

1894 <u> </u> *Nov. 10, 12. <u> </u> 1895 <u> </u> *May 6. <u> </u>	THE DOMINION OF CANADA.....APPELLANT; AND THE PROVINCES OF ONTARIO } AND QUEBEC.....} RESPONDENTS.
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IN THE MATTER OF AN ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

ON APPEAL FROM THE AWARD OF THE ARBITRATORS.

Construction of Statute—British North America Act ss. 112, 114, 115, 116, 118—36 V. c. 30 (D)—47 V. c. 4 (D)—Provincial subsidies—Half-yearly payments—Deduction of interest.

By section 111 of the British North America Act Canada is made liable for the debt of each province existing at the union. By 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the province of Canada at the time of the union over \$62,500,000 and chargeable with 5 per cent interest thereon. Secs. 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven millions respectively, and by 116, if the debts of those provinces should be less than said amounts they are entitled to receive, by half-yearly payments in advance, interest at the rate of 5 per cent on the difference. Sec. 118, after providing for annual payments of fixed sums to the several provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada and shall be paid half-yearly in advance to each province, but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act." The debt of the province of Canada at the union exceeded the sum mentioned in sec. 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the provinces of Ontario and Quebec.

Held, affirming said award, that the subsidy of the provinces under sec. 118 was payable from the 1st of July, 1867, but interest on

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

the excess of debt should not be deducted until 1st January, 1868 ;
 that unless expressly provided interest is never to be paid before
 it accrues due ; and that there is no express provision in the British
 North America Act that interest shall be deducted in advance on
 the excess of debt under sec. 118.

1894

THE

DOMINION
OF CANADA

v.

THE

PROVINCES
OF ONTARIO
AND
QUEBEC.

By 36 V. c. 30 (D), passed in 1873, it was declared that the debt of
 the province of Canada at the union was then ascertained to be
 \$73,006,088.84, and that the subsidies should thereafter be paid ac-
 cording to such amount. By 47 V. c. 4, in 1884, it was provided
 that the accounts between the Dominion and the provinces should
 be calculated as if the last mentioned Acts had directed that such
 increase should be allowed from the coming into force of the
 British North America Act, and it also provided that the total
 amount of the half-yearly payments which would have been made
 on account of such increase from July 1st, 1867, to January 1st,
 1873, with interest at 5 per cent from the day on which it would
 have been so paid to July 1st, 1884, should be deemed capital
 owing to the respective provinces bearing interest at 5 per cent and
 payable after July 1st, 1884, as part of the yearly subsidies.

Held, affirming the said award, Gwynne J. dissenting, that the last
 mentioned Acts did not authorize the Dominion to deduct interest
 in advance from the subsidies payable to the provinces half-yearly
 but leaves such deduction as it was under the British North
 America Act.

APPEAL from an award of arbitrators appointed to
 adjust the accounts between the Dominion of Canada
 and the provinces of Ontario and Quebec respectively.

The circumstances under which this appeal arose
 were the following :—

The appeal herein is taken by the Dominion of Can-
 ada, from the award made and published on the 2nd
 day of November, 1893, by the Honourable John Alex-
 ander Boyd, Chancellor of the province of Ontario ;
 the Honourable George Wheelock Burbidge, Judge of
 the Exchequer Court of Canada ; and the Honourable
 Sir Louis Napoleon Casault, Judge of the Superior
 Court of the province of Quebec, the arbitrators duly
 appointed under the provisions of the Act of the Par-
 liament of Canada, 54 & 55 Vic. ch. 6 ; the Act of the

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 —

Legislative Assembly of Ontario, 54 Vic. ch. 2; and the Act of the Legislature of Quebec, 54 Vic. ch. 4.

Sections 6 and 7 of the Dominion Act and of the respective Acts of Ontario and Quebec provide identically as follows :

6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the awards shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal.

7. In case of an appeal on a question of law being successful the matter shall go back to the arbitrators, for the purpose of making such changes in the award as may be necessary, or an appellate court shall make any other direction as to the necessary changes.

In pursuance of the said statutory enactments the three governments by orders in council duly approved on 15th April, 1893, referred certain matters as specified and contained in "the first agreement of submission to the arbitrators."

The following are such of the matters contained in the "agreement of submission" as were submitted in respect whereof the arbitrators made their award and on which this appeal is made.

1. (a.) All questions relating or incident to the accounts between the Dominion and the provinces of Ontario and Quebec.

2. The accounts are understood to include the following particulars :—

(a.) The accounts as rendered by the Dominion up to January, 1889.

(b.) In the unsettled accounts between the Dominion and the two provinces the rate of interest and the mode of computation of interest to be determined.

On the 2nd November, 1893, the arbitrators published their award, partial in respect of the matters referred.

By the last paragraph of the said award the arbitrators in pursuance of section 6 of the Acts of Refer-

ence set forth that in respect of paragraphs 1, 2 and 3 of the award, they proceeded upon their view of a disputed question of law.

Paragraphs 1 and 2 of the award, which are the subject of contention and exception in this appeal, are as follows :

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

1. That from the 1st July, 1867, to the passing of the Act of Parliament of Canada, 36 Vic. ch. 30, the provinces of Ontario and Quebec shall be credited with subsidy half-yearly in advance, deducting therefrom at the end of each half year their respective shares of interest as determined by the award of September 3rd, 1870, at the rate of five per centum per annum on the excess of debt of the province of Canada over \$62,500,000 as actually ascertained in amount at each period, the first of such deductions to be made on the 1st day of January, 1868, and the others on the 1st day of July and January thereafter down to and including the 1st day of January, 1873.

2. That in the province of Canada account there shall be credited on the 23rd May, 1873, the sum of \$10,506,088.84 remitted by the said Act, and thereafter the subsidy shall be credited in the separate accounts of Ontario and Quebec without any such deduction.

The Dominion objects to this award that it should have determined that the interest on the excess of debt should be deducted from the first half-yearly payment of subsidy on July 1st, 1867, making twelve deductions up to January 1st, 1873, instead of eleven, which would be the number under the award. The decision of such questions depends on the construction of the following sections of the British North America Act.

Section 111 of the British North America Act, 1867, is as follows :

Canada shall be liable for the debts and liabilities of each province existing at the union.

Section 112:

Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

1894

Section 114 :

THE
DOMINION
OF CANADA
v.
THE
PROVINCES
OF ONTARIO
AND
QUEBEC.

Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Section 115 :

New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Section 116 :

In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance from the government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

Section 118 is as follows :

The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures :

Ontario	\$80,000
Quebec	70,000
Nova Scotia.....	60,000
New Brunswick	50,000
	<hr/>
	\$260,000

and an annual grant in aid of each province shall be made, equal to eighty cents per head of the population as ascertained by the census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province ; but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act.

It was further contended that if this contention should not prevail under the British North America Act, that 36 Vic. ch. 30 (D) and 47 Vic. ch. 4 (D)

authorized such deductions of interest in advance. The preamble and secs. 1 and 2 of 36 Vic. ch. 30 provided that :

Whereas by the provisions of "The British North America Act, 1867," and by the terms and conditions under which the provinces of British Columbia and Manitoba were admitted into the Dominion, Canada became liable for the debts and liabilities of each province existing at the time of its becoming part of the Dominion, subject to the provision that each province should, in account with Canada, be charged with interest at the rate of five per cent per annum on the account by which its said debts and liabilities exceeded (or should receive interest at the same rate by half-yearly payments in advance on the amount by which its said debt and liabilities fell short of) certain fixed amounts.

And whereas the amount fixed as aforesaid in the case of the provinces of Ontario and Quebec, conjointly (as having heretofore formed the province of Canada), was sixty-two millions five hundred thousand dollars (\$62,500,000), and the debt of the said late province, as now ascertained, exceeded the said sum by ten million five hundred and six thousand and eighty-eight dollars and eighty-four cents, (\$10,506,088.84), for the interest as aforesaid on which the said two provinces were chargeable in account with Canada.

And whereas it is expedient to relieve the said provinces of Ontario and Quebec from the charge, and for that purpose hereafter to consider the fixed amount in their case as increased by the said sum of ten millions five hundred and six thousand and eighty-eight dollars and eighty-four cents, and to compensate the other provinces for this addition to the general debt of Canada : Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :

1. In the accounts between the several provinces of Canada and the Dominion, the amounts payable to and chargeable against the said provinces respectively, in so far as they depend on the amount of debt with which each province entered the union, shall be calculated and allowed as if the sum fixed by the one hundred and twelfth section of "The British North America Act, 1867," were increased from sixty-two millions five hundred thousand dollars to the sum of seventy-three millions six thousand and eighty-eight dollars and eighty-four cents, and as if the amounts fixed as aforesaid, as respects the provinces of Nova Scotia and New Brunswick, by "The British North America Act, 1867" and as respects the provinces of British Columbia and Manitoba by the terms and conditions on which they were admitted into the Dominion, were increased in the same proportion.

