BETWEEN

THE DOMINION OF CANADA. .....CLAIMANT; 1907

March 18.

AND

THE PROVINCE OF ONTARIO.....RESPONDENT.

Dominion and Ontario—Disputed territory—Indian title—Moneys paid by Dominion for surrender of—Contribution by Ontario.

The jurisdiction that the Court has of controversies between the Dominion of Canada and a Province of Canada, or between two provinces, does not authorize the court to decide the issues in accordance only with what may to it seem fair and without regard to the principle of law applicable to the case.

2. At the time when the North West Angle Treaty No. 3 between Her late Majesty the Queen and the Saulteaux Tribe of the Ojibeway Indians was entered into, the boundaries of the Province of Ontario were unsettled and uncertain. The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That of course did not affect Ontario's title to such part of the lands claimed by the company as were actually within the Province. But on the admission of Rupert's Land and the North Western Territory into the Union, the Government of Canada acquired the right to administer all the lands that the company had a right to administer. And with respect to that portion of the territory which the company had claimed, but which was in fact within the Province of Ontario, the Dominion Government occupied a position analagous to that of a *bonâ fide* possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in those lands could not with prudence be deferred until such boundaries were determined. It was necessary for the peace, order and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations of the treaty without consulting the Province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection and did not ask to be represented in such negotiation. By this treaty the burden

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Statement of Facts.

of the Indian title was extinguished. In the case of *The St. Catherine's Milling and Lumber Company* v. *The Queen* (14 App. Cas. 60), in which it was decided that the ceded territory within the Province of Ontario belonged to the province subject to the burden of the Indian title therein, Lord Watson, delivering the judgment of the Judicial Committee of the Privy Council and dealing with the question of the liability of the province to contribute to the Dominion in respect of the obligations incurred by the Dominion in obtaining the surrender of the Indian title, expressed the following opinion:—"Seeing that the benefit accrues to her, Ontario must, of course, relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty and which are said to have been in part fulfilled by the Dominion Government."

Held, following that expression of opinion, that the Province of Ontario is, in respect of the obligations incurred by the Crown and the Dominion under the said treaty, which involve the payment of moneys and which are referable to the extinguishment of the Indian title in the lands described therein, liable to contribute to the payments of money made by the Dominion thereunder in the proportion that the area of such lands within the province bears to the whole area covered by the treaty.

3. While the question of the true boundaries of the Province of Ontario was in course of determination, the Dominion authorities, under an agreement for a conventional boundary, administered a part of the territory in dispute and derived revenues therefrom, for which the Province in this action set up a counterclaim.

Held, that the Province could not maintain its counterclaim for the moneys so collected by the Dominion without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the obligations incurred in obtaining a surrender of the Indian title.

4. *Semble*: The fact that a part of the benefit arising from the surrender of the lands mentioned in the treaty accrued to the Province of Ontario is not of itself, and without other considerations, sufficient to make the Province liable to contribute to the Dominion a proportionate part of the payments made in pursuance of the obligations incurred by the Crown under the treaty.

If the Parliament of Canada should appropriate, and the Government of Canada should expend, public moneys of the Dominion for either Dominion or Provincial purposes, with the result that a Province was benefited, there being no agreement with the Province or request from it, no obligation would arise on the part of the Province to contribute to such expenditure. The principle stated would apply as well to expenditures made by a province with the result that the Dominion as a whole was benefited. In all such cases the appro-

priation and expenditure would be voluntary and no obligation to contribute would arise.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel

THIS was a proceeding by way of statement of claim wherein the Dominion of Canada sought to recover from the Province of Ontario a certain sum of money alleged to have been expended by the Dominion on behalf of the Province.

The facts of the case are stated in the reasons for judgment.

April 23rd, 24th and 25th, 1906.

The case was heard at Toronto.

E.L. Newcombe, K.C., *W.D. Hogg, K.C.*, and *C.E. Roy* for the Dominion of Canada;

Sir Æmilius Irving, K.C., *G. F. Shepley, K.C.*, *C. Ritchie, K.C.*, and *H. S. White* for the Province of Ontario.

Mr. *Newcombe:* Referring, first, to the surrender of the Hudson's Bay Company, it will be found that clause 14 provides that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian government in communication with the Imperial government, and the company shall be relieved of all responsibility in respect of them.

Now the Charter of the Hudson's Bay Company may be referred to in any book of public documents. It is recited somewhat briefly in the Deed of Surrender, on page 77 of the Appendix to the Dominion Statutes of 1872. It recites the grant by King Charles II in the 22nd Year of his reign to the Governor and Company of Adventurers of England trading into Hudson's Bay, whereby his Majesty granted unto said company and their successors the sole trade and commerce of all those shores in whatsoever latitude they should be that lay within the entrance of the Straits commonly called Hudson's Straits, together with all the lands and countries that were not

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

actually possessed by or granted to any of His Majesty's subjects or possessed by the subjects of any other Christian Prince or State. Your lordship will see that this grant, whatever it conveyed in the nature of property, was limited in extent by the territories possessed by any other Christian Prince or State. Namely, of course, by the territories of France. And it granted the largest possible powers of government. That is, this company were made the absolute lords and proprietors of the territory, "saving the faith, allegiance, sovereignty and dominion due to His Majesty, his heirs and successors for the same." Therefore the grant which was in existence at Confederation to the Hudson's Bay Company conferred upon that company powers of government quite inconsistent with the exercise of the powers of government conferred upon Ontario by *The British North America Act.* Ontario existed at the Union as it now exists; its boundaries existed, although not known exactly, or defined; and Ontario certainly could not extend so far as to cover or include any part of the grant to Prince Rupert, because the two things were inconsistent with each other. So far as Ontario was concerned there were powers of legislation, powers of government, ample and comprehensive, vested either in the Dominion or in Ontario and those powers were inconsistent with the exercise of the authority which had been conferred by the Charter upon the Hudson's Bay Company. Therefore, I submit, that no part of Rupert's Land was ever in the Province of Ontario. Therefore, Rupert's Land did not actually cover any of the ceded territory in this case. Of course I understand that in ascertaining the boundaries of Ontario, the Commissioners or Arbitrators, who enquired into that, would have to ascertain the limits of the French possessions at the time of the grant to the Hudson's Bay Company, and that they did determine; the effect of their Award, confirmed as it afterwards was, was really to find that the French

possessions at the time extended as far west as the boundary fixed by Ontario. So that Prince Rupert never got this ceded territory by his grant because he only went to the boundary of the French possessions, and it is too late now, having regard to what has taken place, to raise any question about Rupert's Land being within this territory. If, on the other hand, my learned friends can make out that Rupert's Land extended into this ceded territory, that the ceded territory includes part of Rupert's Land, then our alternative is that it be declared that that belongs to us, because by a grant Rupert's Land was ceded to the Dominion and the Dominion paid for it. Rupert's Land is a part of, and belongs to, the Dominion of Canada. If this is Rupert's Land then we take it under our alternative claim. If the title is not in Ontario our main claim fails, but our alternative claim comes in and must succeed, I submit, if this territory be held to be Rupert's Land.

Now so much with regard to the actual facts; but I understand my learned friends to say, although this was not Rupert's Land, it was claimed to be Rupert's Land, the Hudson's Bay Company claimed it to be Rupert's Land, and therefore the obligation of Section 14 arises with regard to it. Now in the history of the Hudson's Bay Company it is well known that the company were preferring large claims, and had been for many years previous to this surrender. It was doubtful as to whether they had any sort of title to the soil at all or what their title was, and when arrangements were being made for the taking over of this great territory by the Dominion it was, of course, thought expedient and desirable that all claims should be set at rest, and whatever the nature of the title of the Hudson's Bay Company was, whatever their territories might be or were claimed to be, that all these should be transferred so that there could be no question about it afterwards. Therefore in the Imperial

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

Act of 1868, with regard to Rupert's Land, it is said that Rupert's Land for the purpose of that Act is to include everything which is within Rupert's Land or claimed to be within Rupert's Land, and that was the Act which authorized the company to make the surrender, and also authorized the acceptance of it. In other words, it was an ordinary transaction of a quit claim. But now we know that so far as this territory is concerned, upon the one branch of my argument, that it was not Rupert's Land and did not belong to the company. Therefore, so far as this territory is concerned, its surrender carried nothing; and although it may be, as my learned friend suggests, that they made certain reservations in Rupert's Land of places which were then in the occupation of the company, they did not get any title to that because the Dominion by accepting this grant with a reservation in it did not thereby confer any title upon the Hudson's Bay Company, as they might have perhaps by such a transaction if they had been the proprietor of the soil, because Ontario was the proprietor, and so we have in evidence the transaction which my learned friend has proved this morning, of Ontario making good to the Hudson's Bay Company the title to these posts or some of them, which they never had before.

Then if we take nothing under the surrender with respect to this territory, how does Clause No 14 apply so as to impose any obligation upon us? "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government, and the Company shall be relieved of all responsibility in respect of them."

Now that was obviously a clause to indemnify the company in respect of claims which the Indians might have, having regard to the transactions with the Hudson's Bay Company. I suppose if lands had been taken over

or opened up for the purpose of settlement by the Hudson's Bay Company in respect of which the Hudson's Bay Company had not compensated the Indians, that clause would apply. It may have applied in some other case, but certainly I submit it can have no application in respect to the territory which was not covered by this surrender at all, and we, of course, were under no obligation, even if the clause applied. It is suggested that such clause was the motive, that it was the reason, that we made the Treaty. That, I suppose, although I have not heard my learned friend's argument, is the ground upon which they put it. But that imposed no obligation upon us. The Indians were in possession; according to the evidence, in 1869, they had never been disturbed in their possession and were quite satisfied apparently. We were under no obligation to open up that country for settlement or to buy out the Indian title. The Indians might have remained there and roamed over the country and hunted and fished and kept possession to this day so far as anything in this surrender was concerned. It was a purely voluntary matter as to the Hudson's Bay Company. They were in no sort of position to compel us or ask us to make such a Treaty, and I submit that even upon the ground upon which my learned friends would probably put it, that this Clause 14 does not even suggest motives for the Treaty which the Dominion made.

