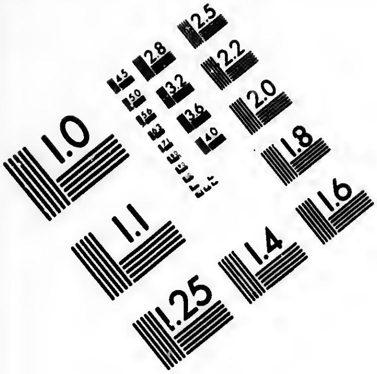

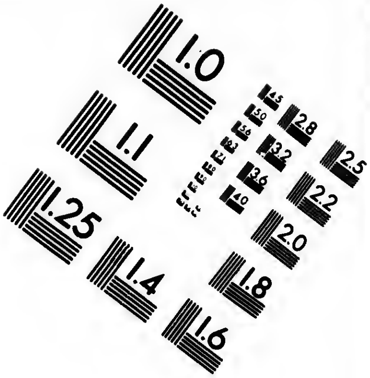

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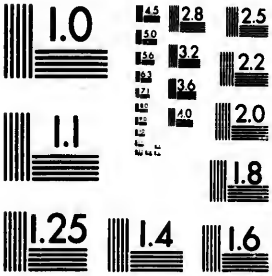

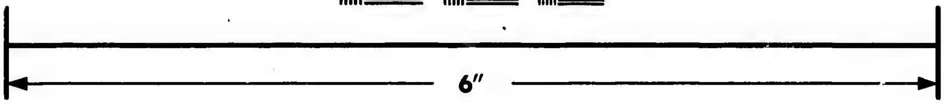

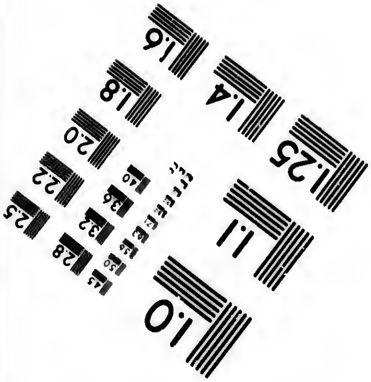

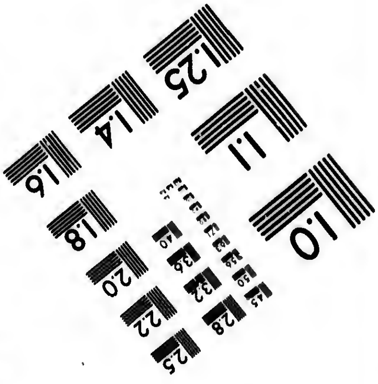

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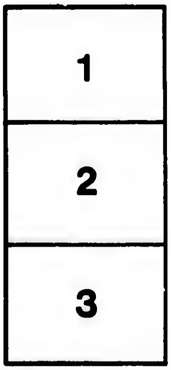

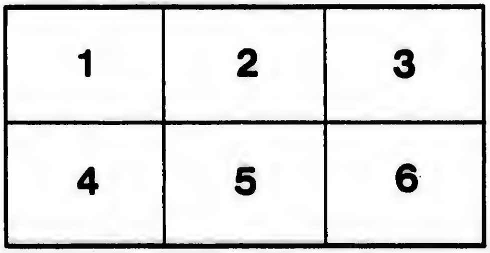

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ARGUMENT

BEFORE THE

Judicial Committee of the Privy Council of the Special Case

AS TO THE

VALIDITY OF THE AWARD OF THE 3rd SEPTEMBER, 1870

RESPECTING THE

Division and Adjustment of the Debts, Credits, Liabilities, Properties and Assets of the Province of Canada

Under the 142nd Section of the British North America Act, 1867.

OTTAWA.
PRINTED AT THE OFFICE OF THOBURN & CO., ELGIN STREET
1895

CORRIGENDA.

Page 34, line 11, for *Bosanquet and Fuller*, read *Bosanquet and Puller.*
Page 56, last line, for *represents* read *represent.*

Rec. Oct. 4, 1903.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Council Chamber, Whitehall,

Wednesday, February 13th, 1878.

Present—

The Lord Chancellor,
The Duke of Richmond,
Sir James W. Colvile,
Lord Selborne,
Sir Barnes Peacock,
Sir Montague E. Smith,
Sir Robert P. Collier.

