CALDER v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

(1970), 13 D.L.R. (3d) 64 (also reported: 74 W.W.R. 481)

British Columbia Court of Appeal, Davey C.J.B.C., Tysoe and Maclean JJ.A., 7 May 1970

(On appeal from judgment of British Columbia Supreme Court, supra p.17)

(Appealed to Supreme Court of Canada, infra p.91)

Indians -- Aboriginal title to lands -- Whether such title possible after conquest -- Whether title extinguished by acts of Crown.

Real property -- Aboriginal title to lands -- Whether such title possible after conquest -- Whether title extinguished by acts of Crown.

The appellants, officers of the Nishga Indian Tribal Council, on their own behalf, and as representatives of various Indian bands in British Columbia, brought an action against the Attorney-General of British Columbia for a declaration that the aboriginal or Indian title to certain lands had never been lawfully extinguished. An appeal from a judgment dismissing the action, *held*, the appeal should be dismissed.

Per Tysoe, J.A., Davey, C.J.B.C., and Maclean, J.A., concurring: A claim to Indian title can only be recognized if the Indian title has been incorporated into the municipal law. The Proclamation of King George III, made in 1763 as set out in R.S.C. 1952, vol. VI, p. 6127, forbidding the purchase, settlement or taking of possession without special leave or licence of the Crown of any lands of "the several Nations or Tribes of Indians with whom we are connected and who live under our protection" did not apply to the lands in question. At the time of the Proclamation the Indian bands represented by the appellants were not any of "the several Nations or Tribes of Indians" with whom the Crown was connected or lived under the Crown's protection.

Petitions lodged by the Nishga tribe in 1913 to the Privy Council, special Commissions of the Senate and House of Commons of Canada in 1922 and 1961 and the lack of action by Parliament on the reports of these Commissions showed that there had been no statutory recognition of the claim of the appellants to Indian title. On the other hand, all of the proclamations, ordinances and proclaimed statutes affecting land in British Columbia emanating from the Crown Imperial and the Crown Provincial showed a unity of intention to exercise, and the legislative exercising of, absolute sovereignty over all lands in the Colony, and later the Province, a sovereignty which was inconsistent with any conflicting interest, including one as to aboriginal or Indian title.

Per Davey, C.J.B.C.: The primitive tribes at the time of British discovery and conquest had no conception of proprietary, as opposed to territorial boundaries. The boundaries claimed by the Nishga tribe were not connected with notions of ownership of particular parcels of land. There was no evidence to justify a conclusion that the aboriginal rights claimed by the appellants are of a kind that it ought to be assumed that the Crown recognized them when it acquired the mainland of British Columbia by occupation.

Per Maclean, J.A.: There was no legislation of the pre-Confederation Government of the Colony of British Columbia, or of the present Province which would constitute recognition of Indian title.

[*Re Southern Rhodesian Land* (1918), 88 L.J.P.C. 1; *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51 Ind. App. 357; *Tamaki v. Baker*, [1901] A.C. 561; *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543; *Worcester v. State of Georgia* (1832), 6 Pet. 515; *Re Labrador Boundary*, [1927] 2 D.L.R. 401; *Cook v. Sprigg*, [1899] A.C. 572; *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] 2 All E.R. 93; *Secretary of State v. Sardar Rustam Khan*, [1941] 2 All E.R. 606; *Francis v. The Queen*, 3 D.L.R. (2d) 641, [1956] S.C.R. 618; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.V.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485; *Warman v. Francis et al*. (1958), 20 D.L.R. (2d) 627, 43 M.P.R. 197; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339; *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, refd to]

APPEAL from a judgment of Gould, J., 8 D.L.R. (3d) 59, 71 W.W.R. 81, dismissing appellants' action for a declaration that the aboriginal or Indian title to ancient tribal territory has never been lawfully extinguished.

Thomas R. Berger and *D. J. Rosenbloom*, for appellants.

Douglas McK. Brown, Q.C., and *A. W. Hobbs*, Q.C., for respondent.

DAVEY, C.J.B.C.:--It has been truly observed by Anglin, J., in *Warman v. Francis et al*. (1958) 20 D.L.R. (2d) 627 at p. 630, 43 M.P.R. 197, and by my brother Tysoe that the validity of claims of aboriginal title differ throughout Canada, and that each case depends on the historical background.

Each of the decisions relied upon during the course of argument, most of them of the highest authority, including judg- ments of the Privy Council and the Supreme Court of the United States, requires close examination because of the prin- ciples upon which they rest are not easy to reconcile unless close attention is paid to the precise question raised in each, and to the particular facts and the historical background out of which that question arises.

In *Re Southern Rhodesian Land* (1918), 88 L.J.P.C. 1 at p. 11, Lord Sumner addressed his attention to the argument that the unalienated lands belonged to the natives from time immemorial, and still belonged to them, and that their title could only be divested by legislation or their consent. At p. 12 he remarked that it appeared to be common ground that the title claimed was "tribal" or "communal", but what precisely that meant remained to be ascertained. I quote from him:

> In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

I add to Lord Sumner's two qualifications a more general one, namely, in the absence of evidence to the contrary, such as occurred in *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51 Ind. App. 357, where the Crown undertook to ascertain by inquiry what rights the inhabitants formerly had in the ceded territory.

Lord Sumner continued at p. 12:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to

> impute to such people some shadow of the rights known to our law, and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribes." On the other hand, there are indigenous peoples whose legal conceptions, although differently developed, are hardly less precise than our own. When once they have been studied and understood, they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.

Turning to the evidence in this appeal, in spite of the commendation by Mr. Duff, a well known anthropologist, of the native culture of the Indians on the mainland of British Columbia, they were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property. I am not overlooking Mr. Duff's evidence that the boundaries of the Nishga territory were well known to the tribes and to their neighbours, and respected by all. These were territorial, not proprietary boundaries, and had no connection with notions of ownership of particular parcels of land. Also Mr. Duff said that on occasion a chief would earmark a particular piece of property for the exclusive use of a particular family, but I see no evidence that this practice was general; even if it was, it would only support claims of the particular occupant, and not claims to the communal use by the whole tribe over all its tribal territory.

I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupa- tion.

These considerations effectively distinguish the *Lagos* line of cases in which the territory of a people was ceded to the British Crown following conquest. The inhabitants had definite notions of rights of private property in specific pieces of land although of a communal, tribal and family nature, which it was presumed the Crown intended to respect and recognize, and intended to be supported by the municipal Courts.

Under the authorities cited by my brother Tysoe, to which I add *Tamaki v. Baker*, [1901] A.C. 561, it is, I think, clear in the circumstances of this case that the appellants must establish that by a prerogative or legislative Act, or by a course of dealing by the Crown from which a prerogative Act can be inferred, the Crown ensured to the Nishga Nation aboriginal rights in the lands in question, which might be asserted and enforced in the Courts of this Province. Unless that can be determined affirmatively, no declaratory judgment can be delivered that such rights have not been extinguished, because to say that they have not been extinguished implies that they exist.

Appellants' counsel submits that contrary to those authorities the long-time policy of the Imperial Government in settling territory throughout the world, especially exemplified in its dealings with the Indians in the eastern part of North America and the Maoris of New Zealand, of buying from the native people those parts of the territory which were needed for the purpose of the Colonies, has become part of the common law, or at least has become so firmly entrenched in the policies by which native territories are occupied, that an intention to observe those policies must be attributed to all colonial Govern- ments. Those policies are fully described in the judgments of Chief Justice Marshall in *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543, and *Worcester v. State of Georgia* (1832), 6 Pet. 515. Whatever may be the law in the various States of the Union, it is clear from the authorities binding this Court (although some of them contain

occasional statements that seem to give support to counsel) that there is no such principle embodied in our law. In each case it must be shown that the aboriginal rights were ensured by prerogative or legislative Act, or that a course of dealing has been proved from which that can be inferred.

Whether aboriginal rights ought to be confirmed or recognized depends entirely upon the Crown's or Legislature's view of the policy required to deal properly with each situation. For the reasons given by my brother Tysoe, I see no prerogative or legislative Act ensuring to the Nishga Nation any aboriginal rights in their territory. The cumulative effect of the historical data negatives the idea, and points to the truth of Trutch's statement, including his remark that Sir James Douglas bought the tribal lands that he did on Vancouver Island, not because he recognized any title in the Indians, but because of considerations of policy.

It is necessary to notice counsel's strong argument that the Royal Proclamation of 1763 applied to British Columbia and its effect ensured to the Nishga people the aboriginal rights they claim. In my opinion as a matter of interpretation it did not. To understand it one must look at the occasion upon which it was made, and the circumstances with which it was dealing. The whole Proclamation is found in R.S.C. 1952, vol. VI, p. 6127. The occasion was the cession of the territories of the Crown of France in North America to Britain. The purpose was to establish civil government, law, and order in the ceded territory. Among the many subjects that had to be dealt with were the rights of the Indian Nations that had fought as allies of France or Britain to their tribal lands. As Chief Justice Marshall pointed out in *Worcester v. Georgia, supra*, p. 548, Britain regarded the Indians with whom she was dealing as nations capable of maintaining peace and war, and of govern- ing themselves under her protection, and she made treaties of alliance with them by which the parties lent their mutual sup- port to each other. Under the Proclamation it was desired to treat the Indian allies of the French now under British sover- eignty in the same manner as the British allies, to confirm the rights of the latter and to restrain and remove encroachments upon Indian lands. It was to those Indians that the Proclamation referred when it spoke of "the several Nations or Tribes of Indians with whom we are connected, and who live under our protection". The limiting effect of those words was noted by Viscount Cave, L.C., in his judgment in the Privy Council in *Re Labrador Boundary*, [1927] 2 D.L.R. 401 at p. 421. The purpose was obviously the protection of the interests of those Indians.

In 1763 the existence of a land mass lying between the Pacific Ocean and the sources of the rivers draining into the Atlantic from the west and northwest was known, but it had not been explored and little was known of its extent, and nothing of its inhabitants. They were not Indians who were connected with the Crown and who lived under its protection. There was nothing in the occasion on which the Proclamation was published or in its purpose that touched the aborigines in British Columbia. In my respectful opinion the Proclamation did not apply to the Indians and to the territory of British Columbia.

