IN THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC,

APPELLANTS;

AND THE

PROVINCE OF ONTARIO,

RESPONDENT.

BRIEF FOR COUNSEL FOR ONTARIO—THE RESPONDENT.

TORONTO:
WARWICK BROS. & RUTTER, PRINTERS, ETC., 68 AND 70 FRONT STREET WEST,
1896.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF THE ARBITRATION FOR SETTLEMENT OF ALL QUESTIONS RELATING OR INCIDENT TO THE ACCOUNTS, AND FOR THE SETTLEMENT OF MATTERS OF ACCOUNT BETWEEN THE DOMINION OF CANADA AND THE PROVINCES OF ONTARIO AND QUEBEC, AND BETWEEN THE SAID TWO PROVINCES, PURSUANT TO 54 AND 55 VIC. CAP. 6, CANADA; 54 VIC. CAP. 2, ONTARIO; AND 54 VIC. CAP. 4, QUEBEC.

BETWEEN

THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC, 10

APPELLANTS;

AND THE

PROVINCE OF ONTARIO,

RESPONDENT.

THE CASE OF THE RESPONDENT, THE PROVINCE OF ONTARIO.

1. This is an appeal by the Dominion of Canada and the Province of Quebec against the judgment of the Supreme Court of Canada, whereby the Supreme Court on the 9th day of December, 1895, reversed the award made on 13th February, 1895, by a Board of Arbitrators constituted and appointed under the Statutes of the Dominion of Canada, the Province of Ontario and the Province of Quebec above set out, subject to appeal to the Supreme Court of Canada, and thence 20 to the Judicial Committee of Her Majesty's Privy Council in case their lordships are pleased to allow such appeal.

Rec. pp. 119, 120.

2. The said statutes purport to have been passed for the settlement by arbitration of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, and between the said two Provinces.

Rec. pp. 14, 15, 16.

3. The said statutes provide that the Arbitrators shall consist of three Judges, one to be appointed by the Governor-General in Council, and one by each of the Provincial Governments, all three to be approved by each Government; and in pursuance of the said provision each of the respective Governments passed Orders in Council whereby the Honourable John Alexander Boyd, Chancellor of the Province of Ontario; the Honourable Sir Louis Napoleon Casault, Chief Justice of the Superior Court of the Province of Quebec, and the Honourable George Wheelock Burbidge, Judge of the Exchequer Court of Canada, were appointed to act as Arbitrators in the matter of the said disputed accounts, and all three of which Arbitrators have been duly approved by each Government.

The sixth clause of the said statutes is 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."

Rec. p. 17. **4**. On the 10th of April, 1893, an agreement of submission of the questions in dispute was prepared and executed by counsel acting for the respective governments, and on the 13th day of April the Government of the Province of Ontario, by Order in Council, adopted the said agreement of submission; like Orders in Council were passed by the Governments of the Dominion and the Province of Quebec on the 15th day of the said month of April, and the Board of Arbitrators Rec. pp. 20, 19, 21. constituted as aforesaid have proceeded with and have disposed of several of the questions involved in the controversy.

5. The claim upon which the present appeal arises was made by the Dominion against the Province of Canada as to part, and against the Province of Ontario as to part, and was based upon two treaties made respectively on the 7th and 9th days of September, 1850, between Her Majesty the Queen, in right of Her Province of Canada, represented by the Honourable William Benjamin Robinson, of the one part, and the principal men of the Ojibeway Indians of the Lake Huron and the Lake Superior Districts respectively, of the other part, whereby in consideration of Rec. p. 22. the immediate payment of two thousand pounds currency and a perpetual annuity of six hundred pounds in the case of the Lake Huron Indians, and an immediate payment of two thousand pounds Rec. p. 25. and a perpetual annuity of five hundred pounds in the case of the Lake Superior Indians, and for further and other considerations in said treaties mentioned, they, the Indians, ceded and surrendered their right, title and interest (with certain excepted reserves) to and in certain large tracts of land bordering upon the said lakes, which, at the said date, were inhabited and occupied by the said Indians, unto Her Majesty, Her heirs and successors.

6. By the British North America Act, 1867, a union of the Provinces of Canada, Nova Scotia and New Brunswick was effected, in which the late Province of Canada was divided into the two

distinct Provinces of Ontario and Quebec. The lands surrendered by both said treaties are all situated in Ontario.

7. The said Lake Huron Treaty, besides providing for the cash payment and the perpetual annuities before mentioned, contained the following stipulation and agreement:

"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 (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, 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 similar stipulation.

Rec. p. 23, line 25.

Rec. p. 26, line 43.

8. After the execution of the said treaties, the late Province of Canada paid annually to the Indians entitled, the said fixed annuities of six hundred pounds and five hundred pounds respectively, up to the date of the union of the provinces, namely, the 1st of July, 1867, which sum when distributed amongst the Indians amounted to about one dollar and sixty cents to each individual Indian; but the said Province of Canada did not pay any increased or augmented annuities under the said clause in the treaties set out in the seventh paragraph hereof.

9. On 22nd August, 1873, a despatch from the Under Secretary of State of the Dominion was addressed to the Lieutenant-Governor of Ontario, whereby it was communicated to the Government of Ontario that under the said treaties concluded in September, 1850, the Indians of Lakes Huron and Superior were claiming the fulfilment of the stipulation of their treaties in paragraph seven hereinbefore set forth, to the extent of four dollars annuity per capita on the plea that the profitable sales of land and timber upon the shores and islands of those lakes within the ceded territory entitled them to such increased annuities and would warrant the Government in advancing their annuities to the amount per head, which as specified in said treaties, would be paid to them in the event of the lands and timber becoming sufficiently profitable to admit of it. And by the said communication the Government of Ontario was asked to take such steps in the matter as, under the circumstances, seemed to the said Government to be just on the part of the Province of Ontario.

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Rec. p. 28, line 19.

10. Subsequently, on 31st October, 1874, the Lieutenant-Governor of Ontario transmitted to the Secretary of State of the Dominion Government the views of the Government of Ontario in

regard to the complaints in question, which were expressed and contained in the report of the Attorney-General of Ontario to the Committee of Council, as follows:

ATTORNEY-GENERAL'S DEPARTMENT,
TORONTO, 14th October, 1874.

Joint App. The undersigned has had under consideration a despatch from the Under-Secretary of State of the Dominion, dated 22nd August, 1873, enclosing, for the consideration of this Government, a copy of an Order of His Excellency the Governor-General in Council, in reference to complaints made by the Indians of Lakes Huron and Superior, parties to the treaties concluded by the Hon. W. B. Robinson in 1850, that certain provisions of those treaties had not been carried out.

In the Order in Council it is directed that the Government should be moved to take such steps in the matter as under the circumstances might seem to them to be just on the part of the Province of Ontario.

The complaint made by the Indians is of the omission to carry out a stipulation contained in the treaties of 1850, that in case the territory ceded by the Indians should at any future period produce an amount which would enable the Government, without incurring loss, to increase the annuities secured to the Indians, these annuities should be augmented, subject to certain conditions.

The undersigned presumes that this matter was brought under the notice of this Government with the view of contending that upon this Province devolves the burden of any increase of the annuities.

The undersigned respectfully submits that there is no sufficient ground for this contention.

Under the British North America Act, and the Dominion Act, 36 Vic, cap. 30, the Dominion assumed the debts and liabilities of each province existing at the time of the union, except so far as the general language of section 111 of the British North America Act is controlled by section 109, which subjects the property of every province to any trusts existing in respect thereof, and to any interest other than that of the Province. The lands now in question were not subject to any trust. Legally, they were the property of the Crown before the surrender. The so-called title of the Indians was one of courtesy only, and was by the treaties extinguished absolutely in order that these lands might be opened up for settlement, and that patents might be issued therefor to purchasers. It was not contemplated that the annuities should be a lien upon the lands, the liability for the amount of the annuities being assumed as a charge upon the entire revenue of the Province.