1894
THE
DOMINION
OF CANADA
v.
THE
PROVINCES
OF ONTARIO
AND
QUEBEC.

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

2. The subsidies to the several provinces in July, one thousand eight hundred and seventy-three shall be paid in accordance with the foregoing provisions of this Act.

And the preamble and sec. 1 of 47 Vic. ch. 4, are as follows:

Whereas the subsidies payable under "The British North America Act, 1867," to the several provinces thereby united into one Dominion respectively, were readjusted and increased by the operation of the Act of the Parliament of Canada, 36 Vic. ch. 30, but the said increase was allowed only on and from the 1st day of July, 1873, and it is expedient that it should be allowed as from the day of the coming into force of the said "British North America Act, 1867," and that a proportionate increase should be made in the subsidies now payable by Canada to the provinces of British Columbia, Manitoba and Prince Edward Island respectively: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. In the accounts between the several provinces and the Dominion, the amounts by which the yearly subsidy to each was increased by the Act 36 Vic. ch. 30, as explained by the Act, 37 Vic. ch. 3, as to Nova Scotia, shall be calculated and allowed to Ontario and Quebec, jointly, as having formed the late province of Canada, and to Nova Scotia and New Brunswick, as if the said Acts had directed that such increase should be allowed from the day of the coming into force of the "British North America Act, 1867," and the total amount of the half-yearly payments which would have in that case been made on account of such increase from the 1st day of July, 1867, up to and including the 1st day of January, 1873, with interest on each at five per cent per annum, from the day on which it would have been so paid, to the 1st day of July, 1884, shall be deemed capital, owing to the said provinces respectively, bearing interest at five per cent per annum, which interest shall be payable to them as part of their yearly subsidies from the Dominion, on and after the 1st day of July, 1884.

Ritchie Q.C. and *Hogg* Q.C. for the appellant.

Irving Q.C. and *Moss* Q.C. for the respondent, province of Ontario.

Girouard Q.C. and *Hall* Q.C. for the respondent, province of Quebec.

Ritchie Q.C.—One of the contentions arising here is shortly this:—Under the sections of the British North

America Act was the Dominion entitled to deduct from the first and each subsequent half-yearly payment of subsidy interest at the rate of five per cent on the excess of debt which was declared by this Act to be a charge against them? Ontario and Quebec, under the British North America Act, were declared to be jointly liable to the Dominion of Canada for this excess of debt, and it was declared that they should be charged with interest at the rate of five per cent upon the excess of debt, and I emphasize the word "charged" because possibly something may turn upon it. There is an express statement that they shall be charged. There is no provision whatever in any of these sections for a liability on the part of Ontario and Quebec to the Dominion for this excess of debt outside of this charge. In other words, there is no statement made in the Act at all that they shall pay to them interest at the rate of five per cent per annum, but it is a charge.

There is no provision similar to 116, with respect to Ontario and Quebec, for this reason, that it was well known that the debt of the old province of Canada considerably exceeded that sum, but, as to Nova Scotia and New Brunswick, it was to some extent doubtful. It was possible it might exceed, therefore it is put in both ways. If it does exceed the stipulated amount then it was to be charged at five per cent; if, on the other hand, it falls short, the provinces should be paid and receive interest at the rate of five per cent half-yearly in advance on the sum by which the real debt fell short of the amount, as between all the parties, it was agreed the Dominion Government should assume. In other words, all these things are carved out of the subsidy.

That being so, one should ask, in the case of one whose debt exceeded the stipulated amount, what reason or what justice would there be, as to that par-

1894
THE
DOMINION
OF CANADA
v.
THE
PROVINCES
OF ONTARIO
AND
QUEBEC.
—

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

ticular province, in saying that that province shall only pay the interest at the expiration of six months, instead of taking it out of the first payment of subsidy, when the Act expressly provided that, as to Nova Scotia and New Brunswick, if their debts fell short of the stipulated amount, they should be paid and receive in advance the interest on the difference. Clearly the intention of the Act was to place all these constituents of the new confederation in the same position. They agreed upon the relative proportion of debt to be assumed, they agreed that they should participate equally, *per capita*, in the subsidy to be granted.

Then in 1873, the different provinces were agitating for better terms, and apparently Ontario and Quebec, at all events, were urging that this deduction made half-yearly should be discontinued, and in 1873 an Act was passed. I call your Lordships' attention to the title of that Act. It is an Act to readjust the amount payable to and chargeable against the several provinces of Canada by the Dominion, so far as they depend on the debt with which they respectively entered the union. It is an Act to readjust the amounts payable to and chargeable against the provinces.

Then in 1874 was passed 47 Vic. ch. 4. I may in passing, refer to that Act as confirming the construction which I asked your Lordships to place upon the clause of the British North America Act, because apparently, in dealing with it, they regarded these deductions as being something carved out of the subsidies, as something going to increase the yearly subsidies, or the amount of subsidy payable to the provinces; the Act is declared to be an Act to readjust the yearly subsidies to be allowed by Canada to the several provinces now united in the Dominion. The recital is:

Whereas the subsidies payable under the British North America Act to the several provinces thereby united into one Dominion were readjusted and increased by the operation of the Act of 1873.

So that the Parliament of Canada in 1884 treats that Act of 1873 as an Act increasing the subsidies. Increasing the subsidies how? By declaring that those subsidies shall not be diminished by deductions in respect of excess of debt. In other words, treating the deductions in respect of excess of debt as something carved entirely out of the subsidy itself, and throughout all the legislation, as I contend, it will be seen that the deductions and the subsidies were treated practically as being part and parcel of the same thing. The subsidies were to be increased or diminished dependent altogether upon whether the debt exceeded or fell short of the amount stipulated in the British North America Act.

Now, following on the statute for a moment, your Lordships will see that the provision is: "it is expedient to allow the increase," because we are dealing with the increase from the day of the coming into force of the Act, which is the 1st of July, 1867.

Now, if the Dominion Parliament had not construed the British North America Act as giving to the Dominion the right to deduct the first half-yearly charge in respect of the excess of debt from the first payment, to deduct it in advance, then it would be absurd to talk about allowing the increase from the 1st of July, 1867, because that would have been paid without being diminished in any way, and the proper reference would be to the payment increased from the 1st January, 1868. So that whatever may have been done by any officer of the government, clearly Parliament in construing the British North America Act acted upon the assumption that the right was vested in the Dominion to deduct from the first half-yearly payment of subsidy the first half-year's interest on the excess of debt. In other words, to deduct in advance. That is manifest also by the first clause:

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

1894.

THE
DOMINION
OF CANADA
v.
THE
PROVINCES
OF ONTARIO
AND
QUEBEC.

In the account between the several provinces and the Dominion the amount by which the half-yearly subsidy to each was increased by the Act.

Treating always this interest question as either increasing or diminishing the subsidy, something carved out of it, as I said before.

The Act of 1884 can only be looked upon in one of two ways. Either it is a gift out and out to the provinces upon certain terms and conditions, or else it must be treated as a settlement or agreement of disputed claims, and no matter which aspect it may be viewed in, the result must be the same, that the provinces must be estopped from contending that the Dominion are not entitled to now charge in their books the sums which they have added together in order to form the capital sum mentioned in the Act of 1884, the provisions of which Act the provinces have availed themselves of.

Hogg Q.C. follows: I do not know that I can add very much to the construction endeavoured to be placed upon the British North America Act by my learned friend, but upon the 118th section it has occurred to me there is one observation which may have some weight in its proper construction.

The observation I desire to make is this, that if the construction placed upon that section of the statute by the arbitrators is correct, then the word "deduct" is practically a meaningless word in that section, because if the amount of interest upon the excess of debt is only to be called for or charged at the end of six months then there is no deduction. A deduction is something that is to be taken from an amount now paid. If the amount is to be paid to-day, subject to a deduction, it must be the amount less the deduction, and the construction which Mr. Langton, Deputy Minister of Finance, in 1868, put upon this section, is

the correct one, and the arbitrators have not put the construction which the words themselves actually bear out.

1894
THE
DOMINION
OF CANADA
v.
THE
PROVINCES
OF ONTARIO
AND
QUEBEC.

Then, with reference to the Act of 1884, while the British North America Act dealt with the equality of all the provinces, the Act of 1884 dealt with the recoupment of the provinces of Ontario and Quebec, with the amount which it was considered might be deducted from them under the British North America Act. That is the whole object of the Act of 1884. The purport and intention of that Act was to recoup the provinces of Ontario and Quebec. Now, what were they to recoup? Putting the case in this position:—Supposing they had kept no account, because the amounts were unsettled, because it was uncertain what the excess of debt was, and supposing that that was simply kept in suspense, and no entries made in their books at all, then, upon the construction of the Act of 1884, what would be the amount which would be recouped or repaid, or allowed to the provinces of Ontario and Quebec under the construction of the Act of 1884, and Acts prior to it? Even if there were no entries, I submit to your Lordships that the only amount that would be recouped to them would be the twelve payments, which, under the British North America Act the Dominion was entitled to deduct.