I am aware that the Supreme Court of the United States has not so restricted the application of the Proclamation and has applied it in some degree to Western Indians. Moreover, that the Court has developed from the course of dealing with Indians and Indian lands in the eastern part of North America, from the Proclamation, and from the liberal political philo- sophy of the revolution a body of law dealing with Indian rights that incorporates as a matter of principle the practice that the Crown had followed as a matter of policy on the eastern part of the continent. In addition to the comment made by Lord Davey in *Tamaki v. Baker, supra*, at p. 579, about the

American cases, in my opinion the decisions of the Privy Council, by which we are bound until the Supreme Court of Canada speaks, have diverged from the principles laid down and applied by the Supreme Court of the United States to Western Indians. For these reasons the judgments of the Supreme Court of the United States have to be applied with caution to the claims of the British Columbia Indians to ab- original rights in their ancient lands.

If I be wrong, and the Indians of British Columbia did acquire any aboriginal rights, I agree with my brother Tysoe that the historical and legislative material which he has cited shows they have been extinguished.

I would dismiss the appeal.

TYSOE, J.A.:-- This is an appeal from a judgment of Gould, J., dismissing an action for a declaration "that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished."

I am in such substantial agreement with the reasons for judgment of Gould, J., that were it not for the importance of this case and the elaborate submissions and able arguments of counsel, I would not have thought it necessary to do more than add a few words to those of Gould, J.

The action was brought by officers of the Nishga Indian Tribal Council on their own behalf and on behalf of all the other members of such tribal council and by the councilors of each of the four Indian bands on the Nass River, on their own behalf and on behalf of the members of each band against the Attorney-General of British Columbia. The appellants are Indians of the Nishga Tribe living today in four villages in the Nass Valley. For the purposes of this action the respondent admitted that the appellants are the descendants of the Indians who inhabited since time immemorial a large area of territory in northwestern British Columbia delineated in the map, ex. 2, and that the appellants' ancestors had obtained a living from the lands and waters shown on the said map. This area lies on the mainland of British Columbia between north latitude 54° point 40 and north latitude 56° point 15. The expression "obtained a living" is used in the sense of procuring food, clothing and shelter. The appellants' ancestors fished, hunted and picked berries. The skins of animals were used for clothing. These people knew nothing of the so-called benefits of civilization. Having regard to the size of the area of territory over which they may have roamed they were comparatively few in number. Professor Duff, a witness called by the appellants, estimated that in 1835 there were about two thousand and that by 1871 this number had been reduced to about one thousand. This witness further testified that there was a greater population density amongst the Indians in the southern part of the British Columbia coast and in the lower parts of the Fraser River drainage area.

The respondent has raised, by way of answer to the claim of the appellants, a point of considerable importance. It is put in this form:

> There is no Indian Title capable of judicial recognition in the courts of Canada unless it has previously been recognized by the Legislature or the Executive Branch of Government.

In support of his submission the respondent has referred to several decisions of high authority.

In *Cook v. Sprigg*, [1899] A.C. 572, the Judicial Committee of the Privy Council had to consider whether the appellants as grantees of concessions made by the paramount chief of Pondoland

could, after the annexation of Pondoland by Great Britain, enforce against the Crown the privileges and rights conferred. In the course of his judgment the Lord Chancellor said at pp. 577-9:

> Their Lordships do not differ with the finding in fact by the Chief Justice that at the time that Sigcau executed the instruments in question he was the paramount chief of the Pondos, and that Sigcau understood perfectly well that he was purporting to grant such rights as the instruments which he executed professed to convey.
>
> Their Lordships do not think it material to enter into such questions, inasmuch as they are of opinion that the statute which gives a power to sue the Prime Minister does not involve the power of making any declaration of right in such a case. And as mere matter of form it does not contain any clause empowering the Court to make a declaration of right as against the Crown; but there is a more complete answer to any claim arising from these instruments. The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign--which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.
>
> It is no answer to say that by the ordinary principles of inter- national law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of inter- national law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well- understood bargain between the ceding potentate and the Govern- ment to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.
>
> In this case it certainly cannot be said that there was any bargain by the British Government that Sigcau's supposed concessions should be recognized. Indeed, the only intelligible sense in which the allegations in the declarations can be understood is that the breach of duty complained of consists in the refusal of the Cape Government to recognize the plaintiffs' concessions.
>
> To quote the language of this Board, used by Lord Kingsdown in the case of *Secretary of State for India in Council v. Kamachee Boye Sahaba* 13 Moo. P.C. 22, 86 and cited in *Doss v. Secretary of State for India in Council* (1875) L.R. 19 Eq. 534:--
>
> "Of the propriety or justice of that act" (here the refusal to recognize) "neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

In *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51, Ind. App. 357, Lord Dunedin said at pp. 360-1:

> But a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of his predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains

> only with the high contracting parties. This is made quite clear by Lord Atkinson when, citing the Pondoland case of *Cook v. Sprigg*, L.R. 42 I.A. 229, 268, he says: "It was held that the annexation of territory made an act of state and that any obligation assured under the treaty with the ceding state either to the sovereign or the individuals is not one which municipal Courts are authorized to enforce".

and at p. 361:

> The whole object of inquiry is to see whether, after cession, the British Government has conferred or acknowledged as existing the proprietary right which the appellants claim.

In *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] 2 All E.R. 93, the chief of a Maori tribe whose members owned lands in New Zealand challenged a charge imposed on their lands. The headnote states in part:

> The alternative contention challenged the validity of the charge imposed by sect. 14 of the Act of 1935, on the ground that such legislation was *ultra vires* the legislature of New Zealand, inasmuch as it derogated from the rights conferred on the native owners by the Treaty of Waitangi, 1840.

At p. 98 Viscount Simon, L.C., quoted art. 2 of the Treaty of Waitangi under which the Queen of England confirmed and guaranteed to the natives the full, exclusive and undisturbed possession of their lands in exchange for a right of pre-emp- tion over such lands at such prices as might be agreed upon. Viscount Simon went on to say:

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law.

The noble Viscount then quoted the passage in Lord Dunedin's judgment set out, *supra*. He continued:

> So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him.

In *Secretary of State v. Sardar Rustam Khan*, [1941] 2 All E.R. 606, Lord Atkin, at p. 611, quoted Lord Dunedin as set out, *supra*, and then said:

> It follows, therefore, that in this case the Government of India had the right to recognize or not to recognize the existing titles to land. In the case of the lands in suit, they decided not to recognize them, and it follows that the plaintiffs have no recourse against the Government in the municipal courts.

In *Francis v. The Queen*, 3 D.L.R. (2d) 641, [1956] S.C.R. 618, Kerwin, C.J.C., with whom Taschereau and Fauteux, JJ., agreed, said at p. 643:

> The Jay Treaty was not a treaty of peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation. This is an adaptation of the language of Lamont J., speaking for himself and Cannon J. in *Re Arrow River and Tributaries Slide & Boom Co.*, [1932], 2 D.L.R. 250, S.C.R. 495, 39 C.R.C. 161, and is justified by a continuous line of authority in England. Although it may be necessary in connection with other matters to consider in the future the judgment of the Judicial Committee in the *Labour Conventions Case* [*Reference re Weekly Rest in Industrial Undertakings Act, etc.*], [1932], 1 D.L.R. 673, A.C. 326, so far as the point under discussion is concerned it is there put in the same sense by Lord Atkin. It has been held that no rights under a treaty of cession can be enforced in the Courts except in so far as they have been incorporated in municipal law: *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51 Ind. App. 357; *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] A.C. 308."

In the light of these authorities I think it is necessary to keep in mind the clear distinction between mere policy of a sover- eign authority and rights of natives conferred or expressly recognized by statute of the sovereign authority or by treaty or agreement having statutory effect and the different legal results that follow. There is no such statute applicable to the Nishga Indians and they have no such treaty or agreement. In saying this, I do not overlook the Royal Proclamation of 1763 so strongly relied on by the appellants. In my view this Procla- mation did not in 1763 and never did thereafter apply to the area of territory inhabited by the Nishga Indians or to those Indians. On this question I would respectfully apply the rea- soning of Sheppard, J.A., in which Lord, J.A., concurred, in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at pp. 619-21, 52 W.W.R. 193, and with which Schultz, Co. Ct. J., agreed in *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619 at p. 629, 63 W.W.R. 485, adapting it to the Nishga territory. In 1763 the existence of that territory was unknown to the British Crown, for how far to the westward and the north the land mass of North America extended had not been determined. Whether whatever land existed was a barren waste or was inhabited and by whom was also unknown. Between the years 1792 and 1794 Captain George Vancouver was in the coastal waters of the mainland of what is now British Columbia and Vancouver Island acting under instructions from the British Admiralty to examine the coastline in an endeavour to determine whether there was a northwest passage there. His explorations were completed in August, 1794. Thereafter, he wrote:

> . . . I trust the precision with which the survey of the coast of North-West America has been carried into effect, will remove every doubt, and set aside every opinion of a north-west passage, or any water communication navigable for shipping, existing between the North Pacific, and the interior of the American continent within the limits of our researches. The discovery that no such communication does exist has been zealously pursued, and with a degree of minuteness far exceeding the letter of my commission or instructions.

See: Cicely Lyons, "Salmon, our Heritage", p. 12. I do not think the Crown could have had in contemplation the Nishga territory when it made the Proclamation of 1763. It had not then been discovered by the British and, not having been dis- covered, it could not be said it was claimed by and was part of the Dominions or Territories of the British Crown. Nor can I give the Royal Proclamation a prospective operation so that it applies to later discovered land on the North American continent which might turn out to be inhabited by Indian tribes rather than by Eskimos or people of some other race and whose mode of living, nature, character, intelligence and state of culture was quite unknown. It must, I think, be re- membered, too, that there was a serious dispute between Great Britain and the United States as to possession and ownership of the land in the Pacific north-west until that dispute was settled by the Oregon Treaty of 1846, by which the Territory on the mainland north of 49° of north latitude was recognized as belonging to Great Britain.