Besides, the policy of the B. N. A. Act was to place all matters relating to the Indians under the exclusive authority of the Dominion Parliament and Government, and not to leave the rights of these people to depend on, or to be dealt with by provincial authorities.

The undersigned has received information from the Crown Lands Office that the amount received before confederation in respect of the lands on the north shore ef Lake Superior was about $110,000. The amount so received in respect of the east and the north shores of Lake

Huron, the undersigned has not been able to ascertain. But there is no doubt that enough has been received to entitle the Indians to the increased annuities which they claim. The question of the liability of Ontario in respect of the Indian annuities was fully discussed by the respective counsel for the Provinces of Ontario and Quebec, before the arbitrators appointed under the British North America Act, and the undersigned is of opinion that the arguments which were advanced by counsel then representing Ontario, and which were afterwards printed, establish conclusively that this Province is not liable to be charged with the Indian annuities.

If the Dominion Government is advised that the lands in question are subject to a trust, the undersigned would suggest that the point should be forthwith submitted to the Court of Chancery on a statement of facts concurred in by the governments concerned, or that the Dominion Government should settle with the Indians without prejudice to any question as to what government ought ultimately to pay the proposed increase.

(Signed) O. MOWAT,
Attorney-General.

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11. The Government of the Dominion having been informed of the views of the Government of Ontario, did, by Order in Council of 22nd July, 1875, adopt the recommendations of the Minister of the Interior, concurring in the report of the Minister of Justice that the annuities be increased to the maximum figure of four dollars per annum per head and to be paid for the year 1875, and the Minister of the Interior also recommended that provision for such payment be made by Parliament at its next session, unless it be in the meantime decided by the courts of law to whom the Minister of Justice suggests the matter be referred for decision, or by any other mode of settlement that may be agreed upon, that the amount in question is to be paid by the Province of Ontario, or by the old Province of Canada.

12. The report of the Minister of Justice above mentioned (7th July, 1875,) is as follows:

DEPARTMENT OF JUSTICE,
OTTAWA, 7th July, 1875.

With reference to the claim of the Indians of the north shore of Lake Huron and the Great Manitoulin Island for an increased annuity in respect of the lands ceded by them in 1850, the undersigned has perused the papers.

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The treaty contains the following stipulation: That should the territory so ceded at any future period produce such a sum as will enable the Government of the Province, without incurring loss, to increase the annuity to them (*i.e.*, the Indians,) 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.

From the papers laid before the undersigned, as well as oral information of the Minister of the Interior, the undersigned is lead to believe that at the period of confederation a certain

augmentation would, under this provision, have been properly claimable by the Indians, but there seems to be no doubt from this statement and information that for some years back the full augmentation, up to four dollars a head, has been claimable.

The 111th section of the B. N. A. Act is as follows: Canada shall be liable for the debts and liabilities of each province existing at the union.

The 109th section of the same Act provides that "all lands shall belong to the several provinces in which the same are situated, subject to any trusts existing in respect thereof, and to any interest other than that of the province on the same."

It appears to the undersigned that the liability to the Indians to which he has referred comes within the 111th section, and this whether or no Canada be entitled to claim that the lands in question are under the 109th section charged in any way with the satisfaction of that liability.

The papers shew that the Government of Ontario repudiates any such charge, and that this view was asserted by the counsel for the Province during the arbitration between the two Provinces. The Government of Ontario, however, acknowledging that the Indians are entitled to the increase, propose that the Government of Canada should settle with the Indians without prejudice to any question as to what Government ought ultimately to pay the proposed increase.

The Government of Ontario also suggests that the question as to the liability of the Province or of these specific lands under the 109th section should be submitted to the Court of Chancery. Having regard to the circumstances connected with the obtaining of this treaty in particular, and to the general policy of the Canadian and British Governments with reference to the Indians, it would seem to be of great importance that their just demand should be met without further delay; and the undersigned recommends that the suggestion of the Government of Ontario should be acted upon, and that the increased annuity for the current year should be paid, without prejudice to any question, by this Government.

The question of the arrears might be postponed for a while, and, meantime, the question as to the liability of the Ontario Government on the specific lands might be decided either by the Court of Chancery, as proposed, or by the Supreme Court, after the organization of that tribunal.

(Signed) EDWARD BLAKE.

13. No action or step was taken by the Dominion Government towards the determination by a competent tribunal of the question as to which Government should ultimately bear the burden of such payment, nor was any communication in respect of any payments to the Indians made to Ontario in reference to the liability of Ontario or otherwise until 1883.

14. At the close of the year 1883, an account was transmitted by the Dominion Minister of Finance to the Governments of Ontario and Quebec, which account was pursuant to an address of the House of Commons laid before Parliament on the 4th February, 1884, as "Accounts of the "late Province of Canada and the Provinces of Ontario and Quebec with the Dominion of Canada "from 1st July, 1867, to 30th June, 1882," (which account is known and has been referred to in the Arbitration proceedings as No. 56, Schedule C. I. Province of Canada.).

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(*a*) In this account, formally transmitted as aforesaid by the Dominion to the Provinces of Ontario and Quebec, the several parts of the claim of the Dominion as now presented were included and the present claims as made up in that account to 30th June, 1882, were rendered as a whole against the Province of Canada, and no part was claimed against the Province of Ontario.

(*b*) The entry in said account of the Province of Canada as rendered as aforesaid is as follows:

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Arrears of payments to Indians under Robinson treaty	$140,800 00
Capitalization of annuities	303,280 00

(*c*) The explanation given by the financial officer of the Government was :—

As to $140,800, that it covered the whole amount of the annuities at the full amount of $4 per head of 2,700 Indians as having been paid from 1851 to 1866 inclusive, fifteen years, together with interest thereon at five per cent. from the date of each annual payment to the year 1866.

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(*d*) As to $303,280, charged as capitalization of annuities, it was explained that by the census at Confederation in 1867 it was found that the number of Indians was 3,791, making an annual charge of which $15.64 capitalization at five per cent. made the sum of $303,280.

Record pp. 123-127, inclusive.

(*e*) And by said Account No. 56 so furnished by the Dominion to the said Provinces, and on which the Dominion claimed against them jointly, said several sums of $140,800 and $303,280 were thereby added to the account of the debt of the late Province of Canada, as part of the excess at the Union over $62,500,000, and charged with interest as and from 1st July, 1867, at the rate of five per centum per annum, in accordance with section 112 of the B. N. A. Act.

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15. After examination of this account Ontario represented to the Finance Minister of the Dominion that, irrespective of other objections, these figures were framed on a wrong basis, as no allowance was made for the payment of $4,400 made annually by the late Province of Canada between 1851 and 1867, and that the capitalization made in 1867 was overlooked.

Joint App.

16. By the memorandum of meeting held at Ottawa, Tuesday, 21st October and Wednesday, 22nd October, 1884, between the Treasurers of Ontario and Quebec and the Minister of Finance of the Dominion for the purpose of settling the outstanding accounts between the Provinces of Ontario and Quebec, the late Province of Canada and the Dominion of Canada, it appears that the Treasurer of Ontario protested against those charges being made against the account of the late Province of Canada because the amount of capitalization for annuities for Indians had been settled by the Dominion of Canada as a whole at $701,280, and so charged against the account of the late Province of Canada, and that without the consent of the Provinces the Dominion could not increase the debt of the Province of Canada of its own motion, and that the arrears for which payment was claimed had not been paid to the Indians.

And that the amount which the Dominion asserted had already been capitalized in respect of the annuities to these the Huron and Superior Indians was entirely disregarded.

Joint App.

