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*May 15,16.

*Dec. 9.

THE PROVINCE OF ONTARIO.....APPELLANT;

AND

THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.....RESPONDENTS.

In re INDIAN CLAIMS.

ON APPEAL FROM AN AWARD IN AN ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Constitutional law—Province of Canada—Treaties by, with Indians—Surrender of Indian lands—Annuity to Indians—Revenue from lands—Increase of annuity—Charge upon lands—B.N.A. Act s. 109.

In 1850 the late province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron districts, by which the Indian lands were surrendered to the Government of the province in consideration of a certain sum paid down and an annuity to the tribes, with a provision that "should all the territory thereby ceded by the Indians at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time."

By the B.N.A. Act the Dominion of Canada assumed the debts and liabilities of the province of Canada, and sec. 109 of that Act provided that all lands, &c., belonged to the several provinces in which the same were situate "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."

The lands so surrendered are situate in the province of Ontario and have for some years produced an amount sufficient for the payment of an increased annuity to the Indians. The Dominion Government has paid the annuities since 1867 (from 1874 at the increased amount) and claims to be reimbursed therefor.

Held, reversing the said award, Gwynne and King JJ. dissenting, that the provision in the treaties as to increased annuities had not the effect of burdening the lands with a "trust in respect thereof" or

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

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"an interest other than that of the province in the same," within the meaning of said sec. 109, and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the increased annuities, but only liable jointly with Quebec as representing the province of Canada.

APPEAL from an award of the 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 came before the court were the following:

Prior to and in the year 1850 the Ojibeway Indians inhabited large tracts of land on the eastern and northern shores of Lake Huron, and on the northern shore of Lake Superior, which tracts of land were at that time within the boundaries of the then province of Canada, but since the year 1867 are within the province of Ontario. At the date first above mentioned, 1850, the administration of Indian affairs within the province of Canada was in the hands of Her Majesty the Queen, and the management of the business with the said Indians was conducted by officers and agents appointed by the Government of Great Britain.

In the said year 1850 the Honourable William Benjamin Robinson was duly authorized by Her Majesty, represented by the Government of the province of Canada, to negotiate and enter into agreements with the above named Indians for the extinguishment of their title to, and to obtain cessions of, portions of the tracts of land occupied and inhabited by them, for the purpose of opening up the said lands for settlement, and developing the mineral resources of the same, and on the 9th day of September, 1850, an agreement was entered into between the said Hon. W. B. Robinson on behalf of the Queen and the Ojibeway Indians of the Lake Huron district, which agreement is in the words and figures following:

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"This agreement made and entered into this ninth day of September, in the year of Our Lord one thousand eight hundred and fifty, at Sault Ste. Marie, in the province of Canada, between the Honourable William Benjamin Robinson of the one part, on behalf of Her Majesty the Queen, and (naming them) principal men of the Ojibeway Indians, inhabiting and claiming the eastern and northern shores of lake Huron, from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay, on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honourable Hudson Bay Company from Canada; as well as all unconceded lands within the limits of Canada west to which they have any just claim on the other part, witnesseth:"

"That for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said chiefs and their tribes at a convenient season of each year, of which due notice will be given at such places as may be appointed for that purpose, they, the said chiefs and principal men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors forever, all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said chiefs and their tribes in common, for their own use and benefit; and should the said chiefs and their respective tribes at any time desire to dispose of any part of such reserva-

tions, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent-General of Indian Affairs for the time being, or other officer having authority so to do, for their sole interest and to the best advantage; and the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this province, hereby promises and agrees to make, or cause to be made, the payments as above mentioned; and further to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have hitherto been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the provincial Government."

"The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent-General of Indian Affairs, or other officer of like authority, being first had and obtained. Nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree, that in case the government of this province should before the date of this agreement have sold, or bargained to sell, any mining locations or other property on the portions of the territory hereby reserved for their use, then and in that case such sale, or promise of sale, shall be perfected by the government if the parties claiming it shall have fulfilled all the conditions upon which such locations were made, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs."

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"The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided further, that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present numbers (which is twelve hundred and forty) to entitle them to claim the full benefit thereof, and should their numbers at any future period not amount to two-thirds of twelve hundred and forty the annuity shall be diminished in proportion to their actual numbers."

A similar treaty was entered into with the Lake Superior Indians in which the annuity to be paid was £600 and the number in the tribe was stated to be fourteen hundred and twenty-two.

On the union of the provinces in 1867 the Dominion became liable for the debts of the several provinces as provided in sections 111, 112 and 142 of the British North America Act, which are as follows:

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

"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."

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"142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the government of Ontario, one by the government of Quebec, and one by the government of Canada; and the selection of the arbitrators shall not be made until the parliament of Canada and the legislatures of Ontario and Quebec have met; and the arbitrator chosen by the government of Canada shall not be a resident either in Ontario or in Quebec."

In accordance with the last named section arbitrators were chosen, and on the third day of September, 1870, two of them, namely, Hon. John Hamilton Gray and Hon. D. L. MacPherson, gave their award, paragraphs 1 and 13 of which are as follows:

"I. That the amount by which the debt of the late province of Canada exceeded on the thirtieth day of June, one thousand eight hundred and sixty-seven, sixty-two millions five hundred thousand dollars, shall be and is hereby divided between and apportioned to, and shall be borne by, the said provinces of Ontario and Quebec respectively, in the following proportions, that is to say—the said province of Ontario shall assume and pay such a proportion of the said amount as the sum of nine millions eight hundred and eight thousand seven hundred and twenty-eight dollars and two cents bears to the sum of eighteen millions five hundred and eighty-seven thousand five hundred and twenty dollars and fifty-seven cents; and the said province of Quebec shall assume and pay such a proportion of the said amount as the sum of eight millions seven hundred and seventy-eight thousand and seven hundred and ninety-two dollars and fifty-five cents bears to the sum of eighteen millions

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five hundred and eighty-seven thousand five hundred and twenty dollars and fifty-seven cents."

"XIII. That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate by the other of the said provinces."

In 1891 the Parliament of Canada passed the Act 5 & 55 Vic. ch. 6, which contained the following provisions:

"An Act respecting the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, and between the said provinces."

[Assented to July 10th, 1891.]

"Whereas certain accounts have arisen or may hereafter arise in the settlement of the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec both jointly and severally, and between the two provinces, concerning which no agreement has hitherto been arrived at; and whereas it is advisable that all such questions of account should be referred to arbitration: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:"

"1. For the final and conclusive determination of such accounts, the Governor General in Council may unite with the Governments of the Provinces of Ontario and Quebec in the appointment of three arbitrators, to whom shall be referred such questions as the Governor General and the Lieutenant-Governors of the said provinces shall agree to submit."

"2. The arbitrators shall consist of three judges, one to be appointed by the Governor General in Council and one by each of the said Provincial Governments, and all three shall be approved of by each Government."

"3. The arbitrators shall not assume to decide any disputed constitutional question, but if any are raised they will note and report them with their award but without delaying the proceedings."

"4. Any two of the arbitrators shall have power to make an award."

"5. The arbitrators, or any two of them, shall have power to make one or more awards, and to do so from time to time."

"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 award 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."

"8. The appointment of the said arbitrators by Order in Council and their award in writing shall be binding on Canada, save in case of appeal on questions of law, in which case the final decision thereon shall be binding on Canada."

"9. In case of a vacancy by death or otherwise among the arbitrators, the same shall be filled in the same

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manner as the appointment was first made, any such appointment to be approved of by the other two Governments."

In the same year the legislature of Ontario passed an Act 54 Vic. ch. 2, and the legislature of Quebec passed 54 Vic. ch. 4, each of which was identical in terms with the above Dominion statute.

In accordance with the provisions of the said statutes the Hon. John A. Boyd, Chancellor of Ontario; the Hon. Sir Louis Napoleon Casault, Chief Justice of the Superior Court of Quebec; and the Hon. George W. Burbidge, Judge of the Exchequer Court of Canada, were appointed arbitrators and the counsel for the three governments entered into an agreement of submission which provided that certain matters should be referred to said arbitrators including:

"1. All questions relating to or incident to the accounts between the Dominion and the Provinces of Ontario and Quebec, and to accounts between the two Provinces of Ontario and Quebec."

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

"(*d*) The claims made by the Dominion Government on behalf of Indians, and payments made by the Government to Indians, to form part of the reference."

"(*e*) The arbitrators to apportion the liability of Ontario and Quebec as to any claim allowed the Dominion Government, and to apportion between Ontario and Quebec any amount found to be payable by the said Government."

The arbitrators made and published an award in respect of the claim of the Dominion for re-payment of the sums paid to the Indians under the above mentioned treaties, which award with the reasons given by the several arbitrators for the conclusion reached therein is as follows:

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"AWARD ON INDIAN ROBINSON TREATIES, HURON AND SUPERIOR.

13th February, 1895.

"*To all to whom these presents shall come:*

"The Honourable John Alexander Boyd, of the city of Toronto, and province of Ontario, Chancellor of the said province; the Honourable Sir Louis Napoleon Casault, of the city of Quebec, in the province of Quebec, Chief Justice of the Superior Court of the said province of Quebec; and the Honourable George Wheelock Burbidge, of the city of Ottawa, in the said province (of Ontario), Judge of the Exchequer Court of Canada,—Send greeting."

"Whereas it was in and by the Act of the Parliament of Canada, 54 & 55 Victoria, chapter 6, and in and by an Act of the Legislative Assembly of Ontario, 54 Victoria, chapter 2, and in and by an Act of the Legislature of Quebec, 54 Victoria, chapter 4, among other things provided that for the final and conclusive determination of certain questions and accounts which had arisen or which might arise in the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had theretofore been arrived at, the Governor General in Council might unite with the Governments of the provinces of Ontario and Quebec in the appointment of three arbitrators, being judges, to whom should be referred such questions as the Governor General and Lieutenant-Governors of the provinces should agree to submit;"

"And whereas we, the undersigned John Alexander Boyd, Sir Louis Napoleon Casault, and George Wheelock Burbidge, have been duly appointed under the said Acts and have taken upon ourselves the burdens thereof;"

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"And whereas it was provided in and by the said Acts that such arbitrators, or any two of them, should have power to make one or more awards, and to do so from time to time;"

"And whereas certain questions respecting a claim made by the Dominion of Canada against the provinces of Ontario and Quebec in respect of Indian claims arising out of the Robinson treaties, and respecting a certain other claim made by the Dominion of Canada against the province of Ontario for certain immigration expenditure, and a certain other claim made by the province of Ontario against the Dominion of Canada in the first instance, and by notice to the province of Quebec against that province, for the recovery of a balance of the Upper Canada Municipalities' Fund, have been submitted to such arbitrators, and they have heard the parties thereto;"

"Now, therefore, the said arbitrators exercising their authority to make a separate award at this time respecting the said matters, do award, order and adjudge in and upon the premises as follows, that is to say:"

"I. In respect of the claim made by the Dominion of Canada against the provinces of Ontario and Quebec in reference to the Indian claims arising under the Robinson treaties:"

"1. That if in any year since the treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual."

"2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the

treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties, the annuities, if the revenues derived from the ceded territory permitted, without incurring loss, were to be equal to a sum that would provide $4 for each Indian of the tribes entitled."

"3 That any excess of revenue in any given year may not be used to give the increased annuity in a former year in which an increased annuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year."

"4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and that this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873, 36 Vic. c. 30."

"5. That interest is not recoverable upon any arrears of such annuities."

"6. That the ceded territory mentioned became the property of Ontario under the 109th section of The British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario; and that

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this burden has not been in any way affected or discharged."

"7. That interest is not recoverable on the arrears of such annuities accruing after the union, and not paid by the Dominion to the tribes of Indians entitled."

"8. That in respect to the matters hereinbefore dealt with the arbitrators have proceeded upon their view of disputed questions of law."

"9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be affected by our previous ruling as to interest on that account."

"That Mr. Chancellor Boyd dissents from so much of the proposition contained in this paragraph as relates to the date at which such payment should be charged."

"II. With respect to the claim made by the Dominion of Canada against the province of Ontario for certain immigration expenditure :"

"1. That the Government of Canada recover against the province of Ontario the amount claimed for the year 1878, but that in reference to the claim made in respect of the years 1879 and 1880 the province of Ontario be discharged, and that this award is without prejudice to any question as to whether or not the province has paid more than was actually due in any year."

"III. With respect to the claim made by the province of Ontario against the Dominion of Canada, and by notice against the province of Quebec, for the recovery of a balance on the Upper Canada Municipalities' Fund :"

"1. That the province do recover against the Dominion $15,732.76, parcel of the sum of $21,488.74 claimed, which said sum of $15,732.76 is to be credited to the province of Ontario in the province of Ontario account as of the date of the 1st of July, 1872; and, that as to the balance of the said claim, amounting to $5,755.98, the Dominion be discharged, and that the province of Quebec be discharged in respect of the whole claim."

"In witness whereof we, the said John Alexander Boyd, Sir Louis Napoleon Casault and George Wheelock Burbidge, have hereunto set our hands and seals this thirteenth day of February, A.D. 1895."

J. A. BOYD,
L. N. CASAULT,
GEO. W. BURBIDGE.

"Witness: L. A. AUDETTE."

(The award was published and decision given on 14th February, 1895.)

"In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec, pursuant to Statute of Canada, 54 & 55 V. c. 6, Statute of Ontario, 54 V. c. 2, and Statute of Quebec, 54 V. c. 4."

"On motion of counsel for the province of Ontario, and on hearing what was alleged as well by counsel for the province of Ontario as by counsel for the Dominion of Canada and the province of Quebec, we, the undersigned arbitrators, do, with reference to a certain award and decision dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that, in respect of the question of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the Union, as in such award is mentioned, the arbi-

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trators proceeded upon their view of a disputed question of law, but that in respect of the question of interest on such increased annuities so paid, which question was dealt with in the ninth paragraph of the first part of such award by determining the time when such annuities should be charged against the province of Ontario in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law."

J. A. BOYD,
L. N. CASAULT,
GEO. W. BURBIDGE.

"Dated at Quebec,
this 26th day of March, 1895."

THE HONOURABLE MR. CHANCELLOR BOYD'S REASONS FOR AWARD OF FEBRUARY 13TH, 1895, DELIVERED 14th FEBRUARY, 1895.

"I. This broad question as to the obligation of Ontario with respect to the Indians of the "Robinson treaties" may fairly and properly be dealt with as if the provisions of the Treaty and the sections of The British North America Act relating to lands were placed in juxtaposition.

"Then arises the inquiry: Does any interest in respect of these Indians attach to the lands belonging to Ontario under the 109th section of British North America Act?"

"The course of construction applicable both to constitutional Act and Indian treaty is not that a literal and strict meaning be given to the words, but that they shall be construed liberally and comprehensively so as to further the reasonable scope of the provisions. This benignant construction obtains with added force in the construction of a treaty wherein the rules of international rather than of municipal law are to be regarded."

"Now in these transactions with the aborigines from the earliest colonial times in North America the Government has assumed the status of the Indian tribes to be that of distinct political communities. When the dealing has been by the Crown for the cession of territory over which some legal possessory right by the tribes in actual occupation has always been recognized, then the form of the transactions has been that of a treaty. Superadded to this, it is to be taken into account that the Indians relatively to the whites are in a state of dependency or pupilage, and that the nearest legal analogy as to the relationship between their tribes and the Government is that of guardian and ward."

"Hence arises the doctrines well established in American jurisprudence, and dating from the era of British colonization, that treaty stipulations are to be carried out with the utmost plentitude of good faith and with even generous interpretation in favour of these public wards of the nation."

"I cite the language of Mr. Justice McLean, in *Worcester* v. *State of Georgia* (1): 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"This language is quoted and approved of by Mr. Justice Mathews, giving the opinion of the court in *Choctaw Nation* v. *United States* (2), and he continues thus: 'The recognized relation between the parties to this controversy is that between a superior and an

(1) 6 Peters 582.
(2) 119 U. S. R. at p. 27.

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inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interest may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisdiction formulating the rights and obligations of private persons equally subject to the same laws.' "

" 'The rules to be applied are those which govern public treaties, which even in the case of controversies between nations equally independent are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger sense which constitutes the spirit of the Law of Nations.' "

" On the face of the treaty of 1850 are found indicia of generous intentions contemplated and liberal dealings promised. Fixed annuities are given, as to which no question now arises. Then comes the provision for the augmentation of the annuities, 'should the territory ceded at any future period produce such an amount as will enable the government, without incurring loss, to increase the annuity.' That is to say, if the rents, issues and profits (whether from sales, leases, mining royalties, timber licenses or other sources of revenue derived from the surrendered land) shall yield a surplus after payment of all outlay in connection with the development and improvement of the territory, then that surplus shall go to augment the annuities from time to time. True, the mere words

used do not say that the increased annuity is to be paid out of the proceeds of the land, but that is the plain and reasonable implication. In a dealing between guardian and ward, if the guardian took all the ward's property and undertook to maintain him, besides the general remedy equity would affix a trust to that effect upon the property so taken. Here the Indians would seem to have a right to an accounting even on the words of the treaty, so as to ascertain whether the event had arisen upon which the annuities were to be augmented. If upon such accounting a proper surplus appeared natural equity would impose a charge upon that surplus for the benefit of the Indians. That surplus would be in truth in the eye of equity the primary fund for the payment of the augmentations. The legislature (that includes the government) appears to treat even the fixed annuities as charges on the properties surrendered, and this though the payments are to be punctually made before any of the lands may have been realized. This no doubt is a proper fiscal arrangement (12 Vic. c. 200, s. 3). Even as to the fixed annuities, it would seem more obviously right where the annuities, as in the case of the augmentation, were only to be paid when a surplus arises out of the administration of the lands."

"In this latter case it would be not only a matter of finance and ordinary book-keeping, but also a conclusion of proper administration, that the revenue for the payment of the augmented annuities should be derived from the surplus outcome of the lands, and should be regarded as a charge upon that revenue, and so earmarked as applicable under the 'Robinson Treaties.'"

