'Asie et l'Amérique étaient reliées ou séparées. Il a constaté que les deux continents étaient séparés et, ce faisant, il a donné son nom au détroit de Béring. Les explorateurs de l'Arctique venus d'Europe et d'Angleterre essayaient de trouver le fameux passage du Nord-Ouest depuis longtemps, avant 1763; entre autres, Frobisher, de 1576 à 1578, et Hudson avant sa disparition en 1610. La Compagnie de la Baie d'Hudson exploitait dans la région s'étendant entre l'ouest de la baie d'Hudson et les Rocheuses depuis presque un siècle, avant 1763, et bien qu'il ait fallu 30 ans avant qu'Alexander Mackenzie traverse les Rocheuses jusqu'au Pacifique, les explorateurs y pensaient déjà depuis de nombreuses années. Anthony Hendry, pour le

1759. The west coast of the continent was not unknown nor was the fact that it extended very far to the north. Drake in 1579, in an attempt to find a passage from west to east, had sailed northward to a point where the bitter cold caused him to return southward. According to *Haklutys' Voyages*, Drake sailed "in a climate zone where his rigging froze, where the trees on the coast were lifeless and where the natives lived in houses covered with earth. Behind the shore rose ridges of snow-capped peaks." It would seem that he reached substantially the same latitude that Cook did two centuries later. Coronado's lieutenant, as early as 1550, stood on the east rim of the Grand Canyon but found it impossible to cross. LaVerendrye's sons sighted the Rockies near Lethbridge in 1743. After LaVerendrye's death in 1749 his sons sought permission to continue their father's explorations into and beyond the mountains but were denied authorization. However, one Legardeur de Saint-Pierre undertook to reach and cross the mountains. In 1750 he sent an associate, one de Niverville, who, following the South Saskatchewan River and the Bow River, reached a point near the present site of Calgary where he built a stockade in 1751 within the territory of the Blackfoot nation. De Niverville learned from his Indian hosts that trading was done by other Indians to the west with white men on the far side of the mountains. These white men were probably Spaniards for it is known that the Spanish were exploring the west coast of America north from California. The names of several localities in British Columbia attest to that fact. Further confirmation of Spanish trading on the west coast was found by Cook when he put into Nootka Sound in 1778. He reports meeting with a native who had come into Nootka with a group of Indians from a distant area. This native was wearing around his neck as an ornament two silver table spoons which were assumed to have come from Spaniards. These spoons were taken by Cook and, after his death, were presented to the artist, Sir Joseph Banks, who had painted a portrait of Cook in 1776. Accordingly it cannot be challenged that while the west coast lands were

compte de la Compagnie de la Baie d'Hudson, a voyagé jusqu'aux Rocheuses passant par la Red Deer en 1754 et est allé jusque dans les montagnes en 1759. La côte ouest du continent n'était pas inconnue, non plus que le fait qu'elle s'étendait très loin vers le nord. En 1579, Drake, en tentant de trouver un passage de l'ouest à l'est, avait navigué vers le nord jusqu'à ce que le froid mordant le fasse revenir vers le sud. Selon l'ouvrage *Haklutys' Voyages*, Drake a navigué [TRADUCTION] «dans une zone climatique où le gréement gelait, où les arbres de la côte étaient morts et où les aborigènes habitaient des maisons couvertes de terre. Derrière la côte, il y avait des chaînes de montagnes aux pics couverts de neige.» Il semblerait qu'il a atteint à peu près la même latitude que Cook deux siècles plus tard. Dès 1550, le lieutenant de Coronado avait atteint la bordure est du Grand Canyon, mais il lui avait été impossible de traverser celui-ci. Les fils de LaVérendrye ont aperçu les Rocheuses près de Lethbridge en 1743. Après le décès de LaVérendrye en 1749, ses fils ont demandé l'autorisation de continuer les explorations de leur père dans les montagnes et au-delà de celles-ci mais on a refusé. Toutefois, un certain Legardeur de Saint-Pierre a entrepris d'atteindre et de traverser les montagnes. En 1750, il a envoyé un associé, un certain de Niverville, qui, en suivant la South Saskatchewan et la Bow, s'est rendu jusqu'à un endroit situé près de l'emplacement actuel de Calgary, où il a construit un abri fortifié en 1751 dans les limites du territoire de la nation Pied-Noir. De Niverville a appris de ses hôtes indiens que d'autres Indiens, à l'ouest, commerçaient avec les Blancs, de l'autre côté des montagnes. Ces Blancs étaient probablement des Espagnols; en effet, on sait que les Espagnols exploraient la côte ouest de l'Amérique au nord de la Californie. Le nom de plusieurs agglomérations de la Colombie-Britannique confirme ce fait. De plus, un autre indice du commerce espagnol sur la côte ouest a été trouvé par Cook lorsqu'il s'est arrêté à Nootka Sound en 1778. Il raconte avoir rencontré un aborigène qui était venu à cet endroit avec un groupe d'Indiens venus d'une région éloignée. Cet aborigène portait autour de

mostly unexplored as of 1763 they were certainly known to exist and that fact is borne out by the wording of the paragraph in the Proclamation previously quoted.

This important question remains: were the rights either at common law or under the Proclamation extinguished? Tysoe J.A. said in this regard at p. 582 of his reasons:

> It is true, as the appellants have submitted, *that nowhere can one find express words extinguishing Indian title* . . . . .
> (Emphasis added.)

The parties here agree that if extinguishment was accomplished, it must have occurred between 1858 and when British Columbia joined Confederation in 1871. The respondent relies on what was done by Governor Douglas and by his successor, Frederick Seymour, who became Governor in 1864.

Once aboriginal title is established, it is presumed to continue until the contrary is proven. This was stated to be the law by Viscount Haldane in *Amodu Tijani* at pp. 409-10 as follows:

> Their Lordships think that the learned Chief Justice in the judgment thus summarized, which virtually excludes *the legal reality of the community usufruct*, has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a *communal usufructuary occupation*, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin kings conquered Lagos or when the cession to the British Crown took place in 1861. The general words used in

son cou, en guise d'ornement, deux cuillers à table en argent, venant probablement des Espagnols. Ces cuillers ont été prises par Cook et après son décès, elles ont été présentées à un artiste, Sir Joseph Banks, qui avait peint un portrait de Cook en 1776. Par conséquent, on ne saurait contester que bien que les terres de la côte ouest eussent été en général inexplorées en 1763, elles étaient certainement connues et ce fait est confirmé par le libellé de l'alinéa de la Proclamation ci-dessus reproduit.

L'importante question suivante se pose encore: les droits ont-ils été éteints, soit en vertu de la *common law*, soit en vertu de la Proclamation? Le Juge d'appel Tysoe a dit ce qui suit à ce sujet, à la p. 582 de ses motifs:

> [TRADUCTION] Comme l'ont affirmé les appelants, il est vrai *que nous ne pouvons trouver nulle part des termes exprès éteignant le titre indien*. . . . .
> (J'ai mis des mots en italique.)

Les parties en cause conviennent que s'il y a eu extinction, cela doit s'être fait entre 1858 et l'année au cours de laquelle la Colombie-Britannique est entrée dans la Confédération, en 1871. L'intimé se fonde sur les actes du gouverneur Douglas et de son successeur, Frederick Seymour, devenu gouverneur en 1864.

Une fois que le titre aborigène est établi, on présume qu'il demeure, jusqu'à preuve du contraire. Tel était le droit, selon le vicomte Haldane, affaire *Amodu Tijani*, pp. 409 et 410:

> [TRADUCTION] Leurs Seigneuries croient que le savant Juge en chef, dans le jugement ainsi résumé, qui nie de fait *l'existence juridique de l'usufruit de la collectivité*, a omis de reconnaître le véritable caractère du titre d'une collectivité aborigène sur les biens-fonds qu'elle occupe. Ce titre, comme elles l'ont signalé, est *prima facie* fondé non pas sur quelque propriété particulière au sens du droit anglais, mais sur un *droit commun d'occupation communautaire de la nature d'un usufruit*, qui peut être si absolu qu'il réduit tout droit radical du Souverain en un droit comparativement restreint d'intervention à des fins administratives. Il n'est pas établi que ce genre de titre de la nature d'un usufruit, détenu par la collectivité, a été modifié en droit, soit lorsque les rois Benin ont conquis le Lagos soit au moment de la cession à

the treaty of cession are not in themselves to be construed as extinguishing subject rights. *The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances.* There is, in Their Lordships' opinion, no evidence which points to its having been at any time seriously disturbed or even questioned. Under these conditions they are unable to take the view adopted by the Chief Justice and the full Court.

(Emphasis added.)

The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty (and that is subject to what I said about sovereignty over part of the lands not being determined until 1903) they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did Parliament at Ottawa. The following quotation from Lord Denning's judgment in *Oyekan v. Adele*[41], at p. 788 states the position clearly. He said:

In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. It has been laid down by their Lordships' Board that

> "Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such right as he had under the rule of his predecessors avail him nothing."

See *Vajesingji Joravarsingji v. Secretary of State for India* ((1924), L.R. 51 Ind. App. 357 to p. 360 per

[41] [1957] 2 All E.R. 785.

la Couronne britannique en 1861. Les termes généraux utilisés dans le traité de cession ne doivent pas être interprétés comme éteignant les droits en question. *Le titre original aborigène était un droit communautaire, et il faut présumer qu'il a continué à exister, jusqu'à ce que le contraire soit établi par le contexte ou les circonstances.* Leurs Seigneuries croient qu'il n'existe aucune preuve qui indique que ce droit a été à un moment donné modifié ou même contesté d'une façon importante. Dans ces conditions, elles ne peuvent pas souscrire à l'avis exprimé par le Juge en chef et la Cour en séance plénière.

(J'ai mis des mots en italique.)

Les appelants se fondent sur la présomption que la Couronne britannique a voulu respecter les droits aborigènes; par conséquent, lorsque le peuple nishga a été soumis à la souveraineté britannique (sous réserve de ce que j'ai dit au sujet de la souveraineté sur la partie des terres qui n'a été délimitée qu'en 1903), il avait le droit de faire valoir son titre indien, comme droit juridique. Cela étant, ce droit ne pouvait pas être éteint par la suite sauf par cession à la Couronne ou par le pouvoir législatif compétent, et alors uniquement au moyen d'une loi précise. Les Nishgas n'ont pas cédé leurs terres et ni la colonie de la Colombie-Britannique ni la province, après la confédération, n'ont adopté une loi visant expressément à éteindre le titre indien; il en a été de même pour le Parlement, à Ottawa. L'extrait suivant du jugement rendu par Lord Denning dans l'affaire *Oyekan v. Adele*[41], p. 788, constitue un exposé clair de la situation. Lord Denning a dit ce qui suit:

[TRADUCTION] Pour déterminer quels droits sont transmis à la Couronne et quels droits sont conservés par les habitants, les tribunaux judiciaires tiennent compte non pas du traité mais du comportement de la Couronne Britannique. Le Comité a établi que

> «Tout habitant du territoire peut faire valoir, devant les tribunaux locaux établis par le nouveau souverain, uniquement les droits que ce souverain a reconnus par l'intermidiaire de ses représentants. Les droits qu'il avait sous le règne de ses prédécesseurs ne lui sont d'aucun secours».

Voir *Vajesingji Joravarsingji vs. Secretary of State for India* (1924) LR 51 Ind. App. pp. 357 à 360, Lord

[41] [1957] 2 All E.R. 785.

Lord Dunedin), *Hoani Te Heuheu Tikino v. Aotea District Maori Land Board* ([1941] 2 All ER 93 at p. 98). *In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.* Whilst, therefore, the British Crown, as sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law: See *Amodu Tijani v. Southern Nigeria* (Secretary) ([1921] 2 A.C. 399); *Sakariyawo Oshodi v. Moriamo Dakolo* ([1930] A.C. 667).

(Emphasis added.)

Reference should also be made to *The Queen v. Symonds*[42], approved in *Tamaki v. Baker*[43], at p. 579. In *Symonds*, Chapman J. said at p. 390:

The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians. In the case of the *Cherokee Nation v. State of Georgia*, (1831) 5 Peters 1, the Supreme Court threw its protective decision over the plaintiff-nation, against a gross attempt at spoliation; calling to its aid, throughout every portion of its judgment, the principles of the common law as applied and adopted from the earliest times by the colonial laws: *Kent's Comm. Vol. ii, lecture 51.* Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it

[42] (1847), N.Z.P.C.C. 387.

[43] [1901] A.C. 561.

Dunedin), *Hoani Te Heuheu Tikino v. Aotea District Maori Land Board* ([1941] 2 All ER 93, p. 98). *Toutefois, en se demandant quels droits sont reconnus, il existe un principe directeur. Ce principe est le suivant: Les tribunaux présumeront que la Couronne Britannique veut que l'on respecte intégralement les droits de propriété des habitants.* Par conséquent, bien qu'en sa qualité de souverain, elle puisse adopter des lois lui permettant d'acquérir de force des terres à des fins publiques, la Couronne britannique verra à ce qu'une juste indemnité soit accordée à chacun des habitants qui possède un intérêt en vertu du droit autochtone; et les tribunaux déclareront que chaque habitant a droit à une indemnité selon son intérêt, même si pareil intérêt est d'un genre inconnu en droit anglais: voir *Amodu Tijani v. Southern Nigeria* (Secretary) ([1921] 2 A.C. 399); *Sakariyawo Oshodi v. Moriamo Dakolo* ([1930] A.C. 667).

(J'ai mis des mots en italique.)

Il importe de mentionner également l'arrêt *The Queen v. Symonds*[42], approuvé dans l'arrêt *Tamaki v. Baker*[43], p. 579. Dans l'arrêt *Symonds*, le Juge Chapman a dit ce qui suit, p. 390:

[TRADUCTION] La pratique qui consiste à éteindre les titres aborigènes par de justes achats a certainement plus de 200 ans. Le gouvernement l'a longtemps adoptée dans nos colonies américaines, comme l'a fait le gouvernement des États-Unis. Cette pratique fait maintenant partie du droit du pays, et bien que les cours des États-Unis, dans les poursuites entre sujets américains, ne permettent pas qu'une concession soit annulée sous prétexte que le titre aborigène n'a pas été éteint, elles n'hésiteront sûrement pas à le faire dans une poursuite engagée par un Indien aborigène. Dans l'arrêt *Cherokee Nation v. State of Georgia*, (1831) 5 Peters 1, la Cour suprême a rendu une décision protégeant la nation demanderesse contre une tentative flagrante en vue de la déposséder; tout le long de son jugement, elle s'est fondée sur les principes de la common law appliqués et adoptés depuis le début en droit colonial: *Kent's Comm., vol. ii, leçon 51.* Quel que puisse être l'avis des juristes au sujet de la validité du titre aborigène, quelles qu'aient pu avoir été les vagues notions passées des aborigènes de ce pays, quelle que puisse être leur conception actuelle, plus claire et en évolution constante, au sujet de leur droit de propriété sur les terres, on ne

[42] (1847), N.Z.P.C.C. 387.

[43] [1901] A.C. 561.

cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.

and to the statement of Davis J. in *Lipan Apache* previously quoted that:

. . . In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the (claimants') rights" in their property, Indian title continues . . . . .

It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect.

The Court of Appeal also erred in holding that there "is no Indian title capable of judicial interpretation unless it has previously been recognized either by the Legislature or the Executive Branch of Government". Relying on *Cook v. Sprigg*[44], and other cases, the Court of Appeal erroneously applied what is called the Act of State Doctrine. This doctrine denies a remedy to the citizens of an acquired territory for invasion of their rights which may occur during the change of sovereignty. English Courts have held that a municipal Court has no jurisdiction to review the manner in which the Sovereign acquires new territory. The Act of State is the activity of the Sovereign by which he acquires the property. Professor D. K. O'Connell in his work *International Law*, 2nd ed., 1970, at p. 378 says:

[44] [1899] A.C. 572.

saurait trop affirmer que ces droits doivent être respectés, qu'ils ne peuvent pas être éteints (du moins en temps de paix) autrement que par suite du consentement de plein gré des occupants aborigènes. Mais, pour leur protection, et par esprit d'humanité, le gouvernement est tenu de maintenir, et les cours de confirmer, le droit exclusif de la Reine de l'éteindre. Il découle de ce que j'ai dit qu'en garantissant solennellement le titre aborigène, et en confirmant ce qui est appelé le droit de préemption de la Reine, le traité de Waitangi, confirmé par la charte de la Colonie, n'apporte en théorie ou en pratique rien de nouveau qui n'ait pas déjà été réglé.

Dans l'affaire *Lipan Apache*, précitée, le Juge Davis a fait la déclaration suivante qu'il importe aussi de signaler:

[TRADUCTION] . . . A défaut d'une «indication claire et expresse», dans les dossiers publics, que le souverain «voulait éteindre tous les droits (des réclamants)» sur leurs biens, le titre indien demeure . . . . .

Par conséquent, il semble incontestable qu'il incombe à l'intimé d'établir que le Souverain voulait éteindre le titre indien, et que cette intention doit être «claire et expresse». En la présente espèce, il n'existe aucune preuve semblable ni aucune loi à cet effet.

La Cour d'appel a également commis une erreur en décidant qu'il [TRADUCTION] «n'existe aucun titre indien pouvant être interprété par les tribunaux, à moins qu'il n'ait auparavant été reconnu soit par la législature soit par le pouvoir exécutif.» Se fondant sur l'arrêt *Cook v. Sprigg*[44], et sur d'autres arrêts, la Cour d'appel a mal appliqué ce qui est connu sous le nom de doctrine de l'acte de gouvernement. Cette doctrine nie tout recours aux citoyens d'un territoire acquis pour tout empiétement sur leurs droits pouvant survenir au cours du changement de souveraineté. Les tribunaux anglais ont décidé qu'une cour locale n'est pas compétente pour réviser la façon dont le Souverain acquiert un nouveau territoire. L'acte de gouvernement est l'acte par lequel le Souverain acquiert la propriété. Dans son ouvrage intitulé *International Law*, 2e éd., 1970, p. 378, le professeur D. K. O'Connell dit ce qui suit:

[44] [1899] A.C. 572.

This doctrine, which has been affirmed in several cases arising out of the acquisition of territory in Africa and India, has been misinterpreted to the effect that the substantive rights themselves have not survived the change. In fact English courts have gone out of their way to repudiate the construction, and it is clear that the Act of State doctrine is no more than a procedural bar to municipal law action, and as such is irrelevant to the question whether in international law change of sovereignty affected acquired rights.

The Act of State doctrine has no application in the present appeal for the following reasons: (a) It has never been invoked in claims dependent on aboriginal title. An examination of its rationale indicates that it would be quite inappropriate for the Courts to extend the doctrine to such cases; (b) It is based on the premise that an Act of State is an exercise of the Sovereign power which a municipal Court has no power to review: see *Salaman v. Secretary of State in Council of India*[45], at pp. 639-640; *Cook v. Sprigg, supra*, at p. 578.

When the Sovereign, in dealings with another Sovereign (by treaty of cession or conquest) acquires land, then a municipal Court is without jurisdiction to the extent that any claimant asserts a proprietary right inconsistent with acquisition of property by the Sovereign—*i.e.* acquisition by Act of State. The *ratio* for the cases relied upon by the Court of Appeal was that a municipal Court could not review the Act of State if in so doing the Court would be enforcing a treaty between two Sovereign States: see *Cook v. Sprigg, supra* at p. 578, *Vayjestingji Joravaisingji v. Secretary of State for India, supra*, at p. 360, *Salaman, supra*, at p. 639. In all the cases referred to by the Court of Appeal the *origin* of the claim being asserted was a grant to the claimant from the previous Sovereign. In each case the claimants were asking the Courts to give judicial recognition to that claim. In the present case the appellants are

[45] [1906] 1 K.B. 613.

[TRADUCTION] Cette doctrine, qui a été confirmée dans plusieurs affaires découlant de l'acquisition de territoires en Afrique et en Inde, a été interprétée à tort comme voulant dire que les droits fondamentaux eux-mêmes n'existaient plus après le changement. En fait, les cours anglaises ont tout fait pour répudier cette interprétation, et il est clair que la doctrine de l'acte de gouvernement ne constitue qu'un empêchement de procédure à l'encontre de l'action fondée sur le droit interne, et qu'à ce titre, elle n'est pas pertinente en ce qui concerne la question de savoir si en droit international le changement de souveraineté porte atteinte aux droits acquis.

La doctrine de l'acte de gouvernement ne s'applique pas dans le présent appel pour les motifs suivants: (a) cette doctrine n'a jamais été invoquée dans les réclamations fondées sur le titre aborigène. Un examen de son fondement montre qu'il serait plutôt difficile pour les tribunaux d'étendre la doctrine à pareilles causes; (b) elle est fondée sur le principe que l'acte de gouvernement est l'exercice du pouvoir souverain, qu'une cour locale n'a pas le pouvoir de réviser: voir *Salaman v. Secretary of State in Council of India*[45], pp. 639-640; *Cook v. Sprigg*, précité, p. 578.

Lorsque le Souverain, au cours de marchés avec d'autres Souverains (par traité de cession ou par conquête) acquiert des terres, les tribunaux locaux ne sont pas compétents, dans la mesure où un réclamant fait valoir un droit de propriété incompatible avec l'acquisition des terres par le Souverain, c'est-à-dire l'acquisition par acte de gouvernement. Le fondement des arrêts sur lesquels s'est fondée la Cour d'appel est qu'une cour locale ne peut pas réviser l'acte de gouvernement si, ce faisant, la Cour se trouverait à appliquer un traité entre deux états souverains: voir les arrêts *Cook v. Sprigg*, précité, p. 578, *Vayjestingji Joravaisingji v. Secretary of State for India*, précité, p. 360, et *Salaman*, précité, p. 639. Dans tous les arrêts mentionnés par la Cour d'appel, le droit revendiqué avait pour *origine* une concession au réclamant par le Souverain antérieur. Dans chaque cas, les réclamants demandaient aux tribunaux

[45] [1906] 1 K.B. 613.

not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British Crown. The appellants are *not* challenging an Act of State—they are asking this Court to recognize that settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people—a title which has its origin in antiquity—not in a grant from a previous Sovereign. In applying the Act of State doctrine, the Court of Appeal completely ignored the rationale of the doctrine which is no more than a recognition of the Sovereign prerogative to acquire territory in a way that cannot be later challenged in a municipal Court.

Once it is apparent that the Act of State doctrine has no application, the whole argument of the respondent that there must be some form of "recognition" of aboriginal rights falls to the ground.

On the question of extinguishment, the respondent relies on what was done by Governors Douglas and Seymour and the Council of British Columbia. The appellants, as I have previously mentioned, say that if either Douglas or Seymour or the Council of the Colony of British Columbia did purport to extinguish the Nishga title that any such attempt was beyond the powers of either the Governors or of the Council and that what, if anything, was attempted in this respect was *ultra vires*.

Douglas' powers were clearly set out in his Commission. A Governor had no powers to legislate other than those given in the Commission: 5 Halsbury, 3rd. ed., p. 558, para. 1209: *Commercial Cable v. Newfoundland*[46], at p. 616; *Musgrave v. Pulido*[47]. Sir Arthur Berridale Keith in his *Responsible Government in the Dominions* said at p. 83:

[46] [1916] 2 A.C. 610
[47] (1879), 5 App. Cas. 102.

de reconnaître judiciairement ce droit. En la présente espèce, les appelants n'affirment pas que leur titre a pour origine une concession par quelque Souverain antérieur, et ils ne demandent pas à cette Cour d'appliquer un traité de cession entre quelque Souverain antérieur et la Couronne britannique. Les appelants *ne* contestent *pas* l'acte de gouvernement—ils demandent à cette Cour de reconnaître que la colonisation de la côte nord du Pacifique n'a pas éteint le titre aborigène des Nishgas, titre qui a une origine très ancienne et ne découle pas d'une concession par un Souverain antérieur. En appliquant la doctrine de l'acte de gouvernement, la Cour d'appel a complètement omis de tenir compte du fondement de la doctrine, simple reconnaissance de la prérogative du Souverain d'acquérir des territoires d'une façon qui ne peut pas être contestée par la suite devant un tribunal local.

Une fois qu'il devient évident que la doctrine de l'acte de gouvernement ne s'applique pas, l'ensemble de la prétention de l'intimé qu'il doit y avoir quelque forme de «reconnaissance» des droits aborigènes n'est plus valable.

Quant à la question de l'extinction, l'intimé se fonde sur les actes des gouverneurs Douglas et Seymour et du Conseil de la Colombie-Britannique. Comme je l'ai déjà mentionné, les appelants disent que si Douglas ou Seymour, ou encore, le Conseil de la Colonie de la Colombie-Britannique, ont voulu éteindre le titre nishga, ils n'étaient pas compétents à cet égard et leurs tentatives, s'il en fut, étaient *ultra vires*.

Les pouvoirs de Douglas étaient clairement énoncés dans sa commission. Les gouverneurs n'avaient pas le pouvoir de légiférer, sauf ceux qui leur étaient conférés dans leur commission: 5 Halsbury, 3e éd., p. 558, par. 1209: *Commercial Cable v. Newfoundland*[46], p. 616: *Musgrave v. Pulido*[47]. Dans son ouvrage intitulé *Responsible Government in the Dominions*, Sir Arthur Berridale a dit ce qui suit, p. 83:

[46] [1916] 2 A.C. 610.
[47] (1879), 5 App. Cas. 102.

the Governor of a colony in ordinary cases cannot be regarded as a Viceroy, nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and *limited* to the powers thereby *expressly or impliedly entrusted to him*.

and at pp. 83-84:

There can be no doubt of the doctrine of the Privy Council; a Governor has no special privilege like that of the Crown; he must show in any court that he has authority by law to do an act, and what is more important for our purpose, he must show not merely that the Crown might do the act, but that he personally had authority to do the act. . . .

There is therefore no alternative but to hold that, apart from statutory powers, the Governor has a delegation of so much of the executive power as enables him effectively to conduct the executive government of the territory.

The Letters Patent under which Douglas acted authorized him in part:

. . . and whereas We have, in pursuance of the said Act, by Our Order made by Us in Our Privy Council, bearing date this 2d instant, ordered, authorized, empowered, and commanded Our Governor of Our said Colony to make provision for the administration of justice in Our said Colony, and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Our subjects and others residing therein, wherein the said Governor *is to conform to and exercise the directions, powers, and authorities given and granted to him by Our Commission, subject to all such rules and regulations as shall be prescribed in and by Our Instructions under Our Signet and Sign Manual accompanying Our said Commission, or by any future instructions, as aforesaid; . . .*

(emphasis added)

and also the following:

IV. And We do by these presents further give and grant unto you, the said James Douglas, full power and authority, by Proclamation or Proclamations to be by you from time to time for that purpose issued

[TRADUCTION] Habituellement, le Gouverneur d'une colonie ne peut pas être considéré comme un vice-roi, et l'on ne peut pas présumer qu'il possède un pouvoir souverain général. Ses attributions sont définies par sa commission et *se limitent* aux pouvoirs *qui lui sont ainsi expressément ou implicitement conférés*.

Plus loin, à la page 83, il dit ceci:

[TRADUCTION] La doctrine du Conseil privé est bien établie; les Gouverneurs n'ont pas de privilèges spéciaux comme ceux de la Couronne; ils doivent établir devant les tribunaux que la loi les autorise à agir, et ce qui est encore plus important en ce qui nous concerne, ils doivent établir non pas simplement que la Couronne pourrait agir de la sorte, mais qu'ils avaient personnellement reçu une autorisation à cet égard. . . .

Il nous est donc uniquement possible de décider que, mis à part les pouvoirs légaux, le Gouverneur, par délégation, détient un pouvoir exécutif suffisamment étendu pour lui permettre de diriger efficacement le gouvernement territorial.

Les lettres patentes en vertu desquelles Douglas agissait lui conféraient en partie les pouvoirs suivants:

[TRADUCTION] . . . et considérant que Nous avons, en vertu de ladite loi, par le Décret adopté par Nous en Notre Conseil privé, portant la date du 2 courant, ordonné, permis, commandé et conféré le pouvoir à Notre Gouverneur de Notre dite Colonie de prendre les mesures nécessaires aux fins de l'administration de la justice dans Notre dite Colonie, et, d'une façon générale, d'adopter et d'établir toutes les lois, institutions et ordonnances pouvant être nécessaires pour le maintien de la paix, de l'ordre et du bon gouvernement de Nos sujets et des autres résidents, ledit Gouverneur *devant se conformer aux directives, pouvoirs et autorisations à lui donnés ou conférés par Notre commission et devant y donner suite, sous réserve de toutes les règles et de tous les règlements qui seront prescrits dans et par Nos instructions sous Notre Sceau et Seing jointes à Notre commission, ou par des instructions ultérieures, tel que susdit; . . .*

(J'ai mis des mots en italique.)

Puis:

IV. Et, par les présentes, James Douglas, Nous vous donnons et conférons pleinement le pouvoir et l'autorisation, par la Proclamation ou les Proclamations que vous ferez de temps en temps à cette fin

under the Public Seal of Our said Colony, to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Our subjects and others residing in Our said Colony and its Dependencies: *Provided that such laws, institutions, and ordinances are not to be repugnant, but, as near as may be, agreeable to the Laws and Statutes of Our United Kingdom of Great Britain and Ireland:* Provided also, that all such laws, institutions, and ordinances, of what nature or duration soever, be transmitted under the Public Seal of Our said Colony for Our approbation or disallowance, as in Our said Order provided: And We do by these presents require and enjoin you that in making all such laws, institutions, and ordinances you do strictly conform to and observe the rules, regulations, and restrictions which are or shall be in that respect prescribed to you by Our Instructions under Our Royal Sign Manual and Signet accompanying this Our Commission, or by any future Instructions, as aforesaid.

(Emphasis added.)

Attached to Douglas' Commission and forming an integral part thereof were "Instructions" by which he was to govern the Colony. Regarding those Instructions, the Letters Patent said:

VII. You are, as much as possible, to observe, in the passing of all laws, that each different matter be provided for by a different law, without intermixing in one and the same law such things as have no proper relation to each other; and you are more especially to take care that no clause or clauses be inserted in or annexed to any law which shall be foreign to what the title of such law imports, and that no perpetual clause be part of any temporary law, *and that no law whatever be suspended, altered, continued, revived, or repealed by general words, but that the title and date of such law so suspended, altered, continued, revived, or repealed be particularly mentioned and expressed in the enacting part.*

(Emphasis added.)

Further Instructions were sent from time to time by the Colonial Secretary in London, including one dated July 31, 1858, which read:

sous le Sceau public de ladite Colonie, d'adopter et d'établir toutes les lois, institutions et ordonnances pouvant être nécessaires pour le maintien de la paix, de l'ordre et du bon gouvernement de nos sujets et des autres résidents de ladite Colonie et de ses dépendances: *sous la réserve que pareilles lois, institutions et ordonnances ne doivent pas être incompatibles avec les lois et textes législatifs du Royaume-Uni de la Grande-Bretagne et de l'Irlande mais dans la mesure du possible, être conformes à ceux-ci:* sous réserve également que toutes ces lois, institutions et ordonnances de quelque nature ou durée qu'elles soient, doivent être transmises sous le Sceau public de ladite Colonie en vue de Notre approbation ou désaveu, tel qu'édicté dans Notre dit Décret: Et par les présentes, Nous vous enjoignons et ordonnons, dans l'adoption de toutes ces lois, institutions et ordonnances, de vous conformer et d'obéir aux règles, règlements et restrictions qui sont ou seront à cet égard prescrits par les Instructions sous Notre Sceau et Seing Royal jointes à Notre présente commission, ou par des Instructions ultérieures, tel que susdit.

(J'ai mis des mots en italique.)

Des «Instructions» en vertu desquelles Douglas devait gouverner la colonie étaient jointes à sa commission et en faisaient intégralement partie. A ce propos, les lettres patentes se lisaient comme suit:

[TRADUCTION] VII. Dans la mesure du possible, vous devez voir, en adoptant toute loi, à ce que chaque question différente fasse l'objet d'une loi distincte, sans mêler dans la même loi des sujets qui n'ont aucun rapport entre eux; et vous devez plus particulièrement veiller à ce qu'aucune clause ne soit incluse dans quelque loi, ou y soit annexée, si cette clause est étrangère à ce qu'évoque l'intitulé de la loi, à ce qu'aucune clause permanente ne fasse partie de quelque loi temporaire, *et à ce qu'aucune loi, quelle qu'elle soit, ne soit suspendue, modifiée, maintenue, remise en vigueur ou abrogée par des termes généraux, mais que l'intitulé et la date de pareille loi ainsi suspendue, modifiée, maintenue, remise en vigueur ou abrogée soient expressément mentionnés et énoncés dans le décret.*

(J'ai mis des mots en italique.)

D'autres Instructions ont de temps en temps été envoyées par le Secrétaire aux Colonies de Londres, dont une directive datée du 31 juillet 1858, qui se lit comme suit:

3. *I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them.* At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. This question is of so local a character that it must be solved by your knowledge and experience, and I commit it to you, *in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest.* Let me not omit to observe, that it should be an invariable *condition, in all bargains or treaties with the Natives for the cession of lands* possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of Civilization among the Natives.

(emphasis added)

to which Douglas replied:

16. *I shall not fail to give the fullest scope to your humane consideration for the improvement of the native Indian tribes, and shall take care that all their civil and agrarian rights be protected.* I have in fact already taken measures, as far as possible, to prevent collisions between those tribes and the whites, *and have impressed upon the miners the great fact that the law will protect the Indian equally with the white man, and regard him in all respects as a fellow subject.* That principle being admitted will go far towards the well-being of the Indian tribes, and securing the peace of the country.

(Emphasis added.)

Another despatch from the then Colonial Secretary, Sir E. B. Lytton, reads:

2. To *open land for settlement gradually; not to sell beyond the limits of what is either surveyed or ready for immediate survey, and to prevent, as far as in you lies squatting on unsold land.* Mineral lands will require a special care and forethought and I request your views thereon.

(Emphasis added.)

[TRADUCTION] 3. *Je dois vous recommander de considérer les moyens les meilleurs et les plus humanitaires de traiter avec les Indiens aborigènes. Notre pays serait fortement défavorable à l'adoption de toute mesure arbitraire ou oppressive en ce qui les concerne.* Vu l'éloignement, et compte tenu des moyens imparfaits à ma disposition pour être bien informé, j'hésite à donner maintenant quelque suggestion en vue d'empêcher les disputes entre les Indiens et les immigrants. Cette question est d'une nature tellement locale qu'elle doit être résolue grâce à vos connaissances et à votre expérience, et je vous en charge, *étant entièrement convaincu que vous tiendrez pleinement compte des intérêts des aborigènes, comme le voudrait un esprit éclairé soucieux d'humanité.* Je dois ajouter qu'une *condition* nécessaire, *dans tout marché ou traité avec les aborigènes en vue de la cession des terres* qu'ils possèdent, est que les moyens d'existence doivent leur être fournis de quelque autre façon, et surtout, que le gouvernement de Sa Majesté tient absolument à ce que vous envisagiez sans délai les meilleurs moyens à prendre en vue de diffuser les bienfaits de la religion chrétienne et de la civilisation parmi les aborigènes.

(J'ai mis des mots en italique.)

La réponse de Douglas a été la suivante:

[TRADUCTION] 16. *Je verrai à donner plein effet à votre préoccupation humanitaire au sujet de l'amélioration des tribus indiennes, et à ce que tous leurs droits civils et agraires soient protégés.* J'ai de fait déjà pris certaines mesures, dans la mesure du possible, en vue d'empêcher des heurts entre ces tribus et les Blancs, *et j'ai bien fait comprendre aux mineurs que la loi protégera l'Indien autant que le Blanc, et le considérera à tous les égards comme un sujet comme un autre.* Une fois reconnu, ce principe contribuera grandement au bien-être des tribus indiennes et à la paix du pays.

(J'ai mis des mots en italique.)

Une autre missive du Secrétaire aux Colonies, Sir E. B. Lytton, se lit comme suit:

[TRADUCTION] 2. *Rendre les terres graduellement accessibles à la colonisation; vendre uniquement dans les limites des terres déjà arpentées ou prêtes à l'être immédiatement, et empêcher dans la mesure du possible tout établissement illégitime sur des terres non vendues.* Les terrains miniers demanderont une attention et une prévoyance particulières et j'attends votre avis à ce sujet.

(J'ai mis des mots en italique.)

There is nothing in the record indicating that the Nishga lands have even yet been surveyed or made ready for immediate survey excepting, perhaps, the land given for the townsite of Stewart. The boundary line with Alaska was not surveyed until after the boundary settlement. Consequently I cannot see how anything can be derived from the fact that surveys were made on Vancouver Island or on the lower mainland that would lead to the conclusion that the rights of the Nishgas in the northwest corner of the Colony were being dealt with by implication or at all.

Specific declarations by Douglas and by the Council of the Colony of British Columbia relied on by the respondent include:

(a) Proclamation dated February 14, 1859, which contained the following paragraph:

> 1. All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.

(b) Ordinance dated April 11, 1865, in which is found:

> 3. All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee.

(c) Ordinance of March 31, 1866, which provided:

> "The aborigines of this colony or the territories neighbouring thereto" could not pre-empt or hold land in fee simple without obtaining special permission of the Governor in writing.

The appellants do not dispute the Province's claim that it holds title to the lands in fee. They acknowledge that the fee is in the Crown. The enactments just referred to merely state what was the actual situation under the common law and add nothing new or additional to the Crown's paramount title and they are of no

Rien au dossier ne montre que les terres nishgas ont déjà été arpentées ou qu'elles sont prêtes à l'être immédiatement, sauf, peut-être, les terres concédées en vue de l'emplacement de la ville de Stewart. La frontière de l'Alaska n'a été arpentée qu'après le règlement de frontière. Par conséquent, je ne puis voir comment il est possible de dire que des levés effectués sur l'île de Vancouver et dans la région continentale inférieure nous permettent de conclure que les droits des Nishgas sur la région nord-ouest de la Colonie ont été implicitement éteints.

Les déclarations expresses faites par Douglas ou par le Conseil de la Colonie de la Colombie-Britannique et invoquées par l'intimé sont, entre autres, les suivantes:

(a) La proclamation du 14 février 1859, qui renferme le paragraphe suivant:

> [TRADUCTION] 1. Toutes les terres de la Colombie-Britannique, ainsi que toutes les mines et tous les minerais s'y trouvant, appartiennent à la Couronne.

(b) L'ordonnance du 11 avril 1865 qui édicte entre autres ce qui suit:

> [TRADUCTION] 3. Toutes les terres de la Colombie-Britannique, ainsi que toutes les mines et tous les minerais s'y trouvant, qui n'ont pas été autrement juridiquement attribuées appartiennent à la Couronne.

(c) L'ordonnance du 31 mars 1866 qui prévoyait que:

> [TRADUCTION] «Les aborigènes de cette colonie ou des territoires voisins» ne pouvaient pas acquérir par préemption ou détenir une terre en propriété inconditionnelle sans obtenir l'autorisation spéciale écrite du Gouverneur.

Les appelants ne contestent pas l'allégation de la province qu'elle détient le titre de propriété à l'égard des terres. Ils reconnaissent que la Couronne est propriétaire. Les dispositions précitées ne font qu'énoncer ce qu'était véritablement la situation en vertu de la common law; ils n'ajoutent rien au titre suprême de la Couronne

assistance in this regard to the respondent. In relying so heavily on these enactments, the respondent is fighting an issue that does not arise in the case and is resisting a claim never made in the action. As to the ordinance of March 31, 1866, the limitation on the right of an aborigine to hold land in fee simple has no bearing whatsoever on the right of the aborigine to remain in possession of the land which has been in the possession of his people since time immemorial. Governor Douglas knew that he had no right to take Indian lands without some form of compensation. He understood his Instructions in that regard. This is clear from paragraphs of his letter to the Colonial Secretary dated March 25, 1861. He said in part:

2. As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country.

3. Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case, prior to the settlement of any district; but since that time in consequence of the termination of the Hudson's Bay Company's Charter, and the want of funds, it has not been in my power to continue it. Your Grace must, indeed, be well aware that I have, since then, had the utmost difficulty in raising money enough to defray the most indispensable wants of Government.

4. All the settled districts of the Colony, with the exception of Cowichan, Chemainus, and Barclay Sound, have been already bought from the Indians, at a cost in no case exceeding 2 pounds 10s. sterling for each family. As the land has, since then, increased in value, the expense would be relatively somewhat greater now, but I think that their claims might be satisfied with a payment of 3 pounds to each family; so that taking the native population of those districts

et, à cet égard, ils n'aident pas l'intimé. En se fondant dans une si large mesure sur ces dispositions, l'intimé plaide sur une question qui ne se pose pas en l'espèce et répond à une prétention qui n'a jamais été soulevée dans la demande. En ce qui concerne l'ordonnance du 31 mars 1866, la restriction imposée au droit d'un aborigène de détenir une terre en propriété inconditionnelle n'a absolument aucun rapport avec le droit de l'aborigène de demeurer en possession des terres que son peuple possède de temps immémorial. Le Gouverneur Douglas savait qu'il n'avait pas le droit de prendre les terres indiennes sans accorder une indemnité quelconque. Il comprenait ses Instructions à cet égard. C'est ce qui ressort clairement de certains alinéas de la lettre qu'il a envoyée le 25 mars 1861 au Secrétaire aux Colonies. Il y déclare en partie ce qui suit:

[TRADUCTION] 2. Étant donné que la population indienne de l'île de Vancouver a des idées particulières au sujet de la propriété immobilière, et que les Indiens se reconnaissent mutuellement leurs divers droits de possession exclusive sur certains districts, ils considéreraient sans aucun doute l'occupation de pareilles parties de la colonie par les colons blancs, sans l'approbation complète des tribus propriétaires, comme un préjudice national; il en découlerait un sentiment d'irritation contre les colons et peut-être du mécontentement contre le gouvernement, la paix de ce pays pouvant être compromise.

3. Connaissant leurs sentiments à cet égard, j'ai eu l'habitude, jusqu'en 1859, d'acheter les droits aborigènes sur les terres, dans chaque cas, avant de coloniser un district; mais depuis ce temps, par suite de l'extinction de la charte de la Compagnie de la Baie d'Hudson, et du manque de fonds, je n'ai pas pu continuer à le faire. De fait, vous devez sûrement savoir que depuis lors j'ai éprouvé énormément de difficulté à obtenir suffisamment de fonds pour subvenir aux besoins indispensables du gouvernement.

4. Tous les districts de la Colonie, à l'exception des districts de Cowichan, Chemainus, et Barclay Sound, ont déjà été achetés des Indiens à un prix qui n'a jamais dépassé 2 livres 10s. sterling par famille. Étant donné que depuis lors, les terres ont pris de la valeur, il en coûterait un peu plus cher maintenant, mais je crois que leurs droits pourraient être éteints en payant 3 livres par famille, de sorte que si l'on considère que ces districts ont une population abori-

at 1,000 families, the sum of 3,000 pounds would meet the whole charge.

The Colonial Secretary replied on October 19, 1861, as follows:

SIR—I have had under my consideration your despatch No. 24, of the 25th of March last, transmitting an Address from the House of Assembly of Vancouver Island, in which they pray for the assistance of Her Majesty's Government in extinguishing the Indian title to the public lands in the Colony, and set forth the evils that may result from a neglect of this precaution.

I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island; but the acquisition of the title is a purely colonial interest, and the Legislature must not entertain any expectation that the British taxpayer will be burthened to supply the funds or British credit pledged for the purpose. I would earnestly recommend therefore to the House of Assembly, that they should enable you to procure the requisite means, but if they should not think proper to do so, Her Majesty's Government cannot undertake to supply the money requisite for an object which, whilst it is essential to the interests of the people of Vancouver Island, is at the same time purely Colonial in its character, and trifiing in the charge that it would entail.

This reply, while refusing funds to acquire the native rights in land, did not authorize Douglas to take or extinguish those rights without compensation. If the lands were to be taken they had to be paid for by the Colony and not by the British taxpayer. If the Colony had intended extinguishing the Indian title to public lands as referred to in the foregoing letter, it could easily have said, "Indian title to public lands in the Colony is hereby extinguished". No such enactment or one with language to like effect was ever passed.

A number of other Acts, Ordinances and Proclamations were passed or issued between February 14, 1859, and June 1, 1870. All of these were repealed and consolidated by an Ordinance passed July 1, 1870. That Consolidation contained in part the following:

gène de 1,000 familles, la somme de 3,000 livres serait suffisante pour défrayer le tout.

Le Secrétaire aux Colonies a répondu comme suit le 19 octobre 1861:

[TRADUCTION] MONSIEUR,—J'ai pris connaissance de votre missive numéro 24, du 25 mars dernier, transmettant une adresse de l'assemblée législative de l'île de Vancouver demandant l'aide du gouvernement de Sa Majesté en ce qui concerne l'extinction du titre indien sur les terres publiques de la colonie, et exposant les maux qui peuvent survenir si cette précaution n'est pas prise.

Je suis tout à fait conscient qu'il est extrêmement important d'acheter sans délai le titre aborigène sur les terres de l'île de Vancouver; mais l'acquisition du titre est une question d'intérêt purement colonial, et la législature ne doit pas s'attendre à ce qu'il incombe au contribuable britannique d'engager des fonds ou le crédit de la Grande-Bretagne à cette fin. Je recommanderais donc fortement à l'assemblée législative de vous permettre de vous procurer les fonds requis, mais si elle estime que ce n'est pas là une mesure appropriée, le gouvernement de Sa Majesté ne peut pas entreprendre de fournir l'argent nécessaire pour un objet qui, bien qu'essentiel en ce qui concerne l'intérêt des habitants de l'île de Vancouver, est en même d'une nature purement coloniale et d'une importance minime en ce qui concerne les frais qui en découleraient.

Cette réponse, même si elle manifestait le refus de fournir les fonds nécessaires en vue d'acquérir les droits immobiliers aborigènes, n'autorisait pas Douglas à annuler ou à éteindre ces droits sans indemnisation. Si les terres devaient être prises, elles devaient être payées par la Colonie et non par le contribuable britannique. Si la colonie avait voulu éteindre le titre indien sur les terres publiques, comme il en est fait mention dans la lettre précitée, elle aurait facilement pû dire: «Le titre indien sur les terres publiques de la colonie est par les présentes éteint». Aucune disposition législative semblable ou disposition au même effet n'a été adoptée.

Un certain nombre d'autres lois, ordonnances et proclamations ont été adoptées ou émises entre le 14 février 1859 et le 1er juin 1870. Toutes ces dispositions ont été abrogées et refondues dans l'ordonnance du 1er juillet 1870. Cette refonte renfermait entre autres le passage suivant:

PRE-EMPTION

3. From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent in that portion of the Colony situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Colony. Provided that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect.

This is the provision chiefly relied on by Gould J. and by the Court of Appeal in making the finding that the Indian title in British Columbia had been extinguished. It is obvious that this enactment did not apply to the Nishga lands on the Nass River. The northwest boundary of the Colony in that area was still in dispute. In any event, this provision is expansive and permissive in so far as it enables aborigines to get title in fee with the Governor's written permission.

If in any of the Proclamations or actions of Douglas, Seymour or of the Council of the Colony of British Columbia there are elements which the respondent says extinguish by implication the Indian title, then it is obvious from the Commission of the Governor and from the Instructions under which the Governor was required to observe and neither the Commission nor the Instructions contain any power or authorization to extinguish the Indian title, then it follows logically that if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so and, therefore, *ultra vires*.

A further observation in respect of the Letter of Instructions of July 31, 1858, must be made

PRÉEMPTION

[TRADUCTION] 3. A compter du jour de la proclamation, dans cette colonie, de la sanction de Sa Majesté à la présente ordonnance, toute personne de sexe masculin qui est un sujet britannique âgé de 18 ans ou plus peut acquérir le droit de préemption grevant toute parcelle de terres de la Couronne non occupées, non arpentées et non réservées (à l'exception des réserves indiennes) d'une superficie d'au plus trois cent vingt acres, dans la partie de la colonie située au nord et à l'est de la chaîne des Cascades ou chaîne côtière, et de cent soixante acres dans le reste de la colonie. Mais pareil droit de préemption ne doit pas être détenu par quelque aborigène de ce continent, à l'exception de ceux qui auront obtenu l'autorisation spéciale du gouverneur, par écrit, à cet effet.

C'est la disposition sur laquelle se sont principalement fondés le Juge Gould et la Cour d'appel pour conclure que le titre indien a été éteint en Colombie-Britannique. Il est évident que cette disposition législative ne s'appliquait pas aux terres nishgas de la Nass. La frontière nord de la colonie dans cette région était encore en litige. De toute façon, cette disposition en est une d'autorisation, dans la mesure ou elle permet aux aborigènes de devenir propriétaires absolus avec la permission par écrit du gouverneur.

Si dans une quelconque des proclamations ou l'un quelconque des actes de Douglas, de Seymour ou du Conseil de la colonie de la Colombie-Britannique, il y a des éléments qui, d'après l'intimé, éteignent implicitement le titre indien, de toute évidence, il ressort de la commission du gouverneur et des instructions que le gouverneur était tenu d'observer, et ni la commission ni les directives ne renferment quelque pouvoir ou autorisation permettant d'éteindre le titre indien, qu'en toute logique, si le gouverneur ou le Conseil ont de quelque façon tenté d'éteindre le titre indien, ils n'étaient pas compétents à le faire; par conséquent il s'agissait d'une disposition *ultra vires*.

Il importe de faire un autre commentaire au sujet de la lettre d'instructions du 31 juillet

of the phrase, "Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the Natives for the *cession* of land possessed by them . . .". Having in mind the use of the word "cession" in this context, how can it logically be said that the Imperial Government was not at the time recognizing that the natives had something to cede? What they had to cede was their aboriginal right and title to possession of the lands, subject to the Crown's paramount title.

Having reviewed the evidence and cases in considerable detail and having decided that if the Nishgas ever had any right or title that it had been extinguished, Tysoe J.A. was inexorably driven to the conclusion which he stated as follows:

> As a result of these pieces of legislation the Indians of the Colony of British Columbia *became in law trespassers* on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves for the use of Indians.

(Emphasis added.)

Any reasoning that would lead to such a conclusion must necessarily be fallacious. The idea is self-destructive. If trespassers, the Indians are liable to prosecution as such, a proposition which reason itself repudiates.

Following the hearing, the Court's attention was drawn to a recent Australian decision in which judgment was handed down on April 27, 1971, but the report of the judgment was not available until after the appeal was argued. The case is *Milirrpum et al. v. Nabalco Pty. Ltd.*[48] It is a judgment at trial by Blackburn J. and involved a consideration of the rights of aborigines and whether the common law recognized a doctrine of "communal native title". The direct issue was the interpretation to be given to the phrase "interest in land" contained in s. 5(1) of the *Lands Acquisition Act*, 1955-1966 relating

[48] (1971), 17 F.L.R. 141.

1858, en ce qui concerne la phrase: [TRADUCTION] «Je dois ajouter qu'une condition nécessaire, dans tout marché ou traité avec les aborigènes en vue de la *cession* des terres qu'ils possèdent . . .». Compte tenu de l'emploi de l'expression «cession» dans ce contexte, comment est-il logiquement possible de dire que le gouvernement impérial ne reconnaissait pas alors que les aborigènes avaient quelque chose à céder? Ce qu'ils avaient à céder, c'était leur droit et titre aborigène de possession des terres, sous réserve du titre suprême de la Couronne.

Ayant examiné fort en détail la preuve et les arrêts et ayant décidé que si les Nishgas ont déjà eu quelque droit ou titre, celui-ci a été éteint, le Juge d'appel Tysoe a inévitablement été amené à la conclusion qu'il a formulée comme suit:

> [TRADUCTION] Par suite de ces textes législatifs, les Indiens de la colonie de la Colombie-Britannique *sont devenus, en droit,* des «*trespassers*» et donc sujets à des actions en expulsion à l'égard des terres de la colonie autres que celles qui avaient été mises de côté à titre de réserves pour l'usage des Indiens.

(J'ai mis des mots en italique.)

Tout raisonnement entraînant pareille conclusion doit nécessairement être fallacieux. Il se contredit en soi. S'ils sont des «trespassers», les Indiens sont sujets à des poursuites à ce titre, c'est là une proposition que la raison elle-même répudie.

Après l'audition, on a attiré l'attention de la Cour sur une récente affaire australienne dans laquelle le jugement, rendu le 27 avril 1971, n'a été publié qu'après l'audition de l'appel. C'est l'arrêt *Milirrpum et al. v. Nabalco Pty. Ltd.*[48] Il s'agit d'un jugement de première instance rendu par le Juge Blackburn; la question des droits des aborigènes et celle de savoir si la common law reconnaît une doctrine de «titre aborigène communautaire» y sont examinées. La question directement en litige était celle de l'interprétation à donner à l'expression «intérêt dans des biens-fonds» du par. (1) de l'art. 5 du *Lands*

[48] (1971), 17 F.L.R. 141.

to the acquisition of land on just terms. The issue was to this degree different from the issue here. It dealt with the validity of a grant made under the *Lands Acquisition Act*.

Blackburn J., after an extensive review of the facts and historical records involving some 50 pages, held as follows:

This question of fact has been for me by far the most difficult of all the difficult questions of fact in the case. I can, in the last resort, do no more than express that degree of conviction which all the evidence has left upon my mind, and it is this: that I am not persuaded that the plaintiffs' contention is more probably correct than incorrect. In other words, I am not satisfied, on the balance of probabilities, that the plaintiffs' predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim.

That finding necessarily disposed of the claim being made. However, the learned justice proceeded with a very comprehensive review of much of the case law regarding the rights of aborigines and the questions of the recognition and extinguishment of aboriginal title. It is obvious that all of the observations contained in his judgment following the finding of fact above set out were *obiter dicta*. In his review he dealt with the trial and appeal judgments in this case and said:

I consider, with respect, that *Calder's* case, though it is not binding on this Court, is weighty authority for these propositions:

1. In a settled colony there is no principle of communal native title except such as can be shown by prerogative or legislative act, or a course of dealing.

2. In a settled colony a legislative and executive policy of treating the land of the colony as open to grant by the Crown, together with the establishment of native reserves, operates as an extinguishment of aboriginal title, if that ever existed.

Acquisition Act, 1955-1966, ayant trait à l'acquisition de terres selon des conditions justes. Dans cette mesure, la question était différente de celle qui est ici en cause. Il était question de la validité d'une concession faite en vertu du *Lands Acquisition Act*.

Après avoir longuement passé en revue les faits et pièces historiques, de quelque 50 pages, le Juge Blackburn a rendu la décision suivante:

[TRADUCTION] Quant à moi, cette question de fait est de beaucoup la plus difficile de toutes les questions de fait de l'espèce. En dernier ressort, je peux uniquement dire jusqu'à quel point peut me convaincre toute la preuve: par là j'entends que je ne suis pas convaincu que la prétention des demandeurs est probablement plus exacte qu'inexacte. En d'autres termes, je ne suis pas convaincu, compte tenu de la balance des probabilités, que les prédécesseurs des demandeurs avaient en 1788 les mêmes attaches sur ces régions que celles que les demandeurs prétendent maintenant avoir.

Cette conclusion tranchait nécessairement le débat. Toutefois, le savant juge a passé en revue, d'une manière très exhaustive, une grande partie de la jurisprudence relative aux droits des aborigènes et aux questions de la reconnaissance et de l'extinction du titre aborigène. Il est évident que tous les commentaires formulés dans son jugement après la conclusion de fait précitée constituaient des *obiter dicta*. Au cours de son examen, il a parlé des jugements rendus en première instance et en appel dans la présente cause et a dit ce qui suit:

[TRADUCTION] Respectueusement, je considère que l'arrêt *Calder*, même s'il ne lie pas cette Cour, fait autorité en ce qui concerne les propositions suivantes:

1. Dans une colonie établie, il n'existe aucun principe à l'appui d'un titre aborigène communautaire, sauf s'il ressort d'un acte de prérogative ou d'une disposition législative, ou d'une façon habituelle de traiter.

2. Dans une colonie établie, lorsque le pouvoir législatif et le pouvoir exécutif ont pour ligne de conduite de traiter les terres de la colonie comme pouvant être concédées par la Couronne, et que des réserves aborigènes sont constituées, cela a pour effet d'éteindre le titre aborigène, si celui-ci a jamais existé.

It will be seen that he fell into the same errors as did Gould J. and the Court of Appeal. The essence of his concurrence with the Court of Appeal judgment lies in his acceptance of the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer. That proposition is wholly wrong as the mass of authorities previously cited, including *Johnson v. McIntosh* and *Campbell v. Hall*, establishes.

One last issue remains to be dealt with. The respondent by way of preliminary objections argued that the Court had no jurisdiction to grant the declaration asked for because it impugns the Crown's title to the land by seeking to have it declared that there is a cloud on the title, namely aboriginal or Indian title, and secondly, that the Court has no jurisdiction to make the declaration as it would affect the rights of persons who have had no opportunity to be heard, and thirdly, that the Court has no jurisdiction to grant a declaration if the declaration cannot have any practical result. Neither Gould J. nor the Court of Appeal found it necessary to deal with these objections because they dismissed the action on other grounds. As I take the view that the action succeeds, I now deal with the objections.

Dealing with them in reverse order, it seems clear to me that if the declaration can be made it will have a most practical result, namely the right of the Nishgas to compensation if and when extinguishment should be attempted or takes place. As to the second objection, the appellants' position is that the Nishgas are not asking to disturb the rights of any persons or corporations which had been given grants or rights even though such grants were *ultra vires*. They are prepared to accept things as they are.

That leaves the first objection, and there are, in my view, two valid answers to it. It is a fact that British Columbia does not have a Crown

Nous verrons qu'il a commis les mêmes erreurs que le Juge Gould et la Cour d'appel. Il a essentiellement souscrit à l'avis de la Cour d'appel, en acceptant la proposition qu'après la conquête ou la découverte, les peuples aborigènes n'ont aucun droit à l'exception de ceux qui leur sont par la suite accordés ou reconnus par le conquérant ou le découvreur. Cette proposition est entièrement erronée, comme l'établit la masse des précédents précités, y compris les arrêts *Johnson v. McIntosh* et *Campbell v. Hall*.

Il reste une dernière question à déterminer. Par des objections préliminaires, l'intimé a soutenu que la Cour n'était pas compétente pour accorder la déclaration demandée parce que cette déclaration vise à contester le titre immobilier de la Couronne au moyen d'une disposition qui est de nature à y porter éventuellement atteinte, soit la déclaration qu'il existe un titre aborigène ou indien, puis, que la Cour n'est pas compétente pour faire la déclaration, étant donné que celle-ci porterait atteinte aux droits de personnes qui n'ont pas eu l'occasion d'être entendues, et troisièmement que la Cour n'est pas compétente pour accorder une déclaration si cette dernière ne peut avoir aucune conséquence pratique. Ni le Juge Gould ni la Cour d'appel n'ont estimé nécessaire de se prononcer sur ces objections parce qu'ils rejetaient l'action pour d'autres motifs. Étant donné que je suis d'avis d'accueillir l'action, je me prononcerai maintenant sur ces objections.

J'en parlerai dans l'ordre inverse; il me semble évident que si la déclaration peut être faite, elle aura une conséquence pratique, soit, le droit des Nishgas à l'indemnisation lorsqu'on tentera d'éteindre leurs droits ou lorsque l'extinction se fera. En ce qui concerne la seconde objection, les appelants affirment que les Nishgas ne demandent pas une modification des droits de personnes ou compagnies à qui l'on a accordé des concessions ou des droits, même si pareilles concessions sont *ultra vires*. Ils sont disposés à accepter l'état actuel des choses.

Il ne reste plus que la première objection; à mon avis, il y a deux réponses valables. Il est établi que contrairement à presque toutes les

Proceedings Act, which virtually all the other Provinces have, which confers on the citizen the right to commence an action and to have his rights vis-à-vis the Crown determined. Actions against the Crown in British Columbia are governed by the *Crown Procedure Act* and this Act provides for the historic petition of right procedure. Accordingly, it is argued by the respondent that actions against the Crown must have the consent of the Crown evidenced by a fiat in respect of the petition of right, but it was argued by the appellants that a writ claiming declaratory relief only does not fall within the provisions of the *Crown Procedure Act*.

Historically there were two main avenues of pursuing a remedy against the Crown. There was the petition of right procedure, the beginning of which is aptly described by Holdsworth [*History of English Law*, 3rd ed., vol. 9, p. 8]:

> . . . it was recognized in Henry III's reign that the King could not be sued in his central courts of law because, like any other lord, he could not be sued in his own courts. But it was admitted that the king, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects. The procedure to be followed in such cases was, like many other rules of English law, fixed in outline in Edward I's reign. It became an established rule that the subject, though he could not sue the king, could bring his petition of right, which, if acceded to by the king, would enable the courts to give redress.

This situation obtained more or less until the *Crown Proceedings Act* of England was enacted in 1947. Thereafter, a subject could invoke the jurisdiction of the courts *as of right* to have his position determined vis-à-vis the government.

However, a vital exception must be noted to the foregoing. The petition of right procedure was the continuing rule of the day in the common law courts but not so elsewhere, *e.g.*, Exchequer.

autres provinces, la Colombie-Britannique n'a jamais adopté un *Crown Proceedings Act*, soit une loi conférant au citoyen le droit d'intenter une action et d'obtenir une décision quant à ses droits vis-à-vis de la Couronne. En Colombie-Britannique, les actions contre la Couronne sont régies par le *Crown Procedure Act* et cette loi crée la procédure historique de la pétition de droit. Par conséquent, l'intimé soutient que les actions contre la Couronne doivent être intentées avec le consentement de celle-ci, établi par une autorisation de poursuivre, en ce qui concerne la pétition de droit, mais les appelants ont d'autre part soutenu qu'un bref (writ) demandant uniquement un redressement déclaratoire n'est pas visé par les dispositions du *Crown Procedure Act*.

Historiquement, il y avait deux principales voies de recours contre la Couronne. Il y avait la pétition de droit, dont l'origine a été décrite avec exactitude par Holdsworth [*History of English Law*, 3e éd., vol. 9, p. 8]:

> [TRADUCTION] . . . au cours du règne d'Henri III, il était reconnu que le roi ne pouvait pas être poursuivi devant ses tribunaux judiciaires centraux parce que, comme tout autre lord, il ne pouvait pas être poursuivi devant ses propres tribunaux. Mais il était reconnu que le roi, étant source de justice et d'équité, ne pouvait pas refuser de redresser des torts lorsque ses sujets lui demandaient de le faire. Les procédures qui devaient être suivies en pareil cas, ont été, comme de nombreuses autres règles du droit anglais, établies en gros au cours du règne d'Édouard I. Il devint de règle établie que le sujet, même s'il ne pouvait pas poursuivre le roi, pouvait présenter sa pétition de droit, laquelle, si le roi accédait à la demande, permettait aux tribunaux d'accorder un redressement.

Cette situation a plus ou moins prévalu jusqu'à l'adoption du *Crown Proceedings Act* anglais en 1947. Par la suite, les sujets pouvaient invoquer la compétence des tribunaux *de plein droit* en vue d'obtenir une décision sur leur situation vis-à-vis du gouvernement.

Toutefois, il importe de noter une exception cruciale à ce qui précède. La procédure de la pétition de droit était la règle constante devant les tribunaux de common law, mais non pas ailleurs, par exemple, devant la Cour de l'Échiquier.

Supplementing the petition of right procedure in an invaluable way was the jurisdiction of the Court of Exchequer to grant equitable relief against the Crown in its Bill procedure. This procedure was not subject to the pitfalls of "writs" which was the form of procedure followed in the common law courts.

Comme complément de la procédure de la pétition de droit, il y avait le pouvoir de la Cour de l'Échiquier, et c'était là un avantage inestimable, d'accorder un redressement en «equity» contre la Couronne par la *Bill procedure*. Cette procédure n'était pas sujette aux obstacles des «brefs» (writs), qui constituaient la forme de procédure suivie devant les cours de common law.

The jurisdiction of the Court of Exchequer to grant equitable relief against the Crown was asserted in *Pawlett v. Attorney-General* in 1668. Holdsworth outlines the salient features of the case [p. 30]:

La compétence qu'avait la Cour de l'Échiquier d'accorder un redressement en «equity» contre la Couronne a été affirmée dans l'arrêt *Pawlett* v. *Attorney General*, en 1668, Holdsworth énonce comme suit les faits saillants de l'affaire [p. 30]:

. . . it was in the case of *Pawlett v. the Attorney-General* in 1668, that it was first clearly recognized that the subject was entitled to this [*equitable*] relief against the crown. In that case the plaintiff had mortgaged property to a mortgagee. The legal estate had descended to the mortgagee's heir, who had been attainted of treason. The King had therefore seized his property; and the plaintiff brought his bill in the Exchequer against the attorney-general for redemption. It was argued that the plaintiff could not proceed in this way, but must petition the King to allow him as a matter of grace and favour, [*petition of right*] to redeem. But the court held that the plaintiff was entitled to succeed.

[TRADUCTION] . . . c'est dans l'arrêt *Pawlett v. The Attorney General*, rendu en 1688, que l'on a pour la première fois, clairement reconnu que le sujet avait droit à un redressement [*en «equity»*] contre la Couronne. Dans cette cause-là le demandeur avait hypothéqué une propriété en faveur d'un créancier hypothécaire. Le droit de propriété juridique avait été transmis à l'héritier de ce dernier qui avait été accusé de trahison. Le roi avait donc confisqué la propriété; le demandeur a poursuivi le procureur général par voie de *bill*, devant la Cour de l'Échiquier, en vue de racheter son bien. On a prétendu qu'il ne pouvait pas procéder de cette façon, mais qu'il devait présenter au roi une pétition visant à obtenir l'autorisation, accordée à titre gracieux, [*pétition de droit*] de racheter son bien. Mais la Cour a décidé que la demande du demandeur devait être accueillie.

In *Pawlett* the equitable title was vested in the plaintiff, the legal title in the Crown. None the less these facts did not inhibit the Court of Exchequer, Hale C. B. and Atkyns B. from giving relief in the absence of a petition of right and fiat. Holdsworth proceeds further to say that [p. 31]:

Dans l'affaire *Pawlett*, le titre en «equity» était dévolu au demandeur, le titre juridique à la Couronne. Néanmoins, ces faits n'ont pas empêché la Cour de l'Échiquier, composée du baron en chef Hale et du baron Atkyns, d'accorder un redressement sans qu'il y ait eu pétition de droit et autorisation de poursuivre. Holdsworth ajoute ce qui suit [p. 31]:

. . . the rule that equitable relief could be given without a petition of right, on a bill filed against the attorney-general, was stated perfectly generally in 1835.

[TRADUCTION] . . . la règle qu'un redressement en «equity» pouvait être accordé sans pétition de droit, par suite de l'introduction d'un bill contre le procureur général, a été énoncée de façon parfaitement générale en 1835.

For the latter proposition *Deare v. Attorney-General*[49], is cited as authority:

It is now settled law, therefore, that any court administering an equitable jurisdiction can give relief in this way.

There are, it is submitted, other than mere historical reasons for suggesting that the petition of right procedure should not, and does not, apply to proceedings seeking declaratory or equitable relief. Firstly, the petition of right procedure is conceptually one to assert proprietary rights evolved in an age of status and feudalism. A declaration is a far broader remedy and when considered analytically merely states the law, without determining, shifting or varying property interests. Furthermore, one must, given an historical awareness, be reluctant to apply a common law rule to fetter the operation of an equitable jurisdiction which co-existed for so many centuries. Kellock J., in *Miller v. The King*[50], said at p. 176:

With respect to a contention that there was no jurisdiction in the ordinary courts as to claims against the Crown where a petition of right would not lie, their Lordships in *Esquimalt and Nanaimo Rly. v. Wilson*, [1920] A.C. 358, said at page 365:

"But there are many cases in which petition of right is not applicable in which the Crown was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned . . ."

At page 367 their Lordships referred to what was said by Lord Lyndhurst in *Deare v. Attorney-General*, (1835) 1 Y. & C. 197, 208, namely:

[49] (1835), 1 Y. & C. Ex. 197 at p. 208.

[50] [1950] S.C.R. 168.

En ce qui concerne ce dernier énoncé, on invoque l'arrêt *Deare v. Attorney General*[49], à titre de précédent:

[TRADUCTION] Par conséquent, il est maintenant établi en droit que tout tribunal ayant une compétence en «equity» peut accorder un redressement de cette façon.

Il existe d'autres motifs que ceux d'ordre simplement historique de présumer que la procédure de la pétition de droit ne devrait pas s'appliquer et ne s'applique pas aux procédures en vue d'obtenir un redressement déclaratoire ou d'«equity». En premier lieu, la procédure de la pétition de droit est conçue comme une revendication de droits de propriété établis à une époque de statut et de féodalité. Une déclaration constitue un redressement beaucoup plus général et lorsqu'on l'analyse, elle énonce simplement le droit, sans entraîner une décision, un changement ou une modification à l'égard de droits de propriété. De plus, compte tenu de l'évolution historique, il faut hésiter à appliquer une règle de common law en vue d'empêcher l'application d'une compétence en «equity» qui a existé parallèlement durant de nombreux siècles. Dans l'affaire *Miller c. Le Roi*[50], p. 176, le Juge Kellock a dit ce qui suit:

[TRADUCTION] En ce qui concerne la prétention que les tribunaux ordinaires n'étaient pas compétents, relativement aux réclamations contre la Couronne, lorsqu'il n'y avait aucun recours par voie de pétition de droit, Leurs Seigneuries ont dit ce qui suit dans l'arrêt *Esquimalt and Nanaimo Rly.* v. *Wilson*, [1920] A.C. 358, p. 365:

[TRADUCTION] «Mais il existe de nombreux cas dans lesquels la pétition de droit ne s'applique pas et dans lesquels la Couronne a été amenée devant la Court of Chancery et le procureur général, à titre de représentant des intérêts de la Couronne, appelé en défense, dans une action dans laquelle les intérêts de la Couronne étaient en jeu . . .»

A la page 367, Leurs Seigneuries ont fait mention de ce qui a été dit par Lord Lyndhurst dans l'arrêt *Deare* v. *Attorney-General*, (1835) 1 Y. & C. 197, 208, soit:

[49] (1835), 1 Y. & C. Ex. 197 à la p. 208.

[50] [1950] R.C.S. 168.

"I apprehend that the Crown always appears by the Attorney-General in a Court of Justice, especially in a Court of Equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General or of making him a party to a bill, where the interest of the Crown is concerned."

Moreover, it cannot be said that when the petition of right jurisprudence was being formulated that it was contemplated that it should apply to declaratory remedies. The declaratory remedy in the absence of concomitant consequential relief emerged only in the 19th century. The application of the ancient common law rule then would have to be one of deliberate judicial policy to constrain the remedies of the subject against the Crown, a policy of dubious validity today. It is much too late for the Courts to place obstructions in the path of citizens seeking redress against Government by resort to ancient judicial procedures.

A further aspect of the historical analysis deserves consideration. An action for a declaratory judgment will lie in the absence of a cause of action in the traditional sense: *Guaranty Trust Co. of New York v. Hannay & Co.*[51] at pp. 557-562. The rule dealt with in *Hannay* is identical, with one minor exception, to British Columbia O.25, R.5, M.R.285, which reads:

No action or proceedings shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

In the English rule the word "proceeding" is used whereas the British Columbia rule says "proceedings".

Pickford L.J. said, respecting the rule under discussion, in *Hannay* at p. 562:

The next contention is that, even if there is no necessity for a cause of action, the declaration can

[51] [1915] 2 K.B. 536.

«Je comprends que la Couronne comparaît toujours par l'intermédiaire du procureur général devant un tribunal judiciaire, et particulièrement devant une Court of Equity, lorsque l'intérêt de la Couronne est en jeu. Par conséquent, on a pris l'habitude d'introduire un bill contre le procureur général, ou de l'appeler à titre de partie dans un bill, lorsque l'intérêt de la Couronne est en jeu.»

De plus, il est impossible de dire que lorsque la jurisprudence ayant trait à la pétition de droit a été formulée, elle devait s'appliquer aux recours déclaratoires. Le redressement déclaratoire, lorsqu'il n'y avait pas de recours résultant concomitant, n'est apparu qu'au 19e siècle. L'application de l'ancienne règle de common law constituerait donc une ligne de conduite judiciaire délibérée en vue d'empêcher les recours du sujet contre la Couronne, ligne de conduite d'une validité douteuse de nos jours. Il est beaucoup trop tard pour que les tribunaux entravent les citoyens qui demandent un redressement au moyen de procédures judiciaires.

Il faut examiner un autre aspect de l'analyse historique. Une action en vue d'obtenir un jugement déclaratoire pourra être intentée à défaut d'une cause d'action au sens traditionnel: *Guaranty Trust Co. of New York v. Hannay & Co.*[51], pp. 557-562. La règle dont il était question dans l'arrêt *Hannay* est identique, à une petite exception près, à l'ordonnance 25 de la Colombie-Britannique, règle 5, règle marginale 285, qui se lit comme suit:

[TRADUCTION] On ne peut soulever d'objection à l'encontre d'une action ou de procédures pour le motif qu'un simple jugement déclaratoire ou qu'une simple ordonnance déclaratoire est demandée, et la Cour peut faire des déclarations obligatoires de droit, qu'un redressement résultant soit demandé ou non ou puisse l'être ou non.

Dans la règle anglaise, le terme "procédure" est employé alors que dans la règle de la Colombie-Britannique, on parle de "procédures".

Au sujet de la règle à l'étude, le Juge Pickford a dit, dans l'arrêt *Hannay*, p. 562:

[TRADUCTION] L'autre prétention est que, même si aucune cause d'action n'est nécessaire, la déclaration

[51] [1915] 2 K.B. 536.

only be made at the instance of the person claiming the right and intending to assert it if it should become necessary. I can find no such limitation in the words of the rule, and I can see no reason why it should be imposed if it is once established that a declaration can be made where no consequential relief can be given. No such limitation, so far as I know, has been suggested in the analogous procedure under Order LIV.A of declaring rights arising out of documents. But I think this point again is covered by authority in the cases of *Dyson v. Attorney-General*, [1912] 1 Ch. 158, and *Burghes v. Attorney-General*, [1912] 1 Ch. 173. The plaintiffs in those cases were not claiming to exercise any right; they claimed a declaration that a document which might be used to make a demand upon them was invalid and got it.

I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration. . . . .

Ex hypothesi this class of case would be *without* the petition of right procedure which is postulated on traditional and ancient rights and "causes of action". In other words, a proceeding seeking declaratory relief is not the kind of "action" within the rule requiring a petition of right to assert a declaratory remedy against the Crown.

There is a further and, I think, complete answer to the first preliminary objection. In this action the appellants assert that certain Acts and Orders and Proclamations of Governors Douglas and Seymour and of the Council of the Colony of British Columbia were *ultra vires*. That issue was spelled out clearly in the statement of claim and in the reply. It has been held by this Court in *British Columbia Power Corporation, Limited v. British Columbia Electric Co. Ltd. et al.*[52] that the absence of a fiat under the *Crown Procedure Act* of British Columbia was not fatal to the right to bring the action. Kerwin C.J. said:

[52] [1962] S.C.R. 642.

peut uniquement être faite à la demande de la personne revendiquant le droit et entendant le revendiquer le cas échéant. Je ne puis trouver aucune restriction semblable dans les termes de la règle, et je ne puis voir pourquoi il faudrait en imposer une s'il est établi qu'une déclaration peut être faite lorsqu'un redressement résultant ne peut être accordé. Aucune restriction semblable, pour autant que je sache, n'a été suggérée dans la procédure analogue de déclaration de droits découlant de documents, prévue par l'ordonnance LIV.A. Mais j'estime que ce point a été réglé dans les arrêts *Dyson v. Attorney-General*, [1912] 1 Ch. 158, et *Burghes v. Attorney-General*, [1912] 1 Ch. 173. Dans ces affaires, les demandeurs ne revendiquaient pas l'exercice de quelque droit; ils demandaient une déclaration énonçant qu'un document susceptible d'être utilisé en vue de faire une demande était invalide, et ils ont obtenu cette déclaration.

Je crois donc que la règle a pour effet de conférer un pouvoir général de faire une déclaration, qu'il y ait une cause d'action ou non, et ce, à la demande de toute partie intéressée à l'objet de la déclaration. . . . . .

Ex hypothesi, cette catégorie de causes ne serait pas visée par la procédure de la pétition de droit qui est établie pour des droits traditionnels et anciens et des "causes d'action". En d'autres termes, une procédure en vue d'obtenir un redressement déclaratoire n'est pas le genre d'"action" visé par la règle prescrivant une pétition de droit, lorsque l'on cherche à faire valoir un recours déclaratoire contre la Couronne.

Il existe une autre réponse, que je crois complète, à la première objection préliminaire. Dans la présente action, les appelants affirment que certaines lois, ordonnances et proclamations des gouverneurs Douglas et Seymour et du Conseil de la colonie de la Colombie-Britannique étaient *ultra vires*. Cette question a été énoncée clairement dans la déclaration et dans la réponse. Cette Cour a décidé, dans l'arrêt *British Columbia Power Corporation, Limited c. British Columbia Electric Co. Ltd.*[52], que le défaut d'obtenir une autorisation en vertu du *Crown Procedure Act* de la Colombie-Britannique n'était pas un vice fatal au droit d'intenter une action. Le Juge en chef Kerwin a dit ce qui suit:

[52] [1962] R.C.S. 642.

In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid.

[TRADUCTION] Dans un système fédéral, lorsque le pouvoir législatif est partagé, comme le sont également les prérogatives de la Couronne, entre le Dominion et les provinces, j'estime que la Couronne, du chef du Canada ou du chef d'une province, ne peut pas revendiquer une immunité particulière fondée sur un intérêt dans une certaine propriété, lorsque l'intérêt même qu'elle détient dépend complètement et uniquement de la validité d'une loi qu'elle a elle-même adoptée, s'il existe un doute raisonnable au sujet de la question de savoir si pareille loi est constitutionnelle. En l'autorisant à invoquer cette immunité, on se trouverait à lui permettre, par la revendication de droits en vertu d'une loi inconstitutionnelle, d'obtenir les mêmes résultats que si cette loi était valide.

The validity of what was done by Governors Douglas and Seymour and by the Council of the Colony of British Columbia is a vital question to be decided in this appeal and the Province cannot be permitted to deny access by the Nishgas to the Courts for the determination of that question.

La validité des actes des gouverneurs Douglas et Seymour et du Conseil de la colonie de la Colombie-Britannique est une question vitale sur laquelle il faut statuer dans le présent appel et la province ne peut pas être autorisée à empêcher les Nishgas de demander aux tribunaux de se prononcer sur cette question.

I would, therefore, allow the appeal with costs throughout and declare that the appellants' right to possession of the lands delineated in ex. 2 with the exceptions before mentioned and their right to enjoy the fruits of the soil, of the forest, and of the rivers and streams within the boundaries of said lands have not been extinguished by the Province of British Columbia or by its predecessor, the Colony of British Columbia, or by the Governors of that Colony.

Par conséquent, je suis d'avis d'accueillir l'appel avec dépens en toutes les cours et de déclarer que le droit des appelants à la possession des terres délimitées dans la pièce 2, sous réserve des exceptions dont il est ci-dessus fait mention, et leur droit de jouir des fruits du sol des forêts et des rivières et cours d'eau, dans les limites desdites terres, n'ont pas été éteints par la province de Colombie-Britannique ou par son prédécesseur, la colonie de la Colombie-Britannique, ou par les gouverneurs de cette colonie.

PIGEON J.—This is an appeal by special leave of this Court from a judgment of the Court of Appeal of British Columbia affirming the judgment of Gould J. in the Supreme Court of British Columbia dismissing an action in that Court claiming "a declaration that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished".

LE JUGE PIGEON—Il s'agit d'un pourvoi porté à la suite d'une autorisation spéciale de cette Cour contre un arrêt de la Cour d'appel de la Colombie-Britannique confirmant le jugement de M. le Juge Gould, de la Cour suprême de la Colombie-Britannique, qui a rejeté l'action intentée devant cette dernière Cour en vue d'obtenir [TRADUCTION] «une déclaration suivant laquelle le titre aborigène, autrement dit titre indien, que les demandeurs détiennent sur leur ancien territoire tribal ci-dessus décrit, n'a jamais été juridiquement éteint».

In his reasons for judgment, Gould J. after reviewing the facts and referring to the *St. Catherine's* case, said:

In the instant case sovereignty over the delineated lands came by exploration of *terra incognita* (see *Johnson v. McIntosh* (supra)), no acknowledgment at any time of any aboriginal rights, and specific dealings with the territory so inconsistent with any Indian claim as to constitute the dealings themselves a denial of any Indian or aboriginal title. As the Crown had the absolute right to extinguish, if there was anything to extinguish, the denial amounts to the same thing, sans the admission that an Indian or aboriginal title had ever existed. There is nothing to suggest that any ancient rights, if such had ever existed prior to 1871 and had been extinguished, were revived by British Columbia's entry into Confederation and becoming subject to the "British North America Act, 1867".

It is convenient here to deal with the third preliminary objection of defendant referred to earlier, that this matter required the granting of a fiat as a prerequisite to adjudication. In the light of opinions already expressed it is not necessary to decide on this question so interestingly argued by both counsel. It is not the usual judicial course to decide on the merits and then deal with the preliminary objections, but I think the comity of our courts as an institution would have suffered had these plaintiffs been told judicially that their clearly enunciated claim would get no adjudication because it had been brought in the wrong form.

In the Court of Appeal, the finding adverse to the plaintiffs on the merits was upheld without any reference to the preliminary objections, save in the reasons of Maclean J.A. at the end of which he said:

In view of the decision I have arrived at, I do not consider it necessary to deal with the three formidable preliminary objections raised by the respondent as follows:

1. The Court does not have jurisdiction to grant the declaration sought because it impugns the Crown's title to the land by seeking to have it

Dans ses motifs de jugement, après avoir passé les faits en revue et s'être reporté à l'arrêt *St. Catherine's*, M. le Juge Gould a dit ce qui suit:

[TRADUCTION] En la présente espèce, la souveraineté sur les terres délimitées découle de l'exploration de terres inconnues (voir arrêt *Johnson v. McIntosh*, précité); il n'y a jamais eu de reconnaissance d'aucun droit aborigène et les marchés ayant spécifiquement trait au territoire vont tellement à l'encontre d'aucun droit indien qu'ils constituent eux-mêmes une dénégation de tout titre indien ou aborigène. Étant donné que la Couronne avait un droit absolu d'extinction, si tant est que quelque chose restait à éteindre, la dénégation équivaut à la même chose, sans qu'il soit reconnu qu'un titre indien ou aborigène ait déjà existé. Rien ne fait supposer que quelque ancien droit, ayant pu exister avant 1871 et ayant pu être éteint, a été ranimé par l'entrée de la Colombie-Britannique dans la Confédération et son assujettissement à l'«acte de l'Amérique du Nord britannique, 1867».

Il est utile de parler ici de la troisième objection préliminaire du défendeur, déjà mentionnée, selon laquelle il faut obtenir une autorisation avant qu'une décision puisse être rendue. Étant donné les opinions déjà exprimées, il n'est pas nécessaire que je me prononce sur cette question qui fut plaidée d'une façon fort intéressante par les avocats des deux parties. Les tribunaux n'ont pas l'habitude de se prononcer sur le fond, puis de statuer sur les objections préliminaires, mais je crois que la Cour aurait agi au détriment du respect porté à nos tribunaux à titre d'institution si elle avait dit aux présents demandeurs que leur réclamation formulée en termes clairs ne pouvait entraîner aucune décision parce qu'elle n'avait pas été faite dans les formes.

En Cour d'appel, la conclusion sur le fond, défavorable aux demandeurs, a été confirmée sans qu'il soit fait mention des objections préliminaires, sauf par M. le Juge d'appel Maclean, qui, à la fin de ses motifs, a dit ce qui suit:

[TRADUCTION] Étant donné la décision à laquelle j'en suis venu, j'estime qu'il est inutile de me prononcer sur ces trois importantes objections préliminaires soulevées par l'intimé:

1. La Cour n'est pas compétente pour faire la déclaration demandée parce que cette déclaration vise à contester le titre de la Couronne au

declared that there is a cloud on the title, i.e. Indian title.

2. The Court has no jurisdiction to make the declaration because it will affect the rights of others who have had no opportunity to be heard. Audi Alteram Partem.
3. The Court ought not to grant a declaration if it can have no practical consequences.

If the objection that the granting of a fiat is a prerequisite to adjudication merely meant that the proceedings were instituted "in the wrong form", it certainly should not be considered for a moment, especially in this Court and at its stage. However, I feel bound by high authority to hold that the granting of a fiat, when required, is a condition of jurisdiction. Furthermore, the decision of the executive to withhold the granting of a fiat is one from which there is no appeal: *Lovibond v. Governor General of Canada*[53].

In *Attorney-General for Ontario v. McLean Gold Mines*[54], an action was brought against the Attorney-General, the Minister of Mines and the registered owners of some mining claims under a new grant made after forfeiture of previous grants, claiming *inter alia* a declaration that the plaintiffs were the true owners of those mining claims. The Court of Appeal, reversing the trial judge, granted a declaration that the proceedings for forfeiture of the claims were null and void. This judgment was reversed in the Privy Council for the sole reason that the declaration had been made in violation of the Crown's prerogative "to decline to be impleaded in the Courts for the recovery of property otherwise than by a petition for the hearing and disposition of which it has accorded its fiat". Anglin C. J. who delivered the judgment in the Privy Council, said:

[53] [1930] A.C. 717.
[54] [1927] A.C. 185.

moyen d'une disposition, soit la déclaration qu'il existe un titre indien, qui est de nature à y porter éventuellement atteinte.

2. La Cour n'est pas compétente pour faire la déclaration parce que celle-ci porterait atteinte aux droits de tiers qui n'ont pas eu l'occasion d'être entendus. Audi alteram partem.
3. La Cour ne devrait pas faire une déclaration si celle-ci ne peut avoir aucune conséquence pratique.

Si l'objection qu'il faut obtenir une autorisation avant qu'une décision puisse être rendue signifiait simplement que les procédures n'ont pas été engagées dans les formes, à coup sûr, elle ne devrait absolument pas être considérée, particulièrement en cette Cour et à ce stade de la procédure. Toutefois, d'importants précédents m'obligent à décider que l'obtention d'une autorisation, le cas échéant, est une condition de la compétence. De plus, la décision du pouvoir exécutif de ne pas accorder une autorisation de poursuivre n'est pas sujette à appel: *Lovibond v. Governor General of Canada*[53].

Dans l'affaire *Attorney-General for Ontario v. McLean Gold Mines*[54], dans laquelle une action avait été intentée contre le procureur général, le ministre des mines et les propriétaires enregistrés de certains claims miniers suivant une nouvelle concession faite après la confiscation de concessions antérieures, on demandait entre autres une déclaration que les demandeurs étaient les véritables propriétaires des claims. La Cour d'appel, infirmant le jugement du juge de première instance, a accordé une déclaration selon laquelle les procédures en vue de faire prononcer la confiscation des claims étaient nulles et de nul effet. Ce jugement a été infirmé par le Conseil privé pour l'unique motif que la déclaration avait été faite en violation de la prérogative qu'a la Couronne [TRADUCTION] «de refuser d'être amenée devant les tribunaux en vue de la remise en possession de biens, sauf par une pétition pour l'audition et la décision de laquelle elle a accordé son autorisation». M. le Juge en chef Anglin, qui a rendu jugement au Conseil privé, a dit ce qui suit:

[53] [1930] A.C. 717.
[54] [1927] A.C. 185.

It is obvious that it is vital to the success of plaintiffs that they should obtain the particular declaration and order last set forth. Had the judgment merely set aside the Crown grants to Fuller and his transfers to the defendant company and vacated the registration of these several instruments, the result would have been to leave the title to the mining claims vested in the Crown. Indeed, it is essential to the plaintiffs' status to seek relief against the defendant company that they should reestablish their interest in the lands by avoiding the forfeiture of that interest under the provisions of the Mining Tax Act. Until that has been done the plaintiffs cannot be regarded as having any interest which would enable them to impeach the title of the defendant company.

However the plaintiffs' claim may be viewed, it seeks in substance and reality to avoid the title acquired by and vested in the Crown as the result of the impugned forfeiture. The real matter in issue is the Crown's title . . . . .

The plaintiffs' claim is for the recovery of property "which has been granted or disposed of by or on behalf of His Majesty," and it rests on the assertion that His Majesty could not effectively grant or dispose of that property because he lacked title thereto, owing to the invalidity of the forfeiture proceedings on which that title depended.

Such a case differs widely from that with which this Board was called upon to deal in *Esquimalt and Nanaimo Ry. Co. v. Wilson* ([1920] A.C. 358, 363), relied upon by the respondents. There, as Lord Buckmaster observed, "the title of the Crown to the land (was) not in controversy." . . . . .

. . . In the case now before their Lordships the plaintiffs, in order to recover the lands they seek, must first set aside the forfeiture proceedings which, if valid, extinguished their ownership of them and vested the title to those lands in the Crown.

This feature of the present litigation serves to distinguish it from *Dyson v. Attorney-General* ([1911] 1 K.B. 410, 414, 421, 422), and also from two cases in the Ontario Courts cited for the respondents: *Farah v. Glen Lake Mining Co.* (17 Ont. L.R. 1) and *Zock v. Clayton* (28 Ont. L.R. 447).

Concerning the contention that the making of the declaration prayed for could be considered as an exercise of equitable jurisdiction, I must

[TRADUCTION] De toute évidence, pour que l'action des demandeurs soit accueillie, il faut qu'ils obtiennent la déclaration et l'ordonnance particulières exposées en dernier lieu. Si le jugement avait simplement annulé les concessions de la Couronne à Fuller et les transferts de celui-ci à la compagnie défenderesse et avait radié l'enregistrement de ces divers actes, le titre sur les claims miniers serait demeuré à la Couronne. De fait, il est essentiel pour que les demandeurs soient en mesure de demander un redressement contre la compagnie défenderesse, qu'ils rétablissent leurs droits sur les biens-fonds en annulant la confiscation de ces droits sous le régime des dispositions du Mining Tax Act. Tant que ce n'est pas fait, les demandeurs ne peuvent pas être considérés comme ayant quelque droit leur permettant de contester le titre de la compagnie défenderesse.

Toutefois, il est possible d'interpréter la réclamation des demandeurs comme ayant essentiellement et réellement pour but d'annuler le titre acquis par la Couronne et dévolu à celle-ci par suite de la confiscation contestée. La véritable question en litige a trait au titre de la Couronne. . . . . .

Les demandeurs réclament la remise en possession de biens «qui ont été concédés ou aliénés par Sa Majesté ou par ses représentants»; ils disent que Sa Majesté ne pouvait pas efficacement concéder ou aliéner ces biens parce qu'elle n'y avait aucun titre, étant donné l'invalidité des procédures de confiscation dont dépendait celui-ci.

Cette cause est très différente de celle dont ce Comité a été saisi dans l'affaire *Esquimalt and Nanaimo Ry. Co. v. Wilson*, ([1920] A.C. 358, 363), invoquée par les intimés. Dans cette cause-là, comme l'a signalé Lord Buckmaster, "le titre de la Couronne sur les biens-fonds (n'était pas) controversé." . . . . .

. . . En la présente espèce, pour être remis en possession des biens-fonds qu'ils réclament, les demandeurs doivent d'abord faire annuler les procédures de confiscation, qui, si elles sont valides, ont éteint leur droit de propriété et investi la Couronne du titre afférent à ces biens-fonds.

Cet aspect du présent litige nous permet de le distinguer de l'affaire *Dyson v. Attorney-General* ([1911] 1 K.B. 410, 414, 421, 422), et de deux autres arrêts rendus par les tribunaux ontariens et invoqués par les intimés: *Farah v. Glen Lake Mining Co.* (17 Ont. L.R. 1) et *Zock v. Clayton* (28 Ont. L.R. 447).

Au sujet de la prétention que la déclaration demandée pourrait être considérée comme constituant l'exercice d'une compétence en «equity»,

say that I fail to see how it could be so and how this could be reconciled with the decision above referred to. The substance of the claim is that the Crown's title to the subject land is being questioned, its assertion of an absolute title in fee being challenged on the basis of an adverse title which is said to be a burden on the fee.

It has been pointed out that in their statement of claim the plaintiffs alleged that some pre-confederation B.C. legislation by proclamations and statutes was *ultra vires* and reference was made to authorities holding that there is jurisdiction to issue, without a fiat obtained on a petition of right, declaratory judgments respecting the invalidity of legislation. The answer to this contention is that plaintiffs do not pray for any such declaration. Assuming the Court had jurisdiction to make it, this would not give it jurisdiction to make another quite different declaration. Furthermore, in view of s. 129, *B.N.A. Act*, I doubt very much that the constitutional validity of pre-confederation legislation affecting Indians or Indian lands can be made in proceedings instituted against the provincial attorney-general.

Concerning the decision of this Court in *B.C. Power Corporation Ltd. v. British Columbia Electric Co. Ltd.*[55], I would point out that the *ratio decidendi* is that the constitutional division of authority under the *B.N.A. Act* was the basis of the alleged invalidity of the impugned legislation. No such question arises in this case. No post-confederation legislation is in question.

For all those reasons, I have to uphold the preliminary objection that the declaration

[55] [1962] S.C.R. 642.

je dois dire que je ne puis voir comment il pourrait en être ainsi et comment cela pourrait être concilié avec la décision précitée. Par la demande, on remet essentiellement en question le titre de la Couronne sur les terres concernées, on conteste sa revendication d'un droit absolu de propriété en se fondant sur un titre rival qui, dit-on, grève la propriété.

Il a été signalé que dans leur déclaration, les demandeurs allèguent que certaines dispositions législatives de la Colombie-Britannique, datant d'avant la Confédération et adoptées sous la forme de proclamations et de lois, sont *ultra vires;* et il a été fait mention de certains précédents dans lesquels il a été décidé que les cours sont compétentes, même sans autorisation sur pétition de droit, pour rendre des jugements déclaratoires de la nullité de textes législatifs. La réponse à cette prétention c'est que les demandeurs ne réclament aucune déclaration semblable. Même en acceptant que la Cour a cette compétence, cela ne lui donne pas le pouvoir d'émettre une déclaration d'un autre genre. De plus, étant donné l'art. 129 de l'*Acte de l'Amérique du Nord britannique*, je me demande réellement si la question de la constitutionnalité de dispositions législatives datant d'avant la Confédération et touchant aux Indiens ou aux terres indiennes peut être décidée dans des procédures engagées contre le procureur général de la province.

Au sujet de la décision que cette Cour a rendue dans l'affaire *B.C. Power Corporation Ltd. c. British Columbia Electric Co. Ltd.*[55], je signale que la *ratio decidendi* était la suivante, savoir que le partage des pouvoirs en vertu de l'*Acte de l'Amérique du Nord britannique* servait de fondement à l'allégation que les dispositions législatives contestées étaient inconstitutionnelles. En la présente espèce, aucune question semblable ne se pose. Aucune disposition législative datant d'après la Confédération n'est en question.

Pour tous ces motifs, je dois accueillir l'objection préliminaire selon laquelle la déclaration

[55] [1962] R.C.S. 642.

prayed for, being a claim of title against the Crown in the right of the Province of British Columbia, the Court has no jurisdiction to make it in the absence of a fiat of the Lieutenant-Governor of that Province. I am deeply conscious of the hardship involved in holding that the access to the Court for the determination of the plaintiffs' claim is barred by sovereign immunity from suit without a fiat. However, I would point out that in the United States, claims in respect of the taking of lands outside of reserves and not covered by any treaty were not held justiciable until legislative provisions had removed the obstacle created by the doctrine of immunity. In Canada, immunity from suit has been removed by legislation at the federal level and in most provinces. However, this has not yet been done in British Columbia.

I would therefore dismiss the appeal and make no order as to costs.

Appeal dismissed, HALL, SPENCE *and* LASKIN JJ. *dissenting.*

Solicitor for the appellants: Thomas R. Berger, Vancouver.

Solicitors for the respondent: Russell & DuMoulin, Vancouver.

demandée étant la revendication d'un titre contre la Couronne du chef de la province de la Colombie-Britannique, la Cour n'est pas compétente pour faire cette déclaration à défaut d'une autorisation du lieutenant-gouverneur de cette province. Je suis parfaitement conscient des difficultés que peut causer le fait de décider que l'accès aux tribunaux pour faire statuer sur la réclamation des demandeurs se trouve fermé en raison de l'immunité du Souverain contre les poursuites intentées sans autorisation. Toutefois, je dois signaler qu'aux États-Unis, il a été décidé que les réclamations portant sur la prise de terres situées en dehors des réserves et non visées par quelque traité ne pouvaient être entendues que si des dispositions législatives avaient enlevé l'obstacle créé par la doctrine de l'immunité. Au Canada, l'immunité contre les poursuites a été enlevée par la loi, au niveau fédéral et dans la plupart des provinces. Mais, ce n'est pas le cas en Colombie-Britannique.

Par conséquent, je suis d'avis de rejeter le pourvoi sans adjuger de dépens.

Appel rejeté; LES JUGES HALL, SPENCE *et* LASKIN *étant dissidents.*

Procureur des appelants: Thomas R. Berger, Vancouver.

Procureurs de l'intimé: Russell & DuMoulin, Vancouver.

CALDER et al. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

British Columbia Court of Appeal, Davey, C.J.B.C., Tysoe and Maclean, J.A. May 7, 1970.

Indians — Aboriginal title to lands — Whether such title possible after conquest — Whether title extinguished by acts of Crown.

Real property — Aboriginal title to lands — Whether such title possible after conquest — Whether title extinguished by acts of Crown.

The appellants, officers of the Nishga Indian Tribal Council, on their own behalf, and as representatives of various Indian bands in British Columbia, brought an action against the Attorney-General of British Columbia for a declaration that the aboriginal or Indian title to certain lands had never been lawfully extinguished. An appeal from a judgment dismissing the action, *held*, the appeal should be dismissed.

Per Tysoe, J.A., Davey, C.J.B.C., and Maclean, J.A., concurring: A claim to Indian title can only be recognized if the Indian title has been incorporated into the municipal law. The Proclamation of King George III, made in 1763 as set out in R.S.C. 1952, vol. VI, p. 6127, forbidding the purchase, settlement or taking of possession without special leave or licence of the Crown of any lands of "the several Nations or Tribes of Indians with whom we are connected and who live under our protection" did not apply to the lands in question. At the time of the Proclamation the Indian bands represented by the appellants were not any of "the several Nations or Tribes of Indians" with whom the Crown was connected or lived under the Crown's protection.

Petitions lodged by the Nishga tribe in 1913 to the Privy Council, special Commissions of the Senate and House of Commons of Canada in 1922 and 1961 and the lack of action by Parliament on the reports of these Commissions showed that there had been no statutory recognition of the claim of the appellants to Indian title. On the other hand, all of the proclamations, ordinances and proclaimed statutes affecting land in British Columbia emanating from the Crown Imperial and the Crown Provincial showed a unity of intention to exercise, and the legislative exercising of, absolute sovereignty over all lands in the Colony, and later the Province, a sovereignty which was inconsistent with any conflicting interest, including one as to aboriginal or Indian title.

Per Davey, C.J.B.C.: The primitive tribes at the time of British discovery and conquest had no conception of proprietary, as opposed to territorial boundaries. The boundaries claimed by the Nishga tribe were not connected with notions of ownership of particular parcels of land. There was no evidence to justify a conclusion that the aboriginal rights claimed by the appellants are of a kind that it ought to be assumed that the Crown recognized them when it acquired the mainland of British Columbia by occupation.

Per Maclean, J.A.: There was no legislation of the pre-Confederation Government of the Colony of British Columbia, or of the present Province which would constitute recognition of Indian title.

[*Re Southern Rhodesian Land* (1918), 88 L.J.P.C. 1; *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51 Ind. App.

357; *Tamaki v. Baker*, [1901] A.C. 561; *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543; *Worcester v. State of Georgia* (1832), 6 Pet. 515; *Re Labrador Boundary*, [1927] 2 D.L.R. 401; *Cook v. Sprigg*, [1899] A.C. 572; *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] 2 All E.R. 93; *Secretary of State v. Sardar Rustam Khan*, [1941] 2 All E.R. 606; *Francis v. The Queen*, 3 D.L.R. (2d) 641, [1956] S.C.R. 618; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485; *Warman v. Francis et al.* (1958), 20 D.L.R. (2d) 627, 43 M.P.R. 197; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339; *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, refd to]

APPEAL from a judgment of Gould, J., 8 D.L.R. (3d) 59, 71 W.W.R. 81, dismissing appellants' action for a declaration that the aboriginal or Indian title to ancient tribal territory has never been lawfully extinguished.

Thomas R. Berger and *D. J. Rosenbloom*, for appellants.

Douglas McK. Brown, Q.C., and *A. W. Hobbs*, Q.C., for respondent.

DAVEY, C.J.B.C.:—It has been truly observed by Anglin, J., in *Warman v. Francis et al.* (1958) 20 D.L.R. (2d) 627 at p. 630, 43 M.P.R. 197, and by my brother Tysoe that the validity of claims of aboriginal title differ throughout Canada, and that each case depends on the historical background.

Each of the decisions relied upon during the course of argument, most of them of the highest authority, including judgments of the Privy Council and the Supreme Court of the United States, requires close examination because of the principles upon which they rest are not easy to reconcile unless close attention is paid to the precise question raised in each, and to the particular facts and the historical background out of which that question arises.

In *Re Southern Rhodesian Land* (1918), 88 L.J.P.C. 1 at p. 11, Lord Sumner addressed his attention to the argument that the unalienated lands belonged to the natives from time immemorial, and still belonged to them, and that their title could only be divested by legislation or their consent. At p. 12 he remarked that it appeared to be common ground that the title claimed was "tribal" or "communal", but what precisely that meant remained to be ascertained. I quote from him:

> In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express

> confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

I add to Lord Sumner's two qualifications a more general one, namely, in the absence of evidence to the contrary, such as occurred in *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51 Ind. App. 357, where the Crown undertook to ascertain by inquiry what rights the inhabitants formerly had in the ceded territory.

Lord Sumner continued at p. 12:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law, and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribes." On the other hand, there are indigenous peoples whose legal conceptions, although differently developed, are hardly less precise than our own. When once they have been studied and understood, they are no less enforceable than rights arising under Engish law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.

Turning to the evidence in this appeal, in spite of the commendation by Mr. Duff, a well known anthropologist, of the native culture of the Indians on the mainland of British Columbia, they were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property. I am not overlooking Mr. Duff's evidence that the boundaries of the Nishga territory were well known to the tribes and to their neighbours, and respected by all. These were territorial, not proprietary boundaries, and had no connection with notions of ownership of particular parcels of land. Also Mr. Duff said that on occasion a chief would earmark a particular piece of property for the exclusive use of a particular family, but I see no evidence that this practice was general; even if it was, it would only support claims of the particular occupant, and not claims to the communal use by the whole tribe over all its tribal territory.

I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them

when it acquired the mainland of British Columbia by occupation.

These considerations effectively distinguish the *Lagos* line of cases in which the territory of a people was ceded to the British Crown following conquest. The inhabitants had definite notions of rights of private property in specific pieces of land although of a communal, tribal and family nature, which it was presumed the Crown intended to respect and recognize, and intended to be supported by the municipal Courts.

Under the authorities cited by my brother Tysoe, to which I add *Tamaki v. Baker*, [1901] A.C. 561, it is, I think, clear in the circumstances of this case that the appellants must establish that by a prerogative or legislative Act, or by a course of dealing by the Crown from which a prerogative Act can be inferred, the Crown ensured to the Nishga Nation aboriginal rights in the lands in question, which might be asserted and enforced in the Courts of this Province. Unless that can be determined affirmatively, no declaratory judgment can be delivered that such rights have not been extinguished, because to say that they have not been extinguished implies that they exist.

Appellants' counsel submits that contrary to those authorities the long-time policy of the Imperial Government in settling territory throughout the world, especially exemplified in its dealings with the Indians in the eastern part of North America and the Maoris of New Zealand, of buying from the native people those parts of the territory which were needed for the purpose of the Colonies, has become part of the common law, or at least has become so firmly entrenched in the policies by which native territories are occupied, that an intention to observe those policies must be attributed to all colonial Governments. Those policies are fully described in the judgments of Chief Justice Marshall in *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543, and *Worcester v. State of Georgia* (1832), 6 Pet. 515. Whatever may be the law in the various States of the Union, it is clear from the authorities binding this Court (although some of them contain occasional statements that seem to give support to counsel) that there is no such principle embodied in our law. In each case it must be shown that the aboriginal rights were ensured by prerogative or legislative Act, or that a course of dealing has been proved from which that can be inferred.

Whether aboriginal rights ought to be confirmed or recognized depends entirely upon the Crown's or Legislature's view of the policy required to deal properly with each situa-

was published or in its purpose that touched the aborigines in British Columbia. In my respectful opinion the Proclamation did not apply to the Indians and to the territory of British Columbia.

I am aware that the Supreme Court of the United States has not so restricted the application of the Proclamation and has applied it in some degree to Western Indians. Moreover, that the Court has developed from the course of dealing with Indians and Indian lands in the eastern part of North America, from the Proclamation, and from the liberal political philosophy of the revolution a body of law dealing with Indian rights that incorporates as a matter of principle the practice that the Crown had followed as a matter of policy on the eastern part of the continent. In addition to the comment made by Lord Davey in *Tamaki v. Baker, supra,* at p. 579, about the American cases, in my opinion the decisions of the Privy Council, by which we are bound until the Supreme Court of Canada speaks, have diverged from the principles laid down and applied by the Supreme Court of the United States to Western Indians. For these reasons the judgments of the Supreme Court of the United States have to be applied with caution to the claims of the British Columbia Indians to aboriginal rights in their ancient lands.

If I be wrong, and the Indians of British Columbia did acquire any aboriginal rights, I agree with my brother Tysoe that the historical and legislative material which he has cited shows they have been extinguished.

I would dismiss the appeal.

TYSOE, J.A.:—This is an appeal from a judgment of Gould, J., dismissing an action for a declaration "that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished."

I am in such substantial agreement with the reasons for judgment of Gould, J., that were it not for the importance of this case and the elaborate submissions and able arguments of counsel, I would not have thought it necessary to do more than add a few words to those of Gould, J.

The action was brought by officers of the Nishga Indian Tribal Council on their own behalf and on behalf of all the other members of such tribal council and by the councillors of each of the four Indian bands on the Nass River, on their own behalf and on behalf of the members of each band against the Attorney-General of British Columbia. The appellants are

Indians of the Nishga Tribe living today in four villages in the Nass Valley. For the purposes of this action the respondent admitted that the appellants are the descendants of the Indians who inhabited since time immemorial a large area of territory in northwestern British Columbia delineated in the map, ex. 2, and that the appellants' ancestors had obtained a living from the lands and waters shown on the said map. This area lies on the mainland of British Columbia between north latitude 54° point 40 and north latitude 56° point 15. The expression "obtained a living" is used in the sense of procuring food, clothing and shelter. The appellants' ancestors fished, hunted and picked berries. The skins of animals were used for clothing. These people knew nothing of the so-called benefits of civilization. Having regard to the size of the area of territory over which they may have roamed they were comparatively few in number. Professor Duff, a witness called by the appellants, estimated that in 1835 there were about two thousand and that by 1871 this number had been reduced to about one thousand. This witness further testified that there was a greater population density amongst the Indians in the southern part of the British Columbia coast and in the lower parts of the Fraser River drainage area.

The respondent has raised, by way of answer to the claim of the appellants, a point of considerable importance. It is put in this form:

> There is no Indian Title capable of judicial recognition in the courts of Canada unless it has previously been recognized by the Legislature or the Executive Branch of Government.

In support of his submission the respondent has referred to several decisions of high authority.

In *Cook v. Sprigg*, [1899] A.C. 572, the Judicial Committee of the Privy Council had to consider whether the appellants as grantees of concessions made by the paramount chief of Pondoland could, after the annexation of Pondoland by Great Britain, enforce against the Crown the privileges and rights conferred. In the course of his judgment the Lord Chancellor said at pp. 577-9:

> Their Lordships do not differ with the finding in fact by the Chief Justice that at the time that Sigcau executed the instruments in question he was the paramount chief of the Pondos, and that Sigcau understood perfectly well that he was purporting to grant such rights as the instruments which he executed professed to convey.
>
> Their Lordships do not think it material to enter into such questions, inasmuch as they are of opinion that the statute which gives a power to sue the Prime Minister does not involve the power

of making any declaration of right in such a case. And as mere matter of form it does not contain any clause empowering the Court to make a declaration of right as against the Crown; but there is a more complete answer to any claim arising from these instruments. The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign—which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.

It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.

In this case it certainly cannot be said that there was any bargain by the British Government that Sigcau's supposed concessions should be recognised. Indeed, the only intelligible sense in which the allegations in the declarations can be understood is that the breach of duty complained of consists in the refusal of the Cape Government to recognise the plaintiffs' concessions.

To quote the language of this Board, used by Lord Kingsdown in the case of *Secretary of State for India in Council v. Kamachee Boye Sahaba* 13 Moo. P.C. 22, 86, and cited in *Doss v. Secretary of State for India in Council* (1875) L.R. 19 Eq. 534:—

"Of the propriety or justice of that act" (here the refusal to recognise) "neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

In *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51, Ind. App. 357, Lord Dunedin said at pp. 360-1:

But a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised

> ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of his predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties. This is made quite clear by Lord Atkinson when, citing the Pongoland case of *Cook v. Sprigg*, L.R. 42 I.A. 229, 268, he says: "It was held that the annexation of territory made an act of state and that any obligation assured under the treaty with the ceding state either to the sovereign or the individuals is not one which municipal Courts are authorised to enforce".

and at p. 361:

> The whole object of inquiry is to see whether, after cession, the British Government has conferred or acknowledged as existing the proprietary right which the appellants claim.

In *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] 2 All E.R. 93, the chief of a Maori tribe whose members owned lands in New Zealand challenged a charge imposed on their lands. The headnote states in part:

> The alternative contention challenged the validity of the charge imposed by sect. 14 of the Act of 1935, on the ground that such legislation was *ultra vires* the legislature of New Zealand, inasmuch as it derogated from the rights conferred on the native owners by the Treaty of Waitangi, 1840.

At p. 98 Viscount Simon, L.C., quoted art. 2 of the Treaty of Waitangi under which the Queen of England confirmed and guaranteed to the natives the full, exclusive and undisturbed possession of their lands in exchange for a right of pre-emption over such lands at such prices as might be agreed upon. Viscount Simon went on to say:

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law.

The noble Viscount then quoted the passage in Lord Dunedin's judgment set out, *supra*. He continued:

> So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him.

In *Secretary of State v. Sardar Rustam Khan*, [1941] 2 All E.R. 606, Lord Atkin, at p. 611, quoted Lord Dunedin as set out, *supra*, and then said:

> It follows, therefore, that in this case the Government of India had the right to recognise or not to recognise the existing titles to land. In the case of the lands in suit, they decided not to recognise them, and it follows that the plaintiffs have no recourse against the Government in the municipal courts.

In *Francis v. The Queen*, 3 D.L.R. (2d) 641, [1956] S.C.R. 618, Kerwin, C.J.C., with whom Taschereau and Fauteux, JJ., agreed, said at p. 643:

> The Jay Treaty was not a treaty of peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation. This is an adaptation of the language of Lamont J., speaking for himself and Cannon J. in *Re Arrow River and Tributaries Slide & Boom Co.*, [1932], 2 D.L.R. 250, S.C.R. 495, 39 C.R.C. 161, and is justified by a continuous line of authority in England. Although it may be necessary in connection with other matters to consider in the future the judgment of the Judicial Committee in the *Labour Conventions Case* [*Reference re Weekly Rest in Industrial Undertakings Act, etc.*], [1932], 1 D.L.R. 673, A.C. 326, so far as the point under discussion is concerned it is there put in the same sense by Lord Atkin. It has been held that no rights under a treaty of cession can be enforced in the Courts except in so far as they have been incorporated in municipal law: *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51 Ind. App. 357; *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] A.C. 308."

In the light of these authorities I think it is necessary to keep in mind the clear distinction between mere policy of a sovereign authority and rights of natives conferred or expressly recognized by statute of the sovereign authority or by treaty or agreement having statutory effect and the different legal results that follow. There is no such statute applicable to the Nishga Indians and they have no such treaty or agreement. In saying this, I do not overlook the Royal Proclamation of 1763 so strongly relied on by the appellants. In my view this Proclamation did not in 1763 and never did thereafter apply to the area of territory inhabited by the Nishga Indians or to those Indians. On this question I would respectfully apply the reasoning of Sheppard, J.A., in which Lord, J.A., concurred, in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at pp. 619-21, 52 W.W.R. 193, and with which Schultz, Co. Ct. J., agreed in *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619 at p. 629, 63 W.W.R. 485, adapting it to the Nishga territory. In 1763 the existence of that territory was unknown to the British Crown, for how far to the westward and the north the land mass of North America extended had not been determined. Whether whatever land existed was a barren waste or was in-

habited and by whom was also unknown. Between the years 1792 and 1794 Captain George Vancouver was in the coastal waters of the mainland of what is now British Columbia and Vancouver Island acting under instructions from the British Admiralty to examine the coastline in an endeavour to determine whether there was a northwest passage there. His explorations were completed in August, 1794. Thereafter, he wrote:

> . . . I trust the precision with which the survey of the coast of North-West America has been carried into effect, will remove every doubt, and set aside every opinion of a north-west passage, or any water communication navigable for shipping, existing between the North Pacific, and the interior of the American continent within the limits of our researches. The discovery that no such communication does exist has been zealously pursued, and with a degree of minuteness far exceeding the letter of my commission or instructions.

See: Cicely Lyons, "Salmon, our Heritage", p. 12. I do not think the Crown could have had in contemplation the Nishga territory when it made the Proclamation of 1763. It had not then been discovered by the British and, not having been discovered, it could not be said it was claimed by and was part of the Dominions or Territories of the British Crown. Nor can I give the Royal Proclamation a prospective operation so that it applies to later discovered land on the North American continent which might turn out to be inhabited by Indian tribes rather than by Eskimos or people of some other race and whose mode of living, nature, character, intelligence and state of culture was quite unknown. It must, I think, be remembered, too, that there was a serious dispute between Great Britain and the United States as to possession and ownership of the land in the Pacific north-west until that dispute was settled by the Oregon Treaty of 1846, by which the Territory on the mainland north of 49° of north latitude was recognized as belonging to Great Britain.

Other matters are, in my opinion, of importance. From time to time over the years the Indians of the mainland of British Columbia, including the Nishga Indians, have agitated for the recognition by the sovereign authority of the rights they have claimed under Indian title and for some form of compensation. As a result of this in 1887 the Government of the Province of British Columbia appointed a Commission under the *Public Inquiries Aid Act*, 1872 (B.C.), c. 25, to inquire into the state and condition of the Indians of the north-west coast of British Columbia, included in which were the Nishga Indians, and what causes and complaints existed amongst them. The Com-

missioners made extensive inquiries and in due course made a report to the Lieutenant-Governor of the Province. This did not result in any statutory recognition of the rights claimed by the Indians or in any treaty or agreement having statutory effect. On May 21, 1913, the Nishga Indians lodged a petition with His Majesty's Privy Council by which they relied, *inter alia,* upon the Royal Proclamation of 1763 and prayed:

> (1) To adjudge and determine the nature and extent of the rights of the said Nishga Nation or Tribe in respect of the said territory.
>
> (2) To adjudge and determine whether, as Your Petitioners humbly submit, the "Land Act" of British Columbia, now in force (Revised Statutes of British Columbia, 1911, Chapter 129), and any previous Land Act of that Province in so far as the same purport to deal with lands thereby assumed to be the absolute property of the said Province and to confer title in such lands free from the right, title or interest of the Indian Tribes, notwithstanding the fact that such right, title or interest has not been in any way extinguished, are ultra vires of the Legislature of the said Province.
>
> Your Petitioners also humbly pray that Your Majesty may be pleased, in pursuance of the above-mentioned provisions of the said Proclamation of King George the Third, to take such measures as may be found necessary for the protection of the said Nishga Nation or Tribe in the exercise and enjoyment of the rights so adjudged and determined.

Nothing resulted from this petition. In 1927 a Special Committee of the Senate and House of Commons of Canada was appointed to inquire into the claims of the Allied Indian Tribes of British Columbia as set forth in their petition presented to Parliament in June, 1926. The Commission made a report on April 9, 1927, from which I quote as follows:

> The Committee, on the recommendation of the Superintendent General of Indian Affairs, advise that the claim be referred to the Exchequer Court of Canada with the right of appeal to the Privy Council under the following conditions:—
>
> 1. The Indians of British Columbia shall, by their Chiefs or representatives, in a binding way, agree, if the Court, or on appeal, the Privy Council, decides that they have a title to lands of the Province to surrender such title receiving from the Dominion benefits to be granted for extinguishment of title in accordance with past usage of the Crown in satisfying the Indian claim to unsurrendered territories, and to accept the finding of the Royal Commission on Indian Affairs in British Columbia as approved by the Governments of the Dominion and the Province as a full allotment of Reserve lands to be administered for their benefit as part of the compensation.
> 2. That the Province of British Columbia by granting the said reserves as approved shall be held to have satisfied all

claims of the Indians against the Province. That the remaining considerations shall be provided and the cost thereof borne by the Government of the Dominion of Canada.

3. That the Government of British Columbia shall be represented by counsel, that the Indians shall be represented by counsel nominated and paid by the Dominion.

4. That, in the event of the Court or the Privy Council deciding that the Indians have no title in the lands of the Province of British Columbia, the policy of the Dominion towards the Indians shall be governed by consideration of their interests and future development.

All which is respectfully submitted for approval.

It would appear from this report that the Dominion Government on June 20, 1914, had passed an Order-in-Council which enabled the Nishga Indians to submit their aboriginal claims to a Canadian Court for adjudication thereon, but that the Indians had refused to do this and insisted upon their claims being referred to the Privy Council, a reference which the Government had no power or authority to direct. It also appears from the report that, instead of accepting the first recommendation of the Committee set out, *supra*, the Indians rejected it. The agitation of the Indians continuing, in 1961 a Joint Committee of the Senate and the House of Commons of Canada looked into the matter of the Indian affairs and made its final report on July 8, 1961. Amongst other recommendations made by the Committee was the following:

IX *Indian Claims Commission*

An Indian Claims Commission should be established to hear the British Columbia and Oka Indian land questions and other matters, and that the cost of counsel to Indians for the two land questions specified above, be borne by the Federal Treasury.

No action was taken by Parliament on this report. These matters and circumstances show that there has been no recognition of the claim of the appellants to Indian title which has statutory force.

It is my opinion that the matter of the possession of Indian title by the Nishga Indians and of any rights thereunder and the claim of the appellants in this action is for Government, and not for the Courts of British Columbia. I think it is clear from the cases I have set out, *supra*, that whatever rights the Nishga Indians may think they have under Indian title are not enforceable in the Courts as they have not been recognized and incorporated in the municipal law. I think it necessarily follows from those cases that this Court is without authority to pass upon the question whether these appellants possess Indian

title. The claim for relief of the appellants is in negative form but it imports an affirmative, *i.e.*, that the appellants possess Indian title. To grant the declaration sought would be to do indirectly what the Courts cannot do directly.

Before concluding this portion of my judgment I wish to make reference to the reliance that was placed by the appellants of certain mention of Indian title and native rights and the extinguishment thereof in communications between the Duke of Newcastle, then Secretary of State for the Colonies, and Governor Douglas. The latter was then Governor of Vancouver Island and he was written to and wrote in that capacity. In *Warman v. Francis et al.* (1958), 20 D.L.R. (2d) 627 at p. 630, 43 M.P.R. 197, Anglin, J., rightly said:

> The nature of the interest in land once or now vested in a Tribe or Band of Indians differs throughout Canada, and each instance depends on its historical background: see the Annotation on Indian Lands in Canada by Cameron, 13 S.C.R. (Cameron Ed.) 45.

The Secretary of State for the Colonies and Governor Douglas were speaking only in terms of *policy*, and the situation as to the Indians in the Colony of Vancouver Island and the progress of settlement there was different to that prevailing in the Colony of British Columbia. Even *policy* of the sovereign authority was not necessarily the same in both colonies.

In my opinion and for the foregoing reasons the appeal must be dismissed.

In case I be wrong in this opinion I propose to discuss the claim of the appellants on the assumption that the Courts of British Columbia have authority to pass upon the matters involved in the prayer for relief. The question is "Has the aboriginal title, otherwise known as the Indian title, of the appellants to their ancient tribal territory, been extinguished?"

Some historical facts must be related.

Sir Francis Drake, the first known British explorer, made a voyage of exploration to the Pacific coast in 1579. He reached a point in the vicinity of 48° north latitude. He may even have sighted the southerly end of Vancouver Island, but there is no evidence that he set foot thereon. Having circled around, he proceeded south and made a landing in the vicinity of San Francisco where he placed a plaque and purported to take possession of the lands which he named New Albion. It appears to be plain that the area inhabited by the appellants' ancestors could not have been a part of Drake's New Albion. The next known exploration of the Pacific coast by a subject of Great Britain was that of Captain James Cook in 1778. He followed the coastline north to Alaska calling at Nootka on

the coast of Vancouver Island en route. In 1792 Captain George Vancouver circumnavigated Vancouver Island and formed a settlement at Friendly Cove on that island.

The first known explorer by land and the first white man known to have set foot in the western part of what is now the mainland of British Columbia was Alexander Mackenzie who reached the Pacific coast on July 22, 1792. Thereafter followed the land explorations to the mainland of British Columbia by Simon Fraser, David Thompson and McGillivray.

The Colony of Vancouver Island was established by the British Crown in 1849. James Douglas was appointed Governor in 1851. The Colony of British Columbia, being the mainland of what is now the Province, was established by the British Crown in 1858 and the same James Douglas was the first Governor of the Colony with full executive powers. Douglas remained Governor of both Colonies until 1864. On November 17, 1866, the two Colonies were united as one Colony under the British Crown and under the name of British Columbia. This Colony entered Confederation on July 20, 1871, and became the Province of British Columbia and part of the Dominion of Canada.

There is no doubt that the area of territory inhabited by the Nishga Indians and shown on the map, ex. 2, was, at least as early as 1858 owned and possessed by the British Crown and it was the sovereign authority until July 20, 1871, when the area became part of the Province of British Columbia. The fee resided in the Crown in right of the Colony until the last-named date and thereafter in the Crown in right of the Province of British Columbia, except only in respect of those lands transferred to the Dominion of Canada by the express provisions of the *B.N.A. Act, 1867*.

In the course of the hearing of this appeal the Court endeavoured to have counsel for the appellants state the nature and incidents of the "Indian title" which he contended was possessed by the Nishga Tribes, but he took the position that it was unnecessary for him to do so and that it was also unnecessary for the Court to determine the attributes of Indian title. He conceded first, that the Indian title of the Nishgas is no more than a burden on the legal title of the Crown; second, that it is a tribal or communal title; third, that the Indians have no power to make grants or other alienations of whatever title or rights they have, and fourth, that the sovereign authority, *i.e.*, the Crown, may extinguish Indian title at will.

While I find it somewhat difficult to determine whether the alleged Indian title of the Nishgas has been extinguished unless I know what the nature of that title is and what are its incidents, for the purpose of this judgment I will assume, without deciding, that the tenure of the Nishgas was a personal and usufructuary right dependent upon the goodwill of the sovereign authority and that there has been all along, since at the latest the year 1858, vested in the Crown a substantial and paramount estate, underlying what has been frequently called the "Indian title", which became a *plenum dominium*, whenever that title was surrendered or otherwise extinguished. I have taken these words from the judgment of Lord Watson in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at pp. 54-5. It cannot be said the nature and character of the Indian title of the Nishgas was any more substantial than this.

There can be no doubt that the sovereign authority in this case was, from 1858 up to July 20, 1871, the British Crown in right of the Colony of British Columbia, and that that sovereign authority had the power to extinguish such Indian title at will. In *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339, Douglas, J., said at p. 347:

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. . . . As stated by Chief Justice Marshall in *Johnson v. M'Intosh, supra*, p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the Courts, *Beecher v. Wetherby*, 95 U.S. 517, 525.

Reed, J., in *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, said at p. 279:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

and at pp. 288-9:

> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.

As I understood his argument, appellants' counsel did not contend that compensation to Indians is a necessary condition of the right of the Crown to extinguish their Indian title, and so it is not necessary for me to consider this question. However, in case I am wrong about this, I wish to say that, whatever may be the situation in this regard in relation to natives in some other part of what was once the British Empire, in my opinion whatever rights the Indians in British Columbia possessed which have not been specifically recognized and confirmed by treaty or agreement of the Crown may be extinguished by the Crown without compensation and without the consent of the Indians, just as is the case in the United States. In the case at bar there is neither treaty nor agreement nor any statutory recognition of aboriginal rights in favour of the Nishga Indians.

Prior to the establishment of the territories of Vancouver Island and the mainland of British Columbia as British colonies they had been governed by the Hudson's Bay Company, of which company James Douglas was for some time the chief factor. It had been his responsibility to see to the orderly settlement of the lands and to control the native Indians, some tribes of which were of a warlike and aggressive nature. Douglas had to keep law and order. The responsibility continued to rest upon his shoulders after the establishment of the colonies and until executive councils were appointed, as in due course they were. Douglas had his difficulties with the Indians on Vancouver Island. In 1852 the white settlers with their children numbered only about one thousand and they were surrounded by an Indian population of nearly thirty thousand. On the mainland he had like troubles but in aggravated form. The territory was much larger and the discovery of gold exacerbated the situation. Vancouver Island had been the scene of an influx of foreigners and it was fear of this that led to the setting up of the Colony of Vancouver Island. On the mainland conditions in this regard were worse. Gold was first discovered on the Fraser River and this resulted in a great number of Americans from the California gold fields entering the territory. They were men who had "'a hankering in their minds after annexation to the United States" and they did not have the same respect for the

native Indians as did the British colonists. The first white child was born at Fort Langley on the mainland on November 1, 1857. The precious metal was the lure that brought the Kanakas from Hawaii in 1858, and it is said that in that year there were ten thousand men engaged in gold mining in the Colony of British Columbia. In the years 1859 and 1860 the mining population was being added to by small parties of men who had travelled overland from Eastern Canada. That was the commencement of a slow but steady stream of immigrants from beyond the Rocky Mountains. See Margaret Ormsby, "British Columbia", p. 145, and Cicely Lyons, "Salmon, our Heritage", pp. 80, 81, 82, 85. In the late fifties and early sixties roads were being built into the mining areas. Frequent clashes with the Indians occurred. As immigration increased Douglas became concerned about the danger of Indian warfare spreading into the interior from Washington territory and alarmed about the great hazard of disrespect for Imperial rights and law and order. The search for gold spread further and further north and east. White settlers were spreading out and some were encroaching upon the village lands and other occupied lands of the Indians. The need for protection to the Indians and protection to the settlers against the Indians increased immeasurably. Such protection and an orderly system of settlement became of paramount consideration. Douglas had these matters very much in mind in the year 1858 and in succeeding years. It is in the light of them that the dispatches that passed between him and the Secretaries of State for the Colonies, and Douglas' actions, which I shall shortly refer to, must be interpreted. It appears to me that the decision was arrived at that, in order to provide the necessary protection to the Indians and to further the orderly settlement of the territory, lands should be set apart for the use of the Indians in various parts of the territory and the remainder of the lands should be opened up for settlement, and that this was the policy that was followed. I think this policy necessarily involved the extinguishment of Indian title.

Exhibit 11A contains a collection of dispatches between the Secretary of State for the Colonies and Governor Douglas and letters relating to the establishment of some of the Indian Reserves and complaints of Indians and of white settlers. This exhibit comes from the archives of what is now the Province of British Columbia. I shall refer to some of these documents.

The following is an extract from a dispatch from Sir E. B. Lytton, the Colonial Secretary, to Governor Douglas dated July 31, 1858:

3. I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. *This question is of so local a character that it must be solved by your knowledge and experience*, and I commit it to you, in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest. Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of civilization among the natives.

(The italics are mine.) On September 2, 1858, Sir E. B. Lytton sent another dispatch to the Governor as follows:

(No. 12.)

Downing Street,
September 2nd, 1858.

SIR,—In my Despatch of the 31st July, No. 6, I directed your attention to the treatment of the Native Indians in the country which it has so recently been decided to establish as a British Colony. I regard that subject as one which demands your prompt and careful consideration. I now transmit to you the copy of a letter from the Aborigines Protection Society, invoking the protection of Her Majesty's Government on behalf of these people. I readily repeat my earnest injunctions to you to endeavour to secure this object. *At the same time I beg you to observe that I must not be understood as adopting the views of the Society as to the means by which this may be best accomplished.*

(The italics are mine.) The letter from the Aborigines Protection Society mentioned in this dispatch dealt with the rights claimed by the Indians, their welfare and the danger of a collision between them and the settlers, as well as the hostility of the Indians towards the Americans who were "pouring into Fraser and Thompson Rivers by thousands". The letter went on to suggest "that the native title should be recognized in British Columbia, and that some reasonable adjustment of their claims should be made by the British Government".

On receipt of the dispatch of September 2, 1858, Governor Douglas replied to the Colonial Secretary on November 5, 1858, as follows:

(No. 17.)

Victoria, Vancouver's Island,
November 5, 1858.

SIR,—I have the honour to acknowledge the receipt of your Despatch, No. 12, of the 2nd of September last, transmitting to me a

copy of a letter from the Aborigines Protection Society, invoking the protection of Her Majesty's Government on behalf of those people.

2. While you do not wish to be understood as adopting the views of the society as to the means by which that may be best accomplished, you express a wish that the subject should have my prompt and careful consideration, and I shall not fail to give the fullest effect to your instructions on that head, as soon as the present pressure of business has somewhat abated. I may, however, remark that the native Indian tribes are protected in all their interests to the utmost extent of our present means. I have, &c.,

On December 30, 1858, the Colonial Secretary sent the following dispatch to Governor Douglas:

(No. 62.) Downing Street,
December 30, 1858.

SIR,—With reference to my Despatches of this day's date, on the present condition of British Columbia, I wish to add a few observations on the policy to be adopted towards the Indian tribes.

The success that has attended your transactions with these tribes induces me to inquire if you think it might be feasible to settle them permanently in villages: with such settlement civilization at once begins. Law and Religion would become naturally introduced amongst the red men, and contribute to their own security against the aggressions of immigrants, and while by indirect taxation on the additional articles they would purchase they would contribute to the Colonial Revenue, some light and simple form of direct taxation, the proceeds of which would be expended strictly and solely on their own wants and improvements, might obtain their consent.

Sir George Grey has thus at the Cape been recently enabled to locate the Kaffirs in villages, and from that measure, if succeeding Governors carry out, with judgment and good fortune, the designs originated in the thoughtful policy of that vigorous and accomplished Governor, I trust that the posterity of those long barbarous populations may date their entrance into the pale of civilized life.

(The italics are mine.) Governor Douglas replied on March 14, 1859, and I set out extracts from that reply:

(No. 114.) Victoria, Vancouver's Island,
March 14, 1859.

SIR,—I have the honour to acknowledge the receipt of your Despatch, No. 62, of the 30th December last, containing many valuable observations on the policy to be observed towards the Indian tribes of British Columbia, and moreover your instructions directing me to inform you if I think it would be feasible to settle those tribes permanently in villages; suggesting in reference to that measure, that with such settlement civilization would at once begin; that law and religion would become naturally introduced among them, and contribute to their security against the aggressions of immigrants; that through indirect taxation, on the additional articles they would purchase, they would contribute to the Colonial Revenue, and with their own consent, some light and simple form of taxation might be imposed, the proceeds of which

would be expended strictly and solely on their own wants and improvements.

2. *I have much pleasure in adding, with unhesitating confidence, that I conceive the proposed plan to be at once feasible, and also the only plan which promises to result in the moral elevation of the native Indian races, in rescuing them from degradation, and protecting them from oppression and rapid decay.*

It will, at the same time, have the effect of saving the Colony from the numberless evils which naturally follow in the train of every course of national injustice, and from having the native Indian tribes arrayed in vindictive warfare against the white settlements.

3. As friends and allies the native races are capable of rendering the most valuable assistance to the Colony, while their enmity would entail on the settlers a greater amount of wretchedness and physical suffering, and more seriously retard the growth and material development of the Colony, than any other calamity to which, in the ordinary course of events, it would be exposed.

4. In my Despatch No. 4, of the 9th of February last, on the affairs of Vancouver's Island, transmitting my correspondence with the House of Assembly up to that date, there is a message made to the House on the 5th February, 1859, respecting the course I propose to adopt in the disposal and management of the land reserved for the benefit of the Indian population at this place, the plan proposed being briefly thus:—that the Indians should be established on that reserve, and the remaining unoccupied land should be let out on leases at an annual rent to the highest bidder, and that the whole proceeds arising from such leases should be applied to the exclusive benefit of the Indians.

5. The advantages of that arrangement are obvious. An amount of capital would thereby be created, equal perhaps to the sum required for effecting the settlement of the Indians; and any surplus funds remaining over that outlay, it is proposed to devote to the formation and support of schools, and of a clergyman to superintend their moral and religious training.

6. I feel much confidence in the operation of this simple and practical scheme, and provided we succeed in devising means of rendering the Indian as comfortable and independent in regard to physical wants in his improved condition, as he was when a wandering denizen of the forest, there can be little doubt of the ultimate success of the experiment.

7. The support of the Indians will thus, wherever land is valuable, be a matter of easy accomplishment, and in districts where the white population is small, and the land unproductive, the Indians may be left almost wholly to their own resources, and, as a joint means of earning their livelihood, to pursue unmolested their favorite calling of fishermen and hunters.

8. Anticipatory reserves of land for the benefit and support of the Indian races will be made for that purpose in all the districts of British Columbia inhabited by native tribes. Those reserves should in all cases include their cultivated fields and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land.

9. In forming settlements of natives, I should propose, both from a principle of justice to the state and out of regard to the well-being of the Indians themselves, to make such settlements entirely self-supporting, trusting for the means of doing so, to the voluntary contributions in labour or money of the natives themselves; and secondly, to the proceeds of the sale or lease of a part of the land reserved, which might be so disposed of, and applied towards the liquidation of the preliminary expenses of the settlement.

. . . . .

12. I would, for example, propose that every family should have a distinct portion of the reserved land assigned for their use, and to be cultivated by their own labour, giving them however, for the present, no power to sell or otherwise alienate the land; that they should be taught to regard that land as their inheritance; that the desire should be encouraged and fostered in their minds of adding to their possessions, and devoting their earnings to the purchase of property apart from the reserve, which would be left entirely at their own disposal and control; that they should in all respects be treated as rational beings, capable of acting and thinking for themselves; and lastly, that they should be placed under proper moral and religious training, and left, under the protection of the laws, to provide for their own maintenance and support.

13. Having touched thus briefly on the prominent features of the system, respecting which you requested my opinion, and trusting that my remarks may convey to you the information you desired, and may not be deemed irrelevant.

(The italics are mine.) This dispatch was answered by the Colonial Secretary on May 20, 1859, in the following words:

(No. 67.) Downing Street,
May 20, 1859.

SIR,—I have to acknowledge the receipt of your Despatch, No. 114, of the 14th of March, on the subject of the policy to be observed towards the Indian tribes, and containing your opinion as to the feasibility of locating the Indians in native villages, with a view to their protection and civilization.

I am glad to find that your sentiments respecting the treatment of the native races are so much in accordance with my own, and I trust that your endeavours to conciliate and promote the welfare of the Indians will be followed by all persons whom circumstances may bring into contact with them. But whilst making ample provision under the arrangements proposed for the future sustenance and improvement of the native tribes, you will, I am persuaded, bear in mind the importance of exercising due care in laying out and defining the several reserves, so as to avoid checking at a future day the progress of the white colonists.

In the meantime, on April 11, 1859, the Colonial Secretary had written the Governor. In his dispatch he said:

In the case of the Indians of Vancouver Island and British Columbia, Her Majesty's Government earnestly wish that when the advancing requirements of colonization press upon lands occupied by members of that race, measures of liberality and justice may be

adopted for compensating them for the surrender of the territory which they have been taught to regard as their own.

In so far as the Colony of British Columbia was concerned, a policy of compensating the Indians by payment of moneys for "the surrender of the territory which they have been taught to regard as their own" had not been and was not thereafter adopted. It is of interest to note what Governor Douglas said in his dispatch to the Colonial Secretary of March 25, 1861, dealing with affairs of the Colony of Vancouver Island. I quote that dispatch in full:

(No. 24.) Victoria, 25th March, 1861.

My LORD DUKE,—I have the honour of transmitting a petition from the House of Assembly of Vancouver Island to your Grace, praying for the aid of Her Majesty's Government in extinguishing the Indian title to the public lands in this Colony; and setting forth, with much force and truth, the evils that may arise from the neglect of that very necessary precaution.

2. As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country.

3. Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case prior to the settlement of any district; but since that time in consequence of the termination of the Hudson's Bay Company's Charter, and the want of funds, it has not been in my power to continue it. Your Grace must, indeed, be well aware that I have, since then, had the utmost difficulty in raising money enough to defray the most indispensable wants of Government.

4. All the settled districts of the Colony, with the exception of Cowichan, Chemainus, and Barclay Sound, have been already bought from the Indians, at a cost in no case exceeding £2.10s. sterling for each family. As the land has, since then, increased in value, the expense would be relatively somewhat greater now, but I think that their claims might be satisfied with a payment of £3 to each family; so that taking the native population of those districts at 1,000 families, the sum of £3,000 would meet the whole charge.

5. It would be improper to conceal from your Grace the importance of carrying that vital measure into effect without delay.

6. I will not occupy your Grace's time by any attempt to investigate the opinion expressed by the House of Assembly, as to the liability of the Imperial Government for all expenses connected with the purchase of the claims of the aborigines to the public land, which simply amounts to this, that the expense would, in the first instance, be paid by the Imperial Government, and charged to the account of proceeds arising from the sales of public land. The land itself would, therefore, be ultimately made to bear the charge.

7. It is the practical question as to the means of raising the money, that at this moment more seriously engages my attention. The Colony being already severely taxed for the support of its own Government, could not afford to pay that additional sum; but the difficulty may be surmounted by means of an advance from the Imperial Government to the extent of £3,000, to be eventually repaid out of the Colonial Land Fund.

8. I would, in fact, strongly recommend that course to your Grace's attention, as specially calculated to extricate the Colony from existing difficulties, without putting the Mother Country to a serious expense; and I shall carefully attend to the repayment of the sum advanced, in full, as soon as the Land Fund recovers in some measure from the depression caused by the delay in Her Majesty's Government has experienced in effecting a final arrangement with the Hudson's Bay Company for the reconveyance of the Colony, as there is little doubt when our new system of finance comes fully into operation that the revenue will be fully adequate to the expenditure of the Colony.

The reply from the Colonial Secretary on October 19, 1861, was as follows:

(No. 73.)

Downing Street,
19th October, 1861

SIR,—I have had under my consideration your despatch No. 24, of the 25th of March last, transmitting an Address from the House of Assembly of Vancouver Island, in which they pray for the assistance of Her Majesty's Government in extinguishing the Indian title to the public lands in the Colony, and set forth the evils that may result from a neglect of this precaution.

I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island; but the acquisition of the title is a purely colonial interest, and the Legislature must not entertain any expectation that the British taxpayer will be burthened to supply the funds or British credit pledged for the purpose. I would earnestly recommend therefore to the House of Assembly, that they should enable you to procure the requisite means, but if they should not think proper to do so, Her Majesty's Government cannot undertake to supply the money requisite for an object which, whilst it is essential to the interests of the people of Vancouver Island, is at the same time purely Colonial in its character, and trifling in the charge that it would entail.

This reply made it plain that the British Government was not prepared to supply the necessary funds "trifling in the charge that it would entail". Doubtless this put a damper on any possibility there might have been of a change in policy in the Colony of British Columbia and of compensating the Indians in money for a surrender of their claims based on aboriginal or Indian title.

I now come to a series of Proclamations by James Douglas as Governor of the Colony of British Columbia.

The first Proclamation is dated December 2, 1858. Excerpts therefrom are as follows:

> PROCLAMATION, having the Force of Law to enable the Governor of British Columbia to convey Crown Lands Sold within the said Colony.
>
> . . . . .
>
> Now, therefore, I, JAMES DOUGLAS, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, ordain and enact, that on and after the day of the date of this proclamation, it shall be lawful for the Governor, for the time being of the said Colony, by any instrument in print or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonging to the Crown in the said Colony; and every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument in the lands therein described.

As all the land belonged to the Crown this Proclamation covered the whole of the territory.

The second Proclamation is dated February 14, 1859. Excerpts therefrom are as follows:

> WHEREAS, it is expedient to publish for general information, the method to be pursued with respect to the alienation and possession of agricultural lands, and of lands proposed for the sites of towns in British Columbia, and with reference also to the places for levying shipping and customs duties, and for establishing a capital and port of entry in the said Colony.
>
> . . . . .
>
> 1.— *All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.*
>
> 2.— The price of lands, not being intended for the sites of Towns, and not being reputed to be Mineral lands, shall be ten shillings per acre, payable one half in cash at the time of the sale, and the other half at the end of two years from such sale. Provided, that under special circumstances some other price, or some other terms of payment may from time to time be specially announced for particular localities.
>
> 3.— It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown Lands, and for such purposes as the Executive shall deem advisable.
>
> 4.— Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, as soon as the same shall have been surveyed and made ready for sale. Due notice will be given of all such sales. Notice at the same time will be given of the upset price and terms of payment when they vary from those above stated, and also of the rights reserved (if any) for public convenience.

[Italics added.]

The third Proclamation is dated January 4, 1860. I quote excerpts:

WHEREAS, by virtue of an Act of Parliament made and passed in the 21st and 22nd years of the Reign of Her Most Gracious Majesty the Queen, and by a Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, in conformity therewith I, JAMES DOUGLAS, Governor of the Colony of British Columbia, have been authorized by Proclamation issued under the Public Seal of the said Colony, to make laws, institutions, and ordinances, for the peace and good government of the same, and

WHEREAS, it is expedient, pending the operation of the survey of agricultural lands in British Columbia, to provide means whereby unsurveyed agricultural lands may be lawfully acquired by pre-emption in British Columbia by British subjects, and in certain cases to provide for the sale of unsurveyed agricultural land in British Columbia by private contract;

Now, therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, order and enact.

1. That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her Successors, may acquire unoccupied and unreserved, and unsurveyed Crown land in British Columbia (not being the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or settlement) in fee simple, under the following conditions:

. . . . . .

3. Whenever the Government survey shall extend to the land claimed, the claimant who has recorded his claim as aforesaid, or his heirs or in case of the grant of certificate of improvement hereinafter mentioned, the assigns of such claimant shall, if he or they shall have been in continuous occupation of the same land from the date of the record aforesaid, be entitled to purchase the land so pre-empted at such rate as may for the time being be fixed by the Government of British Columbia, not exceeding the sum of 10s. per acre.

. . . . . .

13. Whenever a person in occupation at the time of record aforesaid, shall have recorded as aforesaid, and he, his heirs or assigns, shall have continued in permanent occupation of land pre-empted, or of land purchased as aforesaid, he or they may, save as hereinafter mentioned, bring ejectment or trespass against any intruder upon the land so pre-empted or purchased, to the same extent as if he or they were seized of the legal estate in possession in the land so pre-empted or purchased.

14. Nothing herein contained shall be construed as giving a right to any claimant to exclude free miners from searching for any of the precious minerals, or working the same upon the conditions aforesaid.

The fourth Proclamation is dated January 20, 1860. Excerpts therefrom are as follows:

And Whereas, it is expedient that town lots, suburban lots, and surveyed agricultural lands in British Columbia, which have been, or which hereafter may be offered for sale, at public auction, and remain unsold, should be sold by private contract;

Now therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid do proclaim, order, and enact, as follows:—

The Chief Commissioner of Lands and Works for the time being, for British Columbia, and all Magistrates, Gold Commissioners, and Assistant Gold Commissioners, by the said Chief Commissioner authorized in writing in that behalf, may sell by private contract any of the lots and lands, hereinafter mentioned, at the prices, and on the terms hereinafter respectively stated — viz.

a. Town and suburban lots which have been, or hereafter may be offered for sale at public auction, and remain unsold, at the upset price, and on the terms at and on which the same were offered for sale at such auction.

b. Agricultural lands surveyed by the Government Surveyor, which may, or shall have been offered for sale at public auction, and remain unsold, at ten shillings per acre, payable one half in cash at the time of sale, and the other half at the expiration of two years from such sale.

On January 19, 1861, there was a Proclamation which in effect amended the fourth Proclamation by further detail of the methods of land pre-emption.

I now quote excerpts from the sixth Proclamation which was dated January 19, 1861:

By His Excellency JAMES DOUGLAS, Companion of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of British Columbia.

. . . . .

And whereas I have been empowered by Her Majesty's Government to lower the price of Country Lands in British Columbia, in all cases, to the sum of four shillings and two pence (4s. 2d.) per acre.

Now, therefore, I do hereby declare, proclaim and enact as follows:—

I. So much of the said Proclamation of the 20th day of January, 1860, as fixed the price of surveyed agricultural land at ten shillings per acre is hereby repealed.

II. The price of all unsurveyed country land in British Columbia, whether acquired by pre-emption or purchase under the Proclamation dated the 4th day of January, 1860, shall be four shillings and two pence (4s. 2d.) per acre.

The seventh Proclamation was dated May 28, 1861. I quote from it:

Whereas by the Country Land Act, 1861, the price of all unsurveyed Country Land in British Columbia whether acquired by Pre-emption or Purchase under the Proclamation dated the 4th day of January, 1860, was fixed at four shillings and two pence per acre, and

Whereas it is inexpedient that any person other than a bona fide settler should take up land under the said Proclamation, and without the occupation and improvement necessary under the said Proclamation to complete his Title as a Pre-emptor.

Now therefore I do hereby declare, proclaim, and enact as follows:—

That all persons who may after the date hereof purchase land under the provisions of the Proclamation of the 4th day of January, 1860, or the Country Land Act, 1861, shall hold the same under precisely the same terms and conditions of occupation and improvement as are mentioned in the said Proclamation of the 4th day of January, 1860, with regard to lands pre-empted without purchase.

No person shall be entitled to hold by Pre-emption more than 160 acres under the said Proclamation, or any of them, at one time.

If any person, being already registered as a Pre-emptor, pre-empt any other land under the provisions of the said proclamation, the land so previously pre-empted shall *ipso facto* be forfeited and shall with all improvements made thereon be open to settlement by any other person.

This Proclamation may on all occasions be cited as the "Pre-emption Purchase Act, 1861."

The eighth Proclamation was dated August 27, 1861. Excerpts are as follows:

And whereas it is expedient to amend and consolidate the laws affecting the settlement of unsurveyed Crown Lands in British Columbia;

. . . . .

III. That from and after the date hereof, British subjects and aliens who shall take the Oath of Allegiance to Her Majesty and Her Successors, may acquire the right to hold and purchase in fee simple, unoccupied and unsurveyed and unreserved Crown Lands in British Columbia, not being the site of an existent or proposed Town, or auriferous land available for mining purposes, or an Indian Reserve or Settlement, under the following conditions.

. . . . .

XXV. Nothing herein contained shall be construed as giving a right to any claimant to exclude free miners from searching for any of the precious minerals or working the same, upon the conditions aforesaid.

The ninth Proclamation was dated May 27, 1863. I quote excerpts:

And whereas it is desirable for the protection of Miners, and others searching for the precious metals, to retain in possession of the Crown power to prevent such Miners or other persons from being obstructed or hindered by the Claims, and exactions of persons holding land under the provisions of the Pre-emption Consolidation Act passed on the 27th day of August, 1861;

Now, therefore, I do hereby declare, proclaim, and enact as follows:

I. It shall be lawful for the Governor, for the time being of British Columbia from time to time, and at any time hereafter by any writing under his hand, published in the Government Gazette, to erect any portion of the Colony into a Mining District, and to give to such District a distinguishing name, and to define the limits and boundaries thereof, and also again to abolish or reconstruct any

such District, and from time to time to alter and vary such limits and boundaries.

Then followed a number of Ordinances enacted by the Governor by and with the consent of the Legislative Council of British Columbia. On April 11, 1865, an Ordinance for the acquisition of land was passed. I set out excerpts:

3. All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee.

4. The upset price of surveyed lands not being reserved for the sites of towns or the suburbs thereof, and not being reputed to be mineral lands, shall be four shillings and two pence per acre.

5. The Governor shall at any time, and for such purposes as he may deem advisable, reserve any lands that may not have been either sold or legally pre-empted.

6. Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, after the same shall have been surveyed and made ready for sale. Due notice shall be given of all such sales; notice at the same time shall be given of the upset price and terms of payment when they vary from those above stated, and also of the rights specially reserved (if any) for public convenience.

. . . . . .

9. Unless otherwise specially announced at the time of sale, the conveyance of the land shall include all trees and all mines, and minerals within and under the same (except mines of gold and silver).

. . . . . .

12. From and after the date hereof British subjects, and aliens who shall take the oath of allegiance to Her Majesty, Her Heirs and Successors, may acquire the right to pre-empt and hold in fee simple unoccupied and unsurveyed and unreserved Crown Lands not being the site of an existent or proposed town, or auriferous land available for gold or silver mining purposes, or an Indian reserve or settlement, under the following conditions:

. . . . . .

51. Leases of any extent of unoccupied and unsurveyed land may be granted for pastoral purposes, by the Governor or any Officer duly authorized by him in that behalf, to any person or persons whomsoever, being *bona fide* pre-emptors or purchasers of land, at such rent as such Governor or Officer shall deem expedient. But every such lease or pastoral lands shall, among other things contain a condition making such land liable to pre-emption, reserve, and purchase by any persons whosoever, at any time during the term thereof, without compensation, save by a proportionate deduction of rent. And to a further condition that the lessee shall, within six months stock the property demised in such proportion of animals to the one hundred acres, as shall be specified by the Stipendiary Magistrate in that behalf.

On March 31, 1866, an Ordinance to define the law regulating the acquisition of land was passed. The following is an excerpt from this Ordinance:

I. The right conferred under Clause 12 of the Land Ordinance, 1865, on British Subjects, or aliens who shall take the oath of allegiance, of pre-empting and holding in fee simple unoccupied and unsurveyed and unreserved Crown Lands in British Columbia, shall not (without the special permission thereto of the Governor first had in writing) extend to or be deemed to have been conferred on Companies whether Chartered, Incorporated, or otherwise, or without the permission aforesaid, to or on any of the Aborigines of this Colony or the Territories neighbouring thereto.

The *Pre-emption Payment Ordinance, 1869*, was passed on March 10, 1869. It was as follows:

I. The purchase money for Pre-emption Claims, and the balance of purchase money upon Pre-emption Purchase Claims, held under any of the Laws heretofore, or for the time being, regulating the acquisition and tenure of Pre-emption Claims in that part of the Colony formerly known as the Colony of British Columbia and its Dependencies, shall be, and be deemed to have been, and to be due and payable to Her Majesty, Her Heirs and Successors, as part of the General Revenue of the Colony, as and from the date of the service of an application, signed by the Chief Commissioner of Lands and Works and Surveyor General, upon the person or persons to be affected thereby, and notifying the completion of the Government Survey of the Land specified in such application, and calling upon such person or persons for the payment of the amount for the time being due and payable as aforesaid in respect of such Land.

The last Ordinance to which I need refer is one to amend and consolidate the laws affecting Crown Lands in British Columbia. It was passed on June 1, 1870. I set out some excerpts:

2. The following Acts, Ordinances, and Proclamations relating to the disposal and regulation of the Crown Lands of the Colony are hereby repealed:—
An Act dated February 14th, 1859:
An Act dated January 4th, 1860:
An Act dated January 20th, 1860:
The "Pre-emption Amendment Act, 1861:"
The "Country Land Act, 1861:"
The "Pre-emption Purchase Act, 1861:"
The "Pre-emption Consolidation Act, 1861:"
The "Mining District Act, 1863:"
The "Land Ordinance, 1865:"
The "Pre-emption Ordinance, 1866:"
The "Pre-emption Payment Ordinance, 1869:" and
The "Vancouver Island Land Proclamation, 1862:"
Such repeal shall not prejudice or affect any rights acquired or payments due, or forfeitures or penalties incurred prior to the passing of this Ordinance in respect of any land in this Colony.