Quebec also protesting that the lands surrendered became the property of Ontario subject to all trusts attaching thereto under sec. 109 of the British North America Act, and therefore Quebec was exonerated from any liability in respect thereof.

Joint App. The Representatives of the Dominion acknowledged that $88,000 as a capitalization already charged against the Province of Canada was again charged, and in error.

17. The accounts of the late Province of Canada and the Provinces of Ontario and Quebec with the Dominion of Canada were then again made up by the Minister of Finance as from 1st July, 1867, to 30th June, 1885, and transmitted to the Provinces, and also laid before Parliament with the statement that Schedule A therein is a continuation, beginning 1st July, 1882, of the statement previously printed, and that Schedule B therein contains the account recast in the form desired by the Treasurers of Ontario and Quebec. The said account is known in the Arbitration proceedings as No. 18, and Schedule C therein contains in a suspense account the amount chargeable for Indian annuities, and is as follows:

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SCHEDULE C.

Suspense Account.

Arrears of payments under Robinson treaty		$ 52,800 00
Capitalization of annuities		303,280 00
		$356,080 00
Compound interest on the above from 1st July, 1867, to 1st July, 1885, at five per cent. per annum, calculated half yearly		510,097 17
		$866,177 17
Amount chargeable to Ontario	$457,086 04	
do Quebec	409,091 13	
		$866,177 17

And then carried on the liability to the date of the said account, 30th June, 1885, and on the same mode of calculation of interest, and apportioning the liability to that date at the amount following:—

Ontario	$553,846 79
Quebec	495,691 02

19. It is for the settlement of the questions arising on the said accounts between the Dominion of Canada and the Provinces of Ontario and Quebec and between the two Provinces concerning which no agreement had been arrived at, that the subject matter of claims by the Dominion as in the said accounts stated that the Board of Arbitrators was constituted by the Statutes also set forth.

20 The present appeal arises upon a claim presented by the Dominion to the Arbitrators under sub-clauses (*a*) and (*d*) of paragraph 2 of said agreement of submission, which are as follows:

Rec. p. 18. (*a*) The accounts as rendered by the Dominion to the Provinces up to January, 1889.

(*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.

21. Before the Board of Arbitrators, the Dominion put forward the claim which had therefore been preferred against the Province of Canada, dividing it into the following three branches :

Rec. p. 30, line 26.

1. Against the Province of Canada for all claims for increased annuities prior to the 30th June, 1867.

2. Against the Province of Ontario for arrears of the increased annuities from 1867 to 1873, which have not been paid.

Rec. p 31, line 1.

3. Against the Province of Ontario for the amount of the increased annuities actually paid by the Dominion to the Indians since 1874 up to 1892.

22. The Arbitrators dealt with the said claims by their award separately as presented ; on the first head no question arises on the present appeal, as the Provinces of Ontario and Quebec did not appeal against the award in that respect, thereby accepting their liability for the increased annuities prior to Confederation as part of the debt of the late Province of Canada as in paragraph 4 of the award stated.

FIRST BRANCH.

Rec. p. 43, line 20.

23. Under the first branch it is proper to notice (although it is determined by the portion of the award not appealed against) that the Dominion claimed the sum of $325,440, made up as follows :

Arrears of increased annuities between 1851 and 1867 for the difference between the payment of $1.60 and $4.00 per head on 2,700 Indians	$102,400
Joint App. Interest to 31st December, 1892	223,040
Total	$325,440

24. The Arbitrators having awarded (paragraph 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." And (paragraph 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 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 Victoria, chapter 30." And (paragraph 5) " That interest is " not recoverable upon any arrears of such annuities," it follows that no appeal having been taken, the conjoint liability of Ontario and Quebec in respect of the first branch, except as to interest which was disallowed by the Arbitrators, was accepted.

Rec. p. 43, line 1.

Rec. p. 43, line 18.

Rec. 43.

25. ON THE SECOND BRANCH.

The Dominion claimed against the Province of Ontario for the sum of $95,200, being the arrears of annuities from 1867 to 1873 with interest to 31st December, 1892, on behalf of 2,700 Indians $44,800

Joint App. Interest to 31st December, 1892..... 50,400

$95,200

In respect of interest, the Dominion failed by the finding under paragraph 5 of the award.

26. ON THE THIRD BRANCH.

The Dominion claimed against the Province of Ontario for the sum of $389,106.80, being the increased amount of annuities and increased number of Indians as paid by the Dominion to the Indians from 1874 to 1892, inclusive, in numbers rising from 3,791 in 1874 to 5,151 in 1892 ..... $269,874 00

Joint App. Interest from respective periods of increases paid, to 1892..... 119,232 80

$389,106 80

27. The second and third branches so preferred against Ontario, the Arbitrators by paragraph 6 of the award dealt with by making Ontario liable in terms following:

Rec. p. 43, line 26. "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 or Indians entitled."

The event on which such payment depends is stated in paragraph 1 of the award as follows:

Rec. p. 43. "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."

28. The arbitrators therefore decided that the obligation which they recognize in its effect to be a conjoint liability of Ontario and Quebec up to the Union in 1867, and so part of the debt of the late Province of Canada ceased to have such effect after the union, and thereafter became a burden on the surrendered territory, subject to which Ontario took the territory.

Rec. 92, line 28, per Strong, C. J. The Supreme Court have reversed this decision on the ground that the obligation to pay to the Indians is entire as an obligation, and so included in the "debts and liabilities" of the late Province of Canada, for which the Dominion became liable under section 111 of the B. N. A. Act.

Chief Justice, pp. 90-91. And that there was no "trust" or "interest" within the meaning of section 109 of the B. N. A. Act, and pp. 92-93, per Strong, C.J, p. 112, line 33, per Sedgwick, J.,

Rec. 102, Gwynne, J., line 13.

on the ground that the matter had been decided in favor of Ontario by the said award of 1870, under section 142 of the B. N. A. Act. Two of the judges of the Supreme Court dissented from

Rec. 104, per Gwynne, J., line 40.

the decision of the majority, one on the ground that the obligation was not an existing liability of the Province of Canada at Confederation, when the Province of Canada ceased to exist, and that

Rec. 103, 104, Gwynne, J.

the rights of the Indians were protected by section 109 of the B. N. A. Act, and the other on the ground that the award of 3rd September, 1870, decided only that the fixed annuities did not constitute a charge upon the lands surrendered, and that while the word "debt" in section 112 of

Per King, J., p. 119, line 13.

the B. N. A. Act is comprehensive enough to include a liability for increased annuities becoming payable after the union, the particular liability now in question is to be regarded as cast upon Ontario under section 109 of the B. N. A. Act.

From the said decision of the majority of the judges of the Supreme Court the present appeal is brought.

29. Before proceeding further the effect of the two treaties, although similar in their terms, must be considered.

The Indian tribes parties to the several treaties are not affected by the state of the revenue arising from the land surrendered by the treaty to which they are not parties. Thus the Lake Huron Indians are interested only in the sales of lands in that territory, and the Lake Superior Indians only in the sales in their territory.

Thus if the land surrendered by one treaty produced more than sufficient to pay the increased annuities an augmentation would arise in favor of the tribes parties to such treaty only, unless the lands surrendered by the other treaty also produced sufficient revenue to justify an increase of the annuities thereby secured.

Then the award of 13th February, 1895, decided by paragraph 3 (which is not the subject of appeal).

Rec. p. 43, line 13.

"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." It therefore follows that in the accounting up to the union, if there is "any excess or balance of revenue over expen- "diture in hand at the commencement of the year" of the union, say first July, 1867, that excess or balance should be "carried forward" to the credit of the annuities in respect of the treaty wherefrom the excess or balance arises, or of both treaties, as the case may be.

Joint App., sched. C.