"This charge upon the proceeds of the lands which between individuals would have been looked for (especially where the weaker party was granting his property to the stronger) is here not expressed, because

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the undertaking of the Crown to make the payments afforded ample security, but nevertheless the real nature of the transaction involves the existence of an interest in the Indians in and upon the proceeds of the territory surrendered."

"The term 'interest' used in the statute is of large enough import to include this latent charge, as put by Mr. Justice Kay *In re Thomas* (1), an interest in the proceeds of land sold is 'an interest in land in contradistinction to an estate in land.'"

"The making of a treaty usually implies that the nation will by its municipal laws do all that is necessary to carry the provisions of the treaty into effect. (Per Anderson, B., in *Reg.* v. *Serva* (2). If the parts of this treaty were thus extended, one proper term would be to charge the augmentations of the annuities upon the surplus revenues of the territory after the deduction of all proper outlays."

"By analogy to the equitable doctrine laid down in *Waring* v. *Ward* (3), it appears to me that there is an implied obligation to pay the increased annuities out of the proceeds of the lands which passes with the lands as a burden to be borne by Ontario."

"II. I think the treaty provides for an increase in the number of Indians who shall share in the augmented annuities as individuals, and that the increase is not to go to the Indians as a tribe but to the several members *per capita* at the time of payment. This is applying the liberal construction to the language used, so as to give the greatest possible benefit to the party least able to protect their own interests. The provision as to diminution of the annuity has reference only to the fixed sums, and does not impair the meaning given to the language used as to the augmentations. It is

(1) 34 Ch. D. 172. (2) 2 C. & K. 86.
(3) 7 Ves. 336-7.

likely that the treaty was shaped with reference to the then prevalent idea that the tribes were dying out, but the intent of the treaty was to assist the Indians to change their state in bringing them a step nearer to civilization. If, however, the tribes increase in number the only limit of future payment is when they become entirely civilized so as to cease to be Indians."

"III. It is not desirable to define with minuteness who are Indians entitled to share, in advance of any particular case which arises for decision. It would appear from the despatch (a letter of Mr. Robinson, the Commissioner), which accompanies the treaty that half-breeds were then embraced in and numbered with the tribe in the approximate totals given. The recognition of these half-breeds as members of Indian tribes by the government appears to be manifested in contemporaneous and subsequent statutes."

"When the statute of Canada (13 & 14 Vic. ch. 74, passed 10th August, 1850), permitted none but Indians and those who may be intermarried with Indians to reside upon Indian lands (unless under special license from the government officer), and the act altogether seems to contemplate as Indians those of pure or mixed blood and those intermarried with and living among Indians (no distinction being made to sex). Then coming down to 1857, the statute of that year (20 Vic. ch. 26), gives a definition of Indians as meaning persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian bands, residing upon unsurrendered lands, or upon lands specially reserved for tribal use in common, and who shall themselves reside upon such lands; that is, one of other blood married to one of Indian blood, acknowledged as a member of the tribe and living on the tribal land with the tribe (whether man or woman) is accounted a member of that tribe. And the descendants of such marriage would

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be Indians as long as the tribal relation and residence lasted."

"This appears to be a more comprehensive category than would be the case if the matter rested on common law or on international law, for in such case, the maxim *partus sequitur patrem*, governs cases as to Indians. (See judgment of Parker J., in *Ex parte Reynolds* (3).

"There is the observation also to be made that the government of Canada, before 1867, had always power to regulate the inhabitancy of Indian lands by excluding all whites therefrom, and their marriage and residency on the part of white people must have been with the sanction of the government."

"I would therefore favour generally the application of the rule so as to include among Indians those of other blood, who are not only married to Indians, but were adopted and acknowledged by the tribe as members, and as such lived in tribal relation with the other members at their common place of residence. If all these conditions did not exist (as to the males anyway) I should say the person of other blood and his descendants was and were not included in those entitled under the treaties."

"IV. A similar difficulty arises as to the definition of what outlay should be taken into account before the right to increased annuities arises. All expenses connected with the survey and administration of the lands and the keeping of the accounts and all outlays going to develop and advantage the territory so as to induce settlement and sale would appear to be properly charged against the income from their lands, but it is better to deal with disputed items as they arise specifically than now to attempt to exhaust all details by way of anticipation."

(3) 5 Dillon 394.

"V. In case it appears that surplus revenues existed sufficient to pay increased annuities and that there has been paid by the Dominion Government pursuant to the suggestion of Attorney-General Mowat made in 1873, these payments should be recouped to the Dominion as of this date and without interest."

"The nature of annuities is such as not to carry interest and the offer of the Attorney-General then to submit the matter in dispute as to liability to judicial tribunal should preclude the Dominion from getting interest during the period of delay from then till now."

The Honourable SIR LOUIS NAPOLEON CASAULT:

"I would like to say one word about the interest, and about the responsibility of the provinces for the annuities subsequent to confederation. I have had occasion to consider the question before now, a good many years ago, and was firmly of the opinion that for all annuities, and even the capitalization subsequent to confederation, that it should be borne by the province of Ontario. I have had no occasion to change my mind—far from it—and I am glad to say that my two brother arbitrators are to-day of the same opinion. But there is a distinction to be drawn between the annuities payable after confederation, and those which became due before confederation. Of course, those which became due before confederation were due by the province of Canada to the Indians, and formed the debt of the province of Canada, and for those, if any there be, they should be paid both by Quebec and Ontario, in the proportion held by the first arbitration."

"As to interest, we have come to the conclusion, which was not adopted by the learned Chancellor, that the interest should be paid upon a balance of about $900,000 and $500,000, say $1,500,000 by Ontario, and by Quebec upon $625,000, if the balance against each province amounted to these amounts, and if by the final

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settlement of the accounts the balance was made less the interest should be for the less amount. I think this is nothing but a sequence of what we have decided. Of course, it should go with interest if the final settlement of the accounts diminishes the amount for which we have said that the Dominion was entitled to interest as against the province of Ontario, and if not, of course there would be no interest."

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THE HONOURABLE MR. JUSTICE BURBIDGE:

"The case was presented to us by counsel with such completeness and lucidity of argument, and the learned Chancellor has, in the opinion that he has just delivered, and to which we have all listened with so great interest, dealt so fully with the principal issues involved, that I shall content myself with stating, as briefly and with as little discussion as possible, the conclusions to which I have come."

"I am of opinion, and as to that I do not know that there is any controversy between the parties, that if in any year since the two treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government of the province of Canada, or its successor, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase, not exceeding four dollars for each individual. So much they were entitled to as a matter of law and right. Any increase beyond that would have been a matter of grace."

"I am further of opinion that the total amount of annuity to be paid under each treaty is in such a case to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaty; that is, that in case of an increase in the number of Indians beyond the number of 1,240 named in one treaty, and 1,422 in the other,

the annuity, if the funds permitted, was to be equal to a sum that would provide four dollars for each Indian of the tribes entitled. The only difficulty I have had on this point arises from the provision for the diminution of the annuity in case the number of those entitled fell below two-thirds of the numbers mentioned. In that case they were not to have 'the full benefit' of the treaty, and the annuity should be diminished in proportion to the actual members. If this provision, however, be taken to have reference only to the fixed annuities, which at the moment were for all parties the more important matter, the difficulty disappears. That clause probably was intended to operate in reduction in the case provided for of the perpetual and fixed annuities that were payable quite apart from any consideration of the amount of the revenues to be derived from the ceded territory, leaving the other provision as to increase to depend upon the excess of such revenues over the charges referable to the opening up and administration of such territory. That, on the whole, it seems to me, must have been the intention of the parties."

"Then as to 'the individuals' who in case the increase can be made without loss are to be reckoned in ascertaining the amount of the annuity, it is clear of course that they are to be Indians belonging to the tribes or bands entitled, and no one should be counted who was not by law or well-established custom a *bonâ fide* Indian of the tribe or band."

"I agree with what was said by Mr. Robinson of the danger of attempting at present an abstract definition of the word "Indian." With reference to the period before the union I do not see that there can be any difficulty. Whatever government is now liable to pay or make good any amounts that were payable but not paid before the union, is so liable as the successor or successors of

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the old province of Canada, the government of which appears to have kept a record or list of the names of the Indians entitled to share in the fixed annuities. Generally speaking the 'individuals' whose names appear on such lists would be those to be taken into account in computing any increased annuity that should have been paid. The onus of showing that the names of any individuals entitled to be reckoned were improperly omitted from such lists should now be on the Indians, or those who act for them, and in like manner no names should, I think, be struck off, except for good reason shown by those whose interest it is to keep the numbers down."

"With reference to the period after confederation, neither Ontario nor Quebec would be in any way affected or precluded by the action of the Parliament or Government of Canada, or of any of its officers, either in prescribing a definition of who are Indians or in adding to the lists the name of any 'individual' as an Indian of a tribe or band entitled to the benefit of either treaty. The burden of showing that the names of any Indians so added since the union to such lists were rightly added, would be, it seems to me, on the Government of Canada."

"I should be equally unwilling to attempt a definition of the expenses and charges for the opening up, settlement and administration of the ceded territory that should be taken into account in determining whether or not the annuities could be increased 'without incurring loss.' In a general way they must, I think, be fairly referable to the administration of the particular territory and not of the class of expenditures that are incurred by governments for the general advantage of the whole country. During the argument certain expenditures by the Government of Canada since the union were mentioned; but on the whole they did

not appear to me to be such as should be taken account of. If, however, there should happen to be any expenditure directly made or incurred by the Government of the Dominion for the purpose of the opening up of, and enhancing the value of, the particular territory in question, I am not at present prepared to say that it should not be taken into account."

"Then as to the question raised by Mr. Robinson as to whether or not any excess of revenue in any year might not be used to give the increased annuity in a former year in which an increased annuity could not have been paid without loss, I see no reason to change the view I expressed at the hearing, that that could not be done. If in any year the condition prescribed by the treaties did not happen the Indians have in respect of that year no claim. Of course any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be taken into the accounts of that year. But if in any year the increased annuity could not be paid without loss after taking any such existing excess or balance into account, then there was as to that year no liability to pay any increased annuity."

"I think there can be no doubt that any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada since the 111th section of the British North America Act, 1867."

"I am also of opinion that this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act."

"I do not think that Ontario and Quebec have, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873 (36 Vic. ch. 30). The

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matter was never considered or taken any account of in such capitalization or in any of the proceedings leading up to the award of Sept. 3rd, 1870, or in the award itself."

"With respect to the Act of 1873, its effect, so far as it is necessary now to consider it, was to substitute the sum of $73,006,088.84 for the sum of $62,500,000.00 in the 112th section of the British North America Act, 1867, the result being that Ontario and Quebec became and remained conjointly liable to Canada for any excess of debt over the former instead of the latter sum. That is the clear construction of the Act itself, and it is one that has been acted upon without question by all parties since the Act of 1873 was passed. The contention for a different construction is now raised for the first time. It is now said that the Act of 1873 was conclusive of the amount of the debt with which the old province of Canada entered the union. If so, the province of Canada account was closed in 1873, and the negotiations between the parties that have occurred since the agreement of 1888 (Exhibit Z, Report of Conference, 1888, p. 4), the settlement of particular items of that account coming in or ascertaining between the years 1873 and 1888 (*id.* pp. 19 to 22), and our awards in respect to that account and interest thereon all go for nothing. The question is not, it seems to me, open to fair debate."

"With reference to the question of interest on any increased annuities that may be now ascertained to have been payable prior to the union to the Indians under the treaties in question, it is obviously necessary to distinguish between the rights of the Indians to interest, and the question of interest as between the Dominion and the provinces of Ontario and Quebec as the successors in liability to the old province of Canada. The latter question has been concluded by the agree-

ment of 1888, and our award following that agreement. The question as to whether or not interest should be computed on any arrears of such annuities is another matter depending upon the right in law or equity of the Indians to interest as against the Crown, and it seems to me that they have no case either at law or in equity. I regret that I cannot see my way to a different conclusion. But I have no doubt that the debts and liabilities for which Canada became liable under the 111th section of the British North America Act are legal debts and liabilities, and that the excess of debt for which, under the 112th section, Ontario and Quebec became conjointly liable to the Dominion, cannot, without the conjoint consent of Ontario and Quebec, be increased by any debt or liability not enforceable in law or equity."

"If there is to be any consideration of any claim of the Indians to interest on any arrears of annuities payable before the union in recognition of any moral obligation or as a matter of good conscience, it is for Ontario and Quebec to consider the matter and admit or deny the claim as they see fit. The Dominion can collect from them only what they legally owe, and cannot by discharging moral obligations make Ontario and Quebec liable; and there is, if I may express an opinion on that point, obviously no obligation, legal or moral, on the Dominion to do more than collect for the Indians from Ontario and Quebec whatever amount of arrears the province of Canada owed to them, and to pay it over to the tribes entitled."

"Unless Ontario and Quebec will consent that in computing the amount of arrears due to the Indians at the union, such arrears shall be computed with interest, they must, it seems to me, be made up without interest."

"With reference to the period subsequent to the union, the case presented by the Dominion for the

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tribes of Indians interested in the treaties in question is, that the ceded territory became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein. The other question as to whether or not Ontario and Quebec are conjointly liable under the 112th section of the Act to the Dominion for such increased annuities with or without a right on the part of Quebec to be indemnified by Ontario against the same, is not now raised. That question is reserved to come up in some future proceeding or not, as the Dominion may think proper."

"Now, looking to the particular matter, my mind lends a ready assent to Mr. Robinson's argument that it is equitable that this burden should fall upon Ontario. Ontario has the advantages resulting from the ownership of the lands, and it should bear the burden. I agree to that; considered as a matter by itself it is highly inequitable that any part of the burden should fall upon Quebec, and even in a greater degree inequitable that Nova Scotia or New Brunswick or any of the provinces that came into the union since 1867 should be called upon as a part of the Dominion to contribute anything towards making good to the tribes entitled the increased annuities payable to them under the treaties mentioned; and were it not for the consideration to which I am about to refer I should for myself have little or no hesitation in joining in making an award upon the 'equitable principles' mentioned in the sixth section of the Acts under which we are sitting. But the union of the provinces was a large matter involving many issues and considerations of great moment, and the compact to which expression was given in the Act by which the union was con-

summated is one which should, I think, be guarded and maintained with great watchfulness and care. What one might think to be fair and equitable with respect to a particular matter dealt with in the Act, abstracted from other provisions therein, might in conjunction with such provisions be in fact and reality unfair and inequitable. So it seems to me that the only safe way is to adhere strictly to the compact or treaty that was made by the province that entered into the union; and that the highest fairness and equity will be found in giving to each the advantages, and imposing upon each the burdens, it has bargained for. The case is one in which we ought, I think, to proceed upon our view of 'a disputed question of law,' and I am better satisfied to follow that course as it will save to the party against whom any award is made a right of appeal to the Supreme Court of Canada, and thence to the Judicial Committee of the Privy Council [54 & 55 Vict. (D.), c. 6, s. 6]."

"Now with reference to the question of law in dispute, it seems to me clear that in a narrow and strict sense the Indians for whom this claim is made by the Dominion had at the union no interest in the lands constituting the ceded territory, other than the right or privilege of hunting thereon or fishing in the waters thereof so long as such lands were ungranted. These Indians were no doubt interested in such lands in the sense that it would be to them an advantage to have them managed with a prudence and forethought that would at the earliest possible time and for the longest time possible give them the increased annuities for which the treaties made provision. But the very object of the surrender was to give the Crown a free hand in the settlement and administration of the land and to divest the Indians of any title thereto or interest therein. And so too, looking to the parties to

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the treaties in question, the Crown on the one side and the several tribes of Indians on the other, it is possible that the Crown did not, after the surrender, hold the ceded territory on any trust that would be enforceable in law. But in a broader sense, and I agree fully with the learned Chancellor in thinking that the treaties in question and the British North America Act should be construed in a large and liberal way, it seems to me that the Indians, in entering into such treaties, reposed a confidence in the Crown that it would manage the ceded lands fairly for the advantage of all concerned, and so as to raise thereout, if that were fairly possible, the moneys to pay the increased annuities, and that there was a corresponding duty resting on the Crown to do so. In that sense the lands were at the union, it seems to me, subject to a trust or interest existing in respect of the same. It is objected that it was not the lands constituting the ceded territory, but the proceeds of the lands, that were impressed, if at all, with any such trust, or in which the Indians had any such interest, and it is 'lands' and not 'proceeds of lands,' that are mentioned in the 109th section of the British North America Act, 1867. But that objection does not, it seems to me, present any great difficulty in view of the facts of the case. These lands were, before the surrender, and have since been vested in the Crown. There was no change of title at the union. The Crown continued to hold them. Before the union the beneficial interest in such lands and the right to take and appropriate the revenues arising therefrom was vested in the province of Canada, and by the 109th section of the British North America Act, 1867, that right passed to the province of Ontario. The lands themselves did not pass in the sense that the title thereto was transferred. What passed was the right to administer and take the proceeds, the revenues arising from such

lands. This is clear, I think, from two passages of the judgment of the Judicial Committee, delivered by Lord Watson in the *St. Catharines Milling and Lumber Company* v. *The Queen* (1), cited by Mr. Justice King in *Farwell* v. *The Queen* (2), and from what the same learned Lord said in delivering their Lordships' judgment in the 'Precious Metals' Case,' the *Attorney-General of British Columbia* v. *The Attorney-General of Canada* (3)."

"In the former case, referring to the effect of the Imperial statute, 3 & 4 Vic. c. 35, Lord Watson said :—

" 'There was no transfer to the province of any legal estate in the Crown lands which continued to be vested in the Sovereign, but all moneys realized by sales, or in any other matter, became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown.' "

"And then with reference to the distribution of property under the British North America Act, 1867:

" 'It must always be kept in view that, whenever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, (as the case may be), and is subject to the control of its legislature, the land itself being vested in the Crown.' "

"The following are extracts from the judgment in 'The Precious Metals' Case.' :—

" 'The title to the public lands of British Columbia has all along been, and still is, vested in the Crown ;

(1) 14 App. Cas. 46. (2) 22 Can. S.C.R. 559.
(3) 14 App. Cas. 295.