What we submit to your Lordships is, that there has been an error in making up these accounts. Assuming now that we are dealing with the accounts themselves, there has been an error in making up these accounts, and the error is one of a large amount; it is the amount of \$262,000, plus interest, which I understand will make it up to upwards of \$400,000. And I submit that the arbitrators should have considered that position of the matter, and that they should have directed that as the accounts are now open for settlement and

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

adjustment by the Act of 1891, that the accounts should be rectified by the addition of the amount of \$262,000 which should have been charged.

Upon that position, treating this as an error in the accounts, the cases of *Williamson v. Barbour* (1), and *Gething v. Keighley* (2), show this:—That where accounts have been of long standing and have been settled, and it is shown that there has been an error in certain items, they may be opened, and the account rectified.

Then, upon the question of estoppel, which my learned friend has referred to, there is just one case which I desire to direct your Lordships' attention to, *In re Hercules Insurance Co.* (3).

The questions upon the statute have been so fully argued, I do not know that I can add anything that would be of great value.

Irving Q.C. for the province of Ontario.—I wish to say at the outset that in the accounts rendered to the province of Ontario only eleven half-yearly deductions of interest between 1867 and 1873 were ever claimed, and never was the idea of the twelfth payment put forward until before the arbitrators; my learned friend, for the first time, started the question. The case which they submitted to the arbitrators, which is in the blue-book, which is practically a record of the court below, and which can be brought up here, does not say one word about the twelfth payment. Our position is the converse of my learned friend's statement as to that.

Then, taking up the British North America Act, I am almost inclined to think, that we now come merely to discuss what its dry reading is. I do not know that it is necessary for me to offer any observation. My learned friend, Mr. *Hogg* applied some criticism to section 118, in which he said that the word

(1) 9 Ch. D. 529.

(2) 9 Ch. D. 547.

(3) L. R. 19 Eq. 302.

“deduct” became meaningless, but it appears to me that the answer to that is, that the word “deduct” can be only applied when there is something to deduct, when there is something that has been settled and is chargeable. The word “deduct” does not necessarily assume that there must be actually something to deduct; it was to be deducted whenever it should be chargeable.

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

We will see, that after the passing of the Act of 1873, and up to the time of the Act of 1884, the position was that the subsidies were paid in full, and the two provinces remained liable to pay the interest upon the excess of debt between January, 1868, and the 1st of January, 1873. Now, the introduction of the Act of 1884 in no way disturbs that. There, I think, is the fallacy of the position that my learned friends, the appellants, have set up. The Act of 1884 in no way disturbs that. It in no way relieved the provinces from paying the excess of debt between those periods, but it took, as a well-settled arithmetical quantity, the figure or figures which composed the increase of debt between what had been originally allowed by the British North America Act and the increase under the Act of 1873. It took that as a well-settled figure, whatever it might have been.

The Act of 1884 in no way deals with the amount of the debt. It says simply, the increase of subsidies which have taken effect from 1873 are now to take effect from 1867, beginning at the 1st of July, 1867, ending on the 1st of January, 1873, which makes the twelve deductions, and it could not be otherwise, because at that period twelve subsidies had not been paid on their respective dates, and the increases had to relate to such dates. It would seem to me that there would be no other explanation of the Act of 1884, on its reading after having read the two first Acts. All

1894 that the Act of 1884 has to refer to the other Acts for is
 THE to ascertain the amount of figures which compose the
 DOMINION increase under the Act of 1873, and that increase, no
 OF CANADA matter what it was from, became *eo nomine* a subsidy,
 v. and the Act of 1884 says that the increase which is a
 THE subsidy under the Act of 1874, is now to be multiplied
 PROVINCES by twelve.
 OF ONTARIO
 AND
 QUEBEC.

(The learned counsel then dealt with the contention that the provinces having accepted the benefits under the Act of 1884 should be bound by its burdens, and read certain documents and correspondence to show that the province had no knowledge of the details of the adjustment under that Act long after it was passed).

The Act of 1884 was an absolute gift, increasing the subsidy up to January, 1873, inclusive.

I think that is the answer to the whole position, that the Act of 1884 took up the increase to all the provinces wholly, with reference to the amount of increases that had taken place in 1873. It did not deal with the question of interest.

Moss Q.C. follows.—Section 112 makes Ontario and Quebec jointly liable to Canada for the amount, if any, by which the debt of the province of Canada exceeds at the union the sum of \$62,500,000. Now, these two provinces are jointly liable to Canada for any excess. In other words, they are to make good and pay to Canada, to recoup to Canada, in some way or another, any sum over that sixty-two millions, five hundred thousand dollars, and then there follows upon that what very naturally and very frequently certainly follows upon a liability, and that is, an obligation to pay interest upon it; “shall be charged with interest at the rate of five per cent per annum thereon.” That is to say, Ontario and Quebec are to be liable for the excess and are to be charged with interest at five

per cent upon that excess. Now, when does the charge of interest begin ?

Does any debt or obligation create interest until the lapse of some period of time ? The interest begins to run from a certain date, and it runs from that time out, but what is the day at which interest is to begin to run on this ? Could it possibly be a day before the coming into force of the Act of Confederation ? The interest will begin to run from the day when this compact of confederation took effect, and not before. If this Act never took effect that obligation never took effect, and interest would never begin to run. The moment the Act comes into force, the moment the Dominion is established, that is to say, on the 1st of July, 1867, this obligation commences, interest begins to run from that day, on whatever that excess may be. Interest is chargeable, therefore, from that time, beginning at that date, and following up.

When you look at the way in which section 118 deals with it, it is perfectly clear that the provinces are to receive the amounts which are fixed by that section 118 ; they are to be paid these half-yearly in advance, but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest. That is, a sum chargeable when it accrues due.

The law with regard to the right to the payment of interest is very well settled, and perhaps no observation could be clearer than that by Lord Westbury :— That interest can only be demanded by virtue of a contract, express or implied, or by virtue of a principal sum being wrongfully withheld on the day it ought to have been paid.

Then the Dominion for many years kept the accounts according to our contention and in construing statutes long usage has frequently been referred to. *Magis-*

1894 *trates of Dunbar v. The Duchess of Roxburghe* (1);
 THE *Attorney General v. Rochester* (2); *The Queen v. Arch-*
 DOMINION *bishop of Canterbury* (3).
 OF CANADA

v. Then as to the Act of 1884, that Act, your Lordships
 THE will see, does not attempt to deal in terms, at all
 PROVINCES events, with any question of the allowance upon the
 OF ONTARIO excess of interest, or otherwise, but what it does say, is
 AND
 QUEBEC. this: It says that the subsidies payable under the
 British North America Act were readjusted and in-
 creased by the operation of the Act of 1873. That is
 to say, the operation of the Act of 1873 was to read-
 just and to increase, in a certain way, the subsidies,
 and it was desirable that that operation of the Act
 should be so extended as that there should be no
 doubt as to its being intended to apply, not only from
 the date of the coming into force of the Act of 1873,
 but from the coming into force of the Act of 1867, the
 Confederation Act. Now, how does it proceed to do
 that? Here, as it seems to me, my Lords, is where my
 learned friends have not taken the right view of this
 Act. What Parliament has done is, not to decide or
 determine anything absolutely upon figures, but it
 says, the amount by which the yearly subsidy to each
 was increased shall be calculated and allowed to Ontario
 and Quebec conjointly, as if the said Acts had directed
 that such increase should be allowed, and so on; not
 that the Acts did do so, or that they did not do so;
 they do not determine anything with reference to the
 effect of that Act, but, at all events, they say now, in
 the accounts, that amount shall be computed or calcu-
 lated and allowed as if these Acts had directed that
 such increase should be allowed from the day of the
 coming into force of the British North America Act.
 Whether it does or does not do so, at all events, the

(1) 3 Cl. & F. 335.

(2) 5 DeG. M. & G. 797.

(3) 11 Q. B. 483.

amounts are to be computed and calculated and allowed as if that were so.

Girouard Q.C. for the province of Quebec.—As representing Quebec, I have very little to add to the exhaustive arguments presented by the learned counsel representing Ontario. Our interests are almost identical with those of Ontario, and whatever has been said in favour of Ontario should be accepted by the court as being an argument in favour of Quebec. I will content myself with summing up the case as I understand it.

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

In my humble opinion, the statute of 1884 which has been cited in support of the views contended for by the Dominion has no application whatever. The statute of 1884 provides for the case, and no court, as I understand it, should go behind the statute, to find out whether there was a mistake or not, whether there were twelve payments, or ten, or nine. The statute of 1884 has provided for a case which is complete on its face, and we have to-day to decide whether under the British North America Act the Dominion is entitled to get interest in advance. That is the sole question, as I understand it.

Now, let us look at that statute. Section 112 says that Ontario and Quebec shall jointly be liable to Canada for the amount at which the debt, &c.; nothing said about interest payable in advance or to be charged in advance.

By section 118 it says, the government of Canada shall deduct from said grants of subsidy as against any province all sums chargeable as interest on the public debt of that province, and so on; nothing is said there that the interest is to be charged in advance.