It has been shown that the Dominion by its case charged the late Province of Canada with a total of $356,080 as the amount required on first July, 1867, to meet the whole of the arrears of payments and capitalization of annuities claimable under both treaties. Whatever then of excess or balance of revenue there was on first July, 1867, passed to or remained with the Dominion, and it is obvious that such amount in respect of either treaty, or of both, was a credit to be carried

Rec. 122.

forward to the amount of the fund for augmentation of annuities.

It is therefore inconsistent or illogical to hold Ontario liable for the increase of annuities arising subsequent to first July, 1867, and it is to be observed that this argument does not depend for its validity upon the determination as a fact, whether or not there was an excess or balance of revenue on first July, 1867.

The award of the learned arbitrators, if correct, would compel Ontario to pay the increased annuities, though the full amount necessary to pay the augmented annuities for all time to come had been received by the late Province of Canada.

NO TRUST AFFECTING LANDS SURRENDERED.

30. Ontario contends that there was and is no trust within the meaning of section 109 of the B. N. A. Act, subject to which Ontario takes the lands surrendered by the treaties in question.

It is obvious from the said treaties set out in the Dominion Case printed at pages 22 and 25 of the Record of Proceedings that there is no express trust.

It is also abundantly clear that there is no resulting trust and no ground from which such a trust can be implied.

The only other kind of trust known either to law or to equity is a constructive trust, and Ontario submits that it is abundantly clear that no constructive trust is possible unless there be in this case a vendor's lien, and Ontario submits that a vendor's lien or anything in the nature of a vendor's lien is completely negatived by the following considerations:

(*a*) The nature of the Indian title or interest before the session in 1850.

(*b*) That after the treaty the rights of the Indians are confined to the payment of the annuities and the specific rights (to hunt, etc.) provided in the treaties.

(*c*) A vendor's lien is inconsistent with the object of the surrender and the treaty, such object being sufficiently stated in paragraph 3 of the Dominion Case, printed at page 22 of the Record of Proceedings.

(*d*) That a vendor's lien is inconsistent with the terms of the treaty and its operative words.

(*e*) The inconvenience of holding that there is a vendor's lien with all its consequence is such as to be a sufficient reason for holding the opposite construction.

(*f*) The action of the Imperial officers up to 1860, and of the Province of Canada from that time up to 1867, which was inconsistent with the existence of any such trust.

31. The Appellant refers to the case of Dickson *vs.* Gayfere, reported in 1 DeG. & J., 659, where Lord Cranworth said:

"With respect to the general law on this subject, there is no doubt that if a person sells an "estate for a sum of money which is not paid (whether it be expressed to be paid or not on the "conveyance) the seller has a lien on the property for it. Again, there is no doubt that the lien "is not lost by the vendor taking a note or bond or even a real security, the intention being "assumed in this court to be *prima facie*, that if the purchase money be not paid, the vendor "shall have a lien. These are principles not in dispute, but the question is, whether they apply to a

" case in which the price consists not entirely of a gross sum of money, but in part of an annuity. " That is a question which has been often in controversy, and I agree with the Master of the Rolls " in thinking it impossible to state in the abstract, either that the vendor has always, or that he " has never, a security on the property in such a case by way of lien. Whether he has or not " depends on the circumstances of each case.

" The subject is canvassed by Lord St. Leonards in his work on Vendors and Purchasers, and " the conclusion at which I have arrived on all the authorities is, that the Master of Rolls is right " in saying that no general rule can be laid down, and that we must be guided by the circum- " stances of each particular case. I not only concur with the Master of Rolls in thinking that " there is no lien of necessity in the case of a sale for an annuity, but I agree also in the opinion " that the circumstances of this case also exclude the notion that the parties could have so intended, " and I come to that conclusion very much on the same ground as His Honor, namely, that it could " not have been intended to make a purchase of an estate so that it would be inalienable for so " long a period as that of three lives. When the purchase money is a gross sum the charge is easy " to deal with by paying it off, but the consideration here being an annuity for three lives, I con- " fess I should be slow to believe that the purchaser and vendor could possibly have understood " that the estate was to be inalienable for so long a period, as it would be if the annuity were " charged on it, since an encumbrance of that description would not be redeemable at the option " of the land owner.

Ontario also refers to the case of Boulton *vs.* Gillespie, 8 Grant, 222, where it is laid down: " In this case several parties bought a tract of land with a view to laying off a portion thereof into " building lots and selling the same to purchasers; for greater facility in doing so, the legal estate " was vested in one of them as trustee, however, for the several parties interested. Subsequently " one of the owners sold out his share, receiving in payment notes of hand made by his vendee, " and endorsed by two other persons. It was held by the Court of Appeal that the vendor did " not, under such circumstances, retain any lien for the purchase money unpaid.

The Court in giving judgment says (p. 223): " It is the vendor's natural equity, as it has been " termed, to have a lien on his estate until he has been paid for it; but the vendee may show that " under the circumstances of the purchase it is not equitable that such a lien should be retained; " and if he can show that the retention of such lien would defeat or even materially interfere with " the known object of the purchase, so as to clog it with difficulties, which it is reasonable to con- " clude that the parties could not have intended that the purchase should be encumbered with; then " the vendor's *prima facie* equity is rebutted, and a state of things is established under which the " retention of the lien would be the reverse of equitable. But inasmuch as the right to a lien does " not grow out of contract or intention, but out of the natural equity of the vendor, it seems to " follow that whenever it can be shown to be more equitable that the purchaser should have his " land free from the lien, than that the vendor should retain it, no lien for unpaid purchase money " can exist, for the equity against it outweighs the equity in favor of it."

The case of Gilmour *vs.* Brown, 1 Mason, 212, is also very much in point In that case a tract of land was purchased with a view to its sub-division into lots and sale to settlers, and negotiable notes were taken for the unpaid purchase money. In giving judgment, Mr. Justice Story said:

"In applying the doctrine to the facts of the present case, I confess I have no difficulty in "pronouncing against the existence of a lien for the unpaid part of the purchase money. The pro- "perty was a large mass of unsettled and uncultivated lands, to which the Indians' title was not "yet extinguished. It was in the necessary contemplation of all parties, bought on speculation, to "be sold out to sub-purchasers and ultimately to settlers. The great object of the speculation "would be materially impaired and embarrassed by any latent encumbrance, the nature and extent "of which it might not always be easy to ascertain, and which might, by a sub-division of the pro- "perty, be apportioned upon an almost infinite number of purchasers. It is not supposable that "so obvious a consideration should not have been within the view of parties, and viewing it it is "difficult to suppose that they could mean to create such an encumbrance; a distinct and indepen- "dent security was taken by negotiable notes, payable at a future day."

It might be inferred from the language of this eminent Judge, that he rested the decision of the case on the presumed intention of the parties; but it is susceptible of the construction that the equity against the retention of the lien outweighs the equity in favor of it, and therefore its retention would be inequitable.

Ontario also refers to such cases as Parrot *vs.* Sweetland, 4 M. & K., 655; Wilson *vs.* Daniels, 9 Grant, 491; Degear *vs.* Smith, 11 Grant, 570.

NO INTEREST IN LANDS BY INDIANS.

32. Ontario also contends that at confederation there was clearly no Indian interest in the lands referred to in the treaties now in question within the meaning of section 109 of the B. N. A. Act.

So far as is necessary for the present argument, the nature of the Indian title prior to cession is clearly stated by the Privy Council in St. Catharines Milling Company, 14 A.C., 46, at page 54, where Lord Watson points out that the Indian title is based on the proclamation of 1763.