Now, my lord, what was the state of the title with regard to this ceded territory at Confederation? Fortunately, I think, that point has been cleared up, so that there can be no discussion about it, by the judgments of the Judicial Committee. First, there is the decision of the *St Catherine's Milling and Lumber's Co's* case, which is reported in 4 *Cartwright's B. N. A. Cases* at p. 116, and that is a convenient place to look at it because you get all the judgments below grouped under the judgment of the Judicial Committee. Lord Watson, in delivering

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

the judgment of the Committee, refers there to the capture of Quebec in 1759 and the Proclamation which followed in 1763. He says that whilst there have been changes in the administration, there has been no change since the year 1763 in the character of the interest which these Indian inhabitants had in the lands surrendered in the Treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. "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 manner, became the property of the Province; in other words, all beneficial interests in such land 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."

Now, in reading the various judgments in the above case, your lordship will find that while in the result the Judicial Committee supported the judgment of the court below, it did so for quite different reasons, and that Chief Justice Strong, who dissented in the Supreme Court, and would have held the title in the Dominion, came much nearer in accord with the Judicial Committee than any of the other judges who expressed opinions in the courts below. The only substantial difference is that he said that the Indian interest is an interest existing, it is a title which can be disposed of only to the Crown; it cannot be assigned to a third party, but it can be disposed of to the Crown and it may be disposed of to the Dominion Crown, and by virtue of this surrender it passed to the Dominion Crown. As I understand Lord Watson, he goes with Chief Justice Strong, except to this extent, that it cannot be assigned to the Dominion Crown but it can

be assigned or ceded to the Provincial Crown, and that the effect of the transaction—having regard to the evidence which was before their lordships in that case—was that this title which had all along been in the Indians, passed not to the Dominion but to the Province. That was a very substantial title. "The ceded territory was at the time of the Union vested in the Crown, subject to an interest other than that of the Province in the same within the meaning of Section 109." Now that section was the subject of further consideration in the case of the *Robinson Treaties* before the Judicial Committee (1). This decision is also given by Lord Watson, the same learned lord who delivered the judgment in the Judicial Committee in the *St. Catherine's Case.* That part of the decision was on another point, but is important in this regard only, that until the Indian title is disposed of by them in a constitutional way, Ontario has no right to put her hand on one dollar of income coming from that property or administer the property so as to produce it.

[BY THE COURT: That decision was in respect of territory that had already been ceded before the Union and the rights of the Indians were the rights they had under the Treaty.]

Yes, my lord, but we have it established that the Indian title existing originally, or as confirmed or arising under the Royal Proclamation of 1763, is an interest other than that of the Province in the lands within the meaning of Section 109. Now an interest other than that of the Province in the lands is some right or interest in a third party independent of and capable of being vindicated in competition with the beneficial interest of the old Province. The Indians were in possession of these lands. They had an interest or right recognized by the statute, capable of being set up and vindicated in compe-

(1) *Atty.-Gen. for Canada* v. *Atty.-Gen. for Ontario* [1897] App. Cas. at pp. 210, 211.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

tition with the interest of Ontario, which was the right to take and have the revenues of the lands whenever those lands were freed from the Indian title. Those are the words of Lord Watson in the *St. Catherine's Milling Case*. Therefore Ontario had no sort of interest of which it could avail itself in these lands previous to the surrender of the Indian title. The Indians had an interest; they were in possession. No grants could be made. The benefit which Ontario might otherwise derive and have from this territory could not arise, could not be taken, until after the Indians had ceded their interest. The plain effect of that decision is that these lands were lands reserved for Indians There is an interest existing with which Ontario's title is burdened and the Province cannot free itself of that interest by its own act. Therefore, my lord, they were in a position where they never could have the enjoyment of the interest such as it was and which they took under *The British North America Act* until the Indian title was extinguished.

Chief Justice Strong's judgment in the *St. Catherine's Milling Case* (1) collects the authorities with regard to the Indian title and shows what the policy of the Crown had been in dealing with it. That judgment is very important, every word of it, and full of information with regard to the subject. No legislature in Canada has ever undertaken to deal with Indian lands in the way of making grants or getting revenues from them until after the extinction of the Indian title, and could not do so because that Proclamation of 1763 forbids that to be done; it says it cannot be done, and that has the effect of a legislative Act.

Now that being the situation at the Union, t ere were, as appears by the correspondence and documents put in, differences between the Dominion and Ontario as to the western and northern boundary, and correspondence

(1) 4 Cart. Cas. at p. 128.

took place leading up to a conventional agreement in 1874. It appears that the existence of this Indian title there naturally led to some difficulty and postponement with regard to those negotiations, and so we find it in a report of Mr. Laird, of the 2nd June, 1874, which was approved by Council and communicated to Ontario. "That as the Indian title of a considerable part of the territory in dispute had not then been extinguished, it was thought desirable to postpone the negotiations for a conventional arrangement under which the territory might be opened for sale or settlement, until a treaty was concluded with the Indians." Now the time had arrived when it was necessary or expedient to enter and take possession and have this territory opened for settlement or for the progress of civilization, and the Indian title, the Indian right to possession, the interest which could be vindicated in competition with any other interest, stood in the way; and so, while both Ontario and the Dominion were anxious that this territory should be administered, there was a stumbling block in the way which had to be removed, so the negotiations were postponed, deferred, and this treaty was accomplished.

Then having made the treaty in 1873, in October, in the following spring they signed the conventional boundary agreement on the 26th June, 1874, and by that they drew a line which passed through this ceded territory somewhere about the middle of it; it was divided by the conventional boundary and on the west side of that the Dominion was to administer and on the eastern side Ontario. "That all patents for lands in the disputed territory to the east and south of the said conventional boundaries, until the true boundaries can be adjusted, shall be issued by Ontario." And by the Dominion on the other side. So they went on and issued patents and administered the land, and what transpired in the end was that the whole territory fell into Ontario. Having

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel

regard to the ultimate outcome Ontario was administering the eastern part of the ceded territory herself, the Dominion the western part of it as the agent of Ontario, and the income which we received from that goes to Ontario, and the whole administration of that territory from 1874, when it first began to be administered, was Ontario administration in the result; because it must be held, I submit, under this agreement, that our administration was that of an agent. It was under this agreement with Ontario and with the consent of Ontario. It was her property, vested in the Crown, the beneficial interest going to Ontario.

Then, my lord, there is an agreement of 1894 which is an agreement ratified by statute on behalf both of the Province and Dominion, which is in force, by which Ontario agreed with the Dominion that she would in so far as possible, confirm these reserves which the Dominion had laid out, and that, in so far as she was unable to confirm the reserves, there should be a Commission appointed which would absolutely confirm them or establish others to deal with the subject; the idea, of course, being that the Indians were entitled to the reserves which were promised them, and which had been laid out by the Dominion. Ontario would not acquiesce in certain reserves and means were found for making substitution.

[BY THE COURT: That is if Ontario could not confirm a reserve they would consent to some other reserve being selected in its place.]

Not quite that, because it was put in the hands of a Commission who might say, although Ontario will not consent to it, we will confirm this very reserve. Then there was an agreement made between Mr. Blake and myself in London in connection with the *Seybold Case* (1) which is really a supplement to this agreement of 1894.

(1) *Ontario Mining Co. v. Seybold* [1903] A. C. 73.

Therefore, my lord, no doubt Ontario was fully aware of the project of negotiating the treaty and if not actively promoting it, as it seems to me she was, she at least sat by without any objection and after the treaty was accomplished came in and took possession of the lands subject to these special reserves which the treaty provided for and which Ontario has never had the possession of.

Now, we fall into the way of speaking of the Dominion and Ontario as separate governments, distinct political entities, from rather too easy analogy to the governments existing in the United States, which, of course, are separate and independent governments. The real fact is that there is only one government in Canada, there is only one Crown and one government, that is the sovereign government in Canada. There are different departments of the same government, but there are not two Crowns, or two governments, or seven governments in Canada, there is only one.

There is a case which illustrates that somewhat, *Williams v. Howarth*, (1) where a Colonial government had entered into a contract with the respondent for military services in South Africa; and it was held that it did so on behalf of the Crown. That was held by the Judicial Committee, over-ruling the court below, and it proceeded simply upon the principal that there was only one Crown, and that although the government of New South Wales had made a contract with a man who was to serve as corporal at 10 shillings a day during his service from that time in South Africa and return, and although he went to South Africa under that contract and there incidentally came under the British regulations with regard to pay and was entitled to 4 shillings a day from the Imperial Treasury, it was held that to that extent New South Wales was relieved and that they might apply that, although if you regard them as independent they were not

(1) [1905] A. C. 551.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

privy to that contract at all, but they could not set that out as part payment.

Now, in these circumstances we claim that to the extent to which Ontario took the benefits of the treaty she should indemnify the Dominion in respect of its obligations; and this, I submit, should follow as a matter of common sense, and, if I may say so, of common fairness and honesty.

There is no other case like this, in a sense. Your lordship has not actually got two parties before you; you have got one party; you have got the Crown, and you have got the question arising as it were, largely as a matter of book-keeping or collection of revenue as between two departments of one government. The one has inadvertently or otherwise, in fact made a payment which accrues to the benefit of the other. It comes before your lordship under a statute giving your lordship authority to determine all controversies between these two branches of government. Now, is there any reason in those circumstances why an order should not be made that these moneys of Ontario should be applied in discharge of the benefit which Ontario has taken and is enjoying? It would not be contrary to any decision or principle of the common law to hold that Ontario is liable, while to hold the contrary would be certainly in conflict with the opinion of Lord Watson and with the opinion of Mr. Justice Strong in the *St. Catherine's Milling Case* (*supra*).

The cases between subject and subject, applicable or not applicable, really do not apply. Even if they did apply, the principles of the civil law would hold Ontario liable in the position of a subject.