Other matters are, in my opinion, of importance. From time to time over the years the Indians of the mainland of British Columbia, including the Nishga Indians, have agitated for the recognition by the sovereign authority of the rights they have claimed under Indian title and for some form of compensation. As a result of this in 1887 the Government of the Province of British Columbia appointed a Commission under the *Public Inquiries Aid Act*, 1872 (B.C.), c. 25, to inquire into the state and condition of the Indians of the north-west coast of British Columbia, included in which were the Nishga Indians, and what causes and complaints existed amongst them. The Commissioners made extensive inquiries and in due course made a report to the Lieutenant-Governor of the Province. This did not result in any statutory recognition of the rights claimed

by the Indians or in any treaty or agreement having statutory effect. On May 21, 1913, the Nishga Indians lodged a petition with His Majesty's Privy Council by which they relied, *inter alia*, upon the Royal Proclamation of 1763 and prayed:

> (1) To adjudge and determine the nature and extent of the rights of the said Nishga Nation or Tribe in respect of the said territory.
>
> (2) To adjudge and determine whether, as Your Petitioners humbly submit, the "Land Act" of British Columbia, now in force (Revised Statutes of British Columbia, 1911, Chapter 129), and any previous Land Act of that Province in so far as the same purport to deal with lands thereby assumed to be the absolute property of the said Province and to confer title in such lands free from the right, title or interest of the Indian Tribes, notwithstanding the fact that such right, title or interest has not been in any way extinguished, are ultra vires of the Legislature of the said Province.
>
> Your Petitioners also humbly pray that Your Majesty may be pleased, in pursuance of the above-mentioned provisions of the said Proclamation of King George the Third, to take such measures as may be found necessary for the protection of the said Nishga Nation or Tribe in the exercise and enjoyment of the rights so adjudged and determined.

Nothing resulted from this petition. In 1927 a Special Committee of the Senate and House of Commons of Canada was appointed to inquire into the claims of the Allied Indian Tribes of British Columbia as set forth in their petition presented to Parliament in June, 1926. The Commission made a report on April 9, 1927, from which I quote as follows:

> The Committee, on the recommendation of the Superintendent General of Indian Affairs, advise that the claim be referred to the Exchequer Court of Canada with the right of appeal to the Privy Council under the following conditions:--
>
> 1. The Indians of British Columbia shall, by their Chiefs or representatives, in a binding way, agree, if the Court, or on appeal, the Privy Council, decides that they have a title to lands of the Province to surrender such title receiving from the Dominion benefits to be granted for extinguishment of title in accordance with past usage of the Crown in satisfying the Indian claim to unsur- rendered territories, and to accept the finding of the Royal Commission on Indian Affairs in British Columbia as approved by the Governments of the Dominion and the Province as a full allotment of Reserve lands to be ad- ministered for their benefit as part of the compensation.
>
> 2. That the Province of British Columbia by granting the said reserves as approved shall be held to have satisfied all claims of the Indians against the Province. That the remaining considerations shall be provided and the cost thereof borne by the Government of the Dominion of Canada.
>
> 3. That the Government of British Columbia shall be represented by counsel, that the Indians shall be represented by counsel nominated and paid by the Dominion.
>
> 4. That, in the event of the Court or the Privy Council deciding that the Indians have no title in the lands of the Province of British Columbia, the policy of the Dominion towards the Indians shall be governed by consideration of their interests and future development.
>
> All which is respectfully submitted for approval.

It would appear from this report that the Dominion Govern- ment on June 20, 1914, had passed an Order-in-Council which enabled the Nishga Indians to submit their aboriginal claims to a Canadian Court for adjudication thereon, but that the Indians had refused to do this and insisted upon their claims being referred to the Privy Council, a reference which the Government had no power or authority to direct. It also appears from the report that, instead of accepting the first recommendation of the Committee set out, *supra*, the Indians rejected it. The agitation of the

Indians continuing, in 1961 a Joint Committee of the Senate and the House of Commons of Canada looked into the matter of the Indian affairs and made its final report on July 8, 1961. Amongst other recommendations made by the Committee was the following:

> IX *Indian Claims Commission*
>
> An Indian Claims Commission should be established to hear the British Columbia and Oka Indian land questions and other matters, and that the cost of counsel to Indians for the two land questions specified above, be borne by the Federal Treasury.

No action was taken by Parliament on this report. These matters and circumstances show that there has been no recognition of the claim of the appellants to Indian title which has statutory force.

It is my opinion that the matter of the possession of Indian title by the Nishga Indians and of any rights thereunder and the claim of the appellants in this action is for Government, and not for the Courts of British Columbia. I think it is clear from the cases I have set out, *supra*, that whatever rights the Nishga Indians may think they have under Indian title are not enforceable in the Courts as they have not been recognized and incorporated in the municipal law. I think it necessarily fol- lows from those cases that this Court is without authority to pass upon the question whether these appellants possess Indian title. The claim for relief of the appellants is in negative form but it imports an affirmative, *i.e.*, that the appellants possess Indian title. To grant the declaration sought would be to do indirectly what the Courts cannot do directly.

Before concluding this portion of my judgment I wish to make reference to the reliance that was placed by the appellants of certain mention of Indian title and native rights and the extinguishment thereof in communications between the Duke of Newcastle, then Secretary of State for the Colonies, and Governor Douglas. The latter was then Governor of Vancouver Island and he was written to and wrote in that capacity. In *Warman v. Francis et al.* (1958), 20 D.L.R. (2d) 627 at p. 630, 43 M.P.R. 197, Anglin, J., rightly said:

> The nature of the interest in land once or now vested in a Tribe or Band of Indians differs throughout Canada, and each instance depends on its historical background: see the Annotation on Indian Lands in Canada by Cameron, 13 S.C.R. (Cameron Ed.) 45.

The Secretary of State for the Colonies and Governor Douglas were speaking only in terms of *policy*, and the situation as to the Indians in the Colony of Vancouver Island and the progress of settlement there was different to that prevailing in the Colony of British Columbia. Even *policy* of the sovereign authority was not necessarily the same in both colonies.

In my opinion and for the foregoing reasons the appeal must be dismissed.

In case I be wrong in this opinion I propose to discuss the claim of the appellants on the assumption that the Courts of British Columbia have authority to pass upon the matters involved in the prayer for relief. The question is "Has the ab- original title, otherwise known as the Indian title, of the appellants to their ancient tribal territory, been extinguished?"

Some historical facts must be related.

Sir Francis Drake, the first known British explorer, made a voyage of exploration to the Pacific coast in 1579. He reached a point in the vicinity of 48° north latitude. He may even have

sighted the southerly end of Vancouver Island, but there is no evidence that he set foot thereon. Having circled around, he proceeded south and made a landing in the vicinity of San Francisco where he placed a plaque and purported to take possession of the lands which he named New Albion. It ap- pears to be plain that the area inhabited by the appellants' ancestors could not have been a part of Drake's New Albion. The next known exploration of the Pacific coast by a subject of Great Britain was that of Captain James Cook in 1778. He followed the coastline north to Alaska calling at Nootka on the coast of Vancouver Island en route. In 1792 Captain George Vancouver circumnavigated Vancouver Island and formed a settlement at Friendly Cove on that island.

The first known explorer by land and the first white man known to have set foot in the western part of what is now the mainland of British Columbia was Alexander Mackenzie who reached the Pacific coast on July 22, 1792. Thereafter followed the land explorations to the mainland of British Columbia by Simon Fraser, David Thompson and McGillivray.

The Colony of Vancouver Island was established by the British Crown in 1849. James Douglas was appointed Governor in 1851. The Colony of British Columbia, being the mainland of what is now the Province, was established by the British Crown in 1858 and the same James Douglas was the first Governor of the Colony with full executive powers. Douglas remained Governor of both Colonies until 1864. On November 17, 1866, the two Colonies were united as one Colony under the British Crown and under the name of British Columbia. This Colony entered Confederation on July 20, 1871, and became the Province of British Columbia and part of the Dominion of Canada.

There is no doubt that the area of territory inhabited by the Nishga Indians and shown on the map, ex. 2, was, at least as early as 1858 owned and possessed by the British Crown and it was the sovereign authority until July 20, 1871, when the area became part of the Province of British Columbia. The fee resided in the Crown in right of the Colony until the last- named date and thereafter in the Crown in right of the Province of British Columbia, except only in respect of those lands transferred to the Dominion of Canada by the express provisions of the *B.N.A. Act, 1867*.

In the course of the hearing of this appeal the Court en- devoured to have counsel for the appellants state the nature and incidents of the "Indian title" which he contended was possessed by the Nishga Tribes, but he took the position that it was unnecessary for him to do so and that it was also unnecessary for the Court to determine the attributes of Indian title. He conceded first, that the Indian title of the Nishgas is no more than a burden on the legal title of the Crown; second, that it is a tribal or communal title; third, that the Indians have no power to make grants or other alienations of whatever title or rights they have, and fourth, that the sover- eign authority, *i.e.*, the Crown, may extinguish Indian title at will.

While I find it somewhat difficult to determine whether the alleged Indian title of the Nishgas has been extinguished unless I know what the nature of that title is and what are its incidents, for the purpose of this judgment I will assume, without deciding, that the tenure of the Nishgas was a personal and usufructuary right dependent upon the goodwill of the sovereign authority and that there has been all along, since at the latest the year 1858, vested in the Crown a substantial and paramount estate, underlying what has been frequently called the "Indian title", which became a *plenum dominium*, whenever that title was surrendered or otherwise extinguished. I

have taken these words from the judgment of Lord Watson in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at pp. 54-5. It cannot be said the nature and character of the Indian title of the Nishgas was any more substantial than this.

There can be no doubt that the sovereign authority in this case was, from 1858 up to July 20, 1871, the British Crown in right of the Colony of British Columbia, and that that sover- eign authority had the power to extinguish such Indian title at will. In *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339, Douglas, J., said at p. 347:

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

Reed, J., in *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, said at p. 279:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully dis- posed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

and at pp. 288-9:

> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.