After pointing out the various changes in the administration of Indian affairs, Lord Watson says that the policy of this administration has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction for the sale or transfer of their interest in the land, and have only been permitted to surrender their right by a formal contract duly ratified in a meeting of their Chiefs, or head men, convened for the purpose; Lord Watson says: "Whilst there have been certain changes in the administrative authority, there "has been no change since the year 1763 in the character of the interest which its Indian inhabit- "ants had in the lands surrendered by the treaty. Their possession, such as it was, can only be "ascribed to the general provisions made by the Royal Proclamation in favor of all Indian tribes "then living under the Sovereignty and protection of the British Crown. It was suggested, in the

" course of the argument for the Dominion, that inasmuch as the Proclamation recites that the " territories thereby reserved for Indians had never been ceded to or purchased by the Crown, the " entire property of the lands remained with them. That inference is, however, at variance with " the terms of the instrument, which show that the tenure of the Indians was a personal and " usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are ex- " pressly stated to be " parts of our Dominion andt erritories " and it is declared to be the will and " pleasure (55) of the Sovereign that " for the present " they shall be reserved for the use of the " Indians as their hunting grounds under his protection and Dominion. There was a great deal of " learned discussion at the bar with respect to the precise quality of the Indian rights, but their " Lordships do not consider it necessary to express any opinion on the point. It appears to them to " be sufficient for the purposes of this case, that there has been all along vested in the Crown a sub- " stantial and paramount estate, underlying the Indian title, which became a *plenum dominium* " whenever that title was surrendered orotherwise extinguished."

It is to be observed that in both treaties the very word " interest " used in section 109 of the B. N. A. Act was used in the treaties, and as shown on the face of each treaty itself the Indians were to have no interest in the lands thereby ceded, the treaties expressly provide that " 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 " described in the treaty, save and except the reservations set forth in the schedule thereto.

It is quite clear that after these treaties the Indians were intended to have, and could have, no possible further interest in the lands.

This is, if possible, rendered more clear by the fact that where an interest is intended to be given to the Indians, such interest is plainly and unequivocally given on the face of the treaty, as for instance, the right to hunt, and the rights of the Indians in their reservations.

The Indian Annuities Never Treated by the Crown or Legislatures as Charges on the Surrendered Lands

Record pp. 46, 47.

33. Exception is taken by Ontario to the view expressed by the learned Chancellor in his judgment, page 46, line 20 of the case, wherein the meaning given to the treaties as in effect a charge upon the ceded territories is to be inferred from the terms used in the legislation relating to the charges upon lands set apart for Common School purposes; Consol. Stat. Province of Canada, 22 Vic. c. 26, sect. 1. The words of the learned Chancellor to which exception is taken are:

" 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 " (Consol. Stat. Province of Canada, 22 Vic., c. 26, sec. 1; 12 Vict. chap. 200, sec. 3.) Even as to " the fixed annuities it would seem more obviously right where the annuities, as in the case of the " augmentations, were only to be paid when a surplus arises out of the administration of the " lands."

Ontario does not agree to the propriety of this application of the Statutory enactment, contained in Consol. Stat. Province of Canada, 22 Vic. c. 26, sec. 1 ; 12 Vic. c. 200, sec. 3, that before any appropriation of the moneys arising from the sale of One Million Acres of Public Lands for the Common School Fund be made all charges thereon for the management or sale thereof, together with all Indian annuities charged upon and payable thereout shall be first paid and satisfied.

The Legislature of the Province of Canada by 9 Vict. c. 114 (1846), declared that it was Her Majesty's desire that the payment of the Indian annuities were of the purposes to be provided for out of the Consolidated Revenue Fund of the Province of Canada, to which by the Imperial Act to reunite Upper and Lower Canada (3 and 4 Victoria, chapter 35), all Territorial and other Revenues at the disposal of the Crown were to be paid over.

Imperial Act, 10 and 11 Vic. c. 71.
Canada, 9 Vic. c. 114, Sched. B.
Consol. Stat. of Canada, c. 10, sec. 2, Sched. B. } Joint Appendix, p.p.

And among the Indian annuities so secured on the Consolidated Revenue Fund in 1846 by 9 Victoria chap. 114, are included the annuities payable to the Saugeen Indians who had surrendered the lands known as the Huron Tract, out of which the lands for Common School purposes were set apart.

(See Consolidated Statute Province of Canada, c. 26, sec. 1 ; 12 Vic. chap. 200.)

It is in respect of the language of 12 Vic. c. 200 that the learned Chancellor erroneously, it is most respectfully submitted, treats that Statute as an illustration that the Crown recognized the liability to the Indians for all annuities, as a charge on all lands surrendered by them.

Ontario points out and again reiterates the same argument urged before the learned Arbitrators, that the legislation in 1849 by 12 Vict. c. 200, (Consolidated Statute, Province of Canada, c. 26, sec. 1), had no relation to the charge on the lands surrendered as any security to the Indians for payment of the annuities, but provided that certain charges on the sales of specified lands for Common School purposes, including the annuities paid the Indians in respect of such lands, were to be considered and withheld for credit of the Provincial Revenue before the moneys arising from the sale of such lands should be applied to Common School purposes. As a matter of fact no annuities were ever asked by the Saugeen Indians in respect of their surrender ; they surrendered gratuitously. The annuities granted to the Saugeen Indians were not the result of any contract, but wholly a matter of grace.

All Indian annuities had been at the charge of the Imperial Government, and were paid by grants of the Imperial Parliaments, until the Crown had directed the same to be paid from the territorial and casual revenue of the Province of Upper Canada, belonging to the Crown.

Joint App.

(See despatch of Lord Glenelg to Sir F. B. Head, dated the 28th December, 1837. Appendix to Journals, 1839, vol. 2, page 581.)

Subsequently the Saugeen Indians were granted an annuity of £1,250 charged on the Consolidated Revenue Fund and specified and included in 9 Vic. c. 114, which received the assent of
Joint App. Her Majesty in Council on the 16th August, 1847, and this was confirmed by the Imperial Act, 10 and 11 Vic. cap. 31.

And as the payment of the annuities to the Saugeen Indians for the surrender of the Huron Tract in 1836 was charged by the Imperial Government on the Casual and Territorial Revenue of the Province in 1837 while the Imperial Government controlled that revenue, and the annuities were subsequently specifically charged in 1846 by the Legislature of the Province on the Consolidated Revenue Fund of Canada. The legislation to which the learned Chancellor referred of 1849, 12 Vic. c. 200, has no application to the proceeds of the lands surrendered being the subject of an interest in favor of the Indians in respect of the consideration for the surrender.

This grant was not the result of any stipulation by the Indians, and no relation to the land whatever.

Indian annuities payable out of the Consolidated Revenue Fund and not charged by the Crown on the Surrendered Lands.

Joint App. **(See Rawson's Report, Appendix T, Journals of Canada, 1847, Sub-Appendix No 67.)**

The Indian annuities were formerly paid by instructions from Her Majesty's Secretary of State, out of the Provincial Casual and Territorial Revenues of the two provinces of Upper and Lower Canada, at the disposal of the Crown.

The Union of the two Provinces having been accomplished, the Provincial Casual and Territorial Revenues which previously were at the disposal of the Crown, were by the Union Act, 1840, placed at the disposal of the Provincial Legislature.

The Imperial Government was advised that the Indian annuities were to be considered as a permanent charge on the Crown revenues to be paid to the Consolidated Revenue Fund of the Province of Canada.

In 1846, by 9 Victoria, chapter 114, confirmed by 10 and 11 Victoria, chapter 71, the annuities
Joint App. were so specifically charged at the sum of £6,666.0.0. currency.

SUB-APPENDIX No. 67.

SURRENDERS FOR ANNUITIES.

Rec. 76.