And then we come to the common law principle that interest shall only be charged as accrued or earned.

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

Now, let us look at another clause of the British North America Act, which concerns Nova Scotia and New Brunswick, but which, I believe, throws light upon the intention of the legislature:

In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars respectively, they shall respectively receive by half-yearly payments in advance from the government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

The subsidies are to be paid in advance. The interest which should go to Nova Scotia or New Brunswick on their debt shall be payable in advance. Nothing is said as far as the interest on the excess of debt is concerned, whether that should be payable in advance or not, and we conclude, the statute being silent, that we must supply the common law rules. That is to say, the interest shall be charged as earned or accrued. That is commencing on the 1st of January, 1868, as the parties have done in the public accounts; and I wish to call the attention of the court to the agreement of the parties as far as the papers show, which are now before the court in this appeal; the court is not limited to the case as printed; the case is the same as before the arbitrators; each party has leave to refer to any of the documents and papers before the arbitrators. Looking at the public accounts for 1869, what do you find? You find that the parties charged interest to the provinces, on the excess of debt, from the 1st of January, 1868, in conformity with the opinion of the Minister of Justice at that time. Under the circumstances I do not wish to weary the court with a lengthened argument. I think the case is fully before the court. It has been argued in an able manner. Under these circumstances, I leave the case confidently before the court, that the interpretation which will be given to the Act of 1884 will not allow interest to be charged. I ask for the dis-

missal of this appeal, as we have asked in our factum ;
and if they lose their appeal, they should pay the costs.

Halt Q.C. follows :—I would like to emphasize the position we take, that it is for this court to lay down the view of what was the liability of the provinces of Quebec and Ontario under the British North America Act, and I would ask your Lordships to consider the question irrespective of the statutes of 1873 and 1884. Because, I presume, if there is no liability on the provinces of Ontario and Quebec under the British North America Act to be charged with that interest in advance, there is no obligation at all.

We want your Lordships to determine the question whether under the British North America Act, the Imperial Act, there is any obligation on the provinces of Ontario and Quebec to pay interest in advance on the excess of debt. I say at the threshold, that is the question which was evidently determined by the arbitrators below, and is now the question for your Lordships to determine here. Under that Imperial Act, is there a legal obligation against Ontario and Quebec to pay interest on the excess of debt in advance ?

If your Lordships come to the conclusion that there was no legal obligation on the part of Ontario or Quebec to pay interest on the excess of debt in advance, let us come to the statute of 1873. Now, the statute of 1873, according to our contention, relieved the provinces from any obligation. If there was an obligation to pay interest on the excess of debt, whenever that might be, that excess of debt was removed, that was the effect of the Act of 1873 : and your Lordships will see, that in that Act of 1873 the other provinces of Nova Scotia and New Brunswick were compensated for that assumption by Canada of the increased debt of Ontario and Quebec ; so that the other provinces, up to that time any way, never had any cause to complain,

1894

THE

DOMINION
OF CANADA

v.

THE
PROVINCES
OF ONTARIO
AND
QUEBEC.

1894
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

because they were all brought up on the same sort of levelling process. Therefore, whatever obligation there was to pay interest on the excess of debt, that obligation was removed in 1873 by the Dominion assuming the excess of debt. Well, when you come to the statute of 1884, as my learned friends from Ontario argued so elaborately, there is nothing to show how that principal sum is arrived at. There is nothing to show that Ontario and Quebec were ever aware of the terms of that Act. It was after the Act was passed, at the conference that took place in 1884, that the treasurers of Ontario and Quebec first inquired how the principal sum was arrived at. Now, my learned friend Mr. Girouard said, and it was the point taken below, that whether that Act was good or bad, it must stand in its entirety, and on its face. It gives an increased subsidy by the operation of the Act of 1873, but it gives that not only to Ontario and Quebec, but to Prince Edward Island, British Columbia, Nova Scotia and New Brunswick. No question of inequality or injustice can come in there, because whatever was done as regards one province, or the old province of Canada, was done with reference to the other provinces in the levelling up process.

Ritchie Q.C. in reply.

THE CHIEF JUSTICE.—This is an appeal by the Dominion from certain parts of the award of the Honourable John Alexander Boyd, Chancellor of Ontario, the Honourable George Wheelock Burbidge, Judge of the Exchequer Court of Canada and the Honourable Sir Louis Napoleon Casault, Chief Justice of the Superior Court of Quebec, arbitrators appointed under the Act of the Parliament of Canada 54 & 55 Vic. cap. 6, the Act of the Legislature of Ontario 54 Vic., cap. 2, and the Act of the Legislature of Quebec 54 Vic.

cap. 6. The object of the arbitration was the settlement of certain disputed accounts between the Dominion and the provinces. By the 6th section of the Dominion Act it was enacted :

The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the awards shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal.

A similar provision was contained in each of the provincial Acts. An agreement of submission was come to between the Dominion and the provinces on the 10th of April, 1893, by which certain questions were submitted to the arbitrators. This agreement was subsequently confirmed by orders in council, and under it the arbitrators on the 2nd of November, 1893, made the award, the first, second and third paragraphs of which are the subjects of the present appeal.

It is declared in the award that in respect of the findings contained in the paragraphs mentioned the arbitrators proceeded upon their view of a disputed question of law. These paragraphs are as follows :

1. That from the first of July, 1867, to the passing of the Act of the Parliament of Canada, 36th Victoria, chapter 30, the provinces of Ontario and Quebec shall be credited with subsidy half-yearly in advance, deducting therefrom at the end of each half-year their respective shares of interest as determined by the award of September 3rd, 1870, at the rate of five per centum per annum on the excess of debt of the province of Canada over \$62,500,000, as actually ascertained in amount at each period, the first of such deductions to be made on the first day of January, 1868, and the others on the first day of July and January, thereafter, down to and including the first day of January, 1873.

2. That in the province of Canada account, there shall be credited on the 23rd day of May, 1873, the sum of \$10,506,088.84 remitted by the said Act, and thereafter the subsidy shall be credited in the separate accounts of Ontario and Quebec without any such deduction.

1895
THE
 DOMINION
 OF CANADA
 v.
THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

1895

THE
DOMINION
OF CANADA

v.

THE
PROVINCES
OF ONTARIO
AND
QUEBEC.

The Chief
Justice.

3. That on and from the first of July, 1884, the provinces of Ontario and Quebec shall be credited with the additional subsidy granted by the Act 47 Victoria, chapter 4, in the proportion determined for the excess of debt by the award hereinbefore mentioned.

The first question raised relates to interest on the excess of debt of the late province of Canada over the sum of \$62,500,000, being the amount specified in the 112th section of the British North America Act. Is such interest according to the proper legal construction of this 112th section, and of the 118th section to be deducted from the half-yearly subsidies at the end of each half-year from the date of the union until the 1st of January, 1873, inclusive, or at the times when such half-yearly subsidies are directed to be paid to the provinces? In other words, is interest to be charged in advance or not until it had accrued? The learned arbitrators have determined that the interest was not to be deducted until it had actually accrued, and that consequently so far as the decision of this point depends upon the 112th and 118th sections of the British North America Act only eleven half-yearly deductions on interest on the excess are properly chargeable to Quebec and Ontario as representing the former province of Canada, and not twelve as contended for by the Dominion. In other words, the first of such deductions was chargeable at the expiration of the first half-year of the confederation, viz., on the 1st January, 1868, and the last on the 1st of January, 1873.

By section 111 of the British North America Act it was enacted that:

Canada shall be liable for the debt and liabilities of each province existing at the union.

The 112th section is in these words:

Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union \$62,500,000, and shall be charged with interest at the rate of five per centum per annum thereon.

By section 118 it was enacted :

The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures :

Ontario	\$80,000
Quebec	70,000
Nova Scotia.....	60,000
New Brunswick.....	50,000

\$260,000

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

The Chief
 Justice.

And an annual grant in aid of each province shall be made equal to eighty cents per head of the population as ascertained by the census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province ; but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act.

Sections 114, 115 and 116 are respectively as follows :

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

116. In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance from the government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

This question first arose in 1869, when the then treasurer of the province of Ontario objected to the mode in which the Auditor General had charged the interest, that officer having deducted it in advance from each half-yearly payment of subsidy beginning on the 1st of July, 1867. Upon a reference to the Minister of

1895
THE
 DOMINION
 OF CANADA
 v.
THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

Justice, the late Sir John Macdonald, this was held to be wrong and the account was rectified by making the first deduction on the first of January, 1868, instead of on the first of July, 1867, and continuing in this way to deduct the interest on the excess of debt ascertained at the date of each half-yearly payment of the subsidy down to the first of January, 1873, inclusive, and this mode of making up the account has since for a period of twenty-six years been adopted and acquiesced in by all parties. So far as this question depends upon the terms of the 118th section I am of opinion that there can be no possible doubt of the correctness of the principle adopted by the arbitrators, and that for the reasons which have been set forth in the opinions which two of them, Chief Justice Sir Louis Casault and Mr. Justice Burbidge have appended to the award. Sections 114 and 115 which apply to Nova Scotia and New Brunswick respectively are as regards interest in the same terms as section 118. Section 116 which provides for the payment by the Dominion of interest to the two provinces of Nova Scotia and New Brunswick in the event of the amount at which their debts were assumed being found to be in excess of the true amount, makes express provision for such payment being made in advance.