IN THE MATTER OF AN ARBITRATION AND AWARD

BETWEEN

THE PROVINCE OF ONTARIO

AND

THE PROVINCE OF QUEBEC.

[Transcript from Messrs. Marten and Meredith's Shorthand Notes.]

The Attorney-General:—In this case I think both sides claim the right to begin. I do not know what your Lordships will decide about it.

The Lord Chancellor:—Have not you agreed among yourselves which shall begin?

The Attorney-General:—No. My friend Mr. Benjamin, who appears for the Province of Quebec, claims the right to begin, and I also claim the right to begin. Perhaps my learned friend will argue that this is a case in which he seeks to disturb an award, and that *primâ facie* the award is to be considered good; but really and truly it is not an appeal against an award. An award has been made, and the Province of Ontario say that that award is a good award; the Province of Quebec say that it is not a good award. This is a proceeding in fact to substantiate the award. It is not really and truly an appeal. I do not know whether in a case of this description your Lordships will allow a reply. If your Lordships do not allow a reply, I should not contest the matter with my learned friend.

(Their Lordships deliberated.)

The Lord Chancellor:—Their Lordships are disposed to treat the award as an act that has been done, and to hear any one who wishes to object to it.

The Attorney-General:—If your Lordship pleases.

Mr. Benjamin:—May it please your Lordships. I may state that the origin

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of this proceeding occurred in this way. An arbitration having been had under the British North America Act of 1867, the Province of Quebec by a joint address to the Legislative Assembly complained to the Governor-General of the proceedings during the arbitration; alleged that they were illegal and void. They complained of the award which had been made by two of the arbitrators under the Act, and asked the interference of the Federal Government of Canada to do them justice, complaining that the award was not only illegal but unjust to them, having been made by two arbitrators without any representation on their part at the time of the award. Upon that the Governor-General, consulting the Minister of Justice of the Colonies, came to the conclusion in his report that there was no power in him to interfere in the matter, but advised that the proper mode of procedure would be to form a special case which the two Colonies should submit for the decision of Her Majesty with the aid of Her Privy Council and on that recommendation the case has been formed and is now brought before your Lordships.

My Lords, the controversy can be most conveniently placed before your Lordships by calling your attention first to the particular sections of the Act for the Union of the Provinces of the 29th March, 1867,—the particular sections of that Act which are involved in the controversy. It is the 30th Victoria, cap. 3. The 4th section of the Act provides that "the subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union; that is to say, on and after the day appointed for the Union taking effect after the Queen's proclamation, and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act." Then the 6th section provides that "the parts of the Province of Canada, as it exists at the passing of this Act which formerly constituted respectively the Province of Upper Canada and Lower Canada, shall be deemed to be severed and shall form two separate Provinces; the part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario, and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec." Then I will ask your Lordships' attention to sections 107 to 113, which have a very important bearing on the case. Section 107 is "All stocks, cash, bankers' balances and securities for money belonging to each Province enumerated in the 3rd schedule to this Act shall be the property of Canada." 109—"All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia or New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same." One word if your Lordships please on that section. It begins by speaking of lands in the Provinces of Canada and Nova Scotia, but as the Province of Canada was composed of the two Provinces which now form Ontario and Quebec, it goes on to provide that as regards what is in Canada, the lands, mines, royalties and minerals, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which they respectively are situate. Then section 110 is—"All assets connected with such portions of the public debt of each Province as are assumed by that Province." Now the 111th, 112th and 113th sections are really the crucial tests. Section 111 is—"Canada shall be liable for the debts or liabilities of each Province existing at the Union." Section 112 is "Ontario and Quebec conjointly shall be liable to Canada for the amount, if any, by which the debt of the Province of Canada exceeds at the Union 62,500,000 dollars, and shall be charged with interest at the rate of 5 per cent. per annum thereon." Section 113 is—"The assets enumerated in the 4th schedule to this