As I understood his argument, appellants' counsel did not contend that compensation to Indians is a necessary condition of the right of the Crown to extinguish their Indian title, and so it is not necessary for me to consider this question. However, in case I am wrong about this, I wish to say that, whatever may be the situation in this regard in relation to natives in some other part of what was once the British Empire, in my opinion whatever rights the Indians in British Columbia possessed which have not been specifically recognized and confirmed by treaty or agreement of the Crown may be extinguished by the Crown without compensation and without the consent of the Indians, just as is the case in the United States. In the case at bar there is neither treaty nor agreement nor any statutory recognition of aboriginal rights in favour of the Nishga Indians.

Prior to the establishment of the territories of Vancouver Island and the mainland of British Columbia as British colonies they had been governed by the Hudson's Bay Company, of which company James Douglas was for some time the chief factor. It had been his responsibility to see to the orderly settlement of the lands and to control the native Indians, some tribes of which were of a warlike and aggressive nature. Douglas had to keep law and order. The responsibility continued to rest upon his shoulders after the establishment of the colonies and until executive councils were appointed, as in due course they were. Douglas had his difficulties with the Indians on Vancouver Island. In 1852 the white settlers with their children numbered only about

one thousand and they were surrounded by an Indian population of nearly thirty thousand. On the mainland he had like troubles but in aggravated form. The territory was much larger and the discovery of gold exacerbated the situation. Vancouver Island had been the scene of an influx of foreigners and it was fear of this that led to the setting up of the Colony of Vancouver Island. On the mainland conditions in this regard were worse. Gold was first discovered on the Fraser River and this resulted in a great number of Americans from the California gold fields entering the territory. They were men who had "'a hankering in their minds after annexation to the United States" and they did not have the same respect for the native Indians as did the British colonists. The first white child was born at Fort Langley on the mainland on November 1, 1857. The precious metal was the lure that brought the Kanakas from Hawaii in 1858, and it is said that in that year there were ten thousand men engaged in gold mining in the Colony of British Columbia. In the years 1859 and 1860 the mining population was being added to by small parties of men who had traveled overland from Eastern Canada. That was the commencement of a slow but steady stream of immigrants from beyond the Rocky Mountains. See Margaret Ormsby, "British Columbia", p. 145, and Cicely Lyons, "Salmon, our Heritage", pp. 80, 81, 82, 85. In the late fifties and early sixties roads were being built into the mining areas. Frequent clashes with the Indians occurred. As immigration increased Douglas became concerned about the danger of Indian warfare spreading into the interior from Washington territory and alarmed about the great hazard of disrespect for Imperial rights and law and order. The search for gold spread further and further north and east. White settlers were spreading out and some were encroaching upon the village lands and other occupied lands of the Indians. The need for protection to the Indians and protection to the settlers against the Indians increased immeasurably. Such protection and an orderly system of settlement became of paramount consideration. Douglas had these matters very much in mind in the year 1858 and in succeeding years. It is in the light of them that the dispatches that passed between him and the Secretaries of State for the Colonies, and Douglas' actions, which I shall shortly refer to, must be interpreted. It appears to me that the decision was arrived at that, in order to provide the necessary protection to the Indians and to further the orderly settlement of the territory, lands should be set apart for the use of the Indians in various parts of the territory and the remainder of the lands should be opened up for settlement, and that this was the policy that was followed. I think this policy necessarily involved the extinguishment of Indian title.

Exhibit 11A contains a collection of dispatches between the Secretary of State for the Colonies and Governor Douglas and letters relating to the establishment of some of the Indian Reserves and complaints of Indians and of white settlers. This exhibit comes from the archives of what is now the Province of British Columbia. I shall refer to some of these documents.

The following is an extract from a dispatch from Sir E. B. Lytton, the Colonial Secretary, to Governor Douglas dated July 31, 1858:

> 3. I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. *This question is of so local a character that it must be solved by your knowledge and experience*, and I commit it to you, in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest. Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire

of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of civilization among the natives.

(The italics are mine.) On September 2, 1858, Sir E. B. Lytton sent another dispatch to the Governor as follows:

(No. 12.)

Downing Street,

September 2nd, 1858.

SIR,--In my Despatch of the 31st July, No. 6, I directed your attention to the treatment of the Native Indians in the country which it has so recently been decided to establish as a British Colony. I regard that subject as one which demands your prompt and careful consideration. I now transmit to you the copy of a letter from the Aborigines Protection Society, invoking the protection of Her Majesty's Government on behalf of these people. I readily repeat my earnest injunctions to you to endeavour to secure this object. *At the same time I beg you to observe that I must not be understood as adopting the views of the Society as to the means by which this may be best accomplished.*

(The italics are mine.) The letter from the Aborigines Protection Society mentioned in this dispatch dealt with the rights claimed by the Indians, their welfare and the danger of a collision between them and the settlers, as well as the hostility of the Indians towards the Americans who were "pouring into Fraser and Thompson Rivers by thousands". The letter went on to suggest "that the native title should be recognized in British Columbia, and that some reasonable adjustment of their claims should be made by the British Government".

On receipt of the dispatch of September 2, 1858, Governor Douglas replied to the Colonial Secretary on November 5, 1858, as follows:

(No. 17.) Victoria, Vancouver's Island,

November 5, 1858.

SIR,--I have the honour to acknowledge the receipt of your Despatch, No. 12, of the 2nd of September last, transmitting to me a copy of a letter from the Aborigines Protection Society, invoking the protection of Her Majesty's Government on behalf of those people.

2. While you do not wish to be understood as adopting the views of the society as to the means by which that may be best accomplished, you express a wish that the subject should have my prompt and careful consideration, and I shall not fail to give the fullest effect to your instructions on that head, as soon as the present pressure of business has somewhat abated. I may, however, remark that the native Indian tribes are protected in all their interests to the utmost extent of our present means. I have, &c.,

On December 30, 1858, the Colonial Secretary sent the following dispatch to Governor Douglas:

(No. 62.) Downing Street,

December 30, 1858.

SIR,--With reference to my Despatches of this day's date, on the present condition of British Columbia, I wish to add a few obser- vations on the policy to be adopted towards the Indian tribes.

The success that has attended your transactions with these tribes induces me to inquire if you think it might be feasible to settle them permanently in villages: with such settlement civilization at once begins. Law and Religion would become naturally introduced amongst the red men, and contribute to their own security

against the aggressions of immigrants, and while by indirect taxation on the additional articles they would purchase they would contribute to the Colonial Revenue, some light and simple form of direct taxation, the proceeds of which would be expended strictly and solely on their own wants and improvements, might obtain their consent.

Sir George Grey has thus at the Cape been recently enabled to locate the Kaffirs in villages, and from that measure, if succeeding Governors carry out, with judgment and good fortune, the designs originated in the thoughtful policy of that vigorous and accomplished Governor, I trust that the posterity of those long barbarous populations may date their entrance into the pale of civilized life.

(The italics are mine.) Governor Douglas replied on March 14, 1859, and I set out extracts from that reply:

(No. 114.) Victoria, Vancouver's Island,

March 14, 1859.

SIR,--I have the honour to acknowledge the receipt of your Despatch, No. 62, of the 30th December last, containing many valuable observations on the policy to be observed towards the Indian tribes of British Columbia, and moreover your instructions directing me to inform you if I think it would be feasible to settle those tribes permanently in villages; suggesting in reference to that measure, that with such settlement civilization would at once begin; that law and religion would become naturally introduced among them, and contribute to their security against the aggressions of immigrants; that through indirect taxation, on the addi tional articles they would purchase, they would contribute to the Colonial Revenue, and with their own consent, some light and simple form of taxation might be imposed, the proceeds of which would be expended strictly and solely on their own wants and improvements.

2. *I have much pleasure in adding, with unhesitating confidence, that I conceive the proposed plan to be at once feasible, and also the only plan which promises to result in the moral elevation of the native Indian races, in rescuing them from degradation, and protecting them from oppression and rapid decay*.

It will, at the same time, have the effect of saving the Colony from the numberless evils which naturally follow in the train of every course of national injustice, and from having the native Indian tribes arrayed in vindictive warfare against the white settlements.

3. As friends and allies the native races are capable of rendering the most valuable assistance to the Colony, while their enmity would entail on the settlers a greater amount of wretchedness and physical suffering, and more seriously retard the growth and material development of the Colony, than any other calamity to which, in the ordinary course of events, it would be exposed.

4. In my Despatch No. 4, of the 9th of February last, on the affairs of Vancouver's Island, transmitting my correspondence with the House of Assembly up to that date, there is a message made to the House on the 5th February, 1859, respecting the course I propose to adopt in the disposal and management of the land reserved for the benefit of the Indian population at this place, the plan proposed being briefly thus:--that the Indians should be established on that reserve, and the remaining unoccupied land should be let out on leases at an annual rent to the highest bidder, and that the whole proceeds arising from such leases should be applied to the exclusive benefit of the Indians.

5. The advantages of that arrangement are obvious. An amount of capital would thereby be created, equal perhaps to the sum re- quired for effecting the settlement of the Indians; and any surplus funds remaining over that outlay, it is proposed to devote to the formation and support of schools, and of a clergyman to superintend their moral and religious training.

6. I feel much confidence in the operation of this simple and practical scheme, and provided we succeed in devising means of rendering the Indian as comfortable and independent in regard to physical wants in his improved condition, as he was when a wandering denizen of the forest, there can be little doubt of the ultimate success of the experiment.

7. The support of the Indians will thus, wherever land is valuable, be a matter of easy accomplishment, and in districts where the white population is small, and the land unproductive, the Indians may be left almost wholly to their own resources, and, as a joint means of earning their livelihood, to pursue unmolested their favorite calling of fishermen and hunters.

8. Anticipatory reserves of land for the benefit and support of the Indian races will be made for that purpose in all the districts of British Columbia inhabited by native tribes. Those reserves should in all cases include their cultivated fields and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land.