PRE-EMPTION

3. From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and

> unreserved Crown Lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent in that portion of the Colony situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Colony. Provided that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect.
>
> . . . . .
>
> 42. The Governor shall at any time, and for such purposes as he may deem advisable, reserve, by notice published in the Government Gazette, or in any newspaper of the Colony, any lands that may not have been either sold or legally pre-empted.

As a result of these pieces of legislation the Indians of the Colony of British Columbia became in law trespassers on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves for the use of Indians.

At this point in my judgment I would express my agreement with the words of Gould, J., which appear in his reasons for judgment. He said: [8 D.L.R. (3d) 59 at pp. 81-2, 71 W.W.R. 81]:

> The various pieces of legislation referred to above are connected, and in many instances contain references *inter se*, especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

One of the Terms of Union [see R.S.B.C. 1960, vol. 5, p. 5223] with the Dominion of Canada was also, in my view, inconsistent with the recognition and continued existence of Indian title. I refer to art. 11 which is as follows:

> 11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and, further, to secure the completion of such railway within ten years from the date of the Union.
>
> And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furth-

> erance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia (not to exceed, however, twenty (20) miles on each side of the said line), as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-west Territory and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

There was no reservation of Indian rights in respect of the railway belt to be conveyed to the Dominion Government.

It is true, as the appellants have submitted, that nowhere can one find express words extinguishing Indian title but "actions speak louder than words" and in my opinion the policy of the Governor and the Executive Council of British Columbia and the execution of that policy was such that, if Indian title existed, extinguishment was effected by it. Reserves of land for the Indians were set up generally at places where the Indians had their villages and cultivated lands and where they caught their fish — their main food. The correspondence between those who were responsible for this work and which appears in ex. 11A shows that, at least in most cases, the location and boundaries of the reserves were arrived at in consultation with the local Indians. The remainder of the unoccupied lands were thrown open for settlement. Thus complete dominion over the whole of the lands in the Colony of British Columbia adverse to any tenure of the Indians under Indian title was exercised. The fact is that the white settlement of the lands which was the object of the Crown was inconsistent with the maintenance of whatever rights the Indians thought they had.

The 13th article of the Terms of Union between the Colony of British Columbia and the Dominion of Canada agreed to in 1871 read as follows:

> 13. 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 between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

These terms were duly carried out. The Dominion Government took over the trusteeship of the reserves which had been set aside for the Indians and as time went on additional reserves were established. We were told that there are now in British Columbia a great number of such reserves of which about thirty are in the territory inhabited by the Nishga Indians and are held in trust for them.

In November, 1874, the Dominion Government interested itself in the "Indian Land question in the Province of British Columbia" and made representations to the Government of the Province. As a result the latter requested the Honourable the Attorney-General of the Province, Mr. Geo. A. Walkem, to prepare and submit a memorandum on Indian affairs directed to a consideration of the representations of the Dominion Government. That memorandum, dated August 17, 1875, was prepared and submitted to the Lieutenant-Governor in Council. In the provincial archives is a "Report of the Government of British Columbia on the subject of Indian Reserves" which commences with the following:

> Copy of a Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 18th day of August, 1875.
>
> The Committee of Council concur with the statements and recommendations contained in the Memorandum of the Honourable the Attorney-General, on the subject of Indian Affairs, dated 17th August, 1875, and advise that it be adopted as the expression of the views of this Government as to the best method of bringing about a settlement of the Indian Land Question.
>
> Certified,
>
> (Signed) W. J. ARMSTRONG,
> Clerk of the Executive Council.

Then follows Mr. Walkem's memorandum. I do not think any good purpose would be served in quoting extensively from the memorandum. It is sufficient to say that Mr. Walkem's recommendations fall far short of the recognition of any form of Indian title. I desire, however, to set out the following ex-

cerpt from the memorandum and to refer to the Appendix B mentioned therein:

> Since writing the above, the undersigned has fortunately obtained a copy of a despatch, addressed in 1870, by the Governor of British Columbia to the Secretary of State for the Colonies, respecting the Colonial Indian Policy. (Appendix B.) This document strongly and ably bears out many of the views and opinions above expressed.

Appendix B is as follows:

> Governor Musgrave to Earl Granville.
>
> GOVERNMENT HOUSE, BRITISH COLUMBIA,
> 29th January, 1870.
>
> MY LORD,—I have had the honour to receive your lordship's despatch, No. 104, of the 15th November, 1869 transmitting copy of a letter from the Secretary of the Aborigines' Protection Society, relative to the conditions of the Indians in Vancouver Island.
>
> 2. If the statements made in Mr. Sebright Green's letter, forwarded to your lordship by the Society, were statements of facts, they would be a matter of great reproach to the Colonial Government; but I have satisfied myself that his representations are in some cases quite incorrect, and in others greatly exaggerated. As the circumstances alleged and referred to by Mr. Green were antecedent to my acquaintance with the Colony, I referred his letter to Mr. Trutch; the Commissioner of Lands and Works and Surveyor-General, for a report; and I now enclose a memorandum from that officer upon the subject. From other sources of information I have every reason to believe Mr. Trutch's statements to be correct.
>
> 3. It is very difficult, if not impossible, to place Indian tribes exactly in the same position as more civilized races, but they do, substantially, enjoy equal protection from the Government; and I believe that those of them who are most in contact with the white population quite understand that this is the case. Complaints are frequently brought by the Indians in the neighbourhood of Victoria before the Police Magistrate, against each other. And since my arrival here, Indians have been the principal witnesses in trials for murder.
>
> I have, &c.,
> (Signed) A. MUSGRAVE.

Mr. Trutch's memorandum contained the following:

> The Indians have, in fact, been held to be the special wards of the Crown, and in the exercise of this guardianship Government has, in all cases where it has been desirable for the interests of the Indians, set apart such portions of the Crown lands as were deemed proportionate to, and amply sufficient for, the requirements of each tribe; and these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon.
>
> But the title of the Indians in the fee of the public lands, or of any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied. In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have

> been held to have been fully satisfied by securing to each tribe, as the progress of the settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agricultural and pastoral purposes.

As is stated in Governor Musgrave's dispatch of January 29, 1870, Mr. Trutch was the Commissioner of Lands and Works and Surveyor-General of the Colony of British Columbia. When that Colony entered Confederation on July 20, 1871, he was appointed its first Lieutenant-Governor. He had served as the Colony's chief negotiator, both in Ottawa and London, of the terms of entry into Confederation. He had resided in the Colony since it was established in 1858 and he was well acquainted with the hierarchy of Government. He well understood the nature of the dealings with the Indians and the policy of the Governor and the Legislative Council regarding the claims of the Indians. No one was better qualified to give evidence on this subject.

The appellants submitted that the several Proclamations of Governor Douglas mentioned, *supra*, are invalid in law as being contrary to the instructions received by him from the Secretary of State for the Colonies. I am unable to agree that the Governor in making the Proclamations acted contrary to his instructions. As I read the instructions he was given a very wide discretion, and in fact he adopted the suggestion contained in the dispatch of the Secretary of State for the Colonies of December 30, 1858. In any event, s. 4 of the *Colonial Laws Validity Act*, 1865, (U.K.), c. 63, is conclusive against this submission of the appellants. The section is as follows:

> 4. No colonial law, passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument.

In my opinion the answer to the question "Has the aboriginal title, otherwise known as the Indian title, of the appellants to their ancient tribal territory been extinguished?" is "If it ever existed, it has been extinguished."

Having arrived at these conclusions it is unnecessary for me to consider the other interesting points raised by counsel for the respondent. I would dismiss the appeal.

MACLEAN, J.A.:—The plaintiffs are chiefs of an Indian tribe called the Nishgas and have their home in the Nass River valley in the north-west part of the Province. It is admitted by the Attorney-General that the plaintiffs are descendants of an aboriginal people who have occupied the area delineated on ex. 2 since time immemorial, and that the ancestors of the plaintiffs obtained a living from the lands and waters shown on ex. 2 since time immemorial. The area delineated on ex. 2 is said to be in excess of 4,000 square miles in area.

The plaintiffs have sued on their own behalf and on behalf of the other members of the tribe for a declaration:

> . . . that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished.

There is an assumption inherent in the form of the plaintiffs' prayer for relief that (1) an aboriginal or "Indian title" at one time existed, and (2) that it has never been extinguished.

The Attorney-General denies that an enforceable aboriginal title ever existed, and alternatively he says that if it did that it has been extinguished by competent pre-Confederation legislation (of the Colony of British Columbia). Also the Attorney-General urges preliminary objections to the plaintiffs' claim, the allowance of any one of which, if successful, would defeat the claim.

It is common ground that no treaty or contract has ever existed between this tribe of Indians and the Government of British Columbia, that is of the old Colony of British Columbia or the present Province. Further, there has never been any treaty or contract between the Dominion Government and the Indians with regard to this matter of "Indian title" attaching to the lands in question. The plaintiffs do, however, rely on a Proclamation of George III issued on October 7, 1763 (following the Treaty of Paris) [see R.S.C. 1952, vol. VI, p. 6127], dealing with "the several nations or tribes of Indians with whom We are connected". The Attorney-General submits that the Proclamation does not apply to the plaintiffs' claim as the territory in question was *terra incognita* at the time of the Proclamation.

The learned trial Judge dismissed [8 D.L.R. (3d) 59, 71 W.W.R. 81] the plaintiffs' claim and it is from this decision that the plaintiffs appeal.

I turn now to a consideration of the nature of the "Indian title" which the appellants ask this Court to recognize by a declaratory judgment.

Lord Watson, in giving the judgment of the Privy Council in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at pp. 54-5, in referring to King George III's Proclamation of October 7, 1763, said:

> It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

It is conceded by the appellants (and I think properly) that the "Indian title" is one that is the property of a group of individuals, in this case a tribe, and that no effective transfer can be made of the so-called title except to the Sovereign.

It is a matter of some significance that although counsel for the appellants was invited by the Court to define the "Indian title" which he claimed to exist or that once existed, he declined to do so. It is clear from an examination of the authorities that the nature of what is often called aboriginal title or "Indian title" varies in different jurisdictions. It is interesting to examine the decisions of the Courts of various jurisdictions touching this matter of the so-called "Indian title".

One of the early cases in which the "Indian title" was considered was in the case of *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543, a judgment of the well-known jurist Chief Justice Marshall. It was an action of ejectment for lands in the State and District of Illinois claimed by the plaintiffs under a purchase from the Indians, and by the defendant under a grant from the United States. The case proceeded upon facts set out in a stated case.

In giving the judgment of the Court, Chief Justice Marshall had occasion to make reference to the "Indian title" and of the various incidents thereof, including the manner in which the title may be extinguished. I will deal with the subject of extinguishment in greater detail later in this judgment.

The following passages of the judgment [at pp. 573-4, 579, 584-8, 591-2, 596-7 and 603] of the learned Chief Justice have some relevance to the case at bar:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
>
> . . . . .
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> . . . . .
>
> Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees.
>
> . . . . .
>
> It has never been doubted, that either the United States or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.
>
> . . . . .

Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

. . . . . .

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

. . . . . .

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

. . . . . .

All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

. . . . . .

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

. . . . . .

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 only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political rela-

> tions between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property.
>
> . . . . .
>
> The very grant of a charter is an assertion of the title of the crown . . .

It will be seen from the passages quoted above that:

(1) Chief Justice Marshall considered that the law with regard to the "Indian title" is the same in both the United States and Britain.

(2) Discovery or conquest gave full title to the discoverer or conqueror subject only to a right of possession in the Indians (and which in the *St. Catherine's Milling & Lumber Co.* case was considered only to be a usufractuary right).

(3) The "Indian title" did not give the alleged possessor the right to convey his "title" to other than to the Sovereign.

(4) The Sovereign had the exclusive power to extinguish the "Indian title" at his pleasure.

An important case touching upon the incidents of the "Indian title" and its enforceability is the case of *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51 Ind. App. 357. That was a case where the plaintiffs sued the Indian Government for a declaration that they are the proprietors of certain lands. In referring to the aboriginal title, Lord Dunedin said at pp. 360-1:

> But a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties. This is made quite clear by Lord Atkinson when, citing the Pongoland case of *Cook v. Sprigg*, L.R. 42 I.A. 229, 268, he says: "It was held that the annexation of territory made an act of state and that any obligation assured under the treaty with the ceding state either to the

sovereign or the individuals is not one which municipal Courts are authorized to enforce."

The passage quoted above was cited with approval by Viscount Simon, L.C., in *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] 2 All E.R. 93 at p. 98, where he said:

> Art. 2 of the Treaty of Waitangi, which was dated Feb. 6, 1840, was as follows:
>
> "Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the chiefs of the united tribes and the individual chiefs yield to Her Majesty the exclusive right to pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf."
>
> Under art. 1 there has been a complete cession of all the rights and powers of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law. The principle laid down in a series of decisions was summarised by LORD DUNEDIN in delivering the judgment of this Board in the Gwalior case, *Vajesingji Joravarsingji v. Secretary of State for India*, at p. 360:

The same concept is found in the case of *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272. There Mr. Justice Reed in delivering the judgment of the Supreme Court said at pp. 277-81, inclusive:

> The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.
>
> I. *Recognition.* — The question of recognition may be disposed of shortly. Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking. The petitioner contends that Congress has sufficiently "recognized" its possessory rights in the land in question so as to make its interest compensable. Petitioner points specifically to two statutes to sustain this contention. The first is §8 of the Organic Act for Alaska of May 17, 1884, 23 Stat. 24. The second is §27 of the Act of June 6, 1900, which was to provide for a civil government for Alaska, 31 Stat. 321, 330. The Court of Appeals in the *Miller* case, *supra*, felt that

these Acts constituted recognition of Indian ownership. 159 F. 2d 997, 1002-1003.

We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken. There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101.

This policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 under which the timber contracts were made. 61 Stat. 921, §3(b).

II. *Indian Title.*—(a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson v. McIntosh*, 8 Wheat. 543, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." P. 587.

> "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." P. 588.
>
> "Frequent and bloody wars, in which the whites were not always the agressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population ad-

> vanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediatcly from the crown, or mediately, through its grantees or deputies." Pp. 590-591. See *Buttz v. Northern Pacific R. Co.*, 119 U.S. 55, 66; *Martin v. Waddell*, 16 Pet. 367, 409; *Clark v. Smith*, 13 Pet. 195, 201.

In *Beecher v. Wetherby*, 95 U.S. 517, a tract of land which Indians were then expressly permitted by the United States to occupy was granted to Wisconsin. In a controversy over timber, this Court held the Wisconsin title good.

> "The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government." P. 525.

In 1941 a unanimous Court wrote, concerning Indian title, the following:

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347.

I would emphasize the passage found at pp. 278-9 reading as follows:

> There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

It is true that the *Tee-Hit-Ton* case dealt with the matter of compensation, but I can see no reason why when considering the question of the enforceability that the same principle applicable to compensation matters should not also apply to actions for a declaration of title.

Dealing with the question of recognition of the Indian title it is significant that counsel for the appellants could not point to any legislation of the pre-Confederation governments of

the Colony of British Columbia or of the present Province which could constitute recognition of the "Indian title". As a matter of fact the historical references contained in ex. 11A indicate that the exact opposite was the case. Sir Joseph Trutch's letter appearing at p. 10 of the Report on Indian Reserves makes it clear that no legal recognition had ever been accorded to the Indian claims to title to lands in the Colony. It is my view that the aboriginal title affords to the Indians no claim capable of recognition in a Court of law.

Although the plaintiffs do not claim to base their claim for a declaration on any colonial or British Columbia statute, they submit that King George III's Proclamation of October 7, 1763, passed following the Treaty of Paris, accords them a foundation for their claim.

Without going into this matter in detail it is sufficient for my purposes to say that the Proclamation of 1763 referred to in the judgment of my brother Tysoe, did not and never did apply to the Nishga tribe as the territory over which the tribe claims Indian title was *terra incognita* in 1763. Further, when the Proclamation is read as a whole it is clear that it was never intended to apply to the Nishgas.

Captain Vancouver did not appear on the coast till 1792. He circumnavigated Vancouver Island but apparently never was any further north. As a matter of fact, Great Britain did not establish sovereignty over the Nishga area until the Oregon Treaty of 1846. There was no recognition or reservation of "Indian title" in the treaty.

I agree with the judgment of Sheppard, J.A., given in the case of *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi], which was followed by the learned trial Judge in this case. The learned Judge held that the Proclamation of 1763 did not apply to the Nisgha tribe.

Appellants' counsel has argued that even if the Proclamation of 1763 did not apply to the Nishgas at the time the Proclamation was issued, it did apply to them when eventually the tribal territories came under British sovereignty in 1846. In my view the Proclamation cannot be interpreted in that way.

It is therefore my view that the appellants have not established such a case as would entitle them to the declaration of title which they seek.

The learned trial Judge has reviewed the pre-Confederation legislation of the Colony from 1858 till the Province entered

Confederation in 1871 and has held, and I think correctly, that [8 D.L.R. (3d) at p. 82]:

> In result I find that, if there ever was such a thing as aboriginal or Indian title in, or any right analogous to such over, the delineated area, such has been lawfully extinguished *in toto*. It is not necessary to explore what "aboriginal title, otherwise known as the Indian title" may mean, or in earlier times may have meant, in a different context. Lord Watson, for the Privy Council, in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at p. 55, said:
>
> > "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished."

In 1858 the law-making power was vested in Governor Douglas and from 1863 to 1871 the power was vested in the Governor and the Legislative Council.

By the Proclamation of February 14, 1859, it was declared:

> 1.—All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.

The price of land and the terms of sale were set. All British subjects were given the right to pre-empt land not included in the site for a proposed town or an Indian reserve. It is significant to note that even at this time Governor Douglas had established some Indian reserves.

Proclamations of January 20, 1860, dealt with the sale and survey of town lots. Various officials were given the right to sell such lands.

As the years progressed the legislation became more sophisticated, and finally dealt with rights of miners as well as those of pre-emptors of land.

The *Land Ordinance, 1870*, effected a consolidation of most if not all of the then existing legislation. Under s. 3 the right of pre-emption was open to all as against all unoccupied and unsurveyed Crown land (not being "an Indian settlement"). Further, it was provided:

> . . . that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect.

Sections 26, 27 and 28 provided for the issuance of leases for "pastoral purposes" and for the purpose of cutting hay;

and for the purpose of cutting spars, timber and lumber. Section 38 provided for the ejectment of trespassers from pre-emption claims or leasehold property. It read as follows:

> 38. Any person lawfully occupying a pre-emption claim, or holding a lease under this Ordinance may, in respect thereof, institute and obtain redress in an action of ejectment or of trespass in the same manner and to the same extent as if he were seised of the legal estate in the land covered by such claims; but either party thereto may refer the cause of action to the Stipendiary Magistrate of the District wherein the land lies, who is hereby authorized to proceed summarily, and make such order as he shall deem just. Provided, however, that if requested by either party, he shall first summon a jury of five persons to hear the cause, and their verdict or award on all matters of fact shall be final.

It is noticeable that no exception was made in favour of Indian trespassers.

The pre-emption of water was dealt with in s. 30.

All in all the Ordinance bears a striking resemblance to the legislation of the present day.

The learned trial Judge has neatly and correctly summarized the effect of this pre-Confederation legislation when he said [at p. 82]:

> All thirteen [*i.e.*, Proclamations and Ordinances] reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

It is not disputed that the old Colony of British Columbia had complete legislative jurisdiction to extinguish the so-called "Indian title", if in fact any such "title" ever existed.

To use the words of Mr. Justice Douglas of the United States Supreme Court in *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339 at p. 347, the title of the Indians, if it ever existed, was extinguished when the pre-Confederation governments of British Columbia exercised "complete dominion adverse to the right of occupancy" of the Indians. The full quotation of the passage in which the above is contained reads as follows:

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Butz v. Northern Pacific Railroad, supra*, p. 66. As stated by Chief Justice Marshall in

Johnson v. M'Intosh, *supra*, p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher v. Wetherby*, 95 U.S. 517, 525.

To put the matter another way — if there ever was an "Indian title" it was extinguished by the pre-Confederation legislation of the Colony.

Accordingly I would dismiss this appeal.

In view of the decision I have arrived at, I do not consider it necessary to deal with the three formidable preliminary objections raised by the respondent as follows:

1. The Court does not have jurisdiction to grant the declaration sought because it impugns the Crown's title to the land by seeking to have it declared that there is a cloud on the title, i.e. Indian title.
2. The Court has no jurisdiction to make the declaration because it will affect the rights of others who have had no opportunity to be heard. Audi Alteram Partem.
3. The Court ought not to grant a declaration if it can have no practical consequences.

Appeal dismissed.

BEAULIEU v. VILLAGE OF RIVIERE-VERTE et al.

New Brunswick Supreme Court, Appeal Division, Bridges, C.J.N.B., Limerick and Hughes, JJ.A. January 23, 1970.

Municipal law — Liability of municipality for damages — Contractor negligently constructing sewer — Contamination of nearby well — Whether municipality liable for negligence of contractor.

Drains and sewers — Sewer negligently constructed — Contaminating nearby well — Liability of municipality and contractor.

A district organized under the *Local Improvement Districts Act*, R.S.N.B. 1952, c. 136 (since repealed by s. 199 of the *Municipalities Act*, 1966, c. 20), with capacity and power to provide and maintain a sewerage system within the district has a duty in respect of the construction of the sewer to take reasonable care to protect wells in adjacent property from becoming polluted and cannot avoid liability for damages resulting from the breach of that duty by employing an independent contractor to construct the sewer. Thus where the contractor negligently constructs the sewer so that it leaks and sewage seeps into a nearby well, contaminating it, both the contractor and the municipality are liable for the resulting damage.

[*Hardaker v. Idle District Council*, [1896] 1 Q.B. 335, apld; *Penny v. Wimbledon Urban District Council*, [1899] 2 Q.B. 72, refd to]

CALDER et al. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

British Columbia Supreme Court, Gould, J. October 17, 1969.

Indians — Aboriginal title to lands — Whether such title possible after conquest — Whether title extinguished by acts of Crown.

Real Property — Aboriginal title to lands — Whether such title possible after conquest — Whether title extinguished by acts of Crown.

The plaintiffs, on their own behalf, and as representatives of various Indian bands in British Columbia, brought an action against the Attorney General of British Columbia for a declaration that the aboriginal or Indian title to certain lands comprising more than 1,000 sq. miles has never been lawfully extinguished. *Held*, a preliminary objection to the jurisdiction of the Court and the status of the Attorney-General as defendant on the ground that the matter in question pertained to "Indians and the lands reserved to Indians" and therefore fell within Dominion jurisdiction under s. 91(24) of the *B.N.A. Act, 1867* must be dismissed. The action was an action *in rem*, not *in personam*, and the lands in question were not "lands reserved to the Indians". The lands had historically existed as Crown lands, either provincial or Imperial, and since the vast bulk of the lands were still unalienated the present proprietor was the Crown Provincial.

A second preliminary objection made on the ground that, since various interests in part of the lands had been previously granted by the Crown, all the parties having any interest in the lands were not before the Court must also be dismissed. Joining all such parties as defendants would preclude, for practical reasons, any litigation and would frustrate an adjudication of the plaintiffs' claim.

A third preliminary objection made on the ground that a petition of right pursuant to the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, was a prerequisite to litigation of this type need not be decided. Although it is not usual to decide a case on the merits before dealing with preliminary objections, in this case the comity of the Courts as an institution would suffer if the plaintiffs were judicially told their clearly enunciated claim could not be decided because it was brought in the wrong forum.

Apart from treaty, contract, or Crown proclamation, discovery of *terra incognita* gave an exclusive right to the Crown Imperial to extinguish the Indian title of occupancy either by purchase or conquest. Vacant lands vested in the Crown subject to a right of occupancy in the Indian tribes until such right of occupancy was extinguished by the Crown. It was an agreed fact that no treaty or contract with the Crown, the Hudson's Bay Company or any other of the historical parties to dealings with lands in Canada, had ever been entered into with respect to the lands in question by anyone on behalf of the Indian bands represented by the plaintiffs.

The Proclamation of King George III, made in 1763, as set out in R.S.C. 1952, vol. VI, p. 6127, forbidding the purchase, settlement or taking of possession without special leave or licence of the Crown, of any lands of "the several Nations or Tribes of Indians with whom we are connected and who live under our Protection" did not apply to the lands in question. At the time of the proclamation the Indian bands represented by the plaintiffs were not any of "the several Nations or

Tribes of Indians" with whom the Crown was connected or who lived under the Crown's protection.

The lands in question were within the boundaries of the Colony of British Columbia as set out in *Imperial Statute*, 1863, 26 & 27 Vict., c. 83. Between November 19, 1866, when the last mentioned statute was proclaimed, and May 16, 1871, when by Order in Council, the Colony of British Columbia was admitted, as of July 20, 1871, into the Dominion of Canada, the sole sovereignty over the area of British Columbia was in the Crown Imperial. During this period any rights the Indian bands had in the lands in question were totally extinguished by overt acts of the Crown Imperial by way of proclamation, ordinance and proclaimed statute.

All of the proclamations, ordinances and proclaimed statutes affecting land in British Columbia emanating from the Crown Imperial showed a unity of intention to exercise and the legislative exercising of absolute sovereignty over all lands in the colony, a sovereignty which was inconsistent with any conflicting interest, including one as to aboriginal or Indian title.

[*Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543; *Tamaki v. Baker*, [1901] A.C. 561; *Warman v. Francis* (1958), 20 D.L.R. (2d) 627, 43 M.P.R. 197; *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, folld; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Sikyea v. The Queen*, 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65; affd 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613; 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi; *R. v. George*, 55 D.L.R. (2d) 386; [1966] 3 C.C.C. 137, [1966] S.C.R. 267, 47 C.R. 382; *R. v. Prince*, [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234; revd [1964] 3 C.C.C. 2, 41 C.R. 403, [1964] S.C.R. 81 *sub nom. Prince and Myron v. The Queen*; *R. v. Wesley*, [1932] 4 D.L.R. 744, 58 C.C.C. 269, 26 Alta. L.R. 433, [1932] 2 W.W.R. 337, refd to]

ACTION by the plaintiffs personally and as representatives of various Indian bands for a declaration that the aboriginal title to ancient tribal territory has never been lawfully extinguished.

Thomas R. Berger, for plaintiffs.
Douglas McK. Brown, Q.C., *A. W. Hobbs*, Q.C., and *Anthony Hooper*, for defendant.

GOULD, J.:—The plaintiffs sue, as representatives of the Nishga Indian Tribe, the Attorney-General of British Columbia, seeking a declaratory judgment:

> . . . that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished.

It was agreed for the purpose of the litigation that "their ancient tribal territory" in question consisted of an area in

excess of 1,000 square miles in and around the Naas River Valley, Observatory Inlet, Portland Inlet, and the Portland Canal, all located in north-western British Columbia, as delineated on the map, ex. 2, and hereinafter sometimes referred to as the "delineated area".

The plaintiffs are appropriate and adequate representatives to bring the action on the part of the Nishga Indian Tribe, also known sometimes as the Nishga Nation. This group of people is one of the several tribes or Indian "Nations" the members of which constitute the aboriginals of what is now the Province of British Columbia. The Nishga language is unique unto the tribe, and the locale of its activities has remained geographically unchanged throughout recorded history. It is approximately as delineated on the map, ex. 2, a vast tract over which the Nishgas have hunted, fished and roamed since time immemorial.

Within the delineated area are located a number of "reserves" — tracts of land the legal title to which is vested in Her Majesty in right of the Dominion of Canada, that have been set apart by Her Majesty for the use and benefit of certain Indian bands, pursuant to the *Indian Act*, R.S.C. 1952, c. 149. The Nishga Nation is made up of four bands, the Gitlakdamix, Canyon City, Greenville, and Kincolith Bands. The reserves within the delineated area comprise only a minute fraction of the total area. This judgment speaks *qua* the total area, exclusive of reserves.

Three preliminary objections were raised by counsel for the Attorney-General of British Columbia. In effect they were:

This matter is within federal jurisdiction pursuant to s. 91(24) of the *B.N.A. Act, 1867*, which distributes exclusive powers to the Parliament of Canada to legislate in all matters pertaining to "Indians, and Lands Reserved for the Indians".

The broad argument in support of this preliminary objection was that a provincial Court such as the Supreme Court of British Columbia could have no jurisdiction, and in any event the Attorney-General of British Columbia could have no status as defendant, because the matter in question pertains to "Indians, and Lands Reserved to the Indians". In my view the essence of this action has nothing to do with the legal status of Indians as persons. The action is not *in personam*, it is *in rem*, *qua* the state of the title to the lands in question, and such are certainly not "lands reserved for Indians". The phrase "Indian Lands" was used in argument in support of the preliminary objection. That phrase occurs from time to time in

common usage. I know of only three classifications of land which in law could fit into that generic phrase: lands reserved for Indians (pursuant to the *Indian Act*), "special reserves" (s. 36 *idem*), and "surrendered lands", again pursuant to the *Indian Act*. The lands here in question are not in any of these classifications. Historically, they have existed as lands of the Crown, either provincial or Imperial, and all titles and rights under our law pertaining to the lands have issued from one or other of the two fountain-heads, going back in time to when they constituted *terra incognita*. At this time they exist as lands of the Crown Provincial, which since 1871 has granted a multiplicity of titles and rights to and over parts of the lands, ranging from pre-emptions, fees simple, mineral and mining rights and titles, forestry rights and titles, including a tree farm licence pursuant to the *Forest Act*, R.S.B.C. 1960, c. 153, Crown Grants, to a multiplicity of other alienations. Prior to 1871 the Crown Provincial's predecessor in title, the Crown Colony of British Columbia, similarly completed alienations appropriate to the law of that day. See the evidence of David Borthwick, Deputy Minister of Lands for British Columbia, and exhibits put in through him. As a declaration is now sought that the aboriginal title (if such ever existed) has never been lawfully extinguished, the present proprietor of the unalienated parts of the lands (the vast bulk of the tract is still unalienated) has a very real interest and status in this litigation, and the "present proprietor" is the Crown Provincial. Thus the Attorney-General for British Columbia is properly defendant in this action, and this Court is a proper forum for the *lis*. The Attorney-General of Canada was given notice of this action by the plaintiffs, and his reply (ex. 3) is dated December 31, 1968, and was as follows:

> I have to acknowledge your letter dated December 20, 1968.
>
> I have not received instructions to intervene in this action.

The second preliminary objection was that all the parties having any interest in or over any of the said lands should be before the Court. This would involve many hundreds of defendants, such as to preclude, for practical reasons, any litigation going forward in any Court. The law does not take kindly to any such frustratory proposition, nor, as the momentary voice of the law in this instance, do I.

A third preliminary objection raised was that a petition of right pursuant to the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, was a prerequisite to this litigation, and that casting the action in the form of a writ seeking a declaratory judgment

was not a valid substitute. Reference to this preliminary objection will be made later.

Eight witnesses gave *viva voce* evidence. They were:

Frank Arthur Calder, a member of the Greenville Band, and president of the Nishga Tribal Council;

James Gosnell, Chief Councillor (an elective office) of the Gitlakdamix Band;

Morris Jacob Nyce, Chief Councillor, Canyon City Band;

William David McKay, Chief Councillor, Greenville Band;

Anthony Robinson, Chief Councillor, Kincolith Band;

Willard Ernest Ireland, Official Archivist for the Province of British Columbia;

Wilson Duff, Associate Professor of Anthropology, University of British Columbia;

David Borthwick, Deputy Minister of Lands for the Province of British Columbia.

Drs. Ireland and Duff are scholars of renown, and authors in the field of Indian history, and records.

I find that all witnesses gave their respective testimony as to facts, opinions, and historical and other documents, with total integrity. Thus there is no issue of credibility as to the witnesses in this case, and an appellate Court, with transcript and exhibits in hand, would be under no comparative disadvantage in evaluating the evidence from not having heard the witnesses *in personam*.

It is an agreed fact that no treaty or contract with the Crown, the Hudson's Bay Company or any other of the historical parties to dealings with lands in Canada occupied by Indians since time immemorial, has ever been entered into, purportedly or validly, with respect to the lands in question, by anyone on behalf of the Nishga Nation. Thus the bulk of decided leading cases on the subject of Indian rights over lands in Canada can have only indirect application. Such cases turn on the interpretation of a contract. In the instant case there is not, and never has been, any contract of any kind to be interpreted. Schultz, Co.Ct.J., in *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619 at pp. 626-7, 63 W.W.R. 485, catalogues some of such cases as follows:

> Aboriginal rights have been recognized in Canada where the reservation of aboriginal rights is contained in a *written* treaty or statute.
>
> For example, there is a *treaty* reservation of aboriginal rights referred to in:

(1) *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.) at pp. 51-2;
(2) *Sikyea v. The Queen*, [1964] 2 C.C.C. 325 at p. 328, 43 C.R. 83, 43 D.L.R. (2d) 150 (N.W.T.C.A.); affd [1965] 2 C.C.C. 129 at p. 130, 44 C.R. 266, 50 D.L.R. (2d) 80;
(3) *R. v. White and Bob*, *supra*, and
(4) *R. v. George*, [1966] 3 C.C.C. 137 at p. 140, 47 C.R. 382, 55 D.L.R. (2d) 386 (S.C.C.),

while there is a *statutory* reservation of aboriginal rights referred to in:

(5) *R. v. Wesley*, 58 C.C.C. 269 at p. 275, [1932] 4 D.L.R. 744, 26 Alta. L.R. 433 (Alta. S.C., A.D.), and
(6) *R. v. Prince*, [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234 (Man. C.A.); revd [1964] 3 C.C.C. 2, 41 C.R. 403, [1964] S.C.R. 81 *sub nom. Prince and Myron v. The Queen*.

The plaintiffs submit that the Nishgas acquired, and to this day hold, rights over the delineated lands pursuant to the Proclamation of His Majesty King George III, issued October 7, 1763, the same having the force and effect of a statute of the Parliament of Great Britain. The Proclamation in full text is set out in R.S.C. 1952, vol. VI, p. 6127. The particular passage invoked by the plaintiffs follows [pp. 6130-1]:

> 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 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 Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully 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.

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, 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, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall 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 Licence 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 Regulations as We shall at any Time think fit, by ourselves or by our 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 respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And We do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend

> all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.

On this submission the question is, did the Proclamation when made embrace within its ambit the lands in question? Or, alternatively, was it prospective in character, such as to include the lands at some date later than October 7, 1763? This question, with reference to other lands historically occupied by Indians, has had the benefit of judicial opinion in this Province. The case of *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193, decided by the Court of Appeal for this Province, touches directly upon the matter. The Court consisted of Davey, J.A. (now C.J.B.C.), and Sheppard, Norris, Lord and Sullivan, JJ.A. Sheppard, J.A., at pp. 620-1, holds:

> The Proclamation of 1763 does not apply to Vancouver Island. In that Proclamation the Crown states that it is concerned with the "Tribes of Indians with whom We are connected, and who live under our Protection", and with the lands which are "reserved to the said Indians, or any of them". The bands of Indians on Vancouver Island in 1763 were not "Tribes of Indians with whom We are connected, and who live under our Protection", and therefore, the Proclamation of 1763 did not apply to the accused Indians for the following reasons:
>
> First, in 1763 Vancouver Island and the bands of Indians thereon were unknown to the Crown. In 1778 Captain Cook landed at Nootka, which was a separate island. In 1792 Captain Vancouver circumnavigated Vancouver Island and formed the settlement at Friendly Cove, Vancouver Island, so that in 1763, the date of the Proclamation, Vancouver Island had not been discovered by any subject of the Crown and until such discovery the Crown could not have been aware that there was such an island or that it was inhabited by Indians.
>
> Secondly, the Proclamation refers to lands to the west used by "said Indians", and therefore to lands used by Indians with whom the Crown was then connected or who lived under the Crown's protection. In 1763 that would not relate to Vancouver Island or the Indian bands thereon.
>
> Thirdly, in 1763, the date of the Proclamation, the Crown had no lands in Vancouver Island to which the Proclamation could apply as lands "reserved to the said Indians, or any of them".
>
> The Proclamation dealing with Indian rights was considered in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, where Lord Watson said at pp. 54 and 58:
>
> " . . . the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. . . . The Crown has all along had a present proprietary estate in the land, upon which the Indian Title was a mere burden."

> As the Proclamation deals with Crown lands on which such Indian rights are a burden, it could not have application to the lands of Vancouver Island in respect of which the Crown in 1763 asserted no "present proprietary estate".

The learned appellant Judge's reasoning, in that instance applied to lands on Vancouver Island, is equally applicable to the lands in question. Lord, J.A., at p. 664, says: "I would allow the appeal for the reasons given by my brother Sheppard. I would, however, add these further observations: . . ." The passage that follows does not touch upon the *Proclamation of 1763*.

The opinions of Sheppard and Lord, JJ.A., are the dissenting opinions. Majority opinions were written by Davey, Norris and Sullivan, JJ.A. The opinions of Davey and Sullivan, JJ.A., make no reference to the *Proclamation of 1763* but decide the case on another point. The opinion of Norris, J.A., concurs on this point with Davey and Sullivan, JJ.A., but in addition contains a forceful and painstakingly researched opinion that the 1763 Proclamation did apply to the case (and, I add, by analogy would apply to this case). Thus all three opinions touching upon the applicability or otherwise of the Proclamation of 1763 are *obiter dicta*, in the *White and Bob* case. The Supreme Court of Canada, in upholding the majority decision, *R. v. White and Bob*, 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi, did not touch upon the Proclamation.

In *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485, the applicability or otherwise of the Proclamation is part of the *ratio decidendi*. This is a decision of Schultz, Co.Ct.J., and I record with great respect that in my opinion it is an outstandingly lucid opinion on the issue of the *Proclamation of 1763*. Schultz, Co.Ct.J., concludes that he prefers the reasoning of Sheppard, J.A., to that of Norris, J.A., in the *White and Bob* case. In that preference I concur. In result, I hold that the Proclamation does not apply to the lands in question. Before leaving this aspect of the case I record that counsel for the plaintiffs submitted to me a particular argument in support of the applicability of the Proclamation which argument was not before the Court of Appeal in *White and Bob*. The argument was that the lands in question were not *terra incognita* at the time of the *Proclamation of 1763*, because of the British Admiralty secret instructions (*sic*) to Captain Byron of the Royal Navy, given September 11, 1764, to explore the possibility "that a passage might be found between the latitude of 38 degrees and 54 degrees from that coast into Hudson's Bay" (see ex. 30, p. 3). From the

context the quoted latitudes 38° and 54° are both north. From the same exhibit the following passage occurs at pp. 6 and 7:

> When the Season will admit, you are again to put to Sea with the Ship and Frigate, and proceed to New Albion, on the Western Coast of North America, endeavouring to fall in with the said Coast in the Latitude of 38°, or 38°30′ North, where Sir Francis Drake, who was the first Discoverer of that Country, found a convenient Harbour for his Ship, and Refreshment for his People.
>
> You are to search the said Coast with great care and diligence, from the Latitude above mentioned as far to the Northward as you shall find / it practicable, making all such Observations of the Head Lands, Harbours, Bays, Inlets &c[a] as may be useful to Navigation, and endeavouring by all proper means to cultivate friendship & alliance with the Inhabitants, where there are any, by presenting them with Trifles &c[a] as mentioned in the former part of these Instructions. And in case you will find any probability of exploring a Passage from the said Coast of New Albion to the Eastern Side of North America through Hudson's Bay, you are most diligently to pursue it, and return to England that way, touching at such Place, or Places, in North America for the Refreshment of your Men, and for supplying the Ship and Frigate with Provisions, Wood & Water, as you shall judge proper. — But on the other hand, if you shall see no probability of finding a passage from the Coast of New Albion into Hudson's Bay, you are to leave that Coast while you have a sufficient quantity of Provisions left to enable you to proceed to the Coast of Asia, China, or the Dutch Settlements in the East Indies, And you are to proceed to the Coast of Asia, China, or the Dutch Settlements accordingly, touching or not touching at Bengal, or any of the English Settlements as you / shall judge convenient; And having put the Ship and Frigate into a proper condition to return to Europe, you are to make the best of your way with them to England around the Cape of Good Hope, repairing to Spithead, and sending to our Secretary an Account of your arrival & proceedings.

Three comments on this historical document are relevant: First, there was offered no evidence, or even suggestion, that Captain Byron ever in fact made such a voyage; secondly, all the lands in issue here lie north of 54° north latitude (see ex. 2); and thirdly, that the secret instructions were issued after the operative date of the *Proclamation of 1763*. I take the liberty of speculating that had this argument, such as it is, been before the Court of Appeal of British Columbia in *White and Bob*, it would not have changed the opinion of Sheppard or Lord, JJ.A., and from what I have said, it is obvious that the point has not convinced me that Sheppard, J.A., or Schultz, Co.Ct.J., were wrong in their views as to the *Proclamation of 1763*.

The rejection of the submission that the Nishgas acquired and still hold rights pursuant to the *Proclamation of 1763* does

not, however, dispose of the plaintiffs' claim. There are other avenues of argument explored by plaintiffs' counsel which require adjudication. The most cogent one of these is the argument based upon a classic and definitive judgment of Chief Justice Marshall of the United States, in 1823, in the case of *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543, wherein that renowned jurist gives an historical account of the British Crown's attitude towards the rights of aboriginals over land originally occupied by them, and an enunciation of the law of the United States on the same subject. Set out below are some relevant passages at pp. 572-4:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in

themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

At pp. 587-8:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

At pp. 591-2:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

At pp. 595-6:

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. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain. All the lands we hold were originally granted

> by the crown; and the establishment of a regal government has never been considered as impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the king, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.
>
> 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 only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

For more than 150 years this strong judgment has at various times been cited with approval by such authorities as the House of Lords, *Tamaki v. Baker*, [1901] A.C. 561 at p. 580; the Supreme Court of Canada, *St. Catherine's Milling & Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, *per* Strong, J., at p. 610; Court of Appeal for Ontario (in the same case), 13 O.A.R. 148, *per* Burton, J.A., at pp. 159-60; Ontario High Court, Chancery Division (in the same case), 10 O.R. 196, *per* Boyd, C., at p. 209; Court of Appeal for British Columbia, *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at pp. 646-7, 52 W.W.R. 193; Supreme Court of New Brunswick, *Warman v. Francis* (1958), 20 D.L.R. (2d) 627, 43 M.P.R. 197, *per* Anglin, J., at p. 630.

In 1955 the Supreme Court of the United States in *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, considered the matter of extinguishing Indian title based on aboriginal possession. Mr. Justice Reed delivered the opinion of the Court (three Judges dissenting), in which he said at pp. 279-80:

> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson v. McIntosh*, 8 Wheat. 543, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."

And at pp. 281-2:

> In 1941 a unanimous Court wrote, concerning Indian title, the following:

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347.
>
> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.

In my view the doctrine of the supreme power of Congress referred to in the U.S. case above-cited is equally applicable in English law in the form of the supreme power of the Crown, usually termed the Crown prerogative.

In examining the doctrine as it applies to the lands in question it is convenient to refer to the period December 2, 1858, to June 1, 1870, and to consider whether or not the lands were within the geographical confines of the prerogative of the Crown Imperial as they then existed, prior to the entry of British Columbia into the Confederation of Canada in 1871. This entails the genesis and evolution of the boundaries of British Columbia prior to and as at July 20, 1871. For source material on this subject I am specially indebted to the excellent monograph of Dr. Willard Ireland, Provincial Archivist for British Columbia, supplied as ex. 20 in these proceedings, and originally published in the *British Columbia Historical Quarterly*, vol. III, 1939, under title "The Evolution of the Boundaries of British Columbia".

It should be noted here that the northernmost point of the delineated area extends to approximately 56°, 15 minutes N. latitude, and the westerly boundary is the present Alaska-Canada boundary, in particular that part immediately west of the approximate centre of Pearse Island, extending northward to approximately 56°, 07 minutes N. The most westerly point of the western boundary, that opposite Pearse Island, is located at approximately 130°, 20 seconds W. Dr. Ireland's monograph, pp. 266-7, reads:

> The first actual definition of a boundary west of the Rockies developed out of the assertion, in an Imperial ukase of the Russian Czar, dated September 16, 1821, of exclusive rights of trade on the Pacific Coast as far south as the 51st parallel. Opposition to this pretension developed immediately both in Great Britain and the United States. The latter power proposed a tri-partite treaty, under the terms of which no settlements should be made by Russia south

of 55 degrees, by the United States north of 51 degrees, or by Great Britain north of 55 degrees or south of 51 degrees. If necessary, the United States was prepared to accept the 49th parallel as a northern limit for its settlements. This proposition was rejected by the British Government, which preferred to negotiate separately with Russia and the United States.

The discussions with Russia culminated in the convention of February 28/16, 1825. The line of demarcation laid down therein was as follows:—

> Commencing from the Southernmost Point of the Island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes North latitude, and between the 131st and 133rd degree of West longitude (Meridian of Greenwich), the said line shall ascend to the North along the Channel called Portland Channel, as far as the Point of the Continent where it strikes the 56th degree of North latitude; from this last-mentioned Point, the line of demarcation shall follow the summits of the mountains situated parallel to the Coast, as far as the point of intersection of the 141st degree of West Longitude (of the same Meridian); and, finally, from the said point of intersection, the said Meridian Line of the 141st degree in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British Possessions on the Continent of America to the North-West.

It was understood that the whole of Prince of Wales Island was to be within Russian territory, and that the boundary between the British possessions and the Russian strip of coast would be a line parallel to the windings of the coast, never more than 10 marine leagues distant therefrom.

Although the exact interpretation of these terms became a matter of serious dispute after Russian America was purchased by the United States, this convention, broadly speaking, established the boundary as it exists to-day between Canada and Alaska. In other words, it determined the northern limit of British territory on the Pacific coast.

The determination of the southern limit of British Columbia was by the Oregon Treaty of June 15, 1846. The first article of the treaty reads:

> From the point on the 49th parallel of north latitude, where the boundary laid down in existing Treaties and Conventions between Great Britain and The United States terminates, the line of boundary between the territories of Her Britannic Majesty and those of The United States shall be continued westward along the said 49th parallel of north latitude, to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly, through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean: . . .

"By these two conventions the international aspect of the boundary question was settled, although controversies did arise over the interpretation of the rather vague phraseology used,

and eventually recourse was had to arbitration before a definite boundary-line was laid down." (Ireland, *ibid.*)

The boundary to the Crown Colony of British Columbia underwent significant changes from the enactment of the *Imperial Statute*, August 2, 1858, 21 & 22 Vict., c. 99, "An Act to provide for the Government of *British Columbia*" — to the enactment effective November 19, 1866, of "An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia", 29 & 30 Vict. 1866, c. 67 [*British Columbia Act, 1866*]. At this time (1866) the boundaries of the Colony of British Columbia were as defined in the *Imperial Statute*, July 28, 1863, 26 & 27 Vict., c. 83, *viz.*:

> British Columbia shall, for the purposes of the said Act, and for all other purposes, be held to comprise all such territories within the Dominions of Her Majesty as are bounded to the South by the territories of the United States of America, to the West by the Pacific Ocean and the frontier of the Russian Territories in North America, to the North by the sixtieth parallel of north latitude, and to the East from the boundary of the United States northwards, by the Rocky Mountains and the one hundred and twentieth meridian of west longitude, and shall include Queen Charlotte Island and all other Islands adjacent to the said Territories, except Vancouver Island and the Islands adjacent thereto.

These boundaries totally surround the delineated area in dispute in this litigation, and were the boundaries by reference obtaining as at November 19, 1866, the date of the proclamation by Governor Seymour of the *Imperial Statute*, "An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia". At that instant the boundaries of British Columbia, as we now know them, came into being. The delineated area is totally within them. From that date, November 19, 1866, the source of sovereignty over the delineated area was the Crown Imperial, alone, until the Order in Council of May 16, 1871, which provided "that from and after the twentieth day of July, One Thousand Eight Hundred and Seventy One, the said Colony of British Columbia shall be admitted into and become part of the Dominion of Canada".

I am of the view that between November 19, 1866, and May 16, 1871, during which time there can be no doubt that the sole sovereignty over the area of British Columbia as we now know it flowed from the Crown Imperial, such rights, if any, as the Nishgas may have had, were firmly and totally extinguished by overt acts of the Crown Imperial by way of proclamation, ordinance and proclaimed statute. This entails the examination of a series of legislative events spanning in time

from December 2, 1858, to June 1, 1870, thirteen in all. I have added the Roman numbering and dates. Selected excerpts are in most instances quoted.

I. December 2, 1858:

> PROCLAMATION, having the Force of Law to enable the Governor of British Columbia to convey Crown Lands Sold within the said Colony.
>
> . . . . . .
>
> Now, therefore, I, JAMES DOUGLAS, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, ordain and enact, that on and after the day of the date of this proclamation, it shall be lawful for the Governor, for the time being of the said Colony, by any instrument in print or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonging to the Crown in the said Colony; and every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument in the lands therein described.

II. February 14, 1859:

> PROCLAMATION.
>
> . . . . . .
>
> WHEREAS, it is expedient to publish for general information, the method to be pursued with respect to the alienation and possession of agricultural lands, and of lands proposed for the sites of towns in British Columbia, and with reference also to the places for levying shipping and customs duties, and for establishing a capital and port of entry in the said Colony.
>
> . . . . . .
>
> 1. — *All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.*
>
> 2. — The price of lands, not being intended for the sites of Towns, and not heing reputed to be Mineral lands, shall be ten shillings per acre, payable one half in cash at the time of the sale, and the other half at the end of two years from such sale. Provided, that under special circumstances some other price, or some other terms of payment may from time to time be specially announced for particular localities.
>
> 3. — It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown Lands, and for such purposes as the Executive shall deem advisable.
>
> 4. — Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, as soon as the same shall have been surveyed and made ready for sale. Due notice will he given of all such sales. Notice at the same time will be given of the upset price and terms of payment when they vary from those above stated, and also of the rights reserved (if any) for public convenience.

(Italics added.)

III. January 4, 1860:

WHEREAS, by virtue of an Act of Parliament made and passed in the 21st and 22nd years of the Reign of Her Most Gracious Majesty the Queen, and by a Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, in conformity therewith I, JAMES DOUGLAS, Governor of the Colony of British Columbia, have been authorized by Proclamation issued under the Public Seal of the said Colony, to make laws, institutions, and ordinances, for the peace and good government of the same, and

WHEREAS, it is expedient, pending the operation of the survey of agricultural lands in British Columbia, to provide means whereby unsurveyed agricultural lands may be lawfully acquired by pre-emption in British Columbia by British subjects, and in certain cases to provide for the sale of unsurveyed agricultural land in British Columbia by private contract;

Now, therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, order and enact.

1. That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved, and unsurveyed Crown land in British Columbia (not being the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or settlement) in fee simple, under the following conditions:

. . . . .

3. Whenever the Government survey shall extend to the land claimed, the claimant who has recorded his claim as aforesaid, or his heirs or in case of the grant of certificate of improvement hereinafter mentioned, the assigns of such claimant shall, if he or they shall have been in continuous occupation of the same land from the date of the record aforesaid, be entitled to purchase the land so pre-empted at such rate as may for the time being be fixed by the Government of British Columbia, not exceeding the sum of 10s. per acre.

. . . . .

13. Whenever a person in occupation at the time of record aforesaid, shall have recorded as aforesaid, and he, his heirs or assigns, shall have continued in permanent occupation of land pre-empted, or of land purchased as aforesaid, he or they may, save as hereinafter mentioned, bring ejectment or trespass against any intruder upon the land so pre-empted or purchased, to the same extent as if he or they were seized of the legal estate in possession in the land so pre-empted or purchased.

14. Nothing herein contained shall be construed as giving a right to any claimant to exclude free miners from searching for any of the precious minerals, or working the same upon the conditions aforesaid.

IV. January 20, 1860:

PROCLAMATION.

. . . . .

And Whereas, it is expedient that town lots, suburban lots, and surveyed agricultural lands in British Columbia, which have been, or

which hereafter may be offered for sale, at public auction, and remain unsold, should be sold by private contract;

Now therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid do proclaim, order, and enact, as follows:—

The Chief Commissioner of Lands and Works for the time being, for British Columbia, and all Magistrates, Gold Commissioners, and Assistant Gold Commissioners, by the said Chief Commissioner authorized in writing in that behalf, may sell by private contract any of the lots and lands, hereinafter mentioned, at the prices, and on the terms hereinafter respectively stated—viz.

a. Town and suburban lots which have been, or hereafter may be offered for sale at public auction, and remain unsold, at the upset price, and on the terms at and on which the same were offered for sale at such auction.

b. Agricultural lands surveyed by the Government Surveyor, which may, or shall have been offered for sale at public auction, and remain unsold, at ten shillings per acre, payable one half in cash at the time of sale, and the other half at the expiration of two years from such sale.

V. January 19, 1861, a proclamation of Governor Douglas amending the proclamation of January 4, 1860, *supra*, in the main legislating the methods of land pre-emption in expanded detail.

VI. January 19, 1861:

PROCLAMATION.
No. 2, A.D. 1861.

By His Excellency JAMES DOUGLAS, Companion of the Most Honorable Order of the Bath, Governor and Commander-in-Chief of British Columbia.

. . . . .

And whereas I have been empowered by Her Majesty's Government to lower the price of Country Lands in British Columbia, in all cases, to the sum of four shillings and two pence (4s. 2d.) per acre.

Now, therefore, I do hereby declare, proclaim, and enact as follows:—

I. So much of the said Proclamation of the 20th day of January, 1860, as fixed the price of surveyed agricultural land at ten shillings per acre is hereby repealed.

II. The price of all unsurveyed country land in British Columbia, whether acquired by pre-emption or purchase under the Proclamation dated the 4th day of January, 1860, shall be four shillings and two pence (4s. 2d) per acre.

VII. May 28, 1861:

PROCLAMATION.
No. 6, A.D. 1861.

By His Excellency JAMES DOUGLAS, Companion of the Most Honorable Order of the Bath, Governor and Commander-in-Chief of British Columbia and its Dependencies, Vice-Admiral of the same, &c., &c.

Whereas it is inexpedient that any person other than a bona fide settler should take up land under the said Proclamation, and without the occupation and improvement necessary under the said Proclamation to complete his Title as a Pre-emptor.

. . . . . .

No person shall be entitled to hold by Pre-emption more than 160 acres under the said Proclamation, or any of them, at one time.

VIII. August 27, 1861:

PROCLAMATION
No. 9, A.D. 1861.

By His Excellency JAMES DOUGLAS, Companion of the Most Honorable Order of the Bath, Governor and Commander-in-Chief of British Columbia, and its Dependencies, Vice-Admiral of the same, &c., &c.

. . . . . .

And whereas it is expedient to amend and consolidate the laws affecting the settlement of unsurveyed Crown Lands in British Columbia;

. . . . . .

III. That from and after the date hereof, British subjects and aliens who shall take the Oath of Allegiance to Her Majesty and Her Successors, may acquire the right to hold and purchase in fee simple, unoccupied and unsurveyed and unreserved Crown Lands in British Columbia, not being the site of an existent or proposed Town, or auriferous land available for mining purposes, *or an Indian Reserve or Settlement*, under the following conditions.

. . . . . .

XXV. Nothing herein contained shall be construed as giving a right to any claimant to exclude free miners from searching for any of the precious minerals or working the same, upon the conditions aforesaid.

(The emphasis is mine.)

IX. May 27, 1863:

PROCLAMATION
No. 7, A.D. 1863.

By His Excellency JAMES DOUGLAS, Companion of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of British Columbia and its Dependencies, Vice-Admiral of the same, &c., &c.

. . . . . .

And whereas it is desirable for the protection of Miners, and others searching for the precious metals, to retain in possession of the Crown power to prevent such Miners or other persons from being obstructed or hindered by the Claims, and exactions of persons holding land under the provisions of the Pre-emption Consolidation Act passed on the 27th day of August, 1861;

Now, therefore, I do hereby declare, proclaim, and enact as follows:

I. It shall be lawful for the Governor, for the time being of British Columbia from time to time, and at any time hereafter by any writing under his hand, published in the Government Gazette, to

erect any portion of the Colony into a Mining District, and to give to such District a distinguishing name, and to define the limits and boundaries thereof, and also again to abolish or reconstruct any such District, and from time to time to alter and vary such limits and boundaries.

X. April 11, 1865:

No. 27. An Ordinance for regulating the acquisition of land in British Columbia.

. . . . . .

3. All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee.

4. The upset price of surveyed lands not being reserved for the sites of towns or the suburbs thereof, and not being reputed to be mineral lands, shall be four shillings and two pence per acre.

5. The Governor shall at any time, and for such purposes as he may deem advisable, reserve any lands that may not have been either sold or legally pre-empted.

6. Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, after the same shall have been surveyed and made ready for sale. Due notice shall be given of all such sales; notice at the same time shall be given of the upset price and terms of payment when they vary from those above stated, and also of the rights specially reserved (if any) for public convenience.

. . . . . .

9. Unless otherwise specially announced at the time of sale, the conveyance of the land shall include all trees and all mines, and minerals within and under the same (except mines of gold and silver).

. . . . . .

12. From and after the date hereof British subjects, and aliens who shall take the oath of allegiance to Her Majesty, Her heirs and successors, may acquire the right to pre-empt and hold in fee simple unoccupied and unsurveyed and unreserved Crown Lands not being the site of an existent or proposed town, or auriferous land available for gold or silver mining purposes, or *an Indian reserve or settlement*, under the following conditions:

. . . . . .

51. Leases of any extent of unoccupied and unsurveyed land may be granted for pastoral purposes, by the Governor or any Officer duly authorized by him in that behalf, to any person or persons whomsoever, being *bona fide* pre-emptors or purchasers of land, at such rent as such Governor or Officer shall deem expedient. But every such lease of pastoral lands shall, among other things contain a condition making such land liable to pre-emption, reserve, and purchase by any persons whomsoever, at any time during the term thereof, without compensation, save by a proportionate deduction of rent. And to a further condition that the lessee shall, within six months stock the property demised in such proportion of animals to the one hundred

acres, as shall be specified by the Stipendiary Magistrate in that behalf.

. . . . . .

Assented to, in Her Majesty's name, this eleventh day of April, 1865.

FREDERICK SEYMOUR,
Governor.

(The emphasis is mine.)

XI. March 31, 1866:

BRITISH COLUMBIA
Anno Vicesimo Nono
VICTORIAE REGINAE
No. 13.

An Ordinance further to define the law regulating the acquisition of Land in British Columbia.

. . . . . .

Be it enacted by the Governor of British Columbia, by and with the advice and consent of the Legislative Council thereof, as follows:

I. The right conferred under Clause 12 of the Land Ordinance, 1865, on British Subjects, or aliens who shall take the oath of allegiance, of pre-empting and holding in fee simple unoccupied and unsurveyed and unreserved Crown Lands in British Columbia, shall not (without the special permission thereto of the Governor first had in writing) extend to or be deemed to have been conferred on Companies whether Chartered, Incorporated, or otherwise, or without the permission aforesaid, *to or on any of the Aborigines of this Colony or the Territories neighbouring thereto.*

(The emphasis is mine.)

XII. March 10, 1869:

Be it enacted by the Governor of British Columbia, with the advice and consent of the Legislative Council thereof, as follows:—

I. The purchase money for Pre-emption Claims, and the balance of purchase money upon Pre-emption Purchase Claims, held under any of the Laws heretofore, or for the time being, regulating the acquisition and tenure of Pre-emption Claims in that part of the Colony formerly known as the Colony of British Columbia and its Dependencies, shall be, and be deemed to have been, and to be due and payable to Her Majesty, Her Heirs and Successors, as part of the General Revenue of the Colony, as and from the date of the service of an application, signed by the Chief Commissioner of Lands and Works and Surveyor General, upon the person or persons to be affected thereby, and notifying the completion of the Government Survey of the Land specified in such application, and calling upon such person or persons for the payment of the amount for the time being due and payable as aforesaid in respect of such land.

. . . . . .

Assented to, on behalf of Her Majesty, this 10th day of March, 1869.

FREDERICK SEYMOUR,
Governor.

XIII. June 1, 1870:

An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia.

[1st June, 1870]

WHEREAS it is expedient to amend and consolidate the Laws affecting Crown Lands in British Columbia:

Be it enacted by the Governor of British Columbia, with the advice and consent of the Legislative Council thereof, as follows:—

. . . . .

2. The following Acts, Ordinances, and Proclamations relating to the disposal and regulation of the Crown Lands of the Colony are hereby repealed:—

An Act dated February 14th, 1859:
An Act dated January 4th, 1860:
An Act dated January 20th, 1860:
The "Pre-emption Amendment Act, 1861:"
The "Country Land Act, 1861:"
The "Pre-emption Purchase Act, 1861:"
The "Pre-emption Consolidation Act, 1861:"
The "Mining District Act, 1863:"
The "Land Ordinance, 1865:"
The "Pre-emption Ordinance, 1866:"
The "Pre-emption Payment Ordinance, 1869:" and
The "Vancouver Island Land Proclamation, 1862:"

Such repeal shall not prejudice or affect any rights acquired or payments due, or forfeitures or penalties incurred prior to the passing of this Ordinance in respect of any land in this Colony.

PRE-EMPTION.

3. From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (*not being an Indian settlement*) not exceeding three hundred and twenty acres in extent in that portion of the Colony situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Colony. *Provided that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent*, except to such as shall have obtained the Governor's special permission in writing to that effect.

. . . . .

42. The Governor shall at any time, and for such purposes as he may deem advisable, reserve, by notice published in the Government Gazette, or in any newspaper of the Colony, any lands that may not have been either sold or legally pre-empted.

(The emphasis is mine.)

The various pieces of legislation referred to above are connected, and in many instances contain references *inter se*, especially XIII. They extend back well prior to November 19,

1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

It was argued by plaintiffs' counsel that historically the British Crown as a matter of policy and of law has always acknowledged the aboriginal title of the Indian tribes. Cases were cited in support of this, nearly all such arising out of the interpretation of treaties or contracts. As stated earlier herein, there never has been any treaty or contract with reference to the delineated area. So how does one ascertain what has been the policy of the British Crown as to these lands? There is no more emphatic or unequivocal way of enunciating policy as to a particular subject-matter than by enacting competent legislation as to that very subject-matter, and that is what has happened in this instance: *Vide* I to XIII. What may have been the policy of the Crown Imperial as to other lands is irrelevant in the face of specific legislation as to these lands (I to XIII). In result I find that, if there ever was such a thing as aboriginal or Indian title in, or any right analogous to such over, the delineated area, such has been lawfully extinguished *in toto*. It is not necessary to explore what "aboriginal title, otherwise known as the Indian title" may mean, or in earlier times may have meant, in a different context. Lord Watson, for the Privy Council, in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at p. 55, said:

> There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished.

It should be noted that in the *St. Catherine's* case the lands in question, the territory over which certain of the Ojibway

Indian tribes historically had hunted and fished, were within the *Proclamation of 1763*, and further the subject of a specific Indian land treaty of October 3, 1873. On the latter date the Ojibways had something to treat about — their rights under the *Proclamation of 1763*. In the instant case sovereignty over the delineated lands came by exploration of *terra incognita* (see *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543), no acknowledgment at any time of any aboriginal rights, and specific dealings with the territory so inconsistent with any Indian claim as to constitute the dealings themselves a denial of any Indian or aboriginal title. As the Crown had the absolute right to extinguish, if there was anything to extinguish, the denial amounts to the same thing, *sans* the admission that an Indian or aboriginal title had ever existed. There is nothing to suggest that any ancient rights, if such had ever existed prior to 1871 and had been extinguished, were revived by British Columbia's entry into Confederation and becoming subject to the *B.N.A. Act, 1867*.

It is convenient here to deal with the third preliminary objection of defendant referred to earlier, that this matter required the granting of a fiat as a prerequisite to adjudication. In the light of opinions already expressed it is not necessary to decide on this question so interestingly argued by both counsel. It is not the usual judicial course to decide on the merits and then deal with the preliminary objections, but I think the comity of our Courts as an institution would have suffered had these plaintiffs been told judicially that their clearly enunciated claim would get no adjudication because it had been brought in the wrong forum.

In result the declaration sought is denied. There will be no costs, pursuant to the *Crown Costs Act*, R.S.B.C. 1960, c. 87, of this Province.

One would have to be self-blinded to the events and attitudes of the day to ignore the fact that this litigation is of great concern, and this judgment a deep distress, to the Indian peoples of British Columbia. I take the judicial liberty of recording my opinion that should the Nishgas wish to appeal this judgment, the cost of preparing the appeal books, because of the historical documents germane to the issue, would amount to a sum probably beyond their financial resources. The same sum, in the context of the Provincial Treasury, would be insignificant.

Action dismissed.

608, 51 S. Ct. 286; New Jersey v. New York, 283 U. S. 336, 342, 343, 75 L. ed. 1104-1106, 51 S. Ct. 478; Washington v. Oregon, 297 U. S. 517, 528, 80 L. ed. 837, 843, 56 S. Ct. 540. Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.[12]

It has been suggested that this Court lacks jurisdiction to determine the validity and effect of the Compact because Colorado and New Mexico, the par-

Headnote 18

*[111]

ties to it, are not *parties to this suit and cannot be made so. The contention is unsound. The cases are many where title to land dependent upon the boundary between States has been passed upon by this Court upon review of judgments of federal and of State courts in suits between private litigants.[13]

Reversed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

UNITED STATES, Petitioner,
v.
SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

(304 U. S. 111-118.)

Indians, § 52 — ownership of minerals and timber on reservation.

1. In determining the compensation to which an Indian tribe is entitled for the taking by the United States, without the tribe's consent, of reservation lands of which, under treaty, the tribe was to have "absolute and undisturbed use and occupation," the timber and mineral resources are properly to be taken into consideration, even though the legal title to the reservation is in the United States and the Indian right is a right of use and occupation.

Appeal, § 1044 — resort to opinion to supplement findings.

2. On appeal from a determination of the Court of Claims its opinion may not be referred to for the purpose of eking out, controlling, or modifying the scope of the findings.

Indians, § 28 — treaties — construction — "absolute and undisturbed use and occupation."

3. The phrase "absolute and undisturbed use and occupation" in a treaty between an Indian tribe and the United States which provides that the tribe shall

[12] Cissna v. Tennessee, 246 U. S. 289, 295, 62 L. ed. 720, 725, 38 S. Ct. 306; compare Rust Land & Lumber Co. v. Jackson, 250 U. S. 71, 76, 63 L. ed. 850, 852, 39 S. Ct. 424. In Howard v. Ingersoll, 13 How. 381, 14 L. ed. 189, this Court reversed the Supreme Court of Alabama's decision locating the Alabama-Georgia boundary, which depended upon the construction of a cession of territory by Georgia to the United States in 1802. Compare Coffee v. Groover, 123 U. S. 1, 31 L. ed. 51, 8 S. Ct. 1. The decisions are not uniform as to whether the interpretation of an interstate compact presents a Federal question. Compare New York v. Central R. Co. 12 Wall. 455, 20 L. ed. 458, with Wedding v. Meyler, 192 U. S. 573, 48 L. ed. 570, 24 S. Ct. 322, 66 L.R.A. 833, and Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669, 14 S. Ct. 783.

[13] Compare Handly v. Anthony, 5 Wheat. 374, 5 L. ed. 113; Howard v. Ingersoll, 13 How. 381, 14 L. ed. 189; Poole v. Fleeger, 11 Pet. 185, 9 L. ed. 680; Coffee v. Groover, 123 U. S. 1, 31 L. ed. 51, 8 S. Ct. 1; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 S. Ct. 337; Moore v. McGuire, 205 U. S. 214, 51 L. ed. 776, 27 S. Ct. 483; Cissna v. Tennessee, 246 U. S. 289, 62 L. ed. 720, 38 S. Ct. 306; Marine R. & Coal Co. v. United States, 257 U. S. 47, 66 L. ed. 124, 42 S. Ct. 32; Smoot Sand & Gravel Corp. v. Washington Airport, 283 U. S. 348, 75 L. ed. 1109, 51 S. Ct. 474.

have "absolute and undisturbed use and occupation" of lands reserved, is to be read with other parts of the document, having regard to the purpose of the arrangement made, the relation between the parties, and the settled policy of the United States fairly to deal with Indian tribes.

Indians, § 28 — treaties — construction — liberal interpretation.

4. Treaties between the United States and Indian tribes are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.

Indians, § 29 — treaties — ambiguities to be resolved in favor of Indians.

5. In interpreting a treaty between the United States and an Indian tribe, any doubts as to the ownership of lands, or minerals or timber on lands reserved to the tribe, should be resolved in favor of the tribe.

Former decision distinguished.

6. United States v. Cook, 19 Wall. 591, 22 L. ed. 210, distinguished.

[No. 668.]

Argued March 31 and April 1, 1938. Decided April 25, 1938.

ON WRIT of Certiorari to the Court of Claims of the United States to review a judgment awarding compensation to the Shoshone Tribe of Indians of the Wind River Reservation for a part of its reservation taken by the United States. Affirmed.

See same case below, 85 Ct. Cl. 331.

Assistant Attorney General Carl McFarland, of Washington, D. C., argued the cause, and, with Solicitor General Jackson and Messrs. Oscar Provost and Raymond M. Kell, also of Washington, D. C., filed a brief for petitioner:

The Shoshone Tribe's right to use and occupy the lands of the reservation did not include the ownership of the timber and minerals.

United States v. Cook, 19 Wall. 591, 22 L. ed. 210; Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 46 L. ed. 1164, 22 S. Ct. 920; United States v. Paine Lumber Co. 206 U. S. 467, 51 L. ed. 1139, 27 S. Ct. 697; Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 553, 48 L. ed. 788, 791, 24 S. Ct. 538; Chas. Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 562, 69 L. ed. 785, 788, 45 S. Ct. 441; Barney v. Winona & St. P. R. Co. 117 U. S. 228, 231, 29 L. ed. 858, 859, 6 S. Ct. 654; Shiver v. United States, 159 U. S. 491, 498, 40 L. ed. 231, 233, 16 S. Ct. 54; Spalding v. Chandler, 160 U. S. 394, 402, 40 L. ed. 469, 472, 16 S. Ct. 360; Jones v. Meehan, 175 U. S. 1, 8, 44 L. ed. 49, 52, 20 S. Ct. 1; Minnesota v. Hitchcock, 185 U. S. 373, 398, 46 L. ed. 954, 967, 22 S. Ct. 650; Williams v. Chicago, 242 U. S. 434, 438, 61 L. ed. 414, 418, 37 S. Ct. 142; Shore v. Shell Petroleum Corp. (C. C. A. 10th) 60 F. (2d) 1, 3, 4; Annotations in 21 A.L.R. 1002; 43 A.L.R. 811; and 46 A.L.R. 1205; Re Oertle, 34 Minn. 173, 24 N. W. 924, 57 Am. Rep. 48; Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195, 54 L. ed. 725, 727, 30 S. Ct. 459; Schulenberg v. Harriman, 21 Wall. 44, 64, 22 L. ed. 551, 555; United States v. Creek Nation, 295 U. S. 103, 109, 110, 79 L. ed. 1331, 1335, 1336, 55 S. Ct. 681; Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083, 47 S. Ct. 611.

A right of the character enjoyed by respondent is possessory only.

Johnson v. M'Intosh, 8 Wheat. 543, 573, 5 L. ed. 681, 688; Fletcher v. Peck, 6 Cranch, 87, 142, 3 L. ed. 162, 179; Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Brown v. Belmarde, 3 Kan. 41, 48; Portage City Case, 8 Ops. Atty. Gen. 255, 262; Buttz v. Northern P. R. Co. 119 U. S. 55, 67, 30 L. ed. 330, 335, 7 S. Ct. 100.

The treaty did not enlarge respondent's original right.

Spalding v. Chandler, 160 U. S. 394, 402, 403, 40 L. ed. 469, 472, 473, 16 S. Ct. 360; Nadeau v. Union P. R. Co. 253 U. S. 442, 446, 64 L. ed. 1002, 1006, 40 S. Ct. 570; Mitchel v. United States, 9 Pet. 711, 752, 9 L. ed. 283, 298; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 S. Ct. 531; Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 412, 48 L. ed. 1039, 1045, 24 S. Ct. 676; Alaska

Pacific Fisheries v. United States, 248 U. S. 78, 63 L. ed. 138, 39 S. Ct. 40; Winters v. United States, 207 U. S. 564, 52 L. ed. 340, 28 S. Ct. 207; Conrad Invest. Co. v. United States (C. C. A. 9th) 161 F. 829.

Indian tenure is one of occupancy alone, and not the "full ownership."

Pharaoh v. Benson, 69 Misc. 241, 126 N. Y. S. 1035, 164 App. Div. 51, 149 N. Y. S. 438; Brown v. Belmarde, 3 Kan. 41, 48; Den ex dem. Strother v. Cathey, 5 N. C. (1 Murph.) 162, 3 Am. Dec. 683; Brown v. Smathers, 188 N. C. 166, 172, 126 S. E. 22; United States v. Berrigan, 2 Alaska, 442; United States v. Cadzow, 5 Alaska, 125; State v. Towessnute, 89 Wash. 478, 481, 154 P. 805.

Messrs. George M. Tunison and Albert W. Jefferis, both of Omaha, Nebraska, argued the cause, and, with Mr. Charles J. Kappler, of Washington, D. C., filed a brief for respondent:

The aboriginal Indian estate was absolute, subject only to the pre-emption right of purchase acquired by the United States, the holder of the fee, as successor of Great Britain, France, and Spain.

31 C. J. Indians, p. 497, § 43; Fletcher v. Peck, 6 Cranch, 87, 143, 3 L. ed. 162, 180; Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L. ed. 25, 31; Worcester v. Georgia, 6 Pet. 515, 544, 559, 8 L. ed. 483, 495, 500; Mitchel v. United States, 9 Pet. 711, 756, 9 L. ed. 283, 299; Chouteau v. Molony, 16 How. 203, 238, 14 L. ed. 905, 920; Holden v. Joy, 17 Wall. 211, 21 L. ed. 523.

The right which Indians hold in lands embraced within a reservation, in the absence of additional treaty stipulation, is that of possession and occupancy, the fee being in the government. Where Indians hold by grant, their title does not depend upon aboriginal possession, but its nature and extent are measured by the terms of the grant.

United States v. Minnesota, 270 U. S. 181, 70 L. ed. 539, 46 S. Ct. 298; United States v. Celestine, 215 U. S. 278, 285, 54 L. ed. 195, 197, 30 S. Ct. 93; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Beecher v. Wetherby, 95 U. S. 517, 525, 24 L. ed. 440, 441; United States v. Brindle, 110 U. S. 688, 693, 28 L. ed. 286, 288; 31 C. J. Indians, p. 499; Bowser v. Wescott, 145 N. C. 56, 58 S. E. 748; Strother v. Lucas, 12 Pet. 410, 435, 9 L. ed. 1137, 1146; Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 S. Ct. 16; Jones v. Meehan, 175 U. S. 1, 23, 44 L. ed. 49, 58, 20 S. Ct. 1; Winters v. United States, 207 U. S. 564, 576, 52 L. ed. 340, 346, 28 S. Ct. 207; United States v. Nice, 241 U. S. 591, 599, 60 L. ed. 1192, 1195, 36 S. Ct. 696; Yankton Sioux Tribe v. United States, 272 U. S. 351, 353, 354, 359, 71 L. ed. 294–296, 298, 47 S. Ct. 142; Shoshone Tribe v. United States, 299 U. S. 476, 496, 498, 81 L. ed. 360, 368, 370, 57 S. Ct. 244; Chippewa Indians v. United States, 301 U. S. 358, 375, 376, 81 L. ed. 1156, 1166, 1167, 57 S. Ct. 826; United States v. McGowan, 302 U. S. 535, ante, 410, 58 S. Ct. 286.

Minerals and standing timber are tribal land.

British-American Oil Producing Co. v. Board of Equalization, 299 U. S. 159, 164, 81 L. ed. 95, 97, 57 S. Ct. 132; Noonan v. Caledonia Gold Min. Co. 121 U. S. 393, 30 L. ed. 1061, 7 S. Ct. 911; Kendall v. San Juan Silver Min. Co. 144 U. S. 658, 36 L. ed. 583, 12 S. Ct. 779; United States v. Cook, 19 Wall. 591, 593, 22 L. ed. 210, 211.

If the 1868 Treaty was not a grant in fee simple, it was at least a present grant to the tribe of the complete equitable estate in the reservation lands.

66 C. J. Use, p. 68; Re Scharmann, 63 Misc. 640, 642, 118 N. Y. S. 687; Cuyler v. Bradt, 2 Cai. Cas. 326, 332; Nease v. Capehart, 8 W. Va. 95, 105; Hutchins v. Heywood, 50 N. H. 491, 495; 1 Pom. Eq. Jur. 4th ed. § 147; Credit Finance Corp. v. Hale & Perry, (C. C. A 10th) 66 F. (2d) 357.

Treaties with Indian tribes are to be construed in the sense naturally understood by the Indians. Doubtful expressions in statutes are to be resolved in favor of the Indians.

Jones v. Meehan, 175 U. S. 1, 11, 44

L. ed. 49, 54, 20 S. Ct. 1; Seufert Bros. Co. v. United States, 249 U. S. 194, 63 L. ed. 555, 39 S. Ct. 203; Starr v. Long Jim, 227 U. S. 613, 57 L. ed. 670, 33 S. Ct. 358; United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 S. Ct. 662; Northern P. R. Co. v. United States, 227 U. S. 355, 57 L. ed. 544, 33 S. Ct. 368; Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 S. Ct. 75; United States v. Payne, 264 U. S. 446, 448, 68 L. ed. 782, 783, 44 S. Ct. 352; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; United States v. Choctaw Nation, 179 U. S. 494, 535, 45 L. ed. 291, 307, 21 S. Ct. 149; Whitney v. Robertson, 124 U. S. 190, 31 L. ed. 386, 8 S. Ct. 456; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Choate v. Trapp, 224 U. S. 665, 675, 56 L. ed. 941, 946, 32 S. Ct. 565; Alaska Pacific Fisheries v. United States, 248 U. S. 78, 89, 63 L. ed. 138, 141, 39 S. Ct. 40; United States v. Nice, 241 U. S. 591, 60 L. ed. 1192, 36 S. Ct. 696.

Mr. Justice Butler delivered the opinion of the Court.

The Shoshone Tribe brought this suit to recover the value of part of its reservation taken by the United States by putting upon it, without the tribe's consent, a band of Arapahoe Indians. The Court of Claims found the taking to have been in August, 1891, ascertained value as of that date, on that basis fixed the amount of compensation, and gave judgment accordingly. We held, 299 U. S. 476, 81 L. ed. 360, 57 S. Ct. 244, that the court erred as to the date of the taking, declared it to have been March 19, 1878, reversed the judgment and remanded the case for further proceedings. Then the lower court proceeded to determine the value of the tribe's right at the time of the taking, and the amount to be added to produce the present worth of the money equivalent of the property, paid contemporaneously with the taking. It heard evidence, made additional findings, and gave plaintiff judgment for $4,408,444.23, with interest from its date until paid. This Court granted writ of certiorari. 303 U. S. 629, ante, 1090, 58 S. Ct. 609.

*[113]

*The sole question for decision is whether, as the United States contends, the Court of Claims erred in holding that the right of the tribe included the timber and mineral resources within the reservation. Headnote 1

The findings show: The United States, by the treaty of July 2, 1863 [18 Stat. at L. 685], set apart for the Shoshone Tribe a reservation of 44,672,000 acres located in Colorado, Utah, Idaho and Wyoming. By the treaty of July 3, 1868 [15 Stat. at L. 673], the tribe ceded that reservation to the United States. And by it the United States agreed that the "district of country" 3,054,182 acres definitely described "shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians . . . , and the United States now solemnly agrees that no persons," with exceptions not important here, "shall ever be permitted to pass over, settle upon, or reside in" that territory. The Indians agreed that they would make the reservation their permanent home. The treaty provided that any individual member of the tribe having specified qualifications, might select a tract within the reservation which should then cease to be held in common, and be occupied and held in the exclusive possession of the person selecting it, and of his family, while he or they continued to cultivate it. It declared: " . . . Congress shall provide for protecting the rights of the Indian settlers . . . and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservation, and the internal police thereof, as may be thought proper."

The treaty emphasized the importance of education: the United

States agreed to provide a schoolhouse and teacher for every thirty children, and the tribe promised to send the children to school. The United States also agreed to provide instruction by a farmer for members

*[114]

*cultivating the soil, clothing for members of the tribe, and a physician, carpenter, miller, engineer and blacksmith. It stipulated that no treaty for the cession of any portion of the reservation held in common should be valid as against the Indians, unless signed by at least a majority of all interested male adults; and that no cession by the tribe should be construed to deprive any member of his right to any tract of land selected by him.

When the treaty of 1868 was made, the tribe consisted of full-blood blanket Indians, unable to read, write, or speak English. Upon consummation of the treaty, the tribe went, and has since remained, upon the reservation. It was known to contain valuable mineral deposits—gold, oil, coal and gypsum. It included more than 400,000 acres of timber, extensive well-grassed bench lands and fertile river valleys conveniently irrigable. It was well protected by mountain ranges and a divide, and was the choicest and best-watered portion of Wyoming.

In 1904 the Shoshones and Arapahoes ceded to the United States 1,480,000 acres to be held by it in trust for the sale of such timber lands, timber and other products, and for the making of leases for various purposes. The net proceeds were to be credited to the Indians. From 1907 to 1919 there were allotted to members of the tribes 245,058 acres.

The court's finding of the ultimate fact is: "The fair and reasonable value of a one-half undivided interest of the Shoshone or Wind River Reservation of a total of 2,343,540 acres, which was taken by the United States on March 19, 1878, from the Shoshone Tribe of Indians for the Northern Arapahoe Tribe, was, on March 19, 1878, $1,581,889.50." That is $1.35 per acre for 1,171,770 acres, one-half of the reservation in 1878, at the time of taking. The United States does not challenge the

*[115]

principle or *basis upon which the court determined the amount to be added to constitute just compensation.

The substance of the Government's point is that in fixing the value of the tribe's right, the lower court included as belonging to the tribe substantial elements of value, ascribable to mineral and timber resources, which in fact belonged to the United States.

It contends that the Shoshones' right to use and occupy the lands of the reservation did not include the ownership of the timber and minerals and that the *opinion* of the court below departs from the general principles of law regarding Indian land tenure and the uniform policy of the Government in dealing with Indian tribes. It asks for reversal with "directions to determine the value of the Indians' right of use and occupancy but to exclude therefrom 'the net value of the lands' and 'the net value of any timber or minerals.'"

The findings are unambiguous; there is no room for construction. The opinion of the Court of Claims may not be referred to for the purpose of eking out, controlling, or modifying the scope of the findings. Stone v. United States, 164 U. S. 380, 383, 41 L. ed. 477, 478, 17 S. Ct. 71; Luckenbach S. S. Co. v. United States, 272 U. S. 533, 539, 540, 71 L. ed. 394, 397, 47 S. Ct. 186. Cf. American Propeller & Mfg. Co. v. United States, 300 U. S. 475, 479, 480, 81 L. ed. 751, 754, 755, 57 S. Ct. 521.

Headnote 2

In this case we have held, 299 U. S. 476, 484, 81 L. ed. 360, 362, 57 S. Ct. 244, that the tribe had the right of occupancy with all its beneficial incidents; that, the right of occupancy being the primary one and as sacred as the fee, division by the United States of the Shoshones' right with the Arapahoes was an ap-

propriation of the land pro tanto; that although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just

*[116]

compensation to the tribe, *for that would be, not the exercise of guardianship or management, but confiscation.

It was not then necessary to consider, but we are now called upon to decide, whether, by the treaty, the tribe acquired beneficial ownership of the minerals and timber on the reservation. The phrase "absolute and undisturbed use and occupation" is to

Headnote 3

be read, with other parts of the document, having regard to the purpose of the arrangement made, the relation between the parties, and the settled policy of the United States fairly to deal with Indian tribes. In treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as

Headnote 4

sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them. Worcester v. Georgia, 6 Pet. 515, 582, 8 L. ed. 483, 508; Jones v. Meehan, 175 U. S. 1, 11, 44 L. ed. 49, 54, 20 S. Ct. 1; Starr v. Long Jim, 227 U. S. 613, 622, 623, 57 L. ed. 670, 674, 675, 33 S. Ct. 358.

The principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the defined district of country. To that end the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity. Minerals and standing timber are constituent elements of the land itself. United States v. Cook, 19 Wall. 591, 22 L. ed. 210; British-American Oil Producing Co. v. Board of Equalization, 299 U. S. 159, 164, 165, 81 L. ed. 95, 97, 98, 57 S. Ct. 132. For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 742, 743, 23 L. ed. 634, 638; Beecher v. Wetherby, 95 U. S. 517, 525, 24 L. ed. 440, 441. The right of perpetual and exclusive occupancy of the land is not less valuable

*[117]

than full title in fee. See *Holden v. Joy, 17 Wall. 211, 244, 21 L. ed. 523, 534; Western U. Teleg. Co. v. Pennsylvania R. Co. et al., 195 U. S. 540, 557, 49 L. ed. 312, 318, 25 S. Ct. 133, 1 Ann. Cas. 517.

The treaty, though made with knowledge that there were mineral deposits and standing timber in the reservation, contains nothing to suggest that the United States intended to retain for itself any beneficial interest in them. The words of the grant, coupled with the Government's agreement to exclude strangers, negative the idea that the United States retained beneficial ownership. The grant of right to members of the tribe severally to select and hold tracts on which to establish homes for themselves and families, and the restraint upon cession of land held in common or individually, suggest beneficial ownership in the tribe. As transactions between a guardian and his wards are to

Headnote 5

be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe. The cession in 1904 by the tribe to the United States in trust reflects a construction by the parties that supports the tribe's claim, for if it did not own, creation of a trust to sell or lease for its benefit would have been unnecessary and inconsistent with the rights of the parties.

Although the United States re-

tained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. Cherokee Nation v. Georgia, 5 Pet. 1, 48, 8 L. ed. 25, 42; Worcester v. Georgia, supra (6 Pet. 580, 8 L. ed. 508). Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial. Provisions in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with

*[118]

other parts of the *treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation. Ownership of the land would further that purpose. In the absence of definite expression of intention so to do, the United States will not be held to have kept it from them. The authority of the United States to prescribe title by which individual Indians may hold tracts selected by them within the reservation, to pass laws regulating alienation and descent and for the government of the tribe and its people upon the reservation detracts nothing from the tribe's ownership, but was reserved for the more convenient discharge of the duties of the United States as guardian and sovereign.

United States v. Cook, 19 Wall. 591, 22 L. ed. 210, supra, gives no

Headnote 6

support to the contention that in ascertaining just compensation for the Indian right taken, the value of mineral and timber resources in the reservation should be excluded. That case did not involve adjudication of the scope of Indian title to land, minerals or standing timber, but only the right of the United States to replevin logs cut and sold by a few unauthorized members of the tribe. We held that, as against the purchaser from the wrongdoers, the United States was entitled to possession. It was not there decided that the tribe's right of occupancy in perpetuity did not include ownership of the land or mineral deposits or standing timber upon the reservation, or that the tribe's right was the mere equivalent of, or like, the title of a life tenant.

The lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation.

Affirmed.

Mr. Justice Stone and Mr. Justice Cardozo took no part in the consideration or decision of this case.

Mr. Justice Reed dissents.

---

*[119]

*UNITED STATES, Appellant,

v.

KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS.

(304 U. S. 119–126.)

Indians, § 52 — ownership of timber on reservation.

1. In determining the compensation to which Indian tribes are entitled for the taking by the United States without their consent of lands reserved to them by treaty out of country held by them in immemorial possession, the value of timber thereon is properly taken into consideration.

Interest, § 32 — allowability on Indian claim against United States.

2. Compensation to which Indian tribes are entitled for the taking of reservation lands by the United States in exchanging unallotted lands for allotted lands granted by the United States by

ANNOTATION REFERENCES.

1. As to liability of United States for interest generally, see annotation in 73 L. ed. 170.

2. As to power of Congress over Indians, see annotation in 8 L. ed. 484.

the sale ratified and confirmed, and the cause remanded to the special term "for further proceedings." When the case got back to the special term Kendall moved a reference to an auditor to make distribution of the proceeds of the sale: but while this motion was pending, and before anything else was done, Dainese took this appeal.

From this statement it is apparent that the decree appealed from is not a final decree within the meaning of that term as used in the statute allowing appeals to this court. The litigation of the parties on the merits of the case has not been terminated. An account of the rents collected by Kendall while in possession has not been taken; and the amounts due Dainese and Kendall respectively on the notes which they severally hold have not been ascertained. All this is necessary for the purposes of the relief asked for in the bill, and the cause was sent back from the general term for further proceedings on that account. The authorities are uniform to the effect that a decree to be final for the purposes of an appeal must leave the case in such a condition that if there be an affirmance here, the court below will have nothing to do but to execute the decree it has already entered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 [Bk. 27, L. ed. 73]; *Grant* v. *Phœnix Ins. Co.* 106 U. S. 431 [27: 238]; *St. Louis, etc. R. R. Co.* v. *Southern Exp. Co.*, 108 U. S. 28 [27: 639]; *Ex parte Norton*, 108 U. S. 242 [27: 711]; *Mower* v. *Fletcher*, 114 U. S. 127 [Bk. 29, L. ed. 117].

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHOCTAW NATION, *Appt.*

v.

UNITED STATES.

UNITED STATES, *Appt.*,

v.

CHOCTAW NATION.

(See S. C. Reporter's ed. 1-44.)

Settlement of all questions of difference between the Choctaw Nation and the United States—construction of treaties and statutes—Senate award under Treaty of 1855.

1. The award made by the Senate of the United States under the Treaty of 1855, between the United States and the Choctaw Nation, was within the submission, and was not invalid for uncertainty or want of proper notice.

2. Under the Act of 1881, conferring jurisdiction upon the court below to review the entire question of differences between the Choctaw Nation and the United States *de novo*, said award, though not conclusive, may be given effect as *prima facie* establishing the validity of the claim so far adjudged in favor of the Choctaw Nation.

3. In view of the peculiar relations of the parties, and without regard to technical rules, this court holds, upon a review of the questions of difference between them *de novo*, that the principle of settlement adjudged by the Senate in its said award, allowing said Choctaw Nation the net proceeds of its lands in Mississippi ceded by the Treaty of 1830 to the United States, furnishes the nearest approximation to the justice and right of the case that, after this lapse of time, it is practicable for a judicial tribunal to reach.

4. In addition to the amount of said award, less the payment under the Act of March 2, 1861, said Choctaw Nation is entitled to the amount of certain unpaid annuities, and to the value of certain of its lands taken by mistake in fixing the boundary of the State of Arkansas by the Act of March 3, 1875.

[Nos. 848, 850.]

Argued Oct. 19, 20, 21, 1886. Decided Nov. 15, 1886.

APPEALS from the Court of Claims. *Reversed.*

Statement of the case by *Mr. Justice* **Matthews:**

There are two appeals in this case, one by the Choctaw Nation, and the other by the United States, from a judgment rendered by the court of claims in favor of the former for the sum of $408,120.32. Jurisdiction of the cause was conferred upon that court by the provisions of an Act of Congress approved March 3, 1881, 21 Stat. at L. 504, entitled "An Act for the Ascertainment of the Amount Due the Choctaw Nation," as follows:

"That the court of claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon; power is hereby granted the said court to review the entire question of differences *de novo*, and it shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the Treaty of eighteen hundred and fifty-five; and the Attorney-General is hereby directed to appear in behalf of the Government; and if said court shall decide against the United States, the Attorney-General shall, within thirty days from the rendition of judgment, appeal the cause to the Supreme Court of the United States; and from any judgment that may be rendered the said Choctaw Nation may also appeal to said supreme court: *Provided*, The appeal of said Choctaw Nation shall be taken within sixty days after the rendition of said judgment, and the said courts shall give such cause precedence.

"Sec. 2. Said action shall be commenced by a petition stating the facts on which said Nation claims to recover, and the amount of its claim; and said petition may be verified by either of the authorized delegates of said Nation as to the existence of such facts, and no other statements need be contained in said petition or verification."

In pursuance of this Act, the Choctaw Nation filed its original petition on the 13th of June, 1881, which was subsequently amended by new pleadings filed February 26, 1884. The questions of difference between the United States and the petitioner, it was alleged, resulted from the nonperformance and nonfulfillment by the United States of the obligations assumed by it under various treaties between the United States and the Choctaw Nation, including those of the following dates, to wit: the 18th day of October, 1820, the 20th day of January, 1825, the 27th day of September, 1830, the 22d day of June 1855, and the 28th day of April, 1866.

By the terms of the Treaty of October 18, 1820, 7 Stat. at L. 210, it was provided,

amongst other things, that the Choctaw Nation did cede to the United States all that part of its lands situated in the State of Mississippi described in the first article of the Treaty; in consideration whereof the United States stipulated that in part satisfaction for the said cession the United States ceded to the Choctaw Nation a tract of country west of the Mississippi River, situated between the Arkansas and Red Rivers, the boundaries of which were therein described; and also that the boundaries thereby established between the Choctaw Indians and the United States, east of the Mississippi River, should remain without alteration until the period at which the Nation should become so civilized and enlightened as to be made citizens of the United States. It was agreed that Congress should lay off a limited parcel of land for the benefit of each family or individual in the Nation; that all those who had separate settlements falling within the limits of the land ceded by the Choctaw Nation to the United States, and who desired to remain there, should be secured in a tract or parcel of land one mile square, to include their improvements; and that those preferring to remove within one year from the date of the Treaty should be paid their full value, including the value of any improvements.

It is alleged in the petition that, by the Treaties of January 20, 1825, of September 27, 1830, and of June 22, 1855, the boundary line between the lands of the United States and the Choctaws west of the Mississippi River was established; but that the United States, in fixing and causing to be surveyed the said boundary line, did not pursue the line in accordance with the provisions of the said Treaties, but encroached upon and took from the lands ceded to the Choctaw Nation a quantity of land amounting to 186,204.02 acres, which by the legislation of the United States, in violation of these provisions of the Treaties, became a part of the public domain of the United States, for which the Choctaw Nation are entitled to recover their value, estimated at $167,896.57.

The petition further states that, in the Treaty concluded on the 27th of September, 1830, called the Treaty of Dancing Rabbit Creek, it was provided, among other things, by the third article thereof, 7 Stat. at L. 333, that the Choctaw Nation should and did thereby cede to the United States the entire country they then owned and possessed east of the Mississippi River, and agreed to remove beyond the Mississippi River as early as practicable; and that, in pursuance of this Treaty the Choctaw Nation surrendered to the United States all the remaining lands at that time owned by them in the State of Mississippi, amounting, as is alleged, to 10,423,139 acres, and, in compliance with the Treaty on their part, commenced to remove, and did remove, within the time stipulated therein, or within a reasonable time thereafter, from the said lands to the lands purchased and acquired by them under the terms of the Treaty of October 18, 1820.

By the 14th article of the Treaty of September 27, 1830, it was provided that each Choctaw head of a family, being desirous to remain and become a citizen of the States, should be permitted to do so by signifying his intention to the agent within six months of the ratification of the Treaty, and thereupon should be entitled to a reservation of one section of 640 acres of land, to be bounded by sectional lines of survey: and in like manner should be entitled to one half that quantity for each unmarried child living with him over ten years of age, and a quarter section for each child that might be under ten years of age, to adjoin the location of the parent. If they resided upon such lands, intending to become citizens of the States, for five years after the ratification of the Treaty, a grant in fee simple should issue. Such reservation should include the present improvement of the head of the family, or a portion of it, and the persons who claimed under the article were not to lose the privilege of Choctaw citizenship.

It is alleged in the petition that 1,585 heads of Choctaw families signified their intention to remain on their lands in Mississippi and become citizens under this article of the Treaty; and that, although they substantially complied with all its requirements and conditions, and thereby became entitled to grants of land in fee simple, as specified in the article, yet but 143 such families ever received from the United States their title to the lands guaranteed them by the article, leaving 1,442 of the said Choctaw heads of families entitled to a grant of their lands in fee simple, under the provisions of said article 14, whose claims had not been satisfied.

It is alleged in the petition that the lands to which these families were entitled amounted to 1,672,760 acres, which were reasonably worth, with the improvements, $5.50 an acre, and that the value of the whole was $9,200,180.

It is further alleged in the petition that the United States, having failed to secure to each Choctaw head of a family the reservation secured under article 14 of the Treaty of 1830, subsequently, by an Act of Congress approved August 23, 1842, 5 Stat. at L. 513, attempted to provide compensation for the same by the issue and delivery of certificates or scrip, which authorized those entitled to such reservations, or their assignees, to enter any of the public lands subject to entry at private sale in the States of Mississippi, Alabama, Louisiana, or Arkansas, which certificates or scrip they were required by said Act to receive and accept in full satisfaction of all their claims or demands against the United States under said article 14.

It is further alleged in the petition that 292 of the 1,442 Choctaw heads of families, entitled to grants in fee simple under article 14 of the Treaty of 1830, have never received any such grants in fee simple, or any allowance or compensation whatever for the same. The claims of 1,150 of said 1,442 heads of families were adjudicated and allowed under the Act of August 23, 1842, and certificates or scrip awarded to them under the provisions of said Act, authorizing the entry of 1,399,920 acres of land, of which there were paid and delivered to the persons entitled to receive the same 3,833 certificates or pieces of scrip, authorizing the entry of 700,080 acres of land. The certificates for the residue of said 1,399,920 acres; to wit, for 699,840 acres, were not issued, but were withheld under an Act of Congress approved March 3, 1845, 5 Stat. at L. 777, which provided that they should carry an interest of 5 per cent,

payable to the claimants or their representatives to be estimated upon $1.25 for each acre of land to which they were entitled. The aggregate amount, or principal sum, thus funded, amounting to $872,000, was afterwards, under an Act of Congress approved July 21, 1852, 10 Stat. at L. 19, paid in money to the claimants; which sum of $872,000 was included in the sum of $1,749,900 subsequently charged to the claimants in an account referred to hereafter, being for 1,399,920 acres of scrip, in lieu of reservations, at $1.25 per acre; of which sum of $1,749,900, $872,000 was paid as aforesaid in money, the residue, $877,900, being charged in said account for the certificates or scrip authorizing the entry of 700,080 acres of land, delivered as aforesaid to the said claimants; for which 700,080 acres in scrip the said claimants were charged at the rate of $1.25 per acre, although, by reason of the acts of the United States and its agents in delivering said scrip at places where it could not be used, the whole amount realized by the claimants was $118,400, and no more. So that the amount chargeable against the Choctaw Nation should have been the sum of $980,400, and is all that should be deducted from the $9,200,180, the estimated value of the lands for which they claim the right to recover in this proceeding.

It is further alleged that, by the sixteenth article of said Treaty, the United States agreed to remove the Choctaws to their new homes; to furnish them with ample corn, beef and pork for twelve months after reaching there; to take all of their cattle at an appraised value, and pay for the same in money; but it is alleged that, between 1834 and 1846, 960 members of the Choctaw Nation emigrated and subsisted for one year without assistance from the United States, for each of which 960 the Choctaw Nation is entitled to recover $54.16⅔ from the United States, making the total amount claimed $51,998.40.

It is further alleged that, under the provisions of article 19 of said Treaty of 1830, four sections of land were reserved to Col. David Folsom, two of which should include his present improvement; two sections each were reserved to eight persons therein named, to include their improvements, and to be bounded by sectional lines, which might be sold with the consent of the President; and for others not otherwise provided for, there was reserved (1) one section to each head of a family, not exceeding forty, who had in actual cultivation fifty acres or more, with a dwelling house thereon; (2) three quarter sections, after the manner aforesaid, to each head of a family, not exceeding 460, who had cultivated between thirty and fifty acres; (3) one half section, as aforesaid, to those, not to exceed 400, who had cultivated from twenty to thirty acres; (4) a quarter section to such, not to exceed 350, as had cultivated from twelve to twenty acres; and half that quantity to such as had cultivated from two to twelve acres, limited to the same number; each class to be so located as to include the improvement containing the dwelling house. These reservations might be sold with the consent of the President of the United States, but should any prefer it, or omit to take such reservation as he might be entitled to, the United States would, upon his removal and arrival at his new home, pay him fifty cents an acre therefor, provided proof of his claim he made before the first of January following.

It is further alleged that said article 19 intended to provide 458,400 acres for 1,600 cultivators, yet in carrying out the Treaty, land was assigned to but 731, amounting in all to 123,680 acres; that the actual number of cultivators of from two to twelve acres at the date of the Treaty was 1,763, instead of 350; that 1,413, therefore, failed to get any land at all, owing to the limitations of said article 19; that while the Treaty intended to provide reservations for 1,600 cultivators, such reservations were assigned to only 731, although the number of actual cultivators was 2,144; that the 1,413 cultivators thus excluded contended that they were justly entitled to the same measure of compensation for their improvements as was allowed to other cultivators of equal grade; to wit, 80 acres to each, amounting to 113,040 acres, worth at that time $339,120; that of the 731 to whom were assigned lands as aforesaid, 143 had never received any land or other benefit intended to be secured by said article 19; 45 of whom relinquished to the United States 6,400 acres of land and never received compensation therefor, and the remaining 98, to whom 15,520 acres of land were assigned, never had any land set apart for them; that the said 143 cultivators were entitled to 21,920 acres, worth the sum of $65,760.

It is further alleged that article 20 of said Treaty of 1830 provided for each warrior who emigrated, a rifle, molds, and ammunition; that 1,458 warriors became entitled to the benefits of article 20, but they were never received by a large number who emigrated; that such articles were worth at that time $13.50 to each warrior, and that the whole amount claimed, by the failure of the United States to carry out the provision of said article 20, was $19,278.

It is further alleged that the Act of Congress making appropriation for the expenses of the Indian Department, and for fulfilling treaty stipulations with the various Indian Tribes, for the year ending June 30, 1846, approved March 3, 1845, 5 Stat. at L. 776, provided as follows:

"That of the scrip which has been awarded, or which shall be awarded, to Choctaw Indians under the provisions of the law of 23d August, 1842, that portion thereof not deliverable East, by the third section of said law, in these words, 'not more than one half of which shall be delivered to said Indian until after his removal to the Choctaw territory west of the Mississippi,' shall not be issued or delivered in the West, but the amounts awarded for land on which they resided, but which it is impossible for the United States now to give them, shall carry an interest of 5 per cent, which the United States will pay annually to the reservees under the Treaty of 1830, respectively, or to their heirs and legal representatives, forever, estimating the land to which they may be entitled at one dollar and twenty-five cents per acre."

That the Choctaw heads of families and their children became entitled to receive scrip for 697,600 acres of land, valued at $872,000; that said Choctaw heads of families, their heirs and legal representatives, became entitled to interest thereon from March 3, 1845; but the United States refused to pay such interest unless the

person entitled to receive it was at the date of the passage of said Act settled in the Choctaw territory west of the Mississippi River, and also refused to pay such interest on scrip issued subsequent to March 3, 1845, until the beneficiary had removed to the Choctaw territory; that those persons for whose benefit the scrip was funded were entitled to interest on such funded scrip from March 3, 1845, until July 21, 1852, but the United States did not pay the interest on such funded scrip between those dates; and that the amount of such interest due from the United States was $305,551, but only $171,400.34 of interest was paid on such scrip, leaving due thereon $134,150.66.

It is further alleged that the Choctaw Nation, by the fourth article of the Treaty of October 18, 1820, was secured in the right to occupy and enjoy forever the lands retained east of the Mississippi River, which were by the provisions of said article to be set apart to each family or member of the Choctaw Nation, when that Nation should become so civilized and enlightened as to be made citizens of the United States; that the United States agreed, by the seventh article of the Treaty of 1825, not to apportion said lands for the benefit of the Choctaw Nation, but with the consent of that Nation; that the legal effect of said article 4 of the Treaty of 1820, and of article 7 of the Treaty of 1825, was to secure to the heads of families and individual members of the Choctaw Nation a title in fee simple to all lands belonging to that Nation not included in the cession made by the Treaty of 1820, but that the United States having, by the Treaty of 1830, disregarded the obligations of said articles 4 and 7, and having paid for said lands ceded by the Choctaw Nation, under the Treaty of 1830, an inadequate consideration, the Choctaw Nation was entitled to be paid by the United States the whole amount of the proceeds resulting from the sale of said lands so ceded.

It is further alleged that the Choctaw Nation, by its Legislative Assembly, on November 9, 1853, created a delegation to settle all unsettled business with the United States; that on the 22d of June, 1855, the United States entered into a Treaty with the Choctaw Nation to settle and adjudicate all matters of difference, claims or demands of that Nation, or individual members thereof; that subsequent to the ratification of said Treaty by the United States, the Senate of the United States entered upon the examination and adjudication of the questions submitted to it by article 11 of that Treaty; whereupon a statement of the claims and demands of the Choctaw Nation upon the United States, with supporting evidence, was presented to the Senate to enable it to give such claims a just, fair and liberal consideration; that after consideration of such claims, the Senate, on the 9th of March, 1859, passed a resolution to allow the Choctaws the proceeds of the sale of such lands as had been sold by the United States on January 1, 1859, deducting therefrom the cost of survey and sale, and all proper expenditures and payments under the Treaty of 1830, excluding the reservations allowed and secured, and estimating the scrip issued in lieu thereof at $1.25 per acre, and that they be allowed 12½ cents per acre for the residue of said lands.

It is further alleged that, in pursuance of said resolution, the Secretary of the Interior caused an account to be stated between the United States and the Choctaw Nation, showing that the United States were indebted to said Nation, on account of the net proceeds of the lands ceded by the Treaty of September, 1830, in the sum of $2,981,247.30.

It is also alleged that, under the Treaty of June 22, 1855, in consideration of the claims heretofore stated, and of the cession and lease of 15,000,000 acres of land, valued at $2,225,000, the United States agreed that all the rights and claims of the Choctaw Nation, and the individuals thereof, and all matters in dispute, should receive a just, fair and liberal consideration and settlement; that by virtue thereof the Choctaw Nation became entitled to a settlement of and payment for all their pending rights and claims, individual and national, free from all waivers or estoppels which might in equity have been interposed against them; and that, by virtue of article 11 of the Treaty of June, 1855, and of the consideration paid to the United States therefor, the Choctaw Nation became entitled, by virtue of article 18 of the Treaty of 1830, whenever well founded doubts should arise, to have said Treaty construed most favorably toward the Choctaws.

In said petition the Choctaw Nation prays that the award of the Senate of the United States be made final, and that the account stated by the Secretary of the Interior may be restated, in order that the balance due may be determined and the following errors corrected: that the proceeds of the lands sold up to January 1, 1859, and the residue then remaining unsold, at 12½ cents per acre, amounted to $8,413,418.61, instead of $8,078,614.80; that the actual cost of survey and sale was $256,387.74, instead of $1,042,313.96; that the sum of $120,826.76 for reservations to orphans was not deducted, included in or connected with the aggregate fund against which it is charged in said account; that there should not have been deducted from said aggregate fund the payments made to meet contingent expenses of the commissioners appointed to adjust claims under the 14th article of the Treaty of September, 1830, amounting to $51,320.79, nor the expenses growing out of the location and sale of Choctaw reservations, and perfecting titles to the same, amounting to $21,408.36; that the correction of the foregoing errors would show a balance payable to the Choctaw Nation, under the award of the Senate, of $4,295,533.24, instead of $2,981,247.30; for which sum the Choctaw Nation prays judgment, after deducting $250,000 paid on account of said award under the Act of March 2, 1861, and the further sum of $250,000 in bonds appropriated by said Act; and also prays that interest be allowed on this latter sum at 6 per centum per annum from March 2, 1861, until paid.

It is further alleged that, under the Act of Congress approved March 2, 1861, the Choctaw Nation became entitled to receive from the United States $250,000 in bonds bearing interest at 6 per centum per annum, as a payment on

account of said award of the Senate of the United States; that the issue and delivery of said bonds was demanded by the Choctaw Nation in April, 1861, but said bonds were not and never have been issued and delivered to it, nor has it received from the United States any payment of money in lieu of said bonds; that said Choctaw Nation claims from the United States on account of said award the said sum of $250,000, with interest at 6 per centum per annum from the date when demand for said bonds was made until paid; that the claims of the Choctaw Nation against the United States, but for the adjudication thereof by the Senate, would amount to $8,432,349.78, for which the Choctaw Nation would be entitled to recover judgment, with interest at 5 per centum, from September 27, 1830; and that there remains due and payable to the Choctaw Nation from the United States on account of the award of the Senate, after deducting therefrom the said sum of $500,000, the sum of $3,795,533.24, on which the Choctaw Nation claims interest at 5 per centum per annum.

It is also alleged that between July 1, 1861, and July 1, 1866, there became due from the United States to the Choctaw Nation, under various treaty stipulations made prior to July 1, 1861, the sum of $406,284.93, of which amount it is admitted the United States may legally retain $346,835.61, leaving a balance due of $59,449.32.

It is further alleged that the questions of difference existing between the Choctaw Nation and the United States result from the nonfulfillment of treaty stipulations, and relate exclusively to claims which can now only be satisfied by the payment of such sums as the United States ought under its treaties to pay to said Choctaw Nation, which are as follows: (1) claims upon the basis of the Senate award, and of the correctness of the account stated by the Secretary of the Interior May 8, 1860, amounting to $2,958,593.19, with interest on the balance due on the award of the Senate at 5 per cent, and on the bonds authorized by Congress at 6 per cent, until paid; (2) amount due under the award, after correcting errors in the account stated by the Secretary of the Interior $4,272,879.13, to which add interest on balance due under the award of the Senate from March 9, 1859, at 5 per cent, and on bonds authorized by Congress from March 2, 1861, at 6 per cent, until paid; (3) amount claimed in case the award of the Senate, under article 11 of the Treaty of June 22, 1855, should be set aside, $8,659,695.67, with interest on the fourteenth article claims of $7,808,668.80, from August 24, 1836, until paid; (4) claims of the Choctaw Nation against the United States, stated upon the principle that the United States retain the lands acquired by the Treaty of September 27, 1830, in trust for the benefit of the Choctaw Nation, and, as trustee, are bound to account for the value of said lands, after deducting therefrom the amounts paid to the Choctaw Nation on account of said lands.

The petition further prays that if none of the above methods of stating its claims against the United States are such as can be approved and sanctioned, and if the court may rightfully ignore the Senate award and examine the matter *de novo*, then the Choctaw Nation may be considered as having been required, in violation of the Treaties of October, 1820, and January, 1825, to cede to the United States the lands described in the Treaty of September, 1830, and that the court will declare that the United States, from and after the Treaty of September, 1830, held such lands as the trustee for the benefit of the Choctaw Nation, and were bound to account for the proceeds resulting from the sale thereof; that the court will ascertain the amount realized by the United States from the sale of such lands, and cause an account to be stated in respect thereto, and charge against the same the value of all payments on account of said lands by the United States; that upon such accounting a judgment may be rendered for the balance found due, with interest thereon; and that the Choctaw Nation have judgment for the amount of the annuities due to it from July 1, 1861, to July 1, 1866, amounting to $59,449.32, and also for the sum of $167,896.57, being the value of the lands taken from the Choctaw Nation by the United States in locating the western boundary of the State of Arkansas.

The United States, in addition to a general denial, filed a special plea, alleging that by the 14th article of the Treaty of 1830 each Choctaw head of a family who desired to remain in Mississippi and become a citizen of the State was to be permitted to do so upon signifying his intention to the agent of the United States within six months from the ratification of the Treaty, whereupon he should be entitled to a reservation of land including his improvement, and should he live upon the land for five years thereafter, a grant in fee simple should issue to him. That within the six months 100 heads of Choctaw families signified their intention to remain and become citizens of the States and their names were registered. That on August 12, 1833, the ceded lands were directed to be sold, and an agent was appointed to locate the reservations of those intending to remain. That many who were not registered applied for reservations, but were not recognized; yet, it appearing that they had signified their intention in due time and been refused registry, the agent was directed to receive evidence and make provisional locations of lands the sale of which was suspended to await the action of Congress. That commissioners were appointed to adjust the claims to reservations, and filed a report on June 16, 1845. That 143 heads of Choctaw families obtained reservations in the ceded territory, and 1,155 other Choctaw heads of families were found to be entitled to the benefits of article 14 of the Treaty, but the United States had disposed of the lands to which they would have been entitled so that it was impossible to give said Indians the quantity to which they were severally entitled. Said commissioners thereupon estimated the quantity of land to which each of said Indians would be entitled and allowed him for the same quantity, to be taken out of any public lands in the States of Mississippi, Louisiana, Alabama, or Arkansas, subject to entry at private sale. That 1,155 pieces of scrip, each representing one half the allowance of land were issued to those entitled thereto, and were accepted in part payment for the lands aforesaid; that the remaining 1,155 half pieces of scrip were reserved, and interest

paid thereon valued at $1.25 per acre to those entitled thereto, until the principal of $872,000 was paid upon the execution of a final release of all claims of such parties under the 14th article of the Treaty. That thereby the claims of the 1,155 Choctaw heads of families were fully satisfied and discharged, and any further claim by or on behalf of them was forever barred. The plea prays that so much of the amended petition as sets forth a cause of action in behalf of said 1,155 Choctaw heads of families for the value of lands alleged to be due them be dismissed.

To this special plea the Choctaw Nation filed a replication on April 22, 1884, which in substance denied the validity of the alleged release mentioned in the plea, on the ground that the same was wrongfully exacted under circumstances that made it inequitable for the United States to insist upon it as a bar to the claims of the Choctaw Nation covered by it.

The case having been heard before the court of claims, the court, upon the evidence, found the facts, which are set out in much detail. It is only necessary here to state the following:

The War Department, then having charge of Indian affairs, on May 21, 1831, instructed Colonel Ward, the Indian agent in Mississippi, on the subject of carrying into effect the Treaty of September 27, 1830. The correspondence between the departments and its agents is set out fully. On June 26, 1833, Mr. G. W. Martin was appointed by the War Department to make selections of the locations of land granted to the Choctaws under the 14th, 15th and 19th articles of the Treaty, and was instructed to call on Ward and Major Armstrong, also an agent of the United States, appointed under the Treaty, for the registry of the different classes so entitled. In pursuance of his instructions, Mr. Martin located claims and received evidence of claimants, and transmitted reports to the Secretary of War, with a list of 580 claims for reservations under the 14th article, and with affidavits as to forty claimants, showing imperfections in Ward's register, and that persons who sought to be registered were refused, and not permitted to do so.

It was found as a fact by the court of claims that Ward was unfit for the duties of the situation; that his conduct was marked by acts calculated to deter the Indians from making application; that he was abusive and insulting to them, preventing them thereby from making application under the 14th article of the Treaty, in order to necessitate their going west of the Mississippi. He insisted that the Indians had sold their land; that he had been instructed to induce as many as possible to go West; and that more had been registered than had been anticipated. After the 24th of August, 1831, the agents of the United States insisted that those whose names were not registered should go West, and that if they did not go soldiers would be sent to drive them out; that they would take their children from them; and many other threats were made by them.

On the 31st of July, 1838, about 5,000 of the Choctaw Indians still remained in Mississippi; notwithstanding the efforts of the removing agent of the Government to remove them, they remained, asserting their intention to do so, and claiming the benefit of the 14th article of the Treaty of 1830. It was the intention of those remaining east of the Mississippi to take the benefit of the 14th article of the Treaty.

It was also found by the court that the whole number of heads of families receiving land under the 14th article was 143; the number who established their rights under the Act of Congress approved August 23, 1842, was 1,150; and the number disallowed by the commissioner was 292. The commissioner rejected the claims of 191 heads of families under that Act because they had no improvement on their reservations on the 27th of September, 1830, and did not reside on the same for five years continuously after said date. These 191 families complied, or attempted to comply, with the requirements of the 14th article within the time required by it, but were deprived of their rights under it by the agents of the United States. They were entitled to reservations amounting to 225,760 acres.

It was also found by the court that, under the provisions of the Act of Congress approved August 23, 1842, the United States, having failed to grant to said Choctaw heads of families the lands which they and their children claimed under said Treaty, and having disposed of the said lands, so that it was impossible to give said Choctaw heads of families the lands whereon they resided on the date of the Treaty of 1830, did, between June, 1843, and November, 1851, issue and deliver to the said 1,155 Choctaw heads of families, and to their children, the certificates or scrip provided for in said Act, for 1,404,640 acres of land, which certificates or scrip the said Choctaw heads of families and their children were required by the United States to receive and accept in lieu of the reservations of land which, under the said 14th article of the Treaty, they claimed. The United States refused to deliver to the said Choctaw heads of families and their children that one half of the scrip which might have been delivered to them under the provisions of the said Act of Congress, east of the Mississippi River, until the said Choctaw heads of families and their children had either started for, or actually arrived in, the Choctaw territory west of the Mississippi River.

Under the Act of Congress approved March 3, 1845, 697,600 acres in the said certificates or scrip, so directed to be delivered to the 1,155 Choctaw heads of families and their children, were funded at the value of $1.25 per acre, with interest payable thereon annually forever at the rate of 5 per centum per annum; which specified number of acres in certificates, funded under said Act, was that part of said certificates which was not deliverable east to the said Choctaw heads of families and their children, and not until their arrival in the Choctaw territory west of the Mississippi River. This scrip, which was funded for the benefit of said Choctaw heads of families and their children, under the Act of Congress of March 3, 1845, was funded by the United States at the rate of $1.25 an acre, amounting to the sum of $872,000, which sum was paid to the said heads of families and their children, or their legal representatives, under the provisions of an Act of Congress approved July 21, 1852.

It was further found by the court of claims

that the said Choctaw heads of families and their children, claimants under the 14th article of the Treaty of September, 1830, were reduced to a helpless condition of want, which rendered it practically impossible for them to contend with the United States in their requirement that the said Choctaw heads of families should accept and receive the scrip provided to be issued to them, in lieu of the reservations, by the Act of 1842; and the said scrip and the money paid to redeem the same were taken and accepted because they were powerless to enforce any demands against, or impose any conditions upon, the United States.

The Choctaw Nation, by its proper authorities, on November 6, 1852, executed and delivered to the United States the following instrument, for the purposes therein specified:

"*Whereas*, by an Act of Congress entitled 'An Act to Supply Deficiencies in the Appropriations for the Service of the Fiscal Year Ending the 30th Day of June, 1852,' all payments of interest on the amount awarded Choctaw claimants under the 14th article of the Treaty of Dancing Rabbit Creek for lands on which they resided, but which it is impossible to give them, shall cease, and that the Secretary of the Interior be directed to pay said claimants the amount of the principal awards in each case respectively, and that an amount necessary for this purpose be appropriated, not exceeding the sum of $872,000; and that final payment and satisfaction of said awards shall be first ratified and approved as a final release of all claims of such parties under the 14th article of said Treaty, by the proper national authority of the Choctaws, in such form as shall be prescribed by the Secretary of the Interior: *Now be it known*, That the said general council of the Choctaw Nation do hereby ratify and approve the final payment and satisfaction of said awards, agreeably to the provisions of the Act aforesaid, as a final release of the claims of such parties under the 14th article of said Treaty."

On the 9th day of November, 1853, the Legislative Council of the Choctaw Nation provided for the appointment of a delegation which should represent said Nation in the settlement of all the unsettled claims and demands of said Nation or individual members thereof against the United States. The preamble to the joint resolution appointing that delegation recites that "The Choctaws were, and ever have been, dissatisfied with the manner in which the Treaty of Dancing Rabbit Creek was made, owing to the many circumstances which were created to force them into it, and owing to the exceeding small and inadequate amount which was given as payment for their country;" and that "a large number of claims on the United States, arising under the 14th and 19th and other articles of the Treaty of 1830, are still remaining unpaid;" and the said delegates were "clothed with full power to settle and dispose of, by treaty or otherwise, all and every claim and interest of the Choctaw People against the Government of the United States, and to adjust and bring to a final close all unsettled business" between said people and the Government of the United States.

This delegation opened negotiations with the United States, through the Commissioner of Indian Affairs, for a new treaty, by means of a communication in writing, dated on the 5th of April, 1854, which contained a general statement or survey of the condition of the relations then existing between the Choctaw Nation and the United States, and set out *seriatim* complaints against the Government, especially for causes of dissatisfaction arising under the Treaty of September 27, 1830, claiming that scarcely one of the stipulations of that Treaty had been carried out by the Government, so as to do justice according to the intent of the Treaty. They especially alleged that the laws passed for the examination of their claims under said Treaty, and the 14th article thereof, prescribed a course of adjudication of so rigid and technical a character as necessarily to exclude many just claims; that many were compelled to remove because of the failure of the Government to give them their rights under the said article, and that the law unjustly cut off such persons from the benefits of it; that the scrip issued under the law was paid in such a manner as to make it of but little value to the Indian; and that those who received anything received but a mere pittance. They contended that many claims existed unadjusted and unpaid under the 19th article; and proposed to make arrangement for final adjustment of all matters, national and individual, in a new treaty, by which the Nation proposed to pay all individual claims under the 14th and 19th articles, and release the Government of the United States from all responsibility on that account, because such claims were not susceptible of proof against the United States, but could be adjusted by the authorities of the Nation, provided the Nation could effect such a settlement with the United States as the Choctaw People desire. They claimed that under the Treaty of September 27, 1830, the Choctaw Nation was entitled to the funds arising from the sale of lands ceded, after deducting the expenses of sale, and the debt mentioned in said Treaty; that the Government of the United States was a trustee for the Choctaw Nation in the sale of the lands ceded by that Treaty, so that, after the payment of the expenses incident to the execution of the trust, the Indians were entitled to the remainder; and they proposed that the payment to the Nation of such remainder should operate in law as a satisfaction of the individual claims under a new treaty.

Upon the basis of this communication, the Commissioner of Indian Affairs instructed the agent of the United States for the Choctaws to make the requisite inquiry and investigation to ascertain the character and extent of their claims, and what arrangement was necessary to accomplish the object in view. The agent of the United States for the Choctaws submitted to the Commissioner of Indian Affairs, in answer to this reference, a paper containing a comparative estimate or approximate statement of the claims then asserted by the Choctaw commissioners, which statement had been furnished by the Choctaw delegation to said agent. The aggregate amount of these claims so stated was $6,599,230, which it was proposed to settle on the principle of allowing the net proceeds of the sales of the lands ceded to the United States by the Choctaw Nation under the Treaty of

September 27, 1830; the whole showing the balance claimed to be due to the Choctaws to be $2,380,701. The agent of the United States, in his communication to the Commissioner of Indian Affairs, referring to said statement, said: "I have examined this statement carefully, and from the most reliable information I am possessed of, obtained in the Choctaw country and here, I am inclined to think that part of it embracing the extent of the obligations under the Treaty is as nearly correct as it could be made at this date."

The amount of the obligations under the Treaty, thus referred to, was placed in said statement at $6,599,230. These negotiations between the Choctaw delegation and the executive authorities of the United States were conducted with reference to the accomplishment of the following objects:

1. That the United States should provide, in a new treaty, for an examination and settlement of all the claims of the Choctaws, whether national or individual, under the Treaty of 1830, as specified in the letter of the Choctaw delegation to the Commissioner of Indian Affairs, dated April 5, 1854.

2. That the Choctaws should adjust their disputes with the Chickasaws; should lease to the United States all that portion of their common territory between the 98th and 100th degree of west longitude, for the permanent settlement of the Wichita and such other bands of Indians as the United States might desire to locate therein; and should absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the 100th degree of west longitude.

These negotiations resulted in the Treaty of 1855, which was ratified by the Senate of the United States on the 21st of February, 1856, and proclaimed by the President on March 4 of the same year. 11 Stat. at L. 611. The preamble to that Treaty recites that "The Choctaws contend that by a just and fair construction of the Treaty of September 27, 1830, they are, of right, entitled to the net proceeds of the lands ceded by them to the United States under said Treaty, and have proposed that the question of their right to the same, together with the whole subject matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said Treaty, shall be referred to the Senate of the United States for final adjudication and adjustment."

By the terms of that Treaty, a division of their common lands was made between the Choctaws and the Chickasaws, and the Choctaws relinquished to the United States all their lands west of the 100th degree of west longitude, and the Choctaws and the Chickasaws together leased to the United States all that portion of their common territory west of the 98th degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government of the United States might desire to locate therein. The 11th and 12th articles of said Treaty are as follows:

"Article 11. The Government of the United States, not being prepared to assent to the claim set up under the Treaty of September the twenty-seventh, eighteen hundred and thirty, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw People, and being desirous that their rights and claims against the United States shall receive a just, fair, and liberal consideration, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States:

"First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the lands ceded by them to the United States by the Treaty of September the twenty-seventh, eighteen hundred and thirty, deducting therefrom the cost of their survey and sale, and all just and proper expenditures and payments under the provisions of said Treaty; and, if so, what price per acre shall be allowed to the Choctaws for the lands remaining unsold, in order that a final settlement with them may be promptly effected. Or,

"Second. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of all their claims, national and individual, against the United States; and, if so, how much.

"Article 12. In case the Senate shall award to the Choctaws the net proceeds of the lands ceded as aforesaid, the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such individual claims as may be adjudged by the proper authorities of the Tribe to be equitable and just—the settlement and payment to be made with the advice and under the direction of the United States agent for the Tribe; and so much of the fund awarded by the Senate to the Choctaws, as the proper authorities thereof shall ascertain and determine to be necessary for the payment of the just liabilities of the Tribe, shall, on their requisition, be paid over to them by the United States. But should the Senate allow a gross sum, in further and full satisfaction of all their claims, whether national or individual, against the United States, the same shall be accepted by the Choctaws, and they shall thereupon become liable for, and bound to pay, all the individual claims as aforesaid, it being expressly understood that the adjudication and decision of the Senate shall be final."

In pursuance of the eleventh article of the Treaty, the questions submitted to the Senate of the United States were answered by a Resolution of the Senate passed on the 9th of March, 1859, as follows:

"*Resolved*, That the Choctaws be allowed the proceeds of the sale of such lands as have been sold by the United States on the first day of January last, deducting therefrom the costs of their survey and sale, and all proper expenditures and payments under said Treaty excluding the reservations allowed and secured, and estimating the scrip issued in lieu of reservations at the rate of $1.25 per acre; and further, that they be also allowed twelve and a half cents per acre for the residue of said lands."

In reference to this award of the Senate, the court of claims, in the finding of fact, says: "The consideration which was given by the Senate to the subject matter so submitted to it by the said eleventh article of the said Treaty, and to the evidence which was so presented to,

and taken and considered by, the Senate, was full, fair and impartial, and its adjudication, as made under the said article, was not influenced or affected by, and was in no way or degree the result of, any fraud, corruption, partiality, and there is no evidence tending to show that it was the result of surprise or mistake on the part of the Senate, or any member thereof."

On the 9th of March, 1859, the Senate of the United States also adopted a Resolution for the purpose of ascertaining the amount due the Choctaw Nation under their award, as follows: "Resolved, That the Secretary of the Interior cause an account to be stated with the Choctaws showing what amount is due them according to the above prescribed principles of settlement, and report the same to Congress." And the Secretary of the Interior, in compliance with the mandate of said Resolution, did, on the 8th of May, 1860, transmit to Congress a statement of account with the Choctaw Nation. The account shows, as the proceeds of the sales of the Choctaw lands up to January 1, 1859, together with the residue of said lands unsold at that date, at 12½ cents per acre, an amount in all of $8,078,614.80, from which was to be deducted the whole amount of charges, equal to $5,097,367.50, leaving a balance due to the Choctaws of $2,981,247.30.

On the 9th day of January, 1861, the Choctaw Nation, by its memorial addressed to Congress, demanded payment from the United States of the amount claimed to be due to it under said award. By the provisions of the Act of March 2, 1861, the Indian Appropriation Act, 12 Stat. at L. 238, there was paid to the Choctaw Nation the sum of $250,000 on account of their claim. The bonds for the additional sum of $250,000, which were by that Act directed to be issued and delivered to said Choctaw Nation on account of said claim, were never issued or delivered to it, although demand for the same was made upon the Secretary of the Treasury by them on the 4th of April, 1861.

Upon the findings of fact, the court of claims found a balance due the Choctaw Nation from the United States of $408,120.32, made up of various claims arising under the Treaty of 1830, and for the value of land taken in fixing the boundary between the State of Arkansas and the Choctaw Nation, deducting the payment made, under the Act of 1861, of $250,000. In reaching this conclusion the court of claims rejected the award of the Senate, under the Treaty of 1855, as having no effect in law, and excluded the consideration of all claims covered by the release executed by the Choctaw Nation on November 6, 1852.

Messrs. **John J. Weed, Samuel Shellabarger, Jeremiah M. Wilson,** *John B. Luce, James W. Denver* and *Fletcher P. Cuppy,* for the Choctaw Nation.

Messrs. **Wm. A. Maury** and **Robert A. Howard,** *Assistant Attys-Gen.,* for the United States.

Mr. Justice **Matthews** delivered the opinion of the court:

The general purpose of this suit is a judicial settlement of all existing controversies between the Choctaw Nation and the United States. The specific claims of the Choctaw Nation are stated in the petition in the alternative. It is claimed, in the first instance, that the award of the Senate, and the amount found due as a balance upon the account between the parties, stated upon the principles of that award, should either be enforced as a finality by the judgment of the court in the present case, or that if not technically enforceable as an award, it still furnishes a rule for an equitable settlement of the differences between the parties. But, in the second place, it is claimed that if the award cannot be considered in either of these lights, then the whole controversy and all questions involved in it, from the beginning, under any of the treaties between the parties, are open for investigation and decision upon their original merits. And under this head the Choctaw Nation claim compensation for various breaches on the part of the United States of the Treaty of September 27, 1830; and, in general, such a failure on its part to comply with its provisions as in substance deprived the Choctaw Nation of all the benefits intended to be conferred by it, for which it is claimed they are entitled to an equitable equivalent as compensation.

In respect to so much of the petitioner's case as rests upon specific failures to comply with the provisions of article 14 of that Treaty, as to those Choctaw heads of families who claimed reservations within its terms and did not receive them, the Government of the United States relies upon the release executed by the Choctaw Nation in pursuance of the requirements of the Act of July 21, 1852, under which a payment of $872,000 was made in satisfaction of the amounts awarded the Choctaw claimants under that article of the Treaty of 1830.

The court of claims, as it appears, declined to give any legal effect whatever to the award made by the Senate under the Treaty of 1855, feeling constrained to that conclusion by the terms of the Act of March 3, 1881, conferring jurisdiction upon it in this suit, and on the other hand, it gave all the effect claimed by the United States for the release under the Act of 1852. Its judgment in favor of the Choctaw Nation was made up as follows:

For claims under the 14th article of the Treaty of 1830, not covered by the release of 1852	$417,656.00
For claims under the 19th article of the Treaty of 1830	42,920.00
For land taken in fixing the boundary of the State of Arkansas and the Choctaw Nation	68,102.00
For transportation and subsistence under the Treaty of 1830	51,993.00
For unpaid annuities	59,449.32
For guns, ammunition, etc	18,000.00
Total	$658,120.32

And credited the balance thus found due with a payment made under the Act of March 2, 1861, of $250,000.

In reviewing the controversy between the parties presented by this record, it is important and necessary to consider and dispose of some preliminary questions. The first relates to the character of the parties, and the nature of the relation they sustain to each other. The United States is a sovereign Nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany

that consent, and is not subject to any municipal law. Its Government is limited only by its own Constitution, and the Nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign Nation, but of an Indian Tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.

As was said by this court recently in the case of the *United States* against *Kagama*, 118 U. S. 375, 383 [*ante*, 228]: "These Indian Tribes *are* the wards of the Nation; they are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection; because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, by Congress, and by this court, whenever the question has arisen."

It had accordingly been said in the case of *Worcester* v. *Georgia*, 6 Peters, 582 [31 U. S. bk. 8, L. ed. 508]: "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation already stated, as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the eleventh article of the Treaty of 1855, the Government of the United States expresses itself as being desirous that the rights and claims of the Choctaw People against the United States "shall receive a just, fair and liberal consideration."

The language of the Act of March 3, 1881, conferring jurisdiction in the present case, also requires construction. It confers jurisdiction upon the court of claims to try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon. How far the settlement of these differences is to be affected by the various Acts of Congress referred to in the pleadings and findings of fact made by the court of claims, and which were passed professedly in execution of treaty obligations on the part of the United States, must be determined. These Acts of Congress, in one aspect, have the force of law, because Congress has full power of legislation over the subject; but, in so far as they may have proceeded upon insufficient or incorrect interpretations of the treaty rights of the Choctaw Nation, or in so far as they may have attempted to modify or disregard those rights, they form the very subjects of complaint on the part of the Choctaw Nation, whose allegation is that the United States, by these very statutes, as in other particulars, have broken their treaty obligations. Where, in professed pursuance of treaties, these statutes have conferred valuable benefits upon the Choctaw Nation, which the latter have accepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent, on the part of the recipient to the condition, unless that implication is rebutted by other and sufficient circumstances. Under the terms of the Act of March 3, 1881, in exercising the jurisdiction thereby conferred, the court of claims is empowered to review the entire question of differences *de novo*, which may be interpreted to imply that the whole matter was opened from the beginning, with the view of determining what the original treaty rights of the Choctaw Nation were, and how far they have been performed by the United States in its various transactions with them, including the acts done under the authority of the statutes referred to. The meaning of this clause becomes most important, however, in connection with the question, how the court is authorized to deal with the award made by the Senate of the United States in pursuance of the Treaty of 1855.

It is contended on the part of the Choctaw Nation that that award is final and conclusive; and in support of that contention reference is made to the express provisions of the Treaty of 1855. It is recited in the preamble of that

Treaty that the Choctaws have proposed that their claims against the United States, arising under the various provisions of the Treaty of September 27, 1830, shall be referred to the Senate of the United States for final adjudication and adjustment; and by the terms of the twelfth article of the Treaty it is declared to be "expressly understood that the adjudication and decision of the Senate shall be final;" and the right to insist upon the conclusive nature of this award, it is said, is a treaty right in favor of the Choctaw Nation.

On the other hand, it is declared by the Act of March 3, 1881, that, in the exercise of its jurisdiction to try this case, the court of claims "shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the Treaty of 1855;" and it is insisted, on behalf of the United States, that this language is inconsistent with the idea that the court should give to that award any legal effect whatever. And this construction is supposed to be rendered necessary by the previous clause, which grants power to the court to review the entire question of differences *de novo;* for it is said that the court cannot review the question of differences *de novo*, that is, from the beginning, and as if they were new and had freshly arisen, if it gives any effect to a determination of the Senate, which it is claimed operates as *res judicata*, foreclosing further inquiry into the merits of the very questions to be reviewed.

If the words conferring the power to review the question of differences *de novo* are permitted to have that force, it is difficult to understand how the release made by the Choctaw Nation in pursuance of the Act of Congress of July 21, 1852, should stand in the way of a reconsideration of the claims covered by it. That Act of Congress, it is true, declares that the final payment and satisfaction of the sum thereby appropriated and paid, should, when ratified and approved by the proper national authority of the Choctaws, operate as a final release of all claims of those to whom such payments are made, under the fourteenth article of the Treaty of September 27, 1830. But whether that payment was a just and fair extinguishment of those claims, according to the terms of that Treaty was one of the very questions in dispute. And it is not unreasonable to contend, as it is contended on behalf of the Choctaw Nation, that the effect of that release should be considered in view of the circumstances under which it was executed, and in reference to which the court of claims has found, in the sixteenth finding, that "The claimants under the fourteenth article, the said Choctaw heads of families and their children, were reduced to a helpless condition of want, which rendered it practically impossible for them to contend with the United States in their requirement that the said Choctaw heads of families should accept and receive the scrip provided to be issued to them in lieu of the reservations by the Act of 1842; and the said scrip and the money paid to redeem the same were taken and accepted because they were powerless to enforce any demands against, or impose any conditions upon, the United States."

However this may be, the language of the Act of March 3, 1881, in reference to the award made by the Senate under the Treaty of 1855, does not abrogate it, and does not require, as a condition of the exercise of the jurisdiction conferred by the Act, that the court should entirely disregard it, giving it no effect whatever. It merely says that the court shall not be estopped by any action had or award made by the Senate in pursuance of that Treaty. The plain and literal meaning of this language is fully satisfied by holding that the award, considered as such, shall not, upon its face, be taken to be final and conclusive. There is nothing in the language to prevent the court from giving to that award effect as *prima facie* establishing the validity of the claim so far adjudged in favor of the Choctaw Nation, leaving to the representatives of the Government in this litigation the right not only to question the validity of the award, as such, upon any such grounds as might or should invalidate awards ordinarily, either at law or in equity, but also to attack it upon the merits, as a finding unsupported by proof, or unjust and unfair in view of all the circumstances, and on that account not to be enforced. In that view, so much effect only would be given to it as to cast the burden of disproving its justice and fairness upon the United States in this suit. In that light and with that view it has been attacked in argument by the counsel for the United States, upon the proof contained in the case.

In the first place, it is objected that the award did not agree with the submission, and under that head it is argued that the first question submitted for adjudication to the Senate was whether the Choctaws were entitled to the proceeds of the sale of the lands ceded by them to the United States by the Treaty of September 27, 1830, and that there was no authority to allow to them such proceeds, unless the Senate should first find that they were entitled to them. And it is said that the Senate not only did not find that, as matter of law, the Choctaws were so entitled under the terms of the Treaty of September 27, 1830, but that, according to the report of the Committee on Indian Affairs, which was adopted by the Senate in the passage of the resolutions which contain the award itself, their title to those proceeds, considered as matter of law, was denied. We do not, however, think that the words of the question submitted to the Senate by the Treaty of 1855 are to be confined to a consideration of the question of a strict title to the proceeds of the sale of the lands, but that they plainly mean, whether the Choctaws, under all the circumstances, as a matter of justice and fair dealing, ought to receive such proceeds, whether as deducible from the terms of the Treaty or as merely a fair compensation to be awarded to them for its breaches by the United States. The language of the question is in the alternative; it is whether the Choctaws are entitled to or *shall be allowed;* and it was sufficient, in our judgment, to satisfy the terms of the submission, for the Senate to declare, as it did, that the Choctaws should be allowed the proceeds of the sale of the lands sold by the United States which had been ceded by the Choctaws under the Treaty of 1830; and we are, therefore, of opinion that the award cannot be avoided on this ground.

Second. It is next insisted that the award is

invalid because it is uncertain, inasmuch as while it determines that the Choctaws shall he allowed the proceeds of the sale of the lands ceded hy the Treaty of 1830, and at the rate of 12½ cents an acre for the residue, it does not ascertain what those proceeds and the value of the residue amount to in the aggregate. But the award itself provided the means of reducing this uncertainty hy a reference to the Secretary of the Interior, who was directed to cause the account to be stated with the Choctaws, showing what amount was due them according to the principle of settlement embraced in the award. It is not disputed hut that the Secretary of the Interior was enahled hy the records of his office to state such an account, and that in fact he has stated it. This reference to the Secretary of the Interior for the mere purpose of an account cannot he considered as a delegation of authority hy the Senate to adjudicate any of the questions which had been submitted to it hy the agreement of the parties. The stating of the account was merely in execution of the judgment; the principle on which it should proceed was fully, clearly and finally adjudged. Whatever exception might be taken to the account when reudered would not he different from such as in the usual course of equity practice might be taken to the report of a master to whom was referred the statement of an account, the principles of which had been previously settled hy a decree of the court fixing and establishing the rights of the parties.

Third. It is also said that the award is invalid for lack of proper notice to the United States of the intended action of the arhitrator before proceeding to the adjudication. When it is considered that the Senate of the United States was the arhitrator, constituting, as it does, a hranch of the legislative as well as of the treaty-making power of the Government of the United States, it can hardly he contended that the United States had no notice of proceedings taken hy the Senate in pursuance of laws or treaties made by the United States.

Whatever force might otherwise he supposed to reside in these ohjections to the validity of the award are further answered by a reference to the terms of the Indian Appropriation Act of March 2, 1861, 12 Stat. at L. 238, which enacts as follows: "For payment to the Choctaw Nation or Trihe of Indians, on account of their claim under the eleventh and twelfth articles of the Treaty with said Nation or Tribe made the twenty-second of June, 1855, the sum of five hundred thousand dollars; two hundred and fifty thousand dollars of which sum shall be paid in money; and for the residue the Secretary of the Treasury shall cause to be issued to the proper authorities of the Nation or Tribe, on their requisition, bonds of the United States, authorized hy law at the present session of Congress: *Provided*, that in the future adjustment of the claim of the Choctaws, under the Treaty aforesaid, the said sum shall be charged against the said Indians."

This appropriation, and the payment which was made under it, would seem to have the effect of confirming the award of the Senate, for it makes an appropriation in part payment of it, and provides for the future adjustment of the claim of the Choctaws under it. It is true, as is insisted in argument, that no express mention is made in this Act of the award, and the claim of the Choctaw Nation is described as one arising under the eleventh and twelfth articles of the Treaty of 1855, hut no possible claim could arise under those articles of that Treaty in hehalf of the Choctaw Nation, except one to insist upon the arhitration and to enforce the award made, in pursuance of their terms. The whole ohject and scope of those articles of the Treaty is to provide for the submission to the arhitration of the Senate, and the execution of the award made under it. The future adjustment of the claims of the Choctaws mentioned in the proviso evidently refers to the division of the fund, ascertained hy the report of the Secretary of the Interior, hy which a portion was to be paid over to the Nation for the satisfaction of individual claimants, and the remainder retained by the United States as a trust fund, according to the 13th article of the Treaty of 1855.

It does not, therefore, give too much effect to the Act of March 2, 1861, to treat it as an Act of Congress confirming the validity of the Senate award. This view is very much strengthened hy the terms of the Act of June 23, 1874, from which it appears that at that recent date Congress intended to treat the award of the Senate as valid and hinding, and the report of the Secretary of the Interior as to the balance due to he final. The provision of that Act, 18 Stat. at L. 230, is as follows: "That the Secretary of the Treasury is hereby directed to inquire into the amounts of liahilities due from the Choctaw Trihe of Indians to individuals, as referred to in articles 12 and 13 of the Treaty of June 22, 1855, hetween the United States and the Choctaw and Chickasaw Tribes of Indians, and to report the same to the next session of Congress, with a view of ascertaining what amounts, if any, should be deducted from the sum due from the United States to said Choctaw Tribe, for the purpose of enabling the said Tribe to pay its liahilities, and therehy to enable Congress to provide a fund to be held for educational and other purposes for said Tribe, as provided for in article 13 of the Treaty aforesaid."

The only further question, then, which can be claimed to be left open for adjudication in this suit by the terms of the Act of March 3, 1881, is, on the supposition that the award is *prima facie* evidence of the correctness of the claim therehy reduced to judgment, whether upon its merits it was fair, just and equitable, as a settlement between the parties of the matters in controversy, having regard to all the circumstances of the case. As already declared, it is the right of the United States to question its validity by questioning its justice; at the same time, the hurden of proof is upon them to establish, hy affirmative proof, the considerations which ought to constrain this court, as a matter of justice, altogether to disregard it.

Proceeding, then, to review the whole questions of difference hetween the parties *de novo* for this purpose, we are led to the conclusion that the principle of settlement adjudged by the Senate in its award, in pursuance of the 11th article of the Treaty of 1855, furnishes the nearest approximation to the justice and right of the case that, after this lapse of time, it is prac-

ticable for a judicial tribunal to reach. Our judgment to this effect is based upon the following considerations:

The situation and circumstances in which the parties were found at the time the Treaty of September 27, 1830, was entered into, were these: By the previous Treaty of 1820, the policy of the United States therein declared, and the agreement between the parties, was "To promote the civilization of the Choctaw Indians, by the establishment of schools amongst them, and to perpetuate them as a Nation by exchanging for a small part of their land here," that is, in Mississippi, "a country beyond the Mississippi River, where all who live by hunting and will not work may be collected and settled together." It was also recited that it was "desirable to the State of Mississippi to obtain a small part of the land belonging to said Nation for the mutual accommodation of the parties." Accordingly, the Choctaws, by the Treaty of 1820, ceded to the United States a portion only of their lands in Mississippi.

By the 2d article of the Treaty it was declared that, "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said States," thereby ceded to said Nation a tract of country west of the Mississippi River, the boundaries of which were described. It was also declared by article 4 of that Treaty, that "The boundaries hereby established between the Choctaw Indians and the United States on this side of the Mississippi River shall remain without alteration until the period at which said Nation shall become so civilized and enlightened as to be made citizens of the United States, and Congress shall lay off a limited parcel of land for the benefit of each family or individual in the Nation."

By the Treaty of January 20, 1825, it was further stipulated that the 4th article of the Treaty of October 18, 1820, should be so modified as that Congress should not exercise the power of apportioning the lands for the benefit of each family or individual of the Choctaw Nation, and of bringing them under the laws of the United States, but with the consent of the Choctaw Nation. In the meantime, however, under the pressure of the demand for the settlement of the unoccupied lands of the State of Mississippi by emigrants from other States, the policy of the United States in respect to the Indian Tribes still dwelling within its borders underwent a change, and it became desirable by a new treaty to effect so far as practicable the removal of the whole body of the Choctaw Nation, as a tribe, from the limits of the State to the lands which had been ceded to them west of the Mississippi River. To carry out that policy the Treaty of 1830 was negotiated.

By the 3d article of that Treaty the Choctaw Nation of Indians ceded to the United States the entire country they owned and possessed east of the Mississippi River, and agreed to remove beyond the Mississippi River as early as practicable, so that as many as possible of their people, not exceeding one half of the whole number, should depart during the falls of 1831 and 1832, and the residue follow during the succeeding fall of 1833. But, in order to induce the consent of the Choctaw Nation, as such, to the provisions of that Treaty, the United States entered into the obligations already specified and contained in its subsequent articles, particularly articles 14, 15 and 19, by which large reservations of land were made, so that under article 14 the head of every Choctaw family who desired to remain and become a citizen of the United States was entitled to do so, and thereupon became entitled to a reservation of a section of 640 acres of land for himself, and an additional half section for each unmarried child living with him over ten years of age, and an additional quarter section for each child under ten years of age, to adjoin his own location; with the further provision that if they resided upon said lands, intending to become citizens of the States, for five years after the ratification of the Treaty, a grant in fee simple should issue to them. The Choctaws, it appears, were very reluctant to emigrate from their old homes to their new ones, and a very much larger number than was expected manifested an intention to avail themselves of those provisions of the Treaty which entitled them to remain.

It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure had to be brought to bear upon the Indians to effect their removal, and the whole Treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal. The most noticeable thing, upon a careful consideration of the terms of this Treaty, is that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten millions of acres. It was not an exchange of lands east of the Mississippi River for lands west of that river. The latter tract had already been secured to them by its cession under the Treaty of 1820.

It is true that by the 18th article of the Treaty of 1830 it is provided that, "For the payment of the several amounts secured in this Treaty, the lands hereby ceded are to remain a fund pledged to that purpose, until the debt shall be provided for and arranged. And, further, it is agreed that, in the construction of this Treaty, wherever well founded doubt should arise, it shall be construed most favorably towards the Choctaws." The only money payments secured by the Treaty, over and above the necessary expenditures in removing the Indians, in providing for their subsistence for twelve months after reaching their new homes, and paying for their cattle and their improvements, are: first, an annuity of $20,000 for twenty years, commencing after their removal to the west; and, second, the amount to be expended in the education of forty Choctaw youths for twenty years, and for the support of three teachers of schools for twenty years, together with the cost of erecting some public buildings, and furnishing blacksmiths, weapons and agricultural implements in addition to the several annuities and sums secured under former treaties to the Choctaw Nation and People. It is nowhere expressed in the Treaty that these payments are to be made as the price of the lands ceded; and they are all only such expenditures

as the Government of the United States could well afford to incur for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. As a consideration for the value of the lands ceded by the Treaty, they must be regarded as a meager pittance.

It is, perhaps, impossible to interpret the language of this instrument, considered as a contract between parties standing upon an equal footing and dealing at arm's length, as a conveyance of the legal title by the Choctaw Nation to the United States, to hold as trustee for the pecuniary benefit of the Choctaw People; and yet it is quite apparent that the only consideration for the transfer of the lands that can be considered as inuring to them is the general advantage which they may be supposed to have derived from the faithful execution of the Treaty on the part of the United States; and when, in that connection, it is considered that the Treaty was not executed on the part of the United States according to its just intent and spirit, with a view to securing to the Choctaw People the very advantages which they had a right to expect would accrue to them under it, it would seem as though it were a case where they had lost their lands without receiving the promised equivalent. In such a case, there is a plain equity to enforce compensation, by requiring the party in default to account for all the pecuniary benefits it has actually derived from the lands themselves. This is the solid ground on which the justice of the award of the Senate of the United States, under the Treaty of 1855 seems to us fairly to stand.

The committee of the Senate which reported the resolutions adopted by that body as the award under the Treaty of 1855 reached their conclusion upon the same premises. Their report discusses at length the various grounds on which the Choctaw Nation rightfully complained of the injurious character of the dealings of the United States with them under the Treaty, and concludes as follows:

"It being thus impossible to ascertain to how much the Choctaws would be entitled, on a fair and liberal settlement, for the damage and loss sustained by them, it seems to the committee that the only practical mode of adjustment is to give them the net proceeds of their lands, not on the ground that the letter of the Treaty entitles them to it, but that it is the only course by which justice can now be done them.

"And while, on the one hand, to award to the Tribe the net proceeds of their lands would surely be no *more* than just to them, because practically no regard is paid to actual value by the United States in the sales of public lands; and undeniably the real market value of these lands which the Indians might have realized, if protected in their possession, was far greater than the price for which they actually sold; on the other hand, the United States would neither have lost, paid, nor expended anything whatever, but would only have refunded to the Choctaws the surplus remaining on hand of the proceeds of their own lands, after having repaid themselves every dollar expended for the benefit of the Choctaws; and that, after having had the use of this surplus for many years without interest, and when, according to the estimates of the General Land-Office, it would really amount to little more than half of what might be recovered in a court of equity, if the case were one between individuals, as will appear by the comparative statement hereto appended.

"The committee accordingly report the following resolutions, and recommend that they be adopted and made the award and judgment of the Senate upon the questions submitted by the Treaty of 1855."

The Secretary of the Interior found to be due to the Choctaw Nation, in his statement of account in conformity with the resolutions and decision of the Senate under the Treaty of 1855, the sum of $2,981,247.30. This balance was reached by crediting them with the proceeds of the sales of the lands ceded by them under the Treaty of September 27, 1830, made up to January 1, 1859, adding for the unsold residue of said lands their estimated value at 12½ cents per acre, amounting to $8,078,614.80 in the aggregate. Against this, deductions were charged, as follows: First, the cost of the survey and sale of the lands at 10 cents an acre; and, second, payments and expenditures under the Treaty; the whole amounting to, $5,097,367.50, resulting in the balance above stated. Some of the items charged as payments and expenditures in this account are objected to on the part of the Choctaw Nation in this suit, and we are asked to restate the account. If, however, we felt at liberty to enter into such an examination of this account, we see nothing in the evidence presented by the record to show that the items objected to were not properly chargeable. The result therefore, is to establish the balance found by the Secretary of the Interior as the true amount due, ascertained according to the principle adjudged by the Senate in its award, and which we have declared to be the equitable rule of settlement between the parties. From this is to be deducted the payment of $250,000 made under the Act of March 2, 1861.

This disposes of all questions of difference involved in this suit arising under treaties prior to that of 1855, except for unpaid annuities, ascertained by the court of claims to amount to the sum of $59,449.32, which is to be included in the judgment.