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Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly." The next two sections are the 117th and 118th, which I think bear upon the subject. "The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the rights of Canada to assume any lands or public property required for the fortifications or the defence of the Country. The following sums shall be paid yearly by Canada to the several Provinces for the support of their Governments and Legislatures: Ontario, 80,000 dollars; Quebec, 70,000 dollars; Nova Scotia, 60,000 dollars; and New Brunswick, 50,000 dollars; making 260,000 dollars, and an annual grant in aid of each Province shall be made equal to 80 cents per head of the population, as ascertained by the Census of 1861, and in the case of Nova Scotia and New Brunswick by each separate decennial Census until the population of each of those two Provinces amounts to 400,000 souls, at which rate such grant shall thereafter remain. Such grant shall be in full settlement of all future demands on Canada and shall be paid half-yearly in advance to each Province, but the Government of Canada shall deduct from such grants as against any Province all sums chargeable as interest on the public debt of that Province in excess of the several amounts stipulated in this Act." Then comes the section 142, which is the last remaining section which your Lordships will find it necessary to examine. "The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada, and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met, and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec."

Before proceeding to read the case I would call your Lordships' attention specially to the peculiar language of section 142 as compared with the language of sections 112 and 113. Sections 112 and 113 treat of the debts and assets of Ontario and Quebec.

Lord Selborne:—Those are cases of conjoint liability. That can have nothing to do with the division and adjustment, can it?

Mr. Benjamin:—I will call your Lordships' attention to the difference in the phraseology. The 142nd section speaks of the division and adjustment of the debts and assets of Upper Canada and Lower Canada, not of Quebec and Ontario, and provides that that adjustment and division of the debts shall be made by three arbitrators, one for each Province, one by the Government of Ontario, the other by the Government of Quebec, and the third by the Government of Canada. I shall revert to the point, but I will call your Lordships' attention to it at the moment, especially with this view. We think that the meaning of that is that by Articles 112 and 113 the debts and assets of the Province of Canada, to be composed of Quebec and Ontario, are to be divided. Ontario and Quebec are jointly liable to Canada for the excess, over 62 millions, of the public debt, the assets belonging to Quebec and Ontario conjointly.

The Lord Chancellor:—That is the assets in the 4th schedule?

Mr. Benjamin:—Yes; and then as to all other matters, and particularly as to properties and assets of Upper Canada and Lower Canada, which are these distinguished from Ontario and Quebec.

Lord Selborne:—But do not they mean the same thing?

Mr. Benjamin:—We argue that they do not, that the words "Upper Canada" and "Lower Canada" have reference to the existence of the debts and assets at the time of the Union of Upper and Lower Canada into the Province of Canada, because your Lordships are no doubt aware historically that in 1790 Upper and Lower Canada were separate. In 1840 they were united in the Province of Canada

and in 1867 they were separated, and the question would naturally arise what was to become of the debts and assets of the two Provinces as they existed before the time when the two Provinces were united by the Act of 1840, because, as your Lordships will perceive presently by reference to that Act, the Act of 1840 made no provision in relation to the debts of Upper Canada and Lower Canada beyond providing for the payment of interest on those debts by the general Province of the two United Provinces.

Having put your Lordships in possession simply of the legislation upon the subject, it becomes necessary now to call your Lordships' attention in the order of date to what occurred in the execution of this Act of Parliament.

LORD SELBORNE:—I do not know whether this is a convenient time, but I should like to ask you whether there is any general law of the Province or of the Colony as to arbitrations?

MR. BENJAMIN:—The law of Lower Canada would be the French Civil Law and the law of Upper Canada would be the English law.

SIR J. W. COLVILE:—It would be determined now by the Civil Code of Canada.

MR. BENJAMIN:—Yes, now it would be. The Civil Code is the Code of Lower Canada, of Quebec.

LORD SELBORNE:—Do I understand you to say that there was a difference between the law applicable to one Province and the others?

MR. BENJAMIN:—This one is governed by the Civil Law and the other one by the Common Law.

LORD SELBORNE:—And the law as to arbitration is different in the two.

MR. BENJAMIN:—I think there is some little difference, but very little. Our contention is that this being an Act of Parliament the sections of the Act are to be interpreted according to the law of England.

LORD SELBORNE:—According to the law of England?

MR. BENJAMIN:—Yes, an Act of the British Parliament is to be construed according to the law of England.

LORD SELBORNE:—Do you mean that if there were one law as to arbitrations enforced in Canada and another in England, the English law as to arbitrations is to be introduced here?