9. In forming settlements of natives, I should propose, both from a principle of justice to the state and out of regard to the well- being of the Indians themselves, to make such settlements entirely self-supporting, trusting for the means of doing so, to the voluntary contributions in labour or money of the natives themselves; and secondly, to the proceeds of the sale or lease of a part of the land reserved, which might be so disposed of, and applied towards the liquidation of the preliminary expenses of the settlement.

. . . . .

12. I would, for example, propose that every family should have a distinct portion of the reserved land assigned for their use, and to be cultivated by their own labour, giving them however, for the present, no power to sell or otherwise alienate the land; that they should be taught to regard that land as their inheritance; that the desire should be encouraged and fostered in their minds of adding to their possessions, and devoting their earnings to the purchase of property apart from the reserve, which would be left entirely at their own disposal and control; that they should in all respects be treated as rational beings, capable of acting and thinking for themselves; and lastly, that they should be placed under proper moral and religious training, and left, under the protection of the laws, to provide for their own maintenance and support.

13. Having touched thus briefly on the prominent features of the system, respecting which you requested my opinion, and trusting that my remarks may convey to you the information you desired, and may not be deemed irrelevant.

(The italics are mine.) This dispatch was answered by the Colonial Secretary on May 20, 1859, in the following words:

(No. 67.) Downing Street,

May 20, 1859.

SIR,--I have to acknowledge the receipt of your Despatch, No. 114, of the 14th of March, on the subject of the policy to be observed towards the Indian tribes, and containing your opinion as to the feasibility of locating the Indians in native villages, with a view to their protection and civilization.

I am glad to find that your sentiments respecting the treatment of the native races are so much in accordance with my own, and I trust that your endeavors to conciliate and promote the welfare of the Indians will be followed by all persons whom circumstances may bring into contact with them. But whilst making ample provision under the arrangements proposed for the future sustenance and improvement of the native tribes, you will, I am persuaded, bear in mind the importance of exercising due care in laying out and defining the several reserves, so as to avoid checking at a future day the progress of the white colonists.

In the meantime, on April 11, 1859, the Colonial Secretary had written the Governor. In his dispatch he said:

In the case of the Indians of Vancouver Island and British Columbia, Her Majesty's Government earnestly wish that when the ad- vancing requirements of colonization press upon lands occupied by members of that race, measures of liberality and justice may be adopted for compensating them for the surrender of the

territory which they have been taught to regard as their own.

In so far as the Colony of British Columbia was concerned, a policy of compensating the Indians by payment of moneys for "the surrender of the territory which they have been taught to regard as their own" had not been and was not thereafter adopted. It is of interest to note what Governor Douglas said in his dispatch to the Colonial Secretary of March 25, 1861, dealing with affairs of the Colony of Vancouver Island. I quote that dispatch in full:

(No. 24.) Victoria, 25th March, 1861.

MY LORD DUKE,--I have the honour of transmitting a petition from the House of Assembly of Vancouver Island to your Grace, praying for the aid of Her Majesty's Government in extinguishing the Indian title to the public lands in this Colony; and setting forth, with much force and truth, the evils that may arise from the neglect of that very necessary precaution.

2. As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country.

3. Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case prior to the settlement of any district; but since that time in consequence of the termination of the Hudson's Bay Com- pany's Charter, and the want of funds, it has not been in my power to continue it. Your Grace must, indeed, be well aware that I have, since then, had the utmost difficulty in raising money enough to defray the most indispensable wants of Government.

4. All the settled districts of the Colony, with the exception of Cowichan, Chemainus, and Barclay Sound, have been already bought from the Indians, at a cost in no case exceeding £2.10s. sterling for each family. As the land has, since then, increased in value, the expense would be relatively somewhat greater now, but I think that their claims might be satisfied with a payment of £3 to each family; so that taking the native population of those districts at 1,000 families, the sum of £3,000 would meet the whole charge.

5. It would be improper to conceal from your Grace the importance of carrying that vital measure into effect without delay.

6. I will not occupy your Grace's time by any attempt to investigate the opinion expressed by the House of Assembly, as to the liability of the Imperial Government for all expenses connected with the purchase of the claims of the aborigines to the public land, which simply amounts to this, that the expense would, in the first instance, be paid by the Imperial Government, and charged to the account of proceeds arising from the sales of public land. The land itself would, therefore, be ultimately made to bear the charge.

7. It is the practical question as to the means of raising the money, that at this moment more seriously engages my attention. The Colony being already severely taxed for the support of its own Government, could not afford to pay that additional sum; but the difficulty may be surmounted by means of an advance from the Imperial Govern- ment to the extent of £3,000, to be eventually repaid out of the Colonial Land Fund.

8. I would, in fact, strongly recommend that course to your Grace's attention, as specially calculated to extricate the Colony from existing difficulties, without putting the Mother Country to a serious expense; and I shall carefully attend to the repayment of the sum advanced, in full, as soon as the Land Fund recovers in some measure from the depression caused by the delay in Her Majesty's Government has experienced in effecting a final arrange- ment with the Hudson's Bay Company for the reconveyance of the Colony, as there is little doubt when our new system of finance comes fully into operation that the revenue will be fully adequate to the expenditure of the Colony.

The reply from the Colonial Secretary on October 19, 1861, was as follows:

> (No. 73.) Downing Street,
>
> 19th October, 1861
>
> SIR,--I have had under my consideration your despatch No. 24, of the 25th of March last, transmitting an Address from the House of Assembly of Vancouver Island, in which they pray for the assistance of Her Majesty's Government in extinguishing the Indian title to the public lands in the Colony, and set forth the evils that may result from a neglect of this precaution.
>
> I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island; but the acquisition of the title is a purely colonial interest, and the Legislature must not entertain any expectation that the British taxpayer will be burthened to supply the funds or British credit pledged for the purpose. I would earnestly recommend therefore to the House of Assembly, that they should enable you to procure the requisite means, but if they should not think proper to do so, Her Majesty's Government cannot undertake to supply the money requisite for an object which, whilst it is essential to the interests of the people of Vancouver Island, is at the same time purely Colonial in its character, and trifling in the charge that it would entail.

This reply made it plain that the British Government was not prepared to supply the necessary funds "trifling in the charge that it would entail". Doubtless this put a damper on any possibility there might have been of a change in policy in the Colony of British Columbia and of compensating the Indians in money for a surrender of their claims based on aboriginal or Indian title.

I now come to a series of Proclamations by James Douglas as Governor of the Colony of British Columbia.

The first Proclamation is dated December 2, 1858. Excerpts therefrom are as follows:

> PROCLAMATION, having the Force of Law to enable the Governor of British Columbia to convey Crown Lands Sold within the said Colony.
>
> . . . . .
>
> Now, therefore, I, JAMES DOUGLAS, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, ordain and enact, that on and after the day of the date of this proclamation, it shall be lawful for the Governor, for the time being of the said Colony, by any instrument in print or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonging to the Crown in the said Colony; and every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument in the lands therein described.

As all the land belonged to the Crown this Proclamation covered the whole of the territory.

The second Proclamation is dated February 14, 1859. Excerpts therefrom are as follows:

> WHEREAS, it is expedient to publish for general information, the method to be pursued with respect to the alienation and possession of agricultural lands, and of lands proposed for the sites of towns in British Columbia, and with reference also to the places for levying shipping and customs duties, and for establishing a capital and port of entry in the said Colony.
>
> . . . . .
>
> 1.--*All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.*

2.-- The price of lands, not being intended for the sites of Towns, and not being reputed to be Mineral lands, shall be ten shillings per acre, payable one half in cash at the time of the sale, and the other half at the end of two years from such sale. Provided, that under special circumstances some other price, or some other terms of payment may from time to time be specially announced for particular localities.

3.--It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown Lands, and for such purposes as the Executive shall deem advisable.

4.--Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, as soon as the same shall have been surveyed and made ready for sale. Due notice will be given of all such sales. Notice at the same time will be given of the upset price and terms of payment when they vary from those above stated, and also of the rights reserved (if any) for public convenience.

[Italics added.]

The third Proclamation is dated January 4, 1860. I quote excerpts:

WHEREAS, by virtue of an Act of Parliament made and passed in the 21st and 22nd years of the Reign of Her Most Gracious Majesty the Queen, and by a Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, in conformity therewith I, JAMES DOUGLAS, Governor of the Colony of British Columbia, have been authorized by Proclamation issued under the Public Seal of the said Colony, to make laws, institutions, and ordinances, for the peace and good government of the same, and

WHEREAS, it is expedient, pending the operation of the survey of agricultural lands in British Columbia, to provide means whereby unsurveyed agricultural lands may be lawfully acquired by pre- emption in British Columbia by British subjects, and in certain cases to provide for the sale of unsurveyed agricultural land in British Columbia by private contract;

Now, therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, order and enact.

1. That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her Successors, may acquire unoccupied and unreserved, and unsurveyed Crown land in British Columbia (not being the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or settlement) in fee simple, under the fol- lowing conditions:

. . . . .

3. Whenever the Government survey shall extend to the land claimed, the claimant who has recorded his claim as aforesaid, or his heirs or in case of the grant of certificate of improvement hereinafter mentioned, the assigns of such claimant shall, if he or they shall have been in continuous occupation of the same land from the date of the record aforesaid, be entitled to purchase the land so pre-empted at such rate as may for the time being be fixed by the Government of British Columbia, not exceeding the sum of 10s. per acre.

. . . . .

13. Whenever a person in occupation at the time of record aforesaid, shall have recorded as aforesaid, and he, his heirs or assigns, shall have continued in permanent occupation of land pre-empted, or of land purchased as aforesaid, he or they may, save as hereinafter mentioned, bring ejectment or trespass against any intruder upon the land so pre-empted or purchased, to the same extent as if he or they were seized of the legal estate in possession in the land so pre-empted or purchased.

14. Nothing herein contained shall be construed as giving a right to any claimant to exclude free miners from searching for any of the precious minerals, or working the same upon the conditions aforesaid.