Date of surrender.	Name of the tribes.	Area in acres.	Amount of the annuities.	Condition and nature of the annuity.
			£ s. d.	
20th July, 1820 ..	Mohawks of the Bay of Quinté	33,280	450 0 0	£2 10s. in goods to each member of the tribe, but not to exceed £450 yearly.
31st May, 1819 ..	Mississogas of Alnwick	2,748,000	642 10 0	£2 10s. in goods to each member of the tribe, but not to exceed £642 10s. yearly.
28th October, 1818	Mississagas of the Credit.....	648,000	522 10 0	In goods.
5th Nov., 1818....	Mississagas of Rice and Mud Lakes ..	1,951,000	740 0 0	In goods.
17th October, 1818	Chippawas of Lake Huron and Simcoe	1,592,000	1,200 0 0	In goods.
26th April, 1825..	Chippawas of Cheniel Escarte and St. Clair.....	2,200,000	1,100 0 0	In goods. If the tribe decreases half, the annuity is to decrease in the same proportion. The original number of the tribe, by deed is 440 souls.
9th May, 1820....	Chippawas of the River Thames...	580,000	600 0 0	£2 10s. in goods to each member of the tribe, but not to exceed £600 yearly.
25th October, 1826	Moravians of the Thames	25,000	150 0 0	In money.
9th August, 1836.	Saugeen Indians ..	1,500,000	1,250 0 0	£2 10s. in money to each member of the tribe, but never to exceed £1,250 yearly.

Aggregate amount £6,655 0s. 0d. yearly

FURTHER INFORMATION ON THE FACT THAT THE INDIAN ANNUITIES HAD NEVER BEEN CHARGED ON SURRENDERED LANDS, BUT AT FIRST PAID BY IMPERIAL GRANT.

Extract from Rawson's Report, Appendix T. Journals of Assembly of Canada, 1847. Second Part. Section III. Sub-division IV—Annuities (Caps). (The book is not paged.)

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"Previously to the year 1829 the custom was to pay these annuities in goods.

. . . . . .

"In 1829 Sir John Colborne, being desirous of checking the evils of this system, and of "promoting the settlement and civilization of the Indians, obtained permission from the Secretary "of State to apply the annuities towards building houses and purchasing agricultural implements "and stock for such members of the several tribes, interested in the payments, as were disposed "to settle in the Province, and from that period the issue of goods in payments of the annuities "ceased.

. . . . . .

"When the annuities were paid in goods, the expense was borne upon the same fund as the "presents, and was defrayed by an annual vote of the Imperial Parliament."

Extract from Rawson's Report, Appendix E. E. E., Journals of 1844-5. First Part. Section I. (Not paged.)

Joint App.

"In 1832 the Secretary of State recommended that the charge for the Indian Department in "the Canadas should be submitted to Parliament in a separate estimate. Previously to this "period the charges for the presents, including those given on account of the annuities payable "for lands surrendered, had been yearly granted by the British Parliament in a separate vote, "while the salaries and pensions of the officers of the Indian Department had been paid from the "military chest, and provided for out of the Army extraordinaries. This course being considered "irregular, Lord Goderich proposed that for the future, the land payments, or annuities payable "for lands surrendered, which were confined to Upper Canada, should be charged on the casual "and territorial revenue of that Province, while the remaining charge having been originally "incurred with the view of securing the services of the Indians in war, for British, and not "exclusively colonial interests, ought, according to His Lordship's view, to be provided by the "Imperial Parliament.

"This arrangement was completed in 1834, when the annuities were definitely ordered to be "charged on the territorial revenue."

Joint App.

(See despatch of Lord Glenelg to Sir F. B. Head, 28th December, 1837.

Extract from Penefather's Report—Canada Sessional Papers, 1858. No. 21, Part 1. (Book Not Paged.)

Joint App.

The extract is to be found in the first two pages of "Relations with the Government."

"On the 30th January, 1844, the Secretary of State for the Colonies conveyed his approval "of the Commissioner's report (Rawson's), and called for a detailed scheme for the remodelling of

"the Indian Department. He recommended that measures should be taken for securing to the "Indians their annuities, provision for which had been overlooked in the Imperial Act for the "reunion of the Provinces. He suggested that if there could not be made a fresh deduction from "the gross proceeds of the Crown revenues, the Provincial Legislature should be called upon to "remedy the defect.

"In replying to this despatch, on the 25th April, 1845, Lord Metcalfe intimated his concur- "rence generally in the recommendations made by the Commissioners in their report," etc., etc.

. . . . . .

Joint App. "He also said that the Executive Council had considered the propriety of providing for the "Indian annuities by fresh legislative enactments, but that it was understood in the colony that "they had been secured by the Imperial Act." 10

(The 9 Vict., chap. 114, was passed in 1846, and confirmed by Imperial Act 10 and 11 Victoria, chapter 71.

And so Ontario says: It is to be seen that the late Province of Canada, after the passing of the Union Act, 1840, and before the passing of the Act of 9 Vict., chap. 114, had treated the Joint App. Indian annuities as a charge upon the territorial and Crown revenues of the Province of Canada generally; that Lord Metcalfe had so represented to the Imperial Government; but, in deference to the Imperial direction, the 9 Vict., chap. 114, was passed, specially charging the same upon the consolidated revenue fund. Joint appendix, sched. B., line "Indian Annuities."

Meaning of Trust and Interest in Section 109.

34. The meaning of the words "Trusts" and "Interest" in section 109 of the B. N. A. Act 20 have been considered in decided cases, which illustrate the argument on behalf of Ontario.

Central Railway Company *vs.* The Queen, 20 Grant, 273, was a decision in 1873 on a petition of right presented to the Lieutenant-Governor, addressed to Her Majesty the Queen. In that case it appeared that the Legislature of the Province of Canada in 1856 and in 1861, granted to the plaintiff company a certain number of acres of waste land, and made provisions for giving a proportionate part thereof upon the completion of every twenty miles of railway. In the proceedings the plaintiff company established that they had fulfilled the conditions which entitled them to the grant of lands under the Statutes of the Province of Canada, and it was held by the Chancery Divisional Court that Ontario took those lands, referred to in said Statutes within its territory, as trustee, and was bound to convey to the company as claimed, affirming the judgment 30 of Strong, V. C.

In that case, Strong, V. C. "A Court of Equity would consider the party who had contracted to make the grant as bound in respect to the land to be conveyed as by a constructive trust."

The Court held that there was a trust in favor of the suppliant Company, subject to which Ontario the lands within its territory and that such trust was protected by section 109 of the B. N. A. Act.

That case illustrates the sense in which the word trust was used in section 109 of the British North America Act, and it is contended that that word cannot be strained to cover such a case as the present.

Then the word "interest" in section 109 was considered in Booth *v.* McIntyre, 31 U. C. C. P. 183. This case arose out of the same charters and grants which were considered in the previous case of Canada Central *v.* The Queen.

Ontario, within whose territory the lands affected by the said Charter granted by the Province of Canada were situate, granted a timber license to the plaintiff, including therein said lands. The action was for trespass to such timber limits of the plaintiff and for cutting and carrying away pine timber thereon.

The defendant justified under the Charter of the Canada Central Railway Company, with whom he had a contract, and under the said Acts, and it was held that the power to enter upon the lands of the Crown on the line of the railway and to cut and remove trees was an interest possessed at the time of Confederation by the Company, and Mr. Justice Osler says, p. 194, "Such right and interest it appears to us was plainly preserved and protected by section 109 of the B. N. A. Act already referred to."

AS TO ARGUMENT FROM ST. CATHARINES MILLING CASE.

35. Counsel for the Dominion argued from the decision of the Privy Council in the St. Catharines Company Case; but it is urged that the direction given in that case has no bearing upon the present case as that direction proceeded upon entirely distinct principles having no application whatever to the circumstances of the present case. That case first came before the Ontario Court and is reported in 10 O. R. 196. There the question was simplybetween the Ontario Government, the Queen represented by the Attorney-General of Ontario and the St. Catharines Milling and Lumber Company.