MR. BENJAMIN:—That is what I should think. Before proceeding with the discussion of the questions of law which are raised by the Special Case as stated, I think I ought to call your Lordships' attention first to the history of the proceedings under the Act. At page 5 of the Case your Lordships will find the very first act done which is the appointment of Mr. Macpherson as arbitrator for Ontario, which was on the 13th January, 1868. The appointments were by patents from the Crown, and it will be necessary to read the terms of the patent or commission by which the arbitrators were appointed, because as your Lordships would immediately perceive much of the contention in this case must turn on the terms of these patents. According to our contention they admit of no doubt. "Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith, etc., etc. To the Honourable David Lewis Macpherson, of the City of Toronto, Esquire, and to all whom these presents shall come, Greeting: Whereas in and by the 142nd section of the British North America Act of 1867, it is enacted that the division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada should be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec and one by the Government of Canada, and that the selection of the arbitrators should not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec had met, and that the arbitrator chosen by the Government

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of Canada should not be a resident either in Ontario or Quebec. And whereas the Parliament of Canada and the Legislatures of Ontario and Quebec have met, and it is right and convenient that the said division and adjustment should be proceeded with. Now Know Ye that reposing especial trust and confidence in the loyalty, ability and integrity of you, the said David Lewis Macpherson, We, of our special grace and of our will and pleasure, do by these presents nominate, constitute and appoint you, the said David Lewis Macpherson, to be the arbitrator for and on behalf of the Government of our Province of Ontario, touching the said matters under the statute, and we do hereby confer upon you full power and authority as aforesaid to act together with the other arbitrators in the said recited section referred to, and in and about the division and adjustment of the debts credits, liabilities, properties and assets of Upper Canada and Lower Canada, and concerning every matter and thing relating thereto, and to adjudicate and award thereon by virtue of the same British North America Act of 1867, and according to the true intent and meaning thereof, to have and to hold the said office of arbitrator as aforesaid during our pleasure." Then the Great Seal is by order of the Queen affixed. Now, my Lords, on the 30th January, at page 4, is the appointment by Her Majesty of Judge Day for the Province of Quebec, and the language is not quite the same. The grant of the power is in line 33, "To have, hold, exercise and enjoy the said office of arbitrator, chosen by the Government of Quebec as aforesaid unto you, the said Charles Dewey Day, with all and every the powers, authorities, privileges, emoluments and advantages to the said office by law appertaining during our royal pleasure."

Lord Selborne:—You do not say that that is a difference of substance, do you?

Mr. Benjamin:—No, my Lord; I am pointing out that so far as Quebec is concerned, there is no clause in the commission or the patent to the arbitrator for Quebec confining his action in words to acting together with the other arbitrators, but it is a general power to do what as arbitrator he has a right to do. Whereas in the case of the Province of Ontario he is specially confined to acting together with the other arbitrators. So that if there were a question whether by law the meaning was the same, it is at all events certain that the expression in the commission of the arbitrator for Ontario points out his duties. Well, my Lord, these two commissioners having been appointed, Her Majesty appointed on the 23rd May following an arbitrator for Canada, and his commission is at page 3. The terms, after reciting the Acts, are at about line 33 or 34, "Do by these presents nominate, constitute and appoint you, the said John Hamilton Gray, to be the one arbitrator chosen by the Government of Canada in pursuance of and under the authority of the said one hundred and forty-second section of the British North America Act, 1867, and for and on behalf of the Government of Canada to arbitrate together with the arbitrators chosen by the Governments of Ontario and Quebec respectively in all and every the matters referred to in and by the British North America Act, 1867, to such arbitrators. And we hereby confer upon you full power and authority as such arbitrator as aforesaid, to act together with the other arbitrators in the said recited section referred to, in and about the division" and so forth. Then at the top of page 4 "to have and to hold the said office of arbitrators during our pleasure." The three arbitrators, therefore, by the terms of the patents are to act during the pleasure of the Crown. It is especially pointed out in the commissions of the arbitrator for Ontario and of the arbitrator for Canada that they have power to act together with the other arbitrators appointed and in the arbitrator's appointment for Canada it is called to his attention that he is to act for and on behalf of the Government of Canada; our contention being that there were three parties to the arbitration, Upper Canada, Lower Canada or rather Quebec and Ontario and

Canada, the Dominion, that the Dominion had an interest in the arbitration which it was intended should be protected.