They shall respectively receive by half-yearly payments in advance from the government of Canada interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts—

are the words of the Act. From this it appears plain that in the case of these two provinces it was not the intention of Parliament that interest on any excess of the debt which might be found over the stipulated amounts, should be deducted in advance, for when it was intended that interest should be so paid it was said so in express words. Then the same result must follow

as regards the construction to be placed on section 118. No good reason can be assigned why any difference should be made as regards deducting interest on an excess of debt between the two Maritime provinces and the two provinces composing the province of Canada. The words of the 118th section are identical with those of the 114th and 115th, and if these latter did not require a deduction in advance clearly the former did not.

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

Further, the payment of interest before it has actually accrued due is so inconsistent with the normal mode of keeping accounts that in the absence of an express provision to that effect it is not to be inferred. There is no such thing as interest on a debt not yet due. As Chief Justice Casault well observes :

Interest is the price of the use of money or commodity; it cannot be due before its use has been enjoyed and for the duration of the enjoyment, though stipulated at a certain rate per annum, it is never paid in advance without an express stipulation which is to be found nowhere in the British North America Act, 1867.

Then to deduct interest on the excess from the 1st of July, 1867, would be to take interest not actually accrued, for there was of course no debt due to the Dominion before the first of July, 1867, and interest could only be computed from that date. The mere provision of the 118th section that the interest was to be deducted from the grants or subsidies is not at all conclusive to show that it was to be deducted from the first payment of a subsidy and so by anticipation. These subsidies were necessarily payable in advance since the Act had transferred to the Dominion all the available means which the provinces had for carrying on the provincial governments, and they would have been absolutely without means for that purpose if the half-yearly payments of the subsidy in advance had not put them in funds. It does not follow from the

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

provision that the interest is to be deducted from these half-yearly payments, that the interest is to be deducted before it accrues due. It is not said that from "each and every" half-yearly subsidy interest is to be deducted, and to give effect to the claim of the Dominion would be to interpolate those words. It is quite consistent with the terms of the 118th section and with the whole tenor of the statute that the interest should for the first time be deducted when it had accrued, and that the first deduction should be made from the half-yearly subsidy payable on the 1st of January, 1868, and so on half-yearly thereafter.

Section 112 says that the provinces of Ontario and Quebec shall be charged with interest at five per cent on the excess of debt, but to charge interest at that rate in advance as contended for by the Dominion would be to make the provinces pay more than five per cent and thus to give the Dominion a premium which would be entirely unwarranted by the terms of this section. It therefore appears to me to be very clear that under the British North America Act by itself, without regard to subsequent Dominion legislation, the decision of the learned arbitrators is entirely right, in holding that the mode of keeping the accounts and deducting the interest which has been adopted by the Dominion and acquiesced in by all parties since January, 1867, was correct, and that the accounts ought not in that respect to be now disturbed so far as the British North America Act is alone applicable.

It is said, however, that the effect of certain legislation of the Parliament of the Dominion has been to alter the liabilities of the provinces in this respect, and to impose upon them the obligation of submitting to the deduction of twelve instead of eleven payments of interest. In 1873 the statute of Canada 36 Vic. ch. 30, was passed, and received the royal assent

on the 23rd of May in that year. The object of this statute was to increase the yearly grants to the provinces, to give what were called "better terms." By the preamble, after reciting the provision of the British North America Act as to the assumption of the provincial debts, and as to the payment of interest on any excess or less amount of debt over or under the fixed amounts mentioned in that Act, it was further recited as follows :

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

And whereas the amount fixed as aforesaid in the case of the provinces of Ontario and Quebec, conjointly, as having theretofore formed the province of Canada, was \$62,500,000, and the debt of the said late province as now ascertained exceeded the said sum by \$10,506,088.84 for the interest on which the said two provinces were chargeable in account with Canada. And whereas it is expedient to relieve the said provinces of Ontario and Quebec from the charge, and for that purpose hereafter to consider the fixed amount in their case as increased by the said sum of \$10,506,088.84, and to compensate the other provinces for the addition to the general debt of Canada.

By the first section it was enacted that :

In the accounts between the several provinces of Canada and the Dominion, the amounts payable to and chargeable against the said provinces respectively in so far as they depend on the amount of debt with which each province entered the union, shall be calculated and allowed as if the sum fixed by the 112th section of the British North America Act, 1867, were increased from \$62,500,000, to the sum of \$73,006,088.84, and as if the amount fixed as aforesaid, as respects the provinces of Nova Scotia and New Brunswick, by the British North America Act, 1867, and as respects the provinces of British Columbia and Manitoba by the terms and conditions on which they were admitted into the Dominion, were increased in the same proportion.

By the second section it was provided that :

The subsidies to the several provinces, in July, 1873, shall be paid in accordance with the foregoing provisions of this Act.

It was at first contended by the provinces of Quebec and Ontario that this Act was retrospective and authorized the payment of the increased subsidies from the date of union in 1867. This, however, was resisted by the Dominion, and rightly, for it is expressly said in

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

the preamble, that "thereafter" the amount of debt fixed by the British North America Act should be considered as increased in the manner indicated by the Act.

By the Act 47 Vic. ch. 4, the preamble of which, after referring to the Act of 1873 and stating that the increase thereby allowed was only from the first of July, 1873, recited that it was expedient it should be allowed from the coming into force of the British North America Act, and that a proportionate increase should be made to the three provinces subsequently admitted to the Dominion, it was enacted by section one as follows :

In the accounts between the several provinces and the Dominion, the amounts by which the yearly subsidy to each was increased by the Act thirty-six Victoria, chapter thirty, as explained by the Act thirty-seven Victoria, chapter 3, as to Nova Scotia, shall be calculated and allowed to Ontario and Quebec, jointly, as having formed the late province of Canada, and to Nova Scotia and New Brunswick, as if the said Acts had directed that such increase should be allowed from the day of the coming into force of the "British North America Act, 1867," and the total amount of the half-yearly payments which would in that case have been made on account of such increase from the first day of July, one thousand eight hundred and sixty-seven, up to and including the first day of January, one thousand eight hundred and seventy-three, with interest on each at five per cent per annum, from the day on which it would have been so paid, to the first day of July, one thousand eight hundred and eighty-four, shall be deemed capital, owing to the said provinces respectively, bearing interest at five per cent per annum, which interest shall be payable to them as part of their yearly subsidies from the Dominion, on and after the first day of July, one thousand eight hundred and eighty-four.

Section 2 provided in the same terms for proportional allowances to Manitoba, British Columbia and Prince Edward Island.

Section 3 is as follows :

And for the avoidance of doubt under the foregoing provisions, it is declared and enacted, that the amount of the increase of the yearly subsidy and the capital on which the same is payable, to the several provinces respectively, under this Act, shall be as follows :

	Yearly increase.	Capital.	1895
To Ontario and Quebec jointly	\$269,875 16	\$5,397,503 13	THE
Nova Scotia.....	39,668 44	793,368 71	DOMINION
New Brunswick	30,225 97	604,519 35	OF CANADA
Manitoba.....	5,541 25	110,825 07	v.
British Columbia	4,155 39	83,107 88	THE
Prince Edward Island..	9,148 68	182,973 78	PROVINCES
			OF ONTARIO
			AND
			QUEBEC.

Of both these Acts of 1873 and 1884 it is to be said that they are not of their own force binding on the provinces. There never has been any legislation on the part of the provinces agreeing to an alteration of their rights as they existed under the British North America Act. If, however, the provinces accepted the benefits conferred upon them by Parliament in the terms of these statutes, they are, I take it, upon the principle *qui sentit commodum debet sentire et onus*, bound by any burdens and conditions to which the additional grants are made subject.

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The Chief
Justice.
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It was at one time contended by Ontario and Quebec that the effect of the Act of 1884 was not only to give the additional subsidy or yearly increase therein specified but also to authorize the crediting in the accounts of those provinces with the Dominion of all deductions made between 1867 and 1873 on account of half-yearly balances of debt in excess of \$62,500,000 but under \$73,006,088.84. This, however, would have been virtually to give the same benefit to the provinces twice over and being clearly not warranted by the statutes or either of them it was not insisted upon. In determining how the account between 1867 and 1873 is to be constructed the question now arises whether eleven or twelve years of interest are to be deducted. The question of what are the proper balances on which the interest should be deducted will be considered later on. The question now under consideration is confined to the number of those half-yearly deductions of in-

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

terest on the excess of debt. As already demonstrated, the 118th section of the British North America Act would have authorized the deduction between the 1st of July, 1867, and the 23rd of May, 1873, of only eleven gales of interest.