If you take the cases with regard to subjects, I do not say that cases with regard to subjects, having regard to the statutory modification of the common law, would not hold Ontario liable. Certainly they would, so far as

the civil law is concerned, and who says that in a case like this, coming up for the first time, that there is not a principle to be enunciated, and who says that we should not look to the jurisprudence of the civil law on a subject of this kind? There is no doubt that if you go to the civil authorities, this action would lie if it were a case between subjects.

Having brought about this release of surrender upon considerations involving money payments, which the Dominion undertook to execute, the lands were relieved of the Indian title, for the benefit of the Province, as determined in the *St. Catherine's Milling Case*. Now, as between the two governments, both representing the same Crown, is there any constitutional heresy in holding that whether Ontario were a party to the surrender or not, and irrespective of the benefit, if benefit there were, in the discharge of these lands from the Indian title, the payment of the consideration should fall upon Ontario as a department of the King's government, in aid of her title? As I have said, this is only an alternative branch, because I am going to submit a different view in a moment, but I want to submit this in the alternative. It is not competent for a provincial government to make a treaty with the Indians or obtain any transfer from them. The provincial government has no right to require the Dominion government to obtain a surrender. The entire subject of the Indian title is administered by the Dominion and when the Dominion, in the exercise of its power, treats with the Indians and obtains a surrender, that enures to the benefit of the Province. The Province, therefore, held those lands at the Union subject to the Indian interests as defined. The Province could not consistently with the past practice in this country with regard to lands subject to Indian title, dispose of the lands or put settlers in possession or otherwise administer the lands as ordinary Crown lands of the Province

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

until the extinguishment of the Indian title. The constitution gives the Province no voice in the extinguishment of the Indian title, but the extinguishment of the Indian title is obviously a matter of advantage to the Province Hence, the expense of the extinguishment of the title ought to be a matter to be provided for by the provincial territory. The Dominion Crown was a Crown to which the title could not be surrendered, because it was incompetent to take it. But the Ontario Crown was competent and did take it, and how did Ontario acquire the title under this contract which was made, to the Indian interest? By becoming a party, by accepting the benefit, by taking the territory, by becoming the party of the second part to the contract, the Indians being the party of the first part and the Dominion acquiescing, as the Dominion certainly did acquiesce by being actively engaged in bringing this about. It is a clear case, I submit, of ratification and adoption by which Ontario becomes charged with all the obligations of this treaty. Suppose, my lord, the case of an Indian title overlapping two provinces; a large area; one band of Indians; they must be dealt with as a whole. Are there no means provided, if it becomes necessary in the public interest, that it should be converted and the Indian title relinquished; must there be the consent of both provinces before that could be done, in order that they should discharge their liability in respect of the benefit?

Mr. Hogg, followed for the claimant: My learned friend, Mr. Newcombe, in addressing your lordship did not dwell upon any of what might be termed the subsidiary questions of liability. I understood from your lordship yesterday that they would stand in the meantime, and I think we all approved of that suggestion. The only question now before your lordship is the question of liability. That being the case and those questions being the questions to which I have, to some

extent, directed my attention, in the event of its being necessary to discuss them, my remarks to your lordship in connection with the general question of liability will be confined to one or two observations which have already been suggested by my learned friend in his very able argument before you this morning.

Let me say a word with reference to the consideration which went to Ontario by reason of this cession. It has been apparently considered that the lands reserved for Indians, to which the words of *The British North America Act*, section 91, sub-section 24, had reference, were the special reserves which were the result of the treaty; but I think it is now sufficiently and fully demonstrated by the decision of the Privy Council in *The St. Catherines Milling Case* (1), that the interest in the lands were the general reserves under the Proclamation of 1763.

[BY THE COURT: Even if it had said "lands unsurrendered or reserved for Indians" I do not know that that would have affected the case in any way, because it is only a question of legislative authority.]

Quite so, my lord, but my learned friend in discussing the question this morning, read—

[BY THE COURT: He did not read anything that seemed to go to the extent of the proposition with which he started.]

At page 117 of *Cartwright's Cases*, vol. iv, we find Lord Watson speaking as follows: "The territory in dispute has been in Indian occupation from the date of the Proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments and, since the passing of the *B. N. A. Act*, 1867, by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a sub-

(1) 4 Cart. B. N. A. 107.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

ject for the sale or transfer of their interest in the land and have only been permitted to surrender their rights to the Crown by a formal contract duly ratified in a meeting of their chiefs or headmen. * * * Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants 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 favour of all Indians 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 land 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 on the good will of the sovereign."

What we say is this, that the interest which the 109th section of the *B. N. A. Act* speaks of, is that the lands coming to Ontario charged with an interest other than that of the Province, is a necessity of this reservation. That is that these lands, or an interest in these lands, have been reserved to the Indians, and that the lands then fall into the Province of Ontario charged with this interest.

Mr. *Shepley*, for the defendant: I suppose the best way to get at the question which your lordship has to decide is to ascertain in the first place just what was done by the Crown when effecting this treaty. Once the exact boundaries of the thing actually done are ascertained it will be a comparatively simple matter to determine what obligations, if any, have arisen as between the Dominion and the Province with respect to that Act.

Now, with a good deal of what my learned friends have argued I have very little fault to find. I think most of the argument—with very much respect to them—is beside the question which your lordship will have to determine. It is useful, perhaps, indeed I think it is very useful, of vital importance, to ascertain just what the Crown did, because whatever was done it was the act of the Crown. And just a word with regard to the distribution of the administrative powers, under sections 12 and 65 of the *B. N. A. Act.*

Now, 65 vests in the Lieut.-Governor in Council all the executive powers which are appropriate or necessary in respect of matters which are assigned to the Province. That must be so. That only needs to be stated. It is the general effect of the passage. Then if any executive power is incident to the ownership of the public lands, that executive power, of course, passes; it is conferred by section 65 upon the Lieut.-Governor in Council. It does not assist us to refer to sections 12 and 65 unless first we ascertain what the subject-matter is in respect of which the administrative power is required.

I do not myself see any difficulty—I never have seen any difficulty—in holding the view that in respect of lands which were public lands, whether they were charged with or not charged with, whether they were subject to or not subject to an interest in some other entity than the Crown, they fell within the legislative, the administrative powers, as well as the clause relating to property. If, in other words, public lands, that is unsold lands, unoccupied lands, were Crown lands of the Province, then in respect of those lands there was first the property, secondly the legislative authority to deal with them, and thirdly, the executive power to deal with them, so far as dealing with them was a matter of executive. That this property was subject to an interest other than the interest of the Crown could make no difference in that

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

view so long as the interest is not attempted to be dealt with by a legislative body, by an executive body which has no proper function to deal in that way with that subject-matter. If the subject-matter of the interest is within the legislative competence of another tribunal only, then, of course, the Province cannot deal with it. Unless that is so the Province can deal with the interest as well as with the property which is subject to that interest. Now it is I think manifest that, as my learned friends have said, there is only one Crown. This treaty, from whatever standpoint it is viewed, was the act of the Crown. It was not the act of the Dominion or of the Province; it was the act of the Crown, and it was the same Crown which, in right of the Dominion, my learned friends represent, and which, in right of the Province, we represent. There is only one Crown and it was the Crown which extinguished the title, the Crown that negotiated the treaty. Now, what were the circumstances? Because, as I said to your lordship a moment ago, it is most useful to inquire what were the circumstances that led up to the negotiating of this treaty. I do not at all agree with my learned friends that the Crown was under any obligations in respect to this treaty; that there was an obligation resting on the Crown either as represented by the Dominion or the Province.

I do not see how you can argue from an exclusive legislative power to a duty. Assuming that the legislative power was exclusively in the Dominion—which I do not concede at all—it does not necessarily follow that there must be legislation or executive action for the purpose of performing what there was power to perform. A power and a duty are two separate and distinct things, and I suppose the whole field of legislation which the Dominion is competent to occupy, or a great portion of it, may in the will of the Dominion legislature be left unoccupied. There is no duty in the sense that there is

a legal obligation resting upon anybody in respect of the exercise of a power of this sort.

I think my learned friend, Mr. Newcombe, is quite right that we must first inquire what the title was at the time of Confederation. At the time of Confederation—as indeed *The St. Catherines Milling Case* decides—the property in this territory was vested in Ontario. It was subject, as the Privy Council declared in that case, to an interest other than that of the Crown, that interest being the burden—I use that word because it has been used and not because it, perhaps, is altogether an appropriate word—resulting from the Indian occupation. The property was that of the Province. Why could not the Province, owning the property subject to the other interest, compound with the other interest and get it out of the way? My learned friends both seem to think the Province could not have done that. Why not? If the property was in the Province, if an interest was outstanding in someone else, why could not the Province go to that someone else and get rid of the interest, make a bargain with regard to it, sweep it out of the way and make what is called a *plenum dominium* of the property which *The British North America Act* vested in the Province? If the Province could do it—and I am arguing as strenuously as I can that the power was in the Province—that disposes altogether of any legal obligation resting on the Dominion. If the Province, being the owners of the property subject to the interest, could compound for the interest and get it out of the way, of its own motion and without reference to any agency or exercise of power on the part of the Dominion, either executive or legislative, if the Province could do that, of course the Dominion could not have been under any obligation to perform a function which the Province could well and satisfactorily perform for itself. It seems to me that is an answer if it is well founded, and I have not seen

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

a word to the contrary of that in any of the judgments I have seen. I will point your lordship in a moment to words which bear that view out. Let me cite the language of Lord Watson again. He says: "The Crown has all along had a present proprietary estate in the land." (1) He is speaking, of course, of the Crown in the Province, being beneficially entitled to the revenue. "The Crown has all along had a present proprietary estate in the land upon which the Indian title was a mere burden. The ceded territory was at the time of the Union vested in the Crown subject to an interest other than that of the Province." If then, instead of being an interest vested in or enjoyed by the Indians this had been an interest on behalf of the Dominion, an interest in the Dominion for some purpose, one can suppose such a case, could not the Province have bargained with the Dominion to get rid of that interest so as to make the title perfect? And if with the Dominion why not with the Indians? There is nothing in *The British North America Act* to forbid the Province to make a bargain with the Indians. Or if it was the Canada Company, would the Dominion have had to extinguish that interest in order to give Ontario the benefit of her full title? I am utterly unable to appreciate the argument. It does not seem to me to be consistent with either logic or good sense that Ontario should be given by competent legislation a present proprietary interest in a thing, subject to an interest in some one else vested at the same time, with administrative and legislative powers over the property, and then to be told you cannot go to the person that has that interest and bargain for its extinguishment. That seems to me to answer the whole of the argument founded upon the alleged legal duty on the part of the Dominion.