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but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, has been transferred to the province before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only 'conveyance' contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the province, nor that the Dominion Government should occupy the position of a freeholder within the province.'"

"'In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the Government of the province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the province for 'public lands,' which is, in substance, an assignment of its rights to appropriate the territoral revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.'"

"That view of what lands mean when vested in the Crown in the right of or for the use or benefit of the Dominion or of a province relieves us, I think, of any difficulty that might otherwise arise in respect to any

distinction between a trust or interest in such lands and in the proceeds of or revenues arising out of such lands."

"I think the ultimate burden of making provision for the payment of the increased annuities in question falls upon the province of Ontario, and that that burden has not, as against the Dominion or these Indians, been in any way affected or discharged. I express no opinion as to the effect of the award of 1870 on the respective rights of Ontario and Quebec. That question would arise in a case presented by the Dominion against the two provinces under the 112th section of the British North America Act, but does not arise here."

"With reference to interest on arrears of annuities accruing due after the union and not paid to those entitled, it seems to me that they stood in the same position as those that accrued before the union and that interest should not be computed without consent of Ontario. But as to the increased annuities paid by the Dominion to the Indians in 1874 and since, the Dominion should, I think, have interest on any amounts so properly disbursed, if our award as to interest on the province accounts permits thereof. The payments were made after notice and after certain negotiations between the Dominion and Ontario, in which, without determining on whom the burden should ultimately fall, it was admitted the Indians were entitled. The question, then, is not one of interest on unpaid annuities, but of interest on moneys paid by the Dominion in respect of a legal liability, for which it is entitled to indemnity against Ontario"

"I think any such moneys so properly paid should be charged against the province in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be

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affected by any previous ruling as to interest on that account."

The province of Ontario appealed from said award to the Supreme Court of Canada.

Æmilius Irving Q.C, *S. H. Blake* Q.C. and *J. M. Clark* appeared for the appellant, the Province of Ontario.

Christopher Robinson Q.C. and *W. D. Hogg* Q.C., for the respondent, the Dominion of Canada.

D. Girouard Q.C. and Hon. *J. S. Hall* Q.C., for the respondent, the Province of Quebec.

Irving Q.C. With your Lordships' permission, my learned friends Mr. Blake and Mr. Clark appear on behalf of Ontario; I am also in the case but I shall not address the court. My learned friend Mr. Blake will lead.

Blake Q.C. Ontario claims that there was no trust in respect to these lands; that no trust could have been declared in regard to them; that any trust would have absolutely defeated what the parties were endeavouring to arrange, which was that the lands were to be placed in the possession of Canada, so that they might deal absolutely with them. If there was to be any trust in favour of the lands it would have absolutely defeated what the province of Canada was desirous of carrying out. For what the province of Canada wanted to do was at once either absolutely to give away or absolutely to sell, or absolutely to deal with, these lands. If there had been any trust, or if there had been any interest retained in favour of the Indians, then the province would have been utterly unable to do what it desired to carry out. The arrangement was one to do away with any right, to do away with any interest, to do away with anything that in any possible way might check the freest dealing with this property. The

Indians, of course, are perfectly satisfied, because, instead of the illusory charge which they had of fishing and shooting, they get absolutely as much of the land as they felt they could possibly deal with. They retain—and it is specified in the treaty as all that they do retain—the right to fish and shoot on all the other lands until the Government chooses to sell them; but the moment it gives them away, or sells them, or leases them, that ends it. They take a certain sum of money down, and they take the promise of the Government, which embraces the honour of the Crown, which embraces all, it may be, that might come from the lands, which embraces all the revenues of the Government. They take that promise and set absolutely free all these lands; and if these lands are not set absolutely free from any trust and from any interest, then the whole object of the treaty is utterly and entirely defeated.

Trusts or charges, or anything of that kind, would be out of the question because it binds or touches the land; the very object of what was being entered into is utterly defeated, because the person that takes the land must take it with the trust or with the charge, and the land is not land absolutely free to be dealt with, as was the intention of those parties. I think that that should be emphasized, because while both the learned Chancellor and Mr. Justice Burbidge say that, taking this as an ordinary instrument, and construing it as an ordinary instrument, construing it so as to further the reasonable scope of the provisions, they are able to stretch it in such a way as to create upon the land that which did not exist. Now, my Lords, you will find that the learned Chancellor says:

"The course of construction applicable both to the constitutional Act and Indian treaty is not that a literal and strict meaning is to be given the words, but that they shall be construed liberally and comprehensively,

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so as to further the reasonable scope of the provisions." I have no objections whatever to the reasonable scope of the provisions being followed out; but is not the true scope here that the lands are not to be charged? Is not the true scope of the provision that the Government is to take the lands freed from any interest or charge?

It is only by the one solitary means that Ontario can be made responsible and that is by holding that they have taken the lands subject to a trust and holding the lands under the trust must discharge it; and in discharging it, must pay these annuities. Ontario alone did not enter into this bargain; Ontario was not known then. There was no contract with Ontario; it was a contract with the provinces composed of Upper and Lower Canada, and the only way that Ontario can be made responsible is, not by carrying out the reasonable scope of the instrument, but by freely and entirely negativing what is its scope, altering it entirely, altering it entirely to the detriment of Ontario, altering it entirely not to the betterment of the Indians. And this has not been stretched in order to help the Indian, because the Indian knows perfectly well that he has got the whole of the Dominion behind his back in this payment. But what I do submit is that here the true scope is that the lands are not chargeable. The true scope is that there is to be a personal payment by the Crown to the Indians; and if there is to be any such enlargement must not the enlargement be according to the scope of the instrument, and not to defeat the instrument? If you turn round now and say there is to be a trust—and it is admitted that that is an enlargement—why, my Lords, it is an enlargement that defeats the instrument and does not carry it out.

Then again, it is said that there is an implied obligation to pay them out of the revenue from the lands. I

submit not; no implied obligation to pay them out of this at all; a distinct bargain made for certain benefits on the one side and certain benefits on the other; that there will be, in case I make well out of my bargain, a certain additional sum or an augmentation in your favour.

So, I say there was no charge, no right, no interest, and one of my strong arguments is the language that has been used by these two learned judges, showing that the language, taken as it usually is taken, does not warrant it, and showing that the very object that was had in view would be utterly defeated if the language was so broad. But then they say "because these are Indians, you are to deal liberally with them," forgetting, my Lords, that it does not give the Indians one cent more or one cent less. The Indians are not dissatisfied with their paymaster; and, forgetting that, they are making this change in this bargain—for virtually it is a change—not in favour of those that they say are entitled to consideration, but in order to charge the one province as against the other.

I went through the cases that have been referred to, but I did not find that there was anything whatever in them which negatived the position taken by the province of Ontario here.

The case well known to his Lordship, the Chief Justice of the court, of the *Canada Central Railway* v. *The Queen*, in which his Lordship gave judgment in the first instance (1), was referred to. Well, my Lords, I gladly take the conclusion of his Lordship, Chancellor Sprague, there, at page 314, where it was urged there should be, even in an Act of Parliament, an extension or the like. He says: "I am in doubt whether the consequences were appreciated by the legislature, but our duty is to interpret it, and that is our only function."

(1) 20 Gr. 273.

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And then your Lordships will find at pages 326 and 328 of that judgment, a citation of cases in regard to the construction of Acts of Parliament. In that case of the Central Railway Company there was the express statement—and your Lordships will find that at page 275—that the company was to be entitled to a grant of land. I am simply referring to the cases cited, and referring to the fact that there is nothing in those cases which would warrant what the learned arbitrators have done. By section 18 of the Act there certain lands were set apart, and at page 289 it is said that it is taken for granted that, as between individuals, the right to that specific land existed. The only question was the making a selection out of four million acres of lands that were granted; and the court came to the conclusion that if there was a sale of 5 acres out of 100 that the party might make a selection of it. But there was the most absolute trust as declared by the Act of Parliament in favour of the Railway Company that was presenting the petition. And in *Booth* v. *McIntyre* (1), another case cited, it was held that the company had the power untrammelled by any restrictions to enter upon the lands of the Crown, and that that was not taken away but reserved by section 109 of the British North America Act. But there the right existed; it was plain and specific; no question about it.

Then there was a case in Maclean's Reports, as to the treaties with Indians and the tribes and others, and I do not find anything there. On the contrary it was held that the distinction was not authorized by the constitution; that is, to deal in treaties with Indians in different ways from other treaties. They are treaties within the meaning of the constitution, and as such should be laws of the land. Mr. Hallock, whose book was also referred to, says that they are to receive a fair and liberal interpretation, according to the inten-

(1) 31 U. C. C. P. 183.

tion of the contracting parties. That is all that is to be kept in view, according to the intention of the contracting parties—which I say would be utterly defeated by the interpretation put here—and be construed in good faith. Their intention is to be governed by the same rules which we apply to the determination of contracts. That is the third edition of Hallock's International Law, 296. Whitton says they are to be construed in the same way; and Story also, vol. 2, page 44.

I submit, therefore, my Lords, that the true conclusion in respect to this matter was that Ontario is not individually liable for the payment of this amount; that nothing has transpired to place upon Ontario any additional responsibility; and that this is a debt either of the old province of Canada in the augmentation of it, as well as in the original amount; and that it must either be discharged by that province, or else discharged by the Dominion of Canada.

Clark follows for the appellant. In the present appeal before your Lordships, and in the argument before the learned arbitrators, the whole question was as to whether there was a sole liability of the province of Ontario for payment of these annuities subsequent to confederation; the other question was not raised. Ontario asked before the arbitrators that the whole matter should be settled at once, but the Dominion reserved their right to make a claim afterwards against the province of Canada under section 112, if the present claim failed; but your Lordships will see that that matter is not adjudicated upon at all in the award, and was purposely left out by the arbitrators, and that matter, namely, the liability of the old province of Canada, as to whether the Dominion was liable under section 111, and had any right over against the province of Canada under section 112—that is against Ontario

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and Quebec jointly—is entirely left in abeyance, and is not the subject of the present appeal.

Then the whole question now before your Lordships is as to the construction of these treaties and of section 109, of course taken in connection with section 111, and so on, so far as they throw light on section 109.

First, I would like to call your Lordships' attention to the suggestion made in the factum of the Dominion and in the judgment of the learned Chancellor, namely, that all the meaning of these sections could be obtained by construing the British North America Act, or at least the sections in question, as if the treaties, which are the subject of the present bill, had been incorporated in them by way of preamble.

If we consider it in that way, we have first the treaties in question mentioned in the case, and of which my learned friend read sufficient to illustrate the present argument. Then we have the treaties declaring that the Indians surrender, and so on, using the largest possible words of grant, all their right, title and interest—using the very words of the British North America Act—in the lands in question, and give up all their right, title and interest in the land.

And what I submit is that the only interest that the Indians expressed on the face of the treaty—I shall deal afterwards, if necessary, with the question of the implication—refers to the reservations mentioned in the treaty, which are not in question, and to the rights to shoot, and so on, given to the Indians under the words of the treaty.

I submit that the previous arbitrators, in 1870, having dealt with the matter there should not now be an award which is in direct conflict with the previous award, especially when your Lordships bear in mind that there was an appeal from the previous award to the Privy Council, and that the Privy Council con-

firmed the award so far as the objections then taken. In the special case which is referred to in paragraph 6 of the judgment of the Privy Council, (your Lordships will find that special case printed in the Ontario Sessional Papers of 1878, number 42) your Lordships will see that this identical section, 109, is made part of the case. So that if there was anything in the award of 1870 which was in conflict with section 109, then that was the objection appearing on the special case before the Privy Council, and is, I submit, concluded in favour of Ontario by the judgment of the Privy Council, that so far as any objection was made to the award in the special case the award is valid.

Before the learned arbitrators, and in the factum of the Dominion, they argue in favour of the principle that Ontario getting the benefit of the lands should bear the burden of these annuities, and in support of that contention they rely, apparently, on the direction of the Privy Council in *St. Catharines Milling Company* v. *The Queen* (1); but all the decisions of all the courts are collected in the 4th volume of Cartwright, the cases under the British North America Act at page 107 and subsequent pages, commencing with the decision in the Privy Council. Now, your Lordships will see from the whole of the reports, and from the way in which the matter was discussed in the Supreme Court (2), that originally it was a matter entirely between the Attorney-General for Ontario and the St. Catharines Milling and Lumber Company. That was decided in that way by the Chancellor of Ontario, the Court of Appeal for Ontario, and this court. And it was only on the application for leave to appeal to the Privy Council that the question of the right of the Dominion came in at all; and the Dominion was allowed, on a special order made in that case, to intervene, and it is pointed out in

(1) 14 App. Cas. 46. (2) 13 Can. S. C. R. 577.

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the citation in the factum that the whole of the question in regard to the effect of that treaty then in question in 1873, was to be decided on the appeal to the Privy Council; and at page 60 of that case, in the judgment, Lord Watson says that, seeing that Ontario gets the benefit of the land there in question, that Ontario must recoup the Dominion the money payments which are there referred to; but what I point out to your Lordships is that the circumstances in that case were entirely distinct from the present case, and that that case can have no application to the decision here. Your Lordships will observe that the treaty there in question, being the North-west Angle Treaty, no. 3, was made in 1873, subsequent to confederation, so that the position was that at the time that treaty was made in 1873, Ontario took those lands, as was held in all the courts, subject to the burden of the Indian interest, whatever that interest may be.

There is a case in 31 Common Pleas which construes the word interest, and I submit the considerations there are entirely in favour of Ontario, and that only the class of matters which are referred to are intended to be covered by the words "trust and interest" in section 109.

Robinson Q.C. for the Dominion of Canada. There are two or three considerations, which may be put very shortly, which it seems to us is almost conclusive in favour of the constructions which the arbitrators have adopted. In the first place, as I understand, those principles which apply, and which my learned friends seek to apply, with reference to the legal authorities, as to the existence or non-existence of a vendor's lien, and different cases of that kind, and as to the existence or non-existence of a trust, are not relevant to the issue; there is no vendor's lien here; the Dominion is not seeking to retain a vendor's lien; it is

a transaction *sui generis*; you cannot find any transaction like it. The reason of it is this: this land undoubtedly, in the hands of the old province of Canada and before confederation, was certainly land in which the Indians had an interest. It was land subject to a trust for their benefit.

What would have been the position of things before confederation? Canada would have had to pay this debt out of the proceeds of this land. Well, now, does not Ontario, getting this land, hold it from Canada just as Canada held it? What is the difference? The Crown held it before for the benefit of the old province of Canada. There has been no sale and no transfer of title, as we all know. The Crown hold it now for the benefit of the province of Ontario. Why should the Crown hold it for the benefit of the province of Ontario in any different way or different position or free from any claims which attached to it while they held it for the province of Canada? I hold land for A. and hold it for A., with this interest which B. has in it, namely, to get the proceeds from it over and above a certain sum; I make an arrangement instead of holding it for A. I shall hold it for C.; why should I not hold it for C. under the same conditions as I hold it for A? Why should the interest in the land be changed by reason of a difference to the *cestui qui trust?* Because that is what it means. We submit the whole arrangement shows that plainly.

Now, then, let us consider for a moment clause 13 of the award of 1870. Let us see how things stood before that arbitration. Confederation had taken place; the division of assets between Ontario and Quebec had to be made by this arbitration; by confederation the lands in each province went to that province subject to the interest or trust of either people under section 109; but it was thought desirable that this question of

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Indian annuities should be dealt with by the arbitrators of 1870, and it was brought before them, and what did they say? I suppose they looked at section 109, and they said:

This land has become the property of the province. Now, if this land is subject to any annuity or to any claim to be paid out of the proceeds of the land, it must be quite understood that the province that gets the land is not to have any claim on the other provinces for it.

Now, let us see if this is not borne out by the very words of that award. I have not quite apprehended the force or foundation of my learned friend's argument that that award is against us:

"That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to, the said province in which they are so situate, by the other of the said provinces.

How does that affect the claim which is made here by the Dominion against one of the provinces? How has it any bearing upon it? I think that what they said is: "You Ontario, get these lands; you will have to pay the annuities. Now, you must recollect you will have no claim against Quebec or any of the other provinces for it."

The arbitrators have put this case on those grounds, which I submit are unanswerable. In the first place there is a trust or interest. Ontario has got the fund out of which is to come the proceeds or funds which have to pay the annuities. The payment of the annuities is conditional on the person holding the lands en-

abling the payment of those increased annuities. It could not be dealt with by the arbitrators of 1869, because you cannot tell from time to time what the proceeds will be. The case stands in a very peculiar position. Ontario has the lands and is administering the lands, and Ontario is the only person who can tell what the proceeds are. The proceeds depend upon the management of those lands and the receipts of Ontario from these lands. The arbitrators have based their finding on the equitable principle laid down in *Waring* v. *Ward* (1), that principle which is to be found in Broom's Maxims, page 634, 6th edition.

We say, these lands passing to Ontario were taken by Ontario subject to the interest of the Indians in them; that that is the fair meaning of the statute, as it would be if you would put the treaty and the statute in juxtaposition; and that that is the reasonable and fair construction of the statute, looking at the constitution as a constitution, and looking at the treaty as a treaty; because, looking at it on all principles of equity and justice, it should be interpreted that way; and we say, therefore, the judgment should be affirmed.

Hogg Q.C. follows. There is one question I wish to draw your Lordships' attention to, and that is with reference to clause 13 of the award of 1870; that clause deals with the rights only of the provinces; the arbitration was for the purpose of the distribution and division of assets and liabilities as between the provinces, as between Ontario and Quebec, or Upper and Lower Canada, and for the purpose of freeing one from the other It has the effect of freeing absolutely the one province from any claim the other province may have with reference to a charge such as the one at present, but it has no other effect. It does not affect the right of the Indians to say that

(1) 7 Ves. 336.