There is, however, another controversy arising under the Treaty of 1855. The first article of that Treaty fixed definitely the boundary of the territory ceded to the Choctaw Nation by the Treaty of 1820. It is found as a fact by the court of claims, that, in the location of the line which was surveyed under the authority of the United States, and fixed as the permanent boundary between the State of Arkansas and the Indian country by the Act of Congress of March 3, 1875, 18 Stat. at L. 476, the Government made a mistake, whereby they embraced in the territory appropriated by the United States as part of the public lands, 136,204$\frac{68}{100}$ acres of Indian lands, the value of which, as ascertained by the court of claims, is $68,102. This is a just and valid claim, for which the petitioner is entitled to recover.

The final result is that the Choctaw Nation is entitled to a judgment against the United States for the following sums: First, $2,981,247.30, subject to the deduction of $250,000 paid under the Act of 1861; second, for unpaid annuities, $59,449.32; third, for lands taken in fixing the boundary between the

State of Arkansas and the Choctaw Nation, $68,102.

The judgment of the Court of Claims is therefore reversed and the cause is remanded to that court, with instructions to enter a judgment in conformity with this opinion; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Chief Justice **Waite** dissenting:

I regret to find myself unable to agree to this judgment. If the United States had authorized suit to be brought against them on the Senate award, I should not have hesitated about giving judgment in favor of the Choctaw Nation, upon the facts now found by the court below, for the full amount due according to the statement of the Secretary of the Interior That award has not, in my opinion, been abrogated by the bringing of this suit. It remains, so far as anything appears in this record, as valid and as binding to-day as it was when made. The United States have neglected to pay the amount awarded, but the Choctaw People have never, so far as this record shows, released them from their obligation to pay. On the contrary, it seems always to have been insisted upon.

This suit is not brought upon the award, but upon the Treaties, and it is to be determined, in my opinion, according to the legal rights of the parties now existing as fixed by the Treaties, without regard to anything that was done by the Senate under the Treaty of 1855. The language of the jurisdictional statute is this: "The court of claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and render judgment thereon; power is hereby granted the said court to review the entire question of differences *de novo*, and it shall not be estopped by any action or award made by the Senate of the United States in pursuance of the Treaty of 1855." This, as it seems to me, means no more than that the questions of difference are to be tried *de novo*, as far as the award is concerned. A judgment is to be rendered. This implies that the proceeding is to be judicial in its character, and that the judgment is to be in accordance with the principles governing the rights of parties in the administration of justice by a court. The Senate, however, were, by the Treaty of 1855, made arbitrators, and they were invested with power to determine whether the Choctaws were "entitled" legally to the proceeds of their lands, and, if not, whether they ought, under all the circumstances of the case, to be "allowed" such proceeds. The Senate could consider and act upon the moral obligations of the United States; but neither we nor the court of claims can do more than enforce their legal liabilities.

What, then, are the legal obligations of the United States under the Treaties at this time, leaving the Senate award entirely out of view? The jurisdictional statute neither waives nor abrogates the release which was executed under the Act of July 21, 1852. The same is true of the Treaty of 1855. By the Act of 1852 payments were to be made in cash to claimants under the fourteenth article of the Treaty of 1830, for the amount of the scrip which had been awarded under the Act of August 23, 1842, but not delivered, provided "that the final payment and satisfaction of said awards shall be first ratified and approved as a final release of all claims of *such parties* under the fourteenth article." That release was executed on the 6th of November, 1852. The Treaty of 1855 recites that "The Choctaws contend that, by a just and fair construction of the Treaty of September 27, 1830, they are of right entitled to the net proceeds of the lands ceded by them to the United States under said Treaty, and have proposed that the question of their right to the same, together with the whole subject matter of *their unsettled claims*, whether national or individual, against the United States, arising under the various provisions of said Treaty, shall be referred to the Senate of the United States for final adjudication and adjustment." In view of this recital, we are to construe Article XI, of the Treaty, which is in these words:

"The Government of the United States not being prepared to assent to the claim set up under the Treaty of September the twenty-seventh, eighteen hundred and thirty, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw People, and being desirous that their rights and claims against the United States shall receive just, fair, and liberal consideration, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States:

"First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the lands ceded by them to the United States, etc.," or

"Second. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of their claims, national and individual, against the United States; and, if so, how much."

Thus the whole matter was referred to the Senate to determine (1) whether the Choctaws were in law entitled to the proceeds of the sale of their lands, and, if not, then, (2) what, under the circumstances, would be a fair and liberal settlement of all the matters of difference, with the right under this branch of the submission to "allow" the Choctaws the proceeds, or a "gross sum" to be ascertained in some other way. The Senate decided that they were not entitled to the proceeds as a matter of right, but that, under all the circumstances, it would be fair and just to settle on that basis. Had the same power been granted to the court of claims, I should not hesitate to affirm a judgment to the full amount of the award if placed on that ground. But, as has been seen, the jurisdictional statute confines the jurisdiction of the courts in this suit to a determination of the legal rights of the parties. Under the Treaty the Senate could do what was fair and just, but we can only adjudge according to law.

This court agrees with the Senate committee in deciding that the Choctaws were not *legally* entitled to the proceeds of the land. In that I concur. The only inquiry, then, is, how much must be paid for the violation of the Treaty of 1830 by the United States. If the release stands,

then there can only be a recovery for the *unsettled* claims of the Choctaws, national and individual. In my opinion, the release has not been invalidated as an instrument binding in law by the findings in the case. The United States may have taken advantage of the necessities of the Indians and exacted a hard bargain, but the bargain was made and both parties promptly carried it out. The Senate, under its powers, might take the hardship of this bargain into account and go behind the release, but, in my judgment, we cannot. All that remains, then, is to ascertain what is legally due from the United States on account of the national and individual claims not included in that settlement; and upon this I am entirely satisfied with what was done by the court of claims. I think the judgment should be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SCHMIDT BROTHERS, a Firm Composed of ALBERT SCHMIDT and TITUS SCHMIDT, *Appts.*,

v.

E. M. COBB.

(See S. C. Reporter's ed. 286-295.)

Place for sale of intoxicating liquors as a beverage, a nuisance—bill to abate—constitutionality of Statute of Iowa—conflict with Civil Rights Statutes, and Fourteenth Amendment to Constitution of United States.

Where a complaint in equity was filed in the District Court of the State of Iowa, under section 1543, Code of that State, as amended by the Twentieth General Assembly, alleging that the defendants (the appellants here), were keeping a place for the sale of intoxicating liquors as a beverage, and sold such liquors for such purpose, contrary to the law of the State, and asking that such place be declared a nuisance and abated, and that a preliminary injunction be issued, and the defendants filed their petition for removal of the cause to the Circuit Court of the United States, upon the ground that the statutes under which the proceedings were had and which the Supreme Court of Iowa had declared valid were in violation of the Civil Rights Law and the Constitution of the United States, especially the Fourteenth Amendment thereof, and such petition was granted, and upon motion of plaintiff in the circuit court, the case was remanded, upon the ground that no federal question was involved; upon appeal from that decree, this court being equally divided in opinion upon a motion made here by appellee, complainant below, to dismiss the appeal, and affirm the decree of the circuit court remanding the cause, such decree stands affirmed.

[No. 855.]

Submitted Oct. 12, 1886. Decided Oct. 25, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Iowa.

Affirmed.

On motion to dismiss.

On the 4th day of September, 1883, complainant, a citizen of Iowa, filed in the District Court of the State of Iowa, in and for Dubuque County, his complaint in equity, alleging that the defendants, who were and are citizens of Iowa, at their place of business in the City of Dubuque, Iowa, have established a saloon and place for the keeping and sale of intoxicating liquors; to wit, whisky, wine, gin and beer, and are keeping said liquors in said saloon, with the intent to sell the same therein as a beverage, contrary to the provisions of section 1542 of the Code of Iowa as amended and substituted by the Act of the Twentieth General Assembly of the State of Iowa, approved April 3, 1884; and further, that in the month of August, 1884, said defendants in their said saloon sold to divers and sundry persons intoxicating liquors, contrary to the provision of section 1540 of the Code of Iowa, as amended by said Twentieth General Assembly; and further, that said defendants at said saloon, have since the 15th day of July, 1884, by themselves, their agents and servants sold and continue from day to day to sell said liquors therein, to be drank as a beverage, contrary to law.

Complainant therefore prays that said saloon may be adjudged and decreed to be a nuisance, and that the same be abated, and said defendant be enjoined by preliminary injunction from further keeping or maintaining said saloon for the illegal sale of intoxicating liquors, and also from selling the same in said saloon, contrary to law; and that upon final hearing said injunction be made perpetual.

This action is brought under the provisions of section 1543 of said Code of Iowa, as amended by said Twentieth General Assembly, which enacts that in cases of the violation of the provision of section 1540, or section 1542 of said Code, prohibiting the selling or keeping for sale intoxicating liquors, contrary to law, the building in which such unlawful selling or keeping with intent to sell, is carried on, is a nuisance; and further provides that any citizen of the county in which such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and enjoin the same.

On the twenty-first day of September, defendants filed in the state court their petition for removal to the Circuit Court of the United States, upon the ground that the statutes aforesaid were in violation of the Civil Rights Law, and the Constitution of the United States, especially the Fourteenth Amendment thereof.

Which petition was allowed and the case removed.

In the circuit court, defendants amended their petition for removal, and averred therein:

1. That they were, and for five years past have been, citizens of Iowa.

2. That long prior to July 4, 1884, they had been engaged in brewing beer and selling the same at wholesale, and have kept upon their premises a room and bar where said beer so manufactured is kept for sale at retail; which is the keeping of a saloon charged in the petition herein.

3. That they invested in said business of brewing and selling beer a large sum of money; to wit, the sum of ten thousand dollars, exclusive of costs, which will be rendered entirely worthless if plaintiff succeeds in this action.

4. That there has been no trial or final hearing of this case.

5. That plaintiff has filed his motion for a temporary injunction to restrain defendants from prosecuting their said business, which if allowed will work an irreparable injury to defendants.

6. That the Twentieth General Assembly of Iowa passed an Act which went into effect July

tained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. Cherokee Nation v. Georgia, 5 Pet. 1, 48, 8 L. ed. 25, 42; Worcester v. Georgia, supra (6 Pet. 580, 8 L. ed. 508). Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial. Provisions in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with

*[118]

other parts of the *treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation. Ownership of the land would further that purpose. In the absence of definite expression of intention so to do, the United States will not be held to have kept it from them. The authority of the United States to prescribe title by which individual Indians may hold tracts selected by them within the reservation, to pass laws regulating alienation and descent and for the government of the tribe and its people upon the reservation detracts nothing from the tribe's ownership, but was reserved for the more convenient discharge of the duties of the United States as guardian and sovereign.

United States v. Cook, 19 Wall. 591, 22 L. ed. 210, supra, gives no

Headnote 6

support to the contention that in ascertaining just compensation for the Indian right taken, the value of mineral and timber resources in the reservation should be excluded. That case did not involve adjudication of the scope of Indian title to land, minerals or standing timber, but only the right of the United States to replevin logs cut and sold by a few unauthorized members of the tribe. We held that, as against the purchaser from the wrongdoers, the United States was entitled to possession. It was not there decided that the tribe's right of occupancy in perpetuity did not include ownership of the land or mineral deposits or standing timber upon the reservation, or that the tribe's right was the mere equivalent of, or like, the title of a life tenant.

The lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation.

Affirmed.

Mr. Justice Stone and Mr. Justice Cardozo took no part in the consideration or decision of this case.

Mr. Justice Reed dissents.

---

*[119]

*UNITED STATES, Appellant,

v.

KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS.

(304 U. S. 119–126.)

Indians, § 52 — ownership of timber on reservation.

1. In determining the compensation to which Indian tribes are entitled for the taking by the United States without their consent of lands reserved to them by treaty out of country held by them in immemorial possession, the value of timber thereon is properly taken into consideration.

Interest, § 32 — allowability on Indian claim against United States.

2. Compensation to which Indian tribes are entitled for the taking of reservation lands by the United States in exchanging unallotted lands for allotted lands granted by the United States by

ANNOTATION REFERENCES.

1. As to liability of United States for interest generally, see annotation in 73 L. ed. 170.

2. As to power of Congress over Indians, see annotation in 8 L. ed. 484.

mistake in aid of the construction of a military road, includes interest on the unpaid value of such lands from the time of the exchange to the date of the judgment, even though the statute conferring upon the Court of Claims jurisdiction to determine the claim provides that if it shall determine that the United States has wrongfully appropriated any lands belonging to such Indians "damages therefor shall be confined to the value of the said land at the time of said appropriation."

[*See annotation reference*, 1.]

Indians, § 33 — power of Federal Government as to tribal lands.

3. The power of the United States to control and manage the affairs of its Indian wards in good faith for their welfare is subject to constitutional limitations, and does not enable the United States, without paying just compensation therefor, to appropriate lands of an Indian tribe to its own use or to hand them over to others.

[*See annotation reference*, 2.]

Interest, § 25 — recovery of, in suit for compensation for taking of property for public use.

4. The taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, which is its value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.

[No. 707.]

Argued April 1 and 4, 1938. Decided April 25, 1938.

APPEAL by the United States from a judgment of the Court of Claims of the United States in favor of the plaintiffs in an action by Indian tribes to recover the value of lands wrongfully appropriated by the United States. Affirmed.

See same case below, 85 Ct. Cl. 451.

Assistant Attorney General Carl McFarland, of Washington, D. C., argued the cause, and, with Solicitor General Jackson and Mr. C. W. Leaphart, also of Washington, D. C., filed a brief for appellant:

The Court of Claims erred in awarding interest against the United States on the unpaid value of the 87,000 acres from the time of exchange to the date of judgment.

Cherokee Nation v. United States, 270 U. S. 476, 487, 70 L. ed. 694, 699, 46 S. Ct. 428; Harvey v. United States, 113 U. S. 243, 249, 28 L. ed. 987, 989, 5 S. Ct. 465; Tillson v. United States, 100 U. S. 47, 25 L. ed. 544; United States v. Creek Nation, 295 U. S. 103, 111, 79 L. ed. 1331, 1336, 55 S. Ct. 681; Shoshone Tribe v. United States, 299 U. S. 476, 81 L. ed. 360, 57 S. Ct. 244; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 S. Ct. 115; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 S. Ct. 216; Yankton Sioux Tribe v. United States, 272 U. S. 351, 71 L. ed. 294, 47 S. Ct. 142; Winton v. Amos, 255 U. S. 373, 391, 65 L. ed. 684, 694, 41 S. Ct. 342; Stephens v. Cherokee Nation, 174 U. S. 445, 483–488, 43 L. ed. 1041, 1054–1056, 19 S. Ct. 722; Gritts v. Fisher, 224 U. S. 640, 642, 56 L. ed. 928, 931, 32 S. Ct. 580; Wallace v. Adams, 204 U. S. 415, 423, 51 L. ed. 547, 551, 27 S. Ct. 363; Sizemore v. Brady, 235 U. S. 441, 447, 449, 59 L. ed. 308, 310, 311, 35 S. Ct. 135; Choate v. Trapp, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 S. Ct. 565.

The jurisdictional act limited the recovery to the value of the land on the date of taking, without interest, irrespective of whether there was a taking within the meaning of the Fifth Amendment.

United States v. Mille Lac Band, 229 U. S. 498, 500, 57 L. ed. 1299, 1302, 33 S. Ct. 811; Shoshone Tribe v. United States, 299 U. S. 476, 493, 81 L. ed. 360, 367, 57 S. Ct. 244; McElrath v. United States, 102 U. S. 426, 440, 26 L. ed. 189, 193; Ex parte Bakelite Corp. 279 U. S. 438, 452, 73 L. ed. 789, 794, 49 S. Ct. 411; Williams v. United States, 289 U. S. 553, 581, 77 L. ed. 1372, 1384, 53 S. Ct. 751; Lynch v. United States, 292 U. S. 571, 582, 78 L. ed. 1434, 1442, 54 S. Ct. 840; Cherokee Nation v. United States, 270 U. S. 476, 487, 70 L. ed. 694, 699, 46 S. Ct. 428; Wiborg v. United States, 163 U. S. 632, 650, 41 L. ed. 289, 295, 16 S. Ct. 1127, 1197; Lynch v. Alworth-Stephens Co. 267

U. S. 364, 370, 69 L. ed. 660, 662, 45 S. Ct. 274; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 491, 43 L. ed. 521, 527, 19 S. Ct. 247; De Ganay v. Lederer, 250 U. S. 376, 381, 63 L. ed. 1042, 1044, 39 S. Ct. 524; Hurley v. Kincaid, 285 U. S. 95, 104, 76 L. ed. 637, 642, 52 S. Ct. 267.

Mr. G. Carroll Todd, of Washington, D. C., argued the cause, and, with Messrs. Daniel B. Henderson and T. Hardy Todd, also of Washington, D. C., and Mr. John Irwin, of Klamath Falls, Oregon, filed a brief for appellees:

The power of Congress to control and manage the property of the Indian tribes is subject to constitutional limitations, and therefore, when the Secretary of the Interior under authority of an act of Congress took the 87,000 acres from the Klamath Indians, there arose an obligation on the part of the United States to pay the just compensation guaranteed by the Fifth Amendment for private property taken for public use.

Chippewa Indians v. United States, 301 U. S. 358, 375, 81 L. ed. 1156, 1166, 57 S. Ct. 826; Yankton Sioux Tribe v. United States, 272 U. S. 351, 359, 71 L. ed. 294, 298, 47 S. Ct. 142; United States v. Creek Nation, 295 U. S. 103, 111, 79 L. ed. 1331, 1336, 55 S. Ct. 681; Shoshone Tribe v. United States, 299 U. S. 476, 496–498, 81 L. ed. 360, 368–370, 57 S. Ct. 244; Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 67 L. ed. 664, 43 S. Ct. 354; Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083, 47 S. Ct. 611; Campbell v. United States, 266 U. S. 368, 69 L. ed. 328, 45 S. Ct. 115; International Paper Co. v. United States, 282 U. S. 399, 75 L. ed. 410, 51 S. Ct. 176; Russian Volunteer Fleet v. United States, 282 U. S. 481, 75 L. ed. 473, 51 S. Ct. 229; Jacobs v. United States, 290 U. S. 13, 78 L. ed. 142, 54 S. Ct. 26, 96 A.L.R. 1.

Mr. Justice Butler delivered the opinion of the Court.

Congress, by Act of May 26, 1920[1] gave to the lower court jurisdiction of claims of respondents against the United States. They sued to recover the value of 87,000 acres of land alleged to have been taken from them by the United States August 22, 1906. The Court of Claims made special findings of fact, stated its conclusion of law and dismissed the case. We affirmed on the ground that the Act did not confer jurisdiction of released claims and that this claim had been released. 296 U. S. 244, 80 L. ed. 202, 56 S. Ct. 212. Then, by Act of May 15, 1936,[2] the Congress enacted "That in the suit numbered E-346 [this suit] heretofore instituted in the Court of Claims by the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians under an Act . . . approved May 26, 1920, jurisdiction is hereby conferred upon said court, and it is hereby authorized and directed, irrespective of any release or settle-

*[121]

ment, to reinstate *and retry said case and to hear and determine the claims of the plaintiffs on the merits, and to enter judgment thereon upon the present pleadings, evidence, and findings of fact, with the right of appeal, rather than by certiorari, to the Supreme Court of the United States by either party: *Provided*, That any payment heretofore made to the said Indians by the United States in connection with any release or settlement shall be charged as an offset, but shall not be treated as an estoppel."

The findings show: In 1864 plaintiffs held by immemorial possession more than 20,000,000 acres located within what now constitutes Oregon and California. By an Act[3] of March 25 of that year the President was authorized to conclude with them a treaty for the purchase of the country they occupied. The treaty was made October 14 following.[4] A pro-

[1] 41 Stat. at L. 623, chap. 203.
[2] 49 Stat. at L. 1276, chap. 398.
[3] 13 Stat. at L. 37, chap. 41.
[4] Ratified July 2, 1866; proclaimed February 17, 1870. 16 Stat. at L. 707.

viso sets apart a tract retained out of the country a part of which was ceded, to be held until otherwise directed by the President, as a residence for plaintiffs, with specified privileges. Rights of way for public roads were reserved.[5] Shortly before the treaty was made Congress granted Oregon, to aid in the construction of a military road, the odd-numbered sections for three in width on each side of the proposed road.[6] Oregon accepted the grant and assigned it to the road company which undertook to construct the road. Congress recognized the assignment.[7] Patents were issued to the State and to the road company for in all 420,240.67 acres, title to which was later acquired by a land company. Exclusive of right of way, 111,385 acres so acquired by that company

*[122]

were within the boundaries *of the reservation and had been allotted in severalty to members of the tribe. The United States brought suit but failed to recover that area.[8] Congress by Act of June 21, 1906,[9] authorized the Secretary of the Interior to exchange unallotted lands in the reservation for the allotted lands by mistake earlier conveyed. He made an agreement with the land company pursuant to which, on August 22, 1906, it conveyed the allotted lands back to the United States and in return the latter conveyed to the company 87,000 acres of unallotted lands. That transfer was made without the knowledge or consent of plaintiffs and without giving them any compensation for the lands so taken from their reservation. Later, however, the United States paid them $108,750 for which they released their claim.[10] There was then upon the land 1,713,000,000 board feet of merchantable timber of the value of $1.50 per thousand; the value of the lands including timber was $2,980,000. From that amount the court subtracted the $108,750 and to the remainder added 5 per cent per annum to date of judgment; from the total took the amount it found the United States entitled to set off against plaintiff's claim (Act of May 26, 1920, 41 Stat. at L. 623, chap. 203, § 2), and as of June 7, 1937, gave judgment for the balance $5,313,347.32, with interest on a part of that amount until paid.

1. The United States contends that the lower court erred in including the value of the timber. Headnote 1

The tract taken was a part of the reservation retained by plaintiffs out of the country held by

*[123]

them in immemorial possession, *from which was made the cession by the treaty of October 14, 1864. The clause declaring that the district retained should, until otherwise directed by the President, be set apart as a residence for the Indians and "held and regarded as an Indian reservation" clearly did not detract from the tribes' right of occupancy. The worth attributable to the timber was a part of the value of the land upon which it was standing. Plaintiffs were entitled to have that element of value included as a part of the compensation for the lands taken. United States v. Shoshone Tribe, decided this day [304 U. S. 111, ante, 1213, 58 S. Ct. 794].

2. The United States also contends that the lower court erred in allowing interest against the United States on the unpaid value of the 87,000 acres from the time of the exchange to the date of the judgment, and to support that contention argues that there was no exercise of the power of eminent domain and that the jurisdictional Act Headnote 2

[5] 16 Stat. at L. 708.

[6] Act of July 2, 1864, 13 Stat. at L. 355, chap. 213.

[7] Act of June 18, 1874, 18 Stat. at L. 80, chap. 305, 43 U. S. C. A. § 862.

[8] United States v. Dallas Military Road Co. 140 U. S. 599, 35 L. ed. 560, 11 S. Ct. 988; United States v. California & O. Land Co. 148 U. S. 31, 37 L. ed. 354, 13 S. Ct. 458; United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 S. Ct. 266. 82 L. ed. 1222

[9] 34 Stat. at L. 325, chap. 3504.

[10] The release was held valid in Klamath & M. Tribes v. United States, 296 U. S. 244, 80 L. ed. 202, 56 S. Ct. 212.

of 1920 limited recovery to the value of the land on the date of the taking, without interest.

It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others. Chippewa Indians v. United States, 301 U. S. 358, 375, 81 L. ed. 1156, 1166, 57 S. Ct. 826, and cases cited. Nor is it quite accurate to say that interest as such is added to value at the time of the taking in order to arrive at just compensation subsequently ascertained and paid. The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. Jacobs v. United States,

*[124]

*290 U. S. 13, 16, 17, 78 L. ed. 142–144, 54 S. Ct. 26, 96 A.L.R. 1, and cases cited. The lands here in question are not the allotted areas making up the 111,385 acres that the United States conveyed by mistake and through error in the conduct of litigation, as its counsel here says, failed to recover.[11] Plaintiffs seek compensation for the 87,000 acres given to the land company in exchange for the allotted areas which the latter then owned.

Having been informed of the failure of the United States to recover the allotted lands, Congress, by the Act of March 3, 1905, directed the Secretary of the Interior to ascertain "on what terms the said company will exchange such lands [the 111,385 acres of allotted lands] for other lands, not allotted to Indians, within the boundaries of said reservation."[12] The Secretary having reported, the Congress by the Act of June 21, 1906 authorized him to exchange 87,000 acres of the tribes' lands for lands theretofore erroneously conveyed. The exchange having been consummated, Congress by Act of April 30, 1908[13] appropriated $108,750 as compensation. That amount was paid plaintiffs in accordance with the Act; they gave the release here held valid, 296 U. S. 244, 80 L. ed. 202, 56 S. Ct. 212. The Act of May 15, 1936 followed.

The United States argues that the rule of just compensation does not apply because "the tract was lost by mistake rather than taken by the power of eminent domain." But as to the 87,000 acres here involved there is no foundation for that assertion. Unquestionably Congress had power to direct the exchange and for that purpose to authorize expropriation of plaintiffs' lands. The validity of its enactments is not questioned. The taking was to enable the government to discharge its obligation,

*[125]

*whether legal or merely moral is immaterial, to make restitution of the allotted lands. The taking was in invitum, specifically authorized by law, a valid exertion of the sovereign power of eminent domain. It therefore implied a promise on the part of the Government to pay plaintiffs just compensation. Jacobs v. United States, supra.

The provision of the Act of 1920 invoked by the United States is: "That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation. . . ." As shown above, the 87,000 acres were taken by valid exertion of the power of eminent domain. The taking was consummated pursuant to the Act of 1906; it was

[11] See footnote 8, supra.

[12] 33 Stat. at L. 1033, chap. 1460.

[13] 35 Stat. at L. 70, chap. 153.

ratified by appropriation and payment under the Act of 1908. It implied a promise to pay just compensation. Clearly the lands in question were not "wrongfully appropriated."

Moreover the Congress by the Act of May 15, 1936 intended to grant to the plaintiffs the right to have their claim for just compensation under the Constitution for the 87,000 acres judicially determined without regard to the settlement and irrespective of

*[126]

the release.[14] It specifically *directed the lower court to determine the claim of plaintiffs on the merits and to enter judgment thereon "upon the present pleadings, evidence and findings of fact." Unquestionably the findings of fact are sufficient to sustain the judgment.

Affirmed.

Mr. Justice Stone, Mr. Justice Cardozo, and Mr. Justice Reed took no part in the consideration or decision of this case.

Mr. Justice Black concurs in the result.

GUARANTY TRUST COMPANY OF NEW YORK, Petitioner,
v.
UNITED STATES OF AMERICA.

(304 U. S. 126-144.)

Limitation of Actions, § 77 — running of limitations against sovereign — basis of immunity.

1. The immunity of the sovereign from the operation of statutes of limitation, although originally a matter of royal prerogative, is now based upon the public policy of protecting the citizens of the state from the loss of their public rights and revenues through the negligence of the officers of the state.

[*See annotation reference*, 1.]

Limitation of Actions, § 77 — against whom available — foreign government.

2. In the absence of a treaty or of a discriminatory state statute, a foreign government bringing suit in a state or Federal court is subject to the defense of the statute of limitations in the same way as other litigants, not being entitled to the immunity accorded the domestic sovereign in this regard.

International Law, § 15 — foreign government — immunity from suit — waiver of immunity.

3. Although a foreign government is not subject to suit without its consent, it abandons such immunity and subjects itself to the procedure and rules of decision of the forum where it seeks relief in the forum and voluntarily appears as suitor therein.

Limitation of Actions, § 3 — purpose of statute — statute of repose.

4. A statute of limitations is a statute of repose, designed to protect citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.

Limitation of Actions, § 1 — limitations as defense — public interest.

5. Statutes of limitation constitute a meritorious defense and serve the public interest.

Limitation of Actions, § 96 — running of limitations — claim of unrecognized foreign government.

6. The fact that the Soviet Govern-

---

[14] A letter of the Secretary of the Interior to the Committee on Indian Affairs on the proposed Act of 1936 said in part: "The bill now here seeks to authorize 'effective judicial determination' of the claim of these Indians for the land taken from their reservation and given to the California & Oregon Land Co., which the courts have plainly indicated to have been for an inadequate consideration." H. Rep. No. 2354, 74th Cong. 2d Sess.

The Report of the House Committee on Indian Affairs stated: "The pending bill to amend the jurisdictional act is limited solely to the object of giving effect to this suggestion of the Supreme Court by granting the Klamath tribes the right to have their claim for just compensation under the Constitution for the taking of the 87,000 acres of their lands judicially determined on its merits without regard to the grossly inequitable settlement heretofore made." H. Rep. No. 2354, 74th Cong. 2d Sess.

The Report of the Senate Committee on Indian Affairs stated: "The purpose of the bill is to enable these Indian tribes to obtain just compensation for the taking of a part of their reservation in the State of Oregon by the Secretary of the Interior under authority of an Act of Congress approved June 21, 1906." S. Rep. No. 1749, 74th Cong. 2d Sess.

OTOE AND MISSOURIA TRIBE OF INDIANS

v.

The UNITED STATES.

No. 1-54.

United States Court of Claims.

May 3, 1955.

The Otoe and Missouria Tribe of Indians brought proceedings against the United States under the Indian Claims Commission Act and sought recovery under seven causes of action. The Indian Claims Commission entered decisions, and the Indians appealed from determinations with respect to the first, second, fourth, fifth, sixth and seventh causes of action, and the United States appealed from determinations as to the third and fourth causes of action and final determination on off-sets. The Court of Claims, Littleton, J., held that evidence sustained commission's findings and conclusions.

Order in accordance with opinion.

1. Constitutional Law ⇐68(1)

Function of recognizing liability in the United States for claims that have no legal or equitable basis under existing law is a political and not a judicial function.

2. United States ⇐113

Congress, in passage of the Indian Claims Commission Act, was, to a certain extent, exercising its political function of creating new causes of action and recognizing liability in the United States. 25 U.S.C.A. § 70 et seq.

3. Courts ⇐426

United States ⇐78(15)

Statutory provisions of the Indian Claims Commission Act dealing with jurisdiction of the commission extend to Indian claimants the benefits of the Tucker Act and the Tort Claims Act. 25 U.S.C.A. § 70a(1, 2); 28 U.S.C.A. §§ 1346 et seq., 1505, 2671 et seq.

4. United States ⇐113

Provision of the Indian Claims Commission Act giving commission jurisdiction of claims which would result if treaties, contracts and agreements between claimant and the United States were revised on ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any ground cognizable by court of equity merely provides a forum for suits by Indian claimants for reformation or revision of contracts for fraud, duress, unconscionable consideration, and for mutual mistake of fact and does not authorize reformation of contracts for mutual mistake of law, or for unilateral mistake of law or fact, and does not authorize commission to entertain claims requiring revision of treaties. 25 U.S.C.A. § 70a(3).

5. Evidence ⇐39

It is common knowledge that Indian treaties dealt primarily with Indian land and usually provided for cessions of such land held both by "Indian title" and "Reservation title" to the United States.

6. United States ⇐113

Where certain clauses of the Indian Claims Commission Act did not, in so many words, state whether Congress intended to permit adjudication of claims thereunder where land involved was "Indian title land", Court of Claims was required to endeavor to discover by means of both intrinsic and extrinsic aids to statutory interpretation what Congress did intend. 25 U.S.C.A. § 70a(3, 5).

7. Statutes ⇐184

One step in discovery of legislative meaning or intent of statute is ascertainment of the "legislative purpose", that is, the reasons which prompted enactment of the statute.

See publication Words and Phrases, for other judicial constructions and definitions of "Legislative Purpose".

8. Statutes ⇐212.6

Court assumes that legislators sought to use language which would carry out their purpose in enacting statute rather than to defeat such purpose.

9. Statutes ⇐184, 215, 217

In seeking to ascertain legislative purpose of statute, it is proper for court to look at circumstances existing at time of enactment of statute, to necessity for statute, to evils intended to be cured by it, to the intended remedy, and to the law as it existed prior to enactment of statute.

10. Statutes ⇐228

Court, in interpreting provision in statute, may imply exception to general terms used therein, but it will do so only where to apply general terms literally will lead to absurd results, contrary to the manifest congressional purpose as revealed by the statute as a whole and as confirmed by its legislative history.

11. Statutes ⇐184

If language of statute is clearly at variance with legislative purpose as manifested by whole statute, court is justified in following purpose rather than literal meaning of provisions of statutes.

12. United States ⇐113

Provisions of the Indian Claims Commission Act that commission shall hear and determine Indian Claims against the United States, which would result if treaties, contracts and agreements between claimant and United States were revised on ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any grounds cognizable by a court of equity, and claims based on fair and honorable dealings that are not recognized by any existing rule of law or equity, include treaties and dealings concerning "Indian title". 25 U.S.C.A. § 70a (3, 5).

13. United States ⇐113

On appeal from decisions by Indian Claims Commission, Court of Claims would grant motion of Indians to vacate commission's determination dismissing first cause of action and remand case to commission so far as the first cause of action was concerned, in order to permit commission to act on claim concerning land ceded by the Treaty of July 15, 1830, on basis of record relating to the first cause of action, and on the basis of the record in another case in which evidence had a direct bearing on claim asserted in first cause of action, though such evidence had previously been available. 25 U.S.C.A. § 70a(3, 5); Indian Treaties July 15, 1830, 7 Stat. 328, art. 1 et seq.; Oct. 15, 1836, 7 Stat. 524; March 15, 1854, 10 Stat. 1038.

14. Indians ⇐11

Where the government did not induce Otoe Indians to sell a portion of their lands for a nominal sum for allotment to their own half-breeds and those of friendly tribes, and the Otoe Indians apparently knew what they were doing and were under no misapprehensions whatsoever, Otoe Indians were not entitled to recover under the Indian Claims Commission Act because of such sale. 25 U.S.C.A. § 70a(3, 5); Indian Treaties July 15, 1830, 7 Stat. 328, arts. 10, 11.

15. Indians ⇐11

Where Otoe Indians sold certain of their lands for nominal sum for benefit of their own half-breeds and those of friendly tribes, and cessions of the land to the half-breeds was an outright one leaving no remaining property rights, in the Otoe Indians, and government's surveyor in surveying the ceded lands, excluding 15,697 acres from the area called for by terms of treaty, the government did not hold the 15,697 acres in trust for the Otoe Indians. 25 U.S.C.A. § 70a(3, 5); Indian Treaties July 15, 1830, 7 Stat. 328, arts. 10, 11.

16. Indians ⇐11

In proceeding against the United States under Indian Claims Commission Act by Otoe Indians, who claimed that they had received an unconscionably low consideration under the Treaty of Sept. 21, 1833, for 792,000 acres of land allegedly held by them under Indian title and ceded to the United States, when they were paid only 4.9¢ an acre, evidence sustained finding of Indian Claims Commission that Otoe Indians had title to the land ceded. 25 U.S.C.A. § 70a(3, 5); Indian Treaty Sept. 21, 1833, 7 Stat. 429.

17. Evidence ⇐555

In proceeding against the United States under Indian Claims Commission Act by Otoe Indians, who claimed that they had received an unconscionably low consideration under the Treaty of Sept. 21, 1833, for 792,000 acres of land allegedly held by them under Indian title and ceded to the United States, when they were paid only 4.9¢ an acre, factors considered by expert witnesses in forming opinion as to actual value of land ceded included natural resources, climate, vegetation, timber, game and wildlife, mineral resources, whether they were of economic value at time of cession or merely of potential value, and water power. 25 U.S.C.A. § 70a(3, 5); Indian Treaty Sept. 21, 1833, 7 Stat. 429.

18. Indians ⇐11

In proceeding against the United States under Indian Claims Commission Act by Otoe Indians, who claimed that they had received an unconscionably low consideration under the Treaty of Sept. 21, 1833, for 792,000 acres of land allegedly held by them under Indian title and ceded to the United States, when they were paid only 4.9¢ an acre, actual value of land at time it was ceded could not be determined merely on basis of berries and wild fruits. 25 U.S.C.A. § 70a(3, 5); Indian Treaty Sept. 21, 1833, 7 Stat. 429.

19. Evidence ⇐601(4)

In proceeding against the United States under Indian Claims Commission Act by Otoe Indians, who claimed that they had received an unconscionably low consideration under the Treaty of Sept. 21, 1833, for 792,000 acres of land allegedly held by them under Indian title and ceded to the United States, when they were paid only 4.9¢ an acre, evidence sustained finding of Indian Claims Commission that land was worth 75¢ an acre at time it was ceded. 25 U.S.C.A. § 70a(3, 5); Indian Treaty Sept. 21, 1833, 7 Stat. 429.

20. Indians ⇐11

In proceeding against the United States under the Indian Claims Commission Act by Otoe Indians, who claimed that they had received an unconscionably low consideration under Treaty of March 15, 1854, for 1,250,000 acres of land allegedly held by them under Indian title and ceded to the United States, when they were paid only 42¢ an acre, or that amount paid was so low as to represent dealings less than fair and honorable on part of United States, evidence sustained finding of Indian Claims Commission that Otoe Indians had good Indian title to land ceded at time of cession. 25 U.S.C.A. § 70a(3, 5); Indian Treaty March 15, 1854, 10 Stat. 1038, art. 1 et seq.

21. Evidence ⇐601(4)

In proceeding against the United States under the Indian Claims Commission Act by Otoe Indians, who claimed that they had received an unconscionably low consideration under Treaty of March 15, 1854, for 1,250,000 acres of land allegedly held by them under Indian title and ceded to the United States, when they were paid only 42¢ an acre, or that amount paid was so low as to represent dealings less than fair and honorable on part of United States, evidence sustained finding of Indian Claims Commission that land ceded was worth $1 an acre at time of cession. 25 U.S.C.A. § 70a(3, 5); Indian Treaty Sept. 21, 1833, 7 Stat. 429.

22. United States ⇐113

In proceeding against the United States under the Indian Claims Commission Act by Otoe Indians, who claimed that they had received an unconscionably low consideration under Treaty of March 15, 1854, for 1,250,000 acres of land allegedly held by them under Indian title and ceded to the United States, when they were paid only 42¢ an acre, or that amount paid was so low as to represent dealings less than fair and honorable on part of United States, evidence sustained finding of Indian Claims Commission that dealings were less than fair and honorable on part of the United States. 25 U.S.C.A. § 70a(3, 5); Indian Treaty Sept. 21, 1833, 7 Stat. 429.

23. United States ⇐113

In proceedings against the United States by Otoe and Missouria Indians un-

der the Indian Claims Commission Act, evidence sustained findings of Indian Claims Commission that sales of lands in Indian reservation to white settlors with consent of Indians in open council were not unconscionable within meaning of the act. 25 U.S.C.A. § 70a(3, 5); Indian Treaty Dec. 9, 1854, 10 Stat. 1130; Acts June 10, 1872, 17 Stat. 391; Aug. 15, 1876, 19 Stat. 208; March 3, 1879, 20 Stat. 471.

24. Indians ⇐15(1)

Where terms of compromise settlement agreement whereby price to be paid by white settlors under purchase contract for purchase of land located in Indian reservation was to be reduced were explained to Indians in open council and were understood by them, procedure by government inspector in talking to individual Indians and procuring their signatures on the settlement agreement was not illegal or irregular to such a degree as to nullify effect of consent, and Indians were not entitled to prevail under Indian Claims Commission Act on ground of fraud and duress. 25 U.S.C.A. § 70a(3, 5); Acts March 3, 1881, 21 Stat. 380, March 3, 1893, 27 Stat. 568, April 4, 1900, 31 Stat. 59.

Luther Bohanon, Oklahoma City, Okl., and Marvin J. Sonosky, Washington, D. C., Bert Barefoot, Jr., and Bohanon & Adams, Oklahoma City, Okl., on the briefs, for appellants.

Ralph A. Barney, Washington, D. C., Perry W. Morton, Asst. Atty. Gen., for appellee.

Wilkinson, Boyden, Cragun & Barker, Washington, D. C., Donald C. Gormley, Washington, D. C., and John M. Murray, Chicago, Ill., on the brief, amici curiae.

Jay H. Hoag, Duluth, Minn., and Lathers, Hoag & Edwards, Duluth, Minn., for Red Lake Band of Chippewa Indians and others, amici curiae.

Before JONES, Chief Judge, and LITTLETON, WHITAKER, MADDEN and LARAMORE, Judges.

LITTLETON, Judge.

These are appeals from decisions by the Indian Claims Commission, Docket No. 11. See 2 Ind.Cl.Com. 335;[1] *id.* p. 500.[2] The Indians have appealed from the Commission's final determinations in the first, second, fourth, fifth, sixth, and seventh causes of action.[3] The Government has appealed from the Commission's final determinations in the third and fourth causes of action and from the Commission's final determination on offsets.

Subsequent to oral argument on appeal, the Indian appellants moved to vacate the Commission's judgment on the first cause of action and to remand that cause for further proceedings before the Commission in order to permit the Commission to act on a motion there pending concerning this claim. The grounds for the motion herein are changes supervening since the taking of the appeal, and newly discovered evidence. The Government objected to the granting of the motion on the ground, among others, that a decision by this court upholding the Government's contention that no claim involving so-called Indian title land is cognizable under section 2 of the Indian Claims Commission Act, 25 U.S.C.A. § 70a, would render useless a remand of the first claim which concerns such land. Accordingly, we defer action on Indian appellant's motion and shall decide it later in this opinion.

We shall first discuss and decide the Government's overall contention that Congress did not, in enacting the Indian Claims Commission Act, 25 U.S.C.A. § 70 et seq., create any new causes of action, but merely provided a forum in

1. Findings and decision on liability and damages, dated March 31, 1953.

2. Findings and decision on offsets, dated December 11, 1953.

3. The eighth and ninth causes of action requested an accounting of all financial transactions between the parties. These matters were dealt with in a separate hearing on offsets.

which Indian claimants could sue the United States on only those claims concerning which the United States had already consented to be sued by non-Indians.

[1, 2] As pointed out by defendant, the function of recognizing liability in the United States for claims that have no legal or equitable basis under existing law is a political and not a judicial function. We think it is quite clear from the face of the Indian Claims Commission Act that in its passage Congress was, to a certain extent, exercising its political function of creating certain new causes of action and recognizing liability in the United States, if the facts warranted, in connection with such causes. In fact, the Act clearly creates causes of action and permits suit thereon which would not have been possible, and are not possible, as far as we know, between private individuals. In addition, Congress was providing a forum in which these causes of action might be sued on, and also in which the Indians might sue the United States on causes of action available to non-Indians.

Clauses (1) and (2) and portions of clause (3) of section 2 merely provide a forum in which Indians may sue the United States in the same manner as non-Indians, except that Congress expressly waived the defenses of the statute of limitations and laches.[4]

Clauses (1) and (2) provide as follows:

"* * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, *with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;* * * *." [Italics supplied.]

[3] In general, these clauses extend to Indian claimants the benefits of the Tucker Act and the Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671 et seq.

Clause (3) provides:

"* * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * *."

[4] Suits for the reformation or revision of *contracts* for fraud, duress, unconscionable consideration and for *mutual* mistake of *fact* are claims on which the claimant might have brought suit in the Federal courts against the United States if the Government were subject to suit. Accordingly, to this extent, clause (3) merely provides a forum for such suits by Indian claimants.[5] On the other hand, contracts may not be reformed for mutual mistake of *law*, or for *unilateral* mistake of law or fact, as provided in this clause. Neither may Federal courts entertain claims requiring the revision of treaties.[6] In these instances, certainly, Congress was creating new causes of action and also was providing a forum in which they might be litigated.

Clause (5) provides:[7]

"* * * (5) claims based upon fair and honorable dealings *that are not recognized by any existing rule of law or equity.*" [Italics supplied.]

4. Claims arising subsequent to the passage of the Act in 1946 are provided for in section 24 [now 28 U.S.C.A. § 1505], see Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 75 S.Ct. 313, and are subject to all the usual defenses.

5. It would seem that such claims could have been brought under clause (2).

6. Otoe and Missouria Tribes of Indians v. United States, 52 Ct.Cl. 424; Osage Tribe of Indians v. United States, 66 Ct. Cl. 64.

7. We shall discuss clause (4) later in this opinion.

That the above clause creates a new cause of action against the United States seems too obvious for comment.

In the first four causes of action the Indian appellants sue on claims which would result if certain treaties were revised for unconscionable consideration under clause (3) of section 2 of the Indian Claims Commission Act, or which would result if the Government's actions did not measure up to the standard of fair and honorable dealings, on the part of the United States, under clause (5). All of the treaties and dealings involved in these four claims concern land held by the Indian appellants by so-called Indian title, i. e., exclusive possession, occupancy, and use from time immemorial. It is the Government's position that even if Congress did create new causes of action based on revision of treaties for unconscionable consideration, or on lack of fair and honorable dealings by the United States, there is nothing in the Act which indicates a Congressional intent to *create* a cause of action in the claimant, or to admit the existence of a *liability* in the Government, where the treaty sought to be revised, or the dealings claimed to be unfair, involve land held by the Indian claimants by aboriginal use and occupancy title (Indian title) rather than reservation or treaty title.

This phase of the appeal has been extensively and painstakingly briefed by the parties and by others who have filed helpful briefs *amici curiae*. Following the recent decision of the Supreme Court affirming this court's decision in the case of Tee-Hit-Ton Indians v. United States,[8] additional briefs were filed concerning the possible applicability of the decision in that case to this issue in the present appeal.

In the Tee-Hit-Ton case the Supreme Court held that "Indian title" interest in land does not give rise in the Indians claiming such title to any rights against the United States under the Constitution or under section 24 of the Indian Claims Commission Act[9] (now codified as 28 U. S.C. § 1505). Nothing in the opinion in that case purports to speak on the question involved in the present controversy, i. e., whether, in enacting section 2(3) of the Indian Claims Commission Act and creating liability in the United States on claims which would result if treaties, etc., between the Indian claimant and the United States were revised on the enumerated grounds, Congress intended to include treaties dealing with Indian-title land; or whether, in enacting clause (5) of section 2, Congress intended to create liability in the United States where it could be shown that the Government acted less than fairly and honorably in its dealings with the Indians in connection with treaties concerning their Indian-title land. While the Supreme Court's decision is not entirely silent on these questions, it is obvious that it did not intend to decide these questions. We shall discuss such references later in this opinion.

In support of their conflicting contentions regarding the legislative intent, both parties have pointed to the language

8. 120 F.Supp. 202, 128 Ct.Cl. 82, affirmed February 7, 1955, 348 U.S. 272, 75 S.Ct. 313.

9. Section 24 of the Indian Claims Commission Act, 60 Stat. 1049, provides in part as follows:

"The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians * * * whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. sec. 250), as amended: * * *."

of the statute, its legislative history, special jurisdictional acts to some extent in *pari materia*, and to various standard rules of statutory interpretation and construction.

The parties have made numerous contentions based on various so-called rules of statutory interpretation and construction: that because the Indian Claims Commission Act is a special jurisdictional act giving consent to sue the United States, it must be strictly construed; that because the Act is essentially remedial it must be liberally construed in favor of the class it was intended to benefit and in the light of the evils it was intended to correct; that the Act is unambiguous on its face and that therefore resort to legislative history to determine its meaning is improper; that although the meaning of the words used may be plain, courts may still look to the legislative history to determine whether giving the words their natural significance leads to unreasonable results plainly at variance with the policy of the legislation as a whole, or to determine whether a certain word or phrase has been employed with a more limited or different meaning than might be attributed to it in common practice; that the failure of Congress to include the specific words, i. e., "Indian title land," requires the conclusion that Congress intended to exclude such words; that unless the language of the statute necessarily excludes certain matters, it may be construed to cover such matters if they come within the spirit or reason of the law, particularly where such coverage does not give the statute a meaning inconsistent with the language used but rather serves to accomplish the purpose of the law and is in harmony with the other provisions of the statute.

Rules of statutory interpretation and construction are not legal maxims or ends in themselves, but are rather aids in discovering the meaning to be attributed to the language employed by the legislature. The application of any particular rule may well be affected by other rules in order to avoid absurd results. Whether a statute is to be construed strictly or liberally depends on which construction will make the legislative intent and purpose effective. A liberal construction will not justify an extension of the scope of the statute beyond the obvious contemplation of the legislature, even though the statute be purely remedial in nature and the construction proposed will produce a most desirable result. On the other hand, strict construction will not be applied to defeat the clear intention of the legislature or to produce an absurd result, unless absolutely unavoidable.

The Indian Claims Commission Act is both remedial legislation and special legislation. It broadens the Government's consent to suit and as such is in derogation of its sovereignty. It confers special privileges upon the Indian claimants apart from the rest of the community, and to some extent is in derogation of the common law. This was, we think, because of the peculiar nature of the dealings between the Government and Indians from very early times. On the other hand, it remedies defects in the common law and in pre-existing statutory law as those laws affected Indians, and it was designed to correct certain evils of long standing and well known to Congress. Fortunately, under these circumstances, rules of interpretation and construction are subordinate to the principle that the object of all construction and interpretation is the just and reasonable operation of the particular statute, and accordingly it should be possible to construe the statute liberally to affect its remedial purpose and intent, and strictly to limit undue abrogation of fundamental rights or to prevent undue extension of extraordinary remedies.

[5, 6] The Government appellant lays particular stress on the fact that nowhere in clauses (3) and (5) is the expression "Indian title land" employed, and urges that the omission of this expression should not be supplied by the court. Since all mention of "land" is omitted in those clauses, it would seem that a court

would be as little justified in implying that Congress meant to include "reservation title land" or "fee simple title land" as it would "Indian title land." But it manifestly did intend to include land under some title since it is common knowledge that Indian treaties dealt primarily with Indian *land* and usually provided for cessions of such land held both by "Indian title" and "Reservation title" to the United States. Sometimes the land being ceded was land to which the Indians had aboriginal use and occupancy title which, as a matter of policy, the Government preferred to extinguish by formal treaty rather than by arbitrary action or by appropriation. Sometimes the land was held by reservation or treaty title. At other times the treaty in question covered land held by both types of ownership. Since the language of clauses (3) and (5) does not, in so many words, state whether Congress intended to permit the adjudication of claims thereunder where the land involved was Indian title land, we must endeavor to discover by means of both intrinsic and extrinsic aids to statutory interpretation, what Congress did intend.

[7–9] One step in the discovery of legislative meaning or intent is the ascertainment of the legislative purpose, i. e., the reasons which prompted the enactment of the law. The purpose of the legislature may well tend to reveal the meaning of the language used by the lawmakers since we assume that the legislators sought to use language which would carry out their purpose rather than to defeat it. In seeking to ascertain the legislative purpose, it is proper to look at the circumstances existing at the time of the enactment of the statute, to the necessity for the law, the evils intended to be cured by it, to the intended remedy, and to the law as it existed prior to such enactment.

From the publication of the so-called Merriam Report [10] in 1928 until the Indian Claims Commission Act of 1946 was enacted, Congress was almost constantly engaged in considering various proposals designed to bring about a settlement of outstanding Indian claims on a fair and equitable basis and in as expeditious a manner as possible. It was generally agreed that settlement of Indian claims by means of suits under numerous special jurisdictional acts was both cumbersome and unsatisfactory. As pointed out by the Secretary of Interior in a letter introduced in the record of Senate Hearings on S. 2731 (June 1935, 74th Cong., 1st Sess.) to create an Indian Claims Commission, most jurisdictional acts were in fact inequitable, and recoveries by the Indians in the Court of Claims on legal and equitable claims under such acts were infrequent, with resulting justifiable dissatisfaction by the tribes and their later return to Congress for further redress. [Hearings p. 4.]

In general the bills introduced in both houses were of two kinds. One type of bill merely extended the general jurisdiction of the Court of Claims to cover suits by Indians. Under these bills, only claims of a legal or equitable nature could

10. The Problem of Indian Administration prepared by the Institute for Government Research at the request of the Secretary of the Interior. See Chapter XIII.

11. H.R. 7963, 71st Cong., 2d Sess., 1930, to create a separate court of claims for Indians which would have jurisdiction to hear and determine claims of Indians under the Constitution, laws or treaties, regulations of an executive department, contract express or implied with the Government, and for damages, liquidated or unliquidated in cases not sounding in tort, "in respect of which claim the tribe would be entitled to redress against the United States" in law, equity or admiralty courts, if the United States were suable. The defense of the statute of limitations was waived.

S. 2164, 76th Cong., 1st Sess., 1939, to amend the Judicial Code in respect to the jurisdiction of the Court of Claims in Indian cases. Sec. 145C of this act provided that until otherwise expressly provided by Congress, no jurisdictional Act authorizing suit by Indians against the United States *theretofore* or *thereafter* filed, should be construed by the court, by reason of its passage, general language, or the legislative or administrative history thereof, to prejudge the na-

be brought against the United States.[11] The other type of bill provided for the settlement of legal and equitable claims and also for the settlement of extra-legal or moral claims having no basis in law or equity.[12]

ture or merits of the claim in any respect, or as a recognition of liability of any kind, or as a determination in any degree of the existence or nature of an alleged act on the part of the United States, upon which the claim of liability is predicated; that instead, all such actions should be determined in accordance with estsblihsed rules applicable to non-Indians in Federal courts.

S. 3083, 76th Cong., 3d Sess., 1940, was almost identical with S. 2164 above. Extensive hearings were held on this bill which was objected to by the Department of the Interior because it would render a nullity those jurisdictional acts already passed which were intended to afford Indians redress in the Court of Claims for wrongs of a *political* nature.

12. S. 3444 (73rd Cong. 2d Sess., 1934), and S. 1465 (74th Cong. 1st Sess., 1935), provided for the creating of an *Indian Claims Court* for the immediate *settlement by negotiation of* all Indian claims then or thereafter pending before the Court of Claims under special jurisdictional acts. The act provided that the settlements were not to be limited or restricted by technical terms contained in any special jurisdictional act under which the claims were pending, and that the settlement should not be limited by any technical defenses. The Indian Claims Court was to have jurisdiction to reconsider any judgment of the Court of Claims entered within twelve years of the passage of the act and if the Indian Court found that such judgment was not based on a full, fair and complete adjudication of the merits but was based on technical grounds, then the Indian Claims Court might recommend a sum in complete settlement of any claims closed by such judgments. The recommendations of the Court were to be transmitted to Congress for appropriations. Any settlement of other claims reached by the Indian Claims Court were to be referred to the Court of Claims which would render judgments thereon.

H.R. 6655 (74th Cong. 1st Sess., 1935), S. 2731 (74th Cong., 1st Sess., 1935), H.R. 7837 (74th Cong., 1st Sess., 1935), S. 1902 (75th Cong., 1st Sess., 1937), H.R. 5817, (75th Cong., 1st Sess., 1937), and S. 4206 (76th Cong., 3d Sess., 1940), all provided for the establishment of an *Indian Claims Commission* to *investigate and* to determine all facts relative to the following types of claims (1) claims arising under the Constitution, laws, treaties, etc., [this claim was omitted from some of the bills] (2) contract and tort claims, (3) claims arising from the breach of duty by a Government agent while purporting to act in the name of the United States, (4) "claims under *all* treaties heretofore negotiated between the claimant and the United States *but not formally ratified* or executed by all of the parties thereto" (hereinafter referred to as the "unratified treaties" clause), (5) claims based on *fair and honorable dealings*, (6) claims which would arise if treaties, agreements and contracts between the claimant and the United States were revised on the ground of fraud, duress, *mutual or unilateral mistake whether of law or fact*. The Commission was to make its reports and recommendations to Congress either for direct appropriations or for the passage of special jurisdictional acts referring the claims to the Court of Claims. [Italics supplied.]

S. 4234 (76th Cong., 3d Sess., 1940), S. 4249 (76th Cong. 3d Sess., 1940), S. 1111 (77th Cong., 1st Sess., 1941), S. 4339 (77th Cong., 1st Sess., 1941), and H.R. 4693 (78th Cong., 2d Sess., 1944), all provided for the establishment of an Indian Claims Commission *to hear and determine* all claims against the United States on behalf of the Indians. The types of claims enumerated were the precise ones provided for in the bills discussed in the preceding paragraph (including claims founded on the Constitution, laws, treaties, and Executive orders of the President). The bills varied somewhat with respect to the effect of the Commission's final determinations. The Justice Department objected to the passage of this type of bill because it gave the Commission the power to hear and determine claims based on "extra-legal" or moral grounds, a power Congress usually retains for itself.

H.R. 5569 (78th Cong. 2d Sess., 1944), and H.R. 1198 and H.R. 1341 (79th Cong., 1st Sess., 1945) all provided for the estnblishment of an Indian Claims Commission to hear and determine claims against the United States on behalf of the Indians. The claims enumerated in these bills differed slightly from those enumerated in the bills discussed in the preceding paragraph. The "revision of treaties" clnuse contained only the grounds of fraud, duress and mutual mistake; unilnteral mistake of law or fact

Beginning with a bill drafted and submitted to the Senate Committee on Indian Affairs during the course of hearings before a subcommittee, 70th and 71st Cong., by the Solicitor of the Department of the Interior, this latter type of bill usually contained provisions which permitted consideration of non-legal or moral claims, including claims which would result if treaties, contracts and agreements between the Indians and the United States were revised on the basis of fraud, duress, mutual or unilateral mistake of law or fact (hereinafter sometimes referred to as the "revision of treaties" clause); claims based on the breach of duty of a Government agent acting within the apparent [13] scope of his authority; claims arising under treaties theretofore negotiated between the claimant and the United States but not formally ratified or executed by all the parties thereto (hereinafter sometimes referred to as the "unratified treaties" clause), and claims based on fair and honorable dealings not cognizable in law or equity.

The first group of bills provided for the settlement by negotiation of all pending claims. The next group of bills provided for the investigation of all claims and reports and recommendations thereon to Congress. The last group of bills provided for the hearing and final *determination* of the same types of claims. The claims provided for in the earliest bills differed little from those included in the various clauses of section 2 of the bill finally enacted into law.

A study of the numerous bills relating to the proposed final settlement of Indian claims, the accompanying House and Senate hearings, the House and Senate Committee reports, and the debates on the floors of both Houses, reveals that in enacting the 1946 Indian Claims Commission Act, Congress had certain well-

was omitted. The "fair and honorable dealings" language was not used and in its place there appeared a clause reading:

"claims of whatever nature which morally exist though not recoverable by law."

These bills contained no clause referring to "unratified treaty" claims.

On June 11, 1945, the Department of the Interior submitted a draft containing its proposed amendments to H.R. 1198. These amendments called for the reinsertion of the "unratified treaty" clause which had appeared in numerous bills in the past; they called for the insertion of grounds appearing in previous bills in the "revision of treaties" clause, i. e., mutual and unilateral mistake of law and fact; and they called for the reinsertion of the old "fair and honorable dealings" language in place of the language "claims of whatever nature which morally exist". On June 14, 1945, the Department of the Interior submitted another draft of H.R. 1198 with additional amendments which included: (1) the substitution of the following language for the old "unratified treaty" clause language:

"claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant."

(2) the addition of "unconscionable consideration" as a ground for revision of treaties.

Later in the hearings, H.R. 4497 (79th Cong., 1st Sess., 1945) was substituted by the House Committee for H.R. 1198 and H.R. 1341, and it included all the last discussed amendments. On July 13, 1946, the Senate Committee on Indian Affairs considered H.R. 4497 (79th Cong., 2d Sess., 1946), with amendments apparently suggested by the Department of Justice. These amendments eliminated the clause concerning "unratified treaties" and lands owned or occupied by the claimants; there was also omitted the "revision of treaties" clause and the clause relating to breaches of duty by Government agents. The bill as amended was passed by the Senate. On disagreement by the House, the bill was referred to a conference of members of both Houses. As a result of this conference, the two Houses agreed to reinsert the "revision of treaties" clause and the clause relating to the taking of land owned or occupied by the claimant, whether by treaty or otherwise. The clause relating to a Government agent's breach of duty was not reinserted. This bill was finally enacted into law.

13. The United States is not ordinarily liable for the unauthorized acts of its agents. Gibbons v. United States, 8 Wall. 269, 19 L.Ed. 453; Whiteside v. United States, 93 U.S. 247, 23 L.Ed. 882.

defined purposes in mind. Congress wished to settle all meritorious claims of long standing of Indian tribes and bands whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature *not* cognizable in courts of the United States under any existing rules of law or equity. Congress was well aware of the fact that before the latter type of claim could be litigated and a judgment secured, it would be necessary for Congress to take the necessary political action of creating a cause of action and recognizing liability in the Government for the wrong implicit in the cause if facts sufficient to establish the cause provided for were presented by the Indian claimant. Consideration of language which would do precisely that was begun in 1928 and culminated in the enactment of clauses (3), (4) and (5) of the Indian Claims Commission Act in 1946. Efforts to prevent the enactment of a bill which would give the Indian Claims Commission jurisdiction to adjudicate and award judgment on claims having no basis in existing rules of law or equity, met with ultimate failure [14] and the purpose of the majority of the legislators to permit the adjudication of such claims is manifest in the clear language of section 2 of the act as passed.

We next consider the narrower problem of determining whether or not Congress intended to include in clauses (3) and (5) of section 2 of the Act, claims concerning alleged wrongs to Indian claimants in connection with land held by them under Indian title rather than under fee simple or reservation title. As pointed out earlier in this opinion, the word "land" is not mentioned in either clause, and yet no one suggests that because a particular treaty or course of dealings dealt with *land* the treaty is not subject to revision under clause (3), or the dealings cannot be scrutinized under the fair and honorable dealings criteria of clause (5). Government appellant does say, however, that when Congress used the term "treaties" in clause (3) it did not mean to include *all* treaties, but only certain ones, i. e., treaties relating to land held by the claimants under fee simple or reservation title; and that when Congress used the word "dealings" in clause (5), it did not mean all dealings, but rather it meant to exclude from consideration any dealings relative to the claimant's Indian title land. Indians can obtain a reservation title by treaty, statute or agreement.

[10] Since both "treaties" and "dealings" between the Government and the Indians covered numerous subjects including land, it may be said that those words as used in clauses (3) and (5) are general terms. It is true that a court in interpreting a provision in a statute may imply an exception to general terms used therein, but it will do so only where to apply the general term literally would lead to absurd results, contrary to the manifest Congressional purpose as revealed by the statute as a whole and as confirmed by its legislative history. Cf. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413; Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226.

In the absence of legislative direction to do so, Federal courts cannot consider claims relative to Indian title land. Congress must first create a cause of action and recognize liability in the Government on it, or the court is powerless, under the law as it exists, to adjudicate a claim concerning Indian title land and render judgment thereon in favor of the claimant.[15] In providing for the adjudication of claims which would arise from the revision of treaties or on the basis of fair and honorable dealings, however,

14. See footnote 11, supra, in connection with S. 2164, 76th Cong., 1st Sess., 1939, S. 3083, 76th Cong., 3d Sess., 1940, and the Senate amendments to H.R. 4497 (79th Cong., 1st Sess., 1946) discussed in footnote 12, above.

15. The Tee-Hit-Ton Indians v. United States, supra.

Congress *was* creating causes of action and admitting a liability in the Government on such claims. The question is then, do these newly created causes of action extend to claims falling within their general terms including claims based on property rights in the Indians that are not compensable or justiciable under ordinary rules of law or equity.

In the instant case the literal meaning of clauses (3) and (5) does not require the exception urged by Government appellant. Giving the word "treaties" used in clause (3) its natural significance would result in our finding that Congress intended that *all* treaties were to be included regardless of whether those treaties dealt with Indian title or reservation title land, or, in fact, with no land at all. Nothing in the language of clause (5) indicates a Congressional intent to exclude from its coverage "dealings" relating to Indian title land of the claimant.

[11] The court should give the statute the plain meaning indicated by its language unless that meaning is clearly at variance with the legislative purpose as manifested by the whole act and confirmed by the legislative history, in which latter event the court would be justified in following the purpose rather than the literal meaning of the portions of the statute under consideration. Chatwin v. United States, 326 U.S. 455, 464, 66 S.Ct. 233, 90 L.Ed. 198; United States v. American Trucking Associations, Inc., 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345.

Having concluded that a literal reading of clauses (3) and (5) requires the inclusion of claims relating to Indian title land, we next consider whether that interpretation is consistent with other provisions in the statute in the light of the language used in those other provisions, and also in the light of the legislative purpose motivating the passage of the act as a whole.

The word "land" is used only once in section 2 and that is in clause (4) which provides as follows:

> "* * * claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, *of lands owned or occupied by the claimant* without the payment for such lands of compensation agreed to by the claimant; * * *." [Italics supplied.]

Clause (4) not only mentions land specifically, but it characterizes the kinds of property interests intended to be included as (1) land owned, and (2) land occupied. The legislative history of the act is replete with evidence that Congress was acutely aware of the fact that Indians held land in two general ways: (1) by virtue of aboriginal use and occupancy from time immemorial, i. e., by Indian title, and (2) by reservation or treaty title, sometimes known as "recognized" title. Congress was also well aware of the fact that "Indian title" created in the holders of such title no legal rights against the sovereign, and that its extinguishment by the sovereign through solemn treaty for a consideration, was the result of a long standing policy rather than because of any legal obligation in the sovereign to do so. Both from the language of clause (4) and its legislative history which we shall discuss later, we are of the opinion that Congress intended that Indian claimants should have a cause of action and should be entitled to recover the value of the Indian title lands which had been taken by the Government without the payment of compensation therefor, whether the Government acquired that land by ratified treaty of cession, or whether the land was taken without the formality of a treaty, even an unratified one.

If clause (4) permits Indian claimants to recover for the uncompensated taking (deprivation) by treaty or otherwise of a property right which in itself created no legal right in the owner against the Government, it would seem reasonable to conclude that Congress also intended that the same property right ceded under a ratified treaty of cession for a grossly inadequate consideration, would give rise to a cause of action under

clause (3); and also, that where the Government's dealings with Indians concerning that same property right were less than fair and honorable, the Indians should have a claim under clause (5). A study of the legislative history of the Act as a whole and of those three clauses in particular, persuades us that Congress did so intend.

In June 1935, during the course of hearings on S. 2731 before the Senate Committee on Indian Affairs, the Assistant Solicitor of the Department of the Interior testified as follows:

> "Congress does not appear to learn that a great many claims cannot be settled by the Court of Claims but only by political action, in spite of the fact that all the many claims which sought relief from fraud, duress, or mistake of fact, and which have been sent to the Court of Claims were dismissed for want of jurisdiction." [Hearings, pp. 10, 11.]

As examples of the type of claim that had been rejected by the court as beyond its power to adjudicate, the Solicitor cited, among others, Otoe and Missouria Tribes of Indians v. United States, supra, which involved claims based on the payment of unconscionable consideration under a treaty of cession of land held by the Indians by Indian title, and Sisseton and Wahpeton Band of Sioux Indians v. United States, 1923, 58 Ct.Cl. 302, affirmed 277 U.S. 424, 425, 48 S.Ct. 536, 72 L.Ed. 939, involving a claim based on mistake and misrepresentation as to the acreage of Indian title land ceded to the United States by a ratified treaty of cession. The other cases mentioned by the Solicitor involved claims requiring revision of treaties covering reservation title land.

The extra-legal claims over which the Commission was to be given jurisdiction in S. 2731 included (1) claims arising from breach of duty of a government agent acting within the apparent scope of his authority, (2) claims based on *unratified* treaties which had been negotiated between the United States and the Indian claimants, (3) claims based on fair and honorable dealings, and (4) claims which would result if treaties, etc., were revised for fraud, duress, or mutual or unilateral mistake of law or fact.

H. R. 7837 (74th Cong., 1st Sess., 1935) was an almost identical bill considered by the House Committee on Indian Affairs. The Commissioner of the Bureau of Indian Affairs testified in favor of the bill and made the following statement in connection with the problems which the bill was designed to solve:

> "Ever since the beginning of the history of our Government in Indian Affairs the Government has been entering into treaties with Indian tribes and having these treaties, either by agreement or unilateral action, and in later years supplementing them with agreements. Again, it has been acting as the guardian of the Indians in the absence of treaties. It has been recognizing the Indian title to areas of land, extinguishing the Indian claim of title to other areas, and having recognized title repeatedly the Government has changed its mind and altered and diminished them. * * *
>
> "Now, out of this total of the past record, extending down to this day, there have grown up innumerable grievances and claims, in some instances resting upon grounds which are definitely legal or ethical (sic) and therefore can be settled in the Court of Claims, that is if they can get passed a jurisdictional act and if the act is drafted with a knowledge of the necessary facts then the case may be settled in the Court of Claims equitably.
>
> "A considerable number of the claims and grievances do not grow out of legal facts but essentially out of the moral parts of the record. There are a great many valid Indian claims, valid humanely and morally, but such have no basis in law. * * *" [House hearings pp. 5 and 6.]

In 1937 Congress was considering S. 1902 (75th Cong., 1st Sess.) which was almost identical with S. 2731 and H. R. 7837. At page 3220 of the Congressional Record—Senate, April 7, 1937, Senator Thomas made the following statement concerning S. 1902:

> "The reason for the bill is the long delay in the consideration of Indian claims before the Court of Claims. In 1927 a measure was enacted giving the California Indians the right to go into court and present their claims. Their case has been pending since 1927. The case was filed by the Attorney General of California, but it is not being prosecuted; nothing is being done. *It is to help Indians of that class that the measure before us is being urged.* * * *" [Italics supplied.]

On June 23, 1937, the same bill was considered by the House. Speaking in favor of the bill, Representative Dimond stated:

> "And the case of the California Indians is only an example of what has gone on and is going on all over the country with respect to many of the Indian citizens. Some other measure might be proposed which would work out to better advantage both for the Government and for the Indians, but no such measure is now before us and we all know the difficulties that would be encountered in drafting such a bill and having the same presented and considered." [Congressional Record—House, p. 6251.]

The claims of the California Indians were well known to the Congress. The Government had, in the last century, negotiated some eighteen treaties with certain of those Indians pursuant to which the Indians agreed to cede to the United States lands claimed by them under Indian title. In reliance on those treaties, the Indians left their land. The treaties were never ratified and the Indians were paid nothing for the land involved. Other California Indians, not parties to the treaties, were deprived of their land which was taken by the Government without the payment of any compensation. As indicated above, Congress supposed that the claims of these Indians could be settled under the provisions of the bills then under consideration. The hearings and debates do not mention, in the earlier years, under precisely which provision of the bills those claims could be considered, but the claims of the unratified treaty Indians would seem to fall within the meaning of the following clause which appeared in nearly every bill introduced to settle extra-legal claims from 1935 through 1944: [16]

> "* * * claims under all treaties heretofore negotiated between the claimant and the United States but not formally ratified or executed by all of the parties thereto; * * *."

In 1940 there was under consideration S. 3083 (76th Cong., 3d Sess.) to amend the jurisdiction of the Court of Claims to permit Indians to sue therein. It contained a provision that no jurisdictional act theretofore or thereafter passed should be construed by the court to prejudge the nature or merits of a claim in any respect, or to amount to a recognition of liability of any kind, nature or character, in the Government. The Department of Justice explained that this provision was designed to assure that no special jurisdictional act in behalf of Indians could be held by the court to create a right but only to provide a forum for rights recognized under existing rules of law and equity. The Department of the Interior seriously objected to this provision and in a report explain-

16. H.R. 6655 (74th Cong., 1st Sess., 1935); S. 2731 (74th Cong., 1st Sess., 1935); H.R. 7837 (74th Cong., 1st Sess., 1935); S. 1902 (75th Cong., 1st Sess., 1937); H.R. 5817 (75th Cong., 1st Sess., 1937); S. 4206 (76th Cong., 3d Sess., 1940); S. 4234 (76th Cong., 3d Sess., 1940); S. 4349 (76th Cong., 3d Sess., 1940); S. 1111 (77th Cong., 1st Sess., 1941); S. 4339 (77th Cong., 1st Sess., 1941); H.R. 4693 (78th Cong., 2d Sess., 1944).

ing its position it made the following statement:

"* * * it is appropriate and essential in some types of claims for Congress to recognize a liability by the passage of a jurisdictional act. These types of claims are not those based on the violation of any law, treaty, or agreement of the United States but based upon that sort of injury which the Court of Claims has described as political rather than judicial in nature. Among such claims are (a) Claims based on the taking without compensation of the *aboriginal right of use and occupancy of land*, the ownership of which by the Indians was never formally recognized by the Government * * *." [Italics supplied.] [Senate Hearings p. 22]

"The legislative history of the California jurisdictional bill indicates that Congress was repeatedly advised of the lack of a strictly legal or equitable basis for the claims and that recovery for the claims, morally compelling, must depend on the exercise by Congress of its political function of recognizing liability for such claims." [Senate Hearings p. 23]

There was general agreement at the hearings that S. 3083 would prevent the Court of Claims from considering any claim arising out of an Indian title interest in land, or any other so-called extra-legal or moral claim, and that its passage would make a nullity of any jurisdictional act then pending or later enacted which permitted suits on such moral claims. The bill was not passed.

In the summer of 1940, Senator Thomas introduced two bills providing for the creation of an Indian Claims Commission (S. 4234 and S. 4349, 76th Cong., 3d Sess.), to hear and determine claims of the same type as those specified in numerous similar bills considered from 1935 up to that time. In 1941, another almost identical bill was introduced—S. 1111. This bill provided that the Commission's final determination should, when reported to Congress, have the effect of a final judgment of the Court of Claims and be paid in like manner. The Department of Justice objected to the passage of the bill for the following reasons, among others:

"The provision in question might therefore have the effect of making the Commission not a fact-finding body authorized to report its conclusions to the Congress, but virtually a court with the power to determine claims based upon extra legal and moral grounds. Such a result might have the effect of a surrender by the Congress of its very necessary prerogative to sift and control this unusual type of claim against the Government." [Letter from Acting Attorney General Francis Biddle, June 12, 1941, appearing at page 6 of Report No. 909 of the Senate Committee on Indian Affairs to accompany S. 1111.] [17]

17. The Department of Justice had not objected seriously to earlier bills which had merely authorized the Commission (1) to settle by negotiation or (2) to investigate and report to Congress with recommendations, claims of an extra-legal or moral nature, including, among others, claims involving Indian title land. It did object, however, to any bill which would create causes of action on such claims, admit liability in the Government thereon, and give to the Commission or Court the power to render money judgments thereon. In the early years, Congress had no idea of authorizing a Commission to award judgments on purely moral claims. Its purpose was to have the Commission investigate those claims, make findings thereon and report to Congress its recommendations for the disposition of such claims. It was thought that such an arrangement would expedite the handling of Indian claims and would provide a way for more equitable and generous settlement of long-standing grievances on the part of the Indians than did the old system of procuring the passage of special jurisdictional acts. It was finally decided, however, that the most satisfactory and expeditious manner of settling both legal and extra-legal claims of the Indians was to give a Com-

In the 78th and 79th Congresses (1944 and 1945), three additional bills were introduced in the House (H. R. 5569, 78th Cong., 2d Sess., 1944, H. R. 1198 and H. R. 1341, 79th Cong., 1st Sess., 1945). These bills differed from previous bills in that the "revision of treaties" clause contained only the grounds of fraud, duress, and mutual mistake and omitted unilateral mistake and mistakes of law. The usual "fair and honorable dealings" language was also omitted and in its place there appeared a clause reading: "Claims of whatever nature which morally exist though not recoverable by law." The bills contained no clause relating to claims under "unratified treaties."

In March 1945, the House Committee on Indian Affairs held hearings on H. R. 1198. The Assistant Commissioner of the Bureau of Indian Affairs testified in favor of the bill. He stated that most of the claims that would be brought under the bill would involve the failure of the Government to live up to its obligations incurred under treaties, and the failure of the Government to protect lands "reserved by the Indians and recognized by treaty." He then stated that another sort of claim was included in the bill's coverage:

> "Then too, another set of claims arise from the taking by the Government of lands belonging to the Indians, and without making compensation. Now those lands may have been recognized by treaty or they may not have been recognized by treaty, or the treaty may not have been ratified, as in the case of the California Indians, for instance." [House Hearings, p. 60.]

The Commissioner stated that in his opinion, one of the first cases that would be brought to the Commission, if it were created, would be the case of the California Indians.

The Department of the Interior submitted a draft containing its proposed amendments to H. R. 1198. These amendments provided for the reinsertion of the "unratified treaty" clause which had appeared in previous bills; the "revision of treaties" clause was expanded to include mutual and unilateral mistake of law and fact as had previous bills; the old "fair and honorable dealing" language was reinserted in place of the language "claims of whatever nature which morally exist." The Department's explanation of the proposed changes was as follows:

> "The suggested amendments to the first paragraph of this section * * * are for the purpose of defining more exactly the principal classes of Indian tribal claims that might be considered by the Indian Claims Commission. Unratified treaties have been involved, either affirmatively or as a matter of defense, in a number of Indian claims. Instances also exist of claims founded upon unilateral mistakes or upon mistakes of both law and fact. The language 'fair and honorable dealings', when applied in conjunction with the other standards established by this section, would provide a yardstick for the adjudication of moral claims." [House Hearings p. 116.]

On June 14, 1945, further amendments to H. R. 1198 were proposed by the Department of the Interior. The ground of "unconscionable consideration" was added to the "revision of treaties" clause. The "unratified treaty" language that had appeared in so many previous bills and had been reinserted in H. R. 1198

mission the authority to hear and determine such claims and to render judgments thereon which would be final and would be paid in the same manner as are judgments of the Court of Claims. It was felt that this would relieve Congress of the burden of studying the findings and recommendations of a mere fact-finding Commission and of later passing legislation appropriating money to pay claims deemed meritorious, or legislation referring others involving law questions to the Court of Claims.

on June 11, was omitted and the following language substituted:

"Claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant."

These changes were explained as follows:

"The changes of phraseology in clause (3) [revision of treaties clause] would give fuller expression to its [Congress'] apparent intent of placing treaties and agreements between the Government and Indian tribes on the same footing with contracts between the Government and non-Indians, insofar as necessary to permit application of the recognized equitable principles under which contracts may be reformed or set aside for fraud, duress, unconscionable consideration, mistake, and kindred wrongs. Additional [sic] of the new clause (5) [the unratified treaty clause substitute] would give express recognition to one of the most clearly just and grievously resented classes of claims, that growing out of the scattered instances where lands peaceably held under an uncontested Indian title have been expropriated without an act of cession on the part of the Indians, or where the Government has retained ceded land notwithstanding its failure to ratify or carry out the terms of the cession. * * *" [House Hearings p. 141.]

At that time the Committee was fully aware of the fact that a number of special jurisdictional acts were then pending and it was the hope of Congress that passage of the Indian Claims Commission Act would render unnecessary the passage of those special acts. There was prepared and presented to the Committee a list of such tribal claims tentatively formulated but not prosecuted, in connection with which special jurisdictional acts were then awaiting Congressional action. Among them was an act for the Snake or Piute Indians of the Former Malheur Reservation and the land in connection with which that tribe was making its claim was land in which the tribe had only Indian title.

H. R. 4497 was substituted for H. R. 1198 and, on May 20, 1946, this bill was debated and passed by the House of Representatives. In the course of the debate, a letter of the Attorney General, was read into the record. In the course of that letter the Attorney General made the following statement:

"With respect to section 24, which in effect provides for a general jurisdictional act for all legal claims of Indian tribes arising in the future, I may say that the primary purpose of establishing an Indian Claims Commission, as I understand, is to furnish redress to the Indian tribes with respect to claims arising against the United States during the period of the settlement and expansion of the country. Most of these claims, I assume, are of a moral character and are not based upon legal principles. Thus, the problems presented by the proposal made in section 24 are quite different from those dealt with in the remainder of the bill. * * *" [Congressional Record—House, May 20, 1946, p. 5311.]

The Attorney General stated that he was unable to recommend enactment of the bill.

In June 1946, the Senate Committee on Indian Affairs commenced hearings on H. R. 4497. The Committee members and those testifying, all agreed that the clause providing for claims arising from the taking of lands owned or occupied by the claimant, by treaty or otherwise (then clause (5), later renumbered (4)), would permit suit by both the treaty and non-treaty California Indians for the taking of their Indian title lands. The word "taking" here used with reference to "Indian title" land was obviously not used to denote a taking in the constitutional sense.

On July 13, 1946, the Senate Committee met to consider amendments to H. R. 4497 proposed by the Department of Justice. The proposed amendments eliminated the revision of treaties clause, the clause relating to breaches of duty by a Government agent, and the clause relating to the taking of land owned or occupied by the Indians by treaty or otherwise (the clause substituted by the House for the old "unratified treaty" clause). The Department of Justice representative explained that the clauses eliminated would have created liability in the United States whereas the other clauses did not, but merely provided a forum for legal claims. With respect to the fair and honorable dealings clause, the Department's representative stated his position to be that a claim could be maintained under that clause only with respect to land where the land held was reservation land, and not if the land was held by Indian title. The representative of the Department of the Interior suggested that the amendments proposed by Justice, when viewed in connection with the legislative history, might be interpreted to mean that the bill as amended by the Senate was intended to give Indian claimants less than the House bill gave them. The Committee Chairman indicated that this was not the case and that the Senate Committee Report would contain a statement to that effect. The Senate Report 1715 did contain a statement that the amendments were designed for the sake of clarification only and were *not* intended to exclude from consideration of the Commission those claims which the House intended to include. However, the Senate Report also stated that the bill, as amended by it, represented the Committee's intent to provide only a forum for the Indian claimants to assert their claims and not to prejudge particular claims against the Government. H. R. 4497 as amended by the Senate was passed by the Senate on July 17, 1946.

The House of Representatives refused to agree to all the Senate amendments and the bill went to conference. On July 27, 1946, Conference Report No. 2693 was issued. This report reveals that the conferees of both Houses agreed to reinsert the "revision of treaties" clause and the "unratified treaties" clause in the same form passed by the House. The House agreed to the Senate's amendment omitting the clause relating to the unauthorized acts of the Government's agents. The Conference Report, as was customary, did not state the *reasons* for the reinsertion of the clauses, but the Statement of the Managers on the part of the House contained the following explanation:

> "The bill, as passed by the House of Representatives, enumerated six classes of claims cognizable by the Commission. The Senate, in the interest of simplicity, reduced these to three, being careful to state in its report, that the change was not intended to deprive the claimants of the right to invoke the jurisdiction of the Commission in any case which would have been cognizable under the language of the bill as it passed the House. Out of an abundance of caution the conferees reinserted two of the classifications struck by the Senate *because they wanted to make sure that if any tribal claimant could prove facts sufficient to make a case under either of these classifications, the Commission would have authority to make an award to such claimant.*
>
> "The first of these classifications, consisting of 'claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity' is aptly explained in the report of the House committee.[18] The second of these classifications covers claims arising from the taking by the United States

18. See page 11 of House Report No. 1466, 79th Cong., 1st Sess., dated December 20, 1945.

of Indian lands, i. e., lands to which tribal claimants had 'Indian title' or the 'right of occupancy.' Sometimes these lands were taken under the guise of unratified treaties, sometimes without any semblance of a treaty. The reinsertion of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor.

"Both of the classes of claims reinserted by this amendment may fall within the category of 'fair and honorable dealings.' To set them forth explicitly helps to clarify the contents of that category." [Italics supplied.]

The statement sets forth that the clause permitting claims on account of breach of duty by an agent of the United States while acting within the apparent scope of his authority was not reinserted because it was felt this claim was sufficiently covered by general law and by the other enumerated causes of action.[19]

From the above it appears that the last efforts to enact an Indian Claims Commission Act which would merely provide a forum for suit on legal claims and would eliminate the possibility of the Indians suing for and recovering on extra-legal or moral claims, involving, among other things, their Indian title land, met with failure. The legislative history of the Act establishes that from the beginning in 1928, certain members of Congress desired the enactment of a bill which would settle extra-legal or moral claims of Indians against the United States, including claims based on their Indian title property right in land which the Government had either taken without the formality of a treaty, or which the Government had acquired under ratified treaties procured by fraud, duress, unconscionable consideration, etc., or concerning which the Government had been guilty of dealings less than fair and honorable. This desire on the part of certain members of Congress became the desire of the majority of Congress and, with the passage of the Act in 1946, became the legislative intent expressed in clauses (3), (4) and (5) of section 2.

This meaning, or legislative intent, revealed by the legislative history, merely corroborates the literal meaning of those clauses and renders them consistent with

19. Government appellant stresses the fact that the Statement of the Managers on the Part of the House concerning the Conference Report was not read in the Senate when the Conference Report was called up and voted on. Under the House Rules a conference report may not be received by the House without a written statement signed by a majority of the House conferees, in sufficient detail to inform the House of the effect of the amendments contained in the Conference Report. Rule XXIX, House Manual, H. Doc. 810, 79th Cong., 2d Sess., p. 441, in effect during the 79th Congress. The Senate rules did *not* require a statement of its conferees and it was not customary or necessary for the statement of the House conferees to be read in the Senate in connection with the Conference Report. The Statement of the House Managers is as much a part of the legislative history of an act as is the Conference Report to which it relates. Contrary to the Government's contention, the Statement of the House Managers was not contrary to the Conference Report. In the first place, the Conference Report did not attempt any interpretation of the amendments agreed to but merely reported what they were. The Statement of the House Managers explained the reason for the amendments and the effect of those amendments. The Government's reference to Blackfeet and Gros Ventre Tribes of Indians v. United States, 119 F.Supp. 161, 127 Ct.Cl. 807, is inapposite in this connection because the court was there concerned with the *supplemental* Statement of the Managers on the Part of the House, which, it is conceded, was not read to the House when it voted on the Conference Report, and which, on the issue of the defense of *res judicata*, was in conflict with the Statement which *was* read in the House. It so happens that the Supplemental Statement does not conflict with the original Statement in respect to the meaning of clauses (3) and (5), or the reasons for their reinsertion in the bill finally enacted.

each other and with the legislative purpose also revealed in the Act's language and its history.

The Supreme Court has not yet considered or decided the issue just discussed, but in a recent decision it has, we think, indicated a view consistent with the view we take concerning the coverage of section 2 of the Act with respect to claims concerning Indian title land. The claim asserted in The Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 75 S.Ct. 313, arose under section 24 of the Indian Claims Commission Act as codified by 28 U.S.C. § 1505. Section 24 merely extended to Indian claimants the same rights to sue the United States in the Court of Claims as are possessed by non-Indians. Section 1505 provides:

> "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group." (63 Stat. 102.)

The Court held that a claim for just compensation under the Fifth Amendment to the Constitution for the taking by the United States of Indian title land held by Alaska Indians was not justiciable under the above quoted law because Indian title was not such a property interest as would give rise to a cause of action under existing rules of law or equity. In discussing the nature of the petitioner's claim, the Court stated at page 273 of 348 U.S., at page 314 of 75 S.Ct.:

> "This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force, and to grant payments from the public purse to needy descendants of exploited Indians. The legislation in support of that policy has received consistent interpretation from this Court in sympathy with its compassionate purpose."

Footnote 2 to the above statement first cites the Indian Claims Commission Act as an example of the legislation in support of the described policy. It also cites Worcester v. Georgia, 6 Pet. 515, at page 582, 8 L.Ed. 483. At the page to which the court refers, the following statement appears:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

The court next refers to pages 87 and 89 of Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, at pages 41 and 42, 63 L.Ed. 138, where the following language appears:

> "* * * The question is one of construction—of determining what Congress intended by the words 'the body of lands known as Annette Islands.'
>
> "As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created —the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained. * * *
>
> "This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expres-

sions being resolved in favor of the Indians. Choate v. Trapp, 224 U. S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941, * * *."

The Court then refers to page 354 of United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 62 S.Ct. 248, at page 255, 86 L.Ed. 260, on which page the following language appears:

"But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941, the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'"

Later in its opinion in the Tee-Hit-Ton case, 348 U.S. at pages 281, 282, 75 S.Ct. at page 318, the Court stated:

"No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050."

The Indian Claims Commission Act of 1946 begins on page 1049 of 60 Stat. On page 1050 appears section 2 of that Act, under clauses (3) and (5) of which Indian appellants in the instant case are suing.

[12] Under all the circumstances discussed above, we can find no valid reason for implying the exception to clauses (3) and (5) urged by Government appellant and holding that the words "treaties" and "dealings" used in those clauses were not intended by Congress to include treaties and dealings concerning Indian title land. We accordingly hold that the Commission had jurisdiction to hear and determine and make final awards in connection with Indian appellant's claims involving Indian title land under clauses (3) and (5) of the Act, and the Commission's holding to this effect is affirmed.

We shall now consider the several issues raised on the appeals from the Commission's final determinations on the seven causes of action.

First Cause of Action

This cause of action is urged under section 2(3) or, in the alternative, under section 2(5) of the Indian Claims Commission Act. Indian appellants allege that because of duress and for an unconscionable consideration, they ceded their land to the United States under three treaties, i. e., Treaty of July 15, 1830, 7 Stat. 328, Treaty of October 15, 1836, 7 Stat. 524, and Treaty of March 15, 1854, 10 Stat. 1038. In the alternative, Indian appellants allege that the Government's dealings with them in connection with the land ceded were not fair and honorable.

The Commission dismissed the first case of action on the ground that there was no substantial proof in the record that the claimants actually and exclusively occupied and possessed at any time, any definite and ascertainable portion of the land ceded. The Commission found (finding 6) that at the time of the 1830 treaty, the lands described in Article 1 of the treaty were used, occupied, and hunted over by a number of Indian tribes, including those who were parties [20] to the treaty, but that no one tribe

20. Sacs and Foxes, Mednwah-Kanton, Wahpacoota, Wahpeton and Sissetong Bands or Tribes of Sioux, Omahas, Ioways, and claimants.

had exclusive possession of any definite area thereof.

On March 1, 1955, the Indian appellants filed a motion in this court asking the court to vacate the determination of the Indian Claims Commission dismissing the first cause of action and to remand the case so far as that cause of action is concerned, in order to permit the Commission to act on a motion pending before it filed by the Otoe and Missouria Tribe, to determine its claim concerning the land ceded by the Treaty of July 15, 1830, supra, on the basis of the record in the case of Iowa Tribe, v. United States, Docket 138, and the record relating to the first cause of action in the instant case. It is Indian appellants' position that evidence adduced in the Iowa case from the testimony of one of the Government's expert witnesses, has a direct bearing on the claims asserted by the Otoe and Missouria claimants in the first cause of action herein and that its consideration by the Commission might well lead to a determination favorable to the claimants herein on the first cause of action.

In opposing the motion, the Government does not contend that the record before the Commission on the claimant's first cause of action was a complete record, but it says that the material bearing on that claim and presented to the Commission in the Iowa case was as available to the Otoes as it was to the Iowas or to the Government through whose witness it was adduced.

[13] If this were ordinary adversary litigation, we should be inclined to deny the motion. However, as we pointed out in the case of Pawnee Indian Tribe of Oklahoma v. United States, 109 F.Supp. 860, 124 Ct.Cl. 324, Congress was desirous that these claims be "cleaned up" and decided on the fullest possible records and to that end it went so far as to provide for the establishment of a Division of Investigation within the Commission to make, where necessary, an independent search and investigation into the facts and make available to the parties any data so discovered. In the Pawnee case the facts and data on the basis of which the court remanded the case to the Commission for further consideration, were not called to the attention of the court or the Commission by either of the parties. In the instant case, the claimants have called the attention of the Commission and this court to data which, it appears, does have some material bearing on the first cause of action. It is true, as pointed out by the Government, that claimants could have, with the exercise of diligence, developed these facts and presented them to the Commission at the time of the trial, and we are not excusing counsel for failure to do so, but we cannot ignore the emphasis placed by Congress on the necessity that these cases be settled finally on the most complete records available to insure that at some later date the claimants will not again press Congress for special legislation to permit the litigation of matters not fully explored. Since we find it necessary to remand the case on another issue, we shall accordingly allow Indian appellants' motion to vacate the Commission's final determination in the first cause of action and remand the cause for further proceedings.

Second Cause of Action

This cause of action is urged under clauses (3) and (5) of section 2 of the Act, and is concerned with Articles X and XI of the Treaty of July 15, 1830, supra, and the Government's actions in connection with the subject matter of those articles.

Article X provided in part as follows:

> "The Omahas, Ioways and Ottoes, for themselves, and in behalf of the Yanckton and Santie Bands of Sioux, having earnestly requested that they might be permitted to make some provision for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits, to wit; * * * it is agreed that the half-breeds of said Tribes and Bands may be suffered to occupy said tract

of land; holding it in the same manner, and by the same title that other Indian titles are held: but the President of the United States may hereafter assign to any of the said halfbreeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section, of six hundred and forty acres to each individual. And this provision shall extend to the cession made by the Sioux in the preceding Article."

Article XI provided:

"The reservation of land mentioned in the preceding Article having belonged to the Ottoes, and having been exclusively ceded by them; it is agreed that the Omahas, the Ioways and the Yanckton and Santie Bands of Sioux shall pay out of their annuities to the said Ottoe Tribe, for the period of ten years, Three hundred Dollars annually; of which sum the Omahas shall pay one hundred Dollars, the Ioways one hundred Dollars, and the Yanckton and Santie Bands one hundred dollars."

The Commission found that the United States had not requested or suggested that the Otoes cede any part of their lands to the halfbreeds, but that it merely acceded to the desires of the Indians and thereafter acted as trustees for the halfbreeds, holding and allotting the major portion of the lands to them as provided in the treaty. The lands were allotted and patents issued to the halfbreeds, and the Otoes received the $3,000 stipulated in the treaty from the other tribes.

In making the survey of the lands ceded to the halfbreeds, the Government surveyor made an error excluding some 15,697 acres from the area called for by the terms of the treaty. When an 1855 resurvey disclosed this error, Congress authorized an adjustment for the shortage by payment to such halfbreeds at the rate of $1.25 per acre for the deficiency. Indian appellants contended that some 45 acres of halfbreed land were never allotted. The Commission made no finding on this portion of the claim.

Indian appellants contended that the 3.26 cents per acre they received for the land ceded for the benefit of the halfbreeds of other tribes was so inadequate as to be unconscionable. It is urged that the Government, as guardian for the Indians, owed them the duty of preventing them from disposing of their land at such a price, particularly since the Otoes owed no duty whatsoever to the halfbreeds of the other tribes; that fair and honorable dealings require that the Otoes be reimbursed for the true value of all lands ceded which were for the benefit of halfbreeds of other tribes. Indian appellants also contend that in so far as the Government failed to assign lands erroneously omitted by the survey, the purpose of the cession of those 15,697 acres failed and such lands should have been held by the Government as trustee for the Otoes who should have been paid the true market value of those lands.

[14] The Commission dismissed this cause of action on the ground that the Indian claimants had not established any claim against the Government under either clause (3) or (5) of section 2. We are of the opinion that the Commission's conclusions are justified not only from the evidence adduced, but also from the allegations in the petition which, on their face, fail to state a cause of action on this claim against the Government within the meaning of the Act. Articles X and XI of the 1830 treaty actually represent dealings between the Otoes and certain other Indian tribes whereby they accomplished, with the cooperation of the Government, certain objects which they all desired. Not only is there no evidence, but there is no allegation in the petition, to the effect that the Government induced the Otoes to enter into an arrangement which they now consider to have been detrimental to their best interests. From all that appears in the petition and in the record, the Indians appear to have known what they were doing and were under no misapprehensions whatsoever. It is not unreasonable to suppose that the Otoes wished to benefit their own halfbreeds and those of friendly tribes by

selling for a nominal sum sufficient land on which those halfbreeds might live. This is quite different from the situation in the Osage[21] case where it was unreasonable to conclude that the Indians would have willingly relinquished property to be used for the benefit of other Indians with whom the Osage were not on friendly terms and would have no reason to wish to benefit.

Nothing in the circumstances of this claim indicates any failure of the Government to act fairly and honorably with respect to Indian appellants. Certainly the Government was under no duty to prevent the Otoes from doing what was a sensible and generous act.

[15] The Commission also held that as to the 15,697 acres of land omitted from the first survey, the cession of that land to the halfbreeds had been an outright one leaving no remaining property rights in the Otoes, and, accordingly, the Government's action in paying the halfbreeds for the land they did not receive, was proper. We find no merit in Indian appellants' argument that because of the erroneous survey the purpose of the cession failed and left the Government in the position of holding the lands in trust for the grantors, i. e., the Otoes. Title to the land, including that omitted from the survey, was in the halfbreeds upon the ratification of the treaty and there it remained (regardless of the fact that some white settlers came upon it), until the halfbreeds' title to that land was extinguished by later act of Congress.

While the Commission might have disposed of appellant Indians' contentions regarding the 45 acres of land not yet allotted, it seems to us from what has been said that what happened to that land is no real concern of the Otoes but rather of the halfbreeds and therefore the omission cannot be regarded as prejudicial error.

The Commission's final determination of the second cause of action is affirmed.

Third Cause of Action

Indian appellants' third cause of action is brought under Section 2(3) and (5). In this cause of action the Otoes alleged that under the Treaty of September 21, 1833, 7 Stat. 429, they ceded 792,000 acres of land held by them under Indian title (immemorial possession and occupancy), for an unconscionably low consideration. The Commission held that the Otoes had established Indian title (exclusive possession and occupancy from time immemorial) to the land involved; that the tribe had been paid 4.9 cents per acre for land which was actually worth 75 cents per acre, and concluded that such consideration was unconscionable and for that reason the Otoes were entitled to an award in the net amount of $554,589.85, less allowable offsets.

The Government has appealed from this determination on the grounds, (1) that the Commission did not have jurisdiction under the Act to entertain this cause of action because the claim involved original Indian possessory title land; (2) that the evidence failed to establish Indian title (exclusive possession) in claimants, and (3) that the land was worth far less than 75 cents per acre.

We have hereinbefore fully discussed and disposed of the Government's first jurisdictional ground for appeal. In support of its second ground, the Government urges that the Commission's findings of fact are meager and wholly inadequate to support the ultimate findings and conclusion that the Otoes at the time of the treaty of cession and from time immemorial had had exclusive possession and occupancy of a definable area. The Government does not show in what respect it considers the findings meager and inadequate. It says only that the Commission's conclusion concerning exclusive use and occupancy of a definable area is unsupported by the record, mentioning specifically the testimony of

21. Osage Nations of Indians v. United States, 97 F.Supp. 381, 119 Ct.Cl. 592, certiorari denied 342 U.S. 896, 72 S.Ct. 230, 96 L.Ed. 672.

Government's witness, Mrs. Wedel. The Government also lays stress on the fact that Article I of the 1833 treaty gives no western or southern boundary to the cession. In this connection, it should be noted that the parties entered into a stipulation and agreement fixing the boundaries of the land covered by this cession and also by a later cession in 1854, and the Commission relied on these stipulations, as it had a right to do, in finding the area which the treaty purported to cede.

Having found the area which the parties intended to cede in the 1833 treaty, the Commission then found that the claimants actually possessed, used and occupied this area from time immemorial to the time of the cession to the exclusion of other Indians. The findings indicate that the Commission relied on data in connection with the halfbreed cession in 1830 and the cession covered by the Treaty of March 15, 1854, supra, and the supplemental Treaty of December 9, 1854, 10 Stat. 1130. The Commission also relied on evidence that no other tribes claimed or used the areas ceded by the treaties and that neighboring tribes recognized these lands as being the exclusive property of the claimants. The Commission specifically referred (finding 13) to the report of Commissioner Ellsworth, who negotiated the 1833 Treaty, in which he stated that he had found exclusive Indian title to the land ceded to be good in the claimants.

The Commission also relied on and made findings on the basis of expert testimony by Dr. B. B. Chapman, a well-known historian in the field of American History, and a recognized authority on the land tenure of the Otoe and Missouria tribe. The Commission's finding that the claimants actually occupied the area in question to the exclusion of other Indians is amply supported by Dr. Chapman's evidence and other evidence. The Commission also refers in its findings (finding 13) to statements of George W. Manypenny, Commissioner of Indian Affairs, and James M. Gatewood, Indian Agent, concerning the exclusive occupancy ownership of the Otoe and Missourias of the land in question.

[16] A careful study of the record on this cause of action reveals that it contains substantial support for the findings of the Commission and little, if any, support for contrary findings. More detailed findings might have been made on this claim, but we think that those made were adequate and sufficient to indicate the basis for the Commission's ultimate finding of Indian title in claimants to a defined area of land. In making its findings the Commission did take into consideration every essential part of the record on this claim, and defendant's citation of Snake or Piute Indians of Former Malheur Reservation in Oregon v. United States, 112 F.Supp. 543, 125 Ct. Cl. 241, is inapposite.

The Commission found that the lands involved in the 1833 cession were worth 75 cents per acre in 1833. Defendant contends that this valuation is in error and that in any event there are no primary findings of fact sufficient to indicate the basis on which the Commission arrived at this valuation.

Under the principles discussed in this court's decision in the Snake or Piute case, supra, finding 14 concerning value is an ultimate finding without a full statement of subsidiary findings of the primary facts. The Snake decision supra, was, however, issued several months after the Commission's decision in the instant case. In the recent decision by the Commission in the case of The Osage Nation of Indians v. The United States, Docket No. 9, August 13, 1954 (3 Ind.Cl.Com. 217), the Commission has made comprehensive and detailed findings of the primary facts supporting ultimate findings of the value of land. In the Snake case the Commission was furnished with adequate proposed findings by the claimant. In the instant case, the proposed findings submitted to the Commission on value are practically useless in the light of the standard followed in the Osage case.

In view of the above circumstances, we have reviewed the evidence of record

on value submitted by the parties in order to determine whether or not further primary findings on that evidence would support the ultimate finding made by the Commission. Cf. Fletcher v. Fletcher, D.C.Cir., 219 F.2d 768. We are of the opinion that the evidence of record fully supports the Commission's findings on the question of value of the land.

The Government's evidence of value of the lands in question is derived from the testimony and report of John Muehlbier, Agricultural Economist of the United States Department of Agriculture. The evidence prepared and submitted by the Government's witness was in support of the Government's contention that the only cognizable value of Indian land ceded at a remote time and in an area not yet open to public sale or settlement, is "market value" notwithstanding the fact that under the circumstances there could be and was no actual market in the sense contended by the Government. He made a study of the so-called use value of the land and concluded that on that basis the land was worth from two to fourteen cents per acre. He arrived at this conclusion by estimating the money value of the Indians' subsistence derived from such land, the proportion of gross income that could be attributed to the land, the rate of capitalization, the number of persons in the tribe, and the acreage claimed as hunting grounds.

As noted by the Government in its appeal, the Commission obviously rejected the valuation method proposed by the Government and relied on the method urged by the Indian claimants in arriving at the determination that the land had a value of 75 cents per acre at the time it was ceded.

The method of valuation proposed by the Indian appellants is along the lines adopted by this court in many cases and in particular in Alcea Band of Tillamooks v. United States, 87 F.Supp. 938, 115 Ct.Cl. 463, reversed as to interest, 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738, Rogue River Tribe of Indians v. United States, 89 F.Supp. 798, 116 Ct.Cl. 454, certiorari denied 341 U.S. 902, 71 S.Ct. 610, 95 L.Ed. 1342. The same method of valuation was followed by the Indian Claims Commission in the Osage case (3 Ind.Cl. Com. 217). In those cases the court and the Commission rejected the notion that the value of Indian lands must be based on market value alone because the market for such lands was absolutely controlled by the only possible purchaser, i. e., the Government either direct or in trust for sale. Until Indian title to an area of land is extinguished and the land is surveyed, no sales thereof or settlements thereon are possible.

In the instant case the surrounding lands were not open to settlement because the Government had not yet extinguished Indian title thereto. But that does not mean that such land was worth no more than the value of the subsistence it provided for the Indians. In the absence of a market at the time in question, and therefore the absence of evidence of "market value" in the conventional sense, this court and the Commission have taken into consideration numerous other factors in determining the value of lands ceded by the Indians. The Indian appellants' expert witness, Thomas H. LeDuc, took those other factors into consideration in giving his opinion of the value of the ceded lands. For the most part the factors were the same as those relied on by the Commission in its recent Osage findings, and follow, to some extent, the pattern laid down in the Alcea and Rogue River decisions in this court. This method of valuation takes into consideration whatever sales of neighboring lands are of record. It considers the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, markets and transportation—considering the ready markets at that time and the potential market. LeDuc concluded that the land ceded in 1833 was worth not less than $1.50 per acre.

[17, 18] We think that the factors taken into consideration by claimants'

expert witness were valid factors in the determination of the value of Indian lands under the circumstances of this case and similar cases. We believe that the results of such consideration will more nearly accomplish the fair settlement of these claims desired by Congress than the "subsistence" approach advocated by the Government. Values cannot be determined on the basis of berries and wild fruits. In the Alcea case, the Supreme Court had an opportunity to reject the method of valuation used by the Commission in this case, but it confined its consent to review, in view of the consent to sue given by Congress, to the question of an additional allowance by way of interest and refused to review the question of valuation.[22]

[19] If the Commission had made detailed evidentiary findings on the basis of the evidence of value submitted by claimants, we are of the opinion that such findings would have supported its ultimate finding that the land ceded in the treaty of 1833 was then worth 75 cents per acre. What has been said is not to be taken as a statement that this court would necessarily have come to the same conclusion as the Commission, but rather that the Commission's conclusion is based on substantial evidence contained in the whole record and that primary findings adequate to support its ultimate finding could have been made on such whole record. Accordingly, we affirm the Commission's final determination concerning the Third Cause of Action.

Fourth Cause of Action

Under this cause of action the Indian appellants claimed that pursuant to the Treaty of March 15, 1854, 10 Stat. 1038, they ceded 1,250,000 acres of land in Nebraska for a consideration that was either unconscionable within the meaning of clause (3) of section 2 of the Act, or was sufficiently less than the true value of such land as to represent dealings less than fair and honorable on the part of the Government under clause (5).

The Commission held that the Indian appellants had good original Indian title to the land ceded, that the land was worth $1.00 per acre, and that the consideration paid of 42 cents per acre was, if not unconscionable, at least sufficiently inadequate to represent dealings less than fair and honorable on the part of the Government. Both parties have appealed from this determination.

The Government's first ground of appeal, that the claim is not maintainable under section 2 of the Act because the land was held by Indian title, has already been disposed of.

[20] The Government's second ground of appeal is that the Commission's finding that the Indian appellants had good Indian title is not supported by substantial evidence. Our review of the whole record persuades us that the Commission's findings are based on substantial evidence.[23]

The Government and one of the Commissioners object to the finding of the amount paid by the Government as consideration for the cession because (1) of the failure to determine how much of the cash paid was for the relinquishment of the Indians' claims *east* of the Missouri River, and (2) because of the majority's treatment of the reservation of 162,107.71 acres ultimately assigned to the Otoes in the Supplemental Treaty of December 9, 1854, 10 Stat. 1130.

The Treaty of March 15, 1854, provided for a cession by the tribe to the United States of what the parties have agreed was approximately 1,250,000 acres of land in Nebraska held by the tribe by Indian title. Article 1 of this treaty provided for the setting aside of a reservation 10 miles wide and 25 miles long, which, according to the description in the treaty and contemporaneous maps in evidence, lay within the outer limits of the

22. United States v. Alcea Band of Tillamooks, 340 U.S. 573, 71 S.Ct. 121, 95 L.Ed. 635.

23. As in the third cause of action, the parties have stipulated as to the area ceded.

larger area ceded and located in the southwest corner thereof. On October 23, 1854, George Hepner, Indian Agent of the Council Bluffs Agency, wrote to Col. H. Cumming, Superintendent of Indian Affairs at St. Louis, concerning a trip he had just made to examine the reservation carved out of the cession by the March 15th treaty. He stated that the reservation was in an unsuitable location for the tribe because it had insufficient timber for their needs and "because they will be more exposed to the attacks of their enemies there than they would be on the opposite side, the river forming a barrier." Other documents in evidence show that following the 1833 cession, the Otoes had become more sedentary in their mode of life and had taken up farming; that they were frequently attacked by the Sioux and did not always receive the protection they had been promised by the Government. A location for their reservation which would provide natural protection from invaders was of the utmost importance. Accordingly, the Supplemental Treaty of December 9th was negotiated, and under its terms they were given a reservation to the south of the March 15th cession. The reservation was the same size as that provided for in the earlier treaty and was located on the boundary of Kansas and Nebraska, a small strip of the reservation being in Kansas.

The parties agree that both the reservation originally intended for the Otoes within the boundaries of the March 15th cession, and the reservation actually granted to them by the December 9th treaty, consisted of 162,107.71 acres. As a result of the two treaties, the Otoes ceded to the United States 1,250,000 acres of their land and the Government granted to the Otoes 162,107.71 acres of public land in the same vicinity. The Commission upon all the evidence considered all of this land to be worth, as Indian title land, on the average of $1.00 per acre. The evidence in the whole record supports this valuation. This would mean that if the Otoes had received what the land was worth as Indian title land in that area at that time, they would have received $1,250,000, less the $463,423.74 (the cash payment provided for in the treaty), and less the value of the reservation land to the south of the cession granted to them in December 1854, having a value of $162,107.71, making a total received of $625,531.45. Accordingly, the Commission correctly concluded that under the treaty, the Otoes received $624,468.55 less than they were fairly and justly entitled to for the cession of the 1,250,000 acres of land in 1854.

The Government and the dissenting Commissioner object to the majority of the Commission's assignment of $1.00 an acre as the value of the December 9th grant of the 162,107.71 acre reservation, and note that no specific proof was offered by the Indians as to the value of that land in 1854. On the basis of the whole record, including the testimony of Mr. LeDuc, the assignment by the Commission of $1.00 an acre to this tract does not appear to be arbitrary. The land included in this tract appears to have been of the same character as that included in the cession a few miles to the north, and we believe the Commission was justified in concluding on the record that it had the same value.

As to the value to be assigned to the Otoe's cession and relinquishment of its rights east of the Missouri River, the Commission was of the opinion that no significant part of the consideration paid under the March 15, 1854 treaty was for such relinquishment and the Commission attributed none of the consideration paid as in payment for such rights or claims. In view of the state of the record on this point, we cannot say that the Commission was wrong.

[21] On the question of value, the Government contends that $1.00 an acre is too much and the Indians urge that it is too little. The Indians' expert, LeDuc, was of the opinion that the land was worth from $2.00 to $5.00 an acre. The Government expert was of the opinion that the land was worth from 10 cents to 49 cents per acre. On the basis of the whole record, we think the Commission's

finding that the land was worth $1.00 per acre to be supported by substantial evidence.

[22] The Government has objected to the Commission's holding that if this disparity of more than fifty percent between the value of the land at the time of cession and the consideration paid does not in law amount to unconscionable consideration, it at least represents lack of fair and honorable dealings on the part of the Government. The petition before the Commission states this cause of action in the alternative and the Commission, apparently in doubt concerning the unconscionable consideration claim, was not uncertain that the claimants had made out a cause of action on the fair and honorable dealings claim. In finding 13 the Commission refers to the circumstances under which the 1854 treaty was negotiated. The record on this point reveals that the tribe was impoverished and demoralized by the constant encroachment of white settlers on their lands and by the repeated attacks from the Sioux, against neither of which the Government had provided the promised protection. The Commission believed that a certain amount of duress was practiced on the tribe in the negotiation of the treaty and the record supports that belief and the resulting conclusion that the whole transaction, including the surrounding circumstances and the inadequate consideration, does not comport with fair and honorable dealings on the part of the Government.

Both appeals are hereby denied and the final determination of the Commission on this cause of action is affirmed.

Fifth and Sixth Causes of Action

The Fifth cause of action involves the sale by the United States of 119,846.17 acres of land off the west end of the reservation granted to the Indian appellants under the Treaty of December 9, 1854, 10 Stat. 1130, discussed in the fourth cause of action.

The Act of June 10, 1872, 17 Stat. 391, provided that with the consent of the Otoe and Missouria Indians, expressed in open council in the usual manner, the Secretary of the Interior was authorized to cause to be surveyed a portion of the Otoe and Missouria reservation from the western part thereof; that the lands so surveyed should be appraised by three competent commissioners, one to be selected by the tribe and two appointed by the Secretary of the Interior; that thereafter, the Secretary was authorized to offer the lands for sale for "cash in hand"; that sealed proposals, duly invited by public advertisement, should be received for tracts not exceeding 160 acres each, and also for the whole body of land; that the Secretary was also authorized to accept a proposal for the entire tract, or the highest bids for separate tracts, whichever should be best for the Indians. The Act also provided that no bids could be accepted for less than the appraised value nor less than $1.25 per acre. The Act provided for the placing of the proceeds to the credit of the Indians with interest at five percent per annum, except what was needed for the use of the Indians; that not more than twenty-five percent of the principal received from the sales could be spent in any one year; that no sale should be approved unless the *average* sale's price of each parcel should be at least $2.50 per acre.

On August 15, 1876, 19 Stat. 208, Congress passed an act providing that with the consent of the Otoe and Missouria Indians, expressed in open council, the Secretary of the Interior was authorized to have the lands surveyed; that thereafter the lands should be appraised and 120,000 acres from the western end of the reservation offered for sale for "cash to actual settlers only," in tracts not exceeding 160 acres to each purchaser. The Act then provided that if the Secretary deemed it more advantageous to sell the lands upon *deferred payments*, he might, with the consent of the Indians expressed in open council, sell such lands for one-third in cash, one-third in one year, and the remainder in two years from the date of sale, with interest at six percentum per annum; that none of the land should be sold for less than the appraised value

and in no case for less than $2.50 per acre. The Act also provided that the expenses of the sale should be paid out of the proceeds.

On March 3, 1879, 20 Stat. 471, Congress amended the Act of August 15, 1876, to provide that when an actual settler, wishing to purchase a tract, applied for something slightly more than the 160 acres permitted, his application should not be rejected on account of such excess; that bona fide claimants then occupying the lands under the 1876 Act might, in the discretion of the Secretary of the Interior, be allowed additional time for making the deferred payments, not exceeding one year on each payment so required to be made.

The lands in question were appraised at an average value of $3.56 per acre and were sold for an average price of $3.85 per acre.

Indian appellants alleged that the restrictions concerning the sale of the lands were inserted in the three above acts for the sole benefit of the Government and its white citizens, and that they tended to discourage and prohibit the purchase of the lands by investors (as distinguished from actual settlers) who might have paid more for the lands; that the lands were not advertised for sale, as required by the Act, but preference was given to persons already on the lands to purchase the lands at their appraised value. The Indian appellants also alleged that their consent to the provisions of the above acts was not freely given but rather was procured by duress as evidenced by the fact that at that time white settlers had encroached on the reservation making the Indians' possession untenable and forcing them to agree to the terms proposed by the Government; that the restrictions imposed on the sales set forth in the three acts were unfair to the Indians and resulted in their receiving unconscionable consideration since the lands were worth far more than the appraised value. This claim is asserted under clauses (3) and (5) of section 2.

The sixth cause of action concerns the sale of the remainder (eastern portion) of the 1854 reservation pursuant to the Act of March 3, 1881, 21 Stat. 380, which contained substantially the same provisions as did the acts relating to the sale of the western portion of the reservation including the provisions for deferred payments. The Indian appellants made the same contentions regarding these sales which were at twice the amount of their appraised value [24] of approximately $6.

[23] The Commission, dismissing both causes of action, noted that the appraised values were agreed to by the appraiser selected by the tribe and that the same appraiser was selected for both tracts. The Commission found that the evidence in the record did not support the allegation of duress and that in view of the fact that the land sold for more than the appraised value in all instances, the consideration was not unconscionable. We think the Commission was right in its conclusions. The fact that the four acts in question may have been beneficial to the Government and its settler-citizens does not mean that it was not also beneficial to the Indians, and, under all the circumstances, it appears that the Indians were benefited. The Commission also concluded that the Indians' consent was secured in open council as the acts required, and that there were no irregularities in violation of the acts' provisions as would invalidate the sales made thereunder.

We hold the Commission's findings and determinations on these causes of action to be supported by substantial evidence and they are accordingly affirmed.

Seventh Cause of Action

In this cause of action the Indian appellants claimed that the Government, by fraud and duress, induced the Indians to

24. The lands were sold for an average of $12.22 per acre. Indian appellants contend they could have brought $15.23 per acre under less restrictive sales provisions.

enter into a compromise settlement on November 20, 1899, with certain delinquent purchasers of land sold pursuant to the 1881 Act, supra, whereby $168,784.08 due and owing by these purchasers of certain land was forgiven. This cause of action is urged under section 2 clauses (3) or (5).

The purchasers of the land in question were in default in their payments to the extent of $288,583.08 and it was their position that the land had been sold to them at prices far in excess of its actual value (this land was sold for twice the appraised value on the average), and that in fairness and equity the contracts of sale should be adjusted and rebates or reductions granted. By the Act of March 3, 1893, 27 Stat. 568, the Secretary of the Interior was duly authorized by Congress to revise the contracts of sale if the Indians consented to such revision. After prolonged negotiation, a compromise settlement was agreed to by the Indians and the purchasers, on November 20, 1899, and it was thereafter ratified by Congress on April 4, 1900, 31 Stat. 59.

The Indian appellants contend that the settlement was executed in an irregular way by the tribe and not in formal council, and that the United States Indian Inspector, James McLaughlin, was guilty of highly questionable conduct. The record does not support this contention.

The settlement provided that the delinquent purchasers might have the land at the appraised value plus 25 percent thereof, plus annual interest at five percent from the time of the purchase, and for the immediate payment of the purchase price on the basis of such revised sales price.

The Commission held that despite any irregularities which may have occurred in procuring the consent of the Indians to the settlement, the agreement was signed by three-fourths of the adult members of the tribe, though not in council; that the settlement was not for the benefit of the Government but for the mutual benefit of the Indians and the purchasers and was an agreement between them and not between the Indians and the United States. The Commission found that it was not established that the Indians were deceived or misled by the United States agent, and under the resulting agreement the Indians received more than the price which their own appraiser had deemed fair.

[24] The evidence regarding this claim was assembled by Indian appellants' expert witness, Dr. B. B. Chapman (Plaintiff's Exhibit 47), in a thorough and painstaking report. A study of that report reveals that due to a conspiracy of cattlemen and speculators, the price of the lands in question was "rigged" at the public sales; that several sales had to be held; that in spite of every effort on the part of the Government agents conducting the sales, many bona fide settlers had to bid prices far in excess of the fair market value of the land in order to secure the land; that on the occasion of some sales, members of the conspiracy paid prospective purchasers not to bid so that the lands could be secured at low prices by persons who wished to graze cattle thereon for limited times and intended to default in payment when the land had served their purposes. It appears from the record that the Government did its best to carry out its obligations to the Indians and also to the bona fide settlers. The report describes the successive crop failures between 1894 and 1899 which made it difficult and at times impossible for some of the settlers to keep up their payments. During all this time there was constant pressure from some of the delinquent purchasers to revise the purchase contracts so that they would not have to pay the amounts still due. On several occasions the Indians agreed to settlement proposals submitted to them by the Government, but the delinquent purchasers refused to agree. Finally the settlers were persuaded to agree to the compromise in question, and it was submitted to the Indians in open council by the Government inspector. The Indians did not agree to the settlement at that council which was accord-

ingly adjourned for a few days. Being persuaded that the settlement represented the best terms for the Indians that the delinquent purchasers would agree to, and also that the Congressional representatives of the delinquent purchasers would never permit a forfeiture of the lands held by them, the Government inspector spent several days talking to individual Indians and procuring their signatures. The Act of March 3, 1893, does not specify that the consent of the Indians had to be obtained "in open council in the usual manner" as had the acts discussed in the fifth and sixth causes of action, and the Commission concluded that the inspector's method of obtaining the consent was a sufficient compliance with the 1893 Act. In view of the fact that the record establishes that the terms of the settlement were explained to and understood by the Indians in open council, we agree that the inspector's method of securing signatures was not illegal or irregular to such a degree as to nullify the effect of the consent. Congress clearly had the right to legislate in this matter for what it considered to be for the best interest of the Indians. The facts of record show that the Government did not benefit in any way from the settlement and that Congress was attempting to secure for the Indians the best terms possible. It is probably true that the situation requiring such a settlement was brought about by the unscrupulous actions of certain individuals and groups of the Government's white citizens, who consistently brought pressure to bear on certain members of Congress to secure legislation which would benefit their constituents at the expense of the Indians. Their desires, however, were never the desires of the Congress nor of the Department of the Interior. As often happens in a democracy, compromises are sometimes necessary with strong and vocal minorities. In the instant case we agree with the Commission that no unfair or dishonorable motives or conduct can be imputed to the Government, in relation to the compromise settlement agreed to by the Indians and the settlers and ratified by Congress for the best interest of the Indians as the best means of bringing to an end the long controversy over the sale of the reservation lands.

On the whole record we find that the Commission's findings and conclusions are supported by substantial evidence and they are affirmed.

Government Appeal from the Decision on Offsets

On December 11, 1953, the Commission made findings of fact and rendered a decision regarding offsets. It concluded that the Government was entitled to offset $23,024.05 from the award made to Indian appellants. The Government has appealed on the ground that the Commission erred in concluding as a matter of law that the United States was not entitled to all offsets claimed by it in its amended answer filed May 29, 1953. The United States claimed offsets in the total amount of $139,038.29.

Subsequent to the filing of the appeal in this case, the Court, on April 6, 1954, issued its decision in Quapaw Tribe of Indians v. United States, 120 F.Supp. 283, 128 Ct.Cl. 45, in which the Commission's decision (Docket 14, 1 Ind.Cl.Com. 469) concerning offsets was remanded for further proceedings in accordance with that opinion. In view of the fact that the Commission in the instant case has followed the same general pattern used by it in its decision in the Quapaw case, we believe the interests of justice would best be served by remanding to the Commission its findings and decision on offsets herein for further consideration and whatever proceedings may be necessary in accordance with the principles set forth in this court's decision in the Quapaw case, supra. Accordingly, the Commission's findings and decision on offsets are remanded for further proceedings.

It is so ordered.

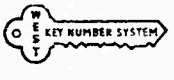
JONES, Chief Judge, and LARAMORE, MADDEN, and WHITAKER, Judges, concur.

term "the interest" does not include the transfer of anything less than the entire interest of the insured and that, therefore, this particular provision of the policy was not violated. Morrison's Admr. v. Tennessee Marine & Fire Insurance Co., 18 Mo. 262, 59 Am.Dec. 299; Grable v. German Ins. Co., 32 Neb. 645, 49 N.W. 713, 715.

[3] The plane disappeared from the ramp during the night of January 30, 1948. The defendant argues that the loss could have been occasioned by malicious mischief, sabotage, intentional injury or destruction, conversion, embezzlement or concealment, all of which are specified in exclusion "b" of the policy. I am of the opinion, however, that these are matters of defense with the burden of proof on the defendant, who submitted no evidence following an adverse ruling on its motion to dismiss. While the evidence as to the manner in which the plane was lost is unsatisfactory, it may be reasonably inferred that it was improperly moored and lost in consequence thereof, and, therefore, I find that the loss is within the coverage of the policy.

I am of the opinion that the plaintiff is entitled to recover the face value of the policy, Dubin Paper Co. v. Insurance Co., 361 Pa. 68, 63 A.2d 85, Anno. 8 A.L.R.2d 1408, 1411, less $983.88, accrued depreciation for 268 days at the rate of 20% per annum, and $50 which is deductible under specific provision of the policy, together with interest.

An attorney's fee of $350 is allowed.



OSAGE NATION OF INDIANS v. UNITED STATES.

Appeals Docket No. 4.

United States Court of Claims.

May 1, 1951.

Claim by the Osage Nation of Indians against the United States for additional compensation for land ceded to the United States. The Indian Claims Commission rendered decision that the Osage Nation was not entitled to any relief, and the Osage Nation appealed. The Court of Claims, Littleton, J., held that the evidence was sufficient to establish the claim on ground of unilateral mistake, unconscionable consideration, and fair and honorable dealings.

Decision reversed, and case remanded.

Whitaker, J., dissented.

1. Administrative law and procedure ⇐655

When and under what circumstances judicial review of an administrative order is available are questions, apart from whatever requirements Constitution may make in certain situations, that depend on particular Congressional enactment under which judicial review is authorized.

2. Administrative law and procedure ⇐744, 791
United States ⇐113

The Congressional intent was to afford as much finality as possible to the determinations, orders and decisions of Indian Claims Commission, in order to insure orderly and efficient administration of Indian Claims Commission Act, and Court of Claims should not whittle away from that purpose nor in any way undermine the effectiveness of the Commission by seeming to treat each appeal as a trial de novo, or by introducing an unduly broad concept of what constitutes substantial evidence to support findings of Commission. 25 U.S.C.A. § 70 et seq.

3. Administrative law and procedure ⇐791
United States ⇐113

The expression "substantial evidence" has been judicially construed as meaning everything from "warrant in the record", "rational basis", "not arbitrary", "some evidence", "reasonable", to what is commonly understood as being the preponderance of the evidence, and Congress intended Court of Claims to follow a course somewhere between those extremes in determining whether findings of Indian Claims Commission are supported by substantial evidence. 25 U.S.C.A. § 70s(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Substantial Evidence".

4. Administrative law and procedure ⇐763, 791
United States ⇐113

Where issues to be decided by Indian Claims Commission involved only factual and legal matters concerning which the Court of Claims was as expert as the Commission, and the evidence before Commission was largely documentary and was not conflicting and opportunity of Court of Claims to evaluate such evidence was equal to that of Commission, and Commission was not faced with necessity of weighing or evaluating conflicting evidence to make its findings of fact, and the problem presented was one of carefully examining a vast amount of material and from it drawing the soundest inferences, Court of Claims must determine the substantiality of evidence to support Commission's findings in the light of all that the record relevantly presents and is responsible for reasonableness and fairness of Commission's decision. 25 U.S.C.A. § 70s(b); Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq.

5. Indians ⇐11

Evidence was sufficient to show such a unilateral mistake of law or fact on part of Osage Indians as would justify revision of treaty ceding surplus Osage land to United States, in that provision relating to creation of civilization fund for Indian tribes other than the Osage but at expense of Osage was not fully explained to nor understood by the Osage. Treaty with Osage Indians, art. 1, 14 Stat. 687; 25 U.S.C.A. §§ 70a(3), 70s(b).

6. Indians ⇐11

The amount which an ignorant and impoverished band of blanket Indians was willing to take in payment for land ceded to United States is not conclusive as to the true value of the land.

7. Indians ⇐11

In arriving at a fair determination of the market value of tribal lands, the Court of Claims considers the prices at which the lands sold, the extent of the demand, the quality of the land, its use at the time, the price paid by the Government for similar land at about same time under treaties with other bands of Indians, and the prices paid by persons other than Indians buying similar land in the locality from private citizens.

8. Administrative law and procedure ⇐791
United States ⇐113

If the whole record contains substantial evidence as a basis for finding of Indian Claims Commission, the finding must be upheld by the Court of Claims. 25 U.S.C.A. § 70s(b).

9. Evidence ⇐33, 35, 43(4)

In determining whether consideration passing to Osage Indians for land ceded to United States was unconscionable, judicial notice could be taken of facts revealed in related Acts and resolutions of Congress, in debates of the Senate and House of Representatives, in a law suit terminating in the Supreme Court, and in Senate Executive Documents. 25 U.S.C.A. §§ 70a(3), 70s(b); Treaty with Osage Indians, art. 1, 14 Stat. 687; Treaty with Osage Indians, 7 Stat. 240; Act August 11, 1876, 19 Stat. 127; Act March 3, 1863, 12 Stat. 772; Act July 26, 1866, 14 Stat. 289; Joint Resolution April 10, 1869, 16 Stat. 55; Act June 16, 1880, 21 Stat. 291; Act March 2, 1867, 14 Stat. 541; Act June 8, 1868, 15 Stat. 67; Act March 3, 1871, 16 Stat. 544, 557; Act April 19, 1871, 17 Stat. 5; Act June 16, 1880, 21 Stat. 291.

10. Evidence ⇐18

It is common knowledge that the prospect of a railroad in an area increases the demand for and the value of land in the area.

11. Indians ⇐11

Only where the inequality of the bargain is very gross does disparity of price alone justify a conclusion that the consideration was "unconscionable" so as to give rise to Indian claim against United States under Indian Claims Commission Act. 25 U.S.C.A. § 70a.

See publication Words and Phrases, for other judicial constructions and definitions of "Unconscionable Consideration".

12. Indians ⇐11

In determining "very gross" within rule that only where inequality of bargain

is "very gross" does disparity of price alone justify a conclusion that consideration was unconscionable so as to justify revision of Indian treaty with United States, each case must be carefully considered on its own particular facts and circumstances. 25 U.S.C.A. § 70a.

13. Indians ⇐11

Evidence was sufficient to show that the consideration passing to Osage Indians for lands ceded to United States was so unconscionable as to give rise to claim against United States under the Indian Claims Commission Act. Treaty with Osage Indians, art. 1, 14 Stat. 687; 25 U.S.C.A. §§ 70a, 70s(b).

14. Indians ⇐11

In determining whether consideration passing to Osage Indians for lands ceded to United States was so unconscionable as to give rise to claim against United States, the Government's expense in maintaining a department to supervise the installment sales of land ceded by Osage Indians to United States was not chargeable to the Osage, where the treaty between the United States and the Osage expressly forbade the sale of the land on installment basis. Treaty with Osage Indians, art. 1, 14 Stat. 687; 25 U.S.C.A. §§ 70a, 70s(b).

15. Administrative law and procedure ⇐387
United States ⇐113

The rule making power of Indian Claims Commission is not so broad as to allow the Commission to refuse to consider a matter properly presented to the Commission by the pleadings upon a technicality of common law pleading long since discarded by the Federal Courts. 25 U.S.C.A. § 70a; Fed.Rules Civ.Proc. rule 8(e), 28 U.S.C.A.

16. Administrative law and procedure ⇐475
United States ⇐105

The word "recognize" in Indian Claims Commission Act authorizing Commission to hear Indian claims against United States based upon fair and honorable dealings that are not "recognized" by any existing rule of law or equity was used in the sense of "triable", and means that if at the outset a claim is not cognizable or if at trial it is not proved and therefore decided favorably to the Indians under rules of law and equity, then the Indians are entitled to have it considered under the fair and honorable dealings clause of the Act. 25 U.S.C.A. § 70a.

See publication Words and Phrases, for other judicial constructions and definitions of "Recognized".

17. Administrative law and procedure ⇐475
United States ⇐113

The Osage Nation of Indians filing claim against United States for additional compensation for lands ceded to United States could plead case under provisions of clause in Indian Claims Commission Act relative to unilateral mistake and unconscionable consideration and under provisions of clause relative to fair and honorable dealings, since on the trial a failure to submit evidence sufficient to establish the exact proof required under the first clause might well satisfy the less exacting demands of the second clause. 25 U.S.C.A. § 70a(3, 5).

18. Indians ⇐11

Evidence was sufficient to establish claim of Osage Nation of Indians against the United States for additional compensation for lands ceded to United States under provisions of clause in Indian Claims Commission Act relative to fair and honorable dealings. 25 U.S.C.A. § 70a(5).

19. United States ⇐110

The Osage Nation of Indians were not entitled to interest on allowed claim against United States for additional compensation for land ceded to United States, where the case did not involve a "taking" of property in the constitutional sense, and the Indian Claims Commission Act contained no express provision for payment of interest, and the facts and circumstances of case were not such as to warrant the allowance of interest on purely equitable grounds. Treaty with the Osage Indians, art. 1, 14 Stat. 687; 25 U.S.C.A. § 70a(3, 5).

Wesley E. Disney, Washington, D. C., F. M. Goodwin and Lawrence H. Gall, Washington, D. C., on the brief, for appellant.

Ralph A. Barney, Oklahoma City, Okl., A. Devitt Vanech, Asst. Atty. Gen., for appellee.

Ernest L. Wilkinson and Robert W. Barker, Washington, D. C., and Aaron, Aaron, Schimberg & Hess, and Adams, Moses & Culver, all of Chicago, Ill., Ralph Montgomery Arkush, New York City, Theodore C. Bonney, Seneca Falls, N. Y., Brown, Dashow & Ziedman, and Dempsey, Mills & Casey, Chicago, Ill., Dykema, Jones & Wheat, Detroit, Mich., Earle & Reilly, New York City, Harrison, Thomas, Spangenberg & Hull, Cleveland, Ohio, Blake, Voorhees & Stewart, New York City, McCarter, English & Studer, Newark, N. J., Pam, Hurd & Reichmann and Pritzker, Pritzker & Clinton, Chicago, Ill., Riegelman, Strasser, Schwarz & Spiegelberg, New York City, and Washington, D. C., Sonnenschein, Berkson, Lautmann, Levinson & Morse, Chicago, Ill., Williamson, Hoge & Curry, Los Angeles, Cal., amici curiæ.

Before JONES, Chief Judge, and LITTLETON, WHITAKER, MADDEN and HOWELL, Judges.

LITTLETON, Judge.

This is an appeal by The Osage Nation of Indians from a final determination of the Indian Claims Commission, in which a majority of the Commission determined that the appellant was not entitled to any relief. Appellant's petition was filed with the Commission under and pursuant to the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C.A. § 70 et seq., hereinafter referred to as the Indian Claims Commission Act.

Appellant's claim, in essence, is for additional compensation, to be measured by the fair market value on September 29, 1865, of a tract of land approximately 30 miles wide and 50 miles long, consisting of 865,930.31 acres, in southeastern Kansas, which land was ceded to the United States by Article 1 of the Treaty of September 29, 1865, between the Osage Nation of Indians and the United States, 14 Stat. 687. Article 1 provided as follows:

"The tribe of the Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments from the government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the lands contained within the following boundaries, that is to say: beginning at the southeast corner of their present reservation, and running thence north with the eastern boundary thereof fifty miles to the northeast corner; thence west with the northern line thirty miles; thence south fifty miles, to the southern boundary of said reservation; and thence east with said southern boundary to the place of beginning: *Provided*, That the western boundary of said land herein ceded shall not extend further westward than upon a line commencing at a point on the southern boundary of said Osage country one mile east of the place where the Verdigris river crosses the southern boundary of the State of Kansas. And, in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribes semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws [including any act granting lands to the state of Kansas in aid of the construction of a railroad through said lands], but no pre-emption claim or homestead settlement shall be recognized: and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed

in the treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

In its petition filed with the Commission, appellant asserted its claim under Section 2 of the Indian Claims Commission Act, which reads, in part, as follows:

"The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *"

Although, in its petition, briefs and arguments before the Commission, appellant urged that its claim for relief was cognizable under all five clauses of Section 2, in its appeal to this court appellant relies only on portions of clause (3) and on clause (5). Appellant contends that the record before the Commission establishes conclusively the following three ultimate facts, any one of which would entitle appellant to the relief requested: (1) that there was a unilateral mistake of law or fact on the part of the Osage such as would justify the revision of the treaty under clause (3) of Section 2, in that the provision in Article 1 of the treaty relative to the creation of a civilization fund for Indian tribes other than the Osage but at the expense of the Osage, was not fully explained to, nor understood by, the Osage, but that, on the contrary, the cession of surplus lands in Article 1 was made with the understanding and belief on the part of the Osage that the proceeds from the sale by the Government of the ceded land, over and above the $300,000 advanced, plus the expenses of survey and sale, were to accrue to the benefit of the Osage Indians residing in the United States: (2) that in any event, the consideration actually passing to the Osage under Article 1 of the treaty, amounting to $300,000, or approximately 34 cents per acre, was unconscionable inasmuch as the land was worth at least what the Government received for it, that is, $1.25 per acre; (3) that the course of conduct pursued by defendant's agents in making the treaty and procuring the cession in Article 1 did not meet the standards of fair and honorable dealings within the meaning of clause (5) of Section 2.

The Commission based its denial of appellant's claims under clause (3) on two ultimate findings of fact: that the value of the land in 1865 did not exceed the sum of $300,000 paid, and that the terms of the treaty of September 29, 1865, particularly with respect to the civilization fund provision of Article 1, were fully explained to and understood by the Osage.

Upon these ultimate findings rests the Commission's disposition of the claim. Upon these or substituted conclusions upon the same issues must rest this court's decision. At the outset, therefore, it is necessary that we determine the extent of the authority of this court to review and to revise the findings of fact of the Commission before proceeding to analyze those findings in the light of the record, and to determine whether they should be modified to accord with what we perceive to be the facts as established by the record.

[1] As stated in National Labor Relations Board v. Cheney California Lumber Co., 327 U.S. 385, 388, 66 S.Ct. 553, 554, 90 L.Ed. 739, "When judicial review is available and under what circumstances, are questions (apart from whatever requirements the Constitution may make in certain situations) that depend on the particular Congressional enactment under which judicial review is authorized."

Section 20 of the Indian Claims Commission Act of August 13, 1946, provides in part as follows:

"(b) * * * At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings,' where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. * * *

"(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of this title."

After a hearing before the Commission, as provided for in the Act, the Commission made its final determination including findings of fact and conclusions of law, all adverse to appellants. Thereafter, pursuant to Sec. 20(b), quoted above, appellant appealed to this court from such adverse final determination.

This appeal raises the questions, (1) whether, on the whole record, the Commission's findings of fact, hereinabove, referred to, are supported by substantial evidence, and (2) whether the Commission's conclusions of law, including its conclusions respecting fair and honorable dealings, are valid and supported by the findings of fact.

Appellee has not provided us with much guidance as to what it considers to be the proper scope of our review of the Commission's findings of fact. It has merely pointed out that similar provisions as to judicial review of findings of facts on appeal appear in the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq., the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., and various other acts governing the duties and powers of administrative and quasi-judicial tribunals. It mentions two Supreme Court decisions, one dealing with the scope of judicial review of facts under the National Labor Relations Act, and the other under the Federal Trade Commission Act,[1] and the excerpts quoted from each decision in the Government brief stresses the proposition that courts have repeatedly held themselves precluded from weighing the evidence in reviewing the Board's or the Commission's orders, and that if the orders are supported by findings based on substantial evidence, the courts are not free to set them aside, even though the administrative tribunal could have drawn different inferences from the record before it. The Government indicates that such decisions represent its

1. National Labor Relations Board v. Crompton-Highland Mills, Inc., 337 U.S. 217, 69 S.Ct. 960, 93 L.Ed. 1320, rehearing denied 337 U.S. 950, 69 S.Ct. 1512, 93 L.Ed. 1752; Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320.

views on the scope of our review of the Commission's findings of fact, and should serve as a guide to this court.

[2] The exact scope of a court's review of the factual determinations or orders of a quasi-judicial or administrative tribunal and the application of the so-called substantial evidence rule, are by no means simple matters. The enabling legislation of such tribunals as the National Labor Relations Board, the Interstate Commerce Commission, etc., has uniformly revealed a Congressional intent to accord as much finality as possible to their determinations, orders and decisions, in order to insure an orderly and efficient administration of the various laws involved. Although, as conceded by the Government, the Indian Claims Commission is not very similar to the above mentioned Board and Commission, this same congressional intent, as we shall show more fully hereinafter, was equally present in the mind of Congress in framing the Indian Claims Commission Act, and we should not whittle away that very proper purpose, nor in any way undermine the effectiveness of the Commission by seeming to treat each appeal as a trial *de novo,* or by introducing an unduly broad concept of what constitutes substantial evidence. We are fully aware that there are limits to our review upon the record of the findings of fact made by the Commission, and we have carefully considered where those limits lie. In so doing we have studied the arguments and authorities referred to in the briefs of the parties, the opinions of the text writers on administrative law, dealing with the problem generally, and the legislative history of the Indian Claims Commission with respect to Section 20(b).[2]

[3] There seems to be little unanimity in the court decisions as to the meaning of the expression "substantial evidence." It has meant everything from "warrant in the record," "rational basis," "not arbitrary," "some evidence," "reasonable," to what is commonly understood as being the preponderance of the evidence. We are convinced that the course Congress intended us to follow lies somewhere between those extremes.

The various theories as to the scope of review, ranging from very narrow to very broad, announced, by the courts, has by no means been a thoughtless or haphazard process, but rather, we think, an honest and considered attempt to give effect to Congressional intent as manifested in the particular legislation involved, and to preserve the dignity and effectiveness of the administrative tribunals whose decisions were under scrutiny. While, for a time, there seems to have been a trend in the courts to look only to see whether the finding of fact in question had *some* evidence to support it and if so, to sustain it even though the record contained masses of uncontradicted evidence to the contrary, those decisions were largely confined to certain specialized fields where the court, reviewing the findings of an expert body vested with discretionary and sometimes rate-making functions, was reluctant to substitute its relatively uninformed judgment for that of a trusted and experienced body of experts.

The problem of when to substitute judicial for administrative judgment is often a difficult one. Courts have refused to substitute their judgment for that of the administrative tribunals involved where the question concerned matters on which the courts felt that the agencies had by statute been vested with authority to exercise discretion or to establish policy, sometimes coupled with rule-making power. Securities and Exchange Commission v.

2. Cases and Materials on Administrative Law, by Milton Katz, 947: Administrative Law, Cases and Comments, by Walter Gellhorn, Chicago 1940; Report of the Atty.Gen.Com. on Adm.Procedure (1941) Stason; "Substantial Evidence" in Administrative Law, 89 U. of Pa.L. Rev. 1026 (1941); Atty.Gen.Com. on Adm.Procedure Final Report; Symposium, 41 Columbia L.Rev., 585 (1941); The Scope of Judicial Review, Edson R. Sunderland, 27 Mich.L.Rev. 416 (1929); Scope of Review of Federal Administrative Action, Kenneth Culp Davis, 50 Columbia L.Rev. 559 (1950). The latter article by Mr. Davis, with its many references to other studies in this field, has been particularly helpful.

Central-Illinois Securities Corp., 338 U.S. 96, 69 S.Ct. 1377, 93 L.Ed. 1836. In such cases, even though the facts might be undisputed and the court might feel more favorably disposed to a different conclusion than that reached by the administrative tribunal, the courts have refused to reverse where the agency acted within its statutory authority. Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 54 S.Ct. 692, 78 L.Ed. 1260; Shields v. Utah Idaho Central R. Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111; Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147. These cases also involved the so-called expert agencies such as the Interstate Commerce Commission, the Securities & Exchange Commission, the Federal Communications Commission, etc., and the test applied seems to have been reasonableness rather than rightness. In National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170, the Court held that the question whether or not a person was an "employee" within the meaning of the National Labor Relations Act was a matter confined to agency discretion. In Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 67 S.Ct. 245, 250, 91 L.Ed. 136, the Court held that the question whether or not there was a labor dispute in active progress was a matter confined to agency discretion and because there was "warrant in the record" and "a 'reasonable basis in law'" to support the agency determination, the Court would not substitute its judgment regardless of its inclination to the contrary on the facts. However, in the same case the Court did not hesitate to substitute its judgment on the question of whether the labor dispute was *at the place of former employment,* apparently feeling that there was no agency discretion involved in the determination of such a question, nor any expertness required in reaching such a determination.

Courts have endeavored to distinguish carefully between questions which are properly the subject of expert and technical judgment in the hands of an experienced and informed agency, and questions of a more general nature concerning which the court is as competent an arbiter as the administrative body. In the former case, the courts have applied a very limited scope of review, and in the latter a much broader one. National Labor Relations Board v. Standard Oil Co., 2 Cir., 138 F. 2d 885. Where the question examined involves the common law, civil law, ethical questions, legislative history, *a priori* reasoning, the meaning of nontechnical words and concepts and the tradition and philosophy of law and government, the court rather than the agency is the expert body.

In determining whether a finding is supported by substantial evidence, courts are usually directed by the statutes and by the Administrative Procedures Act to examine the whole record. In Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 217, 83 L.Ed. 126, the Court said of substantial evidence: "[It] is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Mr. Justice Black's dissent in National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 59 S.Ct. 501, 505, 83 L.Ed. 660, in which the majority held that the evidence of a refusal to bargain was too insubstantial to form a basis from which the fact in issue could reasonably be inferred, makes some general observations which are significant in any approach to this problem. Speaking of such agencies as the Labor Board, the Interstate Commerce Commission, the Securities and Exchange Commission and the like, Mr. Justice Black said:

"* * * were all created to deal with problems of regulation of ever increasing complexity in the economic fields of trade, finance and industrial conflicts. Congress thus sought to utilize procedures more expeditious and administered by more specialized and experienced experts than courts had been able to afford. The decision here tends to nullify this Congressional effort."

In the Report of the Attorney General's Committee on Administrative Procedure,

the additional views of Messrs. McFarland, Stason, and Vanderbilt, suggested that courts had too frequently interpreted "substantial evidence" to mean any evidence to support the conclusion of fact regardless of how heavily the countervailing evidence might preponderate. The report goes on to point out that in any one agency some fact determinations may involve highly technical matters requiring special experience and training while others will involve technology to little or no extent:

"Some impinge heavily upon private rights; others do so lightly, if at all. Some are intended to be merely preliminary to the exercise of validly conferred administrative discretion; others involve no discretionary element but are quite objective. Some are rendered by long-established, well-tried tribunals in whom all persons have confidence; some come from new and hurriedly organized agencies. Yet, for the most part all these different types of fact determinations are cast into a single mold, with a single general formula for judicial review. * * *"

This last statement is, of course, literally true, since many of the statutes employ the same provision relative to the conclusiveness of the tribunal's determinations of fact if based on substantial evidence. However, in recent cases the courts have displayed a greater amount of flexibility in applying this general formula, depending upon the question involved, the technical or nontechnical aspects of the issue, the provisions of the particular statute, the make-up and length of existence of the administrative board, and many other pertinent considerations.

Just how flexible the application of the general formula should be, is itself a difficult problem. In its decision of January 15, 1951, in the combined cases, Niagara Hudson Power Corp. v. Leventritt (No. 211), and Securities and Exchange Commission v. Leventritt (No. 212), the Supreme Court reversed, 340 U.S. 336, 71 S.Ct. 341, 346, the Court of Appeals for the Second Circuit, 179 F.2d 615, which had held that the finding of the Securities and Exchange Commission concerning the value of warrants was not supported by *any* evidence.

The Court stated, in part:

"* * * The informed judgment of the Commission, rather than that of the market, has been designated by the Act as the appropriate guide to fairness and equity within the meaning of the Act. * * *

"In the absence of abuse of its discretion, the Commission's approval of a plan is as lawful and binding when it recognizes a value of zero for a security as when it selects any other figure. The cash allowance it gives to one security it must take from another. In each case, it must determine the fairness and equity of the plan to all who are affected. We conclude, therefore, that in the present instance the Act does not require proof that the warrants are wholly worthless and without all market value in order to sustain the Commission's judgment that the plan is fair and equitable when it denies participation to them. It is enough that the Commission, within its discretion, has given the warrants careful consideration and that under all the circumstances, including their market value, has found the plan to be fair and equitable within the meaning of § 11 of the Act [15 U.S.C.A. § 79k]."

In Universal Camera Corp. v. National Labor Relations Board (No. 40), 340 U.S. 474, 71 S.Ct. 456, 459, the Supreme Court considered the question whether the judicial review provisions contained in the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., and in the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq., in any way altered the scope of judicial review. The Court noted that the Court of Appeals for the Second Circuit and the Courts of Appeals for five other circuits all agreed that no material change had been made in the reviewing powers, whereas the Court of Appeals for the Sixth Circuit in Pittsburgh S. S. Co. v. National Labor Relations Board, 180 F.2d 731, held that the scope of review had been considerably altered.

In the Universal Camera case, the majority opinion of the Court carefully re-

viewed and clarified the problem now before us. At the outset of the discussion of this matter it was stated:

"Want of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review. * *"

The Court then proceeds to review the history of the exercise of judicial reviewing power under the substantial evidence rule and points out that in many cases

"* * * Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was 'substantial,' the phrasing of this Court's process of review readily lent itself to the notion that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself. It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings. * * *"

The Court further pointed out that this problem was of great concern to the Attorney General's Committee on Administrative Procedure, and quoted from page 92 of the Final Report, referring to proposals to enlarge the scope of review to permit "inquiry [as to] whether the findings are supported by the weight of the evidence". The Final Report contained the following:

"* * * Assuming that such a change may be desirable with respect to special administrative determinations, there is serious objection to its adoption for general application.

"In the first place there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. The line between 'substantial evidence' and 'weight of evidence' is not easily drawn—particularly when the court is confined to a written record, has a limited amount of time, and has no opportunity further to question witnesses on testimony which seems hazy or leave some lingering doubts unanswered. 'Substantial evidence' may well be equivalent to the 'weight of evidence' when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided.

"In the second place the wisdom of a general change to review of the 'weight of evidence' is questionable. If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications."

The Court then noted that the three dissenting members of the Committee in their minority report recommended that Congress enact legislation requiring judicial review to be upon "the whole record" and that to that extent, at least, their report was adopted. As pointed out by Mr. Justice Frankfurter, speaking for the majority, it was in the same "mood" that amendments of the Wagner Act contained the same language:

"It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.

* * * * * *

"It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from

that under the Administrative Procedure Act.

* * * * * *

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the sigificance of the requirement in both statutes that courts consider the whole record."

The Supreme Court then cautions that it should not be thought that courts must not give great respect to the specialized or technical findings of an informed and expert body, nor even that a court should displace an administrative tribunal's choice in a matter *not* requiring expertise even though the court might justifiably have arrived at a different result if the matter had been before it *de novo*.

"* * * Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The Court thus concluded that the judicial review provisions of the Administrative Procedure Act and similar language in the Taft-Hartley Act require that substantiality be determined in the light of all that the record relevantly presents. Further, the Supreme Court held that although no precise formula for the scope of judicial review was provided, both acts, in their actual wording and in the light of their legislative history, clearly place upon the courts the responsibility for the *reasonableness* and *fairness* of administrative tribunals' decisions, at least to a greater extent than some courts have in the past shown. The order of enforcement of the Board's order entered by the Court of Appeals for the Second Circuit was reversed and the cause remanded. On the same day in the case of National Labor Relations Board v. Pittsburgh Steamship Co. (No. 42), a second decision[3] of the Sixth Circuit, 180 F.2d 731, refusing enforcement of a Board order, was affirmed 340 U.S. 498, 71 S.Ct. 453, 456. In this case the Court said:

"* * * The court painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed 'substantial.'"

We now turn to a consideration of what Congress intended to be the scope of our review of the findings of fact of the Indian Claims Commission. The language used in Section 20(b) is similar to that of the language in the Administrative Procedure Act and that fact was noted specifically in the Conference Report (Cong.Rec. 7-27-46, p. 10454). The latter act had been recently enacted, however, and there had been no court decisions interpreting that particular portion of it. It is interesting to note that the Indian Claims Commission Act as originally introduced had no provision for a review of the Commission's findings of facts, but only of its conclusions of law. The original bill also provided, in Section 22(a), that the Commission's report of a final determination favorable to the claimant should have the effect of a final judgment and be paid in the same manner as are judgments of the Court of Claims. The Senate objected to this provision and passed an amendment which provided that the amount found due by the Commission should, upon appropriation therefor by Congress, be paid in

3. Previously, the decision of the Circuit Court denying enforcement of the Board order because of bias on the part of a Board trial examiner whose findings had all been adopted by the Board, had been reversed and remanded.

such manner as Congress should provide. The Department of Justice, however, felt that the awards of the Commission should have no such finality and proposed that the Commission's determinations should come back to Congress for a thorough review on the facts and for final action. Ultimately, the Department of Justice agreed that there should be a review of the Commission's findings of fact by the Court of Claims and also agreed to the finality of the Commission's determinations which were so subject to review. The Conference Report of July 27, 1946, in commenting upon these amendments, states in part:

"* * * In order to make perfectly clear the intention of both houses that the determinations of the Commission should, unless reversed, have the same finality as judgments of the Court of Claims, section 22(a) was rewritten to provide expressly that future Congresses may appropriate such sums as may be necessary to pay the final awards of the Commission. At the same time, in deference to the position taken by the Department of Justice that decisions of the Commission should be reviewable on the facts as well as on the law by the Court of Claims, appropriate amendments were made in section 20(b), 21 and 22, which apply to the Commission the forms of review embodied in the recently enacted Administrative Procedure Act. Under these provisions decisions of the Commission may be reversed (a) if the Court of Claims determines that the findings of fact are not supported by substantial evidence, or (b) if the Court of Claims finds an error in the law applied by the Commission. Under the latter heading the Court of Claims is empowered to reverse a decision of the Commission based upon the standard of 'fair and honorable dealings,' inasmuch as the interpretation of such a standard, written into the law of the land by this act, becomes an issue of law. The Court of Claims is likewise empowered to determine whether the findings of fact support the conclusion of the Commission. With these extensive review provisions the Department of Justice agree to withdraw objections earlier raised to the provision authorizing appropriation in payment of awards made by the Commission. (Rept.No.2693, 79th Cong., 2d sess., House of Representatives, Statement of the Managers on the Part of the House, p. 9; Cong. Rec., House, July 27, 1946, p. 10454.)"