Now, my Lords, the commissioners having been appointed, I suppose in consequence of the necessity of preliminary enquiry, did not meet until the 31st of August, 1869. Their first meeting is found at page 2, line 35. "The said arbitrators having taken upon themselves the burden of the said arbitration held their first meeting in the committee room No. 8 of the Parliament Buildings, House of Commons side, in the City of Ottawa, at noon, on the 31st day of August, 1869." There were present the three arbitrators. Very little was done except preliminary proceedings, and after some formal meetings upon various points we find at the 7th meeting on the 27th October, at the foot of page 8, an order was made that "the counsel for the Provinces of Quebec and Ontario shall prepare and print their respective cases and communicate them to each other for such observations in response as they may deem necessary." Now, my Lords, at the 12th, 13th and 14th meetings, arguments of counsel were heard as to the principle on which the arbitrators should proceed, and then an investigation and a discussion took place between the commissioners until we come to the 19th meeting, on the 28th May, 1870, which is at page 13. "The Honourable Charles Dewey Day submitted the following propositions:—

"1. It is proposed that the relation of Upper and Lower Canada created by the Union Act of 1840, be regarded as an association in the nature ot a universal "partnership" which is well known to the Civil Law, and that the division and adjustment of the debts and assets under the British North America Act, 1867, be made according to the rules which govern in such associations, in so far as they can be made to apply. 2. It is proposed that the state of indebtedness of each of the Provinces of Upper and Lower Canada at the time of the Union, in 1841, be taken into consideration by the arbitrators with a view to charge the Provinces of Ontario and Quebec respectively with the debt due by Upper Canada and Lower Canada respectively at that time, and that the remainder of the surplus debt (excess of debt of the late Province of Canada over and above $62,500,000) after such debts have been deducted from it (and charged to the respective Provinces) be equally divided between the said Provinces. 3. It is proposed that the assets specified in the fourth schedule to the British North America Act, 1867, and all other assets to be divided and adjusted under the authority of that Act be divided equally according to their value". That proposition was negatived, the other two arbitrators voting against it. So the whole three propositions of the Honourable Charles Dewey Day were rejected. The Honourable David Lewis Macpherson then submitted the following grounds of dissent to the propositions of the Honourable Charles Dewey Day, which were entered on the minutes of the proceedings of the arbitrators, viz: "1. Because in his opinion the Union of 1841 between Upper Canada and Lower Canada was not analogous to an ordinary association or partnership between individuals, and that the rules of law applicable to the latter are not applicable to a political Union affected by the authority of a parliamentary power between the two Provinces. 2. Because in his opinion the arbitrators have no authority to inquire into or consider the financial condition of Upper Canada and Lower Canada respectively, anterior to or at the time of their union in 1841 with a view of rectifying, at the expense of Ontario, any supposed advantage alleged by the counsel for Quebec, alleged unjustly in his (Mr. Macpherson's) opinion to have accrued to Upper Canada under the Union Act of 1840. 3. Because in his opinion, if the arbitrators were to do so, they would transcend their power and would inflict gross injustice on Ontario by imposing upon that Province eleven fourteenths of the whole surplus debt, that is the excess of the debt of the late Province of Canada over and above $62-

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500,000, or reducing it to figures and assuming the excess of debt to be $10,500-000 it would cast upon Ontario the sum of $8,250,000 and upon Quebec $2,250,000. 4. Because, in his opinion, while the propositions of the Honourable Charles Dewey Day profess to favor an equal division of the debts and assets, the result of a division under them would be most unequal and unjust, inasmuch as Quebec would get one-half of the value of the assets, while required to bear only three-fourteenths of the surplus debt". The Honourable David Lewis Macpherson then submitted the following proposition, namely: "That the division and adjustment of the surplus debt and of the assets owned conjointly by Ontario and Quebec, be upon the basis of the population of those Provinces as shown by the census of 1861," on that question the majority was against him, so his proposition was rejected, and then the Honourable John Hamilton Gray then expressed his reasons for dissenting from the propositions laid down by the Honourable Charles Dewey Day which were entered on the minutes of the proceedings of the arbitrators as follows:

THE LORD CHANCELLOR:—Do you consider that we should have anything to say to the merits of these different propositions?