(1) 4 Cart. Cas. at p. 123.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

Now, this is what is said in one of the judgments of the Court of Appeal in the *St. Catherine's Case*; at page 205 of the 4th volume of *Cartwright*, Mr. Justice Burton says: "The main feature of the scheme of division being to give to the Dominion power to legislate upon subjects of national interest, or matters common to all the Provinces, and to the Provinces power to deal with matters of a local or private nature. It was reasonable, therefore, that the power to legislate for Indians generally throughout the Dominion should be vested in the central authority and that the same power should deal with the lands which the Provinces had reserved or set apart for them, but this power was specially limited to such subjects. It would have been very unlikely that the delegates would have consented to place the power of legislation in reference to the large unorganized tracts of public lands like that in question in the hands of the Dominion. If then, the lands in question passed, or to speak more accurately, remained part of the Province of Ontario, it would seem to follow almost as a matter of course that the Provincial and not the Dominion authorities were the parties, and the only parties, who could extinguish the so-called Indian title in the absence of any express power to the Dominion to deal with it."

Now, what is the thing that the Dominion here has done? Your lordship cannot have heard the documentary evidence without having been impressed with this notion, that whatever incidentally may have been the result of this treaty as extinguishing the Indian title to these lands, that was neither the first nor the paramount consideration which led to the making of the treaty. I do not want to worry your lordship with references, but your lordship will remember that in the first place there was difficulty about the Dawson route. That was a Dominion object and not a provincial object at all. The Dominion was desirous of conducting a highway into the great

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

northwest, which it had then acquired from the Hudson's Bay Company.

[BY THE COURT: It was a public work that fell without the limits of one Province.]

Quite. It was passing from one Province to another. Your lordship must have observed this, that the Dominion was not, at that time of the view that any of this territory was within the Province of Ontario. The Dominion authorities were of the view, which they were actively putting forward in the proceedings towards ascertainment of the boundary, they were stoutly maintaining the view that the whole of this territory fell outside the bounds of the Province of Ontario. While my learned friend Mr. Newcombe points to the Dominion as the agent doing this for the benefit of the Province, as a matter of fact there was nothing of the kind. Even in respect of the extinguishment of the Indian title the Dominion was acting with a view to the advancement of its own supposed interest and not with a view to any interest on the part of the Province. Then the Dawson route was a Dominion object and it had become manifest that in the course of the construction of that highway the Indians had become irritated. There were other sources of irritation, or apprehended irritation. There had been an insurrection in the Red River country among friends and relatives of these Indians, half-breeds, and the discontent which had caused that insurrection it was apprehended might spread to these untamed and savage bands of Saulteaux. These were all matters of public concern from the Dominion standpoint. Matters that in acting for the peace and good government of Canada it was desirable the Dominion should take up. The Dominion was charged legislatively by *The British North America Act* with the care of these Indians, and as a matter of practice had assumed that control over the Indians which the statute contemplated and had

legislated itself into a certain position of trustee or guardian for the Indians. They had passed the Act with regard to education, which your lordship has heard of. The very next section is the one which provides for the prohibition of the liquor traffic. The Dominion had charged itself as public guardian of the Indians with certain duties and relationships towards the Indians, and all those were circumstances which made it eminently proper from the Dominion standpoint that the Indians should be pacified by the making of a treaty. Your lordship will remember that at first the view was, "there is not the value of a Manitoba farm in the whole of this country." That was expressed in the language of some of the special ambassadors employed by the Dominion to deal with this matter. What they wanted to do was to provide for a right of way through the Indian lands for the Dawson route. That was the way the matter came about first. Incidentally, possibly, to keep the Indians in good temper so that they would not join in the insurrection in the Red River country. Then, after a while, they introduce—no doubt it was present all the time—into the necessity for this pacification of the Indians, the subject of the Canadian Pacific Railway. That was a subject as to which by the terms of the Union with British Columbia, the Dominion had bound itself to construct a railway, and it is made manifest in the course of these negotiations that that also was a matter which the Dominion was anxious to provide for. They had bound themselves to British Columbia to build a railway. The railway, as your lordship knows, does pass through this very territory. They could not build that railway and carry out their obligations with British Columbia without providing for the pacification of the Indians.

Then, thirdly there was the Hudson's Bay surrender. What had the Dominion undertaken to do? The Hudson's

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

Bay Company had this great tract of country subject to its government under the charter granted by Charles II. The Dominion desired to add to the country this territory. It was quite manifest that the claim of the Hudson's Bay Company overlapped Ontario territory. Of course it did not in point of strict geography upon the ground; there could not have been an overlapping; but as a matter of practice, as a matter of fact, as a matter of claim the Hudson's Bay Company had overlapped; they had got into this territory; they were occupying it by their posts and were trading there and they claimed, as your lordship must find, upon this evidence, that this territory was part of Rupert's Land.

The Rupert's Land Act (31-32 Vict. c. 105) says almost in so many words that wherever the word Rupert's Land occurs in that Act it is to be read as including, not only what is properly Rupert's Land, but what the Company has been claiming to be Rupert's Land as well. With all that behind them the Government of Canada approached the making of this treaty. Not with any view of benefiting Ontario; not with any view of freeing Ontario land from the burden of the Indian title; that is an after thought; but with a view in so far as they were acquiring any benefit or in so far as any benefit was to flow from the extinction of the Indian title, intending that the Dominion itself should be the beneficiary.

I will give your lordship a few of the authorities which I submit point the way the decision in this case ought to go. (Cites *Leigh* v. *Dickeson* (1); *Bonner* v. *Tottenham Investment Building Society* (2); *Rhabon S.S Co.* v. *London Assurance Co.* (3); *Falcke* v. *Scottish Imperial Insurance Co.* (4).

It is very true that if a man who has a title to property sees another expending money upon it in the erroneous

(1) 12 Q. B. D. 194; 15 Q. B. D. 60.
(2) [1899] 1 Q. B. 161.
(3) [1900] A. C. 6.
(4) 34 Ch. D. 234.

belief that he has a title to it when in fact he has no title, there is an important doctrine of equity which will prevent the real owner from insisting on his title so as to deprive the person who was acting on the supposition of his own title, of the benefit of his expenditure. But, in order to make this doctrine applicable, there must be not only knowledge on the part of the person having the real title that the man whom he sees so acting believes he has a title and acts in consequence of that belief, but also a knowledge that the title on the faith of which he is acting is a bad one.

Now is there anything in the *St. Catherine's Milling Case* to lay down a different principle of law for this case from the principles laid down in the cases to which I have referred? Your lordship asked that, and I venture to think, in view of the authorities I have given your lordship, that such is the inquiry which your lordship will have to make. My learned friends are quite right in saying that we do treat the observations made by Lord Watson as being purely dicta. It is manifest, as I shall show your lordship in a moment, that the questions which have troubled your lordship the last three days, were not before the court there in any shape or form. The court was not told anything that your lordship has heard about the Hudson's Bay surrender, about the agreement with British Columbia, about the Dawson route or any of the circumstances accompanying the making of this treaty and throwing light upon its purposes. Nothing of the sort was before the court.

Then let us look at the language of Lord Watson himself, because that is the last thing I have to say about it. I think it is made very clear by his own language that he did not consider that he was offering any more than a mere dictum, and was not intending to indicate what the rights of the parties were in that respect. At the top of page 126 of the report in the fourth volume of *Cart-*

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

wright (1) after dealing with the considerations which my learned friends do not rely on, he says: "these considerations appear to their lordships to be sufficient for the disposal of this appeal." He might have stopped there, and the judgment would have been complete. Then follows the language which my learned friends have read. Let me just finish the quotation, because the rest of it is what my learned friends have taken as the foundation of their action and the language in which they have crystalized the claim that they lay before this court. "There may be other questions behind," * * * "but none of these questions are raised for decision in the present suit." If language could be more apt to indicate that that question was not before them, I cannot imagine it. "But none of these questions are raised for decision in the present suit." In *Ontario Mining Co. v. Seybold* (2), the Judicial Committee decided that Ontario cannot be bound by anything done by the Dominion in dealing with these Indian lands without its consent.

Then Mr. Newcombe has pointed to the bargain between himself and Mr. Blake, made I think in the summer of 1902. A bargain it was eminently proper to make, but how can my learned friends say that something that Ontario and Dominion counsel agreed to in 1902 can possibly throw any light whatever upon facts and circumstances which preceded 1873, as indicating that what was done in 1873 was done with the authority and at the instance of the Province of Ontario? My learned friend became bolder as his argument proceeded; my learned friend pictured Ontario as authorizing, requesting, demanding of the Dominion that the Dominion should go and extinguish the Indian title in this tract of territory for the benefit of Ontario. Ontario really was getting the Dominion to do this, my learned friend puts it. I ask, in all sincerity, where is the evidence that anything of the

(1) 4 Cart. Cas. at p. 126. (2) [1903] A. C. 73.

sort was going on? What had Ontario to do with this treaty? What mandate did Ontario ever give the Dominion to negotiate this treaty? And if there was no mandate for what the Dominion was doing was not being professed to be done as an agent for Ontario, then there could be no ratification, because Ontario remained the owner of the property of which she was the owner, but freed of a claim which had been removed by the Dominion for the Dominion's own purposes altogether, apart from any question of this title. Why should Ontario be prevented from saying, I have no option but to take the lands as I find them. They were mine before, subject to an interest. Somebody has extinguished that interest. You, the Dominion, claim to have done it. Perhaps you did. If you did, it does not give you any claim against us, we remain in possession of our rights.