The fourth Proclamation is dated January 20, 1860. Excerpts therefrom are as follows:

And Whereas, it is expedient that town lots, suburban lots, and surveyed agricultural lands in British Columbia, which have been, or which hereafter may be offered for sale, at public auction, and remain unsold, should be sold by private contract

Now therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid do proclaim, order, and enact, as follows:--

The Chief Commissioner of Lands and Works for the time being, for British Columbia, and all Magistrates, Gold Commissioners, and Assistant Gold Commissioners, by the said Chief Commissioner authorized in writing in that behalf, may sell by private contract any of the lots and lands, hereinafter mentioned, at the prices, and on the terms hereinafter respectively stated--viz.

a. Town and suburban lots which have been, or hereafter may be offered for sale at public auction, and remain unsold, at the upset price, and on the terms at and on which the same were offered for sale at such auction.

b. Agricultural lands surveyed by the Government Surveyor, which may, or shall have been offered for sale at public auction, and remain unsold, at ten shillings per acre, payable one half in cash at the time of sale, and the other half at the expiration of two years from such sale.

On January 19, 1861, there was a Proclamation which in effect amended the fourth Proclamation by further detail of the methods of land pre-emption.

I now quote excerpts from the sixth Proclamation which was dated January 19, 1861:

By His Excellency JAMES DOUGLAS, Companion of the Most Honour- able Order of the Bath, Governor and Commander-in-Chief of British Columbia.

. . . . .

And whereas I have been empowered by Her Majesty's Government to lower the price of Country Lands in British Columbia, in all cases, to the sum of four shillings and two pence (4s. 2d.) per acre.

Now, therefore, I do hereby declare, proclaim and enact as follows:--

I. So much of the said Proclamation of the 20th day of January, 1860, as fixed the price of surveyed agricultural land at ten shillings per acre is hereby repealed.

II. The price of all unsurveyed country land in British Columbia, whether acquired by pre-emption or purchase under the Proclamation dated the 4th day of January, 1860, shall be four shillings and two pence (4s. 2d.) per acre.

The seventh Proclamation was dated May 28, 1861.I quote from it:

Whereas by the Country Land Act, 1861, the price of all unsurveyed Country Land in British Columbia whether acquired by Pre-emption or Purchase under the Proclamation dated the 4th day of January, 1860, was fixed at four shillings and two pence per acre, and

Whereas it is inexpedient that any person other than a bona fide settler should take up land under the said Proclamation, and with- out the occupation and improvement necessary under the said Proclamation to complete his Title as a Pre-emptor.

Now therefore I do hereby declare, proclaim, and enact as follows:--

That all persons who may after the date hereof purchase land under the provisions of the Proclamation of the 4th day of January, 1860, or the Country Land Act, 1861, shall hold the same under precisely the same terms and conditions of occupation and improvement as are mentioned in the said Proclamation of the 4th

day of January, 1860, with regard to lands pre-empted without purchase.

No person shall be entitled to hold by Pre-emption more than 160 acres under the said Proclamation, or any of them, at one time.

If any person, being already registered as a Pre-emptor, pre-empt any other land under the provisions of the said proclamation, the land so previously pre-empted shall *ipso facto* be forfeited and shall with all improvements made thereon be open to settlement by any other person.

This Proclamation may on all occasions be cited as the "Pre- emption Purchase Act, 1861."

The eighth Proclamation was dated August 27, 1861. Excerpts are as follows:

And whereas it is expedient to amend and consolidate the laws affecting the settlement of unsurveyed Crown Lands in British Columbia;

. . . . .

III. That from and after the date hereof, British subjects and aliens who shall take the Oath of Allegiance to Her Majesty and Her Successors, may acquire the right to hold and purchase in fee simple, unoccupied and unsurveyed and unreserved Crown Lands in British Columbia, not being the site of an existent or proposed Town, or auriferous land available for mining purposes, or an Indian Reserve or Settlement, under the following conditions.

. . . . .

XXV. Nothing herein contained shall be construed as giving a right to any claimant to exclude free miners from searching for any of the precious minerals or working the same, upon the conditions aforesaid.

The ninth Proclamation was dated May 27, 1863. I quote excerpts:

And whereas it is desirable for the protection of Miners, and others searching for the precious metals, to retain in possession of the Crown power to prevent such Miners or other persons from being obstructed or hindered by the Claims, and exactions of persons holding land under the provisions of the Pre-emption Consolidation Act passed on the 27th day of August, 1861;

Now, therefore, I do hereby declare, proclaim, and enact as follows:

I. It shall be lawful for the Governor, for the time being of British Columbia from time to time, and at any time hereafter by any writing under his hand, published in the Government Gazette, to erect any portion of the Colony into a Mining District, and to give to such District a distinguishing name, and to define the limits and boundaries thereof, and also again to abolish or reconstruct any such District, and from time to time to alter and vary such limits and boundaries.

Then followed a number of Ordinances enacted by the Governor by and with the consent of the Legislative Council of British Columbia. On April 11, 1865, an Ordinance for the acquisition of land was passed. I set out excerpts:

3. All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee.

4. The upset price of surveyed lands not being reserved for the sites of towns or the suburbs thereof, and not being reputed to be mineral lands, shall be four shillings and two pence per acre.

5. The Governor shall at any time, and for such purposes as he may deem advisable, reserve any lands that may not have been either sold or legally pre-empted.

6. Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, after the same shall have been surveyed and made ready for sale. Due notice shall be given of all such sales; notice at the same time shall be given of the upset price and terms of payment when they vary from those above stated, and also of the rights specially reserved (if any) for public convenience.

. . . . .

9. Unless otherwise specially announced at the time of sale, the conveyance of the land shall include all trees and all mines, and minerals within and under the same (except mines of gold and silver).

. . . . .

12. From and after the date hereof British subjects, and aliens who shall take the oath of allegiance to Her Majesty, Her Heirs and Successors, may acquire the right to pre-empt and hold in fee simple unoccupied and unsurveyed and unreserved Crown Lands not being the site of an existent or proposed town, or auriferous land available for gold or silver mining purposes, or an Indian reserve or settlement, under the following conditions:

. . . . .

51. Leases of any extent of unoccupied and unsurveyed land may be granted for pastoral purposes, by the Governor or any Officer duly authorized by him in that behalf, to any person or persons whomsoever, being *bona fide* pre-emptors or purchasers of land, at such rent as such Governor or Officer shall deem expedient. But every such lease or pastoral lands shall, among other things contain a condition making such land liable to pre-emption, reserve, and purchase by any persons whosoever, at any time during the term thereof, without compensation, save by a proportionate deduction of rent. And to a further condition that the lessee shall, within six months stock the property demised in such proportion of animals to the one hundred acres, as shall be specified by the Stipendiary Magistrate in that behalf.

On March 31, 1866, an Ordinance to define the law regulating the acquisition of land was passed. The following is an excerpt from this Ordinance:

I. The right conferred under Clause 12 of the Land Ordinance, 1865, on British Subjects, or aliens who shall take the oath of al- legiance, of pre-empting and holding in fee simple unoccupied and unsurveyed and unreserved Crown Lands in British Columbia, shall not (without the special permission thereto of the Governor first had in writing) extend to or be deemed to have been conferred on Companies whether Chartered, Incorporated, or otherwise, or with- out the permission aforesaid, to or on any of the Aborigines of this Colony or the Territories neighbouring thereto.

The *Pre-emption Payment Ordinance, 1869*, was passed on March 10, 1869. It was as follows:

I. The purchase money for Pre-emption Claims, and the balance of purchase money upon Pre-emption Purchase Claims, held under any of the Laws heretofore, or for the time being, regulating the acquisition and tenure of Pre-emption Claims in that part of the Colony formerly known as the Colony of British Columbia and its Dependencies, shall be, and be deemed to have been, and to be due and payable to Her Majesty, Her Heirs and Successors, as part of the General Revenue of the Colony, as and from the date of the service of an application, signed by the Chief Commissioner of Lands and Works and Surveyor General, upon the person or persons to be affected thereby, and notifying the completion of the Government Survey of the Land specified in such application, and calling upon such person or persons for the payment of the amount for the time being due and payable as aforesaid in respect of such Land.

The last Ordinance to which I need refer is one to amend and consolidate the laws affecting Crown Lands in British Co- lumbia. It was passed on June 1, 1870. I set out some excerpts:

2. The following Acts, Ordinances, and Proclamations relating to the disposal and regulation of the Crown

Lands of the Colony are hereby repealed:--

An Act dated February 14th, 1859:

An Act dated January 4th, 1860:

An Act dated January 20th, 1860:

The "Pre-emption Amendment Act, 1861:"

The "Country Land Act, 1861: "

The "Pre-emption Purchase Act, 1861:"

The "Pre-emption Consolidation Act, 1861:"

The "Mining District Act, 1863:"

The "Land Ordinance, 1865: "

The "Pre-emption Ordinance, 1866:"

The "Pre-emption Payment Ordinance, 1869:" and

The "Vancouver Island Land Proclamation, 1862:"

Such repeal shall not prejudice or affect any rights acquired or payments due, or forfeitures or penalties incurred prior to the passing of this Ordinance in respect of any land in this Colony.

PRE-EMPTION

3. From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent in that portion of the Colony situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Colony. Provided that such right of pre- emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect.

. . . . .

42. The Governor shall at any time, and for such purposes as he may deem advisable, reserve, by notice published in the Govern- ment Gazette, or in any newspaper of the Colony, any lands that may not have been either sold or legally pre-empted.

As a result of these pieces of legislation the Indians of the Colony of British Columbia became in law trespassers on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves for the use of Indians.

At this point in my judgment I would express my agreement with the words of Gould, J., which appear in his reasons for judgment. He said: [8 D.L.R. (3d) 59 at pp. 81-2, 71 W.W.R. 81]:

The various pieces of legislation referred to above are connected, and in many instances contain references *inter se*, especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were ap- propriate. All thirteen reveal a

> unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

One of the Terms of Union [see R.S.B.C. 1960, vol. 5, p. 5223] with the Dominion of Canada was also, in my view, in- consistent with the recognition and continued existence of Indian title. I refer to art. 11 which is as follows:

> 11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and, further, to secure the completion of such railway within ten years from the date of the Union.
>
> And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia (not to exceed, however, twenty (20) miles on each side of the said line), as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-west Territory and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

There was no reservation of Indian rights in respect of the railway belt to be conveyed to the Dominion Government.