It thus appears that it was at the instance of the Department of Justice that this court was ultimately directed to review judicially the findings of fact of the Commission, and the forms of review applied to the Commission's findings were those embodied in the Administrative Procedure Act.

In general the jurisdiction of the Indian Claims Commission does not embrace matters of a technical or highly specialized character. The Act sets forth no particular qualifications for the Commissioner except that at least two be attorneys and that not more than two be of the same political party. There was some discussion during the hearings of the advisability of providing that one member be an American Indian, but no such provision was made. The Act contains no language delegating to the Commission authority to perform any specified legislative function, when in the judgment of the Commission such action should be necessary to carry out the policy of Congress, so as to preclude a court's reviewing the Commission's judgment as to the existence of the facts calling for that action. The Commission is vested with no rate making or regulatory functions. Generally, and in this case in particular, the issues to be decided by the Commission involve ordinary matters—both legal and factual—concerning which this court is as expert as the Commission, that is, the market value of land, the meaning of language in a treaty, whether a certain course of dealings between the agents of the United States and the Indians amount to fair and honorable dealings, whether from the circumstances surrounding the treaty negotiations the existence of unilateral mistake concerning one provision can be fairly inferred. Inasmuch as the evidence before the Commission in this case was largely documentary, the opportunity of this court to evaluate such evidence is equal to that of the Commission. This is not a case where the commission was

faced with the necessity of weighing or evaluating conflicting evidence in order to make its findings of fact. If it were, our scope of review and power to modify such findings would be more circumscribed. Pollock-Stockton Shipbuilding Co. v. Brown, 7 Cir., 185 F.2d 37. For the most part the evidence in the instant case is documentary and is not conflicting and the problem presented is one of carefully examining a vast amount of material and from it drawing the soundest inferences.

Section 13(b) of the Act provides for the establishment of an Investigation Division to investigate all claims referred to it by the Commission, for the purpose of discovering the facts and submitting any evidence developed through its search to the Commission and the parties. From the papers contained in the record on appeal, it appears that no such investigation was made or, if it was, that the material developed was not considered by the Commission in reaching its decision since the Commission denied the request of appellants to make the report of the Division a part of the record on appeal. Therefore, we presume that the record before us is the entire record on which the Commission based its determination.

The primary facts contained in the record in this case were for the most part undisputed. Those facts were contained in depositions taken from individuals many years prior to the hearing, in official letters and documents of the Department of the Interior and the Indian Office, in Congressional documents, drafts of treaties from the files of the Indian Office, Acts of Congress in the form of statutes and resolutions, reports of Congressional committees, and the record of this court in the previous Osage case, (Osage Tribe of Indians v. United States), 66 Ct.Cl. 64. The facts in this record were not elicited from oral testimony of witnesses whom the Commission had an opportunity to hear and observe.

[4] Inasmuch as the parties have joined issue upon the question of whether or not the Commission's ultimate findings were based upon substantial evidence, and it appearing that this court may properly review such findings and that upon such review the disposition of this case may largely depend, we proceed to a review of the facts as found by the Commission. In affirming, modifying or reversing the findings of the Commission, we shall be guided by the *criteria* furnished by the Supreme Court in the Universal Camera case, supra.

The primary facts found by the Commission in findings 1 through 7, and upon which it based its two ultimate findings,[4] will be summarized. Early in 1862 the Osage Nation and the United States commenced treaty negotiations looking toward the acquisition by the United States of portions of land in southeastern Kansas which had long been occupied by the Osage Nation. On August 29, 1863, a treaty was concluded which contained, among others, certain provisions for the cession to the United States of two tracts of land. At this point, the Commission quotes in full Article 1, as it appeared in this early draft of the treaty, providing for the sale to the United States of a tract of land in southeastern Kansas approximately 30 by 50 miles in size, for an outright price of $300,000, which sum was to be placed to the credit of the Osage Nation in the treasury of the United States and interest thereon to be paid to the Osage at the rate of five percent per annum. Article 2, also quoted in full, provided that a larger tract should be ceded to the United States in trust for the Osage and be sold for their benefit by the Secretary of the Interior under such rules and regulations as he might prescribe, the proceeds, less expenses incident to the execution of the trust, to be placed in the treasury of the United States to the credit of the Osage and interest thereon at the rate of five percent per annum to be ex-

4. 8. The value of the land ceded by said treaty did not exceed the sum of $300,000 at the time the 1865 treaty was concluded.

9. That the terms of the treaty of September 29, 1865, were fully explained to and understood by the Indian representatives of the Osage Nation of Indians, who executed the same, at the time they signed it.

pended annually for certain specific purposes. Article 16, quoted in full, provided:

"Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this Treaty but the same shall go into effect when ratified by the Senate and approved by the President."

The Commission's findings then state that the treaty was amended in several respects by the Senate and also at the request of the Osage, but that, in 1865, notwithstanding the provisions of Article 16, the then Acting Commissioner of Indian Affairs considered the changes in the treaty to be of such a character as to make the treaty "unfit for publication" and accordingly, with the approval of the Secretary of the Interior, he prepared another treaty embodying all the changes. This new draft of the 1863 treaty, "with slight amendments," was submitted to the representatives of the Great and Little Osage tribes of Indians at Fort Smith, Arkansas, in September 1865. The Commission found that this treaty was interpreted and explained to the representatives of the Osage at Fort Smith by an interpreter and that, after some deletions and interlineations, it was signed by the representatives of the United States and the representatives of the Little (Southern) Osage shortly before September 29, 1865; that the treaty was later submitted to the Great Osage (who had not been authorized to execute the treaty at Fort Smith) at Canville Trading Post in Kansas, where the terms were "fully explained to them by an interpreter," and that it was executed by the Great Osage on September 29, 1865; that the following statement appears before the signatures of the chiefs—

"We the undersigned, chiefs and headmen of the Clermont and Black Dog Band of the Great Osage Nation, in council at Fort Smith, Ark., have had the foregoing treaty read and explained in full by our interpreter, L. P. Chouteau, and fully approve the provisions of said treaty made by our brothers the Osages, and by this signing make it our act and deed." 14 Stat. 691.

The findings then point out that certain of the chiefs who signed the 1863 treaty also signed the 1865 treaty.

The findings then set forth in full Articles 1, 2, and 17, of the treaty signed on September 29, 1865, and finally proclaimed, after certain further amendments, on January 21, 1867. Another attestation clause is quoted with reference to certain amendments, dated September 21, 1866, and the Commission notes that the signatories thereto were the same chiefs and headmen who signed the original treaty.

In finding 6, the Commission states that the tract ceded to the United States by Article 1 of the treaty of 1865 comprised some 865,930.31 acres of land and that this land was sold by the Government "pursuant to the provisions of said article one"; that the sales began in 1868 and continued until 1901. The remainder of finding 6 is significant inasmuch as it is the basis for the Commission's conclusion that the market value of the land ceded in Article 1 was no more than 34 cents per acre in 1865. We shall discuss it in detail later in this opinion. In general, it finds that by the end of 1875 less than 50 percent of the land in the Article 1 tract had been sold and that no land was sold during 1876. It then points out that on August 11, 1876, 19 Stat. 127, Congress passed an act providing for the sale of these lands at $1.25 per acre on a four year installment basis and that following the passage of this act 454,652.48 acres were sold between 1877 and 1880; that the cash proceeds from sales after 1880 indicate that the remaining acreage was sold during the next twenty years. In the latter part of finding 6, the Commission finds that gross proceeds from the Government sales of the land amounted to $1,101,303.78, "out of which the Government retained the purchase price, $300,000.00," plus $24,373.20 also retained to cover the cost of survey, and that the balance of $776,931.58 was placed to the credit of the Civilization Fund; that $3,177.22 was paid out of this fund to cover the expenses of sale of Osage land, leaving $773,754.34 in the fund; that the entire fund was used for the benefit of Indians other than Osage, except for $189.55 which

was spent for the Osage and $248.78 which was returned to the United States Treasury. In Finding 7, the Commission found that the $300,000 specified in Article 1, was set up in the Treasury Department on about February 13, 1883, as a fund to the credit of the Osage; that interest on this fund of $15,000 annually has been paid since 1867 and has aggregated more than $1,200,000.

Claim of Unilateral Mistake

Under Section 2 of the Indian Claims Commission Act, "unilateral mistake" is a ground for the reformation of a treaty. If unilateral mistake is involved here, it is that the Osage, because of their disadvantageous position, complete ignorance of the English language and of the white man's customs, inexpert interpreters and lack of the necessary words in their very limited language to convey the true significance of the language used and the legal concepts involved, did not understand the effect of the treaty they accepted.

The fact of a person's understanding or lack of understanding of a matter, is ordinarily shown judicially by his expressions and actions at the time the matter took place. In the instant case no record was kept of the proceedings either at Fort Smith or at Canville Trading Post, where such expressions or actions might have been noted. The Commission had no opportunity to hear and observe witnesses who had been present at such proceedings and, in this connection, had to depend on written depositions of persons who were not present during the negotiations, either because they were not yet born or were too young at the time, and whose impressions were at best second or third hand. For whatever it may be worth, such persons deposed uniformly that the Osage had not understood the Civilization Fund provision.

Aside from these depositions, to which the Commission apparently attributed no weight, the record consists of the various versions of the treaty from 1863 to 1867 when it was proclaimed, letters and documents from the files of the Department of the Interior and the Indian Office, and certain undisputed facts concerning the history of the times and the nature of the parties involved. We do not believe that the record before the Commission and now before us, justifies the fact inferentially found by the Commission that the civilization fund provision was fully explained to and understood by the Osage Tribes. In its opinion, on the question of unilateral mistake with respect to the meaning of the civilization fund provision in Article 1, the Commission concludes that "the record discloses no deception, over-reaching or other perverse conduct on the part of the representatives of the Government, either in the preliminary discussions or in the actual consummation of the treaty." The Commission concedes that the Osage were full-blooded, blanket Indians, few of whom could read or write, that they had little knowledge of English, that they were destitute and very anxious to make a treaty in order to secure funds. However, the Commission feels that because the unproclaimed treaty of 1863 provided in Article 1 for an outright cession of this land for $300,000, the Osage must have understood that the revised Article 1 in the treaty submitted to them in 1865 also provided for an outright cession. The Commission reasons that the civilization fund provision was actually of no particular interest to these Indians or to the Government, since the land was being sold outright for a fixed sum and it was no concern of the Indians how the proceeds from the sale of the lands were to be disposed of as long as they got the $300,000. The Commission states that the record does not show how much time was spent on treaty negotiations at Fort Smith, but that three hours were consumed in negotiations a few days later at Canville. Admitting that three hours may be a short time to make such a provision clear to Indians who spoke no English and had no words in their vocabulary to express the words "civilization fund," "other Indians," etc.; that the Great Osage were not authorized to sign the treaty at Fort Smith, and that no record of the negotiations there are in existence, the Commission nevertheless states "* * the preliminary negotiations and terms of

the treaty were agreed upon at Fort Smith, at which place the Great Osage were represented, and, for ought that appears to be the contrary, the Great Osage representatives took part in the parley and understood the terms of the treaty."

The Commission appears to rely heavily on the previous negotiations relating to the 1863 treaty and its amendments, as a basis for its conclusion that the Osage never intended to do other than sell outright the 30 by 50 mile tract for $300,000 and that they either fully understood the civilization fund provision inserted in the 1865 draft, or were not interested in such a provision. In commenting on the decision of this court in 66 Ct.Cl. 64, involving the same claim, wherein the court found and concluded that the Osage did *not* understand the meaning of the civilization fund provision, but rather believed that the expression "Indians in the United States" referred to the *Osage* Indians in the United States, the Commission states that the evidence relating to the 1863 treaty negotiations was never brought to the court's attention and that such facts would have had a direct bearing upon the statements made by the court with respect to mistake, although not upon its determination of the jurisdictional question, that is, that the court could not revise the treaty as written.

It is true that certain documents, such as the 1863 treaty itself, the Senate amendments reported in the Senate Executive Documents, letters from the official files of the Department of the Interior, were not introduced in evidence as exhibits, as they were in the present case. However, all of those documents, letters, and the 1863 treaty and its amendments, were quoted in full and were discussed in the briefs of the parties and to that extent were before the court for its consideration. Much of this material, once called to the court's attention, was material of which the court could take judicial notice, and we must presume that the court considered such matters in concluding that the Osage did not understand the terms of the civilization fund provision, regardless of the fact that no findings were made relative to such documents and the material was not referred to in the court's opinion. As recognized by the Commission, this material could not have affected the court's final determination which was that it did not have jurisdiction under the special act of Congress to revise the treaty for unilateral mistake. Actually, the facts relative to mistake presented to the Indian Claims Commission in the form of documentary evidence, and the facts before this Court in the earlier Osage case, are in most respects identical. The court's conclusion in the earlier case that there had been a mistake, was ineffective on the matter of relief, since the court had no power at that time to revise the treaty for mistake. Under the Indian Claims Commission Act, however, a treaty may be revised for unilateral mistake, and we shall therefore review briefly all the facts revealed by the record in the instant case and bearing on that matter.

In 1862 the Osage Indians were destitute. Their annuities from the Government under earlier treaties had ceased. The growth of white settlements in the immediate vicinity of their lands, particularly in the southeastern part of Kansas, and the turbulent conditions in that area resulting from the Civil War, had driven off the wild game on which the Osage depended largely for a livelihood. While the Osage were not a particularly warlike or hostile tribe, they were at best semi-civilized and completely unlettered. They were land-poor and were most desirous of disposing of some of this asset for funds with which to relieve their great distress. The State of Kansas and the United States Government were equally eager to have Indian title to land in Kansas extinguished and to have the Indians moved elsewhere, particularly in the case of southeastern Kansas where the railroad companies and the settlers were demanding an opportunity to obtain the land. In the early negotiations in 1862, the Osage had at first objected to ceding their lands in trust for the reason that by such a procedure they would receive no money until the lands were surveyed and sold. Their need was immediate and they preferred to make an outright

sale of some of their land at least. The treaty finally agreed upon in 1863 provided for such an outright sale of the most desirable portion of their holdings in southeastern Kansas—a tract approximately 30 by 50 miles in size—for $300,000 (Article 1). Article 2 of the treaty provided for a cession in trust for sale for the benefit of the tribes, of a much larger tract adjoining the first and extending far to the west, which was to be sold under such rules and regulations as the Secretary of the Interior might prescribe, the proceeds of such sale to be used for the benefit of the Osage Indians. The treaty also provided for a diminished reserve to which the tribe was to withdraw. The remainder of this early treaty provided that the 16th and 36th sections of land ceded by Article 2, were to be donated to the State of Kansas for school lands and that the Osage were to be paid 25 cents per acre for such lands. One section of the land described in Article 1 was to be given to Father Schoenmaker for the Catholic Mission and the priest was to have the privilege of selecting two additional sections in this tract for which he should pay 50 cents per acre. All settlers who were already on Article 1 and Article 2 lands might, within one year of ratification of the treaty, buy their lands for $1.25 per acre to the extent of a quarter section each. Tribal debts were to be paid to the extent of $30,000. One section of land was to given to Charles Morgrain and $500 paid to him. Five hundred dollars each was to be paid to the chiefs and headmen of the Osage tribe yearly. No homestead or pre-emption rights were to be thereafter recognized on Article 1 lands except by direction of the President. Father John Schoenmaker was to be permitted to select two sections of land from the diminished reserve to be granted to him in fee simple for a school. Darius Rogers was to have the 160 acres on which were located his mill and improvements, in fee simple with the privilege of purchasing the quarter section adjoining such land for 50 cents per acre. Joseph Swiss, a half-breed tribal interpreter, was to have the half section on which his house stood and an additional half section of land in the trust tract.

On July 2, 1864, the Senate changed Article 2 to provide that the land should be surveyed and sold under the direction of the Commissioner of the General Land Office. Further amendments eliminated Article 3 providing for the donation of trust land to Kansas for school purposes; the price of the land which Father Schoenmaker was to be allowed to select from the trust lands was changed from 50 cents per acre to $1.25 per acre; Article 6, providing for the payment of tribal debts, was eliminated; the Article 10 grant in fee simple of two sections to John Schoenmaker, was changed to a grant of one section in trust with the proviso that when the land was no longer used for a school, it should revert to the United States and the Osage; Article 11 was changed to provide that the 160 acres to Darius Rogers on which his mill stood, must be paid for at $1.25 per acre, and the price at which he might purchase the adjoining quarter section was raised to $1.25 per acre. With these changes the Senate consented to the ratification of the treaty, but for some reason, the treaty was again submitted to the Osage, who according to a letter from the Acting Commissioner of Indian Affairs, wished further changes made. In the opinion of the Commissioner, the resulting treaty was "unfit for publication," and with the consent of the Secretary of the Interior, a new draft was prepared which purported to be the original treaty with the amendments of both the Senate and the Indians. It was this new draft that was submitted to the Osage at Fort Smith, Arkansas, just prior to September 29, 1865. In this new draft which was signed by the Osage at Fort Smith and later at Canville Trading Post, the following additional changes appeared. In Article 1 the western boundary of the ceded lands was limited to a natural marker at the request of the Osage and the expression "thirty miles" was eliminated. For the first time the provision relating to the disposition by the Government of the ceded lands and the civilization fund provision appears in the treaty. This was

neither a Senate amendment nor a change requested by the Osage. With respect to the lands for the Catholic Mission, this new draft provided that the selections should be held *in trust*, and that the selections made would be subject to the approval of the Secretary of the Interior instead of the Commission of Indian Affairs. The article providing for the payment of $30,000 of the Tribal debts, which the Senate had stricken in 1864, was reinstated at the request of the Indians, but the amount that could be paid was limited to $5,000. Since Charles Morgrain had died, the 1865 draft provided for the *heirs* of Morgrain, and the cash payment of $500 to Morgrain was eliminated. The draft eliminated the yearly payments of $500 to headmen. The material contained in Article 9 of the 1863 treaty forbidding the recognition of homestead and pre-emption claims in the future on the Article 1 land was incorporated in Article 1, and Article 9 was eliminated. Since Joseph Swiss had died, provision was made for his heirs. Two new articles were added providing that, Article 15 the Osage might unite with any tribe at peace with the United States in the Indian Territory, with provision for the proportionate payment of annuities; and, Article 16 that if the Osage should move to the Indian Territory, their diminished reserve should be disposed of in the same manner as provided in Article 2 for the trust lands.

Up to this point in the treaty negotiations we find no concrete evidence to indicate that the Osage understood the provision in the new treaty that the lands, which they were admittedly willing to sell outright for $300,000 in 1863 and 1864, were to be disposed of by the Government and the proceeds used for the benefit of all other Indians in the United States. Is there anything in these prior negotiations which would justify an inference that the Osage understood this provision? With respect to the other new features appearing for the first time in the 1865 draft, it is noted that they were either plainly for the benefit of the Osage (requiring payment of $1.25 per acre for land instead of giving it away or selling it for less) or were to take care of such matters as the death of someone whom the Osage had wished to benefit. It is reasonable to assume that the Osage understood these changes and may have proposed some of them. The civilization fund provision, under the Government's intention that it be used for other tribes, in no way benefited the Osage. It did not originate in the Senate. The mere fact that the Osage had agreed previously to sell this Article 1 tract outright does not, in our opinion, justify the inference that they fully understood and agreed to the civilization fund provision as it was written and submitted to them for the first time at Fort Smith. The natural inference would seem to be that if the Osage Indians had fully understood the literal meaning and effect of this provision they would have objected to the use of the funds derived from the sale of lands long owned by them for the benefit of other Indian tribes, to the extent that such funds were in excess of the $300,000, plus expenses of sale. It would be difficult to infer that the Osage, who were practically destitute, were so generous as to wish to authorize the Government to pay them only $300,000 for lands that were worth much more and to use the excess received from the sale of such lands for the benefit of Indian tribes other than the Osage, with some of whom the relation of the Osage were definitely hostile.

If, as found by the Commission, the civilization fund provision, which was an entirely new one, was fully explained to and understood by the Osage, the facts justifying such a conclusion must be found in what happened either at Fort Smith, or at Canville, on September 29.

The council attended by the Osage at Fort Smith, Arkansas, in September 1865, was not merely a council of the Osage Nation called to execute a treaty of cession for the Osage. It was a council of *all* the southwest Indian tribes called by the United States for the purpose of attempting to remedy a number of difficult situations arising from the recently ended Civil War wherein a number of the tribes, or parts of them, had participated on the side of the Confederacy. On July 31, 1865, Presi-

dent Johnson appointed a number of Commissioners to negotiate with the southwest Indians under the instructions of the Secretary of the Interior. Those instructions, embodied in a letter dated August 16, 1865, directed the Commissioners to negotiate treaties with the various tribes for permanent peace and amity with each other and with the United States. The Secretary's letter pointed out that a number of the tribes had, by allying themselves with the Confederacy, forfeited their rights to annuities and lands under their then existing treaties, Act of July 5, 1862, 12 Stat. 528, and that it was the desire of the United States "to reestablish order and legitimate authority among the tribes, encourage them in peaceful and industrial pursuits, and secure to them the benefits of Christian civilization, as the only means of attaining permanent prosperity and well-being." Agreements were to be made with the tribes located within the Indian Territory for the organization of civil governments and for the establishment of a common or central government. Slavery was to be abolished among the Indians and it was directed that the treaties must recite that the institution would never again exist among the tribes in any form. The Secretary's instructions noted that in certain tribes, internal dissension because of divided allegiance during the Civil War had been such that it might be impracticable to reconcile the factions to each other, in which event a division of funds, annuities and land might be made and the two factions thereafter treated as independent tribes. The Commissioners were instructed to attempt to negotiate treaties whereby the Kansas Indians would all be removed from Kansas to the Indian Territory, and there was transmitted to the Commissioners certain treaties already negotiated with the Kansas Indians but unratified or unproclaimed. With respect to the tribes which had joined with the Confederacy, the Commissioners were told to remind them that the President was authorized by Congress to abrogate all treaties with them, but that he was disposed to treat them liberally and would give them value for any land they might cede to the Government. The loyal bands (including those wherein a majority of the members had remained loyal) were to be commended for their loyalty and the Commissioners were further authorized to recognize in some appropriate manner their services to the Government during the war. The Commissioners were told to insist upon cessions of all land not needed for tribal use, but they were cautioned to be fair and just in their dealings, and were advised specifically that they might agree in the treaties that "no part of such ceded lands shall be appropriated to Indians not on friendly relations with the party making the cession." The letter of instructions contained other directions, all accompanied by injunctions to be fair and just, but to use all proper means to persuade the Indians to remove from areas near white settlements and near the "great routes of travel."

From the above, it is clear that the consummation of the Osage treaty of cession comprised only a very small part of the task facing the Commissioners at the Fort Smith Council. Careful records were kept of all negotiations relative to the signing of the treaties of peace and amity with the various tribes, including the Osage, some of whose bands had joined with the Confederacy. Some of the Osage Indians had never returned to the tribe but had gone to Canada and Mexico. However, no record whatsoever was kept of the negotiations involving the Osage treaty in suit. Representatives of the Little Osage tribe and the two bands of the Great Osage tribe who had remained loyal to the Government attended the Fort Smith council but were not authorized to sign the treaty of cession, and the treaty was accordingly only signed by the chiefs and some of the members of Clermont's and Black Dog's bands of Great Osage. There was no record kept of the proceedings of this council and the length of time spent in council is not known. Any conclusion made from the record of the negotiations and meetings in Council that the treaty was explained to and understood by the Osage at the Fort Smith council, would be mere supposition.

The council at Canville Trading Post in Kansas, on September 29, with the Northern Osage, was of three hours duration and several Osage who signed at that council had apparently not even been present at Fort Smith. Again no record was kept or report made of the discussions of the Commissioners with the Indians. The attestation clause, quoted in the Indian Claims Commission's finding 3, is, we think, of little significance with respect to the understanding of the Osage signing at Canville. In spite of the fact that the clause states that Clermont and Black Dog are signing a treaty "made by our brothers, the Osages," those brothers did not in fact sign the treaty until several days later at Canville and a number of those signers had not even been at Fort Smith.

None of the Osage chiefs could speak or understand English. The two interpreters, L. P. Chouteau, who acted at Fort Smith, and Alexander Beyett, who acted at Canville, were half-breeds whose competence as interpreters was at best doubtful. We know that about twelve days of the Fort Smith General Council were spent in negotiating the treaty of amity. There were, however, many other treaties, other than the Osage treaty, negotiated during that time. It is likely that the Government's general purposes and intentions, as outlined in the letter of the Secretary of the Interior, were made known to the various tribes. One of the purposes of the council was to persuade certain tribes which had more land than they needed, to make cessions to the United States so that the land might be sold to friendly tribes who were to be moved from other places and needed land. In this connection the Commissioners were told to assure the tribes and in fact to agree, that in making such cesions, their land, upon receipt by the Government, would *not* be used for the benefit of any tribe not friendly to the tribe making the cession. The civilization fund provision in suit did not purport to give or sell Osage ceded lands as such to tribes unfriendly to the Osage, but it did provide for the sale of such land and the use of the proceeds therefrom for the benefit of *all* Indians, which would necessarily include certain tribes and bands of Indians with whom the Osage were on distinctly unfriendly terms. In spite of the paucity of the Osage language, the probable incompetence or inexpertness of its interpreters, and the wild nature of the tribe itself, this proposal could have been *explained* to them, given enough time. It seems highly unlikely, however that in the circumstances it would have been possible to *pursuade* the Osage to *agree* to any such proposition. As was pointed out by this court in the earlier Osage case, supra, the treaty was unique in this respect. Such an innovation in treaty making might have been accomplished without question or objection from the Indians only if the tribe in question had been extremely enlightened and civilized and was inclined to view their tribe and other tribes as one big family, or on the other hand, if the tribe were intensely ignorant and had no real idea of what they were doing. The Osage Indians were neither enlightened nor civilized.

After the signing of the treaty at Canville Trading Post, the treaty was submitted by Superintendent Sells to Commissioner Cooley, and later by Commissioner Cooley to the President for submission to the Senate. In the accompanying summaries of the terms of the treaty, no mention whatsoever was made of the civilization fund provision although all other provisions were carefully noted. In 1866, the Senate undertook to make certain amendments to this treaty. In Article 2 the amendment provided that the trust lands should be sold for $1.25 per acre under the direction of the Commissioner of the General Land Office, whereas the treaty as signed had left the price and manner of sale up to the discretion of the Secretary of the Interior. These same terms applied to the sale of the diminished reserve lands, should the Osage decide to move to the Indian Territory. The Senate did make one amendment in the civilization fund provision relative to a certain railroad grant to the State of Kansas, which will be discussed hereinafter. These amendments were submitted to the Osage

who agreed to them. The Osage were most anxious that their treaty be proclaimed so that they might have some benefit from it. They had already withdrawn from the trust and ceded lands and settled on their diminished reserve and yet, although the whites had swarmed onto the ceded lands and the trust lands, no money or other benefits had come to the Osage. Letters in the spring of 1866 from John Schoenmaker, who was in charge of the school and mission on the reserve, and Elijah Sells, Superintendent, evidence the bitter dissatisfaction and impatience of the Osage at this state of affairs. The first official mention of the civilization fund was made *after* the Senate had ratified the treaty with amendments in 1866, in the Annual Report of the Commissioners of Indian Affairs for 1866. In this connection, the report states:

"After the Government has been reimbursed the cost of the land and of the survey and sale, the balance realized is to be used by the Government as a fund for the civilization of Indians generally—a most beneficent provision, which is thus happily secured."

We do not believe that the acquiescence of the Osage in the various *Senate* amendments indicates their understandings of and agreement with the civilization fund provision of the treaty. Nearly all the Senate amendments were for the benefit of the Osage and there was every reason for their approval of them.

[5] The fact that the Osage were willing to sell the tract described in Article 1, for $300,000 outright, because that was the amount offered by the Commissioners, does not necessarily mean that they would have done so had they understood the purposes for which the land or the proceeds therefrom was to be used, particularly when those purposes were calculated to be of no benefit to the Osage but for the benefit of tribes who were their traditional enemies. This provision for a General Civilization Fund was not a Senate amendment and was not authorized by any statutes, and presumably the inclusion of a provision therefor in the treaty by the Government agents would have to be negotiated in the particular case with the Osage. We cannot agree that this provision in the treaty was of no concern to the Osage, although the Government agents may have thought so. No Osage has ever admitted to understanding this provision, and it certainly concerned the lands being ceded. What statements there are of record by those who were in any position to know, indicate that the Osage believed that the proceeds from the sale of this land were to be used for the civilization of the Osage Indians. All changes made in the treaty by the Senate between 1863 and 1865 (and later) were for the protection of, and resulted in additional benefits to, the Osage. While this civilization fund provision did not take anything away from the Osage which had been granted in prior drafts of the treaty, it would have been natural and understandable for the Osage to have believed that it, like the other changes, meant *additional* benefits to them.[5] What evidence there is in the record shows, in our opinion, that the provision was not fully explained to the Osage and that they completely misunderstood its operation. We, therefore, conclude, from the entire record, that the finding of the Commission that this provision was fully explained to and understood by the Indians is not supported by substantial evidence.

Unconscionable Consideration

[6] Appellant contended before the Commission and repeats the contention in this appeal, that, assuming there was no mistake on the part of the Osage with respect to the civilization fund provision, the consideration paid by the Government for the 865,930.31 acres ceded by Article 1

5. With respect to the phrase "Indians in the United States," it should be noted that some Osage who had been aligned with the cause of the Confederacy, had fled to Mexico and Canada and had not returned. If the phrase meant anything to them, the Osage probably thought that their departed brothers who had left the country were not to share in the treaty benefits.

of the treaty, was so out of line with the then fair market value of the land as to be unconscionable. The Commission has found (finding 8) that the value of the land in 1865 did not exceed the sum paid, that is, approximately 34 cents per acre. The primary findings upon which this ultimate finding is based are finding 2 and finding 6. Finding 2 relates to the treaty of August 29, 1863, and the Commission concludes that the Osage Indians' apparent willingness to take $300,000 for this land in 1863 is good evidence to the effect that $300,000 was the market value of this land in 1865. What an ignorant and impoverished band of blanket Indians was willing to take in payment for land is not, we think, conclusive as to its true value. The Commission, however, appears to rely principally on the facts set forth in finding 6, regarding the actual sale of these lands by the Government. The pertinent parts of this finding are as follows:

The land sales began in the calendar year 1868 and continued until as recent as the year 1901. The sales for the period from the calendar year 1868 to and including the fiscal year 1875 were as follows:

	Acres
Calendar year 1868.....	21,902.60
Calendar year 1869.....	46,029.80
Calendar year 1870.....	145,687.11
Calendar year (first half) 1871..	140,954.08
Fiscal year 1872.....	2,667.10
Fiscal year 1873.....	240.58
Fiscal year 1874.....	320.00
Fiscal year 1875.....	240.00

The acreage so sold aggregated the total of 358,041.27 acres. No land was sold during the 1876 fiscal year.

On August 11, 1876, 19 Stat. 127, Congress passed an act providing for the sale of the ceded lands at $1.25 per acre and giving purchasers the privilege of paying one-fourth of the purchase price at time of entry and the balance spread over a period of three years. Following the passage of this act the sales for the four years ending with 1880 fiscal year aggregated 454,652.48 acres, as follows:

	Acres
Fiscal year 1877.....	267,377.54
Fiscal year 1878.....	164,785.62
Fiscal year 1879.....	15,939.00
Fiscal year 1880.....	6,550.32

During the next twenty years the acreage sold is not shown by the evidence, but the cash proceeds from sales is shown for this period and indicates the sale of the remaining land.

In its opinion, the Commission states with respect to the value of the land as evidenced by the sales:

"* * * The evidence submitted by the petitioner shows that the ceded lands comprised a large area of fifteen hundred square miles, or 865,930.31 acres. It was opened for settlement in the year 1868, during which year only 21,902.60 acres were sold, in the year 1869 there were 46,029.8 acres sold, in the year 1870 the sales amounted to 145,687.11 acres, and in the year 1871, there were sales amounting to 140,954.08, acres. During the four-year period from 1872–1875 only 3,467.68 acres were sold, and in the year 1876 there were no sales. So, during the first nine calendar years after the sales started, less than half or only 358,041.27 acres of the ceded lands were disposed of, and at an average cash price of about $1.25 per acre.

"On August 11, 1876, *apparently for the purpose of stimulating sales*, Congress passed an Act, 19 Stat. 127 allowing purchasers to buy at $1.25 per acre and pay one-fourth at the time of entry and spread the balance over a period of three years, so during the next four fiscal years, 1877–80, 454,652.48 acres were sold, but the sale of the remaining part of the cession (53,236.56 acres) took about twenty more years. [Emphasis supplied.]

"* * * the $300,000 paid by the Government for the ceded lands was not grossly inadequate, in truth, the slow sales during the first nine years following the opening of the area for entry indicates no great demand for the land The first years of that period, 1868 and 1869, during which it would be reasonable to expect the greatest demand, the sales were exceed-

ingly light, so it might well be said that the purchase price was not inadequate at the time of the cession in September 1865, and in any view of the evidence the purchase price of $300,000 was not so palpably low as to shock the conscience and convince the judgment of its unconscionableness."

[7-9] In arriving at a fair determination of the market value of tribal lands, this court has often taken into consideration the prices at which the land sold, the extent of the demand, the quality of the land, and its use at the time. It has also considered the price paid by the Government for similar land at about the same time under treaties with other bands of Indians, and the prices paid by persons other than Indians buying similar land in the locality from private citizens. The Commission's findings make no mention of any of these elements of value except the lack of demand and the slowness of Government sales of this particular land. If the whole record contains substantial evidence as a basis for this finding, the Commission's finding and conclusion must be upheld. However, the Act of August 11, 1876, mentioned by the Commission in its findings and opinion, raises the curtain on a very different story than the one indicated by the Commission. That story, contained in the act itself, in other related acts and resolutions of Congress, in debates in the Senate and House of Representatives, in at least one famous lawsuit terminating in the Supreme Court, and material contained in Senate Executive Documents, reveals facts of which judicial notice may be taken.

A reading of the Act of August 11, 1876, reveals that if it was passed to stimulate sales of the ceded lands, it was to stimulate sales by the Government of land that had already been sold once and of land already settled by persons who for some reason had been unable to perfect their titles. The background of this act is particularly significant in connection with the fate of the land embraced in Article 1 of the Treaty of September 29, 1865, during the period from 1868 to 1875.

First, it should be noted that the land in question was a portion of the land which had been reserved to the Osage "so long as they may choose to occupy the same" by the Treaty of June 2, 1825, 7 Stat. 240. On December 8, 1862, Senator Lane of Kansas gave notice in the Senate of his intention to ask leave to introduce two bills. One bill provided for the appropriation of such portions of the public lands of Kansas "for purposes of internal improvements as shall equal what has heretofore been granted to other new States." The bill provided for the granting of land to the State of Kansas to promote the construction of railroads and telegraphs in the State and included specifically in the grant itself was most of the ceded tract later described in Article 1 of the treaty in suit. The act provided, 12 Stat. 772, for a grant of lands to Kansas in alternate (odd-numbered) sections to aid in the construction of railroads and a telegraph line from Leavenworth by way of Lawrence via the Ohio City crossing of the Osage River to the southern line of the State in the direction of Galveston Bay in Texas, with a branch from Lawrence by the valley of the Wakarusa River to the point on the Atchison, Topeka, and Santa Fe Railroad where that road intersects the Neosho River, and of another railroad from Atchison via Topeka to the western line of the State in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where that road crossed the Neosho, down the Neosho Valley to the point where the first road enters the Neosho Valley. The two roads thus crossed near the middle of the ceded tract. The act provided that the State of Kansas was to have every alternate section of land designated by odd-numbers for ten sections in width on each side of the roads; that the two railroad companies should have 10 years to complete their roads; that if, when the lines were definitely located, the United States had disposed of any portion of the land included in the grant, or that rights of pre-emption or homestead had attached to such granted land, or that such land had been reserved by the United States for any

purpose, the Secretary of the Interior should cause to be selected from other public land of the United States located nearest to tiers of sections specified in the grant, an equivalent amount of land in alternate sections or parts of sections, odd-numbered, to make up for land so disposed of or reserved; that if any land in the grant had already been reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of internal improvement, such reserved portions would be reserved from the operation of the Act, but that the railroad should then have a right-of-way across such reserved lands, subject to the approval of the President. The Act then provided that the even-numbered sections remaining in the United States within 10 miles on each side of the road and its branches *should not be sold for less than double the minimum price for public lands* and should not be sold at private entry until first offered at public sale to the highest bidder at or above the increased minimum price of $2.50 per acre; that actual *bona fide* settlers under pre-emption and homestead laws might, after proof of settlement, improvement, cultivation, etc., purchase such land *at the increased minimum price.* The act also provided that when the Governor of Kansas should certify to the United States Secretary of the Interior that any 20 consecutive miles of either of the roads or branches had been completed, and the Secretary was satisfied that the State had complied with the Act, the State might cause to be sold all the lands situated opposite to and within the limit of 10 miles of the line of the completed roads. The bill was passed with very little debate and was signed by the President on March 3, 1863.

The other bill noticed by Senator Lane of Kansas on the same day (December 8, 1862) was a bill authorizing the Secretary of the Interior to treat with the several Indian tribes of Kansas for the purpose of bringing about their removal from that State. On January 26, 1863, Senator Lane requested that the Senate consider his bill which he characterized as "one little bill * * * that will excite no discussion * * * providing for the extinction of Indian titles in Kansas and the removal of the Indians from said State." It appears that the Commissioner of Indian affairs had recommended that the bill be amended to substitute the President of the United States for the Secretary of the Interior as the one authorized by the bill to enter into the treaties. Contrary to Senator Lane's expectations, the bill caused a fair amount of discussion. First, it was objected that this bill was contrary to the Government's policy with respect to Indians and would involve huge expenditures. To this Senator Lane and Senator Harlan replied that no expense would be involved since "It is expected that if the Indians agree to remove to the Indian territory, their lands can be sold for enough to defray the expenses of the removal." It was also pointed out that the superintendents and agents of the Government now in the field would be used by the Commissioner to negotiate the treaties and that the whole matter would come back to the Senate as a matter of course for its approval. With respect to the Government's official policy regarding Indians, which was somewhat in conflict with this proposal, Mr. Lane made the following remarks, in justification of the proposals in his bill:

"Mr. President, I have here a map of Kansas, showing our condition with regard to these Indian reservations. The Indian reserves are in the midst of our settlements. Lawrence, the town where I live, is within five miles of an Indian reserve on one side, within twelve miles of an Indian reserve on another, and within a mile of another. The Indians themselves are anxious to be removed. They have appointed committees, and have opened a correspondence with the tribes south of us. There is, south of Kansas, an Indian territory of seventy-eight thousand square miles, sufficient to accommodate every Indian east of the Rocky mountains. All the treaties with the Indians of that territory are void because of their action in this rebellion. Congress has heretofore authorized the President of the United States to declare these treaties void. * *

The Indians of Kansas are placed in a pitiable condition at the present time. They are surrounded by the whites pressing upon them from all sides, destroying them. There is another feature in connection with this subject. By improving the lands adjoining these reserves we are increasing the price of them for ourselves upon ourselves. They are to be purchased by our sons and our neighbors, the residents of Kansas; and I think it is unjust. As an instance of how they have raised, take the Delaware reserve, the largest of the reserves; and today, hard as the times are, and dangerous as is the condition of our country, I have no doubt their lands, if put up for sale, would bring from four to seven dollars an acre from our own people, every dollar of which we have made them by our improvements. Our people are dissatisfied with this state of things." [Cong.Globe, Vol. 63, 37th Cong., 3d sess., p. 506.]

Mr. Pomeroy remarked that the Indians of Kansas were indeed in a bad way, that when he had first visited the Osage Indians there had been at least five thousand of them but that "they are now reduced to about three thousand."

Mr. Fessenden had the following comments to make on the bill and its purposes:

"* * * But, sir, I desire to enter my protest against what seems to be one argument of the Senator from Kansas, [Mr. Lane] and that is, that all the rights, and all the justice, to be considered with reference to questions of this sort, are to be reserved exclusively for the whites, and that the Indians do not seem to have any rights in relation to the matter. I regard them as under the protection of the Government; and because the whites have chosen to go into their section of country and settle upon lands and improve those lands and make settlements, I do not think it follows if, in consequence of that, the value of lands owned by the Indians and reserved for their use is increased, that therefore that value should accrue to the whites and not to the Indians themselves. I do not accede to the correctness of such an idea at all, if that was the idea which my friend from Kansas meant to suggest. If any man chooses to come into my neighborhood and settle, and by his improvements increase the value of the land which I occupy, it does not follow that he has a right to take that land from me or compel me to sell it to him; and I think the same rule holds with reference to colored people, whether they are of African descent or native Indians, precisely, in relation to that matter.

* * * I will ask my friend from Kansas [Mr. Pomeroy] suppose you remove them to the Indian territory, how long will it be before the whites encroach on them there, and we shall be called to make a territory and then a State, and the little feeble remnant of them must go still further into the wilderness?

"Mr. Pomeroy. Mr. President, the policy which I would inaugurate would be to consecrate this Indian country forever to the Indians.

"Mr. Fessenden. Exactly; but have not these reservations for the use of the Indians been consecrated forever in the same way as much as the Indian territory can be?

"Mr. Pomeroy. But the construction we have upon it has been that "forever" means until the white people want it.

"Mr. Fessenden. Exactly; and you will consecrate the Indian territory in the same way—until the white people want it.

"Mr. Pomeroy. No, sir; I would consecrate it until eternity begins.

"Mr. Fessenden. If that could be done, though I do not see the slightest probability of its being done, I would say put them in that territory and protect them there. What has been our experience on this question? The Indians have been step by step removed. We make reservations in a Territory or State for the Indians; we inaugurate a policy; we say, hereafter the policy of the Government is to be this; white people are not to go on the reservations; they are to be forever for the use of the Indians; the Indians are to be protected there forever; to be Christianized and made a part of ourselves. The time comes when the whites surround them and want their lands. They say they do not get Christianized fast enough; the process is not sufficiently rapid to suit their pur-

poses; the Indians yet remain semi-barbarians; you do not get the whole of them civilized; there are a few left who adhere to their idols, and, therefore they must be removed to a new territory, somewhere else, which is to be consecrated to their use, forever, which means, perhaps for a generation—some fifteen years. Well sir, if that is to go on; if it is necessary; if such is the state of things in this country that we cannot be Christians except so far as suits our owa interests, let us understand it, and the sooner the Indians are exterminated, perhaps the better for them. [Cong.Globe, Vol. 63, p. 506.]"

Mr. Lane, of Kansas, had no more to say about the fact that the reservations were getting too valuable to leave in the possession of the Indians, and Mr. Doolittle then proceeded to another argument for the removal of the Indians from Kansas, that is, "to preserve the race from being overwhelmed and corrupted by the vices of the whites faster than they are improved by their virtues." In reply to this Mr. Collamer suggested that if such were the case, perhaps the Senate should be considering "a law to civilize the people of Kansas."

A further objection made to the bill was that it was an unnecessary measure because the President already had the treaty making power and did not need an Act of Congress to direct the making of these treaties.

On January 27, 1863, the bill (S. 413) was read the third time and passed. However, instead of being enacted as a separate bill, it was incorporated as sections 4 and 5 of the Act of March 3, 1863, an act making appropriations for the current and contingent expenses of the Indian Department, H.R. 731, 12 Stat. 774. With respect to sections 4 and 5 of this Act, p. 793, Mr. Doolittle on February 25, 1863, remarked "They make no appropriation. They merely provide for the negotiation of treaties for the removal of the Indians from Kansas. They are precisely similar to the bill which passed the Senate a short time since." (Cong.Globe, Vol. 64, p. 1282.) The two sections read as follows:

"Sec. 4. *And be it further enacted*, That the President of the United States be, and is hereby, authorized to enter into treaties with the several tribes of Indians, respectively, now residing in the State of Kansas, providing for the extinction of their titles to lands held in common within said State, and for the removal of such Indians of said tribes as hold their lands in common to suitable localities, elsewhere within the territorial limits of the United States, and outside the limits of any state.

"Sec. 5. *And be it further enacted*, That the President of the United States be, and is hereby, authorized to enter into negotiations, by treaty or otherwise, with such loyal tribes, or the loyal portions of such tribes, now residing in the country south of Kansas and west of Arkansas, commonly known as the 'Indian Country' as may be necessary in order to secure for the Indians of Kansas who shall be removed to said Indian country under the provisions of the preceding section of this act, the title to the lands to which they may be so removed."

At the time of the passage of the appropriation bill Mr. Fessenden objected to the incorporation of these two sections on the ground "that it is burdening down these appropriations bills with all sorts of legislation."

In line with the desire of the Kansas legislators to extinguish Indian title to Kansas lands, United States Indian commissioners and agents were negotiating with the Osage, and on August 29, 1863, a treaty was signed which has been described in detail earlier in this opinion. Pursuant to Article 1 of that treaty the Osage ceded to the United States a 30 by 50 mile tract in Southeastern Kansas, most of the odd-numbered sections of which were already embraced in the grant to the State of Kansas for railroad purposes by the Act of March 3, 1863, 12 Stat. 772. The cession was an outright sale of the tract for $300,000, or approximately 34 cents per acre. The annual report of the Commissioner of Indian Affairs in 1865 indicates that the Osage had withdrawn to the diminished reserve shortly after ex-

ecuting the treaty in 1863 and that the white settlers immediately began settling upon the tracts embraced in Articles 1 and 2.

On February 9, 1864, the Kansas legislature passed an act accepting the railroad grant provided for in the Act of March 3, 1863, 12 Stat. 772, and designated the Leavenworth, Lawrence & Kansas Railroad Co. to build the road from Leavenworth to the southern line of the state and to receive the grant of land upon the prescribed terms and conditions. The authorized route of the road passed through the lands described in Article 1 of the unproclaimed Osage treaty. On July 2, 1864, the Senate ratified, with certain amendments, the treaty of 1863 with the Osage, and on September 29, 1865, a new draft of the amended treaty was signed by the Osage at Canville Trading Post, Kansas. This draft contained the same consideration for the Article 1 lands mentioned in the 1863 treaty, that is $300,000, but it included for the first time the civilization fund language as follows:

"Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, but no pre-emption claim or homestead settlement shall be recognized: and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States.

On April 11, 1866, Father John Shoenmaker of the Neosho Catholic Mission, wrote to Elijah Sells, Superintendent of Indian Affairs, urging that the Treaty of September 29, 1865, be ratified by the Senate. He stated that he realized that it would probably be impossible to remove the whites from the 30 by 50 mile tract ceded in Article 1 "there being no less than 2,000 White Settlers on it, and there are still more on the Cherokee Neutral land, whilst the influx daily increases." He warned that hostilities would result if something were not done. On April 23, 1866, Superintendent Sells forwarded the letter to Commissioner Cooley stating, "The Osage Indians begin to distrust the good faith of the Government, because they are told that they cannot receive their annuities, arising from the sale of their land, because the Treaty has not been ratified by the Senate, whilst the cession of land proposed in the treaty, is already overflowing with the impatient White Settler."

On June 26, 1866, the Senate amended Article 2 of the treaty as hereinbefore mentioned, to provide that the trust lands must be sold for $1.25 per acre rather than have the price left to the discretion of the Secretary of the Interior. This amendment also meant that the diminished reserve must sell for $1.25 per acre, should the Osage elect to withdraw to the Indian Territory. The Senate also amended Article 1, to insert in the civilization fund provision, the language italicized as follows:

"Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, *including any act granting lands to the State of Kansas, in aid of the construction of a railroad through said lands,* but no pre-emption * * *."

It is worthy of note that the Senate resolution providing for the amendment by the insertion of this language was submitted by Senator Doolittle, who had participated in the Senate discussions concerning the Act of March 3, 1863, 12 Stat. 772, providing for the grant of this very land to the State of Kansas for the purpose of building a railroad. S. Ex. Journal, Vol. 14, U. S. Senate 1866, Pt. 2; Cong. Globe, Vol. 63, 37th Cong., 3d sess. p. 1158.

On July 26, 1866, Congress passed an act, 14 Stat. 289, similar to the Act of March 3, 1863, 12 Stat. 772, granting to

the State of Kansas certain odd-numbered sections in the tract of land described in Article 1 of the yet unproclaimed treaty of September 29, 1865, to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.

On January 21, 1867, the Osage treaty of September 29, 1865, was finally proclaimed by the President. On January 2, 1868, a map of the definite location of the railroads through the tract ceded by Article 1 was filed in the General Land Office. On January 21, 1868, the Commissioner of the General Land Office directed the Register and Receiver of the proper office to *withdraw from sale all the odd-numbered sections within ten miles of each side of the line of the road.*

During the summer of 1868 negotiations were commenced between the agents of the United States and the Osage nation for the so-called Drum Creek Treaty. The Missouri, Fort Scott and Santa Fe Railroad Co., and the Leavenworth, Lawrence & Galveston Railroad Co., each wanted a treaty negotiated with respect to the Diminished Reserve lands and also the trust lands (already disposed of by Article 2 of the 1865 treaty), whereby the two railroads could acquire such land for a very small price. The treaty as finally submitted to the Senate also contained a provision referring to the lands ceded by Article 1, and providing that the proceeds from the sale of such lands should be used for the exclusive benefit of the Osage Indians. In the course of the treaty negotiations, an Osage Indian, named Beaver, pointed out to the negotiators that the white settlers had moved on to the Neosho Valley ceded land before it had been paid for by the Government, and that the Osage objected. In a letter dated April 13, 1868,[6] from Representative Sidney Clarke (Kansas) to N. G. Taylor, Commissioner of Indian affairs, Mr. Clarke, in discussing the Drum Creek treaty negotiations and the extinguishing of the remaining Indian title to Kansas land, stated:

"* * * The settlers on the land ceded and sold by the treaty, proclaimed January 21, 1867, are yet without titles to their homes. A joint resolution has been passed by the House of Representatives for the relief of these settlers, and is now pending in the Senate. I appeal to your commission to meet the settlers referred to in full and free conference; and in the treaty you are about to make, provide for the full recognition of their rights, as you have abundant power to do, and thus settle the question, already too long at issue, in the interests of justice."

The above passage apparently has reference to the provision in Article 1 of the Osage treaty of 1865, that no pre-emption or homestead rights should be recognized in the ceded tract and it was the Congressman's hope that the new treaty *would* recognize such rights.

It was felt by Congress that under such a treaty the railroads in question would be acquiring valuable lands for an exceedingly nominal figure and that settlers in turn would be forced to pay far more than the Government minimum price of $1.25 per acre for the land so acquired. The treaty was roundly denounced and was not ratified.

The record indicates that the land in the tract ceded by Article 1 was placed on sale for the first time by the Government in 1868. During that year the Government sold 21,902.60 acres at $1.25 per acre. The record does not reveal the location of the land so sold. On March 11, 1869, Senator Pomeroy of Kansas introduced in the Senate a Resolution (No. 19) providing for the purchase by actual settlers of certain lands of the Osage Nation. On March 19, 1869, Mr. Pomeroy reported the Resolution from the Committee on Public Lands with amendments. On April 1, 1869, debate began on the Resolution (Cong.Globe, Vol. 89, p. 412). As introduced and amended the Resolution then provided that when public sale was made of Article 1 and Article 2 Osage lands, any actual settler who at the date of the sale should be

6. H.R.Ex.Doc. 310, Pt. 3, 40th Cong., 2d sess., p. 28.

residing on any portion of the land, not exceeding 160 acres, who had made improvements, was a citizen or had declared his intention to become one, should have the privilege of purchasing such land for $1.25 per acre and be entitled to purchase such land for $1.25 per acre in four annual installments of 25% of the purchase price in each installment, paying interest at 5% on the unpaid balance. The resolution provided that both odd- and even-numbered sections should be offered for sale under the terms of this Resolution if "they shall not have been reserved and set apart under the existing law, for the purpose of aiding in the construction of any railroad through the land." Mr. Harlan (Iowa) asked Senator Pomeroy whether or not the resolution embraced the odd-numbered sections included within the limits of a railroad grant, and Senator Pomeroy (Kansas) replied that there was some question as to whether the railroad company was actually entitled to those sections or not; that if the railroad was so entitled, they could not be sold under the resolution which would then apply only to the even-numbered sections. "If the Department [of the Interior] decide that it [the railroad] has not a right to them, then the whole of the land is to be sold." (Cong. Globe, Vol. 89, p. 413.) Senator Harlan thought the resolution should be amended to make the price for the land $2.50 per acre, and stated:

"* * * The Senate may not be aware of the fact that the land referred to in this resolution is a strip of about twenty miles by fifty in width on the east end of the Osage lands. The United States bought the land of the Indians and have paid them for it, or put the money to their credit, and it was hoped the Treasury would be reimbursed by the sale of the lands; but either a bill passed or the treaty was so amended as to permit a railroad company to take one half of the land on the usual conditions of increasing the price of the remaining sections to $2.50 an acre.[7] Now, if the even sections are to be sold at $1.25, and the railroad should gain the other sections for nothing, I am not sure that the Treasury would be reimbursed. [Cong.Globe, Vol. 89, p. 413.]"

Senator Pomeroy assured Mr. Harlan that the Treasury would be amply reimbursed if only the even-numbered sections reserved to the Government should be sold for $1.25 per acre. However, the Senate amended the resolution to provide that the land must be sold by the Government for $2.50 per acre. On April 6, it appearing that the House would not agree to the Senate amendments to the resolution, the Senate asked for a conference and Mr. Pomeroy, Mr. Harlan, and Mr. Davis (Kentucky), were appointed from the Senate. On April 8, the House agreed to the conference and appointed Mr. Julian (Indiana), Mr. Clarke (Kansas), and Mr. Swann (Maryland), managers for the House. On April 9, the report of the committee of conference revealed the following compromise: the Senate receded from the $2.50 price and agreed to a price of $1.25; the House receded from the four-year interval for completing payment and agreed to permit only two years for payment, to be made in equal installments; it was agreed to insert the following provision: "Provided however, that nothing in this act shall be construed in any manner as affecting any legal rights heretofore vested in any other party or parties." The Joint Resolution No. 18 was concurred in and became law on April 10, 1869, 16 Stat. 55. As passed, the Joint Resolution provided that *bona fide* settlers residing on any portion of the lands sold to the United States by virtue of Articles 1 and 2 of the Treaty of September 29, 1865, with the Osage Nation, should be entitled to purchase up to 160 acres of such land at $1.25 per acre, within two years from the passage of the Joint Resolution, under such rules and regulations as might be prescribed by the Secretary of the Interior; that both odd- and even-numbered sections should be subject to settlement and sale; that the 16th and 36th

7. This apparently has reference to the amendment of 1866 by the Senate in Article 1, referred to above and mentioning the grant of land to railroads under some law.

sections in each township of the lands should be reserved to the State of Kansas for school purposes; that nothing in the act should be construed to affect legal rights already vested. There was no mention in the debates on this Resolution concerning the prohibition in Article 1 of the 1865 treaty against recognition of pre-emption rights in the Article 1 tract, and this Resolution in effect provided for the recognition of such rights. It was not until the debate on the Act of August 11, 1876, that this matter was discussed. Much later it was recognized that the granting of the 16th and 36th sections in the Article 1 tract to Kansas for school purposes was also a violation of the Osage treaty, and ultimately the civilization fund was credited with $1.25 per acre for such land so granted.[8]

Entries were immediately made by settlers under the provisions of the Joint Resolution on both odd- and even-numbered sections but the entries on the odd-numbered sections were set aside and vacated on January 16, 1872, by the Secretary of the Interior, who had decided that two railroads[9] had title to the land in the odd-numbered sections. Presumably the 46,029.80 acres sold in 1869, the 145,687.11 sold in 1870 and the 140,954.08 sold by the Government in 1871 all in the Article 1 tract (Commission's finding No. 6) were located on even-numbered sections. The Secretary's action in vacating the entries on all odd-numbered sections in January 1872, threw the settlers in this area into a turmoil and only 2,667.10 acres were sold by the Government in that year.

In the meantime, the Kansas representatives in Congress were pushing further legislation for the benefit of settlers on the ceded tract. On March 1, 1871, the House of Representatives objected to and passed over Senate Resolution 266, which purported to extend the two-year time limit for disposal of the ceded tract land, as set forth in the Joint Resolution of 1869, and to apply the townsite laws of the United States to the ceded tract. However, in the Indian Department Appropriation Act of March 3, 1871, 16 Stat. 544, there appeared a proviso, page 557 that the laws of the United States relating to townsites be extended over all the lands obtained from the Osage Indians in the State of Kansas. The townsite laws, Act of March 2, 1867, 14 Stat. 541, and the Act of June 8, 1868, 15 Stat. 67 provided that if any portion of the public lands of the United States had been or should be settled and occupied as a townsite and therefore not subject to entry under agricultural pre-emption laws, if the town should be incorporated, the corporate authorities, or if not incorporated, the county judge, might enter at the proper land office at the applicable minimum price the land so settled and occupied, in trust for the use and benefit of the occupants according to their respective interests. The acts limit the amount of land to be purchased in accordance with the number of inhabitants of the town. The latter act provided that the parties availing themselves of these acts must pay, in addition to the applicable minimum price, the costs of surveying and platting the townsites and the expenses incident thereto incurred by the United States, before any patent might be issued. It appears that prior to the passage of the Act of March 3, 1871, about five towns were flourishing on the Article 1 tract and again we have a law providing for the sale of this land at a providing for the sale of this land at a set price of $1.25 per acre notwithstanding the fact that the treaty provides that the land is to be sold on "the most advantageous terms."

By 1871, the Leavenworth, Lawrence & Galveston Railroad Co. had completed its road through the ceded, Article 1, tract plus about 20 miles of road south of the tract. By the Act of April 19, 1871, 17 Stat. 5, the line was permitted to relocate any portion of its road it wished south of Thayer within the limits of its grant without enlarging or diminishing the grant.

8. Act of June 16, 1880, 21 Stat. 291.

9. Leavenworth, Lawrence and Galveston Railroad Co., and Missouri, Kansas and Texas Railroad Co.

On September 21, 1871, the Governor of Kansas certified to the Secretary of the Interior that the road had been constructed and equipped as required by the Act of March 3, 1863, and that a map of the road had been duly filed. Certified lists of the odd-numbered sections of land within the railroad limits were made by the proper authority in Washington, D. C. On April 8, 1872, and later on March 21, 1873, the Governor of Kansas issued to the railroads patents for the lands in the ceded tract coming within the grant. At about the same time the Missouri, Kansas & Texas Railroad Co. completed its road through the actual tract and received its patents, pursuant to the Act of July 26, 1866, 14 Stat. 289.

With the patenting of the odd-numbered sections in the Article 1 tract to the railroads and the decision of the Secretary of the Interior that no patents should issue to settlers under the Joint Resolution of 1869 on the odd-numbered sections patented to the railroads, the settlers on those odd-numbered sections brought suit against the two railroads on the theory that the railroads did not have good title to the land, that title had remained in the United States and the lands could therefore be patented to settlers under the terms of the Joint Resolution of 1869. Because of the federal question involved, the suits were brought in the name of the United States as a suit to confirm and establish the title of the United States to the odd-numbered sections in the ceded tract claimed by the railroads to have been granted to Kansas for railroad purposes and subsequently patented to the railroads pursuant to the Act of March 3, 1863; and to enjoin the railroads from setting up any right or claim to such lands. Plaintiffs in the suit contended that the lands covered by the lists were not embraced by the grant in aid of the construction of the railroads. The railroads contended that the Act of March 3, 1863, and the subsequent Treaty of 1865 with the Osage, were together effective to pass title to the odd-numbered sections in the ceded tract to Kansas, pointing out that Section 4 of the Indian Department Appropriation Act, passed on the same day as the railroad grant act, clearly showed congressional intent to extinguish Indian title to the lands so granted. The railroads further pointed out the Senate amendment to the Osage Treaty in Article 1, wherein it was provided specifically that the lands in the ceded tract should be sold under existing laws "including any act granting lands to the State of Kansas, in aid of the construction of a railroad through said lands * * *."

The Circuit Court and later the Supreme Court[10] both held that no part of the Article 1 lands passed to Kansas under the Act of March 3, 1863, 12 Stat. 772, or the Act of July 26, 1866, 14 Stat. 289, pointing out that the Osage at both times had good title to that land pursuant to the Treaty of June 2, 1825, 7 Stat. 240, wherein the Osage reserved this particular tract (among others) to be theirs as long as they might choose to occupy the same; that the United States could not survey such land until the Indian title was extinguished and that until such time as it was extinguished, the grant could not include such lands; that the railroads were prohibited from negotiating with the Indian owners and that the Court would not presume that Congress would transfer the possessory right to Indian lands to a railroad or to Kansas before itself acquiring them, since this would be a "poor way of observing a treaty stipulation." There was a good deal of language in the Court's decision about the purity of the motives of Congress respecting Indians, but the Circuit Court indulged in some interesting speculation regarding the reason for the amendment to the first article of the 1865 treaty to include mention of a railroad grant in that tract. The court said:

10. United States v. Leavenworth, Lawrence & Galveston R. R. Co., 26 Fed.Cas. No. 15,582, pages 901, 906; affirmed, 92 U.S. 733, 23 L.Ed. 634; United States v. Missouri, Kansas & Texas R. R. Co., 26 Fed.Cas.No.15,786, page 1275; affirmed, 92 U.S. 760, 23 L.Ed. 645.

"* * * I have no hesitation in expressing my belief that the senator, whoever he may have been,[11] that suggested that amendment, had in his mind the act [of March 3, 1863, granting the land to Kansas] which we have already construed, and that his purpose was to incorporate into the treaty a recognition of the validity of the grant, so that the treaty should not defeat it. There may have been in his mind, there probably was a doubt of the right of congress to make such a grant in the face of the treaty of 1825. The treaty now under consideration, originally presented to the senate, provided for the sale of all these lands, and for the disposition of all the money arising from such sales, in a manner inconsistent with such a grant. With these two treaties staring him in the face, he must have felt the doubt whether the grant, even if by its terms it had included these lands, would be upheld as valid. To remove the argument which might be drawn from this treaty as originally made, it was easy to induce the senate and the Indians to recognize any right which may have been acquired by that act, or any other which was an existing law when the treaty was ratified by the senate. In consenting simply to this, the senate would feel that no wrong was done, because no new right was conferred by or concealed in the amendment. At the same time, as the new words introduced designated no specified statute or law, the attention of the senate was not, probably, directed to this particular statute. But as no other law was then in existence, so far as is shown to us, which, by remotest inference, granted lands to aid in constructing a road through these lands, I must believe that the framer of the amendment had this one in his mind.

"The true intent and meaning of the clause in the mind of the senate seems to have been this: That, as the treaty directed all these lands to be sold, and made provision for the disposition of all the proceeds, and, as it was suggested that there might be a railroad grant or grants which covered some of the lands thus directed to be sold, this provision was inserted to remove or prevent a conflict between the treaty and the statute, if any such existed." United States v. Leavenworth, Lawrence & Galveston R. R. Co., 26 Fed.Cas.No.15,582, pages 901, 906.

The court then concluded that although Congress intended that the treaty with the Osage should not destroy any existing rights, Congress did not intend by the treaty to declare what rights did exist nor to construe the statutes on which those rights might depend nor to create any rights in that regard that did not exist independent of the treaty. Both courts concluded that the Article 1 tract was land "otherwise reserved" within the meaning of the Acts of March 3, 1863, and July 26, 1866, and thus excepted from the operation of the grants since this land had been "otherwise reserved" by virtue of the Treaty of June 2, 1825, with the Osage. Neither court attempted to gloss over the fact that Congress, Kansas, the Secretary of the Interior, and the railroads, all believed and acted on the belief that the Article 1 lands, lying in the odd-numbered sections on either side of the roads, had passed to the State of Kansas for the two railroads. The courts simply held that everyone (except the settlers bringing the suit) was wrong with respect to the legal effect of the grant acts and the amendment relative to railroad grants in Article 1 of the subsequent treaty with the Osage. Naturally, if Congress and Kansas had realized that none of the Article 1 lands passed under the terms of the grant act, sections in other than the Article 1 tract lands would have been included in the lists and patented to the railroads when the roads were completed. In its statement of facts, the Circuit Court had the following to say:[12]

11. As pointed out earlier in this decision, the Senator was Mr. Doolittle who had participated in the Senate debates concerning the Act of March 3, 1863, 12 Stat. 772, under which act Leavenworth claimed title to the land.

12. The Circuit Court was speaking as of June, 1874. United States v. Leavenworth, Lawrence & Galveston R. R. Co., 26 Fed.Cas.No.15,582, pages 901, 902.

"On the 10th day of April, 1869, congress passed an act authorizing bona fide settlers upon any lands ceded to the United States by the treaty proclaimed January 21, 1867, to purchase the same in limited quantities, within two years, at $1.25 per acre, whether odd or even numbered sections, saving, however, the legal rights of others, 16 Stat. 55. Under this joint resolution a large number of settlers went on the land, made the required improvements, proved up their settlements before the local office, paid their money and received their certificates of entry. Three hundred and fourteen thousand, two hundred and twenty-eight acres of this land was entered under this joint resolution, and the settlers thereon, in addition to the fees and expenses of entering the same, paid the government therefor the sum of $454,072,100. Nearly all the rest of these lands have been settled upon; some under the joint resolution, by persons who were not able to make payment within the two years it was in force, and others under the belief that the trust specified in the Osage treaty, that these lands were to be sold on the most advantageous terms for cash, would be carried out by the government, and that consequently they would be able to purchase their lands for cash when the government executed the trust. There are between thirty thousand and forty thousand of these settlers upon the land in controversy, who are indirectly interested in the result of the present suits.

"The entries of the land under the joint resolution have been ordered to be set aside and cancelled by the secretary of the interior, on the sole ground that these railroads had a prior grant of these lands. They have nearly all been cancelled, and are being cancelled as they are reached in the regular course of business in the land department. The interior department at different times has been divided in opinion whether the railroad grants include the land in question."

As a result of the Supreme Court decisions, in 1875, settlers on the odd-numbered sections whose patents had been refused them by the Secretary of the Interior, were able to obtain title to their land. However, many other titles to land in the tract became worthless as a result of the decisions. Those titles were the ones held by the railroads and by purchasers from the railroads, whose claims had been upheld by the Secretary of the Interior. Also, certain townsite corporations had purchased land from the railroads. To remedy this situation, Senator Ingalls of Kansas introduced in the Senate a bill, which later became the Act of August 11, 1876. This act was characterized by the Indian Claims Commission as a bill to stimulate sales in the Article 1 tract where the land was apparently undesirable and little in demand. Senator Ingalls outlined the facts leading up to the Leavenworth and Missouri suits, noting that the Secretary of the Interior, believing that the grants of lands lying in the ceded tract and located directly upon the route of the railroads, had become operative upon the proclamation of the Osage treaty, had issued patents to the State of Kansas which were then transferred to the railroad companies as their roads were constructed; that a very large number of people from all parts of the country had emigrated to Kansas and purchased land on the tract from the railroads and that at least six towns with populations of from a thousand to five thousand inhabitants each had purchased land from the railroads. He then stated that the decision of the Supreme Court had divested all these people of their rights in their land and said, "It therefore becomes necessary that some method should be devised by which these purchasers can obtain title to their property *by paying for it over again.* That is all they ask, and this bill is to carry out the provisions of the treaty which provides for the disposition of these lands by the United States." (Cong.Rec.—Senate, July 20, 1876, p. 4748.) Senator Ingalls also revealed that some of the purchasers from the railroad companies had paid the full price, that others had not completed their payments, but that all had made extensive improvements and that many had purchased much more than

160 acres of land each. During the debates on August 1, 1876 (Cong. Rec.—Senate, Aug. 1, 1876, p. 5038), Senator Booth remarked that he knew of one person who had purchased 800 acres from the railroad in the ceded tract a number of years before and had made very valuable improvements on such land, worth at least $40,000 alone, and that under the provisions of the pending bill such a settler could only purchase 160 acres of such land at $1.40 per acre. Mr. Booth considered this provision of the bill most unjust. Mr. Ingalls stated that to provide otherwise permitting the purchase of tracts larger than 160 acres, would be contrary to the land policy of the United States which strongly favored single settlements of 160 acres each. Mr. Booth felt, however, that in view of the fact that these purchasers had bought their land from the railroads with the express approval and aid of the Department of the Interior, and that every official act necessary to give them notice that title was rightly in the railroads had been done by the United States, simple justice required a deviation from the well-established land policy of the Government in this case. Mr. Ingalls went on to say that the tract in question covered two counties and portions of two or three others; that the tract had been settled for seven or eight years and was at the time he spoke one of the most prosperous, enterprising, and industrious communities in Kansas.

Another troublesome point that the Senate felt must be adjusted, was the fact that the Joint Resolution of 1869 had granted, free, the 16th and 36th sections in the tract to the State of Kansas. It was believed under the reasoning of the Leavenworth case and the terms of the Osage treaty, that the land would have to be sold by the Government and the proceeds placed in the civilization fund. The bill also provided that out of the $1.40 to be paid by those settlers who found themselves with worthless title to the land in the odd-numbered sections, fifteen cents should be set aside to pay the private attorneys who conducted the litigation brought in the name of the United States to clear the title to the other group of settlers who had attempted to acquire the odd-numbered section land under the Joint Resolution. After much debate it became apparent to all that whatever price was fixed, the funds received would *all* be impressed with a trust for the civilization fund, and that it was scarcely just to require the losing parties in the Leavenworth lawsuit to pay the counsel fees of the successful litigants. Mr. Edmunds (Vermont) stated that the provision would not only be unfair to the purchasers from the railroad but also to all subsequent purchasers of the lands. To this Mr. Ingalls replied that there was a settler on every quarter section of the land already and it was thus all occupied.

Next, Mr. Edmunds questioned the right of Congress to stipulate in the pending legislation any set price for the land embraced in Article 1 of the Osage treaty since the treaty provided that the land should be sold "on the most advantageous terms" possible. He then stated that the Joint Resolution passed in 1869 was in direct violation of the treaty wherein Article 1 provided that pre-emption rights would not in the future be recognized in that tract, and was also in violation of the direction in the same article that the land be sold for the best price that could be obtained. Senator Edmunds was of opinion that the settlers who purchased their lands under the Joint Resolution for $1.25 per acre (which lands had become very valuable because the railway had been laid across and near them), should, if they wished to keep the lands, pay an additional price to the Secretary of the Interior representing the true worth of such lands. Senator Edmunds further stated that the civilization fund provision was for the benefit of the Osage Indians as well as for other Indians and that if the pending bill was to vary the terms of Article 1 of the Osage treaty by permitting the sale of the land at a nominal fixed price, the consent of the Osage Indians, at least, should be obtained before the provision could take effect. Said Senator Edmunds, somewhat prophetically:

"* * * If we fail to do that, the result will be, as experience has shown in other cases, it is inevitable morally that the Indians by and by will come back to Congress and say, 'Here we have got a great claim against the United States; these lands instead of having been worth $1.25 or $1.40 an acre, were really and honestly worth to the settlers themselves, over and above all improvements, $2.50 or $3 or $5, depending upon location; and as the United States has violated the trust, the United States must make up to the Indians and to the civilization fund the sum that is thus deficient.' [Cong.Rec.—Senate, July 20, 1876, p. 4751.]"

Later in the same debate, Senator Edmunds said:

"* * * Here if there is anybody in the world we ought to keep faith with—it appears to me we ought to do it with everybody—it is with people who are not able to protect themselves, but who are not intelligent enough to understand that there may be sometimes violations of rights without intending it. We have promised these Indians that homestead and pre-emption rights should not be allowed in these lands; we have said to them 'we will take them and sell them for your benefit, for cash, under the direction of the Secretary of the Interior on the most advantageous terms.' That is the solemn contract we made with them. Have they not a right to rely upon our good faith to carry it out? [Cong.Rec.—Senate, July 21, 1876, p. 4780.]"

Later, Senator Conkling, referring to the proposal to set aside 15 cents of the purchase price to be paid for the lands in order to pay the attorney fees of the successful litigants, said:

"By our act we take fifteen cents out of this land. We take it at our peril, and the Indians not being privy to that, the question is whether they have not a claim against us, as far as Indians have a claim against anybody and especially against the United States, to make that good. That is a very awkward question. [Cong. Rec.—Senate, July 28, 1876, p. 4926.]"

Ultimately, the provision for the payment of attorneys' fees out of the proceeds from the sale of the Article 1 lands was eliminated, but the bill then provided for the sale of this land to holders under the railroads, to the railroads, to townsite companies and to the "squatters" claiming under the Joint Resolution of 1869, who had been prevented from securing their patents by the action of the Secretary of the Interior, all for the same fixed price of $1.25 per acre. Mr. Thurman pointed out that this provision for selling the land at $1.25 per acre was as much a violation of Article 1 of the Osage treaty as had been the Joint Resolution of 1869. Finally the Senate accepted Senator Edmunds' amendment that the consent of the Indians must be obtained before the act could become effective. This amendment was later stricken, however, and in protest against such action Mr. Howe stated:

"The objections that I have to voting for this report are that I understand the effect of it will be first to sell to a given number of individuals lands at $1.25 an acre which in fact are worth from $10 to $20 an acre. The other objection I have is that I understand it to be in direct contravention of a treaty of the United States which obliges you, if you can be obliged by treaty—upon which point I express no opinion—to sell these lands in a fair market at a fair cash price. There is another provision in it that is less objectionable, and that is that you propose to sell on time. * * *

"* * * from the language of the treaty when I read it, I came to the conclusion that the United States had assumed the obligation of disposing of these lands at a fair price, in a fair market, and turning them into money, and dedicated that money to a specific use; and now this bill, as I understand, in utter disregard of that provision, proposed to sell the lands at an even sum of $1.25 an acre, and to do that on time. [Cong.Rec.—Senate, Aug. 5, 1876, p. 5197.]"

In defense of the bill as it was finally passed not requiring the consent of the Indians, but setting the price at $1.25 per

acre and allowing 4 years within which to complete payment, Senator Kernan said, in part:

"* * * Large numbers of settlers acting under this resolution [of 1869] of Congress on the one side, and acting under this patent of the lands to the railroad company on the other, had in good faith entered on these lands, contracted or paid for them, and made improvements. Now it is said we should not confirm their title without having also the assent of the Indian Tribe, for the reason that we were bound to sell these lands for the best price we could, as other public lands have been sold. Therefore it will be observed that if we do not confirm these titles we ought certainly make some compensation to these settlers, so it seems to me. We cannot say to them "Although you have gone on and bought from us and bought from our grantee, in form at least, we will now turn you out and the land shall not be sold unless the Indians consent or unless we sell them at public auction for cash as an ordinary trustee would." In my judgment the Indians have never understood that these lands were to be disposed of differently from other lands. The price has uniformly been, I believe, $1.25 an acre. The government has been allowing these lands to be entered at $1.25 an acre. We inquired from those living in Kansas who know all about it whether this Indian tribe had ever made the slightest objection to the mode in which the Government has been disposing of these lands for years or allowing entries to be made for years. We were informed by a gentleman who is familiar with it, who has been a judge in that State, that there has never been a suggestion that the Government was not dealing with the Indians fairly in regard to these lands. * * * Therefore I do not think the law unjust to the Indians. I think the treaty has been carried out as they understood it, by selling the lands in the ordinary way, at the ordinary Government price. * * * Moreover, it seems to me under existing circumstances, after what the Government has done, having allowed men to enter upon these lands * * * and become grantees under patents from the Government on one side, and allowed others to go there and enter upon them and contract and purchase and pay for them under the joint resolutions of Congress on the other, that if we have wronged the Indians we must protect the settlers who make improvements and let the Indians make their claims and then we can deal justly with them. [Cong.Rec. —Senate, Aug. 1876, p. 5197–8.]"

Senator Edmunds of Vermont disagreed that the consent of the Osage could be implied from their failure to protest the Joint Resolution of 1869 or the Government's mode of selling the land, not to the highest bidder for cash, but at $1.25 and on time. "They (the Osage) had a right to repose upon the good faith of this nation and do not lose anything by not making a perpetual clamor about it." Mr. Edmunds refused to sign the conference report which was nevertheless concurred in by the Senate and, on August 11, the President signed the bill.

The Act of August 11, 1876, 19 Stat. 127, provided in substance (1) that any bona fide settler residing at the time of completing entry, as provided in this act, on any portion of the lands sold to the United States by virtue of Article 1 of the Treaty of September 29, 1865, was entitled to purchase up to 160 acres of such land within one year of the passage of the act and under the terms of the act set forth in Section 3, and that such settlers should not be denied these rights on the ground that they had heretofore had the benefit of the homestead or pre-emption laws of the United States; (2) that any person who in good faith had purchased any portion of the Article 1 land from either the Leavenworth, Lawrence and Galveston Railroad Co., or the Missouri, Kansas and Texas Railroad Co., prior to the commencement of the two suits in the name of the United States against the two companies to test the legality of the title of the two railroads to this land (that is prior to Feb. 25, 1874), and could prove to the land office that all or part of the purchase price had been paid, and that improvements had been made on the land, might purchase 160 acres of such land to

include their improvements, on the terms provided in section 3; that the rights of the purchasers from the railroads should attach as of the date of payment to the railroads, provided the claimant had actually resided on the land at the time of entry made under the act; that these rights would also attach to the heirs of any deceased purchaser from the railroads; (3) that persons making entries within 12 months of the passage of the act could purchase the land for $1.25 per acre under regulations of the Commissioner of the General Land Office, one-fourth of the price to be paid at the time of entry, and the remainder in three annual installments with interest at 5% per annum, the Secretary of the Interior to issue patents upon complete payment; that persons failing to make entries within 12 months should forfeit any land claimed except in cases where title to the land was in contest; that any purchaser might pay the entire purchase price at any time; that the federal laws of townsites were applicable to Article 1 lands upon the filing of the necessary declaratory statements within 60 days of the passage of the act; the occupants of such townsites were to be allowed to purchase 320 acres actually occupied, except where the townsite companies had purchased all claim to title from the original settlers, and all titles claimed by the railroad companies, in which case the townsite companies should have the same right to enter the lands that the original settlers would have had, in quantities not to exceed 800 acres, for $1.25 per acre, in accordance with section 3; (5) that all lawful entries on Article 1 lands which had been set aside or cancelled by the Secretary of the Interior on the ground that the railroads had a prior grant, should be reinstated by the Secretary subject to any valid claim that might have accrued before or since the sale cancellation;[13] (6) that declaratory statements might be filed by settlers who were already on the land and by those who might settle on the land after the passage of the act; (7) that Kansas had the right to tax the lands from and after the making of the first payment under the act; (8) that the railroad companies might purchase in the manner provided in section 3, such subdivisions of lands located outside of their right-of-way[14] occupied by them on April 10, 1876, for stockyards, storage-houses, or for any other purposes legitimately connected with the operation of the roads, whenever the same did not conflict with a settler who in good faith had made a settlement prior to the occupation of the land by the railroads.

From the Senate debates on the above act, it appears that purchasers from the railroads had bought, in some instances, far more than 160 acres of land. Under the provisions of this act they could only keep 160 acres which they must now buy from the Government. On December 29, 1876, Mr. Ingalls of Kansas submitted to the Senate the following resolution which was considered and agreed to by unanimous consent:

"Resolved, That the Secretary of the Interior be directed to report to the Senate what portions or tracts of the Osage ceded lands in Kansas the Leavenworth, Lawrence, and Galveston Railway Company, or the Missouri, Kansas, and Texas Railroad Company claim to have sold prior to the 25th day of February, 1874; and that if such information be not in his office, he be directed to call upon said Railroad companies for the same, specifying the description of the land sold, the date of the contract of sale, the name of the purchaser, the consideration named, and the amount actually paid, and the sums that remain due thereon. [U.S.Senate, Cong.Rec., p. 388, 44th Cong., 2nd sess.]"

On February 13, 1877, the President *pro tempore* laid before the Senate a letter of the Secretary of the Interior transmitting the requested information which had been obtained from the Leavenworth, Lawrence & Galveston Railroad Company, and on February 21, 1877, a similar report was

13. This refers to entries on odd-numbered sections made under the Joint Resolution of April 10, 1869, 16 Stat. 55.

14. The grant to the railroad was finally characterized as a right-of-way, as a result of the Supreme Court decision.

submitted with respect to the Missouri, Kansas and Texas Railroad Company. Both reports were referred to the Committee on Public Lands and ordered printed. They appear as Senate Executive Documents 35, Parts 1 and 2, 44th Congress, 2d Session.

These reports show that the Leavenworth, Lawrence and Galveston Railroad Co. sold 13,080.14 acres of land (exeluding town lots) for $87,765.98, an average price of $6.71 per aere, and it also sold 14 town lots of undisclosed acreage for $4,183.79 (town lots vary greatly in size). The Missouri, Kansas, and Texas Railroad Co. sold 29,263.71 aeres including 42 town lots for $176,696.32, an average price per acre of $6.04. These sales were made between the time the land began to be patented to the railroads late in 1871, and February 25, 1874. Individual sales ranged in price from $2.25 to over $20 per acre for unimproved land. There is no question that the railroads sold this land on the "most advantageous terms" obtainable.

On June 16, 1880, Congress passed an Act, 21 Stat. 291 "to carry into effect the second and sixteenth articles of the treaty" of September 29, 1865. The act provided, among other things, that a settlement should be made with the civilization fund, Article 1 by the Secretary of the Interior with respect to the 16th and 36th sections of land in the ceded tract which had been improperly donated to the State of Kansas for school purposes by the Joint Resolution of April 10, 1869. The Act of June 16, 1880, did not state the price per aere whieh was to be eredited to the eivilization fund for sueh donated lands, but merely provided that the Seeretary must aecount for the number of aeres of Osage lands alienated by the United States by sale or otherwise (in this case a free grant to Kansas) and of the money received for such land. The Scretary was to certify the difference between the fund so received and the amount that would have been due at the date of the aecount if all the land had been disposed of "as provided for by said treaty." Inasmueh as Congress had eonsistently aeted as though the Government was under no duty to sell the land for any price but $1.25 per acre, the aecounting was probably made on that basis. The amount to be credited to the eivilization fund was to be less the expenses to the Government of survey and sale. On September 1, 1880, $55,664.49 was credited to the civilization fund. Presumably this amount represented the priee of the lands at $1.25 per acre, less the expense of survey and sale, provided for in the Act of June 16, 1880. The total aereage in the Artiele 1 tract could have eomprised about 39 townships of 22,040 aeres each. However, certain townships were only partially in the tract. Assuming that two sections from each of 36 townships were donated to the State of Kansas for school purposes, approximately 45,480 acres were so donated. At $1.25 per acre, the sum received would have been about $56,750.00 without deduction for expenses of survey and sale. The amount actually credited to the civilization fund on September 1, 1880 "to proceeds of sections 16 and 36 within the Osage eeded reservation, Act of June 16, 1880." was $55,664.-49.

The facts recounted in detail establish certain historieal facts which are important to the question now under consideration. In 1863, Congress passed two acts; one authorized the negotiation of treaties which would extinguish Osage title to Kansas land; the other prematurely granted certain of such land to the State of Kansas for railroad purposes. Negotiations between the United States and the Osage Nation, beginning in 1862, culminated in the proelamation of a treaty in 1867 by whieh the Osage ceded some 1500 square miles of land in exehange for, *inter alia,* the Government's agreement to sell the ceded land upon the open market for the best available price, all rights of pre-emption and homestead to be denied. In the meantime, the Osage, acting in the belief that the fulfillment of the contemplated bargain would lead to their immediate financial relief, began to withdraw from the area in question as early as 1863, and settlers immediately availed themselves of the better portions of the vaeated land. By 1869 these settlers were firmly

entrenched and their representatives in Congress were able to secure passage of a joint resolution providing for the donation of certain treaty land to the State of Kansas for school purposes, and for the sale to settlers of other land at the bargain price of $1.25 per acre, with two years to pay. This resolution provided for the disposition of land contrary to Article 1 of the treaty of 1865; further, it dealt with land already included, in part, in Congress' 1863 grant to Kansas for railroad purposes. By 1871, the railroads involved had completed their Kansas lines and had been granted patents under the 1863 Act, and were selling part of their land to others. The United States Land Office, in the meantime, refused to grant settlers patents, as seemingly authorized under the Joint Resolution of 1869, in cases where the same land had been granted to the railroads in 1863. Eventually, certain settlers pressed suit which reached the United States Supreme Court and settled the question of these land titles. The Supreme Court held the titles of the railroads and their vendees void inasmuch as the United States had not then owned the land it purported to grant in 1863 (title being in the Osage until proclamation of the Treaty of 1867). To assuage the clamor of the holders of these most valuable roadside plots, Congress granted relief by an 1876 Act allowing those whose title had been divested by Supreme Court decision to buy in the land they then held at $1.25 an acre, payable in four annual installments. Others were allowed to purchase unclaimed sites on the same terms and Kansas was allowed to purchase, at the same price, the 16th and 36th sections on this tract previously dedicated to school purposes. The amounts received less expenses, were deposited in the civilization fund. No attempt was ever made by the Government to dispose of this land on the open market for cash at the most advantageous price obtainable.

In view of all the preceding facts, the situation with respect to the disposition of the land in the ceded tract assumes a rather different aspect than the one indicated by the Commission's finding 6, and by its opinion in which it concludes that there was little demand for the lands and the sales were slow.

With respect to land sales and demand, it appears that from the date when the land was first opened to settlement in 1868, up to 1875, the Secretary of the Interior was of the opinion that all land lying in the odd-numbered sections in the Article 1 tract had passed by the grants contained in the Act of March 3, 1863, 12 Stat. 772, and the Act of July 26, 1866, 14 Stat. 289 to the State of Kansas for railroad purposes. In spite of the Joint Resolution of April 10, 1869, 16 Stat. 55, the Secretary refused to issue patents to settlers on the odd-numbered sections. Presumably, therefore, the sales by the United States listed in the Commission's finding 6(a) between 1868 and 1875 were all sales of land on even-numbered sections and consisted of sales of some 358,041.27 acres. In addition, pursuant to the same Joint Resolution, at least 45,000 acres from even-numbered sections (the 16th and 36th in each township in the ceded tract) were donated free to the State of Kansas. Thus, by 1875, the United States, through the Secretary of the Interior, had disposed of about 86 percent of all the land in the tract that the Secretary believed was available for the Government to dispose of. More significantly, as early as 1871, the Government had disposed of 354,503.39 acres of the 432,965.15 it thought it controlled. The remaining 3,467.68 acres were sold when the whole matter of title was in litigation. That litigation and the Congressional debates on the Act of August 11, 1876, indicate that several thousand settlers had taken up land on the odd-numbered sections pursuant to the Joint Resolution of 1869 and had been unable to secure patents for their land from the Secretary of the Interior. In addition, a number of persons who had settled on the even-numbered sections had been unable to meet the payments within the terms of the Joint Resolution and were thus unable to secure their patents since their right to purchase the land lapsed with the expiration of the two-year time limitation specified in the Resolution. The Act of August 11, 1876, provided for the relief

of both classes of settlers. It would therefore seem that by 1871, or within four years from the time the land was opened for settlement, nearly all the land which the United States believed it had the power to dispose of had been disposed of. With respect to the land on the odd-numbered sections, as mentioned above, several thousand squatters were on such land claiming the right to purchase it under the Joint Resolution. Between 1871 and 1874, the two railroads received their patents to the land in the odd-numbered sections and sold something in excess of 42,343.85 acres for an average price of more than $6.00 per acre. The large number of sales by the Government after 1876, as shown by the Commission's finding 6, were undoubtedly sales of land in the odd-numbered sections which had already been purchased once from the railroads, land settled and claimed by squatters under the Joint Resolution, land occupied by the railroads for stockyards, etc., and some land on even-numbered sections claimed by persons who had not been able to comply with the terms of the Joint Resolution with respect to the time within which payment had to be made.

[10] On the question of demand for the lands, the facts, both of record and of which we may take judicial notice, indicate a vigorous demand for this land, much of which was actually settled before the Osage title was extinguished. With respect to the market value of this land, the Government sales were uniformly at $1.25 per acre, and the railroad sales averaged over $6.00 per acre. However, it is quite apparent that the $1.25 did not necessarily bear any real relation to the true value of the land at the time of sale. It is clear that the Government never attempted to sell the land "on the most advantageous terms" as directed by Article 1 of the Treaty, nor did it observe the prohibition against the recognition of preemption and homestead rights. The debates on the Joint Resolution of April 10, 1869, indicate that there was no thought that the price set ($1.25) represented the market value of the lands which all considered to be worth much more. The real purpose of the Resolution seems to have been to give the Kansas settlers a bargain both in price and in the terms of payment. Again, when, in clear violation of the terms of the treaty, the Act of August 11, 1876, set the price of this land at $1.25 with four years to pay, no one pretended that such a price represented anything like the value of these lands. It is common knowledge that the prospect of a railroad in an area increases the demand for, and the value of, such land. When the railroad is actually built, those portions through which it runs increase greatly in value by virtue of the road and the towns that spring up along the line. In this case the railroad's route was known in 1863, two years before the treaty was signed. The treaty was proclaimed in 1867 and the land opened for settlement the following year. Four years later both roads were complete and at least five or six towns were thriving in the tract. In addition to the railroad a river flowed through the tract which contained much valuable agricultural land. Admittedly, some of the land was probably far better than other portions, but it would appear, under all the facts, that the average value of all the land in 1865 was at least the $1.25 price the Government got for the land, and it was probably worth much more. In fact, at the time the unratified treaty of 1863 was signed, the fact that two railroads would cross the tract was known, and the enabling act itself bound the Government to accept no less than $2.50 per acre for the land lying in the even-numbered sections. Shortly after the signing of the 1863 unproclaimed treaty the Osage withdrew to their diminished reserve and the white settlers immediately began to pour onto the ceded Article 1 tract.

We have no difficulty in concluding that the fair value of the land in question in 1865 was greatly in excess of 34 cents per acre and that the payment of 34 cents per acre for this land, under the circumstances outlined in the previous pages, was unconscionable. We must presume that the agents who negotiated the original treaty, in August of 1863, were aware of

the Act of March 3, 1863, providing for the grant of half of this land to the State of Kansas for railroad purposes and knew that the land would be very valuable. One of the purposes in passing the other Act of March 3, 1863, 12 Stat. 774, to extinguish Indian title to this land as soon as possible, was that the value would be increased by the white man's improvements, and unless the Indians ceded this land at once, a much larger price would have to be paid them for it. By September 1865, when the treaty was finally signed, white settlers, undoubtedly lured by the prospect of the railroad and by the fertility of the land for agricultural purposes, had already moved on the land. The Senate itself with respect to the trust lands and the diminished reserve lands set the price at $1.25, yet these lands were admittedly not as valuable as the lands in the Article 1 tract. The fact that subsequent legislation set the price of the ceded lands at $1.25 per acre, in 1869 and 1876, was due to the earnest efforts of the Kansas representatives in Congress to benefit the white settlers and to secure them a bargain in land by acts that were not only in the face of the Osage treaty, but contrary to the express terms of the Act of March 3, 1863, granting the odd-numbered sections to Kansas and providing that the even-numbered ones should sell for no less than $2.50 per acre. There is no indication that the land would not have sold for $2.50 per acre, but rather that the benefit of a lower price was to be conferred upon the settlers.

[11, 12] The disparity in price between 34 cents per acre paid to the Osage and the then market value of the land, as hereinbefore indicated, was great. The Commission and the appellee urge, however, that there must also be evidence that some person acting for the Government, deceived or misled the Osage Indians as to the value of their land, or "indeed, had knowledge of any fact bearing upon its value that was not well known by plaintiffs when they made the settlement and gave the release." Klamath and Moadoc Tribes of Indians v. United States, 296 U.S. 244, 56 S.Ct. 212, 217, 80 L.Ed. 202. In the instant case, the Indian Claims Commission states, page 5 of its opinion:

"* * * The record discloses no deception, overreaching or other perverse conduct on the part of the representatives of the Government, either in the preliminary discussions or in the actual consummation of the treaty."

Appellants urge that no showing of actual fraud is required for relief on the grounds of unconscionable consideration. There are cases which seem to support both views, but it appears that only where the inequality of the bargain is very gross, does disparity of price alone justify a conclusion that the consideration was unconscionable. As to what is "very gross," the courts have provided no exact formula and each case must be carefully considered on its own particular facts and circumstances.

[13] We have already said that the disparity between the price paid and the fair value of the land, as shown by recorded facts, was great. Turning to evidence indicating overreaching, we are faced first with the fact, admitted by the Commission and the appellee, that appellants were blanket Indians, at best semi-civilized, and, at the time the treaty was negotiated, existing in the most dire poverty and distress. Land was their only asset but they could not sell it except on terms prescribed by the Government. The proximity of the growing white settlement had driven off the game on which they had long subsisted. Their need of money and food was pressing and immediate. To them land meant a place in which to roam and hunt game. They appreciated the fact that their land was valuable but in no sense could they stand on an equal footing with the agents of the Government to conclude a business deal. On the other hand, the opening of eastern Kansas to white settlers and the building of railroads was a matter of extreme importance to the Federal Government and to the State of Kansas. It seems obvious from the record that the Government agents in eastern Kansas knew in 1863 that this land was to be in great

demand, and certainly by 1865 when the treaty here involved was concluded, the fact that two railroads would cross the ceded tract was no secret to Government officials having to do with Indian affairs in eastern Kansas or with public lands in that area.[15] If these Indians had been more versed in the ways of "civilization" or had been represented, as were some other tribes, by astute white attorneys, it would have been impossible to seriously suggest that 34 cents an acre was a fair price for this land. In this case we are convinced from the record that the agents acting for the United States in the negotiation of this treaty had, both in 1863 and subsequently, knowledge of facts bearing upon the value of this land that was not known by the Osage, and this fact, coupled with the very low price placed upon the land by those agents, results in unconscionable consideration having been paid the Osage for the land embraced in Article 1 of their treaty.

In view of the facts and circumstances disclosed by the record and the historical facts of which we take judicial notice, relating to the fair value of the lands in question, we are of the opinion that the finding of the Commission that the fair value of the lands was not in excess of the sum of $300,000 paid therefor, is not supported by substantial evidence. We are further of the opinion that the price of 34 cents an acre paid was unconscionable consideration for such lands.

With the treaty so revised on the ground of unconscionable consideration, appellants are entitled to an award representing the fair actual value of the land on September 29, 1865, which we have concluded was greatly in excess of the 34 cents per acre paid therefor, less the $300,000 already paid to appellants, and less the expenses of survey and sale which the parties have agreed amount to $24,372.20.

In its opinion the Commission further said, in support of its conclusion that 34 cents per acre was adequate consideration of the land in question, that—

"* * * The record does not disclose the cost of administering the cession [under Article 1] during the first sixteen years the Government was disposing of the land, except $3,177.22 for 'expense of sales' paid out of the 'Civilization Fund,' but the expense to the Government in administering the cession and handling the thousands of sales must have been enormous."

Exactly what these "enormous" administrative expenses were the Commission does not explain and on that point the record is silent. The appellee made no attempt to prove what it considered to be the actual value of the land, but took the position that such land was worth at least what the Government received for it. According to Article 1 of the treaty, the Government expected and believed that it would get the land described in Article 1 without cost to it other than some departmental administrative expense, which in all probability was not materially increased because of this treaty. The Government believed that it could, and it actually did, reimburse itself for the expenses of survey and sale and for the amount of $300,000 to be paid to the Osage, and have a very substantial net sum left over for other uses. Fair and honorable dealing required the guardian not to profit so greatly as the Government did in this case at the expense of its ward, an unlettered and uninformed people.

[14] It should be noted that under the laws relative to the disposition of public lands, the purchasers were often required to pay fees over and above the price of the land, which fees were to be used for the purpose of defraying the expenses of the Government incident to the particular manner of disposal of the land. If the lands in question had been sold by the Government in the manner provided in the treaty, for cash at public sale on the most advantageous terms, with no homestead or pre-emption claims recognized, we do not believe the expenses, over and above the costs of survey and sale, and fees paid to the officers of the land dis-

15. The Osage Indians had withdrawn from the tract through which the railroads were to pass, as early as 1863, following the signing of the first draft of their treaty, and had settled on their diminished reserve.

tricts, would have been very large. The Government's expense in maintaining a department to supervise the *installment* sales of the land in question is not, we think, properly chargeable to the Osage, even if the amount of such expense had been properly proved, which it was not. The treaty expressly forbade the sale of this land on an installment basis and the appellee quite properly did not contend that it was entitled to be reimbursed for such expense.

Undoubtedly the cost of disposing of the land on the installment basis and for the benefit of the white settlers of Kansas rather than as provided in the treaty, was considerable. What it was we do not know, but we do not believe that any part of it, actual or estimated, is chargeable against the amount ultimately found to be due appellant.

Fair and Honorable Dealings

Appellant's third ground for recovery is based on clause (5) of section 2 of the Indian Claims Commission Act which provides:

"claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

The Commission has ruled as a matter of law that clause (5) is not applicable to appellant's case for the reasons: (1) that the remedy provided for in clause (5) is exclusive; (2) that the word "recognized" means "triable" and that if a case is actually triable under any existing rules of law or equity, clause (5) cannot be applied to it; (3) that appellant's case both by pleading and evidence comes squarely within the provisions of the rules of law and equity set forth in clause (3); (4) that to grant relief in this case under clause (5) would, in any event, necessitate going behind the express provisions of the treaty or completely disregarding them, a course not authorized by clause (5). In effect the Commission appears to hold that appellant cannot plead in the alternative and that if by its pleadings it states a case coming within the requirements of any of the other clauses of section 2, it may not plead clause (5); that if it does so, the Commission may disregard such plea even though the trial of the case fails to develop facts sufficient to prove a case for relief under the other provisions of the section.

We find nothing in the Indian Claims Commission Act that requires a petitioner to plead under but one clause of section 2. Modern theories of pleading as exemplified by the Federal Rules of Civil Procedure, 28 U.S.C.A., emphasize the importance of the philosophy that the pleadings of the parties shall be construed to do substantial justice. A facet of this philosophy is Rule 8(e) which provides that a party suing in a civil action may plead alternatively or hypothetically and the failure of one cause of action shall not serve to defeat the other cause of action.

[15] The rule making power of the Indian Claims Commission would not seem to be so broad as to allow it to refuse to consider a matter properly presented to it by the pleadings upon a technicality of common law pleading long since discarded by the Federal Courts, and no such rule of the Commission has been called to our attention. Ordinarily, administrative or quasi-judicial tribunals such as this Commission, employ more flexible procedure than is employed in the courts.

[16] In the instant case appellant in its petition set forth certain facts which it expected to prove and urged that they fell within the provisions of clause (3) relative to unilateral mistake and unconscionable consideration. It also alleged that those same facts brought its case within the terms of clause (5). If plaintiff had proved to the satisfaction of the Commission the facts alleged, and the Commission had rendered a judgment based on unilateral mistake or unconscionable consideration, there would have been no need for it to have considered appellant's claim under clause (5). Unconscionable consideration having as an element overreaching or fraud, would, of course, not comport with fair and honorable dealings, but appellants are entitled to and are only requesting, one judgment in this

case, and if it had received that judgment under clause (3), any further decision with respect to clause (5) would have been surplusage. However, proof in a case which might in the opinion of the Commission fall short of proof of fraud, actual or implied, might well indicate a woeful lack of fair and honorable dealings, and where, as here, judgment was denied on the ground that fraud or unilateral mistake had not been proved, the appellant was entitled under the Act to have its claim tested by the yardstick of fair and honorable dealings. We cannot agree with the Commission that the word "recognized" was used in the sense of "triable." We believe it means that if, at the outset, a claim is not cognizable, or if at the trial it is not proved and, therefore, decided favorably to petitioner under rules of law and equity, then petitioner is entitled to have it considered under the fair and honorable dealings clause.

In this case the facts proved by appellant did not, in the opinion of the Commission, meet the strict probative requirements of fraud, unilateral mistake, overreaching, and the like. However, those same facts might spell out a situation wherein from a strictly moral point of view of honesty and fair dealing the agents of the Government could be said to have acted under the circumstances in a manner something less than fair and honorable. Because of the length of time that has elapsed since the occurrence of significant events in most Indian cases, exactness of proof is very difficult of attainment. Fraud and duress are not easy to prove under the most favorable of litigation circumstances, and in cases like the present where the events relied upon took place some 85 years ago, precise proof in the form of testimony and documentary evidence is usually scanty and on some points non-existent.

[17, 18] Under the facts and circumstances of this case, were we to agree with the Commission that appellant had not proved its case sufficiently under clause (3), we would be compelled, in view of the facts and circumstances disclosed by the entire record, to conclude that appellant had proved adequate facts to entitle it to judgment under clause (5). Moreover, we conclude from the entire record that appellant acted properly and wisely in pleading its case under both clauses (3) and (5), since on the trial a failure to submit evidence sufficient to establish the exact proof required under clause (3) might well satisfy the less exacting demands of clause (5). The Commission was of the opinion that appellant had not made out a case under the provisions of clause (3), and it should, therefore, have considered the facts proved in the light of clause (5). In our opinion, the record in this case amply substantiates appellant's claim under clause (5).

Interest

[19] On the question of appellant's right to interest on the award herein, we are of the opinion that on none of the three grounds advanced by appellant would a recovery bear interest. What we said in The Loyal Band or Group of Creek Indians, v. United States, Ct.Cl., 97 F. Supp. 426, regarding the awarding of interest by the Indian Claims Commission, is equally applicable to the instant case. This case does not involve a "taking" of appellant's property in the constitutional sense and the Indian Claims Commission Act contains no express provision for the payment of interest on awards made under clause (3) or clause (5) of Section 2 of the Act. The facts and circumstances of the case are not such as to warrant the allowance of interest on purely equitable grounds. Article 1 of the Treaty of September 29, 1865, as it has been revised to reflect the understanding of the Osage, provides merely for the deposit of $300,000, to the credit of the Osage tribe, in the treasury of the United States and for interest thereon at the rate of 5 percent per annum, to be paid to the tribe semi-annually; and the net proceeds in excess of such sum from the sale of the lands were not to draw interest, but were to be used as they accrued, for the benefit of the Osage. Therefore, the treaty, as revised, does not provide for interest on the funds

paid into the so-called Civilization Fund to which we have decided the Osage were entitled.

The decision of the Indian Claims Commission is reversed, and the case is remanded to the Commission for further proceedings not inconsistent with this opinion.

HOWELL, and MADDEN, Judges, concur.

JONES, Chief Judge.

I concur in the conclusion reached by the majority. However, I cannot subscribe to all that has been said about our power to review the Commission's findings of fact. I agree that it is our duty as a reviewing tribunal to consider all the evidence in the record. If there is substantial evidence, when the record is considered as a whole, to support the Commission's findings, we may not disturb those findings even though we might have reached a different conclusion were we considering the evidence in the first instance.

There is a distinction, a very real area of difference, between trial *de novo* and inquiry as to whether the findings below are supported by substantial evidence. The majority do not agree that they have come too close to the forbidden boundary of that area. But I cannot agree that the court has not gone beyond the simple question of whether there is substantial evidence to support the Commission's findings.

In my judgment the Indian Claims Commission cannot be treated as a purely administrative agency. The wording of the statute creating it convinces me that the Congress intended to give it more of the attributes of a court than of an administrative agency. Its functions are essentially judicial. I feel also that the wording clearly shows that it was not intended that the Court of Claims should go into the whole question on a *de novo* basis if, after examining the entire record, it finds that there is substantial evidence to justify the conclusions which the Commission has reached.

For this reason, I do not think the principles so clearly enunciated in the Universal Camera case are entirely applicable to the Indian Claims Commission since that Commission has a somewhat different status from an administrative board, even though that board may be clothed with some judicial or quasi-judicial powers.

Congress made it very clear, however, that notwithstanding there might be substantial evidence to support the findings of the Indian Claims Commission, if, on examination of the entire record, the Court of Claims should conclude that in dealing with the Indians the transactions had not been on a fair and equitable basis, considering all the circumstances and the sense in which those expressions are used in the statute, we should invoke the provisions of clause (5). We would then have jurisdiction to allow recovery on the part of the Indians notwithstanding the record may show substantial evidence to support the findings of the Commission. Evidence which is substantial enough to preclude a reviewing body from upsetting a lower tribunal's findings of fact may not be enough to convince a court of conscience that the things done were done fairly and honorably.

The court has reversed the Commission's finding of value largely on evidence of which it has taken judicial notice, much of which apparently was not brought to the attention of the Commission. The case should be remanded for the Commission to consider the evidence now of record respecting lack of fair and honorable dealings after both parties have briefed and argued the question.

I conceive our function in reviewing conclusions based upon fair and honorable dealings to be quite different from our function in reviewing findings of fact in the ordinary sense. We sit on this phase of the case as a court of appeals in equity; in fact, our functions are larger even than that, for we, like the Commission, have cognizance of claims not heretofore recognized even in equity.

While I cannot join in holding that ordinary legal rules justify a decision that

there is no substantial evidence to support the Commission's findings, I do not feel so limited in acting under the fair and honorable dealings provisions of the act.

On this basis I agree with the conclusion reached by the majority.

WHITAKER, Judge (dissenting).

I am not persuaded that there is no "substantial evidence" to support the findings of the Indian Claims Commission. I agree with the Chief Judge in what he said in his concurring opinion relative to the weight to be given the findings of this Commission.

The defendant bought some eight hundred sixty-five thousand acres of land for 34 cents an acre. Over a period of about 12 years it sold about half of the acreage, and the balance in the next 20 years. These sales were on a four-year installment basis at $1.25 an acre. They were of 160-acre tracts. One hundred sixty acres is about one five-thousandth of the total acreage, and for each sale of one of these small plots the defendant got only four times what it paid for the plot on the basis of the purchase price of the whole 865,000 acres. A real estate man who buys a large tract of land and subdivides it expects to sell the individual lots for many times what he paid for them.

If the Indians had put their lands up for sale as a whole or in parcels I doubt that they could have done so well.

LOYAL BAND OR GROUP OF CREEK INDIANS et al. ex rel. BRUNER et al. v. UNITED STATES.

Appeals Docket No. 7.

United States Court of Claims.

Feb. 6, 1951.

Claim by The Loyal Band or Group of Creek Indians, and the Loyal Creek Claimants Committee on the relation of Joseph Bruner, and others, against the United States for balance of $600,000 asserted to be owing to the Indians because of an award which the Indians claimed the United States Senate, acting as an arbitrator, made to the Indians in 1903 in the sum of $1,200,000, of which the Indians had been paid only $600,000. The Indian Claims Commission rendered a decision rejecting the claim, and the Indians appealed. The Court of Claims, Madden, J., held that where the United States and Creek Indians entered into agreement, embodied in Act of Congress, that the Senate should arbitrate and determine certain claim of Creeks, and the Senate, by adopting amendment to Indian Appropriation Act, determined the claim and awarded the Creeks $1,200,000, the Creeks were entitled to full amount of award of $1,200,000, notwithstanding that when House refused to agree to amendment the Senate finally agreed to report of conference committee appropriating $600,000 to pay the claim, and that the Creeks adopted resolution accepting $600,000 in full payment of claim.

Decision reversed and case remanded to Commission with directions.

1. United States ⇐113, 116

Where the United States and Creek Indians entered into agreement, embodied in Act of Congress, that the Senate should arbitrate and determine certain claim of Creeks against United States, and Senate, by adoption of amendment to Indian Appropriation Act, determined the claim and awarded the Creeks $1,200,000, the Creeks were entitled to full amount of award of $1,200,000, notwithstanding that when House refused to agree to amendment the Senate finally agreed to report of conference committee appropriating $600,000 to pay the claim, and that the Creeks adopted resolution accepting $600,000 in full payment of claim. Treaty with Creek Indians, arts. 3, 4, 14 Stat. 786, 789; Act March 1, 1901, § 26, 31 Stat. 869; Act March 3, 1903, 32 Stat. 982, 994; 25 U.S.C.A. §§ 70–70w.

2. Arbitration and award ⇐69

Once an arbitrator has made his award, the rights of the parties to that award are vested and cannot be destroyed by later attempted modification of the award.

The SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA et al.

v.

The UNITED STATES.

No. 1-61.

United States Court of Claims.

April 5, 1963.

Rehearing Denied June 7, 1963.

Action by Indian tribes for increased compensation for major part of area ceded to the United States. From a determination of the Indian Claims Commission denying compensation as to a part of the ceded area, the tribes took an interlocutory appeal. The Court of Claims, Davis, Judge, held that evidence sustained determination of the Indian Claims Commission that Sac and Fox tribes did not have aboriginal title to certain lands that were ceded to the United States.

Determination of Commission affirmed.

1. Indians ⇐10

Congress, acting through a treaty or statute, must be the source of recognition of Indian title by the United States, and Congress must grant legal rights of permanent occupancy within a sufficiently defined territory and there must be an intention to accord or recognize a legal interest in the land, and mere executive recognition or acknowledgment that Indians physically lived in a certain region is insufficient.

2. Indians ⇐3

Treaty between United States and six tribes, including the Sacs, renewing and confirming a boundary line which had been established four years before between four of the tribes, not including the Sacs, and the United States and declaring that United States receive Sacs into their friendship and protection and that all of the articles of the treaty, so far as they applied to those nations, should be considered as made and concluded in every part with them, did not acknowledge or recognize Sac ownership of any of the territory which was defined in the prior treaty with the four tribes. Treaty of Jan. 21, 1785, 7 Stat. 16; Treaty of Jan. 9, 1789, 7 Stat. 28.

3. Indians ⇐3

Indian treaty between United States and twelve Indian tribes establishing a general boundary between lands of United States and lands of said tribes did not constitute a recognition of right of all Indian tribes in that area to all the land on the Indian side of the general boundary and did not amount to an acknowledgment of the rights of Sacs and Foxes on the Indian side of the line when they were not present and did not sign as contracting parties. Treaty of Aug. 3, 1795, 7 Stat. 49.

4. Indians ⇐3

Generally, an Indian tribe obtains no legal rights from a treaty to which it is not a contracting party.

5. Indians ⇐11

Indian treaty fixing general boundary lines between lands of United States and of certain Indian tribes and providing that the tribes ceded and relinquished to the United States all the lands included within the described boundary but that as long as the lands remained the property of the United States the Indians belonging to such tribes should enjoy the privilege of hunting and fishing upon the lands did not constitute a recognition of title to the lands by Indians, who sought increased compensation for areas ceded. Treaty of Nov. 3, 1804, 7 Stat. 84.

6. Stipulations ⇐17(1)

The Indian Claims Commission is not bound by a stipulation on an issue of law.

7. Indians ⇐11

Even if treaty between United States and Indian tribes in 1804 was invalid, when the United States unilaterally deprived Indian tribes of their lands under such treaty in that year, the lands would have to be valued as of such time in determining whether Indians were entitled to increased compensation for the land taken.

8. United States ⇐113

Evidence tending to prove that Indian tribes occupied certain areas prior and up to date of treaty ceding such area to United States cannot be disregarded en masse in determining claims of Indian tribes for increased compensation for ceded area.

9. Indians ⇐10

To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive, and continuous use and occupancy for a long time prior to loss of the property.

10. United States ⇐113

Evidence sustained determination of the Indian Claims Commission that Sac and Fox tribes did not have aboriginal title to certain lands that were ceded to the United States.

11. Indians ⇐10

Status of aboriginal ownership is not accorded to Indian tribes at the very instant they first dominate a particular territory but only after exclusive use and occupancy for a long time.

12. United States ⇐113

Court of Claims cannot reweigh the evidence on an interlocutory appeal from a decision of the Indian Claims Commission.

George B. Pletsch, Chicago, Ill., for appellants. Dallstream, Schiff, Hardin, Waite & Dorschel, Pritzker, Pritzker & Clinton, Stanford Clinton, Lawrence C. Mills, Chicago, Ill., Louis L. Rochmes, Washington, D. C., and Dempsey, Mills & Casey, Chicago, Ill., were on the briefs.

David M. Marshall, Washington, D. C., with whom was Ramsey Clark, Asst. Atty. Gen., for appellee.

DAVIS, Judge.

This is another interlocutory appeal on behalf of a claimant from a determination by the Indian Claims Commission that the tribe did not possess recognized title to the lands in suit and had aboriginal title only to a part of those lands. 7 Ind.Cl.Comm. 675, Docket 83 (1959).[1] By the Treaty of November 3, 1804, 7 Stat. 84, the Sac and Fox Tribes ceded to the United States a large area extending north and south along the Mississippi and Illinois Rivers in southwestern Wisconsin, western Illinois, and Northeastern Missouri; most of the tract lay immediately east of the Mississippi, but the southerly portion in Missouri was situated west of the river between it and the Missouri. In Royce's numbering, the area is known as Cession or Area 50. Appellants' suit under the Indian Claims Commission Act is for increased compensation for a major part (but not all) of Area 50. They claim here, as they did below, that the Sac and Fox had both a title recognized by the United States and also aboriginal title through exclusive use and occupancy. We affirm the Commission which wholly rejected the argument of recognized title and eliminated two substantial areas from the aboriginal ownership it accorded the Sac and Fox.

RECOGNIZED TITLE

[1] The general standards for determining recognition are treated in our opinion in Minnesota Chippewa Tribe et al. v. United States, 315 F.2d 906. Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive "recognition" is insufficient, as is a simple acknowledgment that Indians physically lived in a certain region. There must be an intention to accord or recognize a *legal* interest in the land.

[2] Three treaties are woven into appellants' claim of such recognition. The first was the Fort Harmar Treaty of January 9, 1789, 7 Stat. 28, with six tribes including the Sacs. The main objective of this agreement was to renew and confirm the boundary line in Ohio which had been established some four years before in 1785 by the Treaty of Fort McIntosh, 7 Stat. 16, between four of these tribes—*not* including the Sac—

1. See also Minnesota Chippewa Tribe, et al. v. United States, 315 F.2d 906.

and the United States. The provisions of the Fort Harmar Treaty directly relating to boundary and land (Articles I–IV, IX) do not refer to or involve the Sac Nation [2] but only the "said nations" (or "those nations") which had signed the earlier treaty of 1785. As signatories, the Sac were concerned only with the other portions of the Fort Harmar Treaty, the articles as to trading, cessation of hostilities, delivery of criminals, and horse-stealing. This is shown by Article XIV, containing the sole mention of the Sac, which declares that the United States "do *also* receive into their friendship and protection, the nations of the Pattiwatimas and Sacs; and do hereby establish a league of peace and amity between them respectively; and all the articles of this treaty, *so far as they apply to these nations*, are to be considered as made and concluded in all, and every part, expressly with them and each of them" (emphasis added). The reference to the other articles of the treaty "so far as they apply to these nations" indicates plainly that the Sac were not affected by the boundary provisions and the land cessions, but only by the other phases. There was therefore no acknowledgment or recognition of Sac ownership of any defined territory.

[3] The next treaty—on which the appellants primarily rely—was the Treaty of Greenville of August 3, 1795, 7 Stat. 49, already considered at length by this court in The Miami Tribe of Oklahoma v. United States, 175 F.Supp. 926, 929–931, 146 Ct.Cl. 421, 427–431, (1959). In 1794, "General Anthony Wayne was appointed a commissioner to negotiate a treaty with the hostile tribes of the Northwest Territory. In his treaty instructions it was emphasized that he should attempt to bring about an agreement concerning a dividing boundary line between lands used and occupied by the Indian tribes in the territory and the lands which belonged to the United States. He was also instructed to establish the boundary lines between the lands owned by the separate tribes in the territory. He was authorized to guarantee to the Indian tribes the right to the soil in the lands owned by them as against any citizens or inhabitant of the United States. During the course of the negotiations" with twelve tribes "it became apparent that it would not at that time be possible to persuade the tribes to agree to definite boundaries between their separate areas of occupation and accordingly his treaty instructions were altered to permit him to make a single treaty with all of the tribes establishing the overall boundaries of the land owned by all of them without defining inter-tribal boundaries. The treaty was negotiated at Greenville and executed on August 3, 1795" (175 F.Supp. at 930, 146 Ct.Cl. at 427–428). This treaty established a "general boundary line between the lands of the United States, and the lands of the said Indian tribes," beginning at the mouth of the Cuyahoga River at Lake Erie (where Cleveland is now situated), running across Ohio to what is now Indiana, then southwest to the Ohio River on the border between Indiana and Kentucky to a point about 25 miles west of the Ohio line. The Indians ceded all claims to the land east and south of that line; the United States relinquished, in consideration, all claims to Indian lands (with defined exceptions) north of the Ohio River, east of the Mississippi River, and west and south of the Great Lakes and the waters uniting them. "Although the Treaty of Greenville did not establish boundaries between the lands of the various signatory tribes, the tribal representatives to the treaty understood that the United States was dealing with each tribe independently of the others and that boundaries would be established as between the various tribes by future negotiations" (175 F.Supp. at 931, 146 Ct.Cl. at 431). This was done in the following years (175 F.Supp. at 931–936, 146 Ct.Cl. at 431–438).

[4] In Miami Tribe, supra, the Commission and this court held that the

2. The Fox did not participate at all.

Treaty of Greenville, together with the "follow-up" treaties, did accord recognition of the legal right and title *of the signatory tribes* to the lands relinquished by the United States. But neither the Sacs nor the Foxes signed the treaty nor were they present at the negotiations. The general rule is, of course, that an Indian tribe obtains no legal rights from a treaty to which it is not a contracting party. See The Yuchi Tribe of Indians v. United States, 145 F.Supp. 206, 214, 136 Ct.Cl. 433, 448 (1956), cert. denied, 352 U.S. 1016, 77 S.Ct. 558, 1 L.Ed.2d 546 (1957); Potawatamie Indians v. United States, 27 Ct.Cl. 403, 419 (1892). Appellants contend, however, that the Federal Government must have intended, by the Greenville Treaty, to recognize the right of *all* Indian tribes in that area to *all* the land on the Indian side of the general boundary, and therefore to acknowledge the rights of the Sacs and Foxes even though they were not present and did not sign as contracting parties.

We cannot agree with this strained interpretation of the treaty. Under its terms, only the named tribes were to be bound or benefited. The preamble recites that the federal representative met with the agents of "the *said* tribes of Indians" (referring to the twelve signatory tribes) and agreed upon a treaty which, when ratified, was to be binding on the United States "and the *said* Indian tribes" (emphasis added). The reconfirmed boundary was designated as the line "between the lands of the United States, and the lands of the *said* Indian tribes"; the ceded lands were given up by the "*said* Indian tribes"; certain rights of passage for United States citizens were allowed by "the *said* Indian tribes"; trade was to be opened with "the *said* Indian tribes"; the United States and "the *said* Indian tribes" forbade private revenge or retaliation; and previous treaties between the United States and "the *said* Indian tribes, or any of them" were to become void (emphasis added). The United States, as its major concession, relinquished territorial claims "in consideration of the peace now established and of the cessions and relinquishments of lands made * * * by the *said* tribes of Indians * * *"; and a payment was made "to the *said* Indian tribes," with specified annual allowances to be paid in the future to the twelve signatories by name (emphasis added).

It was quite possible for the Federal Government thus to treat differently the various tribes and tribal lands on the Indian side of the general line, depending upon whether the particular tribe entered into a settlement or came to terms with the United States (at Greenville and later). Indeed, it would be natural for the United States to bind itself only to those tribes which obligated themselves to the United States. We find nothing in the negotiations, or the treaty instructions, or the general contemporaneous references to the Greenville Treaty as confirming the Indian ownership of Indian lands (in the collective sense) on their side of the line to cause us to modify our statement in Miami Tribe that "the tribal representatives to the [Greenville] treaty understood that the United States was dealing with each tribe independently of the others and that boundaries would be established as between the various tribes by future negotiations" (175 F. Supp. at 931, 146 Ct.Cl. at 431). The other tribes were representing themselves, and not acting on behalf of the Sacs and Foxes, in signing the treaty. Nor were the latter third party beneficiaries of the compact, or somehow brought within its reach by affiliation or association. On the contrary, the contemporary understanding seems clearly to have been that the Sac and Fox Tribes were wholly outside the benefits of Greenville. Governor Harrison of the Indian Territory reported to the Secretary of War in 1802 that the Sacs "were not included in the treaty of Greenville" but "are now extremely desirous to be put on a footing with the other tribes, and receive an annual present, * * *." Just as the Sacs did not receive an annual present under the Greenville treaty because they were not a signatory, so they did not obtain recognition of their title.

As Harrison and the Indians both knew, a further treaty would be required to give the Sacs (and their allies) any benefits or rights comparable to those granted at Greenville.

[5] The third treaty appellants invoke is that of November 3, 1804, 7 Stat. 84, which ceded the lands for which higher compensation is now sought. This compact fixed "[t]he general boundary line between the lands of the United States and of the said Indian tribes", and the tribes ceded and relinquished to the United States "all the lands included within the above-described boundary." Article 7 provided that "[a]s long as the lands which are now ceded to the United States remain their [i. e., the United States'] property, the Indians belonging to the said tribes, shall enjoy the priviledge [sic] of living and hunting upon them." But, significantly, the treaty did not contain *as to the ceded lands* any equivalent of Article V of the Greenville Treaty (on which the court placed great stress in Miami Tribe) providing that the signatory tribes were to be protected in the quiet enjoyment of the Indian lands relinquished by the United States "so long as they [the tribes] please." [3] There being no prior recognition of the Sac and Fox title and no indication of such recognition in the 1804 Treaty itself, that treaty must be viewed as no more than a cession agreement which, in order to extinguish all *claims*, reflected in its wording and coverage the broadest assertions of the Indians to the ceded territory but did not acknowledge or recognize that those claims had any substance.[4] See Quapaw Tribe v. United States, 1 Ind. Cl.Comm. 469, 485 (1951), affirmed 120 F.Supp. 283, 286, 128 Ct.Cl. 45, 49–50 (1954); The Iowa Tribe of the Iowa Reservation, etc. v. United States, 6 Ind. Cl.Comm. 464, 501 (1958). Appellants apparently assume that "recognition" or "acknowledgment" necessarily follow from an acceptance by the United States of the bare fact that the particular Indians dwelt or hunted, or claimed to dwell or hunt, in the area at that time. But there must be another indispensable element before recognition is had. The Congress must affirmatively intend to grant the right to occupy and use the land permanently. "By 'recognition', the courts have meant that Congress intended to acknowledge, or if one prefers, to grant, to Indian tribes rights in land which were in addition to the Indians' traditional use and occupancy rights exercised only with the permission of the sovereign." The Miami Tribe of Oklahoma v. United States, supra, 175 F. Supp. at 940, 146 Ct.Cl. at 445. As this statement shows, in this context "acknowledgment" is a synonym for "recognition" (see also 175 F.Supp. at 936, 146 Ct.Cl. at 439), and both require some affirmative grant or acceptance of more-than-permissive rights. Appellants can point to nothing affording the Sac and Fox Tribes such recognition or acknowledgment of legal rights in the area ceded by them in the 1804 Treaty.[5]

THE ISSUE OF THE VALIDITY OF THE 1804 TREATY

[6, 7] Although they stand squarely on the 1804 Treaty as recognizing the Tribes' title, appellants nevertheless urge that the Treaty was invalid because not negotiated or signed by proper representatives of the Sac and Fox. At a pretrial hearing the defendant formally stipulated that the treaty "has no validity" of itself but also declared that

3. Article 4 of the 1804 Treaty did contain a comparable provision as to the Sac and Fox lands *retained* by the tribes after the 1804 cession: this provision applied to lands "rightfully" claimed.

4. Cf. Minnesota Chippewa Tribe et al. v. United States, 315 F.2d 906.

5. Appellants, by disavowing any claim to parts of Area 50 (all of which was ceded by the 1804 Treaty), have themselves indicated that the 1804 Treaty did not, in itself, confer recognition, and that they must either rely on earlier treaties or on aboriginal title. Appellants' brief on appeal (p. 10, fn. 1) states: "The Treaty of 1804 included lands which the Sac and Fox Nation did not, as far as we can determine, own in 1804."

later treaties "validated said treaty of 1804." [6] The Commission, correctly refusing to be bound by a stipulation on an issue of law (Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 289, 37 S.Ct. 287, 61 L.Ed. 722 (1917)), held that the validity of a properly executed treaty is not open to judicial inquiry even under the Indian Claims Commission Act, and that the Treaty must be deemed fully valid.[7] The parties have argued the point extensively. It seems to us, however, quite unnecessary to decide the question in this case. The only consequence appellant seriously urges as turning on the Treaty's invalidity is that, if it is void, the land ceded would not have been acquired by the United States in 1804 but only at a later time (under post-1804 treaties or when actually disposed of to settlers) and would therefore have to be valued as of that subsequent date. But that conclusion would not follow even if we deemed the 1804 Treaty invalid. If the treaty were invalid, the United States would have unilaterally deprived the Sac and Fox of their lands in 1804, not later; that would be the date of definitive taking, for there could have been little doubt in the minds of the Indians that the United States was continually asserting full ownership of the area after the Treaty.[8] On this assumption of a unilateral taking, appellants' claim under Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a, would be one "arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." The proper valuation date would, as we have said, be the date of deprivation, November 1804. It follows that, whether or not the Treaty was validly negotiated, the taking or acquisition by the United States, and the loss by the Indians, occurred in that year. It makes no difference to this proceeding whether the Treaty was invalid at its inception or whether it is now revised (under the Claims Commission Act) on the ground of unconscionable consideration. In either event the lands found to have been held by the Sac and Fox are to be valued as of 1804, and not thereafter.

ABORIGINAL TITLE

The remaining question is whether the Indian Claims Commission committed error in holding that appellants, showing no recognized title, also failed to prove aboriginal title to a part of the portion of Cession 50 claimed in this proceeding. The whole area claimed is a relatively narrow elongated tract running north-south along the Mississippi River from about Prairie du Chien, Wisconsin, on

6. The Sac and Fox resented the 1804 Treaty as foisted upon them by a few unauthorized chiefs who obtained far too little compensation for the ceded territory. They complained to federal officials and urgently sought better terms. In the War of 1812 some of the Sacs sided with the British. Although the Tribes entered into treaties in 1815 and 1816 confirming the 1804 compact (7 Stat. 134, 135, 141), the matter was not put to rest. Later treaties in 1824 and 1825 (7 Stat. 229, 272), primarily involving other lands, again attempted to settle (in favor of the United States) the status of the areas ceded in 1804. The feeling of injury subsisted, however, and a part of the tribes continued to refuse to leave the ceded lands. In 1832 armed conflict broke out with settlers and militia in Illinois. The Indians were led by the Sac chief Blackhawk, and the episode is known as Blackhawk's War, in which the Sac and Fox were finally defeated. It was in this conflict that Abraham Lincoln, as an elected captain of volunteers, had his pre-taste of armed hostility.

7. Putting to one side the effect of the Claims Commission Act, there is much authority that the courts cannot inquire whether a duly promulgated treaty with the Indians was validly consummated by or on behalf of the tribe. See, e. g., Fellows v. Blacksmith, 19 How. 366, 372, 15 L.Ed. 684 (1856); Lone Wolf v. Hitchcock, 187 U.S. 553, 567–568, 23 S. Ct. 216, 47 L.Ed. 299 (1903); United States v. Minnesota, 270 U.S. 181, 201–202, 46 S.Ct. 278, 46 L.Ed. 298 (1926). Cf. Baker v. Carr, 369 U.S. 186, 215–216, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

8. By the Act of March 3, 1805, 2 Stat. 343, Congress authorized the ceded lands to be thrown open for sale as public lands. See also footnote 6, supra.

the north, to near St. Louis, Missouri, on the south. The decision below sustained the claimant's aboriginal title to the northern part of this tract as well as to most of the southern portion, but held against the appellants as to the large segment in the middle, as well as a smaller segment in the very south. The large middle area lies between the Illinois and Mississippi Rivers (on the east side of the latter), and the smaller sector lies immediately north of the Missouri River on the west side of the Mississippi. The entire area claimed for the Sac and Fox in this proceeding covers about 9,800,000 acres; of this, about 4,000,000 was awarded below and the remaining 5,800,000 (consisting of a 5,000,000 acre tract and an 800,000 acre tract) were held not to have been owned by the Sac and Fox. The defendant points out that in other proceedings, which are still not final, the Commission has awarded the Sac and Fox large areas on the west side of the Mississippi in Iowa and Missouri, totaling about 18,000,000 acres.[9] The only relevance of this fact—and it is relevant for this purpose—is to show that the two non-contiguous sectors of Area 50 awarded below are not isolated but form the eastern and southern parts of a continuous expanse of territory (in Wisconsin, Illinois, Iowa, and Missouri) determined by the Commission to have belonged to the Sac and Fox; on the other hand, the sectors of Area 50 omitted by the Commission do not make gaps in otherwise solid Sac and Fox territory (as the Commission has found it to be) but, rather, form marked indentations along the edges. Appellants urge, of course, that if the omitted sectors were added the border of these Indians' region would be less indented and more symmetrical.

[8] The adverse factual determinations as to the unawarded tracts are challenged on two major grounds: (a) the Commission erroneously rejected, because the documents came after the 1804 Treaty, evidence tending to prove that the Sac and Fox occupied these areas prior and up to 1804; and (b) the Commission's findings are not supported by substantial evidence in the record as a whole. If the Commission had followed the rule, as a matter of law or of policy, of refusing to consider any post-1804 materials as bearing on pre-1804 occupancy, we would be required to reverse. Post-treaty materials can often shed light on the state of affairs prior to the treaty. Their weight may depend upon their closeness in time to the critical date or upon the nearness of the events they describe, but there is and can be no general rule warranting the fact-finder in disregarding en masse all such evidence. They must be considered and cannot be discarded out of hand. We know that in other cases the Commission has correctly taken post-treaty evidence into account in deciding a treaty or a pre-treaty issue. See, e. g., The Sac and Fox Tribe v. United States, Appeal No. 10-61, Ct.Cl., decided Nov. 7, 1962, slip op., 5–6 (involving another Sac and Fox claim). The difficulty with appellants' argument is that, as we read the findings and opinion below, the Commission here followed the same pattern and did not disregard the post-Treaty materials (although it gave them less weight than appellants think they merit). Nowhere does the Commission say that it is refusing to consider post-1804 materials, and several of its findings specifically refer to such evidence. We cannot say that the Commission failed to *consider* materials which came after the Treaty of 1804 simply because it thought that evidence unpersuasive or overborne by other data.

[9] The issue then narrows to whether the Commission's factual findings and determinations on aboriginal ownership of the two excluded segments are sustainable. From the findings and opinion we gather that the Commission based the phase of its determination which was favorable to appellants[10] on proof that

9. These proceedings have not come to this court and can still do so after final determinations are made.

10. The Government has taken no appeal, at this time, from this holding.

the Sac and Fox lived and hunted in the awarded sections of Area 50 for a long time prior to 1804; conversely, the Commission's refusal to find the required use and occupancy in the sections involved in this appeal was mainly based on its view that (a) there was too slight proof of Sac and Fox villages and occupancy in these areas, and also that (b) any Sac and Fox occupancy of the omitted sectors, through living and hunting, was too recent for acquisition of aboriginal ownership since these Indians had entered and driven out other Indians (who had previously possessed the areas) no earlier than the latter part of the 18th century. To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive,[11] and continuous use and occupancy "for a long time" prior to the loss of the property. See The Snake or Piute Indians v. United States, 112 F.Supp. 543, 125 Ct.Cl. 241, 254 (1953); The Quapaw Tribe of Indians v. United States, 120 F.Supp. 283, 285, 128 Ct.Cl. 45, 49, (1954); Alcea Band of Tillamooks v. United States, 59 F.Supp. 934, 965, 103 Ct.Cl. 494, 557, (1945) affirmed 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29 (1946). Each of these components must be shown by adequate proof.

[10] To sustain their attack on the adverse findings and determination as lacking substantial support, appellants emphasize three main classes of materials in this record: first, documentary references to Sac and Fox villages and hunting in the excluded sectors, particularly the larger segment between the Illinois and Mississippi Rivers; second, general statements by officials that the Sac and Fox occupied or hunted the areas (especially that between the Illinois and the Mississippi) prior to the 1804 Treaty; and, third, historical data tending to show (appellants say) the non-existence of other tribes in the area and Indian recognition of this territory as belonging to the Sac and Fox. We canvass these points in turn.

Although the Commission determined that no Sac and Fox village of any significance can be found within the larger excluded area prior to 1804, appellants insist that they have overwhelmingly proved that there were four such villages in that sector, particularly a Henderson Creek village referred to by Lt. Zebulon Pike as "the largest Sac village" (in his notes of his travels up the Mississippi in August 1805). But the Commission was not compelled to accept the existence of these communities, in or before 1804, as proved by the record. With respect to the alleged Henderson Creek village, for instance, there are adequate reasons to doubt the claim—which is largely based on Lt. Pike's account. Pike's reference was admittedly hearsay since he simply says that on August 23, 1805, he was "informed" by unnamed visitors to his boat on the Mississippi "that the largest Sac village was about 2½ miles out on the prairie"; the "Henderson Creek village" could not have been "the largest Sac village" since at that time the largest village (by far) was undoubtedly Saukenuk on the Rock River some 75 miles to the north in an area awarded by the ruling below to the Sac and Fox; and the well-known Sac and Fox Indian agent Thomas Forsyth referred in 1824 to the Henderson Creek location as the site of a "small Sauk [Sac] village * * * built in May" *1824* (twenty years after the cession).[12] The issue for us, of course, is not where the preponderance of the evidence lies, but whether there is substantial evidence in the record as a whole to support the Commission's adverse finding as to this village. Applying that standard, we cannot say that the Commission had to accept appellants' evidence on this point, subject as it was to so great a possibility of error. The same is true as to three other villages in the larger excluded area

11. Except where two or more tribes or groups inhabit a defined area in joint and amicable possession.

12. The only other recorded reference to such a village is by the Sac and Fox leader Blackhawk who wrote much later that he visited such a village in *1815*.

which the appellants now urge as proved. We do not stop to detail the evidence, which is exhaustively discussed in the parties' briefs, but it is plain that the Commission had even more reason to find against the existence of these Sac and Fox communities prior to the 1804 Treaty.[13]

The second main type of material which appellants proffer to us as invalidating the Commission's adverse findings consists of general statements, around and after 1804, by prominent American officials that the Sac and Fox hunted in, occupied, possessed, owned, or claimed territories which necessarily included either or both of the omitted segments. In submitting the 1804 Treaty to the Senate, President Jefferson said that the Sacs "own the country in the neighborhood of our settlements of Kaskaskia and St. Louis" [14]; General Harrison (who negotiated the Treaty) told the Secretary of War in 1802 that the Sacs were a "considerable nation who reside between the Illinois River and the Mississippi" and in 1814 he wrote that as of the first part of the 19th century "the Sacs remained masters of the country to the north" of the Illinois River [15]; Secretary of War Dearborn, in empowering General Harrison to negotiate with the Sac and Fox in 1804, authorized him to obtain cessions "on both sides of the Illinois * * * they ought to relinguish all pretensions to any land on the southern side of the Illinois, and a considerable tract on the other side, * * *"; Captain Meriwether Lewis reported in 1806 (after the Treaty) that the Sac and Fox still claimed the land on the east side of the Mississippi to the Illinois River and that "their principal hunting is on both sides of the Mississippi, from the mouth of the Ouisconsin [Wisconsin River] to the mouth of the Illinois River"; Lt. Pike described the Sac and Fox, in 1810, as hunting on both sides of the Mississippi in a region which encompassed both of the omitted sectors.

[11] It would have been better if the Commission had dealt specifically with these statements, for materials of this kind have a direct bearing on the factual question of aboriginal title. See, e. g., The Snake or Piute Indians v. United States, 112 F.Supp. 543, 552, 125 Ct.Cl. 241, 254 (1953). But on this record the Commission was not barred from deeming the statements insufficiently probative. For one thing, the phrasing of some of them is not very helpful to appellants: Secretary Dearborn's instruction to General Harrison is so ambiguously worded

13. A related argument by appellants is that under the Commission's determination the large Sac village of Saukenuk (which was situated at the southern end of the northern portion of Area 50 awarded below to the claimant) would have been left as an exposed Sac and Fox enclave on the east side of the Mississippi—without supporting hunting lands to the south and without the military protection of Sac and Fox country to the south. The suggestion is that the Sac and Fox would never have left their "capital" in such a precarious position —from both the defensive and the subsistence points of view—but would certainly have taken over the adjoining land to the south (which lies in the excluded sector between the Mississippi and Illinois Rivers). One answer the Commission could adopt is that this village lay directly across the Mississippi from large Sac and Fox territory in Iowa (not involved in this proceeding), including another large village, and was therefore not isolated on the west or north upon which it could draw both for protection and for food. In addition, the Commission could find that Saukenuk had a sufficient area immediately surrounding it, as well as a large area to the north (even if the west side of the Mississippi be omitted from consideration), for the subsistence needs of its population; and since there is no showing of *strong* hostile Indian forces to the south, in the excluded sector, the chiefs could have been content to let that sector remain unoccupied or only lightly infiltrated from time to time.

14. The reference to Kaskaskia would include, appellants say, the southern part of the larger excluded segment, and the reference to St. Louis might cover the smaller exeluded segment (but not necessarily so).

15. The land between the Illinois and the Mississippi (and similarly the land north of the Illinois) lies in the larger excluded segment.

that it may well refer to Sac and Fox *claims* rather than to accepted ownership,[16] and President Jefferson's acknowledgment of Sac ownership is so general that it could cover very little, if any, of the excluded areas. The relevant statements of General Harrison, Captain Lewis and Lt. Pike are more definite, but there are two interrelated grounds upon which the Commission could reject them as persuasive of Sac and Fox aboriginal title prior to 1804.[17] The first is that Article 7 of the 1804 Treaty, 7 Stat. 86, permitted the Sac and Fox to enjoy the privilege of living and hunting on the lands then being ceded until they were disposed of; reports of Sac and Fox hunting after 1804 would not, therefore, necessarily carry any solid implication as to pre-Treaty hunting. The second, and more important, reason is that these statements do not show that the Sac and Fox had hunted or controlled the disputed areas for "*a long time*" before 1804. We know, as the Commission pointed out, that the Sac and Fox settled in their primary village of Saukenuk and in the northern part of Area 50 (both awarded to them below) as early as the 1730's. But we also know that they did not begin to drive the Illinois tribes out of the large excluded segment to the south of this awarded area until after 1760, and that other Indian tribes were engaged in the same endeavor. Intertribal conflict for the territory left by the retreating Illinois Indians apparently continued for some time (see the discussion, *infra*). Assuming that the Sac and Fox emerged generally victorious toward the end of the 18th century, a trier of fact could properly decide that such a late conquest would not ripen into aboriginal title by 1804. The status of aboriginal ownership is not accorded to tribes at the very instant they first dominate a particular territory but only after exclusive use and occupancy "for a long time." This is as it should be—especially under the Indian Claims Commission Act which is the charter for doing justice between the Indians and the United States. Justice would not be vindicated if a tribe were able to claim a monetary award, on the ground that it was unfairly deprived by the Government of its original ownership of property, where the lands were but recently seized by conquest from another tribe. The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory. The Claims Commission Act, which seeks to repair damage caused by United States conquest of Indian lands, should not be turned into an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before.

On this facet of the case appellants urge that the unfavorable findings and determination are inconclusive because the Commission erred in thinking that there were other Indians inhabiting or claiming the disputed areas before 1804. Here, too, the lateness of the Sac and Fox mastery of the region—if those allied tribes did in fact control it by the first years of the 19th century—warranted the Commission in pointing to the conflicting claims and usages of neighboring tribes as bearing on the claimant's original title. The Illinois Indians were not driven out until the late 1760's; and thereafter the Potawatomis definitely claimed some of the disputed sections of the ceded parts of Area 50 (as well as others) adversely to the Sac and Fox and not jointly with them. In addition, in the latter part of the 18th century, there are references to two Iowa villages on the east side of the Mississippi in Illinois—in the larger disputed segment —which at the least indicate some Iowa possession.[18] As for the smaller excluded

16. Part of Captain Lewis's statement is also a simple repetition of Sac and Fox *claims*.

17. Defendant makes other points as to the defects in these statements, but we need not detail them.

18. The Commission was justified in referring to the testimony of appellants' expert witness (Dr. Wallace), in related proceedings before the Commission, to support the conclusion that two Iowa villages probably existed on the east side of the

segment, there is likewise evidence of warfare between the Osages and the Sac and Fox sufficiently close to 1804 that the Commission could decide that a conquest by the latter, if it occurred before 1804, was too recent to ground a proper claim of aboriginal title; moreover, it is a fair inference that this conflict had not subsided by the time of the Treaty of 1804 since Article 10 of the Treaty embodies the Sac and Fox solemn promise and agreement "that they will put an end to the bloody war which has heretofore raged between their tribes and those of the Great and Little Osages." 7 Stat. 86. See also Iowa Tribe v. United States, 6 Ind.Cl.Comm. 464, 489, 508–509 (1958).[19] In sum, the Commission was not compelled by the record to find that the Sac and Fox had an exclusive and unchallenged claim to the disputed areas for the required span of time before 1804; other tribes were in the vicinity, at least until the closing years of the 18th century.

[12] We conclude, for all these reasons, that the Commission could make the determination and findings it did as to the two excluded sectors. At this stage of litigation under the Indian Claims Commission Act it is, of course, redundant to say that on factual issues we are required to sustain the Commission if its resolution of the controversy is supported by substantial evidence in the record as a whole. The Sac and Fox Tribe v. United States, Appeal No. 10–61, Ct.Cl., decided Nov. 7, 1962, slip op. 6; Yakima Tribe v. United States, Appeal No. 4–61, Ct.Cl., decided Oct. 3, 1962, slip op. 11, 19–20; and cases cited. Although briefs are often written as if we could weigh the evidence independently, we are powerless to do so. Confining ourselves to our own sphere, we can and do hold that there is sufficient substantial evidence in the record considered as a whole to sustain the refusal of the Commission to find that appellants' predecessors had aboriginal title to the two omitted sectors of Area 50.

The determination of the Commission, insofar as it is challenged on this appeal, is affirmed.

JONES, Chief Judge, REED, Justice (Ret.) sitting by designation, and DURFEE and LARAMORE, Judges, concur.

Mississippi before 1804. United States v. Pink, 315 U.S. 203, 216, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

19. Appellants make the point that the Kickapoos must have "recognized" Sac and Fox ownership of the larger disputed area because, after 1819, when the former ceded their lands (on the south side of the Illinois River) to the United States, they sought and received permission from the Sac and Fox to cross the Illinois and live on the north and west side of the river. This was almost 15 years after the 1804 Treaty which had given the Sac and Fox federal permission to hunt and live in the territory being ceded; also, the exact nature of the arrangement between the tribes is very unclear. The Commission could justifiably regard this piece of evidence as having little probative impact on the status of the aboriginal title at the time of the treaty.

MINNESOTA CHIPPEWA TRIBE et al.

v.

The UNITED STATES.

No. 11–61.

United States Court of Claims.

April 5, 1963.

Action involving claim of ownership by Indian tribe of certain land. From an adverse decision of the Indian Claims Commission, the Indian tribe took an interlocutory appeal. The Court of Claims, Davis, Judge, held that under treaties stating that Chippewa Tribe of Minnesota and Lake Superior Chippewas were the owners in common of land lying between the Mississippi River and Lake

JONES, Chief Judge, and LARAMORE and WHITAKER, Judges, concur.

MADDEN, Judge (dissenting).

Section 12 of the Veterans' Preference Act provides:

> "* * * when any or all of the functions of any agency are transferred to, * * * some other agency, * * * all preference employees in the function or functions transferred * * * shall be first transferred to the replacing agency, * * * for employment in positions for which they are qualified, before such agency * * * shall appoint additional employees from any other source for such positions."

On June 30, 1949, the personnel, functions, and records of the War Assets Administration were transferred to the General Services Administration, which was that day created. The fact that the transfer was for liquidation purposes does not seem important, since the purpose of the War Assets Administration had been liquidation. On that day the plaintiff was on annual leave from the War Assets Administration, a status which he would occupy until some time in December.

The Civil Service Commission held that because the plaintiff was not at work on June 30, 1949, the quoted language of section 12 gave him no rights. I see no reason for such a narrow construction of section 12. It is not, after all, an interference with the freedom of management of administrators to say to them that if functions are transferred to their administration, those who have been performing those functions should get the jobs of performing them in the new agency.

An employee on annual leave, even if he has received a notice that his employment and pay will be terminated at the expiration of his leave, is still a Government employee, and is being paid only because he is a Government employee. A normal reading of section 12 would give him the rights created by that section.

The SIOUX TRIBE OF INDIANS, et al.
v.
The UNITED STATES.
No. 4-55.

United States Court of Claims.
Nov. 7, 1956.

The Sioux Tribe of Indians filed a claim with the Indian Claims Commission on ground that the Sioux Tribe had been unconscionably compensated by the United States for lands taken in 1877 by the United States from permanent reservation. The Indian Claims Commission entered an order dismissing the claim, and the Sioux Tribe appealed. The Court of Claims, Laramore, J., held that where Sioux Indians had already been paid by the United States in excess of the 1877 value of lands taken, the United States paid the Indians just compensation for the lands, though the lands contained gold.

Decision affirmed.

1. United States ⇐105

"Unconscionable consideration," which will give rise to an Indian claim against the United States under the Indian Claims Commission Act, is that consideration which is so much less than the actual value of the property sold that the disparity shocks the conscience. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

See publication Words and Phrases, for other judicial constructions and definitions of "Unconscionable Consideration".

2. United States ⇐105

Fact that reprehensible methods were used by United States Commissioners in getting signatures of Sioux Indians on 1877 agreement to cede land, did not constitute "duress", which would give rise to Indian claim against the United States under the Indian Claims Commission Act, where it was not the agreement that caused the cession of land, but subsequent act of Congress, and the agreement was ineffectual because it did not

meet the requirements of 1868 treaty for the cession of land. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749; Act Feb. 28, 1877, 19 Stat. 254; 25 U.S.C.A. §§ 70 et seq., 70a(3, 5); Treaty between the United States and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635.

See publication Words and Phrases, for other judicial constructions and definitions of "Duress".

3. Indians ⇐3

Though it had been the practice and policy of the United States Government during many years of tension between the whites and the Indians to negotiate with the Indians by treaty convention and to settle differences, if possible, by treaty, those treaties did not absolutely abrogate the right of the Government to regulate the Indians or, when necessary, to legislate contrary to or inconsistently with a treaty, and the primary consideration was the good of the country and the duty owed by the government to all its citizens. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

4. Indians ⇐3

Treaties of the United States with Indians are no different than any other public laws and are subject to contrary legislation by the Congress when it is felt to be in the interest of the country. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

5. Indians ⇐11

Fact that the United States in obtaining cession of lands from Sioux Indians did not secure the required 75 per cent of the male adult signatures on 1876 agreement as required by 1868 treaty was immaterial, in view of the fact that the United States could have legislated for a cession of the lands without even attempting to negotiate an agreement. Treaty between the United States and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635; 25 U.S.C.A. §§ 70 et seq., 70a(3, 5); Act Feb. 28, 1877, 19 Stat. 254.

6. Indians ⇐11

The only standard that the United States was required to observe in enacting legislation for cession of Indian Lands in violation of treaties with the Indians is that it is in the best interests of the country and that the Indians be treated fairly in view of treaty guarantees to be abrogated, and fair treatment includes payment by the United States of just compensation to the Indians for the lands taken. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

7. Indians ⇐11

When lands are granted to a tribe of Indians by treaty, the fee remains in the United States subject to Indians' right of occupation, and though the Indians have a better title than they had before the treaty guaranteed the land to them, it is not absolute, and they cannot alienate the land without permission of the United States.

8. Indians ⇐11
United States ⇐105

The United States was not in any legal sense a guardian of Sioux Indians when the United States forced the Sioux Indians to cede to the United States lands containing gold, and the United States was not liable to the Sioux Indians under the Indian Claims Commission Act for the violation of any fiduciary duty to the Sioux Indians. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749; Act Feb. 28, 1877, 19 Stat. 254; 25 U.S.C.A. §§ 70 et seq., 70a(3, 5); Treaty between the United States and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635.

9. Indians ⇐11

Just compensation required to be paid by the United States to Indians for Indian lands must be based on the value of the lands as of the time of their acquisition by the United States. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

10. Indians ⇐11

In determining value of land taken by the United States from Indians, at time of acquisition of the lands, many things must be taken into consideration including the minerals in the ground and the timber standing thereon. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

1363

11. Indians ⇐11
United States ⇐105

Where Sioux Indians had already been paid by the United States in excess of the 1877 value of lands taken in 1877 from permanent reservation, the United States paid the Indians just compensation for the lands, though the lands contained gold, and Indian Claims Commission properly denied claim of Indians for additional compensation. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749; Act Feb. 28, 1877, 19 Stat. 254; 25 U.S.C A. §§ 70 et seq., 70a(3, 5); Treaty between the United States and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635.

12. United States ⇐105

Category of the Indian Claims Commission Act covering situations where the United States had, after mutual agreement as to price, acquired Indian land by treaty of cession or otherwise but did not subsequently pay the price already agreed to by the Indians, does not give jurisdiction to the Indian Claims Commission of an Indian claim in a situation where land that was taken from Indians by the United States was actually paid for but in an amount not agreed to by the Indians. 25 U.S.C.A. § 70a(4).

Ralph H. Case, Washington, D. C., for appellants.

Maurice H. Cooperman, Washington, D. C., with whom was Asst. Atty. Gen. Perry W. Morton, for appellee.

Before JONES, Chief Judge, and LITTLETON, WHITAKER, MADDEN and LARAMORE, Judges.

LARAMORE, Judge.

This is an appeal by the Sioux Tribe of Indians from an order of the Indian Claims Commission Docket No. 74 dismissing appellant's petition alleging that it was unconscionably compensated by defendant for 7,345,157 acres of its permanent reservation, more commonly known as the Black Hills, taken from it by the appellee pursuant to the Act of February 28, 1877, 19 Stat. 254.[1] The claim is brought under section 2(3) and (5) of the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C.A. §§ 70a, 70, establishing an Indian Claims Commission and providing for the powers, duties, and functions thereof.

The facts of the case date back to September 17, 1851, at which time the Fort Laramie Treaty, 11 Stat. 749, was signed between the United States Government and the Sioux Tribe of Indians describing the territorial limits of the Sioux or Dahcotah Nation. As the result of subsequent gold discoveries and the resultant tide of white travelers across the Indian lands to reach the gold fields lying farther west, many conflicts between the whites and the Indians arose and resulted in the Powder River War following which the Treaty of April 29, 1868, 15 Stat. 635, was signed between the Sioux and the United States. This treaty was ratified February 16, 1869, and proclaimed on February 24, 1869, 15 Stat. 635, 647. The treaty, in addition to other land, set apart the above referred to 7,345,157 acres for the absolute and undisturbed use and occupation of the appellant Indians as their permanent reservation and further provided in article 2 that "the United States now solemnly agrees that no persons except those

1. In its original petition, appellant sought compensation for 25,858,594.95 acres of land which was included in the outer boundaries laid down by the treaty of September 17, 1851, 11 Stat. 749, exclusive of the area described as the Permanent Reservation of the Sioux Tribe of Indians by Article II of the treaty of April 29, 1868, 15 Stat. 635, and to which the Sioux had the absolute and exclusive right to the undisturbed use and occupation. Appellant also sought compensation for 40,578,123.25 acres of land outside of the boundary lines of the 1851 treaty but to which the Sioux were guaranteed the right to hunt.

On appeal the claim has been confined to the 7,345,157 acres of its permanent reservation taken by the Act of February 28, 1877, 19 Stat. 254.

meet the requirements of 1868 treaty for the cession of land. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749; Act Feb. 28, 1877, 19 Stat. 254; 25 U.S.C.A. §§ 70 et seq., 70a(3, 5); Treaty between the United States and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635.

See publication Words and Phrases, for other judicial constructions and definitions of "Duress".