The Act of 1873 is, as has been shown, entirely prospective and does not touch this point except in so far as the amount of increase therein specified is referred to in the later Act. If then any change in this respect is to be made, warrant for it must be found in the Act of 1884.

In the first place it would be well to consider the general scope and object of this Act. This clearly was to give to the provinces of Ontario and Quebec jointly from the 1st of July, 1884, an increased subsidy of \$269,875.16. It is true that it is said that this was based on an assumed capital of \$5,397,503.13, but this does not affect the provinces. All they are concerned with is the grant itself. This grant cannot now be disturbed without prejudicially affecting those provinces relatively to the other provinces. It will be observed too that the language of the Act in the third section indicates that it was intended that this should be conclusive: "for the avoidance of doubt under the foregoing provisions," the words are. Surely nothing can be more absolute than this to show that whether the calculation was right or wrong the figures are to be taken as conclusive.

Then in the face of the Act itself nothing appears showing how the amount of the subsidy was arrived at. The first section of the Act does not fix the number of the deductions of interest in excess of debt, nor require any departure from the proper mode of making these deductions as prescribed by the 118th section of the British North America Act.

If then we are to say that it was intended to be attached as a condition to the acceptance of the subsidy, that the provinces in taking these accounts between 1867 and 1873 should submit to be charged with twelve instead of eleven gales of interest, it can only be because the amount of capital upon which the increased subsidy is based coincides with twelve gales of interest on an assumed excess of debt for each half-year during that time of \$10,506,088.84 (contrary as regards the amount of the excess to the well ascertained fact) with five per cent from the supposed time of payment added. Are we to assume that it was the intention of the legislature to attach a submission to this mode of calculation as a condition of the subsidy when we find that it was not warranted by the law, and must have proceeded on an error either of fact or law, and when we find Parliament saying in almost so many words, as it does in the third clause, that without regard to any mistake the subsidy specified shall be paid? I agree with Sir Louis Casault that so to do would be to alter, not to expound, the law, and to compel the provinces to submit to terms they never assented to. If there has been a mistake it is apparent that it is one which is not susceptible of any judicial remedy. It would be out of the question to declare the Act either wholly or partially void. The amount of the subsidy could not be reduced without disturbing the fairness of the proportion between Ontario and Quebec and the other provinces; and to require them to surrender their legal right under the British North America Act to restrict the Dominion to eleven deductions of interest would be to compel them to submit to terms which they were never required to assent to, and in short to make a new arrangement for them. If Parliament was in error, either as to the proper calculation or as to the legal effect of the British North America Act, that can only be corrected by

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

1895 statute. This is not the case of a legislature proceeding
THE upon an assumed construction of one of its own statutes.
DOMINION Parliament had no power in any way to alter the rights
OF CANADA of the provinces under the British North America Act,
v. nor to bind the provinces by its legislation except in so
THE PROVINCES far as it made the subsidy conditional on an acceptance
OF ONTARIO of the terms that twelve gales of interest should be
AND deducted, and I fail to see that they have imposed any
QUEBEC. such condition.
The Chief
Justice.

Sir Louis Casault expresses the opinion that Parliament made no mistake either as to the number or amount of the half-yearly deductions of interest. The learned Chief Justice points out that though the deductions of interest were not to be made in advance the subsidies were so payable, and therefore, although twelve deductions of interest are not authorized in taking the accounts between 1867 and 1873, it is not inconsistent with this that the legislature intended that the capital specified should be based on twelve half-yearly payments of interest on the increase of debt given by the Act of 1873; and that the amount of the subsidy is by the first section of the Act of 1884 fixed with reference, not to the number and amount of the half-yearly deductions of interest, but by the amount of the subsidy granted by the Act of 1873, treated as the subsidies were declared to be by the British North America Act as payable in advance from the date of union. This receives strong support from the recitals of the statute of 1884, showing that the object of that Act was to put the provinces in the same position as if the statute of 1873 had been retrospective. I entirely agree in this view and I adopt what the learned Chief Justice says in regard to it in his judgment. If this is correct it is of course conclusive and there can be no pretense of any error in the statute, nor can it be said that there is anything in it which in any way controls

the rights of the provinces to have the deductions of interest made according to the principle required by the 118th section of the Confederation Act.

On the whole I am of opinion that the learned arbitrators were right in making only eleven half-yearly deductions of interest in the interval between 1867 and 1873, a conclusion which agrees entirely with the mode in which from 1869 the Dominion officers had kept the account.

The third point relates to a sum of \$23,614.22 which the Dominion claims is by the award allowed to the provinces in excess of what they are entitled to. The arbitrators have determined by the first clause of the award :

That from the first of July, 1867, to the passing of the Act of the Parliament of Canada 36 Victoria, chapter 36, the provinces of Ontario and Quebec shall be credited with subsidy half-yearly in advance, deducting therefrom at the end of each half-year their respective shares of interest as determined by the award of September 13th, 1870, at the rate of five per cent per annum on the excess of debt of the province of Canada over \$62,500,000 *as actually ascertained in amount at each period*, the first of such deductions to be made on the first of January, 1868, and the others on the first day of July and January thereafter, down to and including the first day of January, 1873.

The objection to this on the part of the Dominion is that the deduction of interest instead of being based on the excess of debt as ascertained at each time of deduction should be based on such excess as ascertained at the time of the passing of the Act of 1873, or as actually existing at the time of the union. In other words, it is claimed on behalf of the Dominion that interest should be charged against the provinces from the 1st of July, 1867, on an excess of debt amounting to \$10,506,088.84, being the excess as determined by the Act of 1873, as existing on the 1st of January, 1873, instead of on the actual excess ascertained from time to time as the amount over the sum of \$62,500,000 as specified in the

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 The Chief
 Justice.

1895 112th section of the British North America Act, whilst
 THE the same excess of \$10,506,088.84 should not be credited
 DOMINION to the provinces until the 23rd May, 1873, thus not
 OF CANADA giving the provinces the benefit of the increase for the
 v. purpose of establishing the excess of debt on which in-
 THE PROVINCES interest is to be charged whilst taking advantage of such
 OF ONTARIO increase as establishing against them the amount of
 AND debt at each half-yearly period from 1867 to 1873
 QUEBEC. without reference to the actual facts.
 The Chief
 Justice.

The provinces on the other hand contend that the proper mode of calculating the interest on the debt during the interval from 1867 to 1873 is to charge the provinces with interest and to deduct from each half-yearly payment of subsidy, interest at five per cent on the balance from time to time actually ascertained on the excess of the debt over the \$62,500,000 as fixed by the 112th section. This principle has been adopted by the learned arbitrators in their award. A third plan has been suggested by Chief Justice Casault, viz., that the provinces should be credited with the increase of \$10,506,088.84 on the 1st of July, 1867, which would result in half-yearly balances in their favour instead of against them, down to the 1st of January, 1873, inclusive; and that the benefit of the increase being thus given to the provinces from the beginning the Dominion should be at liberty to assume that there was a uniform excess of debt equal to the increase at each half-yearly period during the whole time from 1867 to 1873, and that interest should be credited and charged accordingly. The learned Chief Justice did not, however, act on this view but concurred with the other arbitrators in adopting the mode of calculation sanctioned by the award.

Little or no difference in the result would have been caused by adopting this latter mode of making up the account, as is well shown in the very able judgment of

Mr. Justice Burbidge. I see, however, considerable objection to it in a legal point of view. There is no statutory authority for such a mode of proceeding. I have already shewn in discussing the question as to the number of deductions for interest, that the Act of 1884 ought not to be considered as decisive of that question, and for the same reason it ought not to be considered as conclusive of the amount of the half-yearly balances on which interest should be calculated.

1895
THE
DOMINION
OF CANADA
v.
THE
PROVINCES
OF ONTARIO
AND
QUEBEC.
The Chief
Justice.

The interest account was not kept in this way by the Dominion officers, but on the plan adopted by the arbitrators.

As regards the agreement entered into at a conference held in 1888, between certain Ministers representing the Dominion and others representing the Executives of the provinces, I agree with Mr. Justice Burbidge that as these gentlemen acted under no legislative authority, their conclusions as to the proper mode of constructing the interest account can have no binding effect either on the Dominion or the provinces.

There remains to be considered the contention of the Dominion on this head. According to this the statutory increase should be treated as the uniform fixed amount of the excess of debt during the whole period from 1867 to 1873, and interest charged accordingly, whilst the provinces should not have the benefit of such increase until the 23rd of May, 1873, the deductions for interest up to that date being calculated on the half-yearly balances of the excess thus assumed over the original amount specified in section 112 of the Confederation Act (\$62,500,000).

The proposition of the Dominion is that there could be no increase in the amount of the debt of the provinces for which the 111th section of the British North America Act made the Dominion liable after that Act came into force on the 1st of July, 1867, and as it was

1895
THE
 DOMINION
 OF CANADA
 v.
THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.

ascertained on the 1st of July, 1872, that the excess then amounted to \$10,506,088.84, that that amount must have been due from the beginning, and interest on that amount should therefore be deducted half-yearly all along and not on the actual balances as shown in the Dominion accounts.