The question referred to on behalf of the Dominion was mentioned in the judgment on that case at page 235, where the learned Chancellor said "Whatever equities—I use this word for want of a more suitable—may exist between the two Governments in regard to the considerations given and to be given to the tribes, that is a matter not agitated in this record." Then from that judgment there was an appeal to the Court of Appeal for Ontario where the judgment of the learned Chancellor was unanimously affirmed. 13 Ont., A. R. 148.

This decision was again affirmed by a majority of the learned Judges of the Supreme Court 13 S. C. R., 577.

From the Supreme Court there was an application for leave to appeal to the Privy Council, and the disposition of that application is stated in the judgment by Lord Watson as follows, 14 A. C. p. 53: "In these circumstances Her Majesty by the same order which gave the appellants leave to bring the judgment of the Court below under the review of this Board, was pleased to direct that the Government of the Dominion should be at liberty to intervene in this appeal or argue the same upon a special case raising the legal questions in dispute." The Dominion Govern-

ment elected to "take the first of these courses," and the Dominion in that way came before the Privy Council. The Privy Council as was pointed out decided not only the question immediately before the courts below but also the larger question between the Governments of Canada and Ontario with respect to the legal consequence of the treaty of 1873 there in question, and in that judgment what Lord Watson said was, "Seeing that the benefit of the surrender accrues to her Ontario must, of course, relieve the Crown and the Dominion, of all obligations involving the payments of money which were undertaken by Her Majesty, and which are said to be in part fulfilled by the Dominion Government."

It is to be observed that the decision as between the various parties was there entirely different from anything that can be suggested in the present case.

In the St. Catharines Milling & Lumber Company case Ontario took the lands there in question after Confederation, subject to the burden of the Indian interest, that is a burden which, by section 109 of the B. N. A. Act was expressly admitted to be imposed upon Ontario.

In that case, the Dominion, supposing that the land would belong to them and not to Ontario, purchased the Indian interest.

That is, Ontario being subject to the burden of the Indian title or interest, the Dominion by mistake, made payments and became liable for future payments, which had the effect of relieving Ontario of that burden.

In that case the surrender was in 1873 subsequent to Confederation, in the present case the surrender was in 1850, prior to Confederation and the question of what was to become of the lands which were expressly governed by the B. N. A. Act and also what was to become of the liability to the Indians which is practically admitted to have been a liability of the old Province of Canada are both expressly provided for by the sections of the B. N. A. Act printed at pages —of the Appeal Case. Whether the B. N. A. Act is to be considered as a statute or as an agreement embodied in the Imperial Statute, there can be no analogy whatever between the order made by the Privy Council in the St. Catharines Milling case, or the circumstances which under the order was made the award of the present arbitrators or the circumstances under which the award was made.

Record p. 4.

Effect of Award of 1870.

36. The present Arbitrators find that the ultimate burden of making provision for the payment of increased annuities in the event mentioned in the said award falls upon the Province of Ontario, and that this burden has not been in any way affected or discharged.

It is contended on behalf of Ontario that if there was ever such a burden, which Ontario denies, it has been completely discharged by the award of 1870.

Rec. 5.

In order to determine the validity of this award, a special case was submitted to the Privy Council. The questions submitted and the decision of the Privy Council affirming the validity of the award, appear at pages 12 and 13 of the Record of Proceedings.

Rec. 33, line 17.

Rec. 12 and 13.

As appears from the Ontario answer it appears that before the Arbitrators appointed under section 142 of the B. N. A. Act, Quebec raised the identical questions that are now being raised

Rec. 33, line 32. in this case, and with all the facts before them, the Arbitrators by their award confirmed as above mentioned, by the order of the Privy Council declared that these lands should be the absolute property of Ontario. Quebec there claimed relief before the former Arbitrators and asked compensation to be made, and the former Arbitrators gave their decision, which is embodied in section thirteen of their award. It is obvious that it was necessary for the former Arbitrators to pass upon the very question whether there was a trust or interest within section 109, as was then claimed by Quebec and is now claimed by both Quebec and the Dominion.

Rec. 35, line 5, *et seq.*

The former Arbitrators passed distinctly upon a question of law or of fact in whichever light it is regarded, as to whether there was such a trust or interest, and the conclusion to which they came, as embodied in that award, that there was no such trust or interest, is and should be held to be binding on all parties.

Rec. 40. It is to be observed that the annuities under the identical treaties now in question were considered by the Arbitrators under section 142 of the B. N. A. Act before they made their award of 3rd September, 1870.

Rec. 118, line 41. Mr. Justice King, in discussing the effect of the award of 1870, says: "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," and then proceeds to distinguish between the fixed annuities and the augmentations.

But it is submitted no such distinction is tenable.

Upon the happening of the events specified in the treaties and in the award of 13th February, 1895, the covenant and promise is to pay to the Indians four dollars per head.

The source of payment for the whole of the four dollars is one and the same, and the obligation to pay the whole of the four dollars is entire and indivisible.

Rec. 43, line 26. The award of 13th February, 1895, in holding Ontario separately liable for, say two dollars and forty cents per head parcel of the four dollars per head, is therefore inconsistent with the award of 1870, which held Ontario and Quebec jointly liable for the fixed annuities amounting to the balance, say one dollar and sixty cents per head.

Rec. 10, line 36. Further, the clear language of section thirteen of the award of 1870 cannot be fairly limited so as to refer to the fixed annuities only, but the annuities being referred to as the consideration for the surrender by the Indians must be held to include whatever annuities are secured to the Indians by the treaties of surrender.

Per Strong, C. J. Rec. 87, line 40. Rec. 92, line 41. Per Sedgewick, J. Rec. 106, line 28. Rec. 112, line 33. It is therefore submitted that the majority of the judges in the Supreme Court are right in holding that the award of 1870 determines the question involved in this appeal.

Purchase Money not Affected by Trust or Burdened by Interest.

37. It was argued on behalf of the Dominion that though there might be no legal or equitable trust or interest in respect of the lands surrendered by the treaties in question to the crown, yet that there was a trust or interest respecting the purchase money of the lands received by Ontario. Such a contention, it is submitted, is clearly inconsistent with the express and unmistakable language of section 109 of the British North America Act.

The first part of the section deals with "lands, mines, minerals and royalties." Then the section goes on to deal with "all sums then due or payable" for such "lands, mines, minerals or royalties."

"Then" obviously refers to the time of confederation, the first of July, 1867, so that the section provides for trusts in respect of "lands, mines, minerals and royalties," and an interest in "lands, mines, minerals and royalties," and also for trusts or interest respecting the purchase money thereof, but the trusts and interest relating to the purchase money are by the express terms of tne Act confined to sums due or payable at confederation, and cannot therefore be extended so as to include the purchase money of such lands sold by Ontario subsequent to confederation.

Rec. 117, line 32. Mr. Justice King argues that the treaties are open to two interpretations, one that the revenues shall furnish a measure of the increased price or annuity, and the other that part of the revenue shall go to the Indians by way of increased annuities in a certain event, and that when two interpretations of such an agreement are open it would seem more appropriate to treat it as giving the more effectual security to the unpaid vendor.

Rec 117, line1. It is shown by Mr. Justice King himself that it does not now and never did make any difference to the Indians whether they were declared to have an interest in the proceeds of the land or nos, and that the matter has practical significance when it becomes necessary to consider the nature of the transaction in relation to the provisions of the B. N. A. Act.

It is submitted that in deciding between two such interpretations for the purpose of construing and applying the provisions of the B. N. A. Act, regard should rather be had to the interpretation placed upon the treaties by the Imperial officers from 1850 and 1860, and by the Province of Canada up to 1867 than to the supposed necessity of making provision for the security of the Indians who had already the greatest possible assurance of payment, namely, the covenant and promise of the crown.

