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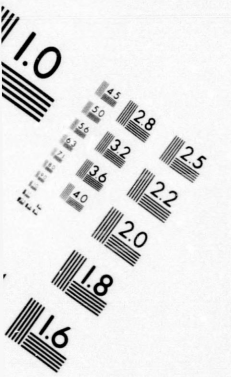

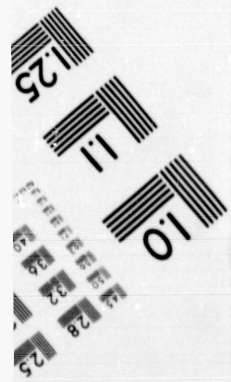

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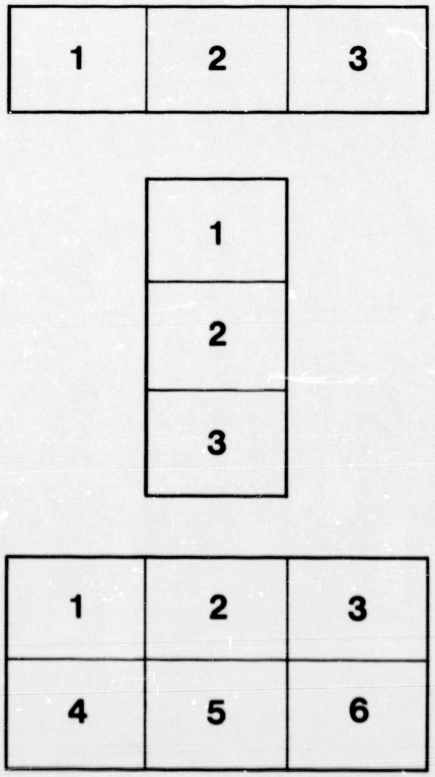

The ONTARIO LANDS CASE.

ARGUMENT OF MR. BLAKE, Q.C., BEFORE THE PRIVY COUNCIL.

Toronto:
PRESS OF THE BUDGET, 64 BAY STREET.
1888.

From EDWARD BLAKE.

In the Privy Council.

COUNCIL CHAMBER, WHITEHALL,

Friday, 20th July, 1888.

Present:

THE RIGHT HONBLE. THE EARL OF SELBORNE.
THE RIGHT HONBLE. LORD WATSON.
THE RIGHT HONBLE. LORD HOBHOUSE.
THE RIGHT HONBLE. SIR MONTAGUE SMITH.
THE RIGHT HONBLE. SIR BARNES PEACOCK.
THE RIGHT HONBLE. SIR RICHARD COUCH.

THE ST. CATHARINE'S MILLING AND LUMBER COMPANY

v.

THE QUEEN.

ARGUMENT OF MR. BLAKE, OF COUNSEL FOR ONTARIO.

TORONTO:
PRESS OF THE BUDGET, 64 BAY STREET.
1888

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PREFATORY NOTE.

THE case of THE QUEEN and THE ST. CATHARINE'S MILLING COMPANY was in substance a controversy between Canada and Ontario as to the ownership of a large portion of the soil of the Province, with its timber and minerals; which were all claimed by the Dominion as its property under the Act of Union, or by virtue of an Indian Treaty made by its government.

The speech for Ontario, now printed, was delivered towards the close of a discussion which lasted seven days.

It is hardly needful to inform the professional reader that at so late a stage many topics had been exhausted, much had become familiar, some points had been settled, and there were several indications of the opinions of the Bench.

It was of course the advocate's duty to have regard to these conditions in the choice of methods and matter, and to touch or omit, state or reiterate, amplify or curtail, according to the exigencies of the cause.

Therefore it is not pretended that this argument is even an attempt to examine completely all the interesting questions involved.

For convenience of reference extracts of the most material parts of the B.N.A. Act are appended.

December 24th, 1888.

EXTRACTS FROM B. N. A. ACT, 1867.

S. 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 as 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:

1. The public debt and property.
3. The raising of money by any mode or system of taxation.
5. Postal service.
7. Militia, military and naval service and defence.
9. Beacons, buoys, lighthouses and Sable Island.
10. Navigation and shipping.
24. Indians and lands reserved for the Indians.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

S. 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:

10. Local works and undertakings other than such as are of the following classes:

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

S. 108.—The public works and property of each province enumerated in the third schedule to this Act shall be the property of Canada.

THE THIRD SCHEDULE.

Provincial public works and property to be the property of Canada:

1. Canals with lands and water power connected therewith.
2. Public harbors.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.
8. Custom houses, post offices and all other public buildings, except such as the government of Canada appropriate for the use of the provincial legislatures and governments.
9. Property transferred by the Imperial government and known as ordnance property.
10. Armories, drill sheds, military clothing and munitions of war, and lands set apart for general public purposes.

S. 109.—All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

S. 117.—The several provinces shall retain 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.

ARGUMENT.

MR. BLAKE — It seems to me, my Lords, that three views have been suggested as to the character of the Indian interest. My learned friends, for the Appellants, suggest the view that the Indians have practically the entire beneficial interest in unsurrendered lands. Then there is a middle view which, I may, for the present purpose describe as that which was very frequently suggested by Lord Watson in the earlier part of the Appellant's argument, which is the view stated in the general run of the United States decisions, namely that there is a legal or recognised right in the Indians of occupancy or enjoyment, of a special kind, perhaps limited to the purposes of hunting and fishing, tribal in its character, capable, not of transfer, but only of extinguishment or of surrender to the owner of the fee or of the allodial title; consistent with the existence in the State of an allodial title, and with the existence in a private owner of a title in fee simple, subject in each case to that burthen. And again there is a third view, suggested by the Respondents, which is not much less effective for the purposes of the Indians than the middle view. It is that, while the Indian interest, such as it is, is of the character I have just endeavoured to describe, it is not absolutely of right, but it has its foundation in grace and policy, in the political department of the Government; although the repeated instances in which the grace has been shown, and the length of time during which the policy has been pursued would render it at this time of day, almost impossible to suppose that the grace had been withdrawn or the policy reversed, or to allege that it was within the power of the political department of the government to withdraw the grace or reverse the policy without giving the Indian just cause of complaint.

This latter, I conceive to be the lowest view of the Indian title. I just state these three views now, because I propose to diverge from the order I had intended to pursue, the chronological order, and to ask your Lordship's permission to treat the case in the first instance on the assumption that the middle view is the sound view of the Indian title. I cannot make the concession that it is the sound view, because of the magnitude of the interests involved, not merely with reference to this area of twenty million acres in which the Indian interest, if the treaty is effective, has been extinguished, but to another area double the size of this—forty million acres more—in which the Indian title is not as yet extinguished; I cannot make the concession, because although for all practical purposes, the Indian title may be regarded as equally secure under the lower view, yet that view, which seems to us the sound one, may be, as between the Dominion and the Province, very much to the advantage of the Province. However that may be, for the moment passing it by, and assuming the interest of the Indians to be such as was suggested by Lord Watson, I propose in the first instance, without touching on the condition in the old colonies, in the United States or in old Quebec, to trouble your Lordships with some considerations on the meaning and effect of the British North America Act, as applied to such an interest as I have described, in the lord of the soil and in the Indian, respectively, in order to a decision of the question whether the interest of the lord of the soil belongs to the Dominion or to the Province.

Now it is quite true, as my Lord Watson observed, that a very large part of the constitution of the United States is to be found in judicial decisions—a larger part than probably ever will be found in such decisions in the case of Canada; but it is nevertheless true, I think, that the written constitution of Canada in two aspects demands a very large, liberal and comprehensive interpretation, a survey in which the interpreter shall look both before and after, if he is to effectuate, and not to frustrate the objects of the Statute. First the act is an attempt—perhaps a somewhat ambitious attempt—to create in one short document a very complicated written constitution, dealing actually with five political entities, and potentially with many more; and dealing not merely with their creation or re-organization, but also with the distribution of political, legislative and executive power, and with the adjustment of their revenues and their assets. It is therefore an Act in its nature dealing with many topics, as has been truly said, of high political import. Thus, its very nature requires a large, comprehensive and liberal spirit of interpretation. But its frame also de-

mands the same spirit. We know well that even where the draftsman has used an abundance of words, he is not always able to make his meaning clear; but upon this occasion there has been no attempt to expand the meaning of the draftsman; the attempt has rather been to deal in the fewest possible words with subject matters of the highest possible importance. One sentence, one phrase, even one word, deals with a whole code or system of law or politics, disposes of national and sovereign attributes, makes and unmakes political communities, touches the ancient liberties and the private and public rights of millions of free men, and sets new limits to them all. And therefore I submit that we are bound, in attempting to ascertain the meaning of these clauses, to become very conversant with the surroundings, to allow due weight to the conditions, and to be thoroughly informed with the spirit of the law, in order that we may so read it as to accomplish its great intents. In truth the Act is in many points little more than a skeleton, which is to be clothed with flesh and muscle, nerve and sinew, into which the breath of life is to be breathed by interpretation. Nay it is not even a complete skeleton; and as from a single bone or fragment the naturalist projects the anatomy of a whole creature, so here from one word or phrase, we must sometimes construct or develope a system. For instance you find a single phrase, as I conceive the governing phrase in this Act, appearing only in the preamble, but operating upon the whole statute—the phrase "Federally united." The word "federal" is the key which unlocks the clauses, and reveals their contents. It is the glass which enables us to discern what is written. By its light the Act must be construed. So again we have a description of the constitution—"Similar in principle to that of the United Kingdom;" where a single line imports into the system that mighty and complex and somewhat indefinite aggregate called the British Constitution.. So further a few words in other cases comprehend vast and complicated subjects; for example we have "laws for the peace, order and good government of Canada," touching "the regulation of trade and commerce," "navigation and shipping." "the criminal law," "municipal institutions," "property and civil rights," "the administration of justice." Upon a sound and comprehensive interpretation of these meagre phrases the most important interests depend. I submit then that in the interpretation of an Act like this a most important enquiry, if not the most important enquiry preliminary to the decision of the meaning of any word or clause is this, what is the general scheme of the Act, what is its general purpose and intent in those particulars which bear on the question to be immediately decided? and what possible construction—what fair construction if more than one construction be open—will best round the scheme and effect the purpose?

What then was the general scheme of this Act? First of all, as I have suggested, it was to create a federal, as distinguished from a legislative union; but a union composed of several existing and continued entities. It was not the intention of Parliament to mutilate, confound and destroy the provinces mentioned in the preamble, and, having done so, from their mangled remains, stewed in some legislative caldron, to evoke by some legislative incantation absolutely new provinces into an absolutely new existence. It was rather, I submit, the design and object of the act—so far as was consistent with the redivision of the then province of united Canada into its old political parts, Upper and Lower Canada, and with the federal union of the four entities, Nova Scotia, New Brunswick and the reconstituted parts of old Canada, Ontario and Quebec—it was the design I say, so far as was consistent with these objects, by gentle and considerate treatment to preserve the vital breath and continue the political existence of the old provinces. However this may be, they were being made, as has been well said, not fractions of a unit, but units of a multiple. The Dominion is a multiple, and each province is a unit of that multiple; and I submit that undue stress has been laid in the judgment of one of the learned judges below, upon the form which is said to have been adopted, of first uniting and then dividing the provinces. I submit that the motive and cause of that form was the very circumstance to which I have adverted, the necessity of the redivision of old Canada. Three provinces there were; four there were to be; and the emphatic word in that clause is the word "four." But for the special circumstance of the redivision of old

Canada, there would have been no such phrase. Again, consistently with and supporting the suggested scheme of the Act, there is to be found important language with reference to provincial institutions and rights of property, which are spoken of as "continued" and "retained," words entirely repugnant to the notion of a destruction and a fresh creation.

Then, my Lords, without further elaborating this point, which I have but touched, my next proposition as to the scheme of this Act is, that it was to place on an equal footing, and to secure equal rights and like conditions under like circumstances to each of the provinces which were to constitute the federation. It is quite true that there were some special provisions which were perhaps needed, or which at any rate were inserted by arrangement; for example, in the cases of Nova Scotia and New Brunswick some provisions were made by continuance, while in those of Ontario and Quebec they were necessarily made by fresh enactment; again, Ontario did not want a Legislative Council, Quebec did want one; and in consequence you find that difference in the original constitution of each province, although each province has power to alter its constitution if it pleases. There are some differences of that description, but, subject to those exceptions, which only prove the rule, there was to be similarity and equality of condition. Thus I ask your Lordships to say that the scheme was one for preserving and not for destroying the provinces, and for securing to them equal rights and similar conditions. And if so, we must seek an interpretation preservative and not destructive, and a construction equalizing and not discriminating.

My next proposition is, that the scheme of this Act is to leave the control, the tenure, the management, the ownership and the development of the lands in which there is a public, state or Crown interest with the province in which those lands are situate; and if one available construction would practically and satisfactorily accomplish that object as to all the four provinces, while another construction, which for the moment I assume is also available, would leave those lands to three of the provinces, but would abstract from the fourth half its area, the extent of a mighty kingdom; and would so destroy the similarity and equality of condition between the provinces, then I say we are to look for and to choose the construction which will accomplish the former and not the latter result. Next, the scheme of this Act is to deal with Indians and lands reserved for Indians in each province alike; no distinction is suggested as to the treatment; and therefore again I argue that, if one construction would accomplish this result, while the other, leaving in three of the provinces vast areas of unsurrendered lands as provincial property, would take away from the fourth half its land because unsurrendered—in case we have a choice, it is not the latter construction which we should choose. Again the scheme of this Act is to provide provincial revenues for local services, which local services include, amongst the most important, the development of the lands of the province and the execution and maintenance of public works incidental to that development. These revenues are mainly provided from one potential and two actual sources. The actual sources are the Dominion subsidy, and the revenues from the lands. The potential source is the power of direct taxation—a power which was not expected to be much exercised, which it was thought would not be required, and which in fact has hardly been used; partly from an "ignorant impatience" of direct taxation, and partly from an uninformed conviction that whatever the province could secure by Dominion subsidy would be clear gain to the province, although in fact all would pay, and some of them would pay more than they received. So it has happened that in practice the power of direct taxation has been but little used; the Dominion subsidies, though enlarged, are inadequate; and the main and essential supply for the deficiency has been and is the revenue from the lands. I would beg your Lordships further to observe that, while unsettled timber lands do produce from the timber, so long as settlement is quite sparse, a very large revenue, the very instant you rise from that condition into a condition of substantial settlement and improvement, the questions of development, of administration, of making roads and bridges and of municipal and other government, come to the front, and tend to absorb the whole of the net revenue, and practically to establish the proposition that the fund is to be devoted to the purpose of developing the lands from which it springs.

Now if one construction would leave this great revenue intact in all the prov-

inces, putting them all upon a like footing, giving them all similar appliances for the discharge of those duties which devolve upon them all alike; while the other would deprive the principal province of the revenues of an area equal to the Kingdom of Ireland, many times larger than Nova Scotia or New Brunswick, and threefold even these great dimensions considering the whole tract involved, but would leave that province still charged with its high duties, still liable to the great expenditures their accomplishment would involve, yet stripped of the means to meet them—can there be a doubt which of those two constructions should be preferred?

My next proposition is, that the scheme proceeds on opposite principles in accomplishing the two objects of distributing the legislative powers and arranging the proprietary rights. As to to the legislative powers, a residuum—I do not say *the* residuum but *a* residuum—a part not specifically reserved to the Provinces, is granted generally to the Dominion; I say "*a* part," because inherent in the federal form there is, with its advantages, great as they are, what may be deemed a defect—it has "the defects of its qualities"; and there are some things which cannot at all be done, or at any rate done by the central authority in a federal union—which cannot at all be done "*modo et forma*" in which they may be done in a legislative union. But passing that by, the rule is as I have stated; and that rule has been recognized as a safe and guiding clue towards the interpretation of the clause distributing the legislative powers. But when you come to proprietary rights there is another rule, just as clear, and furnishing just as plain a clue; but the rule is opposite, the clue is of quite a different color, and it leads quite another way. The residuum of property goes to the provinces and not to the Dominion; and this fact must be treated as an equally important factor in construing that branch of the Act as the opposite fact is considered in construing that part which relates to the distribution of legislative powers.

THE EARL OF SELBORNE—In respect of which branch of the Act do you use this circumstance?

COUNSEL—Well, I use it now with reference to the question of proprietary rights.

THE EARL OF SELBORNE—It struck me that sections 91 and 102 are the same.

COUNSEL—I am speaking of 109 and 117. Your Lordship sees that 109 gives the lands, and 117 gives the residuum of proprietary rights to the Provinces; whereas 91 and 92, dealing with legislative jurisdiction, give to the Dominion all that is not specifically handed over to the Provinces.

THE EARL OF SELBORNE—You say you do not take 102.

COUNSEL—That is the Revenue Clause?

THE EARL OF SELBORNE—Yes.

COUNSEL—No; for reasons which will appear later on. I was endeavouring just now so far as I could to state the various lines of argument which converge, in my mind, to one conclusion; and I propose to enlarge on some of them later.

SIR M. SMITH—You do intend to enlarge upon them?

COUNSEL—Yes, my Lord. I thought the general bearing of the propositions which I was about to advance would be more plain if I summarised them all in the first place as I am attempting to do.

My next point is that the scheme of the Act is to specifically grant every item of property which is intended to go to the Dominion; and this even although legislative power over that item has been already, by a previous clause, granted to the Dominion; and, that being, as I shall presently shew more at large, the scheme, I ask is a construction to be favored which would in one isolated case transfer, by mere implication from the grant of legislative power, a vast territory, while in all other cases items of even small value, over which legislative jurisdiction is already given, are yet expressly transferred by grant?

The next point is that the scheme of the Act is to secure to each individual his own proprietary rights, and not to transfer these under the operation of law to any body politic or corporate; and here again the same question must be put; is a construction to be adopted which would, contrary to the scheme, imply in one isolated case from the grant of legislative power the transfer of the proprietary rights of others. I say "of others" because, according to the Appellant's contention, the Indians have proprietary rights, and not merely proprietary rights, but the substantial property in this land; and they certainly have proprietary rights of an equitable nature in the specific reserves and the lands which are held in trust for them, which are clearly included in the description in con-

troversy in this case; and since, whatever the construction of the words, "Lands reserved for Indians" may be, they comprise at all events the Indian interest as distinguished from all other interests, the Appellant's construction would transfer to the Dominion by implication, that proprietary interest, which he contends exists in the Indian. That construction, I submit, ought not to be adopted in preference to a simple, symmetrical and harmonious construction which will avert all these difficulties, and do justice to all alike. Now, that is a summary of the points which strike me as applicable to the consideration of the principal question arising upon the British North America Act.

If your Lordships will allow me, I will now enlarge upon one or two only of these main propositions, leaving the others to stand on the brief statement of them which I have made. The first proposition I venture to elaborate is, that there is no transfer to Canada of any proprietary interest in lands reserved for the Indians, whatever that phrase may mean. Whatever that phrase means, I say, there is no transfer to Canada of a proprietary interest in those lands.

How are proprietary interests transferred to Canada? Is it by express grant, or by implication from the bestowal of legislative powers? As already stated, it is always by express grant; and never by such implication. I cannot conceive how it is possible to overcome that observation. I cannot conceive how it is possible, after contrasting the grant of legislative power effected by 91 with the transfer of proprietary interests made by 108, to doubt that there is a canon, a scheme, obviously, demonstrably indicated, which makes it out of the question to infer a transfer of property from a grant of legislative power.

Thus by 91 legislative power is granted over Militia, Military or Naval service, and Defence. But military roads, ordnance property, armouries, drill sheds, clothing and munitions of war, were not conceived to be so transferred. Each of them is expressly vested by 108.

Legislative power is granted over navigation and shipping. But there is an express transfer of lighthouses, beacons, buoys, canals, harbours, steamboats, dredges, public vessels, river and lake improvements.