MR. BENJAMIN:—No, my Lord; but I think your Lordships will find as you go on that you would like to know how they did proceed. His reason was, "Because for the reasons already assigned, he thinks the Union of Upper and Lower Canada by the Imperial Act of 1840 cannot be likened to a partnership or mercantile association of any character, and that the arbitrators have no power and ought not to enter into the consideration of the political or financial state of Upper or Lower Canada previous to the Union or the equivalents or inducements influencing the Imperial Government or the Provinces which led to it. That the Union of 1841 in pursuance of that Act concludes all enquiry into matters antecedent thereto, and that from that time for all purposes now under their consideration Upper and Lower Canada must be regarded as one, and the present division and adjustment be decided on grounds entirely irrespective of the position of either Upper or Lower Canada at the time of the Union."

He then submitted the following proposition, "That the division and adjustment of the surplus debt and assets, owned conjointly by Ontario and Quebec, and enumerated in schedule four of the British North America Act, 1867, be based upon the origin of the debts, and that the expenditure made in creating each of said assets be taken as the value thereof, the arbitrators having no right to enquire into or adjudicate upon the policy or advantages of expenditures made by authority of Parliament." That is a matter to which I shall have occasion to call your Lordships' attention presently as being a mistake as to his authority and an abnegation of functions which it was his duty to perform. "Upon the question on this proposition being put, it was affirmed on the following division: For the proposition, the Honourable John Hamilton Gray and the Honourable David Lewis Macpherson; against it, the Honourable Charles Dewey Day. So the proposition of the Honourable John Hamilton Gray passed in the affirmative. The Honourable David Lewis Macpherson at the same time submitted the following memorandum to be entered on the minutes of the proceedings of the arbitrators, which was accordingly done, viz: "That while adhering to his preference for population as the basis for division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada, he nevertheless assents to Colonel Gray's proposition with the view of arriving at some basis, and believing that under it a just award may be made." It was then ordered that the following judgment be communicated to the counsel of both Provinces:

JUDGMENT.

The arbitrators under the British North America Act, 1867, having carefully

considered the statements made and the propositions submitted respectively by and on behalf of the Provinces of Ontario and Quebec, and having heard counsel at length thereupon, do award and adjudge as follows: “1st. That the Imperial Act of Union 3rd and 4th, Victoria, Chapter 35, did not create in fact or in law any partnership between Upper and Lower Canada, nor any such relations as arise from a state of co-partnership between individuals. 2nd. That the arbitrators have no power or authority to enter upon any enquiry into the relative state of the debts and credits of the Provinces of Upper and Lower Canada respectively, at the time of their union in 1841, into the Province of Canada. 3rd. That the division and adjustment between Ontario and Quebec of the surplus debt beyond $62,500,000, for which under the 112th section of the B. N. A. Act, 1867, Ontario and Quebec are conjointly liable to Canada, shall be based upon the origin of the several items of the debts incurred by the creation of the assets mentioned in the fourth schedule to that Act and shall be apportioned and borne separately by Ontario and Quebec as the same may be adjudged to have originated for the local benefit of either; and where the debt has been incurred in the creation of an asset for the common benefit of both Provinces and shall be so adjudged, such debt shall be divided and borne equally by both. 4th. That where the debt under consideration shall not come within the purview of the fourth schedule, whether the same shall or shall not have left an asset, reference shall be had to its origin under the same rule as in the last preceding section laid down. 5th. That the assets enumerated in the fourth schedule to the B. N. A. Act, 1867, and declared by the 113th section to be the property of Ontario and Quebec conjointly shall be divided and adjusted and appropriated or allowed for upon the same basis. (Now, I call your Lordships' attention especially to this.) 6th. That that expenditure made by the creation of each of the said assets shall be taken as the value thereof, and where no asset has been left, the amount paid shall be taken as the debt incurred, the arbitrators having no right to enter into or adjudicate upon the policy or advantages of expenditures or debts incurred by authority of, and passed upon by, Parliament. 7th. It is therefore ordered that in accordance with the above decision, the counsel for the said Provinces of Ontario and Quebec, do proceed with their respective cases.” Your Lordships perceive that this is signed by only two of the arbitrators, Gray and Macpherson. They adjourned to Montreal on some future day to be agreed upon, and then the Honourable Charles Dewey Day, subsequently to the adjournment, requested that the decision arrived at should not be communicated to counsel until he could be heard from in a few days. Subsequently, the Honourable Charles Dewey Day sent to the other two arbitrators, to be entered upon the minutes of the proceedings of the arbitrators, his dissent from the foregoing judgment or decision, which is as follows:—