ULTIMATE BURDEN SHOULD NOT BE THROWN ON ONTARIO.

38. The treaties in question having been made in 1850, if there was or is any liability it is submitted that it was a liability existing at Confederation, and consequently that it would fall within Section 111 of the B. N. A. Act, so that the liability to the Indians is one for which the Dominion is by said section 111 declared to be liable and Ontario submits that there is no equity or contract or statute which entitles the Dominion to call on Ontario to make provision for the payment of the increased annuities in question which the Dominion agreed to pay and was bound

Rec. 82, line 40.

to pay. In the Quebec factum before the Supreme Court it was expressly admitted that the liability is included in section 111 of the B. N. A. Act, and this view is taken by all the Judges in the Supreme Court excepting Mr. Justice Gwynne who holds that the liability is not one within either section 111 or 112 of the B. N. A. Act.

Per Strong, C. J. Rec. 92, line 28. Rec. 87, line 20. Per Sedgewick, J. Rec. 105-107. Per King, J. Rec. 119, line 13. Per Gwynne, J. Rec. 102 and 103.

In Sweet's Law Dictionary, at page 486, it is laid down "liability is the condition of being actually or potentially subject to an obligation and is used either generally as including every kind of obligation or in a more special sense to denote inchoate future unascertained or imperfect obligations as opposed to debts the essence of which is that they are ascertained and certain."

The liability to the Indians is clearly within this definition and it is to be observed that if the view expressed by Mr. Justice Gwynne is correct there would have been no necessity or use for the use of the word liabilities in section 111. The words of section 111 are perfectly absolute and general and place the primary liability for the fulfilment of the obligations to the Indians undertaken by treaties on the Dominion.

Then Ontario submits that the only section or provision which throws any of the liability so assumed by the Dominion on any other party is section 112. The Dominion having on the argument before the learned Arbitrators declined to accept an offer of leave to amend so as to claim in the alternative against the Province of Canada, the rights of the Dominion against the Province of Canada under section 112 are not now in question, but it is submitted that whether section 112 applies or not that the ultimate liability for the payment of these annuities should not be thrown on the Province of Ontario.

39. If the suggestion of the learned Chancellor, that the clauses of the Robinson Treaties now in question should be dealt with as if they were placed in juxtaposition with the sections of the British North America Act is adopted, it is submitted that the result will be exactly the opposite from the conclusion reached by the learned Arbitrators. This is the case whether the treaties are to be considered as rectified in the manner pointed out by the insertion of a charge on the land in favor of the Indians or not. First,—If, as Ontario contends, there is no such rectification, then we have the treaties providing for a liability to the Indians; this was clearly a liability of the old Province of Canada contained in the covenant for the payment of the augmentation of the annuities in question. Then in view of this liability and in respect thereof, section 111 provides that Canada shall be liable for the debts and liabilities of each Province existing at the Union. The liability for these augmentations was a liability of the old Province of Canada, and this section is therefore a clear and unmistakable enactment that the Dominion shall be liable for the payment of the augmentations in question. And, apart from section 112 of the British North America Act, there is nothing to relieve the Dominion of this liability or to enable the Dominion to throw the burden on any other party to the British North America Act.

Rec. 45, line 15.

Then, on the other hand, if such a charge in favor of the Indians were inserted in the treaties, there would be in the treaty a liability to pay as on the covenant by the Province of Canada, and the charge which would be in the nature of a security for such payment. Then Ontario would

take the land under section 109 of the British North America Act, subject to such charge in the nature of collateral security in favor of the Indians, but the Dominion would, under section 111, be bound to pay the amount, and there would be clearly no recourse open to the Dominion to recover from Ontario the amount paid, which would be paid by the Dominion pursuant to and in discharge of its own liability.

To throw the burden of providing for payment of the augmentations of the annuities in question, it is submitted is not to construe the British North America Act liberally, but to ignore the force and effect of its plain and unmistakable language.

There is no equity to relieve the Dominion from its obligation to pay under this section of the Imperial Statute, and it is not only equitable but grossly unjust to throw upon Ontario the burden of the liability which the Act expressly provides should be borne by the Dominion.

The Chancellor in his judgment states that by analogy to the equitable doctrine laid down in Waring *vs.* Ward, 7 Vesey, 336-7, 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." The grounds for implying the obligation under the circumstances stated by the Lord Chancellor in Waring *vs.* Ward are entirely absent in the present case. Such an implication only arises in the absence of an agreement between the parties, and in the present case there is the express agreement embodied in section 111 of the British North America Act that the Dominion will be liable to pay. The expression of this obligation or liability by the Dominion clearly excludes any such implied obligation as is referred to by the learned Chancellor.

Rec. 46, line 5. The cases referred to in the judgment of the learned Arbitrators as indicating that a trust or interest should be applied in favor of the Indians, have, it is submitted, no application to the circumstances of the present case where there was a treaty with the Crown represented by the Province of Canada. The ground on which such a provision would be implied or inserted, or rather in which the absence of such a provision would vitiate an agreement between private parties is that of constructive fraud which cannot be imputed to the Crown or to the Province of Canada.

The whole resources of the Government were pledged to the Indians, and the argument that

Joint App. they are not perfectly secured cannot be successfully advanced. Besides, the existence of such a charge was inconsistent with the declared policy of the Legislature of the Province of Canada, for by 9 Vict., chap. 114, which received the assent of Her Majesty in Council on the 16th August, 1847, the Indian annuities were included in the civil list and charged upon the consolidated revenue of the Province, and this was confirmed by the Imperial Act, 10 and 11 Vict., chap. 31.

Ontario contends, and has always contended, that there is no trust or interest subject to which the lands surrendered by the Indians were taken by Ontario, but even if it is held that there was, or is such a trust or interest as is contemplated by section 109 of the British North America Act subject to which Ontario takes the land in question, Ontario submits that it is exonerated from such burden by virtue of section 111 of the British North America Act, which entitles Ontario to call on the Dominion to discharge such trust or interest if the payment of the increased annuities in question should be considered such trust or interest.

The declaration of such a trust or interest would only have the effect of giving the Indians the additional security of such charge which would be in the nature of further security for the performance of the covenant contained in the Treaty, which further security would be collateral to the security of the covenant for payment, which is the primary security that indeed to which the Indians wholly looked. The position would, on the supposition above referred to, be that Ontario would take the lands in question subject to the burden of the charge in favor of the Indians, and the Dominion would be directed by section 111 to discharge the liability which would have the effect of relieving Ontario from the burden, in other words the liability is that of the Dominion subject to any possible recourse under section 111 of the British North America Act.

40. The Province of Ontario also relies upon the reasons for the Judgment of the Supreme Court of Canada given by Chief Justice Strong and Mr. Justice Sedgwick in which Mr. Justice Tachereau concurred, and submits that the present appeal should be dismissed and the judgment of the Supreme Court affirmed.

41. The Province of Ontario submits that the present appeal should be dismissed and the Judgment of the Supreme Court allowed for the following (amongst other)

REASONS:

1. The liability to pay the Indians increased annuities is included in the "debts and liabilities" for which the Dominion, by section 111 of the B. N. A. Act, became liable.

2. That if the Dominion has any recourse it must be, under section 112 of the B. N. A. Act, against Ontario and Quebec jointly.

3. That there is no trust or interest within the meaning of section 109 of the B. N. A. Act affecting the surrendered lands or the proceeds thereof.

4. The Indian annuities were never treated by the Crown or Legislature as charges on the surrendered lands.

5. That the matter was concluded in favour of Ontario by the award of 3rd September, 1870.

6. That there is no separate liability on the part of Ontario.

ÆMILIUS IRVING.
J. M. CLARK.