3. Indians ⇐3

Though it had been the practice and policy of the United States Government during many years of tension between the whites and the Indians to negotiate with the Indians by treaty convention and to settle differences, if possible, by treaty, those treaties did not absolutely abrogate the right of the Government to regulate the Indians or, when necessary, to legislate contrary to or inconsistently with a treaty, and the primary consideration was the good of the country and the duty owed by the government to all its citizens. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

4. Indians ⇐3

Treaties of the United States with Indians are no different than any other public laws and are subject to contrary legislation by the Congress when it is felt to be in the interest of the country. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

5. Indians ⇐11

Fact that the United States in obtaining cession of lands from Sioux Indians did not secure the required 75 per cent of the male adult signatures on 1876 agreement as required by 1868 treaty was immaterial, in view of the fact that the United States could have legislated for a cession of the lands without even attempting to negotiate an agreement. Treaty between the United States and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635; 25 U.S.C.A. §§ 70 et seq., 70a(3, 5); Act Feb. 28, 1877, 19 Stat. 254.

6. Indians ⇐11

The only standard that the United States was required to observe in enacting legislation for cession of Indian Lands in violation of treaties with the Indians is that it is in the best interests of the country and that the Indians be treated fairly in view of treaty guarantees to be abrogated, and fair treatment includes payment by the United States of just compensation to the Indians for the lands taken. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

7. Indians ⇐11

When lands are granted to a tribe of Indians by treaty, the fee remains in the United States subject to Indians' right of occupation, and though the Indians have a better title than they had before the treaty guaranteed the land to them, it is not absolute, and they cannot alienate the land without permission of the United States.

8. Indians ⇐11
United States ⇐105

The United States was not in any legal sense a guardian of Sioux Indians when the United States forced the Sioux Indians to cede to the United States lands containing gold, and the United States was not liable to the Sioux Indians under the Indian Claims Commission Act for the violation of any fiduciary duty to the Sioux Indians. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749; Act Feb. 28, 1877, 19 Stat. 254; 25 U.S.C.A. §§ 70 et seq., 70a(3, 5); Treaty between the United States and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635.

9. Indians ⇐11

Just compensation required to be paid by the United States to Indians for Indian lands must be based on the value of the lands as of the time of their acquisition by the United States. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

10. Indians ⇐11

In determining value of land taken by the United States from Indians, at time of acquisition of the lands, many things must be taken into consideration including the minerals in the ground and the timber standing thereon. 25 U.S.C.A. §§ 70 et seq., 70a(3, 5).

11. Indians ⇐11
United States ⇐105

Where Sioux Indians had already been paid by the United States in excess of the 1877 value of lands taken in 1877 from permanent reservation, the United States paid the Indians just compensation for the lands, though the lands contained gold, and Indian Claims Commission properly denied claim of Indians for additional compensation. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749; Act Feb. 28, 1877, 19 Stat. 254; 25 U.S.C.A. §§ 70 et seq., 70a(3, 5); Treaty between the United States and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635.

12. United States ⇐105

Category of the Indian Claims Commission Act covering situations where the United States had, after mutual agreement as to price, acquired Indian land by treaty of cession or otherwise but did not subsequently pay the price already agreed to by the Indians, does not give jurisdiction to the Indian Claims Commission of an Indian claim in a situation where land that was taken from Indians by the United States was actually paid for but in an amount not agreed to by the Indians. 25 U.S.C.A. § 70a(4).

Ralph H. Case, Washington, D. C., for appellants.

Maurice H. Cooperman, Washington, D. C., with whom was Asst. Atty. Gen. Perry W. Morton, for appellee.

Before JONES, Chief Judge, and LITTLETON, WHITAKER, MADDEN and LARAMORE, Judges.

LARAMORE, Judge.

This is an appeal by the Sioux Tribe of Indians from an order of the Indian Claims Commission Docket No. 74 dismissing appellant's petition alleging that it was unconscionably compensated by defendant for 7,345,157 acres of its permanent reservation, more commonly known as the Black Hills, taken from it by the appellee pursuant to the Act of February 28, 1877, 19 Stat. 254.[1] The claim is brought under section 2(3) and (5) of the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C.A. §§ 70a, 70, establishing an Indian Claims Commission and providing for the powers, duties, and functions thereof.

The facts of the case date back to September 17, 1851, at which time the Fort Laramie Treaty, 11 Stat. 749, was signed between the United States Government and the Sioux Tribe of Indians describing the territorial limits of the Sioux or Dahcotah Nation. As the result of subsequent gold discoveries and the resultant tide of white travelers across the Indian lands to reach the gold fields lying farther west, many conflicts between the whites and the Indians arose and resulted in the Powder River War following which the Treaty of April 29, 1868, 15 Stat. 635, was signed between the Sioux and the United States. This treaty was ratified February 16, 1869, and proclaimed on February 24, 1869, 15 Stat. 635, 647. The treaty, in addition to other land, set apart the above referred to 7,345,157 acres for the absolute and undisturbed use and occupation of the appellant Indians as their permanent reservation and further provided in article 2 that "the United States now solemnly agrees that no persons except those

1. In its original petition, appellant sought compensation for 25,858,594.95 acres of land which was included in the outer boundaries laid down by the treaty of September 17, 1851, 11 Stat. 749, exclusive of the area described as the Permanent Reservation of the Sioux Tribe of Indians by Article II of the treaty of April 29, 1868, 15 Stat. 635, and to which the Sioux had the absolute and exclusive right to the undisturbed use and occupation. Appellant also sought compensation for 40,578,123.25 acres of land outside of the boundary lines of the 1851 treaty but to which the Sioux were guaranteed the right to hunt.

On appeal the claim has been confined to the 7,345,157 acres of its permanent reservation taken by the Act of February 28, 1877, 19 Stat. 254.

herein designated and authorized so to do, and except such officers, agents, and employés of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article".

The treaty also set forth requirements for any future cession of land as follows:

> "Article XII. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI. of this treaty."

At the time of the signing of the treaty it was known both to the Indians and the defendant that there was gold in the land though it was not known to what extent.

In the early 1870's many white settlers began invading the Indian lands and the United States, living up to its treaty commitments with the Indians, expelled these white people by military force. When, as the result of the Custer expedition in 1874, it became more generally known that there was gold in the Black Hills in paying quantities, the Hills were invaded by large numbers of white settlers and prospectors.

It became apparent to the President of the United States that it was imperative to have this land ceded to the United States not only for the protection of both the whites and the Indians but for the good of the entire country as well. Subsequent efforts were made by Commissioners appointed by the President to acquire the property by purchase. The Commissioners, however, were unable to get the consent of 75 percent of the male adults of the tribe as required by the treaty of 1868. Between September 20 and October 27, 1876, however, they did manage to get the signatures of nearly all the chiefs and about 10 percent of the male adults on an agreement ceding the Black Hills area to the United States Government and providing for certain compensation to be paid the Indians. This agreement was subsequently presented to the Congress and passed into law on February 28, 1877, supra.

It is undeniable that the ceded land was rich in gold and timber and contained huge expanses of arable lands. It is equally undeniable that at this time of history the Sioux Indians were entirely dependent upon the United States Government for their livelihood and had very little or no initiative to support themselves. They were incapable as farmers and indicated no inclination to mine the gold in their land. They were primarily hunters. Their plight was such that if they did not obtain their Government subsistence for one season they would have been reduced to starvation.

The treaty of 1868 contemplated that the Indians, with the assistance agreed to be rendered by the Government, would soon become self-supporting on their reservation. By the treaty of that year the United States agreed to provide the Indians with farming equipment, to furnish educational facilities for not less than 20 years, and to furnish each Indian with certain necessities for 30 years. The Government also agreed to pay the sum of $10 to each Indian while he roamed and hunted and $20 to each Indian who engaged in farming. In addition to these provisions, the defendant agreed to provide subsistence for the Indians for four years, this amounting to a total of $5,295,761.91 for the 4-year period. This provision was completely discharged by the disbursement of $1,314,000 under the Act of February 14, 1873, 17 Stat. 437, 456. Nevertheless, Congress continued to appropriate on June 22,

1874, 18 Stat. 146, 167; March 3, 1875, 18 Stat. 420, 441; and April 6, 1876, 19 Stat. 28, large sums of money for the continued subsistence of the Sioux Indians totaling about $2,350,000. The continuing appropriations were felt to be necessary, though not obligatory on the United States, as the Sioux were not yet self-supporting, contrary to the expectations of the 1868 treaty that they would be well on their way in that direction after four years.

It must be kept in mind that all the while these unobligated appropriations and payments were being made, hostilities existed between the Indians and the whites and, concurrently, the United States Commissioners were attempting to get the Indians to cede by treaty the territory in question as well as other lands.

On August 15, 1876, 19 Stat. 176, 192, another appropriation was made by the Congress to the Sioux Tribe for $1,000,000 but the act provided that none of it should be paid to the Indians while there existed hostilities between them and the white people. The appropriating act further provided that:

> "* * * and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, * * *."

The act went on to say:

> "*And provided also*, That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting: * * *."

Faced with this, the above referred to chiefs and 10 per cent of the male adults signed the agreement which resulted in the Act of February 28, 1877, supra. The act provided in article V for the consideration to be paid the Sioux for the ceded territory. Under this article the United States agreed to provide "all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868." It also stipulated that the United States would supply each Indian with a designated amount of rations as subsistence until the Indians "are able to support themselves." These subsistence commitments continue to be paid to this day and it is estimated that it will be necessary to continue the payments for many years to come at the rate of many hundreds of thousands of dollars per year as the Sioux are still incapable of supporting themselves without Governmental aid. As further consideration for the land taken, the 1877 act added 917,000 acres of grazing lands to the permanent reservation.

The appellant contends that the United States is guilty of duress in securing the signatures of the Indians that signed the agreement which led to the 1877 act ceding the land in question. As examples of the alleged duress, appellant points (1) to the appropriation act of August 15, 1876, supra, cutting off all future subsistence payments until the terms of that act were met, and (2) to other evidence in the record tending to show reprehensible methods used by the treaty commissioners to get the Indians to sign, such as, getting them drunk and then presenting the documents to them for signature. It argues also that such actions on the part of the United States constitutes unfair and dishonorable dealings.

Secondly, appellant contends that the compensation received for the lands it was forced to cede was unconscionable.

The Government denies that it acted unfairly or dishonorably and urges that the taking of the land in question, even though accomplished contrary to the expressed provisions of the treaty of 1868, was in accordance with established legal principles and was the only thing that could have been done under the circumstances when the Government's duty to all the people, whites and Indians alike, is taken into consideration. It further denies that the withdrawal of subsistence payments until the Sioux ceased hostilities and ceded parts of their land as demanded by the Act of August 15, 1876, supra, was duress as the United States was no longer obligated to make the payments. The treaty of 1868 which initiated the subsistence obligations on the part of the Government provided for them to be made for only a 4-year period. The last required payment was made three years previous to the appropriation act of 1876. The Government, in denying duress and lack of fair and honorable dealings, points also to the fact that for over two years it attempted unsuccessfully to negotiate with the Indians for the purchase of their land or, if not this, for the purchase of a license to mine the lands, and the right to grow stock and cultivate the soil as a necessary incident to the mining operations.

The Government, in answer to appellant's allegation of unconscionable consideration, contends that not only was the consideration paid for the land not unconscionable but that based on projected land values in 1877 the Indians have been overpaid.[2] It points out that the United States still makes and will have to continue to make subsistence payments for many years to come.

[1] On the question of unconscionable consideration, which is that consideration which is so much less than the actual value of the property sold that the disparity shocks the conscience, The Osage Nation of Indians v. United States, 1951, 97 F.Supp. 381, 119 Ct.Cl. 592, certiorari denied 342 U.S. 896, 72 S.Ct. 230, 96 L.Ed. 672, the appellant urges that the proper value of the lands was not the market value or sales value at the time of taking which amount they concede has already been paid them, but, rather, a sum representing all the royalties which could have been earned from leasing the right to extract minerals, in addition to payment for all the timber lands that are part of the land in question. The basis of this theory of compensation is that because of the alleged legal relationship of guardian and ward existing between the Sioux and the United States, the United States had no power to appropriate the ward's property even on payment of its sales value, but only the power to manage that property for the continuing benefit of the ward and pay over to the ward the proceeds realized by the guardian's best efforts. The appellant insists that since it was known to the defendant that gold and silver in paying quantities were in the lands, the Govern-

2. Appropriations made under Article V of the Act of February 28, 1877, for the "civilian of the Sioux" are, according to appellant's own figures, as follows:

From the date of the act to June 30, 1925 as per General Accounting Office report	$37,006,973.00
From July 1, 1925, to January 1, 1935, as per General Accounting Office report	7,184,560.00
Estimate from January 1, 1935 to January 1, 1953, based on the average appropriation from July 1, 1925, to January 1, 1935 of $756,269.00. (No exact figures are available.) ..	12,856,573.00
Total appropriations ..	$57,048,106.00

It must be kept in mind that these appropriations will probably continue to be made at the estimated rate of about $750,000 for many years to come. The Sioux have not yet reached a sufficient stage of civilization or self subsistence.

1369

ment should have developed the lands and operated the mines for the benefit of the Indian tribes as a necessary corollary to its fiduciary position as guardian of its ward Indians. The argument is, in effect, that the guardian-ward relationship existing between the United States Government and the Sioux Indians is the same fiduciary relationship that exists between the guardian and ward in private law. This being so, the Government's action in forcing the Indians to cede to it their land was a violation of their fiduciary duty to their wards to manage its property to the benefit of the wards.

The Government disputes this method of determining the proper measure of compensation for the land taken, asserting that the proper measure is found by comparing the consideration provided for in the act requiring the cession to the market value of the property at the time of the involuntary cession.

The Indian Claims Commission decided (1) that the contention of the Government relating to compensation was correct; (2) that the consideration received by the plaintiff was not inadequate or unconscionable; and (3) that the Government made a strenuously sincere effort to reach a fair basis of cession of the gold and silver producing lands to the Government, pointing out that the Indians themselves could not subsist on the gold and silver in the hills, nor extract the minerals or develop commercial mines. The Commission therefore concluded that the Indians were treated fairly and honorably and that the consideration received for the ceded land was not inadequate or unconscionable. The Sioux Tribe of Indians, v. United States, 2 Ind.Cls.Comm. 646.

This court is in complete agreement with all the findings of fact and conclusions of law of the Commission and, therefore, denies appellants request for reversal.

[2] The appellant's allegation of duress is of no avail under the circumstances of this case because regardless of the reprehensible methods that may have been used by the Commissioners in getting signatures on the 1877 agreement, it was not the agreement that caused the cession of land, but the subsequent act of Congress.[3] The agreement as submitted by the treaty commissioners was ineffectual since it did not meet the requirements of the 1868 treaty for the cession of land. The fact that reprehensible methods were used to get signatures on a document that was binding on no one does not constitute duress. The treaty commissioners' mission was a complete failure. Since their actions did not result in the cession of the land, they cannot be the basis for an allegation of duress.

[3] While it had been the practice and policy of the United States Government during the many years of tension between the whites and the Indians to negotiate with them by treaty convention and to settle differences, if possible, by treaty, those treaties did not absolutely abrogate the right of the Government to regulate the Indians or, when necessary, to legislate contrary to or inconsistently with a treaty. The primary consideration must be the good of the country and the duty the Government owes to all its citizens, not only the obligation that arose as the result of a previous treaty with the Indians or the duty that was created in the United States by virtue of its superior bargain-

3. Prior to 1871, the United States dealt with the Indian tribes by treaty. The President had the authority to negotiate with them and make agreements which, if ratified by the Senate, were binding. After that date, pursuant to the Appropriation Act of March 3, 1871, 16 Stat. 544, 566, 25 U.S.C.A. § 71, further dealings with them by treaty were forbidden. Agreements continued to be made but they had to be ratified by both houses of Congress and are therefore, acts of Congress. Congress, nevertheless, could legislate without a previous agreement or without even attempting to secure one.

ing position in relation to a weak and defenseless people.

In Lone Wolf v. Hitchcock, 1903, 187 U.S. 553, 566, 23 S.Ct. 216, 221, 47 L.Ed. 299, the Court said:

> "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. * * *"

[4] Treaties with the Indians are no different than any other public laws and are subject to contrary legislation by the Congress when it is felt to be in the interest of the country. By the same token, treaties with foreign countries can be breached by legislation from the Congress if it is deemed to be in the best interests of the country.

The Court further said in Lone Wolf v. Hitchcock, supra, 187 U.S. at pages 565, 566, 23 S.Ct. at page 221:

> "* * * Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, [Chae Chan Ping v. U. S.] Chinese Exclusion Case, 130 U. S. 581, 600, 9 S.Ct. 623, 32 L.Ed. 1068, 1073, the legislative power might pass laws in conflict with treaties made with the Indians. [Citations omitted.]

The Supreme Court, in Choate v. Trapp, 1912, 224 U.S. 665, 671, 32 S.Ct. 565, 567, 56 L.Ed. 941, while speaking on this subject, stated as follows:

> "* * * the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States."

[5, 6] The state of the law being thus, the fact that the defendant did not secure the required 75 percent of the male adult signatures on the 1876 agreement with the Indians is immaterial. The Government was free to legislate in spite of this and, in fact could have legislated without even attempting to negotiate an agreement. The only standard the Government had to observe was that it be in the best interests of the country to enact such contrary legislation, and that the Indians be treated fairly by it in view of the fact that they had been made certain guarantees by the treaty that was about to be abrogated. Fair treatment would include payment by the United States of just compensation for the lands taken. This, of course, would be necessary whether the suit involved Indians or other citizens. As the Court stated in Missouri, Kansas & Texas Railway Company v. Roberts, 1894, 152 U.S. 114, 117, 14 S.Ct. 496, 38 L.Ed. 177 "* * * the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race * * *."

[7] It may be further pointed out that it is a basic principle of Indian law that even when lands are granted to a tribe of Indians by treaty, the fee remains in the United States subject to the Indians right of occupation. While the Indians have a better title than they had before the treaty guaranteed the

land to them, it is not absolute. They cannot alienate the land without the permission of the Government of the United States.

> "Though the lands of the Indians were reserved by treaty for their occupation, *the fee was always under the control of the government;* and when transferred, without reference to the possession of the lands, and without designation of any use of them requiring the delivery of their possession, the transfer was subject to their right of occupancy; and the manner, time, and conditions on which that right should be extinguished were matters for the determination of the government, and not for legal contestation in the courts between private parties. This doctrine is applicable, generally, to the rights of Indians to lands occupied by them under similar conditions. * * * *The right of the United States to dispose of the fee of land occupied by them,* * * * *has always been recognized by this court from the foundation of the government.*" Missouri, Kansas & Texas Ry. Co. v. Roberts, supra, 152 U.S. at pages 116 and 117, 14 S.Ct. at pages 497.

The aforementioned being the controlling principles of law, the court cannot sustain the allegation of duress and must declare that the Government's action in requiring the cession of the land was, at least, not improper though it is liable to the extent of paying the Indians just compensation for the lands acquired.

[8] The appellant's reliance on its guardian-ward theory of determining the conscionableness of the consideration is not well founded. If the United States was in any legal sense the guardian of the Sioux with respect to the property in question, there might be some merit to appellant's argument. However, we do not find that the legal relationship of guardian and ward did exist between the United States and the Sioux. While it has often been said by this court and the Supreme Court that the general relationship of the Government to the Indians of the United States is *similar* to that of a guardian and ward, it has never been held that such a general relationship amounts to a legal guardian-ward relationship in the absence of some specific language to that effect in a treaty, agreement, or act of Congress. In the absence of such specific language, the general relationship of the United States to the Indians has been that of a strong and powerful sovereign to a comparatively weak and defenseless people and because of that fact, the courts have likened the relationship to that of guardian and ward and held that doubts in treaties and agreements should be resolved in favor of the weak and defenseless party to such treaties and agreements. This issue of the existence of a legal guardian-ward relationship between the Indians and the United States absent a specific provision in a treaty or agreement spelling out such a relationship was before this court in the case of Gila River Pima-Maricopa Indian Community, v. United States, Ct.Cl., 140 F.Supp. 776, 780, which stated:

> "Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presented arises. It is true that the word 'fiduciary' and the expression 'guardian-ward relationship' have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is 'similar to' or 'resembles' such a legal relationship and that doubtful language in the treaty or statute under consideration should

be interpreted in favor of the weak and dependent Indians. Creek Nation v. United States, 318 U.S. 629, 642, 63 S.Ct. 784, 87 L.Ed. 1046."

A reference to the Treaty of Fort Laramie, supra, or the treaty of 1868, supra, upon which this claim is based, will show no provision whereby the United States assumes the status of guardian of the Sioux Tribe of Indians in relation to the land in question. Accordingly, appellant cannot properly base this claim for conscionable consideration on the amount it would have received had the Government been required to manage the appellant's property as a legal guardian for the benefit of its ward.

The appellant does not, and well it cannot, question the power of the Government to take the property in question upon the payment of just compensation. It asserts its guardian-ward argument only as a means of substantiating its theory of compensation on a royalty basis.

[9, 10] It is a long established rule that just compensation must be based on the value of the property as of the time of its acquisition by the Government, in this case February 28, 1877; United States v. Miller, 1943, 317 U.S. 369, 373–375, 63 S.Ct. 276, 87 L.Ed. 336. In determining just what the value of the land was at the time of acquisition many things must be taken into consideration including the minerals in the ground and the timber standing thereon. United States v. Shoshone Tribe, 1938, 304 U.S. 111, 116–118, 58 S.Ct. 794, 82 L.Ed. 1213. Not to be forgotten in establishing this valuation are the facilities available for extracting the minerals and the means of transportation available after they have been extracted. Therefore, mere knowledge that gold in paying quantities lay beneath the ground in a given tract of land does not make it valuable if it can be mined only at an exorbitant expense. Thus, the projected value of a piece of gold bearing land in 1877 would not be as great as it is in this present day of rapid transportation and modern mining methods. The appellant seems to agree with these considerations in valuing a piece of property as it conceded that if the property, for the purposes of this suit, is to be valued as of 1877 they have already been overpaid for the property.

[11] Since the appellant admits that as a result of the treaty of 1868 and its provisions for payment for the land it has already been paid in excess of the 1877 value of the land in question, and since the proper method of compensating for property taken is to base it on land values at the time of the acquisition, the appellant's claim is without merit. The Sioux have been justly compensated for the land they were forced to cede to the United States.

On appeal the appellant asserts that the Commission's findings of fact numbered 19, 22, and 23 are in error. The court does not find any error as the findings are substantially supported by the evidence in the record.

Finding 19, relating to duress or undue influence in securing the signatures of the Indians on the agreement which formed the basis for the 1877 act, has been discussed earlier herein. Finding 23, to the effect that the Indians were paid conscionable consideration and dealt with fairly and honorably under all the circumstances in relation to the land in question, has also been discussed earlier herein. Finding 22 is to the effect that the evidence in the record failed to establish that the Government or subsequent private owners of the land in question profited in any way from the gold and silver mined from the land; that the evidence also failed to establish what expense was involved in the mining of gold and silver from the property in question or that a monetary consideration based on a guess as to the prospective value of the mineral deposits in the land would have been as safe a provision for the future subsistence of the Indians as the actual monetary consideration provided for the land in the 1877 act. While this finding may not have been necessary to support the Commission's decision, it is

true that the evidence in the record does not establish any of the facts stated, and that circumstance does bolster the Commission's conclusion that the Indians were fairly and honorably treated and that the consideration paid them for their land was not unconscionable in view of all the facts and circumstances.

Appellant also makes seven specifications of errors of law. The first two relate to the guardian-ward relationship which has already been disposed of above. The third and fourth are as follows:

> "(3) It was error for the Commission to enter a dismissal of Plaintiffs' petition at a preliminary stage of the proceedings, when the entire matter was before the Commission on a pretrial basis, without proof but based on estimates of mineral and timber production.
>
> "(4) It was error for the Commission to enter a decision dismissing the case without extending to the Plaintiffs' the right to establish, by testimony, the contentions of Plaintiffs."

The proceedings were not dismissed at the pretrial stage. The plaintiff's case had already been rested once and a motion to dismiss for failure of proof was made by defendant, but denied. Plaintiff offered no proof of the value of the land. It was plaintiff's contention that the question of liability should be determined first, and only after that was decided should proof of value be determined. Subsequent briefs by the plaintiff and defendant were permitted by the Commission. In its briefs, and orally before the Commission, plaintiff insisted on its theory of determining the proper compensation for the lands, it being based on a percentage of the value of minerals extracted since the date of acquisition by the United States. The Commission disagreed, and announced to the plaintiff that the correct method would be by proving the value of the land at the date of acquisition by the Government. The plaintiff did not indicate that it would attempt to prove what the value was on that date and did not offer any evidence to that effect. The Commission then made its findings and conclusions denying the plaintiff recovery. If, as argued for in assignment of error number (4), the Commission had allowed the Plaintiff to establish its contentions by testimony respecting value based on later royalty payments, the result would have been nothing but a waste of time. Assuming without deciding that it was error for the Commission not to allow plaintiff to introduce evidence supporting its theory of value, it was harmless error and not prejudicial to the plaintiff's case. See United States ex rel. Lindenau v. Watkins, D.C., 73 F.Supp. 216; Midland Valley R. Co. v. Railway Express Agency, 10 Cir., 105 F.2d 201; Williams v. Great Southern Lumber Co., 277 U.S. 19, 48 S.Ct. 417, 72 L.Ed. 761.

The fifth specification of error of law complains that the Commission disregarded the plaintiff's pleas for relief under categories numbered (2), (3), (4), and (5) of section 2 of the Indian Claims Commission Act, supra. There is no merit in this specification. The Commission in its decision and findings specifically ruled on the conscionableness of the consideration, duress, and fair and honorable dealings, such being the substance of categories numbered (3) and (5). Category (2), we think, involves a claim already decided by this court, Sioux Tribe of Indians v. United States, 1943, 97 Ct.Cl. 613, certiorari denied 318 U.S. 789, 63 S.Ct. 992, 87 L.Ed. 1155, when this identical case was tried and decided before this court under a special jurisdictional act, 41 Stat. 738, authorizing the Court of Claims "to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon." The Court there held that the claimants had no legal right to any compensation other than that which was provided for by the Act of February 28, 1877, and stated that the only claim the Sioux Indians had, if they had one at all, was moral and until the court was given jurisdiction by the Congress to hear a

moral claim it could not act. The Commission has been given the jurisdiction to hear moral claims under categories numbered (3) and (5). The appellant in this case can bring suit only under those categories. It has done so and relief has been denied.

[12] Category (4) does not give the appellant in this case a claim. That category was included to cover those situations where the United States had, after mutual agreement as to price, acquired Indian land by treaty of cession or otherwise but did not subsequently pay the price already agreed to by the Indians. It does not, as claimed by appellant, give jurisdiction in a situation where land that was taken from the claimant and was actually paid for but in an amount not agreed to by the claimant as is the situation in the case at hand. Payment of the consideration provided for in the act of cession in this case was never withheld from the Indians, in fact, payments are still being made and will continue to be made.

Specifications of error of law numbered 6 and 7 relate to conscionable consideration and duress and have already been disposed of in other parts of this opinion.

The decision of the Indian Claims Commission is affirmed.

It is so ordered.

JONES, Chief Judge, and MADDEN, WHITAKER and LITTLETON, Judges, concur.

tive statement of government interpretation. This convinces us that the plaintiff merely wants to discover *if* there are letter rulings inconsistent with the government's defense. As we previously stated, this is not enough. As a matter of fact, plaintiff's reply brief is replete with "ifs" rather than a showing of relevancy and materiality.

Plaintiff makes the further argument that the decisions of this court in Thermo King Corporation v. United States, 354 F.2d 242, 173 Ct.Cl. 860 (1965) and U. S. Thermo Control Co. v. United States, 372 F.2d 964, 178 Ct.Cl. 561 (1967), support the request made in its subpoena duces tecum.

True, the government in at least the *U. S. Thermo Control Co.* case introduced into evidence private rulings. However, that is not our problem here. We are concerned only with the question of whether plaintiff has sufficiently identified the documents sought and whether it has shown "good cause" for production, not whether such rulings, once voluntarily produced, may be considered. The question of their introduction into evidence and the weight to be given them if received in evidence is for further action.

The court is not holding that the requirements for production under Rule 40 are the same as those under Rules 39 and 51, but is holding that the plaintiff has not met the requirements of Rule 40.

Finally plaintiff argues that the Freedom of Information Act, 80 Stat. 250, 5 U.S.C. App. 1002, gives it the right to the documents sought.

The short answer to this contention is that we can find nothing in the above act which would entitle this plaintiff to engage in a hunt for something which *might* aid it in this action any more than it could within the subpoena or discovery processes. Furthermore, even if inspection could be had under the Freedom of Information Act, supra, the same rules as to identification of the particular documents sought, as well as materiality, we believe should be adhered to.

For the above reasons we reverse the trial commissioner's order and hold that the government's motion to quash the subpoena duces tecum be granted.

The TLINGIT AND HAIDA INDIANS OF ALASKA and Harry Douglas et al., Intervenors,

v.

The UNITED STATES.

No. 47900.

United States Court of Claims.

Jan. 19, 1968.

The Tlingit and Haida Indians of Alaska brought suit against United States under special jurisdictional acts to recover for land and property rights allegedly appropriated by the United States. The Court of Claims, Laramore, J., held that no awards in respect to fishing should have been made.

Judgment for plaintiffs in amount of $7,546,053.80.

Nichols, J., dissented.

1. Eminent Domain ⇐124, 131

Equitable and just compensation for land held by Indian title is measured by date-of-taking fair market value of uncompensated-for property rights.

2. Eminent Domain ⇐131

In determining compensation for Indian land expropriated by United States, "fair market value" of property, in absence of actual market, is estimated or imputed fair market value based on sufficient evidence which justifies conclusion as to fair market value which would be established when an informed seller disposes of his property to equally informed buyer.

3. Eminent Domain ⇐134

In determining compensation owed to Tlingit and Haida Indians of Alaska for land expropriated by United States, "value to Indians" valuation was not authorized. Act June 19, 1935, 49 Stat. 388, as amended; Act June 8, 1906, 34 Stat. 225.

4. Indians ⇐10

Ownership by Indian title, although merely a possessory right of use and occupancy and, therefore, less than full fee simple ownership, is complete beneficial ownership based on right of perpetual and exclusive use and occupancy.

5. Eminent Domain ⇐134

The value of land held by Indian title is the same as that held in fee simple and not value to its primitive occupants relying upon it for subsistence.

6. Eminent Domain ⇐131

Absent statutory modification aboriginal title carries with it same standard of valuation that would be applicable were property held by recognized Indian title or by fee simple ownership.

7. Eminent Domain ⇐131

In determining compensation owed to Tlingit and Haida Indians of Alaska for land expropriated by United States, fair market value standard was correct standard of valuation. Act June 19, 1935, 49 Stat. 388 as amended; Act June 8, 1906, 34 Stat. 225.

8. Eminent Domain ⇐134

In determining compensation owed to Tlingit and Haida Indians of Alaska for land expropriated by United States, commissioner properly proceeded to value each area as a whole and properly considered single highest and best potential use of resources of each tract within larger area, and total value of all tracts was proper basis for unit fair market value determination for each of the six areas, and value could not be duplicated when a single tract of land was subject to multiple use, and each possible use for same single tract could not be cumulated to determine its value. Act June 19, 1935, 49 Stat. 388 as amended; Act June 8, 1906, 34 Stat. 225.

9. Fish ⇐3
Game ⇐1

There is no property right in any private citizen or group to wild game or to freely-swimming migratory fish in navigable waters.

10. Fish ⇐1

Fish are ferae naturae, capable of ownership only by possession and control; no citizen has any right to fish nor to exclude any other citizen from equal opportunity to exercise his right to possession.

11. Indians ⇐6

There are no exclusive rights to fish in Indians.

12. Indians ⇐32

An Indian tribe might exclude non-Indians from fishing in navigable waterways which are within its reservation if grant of reservation includes, as part of that grant, right to fish in designated areas free from interference; this is based on implied or explicit grant of right to fish undisturbed in accustomed aboriginal places.

13. Indians ⇐10

Original Indian title, established by proof of occupancy and use of particular area unrecognized by United States in treaty or reservation grant, is ownership acquired by possession and domination for long periods of time; it is actual, continued and exclusive use of defined territory.

14. Navigable ⇐40

Navigable waterways are not property of adjacent landowners.

15. Fish ⇐3

Sovereign owns right to fish in navigable waters and tide waters within its territorial boundaries.

16. Fish ⇐3

Free-swimming migratory fish in navigable waterway are incapable of possession by ownership of adjacent lands.

17. Indians ⇐10

The right to fish in navigable waterways and reduce free-swimming fish to possession is not a concomitant of aboriginal title to adjacent land because

fish in fishing area subject to Indian use can never be possessed.

18. Property ⇐7

Citizens of sovereign do not possess rights of ownership beyond that which sovereign itself might own; all ownership rights are subject to paramount ownership of sovereign.

19. Indians ⇐6

The government has been denied the power to create exclusive fishing rights in navigable waters even for Indians.

20. Eminent Domain ⇐134

In determining compensation owed to Tlingit and Haida Indians of Alaska for land expropriated by United States nothing could be awarded for fishing rights or fisheries. Act June 19, 1935, 49 Stat. 388 as amended; Act June 8, 1906, 34 Stat. 225.

21. Eminent Domain ⇐85

Indian occupancy rights are compensable only if there is a clear statutory directive creating a right to compensation.

22. Courts ⇐449(1)

Acts giving Court of Claims jurisdiction to adjudicate all claims which the Tlingit and Haida Indians of Alaska may have against United States determines both extent of right to recover and jurisdiction of court, neither of which may be enlarged by imposing liability on government which it has neither expressly assumed nor to which it has consented.

23. Indians ⇐10

The exclusive right to extinguish Indian title is in the United States; taking may occur by issuance of patent for the land or actual taking by United States.

24. Eminent Domain ⇐124

In determining compensation owed to Tlingit and Haida Indians of Alaska for land expropriated by United States, townsites were valued at what they were reasonably worth on date of taking; the fact that value had increased up to that date because of white settlers made no difference. Act June 19, 1935, 49 Stat. 388 as amended; Act June 8, 1906, 34 Stat. 225.

25. Eminent Domain ⇐134

In determining compensation owed to Tlingit and Haida Indians of Alaska for land expropriated by United States, plaintiffs were not entitled to their claim for fair market rental value of townsite lands used and occupied by white settlers prior to dates of taking, and calculated by taking five percent of annual average value of occupied portion of townsite. Act June 19, 1935, 49 Stat. 388 as amended; Act June 8, 1906, 34 Stat. 225.

26. Eminent Domain ⇐134

In determining compensation owed to Indians for land expropriated by United States, value of land includes fair market value of its mineral contents, and mineral value is established by adequate proof of fair market value indicating that removal of deposit would be profitable venture and would not involve exorbitant expense.

27. Eminent Domain ⇐300

Those facts to which a court looks in ascertaining value, which are not proved probable, remain mere speculation and may not be basis for valuing Indian property expropriated by United States.

28. Eminent Domain ⇐300

Plaintiffs suing for compensation owed to Tlingit and Haida Indians of Alaska for land expropriated by United States did not sustain their burden of proof as to value by establishing that removal of mineral lode on date of taking would be profitable. Act June 19, 1935, 49 Stat. 388 as amended; Act June 8, 1906, 34 Stat. 225.

29. Eminent Domain ⇐300

In determining compensation owed to Tlingit and Haida Indians of Alaska for land expropriated by United States, finding of no value for hemlock forest lands was supported by the evidence. Act June 19, 1935, 49 Stat. 388 as amended; Act June 8, 1906, 34 Stat. 225.

I. S. Weissbrodt, Washington, D. C., attorney of record, for plaintiffs. Abe W. Weissbrodt and Ruth W. Duhl, Washington, D. C., of counsel.

Ralph A. Barney, Washington, D. C., with whom was Asst. Atty. Gen. Edwin L. Weisl, Jr., for defendant.

James C. Peacock, Washington, D. C., for intervenors.

Before COWEN, Chief Judge, REED, Justice (Ret.) sitting by designation, JONES, Senior Judge, LARAMORE, DURFEE, SKELTON, and NICHOLS, Judges.

OPINION

LARAMORE, Judge.

The Act of June 19, 1935, 49 Stat. 388, ch. 275 (as amended by Act of June 5, 1942, 56 Stat. 323, and Act of June 4, 1945, 59 Stat. 231) gave this court jurisdiction to adjudicate all claims which the Tlingit and Haida Indians may have against the United States, including compensation owed both for land and other tribal property rights in southeastern Alaska expropriated by the United States and for the failure of, and refusal by, the United States to protect those property rights from usurpation by non-Indians.

By our decision of October 7, 1959 (Tlingit and Haida Indians of Alaska v. United States, 177 F.Supp. 452, 147 Ct.Cl. 315), we held that the Indians, as a tribe, had established aboriginal Indian title to six designated areas on the Alaskan archipelago by their exclusive use and occupancy of that territory from time immemorial. In redress for the uncompensated and uncontested taking by the United States, equitable and just compensation, as provided for in the Act, was held owed to the Tlingit and Haida tribes. The court remanded the case for further proceedings to determine the amount of recovery, the existence and amount of any offsets available to the United States, and whether or not the Indians had voluntarily abandoned any of their land prior to the date of taking by the United States.

Trial Commissioner Saul R. Gamer, in his report filed September 12, 1966, concluded that none of the land had been abandoned prior to the taking date and that no offsets are available to the United States. In addition, he awarded damages in an amount determined by two alternative methods of measurement; first, the fair market value on the date of taking, $15,934,368.80 and second, the value to the Indians, as aboriginals, for their own subsistence, $1,287,200.

Both parties except to these findings of fact and by brief and oral argument contest both the proper valuation standard and the application of that standard to the instant facts. We adopt the fair market value standard of valuation and, in part, the application of that standard by the commissioner. First, we will discuss the threshold issue of a correct standard for valuation and, subsequently, the application of that standard to fishing sites, townsite locations, and mineral and forest land areas.[1]

I

Our 1959 decision developed the factual background of this case in detail and only a brief review of the development of this litigation is appropriate. It involves valuing six separate areas of over 17,500,000 acres, each area having a different valuation date ranging from 1891 to 1925, different resources, and numerous land parcels patented over a 50-year period. Over a hundred different mining properties, some 10,700,000 acres of forest land, land in several townsite areas and fishing right valuations produced voluminous appraisal reports and extensive expert testimony. The critical dates of taking, as of which a valuation must be determined, were stipulated to have occurred as follows: The Annette Islands, 86,730 acres, by the Act of March 3, 1891 (26 Stat. 1095); 14,956,312 acres in Tongass National Forest taken by Executive Proclamations of August 20,

1. The commissioner has made findings relative to value to the Indians of fishing rights which the court has rejected. We, however, have included said findings for background purposes only.

1902, September 10, 1907 and February 16, 1909 (except parcels patented prior to those dates), issued pursuant to the Act of March 3, 1891, supra; and 2,558,-246 acres set aside as the Glacier Bay National Monument by Presidential Proclamations of February 26, 1925 and June 10, 1925, issued pursuant to the Act of June 8, 1906 (34 Stat. 225). The parties have not stipulated to a taking date for Area six, some 2,634,744 acres of land, none of which was included in any other taking. The commissioner concluded that except for eight small parcels for which patents were granted, Indian title to this area has not been extinguished. We agree with that conclusion and find that the eight areas held by aboriginal title were taken by the United States on that date when the patents were granted. These are the properties for which we must now find a value.

II

[1] This court has held that equitable and just compensation for land held by Indian title is measured by the date-of-taking fair market value of the uncompensated for property rights. Miami Tribe of Oklahoma v. United States, 175 F.Supp. 926, 146 Ct.Cl. 421 (1959); Otoe and Missouria Tribe of Indians v. United States, 131 F.Supp. 265, 131 Ct.Cl. 593 (1955), cert. denied, 350 U.S. 848, 76 S. Ct. 82, 100 L.Ed. 755 (1955); Alcea Band of Tillamooks, et al. v. United States, 87 F.Supp. 938, 115 Ct.Cl. 463 (1950), cert. granted as to valuation, 340 U.S. 873, 71 S.Ct. 121, 95 L.Ed. 635 (1950), reversed as to award of interest, 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738 (1951); Rogue River Tribe of Indians, et al. v. United States, 89 F.Supp. 798, 116 Ct. Cl. 454 (1950), cert. denied, 341 U.S. 902, 71 S.Ct. 610, 95 L.Ed. 1342 (1951); Shoshone Tribe of Indians v. United States, 85 Ct.Cl. 331 (1937), aff'd, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1090 (1938).

[2] The fair market value of property, in the absence of an actual market, is the estimated or imputed fair market value based on sufficient evidence which justifies a conclusion as to the fair market value which would be established when an informed seller disposes of his property to an equally informed buyer. Miami Tribe of Oklahoma v. United States, supra; Red Lake, Pembina and White Earth Bands, et al. v. United States, 164 Ct.Cl. 389 (1964); Otoe and Missouria Tribe of Indians v. United States, supra.

[3] Defendant has admitted that the proposed "value to the Indians" is without legal precedent and predicated solely on its interpretation of the jurisdictional act and our previous 1959 liability decision. References by this court in our earlier decision to various resources important to the Indians which could be considered in any determination of the fair market value of their land does not authorize a "value to the Indians" valuation. The jurisdictional act does not refer to a standard of valuation other than equitable and just compensation for all claims.

[4–7] Ownership by Indian title, although merely a possessory right of use and occupancy and, therefore, less than full fee simple ownership, is the complete beneficial ownership based on the right of perpetual and exclusive use and occupancy. The value of land held by Indian title is the same as that held in fee simple and not the value to its primitive occupants relying upon it for subsistence. United States v. Shoshone Indians, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1090 (1938); and United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 (1938). Absent statutory modification, aboriginal title carries with it the same standard of valuation that would be applicable were the property held by recognized Indian title or by fee simple ownership. Minnesota Chippewa Tribe v. United States, 315 F.2d 906, 161 Ct.Cl. 258 (1963). The jurisdictional act neither by its terms nor its legislative history provides for any other valuation standard. We adopt the fair market value standard as correct and expressly reject the value to the Indians valuation procedure.

Reaffirming our position as originally adopted in Alcea Band of Tillamooks, et

al. v. United States, supra, and Rogue River Tribe of Indians, et al. v. United States, supra, in Otoe and Missouria Tribe of Indians v. United States, supra, we explicitly rejected the "value to the Indians" subsistence standard and stated that proper consideration must be given to:

> * * * the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value * * *. [131 Ct.Cl. at 633, 131 F. Supp. at 290.]

Defendant objects, as a matter of law, to the determination of fair market value by separately appraising each component resource—timber, fisheries, game, townsites and other lands—and then cumulating these individually determined values to establish a fair market value. Allegedly, this violates the unit rule of valuation we stated in Yakima Tribe v. United States, 158 Ct.Cl. 672 (1962), whereby each land area is valued as a whole in light of its highest and best potential use.

[8] The procedure adopted by the commissioner, however, was to value each area as a whole.[2] Each land area had several exploitable resources, each of which was independently disposable. The single highest and best potential use of the resources of each tract within the larger area was considered. The total value of all tracts was the basis for a unit fair market value determination for each of the six areas. The decision in *Yakima*, supra, precludes duplication of value when a single tract of land is subject to multiple use. Each possible use for the same single tract of land may not be cumulated to determine its value. The total unit value of each area is the cumulative value of each tract within that larger area to which a single highest use of timber, forest or mineral value has been assigned. No single tract value is the total of all of the various uses to which it might have been put. This valuation procedure is appropriate in the absence of an actual market. See Alcea Band of Tillamooks, et al. v. United States, supra; and Citizen Band of Potawatomi Indians of Oklahoma v. United States, 179 Ct.Cl. 473 (1967), petition for cert. denied 389 U.S. 1046, 88 S.Ct. 771, 19 L.Ed.2d 839.

In United States v. Emigrant New York Indians, et al., 177 Ct.Cl. 263 (1966), wherein an actual sales market and proof of comparable sales were similarly absent, we restated the factors and criteria upon which valuation under these circumstances is determined as:

> * * * (a) the prevailing economic situation and the condition of the money market; * * * (c) the relative ease of accessibility to the area; (d) the effect of the existence of more suitable and marketable land in other areas; * * * (h) the existence of various minerals and other natural resources; (i) the existence, location, and extent of timber land within the tract; and (j) the proximity of the land to markets, distribution centers, and transportation facilities. [177 Ct. Cl. at 285].

By taking into account the various factors upon which a market value for the whole area is found, the commissioner's determination was in accord with our fair market value principles.

In Yakima v. United States, supra, we affirmed the procedure whereby the Indian Claims Commission valued the property as a whole by balancing the various factors which bear upon and establish a fair market value including available vegetation, timber, and communication and transportation facilities. The value established for the entire tract was

2. At this point we note that the defendant accepts the valuation figures found by the commissioner, if we accept his method of valuation. In oral argument, government counsel stated that the amount found is fair to the Indians and fair to the government. Further, in its brief, the defendant makes this statement: "Nevertheless in an effort to end this litigation we accept the amounts determined by the Commissioner * * *."

premised on its single highest and best use as timberland or as timberland with limited grazing. The absence of any mineral, agricultural or wildlife value permitted assignment of only one use. We approved the rejection of a proposed valuation technique which would have separately appraised the various kinds of timber, the bare land, and the improvements on the same parcel of land. This would have given several values to the same tract of land by appraising its component parts.

The Tlingit and Haida lands were divided by area; each smaller tract within the area was assigned a single highest and best use. There is no duplication of value which might be created if each component potential use of the same acreage area were valued and then cumulated to obtain a value for that tract.

We can find no error in the commissioner's acceptance of evidence as to the value of each tract, whether it be timber, minerals, etc. As a matter of fact, courts have permitted exactly this, especially when an ultimate overall finding of valuation is arrived at. See United States v. City of New York, 165 F.2d 526 (2d Cir. 1948); Cade v. United States, 213 F.2d 138 (4th Cir. 1954); Uintah and White River Bands of Ute Indians v. United States, 152 F.Supp. 953, 139 Ct. Cl. 1 (1957); Alcea Band of Tillamooks, et al. v. United States, supra. Similarly, the Indian Claims Commission has relied upon testimony by experts of both petitioners and the government of separate values for separate classifications of land. Coeur D'Alene Tribe of Indians v. United States, 6 Ind.Cl.Comm. 1 (1957); The Snake or Piute Indians of the Former Malheur Reservation in Oregon v. United States, 7 Ind.Cl.Comm. 526 (1959); Delaware Tribe of Indians v. United States, 8 Ind.Cl.Comm. 150 (1959); The Nez Perce Tribe of Indians v. United States, 8 Ind.Cl.Comm. 220 (1959).

We find that the fair market valuation procedure establishing a value for the whole area, after consideration of the various highest and best uses for each tract, was proper.

III

Relying on the legislative history of the jurisdictional act and language in our decision on the issue of liability (147 Ct. Cl. 315, 341, 177 F.Supp. 452), plaintiffs have concluded that the United States failed to protect the exclusive occupancy and use of aboriginal Tlingit and Haida fishing rights in the waters both within and surrounding the external boundaries of the land areas in question. Because the defendant permitted non-Indians to extract fish and thereby violated plaintiffs' alleged exclusive right to reduce the fish at a specific site to their possession, the commissioner permitted recovery in an amount equal to the fair market value of this lost, exclusive right on the date of taking of the land area adjacent to a particular fishery. This value was measured by the commercial profits earned by the non-Indian salmon canning industry which fished in these navigable waterways.

Plaintiffs' expert reconstructed a hypothetical "excess profit" which the industry should have paid to the Indians for the right to fish in waterways otherwise subject to the exclusive proprietary fishing rights of the plaintiffs. The value of the fishery was determined by economic principles which established a derived demand for raw salmon based upon the known demand for canned salmon. Plaintiffs' expert admitted that there are no comparable sales of a right to engage in commercial fishing and rejected a fair market valuation by measuring income of the fishermen selling to canneries because available data on the date of taking was inadequate.

Plaintiffs measure the fishery value by the profitability of the fish processing industry compared with the yield of alternative capital investment in industries with substantially comparable risks. The added profitability available from investment in the fish processing industry is attributed to the income-producing potential of the fishery.

The valuation technique involves a tripartite subdivision of the price per

case of canned salmon prevailing on the date of taking into estimated costs including a normal rate of return on invested capital, the "excess profit" to the cannery attributable to free access to the fisheries and the "excess profit" to independent fishermen selling to the cannery. The total of the two "excess profits" is the income attributable to free access to the fishery which was available only because the government failed to protect the rights of plaintiffs. To that total the expert added an additional income which he calculated would have been derived by more efficient fishing methods and an amount which private exploitation would have yielded. This total income from the fisheries, expressed as cents per case of canned salmon, is applied to a projected average annual income from the fisheries based on data from the period prior to and subsequent to the date of taking. From this he derived an expected average annual income, which when capitalized at a rate varying with the date of taking of each area, established a fair market value of the fishery resource.

The government by failing to protect these rights allegedly destroyed a private property right by making the area a common fishery. This inaction, the commissioner held, was sufficient to permit inclusion of the fishery in the valuation of the adjacent land areas. This was considered as a resource of the area and, therefore, compensable.

Each acre of land had been assigned a value based on the most profitable resource that it contained. Superimposed on the total value of an area was this additional value of adjacent fishing locations, which, it is alleged, is a factor in establishing the market value of the land.

Albeit novel in approach, the valuation technique of plaintiffs, adopted by the commissioner, assumes the answer to the threshold question, i. e., whether or not there are compensable proprietary exclusive fishing rights, title to which might be established by proof of aboriginal Indian title to adjacent land areas. Neither the decisions of this court nor the jurisdictional act provide for recovery of lost aboriginal fishing rights.

[9–11] Since the primordial decision in Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896), it has been uniformly held that there is no property right in any private citizen or group to wild game or to freely-swimming migratory fish in navigable waters. Fish are *ferae naturae*, capable of ownership only by possession and control. No citizen has any right to the fish nor to exclude any other citizen from an equal opportunity to exercise his right to possession. Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). This court has repeatedly adhered to that rule of law. Aleut Community of St. Paul Island v. United States, 117 F.Supp. 427, 431, 127 Ct.Cl. 328, 334 (1954). Cf. Bishop v. United States, 126 F.Supp. 449, 130 Ct.Cl. 198 (1954), cert. denied, 349 U.S. 955, 99 L.Ed. 1279, 75 S.Ct. 884 (1955); Fleming v. United States 352 F.2d 533 173 Ct.Cl. 426 (1965). There are no exclusive rights to fish in Indians. United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

[12] An Indian tribe might exclude non-Indians from fishing in navigable waterways which are within its reservation if the grant of the reservation includes, as a part of that grant, the right to fish in designated areas free from interference. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918); Moore v. United States, 157 F.2d 760 (9th Cir. 1946), cert. denied, 330 U.S. 827, 67 S.Ct. 867, 91 L.Ed. 1277 (1947); Metlakatla Indian Community v. Egan, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962); Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct.Cl. 487 (1964), cert. denied, 379 U.S. 946, 85 S.Ct. 441, 13 L.Ed. 2d 544. This is based on the implied or explicit grant of a right to fish undisturbed in accustomed aboriginal places.

[13] Original Indian title, established by proof of occupancy and use of a particular area unrecognized by the United States in a treaty or a reservation grant,

is ownership acquired by possession and domination for long periods of time. It is the actual, continued and exclusive use of a defined territory. Miami Tribe of Oklahoma v. United States, supra; Tee-Hit-Ton Indians v. United States, 120 F.Supp. 202, 128 Ct.Cl. 82 (1954), aff'd, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314, reh. denied, 348 U.S. 965, 75 S.Ct. 521, 99 L.Ed. 753 (1955); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 65 S.Ct. 690, 89 L.Ed. 985 (1945), reh. denied, 324 U.S. 890, 65 S.Ct. 1010, 89 L.Ed. 1437, motion denied, 325 U.S. 840, 65 S.Ct. 1552, 89 L.Ed. 1966.

[14, 15] Navigable waterways have never been the property of adjacent land owners. It has long been recognized that the sovereign owns the right to fish in the navigable waters and tide waters within its territorial boundaries. Martin v. Waddell, 41 U.S. 367, 10 L.Ed. 997 (1842); Manchester v. Com. of Massachusetts, 139 U.S. 240, 11 S.Ct. 559, 35 L.Ed. 159 (1891).

[16, 17] Free-swimming migratory fish in a navigable waterway are incapable of possession by ownership of adjacent lands. The right to fish in navigable waterways and reduce free-swimming fish to possession is not a concomitant of aboriginal title to adjacent land because the fish in a fishing area subject to Indian use can never be possessed.

We have previously concluded that aboriginal fishing rights did not exist. In Tee-Hit-Ton Indians v. United States, 132 F.Supp. 695, 132 Ct.Cl. 624 (1955) we said:

> It [the tribe] says that an Indian tribe, like any person, may acquire by immemorial usage, or at least might have so acquired, at the time it claims to have acquired its right, an exclusive right to fish in certain waters, even against the Government. [132 Ct.Cl. at 625, 132 F.Supp. at 696]

The court therein found that there had been no grant to the Indians after our acquisition of the land from Russia in 1867. We did not determine if aboriginal rights existed. We did indicate, however, that whatever aboriginal rights there may be did not survive our acquisition from Russia.

[18, 19] Citizens of a sovereign do not possess rights of ownership beyond that which the sovereign itself might own. All ownership rights are subject to the paramount ownership of the sovereign. The government has been denied the power to create exclusive fishing rights in navigable waters even for Indians. Hynes v. Grimes Packing Co., 337 U.S. 86, 122–123, 69 S.Ct. 968, 93 L.Ed. 1231 (1949); Organized Village of Kake v. Egan, 369 U.S. 60, 62, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962); Metlakatla Indian Community v. Egan, supra.

An attempt to create an exclusive fishery was rejected by the Supreme Court in Hynes v. Grimes Packing Co., supra, wherein the court said, speaking through Mr. Justice Reed:

> It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of Interior to alienate the Alaska fisheries permanently from public control. [at 105, at 980 of 69 S.Ct.]

In *Organized Village of Kake*, supra, the Supreme Court defined the right of these same Tlingit tribes to erect salmon traps at fishing sites designated by the Secretary of the Interior and to anchor them in the Tongass Forest. In 1960 the new state of Alaska enacted a statute forbidding salmon trap fishing. The Indians urged "that in using fish traps they were exercising an aboriginal right to fish." The court did not answer the question whether there is a "property aboriginal right to fishing" but found that the state had power to regulate any aboriginal Indian rights that may exist.

The Alaska Supreme Court decision in Metlakatla Indian Community v. Egan, 362 P.2d 901, Alaska (1961), held that fishing "rights" were merely privileges given to the Indians in common with whites. That court held that no rights to fishing locations existed and, therefore, no such rights could be held by the

United States for the benefit of the Indians.

The Supreme Court, construing a treaty with the Yakima Indians in United States v. Winans, supra, held that the Indian right to fish in accustomed places within their reservation was acquired by the reservation grant. This right was permitted by the United States. Fishing beyond those borders, however, was in common with all others. The only right in the Indians was a right of access to their accustomed fishing areas which imposed a servitude on land adjacent to their accustomed fishing places over which they might have to pass to reach their fishery.

Alaskan courts have consistently held that the first to occupy a trap or fishing location with a trap completed by the opening day of the salmon season in any year, is entitled to fish at that spot for the entire year. Fisher v. Everett, 66 F.Supp. 540, 11 Alaska 1 (D.C.D.Alaska 1945); General Fish Co. v. Markley, 105 F.Supp. 968, 13 Alaska 700 (D.C.D. Alaska 1952). No person acquires any vested rights by virtue of possession in a prior year. Each location must be reoccupied the next year. There are no vested proprietary rights.

[20] We hold that there are no fishery rights based on aboriginal ownership of the land and that no right of recovery is established by the jurisdictional act. Moreover, were there a statutory right to compensation for a fishery, the value of the fish therein would not be an appropriate valuation technique.

Plaintiffs insist that the jurisdictional act includes a right to recover for lost fishing rights and that our prior decision affirmed their interpretation of the Act. Neither conclusion is accurate. The Act granted jurisdiction to adjudicate whatever existing rights the Indians may have and to award an equitable and just compensation.

Plaintiffs argue that recovery is authorized by the statement:

> All claims of whatever nature, legal or equitable, which the said Tlingit and Haida Indians of Alaska may have, or claim to have, against the United States, for lands or other tribal or community property rights, * * * shall be submitted to the said Court of Claims * * * for the settlement and determination of the equitable and just value thereof, * * *. [147 Ct.Cl. at 343]

The references to tribal community property, it is alleged, indicates a congressional intent to provide for recovery of the value of lost fisheries. Plaintiffs concede that their right to recover is statutory and that, unless the reference to all tribal property rights includes a right to exclusive use of the fisheries, there is no recovery.

[21] Plaintiffs interpret the term "property rights" as having included the fishing rights. Reading the legislative history of this Act as a whole we do not agree. Therefore, we find that there is no compensable statutory property right in migratory fish for which plaintiffs might receive compensation. Nor is there a property right to a fishery location based on aboriginal occupancy and use.

[22] Indian occupancy rights are compensable only if there is a clear statutory directive creating a right to compensation. United States v. Alcea Band of Tillamooks, et al., 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29 (1946); Aleut Community of St. Paul Island v. United States, supra; Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955). The Act determines both the extent of plaintiffs' rights to recover and the jurisdiction of this court, neither of which may be enlarged by imposing a liability on the government which it has neither explicitly assumed nor to which it has consented. Price v. United States and Osage Indians, 174 U.S. 373, 33 S.Ct. 106, 43 L.Ed. 1011 (1899); Klamath and Moadoc Tribes of Indians v. United States, 296 U.S. 244, 56 S.Ct. 212, 80 L.Ed. 202 (1935).

The legislation was enacted to provide compensation for the land taken from these Indians and to provide compensation for the failure to aid and protect

them in the manner in which neighboring tribes were protected. The land taken prevented access to the fishing site and denied the Indian his opportunity to fish as easily as had been previously possible. The value of the land and the resources on that land which enhanced its value, and to which they had title, are the only bases for compensation.

Earlier references to "land and water aboriginally used and occupied" (147 Ct. Cl. at 341, 177 F.Supp. at 468) is not authority for recovery of the value of fishing areas or waters aboriginally used. Navigable waterways are not subject to private possession. Only such inland non-navigable streams and lakes which are within their territorial boundaries might be compensable.

The reference to the right or opportunity to fish in the area surrounding the land to which they held title does not establish an exclusive, compensable property right to extract all fish in a fishery. Exploitation of the opportunity to fish was made more difficult when the land was taken because access was then denied.

Land is the property for which liability was awarded in 1959. Fish in adjacent navigable rivers are not a resource of the land. The only added value which might accrue to the land because of the proximity to the fishery is the value of an easement over the land which provides both access to the fishery and an opportunity to exercise a common fishing privilege. This easement of access was taken.

A prospective purchaser would not pay for the right of access if alternative access was available without substantial additional cost or difficulty. Permitting non-Indians to fish in the area in common with the plaintiffs did not deprive them of the opportunity to take possession of the fish. Unless we conclude, which we do not, that the Indians owned the right to remove all fish and, therefore, owned all of the fish, there is no compensable value lost when others fish in the area. There is no aboriginal right based on occupancy and use which gives the plaintiffs title to the fish or an exclusive right to remove all fish. We hold, therefore, that the value of the fisheries did not enhance the value of the land and, therefore, it is not properly includible in a computation of value for the land.

IV

We have previously discussed the propriety of valuing property as of the date of taking on the basis of sufficient proof of the fair market value established by a hypothetical prospective purchaser and a hypothetical seller. We now reach the question of townsite and settlement land valuation.

Areas two, three, and five do not have any acreage valued as townsite locations. Area one, taken in 1891, includes a value for the existing town of Metlakatla. Defendant does not challenge that award because the town had been settled, and the value as a town created, by Indians. We find the award for Metlakatla as a town and for the adjacent settlement lands proper.

[23] Plaintiffs claim the value of the townsites in Areas four and six, as populated and settled on the stipulated dates of taking, and the fair market rental value of the towns during the period from original settlement to the date of taking.

The exclusive right to extinguish Indian title is in the United States. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823); United States v. Santa Fe Pacific R. R. Co., 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Taking may occur by issuance of a patent for the land or actual taking by the United States. The Creek Nation v. United States, 302 U.S. 620, 58 S.Ct. 384, 82 L.Ed. 482 (1938); United States v. The Creek Nation, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331 (1935), reh. denied, 295 U.S. 769, 55 S.Ct. 911, 79 L.Ed. 1709.

[24] Defendant contends that the townsites as such have no additional value other than as acreage is valued generally in each area. This, it says, is true because the townsite values were

increased by activities of white settlers. We reject this argument.

The parties have stipulated the date of taking of the land in Area four as February 16, 1909, except for parcels patented prior to that date. If the townsites on those dates had a fair market value of $716,940, the fact that the value had increased up to that date because of white settlers, etc., makes no difference. We are concerned with what the Indians owned at the taking date and what it was reasonably worth at that time.

A taking data for Area six has not been stipulated to by the parties. However, we think the taking date to have been the date the townsites were patented, which is the target date stipulated to in parts of Area four. The acreage in that area for which patents were issued was valued as of the date of such patents. The commissioner found that townsite lands on those dates had a fair market value of $61,494.

Because we have accepted the commissioner's method of valuation in the circumstances of this case, and because the government, on brief, has accepted the commissioner's amount, premised on our acceptance of his method, we conclude that the townsites in Areas four and six had a value, as of the pertinent dates of taking, of $778,434.[3]

[25] We also conclude that plaintiffs are not entitled to their claim for the fair market rental value of the townsite lands in Areas four and six, used and occupied by white settlers prior to the dates of taking, and calculated by taking five percent of the annual average value of the occupied portion of the townsite. The commissioner correctly found that plaintiffs proved neither the estimated annual value of the townsite land nor the basis for a five percent rental value.

V

Plaintiffs except to the finding of mineral values, arguing that the valua-

3. The total townsite value of $778,434 was established as follows:

Area 4 ($716,940):		
Juneau:		
Pre-1909 patent value	$111,835	
1909 value	10,000	
		$121,835
Douglas:		
1909 value		35,000
		156,835
Skagway:		
Pre-1909 patent value	89,375	
1909 value	128,230	
		217,605
Ketchikan:		
1909 value		160,000
Sitka:		
1909 value		37,500
Wrangell:		
Pre-1909 patent value	69,900	
1909 value	2,000	
		71,900
Petersburg:		
Pre-1909 patent value	13,600	
1909 value	59,500	
		73,100
		716,940
Area 6 ($61,494):		
1910–1913 patent value	7,120	
1918 value	54,374	
		61,494
		$778,434

tion criteria are erroneous as a matter of law and that they are improperly applied to the evidence. Purportedly, its evidence proves a value for unexplored mineral areas, and evidence of recorded mining interest sales were allegedly ignored.

[26] The value of land includes the fair market value of its mineral content. Potawatomi Indians v. United States, supra. Mineral value is established by adequate proof of a fair market value indicating that removal of the deposit would be a profitable venture and would not involve exorbitant expense.

[27] Proof either of actual profits from an existing mine or of prospective profits from a potential mineral area establishes the mineral value of the area. The valuation data amassed and the testimony offered by plaintiffs do not establish the required factual proof of the mineral area's prospective profitability which could be translated into a market value for the mineral deposit. Those factors to which a court looks in ascertaining value, which are not proved probable, remain mere speculation and may not be the basis for valuing property. Olson v. United States, 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); Morton Butler Timber Co. v. United States, 91 F.2d 884 (6th Cir. 1937).

[28] After consideration of the speculative nature of the mining venture in unexplored mining areas, the absence of any existing production in the area, the cost of development and the removal and transportation of the minerals, the trial commissioner found that the prospective profitability of the venture was not established. In the absence of proof that the venture would be profitable, no fair market value can be found. We find that the procedure of valuation was correct and that, as applied, plaintiffs did not sustain their burden of proof as to value by establishing that removal of the mineral lode on the date of taking would be profitable.

Plaintiffs have offered proof of recorded sales of the mineral interests as speculations. This proves only the value of property as a speculation but does not establish the value of the mineral. The supply and demand for a speculative property does not establish the value of the mineral. The fair market value of a speculation does not enhance the value of the land or the value of a mineral deposit. The purchase of a right to explore does not prove the value of the minerals which the purchaser believes to be present in the land.

Plaintiffs proved the value of mined mineral in those areas for which compensation was awarded, by proof of the value of the ore as a removed and processed commodity. This established that removal was profitable and the fair market value based on the known value of the mineral deposit was determined. We find the denial of any value for unexplored mining areas for insufficient proof correct.

VI

[29] The failure to find a value for hemlock forest lands is also excepted to as not in accord with the standard of just compensation provided for in the jurisdictional act.

Plaintiffs assert that two subsidiary findings which generated the ultimate conclusion that hemlock forest lands were not significantly valuable are invalid and unsupported by the evidence. These are the findings that (1) there was an insignificant demand, if any, for hemlock forest land; and (2) the price and demand levels for timber in the Pacific Northwest and British Columbia were not comparable to those of southeast Alaska.

The speculative nature of investment in Alaskan hemlock timber areas on the date of taking is not in doubt. The availability, in quantity, of hemlock in the Pacific Northwest and general oversupply in more accessible areas argues against establishing a value for these remote hemlock forests based on the supply and demand in British Columbia or the Pacific forests. The date-of-taking value to a prospective purchaser is the only pertinent value and that value, we find, was minimal.

The absence of proof that it had a merchantable value or that the timber was accessible for commercial exploration justifies denial of any significant value. Chippewa Indians of Minnesota v. United States, 87 Ct.Cl. 1 (1938), aff'd, 305 U.S. 479, 59 S.Ct. 313, 83 L.Ed. 300 (1939); The Warm Spring Tribe of Indians of Oregon v. United States, 103 Ct.Cl. 741 (1945). The assignment of a low value to these forest lands was proper.

Both the ultimate and underlying findings of the commissioner are correct and amply supported by the evidence, except that (1) the commissioner has found a total value for alleged fishing rights of $7,521,500 (Area one, $94,000; Area two, $2,678,000; Area three, $60,000, Area four, $3,661,000; Area five, $1,028,500); and (2), he awarded $866,815 (Areas one–five, $664,605; Area six, $202,210) as damages for the failure of the United States to protect these rights prior to the date of taking. We have concluded that these findings relating to fishing rights are incorrect.

Upon consideration of the arguments of counsel, the evidence presented and the report of Commissioner Gamer, to whom we are indebted for his report, we conclude that the plaintiffs are entitled to recover $7,546,053.80 (the commissioner's total award of $15,934,368.80, less the fishing awards of $8,388,315) as equitable and just compensation for all of their claims against the United States.

NICHOLS, Judge (dissenting):

I regret that I feel compelled to dissent in this case, though perhaps not as keenly as if my views commanded majority support, leading to a new trial and further delay in righting the ancient wrongs done the ancestors of these Indians. My minority position, happily, exempts me from feeling any moral scruples against saying what I think. Then too, I am not certain the errors I am concerned about do not to a degree offset each other, so that in the overall, the amount the court awards may be not so far removed from what I would have awarded if I had had sole charge of the litigation from its beginning.

A preliminary question is this: the court lays great stress on the stipulations and concessions of the parties as eliminating inquiry into issues that otherwise it would have to explore, as e. g., the dates of "taking." I agree that the court is never obliged to inquire into disputes the parties have abandoned, and often it is wiser not to, as in Wagner v. United States, Ct.Cl. 387 F.2d 966, decided December 15th, 1967. It is not deemed to have decided any issue that merely "lurks in the record." Clearly, however, it is not bound, unless it chooses to be, by stipulations as to what the law is, or involving or incorporating a legal conclusion, Sanford's Estate v. Commissioner, 308 U.S. 39, 51, 60 S.Ct. 51, 84 L.Ed. 20, reh. denied 308 U.S. 637, 60 S.Ct. 258, 84 L.Ed. 529 (1939); The Sac and Fox Tribe of Indians of Oklahoma v. United States, 315 F.2d 896, 901, 161 Ct.Cl. 189, 198 cert. denied 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed.2d 165 (1963). In this category I would put e. g., a stipulation as to the date of a "taking" in eminent domain. At times a judge may consider the parties have boxed him into a position he anticipates he will have to break out of sooner or later. Then he should speak out, if for no other purpose, so he will not be forever explaining and distinguishing the case in the future. Here we deal with legal doctrines that will remain alive and important as long as there is a Fifth Amendment to the United States Constitution.

I take up now the matter I find troublesome.

FIRST, The Fisheries. It does indeed seem strange that plaintiffs get nothing for the fisheries in view of our recitals in the original opinion at 147 Ct.Cl. 341, 177 F.Supp. 468, "The most valuable asset lost to these Indians was their fishing rights * * *." No doubt, as we now hold, the supposed value of the fish is not an appropriate valuation technique. No doubt too, as the court says, no one owns or can own any exclusive fishing rights in navigable water, other than, perhaps, relating to shellfish. I would have supposed that one who

owned as plaintiffs here did, all the fast lands bordering on so many sounds, bays, and coves, teeming with fish, would have enjoyed such enormous advantages over others in exploiting the fisheries thereon that willing buyers would have paid enhanced prices for the land, even if they could obtain therewith no ownership in the fish. A person owning a building on Fifth Avenue might claim it was worth more because of its favorable location without thereby asserting any proprietorship in the vehicular and pedestrian traffic daily passing by his door. The recent case of United States v. Rands, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (U.S.Nov. 13, 1967), raises some doubt in my mind about this, but I would have considered whether I could distinguish it if the record gave support to such a theory. The result of our commissioner's going off on the wrong tangent here is apparently that plaintiffs get nowhere at all in just the area where we thought originally they had the best case. I hope this decision is not taken as authority that, should an island such as Cuttyhunk, Block Island, or Tangier be taken by eminent domain, the court in setting a valuation must utterly ignore the fact that fishing goes on from there.

SECOND, The Gold Mines. The taking dates herein, as stipulated, were dates of Congressional enactments or of patents, in most cases confirming titles of persons the court calls "squatters", who had been in occupancy long before. Thus it is the awards to the Indians include payment for some fine producing gold mines, in fact discovered and developed by whites. As the commissioner finds, these mines required the developers to make large capital investments. A squatter is, I suppose, a trespasser, and I find it hard to believe the investors would have knowingly invested in a trespass from which they might be legally ousted at any time. As a practical matter they conceived of themselves as owners, with the confident expectation that their de facto ownership would eventually become a good paper title by Governmental act. After entry but before patent no one, I am sure, would have paid 10¢ for the Indians' underlying title. The Indians' cause of action as now validated by Congress accrued on the first entry, for the legislation makes the Government liable for "failure to protect" as well as for a taking. The "failure to protect" was complete and utter between entry and patent. I think the enactments and patents, relied on as takings, were not intended to extinguish the Indian title, which was not at that time deemed to exist. They were intended to quiet title as between the miners and the United States. A person could not get a patent if he was not already in possession. A mere trespasser, not in good faith, will possibly lose the value of improvements it has itself placed on the land. American Cement Plaster Co. v. Acme Cement Plaster Co., 181 S.W. 257 (Tex.Civ.App., 1915); Cf. Christopher v. Garrett, 292 S.W.2d 926 (Tex.Civ.App., 1956); but it is a misconstruction of the enabling legislation here to put the Government in the position of such a trespasser. So far as I know it has occurred but is contrary to most precedent to make a lawful taker pay for an improvement it has itself installed in good faith. See discussions of the problem of valuing land taken by eminent domain when the taker has in good faith improved the land prior to the taking. Orgel, Valuation Under Eminent Domain (1936) 310 and ff.; 5 Nichols, Eminent Domain (3d Ed. 1952) 224 and ff.

However, if the Indians must be treated as owning the gold mines, still it is wrong to base the award on estimates of the unmined gold in place. Such an award is condemned as speculative. United States v. Sowards, 370 F.2d 87 (10th Cir. 1966) and cases cited at p. 90. Likewise it is wrong to use the estimate of gold in place as a starting point to estimate further profits. United States v. Meyer, 113 F.2d 387 (7th Cir.), cert. denied 311 U.S. 706, 85 L.Ed. 459 (1940). 5 Nichols, Eminent Domain, supra, 230, and cases cited. This is an estimate on an estimate.

In my opinion the Indian Claims Commission handled the problem of valuing Indian lands containing minerals with perfect correctness in The Winnebago Tribe and Nation of Indians, Et Al. v. United States, 16 Ind.Cl.Comm. 81 (1965), which we are affirming without opinion, Ct.Cl. (1968). The Commission refused to make a fact finding speculating on possible profits after the taking date from the mineral involved. For consistency with the proceedings in *Tlingit and Haida*, we should be reversing the Commission, but rightly we are not.

As a practical matter, the original proprietors of the soil, however well protected by law and skillfully represented, could not have expected to pocket all or most of the profits from mining on their lands. It is common knowledge that the party who has the capital, the equipment, the know how, and the access to markets, will always take the lion's share. The commissioner's method of valuation here donates these things to the Indians.

I think a proper award for the property, such of it as had its highest and best use for mining, would be made by postulating a willing buyer and a willing seller negotiating for the fee simple title on the date of first entry, both skillful of course, both knowing whatever was ascertainable about the geology of the area, and both protected by law. United States v. Emigrant New York Indians, 177 Ct.Cl. 263, 289 (1966). From this viewpoint, I would not be too much influenced by the history of the mines that were successful, nor would I deem plaintiffs necessarily out of court as to mineral properties we know by hindsight were never successful. Prices between willing buyers and willing sellers are always influenced by the known presence of minerals, to some extent, however slight.

I am sure if the commissioner had adhered to proper valuation methods his awards for mineral properties would have been much less over all.

THIRD, The Town Sites. I believe these too are grossly overvalued. Again this results from the stipulated taking dates. The Capital of Alaska, Juneau, was not patented until it had been a going concern for many years. Hence the Indians are being paid for a white man's town. If the State House had been built on the taking date, no doubt there would be an award for that also.

FOURTH, The Timber Land. As to this, I merely note that there is no indication that the possession of the Indians was disturbed before the stipulated taking dates, so the problems do not arise.

In short, the Indians are being denied payment for the most valuable de facto asset of which they were deprived and instead are being compensated for de jure assets they never could have reasonably supposed belonged to them. I am sure they will be greatly impressed with the wonders of the white man's justice. We may hold that events prior to the case's coming back before us limit our power to influence the course of events at this point, but I think it appropriate for one of us to register lack of complacency, at least.

Travis T. WOMACK, Jr. and John R. Vorhies, Formerly Partners of Petroleum Ownership Map Company (a Dissolved Partnership)

v.

The UNITED STATES.

No. 269-62.

United States Court of Claims.

Jan. 19, 1968.

Action to recover for certain additional costs incurred in carrying out a contract entered into with the Bureau of Land Management. The Court of Claims held that under contract providing that

lief? Clearly, the answer must be no. The hearings and reports do not indicate that Congress intended to depart from the pattern of earlier sections of the National Housing Act by assuming the responsibility of absolute insurer of the profitable operation of Wherry housing projects.

There can be no question of misrepresentations in the lease or certificate because, as we have seen, no representations as to permanency or occupancy were made. Moreover, the Army's good faith in issuing the certificate is not in question. The fact that conditions changed within a few years of the issuance of the certificate does not mean that it was not honest and accurate when executed. Furthermore, the claim of detrimental reliance on the alleged misrepresentations is weak in terms of the statement made by plaintiff that it would not have undertaken to sponsor the project but for the belief that the Government was assuming the role of absolute insurer. Surely the plaintiff cannot have supposed that the statute was designed to take every normal business risk out of the venture. The contractor must have been aware, also, of the inability of the Government, or any government, to guarantee that defense needs are immutable. For all these reasons the suggestion that the defendant must be held liable on some sort of theory of equitable estoppel is also untenable.

In the absence of any representations conferring contractual guarantees against the impermanency of Henry Barracks and because of the clear intent of the Wherry Act that no such guarantees would be made, we hold that the plaintiff has established no right to recover either the capital it has invested or any possible profits.

The plaintiff's motion for summary judgment will be denied; defendant's cross motion for summary judgment will be granted. The petition will be dismissed.

It is so ordered.

JONES, Chief Judge, and LARAMORE, MADDEN and WHITAKER, Judges, concur.

MIAMI TRIBE OF OKLAHOMA, also known as the Miami Tribe, and Harley T. Palmer, Frank C. Pooler and David Leonard, as Representatives of the Miami Tribe, and of All the Members Thereof, Appellants, Ira Sylvester Godfroy, et al., on Relation of the Miami Indian Tribe and Miami Tribe of Indiana, and Each on Behalf of Others Similarly Situated and on Behalf of the Miami Indian Tribe and Various Bands and Groups of Each of Them, Comprising the Miami Tribe and Nation, Appellants

v.

UNITED STATES, Appellee.

Appeal No. 2-59.

United States Court of Claims.

July 15, 1960.

Proceedings on claims for additional compensation for lands ceded by Indians to United States. The Indian Claims Commission rendered the decision challenged on appeal. The Court of Claims, Madden, Judge, held that there is no exact dividing line between what is "unconscionable" and what is not, and to warrant relief under the "fair and honorable dealings" section of the Indian Claims Commission Act disparity between price paid by government and fair market value of Indian land must be very great; but held that payment of less than half of true value of such land was unconscionable.

Judgment of Claims Commission reversed and case remanded with directions.

Whitaker, Judge, and Jones, Chief Judge, dissented.

1392

1. United States ⇐113

Requirement that Indian Claims Commission's findings of fact be supported by substantial evidence means that they must be supported by evidence which is substantial when whatever in record which fairly detracts from its weight is taken into account. Indian Claims Commission Act, § 20(b), 25 U.S.C.A. § 70s(b); Treaty with the Miami Indians, June 5, 1854, 10 Stat. 1093.

2. United States ⇐113

In proceedings on claims for additional compensation for lands ceded by Indians to United States, Commission's finding as to value of land at time of cession was supported by substantial evidence.

3. United States ⇐113

In proceedings on claims for additional compensation for lands ceded by Indians to United States, amount of land available throughout United States was irrelevant to determination as to value of land at time of cession, but availability of very similar land immediately adjoining tract in question but in another state was a relevant consideration.

4. Indians ⇐11

In proceedings on claims for additional compensation for lands ceded by Indians to United States, value of consideration received, as well as value of land ceded, would have to be determined as of date of cession.

5. Courts ⇐89

Statement made when court did not have the issue before it did not have force of holding.

6. Indians ⇐11

Undertaking to pay $7,500 a year for 20 years, starting in six years, was worth only its capitalized value; and for purposes of determining adequacy of consideration paid for Indian lands under treaty, it could not be said that receipt of such undertaking amounted to a payment of $150,000. Indian Claims Commission Act, §§ 1–23, 25 U.S.C.A. §§ 70–70v; Treaty with the Miami Indians, June 5, 1854, 10 Stat. 1093; Treaty with the Miamies, Nov. 28, 1840, 7 Stat. 582.

7. Indians ⇐11

There is no exact dividing line between what is "unconscionable" and what is not, and to warrant relief under the "fair and honorable dealings" section of the Indian Claims Commission Act disparity between price paid by government and fair market value of Indian land must be very great; but payment of less than half of true value of such land was unconscionable. Indian Claims Commission Act, § 2(3, 5), 25 U.S.C.A. § 70a(3, 5); Treaty with the Miami Indians, June 5, 1854, 10 Stat. 1093; Treaty with the Miamies, Nov. 28, 1840, 7 Stat. 582.

See publication Words and Phrases, for other judicial constructions and definitions of "Unconscionable".

8. United States ⇐113

In proceedings on claims for additional compensation for lands ceded by Indians to United States, evidence would not sustain claimants' contention that the Miami had been promised more Kansas land than they had actually received when they agreed to move west. Treaty with the Miamies, Nov. 6, 1838, art. 10, 7 Stat. 569; Treaty with the Miamies, Nov. 28, 1840, art. 8, 7 Stat. 582; Treaty with the Miamies, Feb. 25, 1841, art. 12, 7 Stat. 585.

9. Treaties ⇐7

Treaty provision would have to be given meaning which would give effect to all of its language.

10. Indians ⇐11

In order to give effect to quoted words, in treaty providing that a "permanent annuity" should be paid to the Miami as long as they existed together as a tribe, specification that payments be made to tribe as long as it remained together as a tribe would have to be interpreted as a specification of proper party to receive annuity, rather than a limitation on its length; that is, annuity would have to be considered permanent, payable to tribe so long as it existed together as a tribe and payable thereafter to various individual Miami. Treaty with

the Miamies, Nov. 28, 1840, 7 Stat. 582; Treaty with the Miami Indians, June 5, 1854, 10 Stat. 1093; Treaty with the Miamies, Oct. 23, 1826, 7 Stat. 300.

11. Indians ⇐11

Where there was no reason for the Miami having taken less than value of their annuities other than that they were less than completely aware of meaning and methods of commutation and were incapable of determining for themselves value of permanent annuities, payment by government to the Miami of only 78% of value of their annuities as consideration for commutation thereof was inconsistent with requirements of fair and honorable dealings, and the Miami were entitled to recover difference between value of annuities and amount received for commutation thereof. Indian Claims Commission Act, § 2(3, 5), 25 U.S.C.A. § 70a(3, 5); Treaty with the Miami Indians, June 5, 1854, 10 Stat. 1093; Treaty with the Miamies, Nov. 28, 1840, 7 Stat. 582.

12. United States ⇐110

Interest against United States cannot be recovered in absence of express statutory or contractual provisions therefor, except when there is taking which entitles claimant to just compensation under Fifth Amendment. U.S.C.A.Const. Amend. 5.

13. Eminent Domain ⇐45, 148

Allotment of property rightfully belonging to Indian tribe to some other party is taking of that property for which Indians are entitled to receive just compensation, which includes payment of interest. Act March 3, 1891, 26 Stat. 1000; U.S.C.A.Const. Amend. 5.

14. Eminent Domain ⇐45, 148

When Government gave to persons other than Miami Indians property which rightfully belonged to the Miami, there was such taking as entitled the Miami to just compensation, including interest. Act March 3, 1891, 26 Stat. 1000; U.S.C.A.Const. Amend. 5.

15. Indians ⇐5

Miami Indians who remained in or returned to Indiana without tribal consent separated themselves from tribe, severed their tribal relationship, and lost all right to participate in tribal assets, funds or property.

16. United States ⇐113

In proceedings on claims for additional compensation for lands ceded by Indians to United States, there was sufficient evidence that Indiana Miami had acquiesced in cession of their claims to Kansas lands of the Miami even if representatives of Indiana Miami who participated in making treaty by which claims were ceded were not authorized to act for Indiana Miami.

Edwin A. Rothschild, Chicago, Ill., for appellants Miami Tribe of Oklahoma and others. Edward P. Morse, Chicago, Ill., and Louis L. Rochmes, Washington, D. C., were on the brief.

Walter H. Maloney, Washington, D. C., for appellants Ira Sylvester Godfroy and others. James N. Berry, Kansas City, Mo., on the brief.

W. Braxton Miller, Washington, D. C., with whom was Asst. Atty. Gen. Perry W. Morton, for appellee.

MADDEN, Judge.

This is an appeal from a decision of the Indian Claims Commission (hereinafter called the Commission). The appellants, the Miami Tribe of Oklahoma (hereinafter called the Miami Tribe) and the Miami Tribe of Indiana (herein referred to as the Indiana Miami) filed claims under the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C.A. §§ 70–70v, to recover additional compensation for certain lands which the Miami ceded to the United States by the Treaty of June 5, 1854, 10 Stat. 1093. Under that treaty, the Miami ceded all of their land located on the eastern border of Kansas, with the exception of 70,640 acres. The consideration to be paid to the Miami Tribe was described as $200,-

000, of which $50,000 was to be invested by the President of the United States for the benefit of the Miami Tribe, with the remainder to be paid to the Miami Tribe in twenty annual installments of $7,500, starting in 1860. No part of the consideration was to be paid to the Indiana Miami. The treaty also provided for commutation of tribal annuities which were payable to the Miami under earlier treaties. Payment for the commutation was to be made to both the Miami Tribe and the Indiana Miami.

The appellants claimed that the consideration they received in 1854 for their lands in Kansas and for the commutation of their annuities was unconscionable or inconsistent with fair and honorable dealings. They also claimed that they were entitled to be paid for more land in Kansas than they actually owned, since the United States had promised to give them more land than it did give them. Finally, they claimed interest on certain sums which they had been paid by the United States in 1891 to reimburse them for amounts which were rightfully theirs but which had been paid to other parties. The total amount claimed by the appellants was $1,092,799.28.

The Commission decided that neither appellant was entitled to relief, in an opinion rendered on July 14, 1958, reported at 6 Ind.Cl.Comm. 552. The Commission made findings of fact which are reported at 6 Ind.Cl.Comm. 513.

Prior to 1846, all of the Miami Indians lived in Indiana. In that year, pursuant to a treaty signed on November 28, 1840, 7 Stat. 582, a group of the Miami Indians moved to Kansas. The Miami Tribe are the descendants of those Miami who went to Kansas and remained there (and later moved to Oklahoma), while the Indiana Miami are the descendants of the Miami who remained in Indiana, or who went to Kansas but later returned to Indiana. An issue in the case is whether the Indiana Miami are entitled to participate in any recovery for inadequate consideration received for the Kansas lands ceded to the United States in 1854. It is agreed that the Indiana Miami will participate in any recovery for inadequacy of consideration paid for the 1854 commutation of annuities. It must first be determined, however, whether there is to be any recovery. The Indiana Miami join with the Miami Tribe on issues relative to liability.

The issues in this case are (1) whether the consideration paid by the United States for the Kansas land ceded to it in 1854 was so inadequate as to entitle the Miami to recover under section 2(3) or 2(5) of the Indian Claims Commission Act, 25 U.S.C.A. §§ 70a(3) and (5); (2) whether the Miami were entitled in 1854 to be paid for 500,000 acres of Kansas land, rather than for the 324,796.88 acres which they actually owned, on the grounds that they had moved to Kansas on the understanding that the United States would give them 500,000 acres there; (3) whether the consideration paid for the commutation of certain annuities was inadequate; (4) whether the Miami are entitled to recover interest on sums which were paid to them in 1891 to replace allotments and payments which had been wrongfully made in 1858 and 1859 to spurious or unqualified Miami Indians; and (5) whether the Indiana Miami are entitled to share in recovery for the Kansas land.

The Commission found that the land ceded by the Miami on June 5, 1854, had a fair market value on that date of $1.25 per acre, or a total value of $317,697.93. It concluded that the Miami had received $200,000 therefor, and that this amount was "not an unconscionable consideration under the facts and circumstances surrounding its purchase on that date, and that petitioners are not entitled to relief under section 2(5) [the 'fair and honorable dealings' section] of the Indian Claims Commission Act." 6 Ind.Cl. Comm. 551. The Commission further concluded that the consideration paid the Miami for the commutation of their annuities in 1854 was not unfair, dishonorable or unconscionable; that the Miami were not entitled to recover for the number of acres by which the acreage they actually received under the 1840

treaty was less than 500,000, the number of acres the Miami claim they had been promised; and that the Miami were not entitled to recover the interest they claimed on the funds which were misapplied in 1858 and 1859. It also held that the Indiana Miami had no interest in the Kansas land.

(1) The Adequacy of the Consideration Paid for the Kansas Lands Under the 1854 Treaty.

The Commission found that the Kansas lands were worth $1.25 per acre, $317,697.93 in total; the Miami claim they were worth not less than $2.40 per acre, $609,980 in total. The Commission concluded that the Miami received $200,000 for their lands; the Miami contend they received only $121,974.23. The Commission held that consideration of $200,000 for land worth $317,697.93 was not unconscionable; the Miami contend that since they received only $121,974.23 for land worth at least $609,980, they are entitled to recover $488,005.77, but they also argue that even if the Commission was correct about the values of the land and of the consideration, such consideration was unconscionable, or inconsistent with fair and honorable dealings.

[1] In considering the controversy over the value of the land, it must be borne in mind that this court's jurisdiction on appeal is limited to determining

> "whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact." 25 U.S.C.A. § 70s(b).

The requirement that the Commission's findings of fact be "supported by substantial evidence" means that they must be supported by evidence which is substantial when whatever in the record which fairly detracts from its weight is taken into account. Osage Nation of Indians v. United States, 97 F.Supp. 381, 119 Ct.Cl. 592, 603–614, certiorari denied 342 U.S. 896, 72 S.Ct. 230, 96 L.Ed. 672; Prairie Band of Potawatomi Indians v. United States, Appeal No. 2–57, decided July 16, 1958, 165 F.Supp. 139, 143 Ct. Cl. —— (slip opinion, p. 21).

[2] We think that, in this case, the Commission's finding as to the value of the land was supported by substantial evidence.

In 1856 the land was surveyed and classified as 13.3% Class I land (bottom, terrace and upland, with alluvial and dark residual prairie soil, having a slope of two percent or less), 65.7% Class II land (land with dark residual prairie soil over a clay subsoil, having slopes up to 12%), and 21% Class III land (land unsuited to agriculture, but which produces a good prairie hay). The tract as a whole had a 40% timber coverage of walnut, hickory, elm, sugar maple and other hardwoods on the uplands and sycamore along the streams. The coverage of the ceded lands was only 15%. The Osage River and its tributaries flow generally south and southeast through the tract. The principal use for this land appears to have been for small-scale farming.

Two expert witnesses testified on behalf of the Government. They based their opinions as to the value of the Kansas land primarily upon a comparison with a 350,000-acre tract of land in Missouri lying just to the east of the Miami lands, across the Kansas-Missouri border. The Government's expert Hall noted that similar and contiguous land in Missouri had been on the market, at $1.25 per acre, for years, but that it had not been sold. He derived a value of 35¢ per acre for the Kansas land, by taking into account deductions for advertising, delay in realizing upon investment, costs of financing transportation and other improvements, and similar items. The Government's witness Murray valued the Kansas land at 50¢ per acre. He found

that the Kansas land was quite comparable to the Missouri tract, and noted that only 10% of the Missouri lands had been sold between 1843 and 1846, but that a sharp increase in sales occurred in 1853–1854. It appears that another 10% was sold in 1854, but that about 252,000 of the 350,000 acres, or 72% of the original Missouri tract, remained unsold in June 1854. It appears that there were 22,722,000 acres of unsold public lands in Missouri in June 1853, and that over 20,000,000 acres remained unsold in June 1854. Under the Pre-emption Act of 1841, 5 Stat. 453, settlers could enter upon 160-acre tracts of public lands and obtain preferential rights to buy the land at $1.25 per acre. Military scrip and warrants applicable to land purchases were made assignable in 1852. They were credited at $1.25 for an acre of selected land, but could be obtained in 1854 for about $1.10 each. Public land in Kansas was, in general, held off the market until after July 1, 1857, because, it appears, the general land market in the area was saturated.

[3] The appellants object to the finding that the general land market was saturated. They say that the availability of land in Missouri did not "saturate" the land market of eastern Kansas, and cite our statement in Miami Tribe of Oklahoma v. United States, Appeal No. 2–58, decided July 13, 1959, Ct.Cl., 175 F. Supp. 926, slip opinion, p. 40, that material with respect to land available *throughout the United States* at the time of cession had no relevancy to the issue of value in that case. It is true that the amount of land available throughout the United States is irrelevant, but in this case we are concerned with evidence of the availability of large quantities of very similar land immediately adjoining the tract in question.

The Miami rely primarily upon a comparison between their Kansas lands and a 208,000-acre tract of land, lying immediately north of their own land, which was ceded by the Peoria and other Indians to the United States on May 30, 1854, 10 Stat. 1082. The Peoria tract was placed on the market in 1857, at an average appraisal of $1.66 per acre, and was completely sold within three weeks, for an average price of $1.67 per acre. The Miami argue that this price of $1.67 was considerably below the realistic market value of the land. They say the price was low because no competition was allowed, since most of the acreage was preempted by real or spurious settlers and their assignees. They point to the rapidity with which the land did sell, and to the average profits upon resale of at least 65¢ above appraisal.

There is, however, a significant difference between the Miami and the Peoria tracts which supports a conclusion that the Miami lands were worth less. The location of the Peoria tract was considerably more advantageous than that of the Miami tract, since it was nearer to Kansas City and Leavenworth, as well as to the Santa Fe Trail. At the time with which we are dealing here, such differences in location, even if they do not seem very great by our current standards of distance, could have had significant effect upon land value. As the appellants note, certain lands ceded by the Iowa and Delaware Indians were appraised at higher values than the Peoria lands, "presumably because of advantages arising from their proximity to the Missouri and Kansas Rivers, the only navigable waterways."

Further, the sales of the Peoria lands did not take place until 1857. While these sales were made only three years from the time of the Miami cession, this was a turbulent and significant period in the history of Kansas, and we cannot say that conditions in 1857 were sufficiently comparable to those in 1854 to require a finding that the 1857 sale of the Peoria lands determines their 1854 value. While the Commission would have been justified in placing more weight on the evidence of the market value of the Peoria lands, we cannot say that its failure to do so was erroneous.

The Miami also point to certain sales of preemption claims to land within the

Miami tract itself which were made in 1857 for $5 to $7 per acre and to sales of nearby trust lands for the Iowa and Delaware tribes for an average of $2.35 per acre in 1857 and $2 in 1867. Again while we might have given more weight to these factors than did the Commission, we cannot say, in view of the differences in time and location, which may well have been quite significant, that the Commission erred in discounting their importance.

The appellants complain that the Commission erred by relying on the "wholesale theory" to value the Kansas land. We note that the Commission, in its opinion, indicated that it thought the valuation of the Miami land should take into consideration the value of the tract if it were to be sold as a whole, rather than the total of the values of such smaller tracts into which it might be divided. We have disapproved this "wholesale theory". Miami Tribe of Oklahoma v. United States, supra, 175 F.Supp. 926, 953, slip opinion pp. 43–44. It does not appear, however, that the Commission has based its finding of value in the case upon this theory.

We conclude, therefore, that the Commission's finding that the Miami lands in Kansas were worth $1.25 per acre in 1854 is supported by substantial evidence. The value of the 254,158.34 acres which were ceded was $317.697.93.

It must next be determined how much the Miami received in 1854 for the cession.

[4] The Commission erred as a matter of law when it concluded that the Miami Tribe received $200,000. It is true that the treaty described the consideration as $200,000, but the treaty also prescribed the method of payment. The value of consideration received, as well as the value of land ceded, must be determined as of the date of cession. The payment of $50,000 to be held at interest had a treaty-date cash value of $50,000. But $150,000 payable in twenty yearly installments of $7,500 commencing six years after the treaty date had a treaty-date value of only $71,974.23, which was the then present value of the right to receive such payments, on standard annuity tables, computed at a 5% interest rate. The treaty-date value of the consideration which the Miami Tribe received was therefore $50,000 plus $71,974.23, or $121,974.23.

[5, 6] The Government argues that to so hold would be contrary to what this court said in its opinion in the earlier case of Miami Tribe of Oklahoma v. United States, supra, Ct.Cl., 175 F.Supp. 926, 955–956, slip opinion pp. 47–48, to the effect that the payments on account of a limited annuity which had been allowed as payments on the claim in Quapaw Tribe of Indians v. United States, 1 Ind.Cl.Comm. 644, 652, affirmed in part and reversed in part, 120 F.Supp. 283, 128 Ct.Cl. 45, were "probably installments of a stated purchase price and as such, to the extent actually paid, represented the consideration for the cession and payments on the claim." That statement was made when the court did not have the issue before it, and does not have the force of a holding. After considering the question as it is presented in this case, we cannot say that the receipt of an undertaking to pay $7,500 a year for 20 years starting in six years amounts to a payment of $150,000. If the Indians were in the position of selling such an undertaking, the Government would be the first to point out that it was worth only its capitalized value. In fact, this is the very argument which the Government presents in this case in urging that its payment for the 1854 commutation of the Miami's annuities was adequate.

[7] The Miami received $121,974.23 for land which the Commission found to be worth $317,697.93. This is unconscionable consideration. It is only 38% of the value of the land. It is true that there is no exact dividing line between what is unconscionable and what is not. The disparity between the price paid and the fair market value of the land must be very great. We think that the Com-

mission was correct when it said in this case that payment of less than half the true value in unconscionable. The Miami are thus entitled to recover for the value of their land ($317,697.93), less the payment they received ($121,974.23), which difference is $195,723.70.

(2) Whether the Miami Should Have Been Paid for 500,000 Acres in Kansas.

[8] The Miami claim that they should recover also for the difference between 500,000 acres, the number of acres in Kansas which they claim they were promised when they agreed to move west, and 324,796.88 acres, the amount of Kansas land they actually received. We cannot find any promise that the Miami would be given 500,000 acres in Kansas.

In 1833, when the Miami reservations in Indiana still included almost 1,000,000 acres, Government representatives told the Indians that the President was willing to give them, in exchange for their Indiana lands, as much land west of the Mississippi as they then had in Indiana. The Miami informed the Government representatives that they did not want to give up their reservation, and no agreement was reached.

Again in 1834 the Government attempted to obtain a cession of the Indiana lands, but the Secretary of War directed the Miami agent to offer only 300,000 acres in the west, and to give 800,000 acres only "in the last resort * * * if nothing short will satisfy them." By a treaty signed October 23, 1834, 7 Stat. 458, the Miami ceded 250,560 acres of their Indiana land, for a recited consideration of $208,000 but there was no provision made for land in the west.

It was in Article 10 of the treaty of November 6, 1838, 7 Stat. 569, by which treaty the Miami ceded more than 200,000 acres for a recited consideration of $335,680, that the United States first agreed to possess the Miami with land west of the Mississippi. That Article provided:

> "* * * the said country shall be sufficient in extent, and suited to their wants and condition and be in a region contiguous to that in the occupation of the tribes which emigrated from the States of Ohio and Indiana * * *."

No mention is made of 500,000 acres, or of a number of acres equal to those given up in Indiana. No western lands were given to the Miami under this treaty, but negotiations between the Government's Indian Agents and the Miami continued.

On November 28, 1840, Government representatives and the Miami concluded a treaty at the Forks of the Wabash, in Indiana, whereby the Miami ceded their remaining Indiana lands, about 491,000 acres, for a recited consideration of $550,000. 7 Stat. 582. Article 8 provided:

> "It is hereby stipulated, that the Miami tribe of Indians shall remove to the country assigned them west of the Mississippi, within five years from this date; * * *."

When the treaty was submitted to the Senate for ratification, it was amended, on February 25, 1841, by the addition of an Article 12, which read:

> "The United States hereby stipulate to set apart and assign to the Miamies, for their occupancy west of the Mississippi, a tract of country bounded on the east by the State of Missouri, on the north by the country of the Weas and Kaskaskias, on the west by the Pottawatomies of Indiana, and on the south by the land assigned to the New York Indians estimated to contain five hundred thousand acres." 7 Stat. 585.

The Miami subsequently, on May 15, 1841, assented to the amendment. 7 Stat. 585.

We cannot find, nor are we cited to, any evidence that the Government had promised to give the Miami land in Kansas equal in extent to the land they gave up in Indiana. What was promised was described in the 1838 treaty as country

"sufficient in extent, and suited to their wants and condition."

There is a letter, dated May 29, 1854, from some Miami representatives to Commissioner Manypenny, where the Indians state:

> "We were promised previous to our removal from Indiana, at the formation of our last treaty, a country west of large extent equal if not greater in quantity to the amount we disposed of, which was some ½ million of acres. We were promised a country sufficient in extent to keep off at a distance the bordering and predatory tribes. We are fully of the opinion that these promises and pledges on the part of our Great Father was remembered when the estimated number of acres were designated in, the amendment and ratification of our last treaty. They gave us the precise number of acres we sold in Indiana. We were promised a more extensive country, but an equal amount seemed to be the amount decided on by Congress. Their manner of designating the boundaries, not knowing the locality of the lands of the bordering tribes, is the cause of the unintentional deficiency of the stipulated treaty."

We do not think that the language of the 1840 treaty amounted to an engagement to assign to the Miami anything more than the area which was therein described by its boundaries. The mention of the estimated acreage was no more than it appears to be, a guess as to the size of the area which was to be assigned to the Indians.

Since, therefore, there was no promise to give the Indians 500,000 acres in Kansas, there was no shortage of acreage in the Kansas lands, and the Miami are not entitled to recover for the alleged shortage.

(3) The Commutation of Annuities.

We next consider the commutation of the Miami annuities which took place under the 1854 treaty. We think that the consideration which the Miami received for the commutation of the annuities which the Government was obligated to pay was inadequate. The annuities due the Miami in 1854 totaled $26,540 per year. It is agreed that the present cash value of a permanent annuity of $26,540, based on an interest rate of 5%, is $530,800. The Government contends, and the Indian Claims Commission agreed, that the Miami annuity of $25,000 under the treaty of October 23, 1826, 7 Stat. 300, was not a permanent annuity since it is provided for in the treaty as follows:

> "* * * a permanent annuity of twenty-five thousand dollars shall be paid to them (the Miamis), as long as they exist together as a tribe; which several sums are to include the annuities due by preceding treaties to the said tribe."

[9, 10] We think that such an annuity has the value of a permanent annuity. The Government asserts that, because Congress might have been justified in declaring the tribal existence of the Miami terminated in 1873, the annuity's value in 1854 was that of a twenty-year annuity. It is hardly conceivable that the United States had the power, by its unilateral act, in effect to nullify this annuity. As for the tribe dissolving itself, it would not be expected that this relatively small band of Indians would purposely disable themselves from receiving their annuity. It was the policy of the United States at this time to encourage the assimilation of the Indians into the society, and this policy would hardly have been served by a provision which would end Indians' annuities upon their taking a step toward assimilation. The provision that the annuity, although permanent, be paid to the tribe as long as it existed together as a tribe presents a problem.

We must seek to give this treaty provision a meaning which will give effect to all of its language. "It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable." Geofroy v. Riggs, 133 U.S. 258, 270, 10 S.Ct. 295,

298, 33 L.Ed. 642. "Now, it is the duty of courts of justice so to construe all statutes as to give full effect to all the words in their ordinary sense, if this can properly be done; and thus to preserve the harmony of all the provisions." Bend v. Hoyt, 13 Pet. 263, 272, 10 L.Ed. 154. All words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. McDonald v. Thompson, 305 U.S. 263, 266, 59 S.Ct. 176, 83 L.Ed. 164.

In order to give effect to the words "permanent annuity," the specification that payments be made to the tribe as long as it remained together as a tribe must be interpreted as a specification of the proper party to receive the annuity rather than a limitation on its length. That is, the annuity was permanent, payable to the tribe so long as it existed together as a tribe, and payable thereafter to the various individual Miami.

This interpretation is strengthened by the fact that the various annuities which were consolidated by the 1826 treaty had been described as "permanent" (treaties of August 21, 1805, 7 Stat. 91; September 30, 1809, 7 Stat. 113 and 115), "perpetual" (treaty of October 6, 1818, 7 Stat. 189, 191), and "forever" (treaty of August 3, 1795, 7 Stat. 49, 51). Also, the 1854 treaty described the annuity simply as "permanent." 10 Stat. 1096. We find, therefore, that the value of the annuities to which the Miami were entitled in 1854 was the value of a permanent annuity of $26,400, or $530,800.

We must next determine how much the Miami received for the commutation of these annuities. Article 4 of the 1854 treaty provided that a payment of $421,438.68 be made, $190,434.68 to the Western Miami and $231,004 to the Indiana Miami. However, the Miami were not to receive payments having a present value of $421,438.68. The Indiana Miami's $231,004 was to be invested for them at 5% starting July 1, 1855, which was one year and one month after the treaty date. The treaty date value of such delayed investment was $219,804.59.

Of the $190,434.68 payable to the Western Miami, only $31,739.11 was paid in 1854. The rest was payable in five annual installments of $31,739.11, without interest. The present value in 1854 of the installments was $137,411.30, plus the $31,739.11 actually paid in 1854, or a total of $169,150.41.

Annuity installments of $25,000 were also paid in 1854 and 1855. The 1854 payment had already been earned, however, and the 1854 value of the 1855 payment was only $23,708.50.

[11] The total 1854 value received by the Miami for commutation of an annuity worth $530,800 was therefore $219,804.59, plus $169,150.41, plus $23,708.50, or a total of $412,663.50. This amount is approximately 78% of the annuity's value. The issue then is whether the payment to the Miami of only 78% of the value of their annuity constitutes unconscionable consideration or is inconsistent with the requirements of fair and honorable dealings.

The Government admits that the Miami were entitled to the annuity, and points to no factor which might have induced them to take less than the annuity was worth. The commutation was apparently done at the insistence of the United States. During the negotiations which took place in Washington, D. C., between George W. Manypenny, the Commissioner of Indian Affairs, and the Miami delegation, from May 23 to June 7, 1854, Commissioner Manypenny stated that the Government wanted to "blot out" the old annuities by making several large payments. One of the Miami delegates answered that his party did not want it that way, but wished the annuities to run on. We find no evidence that the Miami wanted the annuities commuted. Under such circumstances, we can think of no reason for their having taken less than the value of their annuities other than that they were less than completely aware of the meaning and methods of commutation, and were incapable of determining for themselves the value of the annuity. Under such circumstances, we think that payment of less than

the true value of the annuities which the Miami were entitled to receive amounted to something less than fair and honorable dealings, and that the Miami are entitled to recover the difference between $530,800 (the value of their annuities) and $412,663.50 (the amount they actually received for the commutation of their annuities), which is $118,136.50.

It is conceded that the Indiana Miami are entitled to share with the Miami Tribe in this recovery, in the same proportions as their respective payments for the commutation as provided in the treaty. For the purpose of computing the proportion, we will use the figures as recited in the treaty, rather than the present values of the respective payments, since we think the recited figures are more likely to indicate the fractions into which the payment was intended to be split. The Indiana Miami are thus entitled to 54.8% of the recovery, which is $64,738.80, and the Miami Tribe are entitled to $53,397.70.

(4) Claim for Interest on Misappropriated Funds.

A rider to the Appropriation Act of June 12, 1858, 11 Stat. 329, 332, provided that Miami annuities be paid to persons "of Miami blood" who had been excluded from annuities since 1846 and who were not included in the list of Miami compiled under the 1854 treaty. These persons were to be added to the list of Miami and be allotted 200 acres each in the Kansas reservation. Seventy-three persons were added to the Miami list under this Act, and they were given lands and annuities. It was later found that these persons were not members of the tribe, nor entitled to share in its funds. In 1891 Congress determined that, under this Act, the United States had taken from the Miami Tribe without their consent the sum of $18,370.89 in October 1858, and lands worth $43,600.14 in November 1859, and it therefore appropriated these sums for the Miami Tribe, without interest. 26 Stat. 1000. The Miami Tribe here claim interest on these sums.

[12] It is, of course, well established that interest against the United States cannot be recovered in the absence of express statutory or contractual provisions therefor, United States v. Alcea Bank of Tillamooks, 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738; United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588, 67 S.Ct. 398, 91 L.Ed. 521, except when there is a taking which entitled a claimant to just compensation under the Fifth Amendment. United States v. Alcea Bank of Tillamooks, 341 U.S. at page 49, 71 S.Ct. at page 553; Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664.

[13] The Miami Tribe argue here that the misappropriation of funds was a taking, for which, under the Fifth Amendment, they were entitled to receive interest as well as the principal.

The allotment by the Government or its agents of property rightfully belonging to an Indian tribe to some other party is a taking of that property for which the Indians are entitled to receive just compensation, which includes the payment of interest. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360; United States v. Creek Nation, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331.

[14] But the Government says there was no "permanent appropriation of property for public purposes," as there was in the Shoshone case. What happened in Shoshone was that the Government had brought a band of Northern Arapahoe to the reservation of the Shoshone under military escort in 1878. No cession or "permanent appropriation" was made to the Arapahoe at that time, yet the Supreme Court held that the Shoshone were entitled to receive just compensation for the value of their property which had been "taken" in 1878. There was no less a taking here when the Government gave to persons other than Miami Indians property which rightfully belonged to the Miami.

Any failure to fully set forth this claim for interest in its pleadings before the

Commission was remedied by the clear statement of the claim by counsel for the Miami Tribe at the beginning of the trial.[1] The Commission's own Rule of Procedure 13(h) provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by motion of any party at any time, even after judgment; but failure to so amend does not affect the trial of these issues."

The Miami Tribe is therefore entitled to recover interest at the rate of 5% on the $18,370.89 from 1858 to 1891, and on the $43,600.14 from 1859 to 1891. This amounts to $100,072.19.

(5) Whether the Indiana Miami Are Entitled to Share in the Recovery for the Kansas Land.

The Indiana Miami claim that they should have shared in the payment which was made for the Kansas lands in 1854, and in the recovery granted in this proceeding of additional compensation for those lands. They argue that because they had been given permission by the tribe and by the United States to remain in Indiana, they could not and did not lose their membership in the tribe, and that since they remained members of the tribe they were and their descendants are entitled to share in the proceeds of the tribal lands.

[15] The Indian Claims Commission found that the Indiana Miami who had remained in or who returned to Indiana without tribal consent had separated themselves from the tribe, severed their tribal relationship, and lost all right to participate in the tribal assets, funds or property. This conclusion is correct. Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 309–312, 6 S.Ct. 718, 29 L.Ed. 880; Prairie Band of Potawatomi Indians v. United States, Appeal No. 2–57, decided July 16, 1958, 165 F.Supp. 139, 143 Ct.Cl. —— (slip opinion, pp. 12 and 20).

[16] The Commission further found that these Miami united with the Miami who had tribal permission to remain in Indiana, and that this united group, by participating in and approving the treaty of 1854, recognized and agreed to a division of the tribal assets in which they accepted certain money, benefits and consideration and waived their claims to other tribal assets, including the Kansas lands. The appellant Indiana Miami dispute this conclusion, on the grounds that the representatives of the Indiana Miami who participated in making the treaty were not authorized to cede the Kansas land. We think that there is evidence that the Indiana Miami acquiesced in the cession as made. Although their representatives present at the treaty negotiations, and at the signing on June 4, 1854, may not have been authorized to cede the land, after the treaty had been signed a full council of the Indiana Miami was called and a delegation dispatched to Washington, D. C., to secure an amendment to the treaty provision relating to

1. "Now, there is still another claim that we have * * * and this again is solely a western Miami claim * * *

"In the year 1858 * * * the payment of annuities and the granting of land was authorized to certain people who were supposed to be Miamis and who, the evidence shows, were never Miami Indians at all. * * *

"[T]his was clearly a taking under the Constitution. It fulfills every requirement of a taking under the Fifth Amendment. * * *

"So the claim of interest from 1858 to 1891 * * *"

"Mr. Miller (for defendant): Could I ask a question there? * * * Is the only thing you are claiming there, which I have down as Issue 4 and which you are speaking of, the contention of interest on the amount that has been previously awarded from 1858?"

"Mr. Rothschild (for petitioners): That is correct, sir."

the method of payment for the commutation of annuities, in which they were to share. The entire treaty, including the provision that the Indiana Miami were to have no share in the payments for the Kansas land, implying that they had no interest therein, was before the Indiana Miami council at that time, and they made no objection to the land cession or to the implication of their lack of any interest in those lands. We conclude therefore that the Commission was correct in its conclusion that the Indiana Miami are not entitled to share in the recovery for the Kansas lands.

Conclusion.

The judgment of the Indian Claims Commission is reversed. The Miami Tribe of Oklahoma (petitioners in Docket No. 251 before the Indian Claims Commission) are entitled to recover $195,723.70 as additional compensation for the Kansas land which was ceded to the United States in 1854, $53,397.70 as additional compensation for the annuities which were commuted by the treaty of 1854, and $100,072.19 as interest on the sums due them as a result of the misappropriations of 1858 and 1859. The total recovery will be $349,193.59. The Indiana Miami (petitioners in Docket No. 124–A before the Indian Claims Commission) are entitled to recover $64,738.80 as additional compensation for their share of the annuities which were commuted in 1854. These cases are therefore remanded to the Indian Claims Commission for the entry of an order in accordance with these conclusions.

It is so ordered.

LITTLETON, Judge (Retired), and LARAMORE, Judge, concur.

WHITAKER, Judge (dissenting).

This case is brought under the Indian Claims Commission Act on the ground that various acts of the Government in its dealings with the Indians were unconscionable or inconsistent with fair and honorable dealings. We said in Sioux Tribe of Indians, et al. v. United States, Ct.Cl., 146 F.Supp. 229, 234, that an unconscionable consideration "is that consideration which is so much less than the actual value of the property sold that the disparity shocks the conscience, Osage Nation of Indians v. United States, 1951, 97 F.Supp. 381, 119 Ct.Cl. 592, certiorari denied 342 U.S. 896, 72 S.Ct. 230, 96 L.Ed. 672."

I do not think that the consideration paid the tribe under the 1854 treaty was so inadequate as to shock the conscience.

The Commission finds that the value of these lands was $1.25 an acre, but some of the Government's witnesses testified to a considerably lower value; one of them testified to 35 cents an acre, and another one to 50 cents an acre. Lands in that western country at the time of the 1854 treaty had a very uncertain value. It was difficult then, and it is much more difficult now, to determine with any degree of accuracy what those lands really were worth. The majority opinion says that what was paid the Indians was less than 50 percent of their value at $1.25 an acre, but what was paid them was more than their value according to the testimony of both of the Government's appraisers. Under such circumstances, I cannot say that my conscience is shocked at the amount the Government paid.

I am more firmly of this opinion with reference to the commutation of annuities. A mistake may have been made in the commutation of these annuities, or there may have been no effort to compute them with accuracy, but the amount paid is by no means so out of line with the amount the court now finds their value to be, by meticulous computation, as to shock my conscience or to amount to conduct that was less than fair and honorable.

JONES, Chief Judge, joins me in the foregoing dissent.

The records maintained at the Atlanta General Depot, Atlanta, Georgia, covering additions to and withdrawals from the supplies at Charlotte lend support to the inference that the bags were received at the Charlotte Army Depot. These records, there being no records kept at the Charlotte depot, showed that an overage from the Charlotte depot was reported on October 27, 1947, of approximately the same quantity and type of shirts as contained in the bags involved here.

We are of the opinion from the record here that plaintiff is entitled to recover and judgment will be entered for plaintiff in the sum of $3,474.90. Defendant's counterclaim will be dismissed.

It is so ordered.

JONES, Chief Judge, and MADDEN and WHITAKER, Judges, concur.

LARAMORE, Judge, took no part in the consideration and decision of this case.

UPPER CHEHALIS TRIBE, Lower Chehalis Tribe, Chehalis Tribe, Satsop Tribe, Humptulip Tribe, Hoquiam Tribe, Confederated Tribes of the Chehalis Reservation and Portions and Descendants of Such Tribes and Bands, Ralph A. Heck, Frank F. Pete and Murphy Seneca as Individual Members of the Chehalis Tribe and Individually and On Behalf of All Other Members of the Chehalis Tribe and Subordinate Bands Not Members of the Confederated Tribes of the Chehalis Reservation,

v.

The UNITED STATES.

Appeal No. 1-56.

United States Court of Claims.

Oct. 9, 1957.

Proceeding by Indian tribe and representatives under Indian Claims Act. The Indian Claims Commission dismissed claimants' petition and they appealed. The Court of Claims held that record did not support findings of Commission that the Indians did not constitute a tribe or identifiable group of Indians, and that Indians did not use and occupy lands as a group.

Remanded for further proceedings.

1. Indians ⇐2

In proceeding by Indian claimants, record failed to support findings of Indian Claims Commission that the Upper Chehalis and the Lower Chehalis Indians did not constitute tribes or identifiable groups of Indians, that such Indians did not have political organization to the extent necessary to constitute tribes, and that Indians did not use and occupy at least their villages and lands surrounding them as identifiable groups or bands of Indians. Indian Claims Commission Act, §§ 1 et seq., 2, 25 U.S.C.A. §§ 70 et seq., 70a.

2. United States ⇐113

Clause in Indian Claims Act giving Commission jurisdiction of claims arising from the taking by the United States, as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimants without payment of agreed compensation, covers those land claims not cognizable under statute relating to claims arising under the Constitution, laws, treaties or executive orders of the President, either because the land involved was held by so-called Indian or aboriginal use and occupancy title rather than by some formal recognized title, or because, if the land was held by some formal recognized title, there had been no taking of it in the constitutional sense. Indian Claims Commission Act, § 2(1, 4), 25 U.S.C.A. § 70a(1, 4).

3. United States ⇐113

Under statute giving Indian Claims Commission jurisdiction of claims arising from taking by the United States, whether as a result of a treaty or cession or otherwise, of lands owned or occupied

by claimants without payment of agreed compensation, only significance of words without payment for such lands is that where Indians have ceded land pursuant to ratified treaty and received agreed compensation no claim arises under this clause. Indian Claims Commission Act, § 2(1, 4), 25 U.S.C.A. § 70a(1, 4).

4. Indians ⇐3
United States ⇐105

Where land held by Indian title is appropriated by United States under unratified treaty but Indians are paid less than the market value of land, claimants cannot be barred from claiming market value even though stipulated amount was paid since an unratified treaty is not binding on either party.

5. United States ⇐113

Where lands, which were basis of claim of the Indians and their representatives were held by virtue of Indian or aboriginal occupancy title were taken without payment or a treaty of cession, claim fell within statute giving Commission jurisdiction over claims arising from taking of lands without payment. Indian Claims Commission Act, § 2(1, 4), 25 U.S.C.A. § 70a(1, 4).

6. United States ⇐113

In action by Indians and their representatives for claims based on land taken by United States, record was sufficient to establish the claimants bringing suit were descendants of the Upper and Lower Chehalis Tribes. Indian Claims Commission Act, §§ 2(3–5), 10, 25 U.S.C.A. §§ 70a(3–5), 70i.

Joseph W. Creagh, Arlington, Va., for appellants. E. L. Crawford, Salem, Or., was on the briefs.

Donald R. Marshall, Washington, D. C., with whom was Asst. Atty. Gen. Perry W. Morton, for appellee.

Before JONES, Chief Judge, and LITTLETON, WHITAKER, MADDEN and LARAMORE, Judges.

PER CURIAM.

This is an appeal from a decision by the Indian Claims Commission in Docket No. 237, 4 Ind.Cls.Com. 301, dismissing the petition filed by the Indian claimants. Appellants take the position that there is no substantial evidence to support the ultimate findings of the Commission adverse to appellants and that the final determination of the Commission based upon such findings should be reversed.

In finding 23 the Commission finds that in the area claimed there were aboriginally a number of autonomous villages or tribelets known as the Copalis Tribe, the Humptulip Tribe, the Satsop Tribe, the Lower Chehalis Tribe, the Sachal Tribe, the Staktamish (Upper Chehalis) Tribe and possibly other village tribes on the Hoquiam and Wynochee rivers in what is now the State of Washington; that there is no evidence that aboriginally and prior to 1855 (year of alleged taking) there was any merger of these village tribes in the claimed area into either a Chehalis Tribe or into two tribes, i. e., the Upper Chehalis and the Lower Chehalis tribes. Earlier in the findings, the Commission found that the villages in question were strictly autonomous, and that the chief of each village had power only in the village he represented; that although neighboring villages did sometimes function together as a single unit for some purposes, political autonomy was rigidly maintained for the most part. From this, the Commission appears to conclude that the village tribes involved herein were not tribes, bands or identifiable groups of American Indians within the meaning of section 2 of the Indian Claims Commission Act and that their descendants or representatives of their descendants would accordingly have no standing to bring a claim against the United States under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C.A. § 70 et seq.

The Commission also found that the village units made limited use, if any, in 1855 of any area of land except in the immediate vicinity of their villages and

that the exact location of those villages and the areas of exclusive use and occupancy were not shown by the record. Finally, the Commission found that there was no evidence that the appellants were the successors in interest of the village groups in question, or from what groups the "Confederated Tribes of the Chehalis Reservation" were organized or formed.

[1] After consideration of the record in this case, the briefs and arguments of counsel, and in view of the purposes of the Indian Claims Commission Act, the background of the various Indian tribes and groups, and the authorities on the subject of Indian affairs and modes of living, we are of the opinion that the Upper Chehalis and the Lower Chehalis Indians constituted tribes or identifiable groups of Indians within the meaning of the Indian Claims Commission Act. We are also of the opinion that the evidence in the record does not support the findings of the Commission and its conclusion that there was no political organization of the Upper Chehalis Indians and the Lower Chehalis Indians to the extent necessary to constitute tribes or other identifiable groups of American Indians. Neither is there substantial evidence to support the finding and conclusion of the Commission that the Upper and Lower Chehalis Indians did not use and occupy at least their villages and the land surrounding them as identifiable groups or bands of Indians. Absolute accuracy of location and extent of occupancy is not essential, and the record in this case is sufficient for the Commission to determine with reasonable accuracy the location and extent of the areas actually occupied by the tribes involved herein. Snake or Piute Indians v. United States, 112 F.Supp. 543, 125 Ct.Cl. 241; Alcea Band of Tillamooks v. United States, 59 F.Supp. 934, 103 Ct.Cl. 494, affirmed 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29; Nooksack Tribe of Indians v. United States, 1 Ind.Cls.Com. 333, and 3 Ind.Cls.Com. 479; Muckleshoot Tribe of Indians v. United States, 2 Ind.Cls. Com. 424, 3 Ind.Cls.Com. 658. In the last two cases cited, the Commission was concerned with problems very similar to those involved in the instant case, including the sort of tribal organization, i. e., autonomous village bands, and the mode and extent of land occupancy and use by such bands. Furthermore the agents of the United States were negotiating with the Muckleshoot and Nooksack tribes at about the same time and in the same manner as they were with the Chehalis groups of Indians. In those two cases, the Commission found that while the record did not support use and occupancy of the large area claimed, the records did support findings of exclusive use and occupancy of certain areas within the confines of the immediate village areas as indicated by the testimony of the claimants' expert witnesses and the maps prepared by them. In the Muckleshoot case the Commission made particular reference to the common practice of exogamy in that area and stated at page 675 of its decision:

> "The practice of exogamy, which was so prevalent among these people, created ties of kinship and friendship among them which led to a natural tendency to share with each other. As a result of this way of life there developed close cultural ties among these people. All these ties existed prior to 1857 when these Indians were consolidated by the defendant at Muckleshoot reservation. From 1857 or possibly a little earlier these Indians *were treated as an entity by the defendant* and as a result gradually became completely merged until by 1868 or 1870 they were designated as a unit by the Indian agents and others who dealt with them. It appears to this Commission that to deny the Muckleshoot Tribe the right to recover for lands occupied by the villages whose people were so closely associated economically and culturally on the grounds of lack of political cohesion would be to misconstrue the beneficient purpose of Congress in enact-

ing the legislation under which this claim is maintained. This seems particularly true when considered in the light of the type of cultural and economic structure existing among the Indians of the Puget Sound area. The heretofore mentioned practice of exogamy and the subsequent ties of kinship and cultural life and more or less economic cohesion warrants the assertion by the descendants of this day and time, as an entity, of the claim for the losses sustained by the original groups of which they are descendants." [Italics supplied.]

On the matter of defining the area used and occupied exclusively by the village Indians, the Commission stated in the Nooksack case and repeated in the Muckleshoot case, at page 677, as follows:

"It is perhaps not required that the boundary lines be as accurately defined as a surveyor would like them but some general boundary lines of the occupied territory must be shown, and it must be shown that the occupant had the possession to the exclusion of other tribes; constructive possession is not sufficient.

* * * * * *

"* * * it is extremely difficult to establish facts after the lapse of time involved in matters of Indian litigation. In attempting to establish boundaries and occupancy on the basis of fragmentary facts and often uninformed opinions and the work of ethnologists who must of necessity base their conclusions upon much the same information, it becomes necessary to take a common sense approach based upon experience with matters of this nature. * * * Snake or Piute Indians v. United States, 112 F. Supp. 543, 125 Ct.Cl. 241, 254: * * *"

We are of the opinion that the approach of the Commission to the problems in the Nooksack and Muckleshoot cases was a sound and reasonable one, and that the problems in the instant case, being nearly identical, would seem to be amenable to a similar approach.

[2–5] Appellee contends that appellants' claim does not fall under clause (4) of section 2 of the Indian Claims Commission Act. Although the Commission has not expressed itself on this matter, we are of the opinion that the claim does come within the meaning of that clause which provides that the Commission shall have jurisdiction of "claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." While the language of that clause is somewhat ambiguous, when read in connection with the other clauses of section 2 of the Act, and in the light of the legislative history, it appears that Congress intended clause (4) to cover those land claims which were not cognizable under clause (1) (claims arising under the Constitution, laws, treaties of the United States, and executive orders of the President), either because the land involved in the claim was held by so-called Indian or aboriginal use and occupancy title, rather than by some form of recognized title, or because, if the land was held by some form of recognized title, there had been no taking of it in the constitutional sense. The sort of taking referred to in clause (4) could come about in several ways, such as where lands held by Indian title were not ceded by the Indians, or were not affirmatively appropriated by the United States by statute, executive order, or the like, but were acquired under the public land laws or by some administrative action. In any event, it is clear from the language of clause (4) and from the legislative history of the Act, that clause (4) was intended to embrace claims based on the taking of lands held by so-called Indian or occupancy title. Otoe

and Missouria Tribe v. United States, 131 F.Supp. 265, 131 Ct.Cl. 593, 610, certiorari denied United States v. Otoe and Missouria Tribe, 350 U.S. 848, 76 S.Ct. 82, 100 L.Ed. 755. We are of the opinion that the only significance of the words in clause (4) "without the payment for such lands of compensation agreed to by the claimant" is that where the Indians have ceded land pursuant to a *ratified* treaty and have received the compensation which they had agreed to in that ratified treaty, no claim arises under clause (4). In such a situation, however, the claimant might have a claim under clauses (3) or (5), inasmuch as clause (3) gives the Commission jurisdiction to go behind *ratified* treaties and revise them for fraud, duress, etc., and in clause (5) the Commission is given jurisdiction to entertain claims based upon fair and honorable dealings. In a case where land held by Indian title is appropriated by the United States under an *unratified* treaty, and the Indians were paid a sum less than the market value of the land, they are not barred from claiming such market value even though the amount paid was the amount stipulated in the *unratified* treaty. This is so because an *unratified* treaty is not, of course, binding on either party. In the instant case, the lands which are the basis of appellants' claim were held by virtue of Indian or aboriginal occupancy title, i.e., they were lands "occupied by the claimant." Those lands were taken, not as the result of a treaty of cession, but "otherwise" without any treaty. Furthermore, there was no payment to claimants for such lands. Accordingly, appellants' claim would seem to fall squarely within the coverage of clause (4).

[6] The Commission has held that the proof before it was insufficient to establish that the plaintiffs bringing suit were the descendants of the Upper and Lower Chehalis tribes. Section 10 of the Indian Claims Commission Act provides as follows:

> "Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."

All the groups covered in the evidence are named parties plaintiffs and individuals are named as their representatives. Under section 10 above, an identifiable group of Indians may be represented by an individual as a representative of all the members of the group. It would therefore appear that the Indian groups having a cause of action would be adequately represented for the purpose of bringing this action through the representation of one of their members. If there is some doubt as to the identity of the Indians entitled to share in the judgment, if any, such a problem would appear to be administrative.

On the basis of the record as a whole, we are of the opinion that the findings of the Commission do not adequately reflect such record; that the ultimate findings adverse to appellants on the matters of identifiable group and land use and occupancy, are not supported by substantial evidence. The case is remanded to the Commission for further proceedings not inconsistent with this opinion.

It is so ordered.

The UNITED STATES
v.
The NORTHERN PAIUTE NATION et al.
Appeal No. 3-66.

United States Court of Claims.
April 19, 1968.

Proceeding on petition before Indian Claims Commission. The Commission entered final judgment and cross appeals were taken. The Court of Claims, Nichols, J., held that record disclosing that Spanish monarchs claimed for the crown all mines, reserving to subjects the right to participate in mines, and decreed that all persons should be at liberty to take out metals without any kind of impediment provided that there should result no injury to Indians would not support contention of government that Indians' subsurface mineral rights had been extinguished when United States in 1848 assumed sovereignty of lands for the taking of which Indians sought compensation.

Affirmed.

1. Limitation of Actions ⇐127(1)

Test of whether amendment relates back, for limitation purposes, is notice, and inquiry should focus on notice given by general fact situation as set forth in original pleading.

2. Parties ⇐50
Pleading ⇐252(1)

Generally, rule of relation back does not extend to amendments that add new causes of action.

3. Limitation of Actions ⇐127(1)

The "original pleading," for purpose of determining whether amendment relates back, does not mean only the first petition filed but includes all timely petitions, original or amended.

See publication Words and Phrases for other judicial constructions and definitions.

4. United States ⇐113

Where original petition to Indian Claims Commission did not name the Mono band but referred to various bands making up Northern Paiute Nation, and timely amended petition was headed the Northern Paiute Nation and the bands thereof, the Monos, constituting a Northern Paiute "band," were included as party to suit.

5. United States ⇐113

Amendment to petition before Indian Claims Commission, filed after last day for filing claims, which extended claimed boundaries of land taken without compensation, did not set forth new cause of action and was not barred by statute of limitations. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

6. United States ⇐113

Northern Paiute Nation, consisting of separate land-owning bands, was properly determined to be an "identifiable group" and entitled under Indian Claims Commission Act to represent or file claims on behalf of band the descendants of which constituted part of the identifiable group. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

See publication Words and Phrases for other judicial constructions and definitions.

7. United States ⇐113

Indians, as predicate for claim under Indian Claims Commission Act, were required to show that there were either living members or descendants of members of identifiable group. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

8. United States ⇐113

Fact that Congress might wish to legislate concerning payment and distribution of award made under Indian Claims Commission Act should have no bearing upon question of jurisdiction to hear and determine claims presented to the Commission. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

9. Indians ⇐10

Record disclosing that Spanish monarchs claimed for the crown all mines, reserving to subjects the right to par-

ticipate in mines, and decreed that all persons should be at liberty to take out metals without any kind of impediment provided that there should result no injury to Indians would not support contention of government that Indians' subsurface mineral rights had been extinguished when United States in 1848 assumed sovereignty of lands for the taking of which Indians sought compensation. Act. Aug. 13, 1946, § 12, 60 Stat. 1049.

10. United States ⇐105

Value of Indian title land taken without compensation is to be determined by fair market value which includes enhancement in value of land caused by subsurface minerals.

11. United States ⇐113

Government asserting error in determination of Indian Claims Commission in refusing to deduct from valuation of mineral areas taken the improvements "made by others" had burden to point out nature of error. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

12. United States ⇐105

In view of fact that land claimed by Indians and exploited by miners was part of public domain, and miners acted without interference by national government but under its implied sanction, government stood in shoes of miners with respect to improvements and was liable to Indians to same extent as if its own engineers had constructed improvements, but to no greater extent.

13. United States ⇐105

Valuation of Indian title lands taken without compensation as of the taking date is not an invariable rule to be followed even if it produces result that shocks conscience of the court. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

14. United States ⇐113

Evidence that improvements constructed by miners on Indian lands involved great waste of money and in many instances detracted from value of land supported conclusion of Indian Claims Commission that making of speculative deductions from award to Indians for improvements would have been no help to the Government when necessary countervailing adjustments were considered. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

15. United States ⇐113

Conclusion of Indian Claims Commission when supported by substantial evidence cannot be disturbed on appeal.

16. United States ⇐113

Indians in making objections to findings of Indian Claims Commission should have made their position clear as to whether they desired remand of case even if reviewing court was prepared to affirm substantial award in their favor.

17. United States ⇐113

Trier of fact has election between manners of appraisal in the appraisal of large, contiguous areas taken at same time from same group or tribe of Indians. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

18. United States ⇐113

Although Indian Claims Commission should have explained why it did not value separately the various mineral areas as did Indians' expert witnesses instead of valuing tract as single unit, failure to do so did not necessitate remand. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

19. United States ⇐113

Indian Claims Commission in rejecting view of Indians' expert appraisers did not have to refute what testimony it did not accept as controlling and could arrive at appraisal supported by all the evidence although not identified with any of it. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

20. United States ⇐113

Indian Claims Commission in making appraisal of tract of land containing mineral areas was not required to apply sales index of value which would have led to appraisal preposterous on its face in view of relative lack of worth of minerals merely because Commission used

sales index in evaluating another district including more valuable mineral areas. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

21. United States ⇐113

Refusal of Indian Claims Commission to appraise lands containing minerals on theory of what a single "willing buyer" would pay, which amount was more than twice that of the Indians' own "sales index of value," was proper. Act Aug. 13, 1946, § 12, 60 Stat. 1049.

22. Evidence ⇐584(1)

Tribunal must give weight to the evidence in inverse ratio to the amount of speculation and unfounded presumption it perceives to form a part of it.

Bernard M. Newburg, U. S. Dept. of Justice, Washington, D. C., with whom was Asst. Atty. Gen. Clyde O. Martz, for appellant.

I. S. Weissbrodt, Washington, D. C., attorney of record, for appellees, Abe W. Weissbrodt and Ruth W. Duhl, Washington, D. C., of counsel.

Robert W. Barker, Washington, D. C., filed a brief, amicus curiae for The Goshute Tribe and Western Shoshone Identifiable Group of Indians, Wilkinson, Cragun & Barker and John S. White, Washington, D. C., of counsel.

Nicholas E. Allen, Washington, D. C., for the Washoe Tribe of the States of Nevada and California, joined in the amicus curiae brief of the Goshute Tribe, George F. Wright, Elko, Nev., of counsel.

Before COWEN, Chief Judge, and LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

NICHOLS, Judge.

This case comes to us on cross-appeals from a final judgment of the Indian Claims Commission (hereinafter called the Commission.) The matters in dispute concern (1) the timeliness of one of the claims, (2) the right of the Northern Paiute Nation or of any of the tribal or individual appellees to sue on behalf of the Mono group of Northern Paiutes, (3) whether Indian title includes rights to subsurface minerals in lands formerly under Spanish and Mexican sovereignty, (4) the inclusion of mineral enhancement in the valuation of Indian title land, (5) the inclusion of improvements made in or on land before the taking date in the valuation of that land, and (6) the ultimate conclusion of the Commission on the value of the Nevada Paviotso tract. (Hereinafter appellant and cross-appellee will be called Government and the appellees and cross-appellants (petitioners before the Indian Claims Commission) will be called Indians, unless otherwise noted.)

The Indians have asserted Indian title to some 50,000,000 acres of land in Nevada, Oregon, California and Idaho. They allege these lands were taken from them by the United States without their being compensated. The Commission found that although the Northern Paiutes did not exist as a single land-owning entity in aboriginal times, the Snakes, Monos and Paviotsos did exist as three separate aboriginal groups, each holding title to separate tracts or areas, and that the United States had taken their lands from them without compensation. Dates of taking were also found by the Commission. Prior to the valuation hearing, a net settlement of $3,650,000 was reached by the parties for the "Snake tract," of Oregon, which is no longer in litigation. After the valuation hearing the Commission found in favor of the Indians: as to the "Mono tract" in the net amount of $935,000 and as to the "Paviotso tract" in the net amount of $15,790,000. The Mono tract consists of 2,506,000 acres in California and 612,000 in Nevada. The Paviotso tract consists of 10,899,726 acres in Nevada and 716,000 acres in California. The largest and most valuable part of the famous Comstock Lode, though not all, was located in the Paviotso tract, and that accounts for most of the award for that tract, as will appear.

August 13, 1951, was the last day for filing claims under Section 12 of the Indian Claims Commission Act (60 Stat. 1049). The original petition in this case was filed on December 26, 1950, and it was on behalf of the Northern Paiute Nation and its various bands. It was filed by six named present-day organized tribes and by Walter Voorhees as a member of and representative of the Northern Paiute Nation and all its members. On August 8, 1951, a timely amended petition was filed in which 17 more individual Indians joined as petitioners. Again there were designated as petitioners "The Northern Paiute Nation and the Bands Thereof * * *." Set forth were a number of causes of action, including claims for the value of certain lands located in Nevada, Idaho, Oregon and California. The petitions alleged the Northern Paiute Nation and its constituent bands had aboriginal title to the lands in issue and that the lands had been taken from them by the United States without payment of any compensation. The amended petition also alleged that the individual petitioners and the Northern Paiute Indians, enrolled as members of the six petitioning reservation organizations, comprised a substantial part of the descendants and members of the Northern Paiute Nation and its various bands, who had held Indian title to the lands in issue. Of the individual Indian petitioners, 17 are clearly Northern Paiutes and 15 are clearly members of one of the six named tribal petitioners. Each of the tribal petitioners sued in its own right, and jointly with the others, both as successors to the claims of the Northern Paiute Nation and to the claims of each and all of its bands and in a representative capacity on behalf of said Nation and the bands thereof; and the named individual Indians sued as members and representatives of all the members of such Nation and the bands thereof.

The claimed territory, as described in the timely amended petition, extended at its southernmost point to the present town of Bishop, California. A hearing was held before the Commission on questions relating solely to the aboriginal title claims. Because of evidence adduced at that hearing showing the claimed lands to extend south from Bishop to a point below Owens Lake in California, the Commission allowed the filing of a newly amended petition (filed April 15, 1957) which, to conform to this evidence, enlarged the Indians' claim to include the area south of Bishop.

The petition of August 8, 1951, had also alleged that the Northern Paiute Nation was divided into 21 aboriginal bands, and these bands were named. Because of evidence received at the title hearing indicating that the list of 21 bands was incomplete, the Commission accepted the amended petition of April 15, 1957, with the bare allegation that the Northern Paiute Nation "was divided into various bands." The bands were not named nor was their number stated.

The Government first argued that the claim for the Mono tract, or at least that part of it which was south of Bishop, was first made in 1957, was therefore untimely and could not be made the basis for any recovery in this action. The Commission was of the opinion that:

> * * * petitioners [the Indians] have, by that amended petition [of April 15, 1957], done no more than sever the claims not presently at issue [those other than the aboriginal title claims] and better define the territory allegedly used and occupied in aboriginal times by the Northern Paiute Nation so as to conform with the evidence produced at the hearing. Petitioners did not thereby plead any new causes of action. [7 Ind.Cl.Comm. 322, 389]

The Government did admit, however, that though the 1951 petition did not specifically claim an area south of Bishop, nor did it name a band that allegedly occupied the additional land (the Mono tract), its position would be untenable if "the subsequent extension of the claim into these new areas is not a new cause of action." The Government would also

agree with the Commission's conclusion had the Northern Paiute Nation been the land holding entity. But, it said, because the Commission found the land holding entity to be the Monos or bands constituting the Monos, a group that had not, the Government alleged, instituted any action prior to the expiration of the limitations period, "the argument that the later petition can 'relate back' is no longer tenable."

[1–3] We have recently dealt with the issue of when a claim can be added by amendment and "relate back" to the original timely petition. See Snoqualmie Tribe of Indians, etc. v. United States, 372 F.2d 951, 959–961, 178 Ct.Cl. 570, 585–589 (1967). The question to be asked is whether the claim for the entire Mono tract was "presented" before the statute of limitations ran out on August 13, 1951. Id., 372 F.2d at 960, 178 Ct.Cl. at 586. Sufficient notice to the Government is the test, Id., 372 F.2d at 960 and 961, 178 Ct.Cl. at 587 and 588, with our inquiry focusing "on the notice given by the general fact situation set forth in the original * pleading." Id., 372 F.2d at 960, 178 Ct.Cl. at 587 (the "aggregate of operative facts" underlying the claim for relief, Id., at footnote 5) and "the standing of the claimant * *." Id., 372 F.2d at 961, 178 Ct.Cl. at 589.

> * * * the rule of relation back does not extend to amendments that add new parties or causes of action. * * But [this] simply states a conclusion. Each case must be tested by the "conduct, transaction, or occurrence" standard to determine whether adequate notice has been given. Id., 372 F.2d at 961, 178 Ct.Cl. at 588.

Closely intertwined with this issue, and bearing on its "standing of the claimant" aspect, is the Government's next claim that neither the Northern Paiute Nation or any of the tribal or individual petitioners is entitled to represent or file claims on behalf of the Mono group. The Government has chosen to treat this as a separate issue and we will do the same. We now state why sufficient notice had been given to the Government.

[4] The original petition did not name the Mono band among those specifically enumerated, nor did the timely amended petition. The original was headed, however:

> The Northern Paiute Nation, ex rel. Walter Voorhees; [named tribes]; each in its own right and each on behalf of the various bands and groups of each of them, and each on behalf of the Northern Paiute Nation *and the various bands and groups making up the Northern Paiute Nation*,

while the time amended petition was headed:

> The Northern Paiute Nation *and the bands thereof*, ex rel. [named individuals and tribes],

and sought relief for "the claims of the Northern Paiute Nation and claims of each *and all* the bands of the Northern Paiute Nation." (Emphasis supplied). The Monos were clearly a Northern Paiute "band." Therefore, the timely petition did include the Monos as a party to the suit.

[5] The "conduct, transaction, or occurrence" alleged, though at different dates and in different places, was the uncompensated taking of Northern Paiute Nation land in the areas named. This included the Mono tract. The Government cannot now say that these petitions could not have led it to believe it would have to defend against Mono claims. Indeed, the Government believed the opposite, for the writings of its own expert witness, introduced by the Government and relied on by it at the hearing on aboriginal title, showed the Monos of the area claimed to be Northern Paiutes. In addition, in its Proposed Findings of Fact No. 11 before the Commis-

* In the *Snoqualmie* case no timely amended petition had been filed, as is not true in the case at bar. By the "original pleading" to be looked to, we do not mean only the first petition filed, but mean to include within the quoted phrase all timely petitions, original or amended.

sion, the Government identified the Indians embraced within the term Northern Paiute as "those portions of the *Mono*-Paviotso speaking peoples living east of the Sierra Nevadas * * *. This includes (1) the Indians of Owens Valley, (2) the eastern Monos, (3) some Indians in (a) the Honey Lake area and other portions of Northern California, (b) perhaps the southwest portion of Idaho, and (c) the southeast part of Oregon." Thus, this case is stronger for the Indians than was *Snoqualmie*, for there the Government had at all times objected to the introduction of evidence on the claim of the "unnamed" party. That the Government was on notice as to the Monos also answers the question of whether the area south of Bishop was timely claimed. The Commission has held in other cases that the extension of claimed boundaries does not set forth a new cause of action which would be barred by the statute of limitations. Pueblo de Zia v. United States, 11 Ind.Cl.Comm. 131, 161–62 (1962), rev'd on other grounds, 165 Ct.Cl. 501 (1964); Suquamish Tribe v. United States, 5 Ind.Cl.Comm. 140, 160–62 (1957). The Government, though agreeing with this rule, would have us limit it to only those cases where the entity for which the extended land was claimed was identical with that bringing the action. Without commenting on the validity of this limitation and assuming *arguendo* that the Government is right, the result in this case would be no different, for we have held that "the entity bringing the action" included the Mono band. It is with this latter conclusion that the Government will differ.

[6] The Government next argued that none of the Indians—the Northern Paiute Nation, the named tribes or the named individuals—were entitled under the Indian Claims Commission Act to represent or file claims on behalf of the Mono group. On this point the Commission said:

> * * * the Northern Paiute Indians are a clearly defined group of American Indians within the meaning of the term "identifiable group" as used in sections 2 and 10 of the Act and, accordingly, this Commission has jurisdiction to hear and determine the claims brought by members of such groups on behalf of all its members. [7 Ind.Cl.Comm. 322, 388]
>
> * * * * * *
>
> The Commission considers it immaterial, for jurisdictional purposes only, that the Northern Paiute Nation may not have been an aboriginal land using entity but may rather have been composed of numerous, separate bands or groups. The fact that it was, at the time the claim was filed, a group of American Indians capable of clear and unmistakable identification brings the "Northern Paiute Nation" within the term "identifiable group" as used in the Act. (Indians of California v. United States, 122 C.Cls. 348). [7 Ind.Cl.Comm. 322, 389]

The Commission then found that the Northern Paiute Nation was not the aboriginal land holding entity. However, since the suit had also been brought for and on behalf of all the land using groups of Northern Paiute Indians, the Commission then asked whether any of those groups were aboriginal land holding groups. It found that:

> * * * those Northern Paiutes who were in aboriginal times generally referred to as Monos or Paiute of Owens Valley * * * had exclusively used and occupied in Indian fashion from time immemorial that portion of the claimed territory [put in issue by the Government in this part of the case—the Mono tract]. * * * [7 Ind.Cl. Comm. 322, 414]

And, the Mono descendants constitute part of the present-day Northern Paiute Nation, the "identifiable group." As to the Mono group, the Commission then found that though there was not included in the record testimony of any Northern Paiute who could definitely trace his ancestry to a member of the Mono or Paiutes of Owens Valley group, other evidence of record and documents not included in the record did establish the

existence on the date the petition was filed of descendants of the Monos or Paiutes of Owens Valley. We think the procedure and result adopted by the Commission was correct, as was its reliance on our case of Thompson (Indians of California) v. United States, 122 Ct. Cl. 348, cert. denied 344 U.S. 856, 73 S.Ct. 91, 97 L.Ed. 665 (1952).

In *Thompson* a claim had been filed by individuals "as members of, and as representatives of, and on relation of the Indians of California, Petitioners." Prior to and at the time the claims presented to the Commission arose, the Indians of California were comprised of a number of tribes, nations, bands and rancherias or villages, with each occupying a definite part of the area in California. The Commission held that this manner of tribal composition was not enough to make the Indians of California an "identifiable group of American Indians" within the intent and meaning of the Indian Claims Commission Act and that the claim should have been presented by a petition by or on behalf of each tribe or band.

On appeal to this court, we reversed the Commission and held the Indians of California to be an "identifiable group." In the case before us today, the Northern Paiute Nation, its constituents being separate land owning bands, is as much an "identifiable group" as was the Indians of California group. And, the Indians' claims herein were presented, in part, on behalf of each band. In the *Thompson* case we said (at p. 357):

> * * * Congress clearly intended in circumstances such as we have here, to confer upon the Indian Claims Commission jurisdiction to hear and determine claims that might be presented to it by groups of Indians, * * even though the ancestors of such group existed as separate bands or villages at the time the claim arose. * * *

[7] For the Mono award to be made in this case, the Indians must have shown that there were either living members or descendants of members of the "identifiable group" as a predicate for their claim. The Snoqualmie Tribe of Indians, supra, 372 F.2d at 957, 178 Ct.Cl. at 581, and cases cited. Also see Red Lake and Pembina Bands et al. v. Turtle Mountain Band of Chippewa Indians, and United States, 355 F.2d 936, 173 Ct.Cl. 928 (1965). The Commission, as stated previously, said that on the date the petition was filed there did exist Mono descendants. The descendants of the Mono group are clearly part of the Northern Paiute Nation, the "identifiable group," as it is constituted today, and on whose behalf, in part, this suit was brought. Though the Commission did not make its statement regarding the existence of descendants a formal finding of fact, there is unrebutted testimony that the tribal petitioners did have, among their members, descendants of the aboriginal inhabitants of the whole area claimed, including the Mono tract, and that among the individual petitioners, 15 of them being members of the tribal petitioners, there might be Mono ancestors. The findings of the Commission reflect that the original Monos were forcibly removed from their tract to the Tejon Reservation in California, but left it later and that most of them returned to their former country, continuing to live in their former manner.

[8] We must stress that what we have just said relates solely to the question of jurisdiction. It may be that after an award is made and submitted to Congress, Congress may wish to legislate further concerning the payment and distribution of the award, "but this should have no bearing upon the question of jurisdiction to hear and determine the claims presented to the Commission." Thompson, supra, 122 Ct.Cl. at 359–360. Also see Snoqualmie Tribe of Indians, supra, 372 F.2d at 959, 178 Ct.Cl. at 585.

The next position of the Government is "that the Indians in territories previously under Spanish and Mexican sovereignty are not entitled to be compen-

sated for minerals which they were not themselves mining when they [the territories] came under the sovereignty of the United States." Its theory is that Indians in lands ceded by the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922, which included the Northern Paiutes, were dispossessed of any subsurface rights they might have had by the Spanish monarchs, remained so dispossessed under Mexican rule, and therefore had no mineral interests in these lands when the United States assumed sovereignty in 1848. The Commission did not agree. If the Government is right, the valuation of the Paviotso tract would be but a minor fraction of the award the Commission has made for that tract.

In the recent case of Lipan Apache Tribe, etc. v. United States, 180 Ct.Cl. 487, at p. 493 (1967), we said:

> * * * * * *
> * * * the law of the prior sovereigns (Spain, Mexico, * * *) accepted aboriginal ownership * * *. "[T]he right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land." Sac and Fox Tribe v. United States, supra, [383 F.2d 991, 179 Ct.Cl. 8, cert. denied 389 U.S. 900, 88 S.Ct. 220, 19 L.Ed.2d 217 (1967)]. * * *

In *Lipan*, however, we did not deal with the question of whether the prior Spanish or Mexican sovereigns specifically intended to extinguish aboriginal Indian rights in subsurface minerals.

In Lipan, Id., at p. 492, we said the following of "extinguishment:"

> * * * * * *
> The correct inquiry is, not whether * * * [the prior sovereign] accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights. Extinguishment can take several forms; it can be effected "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise * * *." United States v. Santa Fe Pac. R. R., supra, 314 U.S. [339] at 347 [62 S.Ct. 248, 86 L.Ed. 260]. While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a "clear and plain indication" in the public record that the sovereign "intended to extinguish * * * the [claimant's] rights" in their property, Indian title continues. Id., at 353 [62 S.Ct. 248].
> * * * * * *

The Government has failed to show in this case the required "clear and plain indication" that the prior sovereigns meant to extinguish the Indians' rights to the subsurface minerals in the lands occupied by them and ceded to the United States under the 1848 Treaty of Guadalupe Hidalgo. The evidence it has presented to us is, at best, favorable to both parties. That which we next refer to favors the Indians' position that their mineral rights were not "extinguished."

In the Government's brief is an excerpt from the Spanish mining law of January 10, 1959. It reads:

> * * * We reclaim, resume and incorporate in ourself in our crown and patrimony, all the Mines of gold and silver and quicksilver of these our kingdoms, in whatsoever parts and places they may be, and are found * * * we will that the said Mines shall and may henceforth (without any other act of seizin (*apprehension*) and possession) belong to our said crown and patrimony * * *.

The Government said this showed the sovereign's intent to make royal ownership of all minerals, wherever situate, unquestioned. However, a reading of the entire law—some 9 pages—shows us the Government is clearly wrong.

In his introductory statement to the law, His Majesty Don Phillip II stated that the discovery, working and reduction of the Mines in the kingdom would benefit not only the Crown, but also its subjects and native citizens and the

public welfare of the kingdom as a whole. He then referred to a law of His Majesty Don Juan I, decreed in 1387, which stated, in part:

> * * * notwithstanding that by us and by the kings whom we succeed * * * there have been reserved for us Mines of gold and silver, and of other metals whatsoever, it is our gift that in future all said persons [ecclesiastical persons and the inhabitants and residents of the cities, villas and places of the kingdom] * * * shall be at liberty to search for and examine (*catar,*) and dig in *their* said *lands* and inheritances, the said Mines of gold and silver, and quicksilver and tin, and stones and other metals; and that they may also search and excavate in all other places whatsoever, not causing injury one to another in their searching and excavations, *and doing so with the permission of the owner;* and all that shall be found and taken out from the said Mines shall be divided as follows: First, that there shall be delivered and paid therefrom to the person who has taken out the mineral, all the expenses which may be incurred in excavating and extracting it; and of that which may remain after deducting said expenses, the third part shall belong to the person who has taken it out, and the other two-thirds to ourself. (Emphasis supplied, except for the word "catar").