I can quite understand the Dominion coming into the Court of Exchequer and saying to the Province, we implead you for the purpose of being indemnified against an obligation which you have undertaken; but I cannot understand the Dominion coming into the court and saying, we do not make any such claim as that but we make a claim that because by some act of ours you have got a vast tract of rich territory, you should pay us some proportion of the value of what you have got.

There is a case which I think emphasizes the difference between the law of the Province of Quebec and the law of Ontario upon the principal question in controversy here. The case of *Hyde* v. *Lindsay* (1). That was a case which fell to be determined by the courts of this Province but upon an application of the law of the Province of Quebec, and our Court of Appeal held absolutely, without any doubt whatever, that no such principle, even in the law of the Province of Quebec, existed as is being contended for here; that is that by a

(1) 29 S. C. R. 595.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

volunteer taking care of another person's property he could put him under any liability. The action was dismissed and the Court of Appeal unanimously affirmed the decision, dismissing the action. The plaintiff was not satified with that but went to the Supreme Court, and the Supreme Court held—which had been conceded in Ontario—that the law of Quebec applied; they held that the law of Quebec did permit a recovery in such a case but the decision of the Supreme Court makes it very clear that according to the law of this Province there is no such right. These are the considerations which I urge upon your lordship as involving the decision by your lordship that this action cannot be maintained and that the liabilities sought to be placed upon the Province, cannot be so placed.

Sir Æmilius Irving, K.C.: Neither my learned friend, Mr. Ritchie, nor myself think it necessary, after the exhaustive argument and statements that have been made by my learned friend Mr. Shepley, to add anything. We think your lordship will be seized of our opinions by the attention you have given to him.

Mr. *Newcombe* in reply: In regard to the *Seybold Case* (1), I think this is the first time I have looked at this case since the argument; this is a somewhat misleading report of the case, because it is stated here that my late learned friend Mr. Loehnis and I argued this case on behalf of the Attorney-General for the Dominion, that Mr. Blake was heard and that I replied. Now the fact is, my lord, that we were intervening parties there. The case was between the Ontario Mining Company and Seybold. Ontario intervened and the Dominion intervened, and during the argument we settled the case as far as the contention that Ontario and the Dominion would otherwise have raised by the agreement which is in evidence. The reporter evidently was not there during the argu-

(1) [1903] A. C. 73.

ment and he has put down what he assumes took place from the cases filed, I suppose. The fact is that neither Mr. Loehnis nor I, nor Mr. Blake addressed the court at all, except to say that as far as we were concerned we had made this agreement and our differences were settled and it was left a matter as between the parties, and of course their lordships did not determine the point which the Chancellor had determined. What they said was, "it is unnecessary for their lordships, taking the view of the rights of the two governments which have been expressed, to discuss the effect of the surrender of 1886. Their lordships however, do not dissent from the opinion expressed by the Chancellor of Ontario on that question." They said they did not dissent from it, but they did not decide it. That was a point that we were prepared to argue, namely that the Indians held by reason of their special reserve under a very different sort of title from that which they had under their original title. Now the Privy Council have not yet discovered a distinction between those two interests, how the one is granted by the Act of the Crown as a consideration for the surrender of the original title and how the Indians hold that title confirmed and strengthened by the special contract and the statute conferring the title upon them.

That brings me back to this, that there can be no doubt, these lands, the subject of the Proclamation of 1763, were lands reserved for Indians within the meaning of that term. In section 91 of *The British North America Act* the words actually used are, according to their natural meaning, sufficient to include all lands reserved upon any terms or conditions for Indian occupation. It appears to be the plain policy of the Act, in order to insure uniformity of administration that all such lands and administration generally shall be under the legislative control of one central authority. Now, my lord, I have not contended and I do not contend that

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

the legislative authority necessary gives adminstrative control but the execution of legislative authority may confer executive control. Therefore you have to look to the Dominion Legislation, the Indian Acts to which I referred in my opening. I did cite the present Indian Act, but going back to 1868, by the legislation which was in force when this treaty was negotiated, the Secretary of State was to be the Superintendent of Indian Affairs. (Cap. 42 of the Dominion Acts of 1868, sections 5 and 6.) The Secretary of State shall be the Superintendent General of Indian Affairs and shall have, as such, the control and management of the lands and property of the Indians in Canada. Now these were the lands of the Indians within the meaning of that Act. These lands subject to the Proclamation of 1763; all lands reserved for Indians. The very words of *The British North America Act* are:—"All lands reserved for Indians or held in trust for their benefit shall be deemed to be reserved or held in trust for the same purposes as before the passing of this Act, and no such lands shall be alienated, sold or leased until they have been released to the Crown for the purposes of this Act." The Indian lands and the management thereof are placed under the administration of the Secretary of State, and there are provisions here about surrender which carried on substantially the provisions of the Act which my learned friend referred to of 1860, whereby it is provided that no release shall be valid or binding except under the following conditions. Then various conditions are set out. That continues to the present day, modified to some extent but still containing the main point that these surrenders must be ratified and approved by the Governor in Council or by the Dominion Government. Therefore, while there may be some things debateable about this case there is one thing that I submit is conspicuously clear, that Ontario could never have got the benefit of

these lands without the sanction and intervention of the Dominion Government. Let that cut which way it will in the argument, that is the situation and it has always been the situation from the earliest times.

Now my learned friend refers to various considerations on account of which he says it was in the interest of the Dominion to have this thing done. There was the Dawson route, the recent insurrection, the Hudson's Bay Company, and that the Dominion itself claimed to be entitled to the lands. Those are motives no doubt which may or may not have actuated the Dominion. Suppose they did; it does not matter. The fact is that the Indians had just one asset, and it was a very valuable asset; their title to this land.

Then what the Indians do is: "the Saulteaux tribe of the Ojibeway Indians and all other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors for ever, all their rights, titles and privileges whatsoever to the lands included within the following limits." Then follows the description, and the rest of the document consists of the covenants which in consideration of that surrender Her Majesty made with the Indians, to make payments, provide materials and so on, and finally the chiefs in the ordinary stereotyped form of these treaties, in their own behalf and on behalf of all their people, engaged to be made subjects and remain in peace and so on with the Crown. So that really if you are looking at the face of the treaty to see what it was that they were dealing with, you find that they were dealing with an asset which was of value only to Ontario and from which Ontario would derive all the revenues, and it was incidental only, if at all, that the Dominion takes any benefit. Incidentally no doubt I suppose it facilitated the construction of this so-called

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

Dawson route. I do not know what that was. A means of communication, I suppose, from this country to the western countries. And very likely it allayed any discontent of the Indians; but the Indians were putting their own value on the property, and they were entitled to put any value; they could set up past claims or damage claims; nobody knows what motive is in a man's mind when he puts a price on his property, and if the object is to acquire the property, you cannot deal with that afterwards; the value of the property is what it can be bought for; if it cannot be bought for less than a sum which seems to be large, then the value of the property must be considered as large. In the present case it does not seem to me that these Indians received an exorbitant consideration for what they gave up.

THE JUDGE OF THE EXCHEQUER COURT now (March 18th, 1907) delivered judgment.

The principal controversy between the parties to this action is as to whether or not the Province of Ontario is liable to repay to the Dominion of Canada any portion of the moneys that have been expended by the Dominion in fulfilment of the obligations created by a treaty which is known as the North West Angle Treaty No. 3; and which was made and concluded on the third day of October in the year one thousand eight hundred and seventy-three between Her late Majesty the Queen and the Saulteaux tribe of the Ojibeway Indians respecting a tract of land, the boundaries of which are given in the treaty, and which may in general terms be described as covering the area from the watershed of Lake Superior to the north-west angle of the Lake of the Woods and from the boundary of the United States of America to the height of land from which the streams flow towards Hudson's Bay, and containing about fifty-five thousand square miles. There is also a counterclaim to which

reference will be made later; but the main question at issue between the parties is that which has been stated.

By the 146th section of *The British North America Act*, 1867, provision was made for the admission into the Union of the Provinces thereby united of Newfoundland, Prince Edward Island and British Columbia, and also of Rupert's Land and the North West Territory; and it was thereby enacted that the provisions of any order in council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland. By the Act of that Parliament known as the "Rupert's Land Act, 1868" (31-32 Vict. c 105), provision was made for the surrender to the Crown, and for the extinguishment thereby of the Hudson's Bay Company's rights in Rupert's Land which for the purposes of this Act was defined to include the whole of the lands and territories held, or claimed to be held, by that company. That Act also gave Her late Majesty authority to declare that Rupert's Land should be admitted into and become part of the Dominion of Canada. In 1869 the Parliament of Canada, in view of the probability that Her Majesty the Queen might, pursuant to *The British North America Act*, 1867, be pleased to admit Rupert's Land and the North Western Territory into the Union or Dominion of Canada, before the then next session of the Parliament of Canada, passed an Act to make temporary provision for the civil government of such territories until more permanent arrangements could be made by the Government and Parliament of Canada. That Act was amended and continued by an Act of the Parliament of Canada, 33 Victoria, chapter 3, which was assented to on the 12th day of May, 1870, and which, among other things, provided that on, from and after the day upon which the Queen should by order in council in that behalf admit Rupert's Land and the North Western Territory into the Union or Dominion of Canada,

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

there should be formed out of the same a province, which should be one of the Provinces of the Dominion of Canada, and which should be called the Province of Manitoba, and should be bounded as therein described (1). The two Acts mentioned, that is, the Act 32–33 Victoria, chapter 3, and the Act 33 Vict. c. 3, were by an Act of the Parliament of the United Kingdom, passed in the year 1871, respecting the establishment of Provinces in the Dominion of Canada, declared to have been valid and effectual for all purposes whatever from the date at which they respectively received the assent in the Queen's name of the Governor General of the Dominion of Canada (2). The order in council admitting Rupert's Land and the North West Territory into the Union was passed on the 23rd of June, 1870, and they thereby from the 15th day of July in that year became a part of the Dominion. That extended the boundaries of the Dominion westerly and northerly from the boundaries of the old Province of Canada. But at that time the boundaries of the old Province of Canada had not been definitely determined, and a dispute arose between the Province of Ontario on the one hand and the Dominion on the other as to what the true boundaries were.