Legislative power is granted over indirect taxation. But there is an express transfer of the custom houses.

Legislative power is granted over the postal service. But there is an express transfer of the post offices.

Legislative power is granted over the public property. But there is an express transfer of land set apart for general public purposes.

Legislative power is granted over Sable Island: But there is an express transfer of Sable Island.

I can shew your lordships that the same principle applies throughout. Lord Selborne adverted to the circumstance that one does not find in 91 an express reference to railways, though the railways are transferred by 108; but it is to be found; the scheme is complete even in that particular. Your Lordships will find that by the 29th article of 91, "such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," are expressly included in the Dominion legislative authority.

Now, amongst those expressly excepted classes are Railways and other undertakings, connecting the Province with any other or others of the Provinces; and the only public railways were at the date of the Act covered by that description. Therefore these were excepted from the local control and expressly included in the legislative authority of the Dominion; but yet the property in them was not thought by such inclusion to be transferred, but they, like all the other subjects, are expressly transferred. Thus we find that the scheme, from the greatest to the smallest, from the largest to the most insignificant item, is carried out. Every one of these items, over each of which legislative power has been already given, is, when intended to be transferred, transferred by express grant. And then having dealt with all such items, we come at last to "Indians and lands reserved for the Indians."

THE EARL OF SELBORNE — You say where there is a case in which it is expedient that it should be under Dominion control, there was an express stipulation to that effect, and you say where that is not done, it is not transferred.

COUNSEL—Yes. We find by 91 Legislative power conferred over "Indians and lands reserved for the Indians," and we turn to 108, which supplements 91 in all cases in which proprietary interests were intended to be transferred, and we find no mention of lands reserved for the

Indians, any more than we find mention of the Indians themselves. But we are to imply it, forsooth! I say you might as well imply a proprietary right in the Indians themselves, and turn them into slaves, as was sometimes done in the old times, as you might imply a proprietary right over their lands!

But your Lordships are asked to imply a transfer, not of a minute article, but a transfer, as I have said, of a kingdom, in a form shown to be deemed inadequate to effect the transfer of mere trifles! Barren worthless Sable Island, that little mass of sand which is diminishing year by year until it is about half a mile wide and twenty miles long—that is expres-ly transferred, because the property was to go. Buoys and beacons, boats and dredges, fire locks and soldiers' breeches —these are all expressly transferred; they are thought worthy to be expressly granted; implication does not suffice for them. But at the same instant, under the same Act, half Ontario is left to be transferred by an implication from the grant of legislative power, thought inadequate in every other case to produce such a result!

I submit, my Lords, with great confidence that the frame of sections 91 and 108 taken together, does not merely give rise to an inference against the view of the Appellants, but demonstrates conclusively that it was not intended to effect any transfer to Canada of the proprietary interest in these lands; and that to decide otherwise would be to frustrate and not to effectuate the plain intent of the Act.

Now, I pass over for a moment the meaning of "lands reserved for the Indians," and the question of what may fairly be implied from the grant of legislative power, in order that with your Lordships' leave I may contrast at once the clauses which touch the vesting of property in the provinces with the clauses which I have just now been discussing; because, having, as I hope, shown, although I have not completed the argument, that this property is not transferred to Canada, my second proposition is that it is expressly vested in Ontario by section 109. By that section, with which your L rdships are painfully familiar, "all lands, mines, minerals and royalties belonging to the provinces at the union, and all sums then due and payable," etc., etc., "shall belong to the several provinces 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." Now the meaning of that clause is expounded in *The Attorney-General* v. *Mercer*, and so expounded as to fully cover this case in any aspect, and at any rate upon that middle construction of the Indian title on which I am just now arguing the case, namely, the idea that there is a legal, established, recognised and permanent right in the Indians, the nature of which I have endeavoured to indicate. I say that the whole current of the authorities in the United States, though some of them state the case of the Indians in the strongest way, yet brings you to the con-lusion that the lord paramount was the state; that the *dominium directum* was in the state; that there was an allodial title in the state, and a seisin in fee in the grantee of the state; and that the interest of the Indian was an interest carved out of the allodial title of the state. Then what is the interest with which that title of the state is burthened? It is burthened with a servitude, with a right of tribal occupation for the accustomed purposes, so long as the tribe either subsists or chooses to remain. If the tribe dies out or removes (and great numbers of these tribes have died out, and some have removed) the servitude ends. And in this connection one must remember that this is not a treaty with 2,600 Indians in bulk who claim common rights over 55,000 square miles; it is a treaty with numerous small bands, I think about thirty, each of which claims its specific portion of the 55,000 square miles; and the smaller the band the greater the chance, either of removal from the locality, or of extinction of the band; while, if there is either a removal from the locality or an extinction of the band, the right becomes absolute and the servitude ends. In the meantime, not further pursuing this branch of the argument, I say, upon these United States' authorities, stating the law as they understood it to be applicable to the old colonial times as well as to their own, there was in the state a right—comprehending a seisin in fee—and a power to grant in fee, while yet the land was unsurrendered, although before surrender or extinguishment the occupation of the Indian could not be disturbed; and again I say that the Indian right of occupation was not transferable by him, but was subject to be

extinguished, either by conquest or by surrender to the owner of the soil. That being so, I say that it is impossible within the case of the *Attorney-General* v. *Mercer* to treat the interest of the old Province of Canada—putting it upon a lower ground than I believe it can fairly be put on—to treat that interest as other than "land" at the time when the British North America Act was passed.

Now some of the phrases which are used in the judgment in the *Attorney-General* v. *Mercer* show that no technical or narrow signification is to be given to the word "land" in this Act, but quite the contrary. For example: "It was not disputed"—let me quote these words —"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)*." There is a definition of the term "lands." It comprehends all estates in land. Again, "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 Province in which they are situate, or arise." So the whole subject matter of the whole section is described in comprehensive terms by your Lordships as "royal territorial rights." Then towards the conclusion of the Judgment your Lordships point out that "The larger interpretation (which they regard as in itself the more proper and natural) also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective provinces."

Now I ask, is it possible seriously to contend that this interest was other than "land" within the meaning and signification which is given to that term in this judgment, always provided that the interest belonged at the date of the Act to the Province; and my learned friend has pointed out, and your Lordships also have rightly said that it is admitted that, at the time the British North America Act was passed, the interest, whatever it was, had become an interest of the old Province. Upon that I shall have to dilate a little further in another branch of my argument; but I state with assurance that the interest, whatever it was, was an interest belonging to the old Province. Again, if the interest was not "land," surely it was "an interest in land," surely it was "an estate in land," and thus comes within the definition in Mercer's case. But if not, then it was at least "a royal right" in the land. I cannot argue that this is the best description, for it seems to me to be an inadequate description of an interest so large and substantial, being in truth the land. But if it was no more, it was at least a royal right.

THE EARL OF SELBORNE—The Crown apparently had a fee simple in lands subject to a burden.

COUNSEL—Yes, burdened by this servitude.

LORD WATSON—There are two events which may happen and one is a mere casualty.

COUNSEL—One is a mere casualty which may never arise. This is the land, it is at any rate an interest or estate in the land; but if, by some process of reasoning which I confess I am unable to grasp, it is to be cut down to some point which I connot perceive, it is reducible at any rate no lower than the point of royalty; there is a royal right; there is a public interest; it is a part of the "*jura regalia*"; and it is larger than the right of escheat because it comprehends the right of escheat.

In this connection just one reference to the provincial statutes. I hope not to trouble your Lordships with many such references; but your Lordships will observe that even in the case of the specific reserves, long before Confederation, provision was made for the gradual enfranchisement of the Indian; and as part of the emancipatory process he might receive to himself an estate in part of the land allotted to the tribe; he was allowed to devise such part amongst his children, with certain rights to his wife; and if he died intestate, then it passed to the children; but if he left no children, then there was an escheat to the Crown. So that there was a special extended escheat provided in the case, because the special tenure even of the enfranchised Indian was lower than the ordinary tenure of the white. The inference is obvious. Now there were other interests which it is admitted passed under this word "land"; for example Crown lands sold before the union. The ordinary course was to make a contract of sale, not as a rule for cash, but on credit; and the land remained vested in the Crown until paid for. Now there is no doubt whatever that the interest of

the province at Confederation in such land as that would belong to the province after Confederation; the legal estate, the allodial title in fact would remain in the Province—would remain in the Crown in the interest of the Province I suppose is the more accurate phrase—and the Province would have the right to collect the purchase money which was its beneficial interest in the land. Subject to that the Province would be of course bound in honour to fulfil the obligation which had been previously undertaken by the Crown to convey to the purchaser his property. But this Act is so careful as to expressly provide that the vesting of the property in the land shall be subject to any existing interest; and thus there is a recognition of each private right, applicable to each special case, and to each particular interest. Go a little further—supposing the case to be that the land had been wholly paid for before Confederation, but that the patent had not been issued; as it often happened that years of delay occurred in the issue of patents. There you find what you might call a naked trust, no beneficial interest in the Province. Yet the legal title would go to or remain in the Province; the Dominion would have no interest in it. It would belong to the Province, though the purchase money having been paid, there would be no beneficial interest, and there would remain only an obligation to transfer the legal estate to the purchaser.

Thus I contend that the old Province in this case possessed the *allodium*, and the province of Ontario since Confederation has possessed the *allodium*, subject to this Indian burden whatever it may be. Now one of their Lordships below speaks of this clause as saving trusts only, and says that the word "trusts" was inappropriate to the Indian interest. I think it was hardly inappropriate; if it had stood alone, I think, according to the view which should be taken of the character of this interest, "trusts" was not a very inappropriate word; in truth many reserves are very much like trusts, and in many cases the Acts of Parliament speak of such lands as being held in trust—see the 12th Victoria, chapter 9, for example.

THE EARL OF SELBORNE—I suppose that means what we call a trust, which may be vested in some persons to be used by them for the benefit of others?

COUNSEL—Yes, my Lord; and there were also some express Royal trusts; there were some lands which were held by the Crown royally in trust for the Indians; however, I pass this by, because, though his Lordship, by an extraordinary accident, entirely omits to take notice of it, yet the fact is that the word "trusts" is not the only relevant word. He entirely overlooks the words, "or any interest other than that of the Province," and, these words having escaped his attention, he fastens upon the inappropriate character of the word "trust," and points out that as a reason why this land should not be treated as vested in the Province, because the Indian interest would not by the word "trust" be saved. His attention failed him or he would have observed, only a line or two below, the words "or any other interest other than that of the Province"; and I say that phrase clearly, incontrovertibly, beyond cavil or criticism, must comprehend the Indian interest, whatever that may be. Therefore, I do not protract this part of the argument. I do not think it is necessary after the discussion here, to say much upon that on which the same learned judge has placed great stress, namely, the use of the word "public," which he erroneously conceived to be in the clause which I am now discussing, but which, in truth, he imported from the 92nd clause. It is not found in the clause under discussion. But the insertion of that word would make no difference whatever. "These lands," that is to say, "the interests of the Province, if any, in these lands," were *publici juris*. The word "lands" adequately and clearly expresses that, and I should feel as strong in my argument if the word "public" had been inserted here, as I do in its absence; but I claim that difference; it is not to be found here, and if there is an intentional omission, that omission must have been for the purpose of widening, and certainly not of narrowing, this clause.

Then a suggestion was made—I do not remember whether it was pressed here—but a suggestion was made that the word "public" should be construed by the light of the former provincial Acts. I think your Lordships' observation as to limiting the meaning of the words, "land reserved for the Indians," by reference to local legislation, is directly applicable to this contention; and I would also recall an observation from Lord Watson, who pointed out that which is perfectly true, that he who would seek to extract one uniform meaning from the word "public"

in these Acts would have a very hard task.

THE EARL OF SELBORNE—Is it necessary to import the word?

COUNSEL—The misfortune is that a very able dissenting Judge has imported it for us, and a large part of his argument was founded on its existence in a place where we do not find it.

We must, however, give a construction to this word which will be applicable to the various Provinces. We cannot put a particular construction on the word "public," because that construction is used in the case of old Canada; while, turning to Nova Scotia and New Brunswick, we find no uniform meaning, nor can extract any similar construction. The word is not the sole, or even the governing word in the clauses in which it occurs. I do not trouble your Lordships further on this point, because it seems to me that a fair and reasonable view of this word "lands" would be that if there was any distinction between it and "public lands," as used in the 91st section, it is to widen the phrase; and even if your Lordships regard the two phrases as equivalent, the result is the same—that this interest is included in "public lands" as well as in "lands." These were lands held for the State interest even in the old Crown Colonies; they were held under statute, and were under public control. Now, I say that even if the words in section 91, "lands reserved for the Indians," include this tract, that does not at all preclude this land belonging to the Province. The argument for the Appellants on this subject of the legislative power is wholly fallacious. They say it excludes a proprietary interest in others than the Dominion, and therefore settles the question against us. But I submit that legislative power in the Dominion does not exclude a proprietary interest in the Indians. I do not think my friends would seriously contend, with respect to the special reserves and so forth, that the fact that the Dominion has exclusive legislative power, would preclude a proprietary interest in the Indians, for whose welfare they are so anxious; and if so, if the proprietary interest in the Indians is to be preserved notwithstanding the grant of exclusive legislative power to the Dominion, why should not the proprietary interest of the Province in the same lands, why should not the proprietary interest of anybody else in the same lands be also maintained, notwithstanding the grant of that same exclusive legislative power? Each Province has exclusive power of legislation over all private lands, over the lands of everybody situate in the Province, but the proprietary interest still resides in the private owner. And therefore I submit with confidence that the legal estate and the beneficial estate, and the rights of old Canada are by 109 expressly declared to belong to the Province of Ontario. But, thirdly, if, for some reason which I am utterly unable to grasp, 109 should not be held to cover this interest, then I appeal with great assurance of success to clause 117 as covering it; and I contend that by 117, if not already vested by 109, the property is not indeed given, but is retained to Ontario. "The several Provinces shall retain all their respective public property not otherwise disposed of in this Act." Now let me pause here and venture to reiterate that, if not taken away by the Act, it is to stay with the Province. If it is not otherwise disposed of, it is to remain with the Province. Then I ask, has it been taken away? Has it been *otherwise* disposed of? I submit not. But it may be said, and it has been said in the Court below, that "lands" are specially dealt with by 109, and therefore they are not comprehended within the meaning of 117. That seems to me to rest upon a fallacy. If this particular interest in land is dealt with by 109, all is right. The property is vested in the Province by virtue of that dealing. But if this particular interest in land be not dealt with by 109, then there seems to be no reason against this particular interest being dealt with by 117, which was intended, as one of your Lordships suggested during the Appellant's argument, to sweep in whatever might not have been otherwise disposed of.

THE EARL OF SELBORNE—It would be very difficult, would it not, to say that land was not within that section because it is subject to the rights of Canada to assume land?

COUNSEL—I was just coming to that, my Lord. I have been endeavoring to argue so far without the assistance of that point. But I say the question is settled by the rest of the clause, "subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country." That seems to me to make it abundantly clear that the Legislature

was dealing with lands in the main part of the clause, since it saves a right of Canada, or rather, as I conceive, createsa right in Canada to assume and exercise the power of eminent domain in respect of land as well as of other public property required for fortifications or the defence of the country. Thus the clause touches lands—any possible interest in lands which may remain after giving effect to the other clauses of the Act.

THE EARL OF SELBORNE—Perhaps public property would not include such a right as that right to escheat, I do not think in the Mercer case much stress was laid on that clause.

COUNSEL—No, we did not get down to it. You use the residuary clause only in case the principal clause does not affect the subject. I cannot lay much stress on it now, simply because I believe we do not in reality reach it; but I say if we do reach it, it disposes of the case. Your Lordships in Mercer's case did not consider it had much bearing.

THE EARL OF SELBORNE—My impression was that it was not thought sufficiently large.

LORD WATSON (Quoting) "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 illustrations from another section, the 117th (which their Lordships do not regard as otherwise very material)."

COUNSEL—Then the saving clause in 117 is in itself not unimportant. My learned friend Mr. McCarthy said that that saving clause was a very puzzling clause. He did not know why it was there—because the Dominion had unquestionably this right without it; and therefore it was impossible to understand why it was put there. But I submit it is a very plain indication of the view of the Legislature that the rights of the Dominion in reference to land were limited to such as were expressly given to it; and that it is upon this clause, and not on some other or general provision, that the right to take lands for the purpose of defence and so forth must rest. It is, in fact, an indication of the limited nature of the power of eminent domain in the Domain. If there had been a general power of eminent domain in the Dominion, of course that clause would have been needless and improper. But it is here, and it leads to the inference I suggest. Then I submit to your Lordships that, if there be no other disposal of the property up to this point in the Act, we clearly find its destination here; and that it is not to be withdrawn from the Province by implication. It is rather to be left to the province under the express words to which I have referred.

Now if your Lordships will permit me to return for a moment to the argument from equality, to which I made allusion a while ago, I will state briefly the grounds which seem to me to lead to my conclusion. I submit that equality of treatment of the several Provinces as to their enjoyment of the crown lands demands our construction. The British North America Act, as I venture to suggest, deals on an equal footing with Quebec, Nova Scotia, New Brunswick and Ontario actually; and potentially with the rest of British North America. It is *The British North America Act.* It contemplates a federal union of the whole northern part of the continent under its provisions, excepting in so far as there may be some alterations of those provisions in the special instruments of union. And to construe it intelligently I submit we must see how things stood as to the other Provinces in order to discern what will be the effect of our construction. They briefly stood thus. In the Province of Quebec there had been no surrender; there had been no recognition of an Indian title; there had been settlement of a vast area. But a far vaster area was open for settlement as Crown lands, unsurrendered, and with the Indian title unrecognized. There had been certain allotments made by the Crown, by the Legislature, and privately by individuals, specially appropriated to the maintenance and education of some Indians.

THE EARL OF SELBORNE—Are you not treading on dangerous ground there? In a certain sense of course it is true that these provisions are to apply to all the provinces; but we can neither presume that the circumstances of the provinces were all alike nor that the Act intended to make them so.

COUNSEL—Not absolutely alike; but my proposition is, that that leading view as to equality of treatment, both with reference to control and development of lands and with regard to the revenues arising from lands, has force where there are two available constructions, one of which leads to the equalizing result and the other leads to a different result.

THE EARL OF SELBORNE — I quite understand what you mean in that respect. Supposing that in some of these provinces the quantity of land reserved for the Indians was very small and in others very large. Of course the provisions bearing on that question would necessarily be more important in the province where there were many such lands than in the province where there were few; but I do not see that any presumption can be made that it was meant to equalize those provinces in that respect.

COUNSEL—No, my Lord, I have not expressed myself with sufficient clearness. I do not intend to argue at all that it was meant to alter the existing conditions; but merely to argue that in interpreting the constitution if one construction will lead to a conclusion which will preserve equality of condition in this sense that it will leave the same control over its own public lands to one province as is left to the other provinces, whereas another construction will take that control away from the one, while leaving it to the others, we should prefer the first.

THE EARL OF SELBORNE—If that inequality is used in the construction placed on the Act, probably you are quite right; but supposing that is merely the difference of circumstances of the provinces.

COUNSEL—There was an inequality in that sense; and I do not for a moment pretend that the British North America Act levelled up things by force, though I shall show to your Lordships later that the arrangements for union did "level up" in certain cases by agreement.

THE EARL OF SELBORNE — It dealt with things as they happened to be perhaps without perfect knowledge of every detail on the part of the British legislature.