Interpreting this to mean that "all persons are permitted to search for, and dig and work said Mines and metals" and that the apportionment as set forth therein was still to be made. Don Phillip stated that mining had languished for numerous reasons: first, many persons kept the information about Mines a secret so that the advantages from them would flow only to themselves; second, most of the Mines had been granted to noblemen and other persons, causing the whole Kingdom, as respected the Mines, to be divided up and distributed; third, many of the grants to individuals provided that a license from the grantee would have to be obtained before a mine could be discovered and worked, thus causing people to hold back from discovering and working the mines; fourth, many of the noblemen, "either in order to avoid the expense and labor, or because they do not give it their attention," had done very little to discover and work the Mines, and the benefit which would accrue to all by the working of the Mines had thereby been impeded; and fifth, because the law of Don Juan I was so ancient, many people were afraid it was no longer applicable. It was to overcome the above difficulties and to enable "the rewards and advantages" of working the Mines to be "effectually secured" that caused Don Phillip II to "reclaim, resume and incorporate" in the crown all the Mines. After "reclaiming" the Mines, Don Phillip II said:

> Art. 2. Inasmuch as the reclamation and incorporation of the said Mines in us, and in our royal patrimony, as aforesaid, are *not made with the object or purpose that we alone, or others in our name alone, shall search for, discover and work such Mines; but as, on the contrary, it is our intention and will that our subjects and citizens shall participate, and have a part in said Mines,* and engage in the discovery and working of them; therefore, by these presents, we give permission and authority to our said subjects, and native citizens, that they may freely, without our license, or the license of any one else, examine, search for, and dig the said Mines of gold and silver * * * and that no person, or persons, shall be at liberty to interpose any impediment or embarrassment, * * *. (Emphasis supplied).

This is not a clear indication that the sovereign dispossessed the Indians of subsurface mineral rights. In Article 5 Don Phillip II further said:

> * * * no other person can interfere to try, dig or work, and that within said space and limits the said discoverer alone shall have such right and power, without that he can be impeded

or prevented by us, or in our name, or by any other person, * * *

Article 4 was merely a variation of the apportionment scheme promulgated by Don Juan I, showing the law to be a revenue statute. This view finds further support in the law of August 22, 1584, which revoked, annulled and made void the law of January 10, 1559 to the extent it was in opposition to the new law. It was so in opposition mainly as to the Crown's share in mining profits.

The Government, relying on its reading of the 1559 law, told us it was codified as part of the law of New Spain and reasserted in the Mining Ordinances of 1783 as follows:

> Art. 1. Mines are the property of my Royal Crown, as well by their nature and origin, as by their reunion declared in [the law of Don Phillip II in 1559].

Since our reading of the 1559 law is not the same as the Government's, the recodification of 1783 does not accomplish the same result either. The King additionally said:

> Art. 2. Without separating them from my Royal Patrimony, I grant them to my subjects in property (*en propiedad*) and possession, in such manner that they may sell them, exchange them, rent them, donate them, pass them by will, either in the way of inheritance or legacy, or in any other manner alienate the right which in the Mines belongs to them on the same terms on which they themselves possess it, and to persons capable of acquiring it.
>
> Art. 3. Let this grant be understood to be upon two conditions: first, that they shall contribute to my Royal Treasury the prescribed portion of metals; * * *.

Again we see the sovereign promulgating a revenue law. In addition, in a glossary to the Government's exhibit containing the quoted laws, "*en propiedad*," as used in Article 2, is defined as follows:

> *Propiedad.* Dominion, ownership, right of property. Also, landed estate. *This term is used to express an exclusive right of property, in contradistinction to the right of use* or usufruct. (Emphasis supplied for the body of the definition).

Thus, the sovereign did not do what the Government would say he did: there was no "clear and plain" "extinguishment" of mineral rights of Indians.

Since the Indians' aboriginal title differed from the titles of the King's other subjects, which were of feudal origin or by Royal grant, and so more within Royal control, one would expect him to say so if he wanted to dispossess Indians. There were at least twelve separate edicts prohibiting various classes of individuals from working or discovering mines but not one of them referred to the Indians.

On December 19, 1526 and June 19, 1568, the sovereign seems to have formally recognized the Indians' existing right to subsurface minerals:

> It is our grace and will, that all persons, of whatsoever state, condition, rank, or dignity, * * * shall be at liberty to take out (*sacar*) gold, silver, quicksilver, and other metals, either personally, or by their servants or slaves, from all Mines which they shall discover, or wherever they shall choose or think proper, and to hold them and work then freely, without any kind of impediment, * * * *provided that there result no injury to the Indians* * * *. (Emphasis supplied, except for the word "sacar").

* * * * * *

The Government argued that the following law, promulgated December 17, 1551, April 5, 1563, and March 6, 1575, emphasized that Indians and Spaniards were on a basis of equality with respect to mining and that the law would not have been necessary if the Indians had owned the subsurface rights:

> We command that no restriction be placed upon the Indians in discovering, holding and occupying Mines of gold, or silver, or other metals, and in working them the same as the Spaniards may do * * *.

It is our view that the unquoted part of the law shows that Government's position to be wrong:

> * * * and that they may extract the metals for their own profit *and for the payment of their taxes;* and that no Spaniard or *Cacique* shall have part or management of any Mines which the Indians shall have discovered, held or worked. (Emphasis supplied, but not to the word "Cacique").

This again illustrates the function of the mining laws to be revenue raising statutes. In addition, in light of the laws of December 17, 1551, and May 5, 1575, the command that no restriction be placed on the Indians and that they should have sole part or management of their Mines seems to say that the Indians were not to be treated as second-class citizens because of their status as Indians and that their pre-existing subsurface rights were to be recognized.

[9] If Indians discovered minerals on their territories they could mine them, according the monarch only his lawful share of the proceeds. While the Spanish law evidently gave the discoverer of minerals rights as against the surface owner, how that effected Indian title is not clearly spelled out. To treat the laws as taking everything from the Indians and giving nothing is to impute to the monarch an intent he never stated. While the Government has introduced other documents going to show the effect of Spanish law in the hope of supporting its position, they do not change the opinion we have just expressed. The Government has not "clearly and plainly" shown the Indians' subsurface mineral rights to have been "extinguished." Therefore, in 1848, when the United States assumed sovereignty of the lands in issue, the Indians held complete Indian title to them.

The next issue is whether, for compensation purposes, Indian title land includes the value of subsurface minerals.

[10] In Miami Tribe of Oklahoma v. United States, 175 F.Supp. 926, at p. 942, 146 Ct.Cl. 421, at p. 449 (1959), we said:

> * * * whether the land to be valued is held by the Indian claimants under recognized title or merely under so-called Indian title, * * * the Supreme Court and this court have held that such land should be valued in the same way. * * *

What we seek is the fair market value of the lands claimed herein. Id., 175 F. Supp. at 943, 146 Ct.Cl. at 450. The fair market value of *recognized* title lands includes the enhancement in the value of the land caused by subsurface minerals. United States v. Shoshone Tribe, 304 U. S. 111, 118, 58 S.Ct. 794, 82 L.Ed. 1213 (1938). Therefore, in determining the value of the *Indian* title lands in the instant case the Commission correctly included the value of subsurface minerals.

We consider next the errors assigned by both sides in the appraisement of the Paviotso tract, assuming that mineral enhancement is not to be excluded.

The Government assigned the Commission's failure, in determining the value of mineral lands, to allow for the improvements, such as shafts, tunnels, mine machinery and mills which were, the Government said, no part of the "Indian title," but for which portions they were awarded compensation. Contrary to the Government's contention, the Commission did not err by refusing to deduct from the valuation of mineral areas the improvements "made by others."

[11] The record and the findings show that the Government does not now contest that the taking date of the Paviotso Tract was December 31, 1862.* It is equally uncontested that from the discovery of the Comstock Lode, in spring 1859 to that date, in Virginia City especially, and to some extent elsewhere in the area, the various mining companies incurred large expenditures in digging shafts and tunnels and in installing mine machinery and mills. This indeed brings

* See my separate observations, *infra*, where taking date is discussed.

to mind immediate questions whether the Indian claimants did have their awards enhanced by such improvements, and whether such enhancement was proper. However, it is incumbent on the Government to point out the nature of the error in this part of the determination below, and we hold it has failed to do so.

The Government referred to the miners as "others," disassociating them from the United States. However, the land involved was part of the public domain which they exploited, not only without interference by the National Government, but under its implied sanction; Del Monte Mining And Milling Co. v. Last Chance Mining And Milling Co., 171 U.S. 55, 18 S.Ct. 895, 43 L.Ed. 72 (1898); Sparrow v. Strong, 3 Wall. (70 U.S.) 97, 104, 18 L.Ed. 49 (1865); they were in no sense trespassers. Mining rights were not obtainable by patent until much later. The miners originated a "mining district" in 1859 according to their custom. In 1865 and 1866 the Congress retroactively validated the rules of such districts as evidence of title to mining claims vis-a-vis other miners, 13 Stat. 441, and vis-a-vis the United States, 14 Stat. 43. The territorial legislature had purported to do this earlier. See Sparrow v. Strong, supra, at p. 104. In 1860 United States troops defeated what was seen as an attempt by the Paiutes to drive the miners out of the Virginia City area. By allowing the prosecution of the claim before us, the United States adopts the miners' acts and assumes responsibility for them, however tortious they may have been in their origin. Shoshone Tribe of Indians, etc. v. United States, 299 U.S. 476, 495, 57 S.Ct. 244, 81 L.Ed. 360 (1937).

[12] It would seem to follow that the United States stands in the shoes of the miners with respect to the improvements and is liable to the Indians to just the same extent as if its own engineers had constructed the improvements, but to no greater extent.

The Government cited our decision in Nez Perce Tribe of Indians v. United States, 176 Ct.Cl. 815 (1966) cert. denied 386 U.S. 984, 87 S.Ct. 1285, 18 L.Ed.2d 233 (1967), to the effect that the value of improvements is to be deducted from Indian awards. A glance at that case shows that it has no application here. The Commission therein appraised Indian lands involved in the litigation by reference to sales of similar lands, not so involved. However, the similar lands were to some extent improved and the lands to be appraised were not. Of necessity, the portion of the value of the similar lands attributable to improvements had to be excluded to make their sales in any way a measure of value. Here, the improvements were on the land taken, a totally different situation.

However, there is authority, not cited to us, which shows that the Government's contention does raise a serious question as to just compensation. In Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 596, 33 S.Ct. 605, 57 L. Ed. 982 (1913), the taker before the taking had purchased a right of way and built a railroad on it. Unfortunately, it had failed to settle with a mortgagee and instituted a condemnation proceeding to clear its title. In that proceeding, the mortgagee said: "pay me for the ties and rails of my fine new railroad." The State courts refused to award anything more than the value of the land unimproved. On writ of error, the mortgagee asked the United States Supreme Court to hold that the State deprived it of property contrary to the 14th Amendment. The Court said (at p. 602, 33 S.Ct. at p. 607):

* * * * * *

> The rule of the common law, to which the plaintiffs in error refer, that fixtures annexed to realty become a part thereof and subject to existing liens thereon, is one subject to many exceptions. One of these is that applied by the Virginia court, namely, that when a corporation possessing the right of eminent domain enters upon lands necessary for its public purposes, under the deed of a mortgagor in possession, and places permanent improvements thereon in good faith, it may lat-

er condemn the interest and title of the mortgagee without being required to pay more than the value of the land without the improvements placed thereon with intent to acquire the entire title. * * *

* * * * * *

The highest secondary authorities have considered the case where the taker has made improvements in good faith prior to a taking and indicated that the opinion of the majority of courts is that the condemnee cannot receive the value of the taker's improvements. Orgel, Valuation Under Eminent Domain (1936) 310 and ff.; 5 Nichols, Eminent Domain (3d Ed.1952) 224 and ff.

In United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943), the Supreme Court held that a condemnee could not recover any enhancement in the value of his land due to activity on the land by the taker before the taking date. In that case the activity consisted, not of improvements, but merely putting out stakes indicating the land would probably be taken.

[13] It is clear at any rate that valuation as of the taking date is not an invariable rule to be followed even if it produces a result that shocks the conscience of the court.

The most obvious way to resolve these difficulties would have been to find that the taking had occurred at some earlier date than December 31, 1862. The United States, which would appear to have suffered most by the date selected, has not preserved this issue for our review, in the opinion of a majority of the court. In the circumstances of this particular case the Government theory about improvements appears to be a belated attempt to reopen the date of taking issue. Our problem, however, is to determine if the Commission appraised the property correctly, assuming the taking date of the Paviotso Tract was December 31, 1862.

It must be noted that neither party attempted to show separately the value of unimproved land and improvements, offering a simple choice of striking or not striking a portion of value attributable to the improvements.

Experts on both sides constructed what they called a sales index of value for the Virginia City area, by far the most important part. These figures were close together and were given great weight by the Commission. They were weighted composites made up of sales prices for mining rights and transactions in the stock of mining companies at or about the taking date, related to footage on the lode. There were no transactions in fee simple titles because the Government had not parted with its underlying fee. The Government said below, as it said here, that the exclusion of improvements is to be accomplished by subtracting a figure of some $3½ million from the sales index of value.

The Commission dealt with this in their opinion. As we understand what they said, they thought that so large a deduction as $3½ million was not supported by the evidence, but in any event if the deduction was made, there would be offsetting adjustments that would cancel it out. This appears to be a reasonable interpretation of the facts.

The record shows that at Virginia City, between 1859 and December 31, 1862, there was a great waste of money and effort in digging shafts and tunnels and installing mine machinery and mills. Many of the items actually detracted from the value of the land because they were barren holes producing insufficient marketable ore, or none. Half of the mills installed were surplusage, as the other half could process all of the ore that the area ever produced. Some of the facilities were needlessly grandiose. These errors were due to ignorance about the geology of the Comstock Lode, oversanguine estimates of its future, inexperience, and the disorganized way in which development was conducted. Consequently, if one could have eliminated the improvements the reduction in value would have been a great deal less than the improvements cost. In the case of the mining company stocks, such an adjustment would have required a corre-

sponding elimination of debt incurred by these companies in constructing the improvements. In such cases the stock might have been worth more if the improvements had never been undertaken. The most remarkable thing about the Government's contention is that it is willing to allow the hypothetical purchaser of Virginia City, unimproved, the benefit of all the geological knowledge that was attained in the course of making the improvements.

It is agreed by everyone who has studied the history of the Comstock Lode that exploitation would have been far more successful, and many financial disasters avoided, if mining had been conducted on a well managed basis with good geologic advice, and with wasteful duplication of facilities eliminated. The Government's hypothetical purchaser would appear, therefore, to be one with all the options restored to him, the wrong exercise of which led so many actual developers to insolvency, but simultaneously he has presented to him gratis the geologic knowledge of the strata that was actually obtained at such a heavy cost.

[14, 15] The Commission concluded that the making of speculative deductions for improvements would have been no help to the Government when the necessary countervailing adjustments were also considered. We think this evaluation is supported by substantial evidence and cannot now be disturbed.

In light of the role of the Government in inducing the Commission to adopt the sales index of value method and the lack of any assignment of error by its side related to this, it is unnecessary to consider now whether this was the soundest method of determining the value of the Virginia City mineral area as of December 31, 1862. It does seem apparent that establishing a taking date for Virginia City and the Comstock Lode, three and one-half years after exploitation on a large scale commenced, really let the genie out of the bottle, and for the Commission to have corked it up again in an intellectually satisfactory manner is beyond reasonable expectation. The conceptual difficulties involved when the taker improves the property before the taking date are brilliantly discussed by Orgel, op. cit. supra, and exposition of them by us would be useless. We do not think the Commission was required as a matter of law to deduct $3½ million, or any other figure, as the supposed value of improvements, from the value estimated by the sales index method.

It will be noted that the Commission did not formally find the values of mineral areas separately. It fixed a single figure for the entire Paviotso Tract, Nevada portion, including timber, grazing and agricultural areas, and desert. The Government's argument requires us to consider as a finding the statement in the opinion, not the findings, that a fair value for the Virginia City District, if considered separately, would have been $8.7 to 9.7 million and the subsidiary statements in support of that view. We have, *arguendo*, so considered these statements.

[16] On behalf of the Indians we confront at the outset strenuously urged and elaborately documented contentions that the findings of the Commission are insufficient. One difficulty, however, is that the Indians say nothing to show they face up to the situation that we, if dissatisfied with the scope of the findings, cannot make new ones of our own but must remand the case to the Commission. Snake or Paiute Indians, etc. v. United States, 112 F.Supp. 543, 125 Ct.Cl. 241 (1953). Do they really want a remand even if we are prepared to affirm a substantial award in their favor, of $15,790,000 after offsets for two tracts in Nevada? We think a party making the kind of objection the Indians do should make its position clear.

[17, 18] Plaintiffs said the Commission should have valued separately the various mineral areas, as their expert witnesses did. In fact the Commission did this only for the Virginia City-Comstock Lode district, and that only in its opinion, not its findings. It would not

have committed reversible error had it accommodated plaintiffs in this regard. We did the job that way in The Tlingit And Haida Indians of Alaska et al. v. United States, 389 F.2d 778, 182 Ct.Cl. (1968), a case we had under original jurisdiction, not an appeal case. On the other hand, the Commission's method in The Winnebago Tribe And Nation of Indians v. United States, 16 Ind.Cl.Comm. 81 (1965), aff'd. without opinion 181 Ct. Cl. (1967), agrees with the one used here. Apparently the trier of fact has an election in the appraisement of large, contiguous areas taken at the same time from the same group or tribe. Obviously there are objections both ways. The value of the sum of the parts may exceed the whole, because, e. g., population, food or transportation problems may be seen as a curb on future development only when the area is viewed as an entirety. On the other hand, the "willing buyer", a figment at best like the ordinary prudent man, becomes completely unimaginable if he is conceived as buying 10 million acres in order to get a few thousand of mineral lands. When a tract has portions having highest and best uses for mining, grazing, farming, and mere cactus desert, but is valued as a single unit, it has the look of the traditional horse and rabbit stew. Our views stated in Citizen Band of Potawatomi Indians of Oklahoma, et al. v. United States, 179 Ct.Cl. 473 (1967), cert. denied 389 U.S. 1046, 88 S. Ct. 771, 19 L.Ed.2d 839 (1968), were not intended to bar separate evaluation of mineral areas, preliminary to an overall determination, but only a separate award for minerals in the ground. We think a trier of fact who elects either procedure should explain why, as we did in Nez Perce Tribe of Indians v. United States, supra. We do not think the omission to do so here is a defect that necessitates a remand.

[19] The Indians' other complaint about the findings is that the Commission rejected its expert appraisers' views, and did not spell out why in detailed findings. In legal appraisement, however, widely divergent opinion testimony is the rule rather than the exception. The trier of fact must decide first, of course, if such testimony is competent and admissible. Before us, no party claims that this case was decided with respect to any issue on inadmissible testimony. The Indians wanted the Commission to take up the reasoning of its appraisers step by step, and either accept each step or show reasons for rejecting it. Having competent testimony before it, the Commission was not restricted to swallowing it whole or rejecting it utterly. It did not have to refute what it did not accept as controlling. It could, and apparently did, synthesize in its mind the immense record before it, determine to what extent opinion evidence rested on facts, consider and weigh it all, and come up with figures supported by all the evidence, perhaps, though not identified with any of it. The Commission did, however, give us a good deal of enlightening discussion of the value issues, and one cannot read it as a whole without getting a pretty clear idea of how they approached their task. Nor does the Indians' brief on the remaining issues seem hampered by uncertainty as to what the Commission held.

We now turn to the Indians' substantive complaints about the evaluations the Commission made. Besides part of Virginia City and the Comstock Lode, the Paviotso Tract also included lesser mineral areas. The Indians constructed sales indexes of value for them also. The two most important, the Esmeralda and Humboldt districts, the Indians showed by that method to be worth $4,689,318 and $7,962,331, respectively. The Commission never found a separate value for these portions but if, as stated in the opinion, $8.7 to $9.7 million is assignable to Virginia City, out of $15,750,000 for the whole Paviotso Tract in Nevada, it is clear, as it said, that it considered the sales index to show a grossly inflated value for the other areas. The Indians said, if the sales index is so infallible for Virginia City, the Commission should have applied it in an "evenhanded manner" across the board.

[20] As to the Humboldt, the argument answers itself. The Indians' own mineral experts said that miners and prospectors in the area were misled by surface indications which would not have deceived a competent geologist. They assigned a value on the taking date of but $3,000,000. The Humboldt never amounted, then or later, to anything comparable to the Comstock Lode. A sales index of value for Humboldt of $7,962,-311 compared to $9,779,239 for Virginia City is preposterous on its face, even considering that part of the Comstock Lode was outside the Paviotso Tract.

The case of Esmeralda differs only in that the Indians' sales index there produced a figure approximately agreeing with their value estimate. The Government's expert witnesses made indexes based on stock sales that were markedly lower. However, the Commission noted that here, too, prices were extravagant in relation to the real values. Here the Indians' index was arrived at by extrapolating from the transactions of a few companies in a manner that is difficult to follow and the Commission considered to be dubious. It would seem that the record, including that submitted by the Government, would furnish the support of "substantial evidence" for a wide range of values. The Indians said that stock prices and values suffered from litigation, inefficiency, mismanagement, and poor mining and milling practices. This may have been so, but it was for the Commission to evaluate the impact these conditions might have had. It is significant that the Indians' same experts who appraised the Virginia City district at over twice the sales index figure appraised Esmeralda approximately at the sales index! They must, therefore, have perceived a difference in the two districts justifying an "evenhanded" appraiser in treating them as different, as the Commission did.

The Commission's use of the sales index in evaluating the Virginia City district did not establish a rule of law that they had to use the index in the same fashion everywhere. They had before them opinion evidence on other factual bases. Each district was a separate problem requiring a separate solution.

The Commission, as we have several times stated, would have valued the portion of the Comstock Lode—Virginia City district that was within the tract, at $8.7 to 9.7 million, if it were to be valued separately. The Indians assigned it $23 million, and it is interesting to see how, as it was more than twice their own computed "sales index."

The two mineral experts for the Indians estimated 3,859,000 tons of ore at reachable levels in the Comstock Lode and within the tract, on the basis of what was known in 1862. This contrasts with 2,893,762 tons actually produced there up to 1882, when the lode was about exhausted. The difference they credited largely to "mail losses" avoidable by efficient operation. They valued the ore at $75 per ton, with a gross value of $289,-440,000, and a "gross recoverable value" of $212,256,000. The cost of production at an estimated $25 per ton was $96,480,-000, and the total operating profit would have been $115,776,000. This was all on the basis of a postulated unified operation, obtaining greater production at far lower cost than the actual inefficient small separate operations could possibly have done. The figure of $23,000,000, represents a payment of twenty percent of the anticipated profit to the proprietor of the soil, the other eighty percent of course representing the share belonging to the party furnishing capital, know how, and access to markets.

The failure of the "sales index of value" to support the $23,000,000 figure was attributed to the fact that the actual sales were depressed by the poor profit expectations due to high production cost and a low recovery ratio, both reflecting the inefficient division of ownership and exploitation of the lode among so many hands. It is clear, therefore, that the assumption of a single "willing buyer" purchasing the entire Comstock Lode, or at least all of it in the Paviotso Tract, was basic to the $23,000,000 appraisement, the keystone of the arch.

The rules of the mining district, as we have seen later validated by the Congress and made the basis of title to mining claims, provided that no claim should exceed 200 feet square. The prospectors were as truly rugged individualists as we have ever had in this country. It was clearly their intent to discourage monopoly although, of course, the claims of several prospectors could be combined by purchase to make possible a viable mine. That there was no actual monopoly in exploiting the Comstock Lode was no accident but flowed directly from their laws. The assumption by the Indians herein of a monopolistic development, is something like an appraisal of a vacant city lot, which seeks to substantiate a high value on the basis of an imposing hypothetical building in violation of the applicable zoning law. Orgel, op. cit., supra, at pp. 105–110.

There is nothing in the Indians' appraisal report to show any effort to discover whether in 1862 any person (or corporation) existed in the United States who could write a check for $23,000,000 just for the mining rights, without starting on the other capital investments requisite to development. If there is a tendency in such cases as this to ignore a lack of persuasive verisimilitude in the portrait of the supposititious "willing buyer", still there is precedent for supposing that if he buys a vast tract, at least he will expect some discount, on a per unit basis, because of the magnitude of his purchase. Nez Perce Tribe of Indians v. United States, supra. The Indians' figures made no allowance for this. Their "willing buyer" grandly ignores the probable lack of other buyers, such as normally by their competition drive up the price of real estate, and in his generosity disregards the fact that the Indians, if they do not sell to him, will have the tract on their hands for a century, in all likelihood, or else will have to sell to the inefficient small developers. His calculation of what he will pay is based entirely on what he considers a reasonable cut from his anticipated profit, and he takes no notice of the going prices for claims such as he is to buy. It is regrettable that such eleemosynary characters were not common in the West as it actually was.

The "willing buyer" can see that the inefficiency of the existing operation, its high costs and low rate of recovery, are due to causes his intended monopoly will eliminate. As the latter is entirely a paper project, the offsetting "bugs" a less sanguine investor might expect in it have no chance to disclose themselves. We all know, of course, that monopoly and bureaucracy are not always more efficient than individualism and free enterprise.

[21, 22] We agree with, and need not repeat, the reasons the Commission put forward for not appraising by this method. The Commission admitted this scheme in evidence nevertheless and considered it. It derived enlightenment from it, no doubt as it said. The Indians would have us hold that the Commission was compelled as a matter of law to swallow it whole, or that its contrary findings are not supported by substantial evidence. In other words, that the Indians' own "sales index of value" is not substantial evidence. Such contentions, stated in those terms, as we would have to do, afford their own answers and no others are necessary. The Government cited authority that schemes of this kind are not even admissible in evidence. In view of our decision in *Tlingit And Haida*, supra, that view would seem no longer tenable in this court. It remains true, however, that an evaluating body which has admitted opinion evidence of value of various sorts, based on different facts and arriving at conclusions by different routes, is not bound by it just because it has been admitted. The tribunal must give weight to the evidence in inverse ratio to the amount of speculation and unfounded assumption it perceives to form a part of it. Though the "sales index of value" may have been depressed by the inefficiency of the miners which a single operation could eliminate, on the other hand it was inflated by the unfounded optimism

which, as the Commission found, was rampant at Virginia City too, at or about the taking date. It was not likely that a hypothetical single operator with $23,000,000 to spend would be more reckless than the actual speculators whose deals in composite made up the "sales index of value." The Commission gave us a fine quote as to this, [16 Ind.Cl.Comm. 215, 331, 332] taken from Eliot Lord's superb Comstock Mining And Miners, which was originally published in 1883, and based on interviews with many participants in Comstock operations, who were then still living, as well as extensive search of records. A 1959 edition was admitted in evidence as Defendant's Exhibit G-27, and Petitioner's Exhibit G-22. That is, both sides offered it. The quote begins at p. 125 and with supporting footnote reads:

* * * * * *

* * *. Men walked the streets of Virginia City as if pacing the roof of a fathomless treasure house, and their heads were constantly in the clouds. They saw a network of silver beneath their feet and the fine strands widening into solid wedges of ore. The eyes of the soberest minded even were dazzled by the vision, and the fancy of the imaginative ran wild. No metaphor can exaggerate the prevailing delirium. It would appear that a silver mist enveloped the slopes of the Sun Peak and men moved and breathed in its unnatural atmosphere. Drunk with the vapor, all prudent considerations were laughed to scorn. Timid suggestions of the utility of thrift and the possibility of an approaching exhaustion of the ore deposits were unheeded or unheard. Every large stockholder in a productive mine counted himself a nabob and scattered his money broadcast like a prince bestowing largesses. The conception of the Brazilian spendthrift in Der Seekadet is scarcely a burlesque of the Washoe production. One fits his doors with handles of solid silver and buys a library like a ledge, by the foot; another fills his water-tank with champagne to enliven the guests at a wedding.[1] * * *

1. W. N. C. Maxwell, Superintendent New Idria Mine, California, formerly Superintendent Overman Mine, Gold Hill, Nevada; Jerome B. Stillson, Correspondent New York World, Letter dated July 3, 1865.

* * * * *

These are the people whose purchases and sales of mining rights and stock in mining companies made a composite value less than half the figure the Indians claim. The Commission need have said no more, and was not required to go through the assumptions and predicates of the Indians' $23,000,000 figure, step by step, acquiescing in or refuting each one. Clearly its rejection was based on substantial evidence.

Accordingly the decisions of the Indian Claims Commission under review are affirmed and the appeals taken by both sides are dismissed.

Affirmed.

NICHOLS, Judge.

Having stated the unanimous views of the court respecting the issues the parties have argued before us, I deem it appropriate to add certain comments on my account only. They are not in conflict with the opinion prepared for the court, and in a way tend to reinforce the result it reaches. They relate entirely to the date of taking of the Nevada portion of the Paviotso Tract, and everything stated is to be deemed applicable only to that.

The Commission found that the above tract was taken on December 31, 1862 (Finding 30, 7 Ind.Cl.Comm. 616, 617). The key importance of the date chosen will be apparent from consideration of the technique of appraisal the Commission used and its application to the facts. It valued in its findings the tract as a whole at $15,750,000 but made it clear in its opinion that $8.7 to $9.7 millions represented the mineralized are of the Virginia City district only. As to that, the method of appraisement is highly contemporary to the taking date, being based

as a starting point on sales of mining rights and stock in mining companies in the district at or about the valuation date, with possible upward and downward adjustments mostly rejected. If the Commission had selected the date of original discovery of the Comstock Lode, 1859, it would have had to consider sales of their rights by the original discoverers at relatively trifling figures. On the other hand, 1865 was for the Comstock a period of forced liquidations, with many investors wiped out. It is clear, therefore, that December 31, 1862 is a more fortunate selection from the point of view of the Indians than many other dates would have been. I do not conceive that the limits of our appellate function, in light of the valuation issues tendered by appellee, bar us from considering the finding which, by the Commission's valuation technique, more than any other controls the amount of the award. How did they pick that date?

There was no trial on the issue. The parties jointly suggested the year 1862, and submitted in support thereof a historical recital which the Commission picked up and used verbatim as its Finding 30.

Finding 30 recites that in 1859 the Indian Agent and the Superintendent for Indian Affairs for the territory commenced to plan the removal of Indians to two named tracts they had selected and recommended to the Secretary of the Interior; that hostilities with the Indians broke out but ended in a truce in August, 1860, at which time a public notice was posted forbidding trespass on the selected tracts; that councils were held in 1861 and 1862 to induce the Indians to settle on the reservations. "*By the end of 1862, many of the Indians had expressed a desire to remain at peace, provided a reservation be set apart for their permanent home. On December 31, 1862, the Pyramid Lake and Walker River reservations had come into operation and had been accepted by a substantial number of Indians.*" (Emphasis supplied). In 1864 and 1865 these reservations were surveyed and in 1874 were established by Executive Orders as reservations for our Indians.

Nothing is said about any force being used on the Indians to compel them to move to the reservations, nor did they relinquish by contract or treaty, formally or informally, whatever ownership they had in lands outside the reservations. No formal act of extinguishment of title is recited, from that day to this.

The Commission may have had in mind that the tract was not taken all at once, and have viewed the chosen date as an average. Creek Nation v. United States, 302 U.S. 620, 58 S.Ct. 384, 82 L.Ed. 482 (1938). However, in that case the selection of the different dates to merge into the average rests on the premise that takings according to established legal principles did occur on the dates averaged.

These findings fail to show that a taking occurred on December 31, 1862, or for that matter, on any other date. The record shows that takings did occur, but at different times and by force of different circumstances.

The record before the Commission and its findings reflect that there was sporadic extraction of gold from 1850, in the Paviotso Tract, Nevada portion. However, it was a hard living at best, and less successful as time went on, so that the gold seekers (one cannot call them miners), who had dropped out from among the westward migrants to California, mostly drifted along. In the spring of 1859 came the dramatic discovery of the Comstock Lode with its wealth of gold and silver ore. The remaining whites located claims all over the hills. They organized a "mining district" according to California precedents, with rules for the staking and recording of claims, and how much actual working was requried to keep the discoverer's rights alive. When word reached Sacramento and San Francisco, the tide of population reversed its flow; the prostitutes, the faro dealers, the bad men, and the honest prospectors all flowed back East through the passes of the Sierras.

As early as 1858 the Indians had been reported to be in a suffering and destitute condition. This was attributed to the invasion of the Indians' hunting grounds by pioneers who had "reduce[d] nature's wilds to the dominion of the white man." No doubt the added white population made this bad situation worse.

What was the United States Government doing? Nothing. These lands were supposed to be public domain, acquired by the treaty of Guadalupe Hidalgo in 1848. In 1860 the Congress debated measures to require licensing of mining and royalty payments, but nothing was enacted. There were never any patents or deeds to the Comstock Lode.

In 1861, at the miners' behest, the Congress split the territory of Utah, as it then was, into two, the western portion becoming Nevada. This was mainly to establish law and order in the mining camp of Virginia City, and to provide a territorial judiciary which would adjudicate the innumerable lawsuits between the mining companies. The titles of these mining companies derived from, and only from, the stakes put out by half-legendary prospectors, and recordings, mostly doctored, kept for the miners by a local blacksmith. In 1865 the Congress enacted that the rules of the mining district should be evidence of title in disputes of the miners vis-a-vis one another, 13 Stat. 441, and in 1866 it made their claims valid as against the United States, 14 Stat. 43.

In 1865, in Sparrow v. Strong, supra, an ejectment action between two mining companies, reached the United States Supreme Court on writ of error to the Territorial Court. It had been brought before the above enactments, and they were not considered as applicable. Defendant urged that the minimum jurisdictional amount of $2,000 was not at issue because the dispute was between two groups of trespassers on the public domain, neither of which could possibly have any property right in the land. The Court answered (3 Wall. (70 U.S.) at p. 104, 18 L.Ed. 49):

* * * * * *

* * *. The Territory, of which Nevada is part, was acquired by treaty. Rights and titles, acquired under ceding governments, remain unimpaired under our government. We cannot know judicially, therefore, that the right and title in controversy was not so acquired. If it was, it certainly may be capable of being valued in money.

But if this were otherwise, we do know that in the act organizing the Territory of Nevada there is no clause annulling grants or claims to land, while large legislative powers are conferred by the Territorial legislature, limited only, as to lands, by the prohibition of interference with the primary disposal of the soil by the United States, and of unequal taxation in certain cases. We know, also, that the Territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts.* And we

* Laws of Nevada Territory, p. 16, § 40, and p. 21, §§ 74, 77.

* * * * * *

cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.

We cannot dismiss this writ of error, therefore, on the ground that a controversy concerning the possessory right to a mining claim, existing under the express sanction of the Territorial legislature and the implied sanction of the national government, does not relate to a subject-matter capable of being valued in money.

* * * * * *

In Del Monte Mining And Milling Co. v. Last Chance Mining And Milling Co.,

supra, the Court reviewed the history of mining claims in the public domain. At p. 62 of 171 U.S., 18 S.Ct. 895, 43 L.Ed. 72 it cited and quoted from Sparrow v. Strong, so that case settled the nature of such claims prior to 1866. See also cases cited therein.

It is, therefore, clear that from 1859 on, the exploitation of the Comstock Lode and elsewhere on the public domain by the miners was not tortious and they were not squatters or trespassers, as the court assumed the miners were in Tlingit And Haida Indians of Alaska et al. v. United States, supra.

What of our Indians? We have already mentioned the invasion of their hunting grounds. In the spring of 1860 the local Paiutes, previously peaceful, took umbrage because two of their women had been kidnapped by white traders. They killed the offending traders and burned their trading post. Later history viewed this act as a legitimate reprisal by frontier standards, but Virginia City saw it as an Indian atrocity. Miners organized themselves as a posse to the number of 100 or more and set forth on a punitive expedition. This was soon proved to be rash indeed. A force of several hundred Paiute braves intercepted them, and after a flag of truce was fired upon, cut off the posse and utterly destroyed it. Half its number lost their lives. Virginia City then frantically sought to fortify itself, and telegraphed for help to California. A force came over the Sierras to the rescue, part Army regulars, part militia, and part volunteers for the fight. They offered battle to the Paiutes, and inflicted a sharp defeat upon them. The Paiute survivors saved their lives by fleeing to inaccessible places, and these Paiutes never made trouble again, ultimately withdrawing into the reservations as the Commission has found.

It is not clear whether the Paiutes intended to terminate mining operations at Virginia City and reassert their dominion over that portion of their heritage. It is, however, evident that Virginia City thought that was their intention, and the intervention of United States troops, including regulars, was to prevent it from being carried out. It is likewise clear, under the uncontested findings in this case, that the Paiutes were at that time the true holders of aboriginal title to the Comstock Lode and the whole Virginia City mining area, so far as they were in the Paviotso Tract, and if they had driven the miners out, they would only have been repossessing their own.

In Lipan Apache Tribe, etc. v. United States, supra, we held that it would constitute a taking if United States troops drove an Indian tribe off their property at the behest of third parties and for their benefit. I do not see any significant difference if, as here, the third parties have seized the property by themselves and the intervention of the United States forces was only afterwards to maintain a possession that, but for them, would have been rightfully terminated. Here, however, this brief military campaign is but one of the circumstances that show the Government as having adopted and ratified the seizure by the miners of the Virginia City and Comstock Lode areas. The others are: the considered and informed refusal of the Congress to intervene; the establishment of a separate territorial government for Nevada, at the miners' behest; the establishment of a judiciary to adjudicate disputes between miners, as to their ownership of the lode; and the determination of the Supreme Court that the miners were not mere trespassers on the public domain. Apart from the litigation between miners, with which the Indians were not concerned, the practical effects were the same as if the Government had issued patents to the miners in 1859, and I would hold the legal effects were the same also. The United States effectively protected the miners against interference from any source, except their own number, until the Comstock Lode was depleted by them, and the issues had become for them academic.

It is irrelevant to consider exactly when the trespass by the miners became, by adoption and ratification, a taking by the United States, because once that step

was taken, it related back to the first move, even one originally tortious. Shoshone Tribe of Indians, etc. v. United States, supra. The first discovery of the lode in 1859 was the immediate cause of a rush of white population into Paiute territory. The aviation easement cases afford a parallel: we have repeatedly held that the first material and sustained invasion of the plaintiff's property starts our six-year statute of limitation running. The latest case is Town and Country Motor Hotel, Inc. v. United States, 180 Ct.Cl. 563 (1967); see other cases cited therein. In light of undisputed facts it is an error of law to fix the date of the taking of the Virginia City district at any date after 1859, an error not correctable by any stipulation or concession of the parties. See my dissent in Tlingit And Haida Indians of Alaska et al. v. United States, supra.

The same principle would fix the taking dates of any other mining areas in the Paviotso Tract. As to land adapted for agricultural or homestead purposes, the patent dates would control. As to land still in the public domain, still vacant, I do not think it has been taken yet.

SUN SHIPBUILDING AND DRY DOCK COMPANY, American Export Isbrandtsen Lines, Inc., Third-Party Intervenor

v.

The UNITED STATES.

No. 169-65.

United States Court of Claims.

April 19, 1968.

Shipbuilder brought action against United States to recover damages for alleged breach of contract to pay ship construction subsidy on three ships shipbuilder had constructed for owner, and the United States made the owner a third-party defendant and asked for judgment over against owner for any amount that shipbuilder might recover against United States, and thereafter owner intervened and requested affirmative relief and decision on the merits. Shipbuilder made motion, United States made cross motion, and owner made motion for summary judgment. The Court of Claims, Skelton, J., held that where United States drew ship construction contract entered into by United States, owner of ship, and shipbuilder, and contract was ambiguous whether United States, after approval of change in work in ships, became bound to pay shipbuilder 48% of total increase in cost of work resulting from change, United States was liable to shipbuilder for ship subsidy for 40% of total increase of cost of work resulting from change.

Shipbuilder's motion for summary judgment granted against United States, motion of United States for summary judgment granted against owner, and motion of owner for summary judgment denied.

1. United States ⇐70(3)

Where an ambiguous contract has been written by the government, the ambiguity will be resolved against the government and in favor of the other party.

2. Shipping ⇐3

Where United States drew ship construction contract entered into by United States, owner of ship, and shipbuilder, and contract was ambiguous whether United States, after approval of change in work in ships, became bound to pay shipbuilder 48% of total increase in cost of work resulting from change, United States was liable to shipbuilder for ship subsidy for 40% of total increase of cost of work resulting from change. Merchant Marine Act, 1936, §§ 501-511 as amended 46 U.S.C.A. §§ 1151-1161; 28 U.S.C.A. § 1491; Reorganization Plan Nos. 7, 21, note following 46 U.S.C.A. § 1111.

(b) On September 26, 1957, a claim for refund signed by his authorized attorney was filed on behalf of this plaintiff for the recovery of the taxes paid as set out above.

(c) While this plaintiff increased the charge to his customers on one or two occasions during the period while he was paying the transportation taxes set out above, these increases were not on account of the transportation taxes but rather on account of other increased expenses. Throughout the period, the fee charged his customers included the transportation tax and he did not undertake to pass the tax along to his customers.

MIAMI TRIBE OF OKLAHOMA, also known as the Miami Tribe, et al. and Ira Sylvester Godfroy, et al.

v.

UNITED STATES.

No. 2-58.

United States Court of Claims.

July 13, 1959.

Action involving claim by Indians against United States to land ceded by Indians to United States, which sold land to settlers who were able to pay cash therefor and whose ability to buy land was unaffected by adverse economic conditions in the country in the year of and subsequent to cession of land, which was comparable to land that had been disposed of by government at $2 an acre on public sale and for more at auctions and on sales of reserve sections and for even more on private sales between settlers. The Court of Claims, Madden, J., held that evidence was insufficient to support finding that the ceded land was worth only 75 cents per acre.

Judgment vacated and cause remanded to the Commission.

Jones, C. J., and Whitaker, J., dissented.

1. Indians ⇦11

Under Indian Treaty of 1795 stating that United States relinquished its claim to all other Indian lands within a well-defined area, reserving therefrom certain specific tracts of land for use of United States in consideration, among other things, of the peace which was established between the Indians and United States and of cessions and relinquishments of land made by Indians to United States, and under which United States undertook to give Indians permanent annuities and gave Indians right to permanently occupy the land without interference from United States, which reserved to itself only the right to buy the land from the Indians, Indians were given right to permanently occupy and use the land until the tribes should be disposed to sell the land to United States, and title of Indians in the land ceded to United States was what is understood as "recognized" title, and because of such recognition Indians did not have to establish extent of their exclusive occupancy of any of land ceded to the United States. Treaty with the Wyandots, etc., Aug. 3, 1795, 7 Stat. 49; Treaty with the Miamies, Oct. 6, 1818, 7 Stat. 189.

2. Constitutional Law ⇦68(1)
Indians ⇦10

Where Indian lands are held by so-called Indian title, their right to occupy land and to use it is permissive and temporary and such right or title may be extinguished by United States at any time, with or without consent of the Indians, and by any means which sovereign may deem appropriate, and in absence of special legislation conferring upon some court or commission jurisdiction to adjudicate matters relative to this permissive right of occupancy, government's disposition of such right is a political and not a judicial matter.

3. Indians ⇦10

Where Congress has by treaty or statute conferred upon Indians or acknowledged in Indians right to perma-

nently occupy and use land, Indians have a right or title to that land which has been variously referred to as "treaty title", "reservation title", "recognized title", and "acknowledged title", and such right may be established in a variety of ways.

4. Eminent Domain ⇐83

Generally, United States does not have an obligation to compensate an Indian tribe for unrecognized Indian title land. Treaty with the Miamies, Oct. 6, 1818, 7 Stat. 189.

5. Indians ⇐10

Lands which Indians hold by recognized title may be lands formerly held by them under mere aboriginal use and occupancy title or may be lands which they never previously occupied and which government conveyed or granted to them, and size of the tract involved is not controlling on question of recognition.

6. United States ⇐105

Whether land to be valued is held by Indian claimants under recognized title or merely under so-called Indian title, or is held under fee-simple title with all the usual rights of ownership, including that of alienation, such land should be valued in the same way.

7. United States ⇐105

In fixing value of land to which Indians have made a claim, if there is evidence of private sales not controlled by government's minimum statutory price for public lands, such sales should be taken into consideration in determining value and in addition consideration should be given to evidence of sales of reserve sections, sales of land at public auction, bearing in mind duration of auction, location and physical characteristics of the land, type of settlers who purchased land and their ability to pay for it, and history and development, both political and economic, of area in which land is located. Indian Claims Commission Act, § 2(3), 25 U.S.C.A. § 70a(3).

8. United States ⇐105

In action involving claim by Indians against United States to land ceded by Indians to United States, which sold land to settlers who were able to pay cash therefor and whose ability to buy land was unaffected by adverse economic conditions in country in the year of and subsequent to cession of land, which was comparable to land that had been disposed of by government at $2 an acre on public sale and for more at auctions and on sales of reserve sections and for even more on private sales between settlers, evidence was insufficient to support finding that ceded land was worth only 75 cents per acre. Act July 22, 1790, 1 Stat. 137; Act March 31, 1793, 1 Stat. 329; Treaty with the Miamies, Oct. 6, 1818, 7 Stat. 189; Indian Claims Commission Act, §§ 2, 2(3), 19, 25 U.S.C.A. §§ 70a and subd. (3), 70r.

9. United States ⇐105

In suit by Indian claimants against United States on a claim for unconscionable consideration alleged to have been paid by United States to claimant tribe for land ceded by tribe to United States pursuant to treaty, measure of tribe's recovery was difference between true market value of land ceded at time of cession and consideration paid for such land by government, less offsets for gratuities and less any payments United States may have made on the claim. Act July 22, 1790, 1 Stat. 137; Act March 31, 1793, 1 Stat. 329; Treaty with the Miamies, Oct. 6, 1818, 7 Stat. 189; Indian Claims Commission Act, §§ 2, 19, 25 U.S.C.A. §§ 70a, 70r.

10. Indians ⇐11
United States ⇐105

Where Indian treaty provided that in consideration of cession by tribe United States should pay to tribe a so-called perpetual annuity of $15,000 and construct a gristmill and a sawmill and provide a blacksmith and a gunsmith and provide implements of agriculture and furnish 160 bushels of salt annually, purchase price for land ceded was capitalized or funded value of annuity plus funded value of goods and services actually paid to tribe as result of a subsequent treaty, and only that amount was deductible from final judgment as a payment on claim in a subsequent action

by Indians for unconscionable consideration alleged to have been paid by United States to the tribe. Treaty with the Miamies, Oct. 6, 1818, 7 Stat. 189; Treaty with the Miami Indians, June 5, 1854, 10 Stat. 1093; Indian Claims Commission Act, § 2, 25 U.S.C.A. § 70a; Treaty with the Miamies, Oct. 23, 1826, art. 4, 7 Stat. 300.

Edward P. Morse, Chicago, Ill., for appellants and cross-appellees Miami Tribe of Oklahoma and others. Edwin A. Rothschild, Chicago, Ill., and Louis L. Rochmes, Washington, D. C., were on the briefs.

Walter H. Maloney and James N. Beery, Washington, D. C., filed a brief on behalf of appellants and cross-appellees Ira Sylvester Godfroy and others.

Ralph A. Barney and W. Braxton Miller, Washington, D. C., with whom was Asst. Atty. Gen. Perry W. Morton, for the United States as cross-appellant and appellee.

MADDEN, Judge.

The Indian claimants and the United States have filed cross appeals from a final determination rendered by the Indian Claims Commission in their Docket Nos. 67 and 124. This determination was made in three stages. In its first decision, 2 Ind.Cl.Comm. 617, 645 (March 26, 1954), the Commission held that the Miami Tribe had so-called "recognized" title to 4,291,500 acres of land located in the State of Indiana and ceded to the United States under the Treaty of October 6, 1818, 7 Stat. 189, and that because of such recognition the claimant Indians did not have to prove their exclusive use and occupancy of the land ceded.[1] The Government, defendant below, has appealed from this holding. In its second decision, 4 Ind.Cl.Comm. 346, 408 (September 17, 1956), the Commission found that as of the date the land was ceded to the United States it had a fair market value of 75¢ per acre and the Commission held that because the difference between that value and the purchase price of 6.4¢ per acre paid for the land was an unconscionable discrepancy within the meaning of section 2(3) of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C.A. § 70a(3), the Indian claimants were entitled to a judgment for the difference. The Government has appealed from this decision on the ground that the ultimate finding of 75¢ per acre market value for the land in 1818 is not supported by the primary findings made by the Commission, that

1. On the issue of title there was consolidated for hearing by the Commission Docket Nos. 67 and 124 (Miamis), Docket No. 314 (The Peoria Tribe of Oklahoma et al. on behalf of the Wea Nation), and Docket No. 337 (Absentee Delaware Tribe of Oklahoma, Delaware Nation et al.). The following tribes intervened and presented their claims: Pottawatomie (Docket No. 15-D); Citizen Band of Pottawatomie (Docket No. 311); Kickapoo Tribe of Kansas (Docket No. 315); The Six Nations et al. (Docket No. 89); Hannahville Indian Community (Docket No. 29-B). The Commission held that none of the intervenors had established an interest in the area ceded and their petitions of intervention were dismissed. No appeal has been taken from this dismissal. The Commission held that the Miamis (Docket Nos. 67 and 124) had established title to 4,291,500 acres of the land ceded; that the Weas had established their ownership of 815,000 acres of the area, and that the Delawares had established that they had a one half interest with the Miamis in 3,859,000 acres, amounting to 1,929,500. The Miamis, Weas and Delawares agreed that the value of the land (represented on Royce's Map of Indiana as tract 99) should be valued as of the date of the Miami Treaty of October 6, 1818 (the other two tribes having ceded their lands on October 2 and October 3, 1818) and that the Commission's determination of value in the Miami case would be binding upon the Weas and Delawares in Docket Nos. 314 and 337. Because of certain issues present in Docket Nos. 314 and 337 which were not ripe for consideration by the Commission, no award could be made for the Weas or Delawares. Accordingly, the instant appeal involves only the Miami Indians in Docket Nos. 67 and 124 in which cases final determinations have been made.

some of the primary findings are not supported by substantial evidence, and that on the basis of the record as a whole the Commission could not reasonably have reached a fair market value of more than 20¢ per acre. The Indian claimants have also appealed from this decision on value on the same ground that the ultimate finding of 75¢ per acre market value in 1818 is not supported by any of the primary findings of the Commission, but except for certain findings which the Indian claimants urge are not properly findings at all, the Indian claimants do not attack the correctness of the primary findings but contend that they lead irresistibly to an ultimate finding of market value of the land in an amount in excess of 75¢ per acre. In its third decision relating to offsets, 5 Ind.Cl.Comm. 494, 516 (September 30, 1957) the Commission allowed $280,500 as a "payment on the claim" and the Government has appealed from this decision on the ground that as a matter of law it is entitled to certain additional deductions.

We first turn to the question of whether the Indian Claims Commission erred as a matter of law in holding that the claimant Indians' title to the land ceded to the United States under the 1818 Treaty had been recognized and acknowledged by the United States so that the claimant Indians were not required to prove their exclusive aboriginal use and occupancy of the area from time immemorial down to the time of the 1818 cession.

[1] We shall review the facts on which the Commission based its conclusion that the United States had, prior to the Treaty of 1818, recognized in the claimant Indians their right of permanent use and enjoyment of the land ceded by the Treaty in 1818. Following the conclusion of the Revolutionary War, much of the territory ceded to the United States by Great Britain east of the Mississippi River was occupied by Indian tribes, many of whom were hostile to the United States and far from at peace with each other. It was the desire of the new Government to conciliate these hostile tribes and to bring about a state of peace between the tribes themselves. To both the Indians and the white inhabitants of the United States land was a matter of paramount importance and the settlement of disputes concerning conflicting claims thereto was a continuing concern of Congress. In order to bring about a more tranquil state of affairs between the Indians themselves and between the Indians and the white inhabitants of the United States, the Government negotiated numerous treaties of peace and friendship for the establishment of boundaries between the areas of land occupied and used by the tribes and those areas of land claimed and used by the United States, as well as the establishment of boundaries between the lands claimed and used by the various tribes themselves.

On July 13, 1787, Congress enacted an Ordinance for the Government of the Territories of the United States northwest of the Ohio River known as the Northwest Ordinance. On August 7, 1789, this ordinance was reenacted to adapt its provisions to the Constitution of the United States, 1 Stat. 50. The ordinance printed in the margin of 1 Stat. pp. 50–53 provided for the government of a territory which later became the states of Ohio, Indiana, Illinois and Michigan. In Article III it was provided:

> "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs

being done to them, and for preserving peace and friendship with them."

In 1794, in pursuance of the policy expressed in the above quoted provision of the Northwest Ordinance, General Anthony Wayne was appointed a commissioner to negotiate a treaty with the hostile tribes of the Northwest Territory. In his treaty instructions it was emphasized that he should attempt to bring about an agreement concerning a dividing boundary line between lands used and occupied by the Indian tribes in the territory and the lands which belonged to the United States. He was also instructed to establish the boundry lines between the lands owned by the separate tribes in the territory. He was authorized to guarantee to the Indian tribes the right to the soil in the lands owned by them as against any citizens or inhabitant of the United States. During the course of the negotiations with the Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Pottawatamies, Miamis, Eel River, Weas, Kickapoos, Piankishaws and the Kaskakias, it became apparent that it would not at that time be possible to persuade the tribes to agree to definite boundaries between their separate areas of occupation and accordingly his treaty instructions were altered to permit him to make a single treaty with all of the tribes establishing the overall boundaries of the land owned by all of them without defining inter-tribal boundaries. The treaty was negotiated at Greenville and executed on August 3, 1795. 7 Stat. 49. The purposes of the treaty were declared to be to put an end to destructive warfare, to settle all controversies between the treaty parties, and to restore free intercourse between the Indian tribes and the United States. In Article III of the Treaty of Greenville a general boundary line between the lands agreed to be owned by the United States and the lands agreed to be owned by the Indians was described. This line, known as the Greenville Line of 1795, began at the mouth of the Cayahoga River on Lake Erie at a point in the western part of Ohio where Cleveland is now located. From the mouth of the river the line ran south about 70 miles to Fort Lawrence, Ohio, thence west across the center part of the state to the border of what later became the state of Indiana at Fort Recovery on a branch of the Wabash River. The line then went southwest at a slight angle to the Ohio River on the border between Indiana and Kentucky to a point on that border about 25 miles west of the Ohio state line. In that same article of the treaty the Indian tribes, in consideration of the peace established, of goods already received and to be received thereafter from the United States, and to indemnify the United States for injuries and expenses sustained during their war, ceded and relinquished all of their claims to the land lying to the east and to the south of that line. This cession is identified on Royce's map of Indiana and Ohio as Area 11 and the cession included about two-thirds of the state of Ohio south of the line, and a little less than one-third of the eastern part of that state, plus a narrow triangle of land in eastern Indiana. In addition to this large cession, the tribes ceded to the United States some 16 small tracts of land in Ohio and Indiana which were occupied by various Government installations, and the Indians agreed to allow the people of the United States free passage by land and water through the Indian country lying along the chain of posts included in the 16 small cessions, and the free use of harbors and the mouths of rivers along the lakes adjoining the Indian territories for the shelter of vessels and the landing of cargoes.

In Article IV of the Treaty of Greenville, the United States agreed to relinquish to the Indian signatories to the treaty Indian lands lying north of the Ohio River, east of the Mississippi River, and west and south of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and Great Britain in the Treaty of 1783, 8 Stat. 80, reserving to the United States four tracts of land in-

cluding one located at the post of Fort Vincennes on the Wabash River in southwestern Indiana. This "relinquishment" on the part of the United States was stated to be made in consideration of the peace established and of the cessions and relinquishments of lands made by the Indians in Article III and was intended to indicate the liberality of the United States and to represent "the great means of rendering this peace strong and perpetual." In return for the cessions made by the Indians to the United States, the United States agreed to deliver to the Indians certain annual allowances in varying amounts.

In Article V of the Treaty of Greenville it was declared precisely what was intended to be the meaning of the "relinquishment" made to the Indians by the United States of the land in Article IV of the treaty. Article V of the Treaty of Greenville provides as follows:

> "To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is thus: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."

In Article VI of the treaty it was provided that any citizen or inhabitant of the United States who might settle upon the lands relinquished by the United States to the Indians would be out of the protection of the United States and the particular tribe on whose land such a settlement might be made could drive the settler off or punish him in any manner the tribe thought fit. The article also provided that because such settlements would be injurious to the Indians and to the United States, the United States would be at liberty to break such settlements up, to remove and punish the settlers and thus protect the Indian lands guaranteed in the previous articles.

In Article VII of the treaty the Indians were given the right to hunt within the land which they had ceded to the United States, as long as they behaved properly.

In Article VIII it was provided that trade would be opened with the Indian tribes and that the tribes would afford protection to properly licensed traders.

Article IX provided for an orderly settlement by the Indian superintendent of any disputes that might arise. It also provided that if a tribe planned to make war against the United States, any tribe learning of such intention should immediately give notice to the commanding officer of the troops of the United States at the nearest post. In return, the United States agreed to give notice to the Indians of any harm which it learned might be planned against the tribes.

Although the Treaty of Greenville did not establish boundaries between the lands of the various signatory tribes, the tribal representatives to the treaty understood that the United States was dealing with each tribe independently of the others and that boundaries would be established as between the various tribes by future negotiations. The work of defining these boundaries preparatory to seeking further cessions of the lands declared to belong to the Greenville Treaty Indians was entrusted to William Henry Harrison who became Governor of the Indiana Territory and Superintendent of Indian Affairs. After making a thorough study of the problem of inter-tribal boundaries, Governor Harrison commenced his project by negotiating a

treaty with the Greenville Treaty Indian tribes on June 7, 1803, 7 Stat. 74. In Article I of that treaty it was noted that the boundaries of the tract of land located at Fort Vincennes in southwestern Indiana, which the United States had reserved for its use in Article IV of the Treaty of Greenville, had been difficult to determine but that the boundaries had now been agreed upon. This area of land known as the Vincennes Tract is Area 26 on Royce's map of Indiana.

On August 18, 1804, Governor Harrison negotiated a treaty with the Delaware Tribe of Indians, 7 Stat. 81. In Article 1 of that treaty, the Delaware tribe ceded to the United States all their right and title to a tract of country bounded on the south by the Ohio River, on the west by the Wabash River, on the north by the tract ceded by the Treaty of Greenville (1795) and redefined by the Treaty of Fort Wayne (1803) (the Vincennes Tract) and the road leading from Vincennes to the Falls of Ohio. In Article 4 of this treaty it was stated that the Delaware tribe had exhibited to Governor Harrison sufficient proof of its right to all the country lying between the Ohio River and the White River[2] and that the Miami tribe, who were the original owners of the upper part of that country, had explicitly acknowledged the title of the Delawares at a tribal council held at Fort Wayne in June 1803. The United States then agreed that it would in the future consider the Delaware tribe as the rightful owners of all the country bounded by the White River on the north, the Ohio on the south, the general boundary line running from the mouth of the Kentucky River on the east (the Greenville Line) and one of the northern boundaries of the tract ceded in Article 1 of the treaty and that ceded by the Treaty of Greenville (the Vincennes Tract) on the west and the southwest. This article of the treaty thus identified a tract of land in southern Indiana as being the sole property of the Delawares.

In Article 5 of the Treaty of August 18, 1804, it was stipulated that the United States would negotiate with the Piankishaw tribe to secure its acknowledgment of the title of the Delawares to the tract of country ceded in Article 1 of the treaty. On August 27, 1804, the Piankishaws agreed (7 Stat. 83) to the cession of the Vincennes Tract covered by the Treaty of Greenville, and to the cession of land south of that tract by the Delawares in Article 1 of the Treaty of August 18, 1804. The Delaware cession of land to the south and east of the Vincennes Tract is Area 49 on Royce's map of Indiana.

On August 26, 1805, Governor Harrison wrote to the Secretary of War stating that the Miami Tribe of Indians would not agree to recognize the Delaware claims set forth in Article 4 of the 1804 Treaty with the Delawares to the country between the White River and the Ohio River east of the Vincennes Tract. Governor Harrison stated that he was finally persuaded that the Miamis had not intended in the 1803 Council at Fort Wayne to concede or recognize any right or title in the Delaware Tribe to that tract and so he proposed to take a cession of the disputed area from the Miamis. In the same letter, Governor Harrison stated that the Pottawatomies had finally given up any right to interfere in future sales of land which might be made by the Miamis on the Wabash River and its waters, stating "The guarantee of those lands to the three tribes, who call themselves Miamis, could not be avoided, as they insisted upon it with the most persevering obstinacy but, I conceive that it will be no difficult matter to get them, in the course of a few years, to make a division of the land they now hold in common. At any rate, a point of much consequence has been gained, by getting the other tribes to acknowledge

2. The Ohio River forms the southern boundary of Indiana and the White River beginning at the Illinois border runs eastward through south central Indiana through the Vincennes Tract to the border of Ohio.

their [Miamis'] exclusive title to the country of the Wabash, above the Vincennes Tract." Governor Harrison was discussing his negotiations in connection with the Treaty of Grouseland (near Vincennes, Indiana) executed August 21, 1805, 7 Stat. 91. This treaty was between the United States and the Miamis, Delawares, Pottawatomies, Eel River, and Weas. In Article I of that treaty it was stated that whereas by the fourth article of the 1804 treaty with the Delawares the United States had agreed to consider the Delawares as the owners of the land bounded by the White River on the north, the Ohio on the south, the Greenville Line on the east and the Vincennes Tract on the west, and whereas the Miami Tribe from whom the Delawares derived their claim insisted that they had never intended to convey to the Delawares more than a right to occupy that land temporarily, the Delawares, for the sake of peace, had decided to relinquish their claim to that tract and to release the United States from the guarantee made in Article 4 of the 1804 treaty. In Article II of the Treaty of Grouseland the Miamis, Eel River and Wea tribes ceded to the United States the tract of land described in Article I identified on Royce's map of Indiana as Area 56, and in Article III, in consideration of such cession, the United States undertook to give the three tribes additional permanent annuities of $600 to the Miamis, $250 each to the Eel River and the Weas.

In Article IV of the Treaty of Grouseland it was stated that since the Miamis, Eel River and Weas considered themselves to be one nation and were agreed that none of them would dispose of any part of the country held in common, the United States agreed to consider them as owners "of all the country on the Wabash and its waters, above the Vincennes Tract,[3] and which has not been ceded to the United States, by this or any former treaty; and they do farther engage that they will not purchase any part of the said country without the consent of each of the said tribes." Article IV contained a proviso that nothing in the treaty would be taken to weaken any claim which the Kickapoos might have to the country which they occupied on the Vermillion River (northwestern Indiana). In Article V the Pottawatamies, Miami, Eel River, and Wea tribes acknowledged the right of the Delawares to sell the tract of land already conveyed to the United States in Article I of the 1804 treaty (Royce Area 49 in Indiana).

On September 30, 1809, Governor Harrison negotiated a treaty with the Delawares, Pottawatamies, Miamis, and Eel River Miamis at Fort Wayne, Indiana, 7 Stat. 113. In Article 1 of this treaty the four tribes ceded to the United States a tract of land lying just north of the Vincennes tract in western Indiana and indicated on Royce's map of Indiana as Area 71. In the same article these tribes also ceded a narrow strip of land on the eastern edge of Indiana bounded on the east by the Greenville Treaty Line and on the south by the Grouseland Line (Royce's Area 56). In the second article of the treaty the Miamis acknowledged the equal right of the Delawares with themselves "to the country watered by the White River" and it was stipulated that neither party could dispose of the same without the consent of the other. In Article IV of the treaty it was stated that all the stipulations made in the Treaty of Greenville of 1795 respecting the manner of paying annuities and the right of the Indians to hunt upon the lands should apply to the annuities

3. The extent of the area intended to be included in this provision identifying land owned by the Miamis, is somewhat clarified by a report of Governor Harrison to the Secretary of War on March 22, 1814, in which he stated of the lands watered by the Wabash that they were the lands "which were declared to be the property to the Miames, *with the exception of the tract occupied by the Delawares on the White River*, which was to be considered as the joint property of them and the Miames." From the correspondence and documents in the record it appears that the White River was at that time considered to be one of the "waters of the Wabash." [Italics supplied.]

granted and the lands ceded in the Treaty of Fort Wayne. In Article 5 it was noted that the consent of the Wea tribe would be necessary to complete the title to the first tract ceded in western Indiana (Royce Area 71) and that a separate treaty would therefore be entered into between the Weas and the United States. In Article 9 of the Treaty of Fort Wayne the signatory tribes agreed to cede to the United States an area of land on the northwest side of the Wabash above the Vincennes Tract in the vicinity of Raccoon Creek if the Kickapoos should agree to such a cession (Royce's Area 73 in Indiana).

By the Treaty of October 26, 1809, 7 Stat. 116, the Weas gave their consent to the Treaty of September 30, 1809, in connection with Royce's Area 71 ceded in Article 1 of the latter treaty. In the Treaty of December 9, 1809, with the Kickapoos, 7 Stat. 117, that tribe gave its consent to the cession of Royce's Area 73 in then ninth article of the Treaty of September 30, 1809, and also agreed to cede to the United States an additional tract lying just above Area 73 and identified as Area 74 on Royce's map of Indiana.

In the Treaty of June 4, 1816, at Fort Harrison, Indiana, 7 Stat. 145, the Weas and Kickapoos recognized and confirmed the Treaty of Greenville of 1795 and all subsequent treaties made by them. In Article 3 they confirmed the boundary line surveyed and marked by the United States of the two tracts of land on the Wabash and the White Rivers ceded in Article 1 of the Treaty of Fort Wayne on September 30, 1809 (Royce's map of Indiana Areas 71 and 72). The Kickapoos acknowledged that by the terms of the Treaty of December 9, 1809, they had ceded to the United States the tract identified as Area 74 on Royce's map of Indiana.

In the Treaty of September 29, 1817, 7 Stat. 160, the Wyandots, Senacas, Delawares, Shawnees, Pottawatomies, Ottawas, and Chippewas ceded a tract of land in Ohio (Royce's Area 87 on the map of Ohio) which included a small triangle of land between the Miami and the St. Mary's Rivers in northeastern Indiana (identified as Area 87 on Royce's map of Indiana).

By the Treaty of October 2, 1818, at St. Mary's, Ohio, 7 Stat. 185, the Pottawatomies ceded a tract of land in northwestern Indiana on the western and north banks of the Wabash River identified on Royce's map of Indiana as Area 98. In another treaty on October 2, 1818, at St. Mary's, Ohio, with the Wea tribe, 7 Stat. 186, the Weas ceded to the United States all the lands claimed and owned by them in the states of Indiana, Ohio and Illinois and reserved to themselves a tract of land which was later found to be within the cession made on October 6, 1818, by the Miamis (Royce's map of Indiana Area 114). In a treaty of October 3, 1818, with the Delawares, 7 Stat. 188, the Delawares ceded all their claims to land in the state of Indiana, and the United States agreed to provide the Delawares with land west of the Mississippi River.

In the spring of 1818 three commissioners were appointed to negotiate treaties with the Miamis and other Indian tribes in Indiana for the cession of the lands watered by the Wabash and the White Rivers. In the letter of May 2, 1818, from the Secretary of War to the treaty commissioners it was stated that because that part of Indiana to which Indian title had already been extinguished was of an "inconvenient form" it was the object of the prospective treaty negotiations to acquire from the tribes such additional cessions "as, being added to the present, will render it more convenient and compact." In a letter to the Secretary of War, dated June 19, 1818, from Governor Cass, one of the treaty commissioners, he stated that because the country owned by the Miamis in Indiana and desired by the Government was "probably equal to any in the world," he recommended that powerful inducements would be necessary to persuade the Miamis to make the cession and that the inducements should be "visible and immediate" rather than "prospective and con-

tingent." Neither the War Department records nor the records of the Indian Office contain the journal of the proceedings of the commissioners with the Miamis in connection with the negotiation of the 1818 Treaty but the War Department records do contain the report dated October 28, 1818, made by Governor Jennings, one of the treaty commissioners, to the Secretary of War, relative to the treaties executed in October of 1818 with the Miamis and the other Indians in Indiana. In the treaty instructions the commissioners had been told that they might, if absolutely necessary, grant reservations for the use of the tribe and make individual grants to influential chiefs and half breeds but with the qualification, in connection with the latter grants, that they could be disposed of only with the consent of the President. It was the desire of the Government even at that early date to move the Indians in Indiana west of the Mississippi River if it were possible to procure the consent of the tribes to such a move. At that time the Miamis would not even consider moving. In Governor Jennings' report he stated that he was unable to avoid giving the Miamis the large reservations they demanded and that he had had to grant certain tracts of lands to individuals. With respect to the large reservations made for the Miamis, Governor Jennings stated:

> "To the large reservations made on account of their villages, the Indians have no higher title than that by which they formerly held the same before the cession;"

In connection with the individual grant to Richardville, the principal chief of the Miami tribe, Governor Jennings stated that without Richardville's influence the treaty might not have been negotiated and that on the occasion of the Treaty of Fort Wayne in 1809 it was Richardville who persuaded the Miamis to agree to a joint tenancy with the Delawares to the land watered by the White River. Governor Jennings also pointed out that while the annuity to the Miamis was disproportionately larger than the annuities granted to the other tribes, this was necessary because the Miamis' claim to the lands was much more extensive.

In the Treaty of October 6, 1818, 7 Stat. 189, the Miamis ceded to the United States the area of land involved in the present appeal, i. e., Area 99 on Royce's map of Indiana. The boundaries of this area had been fairly well established by the cessions and agreements described in the above-mentioned treaties, i. e., on the northeast by the boundaries of tract 87 ceded in the Treaty of September 29, 1817, 7 Stat. 160, on the east by the western boundary of Royce's Area 72 ceded on September 30, 1809; on the south by a part of the northern boundary of Royce's Area 56 ceded in the Treaty of Grouseland August 21, 1805; on the southwest by the northern boundary of Royce's Area 71, ceded by the Treaty of September 30, 1809, and on the northwest by the southeast boundary of Royce's Area 98 ceded on October 2, 1818, and on the north and northwest by the Wabash River. In Article 2 of the Treaty of October 6, 1818, certain reservations were carved out of the area ceded for the use of the Miamis, and in Article 3 the United States granted certain tracts of land in fee simple to the principal chiefs of the Miamis and to other individual Miami Indians. In Article 4 the Miamis assented to the Kickapoos' cession of Royce's Area 74 made to the United States in the Treaty of December 9, 1809. In Article 5 the United States agreed to pay to the Miamis a perpetual annuity of $15,000, together with all other annuities under former treaties, all to be paid in silver. The United States also agreed to build for the Miamis a gristmill and a sawmill wherever the chiefs might wish them built, and to provide a blacksmith and a gunsmith and to give the tribe agricultural implements and 160 bushels of salt annually. This October 6, 1818, cession of Royce's Area 99 was the last large cession in Indiana of land relinquished by the United States to the signatory tribes of the 1795 Treaty of Greenville.

On the basis of the above facts the Indian Claims Commission concluded that in the Treaty of Greenville (1795) the United States intended to and did recognize the right and title of all the signatory tribes, including the Miamis, the Weas and the Delawares, in the land relinquished by the United States within the area described in Article IV of that treaty, and that by subsequent treaties, including particularly the Treaty of Grouseland (1805) and the Treaty of Fort Wayne (1809), the areas owned by the separate tribes, including the claimants herein, were identified and located and again acknowledged by the United States to be the exclusive property of the respective tribes. The Commission also found that on October 2, 1818, the Weas ceded to the United States 815,000 acres to which that tribe had recognized title in the western part of Area 99 (7 Stat. 186), and that on October 3, 1818, the Delaware Tribe ceded to the United States its recognized one-half interest in 3,859,000 acres in the southern part of Area 99, being the country watered by the White River. The Commission also found that on October 6, 1818, the Miami Tribe had recognized and exclusive title to 4,291,500 acres of land in Area 99 (7 Stat. 189). The Commission also found that the Pottawatomies, the Kickapoos and the Six Nations had not established any interest in Area 99. Inasmuch as there is before us no final determination involving the claims of the Weas and the Delawares, we do not pass on the Government's contentions as to the Commission's findings and conclusions on the amount of land owned by them and ceded to the United States in October 1818. With respect to the amount of land ceded by the Miamis on October 6, 1818, and the nature of their title to that land, we are of the opinion that on the basis of the facts of record and the applicable law as expressed in a number of court decisions of this court and the Supreme Court, the Commission is correct in its conclusion that the Miamis had recognized title to 4,291,500 acres of land in Indiana ceded to the United States in 1818.

[2] Where Indian lands are held by so-called Indian title, i. e., aboriginal use and occupancy title, their right to occupy the land and to use it is permissive and temporary and this right or title may be extinguished by the United States at any time, with or without the consent of the Indians, and by any means which the sovereign may deem appropriate. In the absence of special legislation conferring upon some court or commission jurisdiction to adjudicate matters relative to this permissive right of occupancy, the Government's disposition of such right is a political and not a judicial matter. Northwestern Band of Shoshone Indians v. United States, 95 Ct.Cl. 642, affirmed 324 U.S. 335, 65 S.Ct. 690, 89 L.Ed. 985.

[3] Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title", "reservation title", "recognized title", and "acknowledged title." As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right to occupy permanently land and that right may be established in a variety of ways. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314; Hynes v. Grimes Packing Co., 337 U.S. 86, 69 S.Ct. 968, 93 L.Ed. 1231; State of Minnesota v. Hitchcock, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954. In the instant case the Commission was of the opinion that the language contained in the provisions of the Treaty of Greenville was sufficient in itself to show the intention of the United States to "recognize" the Indians' title in the land, but the Commission did not rest its conclusion on the Greenville Treaty alone but referred to the instructions to the Treaty Commissioner, the negotiations between the Commissioner and the Indian tribes, the report of the Treaty Commissioner

concerning the negotiations and the treaty agreed upon, as well as the language of subsequent treaties and the circumstances surrounding them involving the rights of the Greenville Treaty Indians in the land relinquished by the United States in Article IV of that treaty.

Turning first to the language of Article IV of the Treaty of Greenville, we note that it states that the United States "relinquish their claims to all other Indian lands" within a well defined area, reserving therefrom certain specific tracts of land for the use of the United States. This relinquishment was stated to be in consideration of the peace which had been established between the Indians and the United States, and of the cessions and relinquishments of land made by the Indians to the United States in Article III of the treaty. Further consideration for the relinquishment made by the United States was the permission it secured from the Indians in Article III to allow the people of the United States free passage by land and water through country belonging to the Indians along a chain of some 16 posts on tracts of land ceded to the United States by the Indians, and also for permission to the people of the United States to use the harbors and mouths of rivers along the lakes adjoining the Indian lands. It seems obvious from the language of Articles III and IV of the Greenville Treaty that the parties intended to extinguish Indian title to some areas, to confirm Indian title in, and grant permanent possessory rights to, other areas, and to secure from the Indians their relinquishment of mere claims or pretenses of claims to further areas. As further consideration for the cessions, relinquishments and rights given by the Indians to the United States, the United States undertook to give to the Indians permanent annuities in the form of goods to be delivered annually to each tribe. In Article V of the Treaty of Greenville the meaning of the "relinquishment" of the land north and west of Greenville ceded to the Indians by the United States in Article IV is spelled out as follows:

> "To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and untill such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."

The rights which were conferred upon the Indians by the 1795 Treaty in accordance with the above explanation in Article V of the treaty are considerably more than a right of temporary and permissive occupancy of land. The Indians were given the right to permanently as "long as they please" occupy the land without interference from the United States. The United States reserved to itself only the right to *buy* the land from the Indians, and the only restriction put upon the Indians' use of the land was that they might not sell it to any but the United States and this restriction was one placed upon all Indian tribes with respect to the disposition of their lands. In addition, the United States undertook to protect the Indians in the permanent use of their lands against all citizens of the United States and against all other persons who might intrude upon the lands.

[4] The guarantees contained in Article V of the Treaty of Greenville were

made in strict compliance with the instructions given to General Wayne, the Treaty Commissioner. He was told to impress upon the Indians the fact that the United States conceded to them fully the right and possession of the soil as long as they desired to occupy it and that when they chose to sell it they could do so, but only to the United States who would in the meantime protect the Indians against any and all impositions. Since, in general, the United States does not have an obligation to compensate a tribe for unrecognized Indian title land (Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314), an agreement to permit the Indians to occupy land permanently or until they were disposed to sell it to the United States seemed to the Commission, as it does to us, to be a clear indication of an intention on the part of the United States to recognize in the Indian treaty parties more than aboriginal use and occupancy title to the land in question.

If we had before us only the Treaty of Greenville and if the Indian claimants were relying on that treaty alone, it would, of course, be necessary for them to prove what part of the land covered by Article IV of the treaty and relinquished to the Indians by the United States was owned by each of the claimants. General Wayne had found it impossible in 1795 to define the boundaries enclosing the various areas used and occupied by the signatory tribes. But those boundaries were established by subsequent treaties as described in the findings and decision of the Commission and as discussed earlier in this opinion. By the time the cession of October 6, 1818, was made, the boundaries of the land owned by the Miami Indians, including land owned by the Weas and the Delawares, had been established by a number of previous treaties. In those treaties and in the negotiations leading up to them, as well as in the negotiations for the Treaty of October 6, 1818, the right of the Miami Indians as the permanent and recognized owners of the lands ceded in the 1818 Treaty had been unmistakably confirmed by the United States.

The Commission relies to a large extent on the decisions of this court involving land covered by the Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749. In the case of the Indians of Fort Berthold Indian Reservation v. United States, 71 Ct.Cl. 308, the court stated that the important question for decision was whether the "reservation" claimed in the petition was fixed and set aside by treaty stipulations between the United States and the Indians and whether the treaty relied upon did in fact create the "reservation" claimed. Prior to 1851 but after the discovery of gold on the Pacific Coast, travel across the plains and through the country occupied by the Indians who later signed the Fort Laramie Treaty, was greatly increased with the result that the primary means of livelihood of the plains and mountain Indians, i. e., buffalo and game, was greatly diminished. The Indians became aroused and resisted the invasion of their lands by the white travelers. In addition, the mountains and plains Indians were continually fighting among themselves. In order to establish permanent peace and friendship among the hostile tribes, and between the tribes and the United States, to secure the permission of the tribes for the establishment of roads and military posts within their territories, to protect the Indians against the whites and the whites against the Indians, commissioners were appointed to negotiate with the plains and mountain Indians. In Article V of the Treaty of Fort Laramie the Indians agreed to recognize and acknowledge certain tracts of land included within set metes and bounds as the respective territories of the separate signatory tribes. The treaty contained no language of relinquishment or acknowledgment *by the United States* such as that contained in Articles IV and V of the Greenville Treaty involved in the instant appeal, but the court held in the Fort Berthold case that while the language of the treaty was not in all respects the technical

wording of recognition, it was sufficient, when considered in connection with the instrument as a whole and the purpose and intent of the parties as indicated by the instructions to the treaty commissioners, to clearly indicate that the territories of the signatory tribes were to be recognized in accordance with their claims, and that protection was assured to them by the Government within such limitations in consideration of the rights and privileges secured by the United States in other provisions of the treaty. Following the holding in the Fort Berthold case and without any extended discussion, the court reached the same conclusion with respect to whether or not the claimant Indians held the lands by recognized or unrecognized title in the case of the Assiniboine Indian Tribe v. United States, 77 Ct.Cl. 347. The Assiniboine Tribe was a party to the Fort Laramie Treaty and the tribe held the land described therein in exactly the same way as did the Fort Berthold Indians. The Government's attempt in the instant case to distinguish the Fort Berthold from the Assiniboine case in the light of the court's use of the word "granted" in the Assiniboine case is without merit since the nature of the land title of both tribes was governed by the same treaty. While neither the Fort Berthold case nor the Assiniboine case were passed on by the Supreme Court, the holdings in those cases were noted with approval in the decision of the Supreme Court in the case of Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335, 349, 65 S.Ct. 690, 697, 89 L.Ed. 985. In the Northwestern Shoshone case the Supreme Court was of the opinion that nowhere in the treaties relied upon by the Northwestern Band was there any specific acknowledgment by the United States of the Indians' right to permanently use and occupy any area of land, and the court concluded, from the circumstances leading up to and following the execution of the Box Elder Treaty, as well as the language of the treaty itself, that neither of the parties to the treaty had intended it to constitute a recognition or acknowledgment by the United States of the Indians' right to permanently occupy the land in question. The Supreme Court then referred to the petitioner's reliance upon the decisions of the Court of Claims in the Fort Berthold and Assiniboine cases, supra, and in Crow Nation v. United States, 81 Ct.Cl. 238, and noted that a different conclusion on the question of treaty recognition of title in the Northwestern Shoshone case was not inconsistent with the holdings of the Court of Claims in the Fort Laramie cases because different treaties were involved. The Supreme Court stated that the circumstances surrounding the execution of the Fort Laramie Treaty indicated "a purpose to recognize the Indian title to the lands described in the Fort Laramie treaty which may well have induced the Court of Claims to reach one conclusion in those cases and another in this." The Supreme Court then went on to note that the instructions to the Fort Laramie Treaty Commissioners had directed them to establish for each tribe some fixed boundaries within which they would agree to reside and not intrude upon the limits assigned to another tribe without permission, and that the United States had considered it highly important to lay off the country into geographical or national domains. In the instant case we are of the opinion that the language of the Treaty of Greenville was far more apt to express "recognition" than was the language of the Fort Laramie Treaty and that the circumstances surrounding the execution of the Greenville Treaty indicate a clear purpose on the part of the United States to recognize the right of the signatory tribes to permanently occupy the land relinquished by the United States in that treaty.

[5] It is somewhat difficult to determine the exact nature of the Government's arguments with respect to the Commission's holding on recognition, but one thing seems clear and that is that the concept which the Government urges with respect to what constitutes "recognized title" is unduly restrictive. The

lands which Indians hold by recognized title may be lands formerly held by them under mere aboriginal use and occupancy title or may be lands which they never previously occupied and which the Government conveyed or granted to them. The land which an Indian tribe holds by recognized title may be called a "reservation" in the applicable treaty, agreement or statute, or it may not be called a reservation. The area may be a large tract of land [4] sufficient to support a numerous population of Indians without much assistance from the sovereign, as in the case of the Fort Laramie tribes, or it may be a small tract on which the tribe can live only with considerable Government assistance. The size of the tract involved is not controlling on the question of recognition. At the time of the negotiations of the Treaty of Greenville, the United States in 1795 had no immediate need for the admittedly large area which the Commission has found it recognized as being owned by the signatory tribes and which the United States agreed that those tribes should thenceforth occupy on a permanent basis. Since the United States then had no immediate need for the land in question, there was no reason to confine the Indians to small tracts which would have required the United States to undertake many obligations in the form of larger annuities and numerous services necessary to enable the Indians to exist on small tracts of land. By "recognition", the courts have meant that Congress intended to acknowledge, or if one prefers, to grant, to Indian tribes rights in land which were in addition to the Indians' traditional use and occupancy rights exercised only with the permission of the sovereign. Those additional rights may be sufficient to spell out fee simple title in the Indians if that is what Congress wished, or they may result in something less than fee simple title. The extent of those new and additional rights and the accompanying obligations of the sovereign and the tribe will usually be determined by the Congressional enactment, the treaty, or the agreement, conferring them. Sometimes, as in the case of the Fort Laramie Treaty, it is necessary to look to the negotiations leading up the treaty and the reports of the treaty commissioners to accurately determine the precise nature and extent of the rights and obligations created by the treaty.

In the instant case we are of the opinion that the Indian Claims Commission has correctly held that the Miamis were given the right to permanently occupy and use the land ceded by the Treaty of October 6, 1818, until that tribe should be disposed to sell that land to the United States; that the title of the claimant Indians in the land so ceded was what is understood as "recognized" title and that because of such recognition, the claimant Indians did not have to establish the extent of their exclusive occupancy of any of the land ceded to the United States in 1818; and that the Commission has accurately determined the amount and location of land in the ceded tract belonging to the claimant Indians.

We turn next to a consideration of the issues raised by the cross-appeals from the Commission's determination that the land ceded by the claimant tribes under the Treaty of October 6, 1818, was worth on that date 75¢ an acre. The Indian claimants contend in general that the Commission's ultimate finding of value is not supported by the primary findings; that the primary findings numbered 6 through 31 are supported by substantial evidence contained in the whole record; that the remaining findings on value, numbers 32 through 44, are either merely recitations of evidentiary material and not findings, or, in some instances, are contradictory to findings previously made by the Commission and are not supported by substantial evidence.

The United States urges that the Commission's ultimate finding of 75¢ per acre

4. In the Fort Berthold case the court held that the Indians had recognized title to some 13,000,000 acres of land; in the Assiniboine case the court held that the tribe had recognized Indian title to over 6,000,000 acres of land.

as the value of the land in 1818 is not supported by the Commission's primary findings; that some of the primary findings contain uncertaintics and conflicts and that the case should be remanded to the Commission for correction both as to primary findings and the ultimate finding of value. With respect to findings 6 through 31 which the Indian claimants contend are supported by substantial evidence, the Government contends that these findings are mere generalities and are not supported by substantial evidence. The Government says that findings 33 through 40 are supported by substantial evidence and that if the Commission had made certain additional findings from the record it would have reached a valuation as of October 6, 1818, of only 20¢ per acre for the land ceded.

Section 19 of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C.A. § 70, provides that the final determination of the Commission in any case shall include the findings of fact upon which its conclusions are based, *and a statement of its reasons for its findings and conclusions.* Section 20(b) of the Act defines the scope of this court's power to review final determinations of the Commission and provides in pertinent part as follows:

> "* * * On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact."

In the instant case we must determine whether certain primary findings are supported by substantial evidence, whether other findings are, in fact, findings or mere recitations of evidence, whether the ultimate finding or conclusion with respect to value is supported by the Commission's primary findings of fact, and whether the Commission has given adequate and valid reasons for its findings and conclusion on the issue of value.

On the question whether or not the case should be remanded to the Commission for correction and modification of the findings both parties have cited this court's decision in Snake or Piute Indians of Former Malheur Reservation in Or. v. United States, 112 F.Supp. 543, 125 Ct.Cl. 241. The Snake case is not precisely in point. In that case the court was faced with a related problem. We found that the evidentiary findings made by the Commission were accurate and were supported by substantial evidence but that the findings made did not adequately reflect the whole record and failed to present certain essential facts which were established by the record. Inasmuch as the court felt that the whole record, if made the subject of proper findings, did not support the ultimate finding made by the Commission, the case was remanded to the Commission for the making of additional primary findings.

The case before us presents a situation where the primary findings are generally adequate to reflect the essential facts established by the record, but those findings do not support the Commission's ultimate finding on value. In the case of Penn Foundry & Manufacturing Co. v. United States, 75 F.Supp. 319, 110 Ct.Cl. 374 reversed, 337 U.S. 198, 69 S.Ct. 1009, 93 L.Ed. 1308, this court awarded judgment to a manufacturer for loss of anticipated profits under a contract for the manufacture of gun mounts for the Navy, the contract having been canceled by the Government a few days after it was awarded. The Supreme Court reversed this court's decision on the ground that the primary findings made by the court did not show that the plaintiff manufacturer was ready and able to perform its contractual obligations; that such readiness and ability to perform were indispensable prerequisites to the plaintiff's right to recover loss of anticipated profits and that because certain findings of fact conclusive-

ly established that the plaintiff was neither ready nor able to perform the contract, a finding of readiness and ability could not in fact have been made. In that case the court had made no finding at all as to that essential fact. In the instant case the Commission did make an ultimate finding on the issue of value, but both parties contend that the primary findings made by the Commission require an entirely different ultimate finding.[5]

Before we examine the Commission's findings we will discuss certain general principles which are applicable in a determination of the value of Indian land at a time in the remote past.

[6] First we wish to observe that whether the land to be valued is held by the Indian claimants under recognized title or merely under so-called Indian title, or is held under fee simple title with all the usual rights of ownership, including that of alienation, the Supreme Court and this court have held that such land should be valued in the same way. In the case of United States v. Shoshone Tribe, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213, the Court of Claims, in valuing land held by recognized title, had included in such valuation the worth of the timber and minerals in the area. On appeal the Government had urged that the Indians' title being less than fee simple in that it merely included the right to use and occupy the land, the value of that land must be less than land held under fee simple title. The Supreme Court said:

> "For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. Leavenworth, L. & G. R. Co. v. United States, 92 U.S. 733, 742–743, [23 L.Ed. 634]. Beecher v. Wetherby, 95 U.S. 517, 525 [24 L.Ed. 440]. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee." 304 U.S. at page 116, 58 S.Ct. at page 767.

The same issue on value was present in the case of United States v. Klamath and Moadoc Tribe of Indians, 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 and the same holding was made in that case.

In the case of Otoe and Missouria Tribe of Indians v. United States, 131 F.Supp. 265, 131 Ct.Cl. 593, certiorari denied 350 U.S. 848, 76 S.Ct. 82, 100 L. Ed. 755, this court held that both Indian title land to the extent that actual occupancy thereof was proved, and reservation or recognized title land, should have the same value as though it were held in fee simple rather than on the basis of its value as subsistence for primitive Indian occupants as suggested by the Government appraiser. In its petition for certiorari, the Government again urged this theory of valuation.

In the case of Coeur d'Alene Tribe of Indians v. United States, 6 Ind.Cls.Comm. 1, 38, the Indian Claims Commission held that land held by Indian title (mere permissive use and occupancy title) had the same value as land held by recognized or reservation title or as land held by fee simple title, citing the Shoshone and Klamath cases, supra, as well as United States v. Paine Lumber Co., 206 U.S. 467, 27 S.Ct. 697, 699, 51 L.Ed. 1139. In the Paine Lumber case the Supreme Court, noting that usually Indian tribes were not permitted to alienate their lands, stated that "The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple."

5. The instant case is similar in another respect to the Penn Foundry situation. There this court had made an ultimate finding that if the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000, and the court entered judgment for that amount. There were no evidentiary findings or primary findings on the subject of damages or the computation of anticipated net profits, just as there are no primary findings supporting the Commission's ultimate finding of value in the instant case. The Supreme Court discussed this issue but did not base its decision upon it.

[7] The problem of valuation may arise in at least three possible settings: (1) where there is neither an open market nor other evidence upon which to base an estimate of fair market value, in which event the courts have held that the Government's minimum statutory price for public land may be considered to be the value of that land; (2) where there is an open market for the land in question so that the actual market value of the land is known or can be ascertained; (3) where there is no open market for the land in question but there is evidence of sales of comparable land in the same area at about the same time which, together with other evidence, justifies a conclusion as to the fair market value of the land being valued. A situation of the first type was present in New York Indians v. United States, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927, and 170 U.S. 614, 18 S.Ct. 735, 42 L.Ed. 1165. The other two situations mentioned above are really two aspects of the same thing, i. e., the fair market value approach, one being actual fair market value and the other being an estimated or imputed fair market value. Fair market value was defined by the Indian Claims Commission in The Osage Nation of Indians v. United States, 3 Ind.Cl.Comm. 231, as follows:

> "Market price is the highest price estimated in terms of money which land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used."

If, as in The Osage case, there is evidence of private sales not controlled by the Government's minimum statutory price for public lands, these sales should be taken into consideration in determining value. In addition, consideration should be given to evidence of sales of reserve sections; sales of land at public auction, bearing in mind the duration of the auction; the location and physical characteristics of the land; the type of settlers who purchased the land and their ability to pay for it; and the history and development, both political and economic, of the area in which the land is located. The evidence as a whole, taking all these factors into consideration, may show that the fair market value of the particular land involved is actually less than the Government's statutory minimum price for public land. Such was the case in Rogue River Tribe of Indians v. United States, 1950, 89 F.Supp. 798, 116 Ct.Cl. 454, certiorari denied in 341 U.S. 902, 71 S.Ct. 610, 95 L.Ed. 1342. On the other hand, such evidence may show that the fair market value of the land in question is more than the statutory minimum price for public lands as was the case in The Osage Nation of Indians v. United States, supra.

In the instant case, as in most cases involving Indian lands, there was no actual free open market in the precise area ceded to the United States in 1818, because the Indians had been unable, prior to the cession, to sell their land to anyone but the United States, and the United States bought the whole tract in 1818. As a result of the Trade and Intercourse Acts, 1 Stat. 137, 138 and 1 Stat. 329, 330, and under the provisions of the Treaty of Greenville of 1795, 7 Stat. 49, the Indian tribes of the Northwest Territory could only sell their land to the United States or with the approval of the United States. Prior to 1818 the Miami Indians had requested the right to sell their lands directly to settlers, but the United States had refused to grant them such permission (finding 29).

In the case of the New York Indians v. United States, supra, there was no open market for the land in question, nor was there evidence upon which a fair market value could be estimated. Accordingly, the Supreme Court directed that judgment be entered for the net amount actually received by the Government when it sold the lands at the statutory minimum price, plus an amount which the lands disposed of other than by sale would have brought had they been sold as public lands for the Government's statutory minimum price. In the instant case the Commission did not even allow

a recovery on the basis of the minimum statutory price for public land at the time of the cession, which was $2.00 an acre, nor on the basis of the reduced minimum statutory price of $1.25 per acre which was established two years after the cession, although the Commission found that nearly all of the land ceded in 1818 was sold by the Government after its acquisition for at least $1.25 per acre. In the New York Indians case, the Supreme Court did not permit the Indians to be penalized because the Government had not chosen to sell most of the lands involved in that case, and accordingly, the Indians were allowed to recover the amount for which the lands could have been but, for political reasons, were not, sold as public lands.

Had the Commission in this case been faced with the New York Indians situation of no evidence of market value, the Commission would have been justified in considering the statutory minimum price in effect in 1818, i. e., $2.00 per acre, particularly where there was ample evidence that public lands in the vicinity which were neither as desirable nor as accessible were sold for prices equalling and exceeding the previous minimum statutory price of $2.00 an acre. However, in this case there is evidence, and there are primary findings reflecting such evidence, upon which to base a finding of the fair market value of the lands in question, and it was unnecessary for the Commission to rely solely upon the statutory minimum price for public land.

[8] The Commission in this case has made numerous findings on the various elements and factors relating to value which this court and the Commission have previously considered to be proper for a determination of value. Alcea Band of Tillamooks v. United States, 1950, 87 F.Supp. 938, 115 Ct.Cl. 463; Rogue River Tribe of Indians v. United States, supra; Otoe and Missouria Tribe of Indians v. United States, 1955, 131 F.Supp. 265, 131 Ct.Cl. 593; United States v. Kiowa, Comanche, and Apache Tribes of Indians, D.C., 163 F.Supp. 603, decided July 16, 1958, and Osage, supra. In findings 6 and 7 the Commission has described the location and physical characteristics of the lands here in question which were ceded on October 6, 1818. This land is identified on Royce's map of Indiana as Area 99 and is referred to by the Commission and in documents contemporaneous with the sales as "The New Purchase." The land is situated in central Indiana just south and east of the Wabash River and is watered by numerous navigable streams. It was crisscrossed by well-used trails and was readily accessible to emigrants and settlers. Because of its location with reference to the Wabash and Ohio Rivers and to Lake Erie and Lake Michigan, the area was in the direct path of western commercial growth. There were streams in every township and the area contained much potential water power. The area contained some of the most desirable land in all of Indiana for agricultural purposes, there being rich bottom lands, level undulating uplands and rolling uplands. Swamp and marsh lands which were not useful as agricultural land, comprised less than one percent of the area. The best use for the lands in the so-called New Purchase area was for development by settlers as homesteads and the lands were considered by contemporaries to be the best available for that purpose in Indiana and as good or better than any comparable lands in the Northwest Territory.

At this point we note that in a letter dated October 28, 1818, from Governor Jennings, one of the treaty commissioners to negotiate the 1818 treaty, to the Secretary of War, he stated that the land which had been acquired from the claimant Indians was "not equalled by any in the state." This letter was not introduced in evidence. It may be found in the records of the War Department at the National Archives. Furthermore, in a letter from Treaty Commissioner Lewis Cass, dated June 19, 1818, to the Secretary of War, it was stated that because the country to be purchased from the Indians in Indiana "is probably equal to any in the world" powerful induce-

ments for the cession would have to be offered to the Miamis.

In findings 9 and 10 the Commission discussed the development of the areas of land bordering on the cession here in question, apparently for the purpose of comparing such adjacent areas with the New Purchase as to quality and quantity of land made available for settlement, the demand for such lands, and the rate of disposal. All of the adjacent land discussed had been ceded to the United States by the Indian owners prior to 1818 and much of it had been disposed of to settlers prior to that date.

Some 3,150,299 acres of land known as the "Greenville lands" had been ceded to the United States under the Treaty of Greenville, August 3, 1795, 7 Stat. 49, and were opened for settlement in 1800. Approximately 681,298 acres of the Greenville lands lay on the eastern border of Indiana in a small tract known as "The Gore", apparently because of the triangular shape of the area. The rest of the Greenville lands lay in western Ohio. By 1818 approximately 73.3 percent of all of the Greenville lands, and 86.3 percent of the lands in the Gore had been disposed of.

There were 1,202,262 acres of land in an area known as the Vincennes Tract located in southwestern Indiana and ceded to the United States under the 1795 Treaty of Greenville (Royce's Area 26). This tract was not opened for settlement until 1807 and disposition and settlement of this area was retarded because of existing French settlements. Furthermore, as noted earlier in this opinion and in the findings of the Commission, the boundaries of the Vincennes Tract were not definitely settled until the Treaty of June 7, 1803, 7 Stat. 74.

An area of 1,557,833 acres of land in southeastern Indiana was ceded to the United States in the Treaty of Grouseland of August 21, 1805, 7 Stat. 91. This tract, known as the "Grouseland Cession", was opened for settlement in 1808, and by 1818 one-half of this area had been disposed of.

Another tract, known as the "Harrison Purchase", comprising 2,230,816 acres of land was ceded to the United States on September 30, 1809, 7 Stat. 113 (Royce's Area 71). It was located in west central Indiana, was opened for settlement in 1816, and by 1818 one-fourth of it had been disposed of.

A tract of 558,149 acres of land in eastern Indiana known as the "Twelve Mile Strip" (Royce's Area 72) was ceded to the United States on September 30, 1809, 7 Stat. 113. The tract was opened for settlement in 1811 and by 1818 nearly 60 percent of this tract had been disposed of.

The Commission found that none of the tracts described above were on the whole as good as the land included in the New Purchase Cession of 1818, and by October 6, 1818, good lands in these adjacent areas were available only by purchase from prior settlers rather than from the Government, and only at very high prices. All the good land in the more distant parts of the country east and south of Indiana had been settled upon and little good land remained.

In finding 11 the Commission found that the settlement of the whole Northwest Territory followed a set pattern wherein the settlers followed the most accessible routes and took up the most desirable of the accessible lands first. The first settlements in any new area increased the desirability and the accessibility of all adjacent areas. Although the Commission drew no conclusion from this finding, it is obvious from the facts found earlier, that the settlement of the Greenville lands, the Twelve Mile Strip, the Harrison Purchase, the Grouseland Cession, and the Vincennes Tract prior to 1818, increased the desirability, accessibility and consequently the market value of the New Purchase acquired by the United States in 1818 and opened for settlement in 1820.

In subsequent findings the Commission discussed the various ways in which public lands were disposed of from 1787 to 1818, the prices at which the lands were

disposed of and the type of land disposed of both by the Government and in private sales between settlers. In finding 12 the Commission noted that between 1787 and 1795 several large tracts of public land had been sold to land speculators at prices which steadily increased from 8 or 9¢ an acre in 1787 to 40¢ an acre in 1795. Much of this land was inaccessible at the time of purchase; because of distance from existing settlements, the market for it had not been developed. Because of the poor choice of lands made by the speculators, and because of improper financing and mismanagement, most of the land companies failed and there resulted a popular revulsion against land speculators. None of the land involved in the era of land speculation was close to the New Purchase and for many years prior to 1818 there had been no activity of this kind. Although the Commission does not express such a conclusion it appears that the Commission was of the opinion that the prices paid by the land companies in the eighteenth century for land far distant from the New Purchase lands would have no bearing on the value of those lands in 1818.

In finding 13 the Commission found that it was the Government's policy to permit the Indians in the Northwest Territory to sell their lands only to the United States and that the United States in turn sold the land directly to the settlers pursuant to statutory procedures and at prescribed prices. Between 1800 and 1820 the statutory minimum price for public land in this area was $2.00 per acre, payable in four equal installments over a period of four years, and the Government's purpose in setting the price at $2.00 an acre was not to secure the most that could be obtained for the public lands, but to make the lands available for quick settlement at what was considered to be a nominal price. After 1804 settlers could not buy less than 160 acres at a time, and there was no discount for purchases of larger tracts.

In addition to sales to individual settlers at the minimum statutory price per acre of $2.00, public auctions were held at which sales were made to the highest bidder. Those auctions, however, were held for short periods of from one to three weeks after which the lands were open to private entry at the minimum price of $2.00 per acre. The Commission noted that competition was minimized by combinations among buyers who had already settled upon the land or had chosen the locations they desired to purchase, and also by reason of special priorities such as preemption rights granted in the district and military bounties which were granted in southern Indiana to Canadians who had served in American forces. The Commission found that the minimum price of $2.00 per acre for public land thus tended to become the maximum.

In its finding 20 the Commission found that the land most comparable to the New Purchase in size, quality and accessibility was the Greenville land ceded to the United States in 1795 and opened for settlement in 1800, and the Twelve Mile Strip in eastern Indiana ceded to the United States in 1809 and opened for settlement in 1811. The Commission found that when the Greenville lands were opened for settlement in 1800 the prospect of rapid settlement was less favorable than the prospect for settlement of the New Purchase in 1818, because their northern and western borders were still Indian frontiers, the population in western Ohio was less than three persons per square mile, Indiana was not settled at all, and neither Ohio nor Indiana had been organized as a state. In 1811 when the Twelve Mile Strip in eastern Indiana was opened for settlement its western and northern borders were Indian frontiers. Indiana was not yet a state and the population of Indiana was only 1.3 persons per square mile. On the other hand, when the New Purchase was acquired by the United States in 1818, the area was surrounded on the east, south and southwest by areas which had been previously opened to settlement and were largely settled, and only the north and northwest borders of the New Purchase were still bounded by Indian lands.

1452

Furthermore, both Indiana and Ohio had become states and the population density on the borders of the New Purchase had so increased that by 1820 Ohio averaged 14.7 persons per square mile, and the Greenville lands on the eastern border of the New Purchase averaged 27.7 persons per square mile. The Commission also noted that the year 1818 marked a peak of the "Great Migration" into the Northwest Territory and that more public lands were sold in that year than in any prior year. The Commission found that anyone attempting to predict what the development of the New Purchase would be at the time of the cession in 1818 would have given consideration to the history of the development of the Greenville lands and the Twelve Mile Strip, which included lands of similar character and involved an area of comparable size. The other tracts described in findings 9 and 10, that is, the Harrison Purchase, the Grouseland Purchase and the Vincennes Tract, furnished less appropriate guides since the Harrison Purchase was not opened for settlement until 1816, the Grouseland cession (Royce Area 56) had frontiers which were more exposed than the frontiers of the Greenville lands, and the Twelve Mile Strip, and the Vincennes Tract settlement had been impeded by the presence of French settlements. In finding 21 the Commission noted that more than 70 percent of the lands contained in the Greenville area and the Twelve Mile Strip had been disposed of prior to 1818, and that considerable land had been disposed of in the other less desirable areas described above. The Commission said that the defendant's appraiser had inaccurately determined the rate of sale in the Vincennes Tract, the Harrison Purchase and the Grouseland Cession because he had included in the lands as available for sale lands which had been reserved for school grants, private claims and other lands which the Government had withdrawn from the market.

In finding 22 the Commission concluded that because of the rate of sales of comparable and adjacent lands, the rate of disposition of the New Purchase could reasonably have been predicted in 1818 and that after making all proper allowances, it could have been reasonably predicted at that time that 90 percent of the New Purchase lands would be disposed of within 20 years. In finding 23 the Commission found that in the 20 years subsequent to 1820 when the lands in suit were opened for settlement, 91.7 percent of the land was sold to settlers.

In finding 16 the Commission described the type of settler who moved into Northwest Territory in general and Indiana in particular during the years prior to 1818. The settlers were largely English, Scotch-Irish and Quakers, and were farmers of the middle class who had money with them to pay the $80 required as a down payment on the 160-acre farms. These settlers brought with them their hogs, cattle, tools, implements and household goods and most of them were able to raise the additional $80 a year from the sale of their hogs, cattle and produce to pay the subsequent three installments. The settlers were self-sufficient and their ability to pay for the land was not affected by general financial conditions and depressions which adversely affected people who were engaged in business. They cleared only that portion of their 160-acre tracts which they needed to establish a self-sustaining farm and the remaining acreage was usually left in its original wooded state and was disposed of by the farmers at a later time. In finding 17 the Commission found that the settlers in Indiana seldom defaulted in their payments, and that the principal defaults which gave rise to criticism of the credit system engaged in by the Government in the sale of its public lands occurred in Alabama and not in the Northwest Territory.

In finding 18 the Commission found that 1818 was a year of unprecedented optimism and that the fluctuations of the business cycle did not affect the trend of settlement in the Northwest Territory since shortages of currency and credit were easily solved in that area by barter.

In finding 19 the Commission described the steady increase in the sales of public land in the Northwest Territory from 1814 through 1839.

In finding 24 the Commission again noted that since almost any land in the public domain was available prior to 1820 at $2.00 per acre regardless of quality or location, there was no incentive to the purchaser to pay more than the price which all authorities, including those cited by defendant, considered to be nominal. The Commission concluded that Government sales were therefore of little assistance in determining the actual market value of lands adjacent to the New Purchase or of lands in the New Purchase but that in addition to the nominal Government price for land, the record contained evidence of two other types of sale by the Government which gave a better idea of the actual value of the land. These types of sale described by the Commission in findings 25 and 26 were sales of so-called reserved sections and sales made at public auction.

The Commission found (finding 25) that in the Greenville area the Government demonstrated the possibility of obtaining an average rate substantially in excess of the $2.00 per acre minimum statutory price for public land. By statute in 1796 it was provided that the central sections of each township might be reserved for future disposition by Congress. In 1805 Congress authorized the sale of these reserved sections at a minimum price of $8.00 an acre, and between 1805 and 1808 2,972 acres of reserved sections in the Greenville lands were sold for that price.

In 1808 Congress reduced the minimum price of the reserved sections to $4.00 an acre and during the next 10 years 116,085 acres of such reserved sections were sold at or above the $4.00 per acre minimum price. During the same period of time, unreserved land was selling at $2.00 an acre. The Commission noted that the selection of the reserved setions was arbitrarily made by section number without reference to the quality of the sections reserved and that as a consequence the reserved sections were of the same quality as the unreserved sections immediately surrounding them. The Commission therefore concluded that the substantial sales of the reserved sections would never have taken place if the $2.00 minimum price had been a fair measure of market value in the Greenville lands. It also concluded that if all the Greenville lands had been priced at $8.00 or $4.00 an acre and if the purchasers had been permitted to take 80-acre tracts instead of 160-acre tracts, the rate of disposition of the lands probably would have been substantially increased.

In finding 26 the Commission described the procedure of selling lands at public auction in the Northwest Territory. It noted that the auctions were for short periods lasting from one to three weeks; that activity at public auctions was probably retarded because people knew that substantially comparable land would shortly be available at the minimum price of $2.00 an acre. The Commission also noted that squatters on the land banded together to prevent competitive bidding and the Government did little to prevent the squatters from asserting their claimed preemptive rights which were ultimately recognized by Congressional enactments, but that despite these deterrents, the record showed a substantial number of sales at public auctions above the $2.00 minimum. Those prices ranged from $2.00 to $8.00 an acre.

In finding 27 the Commission turned to evidence of so-called free sales between settlers in areas adjacent to the New Purchase prior to the 1818 cession. This evidence was in the form of deed records which usually showed the acreage involved and the price paid, although the nature and extent of improvements, if any, on the land sold, was not always shown by the deeds. The record indicated to the Commission that land in the Twelve Mile Strip prior to 1818 was resold by settlers in tracts of 40 acres or more at prices averaging $5.87 per acre. The average maximum period between original entry on any tract and its resale

was found to be 7½ years. The Commission found that most of the tracts had been resold in substantially shorter periods following original entry and that the average farm resold could not have been subject to much improvement for more than five years after purchase, since the average settler did not clear a total of more than 30 to 40 acres of his main 160-acre tract and the improvements on the cleared section consisted primarily of a log cabin and a small amount of fencing. After estimating the cost of this type of improvement, the Commission concluded that the average net resale price of lands in the Twelve Mile Strip was about $4.46 per acre for unimproved land.

In finding 28 the Commission stated that between 1815 and 1818 first rate unimproved land in southern Indiana and western Ohio sold for from $4.00 to $8.00 per acre even when remote from villages and towns and that much higher prices were obtained when the tracts were near settlements. The Commission found that Government officials expected sales in the Harrison Purchase (Royce's Area 71) opened for settlement in 1816 and immediately adjacent to the New Purchase on the southwest would be from $6.00 to $8.00 an acre. Prices as high as $30.00 per acre were actually realized during the public sales period in the Harrison Purchase.

Lands adjacent to the New Purchase in western Ohio were selling in 1818 for from $4.00 to $8.00 an acre in areas remote from villages; unimproved fertile lands near settlements sold for an average of $8.00 an acre; unimproved land close to principal villages sold from $20.00 to $40.00 an acre; land within 12 miles of Cincinnati sold from $12.00 to $30.00 an acre and, on occasion, sales were made for $150.00 an acre within three miles of Cincinnati. The Commission noted that during the time these prices were being paid, Government-owned land was selling for $2.00 an acre. Finding 28 contains a table showing the prices obtained for unimproved and slightly improved lands in areas near the New Purchase between the years 1815 and 1818, and the prices ranged from a low of $2.50 an acre to a high of $150.00 an acre.

In finding 31 the Commission found that the average cost to the Government of surveying and selling public land at the time of the 1818 cession was 6.2¢ per acre.

In finding 14 the Commission found that following the ratification of the Treaty of October 6, 1818 under which the Government acquired the lands in suit, Congress intended to sell these lands on the same terms upon which other public lands had been marketed, that is, at the minimum statutory price of $2.00 per acre, but that just before the lands were opened for sale in 1820, Congress passed new legislation reducing the minimum price for public lands from $2.00 to $1.25 per acre payable in cash. The reduction in the minimum price for public land was the result of political rather than economic considerations (finding 15) and was a continuation of the Government's earlier policy, described in finding 13, of selling the land to settlers at a nominal price rather than securing for the Government the most that could have been obtained for the land. The Commission found (finding 14) that the new $1.25 minimum price for public land subsequent to 1820 tended to become the prevailing market price of public lands as had the earlier $2.00 minimum price and that most of the lands in the New Purchase sold for $1.25 per acre although many sales were recorded at prices higher than this minimum, particularly during the early sales in 1820, 1821 and 1822. The benefits of the Graduation Act of August 4, 1854, 10 Stat. 574, permitting the sale of land which had been on the market for more than ten years to be sold at reduced prices, was invoked by purchasers on the land in suit in connection with less than one percent of the land in the New Purchase.

The Commission found (finding 29) that the highest and best use for the land in suit was for development by settlers as homesteads, a fact of which the

Indian owners of the land were well aware. The Commission further found that in the negotiations for the treaty of September 30, 1809, the Miamis had requested permission of the Government to sell their lands directly to the white settlers but that the Government had refused to allow them to do so.

The Commission did not make findings concerning private sales between settlers of land in the New Purchase although the record contains evidence of such sales. Neither did the Commission make findings to reflect the fact that the United States considered the land of such value that it authorized (reluctantly) its treaty commissioners to offer special inducements to influential members of the tribe by way of individual grants in fee. In the letter of instructions, dated June 29, 1818, to Lewis Cass, the treaty commissioner was told to make such grants only as a last resort, the instructions saying:

> "Should it be found indispensable to the formation of a treaty, on satisfactory conditions, that some lands should be ceded in fee to some few persons in the tribe, half-breeds, or others of great influence, it may be done, guarding the sales in the manner above stated. This, however, should be avoided, if possible, as it would be to sacrifice the interest of the tribe to the accommodation of individuals—perhaps of the innocent and ignorant to the artful and unprincipled."

In Article 3 of the 1818 Treaty a number of tracts of land were granted in fee simple to influential half-breeds and tribal members and in Article 6 it was provided that except for the tracts granted to Jean Baptiste Richardville, the tracts so granted could not be transferred by the grantees or their heirs without "the approbation of the President of the United States." The grant to Richardville was absolute in all respects. In his report of October 28, 1818, following the execution of the 1818 Treaty, Governor Jennings, one of the treaty commissioners, advised the Secretary of War that the Miamis had a very good idea of what their land was actually worth from the white settlers in the vicinity and that it had therefore been impossible to secure the huge land cession on any better terms than that included in the treaty. He noted that it had been necessary to make the grants in fee simple to the influential individuals but that those individuals, with the exception of Richardville, could not dispose of their lands without the permission of the President. He then stated that although the consideration given the Miamis for the land, including the annuities, might seem large in comparison with the consideration given other tribes for adjacent lands, he felt that a good bargain had been made for the United States since the land ceded by the Miamis was of a type "not equalled by any in the state."

With respect to the above mentioned fee simple grants to influential half-breeds, the Commission failed to make findings to the effect that pursuant to Article 7 of the Treaty of October 23, 1826, 7 Stat. 300, some 6,720 acres of those lands were repurchased by the Government at prices ranging from $3.84 to $6.90 per acre. This was only eight years after the same land had been granted to the individual Indians for the admitted purpose of inducing those individuals to exert their influence on the tribe to secure the large cession desired by the United States in 1818. The total amount expended to reacquire that land in 1826 was $25,780.00.

Before we proceed to anaylze the remaining findings made by the Commission on the matter of the value of the land ceded to the Government in 1818, we wish to state that we have examined the record upon which the findings already discussed were based, and that the findings are fully supported by the evidence. Why the Commission failed to make an ultimate finding drawing the obvious conclusions from the carefully prepared findings 6 through 31 we do not know.

Finding 32 is merely a summary of certain conclusions reached by the plaintiffs' appraiser with respect to the prob-

able value per acre of the lands in the New Purchase as of October 6, 1818. It would appear that the Commission had before it sufficient evidence to form its own opinion of the probable value of the lands in the New Purchase without the assistance of the plaintiffs' appraiser, although much of the evidence relied upon by the Commission in making its findings 6 through 31 was the same evidence used by the plaintiffs' appraiser. In arriving at a value of 75¢ per acre the Commission appears to have chosen to ignore its own findings 6 through 31, as well as the opinion of the plaintiffs' appraiser summarized in finding 32.

In finding 33 the Commission summarized the material found in certain Senate documents with respect to land purchased from Indians throughout the United States prior to 1818, and the amount of such land that had been disposed of by that date. The Commission drew no conclusion from the material summarized and it would appear that that material has no relevancy to the issue of value in the instant case.

In finding 34 the Commission summarized a Treasury report of November 24, 1818, including the fact that the United States was paying six and seven percent interest on the greater portion of its national debt. The relevancy of this material to the issues involved in this case is not apparent. The same may be said of finding 35 in which the Commission summarized a Treasury report of April 23, 1832.

Finding 36 contains a most curious statement to the effect that from the beginning of the sale of public lands by the United States to 1818 and thereafter, the United States was attempting to obtain the "high dollar" from the sale of its public lands. This statement is directly contrary to statements made in previous findings noted above that, in setting the minimum price for public lands at $2 an acre prior to 1820 and at $1.25 an acre in 1820, the United States was not attempting to secure for itself the "high dollar" or even the true value of the public lands it was disposing of but was rather, as a matter of public policy, setting the price for such public lands at what was considered to be a very nominal figure in order to get more lands into the hands of the settlers. The record as a whole supports the conclusion reached by the Commission in the earlier findings. The conclusion reached in finding 36 is not supported by substantial evidence and is contrary to earlier findings which are supported by substantial evidence based on the record as a whole.

Finding 37 notes that in 1820 the credit system used in the sale of public lands was abolished and the minimum price for such lands was reduced to $1.25 per acre with sales permitted in whole, half, quarter and half-quarter sections. Under the general Relief and Relinquishment Act of March 2, 1821, 3 Stat. 612, settlers were authorized to relinquish part of their lands in satisfaction of the debt on the remainder. In view of the Commission's findings 15, 16, and 17 to the effect that typical settlers in the area surrounding the New Purchase had the money to pay for their land and few, if any, defaulted in meeting such payments, it would appear that the passage of the Relief and Relinquishment Act was not for the benefit of these settlers and was not taken advantage of by them. Accordingly, the circumstances relative to defaults in other parts of the United States which occasioned the passage of this Act would have no bearing on the value of the land in the New Purchase in 1818. Finding 37 of the Commission does not indicate that it was the Commission's opinion that this Act did have any bearing on the value of the New Purchase lands. Finding 38 discusses the market price obtained for lands in Kentucky prior to 1820 but the Commission states in the finding that Kentucky lands were not comparable to lands involved in the instant lawsuit.

Finding 39 is concerned with large sales made by land speculators between 1788 and 1795 but the Commission states that neither the lands nor the period involved are comparable with the land and

the period involved in the present lawsuit.

In finding 40 the Commission recites certain statistics which show that as a whole the country had more land than it had money. The finding quotes pages from Harvard Economic Studies relative to financial depressions prior to 1820. In view of the Commission's findings 16–18 that settlers in Indiana who were farmers were not affected by the financial crisis in the period prior to 1818, the relevancy of this finding is not apparent.

In finding 41 the Commission quoted a statement by the defendant's appraiser but makes no independent finding as to the sigificance of that statement which, indeed, is a rather vague and general one. In finding 42 the Commission again summarizes certain statements made by the defendant's appraiser with respect to land available in Indiana prior to 1819 and land actually disposed of. In finding 21 the Commission had pointed out that the defendant's figures with respect to land available and disposed of in earlier Indiana and Ohio cessions were inaccurate because of the failure to eliminate land reserved by the Government from public sale for schools and other purposes. The Commission also found in earlier findings that four of the tracts selected by the defendant's appraiser for comparison with the New Purchase were dissimilar to the New Purchase in quality of soil, and that two of the tracts selected (the Vincennes Tract and the Ohio River Tract) were relatively distant from the New Purchase. Apparently finding 42 is not only inaccurate but is without any particular significance.

In finding 43 the Commission notes that the defendant's appraiser stated that in 1818 the white population of Indiana was centered in the southern third of the state. In view of the fact that the northern two-thirds of the state of Indiana was still owned and occupied by Indian tribes, this statement is scarcely surprising.

In finding 44 the Commission states that the defendant's appraiser evaluated the New Purchase as worth in 1818 20¢ an acre and that 25 percent of the total acreage was not saleable at all. In view of an earlier finding by the Commission that over 90 percent of the entire area was actually sold by the Government itself for no less than $1.25 an acre in the 20 years subsequent to 1818, this finding appears to be merely a statement of what the Government's appraiser's opinion was and not a finding of fact on the saleability of the land in the New Purchase.

Finding 46 is the ultimate finding of the Commission on value, objected to by both parties to the suit on the ground that nothing in the previous findings can be found to indicate a clue as to the 75¢ per acre found by the Commission as the value of land in the New Purchase on October 6, 1818.

In its opinion on the issue of valuation and unconscionable consideration, the Commission stated what the evidence of the parties consisted of and reviewed the contents of its findings briefly, emphasizing the fact that the lands in adjacent areas to the land in suit had been disposed of at a rate and at prices sufficient to indicate that in 1818 the Government should have anticipated a ready sale of the land in the New Purchase for the then minimum price for public lands of $2 an acre, such land being more desirable and accessible than the adjacent lands already largely disposed of by the Government. The Commission also discussed the reports of the claimant's expert appraiser and the Government's appraiser. It rejected the conclusions on value of the tract in suit reached by the claimant Indians' appraiser without giving any reason. It also rejected the conclusions of the defendant's appraiser because it felt the evidence did not support the assumptions indulged in, in particular the assumption that the land would not sell for the minimum price of $1.25 as an average, and that 25 percent of the land was unsalable. Although the Commission did not comment on two theories.

urged by the Government, i. e., the wholesale value of the land and the necessity of discounting any market value found in 1818 by 6% for the length of time the land remained unsold in the hands of the Government, the Commission appears to have rejected both theories.[6]

In conclusion, the Commission stated that, on the basis of its findings of fact, and in view of (1) the large amount of public land available for sale in the United States, (2) the population of the United States as a whole, (3) the economic conditions prevailing throughout the country during the period involved, it concluded that the land in the New Purchase was worth 75 cents per acre on October 6, 1818. If we give to these reasons the content which they would have to be given to support the conclusion, the reasons are not supported by the evidence, nor by the Commission's findings. The Commission has found that the settlers in Indiana in 1818 were well able to pay cash for their land; that their ability to buy the land was unaffected by adverse economic conditions in the country in 1818 and thereafter, and that there were practically no defaults or resorts to relief provisions such as the Graduation Act; that despite the large amount of public land available for sale in the United States generally, there was a lively demand for the land available in Indiana, and that large tracts of comparable land had been disposed of by the Government at $2 an acre on public sale, for more at auctions and on sales of reserve sections, and for even more on private sales between settlers. We are accordingly at a loss to understand why the Commission states in its conclusion that the amount of public land available throughout the United States and the economic condition of the country had a seriously adverse bearing on the market value of the land in the New Purchase in 1818.

In view of those findings of fact discussed above which we have found to be supported by substantial evidence, we are of the opinion that the Commission has not given adequate or proper reasons for its conclusion that the land ceded in 1818 was worth 75 cents per acre, as it is required to do by Section 19 of the In-

6. The only basis on which a wholesale value of the land might be estimated was the prices paid by the land speculating companies in the 18th century, long prior to the 1818 cession. As found by the Commission, the companies were mismanaged and went bankrupt. The methods they employed, including fraud, caused them to be held in great disfavor by the Government and the public and any application of their standards to the Government in the purchase of Indian lands is unthinkable. Furthermore, in 1818 there were in Indiana a large group of willing and able purchasers who were responsible farmers. These settlers could and did buy the 80-acre tracts made available to them in 1820. While it is true that the large tract ceded could not have been sold to individual purchasers all at once, it was the Government which decided to acquire this large tract at one time and to hold it until disposed of in small tracts to settlers.

Because the land acquired in 1818 was not all disposed of for more than 20 years after its acquisition, there is some notion that the fair market value in 1818 should be discounted at 6 percent for the period held before sale in order to determine the fair market value in 1818. Under the circumstances of this case, such a theory seems untenable. The Miamis had asked for permission in 1809 to sell their land directly to settlers when the Government's minimum price was $2 per acre. Permission was refused. In 1809 and thereafter settlers in Indiana wanted this land and had the money to pay for it. Furthermore, the Miamis were not paid the actual fair market value of their land in 1818 or at any future time so that they, the owners of the land in 1818, never got any amount respresenting the fair market value which they could have invested at 6 percent. Discounting the fair market value in 1818 at 6 percent for the period it took to dispose of the land is, in effect, charging the Indians interest on a fair market value they did not receive and giving the Government interest on money it did not part with for land which it got. In 1818 the Indians parted with their land and got no money. The Government got the land and parted with no money. If the Indians had been allowed to keep the land and sell it themselves, it would not have cost them anything to hold it.

dian Claims Commission Act. Furthermore, we hold that those same findings, findings 6 through 31, do not support the Commission's ultimate finding of value. In addition, as noted earlier herein, certain of the Commission's findings following finding 31 are not findings at all, but are merely recitations of evidence, other findings have no bearing on the issues for decision, and still others are not supported by substantial evidence and are contradictory to earlier findings which are supported by substantial evidence. Finally, the record contains some material evidence which has not been made the subject of any findings. For these reasons the Commission's findings and determination on the issue of the value of the land in suit as of October 6, 1818, will be remanded to the Commission for further consideration and further proceedings, if necessary, consistent with this opinion.

Offsets and Deductions for Payments on the Claim

In a separate proceeding to determine the amount of allowable offsets and deductions, the Commission made findings of fact and concluded that there should be allowed as an offset $7,257.33 representing gratuitous expenditures made by the United States for the benefit of the claimant tribe, and that there should be deducted from any award as a payment on the claim [7] the sum of $280,500 representing the commuted or capitalized value of the Government's obligations to the tribe under the Treaty of October 6, 1818. The Government has appealed from the Commission's determination relative to the deduction of the latter sum on the ground that such sum does not include additional amounts actually paid to the tribe under the terms of the treaty.

[9] The claim sued on herein is one for unconscionable consideration alleged to have been paid by the United States to the claimant tribe for 4,291,500 acres of land ceded by the tribe to the United States pursuant to the Treaty of October 6, 1818, and the measure of the tribe's recovery is the difference between the true market value of the land ceded at the time of cession and the consideration paid for such land by the Government, less offsets for gratuities and less any payments the United States may have made "on the claim". At first blush this appears a simple enough formula but, unfortunately, that is not always the case. For example, although an easily determinable consideration may be stated in the treaty, the Government may actually pay less than that amount and it is the amount actually paid which represents the consideration. Furthermore, all payments made in fulfillment of treaty obligations may not be payments of part of the consideration and not payments "on the claim".

[10] In the instant case the Treaty of October 6, 1818, provided that in consideration of the cession by the tribe the United States should pay to the tribe a so-called perpetual annuity of $15,000 in silver; that it would construct a gristmill and a sawmill; that it would provide a blacksmith and a gunsmith (later changed to a miller); that it would provide implements of agriculture and that it would furnish annually 160 bushels of salt. Early in the proceedings in this litigation the parties stipulated that these considerations had a capitalized or funded value of $280,500 made up of $250,000 which was the capitalized value of the annuity of $15,000, such annuity being 6 percent of $250,000, and $30,500 representing the funded value of the other services and goods actually rendered to the tribe under the treaty. Pursuant to this stipulation of the parties $280,500 was used as the consideration or purchase price agreed to and actually paid to the tribe for the land ceded and it was on the basis of this amount that the Commission found that the United

7. Section 2 of the Indian Claims Commission Act provides with respect to deductions from a final award of the Commission:

"In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim * * *."

States had paid approximately 6.4 cents an acre for the land ceded and then determined that, in comparison with the market value of the land in 1818, this consideration of 6.4 cents per acre was unconscionably low. In an amended answer filed some four years after making the above mentioned stipulation regarding the value of the 1818 treaty consideration, and after the Commission had rendered its determination on value and had concluded therein that, on the basis of the stipulated treaty consideration of 6.4 cents per acre the Indians had received an unconscionable consideration, the defendant filed an amended answer in which it stated that the consideration of $280,500 stipulated to was not intended by the United States to represent the amount which the United States had paid "on the claim" and that it was claiming as a deduction for payment on the claims not only the treaty consideration of $280,500 referred to in the stipulation but also all of the annual payments of $15,000 made between 1818 and 1854 when, under the Treaty of June 5, 1854, 10 Stat. 1093, the 1818 annuity (and all others) were terminated and commuted and the tribe was paid the funded value of such annuity. The total amount now claimed by the defendant as a payment on the claim is $841,820.89. The Commission was of the opinion that the sum stipulated by the parties as the consideration actually paid for the land, i. e., $280,500, was also the only payment made by the United States which fell within the meaning of the phrase "payment on the claim" in section 2 of the Indian Claims Commission Act, and that the additional payments which the Government now seeks to have deducted from the final award were something other than payments on the claim. We are of the opinion that the Commission has reached the correct result.

It appears to be the Government's position that treaty consideration and payments on the claim under the same treaty will not necessarily be the same amount and that where consideration for a cession is stated in terms of an annuity, the treaty consideration or purchase price is not the capitalized value of that annuity but all actual payments of such annuity are payments on the claim and are deductible from the final award, citing Quapaw Tribe of Indians v. United Staes, 1 Ind. Cls. Comm. 644, 652, affirmed in part and reversed in part, 120 F.Supp. 283, 128 Ct.Cl. 45. In that case the Commission and this court allowed a limited annuity ($1,000 a year for 11 years) to the extent that it was actually paid ($7,450) as a deduction for payments on the claim arising under the 1824 treaty of cession. We note that in that case the sum representing the annuities actually paid was also treated as part of the treaty consideration for the ceded land in the determination of the Commission that the consideration paid was unconscionable. The parties in the Quapaw case had agreed that the $7,450 actually paid by the Government under the annuity provision of the treaty represented part of the treaty consideration and was deductible as a payment on the claim and there was, accordingly, no discussion in the briefs or the opinions concerning the nature of such payments. We are of the opinion, however, that such payments on account of a limited annuity were probably installments of a stated purchase price and as such, to the extent actually paid, represented the consideration for the cession and payments on the claim.

In the instant case we do not have a provision for a limited annuity but rather a provision for a perpetual annuity. In such a situation, if all payments made thereunder are to be considered as payments on the claim and the annuity actually continues in perpetuity, no claim for unconscionable consideration could ever arise under such a treaty since ultimately the tribe would receive far more than the fair market value of the land ceded although the annual payments agreed to by the United States might be so small that they would be entirely inadequate to meet the annual needs of the tribe involved.

Aside from the fact that the record herein indicates that the United States

did not intend the 1818 annuity to be a perpetual annuity,[8] we are of the opinion that the Government considered only the capitalized value of that annuity to represent the purchase price or consideration for the land it acquired under the 1818 treaty and the annual payments of $15,000 were treated as payments of interest on such capitalized value to be made until the United States should pay the principal amount producing such interest to the tribe. Soon after the 1818 treaty was proclaimed, the United States Treasury set up on its books the sum of $250,000 on which interest at the rate of 6 percent was to be paid to the Miamis in fulfillment of the 1818 treaty obligation to pay $15,000 a year. That the United States considered the principal sum on its books ($250,000) to be the purchase price or consideration for the cession, and the annual payments of $15,000 merely as interest on the principal amount which it retained, is evidenced not only by the book entries, but also by the procedure followed by the Government in an earlier treaty with certain other tribes in this area. In the Treaty of September 29, 1817, 7 Stat. 160, with the Wyandots and six other tribes of Indians, the Government agreed in Article 4 that, in consideration of the cessions made in the treaty, it would pay to three of the tribes "annually and forever" certain stated amounts. In a Report of a Senate Committee on Public Lands, dated December 29, 1817, it was reported that the consideration paid to these tribes for the land ceded in 1817 was 3 cents 8 mills per acre and this amount was arrived at by using in the computation the "present worth of the annuity", i. e., a principal sum which at 6 percent would produce the annual sum stated in the treaty.

We are of the opinion that because of the manner in which the Government chose to discharge its obligation to pay the so-called permanent annuity to the claimant tribe, it viewed this obligation as identical with that created in treaties which provided that the named consideration for a cession should be held in trust or invested in securities and the interest or dividends thereon paid to the tribe with the Government having the use of the money until the principal amount was paid. As in such situations, only the principal amount is the consideration and that consideration is not paid nor is there any payment on the claim until that principal sum is given to the Indians. In the instant case no consideration represented by the annuity was paid and no payment was made upon the claim for such consideration until 1854 when the annuity was commuted and the commuted value was paid to the tribe.

We conclude that the purchase price for the land ceded in 1818 was the capitalized or funded value of the 1818 annuity plus the funded value of the goods and services, actually paid to the tribe as a result of the 1854 treaty, in the total amount of $280,500.00 and that only that amount is deductible from the final judgment as a "payment on the claim". Accordingly, we affirm the Commission's findings and determination on the question of offsets and deductions for payments on the claim.

CONCLUSION

In summary we hold that the Commission was correct in determining that the claimant Indians held the land ceded to the United States on October 6, 1818, by recognized Indian title and did not therefore have to prove aboriginal use and occupancy of the area so ceded, and the Commission's determination on this issue is affirmed. On the issue of the value of the land ceded in 1818 by the Miamis, we are of the opinion that the ultimate finding of value is not supported by the primary findings made by the Commission and that the case must be remanded to the Commission for further proceedings and correction of both primary and ultimate findings on the ques-

8. See Treaty of October 23, 1826, 7 Stat. 300, Article 4, and the report of the treaty commissioner, dated October 23, 1826 concerning the modification of the annuity provisions of earlier treaties including the Treaty of October 6, 1818.

tion of value. On the matter of offsets we are of the opinion that the Commission has reached the correct result and its determination thereon is affirmed. The final judgment is vacated and the cause remanded to the Commission for reconsideration on the question of value in accordance with this opinion.

WILBUR K. MILLER, Circuit Judge, sitting by designation, and LARAMORE, Judge, concur.

JONES, Chief Judge (dissenting).

I think there is substantial evidence to support the findings of the Indian Claims Commission that the lands involved in this case had a fair market value on October 6, 1818, of 75 cents per acre. This value is amply supported by the record made before the Commission. The summation made by the Commission in its concluding findings with respect to value, while not in great detail is fully sufficient to support that determination.

The witness Paul Starrett is the one witness who had made a thorough study of this entire subject of values as shown by the records in this particular area and other areas in which he had served. He has spent many years in appraisal and sale of lands, and since 1934 has had his business headquarters in Indianapolis, Indiana. Before that he had done a great deal of work in connection with appraisals for large business projects and had made appraisals of properties for many corporations in the Middle West. He has had his business headquarters in Indianapolis continuously since the beginning of 1935. He has done appraisal work for the American Can Company, Chrysler Corporation, Shell Oil, and other large concerns. He is a member of the American Institute of Real Estate Appraisers, and at the time his testimony was taken he was president of the Indiana chapter of that organization. He was a witness for the cross-appellant, who is also appellee. He made a search of the records and made an appraisal of the fair market value of the subject project as of October 1818.

Mr. Starrett made a thorough examination of the records which is the only way values as they existed 140 years ago may be determined. He examined The Handbook of Indiana Geology published by the Department of Conservation. One of the authors of that publication had published a book on the economic geography of Indiana. This book was published by Appleton Company in 1823, and was prepared by Steven A. Visher, who was a professor of geography for Indiana University.

The records which he examined showed that Congress was disturbed by the fact that large tracts in the undeveloped sections of the country had been sold for a few cents per acre. Some speculative concerns had purchased and resold western lands for huge profits.

A large part of the Northwest Territory was beginning to be developed. Indiana was admitted to the Union as a State in 1816; Illinois in 1818; Ohio in 1803, and Michigan in 1837. In the controversy as to the best method of disposing of these vast properties and manifestly for the purpose of avoiding speculation, Congress fixed a minimum price of $2 per acre, which was later reduced to $1.25. In many parts of the northwest area the price for sales in small tracts was approximately double the price that could be obtained when larger tracts were sold. Sales in small tracts would have to be surveyed, records kept, and many details given attention.

Mr. Starrett, after a thorough analysis of the records, found that a considerable portion of the tract in question had to be drained, and while at the present time it is one of the most productive parts of the country, at that time much of it was not then suitable for immediate settlement. There was little means of transportation, few supply stations and much of the area was inaccessible. In fact, he quotes from the 14th Census of the United States made in 1820 and cites from that census report analytical tables

which designate "Approximate Location and Area of Operating Drainage Enterprises, State of Indiana." The report had much other data as to conditions in the different parts of the Nation.

As early as 1790, Alexander Hamilton had told of the conflict of pressure interests between the desire to secure public revenue and the problem of providing homes for settlers in the then undeveloped areas of the new country. As early as 1795 the problem of the speculator was sought to be eliminated when the price of public lands in various undeveloped areas was raised to $2 per acre. These conflicts of pressure interests as between the maximum revenue and interest of the settlers were as of 1818 still undetermined. While a number of tracts were sold at $2 or more, the sales were less in 1818 than they had been in 1817, and during the next few years considerable difficulty was had in collections and there were numerous forfeitures. Many of the sales at the higher prices were of selected tracts.

After considering the numerous records, the maps, the books, the histories and the census reports, Mr. Starrett found that the value of the 7,000,000 acres taken as a whole was as of October 6, 1818, 20 cents per acre.

Since we are permitted to reverse a finding of the Commission on the question of value only if it is not supported by substantial evidence, it seems to me that in the light of the testimony of the only witness who was an experienced appraiser and who had thoroughly examined the record, we have no escape from the conclusion that the Commission's finding of value was supported by substantial evidence.

Apparently the majority opinion does not question the fact that there was substantial evidence to support the Commission's finding of value. Rather it takes the position that the Commission did not make a proper finding on this issue. Again I disagree. Findings 44 and 46 constitute a clear finding on this subject. Evidentiary findings support these ultimate findings. The Commission had the evidence of the various witnesses before it and decided in finding 46 the value per acre as of the date of transfer and cession.

The experienced witness offered by appellant fixed the value as of that date as $1.87 per acre. In comparing the conflicting evidence of value offered by the parties, the Indian Claims Commission concluded that the land involved in the case had a fair market value on October 6, 1818, of $0.75 per acre. There was certainly substantial evidence to support the Commission's finding of value.

Since the case is to be returned to the Commission, as the majority opinion directs, I think the entire case should be gone into again, including the question of title [9] as well as of value. The entire case should be reopened so that the nature of the appellant's beneficial interest in, as well as the extent of the use of all the land in question could be explored by the Commission in any reexamination of the value of the land.

There were only 1,000 of the Miami Tribe of Indians in scattered groups in this area in 1818. There are 4,291,500 acres of land involved. There is no showing as to how often the Indians used the vast stretches of this great area. They only occupied a very small portion of it.

The later cases both of the Supreme Court and this court are to the effect that only where there is a grant by treaty or act of Congress a definite or definable tract or tracts for exclusive use may there be what is termed "Recognized Indian title" without proof of use and occupancy. I have been unable to find within the four corners of the Treaty

9. This is especially true in the light of the Indian Claims Commission's subsequent decision in a later case of the Miami Tribe of Indians v. United States (No. 253), 5 Ind.Cls.Comm. 180 (1957), in which a construction of the same treaties was involved.

of 1818 anything that approaches such a description, either by express language or by reference to any other treaty or act that would meet that test. Such vague terms as lands "watered by the Wabash" or "by the White River" are wholly insufficient.

The maze of earlier treaties that refer also to other tribes furnish little information as to definite boundaries of tracts granted to the Miami Tribe of Indians or as to areas given them for exclusive use; and no information whatever as to the extent of actual use or occupancy by such tribes.

In the absence of such definite boundaries and exclusive use, proof must be made of use and occupancy.

This court should not find "Recognized Indian title" where the tract is not a defined or definable area that is set apart by a treaty or act of Congress for the exclusive use or occupancy of the claimant tribe or tribes. There is no sufficient proof of "Recognized Indian title" and there is no evidence in the record of actual and exclusive use and occupancy by claimants of the area and little, if any, proof as to the amount and frequency of the use of great portions of the area in question.

The Indian Claims Commission heard extensive evidence, examined numerous documents, and examined many exhibits, some of which were conflicting. I think it would be tragic to affirm the major and most disputed issue in the case, that is the question of recognized title to this vast area, when there is little evidence of the use of the area or any substantial part thereof and at the same time reverse the action on the question of value upon which latter question there was certainly substantial evidence.

As the case is to be returned to the Indian Claims Commission I trust that the Commission will go fully into both of these issues so that a complete record may be made before final action is taken on these important questions.

I have not the slightest doubt that the Indians are entitled to recover on the basis of the actual value of their right to occupy and use of part of the 4,291,500 acres in question, which they actually used and occupied. The extent of that use should have a bearing on the value of the beneficial interest of the Indians in the area in question.

WHITAKER, Judge, joins in the foregoing dissenting opinion.

WEST KEY NUMBER SYSTEM

CROW TRIBE OF INDIANS
v.
UNITED STATES.
No. 1-59.

United States Court of Claims.
Nov. 2, 1960.

Proceedings on claim for additional compensation for land, presently located in south central Montana and north central Wyoming, which Crow Indian Tribe ceded to United States by 1868 treaty. The Indian Claims Commission decided that the tribe was entitled to recover additional compensation, and an appeal was taken. The Court of Claims, Madden, J., held that even though language of Treaty of Fort Laramie was not technical language of recognition of title, participation of United States in treaty, whereby various Indian tribes described and recognized each others' territories, was, under circumstances surrounding treaty and in light of treaty's overriding purpose to secure free passage for emigrants across tribes' lands by making particular tribes responsible for maintenance of order in their particular areas, a recognition by the United States of tribes' titles to areas for which they were to be held responsible.

Modified and affirmed and case remanded with directions.

Whitaker, J., and Jones, Chief Judge, dissented.

1. Indians ⇐11

To recover additional compensation for land ceded to United States by 1868 treaty, Indian tribe was required to show either (1) "Indian title" to lands in question, that is, that it had used and occupied those lands from time immemorial to exclusion of all others or (2) that at some time prior to 1868 the United States had recognized or acknowledged that tribe had title to such lands. 25 U.S.C.A. § 70 et seq.; Treaty Between United States and Crow Tribe of Indians May 7, 1868, 15 Stat. 649; Treaty of Fort Laramie Sept. 17, 1851, 11 Stat. 749.

See publication Words and Phrases, for other judicial constructions and definitions of "Indian Title".

2. Indians ⇐8

Even though language of Treaty of Fort Laramie was not technical language of recognition of title, participation of United States in treaty, whereby various Indian tribes described and recognized each others' territories, was, under circumstances surrounding treaty and in light of treaty's overriding purpose to secure free passage for emigrants across tribes' lands by making particular tribes responsible for maintenance of order in their particular areas, a recognition by the United States of tribes' titles to areas for which they were to be held responsible. Treaty of Fort Laramie Sept. 17, 1851, 11 Stat. 749.

3. International Law ⇐8

Power of internal police is principal attribute of sovereignty.

4. Judgment ⇐739

Issues can only be res judicata if they were, or could have been, litigated in former suit.

5. Judgment ⇐714(1)

Claim for additional compensation for land which Indian tribe ceded to United States by 1868 treaty was not included within subject matter of suits authorized by Special Jurisdictional Act of July 3, 1926, and issues involved in proceedings on claim for additional compensation were not res judicata by reason of court's decision in suit under Special Jurisdictional Act wherein court disclaimed jurisdiction of such issues and only decided, adverse to tribe, claim that mistaken belief that treaty was not in effect had induced tribe to accept inadequate consideration for lands. 25 U.S.C.A. § 70a(3, 5).

6. United States ⇐113

In proceedings on claim for additional compensation for land, presently located in south central Montana and north central Wyoming, which Crow Indian Tribe ceded to United States by

1868 treaty, evidence supported Commission's findings of fact and findings supported Commission's ultimate finding that land had an average value of 40 cents per acre in 1868. 25 U.S.C.A. § 70 et seq.; Treaty Between United States and Crow Tribe of Indians May 7, 1868, 15 Stat. 649; Treaty of Fort Laramie Sept. 17, 1851, 11 Stat. 749.

7. United States ⇐113

Function of Court of Claims on appeal from Indian Claims Commission is limited to determining whether Commission's ultimate findings are supported by its primary findings. 25 U.S.C.A. § 70s; Treaty Between United States and Crow Tribe of Indians May 7, 1868, 15 Stat. 649; U.S.C.A.Const. Amend. 5.

8. Indians ⇐11

In proceedings on claim for additional compensation for land, presently located in south central Montana and north central Wyoming, which Crow Indian Tribe ceded to United States by 1868 treaty, consideration which Indians received, like land which they surrendered, was required to be valued as of date of treaty.

9. Indians ⇐11

Where all that Indian tribe received when it ceded land to United States was promise to pay certain amounts in future, treaty date value of consideration which tribe later received for its lands would be computed, for purposes of determining whether the tribe had been adequately compensated, by ascertaining sum of money which, if put at 5% simple interest on date of treaty on which land was ceded, would have amounted to sum paid if disbursed in amounts in which, and on dates on which, it was actually expended.

10. United States ⇐110

Interest against United States cannot be recovered, in absence of express statutory or contractual provision, except in case of award of just compensation under Fifth Amendment. U.S.C.A. Const. Amend. 5.

11. United States ⇐110

In proceeding on claim for additional compensation for land, presently located in south central Montana and north central Wyoming, which Crow Indian Tribe ceded to United States by 1868 treaty, mere fact that figure representing interest was required to be used to calculate 1868 value represented by later payment made to Indians by government did not mean that interest was being awarded.

Carl S. Hawkins, Washington, D. C., for The Crow Tribe of Indians. Ralph G. Wiggenhorn, Wiggenhorn, Hutton, Schiltz & Sheehy, John M. Schiltz, Billings, Mont., Wilkinson, Cragun & Barker, John W. Cragun, and Charles A. Hobbs, Washington, D. C., on the briefs.

Maurice H. Cooperman, Washington, D. C., with whom was Asst. Atty. Gen. Perry W. Morton, for the United States.

MADDEN, Judge.

These are cross-appeals from a decision of the Indian Claims Commission. The Commission decided that under the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C.A. § 70 et seq., the Crow Tribe of Indians was entitled to recover additional compensation for 30,530,764.8 acres of land, situated in what is now south central Montana and north central Wyoming, which the Tribe ceded to the United States by the Treaty of May 7, 1868, 15 Stat. 649. In its petition to the Commission the Tribe alleged that prior to the date of that treaty, it owned 38,531,174 acres, and that by the Treaty of 1868 it ceded all of its lands, except for a reservation containing 8,000,409.2 acres, to the United States for an inadequate and unconscionable consideration.

The Commission considered the case in two stages. First, the Commission held that the United States had, by the Treaty of Fort Laramie, signed on September 17, 1851, 11 Stat. 749, recognized the Indians' title to the lands in question. 3 Ind.Cls.Comm. 147. The Commission then considered the question of the value of the lands and of the consideration received, and concluded that the lands had a market value in May of 1868 of an average of $0.40 per acre, but that the Tribe

had received less than $0.054 per acre. 6 Ind.Cls.Comm. 98. The Commission held that this consideration was unconscionable.

The Government appeals from the holding that the Tribe's title to the land had been recognized, and from the Commission's overruling of its defenses of *res judicata* and lack of jurisdiction. The Crow Tribe appeals from the Commission's valuation of the lands, contending that it was too low.

[1] In order to recover for the value of the lands it ceded to the United States in 1868, the Tribe was required to show that it possessed a compensable interest in those lands at that time. This could have been shown in either one of two ways. First, the Tribe could have shown that it had "Indian title" to the lands in question; that is, that it used and occupied those lands from time immemorial, to the exclusion of all others.[1] On the other hand, it could show that at some time prior to 1868 the United States had recognized or acknowledged that the Tribe had title to the lands. The Tribe took the position, and the Indian Claims Commission agreed, that by the Treaty of Fort Laramie, signed in 1851, the United States had recognized the Tribe's title to the lands. The significance of the question of whether the Tribe's title had been recognized lies in the fact that if the Tribe did have such recognized title, it was not required to prove actual use and occupancy of the lands.

The Government says that the Treaty of Fort Laramie was not a treaty of recognition. Although we think that it is abundantly clear that prior decisions of this court,[2] which we will discuss below, have held that the treaty did recognize the Tribe's title to the lands described therein, we think it appropriate to make some observations upon the treaty and the preparation and negotiations which led up to it, since the Government has in this case seen fit to urge so vigorously a position which has already been rejected by this court.

The occasion for and circumstances of the making of the Treaty of Fort Laramie are recited in the decision of this court in the Fort Berthold case, supra, 71 Ct.Cl. at pages 329–331 and will be further discussed in this opinion.

The treaty itself, 11 Stat. 749, IV Kapp. 1065, contains, among others, the following provisions:

"Article 1. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.

"Art. 2. The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories.

"Art. 3. In consideration of the rights and priviliges acknowledged

1. It should be noted that under the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C.A. § 70, et seq., an Indian Tribe has the right to recover for both "recognized title" and unrecognized "Indian title." Otoe and Missouria Tribe of Indians v. United States, 131 F.Supp. 265, 131 Ct.Cl. 593, 599–624, certiorari denied 350 U.S. 848, 76 S.Ct. 82, 100 L.Ed. 755. It is true that prior to the passage of that Act, a tribe's right to recover for the taking of unrecognized Indian title depended upon specific statutory authorization, and that in the absence of such authorization no recovery could be had. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285, 75 S.Ct. 313, 99 L.Ed. 314. But the Indian Claims Commission Act has now provided the required statutory authorization of recovery for unrecognized Indian title, so the question of recognition bears only upon the issue of how title is to be proved.

2. Fort Berthold Indians v. United States, 71 Ct.Cl. 308; Assiniboine Indian Tribe v. United States, 77 Ct.Cl. 347, certiorari denied 292 U.S. 606, 54 S.Ct. 772, 78 L.Ed. 1467; The Crow Nation v. United States, 81 Ct.Cl. 238.

in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty.

"Art. 4. The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by any band or individual of their people, on the people of the United States, whilst lawfully residing in or passing through their respective territories.

"Art. 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respectice territories, viz:

* * * * * *

"The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the headwaters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the headwaters of the Muscleshell River; thence down the Muscleshell River to its mouth; thence to the headwaters of Big Dry Creek, and thence to its mouth.

* * * * * *

"It is, however, understood that in making this recognition and acknowledgment the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described."

The Government's argument seems to be that because Article 5 of the Treaty speaks of recognition and acknowledgment by the Indian nations rather than by the United States, the Treaty was merely one of peace and friendship among the several tribes and between them and the United States.

[2, 3] This construction has been fully considered and rejected by this court in the past, and we reject it again. It is true that the language of the Treaty is not the technical language of recognition of title. Nevertheless, we think that the participation of the United States in a treaty wherein the various Indian tribes describe and recognize each others' territories is, under the circumstances surrounding this treaty, and in light of one of the overriding purposes to be served by the treaty, i. e., securing free passage for emigrants across the Indians' lands by making particular tribes responsible for the maintenance of order in their particular areas, a recognition by the United States of the Indians' title to the areas for which they are to be held responsible, and which are described as "their respective territories." Indeed, the provision of Article 4 of the Treaty that the various tribes were to make satisfaction for "any wrongs committed * * * on the people of the United States, whilst lawfully residing in or passing through their respective territories" implies the recognition by the United States in the tribes of a principal attribute of sovereignty, that is, the power of internal police. An examination of the documents pertaining to the preparations for and negotiation of the Treaty supports this conclusion.

When the Treaty of Fort Laramie was signed in 1851, gold had recently been discovered in California. Increasing numbers of people journeying westward were crossing the lands of the Indians. Buffalo and other game fell prey to the travelers' need for food (and sometimes to their need for sport). See Executive Document No. 1, House of Representatives, 30th Cong., 2d Sess., p. 442. Timber and forage were consumed in increasing quantities. The Indians resented these inroads, and their resistance often made the westward journey a perilous one.

The United States recognized that the serious losses of supplies which were vital to their subsistence gave the Indians cause for dissatisfaction, and the Government was anxious to make the way safe for the travelers. Mr. W. Medill, the United States Commissioner of Indian Affairs, in a letter dated June 15, 1849, suggested to the Secretary of the Interior that some inducement be offered the Indians to influence them to cease their attacks upon the emigrants. He stated:

"* * * They [the Indians] look upon the intrusion of the large bodies of emigrants into *their country*, and particularly the consequent great destruction of buffalo, which is their almost sole reliance for subsistence, with great jealousy and discontent; * * *

"* * * [A]s, until recently, *they have, unmolested, held undisputed possession of the country, which they regard as their own*, it is not to be expected that the passage of such large bodies of emigrants thro' it, and their ravages upon the buffalo, can take place without exciting in them dissatisfaction if not animosity; or that they will remain at peace and abstain from attacks and depredations upon the emigrants, unless some strong inducements are held out to influence them to do so. Under these circumstances, whatever may be the nature and extent of their title to the lands, I think it would be sound policy to make them some annual compensation for the right of way through the country, and in consideration of the destruction of the buffalo therein—by which they must at no late day, be seriously inconvenienced and injured—as well as to conciliate their friendly feelings towards our emigrants. * * *

"* * * I would therefore strongly recommend that measures be adopted, at as early a period as practicable, for entering into a treaty of friendship and amity, binding them to remain peaceable, and not only to avoid all aggressions upon our citizens, but to aid and assist them, so far as may be in their power, in passing through *their country* in safety, and stipulating for a suitable annual remuneration to them, upon the condition mentioned. * * *" [Emphasis added.]