With respect to the Indian title to the territories which were united to the Dominion by the Queen's Order of the 23rd of June, 1870, it was provided in the 14th paragraph of the terms of Union that any claims of Indians to compensation for lands required for purposes of settlement should be disposed of by the Canadian Government in connection with the Imperial Government, and that the Hudson's Bay Company should be relieved of all responsibility in respect thereof. By the Lake Superior Treaty, 1850, made on the seventh day of September of that year, the Ojibeway Indians inhabiting

1 33 Vict. c. 3, s. 1.

(2) *The British North America Act*, 1871, s. 5.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

the northern shore of Lake Superior, in the Province of Canada, from Batchewanaung Bay to Pigeon River at the western extremity of the said lake and inland throughout that extent to the height of land which separates the territory covered by the charter of the Hudson's Bay Company from the said tract, had surrendered to Her late Majesty their title and interest in the tract of land described in the treaty. The Indian title in the territories to the west and north of this tract of land had never been surrendered. So far as such territories were within the true boundaries of the old Province of Canada, all the lands, mines, minerals, and royalties therein which belonged to such Province at the date of the Union of the Provinces of Canada, Nova Scotia and New Brunswick, became the property of the Province of Ontario by virtue of the 109th section of the *British North America Act*, 1867, subject however to any interest other than that of the Province in the same. There was, however, no change of title in respect of these lands. Both before and after the Union the Crown had a "present proprietary estate in the land upon which the Indian title was a mere burden." By the 109th section of the Act of Union the Province of Ontario acquired the right, subject to that burden, to administer these lands and to take the revenues arising therefrom. That was determined in *The St. Catherines Milling and Lumber Company* v. *The Queen* (1). In that case, Lord Watson, delivering the judgment of their Lordships of the Judicial Committee of the Privy Council, and dealing with the territory in respect of which the questions to be determined in this case arise, put the matter in this way:—

"Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario* v. *Mercer* (2), might have been an authority for holding that the Pro-

(1) 14 App. Cas. 46. (2) 8 App. Cas. 767.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

vince of Ontario "could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the Union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land upon which the Indian title was a mere burden. The ceded territory was, at the time of the Union, land vested in the Crown subject to 'an interest other than that of the Pro-'vince in the same' within the meaning of sec. 109, and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.'"(1)

It is also to be observed that the admission in 1870 of Rupert's Land and the North Western Territory into the Union did not work any change in the title to the public lands therein. These remained in the Crown, but the Dominion of Canada thereby acquired the right to administer such lands and to take the revenues which accrued therefrom. It has been seen that it was one of the terms of that Union that the Canadian Government should in communication with the Imperial Government dispose of any claims of Indians to compensation for lands required for the purposes of settlement. But that equally would have been necessary as an act of administration on the part of the Canadian Government if there had been no express stipulation. It had been the well settled policy of the Crown in the administration of lands inhabited by Indians, not to open up such lands to settlement without first obtaining a surrender of the Indian title.

The question of obtaining the surrender of the Indian title in the lands described in the North West Angle Treaty No. 3, was in 1870, when Rupert's Land and the North Western Territory were admitted to the Union, a very urgent and pressing one, not because such lands were at that time required or deemed to be desirable or avail-

(1) 14 App. Cas. at pp. 58, 59.

able for settlement, but because it was necessary for the good government of the country to open up and maintain through such lands a line or way of communication between the eastern and settled portions of Canada and the great and fertile western territory that was added to the Dominion. At that time a line of communication, known as the Dawson route, was being opened up through such lands. During the summer of that year it became necessary to send through this territory a military force to maintain the Queen's authority and establish order in the country about the Red River. Early in the year the Government of Canada had sent an agent to Fort Frances "to keep up a friendly intercourse" with the chiefs and Indians who assembled there and to "disabuse their "minds of any idle reports they might hear as to the "views and intentions of the Government of Canada in "reference to them." In May the Government sent Mr. Simpson to the same place to secure from the Saulteaux Indians a right of way for the troops and to prevent any interruption of surveying parties during the summer. The demands that the Indians made were considered so excessive that Mr. Simpson did not come to any agreement with them. They, however, stated that it was not their intention to try and stop the troops from passing through their lands on their way to the Red River, but that if Mr. Dawson was to make roads through their country they expected to be paid for the right of way. In the next year another attempt was made to arrive at a settlement with these Indians. But on this occasion it was not a question of obtaining merely a right of way through their lands, but of acquiring a surrender of the Indian title therein so that such lands would be open for settlement. By a commission issued under the Great Seal of Canada, and bearing date of the 27th of April, 1871, and in which it was recited that the Indian title to the lands therein mentioned had not been extinguished

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

and that such lands were required for settlement, Her late Majesty appointed Mr. Simpson, Mr. Dawson and Mr. Pitcher commissioners to make a treaty with several bands of the Ojibeway tribe of Indians occupying and claiming the lands in that portion of the North Western Territory lying and being between Lake Shebandowan and the north-west angle of the Lake of the Woods. The commissioners, as appears from their report of the 11th day of July, 1871, entered into negotiations with the Indians and settled, as they thought, "all past "claims" that the Indians had, but, "various causes "prevented them from entering into a formal and per- "manent arrangement" with the Indians at the time. On the 20th day of July, 1871, by an order in council passed on the 16th day of May in that year, British Columbia was admitted into the Union. By the terms of the Union the Government of Canada, among other things, undertook to construct a railway "to connect the "seaboard of British Columbia with the railway system "of Canada." That involved the construction of a railway through the lands for the surrender of the Indian title in which the Government of Canada was in that year negotiating. It afforded another reason, if another were needed, for an early extinguishment of such title. It is put forward on behalf of Ontario that the conclusion of a treaty with these Indians was a prime necessity in the carrying out of the railway policy necessary to implement the agreement of the Dominion with the Province of British Columbia. That the construction of the Canadian Pacific Railway would in the course of time have made it necessary to extinguish the Indian title in these lands, or at least in so much thereof as was needed for a right of way through the same, cannot admit of doubt. But it is not at all clear that this matter was in 1871 pressing or urgent if anything were thought to turn upon that point. But it is, it seems to me, clear that for a

number of reasons either relating, or deemed by the Government of Canada to relate to, the administration of the affairs of the Dominion, it was at the time necessary that the Indian title in these lands should be extinguished. Those whose duty it was at the time to advise Her Majesty and His Excellency the Governor General in relation to the Government of the Dominion, held the view that the Dominion had the right to administer the lands mentioned and to take any revenue to be derived therefrom. There was no question of extinguishing the Indian title in the lands belonging to the Province of Ontario. The lands were thought by the Dominion authorities to belong to the Dominion. So it happened that those whose duty it was to advise the Lieutenant-Governor of the Province of Ontario in respect of the Government and affairs of the Province were not consulted, and had no part in the negotiations that resulted in the treaty that was concluded in 1873.

It is not necessary for the moment to consider in detail the terms of the treaty. That may more conveniently be done on another branch of the case. By the treaty the Saulteaux tribe of the Ojibeway Indians surrendered their title in a tract of land embracing, as therein stated, an area of fifty-five thousand square miles, more or less. Mr. Bray, the Chief Surveyor of the Department of Indian Affairs, who was examined as a witness, gives the total area covered by the treaty as forty-nine thousand three hundred square miles. And of this area, having regard to the boundaries of the Province of Ontario as they were ultimately determined to be, thirty thousand five hundred square miles are in the Province of Ontario, thirteen thousand six hundred square miles in the District of Keewatin, and five thousand two hundred square miles in the Province of Manitoba. The charges arising from the obligations incurred by the Crown under this treaty have been defrayed out of

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

moneys appropriated by the Parliament of Canada and expended by or on behalf of the Dominion Government. Particulars of such expenditure up to the year 1902, amounting, without interest, to something over eight hundred thousand dollars, are given. On the other hand the Province of Ontario for the years 1874 to 1894, both inclusive, received from the sale of lands, minerals and timber in that part of the province which was in the disputed territory, a sum exceeding one million dollars. A part of the disputed territory was, however, for a number of years administered by the Dominion Government in pursuance of an agreement for a conventional boundary for the Province of Ontario, made on the 26th day of June, 1874, between the Minister of the Interior of the Dominion and the Commissioner of Crown Lands of the Province on Ontario, on behalf of the Governments of the Dominion and of Ontario, respectively. In that connection the Dominion authorities collected an amount which may approximately be stated at one hundred and fifty thousand dollars. The sum, the exact amount of which has not been ascertained, the Province of Ontario claims from the Dominion by way of counterclaim in this action. The Dominion admits its liability to account for this amount, and by consent, a reference was made to Mr. Cameron, the Registrar of the Supreme Court of Canada, to make an enquiry and to report as to the amount of the Dominion's liability in that behalf. The amounts collected by the Dominion, and the sums received by the Province of Ontario, from the administration of the lands in which the Indian title was extinguished by the North West Angle Treaty No. 3, represent the revenues that have been derived therefrom. The Dominion, on the one hand, has discharged the burden of the Indian title in such lands. The Province of Ontario, on the other hand, has received or is entitled to an account for the revenues that have accrued from the administration of

the larger portion of such lands. And the Dominion now asks that it be declared that the Province of Ontario is liable to repay to the Dominion a proper proportion of the annuities and other moneys paid by the Dominion to and for the Indians under the terms and stipulations of the treaty. To that demand the Province of Ontario answers in the first place that it was no party to the treaty; that the Dominion of Canada for its own purposes negotiated and entered into the same without any authority or mandate from the Province, and is not entitled to claim any indemnity from the Province in respect of the obligations thereby assumed.