COUNSEL — Of course the plan the British legislature pursued is well known. Sets of resolutions were passed by the legislatures of all the provinces. They were sent over here under addresses. Then deputations of leading men from the various provinces came here and sat in conclave during the passage of the Bill, and with hardly more I think than two exceptions, one as to the title which was proposed in the original draft—the Kingdom of Canada, instead of the Dominion of Canada—and another with regard to the pardoning power, the views of that conclave representing under the authority of the different legislatures the several provinces, were embodied in the Act. So that, presumably, we find embodied in the Act the knowledge of those who were best acquainted with local public affairs. However, I do not intend at all to enlarge upon this point, but merely to state it in the briefest possible way; and, as I have said, the cases of Quebec, Nova Scotia and New Brunswick are in this particular alike. In Prince Edward Island the whole area had been patented in one day, under instructions from the executive in England, without any surrender or recognition; and private charity had bought Lennox Island for an Indian refuge. In Vancouver Island, in the early days of the Hudson's Bay Company, there were some few surrenders and insignificant reserves; but on the enormous mainland of British Columbia, comprising 300,000 square miles—ten times the area in dispute and inhabited by over 25,000 Indians, there was no recognition or surrender. I ask your Lordships to mark that those territories of British Columbia are covered by this proclamation of 1763—that those territories are covered just as much as is the territory now in question by that very clause of the proclamation under which this Indian interest is reserved. There the local government dealt without hesitation, and under the authority granted to it, with the lands of the Indians, assigning them whatever morsels it thought fit, without any question or bargain or compact, not recognizing in them any right in the soil, but reserving for them their residences, their burial grounds, and so on. Then in Rupert's Land and the North-West Territory the only surrender ever obtained was the Earl of Selkirk's surrender at an early period; and the Hudson's Bay Company, without any reference to the Indian title, to the extent to which in their own interests they found it necessary, used to alien lands to settlers; and things stood thus in relation to these various countries as to the Indian title at the union.

THE EARL OF SELBORNE — When you speak of the proclamation as applied to the Pacific I suppose what you mean is that, from the construction of these words it would so apply. You do not mean that the then representatives of the British government were brought into contact with the Indian nations as far as Vancouver Island.

COUNSEL—I am not aware that they were; but I say that that area was re-

served for the Indians just as much as the present area.

THE EARL OF SELBORNE — From the construction of the words I quite follow what you say, but it might perhaps tend to explain any difference in the way of acting upon it that there had really never been any communication between those remote regions which were perhaps hardly discovered at that time, so that the Crown did not feel fettered as by an actual engagement given to persons who could claim the performance of it.

COUNSEL—It may be so. With your Lordship's permission, as I am about to deal with the proclamation later, I will deal with this point then. I am only desirous to make a bare summary at this moment.

THE EARL OF SELBORNE — I quite follow you and I think you are right in saying the words of it would cover the whole ground. France claimed everything though they had not really settled it.

COUNSEL—And besides we must always remember that this proclamation is not limited by any means to what France claimed. It deals with the land the subject of the cession, but it deals also with the old colonies.

THE EARL OF SELBORNE—There are other clauses.

COUNSEL—But this clause——

THE EARL OF SELBORNE—It may be that your proposition might apply to that, but this was not an old colony surely.

COUNSEL—No, but I am merely pointing out that even if that area did not pass by the cession, in whatever way it passed, whether it was ours before the cession, or whether it was French, it is included in the language of the proclamation.

THE EARL OF SELBORNE—You will show that when you come to it.

COUNSEL—Yes. Then I wish to turn for a moment to the other argument for equality, which I suggested to your Lordships. I have pointed out the grounds for equality of treatment with regard to Indian lands, and with regard to the enjoyment by the provinces of their own lands; and, without saying a word more as to the original provinces than those few words I have already used, pointing out the duties which devolved upon the provinces, the funds out of which it was expected they would discharge those duties, and the elements of control and the important functions assigned to them with reference to lands within their boundaries, I wish to show that the argument is strengthened by the facts as to all the additions to the Dominion contemplated at the time and ultimately enected or negotiated. Sometimes indeed the plan of union differed; but the difference in the plan only emphasises the argument for equality. For example: Prince Edward Island was proposed to be joined at the period of the original union; but the negotiations failed at that time owing to the Prince Edward Islanders not desiring union. In Prince Edward Island the Crown lands had all been very improvidently granted by the Crown, and so the Island had no Crown lands. What was done? The fact that the other provinces had their Crown lands, out of which they were to discharge these duties, was recognized. The fact that Prince Edward Island was in a disadvantageous position, was recognized. And she was made a special allowance of $45,000 a year out of the funds of the Dominion. That was in the original proposal of union, and was afterwards agreed to when she did come in a year or two later. She was made a special allowance of $45,000 a year to make up for the fact that she had not got any Crown lands. It was true that Canada had not lost them for her; but it was felt that she could not discharge her functions without the revenue she might have derived if she had had Crown lands. And the Dominion, though not responsible for the loss, *ex necessitate* undertook to make it good. As to Newfoundland, in 1869, she was given the option of handing over her Crown lands to the Dominion; and if she agreed she was to get $150,000 a year in perpetuity for her local services in consideration of the surrender of her Crown lands. So that when it was proposed to depart from the scheme of the Act, it was proposed immediately to compensate the province for that departure. In British Columbia an arrangement was made, in the terms of union, for a grant of twenty miles on each side of the route of the Canadian Pacific Railway, to assist the Dominion in constructing that great railway through the province; and in consequence of that, because British Columbia was going to lose the revenue from her Crown lands for twenty miles on each side of the route, she was given $100,000 a year for

ever, out of the Dominion funds, to put her in the position she would have occupied had that portion of her Crown lands not been taken from her. In Manitoba, where the lands were Dominion lands, because all that province was carved out of the North-Western Territory, they seem to have been largely appropriated by the Dominion towards the construction of the railway and sold; and, when it was decided at first to retain the residue as Dominion property, $45,000 a year were allowed to Manitoba to "even up," as they call it, in consequence of her not having Crown lands. That subsidy was afterwards increased to $100,000 a year; and a portion of the lands that remained was also handed over to the province. Now that series of facts I submit to your Lordships is exceedingly strong, and in fact conclusive in support of my argument that the general scheme of this Act was that the provinces should have all their public lands, or allowances proportionate to what might have been realized out of their public lands, in order to discharge those political and governmental functions with which they were charged under the British North America Act.

Now so much with regard to the argument for equality; and I return if your Lordships will allow me, to the question of the meaning of "Indians and lands reserved for the Indians" in the British North America Act, so far as one is able to discuss that question without a treatment of the various descriptions of the Indian title to which I have referred. Treating it therefore on the hypothesis that it is of the nature I have described as the middle title, I ask, after construing these other clauses which I have discussed, is there to be found in the language of the 91st clause in which that 24th article is contained such a clear and plain intent to grant to Canada the provincial proprietary interest in these lands as will take them out of the operation of the other clauses? Because that is really the question. Unless we can find in this particular clause, granting a legislative power, a clear and plain intent to transfer to Canada a proprietary right, that right is certainly disposed of by the other clauses.

SIR M. E. SMITH—It only professes to give legislative power.

COUNSEL—Quite so.

SIR M. E. SMITH—Then to give the proprietary interest or whatever it may be, it must be necessary implication, must it not?

COUNSEL—Quite so. I think it is impossible to give any other answer to that question.

SIR M. E. SMITH—Is it necessary implication?

COUNSEL—It is not necessary certainly; it is not even probable; and the argument is strengthened when we look at the language of the clause.

SIR M. E. SMITH—I think they used it on the other side to assist their argument on the words of the other clauses. This Act having given legislative power is it not likely they have given the proprietary power to the province? That is the way they use it.

COUNSEL—I think the argument is a very lame one; and that this is a very poor crutch. The clause is this: "It shall be lawful for the Queen," and so on, "to make laws for the peace, order and good government of Canada."—I omit the immaterial words—"in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces," including as No. 24, "Indians and lands reserved for the Indians." There is your clause. The primary and express, and as we say the sole object of this clause is to confer the power to make laws, is to confer the legislative power; and it must be read primarily at any rate, and as we argue with confidence exclusively, with reference to that object. Then secondly, the two subjects must be read together. The first throws light on the second. "Indians" and "lands reserved for the Indians"; "Indians and the lands of the Indians"; "Indians and their own lands"; "The Indian interest only." I submit that when you find these two things together as the subject of the legislative power, you find in effect that it is the Indians and the Indian interest in their reserved lands that is the subject matter of the legislation.

LORD WATSON—Under section 91 it is impossible to suggest that anything went but the legislative power.

COUNSEL—Certainly.

SIR M. E. SMITH—You argued before that it could be only legislative power and not property because when property is expressly granted it is given to them.

COUNSEL—Certainly. I am now dealing with the argument altogether irrespective of the difference between the conveyancing clause and the legislative

clause. I now take the language of that clause by itself; I took it before perhaps a little inconveniently out of its proper order, because I felt it necessary to contrast the two sets of clauses at the moment. I say then, as I suggested a while ago, that there is no grant of a proprietary interest in the Indian himself. He is to be legislated for. There is nowhere any such grant as to his lands. They are to be legislated on for him and in his interest. That is the purpose of the clause; and it surely would be a strained construction to imply a grant to Canada of the proprietary interest of the Indian in these lands; and a still more strained construction to imply a grant to Canada of the vast proprietary interest of the old province. I will not after the long discussion that has taken place, and after your Lordship's expression of opinion during that discussion, allude further to the clue to the meaning of this phrase which is to be found as is suggested in the preconfederation legislation of all the provinces. It does not seem to me to be useful to trespass on your Lordships' time further on that subject, but it is to be pointed out that in three out of the four provinces——

THE EARL OF SELBORNE—It was very right that it should be gone into, because several of the learned judges appear to have attributed importance to it.

COUNSEL—Certainly, and but for what has taken place I should have felt it my duty to go into it.

THE EARL OF SELBORNE—It has been fully gone into.

COUNSEL—I do not feel that I can usefully add anything; but I may just point out that in three out of the four original provinces any Indian interest is repudiated in unsurrendered lands, and in none are such lands treated as reserves. And we have submitted in accordance with those views of the learned judges below, that the phrase here means only lands of that special character, and that in so far as reserves are lawfully carved out of this area, as is contemplated by the treaty, they would come clearly and plainly within clause 24.

Now it has been said by both the dissenting judges, but more strongly by Mr. Justice Strong, that our general contention would effect an abrogation of the old policy, and a destruction of the ancient claims of the Indians. But that is a most extraordinary misconception. I have not been able to find in any of the arguments addressed to the court, certainly not in any of the written arguments or pleadings, any suggestion that what we propose is to effect any alteration whatever in the nature or extent of the Indian interest. Whatever the nature or extent of that interest may have been, it is preserved just as it was. If it be an absolute right, the province takes expressly subject to it. If it be dependent on policy, or good will or discretion, that is all unchanged; and all the arguments which would lead the political department of the government in charge, whatever that government may be, to pursue that policy and to continue that system subsist, and receive increasing force every year during which it is permitted to continue. In connection with the suggestion also made by a learned judge, that it was not thought safe in effect to entrust any discretion or power to the province, I submit that a small part, for it is a small part only of the power entrusted some time before Confederation to 10,000 or 12,000 souls in British Columbia over 25,000 Indians and 300,000 square miles of unsurrendered territories, might be fairly presumed fit and proper and safe to be entrusted to a million and a half of subjects in Ontario with reference to 2,500 Indians and 30,000 square miles of territory.

But I do not stop at the proposition that nothing we advance here impairs the position of the Indians; because I contend that possibly, nay probably, the Indian position is by our construction of the Act materially improved; since the Dominion of Canada may be set up, and in my opinion probably is set up, without self-interest, without anything to gain by making an advantageous or a hard bargain with the Indians, is set up as the superintendent or guardian of the Indians, and the protector and vindicator of the Indian rights. I will submit presently the authorities which would seem by analogy to maintain that view. But then it may be asked, if so limited a meaning of the Indian interest was intended, why was there no grant to Canada of the special reserves in which the Indians are interested? Is it not reasonable that there should be such a grant? Not at all. It is just because it was the Indian interest, that there was neither necessity nor reason for making any proprietary grant to Canada. There is no such grant, as I have shewn, in any part of this Act; there is no grant to any one

of the interests of another, as there would be here if the proprietary interest of the Indian were granted to Canada. There was, my Lords, in truth no beneficial interest to grant in the case : because part was the Indians', and the rest was the province's ; and that is the reason you find nothing granted. You do not find anything at all in the granting clauses, just because there was nothing at all that could with honesty or propriety be granted. The authority to legislate for the Indians and their lands would cover all that was necessary or proper ; and that is all that is given. As I have said, the powers that are conferred upon Canada of legislation, and correlatively of administration, would in all probability entitle Canada to intervene in any negotiation that was proposed with reference to the surrender of the Indian title ; and that independent, disinterested intervention (which it was of course presumed would be constitutionally exercised, without any capricious departure from the old methods, or any improper detriment to the interests of the province, but in a manner conducive to the interests of all), would, no doubt, produce a distinct, theoretical improvement in the condition of the Indians, as it stood in the province of Canada just before confederation, prior to which time, as has been pointed out, the province of Canada had for long proceeded to make bargains with the Indians, having in view the proposition that whatever it should pay was to be paid out of its own pocket, and whatever it should get would be to its own profit ; and thus having a direct and immediate selfish interest to make a hard bargain, while it was bound from motives of duty and propriety to make a fair bargain with the Indians.

I submit, however, my Lords, that our position is not sensibly impaired if the view be adopted that there was a grant to Canada of legislative power over the existing Indian interests, if any, in these lands. Assume, whatever the Indian interest be in these lands, that the grant is of legislative power thereover. Now, what would the general result be of that proposition ? First, continued enjoyment by the Indians of their interest, whatever it might be, in their lands, whatever they were ; that more absolute enjoyment which they had in the special reserves, that more limited enjoyment which they had in these reserves, would remain to them ; next there would exist a legislative power in Canada over the Indians and over their interest in all lands, including their interest in these lands ; next there would exist continued ownership by the province of these lands, subject to the Indian claim ; and lastly there would exist a legislative power of the province over its own interest in these lands. But it is suggested that this would be very confusing indeed. "What ! a legislative power in the Dominion over the Indian interest, and a legislative power in the province over its own interest ? That would never do !" It would do perfectly well ; because, according to the theory which is presented by my learned friends, and upon which I am just now arguing the case, it is impossible for the lord paramount of the soil to interfere with the land, unless and until there has been an extinguishment of the Indian title ; and therefore the legislative right of the province would remain, so to speak, in abeyance so far as meddling with the lands is concerned, until the accomplishment of that preliminary, which, according to this theory, is essential, of the extinguishment of the Indian title. In the meantime the Dominion would legislate for the Indian interest. So nothing towards settlement, nothing towards occupation, nothing towards development, nothing towards interference could be attempted by the province until, first of all, there had been an extinguishment of the Indian interest. At that moment, for the first time the provincial legislative power, existing, but not capable meantime of being usefully and practically exercised, would come into full force and effect ; and also the Dominion power of dealing effectually with the special Indian reserves which would be created on the extinguishment. Then these things being done, over the Indian reserve the Dominion would have ample legislative power, the Indians full enjoyment ; and over the surrendered lands Ontario would have full legislative power, and full enjoyment too ; and here is a simple and satisfactory adjustment of this whole apparently complicated case.

But, my Lords, I submit that the difficulties in the way of implying or finding a grant of a proprietary interest in the Dominion in these lands are not by any means as yet exhausted. It is clear that "lands reserved for the Indians" include, if they are not actually satisfied by the lands of the Indians themselves—

the reserves as we call them, the special reserves. The words certainly include these. As to these a certain legislative power is clearly given. But if it be held that the words embrace an Indian interest in this tract of whatever nature, and also the whole estate in the tract, as my learned friends suggest, then how greatly is the difficulty of implying a proprietary interest enhanced! Because in what character does Canada on this hypothesis become a transferee? Somehow or other, somewhere or other, there is found something or other which vests in Canada the proprietary interest in the lands absolutely. Now in what character? Is it beneficially as to the whole? Is it in trust for the Indians as to their interest, and beneficially for Canada subject to their interest?

LORD WATSON—They put it in this way: they do not read it as giving the Indians a reserved right, but it is read by Mr. McCarthy as lands reserved by the Crown for the use of the Indians.

COUNSEL—Quite so; lands reserved for the use of the Indians.

LORD WATSON—Even in that view it is a mere right to legislate.

COUNSEL—It is a mere right to legislate. I am endeavoring to point out the difficulties that follow from anything more, because, as I was saying, in what character does Canada become the transferee of a proprietary interest? Is it beneficially as to the whole? Is it in trust for the Indians as to their interest, and beneficially for Canada subject to their interest? Is it in trust for the Indians as to the whole? Or is it in trust for the Indians as to their part, and for the province as to its part? It cannot be beneficially as to the whole. It must be in trust for the Indians in the special reserves at any rate. Yet there is no safeguarding of their interest. You do not find that added which is added in the other case where lands are transferred, "subject to existing trusts or interests." You must then imply a trust as well as imply a grant, unless the Indians are to be robbed by the British North America Act. However, I suppose it will be admitted that it is not beneficially as to the whole; that as to the Indian interest, at any rate, it is in effect in trust for the Indians. But how then as to the remainder? The appellants claim a beneficial transfer of the remainder; but why in the world, if the Indian interest be transferred only in trust for the Indian, should the interest of the province be transferred beneficially to the Dominion? why in the world should a different character be given to the transfer in one case from that which is given in the other?

LORD WATSON—These headings, if I recollect right, are incorporated into the statute.

COUNSEL—Yes.

LORD WATSON—I mean the headings such as "Executive power" and "Legislative power" and "Distribution of Legislative power," and there is another which deals with "Revenues, debts, assets, and taxation."

COUNSEL—I am not familiar with the question how far these are treated as parts of the Act. This is, of course, an Imperial Act, my Lord. But I know that they are not marginal notes.

LORD WATSON—No, they are part of the statute.

SIR RICHARD COUCH—That has been considered in some cases in England. *Marriage* v. *The Eastern Counties' Railway* was one case.

SIR BARNES PEACOCK—In the printed copy which I have, in the Act, and I have no doubt it is copied from the Imperial Act.

COUNSEL—Yes, they are in the body of the Act. Here is the official copy, and your Lordships will find that the only difference is that they are in italics.

SIR RICHARD COUCH—There is no doubt they are printed in the Act.

SIR BARNES PEACOCK—There is nothing in the Act to show that they are not part of it.

COUNSEL—No.

LORD WATSON—It has been held that these are parts of the statute. They are not marginal notes. They are the subject matter of legislation.