The Chief
 Justice.

The answer of the provinces to this contention is that it was not intended by the provision for payment of interest on excess of debt to give the Dominion any premium or profit but simply an indemnity, and that it would therefore be unjust and unreasonable to charge interest in respect of claims or debts of the provinces not assumed by the Dominion as between it and the creditors or claimants, or even known to exist, until long after the date of confederation; that all that the Dominion could properly claim under the statute was interest on such subsequently ascertained claims or debts from the dates at which they were either paid or satisfied, or from the time at which interest upon them was paid or a liability to pay interest undertaken on the part of the Dominion.

This was the view adopted by the arbitrators in making their award. It proceeds entirely upon the principle that interest as given by section 118 was by way of recoupment only. There is nothing in the British North America Act itself indicating this, but I am of opinion that it is a fair inference from the whole scope and intention of that statute that the Dominion were merely to be recouped to the extent of interest and were not entitled to receive interest which they did not pay or become liable to pay. Further, this is in accord with the mode of keeping the accounts adopted by the Dominion officers from the beginning, and which prevailed without question for a period of some twenty-six years.

I confess I have had more doubt on this head than on any others, but I do not feel the doubt sufficiently strong to warrant me in dissenting from the award.

On the whole I am of opinion that there was no legal error in the award in respect of the matters brought under review in this appeal, which must therefore be dismissed with costs.

TASCHEREAU J.—Concurred.

GWYNNE J.—By the 104th sec. of the British North America Act, 1867, it was enacted that the annual interest of the public debts of the provinces of Canada, Nova Scotia and New Brunswick at the union should form the second claim on the consolidated revenue fund of Canada. By sec. 111 it was enacted that Canada should be liable for the debts and liabilities of each province existing at the union. But by sec. 112 it was enacted that Ontario and Quebec conjointly should be liable to Canada for the amount, if any, by which the debt of the province of Canada exceeded at the union \$62,500,000 and should be charged with interest at the rate of five per centum per annum thereon. By sec. 118 it was enacted that certain sums specified therein should be paid yearly by Canada to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick for the support of their governments and legislatures and that—

such grants shall be in full settlement of all future demands on Canada and shall be paid half-yearly in advance to each province, but the government of Canada shall deduct from such grants as against any province all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in the Act.

The union of the provinces into the Dominion of Canada came into operation on the 1st day of July, 1867. At that time the public debt of the late province

1895
THE
DOMINION
OF CANADA
v.
THE
PROVINCES
OF ONTARIO
AND
QUEBEC.
The Chief
Justice.

1895 of Canada was known to exceed the said sum of \$62,-
THE 500,000 but to what amount was not ascertained.
 DOMINION Interest upon such excess was coming due in July,
 OF CANADA 1867. To meet such interest which the government of
v. Canada was made liable for by the British North America
 THE PROVINCES Act the government deducted from the half-yearly
 OF ONTARIO AND subsidy payable respectively to Ontario and Quebec
 QUEBEC. a sum calculated as the half-yearly interest upon such
Gwynne J. excess, estimating it at an amount deemed to be with-
 in the mark ; this deduction was made upon the assum-
 ed authority of the British North America Act—the
 118th sec. of which expressly authorized the Govern-
 ment of Canada to deduct from the half-yearly grants
 payable to each province all sums chargeable as interest
 on the public debt of that province in excess of the
 several amounts stipulated in the Act, that is to say,
 as regards Ontario and Quebec, all sums chargeable
 as interest on the public debt of the late province of
 Canada in excess of the said sum of \$62,500,000. Like
 deductions were made from the half-yearly subsidies
 payable to Ontario and Quebec in January and July,
 1868, but in 1869 it appears that upon the authority
 of the Minister of Justice such deductions were no
 longer made until the expiration of each half-year ;
 that is to say, that so much of the interest upon the
 excess of the public debt of the late province of
 Canada over the \$62,500,000 as fell due in July of
 each year, and which the government of Canada was
 bound to pay them, was not charged to the provinces
 until the following January, nor that coming due in
 January until the following July. This continued until
 the month of May, 1873, when an Act was passed by
 the Dominion Parliament intituled :

An Act to readjust the amounts payable to and chargeable against
 the several provinces of Canada by the Dominion Government so far
 as they depend upon the debt with which they respectively entered the
 union.

By that Act, after reciting that by the terms of the union Canada became liable for the debts and liabilities of each province existing at the time of its becoming part of the Dominion subject to the provision that each province should in account with Canada be charged with interest at the rate of five per centum on the amount by which its said debts and liabilities exceeded, or should receive interest at the same rate by half-yearly payments in advance on the amount by which its said debts and liabilities fell short of, certain fixed amounts; secondly, that the amount of Ontario and Quebec conjointly as having theretofore formed the province of Canada was \$62,500,000, and that the debt of the said late province as then ascertained exceeded the sum of \$62,500,000 by \$10,506,088.84; and thirdly, that it was expedient to relieve the said provinces of Ontario and Quebec from the said charge and for that purpose thereafter to consider the fixed amount in their case as increased by the said sum of \$10,506,088.84, and to compensate the other provinces for this addition to the general debt of Canada; it was enacted as follows:

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 Gwynne J.

1. In the accounts between the several provinces of Canada and the Dominion the amounts payable to and chargeable against the said provinces respectively in so far as they depend upon the amount of debt with which each province entered the union shall be calculated and allowed as if the sum fixed by the 112th section of the British North America Act of 1867 were increased from \$62,500,000 to the sum of \$73,600,088.84, and as if the amounts fixed as aforesaid as respects the provinces of Nova Scotia and New Brunswick by the British North America Act, 1867, and as respects the provinces of British Columbia and Manitoba by the terms and conditions upon which they were admitted into the Dominion were increased in the same proportion.

2. The subsidies to the several provinces in July, 1873, shall be paid in accordance with the foregoing provisions of this Act.

Whatever doubt may have existed as to the construction of this Act by the use of the word "hereafter"

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 Gwynne J.

in the third of the above recitals in the preamble of the Act seems to me to be wholly removed by the enacting clause which in plain terms as it appears to me enacts that in all accounting and taking of accounts between the Dominion of Canada and the provinces of Ontario and Quebec such accounts should be taken as if the sum of \$73,600,088.84 had been the sum inserted in the 112th section of the British North America Act instead of the sum of \$62,500,000, in which case as the public debt of the late province of Canada did not at the time of the union exceed the said sum of \$73,600,088.84 there would have been no deduction whatever authorized by the British North America Act to be made from the half-yearly subsidies payable by Canada to Ontario and Quebec, and if the account now being taken had been taken under that Act I cannot entertain a doubt that the provinces would have been entitled to claim and be allowed as against the Dominion so much of the several sums which had been deducted from their half-yearly subsidies with interest thereon from the time of such deductions respectively as had not been repaid ; but doubts appear to have been entertained as to such being the construction of the Act for in 1884 the Dominion Parliament passed an Act to make the matter clear beyond any doubt—47 Vic. ch. 4.

By that Act, after reciting among other things that the subsidies payable under the British North America Act, 1867, to the several provinces thereby united into one Dominion respectively were readjusted and increased by the operation of the Act of the Parliament of Canada 36 Vic. c. 30, but the said increase was allowed only from the first day of July, 1873, and it was expedient that it should be allowed as from the day of the coming into force of the said British North America Act, 1867, it was enacted that :

In the accounts between the several provinces and the Dominion the amounts by which the yearly subsidy to each was increased by the Act 36 Vic. ch. 30, shall be calculated and allowed to Ontario and Quebec (jointly as having formed the late province of Canada) as if the said Act had directed that such increase should be allowed from the coming into force of the British North America Act, 1867, and the total amount of the half-yearly payments which would in that case have been made on account of such increase from the first day of July, 1867, up to and including the first day of January, 1873, with interest on each at 5 per cent per annum, from the day on which it would have been so paid to the first day of July, 1884, shall be deemed capital owing to the said provinces respectively bearing interest at 5 per cent per annum, which interest shall be payable to them as part of their yearly subsidies from the Dominion on and after the first day of July, 1884.

1895
THE
 DOMINION
 v.
THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 Gwynne J.

And the 3rd section enacts that :

For the avoidance of doubt under the foregoing provisions it is declared and enacted that the amount of the increase of the yearly subsidy and the capital on which the same is payable to the several provinces respectively under this Act shall be as follows :

Yearly increase. Capital.