DISSENT of the Honourable Charles Dewey Day to the foregoing decision of the arbitrators. “The undersigned arbitrator dissents from the foregoing award and judgment of the Honourable D. L. Macpherson and the Honourable J. H. Gray, two of the arbitrators appointed under the B. N. A. Act, 1867: 1st. Because the said award and judgment purports to be founded on propositions which in the opinion of the undersigned are erroneous in fact and in law, and inconsistent with the just rights of the Province of Quebec. 2nd. Because the relation of the Provinces of Upper and Lower Canada, created by the Union of 1841, ought to be regarded as an association in the nature of a universal partnership, and the rules for the division and adjustment of the debts and assets of Upper and Lower Canada under the authority of the said Act, ought to be those which govern such association, in so far as they can be made to apply in the present case. 3rd. Because the state of indebtedness of each of the Provinces of Upper and Lower Canada at the time of the

Union of 1841 ought to be taken into consideration by the arbitrators with a view to charge the Provinces of Ontario and Quebec respectively with the debt due by each of the Provinces of Upper and Lower Canada at that time,and the remainder of the surplus debt of the late Province of Canada ought to be equally divided between the said Provinces of Ontario and Quebec. 4th. Because the assets specified in schedule 4 and all other assets to be divided under the authority of the said Act, ought to be divided equally according to their value," and therefore, he presents an award and judgment which he proposes as the one that should be the award. Then at the top of page 18, as part of his award in relation to the objection to the authority of the arbitrators, on lines 6 and 7, he proposes to find "that they have authority and are bound by the provisions of the said Act to inquire into the state of the debts and assets of the said Provinces." Then My Lords on the 5th July we have the 20th meeting of the arbitrators. In that we find communicated to them from the Government of Quebec a statement of a report of the Committee. The Honourable John Hamilton Gray submitted a communication from the Government of Quebec that had been addressed to each of the arbitrators separately which was read and is as follows: "Copy of a report of a Committee of the Honourable the Executive Council approved by His Excellency the Lieutenant Governor-in-Council, on the 6th day of June, 1870, No. 131. On the requirements of the B. N. A. Act, 1867, respectively, the judgment of the arbitrators, the Honourable the Treasurer of the Province reports that it is the opinion of the Law Officers of the Crown that whereas the 142nd section of the B. N. A. Act of 1867 enacts that the division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, it is essential to the validity of any decision to be given by such arbitrators, that their judgment should be unanimously concurred in. He, therefore, recommends that a despatch be transmitted to His Excellency the Governor-General, with the views of this Government and requesting that no judgment of the said arbitrators which is not so unanimously concurred in, be received." Upon that, at page 19, line 10, it is stated, "after the reading of the foregoing papers an irregular discussion took place between counsel on both sides, as to the order of proceedings in which considerable time was spent without any definite conclusion having been arrived at. The arbitrators then adjourned to meet again at the same place the next day at 11 o'clock a. m." Now we have what occurred the next day. "The arbitrators met at the place of their last preceding meeting on Wednesday, the 6th day of July, 1870, pursuant to adjournment. All the arbitrators were present, as also all the parties for Ontario and Quebec respectively as were present at the last preceding meeting. The Honourable J. Hillyard Cameron called upon the arbitrators to pronounce their decision upon the points argued before them in the month of February,1870, and upon which it was understood a judgment would be delivered at the present meeting. The Honourable Mr. Irvine demanded that before any decision on these points was delivered, counsel on behalf of Quebec should be heard on the point of "unanimity" raised by the Government of Quebec. After hearing argument of counsel on both sides on this point, the arbitrators delivered their opinions *seriatim*. The Honourable Charles Dewey Day was of opinion that counsel should be heard on the question of unanimity before the formal announcement of the said decision. The Honourable David Lewis Macpherson was of opinion that the decision should be announced at once. The Honourable John Hamilton Gray concurred in the views of the Honourable Charles Dewey Day that before the decision was announced, the argument of counsel should be heard on the question of unanimity. A majority deciding in favor of the proposition of Quebec, the argument was proceeded with. Messrs. Ritchie and Irvine were heard on behalf of Quebec, and Messrs. Cameron and Wood on behalf of Ontario; and Mr. Irvine was heard in reply"

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THE LORD CHANCELLOR:—What was that about?