COUNSEL—Then, as I was observing, if in order to accomplish justice to the Indians you are to imply that the transfer of their interest is in trust for them, it seems impossible to contend successfully that a transfer of the remaining interest should be implied to be in another character, beneficially for the transferee; because all is contained or implied in one set of words, framed to accomplish one endeavour of the legislator—that of a grant of legislative power. The legislative power is single; and if a proprietary grant is to be implied, it must be single too; it cannot be a double grant—a grant in

part, on trust, so as to preserve the rights of the Indians, and in part beneficial, so as to destroy the rights of the province. Now all this maze and trouble into which a departure from the true path plunges us, seems to be escaped by a return to that path. It was not intended to transfer to Canada either the Indian interest or the interest of the province. Each still belongs, so to speak, to its owner. Canada has ample powers to protect and deal with the Indian interest. That is all that was necessary. It is all that was proper. It is all that was intended. Else we should have found words of grant, and words of limitation as well. Then as to the argument of equality also applicable in this aspect, and very notably with regard to British Columbia, I do no more than simply advert to it, because it seems to me that my learned friend stated it fully, with this single observation that as to British Columbia, which does possess territory which I think I shall be able to show, was clearly within the proclamation of 1763, it is perfectly plain that the local government had and exercised the discretion and power to deal with the Indians as if the proclamation was of none effect; and that when the Imperial government, in settling the terms of union, coming to deal with this important question as affecting that large body of Indians, made a stipulation in their interest, that stipulation was not an affirmance of their right under the proclamation to an extinguishment, and to a bargain, and to a treaty; but a stipulation that as liberal grants as, of its own policy, free will and discretion the British Columbia Government had been in the habit of making to such of these Indians as it dealt with, should be continued. So we find it treated as a question of policy; we find an altogether diverse policy pursued; we find recognition of the pursuance of that policy; and we find the limited safe-guarding of the Indians' interests which was thought adequate by the Imperial authorities and by Canada, namely, to secure that that policy, or a policy as liberal, should be continued. Thus, if there had been no such stipulation, there would have been no obligation at all; and the province of British Columbia might have left the Indians without any reserves. Thus again the reserves were to go in that case to the Dominion by a grant from the province; and the lands otherwise were to remain with the province—exactly the contention that we make as to Ontario. That is what was recognized as the condition of things with reference to these 300,000 square miles and 25,000 Indians in British Columbia—all policy; and the policy maintained. Once again in the negotiations between the Hudson's Bay Company and the Imperial and Canadian Governments, negotiations completed, not mere diplomatic discussions, but actually consummated agreements, you find that the most marked distinction is made between the ordinary rights of white subjects to lands and the Indian title so-called. Canada offers courts and machinery for administering justice with reference to the rights of the white subjects; Canada offers the customary, liberal and humane policy with reference to the Indians; and upon that opening suggestion, marking the distinction between right and policy, the negotiations are concluded; and the last letter of the Secretary of State for the colonies, in announcing their conclusion, is an appeal to Canada to carry out a liberal policy towards the Indians. The same line of argument has been advanced by my learned friend as to the conventional line between Ontario and Canada; on which his point, as I understood it, was simply this: that there was the agreement and concession of both parties to that contract that the question of the title to this very land depended upon the single question within whose bounds it fell. At that time (not as when the case came before your Lordships, because in the meantime Manitoba had been introduced into the dispute), but at that time this disputed territory, if it was not Ontario, was Dominion territory; and the Dominion Government and the Ontario Government both agreed by solemn acts, upon which titles passed—not merely negotiations but acts upon which titles passed—to the proposition that the settlement of the boundary would settle the ownership of the soil. Wherever that line lay, within that line it was Ontario property; outside that line it was Dominion property. Then again this very treaty is framed, hardly as a bargain about rights, but rather as an act of bounty and good will; and it does give a definition of reserves as there understood; and so far is it from the suggestion that the Indians had, so to speak, a paramount title, and that the reserves

were retained by them as of their original title. that your Lordships will find that in this treaty, as in some other treaties, the reserves were not made at the time at all; that everything passed, and that there is simply a stipulation that there should be carved at a subsequent time out of the whole property what are called reserves, after a consultation with the Indians. So that they were not in fact reserved. The phrase, indeed, is used, but it is not applicable. The whole passed; and afterwards they were to be appropriated out of that whole.

THE EARL OF SELBORNE—Was that ever done?

COUNSEL—Yes, my Lord; that has all been done.

THE EARL OF SELBORNE—So that there have been reserves in the narrower sense of the word created out of these lands.

COUNSEL—Yes, my lord. The public documents shew that beyond dispute. In fact it was done quite shortly after the treaty. Then everything in the treaty itself, in the negotiation at any rate, is based upon such a construction of the words Indian reserves, and on such an assertion of the power of the legislature to mould even the reserve title, as is wholly inconsistent with the present extreme contention of my friends, and, as I conceive, inconsistent even with their secondary contention; but certainly destructive of the primary contention—that there was some paramount or superior right of the Indians practically exhausting the whole; on the contrary, the whole of the lands are treated as if the Crown had them. I submit, on the whole, that this general set of the current, this unvaried series of executive legislative and political acts, is of very great consequence, and should turn the scale if the scale be at all doubtful.

Now I desire to make a few observations to your Lordships with reference to the question of the executive authority of the Dominion. As I have already intimated, my contention is that the Dominion has not of itself the right to make the treaty. It has not, as I conceive, the power on its own account, and for itself and by itself, to treat with the Indians for the surrender to itself of Ontario lands.

THE EARL OF SELBORNE—In connection with that subject you will not forget to take notice of the Act of 1868, which was a legislative Act, and under which I suppose the treaty was made.

COUNSEL—The Act of the Dominion?

SIR BARNES PEACOCK—Yes.

THE EARL OF SELBORNE—On the supposition that the Dominion had a right to legislate for "Indian and lands reserved for Indians" and that these were such lands, then we have in the next year actual legislation concerning Indians and their lands, which legislation, I assume, would apply to these lands.

COUNSEL—Yes; it may be so.

THE EARL OF SELBORNE—It was under that legislation, as I understand, that this treaty was made.

COUNSEL—I understand that has been suggested.

THE EARL OF SELBORNE—I call your attention to it because it seems to me it may be of some importance that we should thoroughly understand the bearing on the case of that Act and also of the treaty.

COUNSEL—Yes, my Lord, I will state briefly the position that I will elaborate later. I think it may be found that that Act was an attempt to bring together the powers that the old provinces formerly had, and that the Dominion was thereafter to exercise with reference to the Indians all over the Dominion.

THE EARL OF SELBORNE—Very likely.

COUNSEL—I think it may be found that in the intention of parliament the language would be applicable, and applicable only, to the question of obtaining surrenders of reserves in the sense in which we have been using that term—specific reserves.

THE EARL OF SELBORNE—Do you mean in the narrower sense?

COUNSEL—Yes.

THE EARL OF SELBORNE—You will have to make that out. That is not the present impression of their Lordships, but you may satisfy them that it is so.

SIR BARNES PEACOCK—Do you mean reserves which are created by express treaty?

COUNSEL—Yes, which had been created. Then with your Lordships' permission, not having that statute before me at the moment, I would defer that part.

SIR RICHARD COUCH—It is page 105 of these statutes.

LORD WATSON—I should have thought that it was under the powers granted to the Secretary of State for Canada by this Act that the license came to be issued.

COUNSEL—That may be so. I was rather referring to the treaty power.

LORD WATSON—But it was under the powers given by this Act that the sanction was given.

COUNSEL—It is perhaps fitting that, before discussing what the effect of this Act may be, and whether it would apply to these lands if the Dominion had the power to deal with them, I should do do what I was about to do, namely, discuss the question whether it has any such power, whether it has any such right. My suggestion is not at all limited to the proposition that the executive has not the power without some legislation, but my proposition is——

THE EARL OF SELBORNE—That they are incompetent to legislate.

COUNSEL—Yes; that not the executive and the legislative powers together can make the Dominion competent by itself to arrange this treaty for the benefit of the Dominion itself.

THE EARL OF SELBORNE — I quite follow that; but the first question is to see under what authority the treaty was made, and then when we have seen that to see whether it is validly made, and then after that comes the important question you have stated as to what is its effect.

COUNSEL—Yes. I was endeavouring to ascertain whether it could be validly made.

THE EARL OF SELBORNE—There is no magic in the word "treaty" of course.

COUNSEL—No; it is simply a bargain. We say indeed that the language which my learned friend has pointed out is rather the language of bounty and good will; but putting it in the other light, it is a bargain for the surrender, or, rather, as my learned friends on the other side put it, for the transfer of the Indian interest. It is nothing more than a bargain; although it is called a treaty. Now my proposition is, that the Dominion executive has not the power, nor could the Dominion Parliament confer on that executive the power, to treat with the Indians for the surrender or transfer to the Dominion of lands which are Ontario lands. But if your Lordships should hold that the executive has the power, or that the power can be conferred upon it to treat, then that such power is to be exercised for the benefit of the province, and does not include any right in the Dominion to acquire to itself Ontario lands which are subject to this claim; that no such right as that exists; and, if it does not exist, of course the Dominion legislation, being beyond the competence of the Dominion, can make no difference. The supposed power, if it exists, is to be used as I submit for the benefit of whom it may concern. Canada has the power to legislate for the *Indians;* but that does not mean that it has the right to deal with them as it now alleges that it has dealt with them. It does not imply a right to acquire their property. Still less does it imply a right to appropriate the property of Ontario. Now in order to decide this point we must ascertain what the principle was with reference to the surrender, or extinguishment of the Indian interest; in whom the right to deal existed, upon whom it devolved. Conformably to precedent and to authority, invariably so far as I can make out, this Indian title or interest, which is in its various forms an arbitrary creation, subject to diverse limitations and stipulations of the governing and creating power, this Indian interest was invariably subject to this limitation, namely, that it was not transferable by the Indians, that it was not alienable by the Indians, that it was surrenderable or extinguishable only in favor of the allodial owner, whether the Crown, or a lord proprietor, or a chartered colony, or in favor of the individual owner of the fee, who became such in some early instances by the grant or license of the crown or its grantees without any prior extinguishment of the Indian title.

LORD WATSON—I should like to hear your arguments on both these points. The first question I wish you to answer is: Can the Dominion executive take a surrender from the Indians, the latter stipulating that the lands which they have surrendered should be settled for and the price given by the settlers paid to them, or retained for their benefit. That is not the case which is said to have occurred?

COUNSEL—No.

LORD WATSON—That is one kind of case. That is one view of it. Then there is another; whether they could by any possibility arrange with the Indians to take a cession, the Indians not receiving the full benefit of the prices derived from the ceded land?

COUNSEL—To take a cession of a portion of the land.

LORD WATSON—Could they so deal with the Indians as to take an advantage to themselves, assuming that the prop-

erty would pass? That is not precisely the same question.

COUNSEL — No. One question is, whether they could so arrange as to utilise the whole beneficial interest in the property for the benefit of the Indians; the other question is whether they could divide the spoils.

SIR BARNES PEACOCK—Then there is another question as to the effect of this treaty, which you will come to. The treaty *habendum* is, "To hold it to Her Majesty the Queen, and her successors for ever." Not to hold it to the Dominion.

COUNSEL—Quite so. I am about to argue that these words produce the effect of a surrender to Ontario, notwithstanding all the difficulties raised on the other side.

SIR BARNES PEACOCK—And there is the question, when it is ceded to the Queen, to whose benefit did it enure, whether to the Queen as represented by the Dominion.

COUNSEL—Quite so. I hope to reach that point in a little while. Now, with reference to Lord Watson's questions, of course my argument is entirely in negation of the right of the Dominion to do either of those two things, because the right of the Dominion to do the first of those two things, which is to so arrange with the Indians as that they shall enjoy the whole beneficial interest in the property, is equivalent to saying that, while the province has, according to my argument, a substantial beneficial interest in the property, it is in the power of the Dominion authorities at their will to annihilate that interest. I do not see how these two positions are reconcileable with the sound line of argument which, with a refinement of subtlety I have not been able to reach, has been applied in the court below, on the assumed inconsistency of legislative powers existing as to the land in both legislatures in a certain sense.

SIR BARNES PEACOCK—It is not quite so, because it may be that the Dominion might—I do not mean to say that it could take what was the interest of the Indians for their own benefit, leaving in the province what was in the Crown.

COUNSEL—Lord Watson's first question was whether the Dominion could make such an arrangement with the Indians as would involve the realization of the property for the exclusive benefit of the Indians, so that every shilling that was derived out of the property, whether by way of licenses to cut timber, or by way of sale or other use of the property, would go to the Indians. I say, of course, if they can do that, it simply means that the right which the province has it holds by the will of the Dominion. It has not got any absolute right. What another can legally take from me at his pleasure is rather his than mine.

THE EARL OF SELBORNE—I am not sure whether that is so clear. Supposing that the province has a right, subject to the Indian right, and that according to usage under the previous statutes with the consent of the Crown, the Indians had been able to alienate the land, either to the Crown or any licensee of the Crown, they would of course in that case have put the money into their own pockets, or it would be expended in some way for their benefit. If so, would not that be within the power to legislate given by section 24?

COUNSEL—We must never forget the distinction which subsists, even upon the largest and most liberal view which can be fairly taken, between this particular interest and the interest which the Indian had in a special reserve which became his upon a cession. In that special reserve, which became his upon a cession, he was supposed to have an absolute equitable property, if I may say so. His right might be moulded according to the views of his lord paramount, the legislature, in accordance with what might be thought to be his real interest and advantage from time to time. From time to time the tribal right might be more or less infringed upon in order to give an individual Indian a portion of the tribal interest, and from time to time portions of even that reserve might be surrendered; but invariably such portions were surrendered on the view that it was a mere machinery for enabling the Indian to get in money the whole benefit of that which was regarded as his absolute property. That was the state of things; and of course justly ought to be the state of things with reference to special reserves. It would be entirely unjust that anything else should be done as to them.

THE EARL OF SELBORNE—I suppose that as to the special reserves the Crown would have the same ultimate right. In cases of escheat they would go to the Crown, and if by any means the Indian interest were entirely got rid of, they

would go to the Crown; and I suppose you would say that the province would take them?

COUNSEL—Yes, my lord.

THE EARL OF SELBORNE—I do not see the distinction as to the special reserves.

COUNSEL — When you come to the other class of reserves, according to the theory on which I have been putting the case as to the Indian interest, it is equally clear that it would be contrary to justice and reason to say that the Indian interest of occupancy, his tribal interest of occupancy as a hunter and a fisher, was equivalent to the whole beneficial interest, as I can show from a very important American authority. Chief Justice Marshall shows the state to have the residuary interest; and that interest of the state is shown to have furnished the fund out of which large expenditure was incurred, and by which large works were performed by the United States in the early days, and by the states for whose benefit some of these surrenders were made; and it would be wrong, as I submit, to hold it competent to the Dominion to extinguish or annihilate that beneficial interest of the province by saying to the Indian——

LORD WATSON—There was a judgment cited to us—I do not recollect whether it was by Chief Justice Marshall or not—to the effect that a direct purchase from the Indians by people with the consent of the Crown was sustainable in the United States.

COUNSEL—Yes, my Lord.

SIR BARNES PEACOCK—That was with the consent of the Crown given by the province who held the rights of the Crown.

COUNSEL—Unquestionably.

SIR BARNES PEACOCK—Not by the Dominion.

COUNSEL — It was held rightly or wrongly as I understand in that case, that there was a power in the governor, with reference to this peculiar title, which is unknown to our law and which has its own arbitrary limitations, to create a fee simple by the combination of the treaty or bargain with the Indians and the license of the Crown. My learned friend argued on that "Oh the fee simple must be included." But in truth it was but a method of conveyancing.

SIR MONTAGUE SMITH—It might be a very illusory bargain if the Dominion were to take this enormous territory and sell it and apply all the money for the benefit of the few Indians remaining.

SIR BARNES PEACOCK—The province had the interest of the Crown. Treating the interest of the Crown as separate, and assuming the Crown had a separate interest from the native and that that was vested in the province, the province might probably have arranged with the Indians to get their interest. Therefore when they made an agreement with them that the money which should arise from the sale of the lands which were afterwards settled should be appropriated to the Indians, that was merely the province giving up to the Indians that interest which they held from the Crown.

COUNSEL—Yes, my Lord.

SIR BARNES PEACOCK—It is not the Dominion.

COUNSEL — I may be better able to illustrate my position by pursuing the thread of the argument which I intended to advance, which was rather to indicate to your Lordships where I thought the power rested on precedent and authority; because, if I find the power somewhere else, it is not with the Dominion; and my argument is that according to the invariable limitation, one thing certain, if there be anything certain in reference to the Indian title, is that the power of obtaining the surrender was limited to the state or corporation, province, government or individual having the allodial title or the fee as the case might be. I contend that this view is recognized throughout from the earliest times; that it is recognised in this very proclamation where that class of question is being dealt with; and this being so, if we find that the province is the owner of the allodial title subject to this burden, we find that the province is the proper party to make the bargain with the Indians. I contend that this is the true result; and I point out that in the later periods of the colonial governments of England, not very long before the revolution, having regard to this rule, England established general superintendents of Indian affairs, who were entrusted with powers analogous to those with which, as I suggest to your Lordships, the Dominion is entrusted, namely, to guard the interests of the Indians in making the bargains for the extinguishment of the Indian title with or on behalf of the provinces, just as, after the revolution, under the constitution of the United States and the ordinances on this subject,

the United States undertook the task of making or supervising like bargains ; but so that the bargain had to be made with the consent and acquiescence and for the benefit of the states or individuals in those cases in which states or individuals, and not the United States, were the owners of the land. That is the proposition which I advance. In the old colonial times then, my Lords, take the different classes of governments. Take the case of the chartered governments——

LORD HOBHOUSE—In what way would the Dominion interfere? You are arguing that the Dominion might interfere.

COUNSEL—Yes, my lord.

LORD HOBHOUSE—That the province might and ought to have made this bargain with the Indians?

COUNSEL—Yes.

LORD HOBHOUSE—At what point would the Dominion interfere?

COUNSEL—I will show your Lordship by showing how it has in fact been managed. My view is that its power of legislation and its correlative executive power might be fairly argued to give to the Dominion—and I think it is reasonable that it should give to the Dominion—a right to intervene as protector of the Indians, and, if you can assume that it would act improperly, which we do not assume, a right, perhaps, to block a treaty—a right at any rate to intervene and say, "Now we will make this treaty, or we will assist in making this treaty, we will assist in the negotiation of the bargain, we are here to see fair play"—just as the United States sent its commissioner, and just as Indian superintendents in the old colonial times came forward to see fair play. But the simple proposition, removing "the mystery and the magic" of the Indian title is this: I find A with an easement of occupancy; I find B the owner of the land subject to that easement of occupancy; I find A, the occupant, according to the nature of his tenure entitled only to surrender his interest to the owner, not entitled to transfer it to a stranger. Who then are to bargain as to the terms? The two parties in interest, the occupant and the owner. But the occupant is recognized to be of an inferior race, and in an inferior state of civilization, to be under subjection and liable to imposition; therefore he is to have a guardian or a protector in the making of that bargain. But the bargain is still made between A and B, the two parties in interest; A, the occupant, having the protection of his guardian in the making of the treaty.

THE EARL OF SELBORNE—This really is not a case of that sort of bargain at all. An exclusive legislative power concerning lands reserved for the Indians is given to the Dominion. An act is passed regulating the manner in which alienations of Indian lands may take place, and *ex hypothesi* this treaty was made in a manner consistent with that Act, and authorized by it. All that was done by the Dominion. How is it *ultra vires* if they have the exclusive legislative power. The effect of it is another thing. That lies behind.

COUNSEL—But if it be the case that in point of law the province is the owner of the soil—the owner of this land?

THE EARL OF SELBORNE—Is there not a little fallacy in that? You make the same observation that one of your opponents made while addressing us. You speak of the province or of the Dominion as owner. The Crown has the title to the land, but it has appropriated it for the service or the use of the province or the Dominion, as the case may be.

COUNSEL — I quite agree with your Lordship that it is the Crown in either case—and we speak of the Dominion or the province, meaning the Crown in the interest or right of the Dominion or the Crown in the interest or right of the province as the case may be. If the Crown—whose movements are advised as we know, under constitutional governments, by the responsible executive—if the Crown's movements and powers are exercised through the provincial authority, and if the province, that is the Crown in the right of the province, is the owner of the land, it seems inconsistent and absolutely incompatible with the relation between the province and the occupant that somebody else should have the power to make the bargain on behalf of the province without the assent of the province

THE EARL OF SELBORNE—If it is made on behalf of the province it may be that the province takes the benefit of it except so far as the Indians do. That may be so, but if it is not made on behalf of the province, then it is made in exercise of the legislative power as to Indians and lands reserved for the Indians, and they are so reserved.

COUNSEL — Well, my submission to your Lordship is that that legislative power is in truth a legislative power

over the Indian interest or use in the lands: that it is not a legislative power which entitles the Dominion to alienate for example, the whole of the land. There are two subjects. It is the Indians, and the Indian's lands, that the Dominion is concerned in.

LORD WATSON—That would have been very shortly raised if instead of the treaty with the Indians there had been a provision to say that B or C had no right whatever in the land.

THE EARL OF SELBORNE—They could not have done that, I should think, if you are right in saying that section 109 gives you these lands.