To Ontario and Quebec jointly. \$269,875 16 \$5,397,503 13

Now what Parliament did by the Act of 1873 as regards Ontario and Quebec was to declare in express terms that in the accounts between the provinces and the Dominion the amount of the debt of the provinces should be calculated and allowed as if the sum of \$62,500,000 mentioned in the 112th section of the British North America Act had been increased to \$73,600,088.84, and that in July, 1873, the subsidies to Ontario and Quebec should be paid in accordance with this provision. This Act entitled the provinces of Ontario and Quebec in July, 1873, and thenceforth to receive half-yearly in advance the full amount of their subsidies ascertained under the provisions of the British North America Act without any deduction whatever as for excess of debt as provided for in the British North America Act. The only increase in the subsidies which they received in and subsequently to July, 1873, was the full amount of their half-yearly subsidies

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 Gwynne J.

ascertained in the manner provided by the British North America Act without any deduction whatever as for interest upon an excess of debt of the late province of Canada over the amount of \$73,600,088.84, which by the Act of 1873 was assumed absolutely by the Dominion instead of the amount fixed by the 112th section of the British North America Act. As there was not pretended to be any excess of debt of the late province of Canada over the amount by which the Act of 1873 was fixed as having been the total amount of the debt of the province of Canada at the union, assumed by the Dominion, there was no deduction to be made.

Now the Act of 1884, for the purpose as appears to me of removing all doubt as to the operation of the Act of 1873, simply provides that the benefit in increase of subsidy received by the provinces of Ontario and Quebec by the Act of 1873 in July, 1873, and thenceforward should be allowed to them as from the first of July, 1867—and to effectuate that purpose the Act provided that the whole of the amounts by which the subsidies paid from the 1st July, 1867, to 1st January, 1873, fell short of the full amounts which would have been payable if \$73,600,088.84 had been the sum inserted in the 112th section of the British North America Act instead of \$62,500,000 together with 5 per cent on the respective sums by which the half-yearly subsidies paid fell short of such full amounts should be capitalized, that is to say that the precise amount of the deductions made with interest upon the respective amounts of such deductions at 5 per cent from the respective dates upon which the amounts deducted would have been payable as subsidy but for the deductions should be capitalized, and the Act declares the amount so capitalized to be the sum of \$5,397,508.13, which sum the Dominion acknowledges by statute to owe to the provinces and undertakes to pay 5 per cent

per annum thereon to the provinces as part of their yearly subsidies upon and from the 1st June, 1884. Now the amount so capitalized we find to be composed of twelve several half-yearly sums of \$262,652.22 with interest at 5 per cent per annum upon each of such sums respectively from the respective days upon which the half-yearly subsidies from which such sums were now assumed to have been deducted were payable, the interest being calculated up to the 1st July, 1884, so that the amount allowed to the provinces by the Act as for deductions from their half-yearly subsidies between the 1st July, 1867, and the 1st January, 1873, inclusive exceeded the amount of the deductions actually made, as appears by the evidence in the appeal case, but the Act of 1884 is conclusive against the Dominion having any claim upon that ground and the Dominion Government makes no such claim. So in like manner are the provinces who have accepted the benefit conferred by the Act precluded from contesting that the capital sum of \$5,397,503.13 does not include all the sums which it is plain by the Act that it does, namely, all the amounts which the payments made to them for half-yearly subsidies from the 1st July, 1867, to the 1st January, 1873, inclusive fell short of the full amounts which would have been payable if no deductions had been authorized and made.

In taking the accounts now under consideration both the Dominion and the provinces respectively must rest upon and abide by the Act of 1884, and each party does profess to rest upon and abide by such Act, but each contends that it is the contention of the other which alone departs from the provisions of the Act. I must confess that in my opinion the respondents alone are open to that imputation.

The Act in fact removes all necessity for any consideration now of the amounts of the several deductions

1895
THE
DOMINION
OF CANADA
v.
THE
PROVINCES
OF ONTARIO
AND
QUEBEC.
Gwynne J.

1895
THE
 DOMINION
 OF CANADA
v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 ———
 Gwynne J.

or of the times when such deductions were made respectively, and an inquiry whether or not any such deductions were illegally made is not called for. In the account being taken on the arbitration no deductions were chargeable by the Dominion to the provinces, nor was any sought to be charged; and as the Act of 184 was plainly passed for the purpose of compensating, and does compensate the provinces for all sums which the half-yearly subsidies paid to them between the 1st July, 1867, and the 1st of January, 1873, inclusive, fell short of the amounts which would have been payable to them if the sum of \$73,600,088.84 had been inserted in the 112th section of the British North America Act instead of \$62,500,000; and as the account between the provinces and the Dominion must be taken in conformity with the directions of said provisions of that Act; all inquiry as to the times when the several amounts deducted were so deducted, and whether any of the deductions made was made at a time not authorized by the British North America Act, is now wholly immaterial and irrelevant. The contention of the respondents is that the 118th section of the British North America Act did not authorize the deduction to have been made, which in fact was made, from the first half-yearly instalment of subsidy which was paid in July, 1867. They insist that such deduction operated as a payment of interest by the provinces to the Dominion six months in advance of its becoming due although half-yearly interest accrued due in July, 1867, upon the public debt of Canada, which the Dominion Government had to pay in that month; and further, they contend that the Act of 1884 is to be taken as compensating the provinces for eleven years only of half-yearly interest deducted from the subsidies which, as the respondents contend, is all that could have been deducted legally between the 1st of July, 1867, and the

1st of January, 1873, inclusive, and therefore they now claim that in the account which is being taken between them and the Dominion they are entitled to charge the Dominion Government with the sum of \$262,652.22 and interest thereon from the 1st of July, 1867. But as already shown the Act of 1884 in point of fact made compensation to the provinces for all that was in fact deducted, which as is not disputed, was twelve half-yearly gales of interest on excess of debt, the contention of the provinces if it should prevail would give them the return of thirteen gales of half-yearly interest with interest thereon as compensation for twelve which were in point of fact deducted. Such a construction is plainly at variance with the express intent of the Act of 1884, in accordance with the provisions of which Act, as already stated, the account must be taken. This contention could only be urged if the Act of 1884 had never been passed, but even in that case the construction of the British North America Act which is insisted upon, namely, that nothing could be deducted by section 118 of the Act from the half-yearly subsidies payable to the provinces until the expiration of six months from the 1st day of July, 1867, and then as for interest for the first time then accrued due from the provinces to the Dominion as accruing upon a debt found to be due from the provinces to the Dominion upon, and bearing interest from the 1st July, 1867, is in my opinion a narrow and erroneous construction of the Act.

In determining when first the deductions authorized by the 118th section of the British North America Act might be made, the whole scope and object of the contract contained in the treaty of union of which the British North America Act, 1867, is but the embodiment must be taken into consideration.

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 Gwynne J.

1895 By that contract the Dominion Government agreed
 THE to assume absolutely as their own debt \$62,500,000 of
 DOMINION the public debt of the late province of Canada and to
 OF CANADA pay the public creditors the interest accruing due half-
 v. yearly upon so much of that public debt as exceeded
 THE PROVINCES the said sum of \$62,500,000. The interest so accru-
 OF ONTARIO ing due half-yearly exceeded the sum of 5 per cent
 AND QUEBEC. per annum. The Dominion Government, however,
 Gwynne J. agreed to pay the whole of such interest accruing half-
 yearly upon condition that they should have the
 right of deducting from the half-yearly grants which
 the Dominion agreed to pay to the provinces half-yearly
 in advance interest at 5 per cent per annum on so
 much of the public debt of the said late province of
 Canada as exceeded the \$62,500,000 assumed absolutely
 by the Dominion. Now as such interest was accruing
 due in July, 1867, when the first half-yearly subsidy
 became payable it was necessary and reasonable that
 the deduction should be made in July, 1867, as in any
 other half-year. The deduction is not by the 118th sec-
 tion stated to be authorized as for interest upon a debt
 ascertained to be due from the provinces to the Dom-
 inion upon, and bearing interest from, the 1st day of
 July, 1867, but as interest chargeable on the public
 debt of (in the case of Ontario and Quebec) the late
 province of Canada in excess of the amount stipulated
 in the Act to be assumed absolutely by the Dominion,
 namely, \$62,500,000.

The effect of the contention of the respondents pre-
 vailing would be to make the Dominion liable to the
 public creditors of the late province of Canada for the
 half-yearly interest upon the excess of debt falling due
 in July, 1867, and to give them no claim against the
 provinces of Ontario and Quebec in respect of such
 payment until the expiration of six months; and so
 likewise in respect of the interest accruing due every

half-year upon such excess of debt, and yet not a word is said of allowing interest to the Dominion upon such half-yearly advances.

But it is unnecessary to discuss the point further for as already said, in taking the account, as it must be taken under the Act of 1884, the question and the point involved in it have no relevancy.

In my opinion the appeal must be allowed with costs and a declaration be made to the effect that in the account being taken the provinces of Ontario and Quebec have no claim or demand whatsoever against the Dominion for any deductions made from their half-yearly subsidies payable to them between the 1st July, 1867, and the 1st January, 1873, inclusive, as all such claims, if ever they had any, are compensated by the provision made in favour of the provinces by the Dominion Act 47 Vic. ch. 4.

SEDGEWICK, and KING JJ. concurred in the judgment of the Chief Justice.

Appeal dismissed with costs.

1895
 THE
 DOMINION
 OF CANADA
 v.
 THE
 PROVINCES
 OF ONTARIO
 AND
 QUEBEC.
 Gwynne J.