On August 16, 1849, Mr. Orlando Brown, the new Commissioner of Indian Affairs, wrote to Thomas Fitzpatrick, a Superintendent of Indian Affairs, informing him that the recommendations made in the June 15 letter had been approved by the Secretary of the Interior, who directed that they be carried into effect. Commissioner Brown instructed that

"* * * The arrangements desired can best be effected by a treaty, to which all the Indians, or the larger and more important tribes of your agency, shall be parties; and which shall bind them to abstain from hostilities against each other, and not only from molesting in any way our military expeditions or emigrants, but to afford them any kindness or facilities in their power, when needed. *There should also be a clear and definite understanding as to the general boundaries of the sections of country respectively claimed by them, as their residence and hunting grounds; and they should be required not to trespass upon those of each other without permission from the occupant tribes*, or from the proper agent or agents of the government. * * *" [Emphasis added.]

In his annual report to the Commissioner of Indian Affairs written from St. Louis on October 13, 1849, Superintendent of Indian Affairs D. D. Mitchell stated:

"* * * Again, the boundaries dividing the different tribes have never been settled or defined; that is the fruitful source of many of their bloody strifes, and can only be removed by mutual concessions,

sanctioned by the government of the United States. *The boundaries being once established and clearly understood, each tribe could be held responsible for any depredations that might be committed within their respective territories.* * * *" [Emphasis added.]

The Commissioner, in turn, in his annual report to the Secretary of the Interior, dated November 30, 1849, stated:

"* * * Under these circumstances, it has been deemed expedient and advisable to take measures to bring about a proper understanding with the Indians, which will secure their good will, and prevent collisions and strife among them, *by obligating each tribe to remain as much as possible within their respective districts of country*, and providing that, where disputes or difficulties occur, they shall be submitted to the government, and the Indians abide by its decision. * * *" [Emphasis added.]

Congress by the Act of February 27, 1851, 9 Stat. 570, 572, appropriated $100,000 for the expenses of making treaties with the Indian tribes of the prairies. The President designated D. D. Mitchell and Thomas Fitzpatrick to act as treaty commissioners. In his letter to Mitchell, under date of May 26, 1851, informing him of his selection as a treaty commissioner, the Commissioner of Indian Affairs re-emphasized the need to provide compensation to the Indians for the use of the right of way across their lands, and stated:

"It is important, if practicable, to establish for each tribe some fixed boundaries, within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another tribe without its consent. If in arranging such boundaries there should be a portion of country not included where it has been their habit to go periodically in pursuit of game, it should be recognized as a neutral ground where all will enjoy equal privileges and have no right to molest or interfere with one another. IV Kappler, Indian Affairs, Laws and Treaties, Senate Document 53, 70th Cong., 1st Sess., p. 1074–1075."

Negotiations between the treaty commissioners of the United States and representatives of the various Indian tribes began on the Treaty Ground near Fort Laramie in the Indian Territory on September 8, 1851. According to an account of the proceedings which was published in a St. Louis newspaper, The Republican, during his address to the Indians on the first day of negotiations Mitchell said, in substance, the following:

"The ears of your Great Father are always open to the complaints of his Red Children. He has heard and is aware that your buffalo and game are driven off, and your grass and timber consumed by the opening of roads and the passing of emigrants *through your countries*. For these losses he desires to compensate you. He does not desire that his White Children shall drive off the Buffalo and destroy *your hunting-grounds*, without making you just restitution. But at the same time that he is willing to make you just compensation for injuries you may receive, he expects and will exert the right of free passage for his White Children over the roads running *through your countries*, and restitution for any injuries they may receive from you or your people, whilst passing *through your respective countries*. For the purpose of maintaining peace between the two nations, and for the protection of all parties, he desires from you a recognition of his right to establish military posts, and such other posts as he may deem necessary.

"In order that justice may be done each nation, it is proposed that *your country* be divided into geographical districts—that the country and its boundaries shall be designated by such rivers, mountains and lines, as will *show what country each nation*

claims and where they are located. In doing this it is not intended to take any of *your lands* away from you, or to destroy your rights to hunt, or fish, or pass over the country, as heretofore. But it will be expected that each nation will be held responsible for depredations committed *within its territory,* unless it can be clearly shown that the people of some other nation committed them, and then that nation will be held responsible. * * *

* * * * * *

"When you have made peace between all your nations here assembled, there will be no occasion for war parties going into *the country of another nation.*" [Emphasis added.] St. Louis Republican, October 26, 1851

The November 9, 1851, edition of the Republican reports that the entire day of September 12 was

"given up to an attempt to designate on the map the territory of each of the nations, and to mark it by metes and bounds. * * *

* * * * * *

"* * * After much consultation, particularly of the Indians among themselves, the metes and bounds of the several nations were agreed upon."

The import of these numerous statements by United States Government officials is too clear to be mistaken. The purpose of the Treaty of Fort Laramie was to establish, as between the United States and the various signatory tribes, the boundaries of the lands of the tribes. These boundaries were recognized as much by the United States, for purposes of determining the Indians' rights thereto, as they were by the Indians, for purposes of accepting responsibilities therefor.

The fact that on September 12, 1851, Mitchell pointed out that they were not prohibited from hunting upon or "going into the territory of any other Nation, so long as they remained at peace," (St. Louis Republican, November 9, 1851) does not imply otherwise. The prerogatives of recognized title are not such as to preclude all right of entry by others upon the territory in question. Indeed, one of the purposes of recognizing title is to regularize the rights of other parties within the territory.

Finally, we note that in his report, dated November 11, 1851, transmitting the Treaty to the Commissioner of Indian Affairs, Mitchell stated:

"* * * The laying off of the country into geographical or rather national domains, I regard as a very important measure, inasmuch as it will take away a great cause of quarrel among themselves, and at the same time enable the government to ascertain *who are* the depradators, should depradations hereafter be committed." [Emphasis in original]

This was another illustration of the fact that the United States Government had an important role in the recognition of the domains of the various tribes by the Treaty of Fort Laramie.[3]

3. It is of interest to note that in the brief which the United States filed in this court in the case of The Crow Nation v. United States, No. H-248, 81 Ct.Cl. 238, which brief appears at page 873 of volume 671 of the Printed Records of the Court of Claims, the United States took the position that the Government had made clear to the Crows that the Treaty of Fort Laramie had recognized the Crows' title. The Government pointed to several references which had been made by Commissioner of Indian Affairs Taylor, during the council with the Crow Indians in November 1867 at which the Treaty of May 7, 1868 was negotiated, to the country in which the Crows lived as "your country" or "your land", and the Government argued that under the circumstances the statement of Commissioner Taylor "* * * could have had no other meaning—and most assuredly had no other meaning in the minds of the Indians—than that the Government recognized their ownership in their lands. They were then told that the Government desired to buy of them the right to use and settle the remainder of the Crow land after a part suitable to the Crows had been marked off for their

The Indian Claims Commission, in its able and exhaustive opinion on this aspect of the case, after consideration of all the evidence, made findings of fact and reached conclusions of law with which we are in complete agreement except in one particular which is discussed under the last heading of this opinion. In addition to being in accord with what we think is a correct interpretation of the Treaty of Fort Laramie, the conclusions of the Indian Claims Commission are in accord with the prior decisions of this court.

In Fort Berthold Indians v. United States, 71 Ct.Cl. 308, decided in 1930, this court, in a careful and able opinion by Chief Justice Booth, held that the Treaty of Fort Laramie was a recognition by the United States of the Indians' title to the lands described in the treaty.

The court said, at p. 332, in answering the very argument upon which the defendant so heavily relies in this case:

> "The defendant says the territorial provisions were simply mutual recognition by the Indians of their claims to territory and its segregation by them, without positive governmental recognition or verification of the same. This contention, as we view it, concedes that when the commissioners approached the Indians their title by right of occupancy to all the territory embraced within the treaty was recognized by the commissioners representing the Government, and that what the treaty did was to segregate the same into individual tribal allotments. In other words, the Government not only recognized the Indian title, never at any time disputing it, but by solemn treaty, following negotiations, expressly agreed that each tribe was to be assured title to the territory set aside for it. Surely it was not essential to procure by treaty the grant of a perpetual right of way through Indian lands if the Indians did not own the same by right of occupancy."

The court concluded, at p. 333:

> "The language of the treaty, while not in all respects the technical wording used in other Indian treaties is, we think, sufficient when considered in connection with the instrument as a whole and the purpose and intent of the parties thereto, to clearly indicate that the territory of the Indians was to be delimited in accord with their claims and protection assured them within its bounds, in consideration of the rights and privileges secured to the United States and its citizens."

In Assiniboine Indian Tribe v. United States, 77 Ct.Cl. 347, certiorari denied, 292 U.S. 606, 54 S.Ct. 772, 78 L.Ed. 1467, the court, after concluding that the Assinboines had failed to prove that they had title by immemorial possession to certain lands north of the Missouri River which they claimed, said, at pages 370–371:

> "The plaintiff's case with reference to what is called the Fort Laramie lands is quite different. *The lands were expressly granted to the plaintiff tribe by the treaty made with the plaintiff on September 17, 1851* [*The Fort Laramie treaty*], and one of its purposes was to give each tribe some fixed boundaries within which they should stipulate generally to reside. It was also desired to give the Indians, some compensation for the interference with the Indian hunting expeditions caused by emigrants passing to the Pacific coast region." [Emphasis supplied.]

home. There is nothing in the record which shows or even suggests that from this time until the signing of the treaty on May 7, 1868, any statement was carried to the Crows which could have shaken their belief that they owned the country delimited by the 1851 treaty, and that they could sell it or not as they pleased, and, if they did sell it, that they could demand a valuable consideration and refuse to accept less than they, as vendors, were willing to accept." 671 Printed Records of the Court of Claims at pages 1009–1010.

In The Crow Nation v. United States, 81 Ct.Cl. 238, 271–272, decided in 1935, this court again reaffirmed its view of the Treaty of Fort Laramie.

The Government strenuously urges here that the Supreme Court, in United States v. Northern Pacific Railway Co., 311 U.S. 317, 61 S.Ct. 264, 85 L.Ed. 210, decided in 1940, has "overruled" the Fort Berthold, Assiniboine and Crow Nation cases of this court. Such a conclusion is not warranted.

By the Act of July 2, 1864, 13 Stat. 365, the United States authorized the Northern Pacific Railroad Company to build a railroad and telegraph line from Lake Superior to Puget Sound. A right of way through the public lands was granted to the railroad company, and the United States agreed to "extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill." 13 Stat. 367. To aid in construction of the railroad, the company was also granted every alternate section of public land, not mineral, lying along the railroad line, in the amount of twenty sections per mile on each side of the line when passing through territories, and ten sections per mile through states. The grant was limited to lands to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed." The company was given the right to select other lands in lieu of those excluded from the grant. 13 Stat. 367–368.

Many problems arose in the course of the construction of the railroad and in the determination of what lands the railroad was to receive. Finally, by the Act of June 25, 1929, 46 Stat. 41, the United States declared forfeited to the United States certain rights asserted by the company, and directed the institution of proceedings for the adjustment of the grant. Pursuant to that Act, suit was filed to settle the rights of the United States and the company.

One of the contentions of the Government was that the company should be charged with 13,300,000 acres of land which the Government said had been wrongfully received by the company because they lay within Indian reservations. The Government said that lands embraced by the Treaty of Fort Laramie and another Indian treaty, that of October 17, 1855, 11 Stat. 657, were excluded from the grant to the company by the language of the 1864 Act which excluded "reserved" lands, arguing that the Treaties of Fort Laramie and of 1855 "reserved" the lands described in it for the signatory Indian tribes.

The Supreme Court held the Government's contention unsound, and that the lands in question had not been "reserved", saying that the treaties "did not create technical reservations as have many other treaties and acts of Congress." 311 U.S. at page 349, 61 S.Ct. at page 279.

The Court discussed the treaties in the following language:

> "By an Act of June 30, 1834, all lands lying west of the Mississippi River, not within the States of Missouri and Louisiana or the Territory of Arkansas, were designated as Indian country. The fee of all this territory was in the United States, subject to the Indian right of occupancy. The treaties of 1851 and 1855 did not alter the status of the lands described in them. The purpose of those treaties was to establish peace and amity between warring Indian tribes *inter sese* and between the tribes and the United States. To this end the country or territory of each tribe was described and the tribes agreed to respect the boundaries named in the treaties. No alteration in the status of the lands had occurred up to the date of definite location of the Northern Pacific's line. About seven hundred miles of the railroad traversed the area embraced in the treaties.

This language is not contrary to a conclusion that the Treaty of Fort Laramie constituted recognition by the United States of the Indians' title. That the purpose of the Treaty was to establish peace and amity is clear, as is also the fact that the fixing of the boundaries of "*the country or territory of each tribe*" was done for that purpose. As we have shown above, a basic element of United States policy was to secure peace by establishing the tribes' responsibility for depredations within their respective territories.

What the Supreme Court *held* in Northern Pacific was only that the Treaty of Fort Laramie had not established a *reservation* for the Indians. Establishment of a reservation is something more than recognition of title. Reservations normally involve such matters as schools, farm assistance, and so forth. The Supreme Court said

> "As we have noted, the treaties did not create technical reservations as have many other treaties and acts of Congress. They did not set aside a defined territory for the exclusive use of a tribe nor contain the usual provisions for an Indian Agent for schools, assistance in farming operations, etc. The country described in the Treaty of 1851 amounts to 163,000,000 acres, and that described in the Treaty of 1855 to 37,000,000 acres. In the case of one of the tribes if the treaty were considered to create a technical reservation it would have allotted to each man, woman, and child in the tribe more than eighteen square miles." 311 U.S. at page 349, 61 S.Ct. at page 279.

Our conclusion that the Northern Pacific case decided only that the Fort Laramie treaty did not create a technical reservation is well supported by the careful discussion of the problem by the Supreme Court in the case of Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 65 S.Ct. 690, 89 L.Ed. 985, decided in 1945, less than five years after the decision in Northern Pacific. The question in the Northwestern Shoshone case was whether the Box Elder Treaty of July 30, 1863, 13 Stat. 663, had recognized the Shoshones' title. The Shoshones urged that the Box Elder Treaty was similar to the Treaty of Fort Laramie, and pointed to the Fort Berthold, Assiniboine, and Crow Nation cases in this court holding Fort Laramie to be a treaty of recognition.

The Supreme Court held, however, that the Box Elder Treaty did not recognize title. It distinguished the Treaty of Fort Laramie, stating, 324 U.S. at pages 349–350, 65 S.Ct. at page 697:

> "the circumstances surrounding the execution of the Fort Laramie treaty indicate a purpose to recognize the Indian title to the lands described in the Fort Laramie treaty which may well have induced the Court of Claims to reach one conclusion in those cases [Fort Berthold, Assiniboine and Crow Nation] and another in this. For example, the instructions to the commissioners for the Fort Laramie negotiations contained this direction:
>
> "It is important, if practicable, to establish for each tribe some fixed boundaries within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another tribe without its consent. * * * 71 Ct.Cl. 312. * * *
>
> " 'The laying off of the country into geographical, or rather national domains, I regard as a very important measure, inasmuch as it will take away a great cause of quarrel among themselves, and at the same time enable the Government to ascertain who are the depredators, should depredations hereafter be committed.' * * *
>
> "Furthermore, the words of the Fort Laramie treaty are more apt to express recognition of Indian title than those of Box Elder. Article 5 says:
>
> " 'The aforesaid Indian nations do hereby recognize and acknowledge

> the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz: * * *' 71 Ct.Cls. 315.
>
> In consideration of the treaty stipulations the United States bound itself to furnish supplies and to protect the Indian nations against depredations by its citizens. Such distinctions may quite justifiably have led the Court of Claims to different conclusions than it reached from consideration of the Northwestern Shoshone treaty."

Had the Northern Pacific case "overruled" or in any way brought into question the continuing validity of this court's decisions in Fort Berthold, Assiniboine and Crow Nation, the obvious thing for the Supreme Court in Northwestern Shoshone to have done would be to have pointed that out. It would have considerably strengthened the Court's consideration of the difference between the two treaties if the Court had noted that it had recently held that even the Treaty of Fort Laramie did not recognize title. The obvious answer to the Shoshones' contention that the Fort Laramie cases should govern the interpretation of Box Elder would have been that, since Northern Pacific, those cases were no longer good law.

The Supreme Court, far from citing Northern Pacific in that way, did not even mention the case, although it had been brought to the Court's attention both by the brief for the United States [4] and by the brief for the Shoshones.[5]

The Supreme Court in Northwestern Shoshone did, on the other hand, consider this court's decisions and opinions in Fort Berthold, Assiniboine and Crow Nation, and it gave express approval to the distinction which this court had drawn, in Northwestern Bands of Shoshone Indians v. United States, 95 Ct.Cl. 642, between the Fort Laramie and Box Elder Treaties.

We hold, therefore, that the evidence in this case, the prior decisions of this court, and the pronouncements of the Supreme Court of the United States support the conclusion that the Treaty of Fort Laramie recognized the title of the Crow Tribe in the lands which are here at issue.

Res Judicata

[4, 5] The Indians Claims Commission correctly decided that the issues involved in the case are not *res judicata* by reason of this court's decision in The Crow Nation v. United States, 81 Ct.Cl. 238.

The issues can only be *res judicata* if the same issues were or could have been litigated in the former suit. In this case, the Indians present their claim under clauses (3) and (5) of section 2 of the Indian Claims Commission Act, 25 U.S.C.A. § 70a, which provide that the Indian Claims Commission shall hear and determine

> "(3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * * * and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

In the Crow Nation case, the Indians sued under the special jurisdictional act of July 3, 1926, 44 Stat. 807, which conferred jurisdiction on this court to adjudicate claims "arising under or growing out of" the Treaty of Fort Laramie, including claims for inadequate consideration received "under mistake of fact." The Indians argued in that case that, due to that fact that the Fort Laramie Trea-

4. Brief for the United States in Northwestern Bands of Shoshone Indians v. United States, No. 63, October Term, 1944, at page 28.

5. Brief for Petitioners, idem, at pages 41–43.

ty had never been communicated to the Department of State, they erroneously believed that it was not in effect, and, under this mistake of fact, were induced to accept inadequate consideration for their lands. As to this claim, the court decided against the Indians. But this is not the claim involved in this case. In this case, under the Indian Claims Commission Act, mistake of fact is not a requisite for recovery.

As to the issues which *are* involved in this case, the court in the prior Crow case stated clearly that it did not have jurisdiction of such issues, and was not deciding them. The court said:

> "We can find nothing in the evidence to show that the Crow Indians were at any time misled as to the nature of their holdings under the treaty of 1851, but on the contrary, the evidence shows that they considered the reservation, so set apart in this treaty, as their lands and in all of their dealings with the Government, which resulted in the treaty of 1868, those speaking for the Crow Nation referred to it as their lands.
>
> "However, under the Jurisdictional Act, this court is confined to claims arising under and growing out of the 1851 treaty and the treaty of 1868; both of these treaties set out the consideration to be paid by the Government. Under the Constitution, all treaties made under the authority of the United States are the supreme law of the land, and the question of the amount of the consideration and what entered into the negotiations are not for this court to determine. Both are political and not judicial matters.
>
> * * * * * *
>
> "It has been held repeatedly that the court cannot go behind a treaty, and that a treaty remains the supreme law of the land and that no court, either a court of law or of equity, can declare a treaty to have been procured by duress and fraud and therefore inoperative. The rights of the parties must be considered and the legal and equitable rights determined under the terms of the treaty. We can find nothing in the evidence to justify the finding that any advantage was taken of the Indians so far as the consideration was concerned, or justify the conclusion that Congress intended by the jurisdictional act to submit to this court the question of its fair dealings with these Indians." 81 Ct.Cl. at pages 273–274.

The Indian Claims Commission was therefore correct in holding that the issues in this case are not *res judicata* by reason of the prior Crow case.

The Commission's Jurisdiction

The Government also claims that the Indian Claims Commission was without jurisdiction over the instant claims, by reason of the provision of section 4 of the prior jurisdictional act that

> "*with reference to all claims which may be the subject matter of the suits herein authorized,* the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Crow Indians in and to such money or other property." [Emphasis added.] 44 Stat. 808.

However, as we have pointed out above, the claims involved in this case were not included within the area which could be the subject matter of the suits therein authorized. Therefore, the Commission did not lack jurisdiction of these claims by reason of that act and the adjudication thereunder.

Valuation

[6, 7] The Crow Tribe appeals from that part of the decision of the Indian Claims Commission which determines the 1868 value of the lands ceded by the Tribe at that time to have been $12,212,-305 for the 30,530,764.8 acres ceded, an average of $.40 per acre. The Tribe claims that substantial evidence supports a higher valuation.

The Tribe does not, however, attack any of the Commission's primary findings of fact as being unsupported by substantial evidence. The substance of the Tribe's argument is that the Commission should have drawn a different conclusion from the facts which it found.

We have examined the evidence in this case, and find that it supports the Commission's findings of fact. We also think that the findings support the Commission's ultimate finding as to value. This ultimate finding may not be the only one which could properly have been made, nor the one which we would have made had we to make the determination ourselves, but our function on appeals from the Indian Claims Commission is limited to determining whether the Commission's ultimate findings are supported by its primary findings. See The Miami Tribe of Oklahoma v. United States, Ct.Cl., 1960, 175 F.Supp. 926. We also think that the Commission's conclusions of law are valid and supported by its findings. 25 U.S.C.A. § 70s.

Valuation of the Consideration Received by the Crow Tribe in 1868

[8, 9] The Crow Tribe points out that the Indian Claims Commission decided that the Tribe had received for its lands a sum of $1,644,585.49, which is the total of the amounts expended by the United States under the treaty. However, as we held in The Miami Tribe of Oklahoma v. United States, Ct.Cl., 1960, 281 F.2d 202, the consideration which the Indians receive, like the lands which they surrender, must be valued as of the date of the treaty. What the Crow Tribe received in 1868 was a promise to pay certain amounts in the future. Some of the payments were not made until as late as 1932. In order to determine the 1868 value of the payments which the Tribe received, an accountants' report, based upon figures obtained from the General Accounting Office, was introduced in evidence. That report revealed that the sum of money which, if put at 5% simple interest on May 7, 1868, the date of the treaty, would have amounted to $1,644,585.49 if disbursed in the amounts in which, and on the dates on which, it was actually expended, would be $1,111,768.07. This, therefore, is the treaty date value of the consideration which the Tribe received for its lands.

[10, 11] We recognize, of course, that interest against the United States cannot be recovered in the absence of express statutory or contractual provisions, except in the case of an award of just compensation under the Fifth Amendment. We do not in this case award one cent of interest to the Indians. The Government argues that because, in order to determine the 1868 value of the payments actually made, an interest figure enters into the calculations, interest is being awarded. This is not so. The Indians are not being paid for the use of their money. Interest on the amount representing the value of their lands for which the Indians were not paid in 1868 would indeed be a considerable figure. All we do here is determine the value of what the Indians received in 1868. The fact that a figure representing interest must be used to calculate the 1868 value represented by a later payment does not make this an award of interest.

As we decided in the Miami case of 1960, supra, the treaty date value of the Government's payment is decisive. The treaty date value of its payment in this case was $1,111,768.07. The Indian Claims Commission erred in allowing a larger figure.

The Crow Tribe was entitled to receive $12,212,305 for its lands. It received $1,111,768.07, so it is entitled to the difference, in the amount of $11,100,536.93. The parties stipulated that the Government was entitled to counterclaims and offsets totaling $857,552.23, so the amount of judgment should be $10,242,984.70. As thus modified, the decision of the Indian Claims Commission is affirmed, and the case is remanded to the Commission for the entry of an appropriate order.

It is so ordered.

DURFEE and LARAMORE, Judges, concur.

WHITAKER, Judge (dissenting).

The plaintiff tribe bases its right to recover on the primary proposition that prior to September 17, 1851, it had "occupied, possessed, and owned, and, for many years immediately prior thereto from time immemorial, had continuously held, occupied, possessed and owned" certain described land comprising 38,531,174 acres. It does not claim under any grant from the United States; for instance, because the lands were set apart to it as a reservation; its claim is based alone on aboriginal ownership, that is, exclusive use and occupancy from time immemorial. If this claim of exclusive use and occupancy from time immemorial is not sustained, then plaintiff's claim fails.

A mere claim to the lands along with other rival claimants is not sufficient to show aboriginal ownership, or "Indian title", as it is sometimes called; it must be exclusive use and occupancy. Alike an individual's claim of title to land by adverse possession, a claim of Indian title must be shown by possession adverse to all the world, to the exclusion of all the world. The Supreme Court in United States v. Santa Fe Pacific Railroad, 314 U.S. 339, at page 345, 62 S.Ct. 248, at page 251, 86 L.Ed. 260, said:

> "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied *exclusively* by the Walapais (*as distinguished from lands wandered over by many tribes*) then the Walapais had 'Indian title.'" [Italics mine.]

In order to prove that it had had exclusive use and occupancy of these lands from time immemorial the plaintiff tribe relies alone on the Treaty of Fort Laramie of September 17, 1851, and the Indian Claims Commission bases its decision alone on the terms of this treaty. I do not think the treaty shows plaintiff had exclusive use and occupancy from time immemorable.

The treaty is set out in the opinion of the majority. I call particular attention to Article 5 thereof. It reads in part:

> "The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz: * * *"

Then follows a rough description of the territories assigned to each tribe, and the article continues:

> "It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; *and further that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.*" [Italics mine.]

Several tribes were parties to this treaty, the Sioux, the Cheyennes, the Arrapahoes, the Crows, and perhaps another tribe or two. The treaty dealt with 163,000,000 acres of land. All the named tribes roamed over this vast domain at will. No one of them claimed any particular part of it, but each of them claimed the right to hunt and fish and otherwise use and enjoy the entire area. Warfare between the tribes was not infrequent because each of them claimed an equal rights in the lands. No one of them exercised *exclusive* use and occupancy over any part of them.

The Fort Laramie Treaty recognized that each tribe claimed rights in the entire 163,000,000 acres, because in Article 5, which set apart portions of the 163,000,000 acres to each tribe, it was nevertheless provided "the aforesaid Indian nations * * * *do not surrender* the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." [Italics mine.]

It seems to me impossible to maintain that plaintiff tribe has shown exclusive use and occupancy from time immemorial of the acreage for which they sue, in view of Article 5 of the Fort Laramie Treaty. If they have not, they have not made out the case stated in their petition. They have not shown that they were the owners of the property on account of which they sue.

Parties must prove the case stated in their petitions. That is the case the defendant is called on to defend. It is not called upon to defend against a claim the plaintiff might have made but which it did not assert in the petition. But if we suppose that plaintiff had asserted a claim growing out of the Fort Laramie Treaty, instead of one recognized by it—that it acquired rights under that treaty which it had not had before—what is the result?

This court has previously considered this question and has decided that the Fort Laramie Treaty did set apart reservations for the respective tribes. The first case was Fort Berthold Indians v. United States, 71 Ct.Cl. 308. In that case, we held that the treaty set aside reservations for the Indians who were parties to the Fort Laramie Treaty, and judgment was granted "upon the basis of the amount they [the Indian tribe] might have obtained for the large areas at the time they were taken." This was followed in Assiniboine Indian Tribe v. United States, 77 Ct.Cl. 347. In Crow Nation v. United States, 81 Ct.Cl. 238, in which the tribe was suing under a special jurisdictional act, the question was not raised, but the case was tried on the assumption that the Fort Laramie Treaty did create a reservation for plaintiff. The same is true in Blackfeet, et al., Nations v. United States, 81 Ct.Cl. 101, under a similar treaty.

None of these cases went to the Supreme Court. However, the question of what rights the Indians acquired under the Fort Laramie Treaty was considered and decided by the Supreme Court in United States v. Northern Pacific Ry. Co., 311 U.S. 317, 61 S.Ct. 264, 278, 85 L.Ed. 210. The question presented in that case was whether the grant of public lands to the railway by the act of July 2, 1864, embraced lands said to be reserved to the several Indian tribes by the Fort Laramie Treaty. The railway claimed that the lands were not Indian reservations, but public lands; but the Attorney General filed a bill in the District Court for the Eastern District of Washington, alleging in paragraph XXIX that the grant expressly excepted reserved lands and that the Fort Laramie Treaty had set aside these lands as a reservation for the Indians, and they were Indian reservations at the time of the grant to the railway in 1864.

The railway demurred to this part of the bill. The matter was referred to a special master, who held in an extensive opinion that the treaty did not create Indian reservations. He said the purpose of the treaty was to establish peace between the tribes and the United States and between the several tribes, and nothing more. The District Court affirmed, as did also the Supreme Court.

We quote from the Supreme Court's opinion at some length:

> "Paragraph XXIX of the bill alleges that by treaties of September 17, 1851, and October 17, 1855, the United States 'reserved' certain lands for Indian tribes. * * *
>
> "In accordance with the master's recommendation, the court below sustained the motion to dismiss paragraph XXIX on the ground that the lands in question were granted to the company by the Act of 1864 and the Resolution of 1870. We think the court was right.
>
> "By an Act of June 30, 1834, all lands lying west of the Mississippi River, not within the States of Missouri and Louisiana or the Territory of Arkansas, were designated as Indian country. The fee of all this territory was in the United States, subject to the Indian right of occupancy. The treaties of 1851 and 1855 did not alter the status of the lands described in them. The pur-

pose of those treaties was to establish peace and amity between warring Indian tribes *inter sese* and between the tribes and the United States. To this end the country or territory of each tribe was described and the tribes agreed to respect the boundaries named in the treaties. * * *

"Section 3 limits the land grant to lands as to which the United States 'have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, * * *.' The Government contends that this section excludes lands embraced within the treaty limits for the reason that the treaties 'reserve' all the lands described in them for the signatory Indian tribes. We think the contention is unsound.

"As we have noted, the treaties did not create technical reservations as have many other treaties and acts of Congress. They did not set aside a defined territory for the exclusive use of a tribe nor contain the usual provisions for an Indian Agent for schools, assistance in farming operations, etc. The country described in the Treaty of 1851 amounts to 163,000,000 acres and, that described in the Treaty of 1855 to 37,000,000 acres. In the case of one of the tribes, if the treaty were considered to create a technical reservation it would have allotted to each man, woman, and child in the tribe more than eighteen square miles.[1]"

The special master, the District Court, and the Supreme Court had before them the opinions of this court in the Fort Berthold and the Blackfeet cases, supra. Their opinions are in direct contradiction to what we said in the Fort Berthold case, and assumed in the Blackfeet case.

The case then comes down to this: The Fort Laramie Treaty did not recognize that the Crows had had from time immemorial exclusive use and occupancy of the area set apart to them under the Fort Laramie Treaty, and it did not create a reservation for the plaintiff tribe. However, I do think the Fort Laramie Treaty did give to each Indian tribe something it had not had before.

Before the Treaty, each of the tribes, the Sioux, the Cheyennes, the Arrapahoes, and the Crows were rival claimants to the entire 163,000,000 acres. By the Treaty this 163,000,000 acres were divided up and portions were set apart to each tribe. No tribe had the exclusive right to the use and enjoyment of the part set apart to it, but it did have sort of a prior right therein. But by no stretch of the imagination could it be asserted that it was intended by the treaty to give to each tribe title to the vast domain set apart to each. As pointed out by the Supreme Court in the Northern Pacific case, supra, in the case of one of the tribes this would have given to each man, woman and child more than 18 square miles, about one-fourth of the area of the city of Washington. The area set apart to plaintiff tribe is larger than the State of Ohio. It could not have been intended to vest in them title to such a vast domain. So far as I can see, all they received under the treaty was a better right to hunt and fish in the area set apart to them than the other tribes had.

For the deprivation of this right, it may be they are entitled to compensation, but that compensation is certainly much less than that payable for the taking of lands to which plaintiff tribe had title or the right to exclusive use and enjoyment. The Indian Claims Commission and the majority thought 40 cents an acre was fair compensation for the taking of title. The tribe was paid .054 an acre for what was taken. I think this was fair com-

1. It is of interest to note that 163,000,000 acres is an area larger than that of any state in the United States, except only Alaska and Texas. The amount of 8,000,000 acres set apart by the treaty of 1868 as a reservation for the Crow Indians is larger than the states of Massachusetts and Rhode Island combined, and the 30,000,000 acres is larger than the state of Ohio.

pensation for what the tribe had and what the defendant took.

So, even if we consider the case the tribe might have made, it still has not shown that the consideration paid was unconscionable. Hence, the Indian Claims Commission should have dismissed its petition.

For these reasons I dissent.

I am authorized to say that Chief Judge JONES joins in this dissent.

CENTRAL TECHNICAL INSTITUTE
v.
UNITED STATES.
No. 77-57.

United States Court of Claims.
Dec. 1, 1960.

Action by a school against United States for recovery of allowances allegedly due under the Veterans' Readjustment Assistance Act of 1952, wherein plaintiff and defendant filed motions for summary judgment. The Court of Claims, Jones, Chief Judge, held that prior holding of court that administrative allowance to educational institutions provided for under the Veterans' Readjustment Assistance Act of 1952 is not restricted to preparation and submission of the form entitled "Certification of Training" but covers other reports and certifications required under the Act as well was not limited to reports furnished relative to correspondence courses but also covered resident courses supplied to veterans.

Plaintiff's motion granted and defendant's motion denied.

Armed Services ⇨105

Prior holding of court that administrative allowance to educational institutions provided for under the Veterans' Readjustment Assistance Act of 1952 is not restricted to preparation and submission of the form entitled "Certification of Training" but covers other reports and certifications required under the Act as well was not limited to reports furnished relative to correspondence courses but also covered resident courses supplied to veterans. 38 U.S.C.A. § 1665(a, b); Rules of Court of Claims, rule 38(c), 28 U.S.C.A.

Thomas M. Gittings, Jr., Washington, D. C., for plaintiff; John W. Gaskins and King & King, Washington, D. C., on the brief.

David Orlikoff, Washington, D. C., with whom was Asst. Atty. Gen. George Cochran Doub, for defendant; Joseph B. Grigsby, Arlington, Va., on the brief.

JONES, Chief Judge.

The plaintiff operates a school in the State of Missouri which provides both correspondence and resident courses. It has obtained the necessary approval from the Veterans Administration for the education and training of Korean War veterans as provided for in the Veterans' Readjustment Assistance Act of 1952, 66 Stat. 663 et seq., 38 U.S.C. § 901 et seq.* It seeks to recover allowances alleged to be due under section 265(b) of this act, 66 Stat. 680,** relative to its training of Korean War veterans in its resident courses.

In order to aid in relieving the expenses that would be incurred by educational institutions in submitting reports and certifications to the Veterans Administration, section 265(b) provides the following:

> "The Administrator shall pay to each educational institution which is required to submit reports and certifications to the Administrator under this title, an allowance at the rate of $1.50 per month for each eligible veteran enrolled in and at-

* Now 38 U.S.C.A. § 1601 et seq.

** Now 38 U.S.C.A. § 1665.

1896.
Déchêne & Dussault.
Lacoste, J.C.

A quelque point de vue que l'on se place, je crois que cette cour devrait déclarer que la participation du défendeur au contrat illicite, par elle seule, ne le prive pas de ses droits de défense, et, appliquant ces règles à la cause actuelle, je suis d'opinion d'accorder l'appel avec dépens.

Jugement infirmé, Blanchet, J., *diss.*

T. E. Bédard, C.R., procureur des appelants.

F. X. Drouin, C.R., procureur de l'intimé.

(W.C.L.)

MONTREAL, 20 January, 1897.

Coram SIR ALEXANDRE LACOSTE, C.J., BOSSÉ, BLANCHET, HALL and WURTELE, JJ.

THE HONORABLE SIR OLIVER MOWAT, Attorney-General for the Dominion of Canada (plaintiff by continuance in the court below), appellant, & THE HONORABLE THOMAS CHASE CASGRAIN, Attorney-General for the Province of Quebec (intervenant by continuance in the court below), respondent, & NOEL PINSONNEAULT, defendant.

Constitutional law—Indian lands—Seigniory of Sault St. Louis.

HELD:—1. The distribution of powers contained in sections 91 and 92 of the British North America Act, 1867, not only divides the legislative powers between the Parliament of the Dominion and the Legislatures of the Provinces, but it also defines their respective administerial powers and functions whenever the subjects mentioned are capable of being administered by a government.

2. By paragraph 24 of section 91, the government of the Dominion is entrusted and charged with the care and supervision of the Indians and with the control and administration of the property appropriated for their use.

3. Section 109 of the British North America Act, 1867, assigns all lands vested in the Crown to the government of the province in which they are situated, but does so subject "to any trusts existing in re-"spect thereof and to any interest other than that of the province in "the same."

4. The Seigniory of Sault St. Louis was granted for the use and habitation of the Iroquois Indians and the soil is vested in the Crown, but subject to the enjoyment or usufruct of the Indians.

5. The naked ownership therefore belongs to the Province of Quebec within which the Seigniory is situated, but the control and administration of the Indians' usufruct is entrusted and appertains to the government of the Dominion.

6. The suit for the recovery of the arrears of rent due by the defendant was therefore properly brought by the Attorney-General of the Dominion.

The appeal was from a judgment of the Superior Court Montreal, Doherty, J., 30th June, 1896, and the formal judgment of the Court was as follows:—

"The Court having taken communication of the *facta* submitted by the parties, plaintiff and intervenant, respectively, upon the merits of the intervention of intervenant, and the contestation thereof by plaintiff, examined the proceedings and proof of record, and deliberated:

"Whereas plaintiff in his quality of Minister of Justice and Attorney-General of Her Majesty the Queen for the Dominion of Canada, now represented by the plaintiff *par reprise d'instance*, (his successor in the said office) by his action seeks to have certain lots of land situate in the Seigniory of Sault St. Louis, in the parish of St. Constant, in the County of Laprairie, and known as numbers 177, 180, 238, 150, and 245, of the plan and book of reference of said Seigniory, whereof he alleges defendant is in possession as proprietor, declared affected in favor of Her Majesty for the payment of a yearly rental of $8.80, payable by privilege, and defendant ordered to abandon the same unless he prefer to pay an annual rental of $8.80, for the past 30 years, amounting to $264, and pass a *titre-nouvel* at his own expense, in favor of Her Majesty, binding himself to pay said rental for the future, he further alleging that said Seigniory and the lands therein, appertain to and are held by Her Majesty the Queen, the Crown in trust, and to be administered for the tribe of Indians known as the Iroquois Indians, and such Indians as may join them upon the Caughnawauga Reserve, and that the Government of the Dominion of Canada acts for and represents and has full control for Her Majesty, of matters

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

relating to Indians, and lands reserved for Indians as proprietor and Seigneur of the said Seigniory of Sault St. Louis;

"That there is due on said lands a yearly seigniorial rent of $8.80, which has not been paid for a period exceeding thirty years; that the defendant holds said lands under titles, recognizing the rights of the Crown, as aforesaid, his *auteurs* having by two *titres-nouvels* of dates respectively the 30th July, and 8th August, 1828, in favour respectively of Alexis Ménard, and Joseph Pinsonneault, promised to pay to the Crown a certain yearly rental, now fixed under the schedule duly prepared and published by the Seigniorial Commissioners at the sum of $8.80 per annum, for the whole of said lots; that in said *titres-nouvels* and in other deeds, it was erroneously stated that the said lands formerly formed part of the estates belonging to the religious order of Jesuits, but said property never did so belong, but was originally ceded in favor of and for the use and benefit of the said Iroquois Indians, and since 1762 has been held and administered by the Crown, in trust for said Indians, and defendant has so admitted, and has up to 30 years ago, paid to Her Majesty the obligations under said titles, and subsequently the seigniorial rents provided by the Seigniorial Act of 1854;

"Whereas intervenant in his quality of Attorney-General of Her Majesty for the Province of Quebec, now represented by the intervenant *par reprise d'instance*, his successor in said office, intervenes, by his petition in intervention, as amended by leave of the Court, alleging that, as appears by the declaration and the *titres-nouvels* therein recited and therewith produced as exhibits, the defendant is indebted to Her Majesty in the sum of $264, under authentic deeds passed in 1828; that it appears also by said exhibits, that the lands for which said sum is claimed, as seigniorial rents, are situate in the Seigniory of Sault St. Louis, and heretofore formed part of the property of the order of Jesuits in this Province; that under the British North America Act, the Seigniorial rents of said

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

Seigniory belong to the Province of Quebec, and can only be claimed by intervenant; that assuming said Seigniory not to belong to the Province but to form part of the property of the Indians, the sum claimed cannot be so claimed by plaintiff, but by intervenant,—the Provincial Government, under the terms of the British North America Act, having alone the administration and control of the *cens et rentes* which may accrue in the said Seigniory, which Seigniory, even were it the property of the Indians, would nevertheless be held in trust by the said Province, and the Government of the Dominion has no control in the said property; that it is true that, under the British North America Act the Government of the Dominion has power to legislate concerning Indians and Indian reserves, but that it is not true that said Government has the administration of the properties reserved for Indians—and intervenant in consequence concludes that it be declared that the sum claimed is not the property or under the control of the Federal Government, but belongs to the Province of Quebec, subject to any trust attaching to said Seigniory, and that defendant be condemned to pay the same to him;

"Whereas plaintiff contests said intervention, reiterating the allegation of his declaration, that the lands in question formed no part of any property that ever belonged to the Jesuit order, and reciting in support of said assertion the original deeds of concession of the land in question, granted in 1680, by the king of France; a judgment of General Gage and his military council, of date 22nd March, 1760, and the fact that in said judgment, which declared the lands in question as forming part of a larger extent of land in said deeds referred to, and described to have been conceded to the Iroquois Indians, and not to the Rev. Fathers of the Society of Jesus, the latter acquiesced, and that in no list of their properties made by said Rev. Fathers, or by public authority, were said lands included; that by said judgment it was ordered that as regards any portion of said lands conceded

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

by the said Rev. Fathers of the Society of Jesus prior to said judgment, the *concessionnaires* should not be disturbed, provided they appeared before the proper authorities, and executed *titres-nouvels*, and that the revenues of the lands so conceded should be received by Her Majesty for the benefit of said Indians ; plaintiff further, by said answer alleges that under the provisions of the Act, 18 Victoria, chapter 3, the conceded portion of the lands granted under the original deeds above referred to, was included as coming under said Act, and styled the Seigniory of Sault St. Louis, and the balance of the territory remains as an Indian Reserve, known as the Caughnawauga Indian Reserve ; that of said conceded portion of said territory a schedule and Seigniorial cadastre was duly made and published, showing the amounts that would be due by the various *cessionnaires* under the terms of the Seigniorial Act, which cadastre and schedule was made and proclaimed, and came into force on the 17th December, 1860 ; that from 1762 to 1830 the management and administration of Indians and of Indian affairs, including the lands and rents thereof, were under the control of, and vested in, the Governor-General for Canada, or Lower Canada, for the time being, and thereafter the same was transferred to the Governments of the respective Provinces of Upper and Lower Canada until Confederation, since which time the Government of Canada has control of Indians and Indian affairs, and said rents have been by said Government collected ; that under the B. N. A. Act of 1867, all matters respecting Indians, and lands reserved for Indians come within the jurisdiction, control and legislation of the Government of Canada ; that the rents in question are rents and revenues on the property belonging to the Indians, reserved for them and to be administered by the Government of Canada for their behalf, and that intervenant and the Province of Quebec have no right or authority to claim or collect said rents, or anything to do with them, or any powers of administration in respect thereof ;

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

" Considering that the rents claimed by plaintiff's action, and to enforce payment whereof said action is brought, are so claimed under deeds executed by defendant's *auteurs* in favor of Her Majesty in 1828, and that for whosesoever benefit or subject to whatsoever trust Her Majesty in virtue of said deeds collected said rents prior to Confederation, the same continued and were at the time of Confederation moneys payable to the Government of the heretofore Province of Canada, for lands situate in the now Province of Quebec ;

" Seeing section 109 of the B. N. A. Act ;

" Considering that under said section of said Act all sums of money then (to wit : at the time of Confederation) due or payable to the then Province of Canada, for lands situate in the now Province of Quebec, belong to the Province of Quebec, subject to any trusts existing in respect thereof, and to any interest other than that of the Province therein ;

" Considering that, assuming the lands for which the rents now in question are owing, to have originally been conceded to the Iroquois Indians, as contended for by plaintiff, and said rents to have been at the time of and prior to Confederation, payable to the then Province of Canada in trust for and for the benefit of the said Iroquois Indians—the said rents were nevertheless subject to said section 109, as being money payable to said heretofore Province, and as such passed to and belong to the Province of Quebec, subject to such trust for, and to any interest therein of said Indians ;

" Considering that the dispositions of said B. N. A. Act (sec. 19, 324) vesting in the Parliament of Canada the exclusive legislative authority in all matters concerning Indians, and lands reserved for Indians, had not the effect of vesting in the Dominion of Canada, or the Government thereof, the ownership of any lands situate in the Province of Quebec, or the right to receive any moneys payable to the heretofore Province of Canada, for lands situate in the said Province of Quebec—even though said

1897.
—
Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

moneys may have been payable to said heretofore Province in trust for or for the benefit of Indians ;

" Considering that the existence of any such trust would merely have the effect of subjecting the Province of Quebec, to whom the money, subject thereto, became payable under the section (109) above mentioned, to the obligation of fulfilling said trust, and paying over or accounting for said moneys, to the beneficiaries thereunder or to their lawful representative,—but that the same would not affect the right of said Province of Quebec to collect the same, nor confer upon the Government of Canada any right to collect the same from the debtors thereof ;

" Considering that the intervention of the intervenant is well founded :

" Doth maintain the said intervention and doth declare that any sum that may be due by defendant for the reasons set forth in plaintiff's demand, is not the property nor under the control of the Government of the Dominion, but belongs to the Province of Quebec, subject to any trust that may attach to the said *Seigneurie* of Sault St. Louis, and doth reserve to pronounce upon the demand of intervenant for a condemnation against defendant, until the latter shall have pleaded to or been duly foreclosed from pleading to said demand."

WURTELE, J. :—

The defendant in this cause, Noel Pinsonneault, is the owner of certain lands situated in the Seigniory of Sault St. Louis, which are subject, under the cadastre made by the Seigniorial Commissioner, to the payment of constituted rents representing the *cens et rentes* with which they were formerly charged. The Seigniory of Sault St. Louis is in possession of the Tribe of Iroquois Indians, and their village is built on a part of the unconceded portion.

A suit has been instituted by the Attorney-General of the Dominion, against Noel Pinsonneault, for thirty years'

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

Wurtele, J.

arrears of the constituted rents with which his lands are charged; he alleges that the Seigniory is held by the Crown in trust for the Iroquois Indians and that the Government of the Dominion, which has the administration and control of all matters relating to Indians and of all lands reserved for them, has the right to sue for and collect the arrears of the rents in question. The Attorney-General for the Province of Quebec, has intervened in the cause and alleges that under the provisions of the Union Act of 1867, the Seigniory of Sault St. Louis is vested in the Crown, represented, not by the Government of the Dominion, but by that of the Province of Quebec, and that the latter alone has the right to sue for and recover the arrears of the rents in question, subject, however, to the trust in favor of the Iroquois Indians, and he therefore prays that it should be declared that the arrears in question neither belong to nor are under the control of the Federal Government, but that they belong to and are under the control of the Province of Quebec, subject to the trust in favor of the Indians, and that the defendant should be condemned to pay such arrears to the Provincial Government. The defendant thereon declared that he was ready to abide by the judgment of the Court, and reserved the right to produce a plea of payment and compensation after the decision of the question raised by the intervention.

The Superior Court has maintained the pretensions of the Provincial Government, and the Government of the Dominion now appeals from this decision.

The Iroquois Indians, before 1680, were in the spiritual charge of the Jesuit Fathers and had been settled on lands situated in the Seigniory of Laprairie. As these lands were swampy and undesirable, the Indians were dissatisfied with them and threatened to leave the locality. In order to retain them within the sphere of civilization, and to keep them under the spiritual charge of the Jesuit Fathers, Louis XIV, by letters patent of the 29th May, 1680, granted to the Jesuit Fathers a tract of

1897.

Mowat. Atty.-Gen. & Casgrain, Atty.-Gen. — Wurtele, J.

land containing two leagues in front on the River St. Lawrence, adjoining the Seigniory of Laprairie, for the habitation and use of the Iroquois Indians, but with the condition that the land contained in such grant would revert to the Crown if the Indians should ever abandon it. Later on, another tract of land containing one league and a half in front, lying between the first grant and the Seigniory of Chateauguay, was granted to the Jesuit Fathers by Louis de Buade, then the Governor of Canada, by letters patent of the 31st October, 1680, for the same purpose and on the same condition as the first grant. The Indians established their village on the land contained in the second grant and afterwards the Jesuit Fathers conceded, under the Seignioral Tenure, a part of the first grant to persons other than Indians.

The year after the Capitulation of Montreal, the Iroquois Indians laid a complaint against the Jesuit Fathers before the Governor of Montreal, alleging that the two grants of land had been made for their habitation and use, and complaining that the Jesuit Fathers pretended that they were the owners of the land and that they were conceding portions of it to their detriment. The case was heard by the Governor, Thomas Gage, assisted by his Military Council, and on the 22nd March, 1762, a decree was rendered depriving the Jesuit Fathers of all right in the land contained in such grants, known as the Seigniory of Sault St. Louis, and ordering that the Indians should be put and maintained in the peaceful enjoyment of the same, and of all the revenues produced thereby, but confirming however the concessions which had been made by the Jesuit Fathers up to the 8th day of September, 1760, date of the Capitulation of Montreal, and requiring the occupants to take new titles. It was further ordered that an agent should be appointed by the Governor for the collection of the rents of the conceded portion, and that he should account for his receipts annually to the Indians. By two ordinances, passed the one on

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

Wurtele, J.

the 20th September, 1764, and the other on the 12th November, 1764, a certain delay was given for the purpose of appealing from decrees or judgments which had been rendered prior to the 10th day of August, 1764, on which day, civil government was established in the Province; but no appeal was ever brought against the decree rendered on the 22nd March, 1762, by the Governor of Montreal and his Council on the complaint made by the Iroquois Indians against the Jesuit Fathers.

Since the date of that decree the Iroquois Indians have always been in possession of the Seigniory; and the Seigniorial cadastre which came into force on the 1st December, 1860, declares that it was then possessed by them.

For a considerable time after the Cession of Canada to the Crown of England, all Indian matters were managed and all Indian lands were administered by the Imperial Government, through officers appointed by it. During this period, the owners of the lands now in the possession of the defendant executed renewal deeds, one on the 30th July, 1828, and the other on the 3rd August, 1828, acknowledging that they were charged with Seigniorial rents payable to His Majesty the King of England, as the Seignior of the Seigniory of Sault St. Louis. The Iroquois Indians only had the usufruct and enjoyment of the Seigniory, and the land and Seigniorial dues were consequently vested in the King, subject to such usufruct and enjoyment; and the King as the guardian of the Indians had the administration of their property. Then the control and administration of these matters were transferred to the Provincial Government, but while the Provincial Government had the management of Indian affairs, the title of lands appropriated for the Indians and of Seigniorial rents accruing therefrom remained vested in the Sovereign. Immediately prior to Confederation, all lands and property in Lower Canada appropriated for the use of any tribe or body of Indians were, under Sec. 7 of Ch. 14 of the Consolidated Statutes for Lower Canada, being

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

Wurtele, J.

an Act respecting Indians and Indian lands, vested in trust for such tribes and bodies of Indians in a Commissioner of Indian lands for Lower Canada, who was appointed from time to time by the Governor; and this Commissioner was authorized to recover and receive the rents, issues and profits of all such lands and property.

By the Union Act, or the British North America Act, 1867, a division is made of the powers and functions of governance and administration between the Government of the Dominion, on the one hand, and the Governments of the Provinces, on the other hand, and also of the respective legislative powers of the Parliament of the Dominion, and of the Legislatures of the Provinces. The distribution of legislative powers is made by sections 91 and 92; but the powers of Provincial Legislatures are restricted to the subjects mentioned in sec. 92, while in addition to the subjects mentioned in sec. 91, the Parliament of Canada has the power to legislate on all matters not contained in the classes of subjects attributed to the Provincial Legislatures. Among the matters attributed to the Parliament of the Dominion, paragraph 24 mentions "Indians and lands reserved for the Indians."

It has been contended that the enumeration contained in these clauses merely confers on Parliament and on the Legislatures the power to legislate on the subjects which are mentioned, but that it does not confer on the Dominion and on the Provinces respectively any administerial powers and functions, and that, in short, the power to legislate is one thing while the power to administer is another, and that the power to legislate on a subject does not necessarily infer a right of administration respecting such subject.

Until quite recently, the Court of last resort had not given any pronouncement on this question. The case of the Ste-Catherine's Milling and Lumber Co. and the Queen has been referred to, but nothing decisive on this point is to be found in the report of the case.

In the case, however, of the Attorney-General for the

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

Wurtele, J.

Dominion of Canada and the Attorney-General for the Province of Ontario, in which Lord Watson delivered the judgment of their Lordships on the 9th December last, we find an *obiter dictum* which decides that the enumeration of subjects contained in the two sections of the Union Act which I have mentioned, not only confers legislative power, but also defines the administerial powers and functions of the various Governments. Here is what Lord Watson said: "Even at the present time, and in "view of the change of circumstances introduced by the "Act of 1867, their Lordships thought it must still be a "matter of absolute indifference to the Indians whether "they had to look for payment to the Dominion, *to which* "*the administration and control of their affairs was entrusted* "*by sec.* 91, *par.* 24, *of the Act of* 1867, or to the Province of "Ontario."

So in the opinion of their Lordships the distribution of powers contained in sections 91 and 92 of the Union Act applies to the administerial powers and functions of the different Governments as well as to the legislative authority of the Parliament of Canada and of the Provincial legislatures. It would seem to us that wherever the subjects mentioned in these sections are not only susceptible of legislative powers but also are such as to be capable of being administered by a Government, that the rule thus laid down should apply. Let us take for instance some of the subjects attributed to the Provincial Legislatures. The power to legislate on direct taxation involves the executive and administerial power of collecting and recovering the taxes imposed by Provincial legislation; the power of legislating on the borrowing of money involves the executive and administerial right of the Provincial Government to receive and expend monies of which the borrowing is authorized by the Legislature; the right to legislate on the management and sale of public lands infers the executive or administerial right to manage and dispose of such lands; the right to legislate on the establishment, maintenance and management of prisons,

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen. — Wurtele, J.

hospitals and asylums involves the executive or administerial power to establish, maintain and manage such institutions; the right to legislate on the administration of justice throws on the Provincial Governments the obligation of administering justice in their respective Provinces. And so with respect to the Dominion: the right to legislate on the postal service involves the maintenance and administration of such service; the power to legislate on the census involves the obligation of making it; the right to legislate on the militia and the military and naval services confers on the Government of the Dominion the administration of the militia and of such services; the right to legislate on beacons, buoys and lighthouses and also on quarantine and on marine hospitals puts on the Dominion Government the obligation of establishing and maintaining them. And, in like manner, the power and right of legislating respecting Indians and land reserved for the Indians entrusts the Government of the Dominion with the administration and control of the affairs and of the lands and property of the Indians.

After Confederation, the Parliament of the Dominion repealed Ch. 14 of the Consolidated Statutes for Lower Canada, respecting Indians and Indian lands, and enacted that there should be a department of Indian affairs which should have the management, charge and direction of Indian affairs, and that the Minister of the Interior, or the head of any other department appointed for that purpose by the Governor in Council, should be the Superintendent of Indian affairs and should, as such, have the control and management of the lands and property of the Indians in Canada. These provisions were afterwards consolidated in "The Indian Act" and are contained in sections 4, 5 and 6 of Ch. 43 of the Revised Statutes of Canada. As a matter of fact, I may say that from the formation of the Union on the 1st July, 1867, the control, direction and management of all matters relating to Indians and of their lands and property were assumed and have ever since been exercised by the Government of the Dominion.

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

Wurtele, J.

But it is contended that, inasmuch as at the time of Confederation, all lands or property appropriated for the use of Indians in Canada were vested in the Crown although in trust for their benefit and use, they fell and belonged under the provisions of section 109 of the Union Act, to the Province in which they were situated, subject however to the trust or interest of the Indians existing in respect of the same. The Attorney-General for the Province of Quebec maintains therefore that the constituted rents of which the arrears are claimed by the suit in this cause, and which represent the lands upon which they are charged, belong to the Province of Quebec, subject however to any trust or interest existing in respect thereof, and that it is the Crown represented by the Government of the Province of Quebec, and not the Crown represented by the Government of the Dominion, which has the right to sue for and recover the arrears claimed in this cause.

The special condition contained in the grants from the Crown of France of the two tracts of land forming the Seigniory of Sault St. Louis, which provides that such land would revert to the Crown should the Iroquois Indians ever abandon their settlement, does not affect the present enjoyment or usufruct of the Seigniory by them, and it must be borne in mind that we are now dealing with such enjoyment or usufruct, and not with the ownership of the Seigniory.

While section 109 assigns all lands to the Government of the several provinces in which they are situated, it, however, does so "subject to any trusts existing in respect "thereof and to any interest other than that of the Pro- "vince in the same."

Under this section, it would seem that the contention of the Attorney-General for the Province of Quebec is well founded in so far as the naked right of ownership is concerned, and that the naked property of the constituted rents in question is vested in the Crown represented by the Province of Quebec. The Province of Quebec, how-

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

Wurtele, J.

ever, holds these constituted rents subject to the usufruct or enjoyment of the Iroquois Indians, such usufruct or enjoyment being in the words of the proviso contained in section 109 "an interest other than that of the Province in the same."

On the one hand, the Province of Quebec holds the naked ownership of the constituted rents and on the other hand, the Indians have a right to the enjoyment or usufruct thereof so long as they remain in their settlement on the Seigniory of Sault St. Louis.

The question to be decided does not relate to the ownership of these constituted Seigniorial rents but is as to whom it appertains to sue for, recover, and collect the arrears? By the Union Act, the Government of the Dominion is entrusted with the administration of the affairs and property of the Indians in Canada, and under the Indian Act the control and management of their lands and property is confided to the department of Indian affairs, under the charge and direction of the Superintendent General of Indian affairs, who is authorized, as was the Commissioner of Indian lands before Confederation, to collect and receive the rents, issues and profits of the lands and property appropriated for Indians and to apply the same to their use. The Government to which such control and management is entrusted must necessarily have as a corollary the right to sue whenever the affairs of the trust require such action.

We are therefore of opinion that while the naked ownership of the rents in question is vested in the Province of Quebec, the right to collect the arrears and to apply the same to the use of the Iroquois Indians belongs to the Government of the Dominion. Unless special provision is made with respect to the person who should sue in the name of Her Majesty, this is always done by the Attorney-General. We are of opinion therefore that the suit for the recovery of the arrears was properly brought by the Attorney-General of the Dominion and that the intervention of the Attorney-General of the Pro-

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

Wurtele, J.

vince of Quebec is unfounded, and that there is error in the judgment appealed from which maintains the intervention.

We therefore maintain the appeal with costs; we set aside and annul the judgment appealed from and rendered by the Superior Court on the 30th June, 1896, and proceeding to pronounce the judgment which should have been rendered, we dismiss the intervention, with costs.

The text of the formal judgment of the Court of Appeal is as follows:—

"Whereas the Attorney-General for the Dominion of Canada, on behalf of Her Majesty the Queen, has instituted an action in the Superior Court against Noel Pinsonneault, for the recovery of arrears of the constituted rents representing the *cens et rentes* with which certain lands belonging to him and situated in the Seigniory of Sault St. Louis, which is composed of land appropriated for the use and habitation of the Iroquois Indians, were charged;

"Whereas the Attorney-General for the Province of Quebec has intervened in the suit, and alleges that the Seigniory of Sault St. Louis is not vested in the Crown represented by the Government of the Dominion, but in the Crown represented by the Government of the Province of Quebec, subject nevertheless to the enjoyment or usufruct thereof by the Iroquois Indians, and prays that it be declared that the arrears in question belong to and are under the control of the Government of the Province of Quebec, subject to the trust in favor of the Iroquois Indians, and that the defendant be condemned to pay such arrears to the Provincial Government;

"Whereas the defendant Noel Pinsonneault has declared that he would abide by the judgment of the Court and has reserved the right to plead after the decision of the question raised by the intervention;

"Whereas the Superior Court, sitting at Montreal, in the district of Montreal, by its judgment rendered on

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

the 30th day of June, 1896, maintained the intervention, and declared that the constituted Seigniorial rents in question, and any sum of money due by reason thereof, belonged to the Province of Quebec, subject to any trust existing thereon, and the Attorney-General for the Dominion of Canada, on behalf of the Government thereof, has appealed from such judgment;

"Considering that the land forming the Seigniory of Sault St. Louis was appropriated by the grants thereof, bearing date the 29th day of May, 1680, and the 31st day of October, 1680, for the use and habitation of the Iroquois Indians, and that their right to the possession and enjoyment thereof was recognized by a decree of His Excellency General Thomas Gage, the Governor of Montreal, assisted by his Military Council, rendered on the 20th day of September, 1764, which decree ordered that they should be put and maintained in the peaceful possession of such Seigniory, and that they have ever since been in the possession and enjoyment thereof, subject to the guardianship and control and management of the Crown;

"Considering that prior to the establishment of the Dominion of Canada, the legal title of all land and immovable property appropriated for the use and benefit of Indians and situated in Lower Canada, now constituting the Province of Quebec, was in the King or Queen as the Suzerain of the country, but that the right of enjoyment of such land and immovable property was, under the authority of section 7 of Chapter 14 of the Consolidated Statutes for Lower Canada, being an Act respecting Indians and Indian lands, vested in trust for the Indians having an interest therein in a Commissioner of Indian lands, who had the control and management of all such lands and property and was authorized to recover and receive the rents, issues and profits thereof;

"Considering that the soil of the Seigniory of Sault St. Louis was vested by right of the Crown in the Queen, but that the usufruct of the Seigniory and the Iroquois Indians fell under the purview of the above mentioned statute;

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

" Considering that the 24th paragraph of section 91 of the British North America Act, 1867, confers on the Parliament of Canada the right to legislate on the subject of Indians and of lands reserved for the Indians, and also confers on the Government of the Dominion the control and administration of their affairs and of the lands appropriated for them, but that the legal title of such lands remained and remains in the Crown;

" Considering that the Parliament of Canada repealed the above mentioned Act respecting Indians and Indian lands, and enacted that there should be a department of Indian affairs which should have the management, charge and direction of Indian affairs, and that the Minister of the Interior, or the head of any other department appointed for that purpose by the Governor-in-Council, should be the Superintendent of Indian affairs and should, as such, have the control and management of the lands and property of the Indians in Canada, which provisions were afterwards consolidated in "The Indian Act," and are contained in sections 4, 5 and 6 of chapter 43 of the Consolidated Statutes of Canada;

" Considering that section 109 of the British North America Act, 1867, enacts that all lands belonging to the several Provinces included in the Dominion, and all sums due for such lands, should belong to the Province in which such lands were situate, subject however to any trusts existing in respect thereof, and to any interest other than that of the Province in the same, and that this rule is not affected by the fact that the legal title to such lands and sums may reside in the Sovereign;

" Considering that under the above recited provisions, the ownership of the constituted Seigniorial rents in question in this cause is vested in the Province of Quebec, but subject nevertheless to the enjoyment or usufruct thereof by the Iroquois Indians, such enjoyment, or usufruct, being an interest therein other than that of the Province;

" Considering that under the above mentioned pro-

1897.

Mowat, Atty.-Gen. & Casgrain, Atty.-Gen.

visions the management of such enjoyment or usufruct of the Iroquois Indians in the constituted Seigniorial rents in question is conferred upon the department of Indian affairs, under the control and direction of the Superintendent of Indian affairs, and that the suit for the recovery of the arrears claimed has consequently been properly brought by the Attorney-General for the Dominion of Canada, on behalf of Her Majesty for the Government of the Dominion;

"Considering that the suit in this cause relates to the enjoyment, or usufruct, of the constituted Seignioral rents in question, or to the accrued arrears, and not to the ownership of the capital thereof, and that there is error in the judgment appealed from which maintains the intervention and declares that such arrears are not under the control of the Government of the Dominion, but belong to the Province of Quebec, subject to any trust which may attach to the Seigniory;

"Doth maintain the appeal, with costs; doth set aside and annul the judgment appealed from, to wit; the judgment rendered in the cause by the Superior Court, sitting at Montreal, in the district of Montreal, on the 30th day of June, 1896; and proceeding to pronounce the judgment which should have been rendered, doth dismiss the intervention of the Attorney-General for the Province of Quebec, with costs."

Judgment reversed.

J. S. Hall, Q.C., and *S. Cross, Q.C.*, for appellant.

Bisaillon, Brosseau & Lajoie, for respondent.

G. Lamothe, Q.C., for defendant.

(J. K.)

For the reasons detailed above, we do not think that Champlin is covered by the act and we would reverse the decree of the District Court.

UNITED STATES *v.* ALCEA BAND OF TILLAMOOKS ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 26. Argued January 31, February 1, 1946.—Reargued October 25, 1946.—Decided November 25, 1946.

Under the Act of August 26, 1935, 49 Stat. 801, conferring jurisdiction on the Court of Claims to adjudicate and render final judgment on "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands" previously occupied by certain Indian tribes and bands in Oregon, *held*, that tribes which successfully identify themselves as entitled to sue under the Act, prove their original Indian title to designated lands, and demonstrate that their interest in such lands was taken without their consent and without compensation, are entitled to recover compensation therefor without showing that the original Indian title ever was formally recognized by the United States. Pp. 45–54.

103 Ct. Cl. 494, 59 F. Supp. 934, affirmed.

Certain Indian tribes sued the United States in the Court of Claims under the Act of August 26, 1935, 49 Stat. 801, and recovered judgment for the taking without their consent of their interest under original Indian title in certain lands previously occupied by them. 103 Ct. Cl. 494, 59 F. Supp. 934. This Court granted certiorari. 326 U.S. 707. *Affirmed*, p. 54.

Walter J. Cummings, Jr. argued the cause for the United States. With him on the briefs were *Solicitor General McGrath, Assistant Attorney General Bazelon* and *Roger P. Marquis*. *J. Edward Williams* and *John C. Harrington* were also on the brief on the original argument.

Everett Sanders argued the cause for respondents. With him on the brief were *L. A. Gravelle, Douglas Whitlock* and *Edward F. Howrey.*

Ernest L. Wilkinson and *John W. Cragun* filed a brief, as *amici curiae,* and *James E. Curry* and *C. M. Wright* filed a brief for the National Congress of American Indians, as *amicus curiae,* urging affirmance.

MR. CHIEF JUSTICE VINSON announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY joined.

Eleven Indian tribes have sued the United States in the Court of Claims under the Act of August 26, 1935,[1] which gives that court jurisdiction to hear and adjudicate cases involving "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in . . . the lands . . . occupied by the Indian tribes and bands described in" certain unratified

[1] 49 Stat. 801. The pertinent section in full provides: "That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment . . . (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory."

treaties negotiated with Indian tribes in the Territory of Oregon.

Four of the tribes,[2] the Tillamooks, Coquilles, Too-too-to-neys and Chetcos, successfully identified themselves as entitled to sue under the Act, proved their original Indian title[3] to designated lands, and demonstrated an involuntary and uncompensated taking of such lands. The Court of Claims thereupon held that original Indian title was an interest the taking of which without the consent of the Indian tribes entitled them to compensation. In answer to government contentions that original Indian title, in the absence of some form of official "recognition," could be appropriated without liability upon the part of the sovereign, the Act of 1848,[4] establishing the Territory of Oregon, was cited by the Court of Claims as affording any recognition required to support the claim for compensation. The issues decided, not previously passed upon by this Court and being of importance to the administration of Indian affairs, prompted this Court to grant certiorari. The case was argued during the 1945 term and on April 1, 1946, was restored to the docket for reargument before a full bench.

---

[2] The remaining seven plaintiff tribes failed to state a cause of action under the jurisdictional act and the rules of the Court of Claims.

[3] "Original Indian title" is used to designate the Indian right of occupancy based upon aboriginal possession.

[4] 9 Stat. 323. The Act created a territorial government and declared: "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed . . ."

The events giving rise to the claims here occurred as part of the opening and development of the Territory of Oregon. After creating a government for that territory by the Act of 1848,[5] Congress in 1850 authorized the negotiation of treaties with Indian tribes in the area. Under the latter Act,[6] Anson Dart, later succeeded by General Joel Palmer, was appointed Superintendent of Indian Affairs for the Oregon region and was instructed to negotiate treaties for the extinguishment of Indian claims to lands in that district. On August 11, 1855, Palmer and respondent tribes concluded a treaty providing for the cession of Indian lands in return for certain money payments and the creation of a reservation. The treaty was to be operative only upon ratification. It was not submitted to the Senate until February, 1857, and was never ratified.

Pending expected ratification, and following recommendations from Palmer, the President on November 9, 1855, created a reservation, subject to future diminution and almost identical with that provided for in the treaty. A large part of this reservation, called the Coast or Siletz Reservation, consisted of lands to which the Tillamook Tribe held original Indian title. Almost immediately the Tillamooks were confined to that portion of their land within the reservation, and the other three respondent tribes, as well as other tribes, were moved from their original possessions to the reservation. In 1865 an Executive Order reduced the size of the reservation; in 1875 Congress by statute approved the Executive Orders of 1855 and 1865, and in order to open more land for public settlement, removed additional land from the reservation. By an Act of 1894,[7] Congress officially accepted and approved the res-

[5] 9 Stat. 323.
[6] 9 Stat. 437.
[7] 28 Stat. 286, 323.

727731 O—47——9

ervation as it then existed, and thenceforward did not take reservation lands without compensation.

The claims of respondent tribes are for the wrongful taking which occurred when they were deprived of their original possessions by the Executive Order of November 9, 1855. Even as to the Tillamooks, the Court of Claims found the taking complete as of November 9, 1855, since this tribe was forced to share its former lands with other Indians, and since the reservation was, in any event, only a conditional one, subject to being opened for public settlement at the will of the President. Petitioner disputes neither this finding nor the proof of original Indian title as of 1855.

Other than the benefits flowing from the Act of 1894,[8] none of the four respondent tribes has received any compensation for the loss of its lands. Until the present jurisdictional act of 1935, these tribes, lacking consent of the United States to be sued, were forbidden access to the courts. They alone of the tribes with whom Dart and Palmer negotiated some twenty-odd treaties between 1850 and 1855 have yet to receive recognition for the loss of lands held by original Indian title.[9]

Until now this Court has had no opportunity or occasion to pass upon the precise issue presented here. In only one Act prior to 1935 has Congress authorized judicial determination of the right to recover for a taking of nothing more than original Indian title; and no case under that

---

[8] 28 Stat. 286, 323.

[9] In 1851 Dart and Palmer negotiated treaties with nineteen tribes other than respondents. None of these treaties was ratified; but twelve of the nineteen tribes were included in further treaties made in 1853, 1854, and 1855, and Congress in 1897 and 1912 provided for paying the remaining seven tribes for their lands taken under the unratified treaties.

Act,[10] passed in 1929, reached this Court.[11] In 1930 [12] Congress again authorized adjudication of Indian claims arising out of original Indian title, but expressly directed an award of damages if a taking of lands held by immemorial possession were shown. This Act thus eliminated any judicial determination of a right to recover, once original Indian title was established.

Prior to 1929, adjudications of Indian claims against the United States were limited to issues arising out of treaties, statutes, or other events and transactions carefully designated by Congress. This Court has always strictly construed such jurisdictional acts and has not offered judicial opinion on the justness of the handling of Indian lands, except in so far as Congress in specific language has permitted its justiciable recognition.

The language of the 1935 Act is specific, and its consequences are clear. By this Act Congress neither admitted nor denied liability. The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one. The cases are to be heard on their merits and decided according to legal principles pertinent to the issues which might be presented under the Act.[13] Accordingly the 1935 statute permits judicial determina-

---

[10] 45 Stat. 1256, as amended in respects immaterial here, 47 Stat. 307.

[11] *Coos Bay Indian Tribe* v. *United States*, 87 Ct. Cl. 143 (1938), discussed *infra* p. 50, arose under the 1929 Act.

[12] 46 Stat. 531, amending 44 Stat. 1263. *Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347 (1933) was litigated under this jurisdictional act.

[13] *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500 (1913); *The Sac and Fox Indians*, 220 U. S. 481, 489 (1911).

tion of the legal and equitable claims growing out of original Indian title. That which was within the power of Congress to withhold from judicial scrutiny has now been submitted to the courts. If, as has many times been said,[14] the manner of extinguishing Indian title is usually a political question and presents a non-justiciable issue, Congress has expressly and effectively directed otherwise by seeking in the 1935 Act judicial disposition of claims arising from original Indian title. "By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide, as between man and man . . ." *United States* v. *Arredondo*, 6 Pet. 691, 711 (1832).

It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign.[15] This title was deemed subject to a right of occupancy in favor of Indian tribes, because of their original and previous possession. It is with the content of this right of occupancy, this original Indian title, that we are concerned here.

As against any but the sovereign, original Indian title was accorded the protection of complete ownership; [16] but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy.[17] Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. However, it is now for the first time asked

[14] *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347 (1941), and cases note 27 *infra*.

[15] *Johnson* v. *McIntosh*, 8 Wheat. 543, 573–74 (1823).

[16] *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 (1941).

[17] *Beecher* v. *Wetherby*, 95 U. S. 517 (1877).

whether the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title.

We cannot but affirm the decision of the Court of Claims. Admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid. In speaking of the original claims of the Indians to their lands, Marshall had this to say: "It is difficult to comprehend the proposition . . . that the discovery . . . should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors. . . . It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. . . . The king purchased their lands, . . . but never coerced a surrender of them." *Worcester* v. *Georgia*, 6 Pet. 515, 543, 544, 547 (1832). In our opinion, taking original Indian title without compensation and without consent does not satisfy the "high standards for fair dealing" required of the United States in controlling Indian affairs. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 356 (1941). The Indians have more than a merely moral claim for compensation.[18]

A contrary decision would ignore the plain import of traditional methods of extinguishing original Indian title. The early acquisition of Indian lands, in the main, progressed by a process of negotiation and treaty. The first treaties reveal the striking deference paid to Indian claims,

[18] The "moral" obligation upon Congress, of which the cases speak, refers more to the obligation to open the courts to suit by the Indians. It does not mean that there is no substantive right in the Indians. So in *United States* v. *Blackfeather*, 155 U. S. 180, 194 (1894) it was held that, "While there may be a moral obligation on the part of the government to reimburse the money embezzled by the Indian superintendent . . .," the jurisdictional act in point did not extend to such a claim. Yet, given consent to suit, it would hardly be said that there was no substantive right against the United States for embezzlement of Indian funds.

as the analysis in *Worcester* v. *Georgia, supra,* clearly details. It was usual policy not to coerce the surrender of lands without consent and without compensation.[19] The great drive to open Western lands in the 19th Century, however productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title.[20] In 1896, this Court noted that ". . . nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government." *Marks* v. *United States,* 161 U. S. 297, 302 (1896). Something more than sovereign grace prompted the obvious regard given to original Indian title.

Long before the end of the treaty system of Indian government and the advent of legislative control in 1871,[21] Congress had evinced its own attitude toward Indian relations. The Ordinance of 1787 declared, "the utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent . . ." 1 Stat. 50, 52. When in 1848 the territorial government of Oregon was created, § 14 of that Act[22] secured to the inhabitants of the new territory all the rights and privileges guaranteed by the Ordinance of 1787. Nor did congressional regard for Indian lands change in 1871. In providing for the settlement of Dakota Territory, Congress in 1872 directed the extinguishment of the interests of Indians in certain lands and the determina-

[19] "The practical admission of the European conquerors of this country renders it unnecessary for us to speculate on the extent of that right which they might have asserted from conquest . . . The conquerors have never claimed more than the exclusive right of purchase from the Indians . . ." 1 Op. A. G. 465, 466 (1821) (William Wirt).

[20] See the analysis in Cohen, Handbook of Federal Indian Law (1945) 51–66.

[21] 16 Stat. 544.

[22] 9 Stat. 323, 329, § 14.

tion of what "compensation ought, in justice and equity, to be made to said bands . . . for the extinguishment of whatever title they may have to said lands." 17 Stat. 281; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 59 (1886). The latest indicia of congressional regard for Indian claims is the Indian Claims Commission Act, 60 Stat. 1049, 1050, § 2 (5), in which not only are claims similar to those of the case at bar to be heard, but "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity" may be submitted to the Commission with right of judicial review.

Congressional and executive action consistent with the prevailing idea of non-coercive, compensated extinguishment of Indian title is clear in the facts of the present case. The Act of 1848 declared a policy of extinguishing Indian claims in Oregon only by treaty. The statute of 1850 put in motion the treaty-making machinery. Respondent tribes were among those with whom treaties were negotiated. In many cases, expected ratification did not follow. In the case of respondent tribes alone have no steps been taken to make amends for the taking of Indian lands pending treaty ratification. To determine now that compensation must be paid is only a fair result.

Petitioner would admit liability only if, in addition to clear proof of original Indian title, some act of official "recognition" were shown. Original Indian title would not attain the status of a compensable interest until some definite act of sovereign acknowledgment followed. Apparently petitioner has seized upon language of the Court of Claims in *Duwamish Indians* v. *United States*, 79 Ct. Cl. 530 (1934), and from it has fashioned a full-blown concept of "recognized Indian title." The jurisdictional act in that case authorized suits on "all claims of whatsoever nature, both legal and equitable." [23] Claims based solely

[23] 43 Stat. 886.

on original Indian title were held to be outside the limits of the act; and unless a treaty or act of Congress recognizing the Indians' title by right of occupancy were shown, recovery could not be had.[24] A more specific jurisdictional act was deemed necessary to authorize a suit based upon original Indian title alone.

Petitioner reads into the *Duwamish* case far too much. When the first jurisdictional act specifically allowing suit on original Indian title in language identical with that of the 1935 Act later came before the Court of Claims in *Coos Bay Indian Tribe* v. *United States*, 87 Ct. Cl. 143 (1938), the court clearly recognized the specific directives of the act and denied recovery solely because original Indian title had not been proved. "Recognition" appeared to count only as a possible method of proving Indian title itself, not as a requisite in addition to proof of that title. Furthermore, in the case at bar, the unmistakable language of the Court of Claims stands squarely against the significance petitioner would attach to the *Duwamish* decision: "The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title." *Alcea Band of Tillamooks* v. *United States*, 103 Ct. Cl. 494, 556, 59 F. Supp. 934 (1945).

Authority for petitioner's position is not found in *Shoshone Indians* v. *United States*, 324 U. S. 335 (1945). The jurisdictional act there limited suits to those claims "arising under or growing out of the treaty of July 2, 1863 . . ."[25] Suits based upon original Indian title were not authorized, but we thought a claim would properly arise under the treaty if it were based upon a taking of

[24] *Duwamish Indians* v. *United States*, 79 Ct. Cl. 530, 600 (1934).

[25] 45 Stat. 1407.

land which the treaty had in any way "recognized" or acknowledged as belonging to the Indians. The Court thrice noted that claims based upon original Indian title were not involved, and made no attempt to settle controversies brought under other jurisdictional acts authorizing the litigation of claims arising from the taking of original Indian title.[26]

Nor do other cases in this Court lend substance to the dichotomy of "recognized" and "unrecognized" Indian title which petitioner urges. Many cases recite the paramount power of Congress to extinguish the Indian right of occupancy by methods the justice of which "is not open to inquiry in the courts." *United States* v. *Santa Fe Pacific R. Co., supra,* at 347.[27] Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title. Furthermore, some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what petitioner would call "recog-

[26] *Shoshone Indians* v. *United States,* 324 U. S. 335, 337, 339, 354 (1945).

[27] The statements in many cases are directed to disputes between third parties, one of whom attempts to raise a defect in the other's title by tracing it to a government grant out of Indian territory and attacking the power or the method used by the sovereign to convey Indian lands. *Beecher* v. *Wetherby,* 95 U. S. 517, 525 (1877); *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 66 (1886); *Martin* v. *Waddell,* 16 Pet. 367, 409 (1842); *Clark* v. *Smith,* 13 Pet. 195, 201 (1839). And in other cases, the issue was not the right of Indian tribes to be compensated for an extinguishment of original Indian title by the United States. *Shoshone Indians* v. *United States,* 324 U. S. 335 (1945); *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339 (1941); *Conley* v. *Ballinger,* 216 U. S. 84 (1910); *Lone Wolf* v. *Hitchcock,* 187 U. S. 553 (1903); *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294 (1902).

nized" title;[28] yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of "recognized" title.[29] We think the same rule applicable to a taking of original Indian title. "Whether this tract . . . was properly called a reservation . . . or unceded Indian country, . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388–89 (1902).[30]

---

[28] *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 566 (1903); *Beecher* v. *Wetherby*, 95 U. S. 517, 525 (1877). The *Lone Wolf* case was properly assessed in *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497 (1937): "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty." See also *Oklahoma* v. *Texas*, 258 U. S. 574, 592 (1922).

In *Barker* v. *Harvey*, 181 U. S. 481 (1901), the Indian claims were deemed extinguished by non-presentment to the land commission, and this was true even if the claims had been "recognized" by the Mexican government prior to the cession of lands to the United States.

[29] *United States* v. *Klamath Indians*, 304 U. S. 119 (1938); *Chippewa Indians* v. *United States*, 301 U. S. 358 (1937); *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937); *United States* v. *Creek Nation*, 295 U. S. 103 (1935).

[30] Other cases also draw no distinction between original Indian title and "recognized" Indian title. "The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." *Spalding* v. *Chandler*, 160 U. S. 394, 403 (1896). Of similar tenor is *Conley* v. *Ballinger*, 216 U. S. 84, 90–91 (1910).

The older cases explaining and giving substance to the Indian right of occupancy contain no suggestion that only "recognized" Indian title

Requiring formal acknowledgment of original Indian title as well as proof of that title would nullify the intended consequences of the 1935 Act. The rigors of "recognition," according to petitioner's view, would appear to require in every case some definite act of the United States guaranteeing undisturbed, exclusive and perpetual occupancy, which, for example, a treaty or statute could provide. Yet it was the very absence of such acknowledgment which gave rise to the present statute.

Congress was quite familiar with the precision advisable when drafting statutes giving jurisdiction to the Court of Claims in Indian cases. In 1925 an act authorizing the litigation of any and all claims of certain Indian tribes was passed. In June, 1934, that act was held, for lack of specificity, not to extend to claims based on original title.[31] The following year Congress passed the present Act, employing the specific language used once before in the Act of 1929,[32] under which *Coos Bay Indian Tribe* v. *United States, supra,* arose. The considered attention given to the many ramifications of Indian affairs in the 1930's [33] suggests that Congress well realized the import of the words used in the jurisdictional act of 1935, and that Congress did not expect respondent tribes to be turned out of court either because congressional power over Indian title was deemed to have no limits or because there was, as was obvious to all, no formal guarantee of perpetual and

---

was being considered. Indeed, the inference is quite otherwise. *Mitchel* v. *United States,* 9 Pet. 711, 746 (1835); *Worcester* v. *Georgia,* 6 Pet. 515, 543–48 (1832); *Johnson* v. *McIntosh,* 8 Wheat. 543, 573–74 (1823).

[31] *Duwamish Indians* v. *United States,* 79 Ct. Cl. 530 (1934).

[32] 45 Stat. 1256, as amended in respects immaterial here, 47 Stat. 307.

[33] "The decade from 1930 to 1939 is as notable in the history of Indian legislation as that of the 1830's or the 1880's." Cohen, Handbook of Federal Indian Law (1945) 83.

exclusive possession prior to the taking of respondents' lands in 1855.

Respondents have satisfactorily proved their claim of original Indian title and an involuntary taking thereof. They are entitled to compensation under the jurisdictional act of 1935. The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.[34] It does not "enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them." *United States* v. *Creek Nation,* 295 U. S. 103, 110 (1935).

In view of the grounds upon which decision rests, it is not necessary to consider the alternate holding of the court below relative to the 1848 act affording sufficient "recognition" of respondents' Indian title.

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, concurring.

Before Congress passed the special Act under which this suit was brought, I think that the Government was under no more legal or equitable obligation to pay these respondents than it was under obligation to pay whatever descendants are left of the numerous other tribes whose lands and homes have been taken from them since the Nation was founded. See *Northwestern Shoshone Indians* v. *United States,* 324 U. S. 335, 354–358, concurring opinion. It seems pretty clear to me, however, that Congress in the Act of August 26, 1935, 49 Stat. 801, created an obligation on the part of the Government to pay these Indians for all lands to which their ancestors held an "original Indian title." This interpretation of the Act is not only consistent

[34] *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 478 (1899).

with the unusually broad language Congress used, but also fits into the pattern of congressional legislation which has become progressively more generous in its treatment of Indians. The capstone of this type of legislation was an Act passed by the last Congress, which established an Indian Claims Commission with sweeping powers to pay old Indian claims growing out of seizure of their lands, among other things. This Commission is given power to make awards, subject to review by the Court of Claims, with and without regard to previous rules of law or equity courts. The Commission is even given a blanket power to make awards upon finding, for example, that the land of Indians was taken by the Government in a way that did not comport with "fair and honorable dealings." 60 Stat. 1049, 1050, § 2 (5). Since whatever our action here, these Indians could, I assume, pursue their claims under this broad recent legislation, and since the language of the Act before us does not preclude a similarly broad interpretation, I see no reason why it should be otherwise interpreted. This leads me to concur in affirmance of the judgment.

MR. JUSTICE REED, with whom MR. JUSTICE RUTLEDGE and MR. JUSTICE BURTON join, dissenting.

This case presents directly for the first time in this Court the question of whether an Indian band is legally entitled to recover compensation from the United States for the taking by the Government of the aboriginal lands of the Indians when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land. The Court allows compensation. The importance of the issue persuades us that we should express the reasons for our dissent. It is difficult to foresee the result of this ruling in the consideration of claims by Indian tribes against the United States. We do not know the amount of land so taken.

West of the Mississippi it must be large. Even where releases of Indian title have been obtained in return for recognition of Indian rights to smaller areas, charges of unfair dealings may open up to consideration again legal or equitable claims for taking aboriginal lands.[1]

The Court rightly states the effect of the jurisdictional act in these words:

> "The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one. [*Ante*, p. 45.]
>
> . . . . .

---

[1] See Indian Claims Commission Act, approved August 13, 1946, 60 Stat. 1049, 1050:

"SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

"All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States."

> "Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title." [*Ante*, p. 51.]

This means, and the Court so treats the claims, that the Indians here get no money by grace or charity or for reasons of honorable dealings with helpless peoples.[2] The recovery by them under this Act will be because they have had valid claims against the United States on account of their ouster from these lands in 1855. These Indians have not been paid the sums owing them, one deduces from the Court's opinion, because the sovereign, our nation, kept the courts closed to them. The jurisdictional act, the Court holds, removes this bar to recovery. This conclusion conflicts with our understanding of this Government's right in the public lands of the nation.

The character of Indian occupancy of tribal lands is at least of two kinds: first, occupancy as aborigines until that occupancy is interrupted by governmental order; and, second, occupancy when by an act of Congress they are given a definite area as a place upon which to live. When Indians receive recognition of their right to occupy lands by act of Congress, they have a right of occupancy which cannot be taken from them without compensation.[3] But by

[2] There are sound reasons for congressional generosity toward the remnants of the aborigines. Such reasons as lead the nation to succor the vanquished in any contest. Cf. *United States* v. *Realty Co.*, 163 U. S. 427; *Pope* v. *United States*, 323 U. S. 1; and 60 Stat. 1049, 1055, § 24.

[3] *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–76; *United States* v. *Klamath Indians*, 304 U. S. 119; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *United States* v. *Creek Nation*, 295 U. S. 103, 109–10.

the other type of occupancy, it may be called Indian title, the Indians get no right to continue to occupy the lands; and any interference with their occupancy by the United States has not heretofore given rise to any right of compensation, legal or equitable.[4]

This distinction between rights from recognized occupancy and from Indian title springs from the theory under which the European nations took possession of the lands of the American aborigines. This theory was that discovery by the Christian nations gave them sovereignty over and title to the lands discovered. *Johnson* v. *M'Intosh,* 8 Wheat. 543, 572–86; 1 Story, Commentaries on the Constitution (5th Ed.) § 152. While Indians were permitted to occupy these lands under their Indian title,[5] the conquering nations asserted the right to extinguish that Indian title without legal responsibility to compensate the Indian for his loss.[6] It is not for the courts of the conqueror to question the propriety or validity of such an assertion of power. Indians who continued to occupy their aboriginal homes, without definite recognition of their right to do so are like paleface squatters on public lands without compensable rights if they are evicted. Tenure for Indian tribes specifically recognized by Congress developed along different lines in the original states, the Louisiana Purchase, the Mexican Session or the lands obtained by the Northwest Boundary Treaty. But there is no instance known to us where there has been intimation or holding that congressional power to take Indian title to lands is limited. Whenever the lands to which the Indians had only Indian title were required for settlement

[4] See *Shoshone Indians* v. *United States,* 324 U.S. 335, 339.

[5] See *Mitchel* v. *United States,* 9 Pet. 711, 745.

[6] The Treaty of Paris, 1783, confirmed the sovereignty of the United States without reservation of Indian rights.

or public use, the sovereign without legal obligation could extinguish that title by purchase or the sword.[7]

In *Barker* v. *Harvey*, 181 U. S. 481, Mission Indians claimed a right of permanent occupancy in former Mexican lands ceded to the United States by the treaty of Guadalupe Hidalgo. They made this claim against a right arising by virtue of a patent that was issued by the United States in confirmation of grants by the Mexican Government in derogation of the Indian title. This Court said as to this Indian title, p. 491, "that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States."[8] This Court confirmed title contrary to the Indian claim. Rights of occupancy given to Indians by an executive order may be withdrawn without compensation to the Indians where their title was not recognized by congressional act. The Indians do not hold such lands by the same tenure as they do the lands by the terms of a ratified treaty or statute. *Sioux Tribe* v. *United States*, 316 U. S. 317, 326–28.

As we understand the present holding of the Court, it is that the manner of terminating this Indian title by the United States is limited by the duty to pay compensation. Therein, we think, lies the fundamental error of the Court's opinion. It is true that distinctions have been made between plenary authority over tribal lands and absolute power, with the suggestion that congressional

[7] *Johnson* v. *M'Intosh*, *supra*, at 587–89; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, 117. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 311.

[8] Cf. *Duwamish Indians* v. *United States*, 79 Ct. Cl. 530, 597–600.

727731 O—47——10

power over Indian title was not unlimited. See Cohen, Handbook of Indian Law, 94, 291, 309, 310, 311. Examination of the authorities cited, however, will show, we think, in every instance, that where reference is made to the protection of Indian lands by the Fifth Amendment or to the legal obligation of the United States to compensate Indians for lands taken, the lands under discussion were lands held by the Indians under titles recognized by specific acts of Congress.[9]

When Chief Justice Marshall expounded for the Court the power of the United States to extinguish Indian title, this doctrine was laid down for the nation's guidance in dealing with the Indians:

> "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.
>
> ". . . All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognised the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.
>
> ". . . Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting

[9] E. g. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113; *United States* v. *Creek Nation*, 295 U. S. 103, 109; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–77.

the original justice of the claim which has been successfully asserted. . . .

. . . . . .

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. . . . Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

. . . . . .

". . . the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

"What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

"Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As

> the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." 8 Wheat. 587–91.

It is unnecessary for this case to undertake at this late date to weigh the rights and wrongs of this treatment of aboriginal occupancy. Where injustices have been done to friendly peoples, Congress has sought to soften their effect by acts of mercy. Never has there been acknowledgment before of a legal or equitable right to compensation that springs from the appropriation by the United States of the Indian title.

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz* v. *Northern Pacific Railroad, supra,* p. 66. As stated by Chief Justice Marshall in *Johnson* v. *M'Intosh, supra,* p. 586, 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby,* 95 U. S. 517, 525." *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 347.

The colonies, the states and the nation alike, by their early legislation, provided that only the respective sovereigns could extinguish the Indian title.[10] The way in which it was to be extinguished has been held, continually, a political matter.[11] The jurisdictional act now under consideration does not purport to change a political matter to a justiciable one.

When this present jurisdictional act was considered by Congress, nothing in the reports or the debates [12] indicates that Congress intended to create a new liability because Indian title had been taken. This Court relies upon no change of attitude in Congress, but finds that this liability has always existed and that this act merely removes the bar against suit. This we think is contrary to the whole course of our relations with the Indians.

The Court finds a basis for this action in that this nation should not take the Indian title without compensation because such a taking would not satisfy the " 'high standards for fair dealing' required of the United States in controlling Indian affairs." The language used by the Court is taken from *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 at 356. It there referred to an act unauthorized by Congress and not to such takings as here occurred when Congress opened the original home of these respondents for settlement.

In *Worcester* v. *Georgia*, 6 Pet. 515, 543, 544, 547, lands had been specifically set apart for the Cherokees. P. 556.

[10] See passim, Laws of the Colonial and State Governments, Relating to Indians and Indian Affairs, from 1633 to 1831, inclusive: With an Appendix Containing the Proceedings of the Congress of the Confederation and the Laws of Congress, from 1800 to 1830, on the Same Subject.

[11] *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 311.

[12] See S. Reps. Nos. 571, 795, 74th Cong., 1st Sess.; H. Reps. Nos. 1085, 1134, 74th Cong., 1st Sess.; 79 Cong. Rec. 7806, 11188, 12520.

Therefore Chief Justice Marshall's comments were directed at a situation that does not exist here.

A concurring opinion has been filed which holds that Congress in the act here involved "created an obligation on the part of the Government to pay these Indians" for their Indian title. We do not think this present act is susceptible of that interpretation. We read the act, as we understand our Brethren do, to permit recovery of compensation only in case there were rights in the Indians prior to its passage "arising under or growing out of the original Indian title." We think no rights arose from this Indian title. Therefore no compensation is due.

As we are of the opinion that the jurisdictional act permitted judgment only for claims arising under or growing out of the original Indian title and are further of the opinion that there were no legal or equitable claims that grew out of the taking of this Indian title, we would reverse the judgment of the Court of Claims and direct that the bill of the respondents should be dismissed. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335.

UNITED STATES *v.* HOWARD P. FOLEY CO., INC.

CERTIORARI TO THE COURT OF CLAIMS.

No. 50. Argued October 25, 1946.—Decided November 25, 1946.

1. Under the government construction contract here involved, for installation of lighting of the runways of an airport, the Government was not liable for damages for delay in making the runways available to the contractor, though the delay prevented completion within the specified time, since the contract did not obligate the Government expressly or impliedly to make the runways available promptly, it contained provisions anticipating delays caused by the Government and providing remedies other than an award of damages to the contractor, and no fault actually was chargeable to the Government. Pp. 66–67.

has looked to the substantial justice and law of the case, rather than to the manner in which the questions to be considered are presented. But the allegations and proofs must so far correspond that the latter shall not wholly depart from the case made in the petition, and introduce demands which the Government had no notice to meet. The rule of correspondence to this extent is vital to the substance of the proceedings, and it is necessary to give to the United States the benefit of the principle of *res judicata* in cases where they ought to have protection which it affords.

Baldwin & Co. were to be "indemnified from any damage resulting from compliance with the order of the Government."

The petition is confined to a claim arising under this clause of the agreement. It was, therefore, the only one open for the examination of the Court of Claims, and it is the only one before us for consideration.

The $5,000 lost by Baldwin & Co. in the settlement with the Galena & Chicago Company was clearly within the scope of this clause, and was properly allowed by the court below.

It is equally clear that the fifteen engines constructed for the Government displaced and postponed the construction of an equal number under the contracts of Baldwin & Co. with other parties, and subjected them to a loss of $1,250 on each engine so postponed. If the indemnity clause has any meaning or effect, it must be held to include this charge also. We think it was properly allowed by the Court of Claims, and that there is no ground for complaint on the part of the United States. But the court refused to make the like allowance for the residue of the eighty engines. In this the learned counsel for the petitioner insist that a gross error was committed, and here lies the stress of the case. The difficulty of arriving at a satisfactory conclusion is increased by the finding of the court that the work upon the whole eighty was delayed about two months. Nevertheless, we think this claim of the petitioner is not well founded. The Court of Claims found that eighteen engines "were finished for private parties while the Government work was in progress." In regard to them there was no delay. This shows that the capacity of the establishment was equal to the construction of thirty-three engines at the same time. Baldwin & Co. were to construct eighty for private parties. They agreed to construct for the Government fifteen in addition, and to give them the preference in the order of construction. The additional time necessary to construct the eighty would be the time which it required to construct the additional fifteen for the Government; no more and no less. Suppose, when the Government order was completed, they had decided not to make the fifteen of the eighty which would have been first put under way if the Government order had not been given. Then there could have been no postponement except as to those fifteen. The residue of the eighty would have been unaffected as to the time of their completion. Again; if, when the Government order was given, it had been determined to construct the fifteen displaced and postponed engines last, instead of next after those of the Government, and this purpose had been carried out, then, again, there could have been no delay except as to the fifteen last constructed.

In the light of these considerations, we can come to no other conclusion than that the judgment of the Court of Claims was right in respect to the petitioner, as well as the United States. The allowance of damages was properly limited to fifteen engines, instead of being extended to the eighty in question. The contractors had no right so to conduct their business as unnecessarily to swell their claim for damages. Their duty was in the other direction. *Wicker* v. *Hoppock*, 6 Wall., 99 [73 U. S., XVIII., 753]. Nor can the petitioner be permitted now so to shape his demand as to work out improperly the same result. The theory submitted by his counsel is ingenious, but it does not answer the views we have expressed, and it is unsound. We think it is entirely clear that there could have been no delay, and, consequently no loss imputable to the Government beyond what relates to fifteen of the engines ordered by other parties.

Neither party in the argument here objected to $1,250 as the measure of damages to be applied. We have, therefore, not deemed it necessary to consider that subject.

The judgment of the Court of Claims is affirmed.

PETER F. HOLDEN, *Appt.*,
v.
JAMES F. JOY;
AND
WILLIAM H. WARNER, *Appt.*,
v.
JAMES F. JOY.

(See S. C., 17 Wall., 211-253.)

Indian Tribes are States—Cherokee Treaty of 1835, 1866, and 1868—Indian title—lands in Missouri—fee simple title of United States—Acts of Congress.

1. Indian Tribes are States, in a certain sense, although not foreign States, nor States of the United States, within the meaning of the U. S. Constitution.

2. The lands conveyed to the United States, by the Treaty of Dec. 29, 1835, were held by the Cherokees under their original title, acquired by immemorial possession.

3. Their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successor of Great Britain.

4. June 2, 1825, the Osage Tribes, by the Treaty of that date, ceded to the United States all their right, title, interest and claims to the neutral lands lying west of Missouri.

5. The United States possessed the fee simple title to the neutral lands, discharged of the right of occupancy by the Osage Indians, and it was clearly competent for the United States to convey the same by treaty to the Cherokee Nation.

6. The President and Senate, in concluding such a treaty, could lawfully covenant that a patent should issue to convey lands which belonged to the United States, without the consent of Congress.

7. The condition in the patent by which the Cherokees acquired the lands from the United States, that if the Indians abandon the lands they shall revert to the United States, if valid, is a condition subsequent, which no one but the grantor can set up, and which the parties may waive.

8. The sale in trust by the Cherokee Nation to the United States did not constitute an abandonment of the lands within the condition.

9. The provisions of the 17th article of the Treaty

with the Cherokees, of July 15, 1866, are more than a mere agreement and operated to convey the lands to the United States. Such Treaty is valid.

10. The sale of the Cherokee neutral lands to Joy, as agreed to by the supplemental Treaty of April 27, 1868, and the patent issued therefor to him gave him a valid title.

11. Acts of Congress were subsequently passed, recognizing the Treaty of July 15, 1866, ceding back the lands to the United States, and the supplemental Treaty, as valid, and making appropriations to carry the same into effect, which ratified the same.

[Nos. 360, 327. Dec. Term, 1871.]

Argued Apr. 16, 17, 1872. Decided Nov. 18, 1872.

APPEALS from the Circuit Court of the United States for the District of Kansas.

The case fully appears in the opinion of the court.

Messrs. **Wm. Lawrence, B. F. Butler** and *W. S. Rockwell*, for appellants:

Upon the facts of the case we maintain, as legal propositions:

I. Neither the Cherokee Treaty nor the contracts therein mentioned purport to, or can *ex proprio vigore*, grant a fee simple or legal title in these lands to James F. Joy. And so far as they stipulate for the survey or selection of the lands, the receipt of payment therefor, or the execution of the Treaty trust, as conditions precedent to the right to land patents, and necessary to determine the lands to be patented, they cannot be executed until authorized by Act of Congress; and there is no Act on that subject.

II. The Treaty does not purport to, nor in fact authorize the issuing of land patents, nor otherwise provide for passing the legal title to the lands from the United States. Nor is it aided by any Act of Congress.

III. If this Treaty were even in a form to be an operative law, as it is not, prescribing official duties, or conferring official powers, yet, it cannot, under the Constitution, impose on statutory officers the official duties, nor confer the powers required for its execution. Nor is it aided by any Act of Congress.

IV. This Treaty, so far as it stipulates for a sale of lands, is void, because in conflict with the Acts of July 22, 1854, 10 Stat. at L., 310, and June 2, 1862, 12 Stat. at L., 413, both of which were enacted by Congress in the exercise of the power to dispose of the public lands, to legislate as to the Indians, and to regulate the Indian treaty power.

V. If this Treaty were in a form to be operative as a law, requiring a sale of these lands, as it is not, yet it would be unconstitutional and void, so far as it attempts to dispose of the lands in the forms prescribed. And this is so, no matter what may be the character of the Indian claim in these lands prior to the cession. No Act of Congress has authorized or validated this attempted treaty sale.

If we are correct in any one of these positions, then James F. Joy has no title.

1. An Act of Congress is necessary before the treaty, survey, selection of lands, receipt of payment therefor, or the performance of the treaty trust to sell can be executed.

That the Treaty does not *ex proprio vigore* convey any fee simple or legal title to James F. Joy, needs no argument to prove.

That the Treaty is in form a mere agreement, must be appareut on the face of it.

Foster v. *Neilson*, 2 Pet., 253; *U. S.* v. *Arredondo*, 6 Pet., 735; *U. S.* v. *Percheman*, 7 Pet., 88; *Garcia* v. *Lee*, 12 Pet., 520; *Taylor* v. *Morton*, 2 Curt., 454; *Longlois* v. *Coffin*, 1 Ind., 446; *Verden* v. *Coleman*, 4 Ind., 457; *Haden* v. *Wire*, 15 Ala., 158; *Fipps* v. *McGehee*, 5 Port., 173.

2. James F. Joy has acquired no legal or fee simple title in the lands, because there is no treaty nor other authority to issue a patent.

A patent issued without authority of law is void, and the courts may inquire into conflicting claims resting upon questions of law.

Stoddard v. *Chambers*, 2 How., 284; *Doe* v. *Files*, 3 Ala., 47; *Hunter* v. *Hemphill*, 6 Mo., 106; *Hit tuk-ho-mi* v. *Watts*, 7 S. & M., 363; *Perry* v. *O'Hanlon*, 11 Mo., 585; *People* v. *Livingston*, 8 Barb., 253; *Wright* v. *Rutgers*, 14 Mo., 585; *Garton* v. *Cannada*, 39 Mo., 357; *U. S.* v. *Stone*, 2 Wall., 525 (69 U. S., XVII., 765); *Lindsay* v. *Hawes*, 2 Black, 554 (67 U. S., XVII., 263); *Minnesota* v. *Batchelder*, 1 Wall., 109 (68 U. S., XVII., 551); 5 Minn., 223; *O'Brien* v. *Perry*, 1 Black, 132 (66 U. S., XVII., 114); *Clements* v. *Warner*, 24 How., 394 (65 U. S., XVI., 695); *Garland* v. *Wynn*, 20 How., 6 (61 U. S., XV., 801); *Barnard* v. *Ashley*, 18 How., 43 (59 U. S., XV., 285); *Gingrich* v. *Foltz*, 19 Pa., 38; Report Commissioner General Land Office, 1868, p. 126; *Polk* v. *Wendal*, 9 Cranch, 87; *Polk* v. *Wendell*, 5 Wheat., 301.

The Treaty, *per se*, does not profess to pass any legal or fee simple title from the United States. It is entirely silent on the subject of a patent, or as to the mode in which the title held by the United States shall pass to Joy.

The supplemental Treaty professes to ratify a contract on file in the Interior Department.

It cannot be presumed that this document, hidden away from courts and not legally brought to the notice of officers, inaccessible to all the world, confers any authority or is in a form to be a law.

Neither an international treaty nor an Indian treaty can be a law to executive officers of the Government.

3. The Cherokee Treaty cannot constitutionally impose the official duties, or confer the official powers necessary to execute it, upon executive officers, so as to convey a title to lands.

(*a*) The treaty power cannot impose duties or confer powers to be exercised infraterritorially, even by the President.

The Government ordained under the Constitution sustains international and internal relations.

For internal purposes, its powers are distributed into legislative, executive and judicial. For all internal purposes, Congress makes laws; the President executes them as they require, the courts exercise judicial power. The international relations of the Government are regulated by the Constitution, Acts of Congress, treaties, and the common law of nations.

Federalist, 75; 1 Writings of Madison, 620.

It is not said that the President shall be bound by or execute a treaty, for he can only execute the laws; that is, Acts of Congress.

As illustrations of the doctrine that the courts have cognizance of judicial questions, we refer to *U. S.* v. *The Peggy*, 1 Cranch, 103; *Society, etc.*, v. *New Haven*, 8 Wheat., 464; *Ware* v. *Hylton*, 3 Dall., 199; *Owings* v. *Norwood*, 5 Cranch, 344; see 8 Stat at L., 2, *notes; Anderson* v. *Lewis*, 1 Freem. Ch., 178; *Stockton* v. *Williams*, Walk. Ch., 120.

But all this is only by express provision of the Constitution, and not because a treaty is a law to the courts, under the clause declaring treaties to be laws, and it has been clearly proved that a treaty is not a law to the courts upon all subjects; even those falling within the proper jurisdiction of the treaty power.

Whart. St. Tr., 448; *Foster* v. *Neilson*, 2 Pet., 253; *Taylor* v. *Morton*, 2 Curt., 454; *Turner* v. *Am. B. M. U.*, 5 McLean, 344.

Treaties are laws only to the courts. They devolve no duty on executive officers.

The Attorney-General, Nov. 20, 1821, said: "The people seem to have contemplated the National Government as the sole organ of intercourse with foreign nations. It ought to be armed with power to satisfy * * * the fulfillment of all moral obligations, perfect and imperfect, which the law of nations devolves upon us as a nation. In this respect our system seems to be crippled and imperfect."

1 Ops., Attys Gen., 392; 6 Ops., 291; see 3 Ops., 56; 9 Ops., 25; 10 Ops., 508; 11 Ops., 145; House Rep., 41, 3d sess. 41st Cong., Feb. 27, 1871; House Rep. 39, 3d sess., 41st sess., 20, 1871; Senate Rep., 268, 3d sess., 41st Cong., Dec. 14, 1870; see 9 Jeff. Works, 106, 109, 190; 3 Ham. Hist. Repub., 21.

There are many Acts to execute treaties of various kinds.

Act Feb., 28, 1809, Spanish Treaty; Act, May 23, 1828; Spanish Treaty, Feb. 22, 1819; *Foster* v. *Neilson*, 2 Pet., 315; *U. S.* v. *Arredondo*, 6 Pet., 708, 712; *Mitchel* v. *U. S.*, 9 Pet., 711; 736, 741; Act, May 26, 1830; *U. S.* v. *Percheman*, 7 Pet., 52; Act of Mar. 3, 1851, Mexican Treaty; Act, Feb. 20, 1861, New Granada Treaty, Sep. 10, 1857; Act, Mar. 3, 1819.

The Treaties by which Louisiana and Florida were acquired were followed by Acts of Congress, which gave them sanction. See, Act Oct. 31, 1803, and Treaty of Apr. 30, 1803.

See, *U. S.* v. *Ferreira*, 13 How., 40; *U. S.* v. *Todd*, 13 How., 52; Act, July 6, 1842, 1 Lester, 68-97.

(*b*) An Indian treaty cannot confer powers on or require duties of the President, to execute its provisions in *futuro* for the disposition of the public lands.

If it be possible that an international treaty can be a law to executive officers, which can authorize or require them to perform official acts in execution of its provisions, it is so only because the Constitution declares a treaty to be a supreme law.

But if an Indian treaty, so called, is not a treaty within the meaning of the Constitution, then it cannot be a law to executive officers. Still more; Congress cannot abdicate legislative power, and transfer the power of legislation to persons or officers whom it may authorize to make contracts or treaties.

Parker v. *Com.*, 6 Pa., 515; *Hall* v. *Ohio*, 20 Ohio, 13.

Such a treaty at most could only, to the extent authorized by Acts of Congress, be effectual so far as it would operate *ex proprio vigore* to vest specific designated rights.

It could not assume to repeal existing legislation, for that is a power reserved to Congress, a legislative power.

The Indians are, in no sense, either foreign nations or independent nations. They are "domestic, dependent nations."

The Cherokee Nat. v. *Ga.*, 5 Pet., 1.

And many, very many Acts of Congress have regulated trade and intercourse with the Indian Tribes. This is abundantly shown in 5 Pet. (*supra*). They have always been regarded as subject to the legislative power; so much so, that even a treaty could not protect them from taxation under the authority of Congress.

Boudinot's case, "*The Cherokee Tobacco*," 11 Wall., 616 (78 U. S., XX., 227).

The power to make Indian treaties is placed on a different footing from international treaties. Indian treaties have been authorized by numerous Acts of Congress, showing that they are under legislative authority. And so the Constitution treats them. The Constitution authorizes the President to:

"Appoint ambassadors, other public ministers and consuls." Art. II., sec. 2.

These are officers known to international law. The power to appoint them is so high that it cannot be taken away by Act of Congress. They are the general officers who, in the sense of the law of nations, can make treaties.

Jan. 9, 1817, Governor Morrow made a report in the United States Senate, in which he said, in relation to Indian treaties and public lands:

"The grant of power to make treaties is undefined by the Constitution, which has been considered to extend to all subjects, proper for a treaty regulation, with other independent States, except the cases in which the special grant of power to other branches of the Government may operate as a restriction to its exercise."

He then says that a former Congress regarding the grant of power to Congress "to dispose of the public lands" as a limitation of the treaty making power, expressly, by the Act of Mar. 26, 1804, authorized the President to stipulate with the Indians for an exchange of lands.

Am. State Papers, Indian Affairs, pp. 222, 410.

And Congress accordingly, from time to time, passed Acts to authorize Indian treaties; as, for instance, the Act of,

Aug. 20, 1789, 1 Stat. at L., 54.

The power of the President and Senate under this Act was discussed in cabinet Feb. 25, 1793.

4 Ham. Works, 340; 9 Jeff. Works, 135.

Mar. 26, 1804, 2 Stat. at L., 289, sec. 15; 2 Am. St. Pap., Indian Aff., 224, 124, 410; 1 Benton, Abr., 671.

May 28, 1830, 4 Stat. at L., 411; 7 Stat. at L., 551; see Act, June 30, 1834, 4 Stat. at L., 740.

June 5, 1850, 9 Stat. at L., 437; 1 Lester, 156, sec. 3; Feb. 27, 1851, 9 Stat. at L., 586, requires "All Indian treaties to be negotiated by such officers and agents of the Indian Department as the President * * * may designate."

Mar. 3, 1853, 1 Lester, 204; Dec. 19, 1854, 1 Lester, 241; Mar. 3, 1863, 12 Stat. at L., 793; Feb 23, 1865, 13 Stat. at L., 432; June 15, 1866, Joint Res., 14 Stat. at L., 358; Mar. 29, 1867, 15 St. at L., 9; July 20, 1867, 15 Stat. at L., 17; July 1, 1870, Joint Res., 17 Stat. at L., 384.

Mar. 3, 1871, prohibits treaties.

Mar. 26, 1804, Congress passed an Act for the

disposal of the public lands in the Indian Territory, and another for the government of Louisiana Territory, section 15 of which provides that:

"The President of the United States is hereby authorized to stipulate with any Indian Tribes, owners of lands on the east side of the Mississippi, and residing thereon, for an exchange of lands, the property of the United States, on the west side of the Mississippi, in case the said Tribes shall remove and settle thereon; but in such stipulation the said Tribes shall acknowledge themselves to be under the protection of the United States, and shall agree that they will not hold any treaty with any foreign power, individual or State; or with the individuals of any State or power; and that they will not sell or dispose of the said lands, or any part thereof, to any sovereign power except the United States, nor to the subjects or citizens of any other sovereign power, nor to the citizens of the United States; and the Act of Mar. 30, 1802, 'to regulate trade and intercourse with the Indian Tribes,' etc., is extended to the Territory erected by this Act."

I have already cited the Act of May 28, 1830.

As to the effect of this Act, see opinion of Attorney-General Butler, 3 Ops., 56.

The Act of June 5, 1850, authorizes the President to,

"Appoint Commissioners to negotiate treaties with the several Indian Tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains."

Under these Acts many of the Indian treaties have been made, either in obedience thereto or in excess of the authority so conferred. In other instances, Acts have been passed to carry into effect such treaties.

Whether there is a constitutional power to make Indian treaties or not, it is clear the power is not so high as or of like character with the authority to make treaties with foreign nations. The Indian treaty power may be regulated by Act of Congress fully, while the foreign treaty power is much less liable to restriction and regulation by Act of Congress. The Indians have in all respects and always been subject to control by Acts of Congress.

In 6 Opinions, 664, Attorney-General Cushing says:

"There is a distinction undoubtedly between a treaty with a foreign power and a treaty with Indians, who are subjects of the United States. Examples may be cited of Acts of Congress, which operate so as to modify or amend treaties with Indians. * * * Though they may be weak, and we strong; they subjects, and we masters, yet they are * * * entitled to the exercise of good faith," etc.

Congress, by Acts of Mar. 30, 1802, 2 Stat. at L., 141, sec. 12, and June 30, 1834, 4 Stat. at L., 792, prohibited the Indians from making treaties with foreign nations, and from selling their right of occupancy in lands except to the United States. No such power could be exercised over foreign nations. Congress has always regulated trade and intercourse with Indians, and subjected them to our revenue laws (*Boudinot's* case, *supra*), but this could not be done over foreign nations.

And now, under Act of July 15, 1870, the Osages are being removed from their diminished reserve, and their land sold to settlers. If the Indians themselves can be thus regulated and subjected to Acts of Congress, their power to make treaties may be regulated, restrained or prohibited.

The Act of Congress of Mar. 3, 1871 (Laws 566), declares that no Indian Tribe shall be acknowledged as a power with whom the United States may contract by treaty.

If the power to make Indian treaties be in fact a part of the treaty-making power of the Constitution, to make treaties which are supreme laws, it could not be withdrawn, or its exercise prohibited by Congress. It could no more be withdrawn than the original jurisdiction of the Supreme Court, or the President's power to grant pardons, expressly delegated by the Constitution. Here, then, in this Act, it is proved by the official oaths of more than three hundred members of Congress, including the members of the treaty-making Senate, that the power to make Indian treaties rests on legislative authority, or at least is not of that character which can make treaties having the effect of supreme laws.

When the Constitution speaks of treaties which are to operate as supreme laws, it can only refer to treaties as understood by all nations.

It is a rule of interpretation, well understood, that when a common law word is used in a constitution or law, it is to be understood in its common law meaning.

The word "treaty" is a term which belongs to international law, and must be understood in the sense of international law, at least in the clause which makes a treaty a supreme law. It must be presumed that the framers of the Constitution used it in that sense. The treaties of the Constitution are *fœdera gentium*.

Indian treaties are not *fœdera gentium*, and are, therefore, not laws within the Constitution.

At the time the Constitution was adopted, no Treaty of England had ever imposed duties on an executive officer, and none had ever been executed except by authority of an Act of Parliament. The Constitution must be read in the light of this history. *Cherokee Nat.* v. *Ga.*, 5 Pet., 40.

(c) An Indian treaty cannot impose duties or confer powers on the Commissioner of the General Land Office or Secretary of the Interior, mere statutory officers, and especially not when, as in this case, the attempt is made to require the power to be exercised independent of the President.

(1) These officers are created, and their powers defined by Acts of Congress. The declaration of powers by these Acts is equivalent to an expression that they shall exercise no other powers. "*Expressio unius exclusio alterius.*" It is a positive regulation and restraint upon the Indian treaty-making power, whether exercised by virtue of the Constitution or Acts of Congress.

(2) The powers of statutory officers are conferred by legislation. It is essentially an exercise of legislative power to confer official authority.

(3) It attempts to create offices and make appointments to office. If a treaty, or even an Indian treaty, could be a law, so far as it operates *ex proprio vigore*, or even to the courts, it cannot create offices or fill them by appointment.

(4) The treaty power cannot interrupt or prevent the performance of duties imposed by law on officers whose offices are established by law.

(5) Finally, on this branch of the subject, the title claimed under the Cherokee Treaty is void, because the measures to create and perfect it have been done under neither legislative or treaty power.

4. The Cherokee Treaty, so far as it stipulates for a disposition of lands, is void, because in conflict with the Acts of July 22, 1854, 10 Stat. at L., 310, and June 2, 1862, 12 Stat. at L., 413.

The Acts of 1854 and 1862 declare that these lands shall be subject to preemption "whenever the Indian title shall be extinguished." The Indian title was extinguished by the Cherokee Treaty of 1866.

Unless, therefore, the Treaty could and did defeat the operation of the Acts of Congress, no title could be acquired by a purchaser under it, and James F. Joy is without any valid claim. I insist that the Acts of Congress shall prevail over the Treaty.

But whether this Treaty rests on a power given by the Constitution or by Acts of Congress, the Acts of 1854 and 1862, which dedicate these lands to preemption settlement, are supreme over the Treaty, for many reasons:

1. As regulations of the exercise of the treaty power, they are supreme.

Whart. St. Tr., 452; 74 Cong. Globe, p. 20; 1 Story, Const., 374; 4 West. Law Mo., 519; *Cherokee Nat.* v. *Ga.* (*supra*); Annals of Congress, 1796, p. 526.

2. If there be a treaty power concurrent with the undoubted expressly delegated power of Congress to dispose of the public lands, the legislative power is supreme.

The Constitution fixes the order of supremacy for it, for Acts of Congress, treaties and State Constitutions and laws.

Paschal says: "The national rule of action, then, is: 1. The Constitution; 2. Acts of Congress; 3. Treaties; 4. The judicial decisions and precedents. The State Constitutions, laws and decisions thereon, are subordinate to these.

Annotated Const., 249; *Ableman* v. *Booth*, 21 How., 525 (62 U. S., XVI., 176); Story, Const., 1836; Fed., No. 33; *Gibbons* v. *Ogden*, 9 Wheat., 210; *McCulloch* v. *Maryland*, 4 Wheat., 405; Letter of Congress, Apr. 13, 1787; 12 Journ. Cong., 32, 36; 1 Wirt's State Papers, 45, 47, 71, 81, 145; Serg. Const., ch. 21, pp. 212-219; ch. 34, p. 406; *Ware* v. *Hylton*, 3 Dall., 220; Journ. of Convention, 222, 282, 293; Fed., Nos. 44, 64; Journ. H. Reps., 6 Apr., 1796; Marsh. Wash., 650; 4 Elliot, Deb., 244, 248.

Can a treaty regulate the sale of the public lands after Congress has regulated it?

See *Thurlow* v. *Mass.*, 5 How., 504; *Smith* v. *Turner*, 7 How., 283; *Gilman* v. *Phila.*, 3 Wall., 713 (70 U. S., XVIII., 96); *N. Y.* v. *Miln*, 11 Pet., 142.

The legislative power to sell lands is expressly delegated to Congress; it is not to the treaty-power, and the will of Congress is, therefore, supreme. Its supremacy is essential to its preservation and existence; it is not so essential to the treaty power. It may survive for all purposes over which its power is exclusive, and the just balance of each Department of the Government be preserved.

Foster v. *Neilson*, 2 Pet., 307; *The Kansas Indians*, 5 Wall., 755 (72 U. S., XVIII., 672); *Scott* v. *Sandford*, 19 How., 393 (60 U. S., XV., 691).

Among the grounds which I have heard suggested, in reply to all this, and in support of the title under the Treaty, are these:

I. That the Treaty repealed the Acts of 1854 and 1862 as to these lands.

II. That similar titles have been sustained by the courts and Attorneys-General.

III. That so many interests are involved in treaty titles, that public policy requires that they should not be disturbed.

IV. That the Cherokees had a fee simple title which they could convey by treaty.

V. That the Cherokee Treaty was authorized by law.

And to these propositions I proceed to reply:

I. An Indian treaty cannot repeal an Act of Congress disposing of the public lands, and if a treaty can be, in law and equity cases, a municipal law to the courts, an Act of Congress may repeal and amend such municipal law.

Congress has passed many such Acts, and the courts yield to the will of the Legislature always.

Act July 17, 1798, 1 Stat. at L., 578; 2 Curt., 460; 3 Ops. Attys-Gen., 727; Act Mar. 26, 1804; *Foster* v. *Neilson* (*supra*); Joint Resolution, Apr. 10, 1869, 16 Stat. at L., 55; Osage Treaty, 1865, 14 Stat. at L., 687; Act July 15, 1870, sec. 12, 17 Stat. at L., 362; same Treaty, arts. I., II., XVII.; Act Feb. 21, 1863, 12 Stat. at L., 658, 1101; Act Feb. 16, 1863, 12 Stat. at L., 652; Act Jan. 29, 1861, erecting State of Kansas, art. V.; Cherokee Treaty, Dec., 1835, and other treaties; *Boudinot's* case "*The Cherokee Tobacco*," 11 Wall., 616 (78 U. S., XX., 227); *Taylor* v. *Morton*, 2 Curt., 458; *The Clinton Bridge*, 1 Woolw., 155; *Mitchel* v. *U. S.*, 9 Pet., 712; Act June 30, 1834, 4 Stat. at L., 729; Act Mar. 30, 1842, 2 Stat. at L., 141; Act Feb. 20, 1863, 12 Stat. at L., 652; *Webster* v. *Reid*, 1 Morris, Ia., 467.

And if courts are bound to accept the law of the political departments rather than the law of treaties, why are not executive officers equally bound?

In *Taylor* v. *Morton*, 2 Curt., 454, the learned judge said: "Though a treaty is a law of the land, under the Constitution of the United States, Congress may repeal it, so far as it is a municipal law, provided its subject-matter is within the legislative power of Congress."

The reason of this is, that, on a legislative subject the power of Congress is supreme, and the court must conform its decisions to the will of the Legislature.

II. The authorities do not sustain the titles claimed under this Treaty.

Turner v. *Am. Bap. Mis. Un.*, 5 McLean, 344; *U. S.* v. *The Peggy*, 1 Cranch, 103; *Mitchel* v. *U. S.*, 9 Pet., 711; *Ladiga* v. *Roland*, 2 How., 581.

III. We now proceed to deny the proposition, that so many interests are involved in treaty titles that public policy requires that they should not be disturbed.

An examination of the Indian treaties and of the Acts of Congress will show that, in most of the cases where grants have been made to individuals by treaty, or sales of land stipulated

for, the treaties were either authorized by Act of Congress, or subsequently ratified or their execution provided for.

No treaty stipulated for a sale of lands until the Treaty of Feb. 27, 1819, 7 Stat. at L., 195, and the first grant in operative form was made by the Seneca Treaty of Feb. 28, 1831, 7 Stat. at L., 350, art. 2.

If the ruling in 10 Ops. Attys-Gen., 508, be correct, the Act of Dec. 22, 1854, 10 Stat. at L.,599, ratified all previous titles on the treaties.

And, see, Act May 30, 1854, 10 Stat. at L., 290, sec. 37. The Act of Mar. 3, 1859, 11 Stat. at L., 431, authorized patents to all separate selections in Kansas.

If the ruling in 3 Ops. Attys-Gen., 56, be correct, most of the individual reservations were authorized by Act of Congress.

A decision, therefore, now, against the treaty grant claimed by James F. Joy, will disturb no great interest.

Before reaching another question made in this case, we may state again that the Indians have no fee simple title in the public lands.

1 Story, Const., 3, 101; *Cherokee Nat.* v. *Ga.*, 5 Pet., 48; *Worcester* v. *Ga.*, 6 Pet., 580; *Johnson* v. *McIntosh*, 8 Wheat., 574, 579; *Mitchel* v. *U. S.*, 9 Pet., 745; *Lattimer* v. *Poteet*, 14 Pet., 14; *U. S.* v. *Fernandez*, 10 Pet., 303; 8 Ops. Attys Gen., 225, 262.

These cases show that the Indians have always been regarded as having a mere occupancy by permission.

IV. The character of the Cherokee title did not withdraw it from the operation of the Acts of 1854, 10 Stat. at L., 310, or 1862, 12 Stat. at L., 413, nor authorize the treaty power to dispose of it in violation of these Acts.

V. No treaty sale is authorized by law. During the era of the Articles of Confederation, the States "made war and peace with the Indian Nations," and claimed or exercised the power to make treaties. House Rep., 37, 2d sess. 40th Cong.

The Constitution took away the right of States to make treaties; but Congress, in view of the fact that States owned the lands, passed "An Act to Regulate Trade and Intercourse with the Indian Tribes."

Many of its provisions were temporary, and hence all were made so. It provides, among other things, "That no sale of lands made by any Indians or any Nation and Tribe of Indians, if in the United States, shall be valid to any person or persons or to any State, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States. This Act shall be enforced for two years from thence to the end of the next session." Approved July 22, 1780, 1 Stat. at L., 138.

The Act of Mar. 30, 1802, 2 Stat. at L., 141, sec. 12, applicable to all Indian lands in the United States, and Act of June 30, 1834, 4 Stat. at L., 729, sec. 12, contained provisions substantially as follows:

"No purchase, lease or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly to treat with any such Nation or Tribe of Indians for the title or purchase of any lands by them held or claimed, such persons shall forfeit and pay $1,000: *Provided*, nevertheless, That it shall be lawful for the agent or agents of any State, who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the Commissioner or Commissioners of the United States appointed to hold the same, to propose to and adjust with the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty." Act, June 30, 1834, sec. 12, 4 Stat. at L., 729.

The Acts of Congress of 1854 and 1862 did and do restrict the right of the Cherokees to aliene these lands to individual purchasers. For even if the Act of 1834 could confer such right, the Act of 1862 could take it away.

But whatever might be claimed from these Acts, the whole disposition of the public lands was settled by the Acts of 1854 and 1862.

They controlled all prior legislation and prohibited any disposition of the public lands, except that which gave them to preemption entries, etc.

5. An Indian treaty which undertakes to dispose of the public lands without the authority of an Act of Congress, is unconstitutional and void. The power to dispose of the public lands is, by the Constitution, delegated to Congress, and cannot be exercised except in pursuance of an Act of Congress.

Marbury v. *Madison*, 1 Cranch, 137; *In re Metzger*, 5 How., 191; *In re Kaine*, 14 How., 119.

The power to dispose of public lands infraterritorially, and for individual ownership, by treaty, never was exercised by England, France or Spain on this Continent; was not during the Continental Congress, under the Articles of Confederation, nor until recently under our Constitution.

It is not a subject of treaty jurisdiction. It is made legislative by the Constitution. It is not necessary that there should be any such treaty power. But the question is not one of necessity, but of constitutional law.

Johnson v. *McIntosh*, 8 Wheat., 587; *Bagnell* v. *Broderick*, 13 Pet., 450; *Wilcox* v. *Jackson*, 13 Pet., 517; *Cherokee Nat.* v. *Ga.*, 5 Pet., 44; *U. S.* v. *Nicoll*, Paine (C. C.), 649; *Foster* v. *Neilson*, 2 Pet., 307; *U. S.* v. *Fitzgerald*, 15 Pet., 421; 2 Am. L. Rev., 385; *Sumner* v. *Coleman*, 23 Ind., 91; *Irvine* v. *Marshall*, 20 How., 558 (61 U.S., XV., 994); *People* v. *Folsom*, 5 Cal., 373.

Now, having before us the judicial authorities, the opinions of elementary writers, of statesmen and of the learned in national and international and constitutional law, the principles stated and arguments already advanced, and with all history in view, the unerring and unanswerable logic of them all leads to the conclusion that the legislative power to sell the public lands is supreme in the court of last resort, and exclusively so even as against an Indian treaty, which, in contravention of it, undertakes, by terms in form as operative *in præsenti*, as would be "*dedi et concessi*" to a party named, for the

reasons stated, and some of which may be condensed as follows:

I. The public lands are the property of the United States by an allodial title in fee simple, and from the nature of the case no authority can sell but that of the United States, the owners. The sale being infraterritorial, is not within the scope of the treaty-making power, which is international, or if it exists as to Indians, can only relate to their title by occupancy, and not to the fee.

II. The power to dispose of the public lands is given expressly as a delegated power to Congress by the Constitution, article IV., section 3, and is given in the same words which give other legislative powers, conceded by all jurists, writers and statesmen to be infraterritorially supreme and exclusive, as the power to declare war, etc. The maxim applies. *Noscitur a sociis.*

III. The power to sell lands is by universal consent admitted a legislative power, and as to this, and other legislative powers the Constitution, in express terms, says that all legislative powers so given are vested in Congress; and if all legislative power is so given, there can be no hostile or conflicting power.

IV. The legislative power to sell is in the same clause which gives the power to establish territorial governments, and by its connections and for the same reasons, like it, must be exclusive. If the treaty power can usurp supremely the one, it may both, and thus indefinitely establish and continue a territorial government in a form to destroy both the delegated power to sell and to admit new States. If the legislative delegated power to admit new States excludes a treaty power to establish territorial governments, the legislative delegated power to sell excludes a treaty power to sell.

V. The delegated power to dispose of the public lands confers the same high legislative power which was exercised solely by the legislative authority of the States prior to the deeds of cession to the United States. Congress, under the Articles of Confederation, had or exercised the same exclusive legislative authority, and there was no treaty power of sale, and no treaty power independent of legislative authority.

In England the prerogative power of sale was only concurrent and subordinate to the supreme legislative power to sell.

Even in the American Colonies before the Revolution, the public lands "Could be granted by the Crown or Colonial Legislatures." *Mitchel v. U. S.*, 9 Pet., 713.

The delegated power to sell was inserted in the Constitution as a substitute for the previously exercised exclusive legislative power of sale, and for the purpose of excluding all executive authority over the public lands.

VI. In England the King, as lord paramount, clothed with the fee of the public domain exercised by reason of that theory a prerogative power of sale. But it was not a treaty power. He could sell without the aid of a treaty. If a treaty was made authorizing a sale, it only extinguished the Indian right of occupancy, and it was the union of this " with the ultimate fee which passed from the Crown by the license." *Mitchel v. U. S.* (*supra*). The license was a prerogative, not a treaty power.

In this country our titles are allodial. The fee is not in the President. He can make no grant. The treaties and deeds of cession all convey to the United States. The Constitution, in giving Congress power to sell, regarded the feudal theory that the fee and power of sale were in the King as an evil, and abolished it. The fee and the power of sale alike fell from the executive authority, and became exclusively subject to legislative power.

VII. An Indian treaty cannot sell or authorize a sale, because the Indians have no fee; and being unable to give what they do not have, can neither give nor assent to the exercise of power over a subject-matter in which they have no interest.

Bk. v. Earle, 13 Pet., 521.

As they have no title and no power to confer, the President and Senate can, as to the fee, receive none from them, nor can any officer designated.

As the President and Senate, unlike the King, have no separate title, fee or power over the lands, they can neither give nor exercise any. Where neither side has any power or title, two incapacities, having a nothing, cannot confer power as to anything.

There can be no union of power over a subject, unless it be one in which each has or may have an interest, always essential to grant a fee. An Indian Nation, as such, is, unaided by Act of Congress, incapable of receiving a fee; for if so, they could sell to foreign nations or individuals of their own right. The treaty power never did exist and never was exercised, except over a subject matter the title of which might be received by either party to the compact. The Indians, as tribes, by our policy, are incapable of receiving the right of soil or sovereignty, and these alone have been the subject-matter of treaty jurisdiction, and that only, if at all, as a question of boundary and between nations.

VIII. There can be no supreme power by an Indian treaty to sell the lands, because so to hold would destroy the unquestioned exclusive power of Congress to admit new States organized over territory owned by the United States. If a treaty can go beyond the settlement of an external boundary with a foreign nation, and sell our infraterritorial possession, it can select its vendees and sell to a foreign government or to savage tribes, and thus render the erection of States impossible. And it cannot be allowed that any delegated power of Congress can, by any other department, be destroyed even by indirection.

IX. As the Indians have no fee, and the President and Senate alone no power to sell, if by a treaty with an Indian tribe they can sell, it is by virtue of their inherent and supreme right to contract in relation to lands of the United States, whether in their occupancy or not, and without reference to location. And if they have such powers, they can by treaty buy or authorize a sale of lands, no matter where situated, to individuals or foreign nations, to alien enemies or Chinese settlers, or buy or sell all our personal and real property, the navy, the Capitol and its grounds, the fee of which is in the United States.

X. No jurist, writer or statesman has ever claimed that a treaty could, infraterritorially,

usurp the place or perform the duties of an express delegated power, but such a power has been denied and repudiated by them all.

XI. As an absolute power, conferred by the Constitution, cannot rest for its authority upon an Act of Congress, nor be abolished nor its exercise prohibited, it is proved by the concurrent voice of every department of the Government that there is no constitutional infraterritorial treaty power of sale. The many Acts of Congress authorizing Indian treaties disprove it.

The almost unanimous vote of both Houses of Congress, Mar. 1, 1871, to the conference committee report on the Indian Appropriation Bill, with a clause prohibiting Indian treaties, furnishes three hundred oaths, including the oaths of the treaty-making Senate, that there is no such constitutional power.

And the many Acts of Congress, regulating trade and intercourse with the Indian Tribes, prove that they are a subject people, liable to legislative control of Congress; and as to them, there is no constitutional treaty power supreme over the legislative will as to the public lands.

XII. The Constitution gives to the President power, which legislation cannot take away (3 Writings of Madison, 268; 4 *Ib.*, 370), to "appoint ambassadors and other public ministers;" officers known to international law and with power to make international treaties. It provides no such officers to make Indian treaties, but leaves them as subjects of legislative power. Indian affairs have never been mentioned by the Department of State intrusted with international subjects.

The Constitution, therefore, does not, without legislation, authorize Indian treaties, and this whole subject is controlled by Acts of Congress.

The Constitution, then, gives no power by Indian treaty to dispose of the public lands. It cannot, unless our whole history is false, the testimony of the men who made the Constitution untrue, and the jurists and statesmen who founded and have conducted the Republic through its entire career, are all mistaken.

Messrs. Willard P. Hall and **B. R. Curtis,** for appellee:

1. The Cherokee Nation of Indians is a State, with which treaties may be made by the President and Senate of the United States.

Cherokee Nat. v. *Ga.*, 5 Pet., 15; *Worcester* v. *Ga.*, 6 Pet., 581.

2. We have made treaties with Indians ever since we have had a Government. By entering into those treaties, we have admitted the power of these people to bind themselves, and to impose obligations upon us. After the lapse of more than three quarters of a century, since treaties with the Indians have been solemnly ratified by the General Government, it is too late to deny their binding force.

Worcester v. *Ga.* (*supra*).

3. The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was intended to extend to all those subjects which, in the intercourse of nations, had usually been the subjects of negotiation and treaty; and which are consistent with the nature of our government, and the distribution of power between the General and State Governments.

Holmes v. *Jennison*, 14 Pet., 569; 1 Kent, Com., 165, 166; Story, Const., sec. 1508; Annals of Congress, 14th Cong., 1st sess. 1815, 1816, pp. 489, 526, 564, 639; Works of Hamilton, vol. I., pp. 501–528; Annals of Congress, 4th Cong., 1st sess., 1795, 1796, p. 760; Calhoun's Works, vol. I., p. 202; 5 Cal., 384; Duer, Const. Jur., p. 228, *et seq.*; 2 Yerg., 439.

4. There is nothing in the Constitution which prohibits the treaty making power to dispose of the property of the United States, either by a treaty with foreign nations or Indian Tribes. The power given to Congress to dispose of the territory or other property of the United States, is not a limitation of the treaty making power. The power of Congress is a power to make laws to be executed municipally, without consultation or agreement with foreign nations or Indian Tribes. Congress cannot dispose of our territory by a compact with a foreign nation, because that would be making a treaty, and Congress cannot make a treaty. When, therefore, the President and Senate dispose of property of the United States by contract with foreign nations or Indian Tribes, they are not invading any power of Congress; they do not legislate, they make a treaty.

5. The land in suit was not subject to the preemption laws when complainant settled upon it. The preemption laws did not extend to it, and even if they did, the Treaties of 1866 and 1868 provide a mode of disposing of said lands, inconsistent with the right of preemption; and, to that extent, supersede the preemption law under which the complainant claims, the treaty being subsequent to the law. It is true that the effect of treaties and Acts of Congress, when in conflict, is not settled by the Constitution, but the question is not involved in any doubt as to its proper solution. A treaty supersedes or repeals all prior Acts of Congress which are repugnant to it.

Foster v. *Neilson*, 2 Pet., 314; *Cherokee Tobacco*, 11 Wall., 621 (78 U. S., XX., 229).

6. A treaty may convey to the grantee a good title to lands belonging to the United States. Such title is valid without an Act of Congress confirming it; and not only is this so, but Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.

6 Wall., 89 (73 U. S., XVIII., 729); 23 How., 457 (64 U. S., XVI., 584); 9 Pet., 711; 10 How., 442; 5 Wall., 737 (72 U. S., XVIII., 667); 6 Pet., 558; 1 Black, 355 (66 U. S., XVII., 92); 4 How. (Miss.), 559; 4 Blackf., 371; 2 Yerg., 439; 4 McLean, 418; 1 Kan., 394; 2 Kan., 198, 224, 225; *Parker* v. *Winsor*, 5 Kan., 367.

7. The treaties under which defendant claims title and which are referred to in complainant's petition, have been sanctioned by Acts of Congress. The Treaty of 1835, with the Cherokees, was recognized as valid by the Act entitled "An Act Making Further Appropriations for Carrying into Effect Certain Indian Treaties," approved July 2, 1836. The Treaties of 1866 and 1868 were recognized as valid, and the provisions therein contained for the sale of the Cherokee neutral lands were sanctioned by section 4 of the Indian Appropriation Bill, which was approved July 27, 1868, 5 Stat. at L., 73; 16 Stat. at L., 359.

In fact, an Act of Congress of date Mar. 3, 1863, authorized the President of the United

States to enter into treaties with the Indians of Kansas for the extinguishment of the Indian titles to the land claimed by them.

12 Stat. at L., 793, see, also, Kansas-Nebraska Act, 10 Stat. at L., 283, 284.

8. The land in suit did not belong to the United States at the time the Treaties of 1866 and 1868 were made. It was granted to the Cherokees in fee simple by patent, in 1838, issued by the President of the United States in accordance with the provisions of the Treaty of 1835.

9. If there is a condition or proviso in the patent of 1838, reducing the estate of the Cherokee Indians in the lands thereby conveyed, to less than a fee, that condition or proviso is a nullity, it being in violation of the terms of the Treaty under which it was issued. A condition in violation of law is void, and the estate of the grantee becomes absolute.

Art. 2, Treaty with the Cherokees of 1835, 7 Stat. at L., 480; 4 Kent, Com., 130.

10. The allegations in complainant's petition in reference to the abandonment by the Cherokees of the land in suit, are entitled to no weight. They are based upon a proviso in the patent of 1838, which stipulates that said land shall revert to the United States, if the Cherokee Nation abandons the same. This is a condition subsequent, which no one but the grantee can take advantage of.

4 Kent, Com., 127; *Kennett* v. *Plummer*, 28 Mo., 145; *Cooper* v. *Roberts*, 18 How., 181 (59 U. S., XV., 341).

Moreover, this condition was waived by the Treaties of 1866 and 1868.

11. There is nothing in the position that the sale to the defendant is void, for the reason that he purchased only a portion of the lands described in the Treaty of 1866 at $1 per acre, while the Treaty itself did not authorize a sale of any less than the whole of said lands at that price. The contract of defendant was ratified in express terms by the supplemental Treaty of 1868, and his patent was issued under and by virtue of the last mentioned Treaty.

12. To say that the Treaties of 1866 and 1868 authorized the sale of nothing but the right of the Indians to occupy the land described in said Treaties, and that, by the very sale itself, that right was destroyed, would be to make the President and Senate parties to a gross fraud, and would do violence to the plain meaning of language.

Mr. Justice **Clifford** delivered the opinion of the court.

Absolute title to the premises in controversy is claimed by the complainant, under the following alleged state of facts: That the land, on the 12th of February, 1867, was public land, to which the Indian title had been extinguished; that he, the complainant, having the qualifications of a preemptor, on that day settled upon the land and took possession of the same; that he had acquired the legal and equitable right to enter the same at the proper land-office under the preemption laws; that he then made settlement on the land for the purpose of entering it under the said laws, and then took and has ever since had and now has open, notorious, adverse, exclusive and rightful possession of the premises; that, at the time he took possession of the tract, the Tribe of Cherokee Indians did not live in the State and have not since lived there; that no individual Indian of the Tribe lived on or near the premises, and that the tract was never settled upon by any person until it was taken possession of by the complainant; that he took possession of the land at the time and has continued to occupy it without any objection from the Tribe of Indians or any one of the members of the Tribe; that he is the head of a family and citizen of the United States, and that he is not the owner of three hundred acres of land in any other State or Territory, nor has he settled on or improved the land for the purpose of speculation, but in good faith to appropriate it to his own exclusive use and benefit; that he has not, directly nor indirectly, made any contract or agreement in any way or manner, with any persons whatever, by which the title he may acquire will inure, in whole or in part, to any person except himself; that he has erected a dwelling-house thereon, and made other lasting and valuable improvements of the value of $25,000; that he has not heretofore had any preemption right, nor did he at any time quit or abandon a residence on other land to reside on this tract; nor is the tract within any of the exceptions specified in the 10th section of the Act "granting preemption rights." 5 Stat. at L., 455.

He admits, however, that there was no public survey of the tract returned and approved until a later period; that no plat or survey of the tract made by authority has ever been returned to the office of the register and receiver, or to the office of the Surveyor-General; that the only record of the survey is in the office of the Commissioner of the General Land Office, and that no instructions have ever been given to the register and receiver respecting the tract by the Secretary of the Interior. But he alleges that he has at all times been, and still is, ready and willing to make proof before the register and receiver, of his settlement and improvements upon the tract, and to pay therefor the price of $1.25 per acre, and that he has tendered such proof and payment, and that the register and receiver have at all times refused to take such evidence or accept pay for the land.

Based upon these several allegations, the claim of the complainant is, that the right has accrued to him to enter said land under preemption laws of the United States, and his alleged grievance is, that the respondent has commenced an action of ejectment against him for the purpose of ejecting him from the lands, and he prays that the respondent, his attorneys and counselors at law may be restrained by an injunction from proceeding further against him in the said action of ejectment, and for other relief.

Preliminary to the before mentioned allegation, the complainant sets forth in considerable fullness what is alleged in the title claimed by the respondent, and he avers that there is no other authority of law for the issue of the patent to the respondent, of the 31st of October, 1868, under which he claims the premises in controversy, than the several patents, treaties and contracts, set forth and referred to in the bill of complaint.

Service was made and the respondent appeared and demurred to the bill showing the following causes of demurrer: (1) Because the

facts set forth in the bill do not constitute any cause of action against the respondent. (2) Because the facts set forth in the bill are not sufficient to entitle the complainant to any relief in a court of equity. (3) Because the bill of complaint, if true, shows that the complainant has a complete and adequate remedy in a court of law.

Subsequently, the parties were heard and the court sustained the demurrer, and entered a decree for the respondent dismissing the bill of complaint; whereupon the complainant appealed to this court.

Concessions made in the bill favorable to the respondent are to be regarded as facts undisputed by the complainant, and matters well pleaded, in favor of the complainant are, in view of the demurrer, to be considered as facts admitted by the respondent. Viewed in that light, as the pleadings must be, it will be most convenient to inquire, in the first place, whether the title claimed by the respondent is a valid one, as if it is, the decree must be affirmed, and if it is not, the decree must be reversed, and the complainant may perhaps be entitled to relief.

Disturbances, and in some instances collisions, of a threatening character, occurred between the Cherokee Nation of Indians and certain citizens of the States or Territories in which they resided, in consequence of which the United States and the Cherokee Nation became anxious to make some arrangement whereby the difficulties which had arisen by the residence of the Indians within the settled parts of the United States, under the jurisdiction and laws of the States or territorial governments, might be terminated and adjusted. Measures of various kinds had been devised and tried without effectually accomplishing the object, as will be seen by reference to some of the early treaties with that Nation and the Acts of Congress upon the subject. 7 Stat. at L., 311; 7 Stat. at L., 414.

Treaties of the kind were concluded with that Nation of Indians on the 6th of May, 1828, and on the 14th of February, 1833, in both of which the United States agreed to possess the Cherokees of seven million acres of land west of the Mississippi River, bounded as therein described, and to guaranty it to them forever, upon the terms and conditions therein stipulated and agreed. Enough appears in those Treaties to show that it was the policy of the United States to induce the Indians of that Nation, resident in any of the States or organized Territories of the United States, to surrender their lands and possessions to the United States, and emigrate and settle in the territory provided for them in those Treaties. Sufficient is known, as matter of history, to justify the remark, that those measures, as well as some of like kind of an earlier date, were unsuccessful, and that the difficulties continued and became more and more embarrassing. *Cherokee Nation* v. *Ga.*, 5 Pet., 15; *Worcester* v. *Ga.*, 6 Pet., 515.

Prior measures having failed to accomplish the object of quieting the disturbances or removing the difficulties, the United States, on the 29th of December, 1835, concluded a new Treaty with the Cherokee Nation, with a view to re-unite their people in one body and to secure to them a permanent home for themselves and their posterity in the country selected for that purpose, without the territorial limits of the state sovereignties, and where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition. 7 Stat. at L., 478.

By the 1st article of the Treaty the Cherokee Nation "cede, relinquish and convey to the United States all the lands owned, claimed or possessed by them east of the Mississippi River," and released all their claims for spoliations of every kind, for and in consideration of the sum of $5,000,000, to be expended, paid and invested in the manner stipulated and agreed upon in other articles of the Treaty.

Reference is made in the second article of the Treaty to the respective articles of the two before mentioned Treaties, in which the United States agreed to possess the Cherokees of seven million acres of land, situated and bounded as therein described, and guarantied it to them forever upon the terms and conditions therein stipulated and agreed. Apprehension, it seems, was felt by the Cherokees that the cession contained in those Treaties, and confirmed in the new Treaty, did not contain a sufficient quantity of land for the accommodation of the whole nation on their removal, and in view of that fact the United States, in consideration of $500,000, covenanted and agreed to convey to the said Indians and their descendants, by patent in fee simple, a certain tract of land, situated and bounded as therein described, estimated to contain eight hundred thousand acres of land, ever afterwards known as the Cherokee neutral lands, and it is admitted in the bill of complaint that it includes the tract in controversy.

Authority was conferred upon the President by the 1st section of the Act of the 28th of May, 1830, to cause so much of any territory belonging to the United States, west of the Mississippi, not included in any State or organized Territory, and to which the Indian title had been extinguished, "as he may judge necessary," to be divided into a suitable number of districts, for the reception of such Tribes or Nations of Indians as may choose to exchange the lands where they now reside, and to remove there, and to cause each of said districts to be so described by natural or artificial boundaries as to be easily distinguished from every other.

Power is also conferred upon the President by the 2d section of the Act to exchange any or all of such districts with any Tribe or Nation of Indians residing within the limits of any of the States or Territories, for the whole or any portion of the territory, claimed and occupied by such Tribe or Nation, within the bounds of any one or more of the States or Territories, subject to certain conditions therein prescribed. Section 3 provides that in making such exchanges the President may solemnly assure the tribe or nation that the United States will forever secure and guaranty to them and their heirs and successors the country so exchanged with them, and that, if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same, provided that such lands shall revert to the United States if the Indians become extinct or abandon the territory.

Much reason exists to suppose that Congress in framing those provisions had in view the

stipulations of the Treaty concluded two years earlier, and it is equally probable that the President and Senate in negotiating and concluding the two Treaties of later date were largely governed by the several provisions in that Act of Congress, but they were not controlled by these enactments, as is evident from the fact that the later of the two contains many stipulations differing widely from the provisions of that Act, as, for example, the United States, in the supplemental article enlarging the quantity of land set apart for the accommodation of the Nation, expressly covenant and agree to convey the additional tract to the said Indians and their descendants by patent, in fee simple title, and the article does not contain any such provision as that contained in the 3d section of the Act of Congress, that the land shall revert to the United States if the Indians become extinct or abandon the territory. 4 Stat. at L., 412; 7 Stat. at L., 480.

Attempt is made in argument to show that the last named Treaty was negotiated by force of the Act of Congress to provide for an exchange of lands with the Indians, but it is clear that the proposition cannot be sustained, as the Treaty differs widely in many respects from the provisions of that Act of Congress. Doubtless the intent and purpose were the same—to quiet the disturbances and to induce the Indians remaining in the States and Territories to emigrate and settle in the district of country set apart for them without the limits of the several States and organized Territories—but the Treaty, though concluded to promote the same object as the Act of Congress, adopts very different instrumentalities. It is a Treaty to confirm to the Indians the possession of the seven million acres of land previously granted to the Nation, and to purchase their lands east of the Mississippi River for the sum of $5,000,000, to be expended, paid and invested in the manner therein stipulated and provided.

Such prior grant of land was made or defined under the two Treaties before mentioned to secure a new home for the Indians without the limits of the several States and Territories, and to induce the Indians still residing within those limits to emigrate and settle in the country long before set apart for that purpose. Large numbers of the Cherokees emigrated and settled there under the Treaty of the 8th of July, 1817, and measures of various kinds had been adopted, at later periods, to induce the residue of the nation to follow those who had accepted the proffered protection, but without much success. 7 Stat. at L., 156.

Even treaties proved ineffectual, as one after another failed to accomplish the desired end. They would not emigrate without compensation for their improvements, and many were reluctant to accept any of the terms proposed, upon the ground that the quantity of land set apart for the accommodation of the whole nation was not sufficient for the purpose. Twice the United States offered the seven million acres of land, with other inducements, but the terms, though formally accepted, did not have the effect to accomplish the end. Experience showed that better terms were required, and the government agreed to purchase their lands for the consideration named in the Treaty and to convey to the Indians, in fee simple title, the additional tract of eight hundred thousand acres, for $500,000, to be deducted from the consideration stipulated to be paid for the purchase of their lands.

Other important stipulations are contained in the Treaty, among which are the following: (1) That the United States agree that the lands ceded shall all be included in one patent, executed by the President, to the Cherokee Nation, according to the provision of the beforementioned Act of Congress. (2) That the United States agree to extinguish, for the benefit of the Cherokees, the titles to the reservations within their country, made in the Osage Treaty to certain half-breeds, and for that purpose the United States agree to pay to the persons to whom the titles belong the sum of $15,000, according to the schedule accompanying the treaty. (3) That the United States shall pay the American Board of Commissioners for Foreign Missions, for the improvements they have on the ceded country, the sums at which the same shall be appraised, and that the money allowed for the improvements shall be expended in schools among the Osages, and for improving their condition. (4) That the land ceded to the Cherokee Nation shall, in no future time, be included, without their consent, within the territorial limits or jurisdiction of any State or Territory. (5) That the United States agree to protect the Cherokee Nation from domestic strifes and foreign enemies and against intestine wars between the several Tribes. (6) That the United States agree to remove the Cherokees to their new homes and to subsist them for one year after their arrival. (7) That the United States shall liquidate claims for reservations and pay the sums awarded to the claimants; and many other stipulations which were of great value and highly beneficial to the Cherokee Nation.