COUNSEL—No, my Lord.

THE EARL OF SELBORNE—But that is a very different thing, it seems to me at present, from what they actually did.

LORD WATSON—They seem to have done that which in the ordinary course of administration it might be very proper and expedient that they should do, and if done in the ordinary way by a simple cession to the Crown it could not disturb the interest of the province.

COUNSEL—Of course your Lordships will understand that assuming the conclusion which his Lordship Sir Richard Couch suggested a little while ago, and Sir Barnes Peacock too, I think, namely, that the Crown to whom this *habendum* applies is the Crown as representing or in right of the province, and that the cession is for whom it of right ought to be, then *cadit quæstio*. I so contend.

LORD HOBHOUSE—The Crown is in on both sides in this document.

THE EARL OF SELBORNE—I do not know whether it is material, but in constituting the parliament of the Dominion the Crown is a member as in this country, but is not in the provincial legislature.

COUNSEL—That is quite true.

THE EARL OF SELBORNE—It seems to me to show that the Queen is connected with the province through the Dominion.

COUNSEL—Yes.

LORD WATSON—All the governors of the provinces derive their appointments from the federal government.

COUNSEL—That is quite so, and yet your Lordships will find that when the legislative power is to be exercised the Lieutenant-Governor is authorised to summon the legislature in the Queen's name.

LORD HOBHOUSE—I doubt very much whether it really affects the subject in question here, only you must not use language which seems to imply that there is anything special in the relation of the Crown to the province.

COUNSEL—Oh no, my Lord, I quite observe that; and I have never been able to reconcile to myself the manner in which the local legislatures are formed—consisting, as they do, of the Lieutenant-Governor and the House or Houses—with the fact that the Lieutenant-Governor is expressly ordered to call together the legislature of which he is one part, in the Queen's name. The Act says so.

LORD HOBHOUSE—That is an executive act—calling the parliament together.

COUNSEL—Yes. But if all the executive acts were to be in the Queen's name, why was this particular act specially provided to be done in the Queen's name?

LORD HOBHOUSE — All prosecutions have to be in the Queen's name.

COUNSEL—Of course. That is one of the proofs—in spite of the peculiar nature of the link to which his Lordship Lord Selborne has referred between the Crown and the province—that is one of the grounds why we contend that by reason of universal practice and of necessity the provinces are entitled to use the name of the Crown in all acts in which according to usual British principles and practice the Crown's name is used.

SIR BARNES PEACOCK—All the grants to settlers are in the Crown's name.

COUNSEL—Yes, and informations are in the Crown's name, and they are the Queen's courts, and the Queen's judges, and so forth. So that, notwithstanding the complication and puzzlement, unless everything that has been done for twenty-one years is to be upset, it is certain as to these things which were done before, and which, being done before, were continued to be done by the provinces after confederation, that, as they were done before, so they have been done since, and will be done in the future, in the Queen's name.

LORD HOBHOUSE—You are suing in the Queen's name.

COUNSEL — Yes, and Mr. Justice Gwynne considers that that is a most extraordinary thing.

LORD HOBHOUSE—And the Queen has justified.

COUNSEL—Yes, the Queen is on both sides.

THE EARL OF SELBORNE—It is not a question of property in the Dominion or property in the province as if it were a

corporation, but it is a question of appropriation by this particular Act of Parliament of the benefits of certain property to the one or to the other.

COUNSEL—Yes, my Lord, that is the real question for argument.

THE EARL OF SELBORNE—It is perfectly consistent with that, that for the subjects included the Dominion may have a very large and complete legislative power; even although as to some of those subjects the province is empowered to legislate.

COUNSEL—Unquestionably. All that I am careful to do is to prevent the Dominion from having an annihilating power.

THE EARL OF SELBORNE—You use that word very boldly and very ingeniously, but I am not sure that it is in the nature of that.

COUNSEL—Well, it seems to me to rather tend to annihilate the substantial interest of Ontario.

THE EARL OF SELBORNE—In one sense every sale admits the previous state of the title.

COUNSEL—I was using the word with reference to one of Lord Watson's questions put to me, namely, whether it was competent to the Dominion Government to arrange with the Indians that they would take these 55,000 square miles, and that it should be all ceded on the terms that the whole should be sold and realized for the benefit of the Indians. If that be competent to the Dominion Government I think that it annihilates the beneficial interest of the province.

THE EARL OF SELBORNE—The province would maintain against the purchaser, I suppose, the *jus regale* that it had before, that is to say, it would have the right of escheat and whatever royal rights there would be in mines and royalties and so on.

COUNSEL—It may be so; but to retain the casual rights to which your Lordship refers would be something very different from the allodial title burdened with a limited right of occupancy.

THE EARL OF SELBORNE—That is not quite so clear to me. As long as the Indian right exists the rights of the province seem to be hardly beneficial. What its nature is has been very ably argued, and we have to consider it, but there can be no doubt at all that as long as the Indian title subsists it is an impediment of the exercise beneficially of any other right over the same land.

LORD WATSON—It is beneficial—it is not an entirely barren right.

COUNSEL—No, it is not; but practically, from the very important and cogent circumstances to which I have adverted, the Indian beneficial right is enormously diminished here. The Indians could in practice make very little use of it.

LORD WATSON—Supposing the Indian said I will not take anything less than the price the land was sold to the settler for. Would he not be justified?

COUNSEL—I do not know whether he would be justified; but I suppose he might have the power to say so, because it assumes a free bargain. It is true a gentle pressure has been always put upon the Indian.

SIR RICHARD COUCH—A pressure would be put?

COUNSEL—Certainly. A gentle pressure has always been put upon the Indian, to which pressure he has always yielded. It has never happened that the Indian, although "tall talking" has been indulged in, has not yielded.

LORD WATSON—If that is so, it does not show that the Dominion Government ought to squeeze the occupants.

COUNSEL—No; I say that the Indian occupies a better position now.

LORD WATSON—But really that is not the question.

SIR BARNES PEACOCK—It must be borne in mind that in the Dominion Parliament the provinces are respectively represented by their members in the House of Commons, and also to a certain extent by the qualification of the senators. A certain portion of the senators must reside in the province as part of their qualification, and hold property in the province. Therefore the Dominion Parliament cannot do anything without its being done with the consent of the representatives in the House of Commons and also of the Senate.

COUNSEL—Quite so; but then, of course, if you take a small province like Prince Edward Island, which has six members and two senators, they may all vote one way, but their votes do not count greatly.

LORD WATSON—The province has a right of the same kind in the smaller reservations which the Indians accepted upon surrender, and apparently it is recognized by statute that they may stipulate for certain things, and therefore it would seem that they have a right to stipulate for the land.

COUNSEL—But the right is very much smaller.

LORD WATSON—It seems to be equitable.

COUNSEL—I think your Lordship will find that it is distinctly laid down that where reserves have been made upon cessions, the land is not held as my friend, Mr. McCarthy, contended, solely as of the original title of the Indians; but the Indian holds the reserves, confirmed and strengthened by the compact expressed or implied in the treaty, which is that instead of his having the limited occupancy of the whole, he has practically the entire equitable title in the part reserved.

LORD WATSON—If so, that simply destroys the provincial interest in that part.

COUNSEL—It leaves even then a certain provincial interest, as for instance the interest of escheat. Now, after the appointment of the general Indian superintendents in the old colonial times, there were several treaties made, and amongst others treaties with the Southern Indians in 1763, the very year of the proclamation, and in 1765. They are to be found in the appendix, page 85. Your Lordships will find there the principle of action which I venture to suggest ought to and does apply in this case, and which provides the best way of working out this complicated matter. "Present—James Wright, Esq., Governor of Georgia; Arthur Dobbs, Esq., Governor of North Carolina; Thomas Boone, Esq., Governor of South Carolina; Frans Fauquier, Esq., Lieut.-Governor of Virginia; John Stuart, Esq., Superintendent of Indian Affairs for the Southern District in North America, Headmen of the Chickasaws, Upper and Lower Creeks, Chactaws, Cherokees, Catawbas." These are the persons who were present at the treaty. Your Lordship sees it affected all these colonies and it affected these tribes of Indians. It was a treaty for a boundary upon which I shall have to trouble your Lordships with some observations later. "The Creeks grant that the boundary between the English settlements and our lands and hunting grounds shall be known by a line extending," and so forth. "The Catawbas confirm a former agreement and declare they will remain satisfied with the tract of land fifteen miles square, a survey of which was begun," and the governors and superintendents promised that the survey should be finished, and that the Catawbas should not be molested within those lines. Thus your Lordship sees the method in which, after the appointment by the Imperial Government of a superintending authority, who had, as your Lordships will see from his instructions, great executive and administrative control, the interests of the Indians and of the provinces were adjusted. The provinces were there by their representatives; the Indians were there by their headmen; and the Imperial power was there by the superintendent overseeing the bargain.

THE EARL OF SELBORNE—Is that a precedent for the mode in which it was done under the British North America Act.

COUNSEL—It seems to me to be practically a precisely analogous case. I say that the superintending power of the Dominion is very analogous to the superintending power which the chief superintendent had in respect of the Indians.

There is a similar cession of land of the Cherokees to South Carolina, it is dated October 19th, 1765, and is approved by William Bull, Esq., Governor of South Carolina, and approved also by John Stuart, Esq. Superintendent; so that you find the Governor of South Carolina a party to the arrangement.

So again in the great treaty of Fort Stanwick, determining the boundary line between the English Atlantic provinces and the Indians, made in 1768, which is to be found in the appellants' supplement, and is useful to them for some purposes. This document is in the form of a deed determining the boundary line between the whites and the Indians, although it is called the Treaty of Fort Stanwick; and it is agreed to by the chiefs and by Sir William Johnson, the chief superintendent—the famous Sir William Johnson—"the whole being fully explained to us in a large assembly of our people before Sir William Johnson, and in the presence of His Excellency the Governor of New Jersey, the commissioners from the provinces of Virginia and Pennsylvania, and sundry other gentlemen, by which line so agreed upon a considerable tract of country along several provinces is by us ceded to His said Majesty," and so on. Now, how was that done? Just as here; a sum was paid—£10,000 odd—by Sir William Johnson, the sole agent and

superintendent of Indian affairs for the Northern Department, and the Indians "grant, sell, release and confirm to our Sovereign Lord King George the Third," all that tract.

THE EARL OF SELBORNE — The only difference being that there was no British North America Act.

COUNSEL—No; there was no British North America Act.

THE EARL OF SELBORNE—That is the only thing we have to do with.

COUNSEL—I hope I shall be able to satisfy your Lordship that there is no reason why the British North America Act should not receive an interpretation which would make to a treaty, properly made, the province a party, the Indians a party, and the Dominion itself also a party.

LORD WATSON—It proceeds on the express assumption that the Indians have absolute rights over the land in question.

COUNSEL—Yes, my Lord, there are a great many expressions of that kind to be found scattered about in such documents. In fact, it was not thought wrong to please the Indians, whenever they could be so gratified, by swelling words, always provided that the English got from them just what they wanted. Then there is to be found in the Joint Appendix, at page 47, under the date of 1768, the representation of the Lords of Trade to the King on the state of Indian affairs, which contains also a statement of a plan for the management of Indian affairs, and points out the position which the superintendents are to occupy, and the powers they should have. It refers to a plan for the management of Indian affairs, prepared by the Board in 1764, in which the fixing of a boundary between the settlements of the subjects and the Indian country was proposed to be established by a compact with the Indians; the plan was communicated to the superintendents; and then it speaks of those treaties to which I have just referred as applicable to the provinces of North and South Carolina, and to the Northern District as well, under Sir William Johnson. Then it says, "We submit that their other branches of duty and service which require the intervention of officers acting under your Majesty's immediate authority, and which as they have reference to the general interests of the Indian, independent of their connection with any particular colony, cannot be provided for by the provincial laws. Such are the renewal of ancient compacts or covenant chains made between the Crown and the principal tribes of savages in that country, the reconciling differences and disputes between one body of Indians and another; the agreeing with them for the sale or surrender of lands for public purposes not lying within the limits of any particular colony." So that there, where there were no colonial interests, they were to agree absolutely; while in the other cases, as I have pointed out, they were present as supervisors who were assisting, and acting in a superintending position when the colonies were interested in the making of the treaties, which accordingly were to be made between the colony and the Indian.

LORD WATSON—No doubt, but at that time the most urgent duty of the manager was to negotiate concerning the boundary line.

[*Adjourned.*]

[*Resumed Tuesday 24th July.*]

MR. BLAKE—My Lords, when your Lordships adjourned I had concluded, with a single exception, the earlier references I intended to make illustrative of the practical operation of the working which I suggested of the British North America Act. My remaining reference prior to the Revolution is to the Imperial plan of 1764 for the management of Indian agencies, the 11th paragraph of which is in these words: "That the said agents or superintendents do in all affairs of political consideration respecting peace or war with the Indians, purchase of lands and other matters in which it may be necessary to hold any general meetings with the Indians, advise and act in concert with the governor or governors and councils, as the occasion may arise, of the several colonies within their respective districts," and in this wise, as I have already pointed out, things were actually done.

Then, my Lords, to carry on that line of reference to the making of the treaties in Upper Canada in the old times, my learned friend, Mr. McCarthy, produced a book which contains these treaties; but that book is not complete, in this sense, that it gives only the substance of the treaties without giving the names of the signatories; and I have to call your Lordships' attention to the fact that a full copy of those treaties would

disclose the application of the same principle. In the early days, while the province was not yet enjoying responsible government, before the cession of the territorial revenues of the Crown, while everything was largely, and Indian affairs were very specially retained under the supervision of the Imperial authorities; yet, even then, commissioners on behalf of the province intervened in the making of the Indian treaties in those territories in Upper Canada in which the Indian title had not been extinguished. For example: there was a treaty of the 21st August, 1797, in which Robert Millar and Geo. Chisholm signed as commissioners on behalf of Upper Canada. On 5th August, 1816, F. W. Allan and Alexander Wood signed as such commissioners. On 30th June, 1798, David Cowan and Robert Pollard signed as such commissioners; and so on. I need not trouble your Lordships with a long list. Enough has been said to state the principle and establish the proposition that, even in that condition of the province and of the Indian title, and with reference to territories embraced in the proclamation, there was full recognition of the provincial interest in the making of the treaties for lands which were not special reserves, but which may be called unceded lands within the proclaimed limits; and this on the ground that it was quite understood that, although the territorial revenues were retained in the Imperial control, they were retained for the purposes of the colony, to meet the expenses of the civil list and the administration of justice, and that the management of the lands surrendered and the real beneficial interest in them belonged to the province, which, therefore, ought to have a voice in the making of the treaty and in the establishment of the terms upon which the title should be extinguished.

So, my Lords, again, in the case of the United States immediately after the Revolution, arrangements were made under which, as I previously intimated, the central authority acted. A very large proportion of the territories of the United States at the time of the revolution consisted of the western extensions, so to speak, of the Eastern and seaboard states. Their areas were inordinately large and cumbrous for single states. That fact was recognised. It was recognised that as settlement advanced and population increased, they should properly be carved into several independent states, and therefore new limits were by their own consent assigned to these original provinces—large limits, it is true, but still limits greatly contracted compared to their former bounds; and they freely and voluntarily ceded the western parts of their country, beyond those limits, to the United States as a common property for the purposes of the whole Union, and with the intent that they should be erected from time to time, first into districts, and afterwards as events ripened, into states. So that the United States had a double interest. It had the interest, in respect of these western lands, that of them it was the lord paramount; it had also an interest in respect to the general peace, order and good government of the country, to take care that the Indians were properly treated, even within the state limits; therefore authority was reserved to the central power to make or to supervise the execution of all treaties with the Indians, even in respect of lands which were the property of proprietary governments or state governments, or individuals. So section 4 of the Act of Congress in 1790 reads thus: "And be it enacted and declared, that no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption 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." In furtherance of that view, without troubling your Lordships with a single quotation, I may ask your Lordships to refer to pages 102 to 125 as evidences of numerous actual transactions in which treaties for lands to which certain individuals had acquired the right, or which were the lands of a state, were made under the supervision of the United States, but with the presence and participation in every case of the representatives of the owners of the soil, whether those owners were individuals or whether they were states.

THE EARL OF SELBORNE—Will you say how you apply that?

COUNSEL—My Lord, I am attempting to state a principle and course of action, the adoption of which, it seems to me, will give a reasonable interpretation,

satisfying all the exigencies of the case, to the clause of the British North America Act.

LORD WATSON—Are we to assume that the course of action is necessarily the same in one case as the other?

COUNSEL—Nay, my Lord, not necessarily the same; but not unreasonably may we argue that the same principle, which had been proved to be efficacious, and which, as I shall contend in a moment, is the most efficacious and most fair principle in the interest of the Indians and of all parties, which had received the sanction of the British authorities before and after the Revolution, and also of the United States, is the principle which, if the clause of the Act is susceptible of its application, your Lordships should be disposed to apply.

LORD WATSON—Do you suggest it is necessary to go into such speculation as this in order to determine what was the course of dealing with the Indians by the British authorities.

COUNSEL—Not in order to determine what was the actual course; but to give an interpretation to the clause of the British North America Act which gives a certain legislative authority to the Dominion in respect of lands reserved for the Indians.

THE EARL OF SELBORNE—I have a difficulty in following that. It would seem to show that the province and not the Dominion ought to have had according to that argument the special powers over Indians and the Indian lands which were given to the Dominion.

COUNSEL—Hardly, my Lord; I hope to be able to remove that impression by this suggestion, that on the hypothesis on which I have been arguing the case, namely, that the Indians have a right of the character which I have endeavoured to describe, there can be no claim that the province has the power to control the exercise of the Indian right at all. The Indians on that hypothesis are entitled to a limited occupation and enjoyment of their lands according to the immemorial custom, unless and until they shall freely extinguish or surrender that right. The province has no power to coerce an extinguishment, to compel an extinguishment, to dictate the terms of an extinguishment. But inasmuch as the extinguishment or surrender, by the invariable rule and by the very nature of the operation, is to be in favor of the owners of the soil burdened with the easement, the province is to be a party to the transaction; but, further, in the interest of the Indian, care is to be taken by the intervention of the Dominion that the Indian is not overborne or oppressed or tricked.

SIR M. E. SMITH—Where would that argument lead, because the treaty would be of no avail without the consent of the province?

COUNSEL—Yes.

SIR M. E. SMITH—Then the rights are not extinguished?

COUNSEL—No.

SIR M. E. SMITH—Then it lands you where you were before.

COUNSEL—Yes; that is one view; subject to the submission that Ontario has always been and now is willing to validate this treaty; but on the abstract point of law I was proceeding to point out that very view.

SIR M. E. SMITH—The extinguishment depends on the treaty.

COUNSEL—Yes; but the right of Ontario to prevent the wasting of her timber does not at all depend, as we contend, on the treaty. It does not at all depend on the extinguishment. We contend that Ontario has a right to prevent the spoliation of the timber whether the title is or is not extinguished.

LORD WATSON—Apparently the case in the United States was that these cessions by the Indians were made by them to the people of the state.

COUNSEL—Sometimes to the United States for the state or the individual owner, and sometimes to the state or owner direct. There are variations. Sometimes the treaty appears to be made by the United States commissioners, the other parties being present, and sometimes it is made by the parties themselves, the United States being present; but in all, the general principle is observed. In the early Upper Canada times, while the colony remained as yet without responsible government and these Indian affairs were managed at the will of England and by English officers, the province was yet a party to the treaties; and it is not to be forgotten in this connection that the proclamation of 1763 itself, upon which so much in this case depends, recognizes expressly the right and the exclusive right of a proprietary government to make a treaty in cases in which there was a proprietary government. Your Lordships will recollect that the clause of the proclamation

which deals with treaties in the parts of the old colonies and governments which were open to settlement, provides that no treaty shall be made except at a public meeting and so forth, that it shall be made by the Crown and in favor of the Crown in the case of the royal governments, and by the proprietary and in favor of the proprietary in the case of the proprietary governments.