The jurisdiction of this court to hear and determine the question at issue is derived from statutes passed by the Parliament of Canada, and by the Legislature of the Province of Ontario (R. S. C. c. 135, s. 72, now R. S C. 1906, c. 140, s. 32; and R. S. O. 1897, c. 49), which gives the court jurisdiction of controversies between the Dominion of Canada and the Province. And as to that I agree with Mr. Shepley that the mere fact that there is a controversy does not give the court authority to decide against the Province simply because it should think that, as a matter of good conscience and honourable dealing, the Province, having derived a benefit from the treaty, should relieve the Dominion from a proportionate part of the burden arising therefrom; that it is not simply a question of what the court might think to be fair in the premises without regard to the principles of law applicable to the case. At the same time, as Mr. Newcombe pointed out, the question arises between governments, each of which within its own sphere exercises the authority of one and the same Crown. For that reason one cannot expect the analogies of the law as applied between subject and subject to be perfect or in every way adequate to the just determination of the case. Such distinctions must of course be kept in mind; and perhaps

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

for that reason it may be convenient to refer to a few of the provisions of the *British North America Act*, 1867, which are so well known that otherwise it would be wholly unnecessary to make any reference to them. The executive government and authority of and over Canada is vested in the King of the United Kingdom of Great Britain and Ireland (1). The Governor General is His Majesty's chief executive officer for carrying on the government of Canada in his name (2). In general he acts in respect of the government of Canada upon the advice of his ministers, being members of the King's Privy Council for Canada (3). The executive authority of the Crown in respect to the government or affairs of a Province is vested in the Lieutenant-Governor or administrator of the Province acting with the advice or consent or in conjunction with the Executive Council of the Province (4). In such case it is the King's or the Crown's authority that is exercised. But in respect of the government of Canada the King's representative acts upon the advice of the Dominion ministers; while in respect of provincial matters the Lieutenant-Governor acts upon the advice of the Executive Council of the Province. With regard to the distribution of executive authority between the Governor General of the Dominion and the Lieutenant-Governors of the several Provinces, it will, I think, in general be found that the former has executive authority in respect of matters over which the Parliament of Canada has legislative authority; while the latter have executive authority over matters which are within the legislative control of the legislatures of the several Provinces. In construing the *British North America Act*, 1867, it is necessary, as has often been pointed out by the highest authority, to distinguish

(1) *The British North America Act*, 1867, ss. 9 and 2.
(2) Id. s. 10.
(3) Id. s. 12.
(4) Id. ss. 58-67.

between proprietary rights and legislative authority. The former does not follow the latter. But under that Act executive authority does, I think, in general follow legislative authority. There may be some exceptions, but I am not aware of any that in any measure affect this case. But as it happens that a subject or matter which, in one aspect of a case, is within the legislative authority of the Parliament of Canada may in another aspect of the case be within the legislative authority of a provincial legislature; so it may happen that while in one aspect of a matter, executive authority in respect thereof may be vested in the Governor General, in some other aspect of the same matter it may fall within the executive authority and action of a Lieutenant-Governor of a Province. By the 91st section of *The British North America Act*, 1867, class of subject No. 24, the Parliament of Canada has exclusive legislative authority to make laws for the peace, order and good government of Canada in relation to Indians and lands reserved for Indians; and it cannot, I think, be doubted that, unless the Parliament of Canada otherwise declares, the executive authority of the Governor General of Canada extends to all matters of administration relating to Indians and to their lands and affairs. By the 92nd section of the same Act, class of subject No. 5, the legislature of each Province may exclusively make laws in relation to the management and sale of the public lands belonging to the Province and of the timber and wood thereon; and the executive authority exercisable in the administration of such lands is, unless the legislature otherwise enacts, vested in the Lieutenant-Governor acting by and with the advice of the Executive Council of the Province.

The treaty out of which the question in issue here arises was concluded by commissioners appointed by the Queen acting on the advice of Her ministers for the Dominion. There is no question as to its validity. In *The*

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment

St. Catherine's Milling and Lumber Company v. *The Queen* (1), Lord Watson stated that they had full authority to accept a surrender to the Crown; but that they had no authority or power to take away from Ontario the interest which had been assigned to that Province by the Imperial Statute of 1867. There can, I think, be no doubt of their authority to bind the Crown to make the payments stipulated for in the treaty. The case cited shows that the lands thereby surrendered were or might fall within the true construction of the words of section 91 (24) of the Act of 1867 "lands reserved for the Indians" (2). And that being the case, there can I think be no doubt as to the authority of the Crown at the instance of the Dominion ministers and upon their advice to enter into this treaty. The difficulty is that in one aspect of the matter they were, although it was not known at the time, dealing with the public lands belonging to the Province of Ontario, and removing a burden therefrom. It is argued for the Dominion that Ontario must be taken to have acquiesced in what the Dominion authorities did in negotiating this treaty, and that the Province is bound by such acquiescence. I am not able to accede to that contention or to rest my judgment on that ground. The most that can be said on that branch of the case is, it seems to me, that while on the one hand the Government of Canada holding, in good faith, but erroneously as it turned out, the view that all the lands to be surrendered belonged to the Dominion, did not consult the Government of Ontario in respect of the negotiations with the Indians for the surrender of their title in such lands; on the other hand the government of the Province did not raise any objection to the matter so proceeding and did not prefer any request to be represented in the negotiation of the treaty.

(1) 14 App. Cas. 60.

(2) 14 App. Cas. 59.

Now, with regard to the contention that inasmuch as a part of the benefit arising from the surrender of the lands mentioned in the treaty accrues to Ontario, that Province should relieve the Dominion from a proportionate part of the obligations thereby created, it appears to me that that consideration is not of itself sufficient to make the Province liable. If the Province had had any option in the matter, if it had been open to it to accept or decline such benefit, and it had accepted it, then the Province would have been liable for its fair proportion (1). But that is not the case. The burden of the Indian title was removed from these lands before it was determined whether any part of them was within the Province or not. When it was decided that a large portion of such lands was within the Province of Ontario there was nothing the Province could do but accept the lands and administer them free from such burden. In the *Ruabon Steamship Company, Lt*, v. *The London Assurance* (2), one of the cases on which Mr. Shepley relied, it was held that there is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit therefrom. And that principle is, I think, as clearly applicable to the transactions of the Dominion and Provincial Governments as it is to those which occur between individuals. If the Parliament of Canada should appropriate, and the Government of Canada should expend public moneys of the Dominion for Dominion purposes, with the result that a Province was benefited, and there was no agreement with the Province or request from it, then it would be clear that the Province was under no obligation to contribute to such expenditure, or to indemnify the Dominion against any part thereof. According to the contention of the Province of Ontario, as I understand it, the present case falls within that proposition.

(1) *Leigh* v. *Dickeson*, L. R. 15 Q. B. D. 60.

(2) [1900] App. Cas. 6.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

Equally it seems clear that if the Parliament of Canada should appropriate and the Government of Canada should expend the public moneys of the Dominion for a provincial purpose to the benefit of a Province, there being no agreement with the Province or request from it, no obligation would arise on the part of the Province to contribute towards such expenditure or to reimburse the Dominion for any part thereof. The principle would apply as well to expenditures made by a Province with the result that the Dominion as a whole was benefited. In all such cases the appropriation and expenditure would be voluntary and no obligation to contribute would arise. But the present case appears to me to differ from those stated in some material respects.

At the time when the treaty was negotiated the boundaries of the Province were unsettled and uncertain. The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That of course did not affect Ontario's title to such part of the lands claimed by the company as we were actually within the Province. But on the admission of Rupert's Land and the North Western Territory into the Union the Government of Canada acquired the right to administer all the lands that the company had a right to administer. And with respect to that portion of the territory which the company had claimed but which was in fact within the Province of Ontario, the Dominion Government occupied a position analogous to that of a *bonâ fide* possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in these lands could not with prudence be deferred until such boundaries were determined. It was necessary to the peace, order and good government of the country that the question should be

settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiation for the treaty without consulting the Province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection and did not ask to be represented in such negotiation. The case bears some analogy to one in which a person in consequence of unskilful survey, or in the belief that the land is his own, makes improvements on lands that are not his own. In such a case the statutes of the old Province of Canada made, and those of the Province of Ontario make, provision to protect him from loss in respect of such improvements, or to give him a lien therefor (1). The case, however, appears to me to bear a closer analogy to one in which a *bonâ fide* possessor or purchaser of real estate pays money to discharge an existing incumbrance or charge upon the estate having no notice of any infirmity in his title. In such a case, as stated by Mr. Justice Story in *Bright* v. *Boyd* (2) the possessor or purchaser was according to the principles of the Roman law entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him. And again, in the same case (3) Story, J., is reported as follows:—

"I wish in coming to this conclusion to be distinctly understood as affirming and maintaining the broad

(1) 59 Geo. 3, c. 14, s. 12; 12 Vict. c. 35, s. 49; C. S. U. C. c. 93, s. 53; R. S. O. (1877) c. 51, ss. 29 and 30; (1887) c. 100, ss. 31, 32; (1897) c. 119, ss. 31 and 32; 36 Vict. (Ontario) c. 22, s. 1; 40 Vict. (Ont.) c. 7, Schedule No. 114; R. S. O. (1877) c. 95, s. 4; (1887) c. 100, s. 30; (1897) c. 119, s. 30; *Gummerson* v. *Banting*, 18 Grant, 516; *Carrick* v. *Smith*, 34 U. C. Q. B. 399; *O'Connor* v. *Dunn*, 37 U. C. Q. B. 430; *Fawcett* v. *Burwell*, 27 Grant, 445; *Beaty* v. *Shaw*, 14 O. A. R. 600.

(2) 1 Story, 497, 498.