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they have a claim, nor of the Dominion on behalf of the Indians that this claim should be presented. In other words, if the clause 13 has the effect which my learned friends for Ontario have said, then if there is an interest of the Indians in those lands under the 109th section of the British North America Act, then that clause of the award is *ultra vires* the powers of the arbitrators of 1869.

There is just one other point, my Lords, that I had intended to draw your Lordships' attention to; that was with reference to the statement made by my learned friends from Ontario, as to the difference which exists between the treaty referred to in the St. Catharines Milling case, and the present treaty. My learned friend made the statement that the St. Catharines Milling case established the character of the interest which the Indians had in lands in this country; that is, that the interest there defined was the only interest which the Indians had in the lands. That is quite true with reference to the treaty in that case; for a fixed annuity under that treaty the Indians surrendered all their interest, whatever it might be. In the present treaties there was a fixed annuity, but there was a contingent annuity, or an annuity based upon the lands being of sufficient value or sufficient produced from those lands to pay a further annuity; and while the whole interest of the Indians in the lands in the North-west Angle Treaty was disposed of for a fixed annuity, the whole interest in the Robinson Treaty was not disposed of, because they retained an interest in the results or produce of the lands for the augmented annuity; and therefore at the time these lands came into the province of Ontario at confederation there was still this outstanding interest which the Indians had, and that is the interest which the learned arbitrators have defined in their judgments as an interest

under the 109th section of the British North America Act.

Girouard Q.C. for the respondent, the province of Quebec.

(The learned counsel after pointing out that no suggestion was ever made until 1884 that Quebec should be liable for these payments, proceeded as follows) :

Now, it seems to me, that in order to fully understand this case it will be proper to give a little history of the Indians on this continent, and to consider the purpose of these Robinson Treaties. On the one side Her Majesty, Queen Victoria, represented by the Hon. William Robinson, Commissioner of Crown Lands, and on the other side certain tribes of Indians called in the treaty Nation Indians of Lake Huron, and Ojibeways of Lake Superior. I would like to go back to the very beginning, and show the history of the Indians at the present time, to show they are not to be considered as individuals, to show their rights are not mere rights of subjects of Her Majesty. I shall show that these Indians have some greater rights than British subjects. When the Spanish, English and Dutch took possession of this northern America what did they do? They immediately put themselves into relations with what they called the Indian nation, not only one Indian nation but several of them. The English sought the friendship of what was called then the Confederacy of the Five Nations located at the south of lake Ontario, between Niagara and somewhere, the line of the province of Quebec and the province of Ontario to-day; and the French sought the friendship of the other Indian nations which were inhabiting the northern portion of the St. Lawrence as far as Sault Ste. Marie. It was admitted that these Indian nations formed distinct political communities in the country. Treaties were made with them, not only as far as the line was con-

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cerned, but also as far as peace and war were concerned. In 1698 came the end of that long war which commenced in 1667. In the month of September, 1698, there was a large gathering of all the Indian nations inhabiting the whole of this northern continent for the purpose of concluding the peace with the French King, represented by the colonial authorities in Canada. Then later on we find that the French King made some provisions for the maintenance of these Indians.

The cession of Canada took place in 1763, and then you find a different policy pursued by the English Government. The French Government took possession of all the lands of the province of Quebec as their own. They did not purchase anything from the Indians, but in some cases reservations followed; but it was a sale, it was a gift or donation from the King of France for the benefit of these Indians. The mission of Oka of Two Mountains is one; Caughnawaga is another; the mission of St. François du Lac is another; and another one will be at Quebec, at Lorette. There is a great difference between the wording of these Indian treaties made at the time with the French and those made with the English. Let us take one which has been the subject of contention before the court of justice in order to understand the scope of these treaties which the French King made for the Indians. I take the concession of Sault St. Louis, for the benefit of the Iroquois which was made in the year 1680 to the Jesuit Fathers:

"Our dearest and well-beloved, the Religious Order of the Society of Jesus, residing in our Dominion of New France, have caused it to be most humbly represented to us that the lands of the Prairie de la Magdelaine which were heretofore granted to them, being too damp for the purpose of sowing and providing for the sustenance of the Indians who have thereon settled,

and that it is feared they might leave if we were not pleased to give them the land called the Le Sault, containing two leagues in width from a point opposite the St. Louis Rapids, going up along the lake by an equal depth, with two islands, islets and shoals, which are in front and adjoining the lands of the said Prairie of La Magdelaine, which would allow them not only to receive the said Iroquois, but even to increase their number, and to spread by that means the knowledge of Faith and of Gospel."

And then the grant proceeds to say that the title to the land is given to the Jesuit Fathers "on condition that the said land called the Sault, shall belong to us free and clear, as it then may be, without any claim on us." And then there is a provision in the grant that the French people shall not reside on this reservation.

About the time of the cession to Great Britain the Jesuit Fathers undertook to sell to some white men pieces of that reservation. The Indians complained. There was a regular law-suit; and the decision was that although the title in the land was in the name of the Jesuit Fathers, still it was subject to a trust, and that trust was that it should be for the sole use of these Iroquois Indians. The word "trust" is not used in that grant or cession. It is not said that the Jesuit Fathers shall hold the land in trust for the Indians. It is a gift, a donation, to the Jesuit Fathers, without using the word "trust," but the trust can be construed just the same. It is a constructive trust from the very wording of the grant, which says that it shall be:

"To allow the Jesuit Fathers not only to receive the said Iroquois, but even to increase their numbers, and to spread by that means the knowledge of Faith and of the Gospel," and so on.

That decision will be found in the last volume of what is called Indian treaties and surrenders, published by the Dominion Parliament in 1891.

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The decision was rendered by General Gage, and I think it should have careful scrutiny and examination. He says that:

"At the surrender of this country, all things had been well arranged to maintain the said Indians in possession of their lands at Sault St. Louis, but that now the Jesuit Fathers, their missionaries, were granting continually to the French the lands forming part of the territory of Sault St. Louis, which, however, they believed belonged to them, by a title of grant given them by his most Christian Majesty."

Then he says:

"We are of opinion that the grant of the lands of Sault St. Louis was made to the Jesuit Fathers with the sole intention of settling there Iroquois and other Indians, and that all the soil could produce was intended for their profit and advantage."

I mention this case in order to show how liberally a treaty of this kind must be construed. It must be construed especially in favour of the Indian. Now let us take the policy of the British Government since the cession. After the revolutionary war, the Iroquois, who had been always friendly to the English, desired to cross the St. Lawrence and be located somewhere about the Peninsula of Niagara; and you find that about the end of the last century, treaties and surrenders were made by the British Government with the different Indian nations. All those treaties will be found in the volume which I had in my hand a moment ago. I have taken the trouble to compare all those treaties from say about the first cession—1785 I think is the date of the first one—to about the year 1856, and I find only about two kinds of treaties. First there is an absolute surrender for a fixed sum without any trust; for a sum say of a thousand pounds; such a treaty surrenders all titles, rights, and interests

in certain tracts of lands, and there is no reservation of any kind whatever. That is what I call a surrender absolute. I may say that most surrenders are absolute. And then you find also surrenders which are not absolute. I forgot to mention that all the land of Upper Canada, after the cession to Great Britain by France, was held by the Indians, with the exception of a few pieces at Cataraqui, at Niagara, and all along Windsor and Sault Ste. Marie. All that piece of land was still inhabited by the Indians, and it was therefore necessary for Great Britain, pursuing the policy they had followed in the United States, to extinguish what was known as the Indian title.

In twenty of these surrenders the word "trust" is to be found; in ten of them it is not to be found; the wording is the same, the only difference being that the word "trust" is not to be found in the treaty. Instead of reading "upon the trust and with the intent," it is "that His Majesty, his heirs and successors may out of the proceeds of the profits of the said lands and premises, arising from the sale or leasing or such other disposition of the lands or any part thereof as to His Majesty, his heirs or successors, may seem meet, make provision for the maintenance and religious instruction of the Indians."

The trust is provided for; the trust is created; the trust is stipulated, undoubtedly, just as in a case where the word "trust" is used. The treaty is worded in the same way, except the word "trust" is not there. Well, I do not think a court of justice ought to make any distinction because in a deed the word "sell," for instance, is used if it is a deed of sale, or the word "trust" is used if it is a deed in trust. But is the character different? Is the nature of it different, or the whole text of it, so that we may see whether, from the wording, you can make up or construe a trust? I

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say the wording is just the same, with the exception of the word trust.

Then, in the next place, supposing you come to the conclusion that because the word "trust" is used in some of these surrenders—including the surrenders by those Lake Huron and Lake Superior Indians—that there is no trust in those ten cases, but there is a trust in the other twenty cases, in what a state of confusion would the lands held for the benefit of the Indians be. You will have some subject to a trust, and some not subject to a trust. I say that with reference to all the lands which have been bought subject to a trust, whether the word "trust" is used in the deed or not used in the deed, but from the context of it we can infer a trust, that is, a promise on the part of Her Majesty that something should be done for the benefit of these Indians in the future—that then there is a trust. And I say more than that. I say that is the interpretation that has been given by all the authorities in this country from the end of the last century to the present time.

Now, my Lords, I intend to quote the statute to show that it was the intention of the late legislature that lands subject to the payment of annuities, lands subject to increased annuities, were construed as lands held in trust, and that these annuities formed a charge upon the land. I quote in the first place from the statute which has been already quoted, but I think it is very important that the special attention of the court should be called to it, that is 12 Victoria, chapter 200, commonly known as the Public Schools Lands Act, or Consolidated Statutes of Canada ch. 26. The statute proceeds to set apart acres of land for the purpose of education, but at the very end of the clause it says:

"But before any appropriation of the moneys arising from the sales of such lands shall be made, all charges thereon for the management or sale thereof, and all Indian annuities charged upon such lands or moneys, shall be first paid."

My learned friends say these school lands were located in a place where no Indian annuities were due; but it puts it still more strongly, it seems to me. But supposing it is the case—which I do not believe—it shows the intention of Parliament that it should not be possible that school lands should be set apart to destroy Indian annuities. The Indian annuities shall continue to be the first charge upon the lands. In the face of that interpretation given to it by our own Parliament, the late province of Canada, represented by Quebec and Ontario to-day, the very parties to this arbitration, are we going to be told that the Parliament of the late province of Canada did not intend to make a charge upon their land when their statute says so. If one treaty could be quoted where it says that for the said annuity the said lands shall be charged, I would understand it; but no such treaty can be found. There are two kinds of surrenders; one is absolute, on consideration of such money paid down, and the other one is subject to future annuities, or increased annuities. There is never a case where it states the lands shall remain charged, or a lien shall exist. But I say that when you find that declaration of the late Parliament of the province of Canada contained in the statute of 1849, it shows the intention of the parties then; that is to say, the late province of Canada, represented by Ontario and Quebec—the very parties to-day contending for a different interpretation—we find their declaration that Indian annuities which all stand upon the same footing, are a charge upon the lands which were surrendered.

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Now, I have only one more word to say. My learned friends representing Ontario hold that the arbitrators of 1870 did, in fact, deal with this question; but I submit they did not; I submit that they had no power to do it; and they did not do it. The only thing they said was that "all the lands in either of the said provinces of Ontario or Quebec respectively, surrendered by the Indians in consideration of annuities to them granted which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate, by the other of the said provinces."

I say in the first place that this exception made in favour of Ontario is only as to a claim the province of Quebec may have in this matter. Quebec claims nothing. Who claims it? The Indian. They may claim in their own name, or they may claim in the name of the Dominion; and even if these first arbitrators had in view to remove any claim of the Indian, they had no power to do so. If the Indians had a trust upon these lands under section 109, it was not in the power of the first arbitrators to set aside that section 109 of the Constitution, and the Privy Council has been very careful in deciding the special case which was submitted to them, to declare that the award was valid only as far certain points of form were concerned.

"The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, have taken the said Special Case into consideration, and having heard counsel for the province of Ontario, and likewise for the province of Quebec, their Lordships do this day humbly advise Your Majesty that under the circum-

stances stated in the Special Case (to which circumstances all their answers must be taken to refer):

"1. John Hamilton Gray had not become disqualified to act as an arbitrator.

"2. That after hearing before the three arbitrators two of them could legally render a decision or award, and could do so in the absence of the third, absenting himself under the circumstances stated.

"3. That after the subsequent *ex parte* hearing before two arbitrators, in the absence of the third then two of them could legally render a decision.

"4. That the arbitrators appointed by Quebec had not the right to resign, and the Government of Quebec had not the right to accept his resignation and to revoke his appointment, and such resignation and revocation were not effectual and valid.

"5. That after one of the arbitrators had so affected to resign, and his resignation had been so accepted, and his authority had been so affected to be revoked, the remaining two could legally proceed to hear the case and make a final award.

"6. That so far as regards any objection made to the award in the Special Case, the award of the 3rd of September, 1870, is valid (save as affected by the Dominion Act therein set forth)."

The Dominion Act is the British North America Act.

Nothing is plainer than this decision of the Privy Council:

"Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the said recommendations and advice of the Lords of the Judicial Committee of the Privy Council be adopted, aud that the same be punctually observed, obeyed and carried into execution as the decision of Her Majesty upon this Special Case.

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Whereof the Governer General of the Dominion of Canada, the Lieutenant-Governor or Commander in Chief of the same for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

I forgot, when dealing with the legal status of the Indians, taken as nations and not as individuals, to say that the laws passed by these Indian nations had been recognized by the courts of our own country as binding upon themselves. Take the case of marriage; take *Connolly* v. *Woolwich* (1), which says that the marriage of a white man to an Indian, according to their own laws, was a valid marriage; and they have certain rules and laws of succession, certain rules and laws concerning the property, which was especially reserved for their own use. I forgot to mention that, as another illustration of the proposition I laid down at the beginning, that those Indians, as nations, must not be looked upon as a big corporation or company; but must be looked upon as a nation, having a political economy in the country.

Hall Q.C. followed. I would like to say one or two words with reference to section 109; and I would like your Lordships to bear in mind that in dealing with this question under the British North America Act, and in dealing with the question you have to deal with now, you are dealing, so to speak, with the three crowns. It is not a dealing between three individuals, or between the Crown and any one particular individual; and we are dealing with the British North America Act, which Mr. Girouard still says ought to be considered, not as a strict statute, but more as a compact and agreement between the various parties; and this section 109 is not only to be considered with reference to the interests of this particular claim, but with whatever interest there may have been with other

(1) 11 L.C. Jur. 197.

parties with reference to existing lands they may have held prior to the union.

I do not think adding the words "subject to any trust," &c., destroys the intent which the parties had; and while that clause does refer to the various other provinces, it has more of a particular bearing between Ontario and Quebec. And what was the condition of affairs there? The Crown, if I may use the expression, of the old province of Canada, held all these lands in Ontario and Quebec, and of course they held these lands without any mortgage or hypothec being put upon them in the sense that they could not give a good title; and they had to be apportioned as between Ontario and Quebec in some manner or form; therefore, under section 109, the general rule is laid down—the lands in Ontario will go to Ontario, and the lands in Quebec will go to Quebec; and you in Ontario will take care of all the liability and all the obligations the Crown is under in respect to those lands, and we will not be troubled by any person who may have any claim or petition of right; and we in Quebec take these lands, not by a deed, not as a third party getting a deed in writing purporting to give us a title to lands under a deed; but we just take them by way of apportionment; they are still Crown lands; and instead of belonging to the Crown of Canada, if I may use that expression, they go to the Crown in Quebec; and the Crown in Quebec takes those lands and has to abide by all the conditions, liabilities, and anything of that kind there may be attached to those lands.

In construing this clause, section 109, in reference to that, the words "trust" and "interest" are not to be taken in their ordinary strict sense, or even in a municipal sense; but they must be taken in the broad sense made in the treaty with the Indians at that time. The Crown dealing with the Indians, as they had done

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for a number of years, clearly recognizing, as far as the Indians are concerned, whether it was right or wrong, or legal or illegal, clearly leading the Indians to believe they had some rights or title in the land. Now, having dealt with them in that way, have not the Indians got this interest in the lands? Have not they a right in the proceeds of the lands? Have not they a right to come in and protect themselves? And now we say, the lands having gone over to Ontario in that way, and being in the Crown, as it were, all the time, they must take them subject to the trust existing in the Crown. We think under the terms of the Robinson Treaty there is clearly a trust there that out of the proceeds of the lands the increased annuity must be paid; and it is out of those proceeds alone that the trust must be paid, and it could not be charged against the Consolidated Revenue Fund without some legislation. It is only a trust in respect to those, and no more; and it is only the party who has the administration of the lands, and who has the proceeds who can be reached in order that these increased annuities may be paid; and we say that is the province of Ontario.

Blake Q.C. in reply.

THE CHIEF JUSTICE.—This is an appeal from a portion of an award made on the 13th February, 1895, by the Hon. John A. Boyd, Chancellor of Ontario; the Hon. Sir Louis Napoleon Casault, Chief Justice of the Superior Court of the province of Quebec; and the Hon. George Wheelock Burbidge, Judge of the Exchequer Court of Canada, arbitrators appointed pursuant to three identical statutes passed respectively by the Parliament of the Dominion and the Legislatures of Ontario and Quebec, providing that for the final and conclusive determination of certain questions and

accounts, which had arisen or which might arise in the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had theretofore been arrived at, the Governor General in Council might unite with the governments of the provinces of Ontario and Quebec, in the appointment of three arbitrators, being judges, to whom should be referred such questions as the Governor and the Lieutenant-Governors of the provinces should agree to submit.

The sixth and seventh sections of these identical statutes were 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 award 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.

By a document signed by counsel for the Dominion and the two provinces respectively, dated the 10th of April, 1893, and entitled "first agreement of submission," after reciting the statutes before referred to, and the appointment thereunder of the arbitrators before named, certain questions were agreed to be referred, including all questions relating to or incident to the accounts between the Dominion and the provinces of Ontario and Quebec, and certain particulars were then specified, which it was agreed should be understood as included in this general submission, one of which specifications was as follows :—

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The claims made by the Dominion Government on behalf of Indians, and payments made by the Government to Indians, to form part of the reference.