The whole system then, as I maintain, was one of recognition of the right of the owners to make or participate in the bargain, coupled with protective provisions in later days in the interest of the Indians.

Now, my Lords, I submit that the executive authority of the province, which of course can if necessary be reinforced by its legislative authority, is ample for the performance of the functions which I am suggesting may properly be ascribed to the province; and without troubling your Lordships with a repetition of the argument I would take leave to refer to the judgment of Mr. Justice Burton, on pages 46 and 47 of the Record, as elucidating that view. I submit that the division of executive authority has, as I think is agreed on the other side, reference to the functions of government; and that all the executive authority which is needed by the provinces to discharge their functions, remains to them. The province, as has been said, grants Crown lands in the Crown's name, and the province can surely deal with claimants to or owners of interests in Crown lands. If the claimant or the owner of the interest were Smith or Jones, no question could at all arise; and I cannot perceive that it makes any difference that his name is Yellowquill or Strike-him-in-the-Back or any other of the euphonious names used by these Indians. The only difference in truth is this, that the interests of Yellowquill and Strike-him-in-the-Back, are specially protected under the law, since their rights and interests are not absolutely in their own hands and at their own free disposal. They are in the hands of the Dominion executive and legislature, who are to act for and to control them, and whose authorities are to be parties to the treaty. This, my Lords, is the construction which is most for the interest of the Indians. The reason of the change of policy which I have already stated, and which was continuous, was this, that it was found that where the state or the individual held a double position, being on the one hand the owner of the soil subject to the Indian easement, and being on the other hand clothed with that great authority and influence which the government of the country or the lordship of the soil conferred, the temptation was too great to make a hard bargain with the Indians; and it was in order to protect the Indians by the interposition of a power at once disinterested and exalted that this principle of action was introduced. Apply that reasoning to the present case, and it gives, according to my reading of the Act, the same results. But if it is not applied, if it is held that the Dominion has the power to make a treaty of which it shall enjoy the benefit, a bargain which is to be a bargain for its own advantage, in which it is considering, or attempting to consider, the interest of the Indians by one mental operation, while it is advancing its own interest by another, of course under such circumstances all protection is removed.

LORD WATSON—That is one reason for holding that the powers of the Dominion may not extend to making any transaction for their own benefit.

COUNSEL—I said the other day *cadit questio*, if your Lordships come, as I hope you will, to that conclusion.

LORD WATSON—All that they did under this treaty was to make a cession to the Crown.

COUNSEL—I am just about to reach that point. All that I am desirous to do is to maintain, by one mode or the other, the proposition that the same party shall not have power to make the treaty which is to gain the benefit under the treaty.

LORD WATSON—The reasoning of Mr. Justice Burton really, on page 46 of the record, resolves itself into an additional argument in favor of a limited reading of the word "reserved" in sub-sec. 24.

COUNSEL—In part it does.

LORD WATSON—He reads it as an argument in favor of restricting the power of the Dominion to these Indian reserves.

THE EARL of SELBORNE—He goes a very great length, indeed.

COUNSEL—Yes, I quite agree that he does go a very great length, further, perhaps, than any of the other Judges; but the line of reasoning he pursues appeared to me to exemplify my argument.

LORD WATSON—His argument seems to be *ab inconvenienti*, nothing more.

COUNSEL—Then, coming to that question to which your Lordship has just alluded, I submit that it would be contrary to reason and to the recognized canons of construction, to give such an interpretation to the grant of legislative power as would be destructive of the other parts of the Act. The power in truth is given—and I do not think sufficient attention was paid in the appellants' argument (with due respect I say it), to this view — the power is given in truth, as the other powers are given by the 91st section, subject to the controlling clause that it is a power to legislate for the peace, order and good government of Canada, of the whole Dominion. It is legislative power of that description that is conferred; and, as has been held in one important case and repeated and approved of by your Lordships, a fair reading must be given, and such an interpretation assigned to that grant as is reconcileable with the continued existence of the other rights and interests given by the Act. If then, as I have contended, Ontario retains the interest of old Canada in these lands, it is not reconcileable with the existence of such an interest in Ontario that the Dominion should have power to take them away and appropriate them to herself; and all I contend for, and all I desire to contend for is such a limitation of the powers of legislation as shall prevent them from covering the proposition that Canada can legislate into herself, or by executive action appropriate to herself Ontario's interest in the land.

LORD WATSON—The argument on that point of Mr. McCarthy, as I understood, was mainly this, not wholly, that under the general scheme of the Act property was intended to follow or accompany the right of administration and legislative jurisdiction that where you find both the administration and power of legislation the right of property must also follow.

COUNSEL—Yes, that seemed to be the argument, and upon that I have addressed your Lordships; I am not able to add anything upon that.

SIR M. E. SMITH—You showed that where property was intended to pass in certain instances there were specific enactments giving the property.

THE EARL OF SELBORNE—We shall not forget that argument.

COUNSEL—I have no intention in the slightest degree of reiterating anything I have said on that head if I can possibly avoid it. I did not discuss fully, but I just fore-shadowed the particular line I am now about to ask permission to lay before you; and what I say is that if a trust or a limitation can be implied which would safeguard those rights of Ontario, of course the question of the form of the treaty and whether Ontario should be a party to the treaty becomes for this purpose less material. In fact one reason, though not every reason, for Ontario's being a party to the treaty would cease if the Dominion really occupied an indifferent position as between the Indians and the province. The trouble arises the instant it is contended, as my learned friends contend, that the Dominion does not occupy an indifferent position towards the Indians, because it is to gain whatever the Indians lose; that it does not occupy an indifferent position towards Ontario, because it may, by its treaty with the Indians, acquire Ontario's lands. I dispute altogether the general contention of my learned friend, Mr. McCarthy, as to the effect with regard to property of the grant of legislative power. I think that contention was entirely extreme, and was quite unsustainable. Take for example the illustrations he gave, the cases of public buildings or farms which the Dominion may acquire. I may point out that the acquisition of the agricultural lands to which my learned friend alluded was under an exercise of powers specially granted, because the subject of agriculture is one of the few subjects on which there is a concurrent legislative power in the Dominion and the provinces; and those farms were acquired in the interests of the development of agriculture. But I say that, with reference to those properties which the Dominion has in the exercise of its legislative power acquired, that power does not extend to enable it to alter for example the tenure or the mode of conveyance. It cannot devise a new tenure for its properties. The tenure which is devised by the ordinary law of the province for all properties must be the tenure of its properties. So also the form by which they shall be granted or aliened remains to be settled by the province. So again even with reference to general police or fire or sanitary regulations, which may be essential to the safety and comfort of all the neighboring occupants of a city, I maintain that the

general power of legislation of the Dominion would not extend to enable it to exempt anything it might buy from such regulations.

SIR M. E. SMITH—I suppose if section 109 gives these lands to the province, the Dominion legislation could not take it away. It would be altering the Imperial Act.

COUNSEL—That is my argument. We must find a construction which shall reconcile the legislative powers of the Dominion, given in one section, with the proprietary rights, aye, and also with the legislative powers of the province, given in another. That, of course, is the recognized canon of construction. As to this extreme view of the legislative power, I would refer to one express limitation which shews the character of this so-called exclusive power. I mean section 125 where it is provided that no lands or property belonging to Canada or any province shall be liable to taxation. This was doubtless to ensure that the powers of taxation which were given in that division of the Act, generally to the province by direct taxation, and to the Dominion by direct and indirect methods, should not be used destructively to the interests of the provinces by the Dominion, or to the interests of the Dominion by the provinces. Nor is there any foundation I submit for the view of my learned friend, Mr. McCarthy that the Dominion may buy property in its uncontrolled discretion. It can only buy property under its express powers, or under its incidental powers in order to the fulfilment of its proper functions. Whatever its functions are, if the acquisition of a property be an incident of their proper fulfilment, it may be able to acquire that property; but there is no unlimited power to acquire for other purposes. I think the whole argument was reduced to an absurdity by the suggestion which was made. Could the Dominion buy up the soil of the island of Prince Edward, which is not a very large place, and, by buying it up, get an absolute exclusive legislative jurisdiction over the whole lands of Prince Edward Island, and take away from the province in effect its jurisdiction over property in the province?

LORD WATSON—It does not seem to me to have much bearing on the real question at issue. It is quite obvious the Dominion could lay no claim to land of that description under section 109.

COUNSEL—Certainly not. The province could not lay claim to those lands. I was only endeavouring to answer my learned friend's argument. I would not myself have introduced the question.

LORD WATSON—I did not see the bearing of the argument on the real question.

COUNSEL—Then the lands which are lawfully bought, and may be subject to the legislative control of the Dominion, which, as I have shown, is not unlimited, are subject to that legislative control in all things which concern the peace, order and good government of Canada, and perhaps in all things which are essential to the preservation of the Dominion interests. They may have such powers of legislation over those lands as are essential, in order that they may effectively deal with their own property and carry out the objects of their purchase. But that is the furthest limit. Now, from that construction it would follow, I submit, that no treaty that could be made by the Dominion Government, and no power that it has or can acquire to itself by the action of Parliament, could defeat the claims of Ontario, those claims being based upon the proposition that Ontario is owner, subject to the Indian interest, and that the Indian interest is not transferable, but only extinguishable. But I submit the case is made easier and clearer, and in fact so easy and clear as to be beyond dispute and discussion, by that fact to which allusion was made by his Lordship Sir Barnes Peacock, earlier in the argument, and to which Lord Watson referred a moment ago, that this is a Crown interest and estate. It is the Crown that holds all Ontario ungranted lands. The *habendum* in this treaty is to the Crown. Thus the court is perfectly free to decide, the *habendum* being to the Crown, in what interest, in what right, the name of the Crown is used. In what interest or right can it be used? It would surely be a violent construction to hold that a cession which in its very title and terms is a surrender, and thus has regard to the fact that it is being made to the owner of the main interest, of the proprietary interest, of the lordship, a cession which is in terms to the Crown, which Crown was such owner in the interest or right of Ontario, has the effect of extinguishing the title of Ontario, and of converting both the Indian title, and the entire title which was theretofore held in the name of the

Crown for Ontario, into an estate held by the Crown for the Dominion! That is an effect and operation which would be most violent and unjust. I can show that it was impossible that the transaction could have taken any other form than this of a surrender to the Crown. But if we are to conceive an attempt to put it in some other form, to clothe the Dominion with power, for example, to take the title to a trustee for itself, I submit that would be void. I am not driven to that. It is not necessary to discuss it; because we have here a case in which the interest of the lord of the soil was recognized. The soil was in the Crown. It was, according to my argument, in the Crown in right of Ontario. Then the cession and surrender to the Crown was surely to the Crown in that same right, namely, in right of Ontario! Thus the treaty enures expressly to the benefit of Ontario; the case being very much easier than those in which cessions, though made to the United States of America, have yet been held to enure to the benefit of the state or individual really entitled.

Now as to the burdens which the treaty involves, it is to be observed that it has never been desired to disturb the treaty at all, in view of the effect of such action on the ignorant Indians, who do not know anything of these legal and constitutional subtleties of ours—of two Crowns at Westminster or in Canada, any more than at Brentford; that it has never been desired to repudiate the burdens which are involved——

THE EARL OF SELBORNE—We must not fall back upon the willingness of the province to undertake the burdens. If the incidence of the burdens under the treaty is material to the question you must deal with it as it stands.

COUNSEL—I quite admit that. I do not dispute that the mere voluntary concession of the province can not add to or alter its legal rights.

THE EARL OF SELBORNE—I see nothing in the treaty as it stands to throw any peculiar burden upon the Crown.

COUNSEL—Not directly.

THE EARL OF SELBORNE — Neither directly nor by implication on the supposition that the cession operates for the benefit of the province.

COUNSEL—No, I cannot find any words in the treaty.

THE EARL OF SELBORNE—On the supposition that it operates necessarily and by law for the benefit of the province, you must take that into account in looking at all that is said about burdens. There is not a single word which by Dominion legislation purports to say that this shall operate conditionally upon the province assuming its burdens. On the other hand, as far as the Dominion is concerned, there is positive stipulation by the legislative power.

COUNSEL—I do not know, I am sure, whether your Lordships will hold that it does not affect the case———

THE EARL OF SELBORNE—I did not say it did not affect the case.

COUNSEL—I was intending to say that I do not know whether your Lordships will hold that it affects the case, but it is the obvious fact that at the time this treaty was made the boundaries of the territory were in dispute. It was in dispute between the Dominion and Ontario as to within whose limits that land was. At that time the Dominion government was making the treaty upon the theory, that it would be Ontario property if within the limits of Ontario, and Dominion property if within the limits of the Dominion.

THE EARL OF SELBORNE—I do not follow you when you say Dominion property within the limits of the Dominion.

COUNSEL—The province of Manitoba, as originally constituted and as it stood for many years after this treaty was made, extended only to a point west of the Lake of the Woods. The title to the intervening part from the then eastern limit of Manitoba to Ontario was disputed between the Dominion and Ontario. Manitoba had no claim to it whatever.

THE EARL OF SELBORNE—Then there was Dominion territory which was in no province.

COUNSEL—Surely, my Lord, and there is still. The very province of Manitoba itself was Dominion territory. It was embraced in the cession by the Imperial Government of the Hudson's Bay and the North-West Territories. There is something like two millions of square miles, I believe, altogether embraced in that cession which became Dominion territory. Out of that they carved Manitoba; but there was left a large strip between Manitoba and Ontario, as to all of which in form, and as to the greater part of which in fact and in substance, there was a dispute between the province and the Dominion as to whether the boundary

of Ontario covered it or no. The land which is the subject of this treaty is in great part within that portion which was ultimately decided by your Lordships to be in Ontario. Another large part was decided by your Lordships to be within the limits of the Dominion; but at the time at which the treaty was made there was no question of Manitoba's rights at all.

SIR M. E. SMITH—How came Manitoba to claim it?

COUNSEL — Years afterwards the Dominion extended by Act of Parliament the eastern boundaries of Manitoba to the western limit of Ontario.

SIR M. E. SMITH—Then it became necessary to ascertain. The simple question was as to the boundary of Ontario because the Act of Parliament brought Manitoba down to it wherever it was.

COUNSEL—Yes. So that at the time at which this treaty was made the Dominion was acting with reference to a property as to which it was doubtful and disputed whether it was its own property or Ontario's property; and acting with reference to that property upon the theory, as shown by the papers, that the question of the title to the soil depended upon the limitary line.

THE EARL OF SELBORNE—It struck me that at the beginning of the Act of Parliament it is said that the provinces of Canada, Nova Scotia and New Brunswick shall form one Dominion under the name of Canada, and again that Canada shall be divided into four provinces named Ontario, Quebec, Nova Scotia and New Brunswick. What parts of the Act contemplate some other territory not included in any of the provinces which shall constitute Canada.

COUNSEL—There is the preamble and a subsequent section.

THE EARL OF SELBORNE—The clauses I have read, in the first aspect at all events, contemplate certain existing provinces which are to be united into Canada.

COUNSEL—Certainly.

THE EARL OF SELBORNE—Which are the clauses of the Act which show that there was a territory outside those provinces belonging to the Dominion.

SIR RICHARD COUCH—The 146th section I think — the power to admit Rupert's Land and the North-Western Territory. All the North-Western Territory was Dominion at that time.

THE EARL OF SELBORNE—That is to admit those colonies into the union.

COUNSEL — There are addresses to admit Rupert's Land and the North-Western Territory or either of them into the union.

LORD WATSON—That does not show either of those provinces was in the Dominion of Canada.

THE EARL OF SELBORNE—What was it that introduced the new state of things? I dare say you are quite right, but we wish to be quite right ourselves.

LORD WATSON—It seems to have been the Act of the Dominion itself. In dividing the upper provinces they seem to have made a delimitation of Manitoba.

COUNSEL — Rupert's Land and the North-West Territory formed an enormous tract — comprising, I think, two millions of square miles, the northern part of the continent—in which no provincial or colonial governments had been formed.

THE EARL OF SELBORNE—Is Rupert's Land mentioned?

COUNSEL—Yes, in the latter part of that 146th section.

THE EARL OF SELBORNE — You are quite right. Then that authorized them to admit the colonies or provinces mentioned and also Rupert's Land and the North-West Territory into the union.

COUNSEL—Yes. Then Rupert's Land and the North-West Territories were simple territories without any settled form of government at all; and precisely the same general process was adopted in those cases as was adopted with reference to the western lands of the United States. To the central authorities was handed over the jurisdiction and the soil of those territories by the Imperial authority upon their own address and request, with the intent and design as shown by the papers, that they would proceed to settle and to colonise and to form them into provinces at their will.

THE EARL OF SELBORNE—Now we understand it. Under that power subsequent to the Act, Rupert's Land and the North-Western Territory were, upon the address of the Parliament of Canada, admitted into the union upon terms which did not at the time make them provinces.

COUNSEL—Certainly; but which left to the Dominion, as it was supposed (the question was doubtful), the power of turning them into provinces. The

Dominion exercised in part that power, and a confirmatory Imperial Act was obtained to make it quite sure that the provincial rights of Manitoba should rest upon the same secure foundation as did the rights of the other provinces; because it was argued that what the Dominion Parliament had done by itself it could by itself undo, and therefore the province might occupy a subordinate and insecure position. Having decided to exercise its power, the Dominion did so by carving a small province out of the large territory; and this small province was surrounded, except to the southward, by Dominion territories; but the extent of the Dominion territories to the eastward depended on the extent to which Ontario went to the westward. That question remained in dispute. It was while that question remained in dispute, and while this territory was subject to that dispute that this treaty was made. It was made, as it were, for the benefit of whom it might concern, because it is quite clear from these papers that at that time it was the opinion of the executive and legislative authorities on all sides that the title to the soil would go with the political jurisdiction. So it happened that the treaty was made, and the surrender was made to the Crown. It was ultimately decided by your Lordships in effect that the Crown, in so far as we are now disputing about it, meant the Crown in the interest of Ontario. Whether the consequence of that is to make the treaty enure to the benefit of Ontario is what we are now discussing. I do not know whether your Lordship proposes to entertain the argument of my learned friend that great expense has been gone to by the Dominion. It seemed to me extremely remote.

THE EARL OF SELBORNE—That cannot be material. The question of principle of course deserves consideration.

COUNSEL—I would only say it seemed to me extremely remote. I would rather wash our dirty linen at home. I do not want to enter into, nor have we the materials here for discussing the reason of that failure of administration as contrasted with the success of the provincial administration of Crown Lands. But this observation I may make, that there is no doubt whatever that the existence of the dispute, as my learned friend, Mr. McCarthy said, did affect the reasonable chances of administering these lands in a manner by which profit might have been realised had the administration been judicious. So that I maintain, if the issue is to be tendered as a material issue in this case, that what has been done——

THE EARL OF SELBORNE—You are quite right in thinking we cannot possibly go into that question.

COUNSEL—No, my Lord. Then I would observe that the argument of my learned friend, drawn *ab inconvenienti* I suppose, as to the very great expense to the Dominion of looking after the Indians is entirely overbalanced by the consideration of the very much greater expense involved in the government and administration, the settlement and development of the property in which the title is extinguished. When you consider that in a new country into which settlers go, having to make for themselves homes, the government in the initial condition has to provide roads and bridges and schools, and the administration of justice, and in various ways to develop the country, that occurs which I stated to your Lordships in the opening, that the country, instead of being a source of profit, is at first a source of great expense.

LORD WATSON — In the treaty the Crown accepts certain obligations to the Indians, and it is the promise of the Crown duly to fulfil these obligations as they arise, that forms the consideration for a cession of territory by the Indians.

COUNSEL—Yes, that is true.

LORD WATSON—That seems to me the inherent right of the Crown. These obligations are the conditions upon which the Crown claims a cession.