It is true, as the appellants have submitted, that nowhere can one find express words extinguishing Indian title but "actions speak louder than words" and in my opinion the policy of the Governor and the Executive Council of British Columbia and the execution of that policy was such that, if Indian title existed, extinguishment was effected by it. Reserves of land for the Indians were set up generally at places where the Indians had their villages and cultivated lands and where they caught their fish -- their main food. The correspondence between those who were responsible for this work and which appears in ex. 11A shows that, at least in most cases, the location and boundaries of the reserves were arrived at in consultation with the local Indians. The remainder of the unoccupied lands were thrown open for settlement. Thus complete dominion over the whole of the lands in the Colony of British Columbia adverse to any tenure of the Indians under Indian title was exercised. The fact is that the white settle- ment of the lands which was the object of the Crown was inconsistent with the maintenance of whatever rights the Indians thought they had.

The 13th article of the Terms of Union between the Colony of British Columbia and the Dominion of Canada agreed to in 1871 read as follows:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and

> benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government; and in case of disagreement between the two Govern- ments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

These terms were duly carried out. The Dominion Government took over the trusteeship of the reserves which had been set aside for the Indians and as time went on additional reserves were established. We were told that there are now in British Columbia a great number of such reserves of which about thirty are in the territory inhabited by the Nishga Indians and are held in trust for them.

In November, 1874, the Dominion Government interested itself in the "Indian Land question in the Province of British Columbia" and made representations to the Government of the Province. As a result the latter requested the Honourable the Attorney-General of the Province, Mr. Geo. A. Walkem, to prepare and submit a memorandum on Indian affairs directed to a consideration of the representations of the Dominion Government. That memorandum, dated August 17, 1875, was prepared and submitted to the Lieutenant-Governor in Council. In the provincial archives is a "Report of the Government of British Columbia on the subject of Indian Reserves" which commences with the following:

> Copy of a Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 18th day of August, 1875.
>
> The Committee of Council concur with the statements and recommendations contained in the Memorandum of the Honourable the Attorney-General, on the subject of Indian Affairs, dated 17th August, 1875, and advise that it be adopted as the expression of the views of this Government as to the best method of bringing about a settlement of the Indian Land Question.
>
> Certified,
>
> (Signed) W. J. ARMSTRONG,
> Clerk of the Executive Council.

Then follows Mr. Walkem's memorandum. I do not think any good purpose would be served in quoting extensively from the memorandum. It is sufficient to say that Mr. Walkem's recommendations fall far short of the recognition of any form of Indian title. I desire, however, to set out the following excerpt from the memorandum and to refer to the Appendix B mentioned therein:

> Since writing the above, the undersigned has fortunately obtained a copy of a despatch, addressed in 1870, by the Governor of British Columbia to the Secretary of State for the Colonies, respecting the Colonial Indian Policy. (Appendix B.) This document strongly and ably bears out many of the views and opinions above expressed.

Appendix B is as follows:

Governor Musgrave to Earl Granville.

GOVERNMENT HOUSE, BRITISH COLUMBIA,
29th January, 1870.

MY LORD,--I have had the honour to receive your lordship's des- patch, No. 104, of the 15th November, 1869 transmitting copy of a letter from the Secretary of the Aborigines' Protection Society, relative to the conditions of the Indians in Vancouver Island.

2. If the statements made in Mr. Sebright Green's letter, for- warded to your lordship by the Society, were statements of facts, they would be a matter of great reproach to the Colonial Govern- ment; but I have satisfied myself that his representations are in some cases quite incorrect, and in others greatly exaggerated. As the circumstances alleged and referred to by Mr. Green were antecedent to my acquaintance with the Colony, I referred his letter to Mr. Trutch; the Commissioner of Lands and Works and Surveyor-General, for a report; and I now enclose a memorandum from that officer upon the subject. From other sources of information I have every reason to believe Mr. Trutch's statements to be correct.

3. It is very difficult, if not impossible, to place Indian tribes exactly in the same position as more civilized races, but they do, substantially, enjoy equal protection from the Government; and I believe that those of them who are most in contact with the white population quite understand that this is the case. Complaints are frequently brought by the Indians in the neighbourhood of Victoria before the Police Magistrate, against each other. And since my arrival here, Indians have been the principal witnesses in trials for murder.

I have, &c.,

(Signed) A. MUSGRAVE.

Mr. Trutch's memorandum contained the following:

The Indians have, in fact, been held to be the special wards of the Crown, and in the exercise of this guardianship Government has, in all cases where it has been desirable for the interests of the Indians, set apart such portions of the Crown lands as were deemed proportionate to, and amply sufficient for, the requirements of each tribe; and these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon.

But the title of the Indians in the fee of the public lands, or of any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied. In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing to each tribe, as the progress of the settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agricultural and pastoral purposes.

As is stated in Governor Musgrave's dispatch of January 29, 1870, Mr. Trutch was the Commissioner of Lands and Works and Surveyor-General of the Colony of British Columbia. When that Colony entered Confederation on July 20, 1871, he was appointed its first Lieutenant-Governor. He had served as the Colony's chief negotiator, both in Ottawa and London, of the terms of entry into Confederation. He had resided in the Colony since it was established in 1858 and he was well acquainted with the hierarchy of Government. He well understood the nature of the dealings with the Indians and the policy of the Governor and the Legislative Council regarding the claims of the Indians. No one was better qualified to give evidence on this subject.

The appellants submitted that the several Proclamations of Governor Douglas mentioned, *supra,* are invalid in law as being contrary to the instructions received by him from the Secretary of

State for the Colonies. I am unable to agree that the Governor in making the Proclamations acted contrary to his instructions. As I read the instructions he was given a very wide discretion, and in fact he adopted the suggestion contained in the dispatch of the Secretary of State for the Colonies of December 30, 1858. In any event, s. 4 of the *Colonial Laws Validity Act*, 1865, (U.K.), c. 63, is conclusive against this sub- mission of the appellants. The section is as follows:

> 4. No colonial law, passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument.

In my opinion the answer to the question "Has the ab- original title, otherwise known as the Indian title, of the appellants to their ancient tribal territory been extinguished?" is "If it ever existed, it has been extinguished."

Having arrived at these conclusions it is unnecessary for me to consider the other interesting points raised by counsel for the respondent. I would dismiss the appeal.

MACLEAN, J.A.:--The plaintiffs are chiefs of an Indian tribe called the Nishgas and have their home in the Nass River valley in the north-west part of the Province. It is admitted by the Attorney-General that the plaintiffs are descendants of an aboriginal people who have occupied the area delineated on ex. 2 since time immemorial, and that the ancestors of the plaintiffs obtained a living from the lands and waters shown on ex. 2 since time immemorial. The area delineated on ex. 2 is said to be in excess of 4,000 square miles in area.

The plaintiffs have sued on their own behalf and on behalf of the other members of the tribe for a declaration:

> . . . that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory hereinbefore de- scribed, has never been lawfully extinguished.

There is an assumption inherent in the form of the plain- tiffs' prayer for relief that (1) an aboriginal or "Indian title" at one time existed, and (2) that it has never been extinguished.

The Attorney-General denies that an enforceable aboriginal title ever existed, and alternatively he says that if it did that it has been extinguished by competent pre-Confederation legislation (of the Colony of British Columbia). Also the Attorney- General urges preliminary objections to the plaintiffs' claim, the allowance of any one of which, if successful, would defeat the claim.

It is common ground that no treaty or contract has ever existed between this tribe of Indians and the Government of British Columbia, that is of the old Colony of British Columbia or the present Province. Further, there has never been any treaty or contract between the Dominion Government and the Indians with regard to this matter of "Indian title" attaching to the lands in question. The plaintiffs do, however, rely on a Proclamation of George III issued on October 7, 1763 (follow- ing the Treaty of Paris) [see R.S.C. 1952, vol. VI, p. 6127], dealing with "the several nations or tribes of Indians with whom We are connected". The Attorney-General

submits that the Proclamation does not apply to the plaintiffs' claim as the territory in question was *terra incognita* at the time of the Proclamation.

The learned trial Judge dismissed [8 D.L.R. (3d) 59, 71 W.W.R. 81] the plaintiffs' claim and it is from this decision that the plaintiffs appeal.

I turn now to a consideration of the nature of the "Indian title" which the appellants ask this Court to recognize by a declaratory judgment.

Lord Watson, in giving the judgment of the Privy Council in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at pp. 54-5, in referring to King George III's Proclamation of October 7, 1763, said:

> It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, under- lying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

It is conceded by the appellants (and I think properly) that the "Indian title" is one that is the property of a group of individuals, in this case a tribe, and that no effective transfer can be made of the so-called title except to the Sovereign.

It is a matter of some significance that although counsel for the appellants was invited by the Court to define the "Indian title" which he claimed to exist or that once existed, he declined to do so. It is clear from an examination of the authorities that the nature of what is often called aboriginal title or "Indian title" varies in different jurisdictions. It is interesting to examine the decisions of the Courts of various jurisdictions touching this matter of the so-called "Indian title".

One of the early cases in which the "Indian title" was considered was in the case of *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543, a judgment of the well- known jurist Chief Justice Marshall. It was an action of ejectment for lands in the State and District of Illinois claimed by the plaintiffs under a purchase from the Indians, and by the defendant under a grant from the United States. The case proceeded upon facts set out in a stated case.

In giving the judgment of the Court, Chief Justice Marshall had occasion to make reference to the "Indian title" and of the various incidents thereof, including the manner in which the title may be extinguished. I will deal with the subject of extin- guishment in greater detail later in this judgment.

The following passages of the judgment [at pp. 573-4, 579, 584-8, 591-2, 596-7 and 603] of the learned Chief Justice have some relevance to the case at bar:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowl- edge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

. . . . .

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in posses- sion of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

. . . . .