This agreement of submission was adopted by the three governments of the Dominion, Ontario and Quebec, by Orders in Council of the Governor General and the Lieutenant-Governors in Council, made respectively on the 13th of April and the 15th of April, 1893.

The appeal now before us is from a portion of the award made by the arbitrators under this submission, disposing of the claim of the Dominion Government in respect of certain payments made to the Indians mentioned in the treaties hereafter referred to, and also of claims to further payments set up by the Dominion Government on their behalf.

On the 7th September, 1850, the Hon. William B. Robinson, acting as a commissioner on behalf of the Crown, obtained from the Ojibeway Indians of the Lake Superior district a surrender in favour of the Crown of certain Indian territory, situate within the limits of the late province of Canada, as described in a treaty entered into on that day between Mr. Robinson, on behalf of the Crown, and the chiefs and principal men of the Ojibeway Indians, inhabiting part of the northern shore of Lake Superior. And on the 9th day of September, 1850, the same Commissioner obtained a like surrender of certain other lands, by the Ojibeway Indians inhabiting and claiming certain portions of the eastern and northern shores of Lake Huron, represented by their chiefs and principal men, and which lands were described in a treaty entered into on the last mentioned day.

The surrender under the Lake Superior Treaty was in consideration of the sum of two thousand pounds paid down, and a perpetual annuity of five hundred pounds. The consideration for the Lake Huron sur-

render was the sum of two thousand pounds paid down, and a perpetual annuity of six hundred pounds.

The Lake Huron Treaty contained the following clause, viz.:

> The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should all the territory hereby ceded by the parties of the second part, at any future period produce such an amount as will enable the Government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof. And should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

The Lake Superior Treaty contained a clause in the same words, with the exception of the statement of the number of Indians which in the latter treaty was stated as being 1240.

It is under the provision for the payment in a certain event of increased annuities that the question now presented for the decision of this court has arisen.

By the British North America Act provision was made for the disposition of the public lands which, on the 1st of July, 1867, the date of confederation, were the property of the province of Canada which became extinct by that Act. Provision was also made for the assumption by the Dominion of the debts and liabilities of the province of Canada, and for the payment by the new provinces of Ontario and Quebec of interest on any excess of that debt of $62,500,000, and for the deduction of that interest from the half-yearly subsidies payable to those provinces. Further, provision was

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made for a division and adjustment by arbitration of the debts, credits, liabilities, properties and assets of Upper and Lower Canada. The sections of the British North America Act material to be considered are sections 109 to 113 inclusive, and section 142. These sections are as follows:

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

110. All assets connected with such portions of the public debt of each province as are assumed by that province shall belong to that province.

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

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, $62,500,000, and shall be charged with interest at the rate of five per centum per annum thereon.

113. The assets enumerated in the fourth schedule to this Act, belonging at the union to the province of Canada, shall be the property of Ontario and Quebec conjointly.

142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

By an Act of the Dominion Parliament (36 Vict. ch. 30) passed on the 23rd May, 1873, the amount of debt to be absolutely assumed by the Dominion was increased from the sum of $62,500,000 as fixed by the 112th section of the Confederation Act, to $73,006.088.84 and thereafter interest was only to be deducted against the

provinces of Ontario and Quebec on any excess of debt over the last mentioned sum. I refer to this statute, not because I think it has any bearing on the questions now before us for decision, but because it is an alteration of the terms imposed by the British North America Act. The effect of this Act (36 Vict. ch. 30) has already been considered by this court on a former appeal from the same arbitrators (1).

At the date of the Robinson Treaties in 1850 the management of Indian affairs was not in the hands of the provincial government, those affairs having been administered by the Governor General as representing the Imperial Government until some time in or after the year 1854, when it was handed over to the province.

The province of Canada, however, paid the fixed annuities, amounting in the aggregate to $4,400, every year up to the date of confederation, and since confederation up to the present time the Dominion Government have paid the same amount. The question raised by this appeal is confined to the increased annuities. What is claimed by the Dominion is that the difference between the fixed annuities, which, distributed amongst the Indians, amounted to $1.60 per head, and the increased annuities of $4 per head stipulated for by the clause in the treaties before set forth from 1851 to 1867, and which have never been paid to the Indians, should be paid by the province of Canada with interest to 31st December, 1892, amounting in all to $325,440; and that the province of Ontario should pay to the Indians the sum of $95,200, being the amount of the increased annuities from the date of confederation in 1867, up to the year 1873, with interest added to the 31st December, 1892.

(1) See *Canada* v. *Ontario and Quebec* 24 *Can.* S. C. R. 498.

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Further, it is claimed by the Dominion that as the Dominion Government has from 1874 to 1892, inclusive, paid the increased annuities to the Indians, it should be reimbursed the amount so paid by the province of Ontario, the sum thus claimed for increased annuities paid by the Dominion since 1874 amounting, with interest to 31st December, 1892, to $389,106.80.

In 1874 the province of Ontario admitted that from the year 1851, up to 1892, the surrendered territory produced an income sufficient to enable the government to pay the increased annuities without incurring loss, and that the Indians are of right, under the treaties, entitled to the payment of the arrears. This has not been disputed by the province of Quebec and I regard it as a fact conceded on all hands.

As regards this debt or liability up to 1867, it was clearly one of the late province of Canada which must be considered as having been assumed by the Dominion under section 111 of the British North America Act, forming part of the general debt with any excess of which over the sum of $73,006,088.84, Ontario and Quebec were to be charged and were to pay interest on as provided for by section 116 of the British North America Act. This is, however, subject to a claim, not of the Dominion but of the province of Quebec, to throw the whole of this debt or liability existing at confederation on the province of Ontario. The contention of the Dominion, however, is that there was in respect of these annuities, payable subsequent to 1867, a charge in favour of the Indians upon the surrendered lands, or a trust of the rents, profits and proceeds thereof in their favour, and that when these lands became vested, under the 109th section of the Union Act of 1867, in the province of Ontario, that province took them *cum onerê* subject to the trust or charge in favour of the Indians.

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Ontario insists that there is no trust or charge created by the treaties, and that the liability to pay the increased amount of the annuities since confederation was, at the date of the British North America Act, a debt, or at least a liability, of the province of Canada which is to be dealt with under sections 111, 112 and 116 just as the annuities up to the date of confederation are to be dealt with. Further, it is contended by Ontario that the whole question is *res judicata*, having, as it is said, been disposed of by the 13th clause of an award made on the 3rd September, 1870, by arbitrators appointed under the 142nd section of the British North America Act. Under that provision three arbitrators were appointed in 1870, two of whom made the award already referred to, the third—the arbitrator for Quebec—the Hon. Charles Day, having resigned his office and retired from the arbitration. Two questions having arisen as to the validity of this award of 1870, one as to whether the award made by a majority of the arbitrators was valid, and the other as to the qualification of Mr. John Hamilton Gray, one of the arbitrators who made the award, these questions were referred to the Judicial Committee of the Privy Council who pronounced in favor of the legality of the award, and their report was accordingly confirmed by an order of Her Majesty in Council on the 26th March, 1878. The merits of the award of 1870 were not, so far as I can find, in any way before the Privy Council, the reference to them being confined to the two points mentioned. By the first clause of the award the arbitrators of 1870 fixed the proportions in which Ontario and Quebec respectively were to contribute to the excess of debt of the province of Canada assumed by the Dominion, over the amount fixed by the statute.

The 13th clause of the award of the 3rd of September, 1870, is as follows:

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That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon or charge to the said province in which they are so situate, by the other of the said provinces.

This award has now stood for twenty-five years, its legality never having been disputed except as before mentioned.

This adjudication Ontario now sets up as a final disposition of the same question as that raised before the present arbitrators and now under appeal.

By their separate award of the 13th February, 1895, a portion of which is now under appeal, the present arbitrators found and awarded as follows:

In respect of the claim made by the Dominion of Canada against the provinces of Ontario and Quebec in reference to the Indian claims arising under the Robinson Treaties.

1. That if in any year since the treaties in question were entered into, the territory thereby ceded produced an amount which would have enabled the Government, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual.

2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties, the annuities, if the revenues derived from the ceded territory permitted, without incurring loss, were to be equal to a sum that would provide $4 for each Indian of the tribes entitled.

3. That any excess of revenue in any given year may not be used to give the increased annuity to a former year, in which an increased annuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year.

4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and that this is one of the matters to be taken into account in ascertaining the ex-

cess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873 (36 Vic. ch. 30).

5. That interest is not recoverable upon any arrears of such annuities.

6. That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario; and that this burden has not been in any way affected or discharged.

7. That interest is not recoverable on the arrears of such annuities accruing after the union, and not paid by the Dominion to the tribes of Indians entitled.

8. That in respect to the matters hereinbefore dealt with, the arbitrators have proceeded upon their view of disputed questions of law.

9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be affected by our previous ruling as to interest on that account.

The province of Ontario on the 4th of March, 1895, gave the following notice of appeal from the award:

Notice of appeal and limitation of contention of appeal.

Take notice that under the provisions of the statutes above mentioned the province of Ontario intends to appeal to the Supreme Court of Canada from the award of the arbitrators herein bearing date the 13th day of February, 1895, but delivered and published on the 14th day of February, 1895.

And further, take notice that Ontario will, on the hearing of such appeal, limit its contentions and except only to so much of the said award as determines and decides, as stated and formulated in paragraph 6 of the award, as follows:

That the ceded territory mentioned become the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the union, of the event on which such payment depended and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in

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such event falls upon the province of Ontario ; and that this burden has not been in any way affected or discharged.

And also as formulated in paragraph 9 of the award, as follows :

That as respects the increased annuities that have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account, as of the dates of payment by the Dominion to the Indians.

Ontario will urge among other grounds for appeal against the matters assumed to be decided by paragraphs 6 and 9 of the award above set forth that the said matters are decisions of the learned arbitrators upon disputed constitutional questions, the same being raised and relied upon in the respective cases of Ontario and Quebec filed of record before the learned arbitrators, and which questions were renewed and pressed at the argument before the learned arbitrators, whereby Ontario disputed that any liability in respect of the said matters accrued or could accrue to Ontario except jointly with Quebec ; and that the decision of the learned arbitrators in the premises are not final.

Subsequently to this notice of appeal the arbitrators made the following order :

In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec, pursuant to statute of Canada, 54 & 55 V. c. 6, statute of Ontario, 54 V. c. 2, and statute of Quebec, 54 V. c. 4.

On motion of counsel for the province of Ontario, and on hearing what was alleged as well by counsel for the province of Ontario as by counsel for the Dominion of Canada, and the province of Quebec, we, the undersigned arbitrators, do, with reference to a certain award and decision dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that, in respect of the question of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the union, as in such award is mentioned, the arbitrators proceeded upon their view of a disputed question of law, but that in respect of the question of interest on such increased annuities so paid, which question was dealt with in the ninth paragraph of the first part of such award, by determining the time when such annuities should be charged against the province of Ontario in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law.

J. A. BOYD.
L. N. CASAULT.
GEO. W. BURBIDGE.

Dated at Quebec, this 26th day of March, 1895.

No appeal was lodged by the province of Quebec.

I now proceed to consider the questions thus presented by the appeal.

In the first place nothing in the clause of the treaties providing for the augmentation of the annuities in the event specified indicates that the undertaking to make these increased payments was to constitute them a charge or lien upon the surrendered lands. There is nothing shewing that either the original annuities of six hundred pounds and five hundred pounds per annum, or one dollar and sixty cents per head of the respective bands of Indians, were to be paid out of the proceeds of the lands or out of any particular fund, nor that in the event of a right to the increased amount arising it should be paid out of any particular fund; all that is specified is that in the event of the augmentations being payable without loss they were to be paid. This does not mean that the increase was to be paid out of the proceeds of the lands, but has reference only to the event in which the increase was to become payable. There is, therefore, no ground for saying that there was any express charge, lien or trust. Then, if there is any charge it can only be on the principle of the equitable lien of an ordinary vendor of real property, and from analogy to the rules of courts of equity applicable to such liens. I think this argument entirely inadmissible. At the date of these surrenders, in 1850, the Indians were under the protection of the Imperial Government, and their affairs were administered by the Governor General, not through the responsible ministers of the province, but directly as representing the Crown. Not until 1854 was the management of Indian affairs transferred to the provincial governments. The Indians had therefore the highest security which could be given for the payment of the augmentations, the assurance and covenant of the Imperial Government

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There was, therefore, no reason for giving or implying any other. Then, as these lands were acquired by the Crown with a view to settlement, for developing mineral deposits, and for the purpose of applying the timber to purposes of utility, it would have been in the highest degree inconvenient that the power of dealing freely with them for these purposes should be fettered with any latent lien or trust. Again, even if we are to apply strictly the rules applicable between ordinary vendors and purchasers, numerous authorities show that this would not be a proper case for the implication of a lien. I refer to the cases cited in the Ontario factum as showing this conclusively (1).

Further, as against the Crown or Government, implications of this kind are not to be made. The Indian bands had as security the pledge of the Imperial Government whose commissioner and delegate, through the appointment of the Governor General, Mr. Robinson was, and they had the security of a charge on the consolidated fund of the province of Canada for the government of that province, which government, though the surrender was not made to it directly, obtained the benefit of it, the lands so soon as surrendered coming under the act of parliament by which the territorial and casual revenues had before the date of the surrender been transferred to the province, and the original annuities were therefore always paid out of the consolidated fund and not out of a specific fund provided from the revenue derived from the lands themselves. There, was therefore, no necessity that this security should be supplemented by any charge or lien not expressed in the treaties themselves.

(1) See *Dixon* v. *Gayfere*, 1 DeG. & J. 659; *Boulton* v. *Gillespie*, 8 Gr. 223; *Gilman* v. *Brown*, 1 Mason (U.S.) 212; *Parrott* v. *Sweetland*, 3 Mylne & K. 655; *Wilson* v. *Daniels*, 9 Gr. 491; *DeGear* v. *Smith*, 11 Gr. 570.

An argument against the province of Ontario is attempted to be deduced from the decision of the Privy Council in the case of *The St. Catharines Milling Co.* v. *The Queen* (1). In that case there was an Indian surrender to the Crown represented by the Dominion Government, made in 1873, subsequent to confederation. The Privy Council held that this surrender enured to the benefit of the province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown, and the most obvious principles of justice required that the government which got the lands should pay for them. Here the lands were originally acquired by the province of Canada which was to pay for them, and the present question only arises on a severance of that government into two separate provinces and a consequential partition of its assets and liabilities.

The statute which gives jurisdiction to this court to entertain this appeal in the section I have already quoted from provides that an appeal shall be only in respect of points decided by the arbitrators in which they shall indicate that their award has proceeded on disputed questions of law. In the 8th paragraph of the award it is stated that in the decision under appeal the arbitrators did so proceed. This of course limits this court to purely legal considerations in adjudicating on the matter in controversy, and it excludes all such equitable considerations as to what might be fair and reasonable

(1) 14 App. Cas. 46.

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outside the construction of the British North America Act, and the legal interpretation of the treaties, and I have so endeavoured to deal with the case. The question before us is, therefore, purely a question of law arising upon the construction of the treaties and the British North America Act.

The result is that the liability incurred by the Crown and the province of Canada to pay the increased annuities was, at the date of confederation, a general debt or liability of that province within the meaning of the 111th section of the British North America Act, and as such one required by that section to be assumed primarily by the Dominion, subject to such recoupment as is provided for by the 112th and 116th sections. That it was a "liability" though consisting of deferred periodical payments cannot be doubted, and that it was a "debt" though not payable *in presenti* is also clear; it therefore comes within the literal meaning of the 111th section, and we are not at liberty to unravel the arrangements between the two divisions of the old province, upon which it may be assumed the provisions of the Union Act as to the apportionment of assets and liabilities was based in order to arrive at some secondary meaning contrary to the ordinary and natural import of the language of the Act.

Then, turning to the award of 1870, I am of opinion that this point was substantially decided by the arbitrators appointed under the 142nd section of the British North America Act. I have already stated the 13th section of that award determining that lands in either Ontario or Quebec surrendered by Indians in consideration of annuities should be the absolute property of the province in which the lands might be situated, free from any charge, and that the annuities should be included in the general debt of Canada,

which was to be borne in the first place by the Dominion subject to such indemnity as the statute provides, as regards any excess over the fixed amount. The burden of the indemnity was of course to be borne by the provinces in the proportions declared by the arbitrators in the first section of their award. It is true that at the time this award of 1870 was made no question had arisen regarding the payment of the augmented annuities, but this in my opinion can make no difference. There is nothing before us to show that the arbitrators of 1870 did not intend to refer to the liability to pay the increased annuities when they made their award. That liability was clearly within the terms of the 142nd section of the British North America Act, and of the reference to them, and they had power to decide questions of law as well as questions of account and matters of fact, and were the sovereign judges of all such questions. It must therefore be intended that, having before them the treaties and the act of parliament under which they acted, they decided as a question of law that the increased annuities were not charged upon the surrendered lands, and that there was no trust of these lands for the purpose of paying the annuities. I think, as I have already said in disposing of the first point, that they were right in this view of the law. But whether they were or were not right can make no difference, for the award of 1870 must be conclusive on all the parties to it. It has stood for twenty-five years unimpeached except upon the points referred to the judicial committee, and now to re-open it and disturb one of its provisions, upon which other dispositions may have depended, would not only be most unfair but would be a proceeding without any legal warrant, statutory or otherwise. The arbitrators must therefore be taken to have had in mind all the annuities, the original fixed annuities as well as those

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contingently provided for. They held that the lands vested absolutely, free from any charge, and this must have included both. It is out of the question to say, as is argued in the factum of the province of Quebec, that in so deciding the arbitrators were assuming to alter the provisions of the 109th section of the British North America Act, by holding that the lands should be vested free from incumbrances, which the statute declared should be a charge. So to argue is to beg the question. Of course we are not to presume that the arbitrators intended so far to exceed their powers as to assume to repeal the statute. What they intended is clear. They meant to say, and did in terms decide, that the annuities in question, all of them, the increased as well as the original annuities, which formed the consideration for these cessions were not charged upon the surrendered lands at all but formed part of the general debts and liabilities of the former province of Canada.