THE EARL OF SELBORNE—As to some of those you told us, I think, before, and it did not seem to be disputed that the whole thing had been done.

COUNSEL—It is not disputed.

THE EARL OF SELBORNE—But with regard to the money payments, of course they continue.

COUNSEL—Yes, they must continue.

LORD WATSON—Are there any stipulations for the Crown that it has a right to take reserves?

COUNSEL—Yes; your Lordship called my attention to the Act of 1868, and asked me to state whether I contended that it did not authorize the making of this treaty. I have since re-examined that Act. I find its language with reference to the character of the lands which may be dealt with by the executive sub-

stantially identical with the language of the provincial Act, from which it was obviously copied.

LORD WATSON — That argument we may hold of course as applying to that Act, also as to the limit of the word "reserve" and public lands.

COUNSEL—Yes.

LORD WATSON—The same argument applies.

COUNSEL—Yes. It is not to be doubted that in the mind of the Provincial Legislature, and in the mind of the Dominion Legislature, at the time of the passing of that Act, they were special reserves that were being thought of.

THE EARL OF SELBORNE—I do not understand that to be the case. It is not admitted, it is doubted at least.

COUNSEL—I will give your Lordship the reason; because at that time there was no subject at all on which this Act could possibly operate, with reference to which treaties could be made, save special reserves. No one thought of touching this particular area, which was at that time disputed between Canada and the Hudson's Bay Company; and there were no other lands to touch.

THE EARL OF SELBORNE—What difference would that make? The legislature does not think of every item to which the language may apply. It uses general language. If these lands fall within that language, that language applies to them, although there may have been a dispute which it seems to me is not taken notice of one way or the other, *ex hypothesi* these lands did in point of fact belong to Canada. If they were Indian lands within the meaning of this legislation, they fall within that legislation, although nobody at the time thought of them.

COUNSEL—All I was suggesting was that nobody at the time ever did think of such a thing as being possible, because it was in truth impossible.

LORD WATSON—The intention of this Act seems to be to appoint an administration for the control and management of the Indian lands referred to in the Act of 1867.

COUNSEL—I have failed to state my proposition clearly. My proposition was that it was not in the mind of the legislature to touch these lands at that time, although the language may be broad enough to touch them.

THE EARL OF SELBORNE—We know nothing about the mind of the legislature, and in point of fact no legislature has any mind, except that which is expressed in the words which it has used.

COUNSEL—And sometimes it is very difficult to find it even there, my Lord. The language of this statute, however, does not appear to be directed to such transactions as were effected by this treaty. It does not contemplate a treaty with a large number of bands of Indians, acting together and at one time, in respect of the extinguishment of the several tribal rights of this large number over various areas. The language is more applicable to the case of one band or tribe or body of Indians dealing with reference to its own special or other reserve. It is to be remembered that although the statute refers to more than one chief, many of the bands had more than one chief. So that the force of my observation is not interfered with by that circumstance. Your Lordships will also observe a provision as to the residence upon the land of the signatory or assenting chiefs, which seems to be hardly applicable to a case in which it was quite impossible that the assenting chiefs could reside upon the lands. Each could reside, it is true, upon the land of his band, but no one had any relation to the land of the other bands. Again, under the Act there is to be proof on oath by the oath of an officer on the white side.

LORD WATSON—I do not quite understand the observation. Does a man not reside on an area of land if he does not sleep in the same place twice in a year.

COUNSEL—Surely yes. But if you will notice this treaty had relation to an area of over 56,000 square miles, and it was not one tribe of Indians that was supposed to occupy that area, but some twenty or thirty tribes were supposed each to occupy and reside on a different portion of that area. It is with relation to that circumstance I speak. I quite admit the chief is supposed to reside within his own area, but not within the area of the others. Then, as I was saying, there was to be proof on oath on the part of the whites, and also by one chief.

SIR RICHARD COUCH—Where is that?

COUNSEL—It is the 8th section. The first condition is that to which I referred a moment ago. The second one is that to which I am now referring.

SIR RICHARD COUCH—You said proof on oath.

COUNSEL—Yes, the second subsection. It is one of the conditions upon which

the treaty is to be operative. It is to be transmitted——

THE EARL OF SELBORNE—It is to be certified on oath by the officers authorised.

COUNSEL—Yes. I am not aware that these conditions have been at all complied with. There is no evidence that they have.

THE EARL OF SELBORNE—We cannot suppose that they were not complied with. If all that does appear is consistent with action taken under this Act we must presume that they were complied with. "*Omnia præsumuntur rite esse acta.*"

COUNSEL—Yes. But the 8th clause provides that a release or surrender shall be binding on the following conditions. Then it prescribes certain conditions——

SIR RICHARD COUCH—This has never been raised before, has it?

COUNSEL—I am not aware.

THE EARL OF SELBORNE—We cannot presume the thing was done wrongly when it may have been done rightly.

COUNSEL—Of course if your Lordship presumes the performance of the conditions my argument falls to the ground.

LORD WATSON—Surely the presumption *omnia rita esse acta* applies. You find it on the proceedings.

COUNSEL—No; I do not think we do. That seemed to me to strengthen the position of my friend Mr. McCarthy, who said the treaty was made under the authority of the proclamation.

LORD WATSON—We must face that aspect of the case. Either there is a treaty or not. The case has been presented to us entirely on the footing that there is.

THE EARL OF SELBORNE—And both parties seem to me to be contending which shall have the benefit of the treaty.

SIR RICHARD COUCH—It has never been suggested until now that this was not complied with.

COUNSEL—Except in so far as I have made these suggestions.

SIR RICHARD COUCH—In the previous proceedings in the lower court it was never suggested that these conditions had not been complied with.

SIR M. E. SMITH—Your strong points are not helped by your weaker ones.

COUNSEL—My learned friend the Attorney-General of Ontario, who is familiar with the proceedings below, asks me to state that it was not argued in the lower courts that this treaty was under the Act at all. It was, as my learned friend Mr. McCarthy put it here, sustained under the general executive powers of the Dominion Government and by virtue of the proclamation.

THE EARL OF SELBORNE—If you find an Act of Parliament and a thing done we must couple the one with the other. Of course if the Act has no reference to the thing done, then we cannot make that presumption. This Act binds as to the matters comprehended within it if they were *intra vires*. If we think these matters were included in it they must be governed by it.

COUNSEL—The information which I have just communicated to your Lordships would well account for the fact that attention was not directed to these conditions earlier. If the contention was not made on behalf of the other side that the treaty was under the Act it would not be material to consider the question of the Act at all. However, I do not propose to add anything to what I have said upon that subject. It seems to me that, if the treaty be effective, yet it must be effective in respect of this cession and surrender in the interest of the province, all whose lands were held in the name of the Crown, all whose lands are still held in the name of the Crown, and whose were the lands in respect of which the Indian interest was surrendered to the Crown. I do not see how it is possible to escape from this conclusion, or to affirm that by some violent operation of conveyancing the act of cession or surrender to the Crown has not merely given the Indian interest to the Crown in right of the Dominion, but has taken away the Ontario interest, up to that moment held in the name of the Crown, and placed that interest also in the Crown in right of the Dominion.

LORD WATSON—You have succeeded apparently in all the courts below upon this ground in the first place.

COUNSEL—That is the line I am at this moment taking with reference to the treaty. Then my learned friends suggested that the Indian title was not in effect extinguished by the treaty, and referred to the new privilege to hunt and to fish as an indication of that result; but that new privilege given by the treaty is not at all the old, or an exclusive privilege; it is merely a temporary and common privilege, terminable when arrangements are made to set out the lands

for either cutting of timber or for settlement; and, as your Lordships observed, the presumption upon the materials before us is (and I believe that presumption is justified by the actual fact) that Orders in Council were passed for providing for timber limits in this district.

THE EARL OF SELBORNE—I thought it was arranged that that Order in Council should be produced.

COUNSEL—I am not able to produce it. It was in my learned friend, Mr. McCarthy's argument that that arrangement was made.

LORD WATSON—There may have have been some proceedings in this case equivalent to taking up for the purpose of lumber before.

COUNSEL—There must have been an Order in Council.

LORD WATSON—I am not in a position to say must have been. I can only say may have been.

COUNSEL—His Lordship, Lord Selborne, observed during Mr. McCarthy's argument, that the officer had no authority unless there was some Order in Council.

THE EARL OF SELBORNE—It certainly was the inference I was prepared to draw that some antecedent acts had taken place under which he was exercising authority.

THE ATTORNEY-GENERAL OF ENGLAND—I am told that Order in Council referred to at page 10 of the Record, does not purport to allot lands, but only to subject persons to the penalties contained in the Dominion Lands Act, 1879. Mr. McCarthy has sent for it and I believe it is coming across. It begins at line 9, page 10.

LORD WATSON—Do you dispute, Mr. Attorney, that the area referred to in the license was afterwards taken up for lumber purposes?

THE ATTORNEY-GENERAL—Yes.

LORD WATSON—Within the meaning of the treaty?

MR. MCCARTHY—Yes. No such thing ever took place.

THE EARL OF SELBORNE—Will the Order in Council be produced?

THE ATTORNEY-GENERAL—My friend, Mr. McCarthy, asked me to mention to your Lordship that he has sent for it. It is on the way. He says it does not do anything more than subject them to penalties and does not purport to take up the land.

LORD WATSON—The license refers to a particular area.

MR. MCCARTHY—Perhaps your Lordship will allow me to state what I have done about this. The statute referred to of 1879 authorized the governor and council to set apart certain lands for lumber purposes. That has not been done with regard to this. The same statute in that case authorized the issue of licenses, each license lasting for a period of twenty-one years, and entailing on the person who obtains the license the necessity of putting up a sawmill; but these permits, which were issued in this case, are granted quite irrespective of that over any and all parts of the North-West territory. I cabled to know where that was to be found. The answer I get is, "Order not printed on statutes or sessional papers. It relates almost exclusively to permit dues. It consolidates former orders and provides that permit shall set forth that permittees must conform to conditions; copy mailed you to-day."

THE EARL OF SELBORNE—That is not the most satisfactory way of putting us in possession of the tenor of that document.

MR. MCCARTHY—It was the best that I could do, because it is not printed.

THE EARL OF SELBORNE—You are not responsible. Those with whom you have been in communication ought to have the means of sending over a correct copy of the document.

THE ATTORNEY-GENERAL—They have sent it forward.

THE EARL OF SELBORNE—Then we shall form our opinions as to what that means.

MR. BLAKE—At any rate, my Lords, I was about to argue that this is not a material question, because I contend that the Indian title is extinguished in any case, and the mere grant of a new non-exclusive privilege to hunt or fish over the lands until they are wanted is, in point of fact, by no means inconsistent with complete and absolute extinguishment. It is not the old title at all. They have surrendered everything, and they have acquired simply the privilege to hunt and fish over these lands, as long as they remain Crown lands in which no interest of a white is created by any act of the Crown.

THE EARL OF SELBORNE—You can say whatever may be the extent of their previous right, this is a different thing and clearly limited to a particular matter.

COUNSEL—Yes. They have surrendered. They surrender everything.

LORD WATSON—They could not mine.

COUNSEL—No; they could only hunt and fish.

THE EARL OF SELBORNE—It is like a right of chase and warren.

SIR RICHARD COUCH—The government may make any regulations they please.

COUNSEL—Yes. My learned friend argued that the right of the Dominion Government to make regulations showed they were to continue to interfere; but the regulations would be necessarily limitary regulations. As the right exists, it is a temporary right to hunt and to fish as long as the Dominion Government does not limit or regulate that right, and ceasing altogether the moment the lands are set out for lumbering or for settlement. All they could legislate upon would be to limit the right of hunting and fishing, not to extend it. There is the whole of it. That does not interfere in the slightest degree with the proposition that the Indian title is absolutely extinguished.

Then my learned friend claims that the Dominion is under any circumstances the assignee of the Indian right, and that this justifies the cutting of the timber. That was his secondary proposition. But the Dominion is not an assignee at all. This is in form and substance a surrender or cession to the Crown.

LORD WATSON—There is no division of the right. It is an undivided right in the Crown.

COUNSEL—Yes, all is got together; and all is in the Crown in whose interest it is got together. That is the position before your Lordships. Under any circumstances the Indians could not assign or transfer, because it is one of the conditions of the peculiar tenure upon which we have been arguing the case that assignment or transfer was not possible for them. The attempt at assignment would operate an extinguishment of the Indian title. It would be destructive of their title. Their title being destroyed, nothing would remain but that title which existed already, absolute and unimpaired save by the Indian title.

Then as to granting a right to cut the timber. I do at all admit that the Indians had themselves the right to cut the timber on these lands for the purposes of sale. So far from that being part of the immemorial custom and enjoyment of the Indians, if we are to apply the rule of common sense, it would be utterly subversive and destructive of the very interest which they were to enjoy, namely, the hunting interest. The continuance of the forest was the condition of the continuance of the game, and the idea of cutting the timber for mercantile purposes has never, that I know of, been snggested as an idea relevant or other than repugnant to the notion of the Indian title. I do not at all say, of course, that, when special reserves are created, that title may not be moulded, and larger rights may not be given according to the terms on which the special reserves are established.

LORD WATSON—By the terms of the treaty the Indians are not to have the right of hunting and fishing upon those parts of the ceded lands which are taken up for lumber. They are expressly excepted.

COUNSEL—Yes, they are expressly excepted; and also the lands for settlement. In that view I will not pursue this argument at length. But I wish to refer to an authority my learned friend cited in answer to your Lordship's question whether the Indians had a right to mine.

THE EARL OF SELBORNE—You mean the Cherokees?

COUNSEL — Yes; my learned friend cited from a note in the third volume of the Commentaries of Kent.

THE EARL OF SELBORNE—Mining is not mentioned in the note at all.

COUNSEL—Yes.

LORD WATSON—I do not think mines and minerals are necessarily touched in the case it gives a reference to.

COUNSEL—It seems so.

LORD WATSON—There was a conviction of an Indian under a local Act or Act of the provincial legislature. It was held that that Act was passed with reference to Indian land and Indian reserves and was beyond the power of the provincial legislature and accordingly they quashed the conviction, holding that the statute was entirely beyond their powers but the statute did relate to mines within the Indian reserves and apparently the Indians had transgressed the rules laid down with respect to mining by the Provincial Act.

COUNSEL—I had assumed it was another note.

LORD WATSON—It decides nothing more.

THE EARL OF SELBORNE—The note from Kent has nothing about mining in it.

COUNSEL—We had found what my

learned friend intended to cite at any rate, and I was about to state it to your Lordship.

SIR RICHARD COUCH — This is what Mr. McCarthy said; Indians were entitled to mines. Then he quoted 3 Kent's Commentaries page 378.

THE ATTORNEY-GENERAL—It is originally page 380.

COUNSEL—In my paging it is lecture 51, page 483.

LORD WATSON—What edition have you got? I have got 1840.

THE ATTORNEY-GENERAL—I have 1851.

COUNSEL—Your Lordship will find it at the close of a long note:—"Mr. Justice Clayton, of Georgia, in the case of the State of Georgia v. Conatos, a Cherokee Indian, brought up on *habeas corpus* (reported in the *National Intelligencer* of October 24th, 1843) held, that the right and title to land included a right to all the mines and minerals therein, unless they were separated from the lands by positive grant or exception; and that if the State made a grant of public lands to an individual, without any exception of mines and minerals, the mines and minerals would pass to the grantee as part and parcel of the land, and that the Cherokee Indians had a right to dig and take away gold and silver from the lands in their reserves, or lands not ceded to the State, and were not amenable to trespass for so doing, inasmuch as they had as good a right to the use of the mines and minerals as to the use of the land and its products in any other respect; that they were lawful occupants, not chargeable with waste; for the right of the State was a right of pre-emption only, and never considered otherwise by the government of Great Britain, when it claimed and exercised dominion over this country, nor by our own government which succeeded to the British powers."

LORD WATSON—That does not occur in mine.

MR. MCCARTHY—That is not in the earlier edition. The case was not decided till 1843.

SIR BARNES PEACOCK—Did that relate to lands in respect of which a treaty had been made by the government with the Indians?

COUNSEL—Yes.

SIR BARNES PEACOCK—Or under the Proclamation of George III?

COUNSEL—No, the Cherokee Indians occupied a wholly exceptional position. The learning about the Cherokee Indians is very large and interesting. If your Lordship refers to the cases in 5 and 6 Peters, you will find ample ground to sustain the proposition I advance.

THE EARL OF SELBORNE—I want to know exactly about this authority. It would seem to be the note of some late edition of Kent.

COUNSEL—Yes.

LORD WATSON—It appears to be an edition by Comstock who appears to have added that.

COUNSEL—Yes.

THE ATTORNEY-GENERAL—I think that will turn out to be Chancellor Kent's note.

SIR BARNES PEACOCK—How did the Cherokee Indians get their title—by a grant from the government or merely by reservation in the Proclamation of George III?

COUNSEL—There were treaties, and repeated treaties with them.

SIR BARNES PEACOCK—Therefore they had a grant perhaps more extensive than that in the reservation of George III.

COUNSEL—So I contend, unquestionably. Nobody can read the cases without seeing that. The Cherokee Indians by one of the earlier treaties were recognized as a nation, entitled to elect and send a deputy to the Congress of the United States. They were treated with a great degree of respect. They formed an organized political community. They had laws and customs and arrangements which are described in the most eulogistic terms by the Judges in these cases in 5 and 6 Peters. They were approaching rapidly, if they had not attained a high condition of civilization. I think it will be found utterly impossible, either with reference to the general question or with reference to this particular case, to hold that the position of the Cherokees could in the slightest degree affect the position of the title in ordinary unconceded lands, dependent on the proclamation.

SIR BARNES PEACOCK—There might be a difference between mining and cutting down timber. The Indians might have under the reservation a right to cut down timber for the purpose of building their huts and houses.

COUNSEL—I have no doubt that was their accustomed enjoyment.

SIR BARNES PEACOCK—They had a right to cut down timber. Then it is contended (I do not say successfully) as one of the grounds of appeal, that al-

though the lands may not have passed to the Dominion Government, at least the right which the Indians had to cut timber did pass.

COUNSEL—I say there is no question that the Indians in those lands to which the proclamation applied, on the general theory of an Indian title in unsurrendered lands, continued their accustomed enjoyment. If they wanted timber to make passages across streams, or for their wigwams, or for fuel, and so forth, they could take it. Nobody would dispute that. But to enter into the mercantile operation of cutting down timber for sale, was as much impossible for them as it was contrary to every instinct of the Indian population.

LORD WATSON—"Timber" is a large word to employ.

COUNSEL—Anything they wanted for their usual and customary enjoyment I have no doubt would be included.

SIR BARNES PEACOCK—That is a very different thing from creating a public company.

COUNSEL—That is what I was going to say. Their personal right was their personal right. To allow them to sell or transfer their right, if regarded as unlimited, might be practically allowing them to sell the fee simple, because the timber was really often the whole value of the land.

THE EARL OF SELBORNE—The matter seems to stand in this way under Chancellor Kent's authority. The note in Chancellor Kent has not a word about this. This book, which was published in 1840, has not a word about it. The case seems to have been decided in 1843. Therefore, whatever its value may be, unless some later edition by the chancellor himself containing this latter note is produced, we can hardly avoid supposing it was added by Mr. Comstock.

COUNSEL—It was not deemed a case of such importance as to find its way into the regular reports of the United States. It is quoted from the *National Intelligencer*. It is the decision of a single judge, quoted from a newspaper.

LORD WATSON—Was the chancellor alive in 1857?

THE ATTORNEY-GENERAL—He published an extra edition himself in 1851.

THE EARL OF SELBORNE—It was a decision of a single judge upon a *habeas corpus* reported in the *National Intelligencer*. It may be perfectly good law, but I am not quite sure that we can infer any universal rule from it.

LORD WATSON—It seems to have resulted in quashing a conviction merely. It does not appear what other objections the conviction was open to.