Valid treaties were made by the President and Senate during that period with the Cherokee Nation, as appears by the decision of this court in several cases. *U. S.* v. *Rogers*, 4 How., 567. Indeed, treaties have been made by the United States with the Indian Tribes ever since the Union was formed, of which numerous examples are to be found in the seventh volume of the public statutes. *Cherokee Nation* v. *Georgia* [*supra*]; *Worcester* v. *Georgia* [*supra*]. Indian Tribes are States in a certain sense, though not foreign States, or States of the United States, within the meaning of the second section of the third article of the Constitution, which extends the judicial power to controversies between two or more States, between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens or subjects. They are not States within the meaning of any one of those clauses of the Constitution, and yet in a certain domestic sense and for certain municipal purposes, they are States, and have been uniformly so treated since the settlement of our country and throughout its history, and numerous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by Congress in the spirit of those

treaties, and the Acts of our Government, both in the executive and legislative departments, plainly recognize such Tribes or Nations as States; and the courts of the United States are bound by those Acts. *Doe* v. *Braden*, 16 How., 635. *Fellows* v. *Blacksmith*, 19 How., 372 [60 U. S., XV., 686]; *Garcia* v. *Lee*, 12 Pet., 519.

Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur and, inasmuch as the power is given in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States. *Holmes* v. *Jennison*, 14 Pet., 569; 1 Kent, Com., 166; 2 Story, Const., sec. 1508; 7 Hamilton's Works, 501; Duer, Jur., 229.

Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory, and claimed the right to govern themselves by their own laws, usages and customs. Guided by nautical skill, enterprising navigators were conducted to the New World. They found it, says Marshall, *Ch. J.*, in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing. Expeditions were fitted out by all the great maritime powers of the Old World, and they visited many parts of the newly discovered continent, and each made claim to such part of the country as they visited. Disputes arose and conflicts were in prospect, which made it necessary to establish some principle which all would acknowledge, and which should decide their respective rights in case of conflicting pretensions. Influenced by these considerations they agreed that discovery should determine the right; that discovery should give title to the government by whose subjects, or by whose authority it was made, against all other governments, and that the title so acquired might be consummated by possession. *Johnson* v. *McIntosh*, 8 Wheat., 573. As a necessary consequence the principle established gave to the nation making the discovery the sole right of acquiring the soil and of making settlements on it. Obviously this principle regulated the right conceded by discovery among the discoverers, but it could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a more ancient discovery. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. Colonies were planted by Great Britain, and the United States, by virtue of the Revolution and the Treaty of Peace, succeeded to the extent therein provided to all the claims of that Government, both political and territorial. Throughout, the Indians, as Tribes or Nations, have been considered as distinct, independent communities, retaining their original natural rights as the undisputed possessors of the soil, from time immemorial, subject to the conditions imposed by the discoverers of the continent, which excluded them from intercourse with any other government than that of the first discoverer of the particular section claimed. They could sell to the government of the discoverer, but they could not sell to any other governments or their subjects, as the government of the discoverer acquired, by virtue of their discovery, the exclusive preemption right to purchase, and the right to exclude the subjects of all other governments, and even their own, from acquiring title to the lands.

Enough has already been remarked to show that the lands conveyed to the United States by the Treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs. *Mitchel* v. *U.S.*, 9 Pet., 748. Evidently, therefore, the Cherokees were competent to make the sale to the United States, and to purchase the lands agreed to be conveyed to them by the second article of the Treaty. Both parties concede that the title of the United States to the tract known as the Cherokee neutral lands was perfect and complete, and that the tract includes the land in controversy. Title to that tract was acquired by the United States as a part of the Louisiana purchase from the French Republic. By the Treaty between the United States and the French Republic of April 30, 1803, the chief executive officer of that republic ceded the said Territory to the United States, with all its rights and appurtenances, forever. 8 Stat. at L., 200. When the President took possession of the Territory the absolute fee simple title and right of sovereignty and jurisdiction became vested in the United States as the successor of the original discoverer, subject only to the Indian title and right of occupancy as universally acknowledged by all the departments of our government throughout our history. All agree that this land then, and for many years thereafter, was occupied by the Osage Indians. On the 2d of June, 1825, the Osage Tribes, by the Treaty of that date, ceded to the United States all their right, title, interest and claims to the lands lying * * * west of the State of Missouri, with such reservations and for such considerations, as are therein specified, which, it is conceded, extinguished forever the title of the Osage Indians to the neutral lands. 7 Stat. at L., 240.

Prior to the Treaty of the 8th of July, 1817, the Cherokees resided east of the River Mississippi. Pursuant to that Treaty they were divided into two parties, one electing to remain east of the Mississippi and the other electing to emigrate and settle west of it; and it appears that the latter made choice of the country on the Arkansas and White Rivers, and that they settled there upon the lands of the United States described in the Treaty. 7 Stat. at L., 157.

Possessed as the United States were of the fee simple title of the neutral lands, discharged of the right of occupancy by the Osage Indians, it was clearly competent for the proper authorities of the United States to convey the same to the Cherokee Nation. Subsequent Acts of the United States show that the stipulations, covenants and agreements of the Treaty in question were regarded by all the departments of the government as creating binding obligations, as fully appears from the fact that they all concurred in carrying the provisions into full effect. *Minis* v. *U. S.*, 15 Pet., 448; *Porterfield* v. *Clark*, 2 How., 76. Appropriations were made for surveys, and surveys were ordered, and plats were made; and on the 1st of December, 1838, a patent for the land promised was issued by the President in full execution of the second and third articles of the Treaty. Among other things it is recited in the patent that it is issued in execution of the agreements and stipulations contained in the said several treaties, and that the United States do give and grant unto the Cherokee Nation the two described tracts of land as surveyed, containing the whole quantity therein mentioned; to have and to hold the same, together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation forever, subject to certain conditions therein specified, of which the last one is that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the premises.

Objection is made by the appellant that the Treaty was inoperative to convey the neutral lands to the Cherokee Nation, which may well be admitted, as none of its provisions purport, *proprio vigore*, to make any such conveyance. Nothing of the kind is pretended, but the stipulation of the second article of the Treaty is that the United States covenant and agree to convey to the said Indians and their descendants, by patent in fee simple, the described additional tract, meaning the tract known as the neutral lands; and the third article of the Treaty stipulates that the lands ceded by the Treaty, as well as those ceded by a prior treaty, shall all be included in one patent, to be executed to the Cherokee Nation of Indians by the President, according to the provisions of the before mentioned Act of Congress. *Gaines* v. *Nicholson*, 9 How., 356; *Ins. Co.* v. *Canter*, 1 Pet., 542.

Suppose that is so, still it insisted that the President and Senate, in concluding such a treaty, could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress, which cannot be admitted. *U. S.* v. *Brooks*, 10 How., 442; *Meigs* v. *McClung*, 9 Cranch, 11. On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an Act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political. *Wilson* v. *Wall*, 6 Wall., 89 [73 U. S., XVIII., 729]; *Ins. Co.* v. *Canter*, 1 Pet., 542; *Doe* v. *Wilson*, 23 How., 461 [64 U. S., XVI., 585]; *Mitchell* v. *U. S.*, 9 Pet., 749; *U. S.* v. *Brooks*, 10 How., 460; *Kansas Indians*, 5 Wall., 737 [72 U. S., XVIII., 667]; 2 Story. Const., sec 1598; *Foster* v. *Neilson*, 2 Pet., 253; *Crews* v. *Burcham*, 1 Black, 356 [66 U. S., XVII., 92]; *Worcester* v. *Ga.*, 6 Pet., 562; *Blair* v. *Pathkiller*, 2 Yerg., 407; *Harris* v. *Barnett*, 4 Blackf., 369. Much reason exists in view of those authorities, and others which might be referred to, for holding that the objection of the appellant is not well founded, but it is not necessary to decide the question in this case, as the Treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized by Congress as valid. *Ins. Co.* v. *Canter*, 1 Pet., 511; Lawr. Wheat., 48. Congress, on the 2d of July, 1836, appropriated $4,500,000 for the amount stipulated to be paid for the lands ceded by the Cherokees in the first article of the Treaty, deducting the cost of the the land to be conveyed to them west of the Mississippi under the second article of the same Treaty, which is the precise amount stipulated to be paid for the concession, deducting the consideration which the Indians agreed to allow for the neutral lands. Appropriations were also made by that Act to fulfill and execute the stipulations, covenants and agreements contained in the fourth, eleventh, seventeenth and eighteenth articles of the Treaty, and for the removal of the Cherokees, and for surveying the lands set apart by treaty stipulations for the Cherokee Indians west of the Mississippi River. 5 Stat. at L., 78. Commissioners were appointed to adjudicate the claims of individual Cherokees, as provided in the thirteenth article of the Treaty, and their compensation was fixed by Congress, and appropriations were made by Congress for that purpose. Such a Board was duly constituted, consisting of two commissioners, and it was made the duty of the Attorney-General, in case of their disagreement, to decide the point in difference. 4 Ops. Attys-Gen., 580, 598, 613, 615–621; 10 Stat. at L., 673, 686; 11 Stat. at L., 80.

Prior treaties between the United States and the Cherokee Nation proving to be insufficient to protect and promote their respective interests, the contracting parties, on the 15th of July, 1866, made a new Treaty of that date, by the first article of which they declare that the pretended treaty made with the so-called Confederate States by the Cherokee Nation, on the 7th of October, 1861, is void which is all that need be said upon the subject, as both parties repudiate the instrument and concur that it is of no effect. 14 Stat. at L., 799; 14 Stat. at L., 326; 14 Stat at L., 499. Many new regulations are there adopted and many new stipulations made, but they are all, or nearly all, foreign to the present investigation, except the provision contained in the seventeenth article. By that article the Cherokee Nation ceded, in trust, to the United States the tract of land which was sold to the Cherokees by the United States under the provisions of the second article of the prior Treaty, and also that strip of the land ceded to the nation by the fourth article of said Treaty, which is included in the State where the land is situated, and the Cherokees consent that said lands may be included within the limits and under the jurisdiction of the said State, to be surveyed as the public lands of the United States are surveyed, under the direction of the Commissioner of the General Land Office, and that the lands shall be appraised as therein provided.

Annexed to that stipulation is a proviso that persons owning improvements and residing on the same, if of the value of $50, and it appears that they were made for agricultural purposes, may, after due proof, be entitled to buy the same at the appraised value, under the conditions therein specified. Sales of the kind may be made under such regulation as the Secretary of the Interior shall prescribe, but another proviso is annexed to the stipulation that nothing in that article shall prevent the Secretary of the Interior from selling for cash the whole of said neutral lands in a body to any responsible party for a sum not less than $800,000.

When the Treaty was submitted to the Senate the last proviso was stricken out and another was adopted in its place, as follows: that nothing in the article shall prevent the Secretary of the Interior from selling the whole of said lands, not occupied by actual settlers at the date of the ratification of the Treaty (not exceeding one hundred and sixty acres to each person entitled to preemption under the preemption laws of the United States), in a body, to any responsible party, for cash, for a sum not less than $1 per acre. Exception is there made of improvements made by actual settlers, but the amendment in one respect is more comprehensive than the original Treaty, as it extends the authority of the Secretary of the Interior to lands other than those known as the neutral lands, to which the original Treaty was confined.

Two objections are made to the title of the appellee as affected by that Treaty, in addition to those urged to show that the prior Treaty between the same parties was inoperative and invalid. It is contended by the appellant that the Cherokee possessory right to the neutral lands was extinguished by the seventeeuth article of the Treaty, which undouhtedly is correct, but the conclusion which he attempts to deduce from that fact cannot he sustained, that the Cherokee Nation abandoned the lands within the meaning of the last condition inserted in the patent by which they acquired the same from the United States.

Strong doubts are entertained whether that condition in the patent is valid, as it was not authorized by the treaty under which it was issued. By the Treaty the United States covenanted and agreed to convey the lands in fee simple title, and it may well be held that if that condition reduces the estate conveyed to less than a fee, it is void; hut it is not necessary to decide that point, as it is clear that if it is valid it is a condition suhsequent, which no one but the grantor in this case can set up under any circumstances. 4 Kent, Com., 127-130; *Cooper* v. *Roberts*, 18 How., 181 [59 U. S., XV., 341]; *Kennett* v. *Plummer*, 28 Mo., 145.

Even if the rule was otherwise, still the point could not avail the appellant, as the parties manifestly waived it in this case, nor is it true that the sale in trust by the Cherokee Nation to their former grantor constitutes such an abandonment of the premises as that contemplated by the condition inserted in the patent.

Unsupported in that proposition, the appellant in the next place contends that the provisions of the seventeenth article of the Treaty are a mere agreement that the article did not operate to convey the lands to the United States; but the court is entirely of a different opinion, as the proposition is contradicted hy the practice of the government from its origin to the present time. *Ins. Co.* v. *Canter*, 1 Pet., 542; *U. S.* v. *Brooks*, 10 How., 460.

Most of the objections urged against the prior Treaty are also urged to show that this Treaty is inoperative and invalid, to which the same answer is made as is given by the court in response to the antecedent objections.

Under that article of the Treaty a contract was made and executed, dated August 30, 1866, by the Secretary of the Interior, on behalf of the United States, and hy the American Emigrant Company, for the sale of the so-called Cherokee neutral lands, containing eight hundred thousand acres, more or less, with the limitations and restrictions set forth in that article of the Treaty as amended, on the terms and conditions therein mentioned, hut the successor of the Secretary of the Interior came to the conclusion that the sale, as made hy that contract, was illegal and not in conformity with the Treaty and the amendments thereto, and on the 9th of October of the succeeding year he entered into a new contract on behalf of the United States with the appellee for the sale of the aforesaid lands, on the terms and conditions in said contract set forth. Embarrassment to all concerned arose from these conflicting contracts, and for the purpose of removing the same all the parties came to the conclusion that it was desirable that the Emigrant Company should assign their contract, and all their right, title, claim and interest in and to the said neutral lands, to the appellee, and that he should assume and conform to all the obligations of the said Company under their said contract. All of the parties having united in that arrangement, the United States and the Cherokee Nation, on the 27th of April, 1868, adopted a supplemental article to the last named Treaty, and the same was duly ratified hy the Senate and proclaimed hy the President. 16 Stat. at L., 727. Acting through commissioners the contracting parties agreed that an amendment of the first contract should he made, and that said contract as modified should "be, and the same is hereby, with the consent of all parties, re affirmed and made valid;" that the second contract shall he relinquished and canceled hy the appellee, and that said first contract, as modified, and the assignment of the same, and the relinquishment of the second contract, "are hereby ratified and confirmed whenever said assignment of the first contract and the relinquishment of the second shall he entered of record in the Department of the Interior, and when" the appellee "shall have accepted said assignment and shall have entered into a contract with the Secretary of the Interior to assume and perform all the obligations of the Emigrant Company under said first named contract, as therein modified." Important modifications were made in the first contract, hut it is not important that they should be reproduced at this time. 16 Stat. at L., 728.

After the Indian title was extinguished by the treaty ceding the neutral lands to the United States, and before the supplemental Treaty was concluded, many settlers, it is claimed, including the appellant, went on these lands for the purpose of settlement. They took, and have continued, possession for the purpose of com-

plying with and procuring titles under the preemption laws passed by Congress, but the local land-offices were not open to them, and of course they were denied the opportunity to make proof and payment. Instead of that, patents of the lands, not belonging to actual settlers, were issued to the appellee, and it is admitted by the appellant that the patent of October 31, 1868, covers the land in controversy, and that he, the appellant, is not entitled to relief if that patent gives to the appellee a valid title.

Precisely the same objections were made to the Treaty ceding back the neutral lands to the United States, and to the supplemental Treaty, as were taken to the prior Treaty under which the United States covenanted to convey the neutral lands to the Cherokee Nation, and they must be overruled for the reasons given for overruling the objections to the prior Treaty.

Acts of Congress were subsequently passed recognizing the treaty ceding back the lands to the United States, and the supplemental Treaty as valid, and making appropriations to carry the same into effect. 15 Stat. at L., 222; 12 Stat. at L., 793; 10 Stat. at L., 283; 16 Stat. at L., 359; 5 Stat. at L., 73.

Some other objections of a purely technical character are made by the appellant to the title of the appellee, but these are satisfactorily answered in the printed argument filed in the case by the latter party, and are accordingly overruled. *Atty-Gen.* v. *Deerfield Bridge Co.*, 105 Mass., 9.

Viewed in any light, the court is of the opinion that the title to the land in controversy is in the appellee, and that there is no error in the record.

Apply the principles adopted in this case and the reasons given in support of the same, to the case of *Warner* v. *Joy*, No. 327 on the calendar, and it is clear that the decree in that case must also be affirmed, as the pleadings are substantially the same as in the case just decided, and the stipulation of the parties is that the court may take and determine the demurrer filed upon the agreements made in that case, and without further argument.

Decree affirmed in each of these two cases.

Cited—17 Wall., 253; 109 U. S., 567; 6 Sawy., 376; 5 Dill., 409; 2 McCrary, 295.

WILLIAM H. WARNER, *Plff. in Err.*,

v.

JAMES F. JOY.

(See S. C., 17 Wall., 253, *Note.*)

Holden v. Joy, ante, *p.* 523, *followed—Cherokee Treaty valid—title thereunder, good.*

The questions in this case are the same as in Holden v. Joy *ante*, p. 523, and this case is controlled by the rules of decision established in that case.

The Treaty between the United States and the Cherokee Indians, concluded July 19, 1866, is not in violation of the Constitution, which gives to Congress the power to dispose of property belonging to the United States, but is valid.

The sale to Joy in pursuance of the Treaty with the Cherokees is not void because the conditions and requirements of the Treaty were not complied with in such sale, but his title is good.

[No. 328.]

Argued Apr. 16, 17, 1872. Decided Nov. 18, 1872.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is stated by the court.

Messrs. William S. Rockwell, **Wm. Lawrence** and **B. F. Butler**, for plaintiff in error.

Messrs. W. P. Hall and **B. R. Curtis**, for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Joy, the plaintiff, alleged that he was the owner in fee of the land and tenements described in the declaration, and that the defendant, Warner, unlawfully keeps him out of the possession of the same, and he asks judgment for the recovery of the possession of the premises and for his costs.

Service was made and the defendant appeared and filed an answer setting up two defenses: 1. That the plaintiff is not the owner of the premises, as is alleged in the declaration. 2. He admits that the land was patented by the United States to the plaintiff; that he, the plaintiff, conveyed the same to a certain railroad company; and that the said railroad company subsequently conveyed the premises to the plaintiffs, and that the patents and conveyances were in due form of law; but he avers that the patent was issued by virtue of a pretended Treaty between the United States and the Cherokee Indians, concluded July 19, 1866, and he alleges that the Treaty was void, as it attempted to convey said land for the reason that, in seeking to alienate the land in question, it is in violation of the Constitution, which gives to Congress the power to dispose of that territory or other property belonging to the United States.

He also avers that the pretended sale attempted to be made to the plaintiff in pursuance of the alleged Treaty with the Cherokee Indians was also void, because the conditions and requirements of the so-called Treaty were not complied with in the pretended sale. 3. That the land, being a part of the Cherokee neutral lands, became a part of the public domain by virtue of the abandonment by the Cherokees of their right of occupancy, long anterior to the execution of said pretended Treaty. 4. That he settled on the land on the 5th of November, 1869, in good faith as a preemption claimant, and that he is entitled to the benefits of the preemption laws; that he has sought to file his declaratory statement under the Preemption Act, with the register and receiver of the proper local land office, but that they refused to receive the statement.

Subsequently, the plaintiff demurred to the second defense, and showed the following causes: 1. That the facts alleged are not sufficient to constitute a defense to the declaration. 2. That the facts stated do not constitute a defense in law to the plaintiff's cause of action. 3. That the facts stated, if any defense, constitute an equitable and not a legal defense to the action.

Both parties afterwards came and filed a stipulation waiving a jury, and consented that the issues in the case should be tried by the court. They also agreed that the issues should be tried upon the agreed statement of facts, filed in the case and made a part of the record. It appears by the agreed statement that the questions pre-

plying with and procuring titles under the pre-emption laws passed by Congress, but the local land-offices were not open to them, and of course they were denied the opportunity to make proof and payment. Instead of that, patents of the lands, not belonging to actual settlers, were issued to the appellee, and it is admitted by the appellant that the patent of October 31, 1868, covers the land in controversy, and that he, the appellant, is not entitled to relief if that patent gives to the appellee a valid title.

Precisely the same objections were made to the Treaty ceding back the neutral lands to the United States, and to the supplemental Treaty, as were taken to the prior Treaty under which the United States covenanted to convey the neutral lands to the Cherokee Nation, and they must be overruled for the reasons given for overruling the objections to the prior Treaty.

Acts of Congress were subsequently passed recognizing the treaty ceding back the lands to the United States, and the supplemental Treaty as valid, and making appropriations to carry the same into effect. 15 Stat. at L., 222; 12 Stat. at L., 793; 10 Stat. at L., 283; 16 Stat. at L., 359; 5 Stat. at L., 78.

Some other objections of a purely technical character are made by the appellant to the title of the appellee, but these are satisfactorily answered in the printed argument filed in the case by the latter party, and are accordingly overruled. *Atty Gen.* v. *Deerfield Bridge Co.*, 105 Mass., 9.

Viewed in any light, the court is of the opinion that the title to the land in controversy is in the appellee, and that there is no error in the record.

Apply the principles adopted in this case and the reasons given in support of the same, to the case of *Warner* v. *Joy*, No. 327 on the calendar, and it is clear that the decree in that case must also be affirmed, as the pleadings are substantially the same as in the case just decided, and the stipulation of the parties is that the court may take and determine the demurrer filed upon the agreements made in that case, and without further argument.

Decree affirmed in each of these two cases.

Cited—17 Wall., 253; 109 U. S., 567; 6 Sawy., 376; 5 Dill., 409; 2 McCrary, 295.

WILLIAM H. WARNER, *Plff. in Err.*,

v.

JAMES F. JOY.

(See S. C., 17 Wall., 253, *Note.*)

Holden v. Joy, ante, *p.* 523, *followed—Cherokee Treaty valid—title thereunder, good.*

The questions in this case are the same as in Holden v. Joy *ante*, p. 523, and this case is controlled by the rules of decision established in that case.

The Treaty between the United States and the Cherokee Indians, concluded July 19, 1866, is not in violation of the Constitution, which gives to Congress the power to dispose of property belonging to the United States, but is valid.

The sale to Joy in pursuance of the Treaty with the Cherokees is not void because the conditions and requirements of the Treaty were not complied with in such sale, but his title is good.

[No. 328.]

Argued Apr. 16, 17, 1872. Decided Nov. 18, 1872.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is stated by the court.

Messrs. William S. Rockwell, **Wm. Lawrence** and **B. F. Butler**, for plaintiff in error.

Messrs. W. P. Hall and **B. R. Curtis**, for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Joy, the plaintiff, alleged that he was the owner in fee of the land and tenements described in the declaration, and that the defendant, Warner, unlawfully keeps him out of the possession of the same, and he asks judgment for the recovery of the possession of the premises and for his costs.

Service was made and the defendant appeared and filed an answer setting up two defenses: 1. That the plaintiff is not the owner of the premises, as is alleged in the declaration. 2. He admits that the land was patented by the United States to the plaintiff; that he, the plaintiff, conveyed the same to a certain railroad company; and that the said railroad company subsequently conveyed the premises to the plaintiffs, and that the patents and conveyances were in due form of law; but he avers that the patent was issued by virtue of a pretended Treaty between the United States and the Cherokee Indians, concluded July 19, 1866, and he alleges that the Treaty was void, as it attempted to convey said land for the reason that, in seeking to alienate the land in question, it is in violation of the Constitution, which gives to Congress the power to dispose of that territory or other property belonging to the United States.

He also avers that the pretended sale attempted to be made to the plaintiff in pursuance of the alleged Treaty with the Cherokee Indians was also void, because the conditions and requirements of the so called Treaty were not complied with in the pretended sale. 3. That the land, being a part of the Cherokee neutral lands, became a part of the public domain by virtue of the abandonment by the Cherokees of their right of occupancy, long anterior to the execution of said pretended Treaty. 4. That he settled on the land on the 5th of November, 1869, in good faith as a preemption claimant, and that he is entitled to the benefits of the pre-emption laws; that he has sought to file his declaratory statement under the Preemption Act, with the register and receiver of the proper local land office, but that they refused to receive the statement.

Subsequently, the plaintiff demurred to the second defense, and showed the following causes: 1. That the facts alleged are not sufficient to constitute a defense to the declaration. 2. That the facts stated do not constitute a defense in law to the plaintiff's cause of action. 3. That the facts stated, if any defense, constitute an equitable and not a legal defense to the action.

Both parties afterwards came and filed a stipulation waiving a jury, and consented that the issues in the case should be tried by the court. They also agreed that the issues should be tried upon the agreed statement of facts, filed in the case and made a part of the record. It appears by the agreed statement that the questions pre-

sented for decision are, in all respects, the same as those presented and decided in the case of *Holden* v. *Joy* [*ante*, 523], in which the opinion of the court has just been delivered, and of course the case is controlled by the rules of decision established in that case. Joy makes the same response in this case to the claim of the defendant that he made to that, and the court without hesitation decides that the title of the plaintiff is complete, and that he is entitled to judgment for the recovery of the possession of the premises in controversy.

Judgment affirmed.

UNITED STATES, *Plff.*,
v.
ISAAC N. COOK.

(See S. C., 17 Wall., 168-182.)

Exception in statute, when must be pleaded in indictment—when by accused—demurrer.

1. Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception.

2. Where the exception is not incorporated with the clause defining the offense, nor connected with it in any manner by words of reference, it is not a constituent part of the offense, but is a matter of defense, and must be pleaded or given in evidence by the accused.

3. Defendant cannot, by demurrer, set up the Statute of Limitations as a defense, where the Act defining the offense contains neither an exception nor a proviso of any kind.

4. The 32d section of the Crimes Act enacts the only Statute of Limitation applicable to the offense of embezzlement by a public officer, but the defendant cannot avail himself of it under a demurrer to the indictment.

[No. 58.]

Argued Nov. 19, 1872. *Decided Dec. 9, 1872.*

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

This case arose upon an indictment in the court below against the defendant, for embezzling funds of the United States. The court, being equally divided in opinion, certified the case to this court.

The case is fully stated by the court.

Messrs. Geo. H. Williams, Atty-Gen., and **C. H. Hill**, *Asst. Atty-Gen.*, for plaintiff:

The general rule of law is unquestionable, that while an indictment must charge the offense to have been committed at a time certain, yet the time charged in the indictment is immaterial, and the Government may prove it to have been committed at any other time not barred by any Statute of Limitations.

2 Hawk., ch. 46, sec. 32; 1 Hale, P. C., 361; 1 Archb. Crim. Pr. & Pl., 7th Am. ed., 278, and cases cited; 2 Gabb. Cr. L., 399.

The fact that an indictment charges the offense to have been committed antecedent to the time within which, by statute, a prosecution for the same can be brought, is not a sufficient reason for quashing the indictment, for arresting judgment, or for discharging the defendant on *habeas corpus* after judgment.

U. S. v. *White*, 5 Cranch (C. C.), 38; *State* v. *Howard*, 15 Rich. (S. C.), 274; *People* v. *Van Santvoord*, 9 Cow., 655; *State* v. *Bowling*, 10 Humph., 52; *Johnson* v. *U. S.*, 3 McLean, 89.

From these authorities it follows, necessarily, that, although as charged in the indictment, the offense is barred by a Statute of Limitations, yet the indictment, nevertheless, charges an offense, and the defendant may be convicted and punished under it. Ang. Lim., sec. 285, and cases cited.

The only distinction between civil and criminal cases is, that in civil cases the defendant must plead the statute in order to take advantage of it: while in criminal cases the objection may be raised under the general issue.

None of the authorities, usually cited as holding the contrary doctrine, apply to the present case.

The cases of *U. S.* v. *Watkins*, 3 Cranch (C. C.), 441 *et seq.*; *State* v. *Bryan*, 19 La. Ann., 435, are unsatisfactory and not reconcilable with those heretofore cited.

The second question certified, the counsel for the Government will submit to the court without argument. See, *Parsons* v. *Hunter*, 2 Sum., 419.

Messrs. **H. H. Hunter**, and *Kebler & Whitman*, for defendant:

In the case of *Sturgis* v. *Burton*, 8 Ohio St., 220, it is said: "Where the cause of action appears upon the face of the petition to be barred, there is in law no cause of action alleged; and in analogy with the practice in chancery, we see no objection in such case to the defendant interposing a demurrer, under the Code. He may either demur in such case, or answer by setting up the bar."

There surely need not be any delicacy or hesitation about requiring the prosecution, *prima facie*, to bring itself by proper allegations within the law, so far as to show a *prima facie* case of crime, legally punishable under the law. On this subject we desire to refer the court to, Van Sant. Pl. (2d ed.), 688; Whart. Am. Cr. L., 450 (top); *Com.* v. *Ruffner*, 28 Pa. St., 259; *People* v. *Miller*, 12 Cal., 291; *People* v. *Van Santvoord*, 9 Cow., 655; *McLane* v. *State*, 4 Ga., 335; *State* v. *Robinson*, 9 Fost., 274; Johnson v. *U. S.*, 3 McLean, 89; *U. S.* v. *Ballard*, 3 McLean, 469; *U. S.* v. *Paul*, 6 Pet., 141; *U. S.* v. *Watkins*, 3 Cranch (C. C.), 441; *U. S.* v. *White*, 5 Cranch (C. C.), 73; *U. S.* v. *Stowell*, 2 Curt., 153.

Mr. Justice **Clifford** delivered the opinion of the court:

Officers and other persons charged with the safe keeping, transfer and disbursements of the public moneys, are required by an Act of Congress to keep an accurate entry of each sum received, and of each payment or transfer; and the 16th section of the same Act provides that if any one of the said officers shall convert to his own use, in any way whatever, any portion of the public moneys, intrusted to him for safe keeping, disbursement or transfer, or for any other purpose, every such act shall be deemed and adjudged to be embezzlement of so much of the public moneys as shall be thus taken and converted, which is thereiu declared to be a felony; and the same section also provides, that all persons advising or participating in such act, being convicted thereof before any court of the United

authorized under then existing laws, by a vote of the people prior to the adoption of the Constitution.

The present case is directly within the decision of this court in *Ins. Co.* v. *Bruce*, 105 U. S. 328 [Bk. 26, L. ed. 1121], where it was held that recitals in bonds estopped a town in Illinois, as against a *bona fide* holder, from showing that conditions imposed on its liability by the vote of the people had not been complied with, although the statute declared that the bonds should not be valid and binding until such conditions precedent had been complied with. There are numerous other cases in this court to the same effect.

The provision of section 12 of article 9 of the Constitution of Illinois did not introduce any new rule of evidence in regard to the mode of proving, in favor of a *bona fide* holder, the compliance with the vote of the people, but left the compliance to be conclusively established in such a case by the recital in the bonds, made by the designated official authorities.

We are not referred to any decision of the Supreme Court of Illinois, made prior to the issuing of the bonds in question, which holds to the contrary of the views we have announced. The case of *People* v. *Dutcher*, 56 Ill. 144, decided at September Term, 1870, was a *mandamus* applied for by a railroad company to compel a supervisor to subscribe for stock, where conditions imposed by the vote of the town had not been complied with, and its bonds had not been issued. The *mandamus* was refused. This direct proceeding is, as this court has uniformly held, a very different thing from a suit on the bonds by a *bona fide* holder, the cases not being analogous or governed by the same rules.

A defense is also set up, under the amended fourth plea, founded on the second additional section or article to the Constitution of Illinois, of 1870, which took effect July 2, 1870, and is in these words: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

The bonds in question having been issued after July 2, 1870, and the requirement, to make them valid, being that they must have been authorized, under laws in force before July 2, 1870, by a vote of the people of the Town given before that date, it is contended that they were not so authorized, because the vote of June 23, 1870, was taken at a town meeting held and presided over by a moderator, and not by judges of election. The argument made is, that section 6 of the Act of March 30, 1869, provided that the election should "be held and conducted and return thereof made as is provided by law, and, in any village or city, as is provided by the law under which the same is incorporated;" and that a town meeting, presided over by a moderator, and not held by the supervisor, assessor and collector, as judges of election, was not an "election," within the meaning of the statute, and so was not an election "under existing laws," within the meaning of the Constitution.

The election was in fact conducted in the manner required for the election of town officers, and not in the manner required for general elections. We are of opinion that, under the Act of 1869, the election in a town could properly be conducted in the manner prescribed by law for the election in towns of town officers; namely, by a moderator and the town clerk—the town clerk having given, as required by the Act, the prior notice of the election, and the return of the election being filed in the office of the town clerk, and the two officers being paid by the town. The voting for town officers at annual town meetings in the manner prescribed therefor by the Statutes of Illinois, is called in those statutes an "election," and this special voting in the same manner for this town object was an "election," within the meaning of the Act of 1869. The requirement of the Act is that the "election shall be held and conducted and return thereof made as is provided by law," and not "as is provided by law for general elections." If a town, it is the law provided for town elections. If a village or city, and the law of its incorporation has special provisions, those are to be followed; otherwise, any general law as to village or city elections is to be observed. As the proceeding was to originate by an application filed in the town clerk's office, so the same officers who would conduct an ordinary town election were to be concerned with this election, and the town clerk's office was to be the place of deposit of all the papers and of the return of the vote, and two town officers were to issue the bonds. None of the proceedings were to be connected with the county clerk's office, as in the case of a general election. This was the ruling of the Supreme Court of Illinois, in a case decided after June 23, 1870, though before these bonds were issued (*People* v. *Dutcher*, 56 Ill. 144); and it was followed in other cases, in that court, after the bonds were issued, though somewhat modified more recently. We think it was the correct ruling.

The questions above considered cover substantially all the assignments of error. The direction to find a verdict for the plaintiff was proper.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES W. BUTTZ, EXR. of FRANCIS PERONTO, Deceased, *Appt.*,

v.

NORTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 55–73.)

Grant of Indian lands to railroad company—extinguishment of Indian title, exclusively for the government—relinquishment of title, when took place—upon definite location, when rights of company attached—location of route withdrew from sale or preemption the odd sections for forty miles on each side—when general route considered fixed—construction of section 3 of Act of July 2, 1864.

*1. The grant by the Act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, of lands to which the Indian title had not been extinguished, operated to convey the fee to the Company, subject to the right of occupancy by the Indians.

2. The manner, time and conditions of extinguishing such right of occupancy were exclusively matters for the consideration of the government, and could not be interfered with nor put in contest by private parties.

3. The agreement of the Sisseton and Wahpeton bands of Dakota or Sioux Indians for the relinquishment of their title was accepted on the part of the United States when it was approved by the Secretary of the Interior, on the 19th of June, 1873. That agreement stipulating to be binding from its date, May 19, 1873, and the Indians having retired from the lands to their Reservations, the relinquishment of their title, so far as the United States is concerned, held to have then taken place.

4. Upon the definite location of the line of the railroad, on the 26th of May, 1873, the right of the Company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections; and no preemptive right could be initiated to the land, so long as the Indian title was unextinguished.

5. When the general route of the road provided for in section 6 of the Act of July 2, 1864, was fixed, and information thereof was given to the Land Department by the filing of a map thereof with the Secretary of the Interior, the statute withdrew from sale or preemption the odd sections to the extent of forty miles on each side thereof: and, by way of precautionary notice to the public, an executive withdrawal was a wise exercise of authority.

6. The general route may be considered as fixed, when its general course and direction are determined, after an actual examination of the country or from a knowledge of it, and it is designated by a line on a map, showing the general features of the adjacent country and the places through or by which it will pass.

7. That part of section 3 of said Act, which excepts from the grant lands reserved, sold, granted or otherwise appropriated, and to which a preemption and other rights and claims have not attached, when a map of definite location has been filed, does not include the Indian right of occupancy within such "other rights and claims;" nor does it include preemptions where the sixth section declares that the land shall not be subject to preemption.

[No. 18.]

Argued Oct. 26, 27, 1886. Decided Nov. 15, 1886.

APPEAL from the Supreme Court of the Territory of Dakota. *Affirmed.*

Statement of the case by *Mr. Justice* **Field:**

This was an action for the possession of a tract of land in the Territory of Dakota. The plaintiff below, the Northern Pacific Railroad Company, asserted title to the premises under a grant made by the Act of Congress of July 2, 1864. The defendant, Peronto, asserted a right to preempt the premises by virtue of his setilement upon them under the preemption law of September 4, 1841, and that his right thereto was superior to that of the Railroad Company.

The action was brought in the District Court of the Territory. The complaint was in the usual form in such cases, alleging the incorporation of the plaintiff, its owuership in fee of the premises (which are described), and its right to their immediate possession, and that they are withheld by the defendant; with a prayer for judgment for their possession, and damages for the withholding.

The answer of the defendant admits the incorporation of the plaintiff, and that he is in possession of the premises, but denies the other allegations of the complaint. It then sets up as a further defense that he settled upon the premises on October 5, 1871, and resided thereon, and the several steps taken by him to perfect a right of preemption to them, and that he possessed the qualifications of a preemptor under the laws of the United States. It concludes with a prayer that the title of the plaintiff be declared void, and that the plaintiff be enjoined from enforcing or attempting to enforce it; that the title he declared to be in the defendant, and that such other and further relief be granted as may be necessary to protect and preserve his rights.

The plaintiff replied, traversing the allegations of the answer; and the issues, by consent of the parties, were tried by the court, without a jury. The court found for the plaintiff, and gave judgment in its favor for the possession of the premises, with costs. On appeal to the Supreme Court of the Territory the judgment was affirmed and, by appeal from the latter judgment, the case was brought to this court. Since it was docketed here, the defendant, who was the appellant, died, and by leave of the court his executor, the devisee of his estate, has been substituted as appellant in his place.

The Act of Congress of July 2, 1864, is entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route." 13 Stat. at L. 365.

By the first section, the Northern Pacific Railroad Company was incorporated and authorized to equip and maintain the railroad and telegraph line mentioned, and was vested with all the powers and privileges necessary to carry into effect the purposes of the Act.

By the third section, a grant of land was made to the Company. Its language is: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land-Office."

By the sixth section, it was enacted "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or preemption before or after they are surveyed except by said Company, as provided

*Head notes by *Mr. Justice* FIELD.

in this Act: but the provisions of the Act of September, 1841, granting preemption rights, and the Acts amendatory thereof, and of the Act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said Company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

At the time this Act was passed, the land in controversy, and other lands covered by the grant were in the occupation of the Sisseton and Wahpeton Bands of Dakota or Sioux Indians; and the second section provided that the United States should extinguish, as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands "falling under the operation of this Act and acquired in the donation to the road."

On the 19th of February, 1867, a Treaty was concluded between the United States and these Bands, which was ratified on the 15th of April and proclaimed on the second of May of that year (15 Stat. at L. 505), in the second article of which the Bands ceded "to the United States the right to construct wagon roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the government may require, over and across the lands claimed by said Bands (including their Reservation as hereinafter designated), any route or routes that may be selected by authority of the government, said lands so claimed being bounded on the south and east by the treaty line of 1851 and the Red River of the North to the mouth of Goose River; on the north by the Goose River and a line running from the source thereof by the most westerly point of Devil's Lake to the Chief's Bluff at the head of James River; and on the west by the James River to the mouth of the Mocasin River, and thence to Kampeska Lake." By articles III and IV certain lands were set apart as permanent reservations for the Indians—one of which was known as Lake Travers Reservation, and the other as Devil's Lake Reservation, so called because their boundary lines commenced respectively at those lakes.

On the 7th of June, 1872, Congress passed an Act "to quiet the title to certain lands in Dakota Territory," which provided that it should be the duty of the Secretary of the Interior to examine and report to Congress what title or interest the Sisseton and Wahpeton Bands of Sioux Indians had to any portion of the land mentioned and described in the second article of that Treaty, except the Reservations named; and whether any and if any what, compensation ought, in justice and equity, to be made to said Bands for the extinguishment of whatever title they might have to said lands. 17 Stat. at L. 281.

Under this Act, the Secretary of the Interior appointed three persons as commissioners to treat with the Indians for the relinquishment of their title to the land. On the 20th of September, 1872, they made an agreement or treaty with the Bands for such relinquishment. This agreement recited the conclusion of the Treaty of 1867, and the cession by it to the United States, of certain privileges and rights supposed to belong to said Bands in the territory described in the second article of the Treaty; and that it was desirable that all the Territory, except that portion comprised in certain Reservations described in articles III and IV of the Treaty, should be ceded absolutely to the United States, upon such considerations as in justice and equity should be paid therefor; and that the lands were no longer available to the Indians for the purposes of the chase, and their value or consideration was essentially necessary to enable them to cultivate portions of the permanent Reservations, and become self-supporting by the cultivation of the soil and other pursuits of husbandry. "Therefore," the agreement continues, "the said Bands represented in said Treaty, and parties thereto, by their chiefs and head men, now assembled in council, do propose to M. N. Adams, William H. Forbes, and James Smith, Jr., Commissioners on behalf of the United States, as follows:

"First. To sell, cede and relinquish to the United States all their right, title, and interest in and to all lands and territory particularly described in article II of said Treaty, as well as all lands in the Territory of Dakota to which they have title or interest, excepting the said tracts particularly described and bounded in articles III and IV of said Treaty, which last named tracts and territory are expressly reserved as permanent reservation for occupancy and cultivation, as contemplated by articles VIII, IX and X of said Treaty."

"Second. That, in consideration of said cession and relinquishment, the United States should advance and pay annually, for the term of ten years from and after the acceptance by the United States of the propositions herein submitted, eighty thousand ($80,000) dollars, to be expended, under the direction of the President of the United States, on the plan and in accordance with the provisions of the Treaty aforesaid, dated February 19, 1867, for goods and provisions, for the erection of manual labor and public schools, and to the erection of mills, blacksmith shops, and other workshops, and to aid in opening farms, breaking land, and fencing the same, and in furnishing agricultural implements, oxen and milk cows, and such other beneficial objects as may be deemed most conducive to the prosperity and happiness of the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, entitled thereto, according to the said Treaty of February 19, 1867."

This agreement contained seven other articles, some of which had provisions of great value to the Indians. It does not appear that it was ever presented to the Senate of the United States for ratification, but it was communicated to Congress by the Secretary of the Interior; and in the Indian Appropriation Act of February 14, 1873, an amount was conditionally appropriated to meet the first installment of the sum provided by the second article—$80,000. The condition was that the amount should not be expended until that agreement, amended by the exclusion of all the articles except the first two, should be ratified by the Indians. The agreement, exclusive of those articles, was confirmed by Congress. 17 Stat. at L. 456.

The ratification of the agreement, as amended, was obtained from the Indians at the two Res-

ervations; from those on one Reservation, on May 2, 1873, and from those on the other Reservation on the 19th of the same month. This ratification was accepted and approved by the Secretary of the Interior on the 19th of June, 1873, and the expenditure of the appropriation made was authorized. No approval of the agreement was had by Congress until the passage of the Indian Appropriation Act of June 22, 1874, by which it was confirmed and an appropriation made to meet the second installment of the consideration stipulated.

It appears by the findings of the court that some time in the fall of 1871, under the Act of Congress mentioned, and other Acts and Resolutions relating to the same subject, the Railroad Company commenced work on that part of its line of road beginning on the westerly bank of the Red River of the North (which was the eastern boundary of Dakota), and extending westerly through and across what was afterwards shown by the public surveys to be the section of land of which the premises in controversy form a part, namely, section 7 in township 139 and range 48. It also caused all that part of its line of road thus located to be graded and prepared for its superstructure; and in June following the superstructure and the iron rails were laid, and that part of the road was completed which crossed the section named, and ever since the road has been maintained and operated.

On the 21st of February, 1872, the Company filed in the office of the Secretary of the Interior a map showing that part of the general route of the road beginning at the westerly bank of the Red River of the North, and extending westerly to James River, in Dakota Territory. On the 30th of March following, the acting Commissioner of the General Land-Office forwarded to the register and receiver of the Pembina land-office, within the limits of which the tract of land in controversy was situated, a description of the designated route, and, by order of the Secretary of the Interior, directed them to withhold from sale or location, preemption, or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles, as designated on the map, and stated that this order would take effect from the date of its receipt by them.

The order with the diagram was received by them April 20, 1872. The diagram represented the route of the road as passing over and across the section of land in question. The order of withdrawal thus given was never afterwards revoked.

On May 26, 1873, the Company filed in the office of the Commissioner of the General Land-Office a map, showing the definite location of that part of its line of road extending from the Red River of the North to the Missouri River in Dakota Territory. All that portion of this definite location, from the Red River to the west line of the section named, was the same as that made in 1871. On the 11th of June, 1873, the acting Commissioner of the General Land-Office addressed a letter to the local register and receiver, informing them of the filing of this map of definite location, and transmitted to them a diagram showing the limits of the land grant along said line, and also the limits of the withdrawal ordered on March 30, 1872, upon a designated line; and directed them to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits. This letter, with the diagram referred to, was received at the Pembina land-office on June 24, 1873.

Soon after the execution of the amended agreement with the Indians, mentioned above, which was approved by the Secretary of the Interior on the 19th of June, 1873, the government land surveys of the region embraced in it were completed, and plats thereof were filed in the local land-office. Those surveys show that the premises in controversy constitute a portion of the odd section number seven, which was granted to the Railway Company.

The defendant, Peronto, settled, as already stated, upon that section on October 5, 1871. It is found by the court that he had all the qualifications of a preemptor, and entered upon the land with the intention of securing a preemption right to it under the laws of the United States, and built a house upon it, in which he resided. On the 11th of August, 1873, he presented his declaratory statement to the register and receiver of the local land-office, stating his intention to claim a preemption right to a portion of the section (describing it) and his settlement thereon in October, 1871. This declaratory statement was presented within three months after the township plats, showing the government surveys, had been filed in the local land-office. The register and receiver refused to file it, for the alleged reason that the land therein described was the land of the Railroad Company, as shown by its diagram filed in the Department of the Interior February 21, 1872, and that his alleged prior settlement was illegal, the lands not being subject to preemption settlement by reason of the Indian Treaty. The defendant thereupon appealed from this ruling to the Commissioner of the General Land-Office, by whom, on the 14th of February, 1874, it was approved and confirmed. The defendant then appealed to the Secretary of the Interior, and he approved the decision of the Commissioner.

Messrs. **Albert G. Riddle, Henry E. Davis** and *James E. Padgett*, for appellant:

Unless provided otherwise by statute, or treaty, all the country described by the first section of the Act of June 30, 1864, as Indian country remains such as long as the Indians retain their title to the soil.

Leavenworth, L. & G. R. R. Co. v. *U. S.* 92 U. S. 733 (Bk. 23, L. ed. 634); *U. S.* v. *43 Gallons of Whisky*, 93 U. S. 188 (Bk. 23, L. ed. 846); *Bates* v. *Clark*, 95 U. S. 204 (Bk. 24, L. ed. 471).

The right until extinguished by voluntary cession is in the Indians.

Cherokee Nation v. *Ga.* 5 Pet. 1 (30 U. S. bk. 8, L. ed. 25); *U. S.* v. *Cook*, 19 Wall. 591 (86 U. S. bk. 22, L. ed. 210).

When land has once been legally appropriated, it becomes severed from the mass of public lands, and subsequent law or proclamation or sale will not be construed to embrace it.

Wilcox v. *Jackson*, 13 Pet. 498 (38 U. S. bk. 10, L. ed. 264); *Polk's Lessee* v. *Wendall*, 9

Cranch, 87 (13 U. S. bk. 3, L. ed. 665); *Tr. Vincennes University* v. *Indiana*, 14 How. 268 (55 U. S. bk. 14, L. ed. 416).

This principle "applies with more force to Indian than to military reservations. The latter are the absolute property of the government; in the former other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms."

Leavenworth, L. & G. R. R. Co. v. *U. S. supra; U. S.* v. *Payne*, 2 McCrary, 289; *Dubuque, etc. R. R. Co.* v. *Des Moines, etc. R. R. Co.* 109 U. S. 334 (Bk. 27, L. ed. 954).

Lands forming part of an Indian reservation at the date of a grant are excepted from the grant.

Leavenworth, L. & G. R. R. Co. v. *U. S. ubi supra; Clark* v. *Smith*, 13 Pet. 195 (38 U. S. bk. 10, L. ed. 123); *Kansas Pac. R. R. Co.* v. *Atchison, T. & S. F. R. R. Co.* 112 U. S. 422 (Bk. 28, L. ed. 797).

No attempt has ever been made to include lands reserved to the United States within a prior grant, where the reservation afterwards ceased to exist. Nor where lands had been otherwise disposed of did their reversion to the government bring them within a previous grant.

Leavenworth, L. & G. R. R. Co. v. *U. S. ubi supra; Newhall* v. *Sanger*, 92 U. S. 761 (Bk. 23, L. ed. 769); *Wolcott* v. *Des Moines Nav. & R. R. Co.* 5 Wall. 681 (72 U. S. bk. 18, L. ed. 689); *Ex parte Flint & M. R. R. Co.* Copps, L. L. 385; *Central Pac. R. R. Co.* v. *Nevada, Id.* 424; *Phelps* v. *N. P. R. R. Co.* 1 Law Dec. (Dept. Int.) 384.

It is the Act, and not its denomination, that definitely fixes the line of the road; and the criterion is, has the act done, terminated the volition of the Company in respect to changing that line? if so, the line is "definitely fixed."

Van Wyck v. *Knevals*, 106 U. S. 366 (Bk. 27, L. ed. 203); *Kansas Pac. R. Co.* v. *Dunmeyer*, 113 U. S. 634 (Bk. 28, L. ed. 1123); *Walden* v. *Knevals*, 114 U. S. 374 (Bk. 29, L. ed. 167).

Upon construction, all that could be done had been to cause the grant to attach; and on payment by the Company of the costs and receipt of the patents, its title would relate back to the Act causing attachment of the grant.

Stark v. *Starrs*, 6 Wall. 418 (73 U. S. bk. 18, L. ed. 929); *Northern Pac. R. R. Co.* v. *Traill Co.* 115 U. S. 600 (Bk. 29, L. ed. 477).

When the routes were definitely fixed, and it appeared that lands within these limits had been sold at private entry, and taken up by preemptors, or reserved by the United States, an equivalent was provided.

Leavenworth, L. & G. R. R. Co. v. *U. S. supra.*

Thus, settlements on the public lands were encouraged, without the aid intended for the construction of the roads being thereby impaired.

R. R. Co. v. *Baldwin*, 103 U. S. 429 (Bk. 26, L. ed. 579); *Winona, etc. R. R. Co.* v. *Barney*, 113 U. S. 625 (Bk. 28, L. ed. 1112).

The right of a settler to enter the lands could not be prejudiced by the refusal of the legal officers to receive his declaratory statement duly presented.

Frisbie v. *Whitney*, 9 Wall. 195 (76 U. S. bk. 19, L. ed. 671); *Shepley* v. *Cowan*, 91 U. S. 338 (Bk. 23, L. ed. 427).

If the action of the land officers, by erroneously construing the law, deprived the settler of a substantial right, his remedy in equity is undoubted.

Minnesota v. *Bachelder*, 1 Wall. 109 (68 U. S. bk. 17, L. ed. 551); *Sampson* v. *Smiley*, 13 Wall. 91 (80 U. S. bk. 20, L. ed. 489); *Ferguson* v. *McLaughlin*, 96 U. S. 174 (Bk. 24, L. ed. 624); *Moore* v. *Robbins*, 96 U. S. 530 (Bk. 24, L. ed. 848).

In the clear language of the statute must be found all that is conveyed by the grant, and where doubt arises, the statute must be construed most strictly against the grantee.

Dec. Dept. Int. 243; *Rice* v. *R. R. Co.* 1 Black, 380 (66 U. S. bk. 17, L. ed. 154); *Leavenworth L. & G. R. R. Co.* v. *U. S.* 92 U. S. 740 (Bk. 23, L. ed. 637); *Rice* v. *Sioux City, etc R. R. Co.* 110 U. S. 698 (Bk. 28, L. ed. 290).

Mr. **W. P. Clough,** for appellee:

Upon the filing of the map of general route, the Commissioner of the General Land-Office, under instructions of the Secretary of the Interior, made an express withdrawal from entry by any mode, for the benefit of the railroad, of all odd-numbered sections of land within the distance of forty miles upon either side of the line of general route; which was never vacated. This withdrawal was effective.

Wolcott v. *Des Moines Nav. & R. R. Co.* 5 Wall. 681 (72 U. S. bk. 18, L. ed. 689); *Williams* v. *Baker*, 17 Wall. 144 (84 U. S. bk. 21, L. ed. 561); *Homestead Company* v. *Nav. & R. R. Co.* 17 Wall. 153 (84 U. S. bk. 21, L. ed. 622); *Wolsey* v. *Chapman*, 101 U. S. 755 (Bk. 25, L. ed. 915); *Dubuque, etc. R. R. Co.* v. *Des Moines, etc. R. R. Co.* 109 U. S. 329 (Bk. 27, L. ed. 952).

Mr. Justice **Field** delivered the opinion of the court:

The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the Act of July 2, 1864, was passed, the title of the Indian Tribes was not extinguished. But, that fact did not prevent the grant of Congress from operating to pass the fee of the land to the Company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals. As we said in *Beecher* v. *Wetherby*, 95 U. S. 517 [Bk. 27, L. ed. 440]: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of

governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the goverument." In support of this doctrine several authorities were cited in that case.

In *Johnson* v. *McIntosh*, 8 Wheat. 575 [21 U. S. bk. 5, L. ed. 689], which was here in 1823, the court, speaking by *Chief Justice* Marshall, stated the origin of this doctrine of the ultimate title and dominion in the United States. It was this: that, upon the discovery of America, the nations of Europe were anxious to appropriate as much of the country as possible, and, to avoid contests and conflicting settlements among themselves, they established the principle that discovery gave title to the government by whose subjects or by whose authority it was made, against all other governments. This exclusion of other governments necessarily gave to the discovering nation the sole right of acquiring the soil from the natives, and of establishing settlements upon it. It followed that the relations which should exist between the discoverer and the natives were to be regulated only by themselves. No other nation could interfere between them. The chief justice remarked that "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity in exchange for unlimited independence." Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian right of occupancy. The chief justice adds that the history of America, from its discovery to the present day, proves the universal recognition of this principle.

In *Clark* v. *Smith*, 13 Pet. 195 [38 U. S. bk. 10, L. ed. 125], which was here in 1839, the patent under which the complainant became the owner in fee of certain lands was issued by the Commonwealth of Kentucky in 1795, when the lands were in possession of the Chickasaw Indians, whose title was not extinguished until 1819. It was objected that the patent was void because it was issued for lands within a country claimed by Indians; but the court replied "That the colonial charters, a great portion of the individual grants by the proprietary and royal governments, and a still greater portion by the States of this Union after the Revolution, were made for lands within the Indian hunting grounds. North Carolina and Virginia, to a great extent, paid their officers and soldiers of the Revolutionary War by such grants, and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these States but by others. The ultimate fee (encumbered with the Indian right of occupancy) was in the Crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unencumbered fee. So this court, and the state courts, have uniformly and often holden." 13 Pet. 201 [126].

In the grant to the Railroad Company now before us, Congress was not unmindful of the title of the Indians to the lands granted, and it stipulated for its extinguishment by the United States as rapidly as might be consistent with public policy and the welfare of the Indians.

In compliance with the pledge thus given, the United States took steps, first, to obtain from the Indians the right to construct railroads, wagon roads, and telegraph lines across their lands, and to make such other improvements upon them as the interests of the government might require, and afterwards to obtain a cession of their entire title.

The right to construct railroads and telegraph lines across their lands was secured by the Treaty concluded on the 19th of February, 1867, ratified on the 15th of April, and proclaimed on the second of May of that year. The right was in terms ceded to the United States, but the cession must be construed to authorize any one deriving title from the United States to exercise the same right. 15 Stat. at L. 505.

For the relinquishment of the entire title of the Indians to the lands, an agreement was made by commissioners appointed by the Secretary of the Interior, under the Act of Congress of June 7, 1872. That agreement in form was merely a proposition by the Indians to cede their title, upon certain money considerations to be paid, and certain acts to be performed by the United States. Congress declined to approve of it in its entirety, but expressed an approval of it so far as it related to the cession of the title of the Indians upon the money considerations named. It refused, however, to allow an appropriation made to meet the first installment of the money consideration to be expended, except upon the condition that the Indians should abandon the other provisions and ratify the agreement thus modified. The Indians on the different Reservations accepted the condition and ratified the agreement as modified; those on one Reservation on May 2, 1873, and those on the other on the 19th of the same month.

The agreement, thus ratified, was forwarded to the Secretary of the Interior, and was approved by him on the 19th of June following, and on June 22, 1874, Congress approved it in the Indian Appropriation Act of that year, when it also provided for the payment of the second installment of the money consideration.

This modified agreement must be considered as accepted, on the part of the United States, when it was approved by the Secretary of the Interior. Some official recognition was necessary to satisfy those who might be interested as to the good faith of the alleged consent of the Indians; whether the parties acting nominally in their behalf really represented them, and whether their assent was freely given after full knowledge of the import of the legislation of Congress. Proof of these facts was not to rest in the recollection of witnesses, but in the official action

of the officers of the government, or in the legislation of Congress. The agreement, however, on the part of the Indians was only to cede their title; it was not a cession in terms by them. The officers of the Land Department, however, treated it as an actual cession of title from its date. The Indians had then retired to the Reservation set apart for them by the Treaty of 1867, thus giving up the occupancy of the other lands. The relinquishment thus made was as effectual as a formal act of cession. Their right of occupancy was, in effect, abandoned, and full consideration for it being afterwards paid, it could not be resumed. The agreement in terms provided that it should be binding from its ratification. So, therefore, considered in connection with the actual retirement of the Indians from the land, it may properly be treated as establishing the extinguishment of their title from its date, so far as the United States are concerned. The definite location of the line of railroad was subsequently made by the company, and a map of it filed with the Secretary of the Interior. The right of the Company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections, a portion of one of which constitutes the premises in controversy. The defendant could not initiate any preemptive right to the land so long as the Indian title remained unextinguished. The Act of Congress excludes lands in that condition from preemption. R. S. § 2257.

If we are mistaken in this view, and the relinquishment of the right of occupancy by the Indians is not to be deemed effected until the agreement was ratified by Congress in June, 1874, notwithstanding their actual retirement from the lands, the result would not be changed. The right of the Company to the odd sections within the limits of its grant, covered by the Indian claim, did not depend upon the extinguishment of that claim before the definite location of the line of the road was made, and a map thereof filed with the Commissioner of the General Land-Office. The provisions of the third section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from preemption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold or appropriated, which were subject simply to their right of occupancy. Nearly all the lands in the Territory of Dakota, and, indeed, a large, if not the greater portion of the lands along the entire route to Puget Sound, on which the road of the Company was to be constructed, was subject to this right of occupancy by the Indians. With knowledge of their title and its impediment to the use of the lands by the Company, Congress made the grant, with a stipulation to extinguish the title. It would be a strange conclusion to hold that the failure of the United States to secure the extinguishment at the time when it should first become possible to identify the tracts granted, operated to recall the pledge and to defeat the grant. It would require very clear language to justify a conclusion so repugnant to the purposes of Congress expressed in other parts of the Act. The only limitation upon the action of the United States with respect to the title of the Indians was that imposed by the Act of Congress, that they would extinguish the title as rapidly as might be "consistent with public policy and the welfare of said Indians." Subject only to that condition, so far as the Indian title was concerned, the grant passed the fee to the Company. In our judgment, the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy.

Assuming that the extinguishment of the Indian title to the lands in controversy may, so far as any claim to them against the United States is concerned, be held to have taken place at the date of the amended agreement—taking the last date, when the Indians on the second Reservation ratified it—the defendant did not acquire any right of preemption by his continued settlement afterwards. The Act of Congress not only contemplates the filing by the Company, in the office of the Commissioner of the General Land-Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or rights; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or preemption of the adjoining odd sections within forty miles on each side, until the definite location is made. The third section declares that after the general route shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or preemption, before or after they are surveyed, except by the Company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter so as to require good faith on the part of the Company in designating the general route, and not to accept an arbitrary and capricious selection of the line irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land-Office, or the Secretary of the Interior, the law withdraws from sale or preemption, the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the Company to which, in aid of the construction of the road, it is granted. Although the Act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the Department in such cases, to formally withdraw them. It cannot be otherwise than the exer-

cise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which preemption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and preemptions in cases where the sixth section declares that the land shall not be subject to sale or preemption. The two sections must be so construed as to give effect to both, if that be practicable.

In the present case, the general route of the road was indicated by the map filed in the office of the Secretary of the Interior on the 21st of February, 1872. It does not appear that any objection was made to the sufficiency of the map, or to the route designated, in any particular. Accordingly, on the 30th of March, 1872, the Commissioner of the General Land-Office transmitted a diagram or map, showing this route, to the officers of the local land-office in Dakota, and by direction of the Secretary ordered them to withhold from sale, location, preemption, or homestead entry all surveyed and unsurveyed odd-numbered sections of public land falling within the limits of forty miles, as designated on the map.

This notification did not add to the force of the Act itself, but it gave notice to all parties seeking to make a preemption settlement that lands within certain defined limits might be appropriated for the road. At that time the lands were subject to the Indian title. The defendant could not, therefore, as already stated, have then initiated any preemption right by his settlement; and the law cut him off from any subsequent preemption. The withdrawal of the odd sections mentioned from sale or preemption, by the sixth section of the Act, after the general route of the road was fixed, in the manner stated, was never annulled.

It follows that the defendant could never afterwards acquire any rights against the Company by his settlement.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN J. SHIPMAN, *Appt.*,
v.
DISTRICT OF COLUMBIA.

DISTRICT OF COLUMBIA, *Appt.*,
v.
JOHN J. SHIPMAN.

(See S. C. Reporter's ed. 148.)

Board Public Works, District Columbia—contract to repair roads—"board rates"—commissioners—variance from specifications—casus omissus—bonds made equal to cash—allowances by engineer.

1. Where in the autumn of 1871, the claimant offered to put the canal road, between Aqueduct and Chain Bridges in the District of Columbia, in order, and his terms were not accepted, but a year later the board of public works ordered that a contract should be awarded him for this work, and that he should be notified of its action, and the secretary of the board, instead of notifying him of such action, informed him that a contract had been awarded him at "board rates" and the claimant proceeded to perform the work, being paid therefor at "board rates"—except as to masonry, for which he received $5 per cubic yard, while the "board rates" were $0.50 per perch—and he was paid nothing for haul, and subsequently a contract was drawn at the rates he had been paid and antedated, the court refused to correct the contract, under the claimant's theory that the price fixed for masonry per cubic yard, and the omission to pay for haul was through mistake; "board rates" being claimed.

2. Where, after the commissioners had succeeded the board of public works, the claimant varied from the plans and specifications, by constructing a wall wider than called for, giving his reasons for these changes to the assistant engineer of the District and to the commissioners, who assented thereto, and measurements and payments were made with the knowledge of the assistant engineers and commissioners, after final settlement it was held that a claim by the District of Columbia to recover back the amount paid in excess of the original specifications could not be maintained.

3. Where the instrument extending the contract made no provision for excavation in places where there was no previous wall, a provision in the original contract for "excavations and refilling, 40 cts. per cubic yard, to be measured in excavation only;" and "grading, 30 cts. for each and every cubic yard of earth, sand or gravel, excavated and hauled," will not include such excavation.

4. Where in the contract there is a *casus omissus*, and the claimant has done the work, and the District has received the benefit of it, the court will examine the findings, and ascertain whether they furnish the means for fixing its value.

5. Where there was a misunderstanding between the parties, as to whether by "an extra compensation of 40 cts. per foot," was intended 40 cts. per square foot, or 40 cts. per lineal foot, a compromise, by fixing upon a rate of 74 and 1-2 cts. a running foot, will be regarded by the court as a settlement of the disputed item, and will not be disturbed.

6. Where, in an emergency, the engineer in chief wrote to the contractor "to repair the roads and culverts, in the vicinity of the work now being performed by you along the Little Falls Road, which have been damaged by the late storms, as extra work, under your contract number 561, with the late board of public works," and the work was performed, the payment called for was in cash; and it was illegal for the commissioners to direct a bill to be made out and certified to at rates which produced an aggregate that would make the payment in certificates equivalent to a payment of the bill rendered, in cash. The amount paid in certificates, will be treated as a cash payment to that amount, although the commissioners had no cash at the time applicable to such payment.

7. Allowances by the engineer in chief, made after the controversy arose, in excess of the contract price for masonry and an allowance for haul, will not be disturbed; the court assuming there may have been good reason for allowing the haul, and the masonry may have been of a different quality from the rubble cement, for which the contract fixes the price at $5.

[Nos. 25, 157.]

Argued Nov. 3, 1886. Decided Nov. 15, 1886.

CROSS APPEALS from the Court of Claims. *Affirmed.*

This case arose upon a petition filed in the court below by the appellant, John J. Shipman, to recover a large amount claimed to be due the petitioner under a contract with the defendant for the repair of what is known as the Canal Road, located in the District of Columbia.

1774.

GOODRIGHT *verſus* STRAPHAN.

" as his deed, this ſecond delivery is void. But if a married " woman deliver a bond unto me, or other writing as her deed, " this delivery is merely void; and, therefore, if after the death " of her huſband ſhe being ſole, *deliver* the ſame deed *again* " unto me as her deed, the *ſecond delivery* is *good* and *effectual.*" The year books, *Mich.* 3 *Hen.* 6. 4. and *Hil.* 8 *Hen.* 6. 8. confirm the propoſition laid down by *Perkins*; namely, that the deed is not to be re-executed or re-atteſted, but delivered only. Now delivery is an act in *pais* only.

The queſtion then is, Whether the law has laid down any preciſe form in which delivery muſt be made, or whether circumſtances may not be equivalent to it without actual delivery?

Lord *Coke* in his Commentary on *Lit.* 36, ſays, " As a deed " may be delivered to the party without words, ſo a deed may " be delivered by words, without any act of delivery: as if the " writing ſealed lies upon the table, and the feoffor or obligor " ſays to the feoffee or obligee, take up the ſaid writing, it is " ſufficient for you, as it will ſerve your turn, it is a ſufficient " delivery."—2 *Roll. Abr.* 26. *pl.* 2.

This brings it to the ſingle queſtion, Whether theſe facts amount to a delivery. Now the mortgage deed was in the hands of the mortgagee: the wife, after the death of her huſband the mortgagor, ſurrenders poſſeſſion under her own hand to *Sanders* and *Smith*, the executors of the mortgagee, and orders the tenants to attorn to them as executors of the mortgagee in terms. This is a clear acknowledgment that the deed was hers, and that ſhe was content, the defendants ſhould enjoy according to the terms of the deed.

Therefore, we are all of opinion for the defendants, and that theſe facts were a confirmation of the mortgage, upon the ground of their being equivalent to a re-delivery of the deed.

Per. Cur. unanimouſly. Rule for a new trial diſcharged.

CAMPBELL *verſus* HALL.

THIS caſe was very elaborately argued four ſeveral times; and now on this day Lord *Mansfield* ſtated the caſe, and delivered the unanimous opinion of the court, as follows:

This is an action that was brought by the plaintiff *James Campbell*, who is a natural born ſubject of this kingdom, and who, upon the 3d of *March* 1763, purchaſed a plantation in the iſland of *Grenada*: and it is brought againſt the defendant *William*

1774.

CAMPBELL *verſus* HALL.

William Hall, who was a collector for his Majeſty of a duty of four and an half *per cent.* upon all goods and ſugars exported from the iſland of *Grenada*. And the action is brought to recover back a ſum of money which was paid, as this duty of four and an half *per cent.*, upon ſugars that were exported from the iſland of *Grenada*, by and on account of the plaintiff. The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any conſideration; the duty, for which, and in reſpect of which he received it, not having been impoſed by lawful or ſufficient authority to warrant the ſame. It is ſtated by the ſpecial verdict, that that money ſtill remains in the hands of the defendant, *not paid over* by him to the uſe of the king, but continued in his hands, and ſo continues with the privity and *conſent* of his Majeſty's *Attorney General*, for the expreſs purpoſe of trying the queſtion as to the validity of impoſing this duty.

It came on to be tried at *Guildhall*, and of courſe, from the nature of the queſtion, both ſides came prepared to have a ſpecial verdict; and a ſpecial verdict was found, which ſtates as follows.

That the iſland of *Grenada* was taken by the *Britiſh* arms, in open war, from the *French* king.

That the iſland of *Grenada* ſurrendered upon capitulation, and that the capitulation on which it ſurrendered, was by reference to the capitulation upon which the iſland of *Martinique* had before ſurrendered.

The ſpecial verdict then ſtates ſome articles of the capitulation, and particularly the 5th article, by which it is agreed, That *Grenada* ſhould continue to be governed by its preſent laws until his Majeſty's further pleaſure be known. It next ſtates the 6th article; where, to a demand of the inhabitants of *Grenada*, requiring that they ſhould be maintained in their property and effects, moveable and immoveable, of what nature ſoever, and that they ſhould be preſerved in their privileges, rights, honors, and exemptions; the anſwer is, the inhabitants, being *ſubjects* of *Great Britain*, will enjoy their properties and privileges in like manner as the other *his Majeſty's ſubjects* in the other *Britiſh Leeward Iſlands*: ſo that the anſwer is, that they will have the conſequences of their being ſubjects, and that they will be as much ſubjects as any of the other *Leeward Iſlands*.

Then it ſtates another article of the capitulation; *viz.* the 7th article, by which they demand, that they ſhall pay no other duties

1774.

CAMPBELL *verſus* HALL.

duties than what they before paid to the *French* king; that the capitation tax ſhall be the ſame, and that the expences of the courts of juſtice, and of the adminiſtration of government, ſhould be paid out of the king's demeſne: in anſwer to which they are referred to the anſwer I have ſtated, as given to the foregoing article; that is, being *ſubjects* they will be entitled in like manner as the *other his Majeſty's ſubjects* in the *Britiſh Leeward Iſlands*.

The next thing ſtated in the ſpecial verdict is, the treaty of peace ſigned the 10th *February*, 1763; and it ſtates that part of the treaty of peace by which the iſland of *Grenada* is ceded; and ſome clauſes which are not at all material for me to ſtate.

The next inſtrument is a proclamation under the great ſeal, bearing date the 7th of *October*, 1763, wherein amongſt other things it is ſaid as follows:

Whereas it will greatly contribute to the ſpeedy ſettling our ſaid governments, of which the iſland of *Grenada* is one, that our loving ſubjects ſhould be informed of our paternal care for the ſecurity of the liberties and properties of thoſe who are and ſhall become inhabitants thereof: we have thought fit to publiſh and declare by this our proclamation, that we have in our *letters patent* under our great ſeal of *Great Britain*, by which the ſaid governments are conſtituted, given *expreſs power* and *direction* to our governors of the ſaid colonies reſpectively, that ſo ſoon as the ſtate and circumſtances of the ſaid colonies will admit thereof, they ſhall, with the advice and conſent of the members of our council ſummon and call general aſſemblies, within the ſaid governments reſpectively, in ſuch manner and form as is uſed and directed in thoſe colonies and provinces of *America*, which are already under our immediate government; and we have alſo given power to the ſaid governors, with the conſent of our ſaid councils, and the *repreſentatives of the people* to be ſummoned as aforeſaid, *to make, conſtitute, and ordain laws*, ſtatutes, and ordinances, for the public peace, welfare, and good government of our ſaid colonies and the inhabitants thereof, as near as may be agreeable to the laws of *England*, and under ſuch regulations and reſtrictions, as are uſed in our other colonies.

The next inſtrument ſtated in the ſpecial verdict, is the *letters patent* under the great ſeal, or rather a proclamation, bearing date the 26th *March*, 1764; wherein, the king recites a ſurvey and diviſion of the ceded iſlands, and that he had ordered them

to

1774.

CAMPBELL *versus* HALL.

to be divided into allotments, as an invitation to purchasers to come in and purchase upon the terms and conditions specified in that proclamation.

The next instrument stated, is the *letters patent* under the great seal, bearing date the 9th of *April*, 1764. In these letters there is a commission appointing General *Melville* governor, with a *power* to *summon an assembly* as soon as the state and circumstances of the island would admit, and to make laws with consent of the governor and council, with reference to the manner of the other assemblies of the king's provinces in *America*. This instrument is dated the 9th of *April*, 1764. The governor arrived in *Grenada* on the 14th *December*, 1764, and before the end of the year 1765, an assembly actually met in the island of *Grenada*. But before the arrival of the governor at *Grenada*, indeed before his departure from *London*, there is another instrument upon the validity of which the whole question turns, which instrument contains *letters patent* under the great seal, bearing date the 20th *July*, 1764. Wherein, the king reciting, that whereas, in *Barbadoes*, and in all the *British Leeward Islands*, there was a duty of four and an half *per cent.* upon all sugars, *&c.* exported; and reciting in these words; that whereas it is reasonable and expedient, and of importance to our other sugar islands, that the like duty should take place in our said island of *Grenada*; proceeds thus: we have thought fit, and our royal will and pleasure is, and we do hereby, by virtue of our prerogative royal, order, direct, and appoint, that from and after the 29th day of *September* next ensuing the date of these presents, a duty or impost of four and an half *per cent.* in specie, shall be raised and paid to us, our heirs and successors, upon all dead commodities, the growth and produce of our said island of *Grenada*, that shall be shipped off from the same, *in lieu of all customs and import duties*, hitherto collected upon goods imported and exported into and out of the said island, under the authority of his most Christian Majesty.

The special verdict then states that in fact this duty of four and an half *per cent.* is paid in all the *British Leeward Islands*, and sets forth the several acts of assembly relative to these duties. They are public acts: therefore, I shall not state them; as any gentleman may have access to them; they depend upon different circumstances and occasions, but are all referable to those duties in our islands. This, with what I set out with in the opening, is

1774.

CAMPBELL *versus* HALL.

is the whole of the ſpecial verdict that is material to the queſtion.

The general queſtion that ariſes out of all theſe facts found by the ſpecial verdict, is this; whether the *letters patent* under the great ſeal, bearing date the 20th *July*, 1764, are good and valid to aboliſh the *French* duties; and in lieu thereof to impoſe the four and half *per cent.* duty above mentioned, which is paid in all the *Britiſh Leeward Iſlands?*

It has been contended at the bar, that the *letters patent* are void on two points; the *firſt* is, that although they had been made before the proclamation of the 7th *October*, 1763, yet the king could not exerciſe ſuch a legiſlative power over a conquered country.

The *ſecond* point is, that though the king had ſufficient power and authority before the 7th *October*, 1763, to do ſuch legiſlative act, yet before the *letters patent* of the 20th *July*, 1764, he had diveſted himſelf of that authority.

A great deal has been ſaid, and many authorities cited relative to propoſitions, in which both ſides ſeem to be perfectly agreed; and which, indeed are too clear to be controverted. The ſtating ſome of thoſe propoſitions which we think quite clear, will lead us to ſee with greater perſpicuity, what is the queſtion upon the firſt point, and upon what hinge it turns. I will ſtate the propoſitions at large, and the firſt is this:

A country conquered by the *Britiſh* arms becomes a dominion of the king in the right of his crown; and, therefore, neceſſarily ſubject to the legiſlature, the parliament of *Great Britain.*

The 2d is, That the conquered inhabitants once received under the king's protection, become ſubjects, and are to be univerſally conſidered in that light, not as enemies or aliens.

The 3d, That the articles of capitulation upon which the country is ſurrendered, and the articles of peace by which it is ceded, are ſacred and inviolable according to their true intent and meaning.

The 4th, That the law and legiſlative government of every dominion, equally affects all perſons and all property within the limits thereof; and is the rule of deciſion for all queſtions which ariſe there. Whoever purchaſes, lives, or ſues there, puts himſelf under the law of the place. An *Engliſhman* in *Ireland*, *Minorca*, the *Iſle of Man*, or the *Plantations*, has no privilege diſtinct from the natives.

The

1774.

HALL *versus* CAMPBELL.

The 5th, That the laws of a conquered country continue in force, until they are altered by the conqueror: the abſurd exception as to *Pagans*, mentioned in *Calvin's* caſe, ſhews the univerſality and antiquity of the maxim. For that diſtinction could not exiſt before the Chriſtian æra; and in all probability aroſe from the mad enthuſiaſm of the *Croiſades*. In the preſent caſe the capitulation expreſsly provides and agrees, that they ſhall continue to be governed by their own laws, until his majeſty's further pleaſure be known.

The 6th, and laſt propoſition is, that if the king (and when I ſay the king, I always mean the king without the concurrence of parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legiſlation being ſubordinate; that is, ſubordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for inſtance, from the laws of trade, or from the power of parliament; or give him privileges excluſive of his other ſubjects; and ſo in many other inſtances which might be put.

But the preſent change, if it had been made *before* the 7th *October* 1763, would have been made recently after the ceſſion of *Grenada* by treaty, and is in itſelf moſt reaſonable, equitable, and political; for it is putting *Grenada*, as to duties, on the ſame footing with all the *Britiſh Leeward Iſlands*. If *Grenada* paid more it would have been detrimental to her; if leſs, it muſt be detrimental to the other *Leeward Iſlands*: nay, it would have been carrying the capitulation into execution, which gave the people of *Grenada* hopes, that if any new tax was laid on, their caſe would be the ſame with their fellow ſubjects in the other *Leeward Iſlands*.

The only queſtion then on this firſt point is, Whether the king had a power to make ſuch change *between* the 10th of *February*, 1763, the day the treaty of peace was ſigned, and the 7th *October*, 1763? Taking theſe propoſitions to be true which I have ſtated; the only queſtion is, Whether the *king* had of *himſelf* that power?

It is left by the conſtitution to the king's authority to grant or refuſe a capitulation: if he refuſes, and puts the inhabitants to the ſword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix ſuch terms and conditions as he thinks proper. He is intruſted with making the

1774.

HALL *verſus* CAMPBELL.

treaty of peace: he may yield up the conqueſt, or retain it upon what terms he pleaſes. Theſe powers no man ever diſputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion.

To go into the hiſtory of the conqueſts made by the crown of *England*.

Ireland. The conqueſt and the alteration of the laws of *Ireland* have been variouſly and learnedly diſcuſſed by lawyers and writers of great fame, at different periods of time: but no man ever ſaid, that the change in the laws of that country was made by the parliament of *England:* no man ever ſaid the crown could not do it. The fact in truth, after all the reſearches which have been made, comes out clearly to be, as it is laid down by Lord *Vaugh. Rep.* 291. Chief Juſtice *Vaughan**, that *Ireland* received the laws of *England*, by the charters and commands of *Hen.* 2, king *John*, *Hen.* 3. and he adds an *et cætera* to take in *Ed.* 1. and the ſubſequent kings. And he ſhews clearly the miſtake of imagining that the charters of the 12th of *John*, were by the aſſent of a parliament of *Ireland*. Whenever the firſt parliament was called in *Ireland*, that change was introduced without the interpoſition of the parliament of *England*; and muſt, therefore, be derived from the crown.

Wales. Mr. *Barrington* is well warranted in ſaying that the ſtatute of *Wales*, 12th *Ed.* 1ſt, is certainly no more than *regulations* made by the *king* in his council, for the government of *Wales*, which the preamble ſays was then totally ſubdued. Though, for various political purpoſes, he feigned *Wales* to be a *feoff* of his crown; yet he governed it as a *conqueſt*. For *Ed.* 1ſt never pretended that he could, without the aſſent of parliament, make laws to bind any part of the realm.

Berwick. *Berwick*, after the conqueſt of it, was governed by charters from the crown without the interpoſition of parliament, till the reign of *Jac.* 1ſt.

Gaſcony, Guienne, Calais. All the alterations in the laws of *Gaſcony*, *Guienne*, and *Calais*, muſt have been under the *king*'s authority; becauſe all the acts of parliament relative to them are extant. For they were in the reign of *Edward* 3d, and all the acts of parliament of that time are extant. There are ſome acts of parliament relative to each of theſe conqueſts that I have named, but none for any change of their laws, and particularly with regard

1774.

gard to *Calais*, which is alluded to as if their laws were considered as given by the crown.

HALL *verſus* CAMPBELL.

Beſides the garriſon, there are inhabitants, property, and trade in *Gibraltar*: ever ſince that conqueſt the king has made orders and regulations ſuitable to thoſe who live, &c. or trade, or enjoy property in a garriſon town. *Gibraltar.*

The *Attorney General* alluded to a variety of inſtances, and ſeveral very lately, in which the king had exerciſed legiſlation in *Minorca*: there, there are many inhabitants, much property, and trade. If it is ſaid, that the king does it as coming in the place of the king of *Spain*, becauſe their old conſtitution remains, the ſame argument holds here. For before the 7th *October* 1763, the original conſtitution of *Grenada* continued, and the king ſtood in place of their former ſovereign: *Minorca.*

After the conqueſt of *New York*, in which moſt of the old *Dutch* inhabitants remained, king *Charles* 2d changed the form of their conſtitution and political government; by granting it to the duke of *York*, to hold of his crown, under all the regulations contained in the *letters patent*. *New York.*

It is not to be wondered at that an adjudged caſe in point has not been produced: No queſtion was ever ſtarted before, but that the king has a right to a legiſlative authority over a conquered country; it was never denied in *Weſtminſter-hall*; it never was queſtioned in parliament. *Coke*'s Report of the arguments and reſolutions of the judges in *Calvin*'s caſe, lays it down as clear. If a king (ſays the book) comes to a kingdom by conqueſt, he may change and alter the laws of that kingdom; but if he comes to it by title and deſcent, he cannot change the laws of himſelf without the conſent of parliament*. It is plain he alludes to his own country, becauſe he alludes to a country where there is a parliament. *7 Rep. 17. b.

The authority alſo of two great names has been cited, who take the propoſition for granted. In the year 1722, the aſſembly of *Jamaica* being refractory, it was referred to Sir *Philip Yorke* and Sir *Clement Wearge*, to know "what could be done if the "aſſembly ſhould obſtinately continue to withhold all the uſual "ſupplies." They reported thus: "If *Jamaica* was ſtill to be "conſidered as a *conquered iſland*, the *king* had a *right* to *levy* "*taxes* upon the inhabitants; but if it was to be conſidered in "the *ſame light* as the other *colonies*, no tax could be impoſed "on the inhabitants but *by an aſſembly of the iſland*, or by an "*act of parliament*."

1774.

HALL *verſus* CAMPBELL.

They conſidered the diſtinction in law as clear, and an indiſputable conſequence of the iſland being in the one ſtate or in the other. Whether it remained a conqueſt, or was made a colony they did not examine. I have upon former occaſions traced the conſtitution of *Jamaica*, as far as there are papers and records in the offices, and cannot find that any *Spaniard* remained upon the iſland ſo late as the reſtoration; if any, there were very few. To a queſtion I lately put to a perſon well informed and acquainted with the country, his anſwer was, there were no *Spaniſh* names among the white inhabitants, there were among the negroes. King *Charles* 2d by proclamation invited ſettlers there, he made grants of lands: he appointed at firſt a governor and council only: afterwards he granted a commiſſion to the governor to call an aſſembly.

The conſtitution of every province, immediately under the king, has ariſen in the ſame manner; not from grants, but from commiſſions to call aſſemblies; and, therefore, all the *Spaniards* having left the iſland or been driven out, *Jamaica* from the firſt ſettling was an *Engliſh* colony, who under the authority of the king planted a vacant iſland, belonging to him in right of his crown; like the caſes of the iſland of St. *Helena* and St. *John*, mentioned by Mr. *Attorney General*.

A maxim of conſtitutional law as declared by all the judges in *Calvin*'s caſe, and which two ſuch men, in modern times, as Sir *Philip Yorke* and Sir *Clement Wearge*, took for granted, will require ſome authorities to ſhake.

But on the other ſide, no book, no ſaying, no opinion has been cited; no inſtance in any period of hiſtory produced, where a doubt has been raiſed concerning it. The counſel for the plaintiff no doubt laboured this point from a diffidence of what might be our opinion on the ſecond queſtion. But upon the ſecond point, after full conſideration we are of opinion, that *before* the *letters patent* of the 20th *July*, 1764, the *king* had *precluded* himſelf from the exerciſe of a legiſlative authority over the iſland of *Grenada*.

The firſt and material inſtrument is the proclamation of the 7th *October*, 1763. See what it is that the king there ſays, with what view, and how he engages himſelf and pledges his word.

"For the better ſecurity of the liberty and property of thoſe "who are or ſhall become inhabitants of our iſland of *Grenada*, "we have declared by this our proclamation, that we have "commiſſioned our governor (as ſoon as the ſtate and circum-

"ſtances

1774.

HALL *versus* CAMPBELL.

" ſtances of the colony will admit,) *to call an aſſembly* to *enact* " *laws*," &c. With what view is this made? It is to invite ſettlers and ſubjects: and why to invite? That they might think their properties, &c. more ſecure if the legiſlation was veſted in an aſſembly, than under a governor and council only.

Next, having eſtabliſhed the conſtitution, the proclamation of the 20th *March*, 1764, invites them to come in as purchaſors: in further confirmation of all this, on the 9th *April*, 1764, three months before *July*, an actual commiſſion is made out to the governor to call an aſſembly as ſoon as the ſtate of the iſland would admit thereof. You obſerve, there is no reſervation in the proclamation of any legiſlature to be exerciſed by the *king*, or by the governor and council under his authority in any manner, until the aſſembly ſhould meet; but rather the contrary: for whatever conſtruction is to be put upon it, which, perhaps, may be very difficult through all the caſes to which it may be applied, it alludes to a government by *laws in being*, and by courts of juſtice, *not* by a *legiſlative* authority, until an aſſembly ſhould be called. There does not appear from the ſpecial verdict, any impediment to the calling an aſſembly immediately on the arrival of the governor, which was in *December*, 1764. But no aſſembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think, that by the two proclamations and the commiſſion to governor *Melville*, the king had immediately and *irrecoverably* granted to all who were or ſhould become inhabitants, or who had, or ſhould acquire property in the iſland of *Grenada*, or more generally *to all whom it might concern*, that the ſubordinate legiſlation over the iſland ſhould be exerciſed by an aſſembly with the conſent of the governor and council, in like manner as the other iſlands belonging to the king.

Therefore, though the aboliſhing the duties of the *French* king and the ſubſtituting this tax in its ſtead, which according to the finding in this ſpecial verdict is paid in all the *Britiſh Leeward Iſlands*, is juſt and equitable with reſpect to *Grenada* itſelf, and the other *Britiſh Leeward Iſlands*, yet, through the inattention of the king's ſervants, in inverting the order in which the inſtruments ſhould have paſſed, and been notoriouſly publiſhed, the laſt act is contradictory to, and a violation of the firſt, and is, therefore, void. How proper ſoever it may be in reſpect to the object of the *letters patent* of the 20th *July*, 1764, to uſe the words of Sir *Philip Yorke* and Sir *Clement Wearge*, " *it can only*

1774. HALL *verſus* CAMPBELL.

" *now be done, by the aſſembly of the iſland, or by an act of the* " *parliament of Great Britain.*"

The conſequence is, judgment muſt be given for the plaintiff.

ELDRIDGE *verſus* KNOTT and Others.

Mere length of time, ſhort of the period fixed by the *ſtat.* of limitations, and *unaccompanied* with any *circumſtances*, is *not* of *itſelf* a ſufficient ground to preſume a releaſe or extinguiſhment of a quit rent.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Mr. Juſtice *Aſhhurſt* reported from Baron *Eyre* as follows: this was an action of treſpaſs for breaking and entering the plaintiff's houſe, and deſtroying his goods. Plea not guilty. Verdict for the plaintiff.

The defendants were bailiffs of *Dennis Rolle*, Eſq.; lord of the manor of *Eaſt Suderly* and *Lockerly* in the county of *Wilts*; and the treſpaſs complained of, was for taking a diſtreſs for quit-rents due to the lord, in right of this manor. Upon evidence it appeared, that till the the year 1736, a quit rent had been regularly paid to the reſpective lords of this manor, for the tenement in queſtion. That in the year 1738, a demand was made and refuſed; ſince which time there had been no further demand, nor had any payment been made, till within theſe few years, from the year 1736 to the time of the preſent action. That in 1736, an action was tried between the lord of the manor, and the owner of the tenement in queſtion, for cutting down two timber trees growing thereon; when a verdict was given for the tenant: ſince which the owners of the tenement in queſtion had refuſed to pay this quit rent, or to attend the lord's court.

Upon theſe facts Mr. Baron *Eyre* was of opinion, that though the claim of the defendant was not barred by the *ſtat.* of limitations, yet, that a non-payment and acquieſcence for 37 years, was a ſufficient ground to preſume a releaſe or extinguiſhment of the quit-rent; and left it to the jury to ſay, whether, upon the evidence, they would or would not preſume it was ſo releaſed or extinguiſhed: and the jury found it was.

Mr. *Buller* had moved for a new trial upon the ground of this being a miſdirection of the judge, and that the verdict was againſt evidence.

Mr. Serjeant *Davy* and Mr. *Kirby* ſhewed for cauſe; that though there was no caſe exactly in point, yet by analogy to the reaſoning and deciſion of the court in a variety of caſes, the direction of the judge in this caſe, was clearly a right direction.

In

orders in question should be discharged. The respondents must pay the costs of this appeal and of the appeal to the Supreme Court of Ontario.

Solicitors for appellants: *Linklater & Co.*
Solicitors for respondents: *Freshfields.*

J. C. 1915 — TORONTO SUBURBAN RAILWAY v. TORONTO CORPORATION.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL OF SOUTHERN NIGERIA . . . . . } APPELLANT;

AND

JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED AND OTHERS . . . . } RESPONDENTS.

[AND CROSS-APPEAL.]

ATTORNEY-GENERAL OF SOUTHERN NIGERIA . . . . . } APPELLANT;

AND

W. B. MAC IVER AND COMPANY AND OTHERS . . . . . } RESPONDENTS.

[AND CROSS-APPEAL.]

J. C.* 1914 *Nov.* 5, 6, 12, 13, 16; 1915 *Feb.* 9.

APPEALS AND CROSS-APPEALS CONSOLIDATED.

ON APPEAL FROM THE SUPREME COURT OF SOUTHERN NIGERIA.

Foreshore—Riparian Owners—Accretion—Artificial Reclamation—Knowledge of Crown—Duty of Crown to prevent Sea Incursion—Preservation of Riparian Rights—Rights in Reclaimed Land—Licence.

The respondents were in occupation of lands on the shore of the island of Lagos and there carried on businesses as African merchants. The lands had originally been granted by native grants to the respondents' predecessors in title, who in 1861 had obtained Crown grants. All the grants described the lands as bounded by the sea. About 1860 a wharf and two piers had been built upon the foreshore. At various dates subsequent to the Crown grants the respondents had carried out works on the foreshore to prevent incursion by the sea and erosion.

---

* *Present:* LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

J. C.

1914

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

Owing to these works a strip of land had been reclaimed below that which in 1861 had been high water mark. The respondents had built stores and sheds upon the reclaimed land and had for a period of from thirty to fifty years used it, together with the land granted and the piers and wharf, for the purposes of their businesses and had had exclusive possession. The Government of the island had knowledge of the reclamation and of the building upon and use of the reclaimed land:—

Held, that the reclaimed land, not being the result of natural accretion, vested in the Crown as owner of the foreshore, but that the respondents continued to have the rights of riparian owners over the foreshore, and that there was to be presumed in the respondents' favour an irrevocable licence from the Crown to erect buildings and to store goods upon the reclaimed land and to use it generally for the purposes of their businesses.

CONSOLIDATED APPEALS and cross-appeals from two judgments of the Full Court of the Supreme Court of Southern Nigeria (April 22, 1911) varying the judgment of Osborne C.J. (March 14, 1910).

The questions for determination in the appeals were as to the rights of John Holt and Company (Liverpool), Limited, and W. B. MacIver and Company, Limited (hereinafter referred to as the respondents), in certain lands situated on the shore of the island of Lagos and over the adjoining foreshore. The lands in question consisted of five plots granted by native chiefs or the King of Lagos to the respondents' predecessors in title, who after the cession of the island in 1861 had obtained Crown grants in respect of them. These grants described the lands as being bounded by the sea or lagoon, but contained no grant of the foreshore. The respondents had for many years occupied the lands for the purposes of their respective businesses as African merchants; of part they were freeholders and of part tenants. The following acts of user were proved or admitted. (*a*) The respondents' predecessors built a wharf and two piers about 1860; (*b*) about 1879 a retaining wall was built in front of one plot, and was extended in front of the adjoining plot between 1886 and 1888; (*c*) from time to time stakes were driven into the foreshore to protect the land from erosion; (*d*) the respondents and their predecessors used the foreshore and the land near the waterside for storage and other purposes of their businesses and had built stores, sheds, and other works thereon.

The land near the waterside so used included a strip of shore which had been below high water mark in 1861 but had become dry land owing either to natural accretion or to artificial reclamation, the respondents alleging the former cause, the Crown the latter. The respondents had, for a period of between thirty and fifty years, used this strip of land, together with the lands granted and the piers and wharf, for the purposes of their business, and had had exclusive possession. There was no public right of way over the foreshore. In 1907 the Government of Lagos began the construction of a public road along the waterside and continued it across the strip of land above referred to, thus cutting off part of the land occupied by the respondents, and the stores and sheds thereon, from the sea or lagoon and from their wharf and piers. The facts are more fully stated in the judgment of their Lordships.

The respondents instituted suits against the Attorney-General to recover compensation for the loss which they would sustain, but these suits had not been proceeded with pending the present proceedings.

On March 17, 1909, and April 2, 1909, the Attorney-General filed informations against the respondents respectively praying for declarations that the Crown was seised of and entitled to the foreshore of the lagoon or of so much as was appurtenant to the five plots and for other incidental relief. The cases proceeded, by consent, upon the basis that it was desired to obtain the decision of the Court as to the rights of the respective parties not only in the foreshore but in the strip of land above referred to.

By Ordinance 3 of 1863 of Lagos, English law is there applicable so far as local circumstances permit, and unless inconsistent with any ordinance in force in the Colony.

The trial took place before Osborne C.J., who delivered judgment on March 14, 1910. The learned Chief Justice held that under the treaty of cession of the island in 1861 the foreshore became vested in the Crown, subject to the then existing rights of riparian occupiers to use it for the purpose of access to the water, and for landing and embarking and hauling up canoes. With regard to the question of accretion or reclamation, he said that it was impossible to say how far the additions to the land

J. C. 1914

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

were due to accretion and how far to reclamation, but that it must have been to some extent the result of the acts of the occupiers and consequently belonged to the Crown. The learned Chief Justice, however, was of opinion that the Government must have been aware of the reclamation and of the subsequent building upon and user of the reclaimed land, and that the presumption was that these acts were done with the permission of the Governor for the time being. This permission, he thought, was probably by licence to the riparian owners, in consideration of their reclaiming land from the lagoon at their own expense, to make use of the land so reclaimed for the purposes of their business. He held on the authority of *Plimmer* v. *Mayor of Wellington* (1) that the licence had become irrevocable and, being of indefinite duration, perpetual. The learned Chief Justice accordingly made a declaration that the Crown was entitled to the foreshore subject to the rights of the respondents as riparian owners and subject, as to the reclaimed land, to a perpetual right in them to place and store such things thereon and to erect such buildings thereon and generally to use it in such manner as they might deem expedient for the purpose of carrying on business as merchants.

Cross-appeals were made to the Full Court consisting of the said Osborne C.J. with Griffith C.J. (Gold Coast) and Winkfield J. Judgments were delivered on April 22, 1911, dismissing the appeals of the companies, and in the appeals of the Attorney-General varying the judgments by declaring the respondents entitled only to an easement by prescription, as to one plot, to use such of the reclaimed land as had not been built on for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and to easements by prescription in respect of two jetties upon the foreshore. Osborne C.J. agreed with the other members of the Court that his judgment at the trial was erroneous on the ground that the Governor of the island could only make grants and dispositions of Crown lands under the seal of the Colony, and had no authority to make an indirect grant in any other manner. All three judges based their judgments upon findings of fact similar to those at the trial and

(1) (1884) 9 App. Cas. 699.

expressed the view that the addition to the land was mainly the result of artificial reclamation by the respondents and their predecessors, Osborne C.J. and Winkfield J. stating further that in their view there was no evidence that any part of it was due to natural accretion.

There were cross-appeals to His Majesty in Council.

P. O. Lawrence, K.C., A. R. Pennington, and *Whinney*, for the appellant, the Attorney-General. The Attorney-General appeals only from so much of the judgment of the Full Court as declares that the respondents are entitled to an easement to place coopers' stores, casks, and trade goods upon the reclaimed land. The respondents were in exclusive possession of the servient land and could not therefore acquire an easement over it by prescription: *Lyell* v. *Lord Hothfield*. (1) Further, the easement is too wide since it was not confined to the respondents' own goods and might extend to the occupation of the whole servient land. There is no English authority to support an easement of this character. In the United States the law recognizes wider easements than our Courts. [*Richardson* v. *Pond* (2) was referred to.] The grants did not extend to the foreshore; "a grant of land abutting on the sea does not carry the adjoining foreshore": per Cotton L.J. in *Attorney-General* v. *Portsmouth Corporation*, cited in Stuart Moore on Foreshores, 3rd ed., p. 557. The land in dispute was the result of artificial reclamation and not of imperceptible natural accretion; it consequently did not become part of the respondents' lands.

Cave, K.C., Tomlin, K.C., and *A. T. Miller*, for the respondents (appellants upon the cross-appeals). The easement appealed against does not entitle the respondents to occupy the whole land or to leave goods upon it permanently. It is claimed as appurtenant to the respondents' businesses, and if it is unreasonably exercised the respondents can be restrained. Whatever can be the subject-matter of a grant can be enjoyed as an easement: Gale on Easements, 8th ed., pp. 22 to 24. But upon the true view of the facts and law the respondents are entitled upon their cross-appeals to wider rights. Even assuming that the foreshore

(1) [1914] 2 K. B. 911. (2) (1860) 15 Gray (Mass.) 387.

J. C. 1914

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

was not vested in the respondents under their grants, they have as riparian owners greater rights than members of the public and are entitled as an easement to have access to the sea from their lands: *Lyon* v. *Fishmongers' Company* (1); *Attorney-General of Straits Settlements* v. *Wemyss* (2); *Marshall* v. *Ulleswater Steam Navigation Co.* (3) Further the evidence shows that the disputed land was the result of a gradual natural accretion, and it therefore became a part of the respondents' lands: *Rex* v. *Lord Yarborough.* (4) The later authorities establish that the same result follows even if the process has been assisted by artificial works carried out to protect the land from erosion: *Attorney-General* v. *Chambers* (5); *Doe* v. *East India Company.* (6) The foreshore, however, never was the property of the Crown, but formed part of the respondents' lands. The respondents' title rests upon the native grants, and the evidence shows that by native custom the grants carried the land down to low water mark, as would have been the case under Scottish law. The Crown grants merely confirmed the native grants. Where the terms or effect of a grant are ambiguous as to whether particular land is included, evidence of user of the land is admissible to establish the identity of the land granted: *Duke of Beaufort* v. *Swansea Corporation* (7); *In re Belfast Dock Act* (8); *Van Diemen's Land Co.* v. *Table Cape Marine Board* (9); *Attorney-General for Ireland* v. *Vandeleur.* (10) It was not denied that the respondents had exclusive possession of the land in dispute and had always used it for the purposes of their businesses as part of the land granted. If the disputed land was not part of the land granted, nor an addition to it by natural accretion, the respondents are nevertheless entitled to succeed upon the principle of *Plimmer* v. *Mayor of Wellington.* (11) It is the duty of the Crown to protect the land from incursion by the sea: *Attorney-General* v. *Tomline.* (12) Where, as in the

(1) (1876) 1 App. Cas. 662.
(2) (1888) 13 App. Cas. 192.
(3) (1871) L. R. 7 Q. B. 166.
(4) (1824) 3 B. & C. 91; (1828) 2 Bli. (N.S.) 147.
(5) (1859) 4 De G. & J. 55.
(6) (1856) 10 Moo. P. C. 140.
(7) (1849) 3 Ex. 413.
(8) (1867) I. R. 1 Eq. 128.
(9) [1906] A. C. 92.
(10) [1907] A. C. 369.
(11) 9 App. Cas. 699.
(12) (1879) 12 Ch. D. 214; (1880) 14 Ch. D. 58

present cases, a subject has for a long series of years made defensive works upon the foreshore with the knowledge of the Crown, there is a strong presumption that it has been done with the sanction and under the licence of the Crown. It should be presumed that in consideration of the respondents erecting defensive works the Crown licensed them to use the land reclaimed for their businesses. This licence is irrevocable.

P. O. Lawrence, K.C., in reply and for the Attorney-General upon cross-appeals. There were concurrent findings that the disputed land was, in the main, the result of artificial reclamation. There was no evidence of natural accretion, only of erosion. Further, the limits of the grant were well defined and the rule as to natural accretion consequently does not apply: *Foster* v. *Wright* (1); *Hindson* v. *Ashby* (2); *Attorney-General* v. *Chambers*. (3) The case of *Plimmer* v. *Mayor of Wellington* (4) is distinguishable, as in that case the Government requested its tenant to carry out the works. Acts of acquiescence by officers of the Government do not bind the Executive: *Ontario Mining Co.* v. *Seybold*. (5) There was no such acquiescence as entitles the respondents to the rights claimed: *Wilmot* v. *Barber* (6); *Russell* v. *Watts*. (7)

Cave, K.C., in reply upon the cross-appeals. Where there has been continuous and uninterrupted enjoyment of a right during a period of many years, a deed embodying the right will be presumed: *Phillips* v. *Halliday*. (8)

1915
Feb. 9.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. These are two appeals and two cross-appeals, all consolidated, against two judgments pronounced by the Full Court of the Supreme Court of Southern Nigeria on April 22, 1911, varying the judgment of Osborne C.J. pronounced on March 14, 1910. For the sake of convenience the Attorney-General for Southern Nigeria is hereinafter referred to as "the Crown" and the opposite parties as "the respondents."

(1) (1878) 4 C. P. D. 438.
(2) [1896] 2 Ch. 1.
(3) 4 De G. & J. 55, at p. 71.
(4) 9 App. Cas. 699.
(5) [1903] A. C. 73.
(6) (1880) 15 Ch. D. 96.
(7) (1883) 25 Ch. D. 559; (1885) 10 App. Cas. 590.
(8) [1891] A. C. 228.

J. C.
1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA
v.
JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

The proceedings relate to certain lands in the district of Olowogbowo, in the island of Lagos, which became a part of the Colony of Southern Nigeria. The lands consist of five plots, all of which are situated on the shore of the lagoon. As commerce has developed, these lands, and especially the frontage thereof to the sea, have become of considerable value. They adjoin each other; and in the view which is to be taken of these appeals the facts as to the different plots may be sufficiently stated as follows: The respondents Holt and Company were in occupation claiming as freeholders of (1.) William's land and (2.) Dunkley's land, and as tenants of the executors of the Reverend James White, who claimed to be the freeholders of (3.) White's land. The respondents MacIver and Company were in the occupation of (4.) George's land and (5.) Johannsen's land as tenants of the freeholders of these respective plots. The whole premises were occupied for the purpose of the respondents' respective businesses as African merchants.

In regard to the possession and occupancy of the properties, the admitted facts are these: A wharf was built from George's land in or before the year 1859, a pier was built from Johannsen's land prior to the year 1861, and a pier was also built from Dunkley's land soon after that year. The respondents, it is further admitted, built stores, sheds, and other works at different dates upon the land adjoining the waterside, and in particular upon not inconsiderable portions of the solum of the land in question in the case, namely, that which had been foreshore, i.e., land between high and low water marks at ordinary spring tides. The respondents and their predecessors used the foreshore and land for storage and for the purposes of their business; and the wharf and piers already mentioned were also used by them in connection with their trade.

While upon the one hand there seems little doubt that for about half a century continuous use and possession were had—of the kind and nature just described—and that, as trade developed, additional buildings and erections were put upon the ground, yet upon the other hand it is admitted that this use and possession cannot be established for a period of sixty years.

To complete the general statement of the facts, it may be

mentioned that a retaining wall was built to protect Dunkley's land prior to 1879, and that this retaining wall was continued in front of William's land in the years 1886-88. Further, as was stated on the appeal to the Full Court, there was no public right of way over the foreshore.

In the year 1907 or 1908 the Government of the island began the construction of a public road along the waterside of the lagoon. The road was continued over the lands in dispute in the present case. By this means the five plots belonging to the respondents have been cut off from the waters of the lagoon, and from their wharves and piers. By the construction of the road so made some of the stores, buildings, and sheds erected by the respondents or their predecessors have been destroyed, and the use and possession of the respondents' lands have been in an important degree subverted. It became, accordingly, necessary to determine the nature of the rights of parties so as to settle the basis upon which compensation shall be made.

The form of the proceedings is by way of information. It is only necessary to look at the prayer of these to observe the startling consequences which would result to all the respondents' properties should that prayer be granted as it stands. For it is prayed that a declaration be made of the absolute right of the Crown in the land in dispute, and for an injunction and peaceable possession. The result of this would be the complete extrusion of the respondents from land, foreshore, wharves, and piers. The properties themselves, instead of being properties abutting on the sea, would be separated therefrom by the road to be constructed, and be converted into hinterland.

Their Lordships are not surprised that the advisers of the Crown shrank from the consequences of this sweeping demand. The only substantial concession made, however, was that, as to Dunkley's land and Johannsen's land, no appeal was presented against that portion of the judgment of the Court below which declared that the respondents have acquired an easement for a jetty and a right of way thereto from these respective lands. Subject to this, the demand of the Crown is maintained in all its breadth.

This is the first time that process by way of information

J. C. 1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

has been used in Southern Nigeria, and it is remarked by Osborne C.J. that "It has proved exceedingly difficult to adapt to the Supreme Court Ordinance and the procedure rules thereunder, which are framed to meet the requirements of a community wherein illiterate suitors not uncommonly conduct their own litigation." Strict English procedure was accordingly departed from, and the Courts went further in considering themselves not limited by the actual wording of the informations and pleadings. This occurred with the consent of both parties. "What," said the learned Chief Justice, "we are really asked to do is to ascertain and declare what have been the rights of the respective parties from the time of first occupation of their lands by their predecessors in title, not only with regard to foreshore, but with regard also to a strip of land which lies between the limits specified in the various grants relating to the defendants' lands, and the low water mark of the lagoon."

While it is true that this state of the record may import certain difficulties into the case, their Lordships pass no adverse comment upon the course taken by the parties and the Courts below. And they desire to express their sense of the thoroughness and care with which the perplexing problems which emerge in the case, both upon the law and in fact, have been treated by all of the learned judges.

It appears from the historical narrative in the judgment of Osborne C.J. that about 1850 Lagos, then under powerful chiefs, was one of the principal centres of the slave trade. It was bombarded in 1851 by a British force, and on January 1, 1852, the slave trade was finally abolished. A British Consulate was established, and there was an influx of many liberated slaves from Sierra Leone and elsewhere. There seems no reason to doubt the opinion of the learned Chief Justice that the land had originally belonged to tribal communities, but that "during the decade between 1852 and 1862 the practice of alienation sprung into vogue, and another new feature, totally foreign to native law, which knew not writing, was introduced in the shape of written grants by the King of Lagos. The land in Lagos was originally attached to the stools of the white cap chiefs, who were in no way subordinate to the early Kings." In course of time,

J. C.
1915
ATTORNEY-GENERAL OF SOUTHERN NIGERIA
v.
JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

however, the royal power increased and the tribal and chieftain power diminished. This was the state of matters when King Docemo and his chiefs, on March 6, 1861, entered into a treaty of cession of the port and island of Lagos to Her Majesty the Queen of Great Britain.

The treaty is printed at length: the only question which has been mooted upon it is as to whether by its terms it granted sovereignty and jurisdiction alone to the exclusion of property. The words are complete and absolute, they "grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island, and premises, with all the royalties thereof, freely, fully, entirely, and absolutely." Their Lordships do not refer to the treaty further than to say that in their opinion property was not excluded from the grant; and they think also that this is subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors were to be respected. It may be that these required confirmation by subsequent procedure, prescribed by way of ordinance or otherwise, but no question on that head arises in the present case.

On March 13, 1862, the ceded territories, under the title of Settlement of Lagos, were erected into a separate government. On February 19, 1866, Lagos became part of the West African Settlements. On July 24, 1874, the Gold Cost Colony, including Lagos, was formed. On January 13, 1886, Lagos again became a separate colony, and finally, on May 1, 1906, it became part of the Colony of Southern Nigeria. This is briefly the political history of the island; but none of these changes, recorded in the judgments of the Court below, effected any alteration in the status of occupants of land, or in the nature of the tenure thereof.

With regard to the plots of land in question in the present case, the one point which has a really important bearing upon the questions to be determined in the appeals is as to the

J. C. 1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

boundary seaward of those plots. On January 21, 1864, a Crown grant was executed in favour of William, who had been in possession for twelve years before, and the boundary on the south-west side of the property was stated to be the river Lagos. In 1861 there had been a grant of the next plot by King Docemo to a native called Captain Harry Johnson; Johnson sold to Dunkley, and in 1869 Dunkley obtained a Crown grant. There is a peculiarity as to the southern boundary, which is stated to be the "Marina," but it appears to be a fact that there was no "Marina" or public thoroughfare in that island, and, as the Chief Justice states, there is evidence that Dunkley himself had previously reclaimed some land and built a sea wall thereon as early as 1868, and that at the time he acquired the Crown grant he had a jetty or pier opposite his land. As to the third plot, the original grant was to the Reverend James White, in 1861, and in his Crown grant the western boundary is stated to be the lagoon. The fourth plot, namely, George's land, was the subject of a grant from King Docemo, and the boundary is described as "facing the lagoon." The fifth plot, namely, Johannsen's land, is described as having a water frontage, and in an earlier agreement the property is said to include the ground on the beach.

Their Lordships do not investigate these titles in further detail. For in their opinion they are substantially at one in this, that the properties were each and all treated in description as being bounded in fact by the sea. The expression may be in one case the river Lagos, in another the lagoon, and so on, but a sea frontage was that which was meant, and in their Lordships' opinion was sufficiently expressed. They were riparian properties.

In the next place, in their Lordships' view, there was no express grant of foreshore made in any one of these titles, nor can any grant of foreshore be implied, looking to the language of description which is employed. Their Lordships are not moved by the fact that in some cases measurements are given; these would have to yield to the description. But the description itself is a water lagoon or sea boundary, and, as stated, this, in the opinion of the Board, does not embrace foreshore within the scope of the grant.

Before adverting to the state of possession of these properties, their Lordships think it right to allude to one fact with regard to the sea frontage. A swift current sweeps along the shore. The effect in the past has been to erode the coast, and it has been the practice in time past memory to erect upon the shore stakes or "cabbage posts" to prevent the serious inroad and ravages of this tidal erosion. The practice was not only known to the British Government, but so early as 1864 it was recognized, and indeed enforced, by an ordinance confirmed upon March 28 of that year. A road had been made along a part of the riverside, and the owners of land abutting on the road were ordained, among other things, to drive in stakes in the bank of the river in such a manner as should be required by the Government surveyor—the narrative of the ordinance being that the road was liable to be put out of repair and the soil carried away by inter alia "the action of the tide at the base thereof." The reason of the ordinance is stated to be the convenience and comfort of Her Majesty's subjects. There can, in the opinion of the Board, be little doubt that the erosive action of the sea was such along the coast of Lagos that a protection against it was considered not only to be for private but for public advantage.

Before stating the nature of the operations conducted by the respondents, their Lordships, in view of the argument presented to them, think it necessary to consider the rights in the properties, the descriptions whereof have been already alluded to, in reference to the doctrine of the accretion from the sea. In the first place, their Lordships are of opinion that when de facto the boundary was the sea under the different names already alluded to, there is nothing in the law or the nature of the case to prevent the application of the ordinary doctrine of accretion or dereliction to such a condition of things. On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had de facto been transferred to the Crown as owners of the sea and its bed within territorial limits, and of foreshore, even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles.

J. C. 1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel, and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained.

The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, were de facto fronted and bounded by the sea were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a strip of land (it might be yards, feet, or inches) between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into inland property, would be followed by grotesque and well-nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage.

The whole of this question as applicable to lands de facto fronting a river but described by measurements which excluded its bed was anxiously discussed in the case of *City of London Land Tax Commissioners* v. *Central London Railway*. (1) The law with reference to river and street boundaries of property was there gathered together, and it need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of the soil ad medium filum is not interfered with on account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation, or colouring does not in fact include any part of the bed of the river or of the street. Similarly, in their Lordships' opinion, properties scheduled or specifically measured but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea. In the present case, accordingly, the conveyances of the properties

(1) [1913] A. C. 364.

which are in question in this appeal were in the opinion of the Board habile to cover the land formed by slow, gradual, and natural accretion.

Although various points were brought before their Lordships in the direction of questioning the law of accretion, their Lordships, for the reasons stated, do not doubt its general applicability to lands like those of the respondents' abutting on the foreshore. Nor do they, however, doubt the one condition of the operation of the rule. That is that the accretion should be natural, and should be slow and gradual—so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs.

There has been much written and decided law upon this subject, and, notwithstanding the very full argument, it need not be entered upon at large. But in spite of the wealth of authority, including the dicta in Hale's De Jure Maris and of many eminent judges, it is not clear that the general proposition has been advanced beyond that laid down by Justinian in his Institutes, bk. ii., tit. i., s. 20: "Praeterea quod per alluvionem agro tuo flumen adjecit jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intellegere non possis quantum quoquo momento temporis adjiciatur." Blackstone says (vol. ii., chap. xvi.), "As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little by little, by small and imperceptible degrees, it shall go to the owner of the land adjoining." Blackstone then introduces by way of explanation a reference to a doubtful brocard de minimis non curat lex, which Lord Chelmsford in *Attorney-General* v. *Chambers* (1) properly disclaims. The true reason for the principle of law in regard to foreshores is the same reason as the principle in regard to river banks, i.e., that it is founded upon security and general convenience.

In *In re Hull and Selby Railway* (2) Lord Abinger C.B.,

(1) 4 De G. & J. 55, at p. 66. (2) (1839) 5 M. & W. 327.

J. C. 1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

referring to *Lord Yarborough's Case* (1), said: "The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property."

The case of *In re Hull and Selby Railway* (2) is important not only for the opinions of Lord Abinger and Alderson B., but for the fact of its acceptance of this principle of the law (settled as between subject and subject) to the relations between the subject and the Crown. "In all cases," said Lord Abinger, "of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added; and vice versa," and he repeats in different words his main proposition—"No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property."

Alderson B. dwelt specially upon the double-sided operation of the rule. "I think," he said, "the question is precisely the same, whether the claim is made against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the foreshore—that is, the space between high and low water mark—grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible, in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question."

In the case of *Attorney-General* v. *Chambers* (3) Lord Chelmsford refers to the double-sided operation of the rule in this way: "It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore."

(1) 2 Bli. (N.S.) 147. (2) 5 M. & W. 327.

(3) 4 De G. & J. 55.

As to the nature of the accretion, it must be, as already mentioned, so gradual as in a practical sense to be imperceptible in its progress. "Considering," said Abbott C.J., "the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time." This statement of the principle, namely, that the accretion is to be something which is imperceptible in the sense of not being observed in its actual progress, goes no further than the words of Justinian already quoted.

It was strongly contended before the Board that the facts of this case showed it to be substantially one of natural accretion. The argument was this. In accordance with the policy generally approved, stakes were set out between high and low water mark, and the silting up took place within those stakes and between them and the actual shore, and, secondly, any artificial erections were merely for the purpose of levelling the ground so as to make it suitable for the landing of cargoes, and avoiding the erosive action of the sea. The view thus presented certainly does receive no inconsiderable justification from language employed in the judgments of the Court below. More than one reference is made to "the question of the reclaimed or silted-up land," and no distinction appears to be clearly drawn between the one and the other. Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work upon it remains as before, i.e., in cases like the present, with the Crown.

The history of the foreshore adjoining these lands, and of the operations thereon, produces one of the main difficulties of the present case. Their Lordships have come to the conclusion that they are confronted with substantially concurrent judgments of the Courts below upon this question of fact. Upon the appeals Griffith C.J., after referring to the finding of the trial judge, said: "I have no reasonable doubt that the great bulk of the land

J. C. 1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY LIVERPOOL), LIMITED.

between the Crown grant land and the lagoon is the result of artificial reclamation on the part of the defendants and their predecessors."

Osborne C.J., who had been the trial judge, puts his judgment upon this point thus: "The evidence seems clearly to show that actual reclamation contributed more than alluvion to the extension of the lands in the occupation of the defendants and their predecessors in title, and as to actual gain by alluvion, uninfluenced by the defendants' and their predecessors' reclaiming operations, there is no direct evidence."

The finding is thus not very specific, although Winkfield J. goes the length of saying "It is not established that any part of the land neutral tint on the plan" (i.e., the land in question) "was the result of natural accretion or alluvion."

In this state of the judgment their Lordships are not in a position to hold themselves free to decline to accept the finding. Nor do they say that they would have come to a different conclusion. The case accordingly must be dealt with as substantially one of an addition to adjoining lands being caused artificially by the execution of reclamatory work.

The natural situation of the land was that, consequent upon the erosion mentioned, a relatively steep and inconvenient shore had been created. The reclamation mentioned undertaken by the respondents and their predecessors was not of the simple character of the erection of stakes, as alluded to, but was the building of a solid wall; and the evidence appears to point to the foundations of that wall having been sunk to the extent of at least a few feet in the soil between ordinary high and low water mark, i.e., in the foreshore itself. Nothing more natural could have been expected, and probably nothing more in the interest of all parties, including the Crown. The fact, however, being accepted as stated, the legal consequence follows, namely, that the doctrine of natural accretion cannot be held to apply.

The wall, having been founded as stated, was built up; the land within it and the old high line of foreshore was levelled; and the respondents and their predecessors have possessed the same ever since, that is, during a very long course of time, and they built thereupon from time to time

the warehouses and sheds which appear upon the plans. The ground upon which these are erected protrudes largely over the disputed territory. Upon the new wall frontage itself wharfage accommodation was constructed; and the whole, namely, piers, wharf, disputed land and property within the old boundaries, have been possessed together and used, roughly speaking, in this way for a period of between thirty and fifty years.

The judgment of the Full Court has affirmed various easements over reclaimed land (1.) in the case of William's land for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and (2.) and (3.) in the case of Johannsen's and Dunkley's lands easements for jetties. Against these last the Crown has not insisted at their Lordships' Board; but with regard to the first point it is maintained that such an easement is unknown to the law. It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors in title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession of the land as owner thereof.

Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce* v. *Hay* (1) by Lord St. Leonards L.C., who observed: "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."

But in their Lordships' opinion the second contention of the Crown is correct. It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appear to have considered these operations, which were clearly

(1) (1852) 1 Macq. 305.

J. C. 1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

beneficial to the general interest, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained.

There remains for consideration the judgment of Osborne C.J., which was inter alia defended in argument by the respondeuts, and to which it was part of their case that this Board should revert.

The respondents are not in a position to plead the benefit of prescription, as, although their buildings and erections have been used and occupied for a time unquestionably long, it has, as already mentioned, not reached the requisite period of sixty years.

Their Lordships have been referred, on the other hand, to cases like *Attorney-General for Ireland* v. *Vandeleur*. (1) But the facts of the present case cannot be subsumed under the category of lost grant. Although their Lordships are accordingly impressed with the long-continued possession, they are unable to discover in the law of England any acknowledged ground for holding that the property of the solum of the artificially reclaimed land has thereby become vested in the respondents.

A reference also was made to the case of *Phillips* v. *Halliday*. (2) But the circumstances of that case were remote from the present. What was decided was that a pew may be annexed to a dwelling-house within a parish "either by a faculty or by prescription, which supposes a faculty," and that a faculty might be presumed upon evidence of exclusive possession and repair for a long period. A passage in the judgment from the opinion of Herschell L.C. is much relied upon; it is to the following

(1) [1907] A. C. 369. (2) [1891] A. C. 228.

effect:—"In the case of *Rogers* v. *Brooks* (1), Willes J., a very learned judge, said, referring to a possession of only thirty-six years, that after so long a possession he would presume anything in favour of the plaintiff. No doubt that is a strong expression, and possibly there may be presumptions that ought not to be made even under such circumstances as those, but I think it points out how emphatically the view has been entertained by learned judges that where there has been long-continued possession which is consistent with a legal title, every reasonable presumption ought to be made in order to support the possession and maintain it as having been of right."

In the opinion of the Board this passage does not support the proposition that a transfer of the dominium of lands can be effected without the presumption of a lost grant, or without possession during the full requisite period of prescription. But the case does bear upon a question of maintenance of possession considered apart from declaration of ownership. The effect of this upon the present case will be immediately seen.

As to the facts, the dates of reclamation have already been given and the nature of the erections, operations, and occupation stated. To all intents and purposes the reclaimed ground was used along with and as part and portion of the respondents' properties as a whole; and the piers, wharves, and whole land have been, for the protracted period alluded to, used for the purposes of the shipping and mercantile businesses. Their Lordships are further of opinion that the circumstances in which the reclamation itself was made negative all ideas of intentional trespass or of surreptitious acquisition of land. As stated, the respondents' and their predecessors' acts of reclamation were good for all concerned, and were a public benefit. Their Lordships find themselves in agreement with Osborne C.J., who tried the cause, and has submitted both facts and law to a thorough consideration, that "it is quite impossible to believe that all the reclamation and subsequent building can have gone on without the knowledge and against the wish of the Government . . . . as the Government must have been aware of the reclamation and subsequent building, it is more probable that those acts were

(1) (1784) 1 T. R. 431, n.

J. C. 1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

done with permission from the Governor for the time being than that they were acts of trespass done in defiance of the Government."

It remains accordingly for the Board to consider, under such circumstances, whether it is now the right of the Crown to subvert this long-continued occupation and to obtain an injunction which would extrude the respondents from the reclaimed land.

One result of no inconsiderable consequence would, of course, follow. The plots of land, all of which were bounded by the foreshore and the sea, would be converted into inland properties, and the result of artificial reclamation upon the foreshore forty years ago, a reclamation made as above described, not objected to, and followed by occupation ever since, would be the loss of all kinds of navigation, groundage, and other foreshore rights, and the destruction of probably the most serious elements of value in the whole of the respondents' properties.

Their Lordships are of opinion that this result is not in accordance with law. It may be that in building the foundation of the wall a stricter care should have been taken to keep on the landward side of the foreshore; but the foreshore, it should not be forgotten, was exceptionally troublesome; the erosion was going on and the current was so dangerous that in native opinion there was a devil in the water. In truth and substance what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it is recognized by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown. This principle is in accord with the law laid down in *Attorney-General* v. *Tomline* (1), and principally with the opinions of Fry J. (2) at the trial and Cotton L.J. in the Court of Appeal. (3)

(1) 14 Ch. D. 58. (2) 12 Ch. D. 214, at p. 233.
(3) 14 Ch. D. 58, at p. 69.

J. C.
1915
ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

With regard to the use and enjoyment of the made up land by the respondents as merchants their Lordships are, as already indicated, of opinion that the same cannot, in the circumstances, be subverted. As to what may be called foreshore rights, as such, the point of the case seems to be what is the effect of a frontage owner reclaiming part of a foreshore which is vested in another. It appears from the case of *Lyon* v. *Fishmongers' Company* (1) that the frontage owner has foreshore rights annexed to his land beyond such rights as he possesses as one of the public. And the real question, therefore, is whether the reclamation made in the circumstances before described operates as an abandonment of these rights over the land reclaimed. The abandonment of rights annexed to land is a question of intention, and it is absurd to suppose that the frontagers in the present case intended to convert their holdings into what has been described as "hinterland." Further, it appears from the case of *Marshall* v. *Ullswater Steam Navigation Co.* (2) that the reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist even after the land has ceased to be subject to the flow and reflow of the tide.

The case has been brought in order to determine the principles upon which compensation shall be awarded to the respondents in consequence of the construction by the Crown of a road over the disputed land. Their Lordships desire to make it clear that it follows from their decision that the foreshore rights originally attaching to the respondents' lands before reclamation have accordingly not been destroyed thereby. The lands further will fall, upon the case of compensation, to be treated upon the principle laid down in *Duke of Buccleuch* v. *Metropolitan Board of Works* (3), as possessing not only rights of navigation and otherwise in and enjoyable by the public at large, but those special rights which are attached and add value to specific riparian lands.

Their Lordships will humbly advise His Majesty that the judgment of the Full Court should be set aside and the judgment

(1) 1 App. Cas. 662. (2) L. R. 7 Q. B. 166.
(3) (1872) L. R. 5 H. L. 418.

J. C. 1915

ATTORNEY-GENERAL OF SOUTHERN NIGERIA v. JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED.

of the Chief Justice in the Court of first instance on March 14, 1910, restored, except upon the point of costs. The Crown will pay to the respondents the costs of the appeals and of the causes in the Courts below.

Solicitors for appellant (the Attorney-General): *Sutton, Ommanney & Rendall.*

Solicitors for respondent companies: *Field, Emery, Roscoe & Medley, Agents for Alsop, Stevens, Crooks & Co., Liverpool.*

[PRIVY COUNCIL.]

J. C.* 1915

Feb. 8; *March* 9.

UNION STEAMSHIP COMPANY OF NEW ZEALAND, LIMITED . . . . . } APPELLANTS;

AND

WELLINGTON HARBOUR BOARD . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Shipping — Harbour Dues — Exemption — "Steamship carrying mails" — Agreement — Construction — Harbours Act, 1908 (*No.* 75 *of* 1908, *New Zealand*), *s.* 116, *sub-s.* 1 (*d*).

By the Harbours Act, 1908 (No. 75 of 1908, New Zealand), s. 116, sub-s. 1, "Nothing in this Act shall charge with any dues . . . . (*d*) any steamship carrying mails under any contract made with the Postmaster-General, in cases where it is provided by the terms of such contract that such steamships shall be exempt therefrom." Under a contract with the Postmaster-General of New Zealand the appellants were bound to provide a periodic service of steamships to carry mails from Wellington to San Francisco and vice versa. Clause 17 of the contract exempted steamships "employed in the service under this contract" from harbour dues at Wellington. Under liberty given them by clause 32 of the contract, the appellants extended the service by continuing the voyages from Wellington to Sydney and back, but without further payment by the Postmaster-General. The respondents claimed harbour dues (levied by them under the above Act) upon the appellants' steamships using the port of Wellington while engaged upon the extended service:—

Held, that the steamships while so engaged were not "employed in the service of the contract" so as to be exempt from dues, and that

* *Present:* LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, and SIR ARTHUR CHANNELL.

[PRIVY COUNCIL.]

J.C.* 1898 Nov. 30; Dec. 1, 7. 1899 Aug. 1.

COOK AND ANOTHER . . . . . PLAINTIFFS;

AND

SIR JAMES GORDON SPRIGG . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.

Act of State—Concessions granted before Cession—Rights after Annexation—Jurisdiction of Municipal Courts—Crown Liabilities Act, 1888.

Held, that the appellants as grantees of concessions made by the paramount chief of Pondoland cannot, after the annexation of Pondoland by Her Majesty, enforce against the Crown the privileges and rights conferred.

Annexation is an act of State, and any obligation assumed under a treaty to that effect, either to the ceding sovereign or to individuals, is not one which municipal courts are authorized to enforce.

The Crown Liabilities Act, 1888, permits such an action to be brought, but it does not empower the Court to make a declaration of right.

Secretary of State for India in Council v. *Kamachee Boye Sahaba*, (1859) 13 Moo. P. C. 22, followed.

APPEAL from a judgment of the Supreme Court (March 11, 1895).

The appellants claimed in their action—(1.) certain railway, mineral, township, land, forest, trading, and other rights in Eastern Pondoland granted to them by Sigcau, paramount chief of Pondoland, under and by virtue of certain four concessions, dated April 10, 1889, October 24, 1890, October 4, 1891, and June 30, 1893, respectively; (2.) a declaration of rights in the premises; (3.) a sum of 5000*l.* as damages sustained by the appellants, by reason of the interference by the Premier of the Cape Colony with the exercise by the appellants of their rights under the said concessions.

The respondent admitted the execution by Sigcau of the said concessions, but he alleged that at the date of the same the British Government was the sole paramount authority in

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD MORRIS.

Pondoland, and that without the consent of the said Government—which consent was not given—the said concessions were of no legal force or effect. He further alleged that the said concessions were contrary to the law and customs of the Pondos, that they were not understood by the said Sigcau and his councillors, that they were void for vagueness and uncertainty, and that no adequate consideration was paid for them by the appellants. He did not admit that the appellants had performed the conditions and stipulations which they were liable to perform by virtue of the said concessions, and he denied that prior to the year 1894 the Pondo nation was an independent State. He alleged that prior to annexation of their territory by the Cape Act No. V. of 1894 Pondoland had already been annexed to and became part of the British dominions, and that neither at that time nor at any subsequent time was any condition made binding upon either the Imperial or Colonial British Government to recognise the said concessions. He further alleged that the said concessions had never been acted upon or carried out, that they affected the lands of certain chiefs who would not by native law be bound by the said concessions, and that they could create only personal obligations, if any, against the said Sigcau.

The Supreme Court held that Sigcau was the recognised paramount chief and supreme ruler of the Pondos, and that in granting the said concessions to the appellants he perfectly well understood the nature of the rights and privileges granted by him; but it held in favour of the respondent that the grant of the said concessions was not in accordance with native customs, that the said concessions had not been carried into practical effect, and that they created no legal obligations which could be enforced in a court of law against the Government of Cape Colony, inasmuch as the said Sigcau might at any time have repudiated the said rights and privileges which he had granted to the appellants, and there would have been no remedy for such repudiation open to the said appellants. The Court further found that the appellants had spent much time and money in acquiring the said concessions, and that their conduct had throughout been honourable and reasonable,

J. C. 1899 — COOK v. SPRIGG

and, while giving judgment for the defendant, each party was ordered to bear their own costs.

Asquith, Q.C., *Roger Wallace, Q.C.*, and *Mackarness*, for the appellants, contended that they were entitled as prayed. Sigcau, the grantor of the concessions in suit, had, since his accession to power in 1888, been recognised and treated by the British Government as the sole and absolute ruler of Eastern Pondoland as an independent State. Pondoland was annexed to Cape Colony by Act V. of 1894, passed in consequence of Sigcau's deed of cession dated May 17, 1894. It was contended that at the time of making the cession of Eastern Pondoland Sigcau, as paramount chief of Pondoland, gave notice to the Government of the Colony that he desired their recognition of the concessions in suit; and that no repudiation or disapproval thereof by the Colonial Government was at any time communicated to Sigcau until after the deed of cession had been executed by him. The evidence shewed that the appellants had for upwards of five years resided in Pondoland and occupied themselves in obtaining the concessions. Many months of negotiation between Sigcau and the concessionaires preceded the grants. Full notice was given of the grants, and no disapproval intimated by the Government. The evidence shewed that Sigcau had, as he swore, the power to make grants of the nature of those in suit, that the grants had been sanctioned by all the due formalities required by Pondo law, and that they were made in good faith and for good consideration. It was accordingly contended that they became legally and equitably binding upon the said Colonial Government as soon as they had, by accepting from Sigcau the cession of Eastern Pondoland, become his successor as paramount chief of that country. The respondent became by virtue of Sigcau's cession of March 17, 1894, and of the Cape Act V. of 1894, clothed with all the rights and all the obligations attaching to or binding upon Sigcau as such paramount chief. Upon the question how far a civilised government on succeeding to the power theretofore exercised by a barbarian was bound by all the engagements he had made, they referred to the following cases: *United States*

v. *Parchemin* (1); *Strother* v. *Lucas* (2); *Smith* v. *United States* (3); *United States* v. *Auguisola*. (4) It was contended that it was impossible to reconcile the ratio decidendi of the judgment of the Court below with the doctrine laid down in those cases. The right to sue and the jurisdiction of the Court to entertain the case are given by Crown Liabilities Act, No. XXXVII. of 1888.

Sir Edward Clarke, Q.C., *Swinfen Eady, Q.C.*, and *Waggett*, for the respondent, denied that all the obligations of Sigcau were taken over by the Government, and in particular that the obligations under the concessions in suit had been so taken over. Those concessions were in their nature invalid. The land laws of the Cape Colony, to which East Pondoland was annexed, contain no provision for the granting by the Government of tracts of land or servitudes on land such as were promised by these concessions. The rights, moreover, which they purported to grant were unknown, and contrary to and in conflict with the native laws and customs of East Pondoland as the same existed and prevailed before its formal annexation. The concessions were, moreover, injurious to the interests of the native occupants of the country. They could not have been granted without the consent of all or the great majority of the native chiefs and headmen of the district. But only six chiefs were parties to them, whilst forty-three chiefs were parties to the cession of the whole territory to Her Majesty.

The evidence shewed that Sigcau was never, in fact, in territorial possession of the land over which he granted the rights in dispute. Even if the grants were valid, they depended for their continuance on the will of Sigcau as a lord despot, and were revocable by him at will The concessions themselves were never understood by Sigcau, and are void for uncertainty and are incapable of being enforced. The appellants, moreover, are shewn never to have obtained possession of the lands under their concessions. The Court has no jurisdiction to enforce the rights claimed, and therefore acted rightly in refusing to declare the same and in dismissing the suit. The doctrine

(1) (1833) 7 Peters, 51, 86.
(2) (1838) 12 Peters, 410, 436, 435, 438.
(3) (1836) 10 Peters, 326, 330.
(4) (1863) 1 Wallace, 352, 358.

J. C. 1899 COOK v. SPRIGG.

that under a cession of territory from one sovereign Power to another the grantee succeeds to all the liabilities of the grantor is carefully guarded in the case cited from 12 Peters. And in all three cases cited from Peters legislation had taken place to give effect to the rights conceded. Sigeau stands in a totally different position from the grantors in those cases. Here there was no treaty, and no legislation relating to the rights which he is supposed to have conceded. A subject cannot sue the Government which has annexed territory by an act of State to enforce claims which also by an act of State the annexing Government refuses to be bound. If it had been a case of conquest the question could not arise of enforcing obligations by the conquered. This is a case of cession, and the sovereign Powers could contract as they pleased in reference to such obligations. But whether they did so or not the municipal courts of the annexing territory have no authority or jurisdiction to revise, as it were, the terms of the cession, imply obligations which are not expressed, or enforce those which are. As between the sovereign Powers, the acts done are acts of State, not to be interpreted or enforced by municipal courts; and the same principle applies as between either sovereign Power and its own subjects in respect of the same matters. Reference was made to Halleck's International Law, 1893 ed. vol. ii. pp. 489, 493, 505, 506, 1878 ed. c. 34, ss. 21, 25, 26; *United States* v. *Pearson* (1); and *United States* v. *Boisdoré* (2), cited in the last case. Under these circumstances the rights claimed under these concessions cannot be declared against the Crown, nor can grants be ordered by way of enforcement of those rights for which grants no legislative sanction has been given.

Asquith, Q.C., replied, contending that, whether an act of State or not, the question was whether it fell within the scope of the Crown Liabilities Act, 1888. As to obligations resulting from international law or treaties being enforceable in municipal courts, and the jurisdiction to entertain the present suit, reference was made to *Triquet* v. *Batte* (3); *Thomas* v. *The*

(1) (1855) 18 Howard, 1, 13. (2) (1850) 11 Howard, 63, 96.
(3) (1764) 3 Burr. 1481.

Queen (1), and to certain Cape Colony cases, in which rights had been declared against the Crown: *Blanckenbury* v. *Colonial Government* (2); *Joubert* v. *Worcester Municipality and Colonial Government* (3); *De Beers Consolidated Mines* v. *Colonial Government*. (4)

1899
Aug. 1.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal from the Supreme Court of the Cape of Good Hope, wherein judgment was given for the defendant.

The action is brought against the Prime Minister of the Colony in his official capacity under the powers of an Act of the Parliament of the Cape of Good Hope intituled the "Crown Liabilities Act, 1888," which permits such an action to be brought in terms hereafter to be referred to.

The case made on behalf of the plaintiffs was that certain agreements or concessions were made by a native chief described as "Paramount Chief of Pondoland" granting certain privileges and rights to the appellants.

It appears to be established by proof that the appellants never in fact obtained possession of the lands or exercised the rights which these documents purported to convey; but it is argued that some effort was made to search for "graphite" in pursuance of these documents.

A considerable amount of evidence appears to have been given with the object of shewing that the rights purported to be granted were contrary to the native laws and customs prevailing in Pondoland at the time when they purported to be granted; that Sigcau was a lawless despot; and that any rights purporting to be granted by him were subject to his arbitrary power to recall them at any moment. And, further, that Sigcau did not understand the meaning or object of the documents which he was supposed to execute.

Their Lordships do not differ with the finding in fact by the Chief Justice that at the time that Sigcau executed the

(1) (1874) L. R. 10 Q. B. 31.
(2) (1894) 4 Shiel, 61; S. C. 11 Juta, 90.
(3) (1895) 5 Shiel, 303; S. C. 12 Tredgold, 305.
(4) (1892) 9 Juta, 101, 107.

J. C. 1899 COOK v. SPRIGG.

instruments in question he was the paramount chief of the Pondos, and that Sigcau understood perfectly well that he was purporting to grant such rights as the instruments which he executed professed to convey.

Their Lordships do not think it material to enter into such questions, inasmuch as they are of opinion that the statute which gives a power to sue the Prime Minister does not involve the power of making any declaration of right in such a case. And as mere matter of form it does not contain any clause empowering the Court to make a declaration of right as against the Crown; but there is a more complete answer to any claim arising from these instruments. The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign—which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.

It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.

In this case it certainly cannot be said that there was any bargain by the British Government that Sigcau's supposed concessions should be recognised. Indeed, the only intelligible sense in which the allegations in the declaration can be under-

stood is that the breach of duty complained of consists in the refusal of the Cape Government to recognise the plaintiffs' concessions.

To quote the language of this Board, used by Lord Kingsdown in the case of *Secretary of State for India in Council* v. *Kamachee Boye Sahaba* (1), and cited in *Doss* v. *Secretary of State for India in Council* (2):—

"Of the propriety or justice of that act" (here the refusal to recognise) "neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

At the same time, their Lordships are by no means prepared to differ from the observations of the Chief Justice that the appellants "have strong claims to the favourable consideration of the Government and Parliament of the country."

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed, the parties on each side to pay their own costs.

Solicitors for appellants: *Grant, Bulcraig & Co.*
Solicitors for respondent: *Wilson, Bristows & Carpmael.*

(1) 13 Moo. P. C. 22, 86. (2) (1875) L. R. 19 Eq. 534.

Page

Amodu Tijani v. Secretary, Southern Nigeria (1921) 2 App. Cas 399 350

Nigeria - Lagos - Native Tenure of Land - White Cap Chiefs - Communal Land - Acquisition of Land by Government - Compensation - Public Lands Ordinance, 1903 (No. 5 of 1903, Lagos).

Att. Gen. for Canada (Mowat) v. A. G. Québec (Casgrain) 1897 6 Qué. Q.B. 12 1482

Constitutional law - Indian lands - Seigniory of Sault St. Louis.

Att. Gen. for Québec v. A. G. Canada (1921) 1 App. Cas. 401 (Star Chrome) 363

Canada (Québec) - Lands appropriated to Indians - Dominion or Provincial Title - 13 & 14 Vict. (Can.), c. 42, ss. 1, 2 - British North America Act, 1867 (30 & 31 Vict. c. 3), s. 109 - Sale of Crown Property by Sheriff - Title of Purchaser - Code of Civil Procedure, arts. 399, 2213.

Att. Gen. of Southern Nigeria v. John Holt Co. Ltd. (1915) App. Cas. 599 1562

Foreshore - Riparian Owners - Accretion - Artificial Reclamation - Knowledge of Crown - Duty of Crown to prevent Sea Incursion - Preservation of Riparian Rights - Rights in Reclaimed Land - Licence.

Beecher v. Wetherby, 95 U.S. 517 (1877) 347

School lands - Title of State - Indian occupancy - Sale of Indian lands.

R. v. Bonhomme (1917) 38 D.L.R. 647. Affirmed 59 S.C.R. 679 (no reasons given) 375

Buttz v. Northern Pacific Railroad Co., 119 U.S. 55 (1886) 1543

Grant of Indian lands to railroad company - Extinguishment of Indian title, exclusively for the government - Relinquishment of title, when took place - upon definite location, when rights of company attached - location of route withdrew from sale or preemption of the odd sections for forty miles on each side - When general route considered fixed - Construction of Section 3 of Act of July 2, 1864.

Calder v. A.G. of B.C. (1973) S.C.R. 313; (1971) 13 D.L.R. (3d) 64; (1970) 8 D.L.R. (3d) 59 1057

Indians - Aboriginal title to lands - Territory occupied by Nishga Tribe - Extinguishment of title.

Crown - Sovereign immunity - Claim of title against Crown in right of Province - Absence of fiat of Lieutenant-Governor - Court without jurisdiction to make declaration requested - Crown Procedure Act, R.S.B.C. 1960, c. 89.

Campbell v. Hall (1774) 1 Cowp. 204 1551

Cherokee Nation v. The State of Georgia, 30 U.S. (5 Pet.) 1 (1831) 380

Injunction to prevent execution of Act of State Legislature - Jurisdiction of the Supreme Court under the Constitution - Legal status of Indian tribe, not foreign State within meaning of the Constitution - Title of Indians to land - Their relations to the United States - Province of the Judicial Department.

Choctaw Nation v. United States, 119 U.S. 1 (1886) 1250

Settlement of all questions of difference between the Choctaw Nation and the United States - Construction of treaties and statutes - Senate award under Treaty of 1855.

Cook v. Sprigg (1899) App. Cas. 572 (P.C.) 1586

Act of State - Concessions granted before Cession - Rights after Annexation - Jurisdiction of Municipal Courts - Crown Liabilities Act, 1888.

Corinthe et al v. Seminary of St. Sulpice (1912) 5 D.L.R. 263. Affirming 21 Qué. K.B. 316; 38 Qué. S.C. 268 409

Indians (ss. 11-8) - Title to Seigniory of the Lake of Two Mountains - Oka Indians in Québec.

Page

Cramer et al v. U.S., 261 U.S. 219 (1923) 415

Public lands - Railroad grant - Exception - Land occupied by individual Indians.

Crow Tribe of Indians v. United States, 284 F 2d 361 (Ct. Cl 1960) 1465

Indians - International Law - Judgment - United States.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 51

If the breach of covenant assigned be, that the state had no authority to sell and dispose of the land, it is not a good plea in bar to say that the governor was legally empowered to sell and convey the premises, although the facts stated in the plea as inducement, are sufficient to justify a direct negative of the breach assigned.

It is not necessary that a breach of covenant be assigned in the very words of the covenant. It is sufficient if it shows a substantial breach.

The Court will not declare a law to be unconstitutional, unless the opposition between the constitution and the law be clear and plain.

The legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits.

In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law. When a law is in its nature a contract, when absolute sights have vested under that contract, a repeal of the law cannot devest those rights.

A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state.

A grant is a contract executed.

A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.

The proclamation of the King of Great Britain in 1763 did not alter the boundaries of Georgia.

The nature of the Indian title is not such as to be absolutely repugnant to seizure in fee on the part of the state.

Page

Holden v. Joy, 84 U.S. 211 (1872) 1526

Indian Tribes are States - Cherokee Treaty of 1835, 1866 and 1868 - Indian title - Lands in Missouri - Fee simple title of United States - Acts of Congress.

James Bay Development Corp. v. Kanatewat
Société de Développement de la Baie James c. Kanatewat (1974) R.P. 38, (1975) C.A. 166, (1975) S.C.R. 48 423

Injonction interlocutoire - Aménagement du territoire de la Baie James - Complexe hydroélectrique - Suspension des travaux - Droit des Indiens et Inuits sur ce territoire - Protection de l'environnement - Importance économique et sociale du projet - Constitutionnalité de la Loi 50 - Objet et essence de la Loi 50 - Immunité et clause privative - Poids des inconvénients.

Territoire de la région de la Baie James - Superficie = 1/5 du territoire du Québec - Population = 27,000 habitants - 21,000 Blancs, 6,000 Indiens - 72% de la population a moins de 30 ans - 22 à 30% de superficie sans potentiel forestier - 300 milles de routes municipales - 125 à 150 milles de chemins de fer - De nombreux aéroports - Accès par bateaux - Importante industrie forestière - Neuf mines très importantes - Industries de service.

Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 240 (1823) 635

A title to lands, under grants to private individuals, made by Indian tribes or nations north-west of the river Ohio, in 1773, and 1775, cannot be recognized in the courts of the United States.

Re Labrador Boundary (1927) 2 D.L.R. 401 13

Boundaries 1 - Between Labrador and Québec - "Coast" or "Coasts" - Evidence - Inferences to be drawn from maps.

R. v. McMaster (1926) Ex. C.R. 68 42

Crown - Indian Lands - Lease by Indians - Royal Proclamation, 1763 - Tenant-at-Will.

Miami Tribe v. United States, 281 F. 2d 202 (Ct. Cl. 1960) 1391

Courts - Treaties - Eminent Domain.

Miami Tribe v. United States, 175 F. Supp 926 (Ct. of Claims 1959) 1431

Indians - Constitutional law 68(1) - Eminent Domain - United States.

Milirrpum and Others v. Nabalco Pty. Ltd. and The Commonwealth of Australia (1970-71) 17 F.L.R. 141 131

Aboriginals - Tribal lands - Colonial settlement - Title of Crown - Effect on particular areas used by aboriginal natives - Relation of native clans to particular areas - Necessity for continuity of relationship - Doctrine of communal native title - General principles - Whether doctrine part of law of any part of Australia - Whether applicable in settled colony except by statutory recognition - Extinguishment by statute - Whether enactment must be explicit - Aboriginal social rules and customs - Whether recognizable as system of law - Relationship under system of native clans to land - Whether recognizable as right of property - Land Acquisition Act 1955-1966, s. 5 (1) "Interest".

Constitutional Law - Acquisition of colonial territory - General principles - Colonial policies relating to native lands - Establishment of Province of South Australia - By Letters Patent of 1836 (Imp.) - Effect of proviso reserving rights of aboriginal natives to occupation and enjoyment of land - Whether applicable to after-acquired territory - Whether constitutional guarantee of aboriginal rights - Whether mere affirmation of principle of benevolence - Effect of subsequent Imperial legislation granting succession of legislative powers over territory - Surrender of Northern Territory to Commonwealth - Application of Lands Acquisition Act to Northern Territory - Whether exclusive code for control of acquisition of land in Northern Territory - Effect of subsequent legislation of Northern Territory - Northern Territory (Administration) Act 1910-1949, s. 9 - Lands Acquisition Act 1906-1916 - Minerals (Acquisition) Ordinance 1953 (N.T.).

Mines and Minerals - Mineral leases - By Crown over private land - Effect of validating legilation - Provision that lease have effect according to terms - Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 (N.T.), s.6 (2).

Evidence - Hearsay - Reputation evidence - Statements by deceased ancestors - About matters of public and general rights - Testimony of aboriginal natives of ancestors' statements - About clan rights to particular areas of land - About system relating to such rights - Expert opinion - Anthropological testimony - Whether hearsay - Whether founded on non-apparent facts - Testimony in terms of concepts - Admissibility.

Minnesota v. Hitchcock, 185 U.S. 373 (1902) 332

Original jurisdiction of Supreme Court - When United States is a party to suit - Suit by State - School lands - Indian cession.

Page

Mitchel et al v. U.S., 34 U.S. (9 Pet.) 711 (1835) 111

Land titles in Florida - Construction of the Treaty of Cession and of acts of Congress - Law of Nations - Property rights of individuals in ceded territory Indian titles - Grant from Indians - No new evidence to be considered in appellate courts.

Osage Nation of Indians v. United States, 97 F. Supp. 381 (Ct. Cl. 1951) 1304

Administrative law and procedure - United States - Indians - Evidence.

Otoe and Missouria Tribe of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1955); Cert. denied, 350 U.S. 1948 (1955) 1272

Constitutional law - United States - Courts - Evidence - Statutes - Indians.

Paulette et al v. R. (1977) 2 S.C.R. 628; (1976) 2 W.W.R. 193 (NWT - Court of Appeal); Reversing 42 D.L.R. (3d) 8; Related proceedings (1973) 39 D.L.R. (3d) 81 (Fed. Crt.) 651

Real property - Unpatented Crown Land - Caveat claiming interest by way of aboriginal rights - Filing of caveat against unpatented Crown lands not permitted - Land Titles Act, R.S.C. 1970, c. L-4, ss. 2, 35, 48, 49, 54, 56, 95, 134(2).

Sac and Fox Tribe of Indians of Oklahoma et al v. U.S., 315 F 2d 896 (Ct. Cl. 1963) 1350

Indians - Stipulations - United States.

R. v. St. Catherine's Milling & Lumber Co. (1888) 14 App. Cas. 46; Affirming 13 S.C.R. 577; Affirming 13 O.A.R. 148; Affirming 10 O.R. 196 823

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.

Page

Sioux Tribe v. United States, 146 F. Supp. 229 (Ct. Cl. 1956) 1361

Re Southern Rhodesia, (1918) App. Cas. 211 (P.C.) 784

Constitutional Law - Chartered Company - Conquered territory - Rights of Crown - Annexation - Administration by Company - Reimbursement of Expenditure.

R. v. Symonds, (1847) N.Z.P.C.C. 387 284

Constitutional law - Powers of Governor - Validity of Proclamations waiving pre-emption - Land Claims Ordinance, 1841, Sess. 1, No. 2 - Nature of Native title - Treaty of Waitangi - Australian Waste Lands Act, 1842 (Imp.), 5 & 6 Vict., c. 36.

Nireaha Tamaki v. Baker, (1901) A.C. 561 296

Law of New Zealand - Native title to possession of land - Land Act of 1892, ss. 136, 137 - Jurisdiction as to cession to the Crown - Native Rights Act 1865, ss. 3, 4, 5.

Tee-Hit-Ton Indians v. U.S., 348 U.S. 272 (1955) 317

Indians - Timber - Appropriation by government - Eminent Domain - Sale of timber - Indians - Lands - Taking by government - Indians - Lands in Alaska - Extent of rights - Indians - Grant of rights by Congress - Extent - Indians - Title to land - Extent - Eminent Domain - Partial taking - Timber - Rights of Owner of Fee - Indians - Title to lands - Disposal by Government - Indians - Lands - Taking - Compensation - Indians - Title to lands - Alaska Indians.

Tlingit and Haida Indians v. United States, 389 F. 2d 778 (Ct. Cl. 1968) 1375

Eminent Domain - Indians - Fish - Game - Navigable Waterways - Property - Courts.

Page

United States v. Alcea Band of Tillamooks et al, 329 U.S. 40 (1946) 1501

United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1937) 1266

Indians, ss.52 - Ownership of timber on reservation - Interest, ss. 32 - Allowability on Indian claim against United States - Indians, ss. 33 - Power of Federal Government as to tribal lands - Interst, ss. 25 - Recovery of, in suit for compensation for taking of property for public use.

United States v. Northern Paiute Nation et al, 393 F. 2d 786 (Ct. Cl. 1968) 1409

Limitation of Actions - Parties - Pleading - United States - Indians - Evidence.

United States v. Santa Fe Pacific Railroad Co., 314 U.S., 339 (1941) 1003

United States v. Shoshone Tribe, 304 U.S. 111 (1938) 1243

Indians, ss. 52 - Ownership of Minerals and Timber on reservations - Appeal, ss. 1044 - Resort to opinion to supplement findings - Indians, ss. 28 - Treaties - Construction - "Absolute and undisturbed use and occupation" - Indians, ss. 28 - Treaties - Construction - Liberal interpretation - Indians, ss. 29 - Treaties - Ambiguties to be resolved in favour of Indians - Former decision distinguished.

Upper Chehalis Tribe v. United States, 155 F. Supp. 226, (Ct. of Claims, 1957) 1404

Warner v. Joy, 84 U.S. 253 (1872) 1541

Holden v. Joy, ante, p. 523, followed - Cherokee Treaty valid - Title thereunder, good.

Worcester v. The State of Georgia, 31 U.S. (6 Pet.) 515 (1832) 1025

Writ of error - Practice - Indictment for residing in Cherokee territory contrary to laws of Georgia - Jurisdiction - Rights of discoveries - Relations of Indians to European nations, to the United States - legal status of the Cherokees - Construction of treaties - Act of Georgia contrary to Federal Constitution, acts of Congress and treaties.