This appeal must be allowed, and the award must be varied by substituting for the 6th paragraph thereof, the following:

> The ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, absolutely, and free from any trust, charge or lien in respect of any of the annuities as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities upon the condition in the treaties mentioned. And further, by striking out the 7th and 9th paragraphs of the award.

The province of Ontario is entitled to the costs of this appeal to be paid by the Dominion.

TASCHEREAU J.—Concurred.

GWYNNE J.—The sole question involved in this appeal simply is which of the governments, namely, that of the Dominion of Canada, or of the provinces of

Ontario and Quebec conjointly, or that of the province of Ontario alone, is chargeable with the fulfilment of obligations and liabilities to the Ojibeway Indians of Lakes Superior and Huron, if any have accrued since confederation in virtue of the terms of the treaties entered into between Her Majesty and the respective Indian nations in the year 1850 before confederation.

By treaty bearing date the 7th day of September, 1850, entered into between Her Majesty the Queen through the intervention of the honourable William B. Robinson acting for her, duly authorized in that behalf, of the one part, and the chiefs and principal men of the Ojibeway Indians inhabiting the north shore of Lake Superior from Batchewanaung Bay to Pigeon River at the western extremity of said lake, and inland throughout that extent to the height of land which separates the territory covered by the charter of the honourable the Hudson Bay Company from the said tract and also the islands in the said lake within the boundaries of the British possessions therein, of the other part; it was witnessed that in consideration of two thousand pounds of lawful money of Canada to them in hand paid and of the further perpetual annuity of five hundred pounds to be paid and delivered to the said chiefs and their tribes at a convenient season of each summer not later than the first day of August at the honourable the Hudson Bay Company's post ot Michipicoton and Fort William, they the said chiefs and principal men did freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors for ever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in a schedule thereunto annexed; and by a certain other treaty, bearing date the 9th day of the same month of September, between Her Majesty the Queen

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through the intervention of the said honourable William B. Robinson acting for her and duly authorized on that behalf of the one part, and the chiefs and principal men of the Ojibeway Indians inhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie and thence to Batchewanaung Bay on the northern shore of Lake Superior together with the islands in the said lake opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the honourable the Hudson Bay Company from Canada as well as all unconceded lands within the limits of Canada west to which they have any just claim, of the other part, it was witnessed that for and in consideration of two thousand pounds of lawful money of Canada to them in hand paid and of the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said chiefs and their tribes at a convenient season of each year, of which due notice should be given at such places as might be appointed for that purpose, they, the said chiefs and principal men on behalf of their respective tribes did fully, freely and voluntarily surrender all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in a schedule thereunto annexed.

Each of the said treaties respectively contained a promise and undertaking of Her Majesty expressed in the terms following:

> The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time provided that the amount paid to each individual shall not exceed the sum of

one pound provincial currency in any one year or such further sum as Her Majesty may be graciously pleased to order; and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present numbers (such numbers in the treaty with the Lake Superior Indians being stated to be then twelve hundred and forty, and of the Lake Huron Indians in the treaty with them to be then fourteen hundred and twenty-two), to enable them to claim the full benefit thereof, and should their numbers at any future period not amount to such two-thirds (of their then numbers respectively) the amount should be diminished respectively in proportion to their actual numbers.

The first point presented for our consideration is the construction of the above clause which is common to both of the treaties, and in the consideration of it it is altogether beside the question to insist that the title of Her Majesty to the lands mentioned in the treaties as being surrendered by the Indians were vested in Her Majesty in right of Her Crown to the fullest extent independently of the treaties and that the execution of those instruments neither added to, nor detracted from Her Majesty's title to the ceded territories. It is not contended that Her Majesty's title to the lands was not perfect, independently of the treaties, or that Her Majesty derived title to the lands in virtue of the surrender by the Indians mentioned in the treaties; what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instru-

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ments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.

Now, by the claims under consideration Her Majesty was graciously pleased to promise and agree with the Indians, the parties of the second part to the said respective treaties, that in case the territories mentioned in the said respective treaties as being thereby ceded by the respective parties thereto of the second part should at any future period produce such an amount as would enable the government of the province of Canada, without incurring loss, to increase the fixed annuities thereby secured, that then, in such case, the same should be increased from time to time to an amount not exceeding one pound provincial currency to each individual of the respective tribes or nations. Now as the payment of the increased annuity is expressly made contingent upon the fund to be realized or produced out of the territories expressed to be ceded proving to be sufficient to enable the Government of Canada to pay such increased sum without incurring loss, the plain construction of Her Majesty's promise and undertaking is that such increased sum (in the event of the fund permitting it) should be paid out of the funds so to be produced and so enabling the government to pay it without incurring loss. The fulfilment of that promise and undertaking involved a trust graciously assumed by Her Majesty affecting the fund to be produced and realized out of the territories expressed to be respectively ceded to Her Majesty. It cannot, I presume, admit of a doubt that if the province of Canada had continued, and was still in existence as

it was in 1850 when the treaties were entered into, the increased sum, though first charged upon the consolidated fund of that province, must have been charged upon and paid out of the fund realized and produced out of the ceded territories, which were paid into the consolidated fund, if such proceeds enabled Her Majesty's provincial Government of Canada to pay the increased amount without incurring loss; but that government no longer being in existence, although the fund is, that same fund, in whose hands soever it is, appears to be the sole fund which, if it be sufficient to enable the payment to be made without incurring loss, is naturally and reasonably still chargeable with the payment, unless there be some different provision of statutory obligation made in that behalf upon or since the confederation of the provinces into the Dominion of Canada.

At the time of the union of the provinces in 1867 there does not appear to have been any claim or inquiry made for the purpose of ascertaining whether or not sufficient funds had been produced out of the ceded territories or either of them to have enabled the Government of the late province of Canada, without incurring loss, to have paid the increased annuity or any part thereof by the said treaties agreed to be paid; but in 1873, upon the petition of the Indians, suggesting that the proceeds from the respective territories must then be sufficient to entitle them to fulfilment of the stipulations of the treaties in that behalf, the matter was, by an order in council of the Dominion Government, made the subject of a communication with the Government of the province of Ontario, and by an order in council of that government, bearing date the 31st October, 1874, it was admitted by that government that the proceeds from the ceded territories were then sufficient to entitle the Indians to the in-

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creased sum, and while repudiating all liability of the province to be charged with the Indian annuities, it was suggested that this point as to the liability of the province should be either forthwith submitted to the Court of Chancery upon a statement of facts to be concurred in by the governments concerned, or that the Dominion Government should settle with the Indians without prejudice as to what government ought ultimately to pay the proposed increase. Upon this order in council having been communicated to the Government of the Dominion, the suggestion that that government should settle with the Indians in respect of the increased sum claimed, without prejudice to the question of liability to be determined at a future period, was adopted and accepted by the Dominion Government by an order in council of 22nd July, 1875, and accordingly thenceforth the increased annuity, as promised by treaties, has been advanced by the Dominion Government.

Now, by three several Acts, viz., 54 Vic., ch. 4 of the legislature of the province of Quebec; 54 Vic., ch. 2 of the province of Ontario, and 54 & 55 Vic., ch. 6 of the Parliament of the Dominion of Canada, all three being in identical terms, after reciting therein respectively that certain questions had arisen, or might thereafter arise, in the settlement of the accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had hitherto been arrived at, and that it was advisable that all such questions of account should be referred to arbitration, it was by the said several Acts enacted, among other things, that for the final and conclusive determination of such accounts, the governments of the respective provinces and of the Dominion might unite in the appointment of three arbitrators, to whom

should be submitted such questions as the Governor General and the Lieutenant-Governors of the said provinces should agree to submit; that the arbitrators, or any two of them, should have power to make one or more awards, and to do so from time to time; that the arbitrators should not be bound to decide according to the strict rules of law or evidence, but might decide upon equitable principles, and when they did proceed on their view of a disputed question of law, the award should set forth the same at the instance of either or any party, and that any award made under the said Acts should be, in so far as it related 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 were pleased to allow such appeal.

Arbitrators were duly appointed to act in the premises by and on behalf of the Governments of the Dominion of Canada and of the provinces of Ontario and Quebec respectively, under the provisions of the said respective Acts in that behalf. Thereupon an agreement was made and entered into between the said respective governments through their respective counsel acting in their behalf, and bearing date the 10th day of April, 1893, which agreement, as an agreement of submission to arbitration, they recommended for adoption by the said respective governments. By this agreement after reciting the above mentioned statutes and that arbitrators had been appointed in pursuance of the provisions thereof, and that

it is intended by these presents to define and agree upon certain questions in difference which shall be submitted to the said arbitrators for their determination and award.

Now, therefore, it is agreed by and between the several governments, parties hereto, that the following questions as mentioned in the order of the Governor General in Council of the twelfth day of December, eighteen hundred and ninety, be and they are hereby re-

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ferred to the said arbitrators for their determination and award in accordance with the said statutes, namely:

1. All questions relating to or incident to the accounts between the Dominion and the provinces of Ontario and Quebec, and to accounts between the two provinces of Ontario and Quebec.

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

Here follow several particulars, including the following paragraphs, lettered "*d*" and "*e*."

d. The claims made by the Dominion Government on behalf of the Indians and payments made by the government to Indians to form part of the reference.

e. The arbitrators to apportion the liability of Ontario and Quebec as to any claim allowed the Dominion Government, and to apportion between Ontario and Quebec any amount found to be payable by the said government.

This agreement of submission was approved and adopted by order in council of the Government of the province of Quebec, bearing date the 13th day of April, 1893, and by orders in council of the Government of the province of Ontario and of the Dominion of Canada bearing date respectively the 15th day of April, 1893.

This submission referred to the award of the arbitrators, as a matter concerning which no agreement had been arrived at at the time of the passing of the said several statutes passed in the 54th and 55th years of Her Majesty's reign, and therefore as being within the province and operation of those statutes, the determination of the claim made by the Indians of Lake Huron and Lake Superior in 1873 for an increase of $2.40 per head in their number under the provisions of the above treaties of 1850. In such submission were involved two questions, namely: 1. Whether and when first the increase claimed had become due and payable; and 2, assuming it to have become due and payable within the terms of the treaties by what government and out of what fund it was to be paid.

Upon the arbitration the Government of Ontario insisted, among other things, that in point of fact the lands ceded by the treaties have not produced revenues sufficient to permit of the payment of the augmentation claimed by the Indians or any part thereof; and even though the revenues so received should prove to be sufficient for that purpose, denied all liability upon the Ontario Government to pay the increase claimed or any part thereof either conjointly with Quebec, or separately.

As to these two questions, it was agreed by all the parties to the arbitration, with the approbation of the arbitrators, that this latter question affecting liability to pay, assuming the fund to be sufficient, should be in the first place determined, leaving the question of fact as to whether the liability had accrued and when first, and the amounts so accrued due and payable, to be subsequently entered into; accordingly, the arbitrators in the exercise of the authority vested in them by the said statutes in virtue of which they were acting to make one or more awards from time to time, in respect of these matters have in an award made by them awarded adjudged and determined:

1. That if in any year since the treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government, without incurring loss, to pay the increased annuities thereby accrued to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual.

2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties the annuities, if the revenues derived from the ceded territory permitted without incurring loss, were to be equal to a sum that would provide $4 to each Indian of the tribes entitled.

3. That any excess of revenue in any given year may not be used to give the increased annuity in a former year in which an increased an-

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nuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year.

4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not been in respect of any such liability discharged by reason of the capitalization of the fixed annuities or because of anything in the Act of 1873 (36 Vic. ch. 30).

5. That interest is not recoverable upon any arrears of such annuities.

6. That the ceded territories mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario, and that this burden has not been in any way affected or discharged.

7. That interest is not recoverable upon any arrears of such annuities accruing after the union and not paid by the Dominion to the tribes of Indians entitled.

8. That in respect of the matters hereinbefore dealt with the arbitrators have proceeded upon their view of disputed questions of law.

9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario account as of the date of payment by the Dominion to the Indians and so fall within and be affected by our previous ruling as to interest on that account.

This award was made on the 14th February, 1895. On the 26th day of March, 1895, an order was made and signed by all the arbitrators in the words following:

In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec pursuant to statute of Canada 54 & 55 Vic. ch. 6, statute of Ontario 54 Vic. ch. 2, and statute of Quebec 54 Vic. ch. 4.

On motion of counsel for the province of Ontario, and upon hearing what was alleged as well by counsel for the province of Ontario as by

counsel for the Dominion of Canada and the province of Quebec, we the undersigned arbitrators do with reference to a certain award and decision dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that in respect of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the union as in such award is mentioned, the arbitrators proceeded upon their view of a disputed question of law; but that in respect of the question of interest upon such increased annuities so paid which question was dealt with in the ninth paragraph of the first part of such award, by determining the time when such annuities should be charged against the province of Ontario, in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law.

The matter in this order contained was thus attached to the said award and the eighth paragraph of the award above cited was inserted for the purpose of complying with the provisions of the statutes above cited in virtue of which the arbitrators were acting, namely:

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 in their view of a disputed question of law the award 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.

The award does not state in terms any disputed question of law upon which the arbitrators proceeded, their dealing with which might be subjected to appeal. The question which was in dispute was simply the liability imposed by the sixth paragraph of the award upon the province of Ontario to pay all sums by way of increased annuities, if any such had accrued due and payable, by force of the stipulations in the said treaties of 1850 in the several or any of the years subsequent to the union in 1867. We were repeatedly

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informed by the learned counsel for the appellants, the province of Ontario, during the argument that this is the sole matter at present in appeal. No question therefore arises before us as to the liability imposed by the 4th paragraph of the award upon Ontario and Quebec conjointly in respect of any such sums by way of increased annuities if any accrued due and payable under the stipulations of the treaties between the making of them and the treaty of union in 1867. Any such sums which so had accrued due and payable prior to the union may well be held to have constituted part of the debt of the province of Canada existing at the union.

Now, by the treaty of union, the Dominion of Canada assumed the debts and liabilities of Canada existing at the union subject to the provision and condition that Ontario and Quebec conjointly should be liable to the Dominion of Canada for the amount, if any, by which the debt of the province of Canada exceeded at the union sixty-two millions five hundred thousand dollars, and should be charged with interest at the rate of five per centum per annum thereon. The sole obligation which in substance was incurred absolutely by the Dominion in the union, was the assumption of the debt of the province of Canada existing at the union and the liability to pay such interest, if any, as the province of Canada was subject to at the union in respect of so much of the debt of that province existing at the union as exceeded the said sum of sixty-two millions five hundred thousand dollars. Now by a Dominion Act passed in 1873, 36 Vic. ch. 30, after reciting therein that the debt of the late province of Canada as then ascertained exceeded the said sum by the sum of ten millions five hundred and six thousand and eighty-eight dollars and eighty-four cents, 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 upon the amount of debt with which each province entered the union, should be calculated and allowed as if the sum fixed by the 112th section of the British North America Act, 1867, was increased from sixty-two millions five hundred thousand dollars to seventy-three millions six thousand and eighty-eight dollars and eighty-four cents.

This Act is not to be construed as a statutory declaration by Parliament binding upon the Dominion Government that the total debt of the province of Canada existing at the union was the sum of $73,006,088.84, and no more, but reciting that so far as then ascertained, the debt of the province of Canada exceeded $62,500,680 by $10,506,088.84, and the true construction of the Act is that the accounts between the Dominion and the provinces of Ontario and Quebec shall be taken as if the sum of $73,006,088.84 had been inserted in the 112th section of the British North America Act, 1867, instead of the amount which was therein inserted, thus making that section for the purpose of taking said accounts read as follows: "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 $73,006,088.84, and shall be charged with interest at the rate of five per centum per annum thereon."

As the object of the Act was simply to subject the Dominion Government to a greater burden than it had assumed by the treaty of union, there can be no doubt that it was quite competent for the Dominion Parliament to pass the Act so altering the effect of the 112th section of the British North America Act.

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Now it is sufficiently obvious, I think, that if any debt or liability to pay to the Indians, parties to the treaties of 1850, by any augmentation in their annuities under the stipulations of those treaties, has accrued in any of the years subsequent to confederation, such cannot be held to have constituted a debt or liability of the late province of Canada, which ceased to exist upon confederation being accomplished, much less can it be said to have constituted a debt or liability of the late province of Canada existing at the union. True it is, no doubt, that the treaties in virtue of the stipulations of which such debt or liability, if any there be accrued, were entered into prior to confederation, but these treaties did not in themselves, nor did anything contained in them or either of them, constitute a debt or liability upon the late province of Canada to pay any sum of money by way of augmentation of the fixed annuities stipulated for therein respectively. By the terms of the treaties no augmentation of the fixed annuities stipulated for was to take place in any year unless, nor until, the following conditions should concur:

1st. That the territories respectively ceded by the treaties should produce such an amount as would enable the Government of the then province of Canada, without incurring loss, to increase the annuity from time to time to an amount not exceeding one pound provincial currency in any one year, or such further sum as Her Majesty might be graciously pleased to order; and

2nd. That the number of the Indians entitled to the benefit of the respective treaties should amount to two-thirds of their number at the time of the treaties being entered into, and mentioned in the respective treaties. If the number of Indians benefited by the respective treaties should in any year fall short of two-thirds of the number mentioned in the respective treaties,

no augmentation of annuity in such year accrued. The concurrence of these conditions being necessary to entitle the Indians, parties to the respective treaties, to any augmentation in their annuities in any year, no debt or liability, nor any claim under the stipulations of the treaties could accrue save in each particular year as it should come into existence, and in which those conditions should concur. No augmentation, therefore, claimed as having accrued due in any year subsequent to confederation can by possibility be held to have constituted a debt or liability of the late province of Canada, which province ceased to exist before the accruing of such debt or liability, much less a debt or liability of that province existing at the union. And the case, therefore, is not one which in any respect falls within the 111th or 112th sections of the British North America Act, 1867. Consequently the claims of the Indians to any augmentation in their annuities in respect of the years subsequent to confederation and all liability in respect thereof must be determined and adjudicated upon, either under the provisions of some other clause in that Act or upon some principle of law and justice applicable to a point or question which, it may be, is not in express terms covered by the Act.