COUNSEL—No.

SIR BARNES PEACOCK—According to the claim this company cut down two million feet of pine timber. That is very different from what the natives would have done if they have been allowed to enjoy the land.

COUNSEL—Yes. And besides it involves the proposition that they can transfer, which is contrary to the fundamental notion of the Indian title. They may enjoy, but they have no right to alienate.

Now, having argued the case up to this stage upon the hypothesis I stated in my opening, namely, that the middle view of the Indian title applies, and that the proclamation is in force, and that the words, "lands reserved for the Indians," extend to these lands, I have to ask your Lordships' permission to refer very briefly to the earlier historic views in order to establish, so far as I am able, the untenability of the appellant's suggestion with reference to the real character of the Indian title, and the soundness of the ground we take, namely, that the title was not, in the case at any rate of Canada and of these lands, one of extensive and absolute right. Your Lordships will recollect that both the Attorney-General in his opening, and my friend, Mr. McCarthy, in the opening and in the close of his argument, contended that the general character of the Indian title was such that it was practically the beneficial title in the land, that it was something very much superior to the easement or limited right on the hypothesis of which I have been arguing the case—something in effect paramount—and that the interest of the state was practically *nil*. My own view is that the question of the Indian title, both as to its origin, as to its subordination to the rights of the Crown, and as to its extent, is susceptible, in respect of these parts of Canada, of very different and much clearer treatment than applies to the question of the Indian title or right in the old colonies and in the United States. But I do not admit that even the most enlarged view which can be fairly taken of the line of decision (I do not say of the strongest isolated judgments, still less of the strongest expressions in the text books of the United States), reaches the length which my learned friend has claimed. On the con-

trary, I am satisfied that the fair conclusion from those judicial decisions as a whole, is the middle view to which I have referred, and that if you look to the particular circumstances in the stronger cases themselves it will be found that a much narrower rule than may be indicated in the judgments would suffice for the decision.

LORD WATSON—What difference do you think it makes to your case that the Indian title should be greater or less so long as there is a substantial interest underlying it in the Crown? Does the precise extent or limit of the Indian title matter much to the result of your argument so long as there is left a right in the Crown, a substantial right, not a mere casualty which will depend on the Indian title but a substantial title—a substantial interest which is underlying in the Crown.

COUNSEL—So long as it is agreed that there is such an interest as passed under the word "land" in the 109th section, then for the immediate purposes of this case I care for nothing more.

LORD WATSON—That is the answer which I anticipated.

THE EARL OF SELBORNE—On the other hand if the proposition could have been maintained that the Indians were what we call owners in fee simple of the soil, then that decision would bring you round to the word "royalties."

COUNSEL—Yes, certainly; and would remove one of the grounds of my argument, because I rest upon both at this moment. And therefore it seemed to me important, if my learned friend's argument led your Lordships to lean towards the adoption of his view as to the very extensive nature of the Indian right—it seemed to me to be very important to combat it. But I at once concede the general proposition which Lord Watson has stated, that it is utterly immaterial to us for the purposes of this case, provided we have "land" within the meaning of section 109.

Now I contend that from the very beginning the true result of the principles, the theories, and the practice with reference to the Indian title is opposed to the notion of the Indian having a practical fee simple or a paramount title, or to any other notion than that the title to the soil was in the Crown, and that the interest of the Indian, whatever you may call it, however extensive it may be, even if it be held to be of right, was yet subordinate to and carved out of the paramount and absolute legal estate of the Crown. That is the proposition which I shall endeavour to maintain by a brief review without tedious reference to the authorities. In the earliest days the first foundation of the titles of Christian nations to these countries was to be found at Rome. In the earliest days it was the pope who claimed the right to grant away the kingdoms of this world as well as of the world to come. England, and France also, later on, as protestant views and principles more prevailed, repudiated those pretensions; yet not with any idea that there was no intrinsic right in Christian states as such to take the soil, but with the view that the right was not in the pope. Thus it became the recognized doctrine of the Christian states that the discovery of heathen lands gave the discoverer, being a Christian state, the soil absolutely. Your Lordship pointed out that there was rather a difficulty about this title arising from discovery, suggesting that it would not apply very happily if the Indians had came over and found out England——

THE EARL OF SELBORNE—The argument about the pope is a very extravagant one. The pope's authority in these matters can hardly be made an argument at this time of day.

LORD WATSON—A pretext has never been wanted for taking land.

THE EARL OF SELBORNE—It is the right of the stronger, the power to take from the weaker.

COUNSEL—That is quite true; but I venture to submit that what is material is not the solidity of the foundation, or the justice and equity of the proposition, but whether in point of fact in those early days this was the foundation and the proposition—the thing which was put forward; being dependent for its success, as it doubtless was, on the right of the stronger. Of course, the proposition that the stronger should make anything which he pleased the law, is a proposition which cannot fairly be put forward in argument at the present day——

THE EARL OF SELBORNE—If that was the law, that would be quite proper whatever one might think of the foundation of that law. But that never was taken to be so in principle.

COUNSEL—This certainly has happened my Lord, with reference to the English occupation, that English charters were

based upon this very theory, and that the Crown did assume to grant the soil as well as the sovereignty, and the jurisdiction——

LORD WATSON—Without being in the least aware of how it was occupied.

COUNSEL — And sometimes actually knowing; and in some cases even saying, "whether vacant or occupied by heathens;" and that is the distinction which was taken. Respect was to be paid to the discovery and occupation by other Christian states in America, to the absolute disregard, the ignoring altogether of rights or interests on the part of any Pagan inhabitants.

THE EARL OF SELBORNE—I think the word "Christian" should be left out.

COUNSEL—I quite agree.

LORD WATSON—We know what has been done in the name of Christianity in the taking possession of land.

COUNSEL—Yes, my Lord, my contention however is that, founded upon whatever fantastic and, I might almost say, revolting notions——

LORD WATSON—I do not dispute the good title of the power who has taken possession.

THE EARL OF SELBORNE—Where possession is taken and the law is established.

COUNSEL—However it may be as to the principle, my contention is with reference to the fact, the historical fact. I maintain that the fact is in accordance with the view taken in the opinion of the Six Counsel, which has been referred to, and that the current of the authorities is to the effect that the Indian title was such a title or interest, as those who had possessed themselves of the land, who claimed and exercised full rights over it, the right to grant it, the right to use it, the right to occupy it, chose to assign to the Indian. It was an entirely arbitrary title. Nobody pretends it was the original Indian title; nobody pretends it was known to the aboriginal Indians; nobody pretends that the notion of such a title as this, with such limitations as these, was the notion which the aboriginal inhabitant conceived, if indeed he conceived of any title at all, to the soil of his country. But just such a title, just such an interest as from motives of justice, from motives of policy, from motives of convenience, or from the necessities of the case, the discoverer chose in certain cases to recognize or set up as existing in the Indian—just such a title or interest was all that the Indian had; yet always subordinate to the claims of the strong discoverer——

LORD WATSON—There are great tracts of country at the present moment in Europe and elsewhere, the occupation of which is in the Crown and yet they are admittedly private property.

COUNSEL—Yes.

LORD WATSON—Simply because it has been found expedient that the property should be recognized.

COUNSEL—Yes, that is my whole argument. In a word, it was and is a question of expediency and policy.

SIR M. E. SMITH—I suppose so, for the French King had not recognized these rights and therefore he had possession. They were public lands of the French Crown. Then the English Crown proposed to limit its general power by that proclamation, that is the state of things is it not?

COUNSEL—Yes. I was endeavouring at the moment to state my view as to the title in the colonies and the United States, apart from the question of the French cession altogether, because my friend's argument is based, if not wholly, yet very largely, on the old colonial title. They state that as the substratum of everything——

LORD WATSON—I admit that the argument starts from that point, that the right sprang from legislation, proceeded from legislation. Now legislation may take away a right, no doubt of that.

COUNSEL—If your Lordships hold that the real and substantial argument for the appellant is based on the proclamation, and that that must be taken into consideration as the groundwork when you are looking at what the Indian rights are——

LORD WATSON—I do not in the least mean to suggest, if that is so, that that is not the starting point.

COUNSEL—If that is the starting point of the right, then it becomes, of course, less material to consider what the rights were in the old colonies and in the United States. I have no desire to detain your Lordships an instant longer than the exigencies of the case require; but my friends' numerous citations and lengthy discussion of the Indian title in the old colonies and the United States, seemed to me to point to no other conclusion than that he proposed to ask your Lordships to hold that that title

was the foundation of the Indian title here. My own position has always been that all that was not material, for the simple reason that French Canada, before the cession, was unquestionably free from the Indian title; and that, therefore, we must find the existence of the Indian title there in something that was done after the cession. And after your Lordships' observations I will pass over the remainder of the argument which I had intended to state with reference to the Indian title elsewhere, and will turn at once to the question of how it stood in Canada, only saying that it is not in my view the true result that the Indian title in the States and in the Colonies interfered at all——

LORD WATSON—The result of that would be that these Indians, with whom this treaty was made, would be liable to be squeezed out of the territory without any compensation with regard to their rights, if your argument is correct.

COUNSEL—I was at present, my Lord, only saying——

LORD WATSON—I understand your argument. Your argument at present is directed to this, that these lands are free from settlement, unencumbered by Indian title, is not that so?

COUNSEL—Yes; unencumbered by Indian title as of right.

LORD WATSON—As of right?

COUNSEL—Yes; as of right.

THE EARL OF SELBORNE—As a matter of fact the Indian was there, and then we came whatever became of the Indian right and jurisdiction, and then certain rights were recognized. You need not labour that.

COUNSEL—Very well, my lord.

THE EARL OF SELBORNE—We recognize that fact.

COUNSEL—That being your Lordships' view, I pass by the argument which I was going to address to your Lordships as to the condition of things elsewhere—

THE EARL OF SELBORNE—The authorities which you have cited are at least as much in your favour as against you.

LORD WATSON—It really comes to the question as to your argument, either they had some right or they had not. It might further your argument if it was on some other ground than merely showing there is some right.

COUNSEL—Yes; my argument will be directed to proving this; first, to shew that such interest as the Indian had in Canada cannot properly be called a right; that it was originally a question of policy and discretion, and continued so to be; and next, that even if you put it upon the footing of a right, yet it was a right under the proclamation, lower than any contention of my learned friends, and one which was obviously carved out of the Crown title, and leaves the province the main interest in the land. And I start from that point to which Sir Barnes Peacock alluded at an early stage of the argument——

LORD WATSON—Unless I misunderstood the argument, it really appears to me on this point that the parties are only at issue upon what is materially disputed. It is not disputed on the other side as to the underlying right on the part of the Crown; it was conceded there was such an underlying right that the Indian right to the land depended on an arrangement made with the Crown. You are now discussing what was the precise extent of the right.

COUNSEL—I understood so, certainly; but my friend, the Attorney-General of England, suggests to me that no such wide concession as your Lordship has stated was made.

LORD WATSON—Then I misunderstood the argument. I fancy that is a separate point.

COUNSEL—The concession, I mean that the land would have passed to the province if there had been an extinguishment before the union. My impression was the same as your Lordship's. I understood Mr. McCarthy, in answer to questions put to him, to make that statement, but I have no desire at all——

THE EARL OF SELBORNE—He conceded no more than that the Crown is lord of the soil.

LORD WATSON—I do not think it was seriously disputed that the Crown had an interest in the soil.

COUNSEL—At any rate it is now disputed, my Lord, as I understand, that the Crown had such an interest in the soil as we contend for.

LORD WATSON—Yes.

COUNSEL—So that we now understand what is contended——

LORD WATSON—The interest of the Crown is not carried by section 109.

COUNSEL—I am about to try to shew that it is. We get then to the root of the Indian title very clearly. We find the old original title extinguished in the time of the French. The French Crown never recognized it, and by conquest

extinguished it. That proposition certainly, whatever doubt exists as to other propositions, was stated by my learned friend, Mr. McCarthy, in the clearest possible terms, that the French Crown did not recognize the Indian title, which was therefore at an end; and reference may be made to the judgments of Mr. Justice Taschereau and Mr. Justice Gwynne, and others, which are entirely at one with that view. Well, then, it was absolutely in the discretion of the English Crown, when it became possessed of the country and the soil, and of all the rights of the French Crown, to deal with these at its pleasure. And therefore I take as my starting point that, the French right being absolute and entire, the English right was the same. And I am relieved, with reference to Canada and this district, from any consideration of any possible anterior or subsisting Indian title. In this particular case it required the voluntary act of the Crown to create an Indian title. It must be a new Indian title, the voluntary creation of the Crown, whatever its nature and extent. That is the only possible origin. There is then, with regard to Canada, no ground to contend for a paramount, or superior, or anterior or subsistent Indian title. Whatever it may be, it is carved by the Crown out of that entirety which the Crown held by the cession, and so we get rid at once and forever of all suggestions to the contrary.

Now the transactions subsequent to the cession in respect of Indian affairs were based upon general considerations of state policy, and were adapted to the English situation at the time. It would be a great error to suppose that they were based upon the simple proposition that it was just that an Indian title of a certain description should be recognized in such and such lands, and therefore England recognized it. That was not done. As to this land, and as to the vast proportion of all the lands, no idea of recognition by England on the one hand, or of cession by the Indians on the other hand, was conceived or attempted by the proclamation or by any other Act. What was done arose from suggestions of expediency and policy, with which indeed the Indians had something to do, but not the most. The situation of England, although at that time she had become, largely by the fortune of war, and in part by her title of discovery and occupation, the lord of the bulk of the continent, was critical and difficult. England had to consider the chances of a renewed struggle with France for the recovery of her lately ceded possessions, aided by her former subjects, not yet devoted to their new allegiance. England had to consider the possibility also of a fresh contest with Spain for the recovery of the Floridas, only just wrested from that power. She had to deal with the growing restlessness of her old colonies, so soon after to culminate in the revolutionary war. And besides all these, she had to cope with her Indian troubles. During the long and arduous French war, England had flattered and stimulated her Indian friends with the notion that, if they succeeded in conquering the French, the interior settlements would be done away with and the French pioneers expelled. That was the Indian's dream, his hope, his national aspiration. But that could not be accomplished under the capitulation. The French settlers had the right, under its provisions, to remain and be protected in their settlements, wherever situate. Thus it had become impossible to carry out the promised policy; and great disappointment and vexation arose in the minds of those Indians. Again, at this time fierce Indian wars were raging. The great conspiracy of Pontiac, the widest and most far-reaching, the best organized and most persistent of all the Indian wars, had broken out; and it was only by superhuman exertions, and under the most trying vicissitudes of fortune, that the English held any part of their ground in the interior. Therefore it was thought necessary to conciliate the Indians, and to get breathing time to consider the situation. On the other hand, the need of pushing English western settlements, formerly urgent in order to occupy the country and keep out the French, no longer existed; because even those French who stayed remained as English subjects. Now in relation to the whole situation, as is shown by the public documents and historical records, great problems of statecraft presented themselves. The colonies had been founded and fostered that they might extend the commerce and consume the manufactures of England; and supply her with raw materials and naval stores. They had been founded with the idea that they should sustain a relation of inferiority and dependence. But the danger had arisen

and was present to the mind of the English government, that the colonies might themselves become manufacturers, supply their own wants, consume their own raw materials, and even presume to export manufactured goods. There was also abroad in British America a painful and inexplicable feeling of restiveness and independence. Thus the questions which presented themselves to the English government when this proclamation, so wide and general in its terms and dealing with so many subjects, was being considered, were, how could the English possessions be best secured; how could the colonies be kept consumers and dependent; and what should be the policy of settlement. There was a division of opinion in the Cabinet. An important minority thought interior settlement should be vigorously promoted. The majority held that settlement for the time should be directed, not to the interior but to the seaboard; first, in order to increase the available English strength against French attempts on Nova Scotia and Spanish attempts on Florida; next, because settlers by the sea could be more readily and advantageously supplied with English manufactures, and more effectually kept in touch with and controlled by England, than could the remote inland people, who would be compelled to manufacture for themselves and would be in a state of practical isolation and independence; and lastly, because this course would, they thought, lessen the danger of Indian wars. It was admitted that the case was doubtful. No final decision was reached. But time pressed. Something had to be done, and done quickly; and at length a policy was adopted, in its material features, so far as they touch this case, purely provisional, temporary and experimental. That policy was embodied in the proclamation of 1763. Now this proclamation dealt with various subjects, under various titles and authorities, in various ways, and with various effects. In part it was a legislative act of the sovereign under his prerogative power with regard to conquered territories; in part it was an executive act based on the king's more limited power of dealing with territories held by discovery and occupation; in part it was founded on express legislative authority conferred on the sovereign; in part it was void as in excess of the regal power; in part it was permanent in its nature; in part it was temporary; and the part relating to this area was of the temporary character.

If your Lordships will allow me to refer to the proclamation, you will see in almost its earliest clauses provisions with reference to Quebec and the other colonies. It refers to the expediency of settling the government and of giving authority to dispose of the lands, and provision is made for the settlement of lands within the colonies, and authority to deal with lands, tenements and hereditaments within the colonies, and to alien the Crown lands to settlers, is expressly given. An argument was used by one of the learned Judges below, that the practical effect of the proclamation in dealing with unsurrendered and with reserved lands is to produce the result that unsurrendered lands were *ipso facto* reserved lands. But I submit to your Lordships that that argument is not well founded. The words upon which that argument was based are these: "Such parts as not having been ceded to and purchased by us are reserved by us to the Indians." They give ground for no such inference. And they are a second, and yet a third time repeated, with the word "still" introduced: "Such lands as not having been ceded are *still* reserved," showing very plainly that mere non-surrender does not *ipso facto* constitute reserve. And again vast quantities of unceded land in Quebec are treated in the proclamation as open to settlement. And yet again an enormous area not yet surrendered is by express provision temporarily reserved; everything leading incontrovertibly to the conclusion that lack of cession did not create reserve, but that an act of reserve was essential.

Next there is a clause under which the governors of Quebec, East Florida and West Florida, provinces created by the proclamation, are not to pass patents for lands beyond their bounds, which seems at first sight an extraordinary clause. The only explanation I can suggest is that when you come to the governor's instructions you find they speak of him as "Governor of the province of Quebec, and *of all our territories dependent thereon.*" So it was supposed that there were some territories dependent on the province, beyond its bounds; and probably this clause was an attempt to prevent any such power being assumed in such territories outside the limits of provinces. Thus far that is the only

land; but that the Crown declared its pleasure and policy by a measure which it might not legally be modify to the prejudice of the Indians; but still, which it might modify at its will.

Lord Watson.—Whatever was done, was done as a matter of policy. The more violent policy would be that they should be turned out altogether.

Counsel.—Yes.

Lord Watson.—If a more cautious policy was pursued, they might settle the lands as open.

The Earl of Selborne.—Certainly, it is consistent with and corroborative of your argument that the interest in the soil was considered as being in the Crown. [illegible]

Counsel.—[illegible]

[illegible]

Sir M. E. Smith.—They reserved to themselves power over the lands.

Counsel.—Yes.

Sir M. E. Smith.—The use by the Indians, whether perpetual or present, was by their usual mode of doing it, namely by hunting.

Counsel.—Yes, quite so. Now I would point to the fact that the appellants case states that the provisions as to the mode of purchase of the Indian interest by public meeting and so forth, apply to this reservation. [illegible]

[illegible]

[illegible] the boundaries of the provinces [illegible] in the proclamation.

Sir M. E. Smith.—The Indians may not have been settled on that.

The Earl of Selborne.—The proclamation [illegible] that in general terms, as you say, all lands outside [illegible] and [illegible] settlements [illegible] are prohibited. [illegible]

[illegible]

[illegible] special reserves.

Sir M. E. Smith.—No; [illegible] the proclamation [illegible] reserved for the Indians under the proclamation as hunting grounds.

[illegible]

[illegible]