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees.

. . . . .

It has never been doubted, that either the United States or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

. . . . .

Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

. . . . .

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extin- guish their title, and to grant the soil, has never, we believe, been doubted.

. . . . .

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of

sovereignty, as the circumstances of the people would allow them to exercise.

. . . . .

All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

. . . . .

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

. . . . .

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political rela-tions between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property.

. . . . .

The very grant of a charter is an assertion of the title of the crown . . .

It will be seen from the passages quoted above that:

(1) Chief Justice Marshall considered that the law with regard to the "Indian title" is the same in both the United States and Britain.

(2) Discovery or conquest gave full title to the discoverer or conqueror subject only to a right of possession in the Indians (and which in the *St. Catherine's Milling & Lumber Co*. case was considered only to be a usufractuary right).

(3) The "Indian title" did not give the alleged possessor the right to convey his "title" to other than to the Sovereign.

(4) The Sovereign had the exclusive power to extinguish the "Indian title" at his pleasure.

An important case touching upon the incidents of the "Indian title" and its enforceability is the case of *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51 Ind. App. 357.

That was a case where the plaintiffs sued the Indian Government for a declaration that they are the proprietors of certain lands. In referring to the aboriginal title, Lord Dunedin said at pp. 360-1:

> But a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties. This is made quite clear by Lord Atkinson when, citing the Pondoland case of *Cook v. Sprigg*, L.R. 42 I.A. 229, 268, he says: "It was held that the annexation of territory made an act of state and that any obligation assured under the treaty with the ceding state either to the sovereign or the individuals is not one which municipal Courts are authorized to enforce."

The passage quoted above was cited with approval by Viscount Simon, L.C., in *Hoani Te Heuheu Tukino v. Aotea Dis- trict Maori Land Board*, [1941] 2 All E.R. 93 at p. 98, where he said:

> Art. 2 of the Treaty of Waitangi, which was dated Feb. 6, 1840, was as follows:
>
> "Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the chiefs of the united tribes and the individual chiefs yield to Her Majesty the exclusive right to pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf."
>
> Under art. 1 there has been a complete cession of all the rights and powers of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been in- corporated in the municipal law. The principle laid down in a series of decisions was summarized by LORD DUNEDIN in delivering the judgment of this Board in the Gwalior case, *Vajesingji Joravarsingji v. Secretary of State for India*, at p. 360:

The same concept is found in the case of *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272. There Mr. Justice Reed in delivering the judgment of the Supreme Court said at pp. 277-81, inclusive:

> The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.
>
> I. *Recognition*.-- The question of recognition may be disposed of shortly. Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking. The petitioner contends that Congress has sufficiently "recognized" its possessory rights in the land in question so as to make its interest compensable. Petitioner points specifically to two statutes to sustain this contention. The first is §8 of the Organic Act for Alaska of May 17, 1884, 23 Stat. 24. The second is §27 of the Act of June 6, 1900, which was to provide for a civil government for Alaska, 31 Stat. 321, 330. The Court of Appeals in the *Miller* case, *supra*, felt that these Acts constituted recognition of Indian ownership. 159 F. 2d 997, 1002-1003.

We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken. There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101.

This policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 under which the timber contracts were made. 61 Stat. 921, §3 (b).

II. *Indian Title*.--(a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson v. McIntosh*, 8 Wheat. 543, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." P. 587.

"We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respect- ing the original justice of the claim which has been successfully asserted." P. 588.

"Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." Pp. 590-591. See *Buttz v. Northern Pacific R. Co.*, 119 U.S. 55, 66; *Martin v. Waddell*, 16 Pet. 367, 409; *Clark v. Smith*, 13 Pet. 195, 201.

In *Beecher v. Wetherby*, 95 U.S. 517, a tract of land which Indians were then expressly permitted by the United States to occupy was granted to Wisconsin. In a controversy over timber, this Court held the Wisconsin title good.

"The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government." P. 525.

> In l941 a unanimous Court wrote, concerning Indian title, the following:
>
> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justifiable, issues." *United States v. Santa Fe Pacific R. Co*., 314 U.S. 339, 347.

I would emphasize the passage found at pp. 278-9 reading as follows:

> There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

It is true that the *Tee-Hit-Ton* case dealt with the matter of compensation, but I can see no reason why when consider- ing the question of the enforceability that the same principle applicable to compensation matters should not also apply to actions for a declaration of title.

Dealing with the question of recognition of the Indian title it is significant that counsel for the appellants could not point to any legislation of the pre-Confederation governments of the Colony of British Columbia or of the present Province which could constitute recognition of the "Indian title". As a matter of fact the historical references contained in ex. 11A indicate that the exact opposite was the case. Sir Joseph Trutch's letter appearing at p. 10 of the Report on Indian Re- serves makes it clear that no legal recognition had ever been accorded to the Indian claims to title to lands in the Colony. It is my view that the aboriginal title affords to the Indians no claim capable of recognition in a Court of law.

Although the plaintiffs do not claim to base their claim for a declaration on any colonial or British Columbia statute, they submit that King George III's Proclamation of October 7, 1763, passed following the Treaty of Paris, accords them a foundation for their claim.

Without going into this matter in detail it is sufficient for my purposes to say that the Proclamation of 1763 referred to in the judgment of my brother Tysoe, did not and never did apply to the Nishga tribe as the territory over which the tribe claims Indian title was *terra incognita* in 1763. Further, when the Proclamation is read as a whole it is clear that it was never intended to apply to the Nishgas.

Captain Vancouver did not appear on the coast till 1792. He circumnavigated Vancouver Island but apparently never was any further north. As a matter of fact, Great Britain did not establish sovereignty over the Nishga area until the Oregon Treaty of 1846. There was no recognition or reservation of "Indian title" in the treaty.

I agree with the judgment of Sheppard, J.A., given in the case of *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi], which was followed by the learned trial Judge in this case. The learned Judge held that the Proclamation of 1763 did not apply to the Nishga tribe.

Appellants' counsel has argued that even if the Proclamation of 1763 did not apply to the Nishgas at the time the Proclamation was issued, it did apply to them when eventually the tribal territories came under British sovereignty in 1846. In my view the Proclamation cannot be interpreted in that way.

It is therefore my view that the appellants have not established such a case as would entitle them

to the declaration of title which they seek.

The learned trial Judge has reviewed the pre-Confederation legislation of the Colony from 1858 till the Province entered Confederation in 1871 and has held, and I think correctly, that [8 D.L.R. (3d) at p. 82]:

> In result I find that, if there ever was such a thing as aboriginal or Indian title in, or any right analogous to such over, the delineated area, such has been lawfully extinguished *in toto*. It is not necessary to explore what "aboriginal title, otherwise known as the Indian title" may mean, or in earlier times may have meant, in a different context. Lord Watson, for the Privy Council, in *St. Catherine's Mill- ing & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at p. 55, said:
>
> "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished."

In 1858 the law-making power was vested in Governor Douglas and from 1863 to 1871 the power was vested in the Governor and the Legislative Council.

By the Proclamation of February 14, 1859, it was declared:

> 1.--All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.

The price of land and the terms of sale were set. All British subjects were given the right to pre-empt land not included in the site for a proposed town or an Indian reserve. It is significant to note that even at this time Governor Douglas had established some Indian reserves.

Proclamations of January 20, 1860, dealt with the sale and survey of town lots. Various officials were given the right to sell such lands.

As the years progressed the legislation became more sophisticated, and finally dealt with rights of miners as well as those of pre-emptors of land.

The *Land Ordinance, 1870*, effected a consolidation of most if not all of the then existing legislation. Under s. 3 the right of pre-emption was open to all as against all unoccupied and unsurveyed Crown land (not being "an Indian settlement"). Further, it was provided:

> . . . that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect.

Sections 26, 27 and 28 provided for the issuance of leases for "pastoral purposes" and for the purpose of cutting hay; and for the purpose of cutting spars, timber and lumber. Section 38 provided for the ejectment of trespassers from pre- emption claims or leasehold property. It read as follows:

> 38. Any person lawfully occupying a pre-emption claim, or holding a lease under this Ordinance may, in respect thereof, institute and obtain redress in an action of ejectment or of trespass in the same manner and to the same extent as if he were seized of the legal estate in the land covered by such claims; but either party thereto may refer the cause of action to the Stipendiary Magistrate of the District wherein the land lies, who is hereby authorized to proceed summarily, and make such order as he shall deem just. Provided, however, that if requested by either party, he shall first summon a jury of five persons to hear the cause,

> and their verdict or award on all matters of fact shall be final.

It is noticeable that no exception was made in favour of Indian trespassers.

The pre-emption of water was dealt with in s. 30.

All in all the Ordinance bears a striking resemblance to the legislation of the present day.

The learned trial Judge has neatly and correctly summarized the effect of this pre-Confederation legislation when he said [at p. 82]:

> All thirteen [*i.e.*, Proclamations and Ordinances] reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

It is not disputed that the old Colony of British Columbia had complete legislative jurisdiction to extinguish the so-called "Indian title", if in fact any such "title" ever existed.

To use the words of Mr. Justice Douglas of the United States Supreme Court in *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339 at p. 347, the title of the Indians, if it ever existed, was extinguished when the pre-Confedera- tion governments of British Columbia exercised "complete dominion adverse to the right of occupancy" of the Indians. The full quotation of the passage in which the above is contained reads as follows:

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

To put the matter another way -- if there ever was an "Indian title" it was extinguished by the pre-Confederation legislation of the Colony.

Accordingly I would dismiss this appeal.

In view of the decision I have arrived at, I do not consider it necessary to deal with the three formidable preliminary objections raised by the respondent as follows:

> 1. The Court does not have jurisdiction to grant the declaration sought because it impugns the Crown's title to the land by seek- ing to have it declared that there is a cloud on the title, i.e. Indian title.
>
> 2. The Court has no jurisdiction to make the declaration because it will affect the rights of others who have had no opportunity to be heard. Audi Alteram Partem.
>
> 3. The Court ought not to grant a declaration if it can have no practical consequences.

Appeal dismissed.