(3) 2 Story, 607.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration without notice of any infirmity in his title has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law, and it has the most persuasive equity, and I may add common sense and common justice, for its foundation. *The Betterment Acts* (as they are commonly called) of the States of Massachusetts and Maine, and of some other States, are founded upon the like equity, and were manifestly intended to support it even in suits of law for the recovery of the estate."

In *Gummerson* v. *Banting* (1) Mr. Chancellor Spragge stated that he entirely agreed with Mr. Justice Story that the principle cited from the Roman law had the most persuasive equity and common sense and justice for its foundation. In the latter case the learned Chancellor held that the rule that a party in good faith making improvements on property which he has purchased, will not be disturbed in his possession, even if the title prove bad, without payment for his improvements, will be enforced as well where the purchaser is plaintiff as where he is defendant, and that although no action has been brought to dispossess him. This decision was the subject of some comment in *Beaty* v. *Shaw* (2) in the Court of Appeal for Ontario, where Burton, J.A., stated that he could find no case in Ontario before *Gummerson* v. *Banting*, and no case at all in England, where a stranger who has entered upon land, even under colour of title, can, as against the true owner, claim to be paid for his improvements. He states his view of the law in the following terms (3):

(1) 18 Grant 522.

(2) 14 O. A. R. 600.

(3) Id. p. 609.

"No doubt by the rules of the civil law, the possessor of the property of another who has made improvements in good faith, believing himself to be the owner, was entitled to be paid for such improvements; and this law has been adopted by many countries whose laws are based upon the civil law; thus it has been acted upon in Scotland, and in some instances, but not universally, in America; but we do not derive our laws from that source; and I know of no instance in which by the law of England the principle has been adopted except in the action for mesne profits, where the party has been sometimes allowed to recoup himself by setting off the value of the improvements, and in cases where the legal title has been in the person making the improvements and the equitable title in another, who is obliged to resort to a court of equity for relief; and where the court then acts upon the principle that the party who comes to court to seek equity must himself be willing to do what is equitable." It appears therefore that if the question in issue were to be determined by analogy to the law of the Province of Ontario applicable to individuals, the Province could not maintain its counterclaim for the moneys which the Dominion collected as revenue from the disputed territory without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the charges incurred in extinguishing the burden of the Indian title; but that it is, to say the least, extremely doubtful if this equity could be enforced in an action by the Dominion against the Province.

The question, however, does not rest there. In *The St. Catherine's Milling and Lumber Company* v. *The Queen* (1), Lord Watson, dealing with this very question of the liability of the Province to contribute to the Dominion in respect of the charges mentioned, said:—"Seeing that the benefit of the surrender accrues to her,

(1) 14 App. Cas. 60.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

"Ontario must of course relieve the Crown and the "Dominion of all obligations involving the payment of "money which were undertaken by Her Majesty, and "which are said to have been in part fulfilled by the "Dominion Government." The Dominion relies strongly upon this expression of their lordships' views as conclusive of the question at issue. On the other hand, for the Province it is argued that the opinion expressed is obiter, that it formed no part of the judgment in that case, and that the facts proved in this case differ materially from those that were before their lordships in the case referred to So far as the questions in this case relate to the extent to which the Province is liable to contribute to the expenses incurred by the Crown in fulfilment of the obligations created by the treaty, this case no doubt differs materially from *The St. Catherine's Milling and Lumber Company's* case. But with respect to the principal question at issue, namely, whether the Province is liable to contribute anything, this case presents, I think, no new fact or aspect. The Province's main defence here is that it was not a party to the treaty. In the case for the appellants in *The St. Catherine's Milling and Lumber Company's* case, paragraph 6, it was stated that neither the Lieutenant-Governor of Ontario, nor the Province of Ontario, were parties to the treaty. And in the 21st paragraph of the case of the respondent the ground was taken that the Province, not having been a party to the treaty, was not bound by it. With regard to the formal judgment in the case last referred to, it is to be observed that it was entered up between the original parties to the action on consideration of the question as to whether the judgment of the Supreme Court of Canada ought to be affirmed or not. By the order which gave the appellants leave to bring the judgment of that court under review, Her Majesty was pleased to direct that the Government of the Dominion should be at liberty to intervene in the

appeal, or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to take the first of these courses (1), with the result that between the Dominion and the Province there was no formal judgment of the questions at issue between them. It was, however, determined that the ceded territory within the Province of Ontario belonged to the Province subject to "an interest other than that of the Province in the same"; that is, that it was subject to the burden of the Indian title that the Crown upon the advice of its Dominion ministers extinguished; and that as the benefit of that surrender accrued to the Province it must relieve the Crown and the Dominion of the obligations involving the payment of money which were undertaken by Her Majesty and fulfilled by the Dominion Government. In *The St. Catherine's Milling and Lumber Company's* case the Province of Ontario stood in the position of a plaintiff; and as between the Province and the Dominion the views of their lordships as to the Province's liability to indemnify the Dominion may, I think, with fairness be taken as a part or condition of the judgment in favour of the Province, although such views found no place in the formal judgment pronounced. But however that may be, it is, I think, proper that this court should give effect to the view that their lordships expressed. I therefore answer in the affirmative the question as to whether the Province of Ontario is liable to indemnify the Dominion against any portion of the expenditure incurred in discharge of the obligations created by the North West Angle Treaty No. 3.

The obligations involving the payment of money which the Crown incurred by this treaty, and which have been discharged by the Government of Canada, are as follows:—

(1) 14 App. Cas. 53.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

First, with a view of showing her satisfaction with the behaviour and good conduct of Her Indians, and in extinguishment of all claims theretofore preferred, Her Majesty, through Her Commissioners, made them a present of twelve dollars for each man, woman and child belonging to the bands represented.

Secondly. Her Majesty agreed to maintain schools for instruction in such reserves as to the Government of Canada might seem advisable, whenever the Indians of the reserves should desire it.

Thirdly. Her Majesty agreed that no intoxicating liquor should be sold on any reserve, until otherwise determined by the Government of Canada; and that laws to protect the Indians from the evil influence of the use of intoxicating liquors should be strictly enforced.

Fourthly. That each Indian person inhabiting the tract surrendered should be paid by Her Majesty the sum of five dollars yearly.

Fifthly. That the sum of fifteen hundred dollars per annum should be expended yearly by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians.

Sixthly. Her Majesty agreed to supply to the Indians certain articles and animals to assist them in their work, and for the encouragement of the practice of agriculture among them; and

Seventhly. Her Majesty agreed that each duly recognized chief should be paid a salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, should be paid fifteen dollars per annum, and that each chief and subordinate officer should also receive once in every three years a suitable suit of clothing; also that each chief should receive in recognition of the closing of the treaty a suitable flag and medal.

Omitting interest, the following is a brief summary of the claim made by the Dominion against the Province

for moneys expended under the treaty down to the year 1902:—

For annuities paid	$ 465,376 00
For cattle	17,344 08
For farming implements	6,724 53
For tools	3,301 99
For ammunition and twine	43,500 00
For clothing	23,285 37
For schools	84,221 64
For seeds	8,616 06
For provisions and presents supplied at the treaty negotiations and at the first payment of annuities	21,296 96
For surveys	25,242 53
For salaries to agents	78,886 10
For agents' travelling expenses	35,409 62
For office rent	9,984 99
For suppression of the liquor traffic	6,206 96
	$ 829,396 83

Now it is to be observed that whatever moneys have been expended under this treaty by the Dominion Government have been expended in respect of the Indians inhabiting a tract of land part of which only is within the Province of Ontario, and it is suggested by Mr. Newcombe for the Dominion that the Province should contribute to such expenditure in the proportion that the area of the surrendered territory within the Province bears to the whole area surrendered by the treaty. There is no other suggestion on that branch of the case, and I do not see that any fairer or better rule could be adopted.

Then in regard to the claim made by the Dominion, the Province, as an alternative defence, alleges that if it

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

should be held that the Province is under any liability to indemnify the Dominion it is not liable except where there has been a money payment, undertaken by the Dominion under the terms of the treaty, made to the Indians wholly as a consideration for the ceding of their claims to the territory covered by the treaty. In a general way, with some slight modification, that proposition may, I think, be accepted. It seems equitable that the Dominion should recover from the Province a proportionate part only of such expenditure under the treaty as is fairly referable and attributable to the discharge of the burden of the Indian title in the lands described in the treaty; and that the Dominion should not recover from the Province any portion of the moneys expended in the extinction of prior claims of the Indians, or in respect of obligations resting upon the Crown and the Dominion in relation to the administration of Indian affairs. It is argued for the Province that the question of determining what part of the expenditure made by the Dominion and now claimed from the Province is referable to the extinguishment of the Indian title, is so difficult and the matter so indefinite and uncertain that the Dominion cannot, or ought not, to recover anything. I agree that the question presents difficulties, and that it is one which would be more easily dealt with by reasonable negotiation and agreement between those who represent the parties than by a judicial determination. But the fact that the enquiry is difficult affords no reason for the court refusing to attempt its solution if the parties cannot themselves agree. The enquiry on this branch of the case was not concluded. It is open for further evidence, and of course for further argument. The enquiry will be continued before the court itself or by a reference, as may be subsequently determined. In the meantime it may be taken for granted that the amount to which the Dominion will be entitled as against the Province

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment

will exceed greatly the sum necessary to allow an appeal from the decision upon the main question discussed.

On the claim of the Dominion of Canada against the Province of Ontario, there will be judgment for the Dominion, and a declaration that the Province is, in respect of the obligations incurred by the Crown and the Dominion under the North West Angle Treaty No. 3, which involve the payment of money, and which are referable to the extinguishment of the Indian title in the lands described in the treaty, liable to contribute to the payments of money made by the Dominion thereunder in the proportion that the area of such lands within the Province bears to the whole area covered by the treaty.

Judgment accordingly.

Solicitor for the claimant: *E. L. Newcombe.*

Solicitor for the respondent: *Sir Æmilius Irving.*