Now, as has been already observed, what Her Majesty, according to the true construction of the treaties, was graciously pleased to undertake and promise was, that the augmentation of annuities which, if any, should accrue due and payable within the stipulations of the respective treaties should be paid to the Indians, parties thereto, respectively out of the proceeds of the respective territories ceded. No other fund was contemplated out of which such augmentations should be paid, and the promise did certainly not operate as imposing a personal obligation upon Her Majesty. The condition then in which the matter

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stood prior to confederation, was that while Her Majesty was seized in fee in right of Her Crown of the lands mentioned in the territories as ceded to Her Majesty, she held the same for the benefit of the province of Canada, to be sold and disposed of by Her Government of that province as the property of that province, and notwithstanding that letters patent of the said lands granted by the Government of Canada would pass an absolute title in fee simple to the grantees thereof, still Her Majesty's gracious undertaking and promise in the treaties as to the augmentation of the annuities constituted a trust assumed by Her Majesty in the interest of the Indians to the fulfilment of which Her Government of the province of Canada, so long as that province existed, was in conscience bound. Now by union of the British North America provinces into the Dominion of Canada, upon the completion of which the province of Canada ceased to exist, it was enacted by the 109th section of the British North America Act, 1867, that "all lands, &c., belonging to the province of Canada at the union, and all sums then due and payable for such lands, &c., shall belong to the several provinces of Ontario, &c., in which the same are situate, or arise subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."

Her Majesty's undertaking and promise constituted a trust obligation existing in respect of the proceeds arising out of the ceded territories which, until the union, belonged to the late province of Canada, and in the fulfilment of such obligation the Indians, parties to the treaties, had an undoubted interest. The above clause in the British North America Act was never framed with intent to provide for the case of a trust capable of recognition in a court of law or equity, as being attached to the lands themselves so as to affect a

purchaser with notice, as contended by the learned counsel for Ontario. The estate of Her Majesty in the ungranted lands of the Crown in the province never were, nor were supposed to be nor indeed could be, subject to any such trust, but the undertaking of Her Majesty in the treaties, constituting as it did a trust obligation assumed by Her Majesty in respect of the proceeds of the ceded territories, the language of the section appears to be quite appropriate to the expression in the Act of a provision, in accordance with the principles of law, equity and common sense, that the fund out of which the augmentation in the annuities were contemplated to be paid by the treaties should, after the union equally as before, provide for the payment of any augmentations which should accrue due and payable after the union. And as by the 109th section of the British North America Act the province has become entitled to that fund, Her Majesty's government of that province must take the same subject to the trust obligation in the interest of the Indians assumed by Her Majesty by the stipulations of the treaties. Her Majesty's government of the province of Ontario must in all reason and justice take the property mentioned in the section subject to the same obligation as to the payment of augmentations of the annuities, if any such accrue due after the union, as the late province of Canada would have held them if no union had taken place. This was the unanimous judgment of the arbitrators upon this point. That judgment is not at variance with any principle of law, or any statutory provision; on the contrary it is in perfect accordance with the plainest principles of justice and is not open to any sound legal objection.

It was argued that the question under appeal had already been concluded by a paragraph in an award between the province and the Dominion made in 1870.

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The clause of that award relied upon for the above purpose by the province of Ontario is as follows:

13. That all lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate free from any further claim upon or charge to the said provinces in which they are situate by the other of the said provinces.

Now as to this clause in that award it is to be observed:

1. The submission by the Government of the province of Ontario by the order in council referring the very question under consideration to the present arbitrators as a question as to which no agreement had hitherto been arrived at, seems to afford answer to the contention that the matter had been disposed of by the award of 1870.

2. The present case is not for the determination of or adjudication upon any claim made by any of the provinces against the province of Ontario, but for the determination of and adjudication upon the single question as to where exists the liability to discharge the obligation assumed by Her Majesty in the interest of the Indians to pay any increased annuities stipulated for by the treaties of 1850 which have accrued due and payable since the ceded territories became by the union the property of the province of Ontario.

3. As already shown, augmentations so accruing since the union did not in point of fact form and indeed could not have formed, any part of the debt of the late province of Canada mentioned in 36 Vic. ch. 30 as then ascertained as being $73,006,088.84; the fixed annuities only as the only sums then known to exist as a debt of liability of Canada were included in that sum.

4. There seems therefore, to be no foundation whatever for the contention that the question now under consideration involves a matter concluded by the award of 1870.

The determination of the question by the present arbitrators is in conformity with every principle of justice and with the provisions of the 109th section of the British North America Act which seem to be indeed simply declaratory of what law and justice would have required if the clause had not been inserted in the Act, namely, that the proceeds of the ceded territories should bear the burden of discharging Her Majesty's obligation to the Indians under the stipulations of the treaties as to any augmentation of annuities, if any have accrued due under the treaties since the union, whereby the ceded territories became the property of Ontario.

The award, therefore, must be maintained, and the appeal dismissed with costs.

SEDGEWICK J.—It is admitted, but only for the purpose of this appeal, that the Indians in question are entitled to be paid the augmented annuities which they have been receiving since 1874. It is not, however, admitted by the appellant province that there is any liability on the part of that province to pay these annuities, and it contends that should it in any way be found liable it is only liable conjointly with the province of Quebec. The questions are, first: Do the annuities in question constitute a debt or liability under section 112 of the British North America Act? And secondly: If such liability exists, shall it be borne by Ontario and Quebec jointly or by Ontario alone? The first contention was but feebly put forward by counsel for Ontario, and I must confess that I see no ground for giving it any weight.

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By the scheme of the Union Act, Canada was to become liable for the debts and liabilities of the confederating provinces, in other words, she entered into an obligation to liquidate and satisfy all provincial creditors. The scheme, however, did not contemplate that the Dominion was to commence its existence with an indebtedness measured by the full extent of provincial liability. As between the Dominion and the provinces the public debt of Canada was fixed at $77,500,000; $62,500,000 being the amount absolutely assumed on behalf of Ontario and Quebec, and $8,000,000 and $7,000,000 on behalf of Nova Scotia and New Brunswick respectively, and it was provided that, should the debt of the old province of Canada exceed the $62,500,000, assumed by the Dominion, those provinces should be liable to Canada for that excess, with interest at five per cent per annum. No similar provision was made in regard to Nova Scotia or New Brunswick, inasmuch as the debts of those provinces did not amount to the sums assumed on their behalf by the Dominion. It is very clear that the Dominion entered upon its national existence with a fixed and indisputable debt. While it was under an obligation to pay all existing provincial debts or liabilities, no matter how large or how much in excess of the $77,500,000 they might eventually be found to be, it had a right to recoup itself by calling upon Ontario and Quebec to make good the difference between the actual indebtedness and the net amount which as between the provinces and itself it undertook to pay. The actual amount of that excess has never yet been definitely ascertained. By the Dominion Act of 1873, the $62,500,000 assumed by the Dominion on behalf of Ontario and Quebec was increased to $73,006,088.84, but even that increased amount does not fully represent the liabilities of the old province, and it is one of the objects

of the tribunal from whose award this appeal is taken, to determine definitely the exact amount of that excess in order that there may be a complete and final adjustment of accounts between the Dominion and these provinces.

Now, the annuities payable to Indians by virtue of pre-confederation treaties made with them, having in view the surrender of the Indian title to the Crown in any public lands, clearly constituted a liability on the part of the old province of Canada, which liability was assumed by the Dominion under the British North America Act. The argument is, that section 112, in making Ontario and Quebec liable for the excess of debt beyond the $62,500,000, does not make it liable for pre-existing liabilities which are not debts, and that the annuities in question, though they are liabilities, do not come within the meaning of that expression. As already stated, I dissent from this view. These annuities, though perhaps not debts in the strict sense of that term until they become due, are debts immediately thereafter, but whether or not, they are, in my judgment, debts within the contemplation of section 112, for which the provinces are liable. It may not have much bearing on the case, but it is proper to notice that in the award made in pursuance of section 142 of the Union Act, clause 13 expressly states that these annuities, or that portion of them which was fixed by the original treaties "are included in the debt of the old province of Canada." I entertain no doubt but that this is the correct view, and that in the adjusting of the accounts between the Dominion and the old province of Canada, the annuities payable to the Indians since the 1st of July, 1867, whether these annuities are to be augmented as therein provided for, or remain as originally fixed, constitute a liability or debt which the old provinces, whether Ontario alone, or Ontario and Quebec jointly, must assume.

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The other question involved in this appeal is a more difficult one. Is Ontario alone liable for these annuities, or is it conjointly liable with Quebec? The matter, as I view it, is of no significance to the Dominion. It is solely a question as between Ontario and Quebec. The case, however, is put forward by the Dominion insisting that Ontario is solely liable. I extract from its statement of claim the following:

9. The Dominion of Canada claims that under the "Robinson Huron Treaty" and the "Robinson Superior Treaty" for the 16 years from the dates of the said treaties until the date of confederation of the provinces in 1867, and based upon the increased annuity of $4 per head, and after giving credit for the sum of $1.60 which was yearly paid to each individual Indian during the said period, there is due and payable by the late province of Canada to the Indians aforesaid the sum of $325,440 for principal money and interest, and the Dominion asks the board to award payment of the said sum by the said province of Canada.

10. By the British North America Act, 1867, the tracts of land which had been ceded to Her Majesty, under the said Robinson treaties, became and formed portions of the public lands of the province of Ontario.

11. By the 111th section of that statute it is enacted that "Canada shall be liable for the debts and liabilities of each province existing at the time of the union," and by the 109th section it is provided that "all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the time of the union, and all sums then due and payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate, or arise, subject to any trusts existing in respect thereof, or to any interest other than that of the province in the same."

12. The Dominion submits that at the time of confederation the lands which had been ceded by the said Indians, under the said treaties as aforesaid, came into the hands and possession of Ontario subject to the trusts contained in the said treaties and subject to "an interest other than that of the province in the same" within the meaning of said section 109, namely, the right of the Indians to receive and be paid the annuities under the terms and stipulations of the said treaties, and that from and after the 30th June, 1867, the province of Ontario, as the beneficial owner of the said lands, and recipient of the revenues derived therefrom, was legally liable to provide the Dominion with moneys necessary to pay the said annuities to the Indians under the said treaties.

13. By section 91 of the British North America Act, the Parliament of Canada is given legislative authority over "Indians and lands reserved for Indians," and the Dominion acting under said authority has enacted laws for the government of the Indians of Canada, and has undertaken the administration of, and has since the passing of the said act administered, the affairs of the Indians throughout Canada.

14. The Dominion submits that it was and is the duty of the province of Ontario to pay into the Dominion treasury, out of moneys received as revenues from the lands which were ceded as aforesaid, such sums as would enable the Dominion to carry out the provisions and requirements of the said treaties; but the province of Ontario has hitherto declined to admit any liability, and has paid no sum to the Dominion for the purposes aforesaid, although often requested to do so, and although it has been admitted by the said province of Ontario that the revenues received by the said province out of the said ceded territory have been more than sufficient for many years past to have satisfied the claims of the said Indians to be paid the full increased annuities mentioned in the said treaties of $4 for each individual Indian.

15. From the year 1867 until the year 1875, the Dominion annually paid to and distributed amongst the said Indians the annuities of $2,400 and $2,000 mentioned in the said treaties respectively, and the Dominion now claims on behalf of the Indians, for the reasons above set out, that the province of Ontario ought to pay all arrears of annuities since the 30th June, 1867, made up of the difference between the sum of $1.60 and the sum of $4 for each individual Indian, which arrears of annuity with interest thereon from the 30th June, 1867, to the 31st December, 1892, amount to the sum of $95,200, and the Dominion asks the board to award payment of the said sum by the province of Ontario.

16. Since the year 1875 the Dominion, for the reasons before mentioned, has paid in each year up to and including the year 1892, the full increased annuity of $4 to each individual Indian within the said treaties, and the Dominion now claims to recover from, and be paid by, the province of Ontario the sum so paid, which sum with interest thereon amounts to the sum of $389,106.80.

Quebec supports the Dominion view, while Ontario contends upon this point that the case is one in which Quebec is jointly liable with her.

The clause of the treaty giving rise to the conflict is as follows: (the clauses are the same in both treaties).

Should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall

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be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of the treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof. And should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

And section 109 of the British North America Act referred to in the Dominion case is as follows:

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

Now in my view this section is material for the purposes of this case, only in so far as it transfers to Ontario the Crown lands, &c., within its territorial limits. It does not purport to deal with property or rights or interests other than those of the Crown. As far as I can at present see the section would have been equally effectual for its purpose had the words "subject to any trusts existing in respect thereof and to any interest other than that of the province in the same" been left out. The Dominion took those large areas known as "Ordnance lands" under section 108. The *quantum* of the interest which passed by the operation of that section was not greater, and not less, because these words were omitted. In the case of the Crown lands, Ontario took the whole of old Canada's interest—in the case of the Ordnance lands the Dominion took the whole of the old provinces' interest—private rights in both cases remaining undisturbed. The section is, however, material in so far as it operates as a transfer.

There is a principle referred to by the learned Chancellor that where in ordinary cases a vendor sells lands charged with a mortgage or other burden in respect to which he the vendor is under a personal obligation the purchaser takes them not only subject to that burden, but subject, too, to the duty of indemnifying the vendor in respect to his obligation, and that too irrespective of contract. In other words the law imposes upon the buyer the duty of discharging the burden, and, as between him and the seller, relieves the latter from it. And this principle has been more than once recognized by this court. *Williston* v. *Lawson* (1), *Fraser* v. *Fairbanks* (2).

Then too, there is the principle expressed in the maxim *qui sentit commodum sentire debit et onus.* If a person accept anything which he knows to be subject to a duty or charge it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself (3).

On the whole I am of opinion that if the lands in question or the proceeds of those lands are burdened by the operation of the Indian treaties, if they have been put in pledge or hypothecated in order to render more secure the stipulated annuities, if the Indians have in them a property right whether legal or equitble capable of being enforced or adjudicated upon by petition of right or otherwise in a court of justice, then Ontario having under the Union Act taken these lands, she has taken them subject to this burden, and is therefore bound to relieve Quebec therefrom.

But the question still remains: Do these treaties as they are called in law create a burden upon or give to the Indians an interest in the lands they purport to cede ?

(1) 19 Can. S. C. R. 673. (2) 23 Can. S. C. R. 79.
(3) Broom 7th ed. p. 708.

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Before minutely examining the phraseology of the contract, a few words may be necessary as to some preliminary considerations that should not be lost sight of in endeavouring to arrive at its meaning.

A self respecting state in dealing with its citizens in matters of contract does not usually give the public property as a security for the fulfilment of its obligations. It gives its promise, it pledges the national faith, but nothing more. A person contracting with it, should he ask more, would so far manifest a distrust in either its good faith or its credit, and a state by yielding to the request would so far admit that such distrust was not wholly groundless. Not during the present century has any powerful civilized state pledged to its subjects state property (crown jewels for example), as security for a national obligation. On the other hand a state may consistently with its dignity pledge its revenues or other property when it takes upon itself the obligations of another state, or when it goes into the foreign money markets to raise money for the purposes of the nation. When in the old provinces the casual and territorial revenues of the Crown were surrendered, and in return they assumed the burdens of the civil list, as well as the other obligations of the Imperial Government previously incurred in connection with the administration of affairs of British North America, the provinces, by special act, pledged the whole of the provincial revenues as security for the performance of such obligations in the case of old Canada including in such secured imperial obligations the annuities payable to Indians under the then existing treaties. That pledge, however, was made, not to or for the benefit of the functionaries or classes mentioned, but to the Crown itself and for its security alone.

Another consideration has a bearing on the matter. The contest in this case is not between the Indians on

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the one hand and the Government on the other; it is in its last analysis a contest between Ontario and Quebec. The principle of generous construction so ably and correctly pointed out by the learned Chancellor would very properly be applicable were it a case of the former kind. Had the rights of the Indians been in question here—were their claims to the increased annuity disputed—did that depend upon some difficult question of construction or upon some ambiguity of language—courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost limit all ordinary rules of construction or principles of law—the governing motive being that in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.

But I do not see that where the question is solely between the two provinces these high ethical doctrines should have weight. It is one thing from motives of grace or from a sense of moral obligation to do more than justice to the Indian races. It is quite another thing in the construction of a legal instrument to give weight to these motives in favour of one province at the expense of another, especially when these races are in no way benefited thereby.

In my view this contract is in the present controversy to be read like any other contract as between parties who are *sui juris*, and dealing with each other at arms' length.

Another question is involved. It is in my view immaterial whether the treaties give to the Indians an interest in the ceded lands themselves or in the proceeds of those lands. The authorities, I think, clearly

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establish the proposition that under the Statute of Frauds and the Statutes of Mortmain, and similar statutes, an interest in the proceeds of the sales of lands is an interest in the lands themselves. Leach, Vice-Chancellor, in *Attorney-General* v. *Hanley* (1), thus expresses it:

> That money to arise from the sale of land is an interest in land admits of no doubt.

In the well-known case of *Jeffries* v. *Alexander* (2), the House of Lords, although divided in opinion, so held. In that case Mr. Justice Blackburn (one of the six learned judges who gave their opinion) (3) says:

> But the devise of land to be sold on the bequest of the mortgage money does actually give the objects of the bounty of the testator an equitable interest on the land which is to be sold, or in the mortgaged estate, and therefore is within the very words of the statute a gift of an interest in land.

And so the late Master of the Rolls held in *Lacey* v. *Hill* (4); and Mr. Justice Kay in *Re Thomas. Thomas* v. *Howell* (5). Nor was any different rule laid down in this court in the case of *Stuart* v. *Mott* (6), as I understand that case.

I now come to the treaty itself, and the question is as to the effect of these words:

> Should the territory hereby ceded at any future period produce such an amount as will enable the Government, without incurring loss, to increase the annuity hereby secured to them (the Indians), then, and in that case, the same shall be augmented.

Now there is here no express creation of a charge, whether upon the lands or upon their proceeds. Are we to read into or add to this stipulation what, it is argued, it impliedly contains "and the lands hereby ceded, or the proceeds thereof, after deducting cost of

(1) 5 Madd. 327.
(2) 8 H.L. Cas. 594.
(3) At p. 626.
(4) L.R. 19 Eq. 346.
(5) 34 Ch. D. 166.
(6) 23 Can. S.C.R. 384.

administration, is hereby charged with the payment of such augmented annuities"?

If we are, then I think the Indians have an interest and Ontario is bound to discharge it. But is that the true meaning of the contract? Was that the intention of the parties? Did the Indians, in consideration of the cession, get the personal obligation of the Crown *plus* an interest in the proceeds of the ceded lands to bolster it up as it were and make it more binding, or did they get that obligation only?

Let me consider the case had this provision as to the augmented annuities been left out. In that case the Indians would have been entitled to a perpetual annuity of £1,100. As to this sum there are no words from which it could possibly be implied that any property was to be pledged as security for its payment. The only security was the personal covenant of the Sovereign. The Indians do not appear to have asked —the idea of implementing that covenant by further pledges never seems to have been contemplated or suggested. Then, when in the course of the negotiations the question of augmentation came up and was settled in the manner specified, was it the intention either of the Indians or the Crown that their rights to the increased annual sum should be secured not only by the Crown's covenant, but by the pledging of the property as well? Let us suppose that in the case of the fixed annuity some Sachem—wise above his fellows —had suggested: "We are giving up our lands and you are giving us £4,000 and our reserves, but what security have we that you will pay us to the end of time the eleven hundred pounds a year? Give us a mortgage as security." Would not the answer have been refusal—a kindly one it may be, but an explanation that the Queen Mother did not so deal with her children—that they must take her at her word or not at

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all? And were the same suggestion made when the other question came up, would not the same answer be given? For my part I cannot bring myself to think that it was ever within the contemplation of the parties that as security for payment the Indians were to have a charge upon the proceeds of the ceded lands.

What does the word "interest" mean whether used in a statute or according to the common law? As I understand it, it means such a right in or to a thing capable of being possessed or enjoyed as property which can be enforced by judicial proceedings. One may be interested in a property but have no legal interest in it. If he has a legal interest he can enforce it against the property. If in the present case the lands in question are burdened with the charge the Indians have such an interest in their proceeds as will enable them to follow the moneys no matter where they are or to whom paid, they have a property right in the moneys themselves indefeasible, indestructible, which the State must acknowledge and to which the courts must give effect.

In the present case the Indians, I admit, are interested in these lands in the sense that the augmentation of the annuities wholly depends upon what they will sell for but not in the sense that they have any right in or to the proceeds of such sales no matter what they amount to.

They have no "interest" in these proceeds. The treaty might have made the augmentation dependent or conditional upon the happenings of any other uncertain future event, the increased or diminished population of the tribe at a given time for instance, or the going of one of their number to Rome on a certain day. But it is the event alone they are interested in. If circumstances so combine as to produce the event then the money becomes payable.

I admit too that were it a matter of contention as to whether the determining event had happened it would be necessary on the part of the Indians to have an inquiry as to the amounts realized from the sale of the ceded lands; but that inquiry would be necessary not for the purpose of obtaining a declaration that the Indians were entitled to be paid therefrom but for the purpose of establishing whether the determining event had happened and the consequent liability of the Crown upon its personal covenant.

The question has been presented to us as a pure matter of law. I have been unable to find that as a matter of law the Indians have any charge upon or interest in the lands ceded by the treaties in question or that these lands or their proceeds are subject to any interest or trust by reason of such treaties. They have therefore become the absolute property of Ontario.

It was further contended that the question was settled in favour of Ontario by the operation of clause 13 of the award under the British North America Act of the 3rd of September, 1870. If clause one of that award be read with clause 13 then it seems to me that that contention is correct. I have already stated that in my view the moneys payable under the Robinson treaties whether upon the original or the augmented basis was a debt or liability of the old province of Canada at the time of the union, that the whole of that liability was assumed by Canada, she thereby becoming responsible to the Indians therefor, and that (subject to the principal question in this appeal) Ontario and Quebec conjointly are liable therefor to the Dominion as a portion of that excess of debt referred to in section 112. Now under section 142 of the British North America Act the division of the debts and liabilities of Upper Canada and Lower Canada was to be referred to the arbitration therein specified, and that

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arbitration was held and an award made. That award did not purport to determine the amount of such debts or liabilities. It did, however, purport to divide that amount and to fix the proportion to be borne by Ontario and Quebec respectively. Clause 1 of the award specifies that proportion, Ontario being declared liable to pay such a proportion of the excess as the sum of $9,888,728.02 bears to the sum of $18,587,520.57 and Quebec being declared liable to pay such a proportion as the sum of $8,778,792.55 bears to the same sum; or, approximately, Ontario is to pay five-ninths and Quebec four-ninths of the old province's liabilities. It appears to me that both provinces are still bound by this award and that this finding determines the question involved in this appeal. It is a finding that Quebec as well as Ontario is liable to recoup the Dominion on account of these Indian annuities and it determines the proportions to be borne by each.

KING J.—The question is whether Ontario alone, or jointly with Quebec, is liable to be charged in account with the Dominion with the amounts paid by the Dominion since the union in satisfaction of increased annuities payable to certain Indian tribes under the Robinson treaties of 1850.

It is held by the arbitrators that the amounts are chargeable against Ontario alone.

In the year 1850 it was deemed advisable by Her Majesty's Government to extinguish Indian rights in and over extensive districts on the shores of Lakes Huron and Superior occupied by tribes of the Ojibeways and it was in accordance with practice that the conclusions should take the form of a treaty between Her Majesty and the chiefs and principal men representing the tribes. Treaties were concluded by Mr.

Robinson acting on behalf of the Queen, which in the provisions material to the present inquiry are alike.

It was declared (citing from the Huron treaty):

That for and in consideration of the sum of £2,000 currency * * to them in hand paid, and for the further perpetual annuity of £600 (£500 in the case of the Superior treaty) * * * they the said chiefs and principal men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors for ever, all their right, title and interest to and in the whole of the territory (saving and excepting certain reservations), and the said William Benjamin Robinson on behalf of Her Majesty and the Government of the province hereby promises and agrees to make or cause to be made the payments as above mentioned, and further to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded to them, and to fish in the waters thereof as they have hitherto been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the provincial government.

There was then this further stipulation:

The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that, should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province without incurring loss to increase the annuity hereby secured to them, then and in that case the sum shall be augmented from to time provided that the amount paid to each individual shall not exceed the sum of one pound currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number which is 1422 (in the Lake Superior case 1240), to entitle them to claim the full benefit thereof. And should they at any future period not amount to two-thirds then, the said annuity shall be diminished in proportion to their actual numbers.

At and before the passing of the British North America Act, 1867 (and at and before the making of the cession), the casual and territorial revenues from the Crown lands of Canada had been granted by the

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Imperial Government to the province of Canada. The effect of this was that the lands were thereafter held by the Crown in right of the province of Canada.

Then came the union in 1867. By sec. 109 of the British North America Act, it was enacted that

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

Secs. 111 and 112 are as follows:

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

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 5 per cent per annum thereon.

In the accounts heretofore adjusted and settled the fixed annuities under the above treaties have been regarded as a portion of the debt of the province of Canada, and the provinces of Ontario and Quebec have been charged with a capital sum sufficient to yield such annuities according to the terms of the award of 1870, made under the provisions of section 114 of the British North America Act. These fixed annuities were regularly paid by the Dominion Government, as having the administration of Indian affairs. As for the augmented annuities, nothing was paid in respect of them, either by the old province of Canada or by the Dominion Government, until about the year 1874, when a claim for them was made on behalf of the tribes. The Dominion Government becoming satisfied that the increased amounts were properly payable (as seems to be the fact) paid over the same, upon an understanding

with the provinces that the question of ultimate responsibility as between the different governments should be afterwards settled.

The present arbitration is for the purpose of settling (amongst other questions of account and claims) "the claims made by the Dominion Government on behalf of the Indians."

Upon that portion of this claim involved in the present appeal, viz., the claim for payment of increased annuities for the period subsequent to the union, the arbitrators have found (par. 6):

> That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such event falls upon the province of Ontario, and that this burden has not been in any way affected or discharged.

The arbitrators declare in their award that these conclusions proceed upon their view of disputed questions of law, the effect of which is, by the statute, to render them appealable.

In the reasons given by the learned Chancellor, concurred in by the other learned judges, it is held, in conformity with decisions of the Supreme Court of the United States, that treaties with the aborigines are to receive a generous interpretation in favour of them as public wards of the nation. Approaching it in this spirit, the learned Chancellor concludes that although the mere words used do not say that the increased annuity is to be paid out of the proceeds of the land, still that, in his opinion, is the plain and reasonable implication.

Upon the appeal the province of Ontario contests the position that the lands passed to it subject to any trust in respect of it, or to any interest in the Indians so far

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as relates to the claim in question. It is further contended that, as by section 111 the Dominion assumed the "debts and liabilities" of the old province of Canada, and by section 112 the provinces of Ontario and Quebec are liable over to the Dominion only for the excess of "debt" over $62,500,000, the effect of this is that the augmentations becoming payable after the union are to be assumed by the Dominion, under section 111, as a "liability" existing at the union, while they are not a "debt" under section 112 to be taken into account in calculating the excess of debt for which Ontario and Quebec are conjointly responsible over to the Dominion.

It was further claimed that if the amounts are to be charged against the provinces at all, it must be against both Ontario and Quebec jointly in the proportion fixed by the award of 1870, and not against Ontario alone.

In the second of the above contentions the province of Quebec joins.

Now, first, respecting such contention, it is to be noted that, while section 111 uses both words "debts" and "liabilities," section 112 does not use either of them, but instead, the comprehensive word "debt":

> 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 the sum of $62,500,000.

This general word "debt" may very well include all forms of indebtedness, whether ascertained or unascertained, determinate or indeterminate, except so far as particular provisions of the Act impose a limitation.

The financial provisions of the scheme of union were manifestly a matter of arrangement between the provinces of old Canada, Nova Scotia and New Brunswick; and while, for the public creditor, the Dominion was to be the paymaster, as between the provinces

and it, the amount of provincial indebtedness which the Dominion, as representing the people of the united provinces as a whole, was to assume was definitely determined and limited by the amount of debt of the several provinces stated to be assumed by it without recourse.

It follows, therefore, that the ultimate liability in this case must fall either upon Ontario alone, or upon Ontario conjointly with Quebec according to the ratio fixed by the award of 1870 for the division of the debts and liabilities of the old province of Canada in excess of the sum stated by the Act of 1873.

Then, as the main question, viz: whether the ceded lands were subject to a trust or interest as claimed. In *St. Catharines Milling & Lumber Co.* v. *The Queen* (1), it is laid down that:

> Wherever public land with its incidents is described as "the property" of or as "belonging to" the Dominion or province, these expressions merely import that the right to its beneficial use or to its proceeds has been appropriated to the Dominion or the province (as the case may be) and is subject to the control of the legislature, the land itself being vested in the Crown.

When therefore it is declared that upon the union the lands shall belong to the province in which they are situate, subject to any trust in respect thereof or to any interest other than that of the province in the same, the saving clause extends to trusts or interests affecting the beneficial use of the land, or its proceeds.

The question then is: Did the Crown, or the province of old Canada to whose rights Ontario has succeeded, hold the proceeds to be derived from the ceded lands upon any trust to pay to the Indians the augmented annuities?

There is no doubt that the Indians were dealt with as though they were possessed of substantial rights which at least imposed a burden upon the lands. In

(1) 14 App. Cas. 46.

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St. Catharines Milling Co. case already alluded to, Lord Watson said that it was not then necessary to express any opinion upon the precise quality of the Indian right, but it was sufficient to say that there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title which became a *plenum dominium* when that title was surrendered or otherwise extinguished.

The consideration to the Indians for the ceding of their rights was threefold, the cash payment, the fixed annuity, and the further annuity up to a certain amount depending upon the proceeds of the lands. Although the promise on the part of the Crown to pay the augmentations is separated from that relating to the fixed annuity and the cash payment, and although it is introduced by reference to the liberal intentions of the Crown, still all that was promised by the Crown constituted the consideration for the act of cession.

Practically it does not now, and it never did, make any difference to the Indians whether they were declared to have an interest in the proceeds of the land or not. Their assurance of payment would be equal in either case.

Nor, on the other hand, would it practically make any difference to the Crown whether or not the Indians were declared to have such interest in the proceeds. *Ex hypothesi*, the lands were to be sold, and there could be no fetter upon the right to dispose of them.

The matter only came to have practical significance when it became necessary to consider the nature of the transaction in relation to the provisions of the British North America Act.

The question is to be solved by the light of what is expressed and by the application to it of general principles of law.

The law is very considerate of the rights of a vendor of an interest in lands. It proceeds upon the principle that one who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it and not to pay the full consideration money. This is a general principle of most systems of law. Hence the lien of the vendor, which is deemed to be based upon a natural equity.

This may even exist where the price, or a part of it, is payable in the way of an annuity, but in such case the circumstances may be such as to exclude the notion that the parties could have reasonably contemplated such a lien.

Here it was manifestly contemplated that the land might be sold, and as there was to be no limit to the continuance of the annuity it would not be reasonable to suppose that there was to exist a perpetual lien.

But it was agreed that if the ceded territory should at any future period produce, *i.e.*, from sales, rents, royalties, &c., such an amount as would enable the Government of the province of Canada, without incurring loss, to increase the stated annuity, then the same should be augmented from time to time to an amount not exceeding, in the whole, a payment to each individual of the sum of £1 currency.

Now this may mean merely that the revenues shall furnish a measure of increased price or be a circumstance to determine whether or not it shall be paid; or, on the other hand, it may mean that a part of the revenue shall go to the Indians by way of increased annuities in a certain event.

Where two interpretations of such an agreement are open, one consistent with and the other inconsistent with a provision for the security of the unpaid vendor, it would seem more appropriate to treat it as giving the more effectual security to the unpaid vendor, and

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more in accordance with the general principles of the law to do so.

It would give to the undertaking a more simple and less circuitous operation, and one more in accordance with the natural meaning of the language, to construe it as providing that the augmented annuities should be paid out of the fund, the existence of which is the condition and the reason for its payment. Take the words in which the condition is expressed:

> Should the territory produce such an amount as would enable the Government, without incurring loss, to increase the stated annuity.

Is it not the natural meaning of this, that if the territory should produce such an amount as would enable the Government out of it, and without incurring loss, to increase the stated annuity, then etc.? I am inclined to think so. Upon the whole, therefore, but not without doubt, it seems to me that there is a reasonably clear manifestation of an intention to devote a portion of the proceeds of the ceded lands in certain events to the increased annuities.

If this is so, it would follow that Ontario, getting the lands subject to the trust, would have to discharge the burden which before that was upon the province of Canada, now represented by the provinces of Ontario and Quebec, unless there is something in the British North America Act, or in some other binding instrument or act, to make it otherwise.

It is contended that the award of the arbitrators made in 1870 under the provisions of section 114 of the British North America Act has such effect. By that section it was provided that:

> The division of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada.

In accordance therewith arbitrators were appointed, and on 3rd September, 1870, their award was made, by paragraph 1 of which it was determined that:

> The amount by which the debt of the late province of Canada exceeded on the 30th day of June, 1867, $62,500,000, shall be and is hereby divided between, and apportioned to, and shall be borne by the said provinces of Ontario and Quebec respectively, in the following proportions,

i.e., in a certain named ratio.

By paragraph 13 it was determined:

> That all the lands in either of the said provinces of Ontario and Quebec surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon or charge to the said province in which they are so situate by the other of the said provinces.

Before that tribunal the province of Quebec had contended that the amount at which the fixed annuities had been capitalized should be charged against the province of Ontario upon grounds similar to some of those urged in the present appeal respecting the augmentation of the annuities, but the arbitrators rejected the contention and held as already stated in par. 13 of their award.

Accordingly, the capitalized amount of the fixed annuities was finally adjusted and settled, and in respect of it Quebec had no right further to contend that it should be dealt with as a charge upon the ceded territory in Ontario, nor would the Dominion have the right so to contend inasmuch as the result of a contrary decision would be to give to Quebec in the ultimate accounting a charge or claim against Ontario in respect of it.

But the matter of the augmentation of annuities was not raised before the arbitrators, and if the views herein stated upon the main point are correct, it is apparent

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that the two things do not rest entirely upon the same foundations. The finding of the arbitrators that the claim as to the fixed annuities that was brought before them did not constitute a charge upon the lands, is therefore not conclusive as to the matters in question here. Par. 13 is to be read in the light of the contention before the arbitrators, and not as an abstract and general denial of all charges, etc., respecting the annuities, but simply as a denial of the lands being subject to the alleged charge to which it was then claimed to be subject.

The result therefore, in my view is, that while the word "debt" in the 112th section is comprehensive enough by itself to include a liability for increased annuities becoming payable after the union, this particular liability, or part of the debt, of the late province of Canada is to be regarded as cast upon the province to which by sec. 109 the land is given subject to the burden. I think, therefore, that the appeal should be dismissed.*

*The Dominion of Canada and the province of Quebec have respectively obtained leave to appeal from the judgment in this case to the Judicial Committee of the Privy Council.