MR. BENJAMIN:—That they would hear the question of unanimity argued before delivering their judgment. Mr. Cameron asked them to proceed to deliver their judgment. Your Lordships will remember that it had been signed by two, but held back at the request of Mr. Day. He then asked them to proceed to deliver their judgment, and Mr. Irvine said, you must first determine whether such a judgment is to be unanimous or not, and they said they would hear the argument on that question of unanimity first.

Then, my Lords, at the 24th meeting, which is at page 20, on the 9th July, the important proceedings took place in relation to which the questions before your Lordships have now finally arisen. "The Honourable John Hamilton Gray, the arbitrator appointed by the Dominion, then read the following opinion respecting the delivery of the judgment or decision of the arbitrators on the points argued in the month of February last, as follows:

LORD SELBORNE:—There had been an argument on the question of unanimity.

MR. BENJAMIN:—Yes. Your Lordships will see that at the 23rd meeting the arbitrators announced that there was a difference of opinion between them respecting the delivery of any preliminary judgment, the arbitrator for Ontario contending that the judgment should be delivered, and the arbitrator for Quebec being of opinion that it should be reserved. The arbitrator appointed for the Dominion desired an adjournment to the following day. Then we come to the next day, the 24th meeting, on the 7th July, 1870, at 11 o'clock. "The Honourable John Hamilton Gray, the arbitrator appointed by the Dominion, then read the following opinion respecting the delivery of the judgment or decision of the arbitrators on the points argued in the month of February last, as follows:—

OPINION OF THE ARBITRATOR APPOINTED BY THE DOMINION GOVERNMENT.

"In deciding on the point of difference between my two colleagues, it is necessary to recur to certain facts. In the arguments which took place at Ottawa, in February last, upon the different modes for the adjustment and division of the debts and assets referred to us under the 142nd section of the B. N. A. Act, the arbitrators were called upon by the counsel for Ontario to dispose of, in the first instance, the important question of partnership raised by the counsel for Quebec.—This was objected to by the latter, and after consideration the arbitrators on the following day sustained the objection. The arguments were then continued for several days by the counsel on both sides, and the several modes of division suggested by Ontario and Quebec, including the above question of partnership, were fully discussed, some of the members of the Government of each of those provinces being present each day; and the arbitrators, at the close of the argument, were urgently pressed by the counsel on both sides to determine and declare the mode under which the division and adjustment should proceed as preliminary to any further action, notwithstanding that the arbitrators had previously expressed their opinion that decisions on these preliminary points were not desirable, but that it would be better to go on, enter fully into the case on both sides, and decide upon the whole as ultimately might be deemed right. In accordance with the wishes expressed both by Ontario and Quebec, and solely in accordance with these wishes, the arbitrators did proceed to consider the questions submitted and the arguments, and after a long and laborious consultation extending over several days, held at Montreal in May last, came to a decision, but which decision was not unanimous. That decision was by the three arbitrators ordered to be entered in the minute book and to be communicated to the counsel for the two provinces respectively. At the subsequent request of the arbitrator for Quebec, made to the other two

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"arbitrators separately after their adjournment on the 28th May last, that commu-
"nication was delayed for a short time, and was, on further request, still further
"delayed. The decision was entered as directed. About the 16th June last, the
"arbitrators severally received from the Government of Quebec a minute of
"Council of that Government expressing the opinion of the Law Officers of that
"Government that it was essential to the validity of any decision by the arbitrators
"that their judgment should be unanimously concurred in. The communication
"of the decision arrived at on the 28th May last was therefore postponed until the
"action of the arbitrators could be determined on this point at their meeting which
"was to take place at Montreal on the first Tuesday in July, though the arbitrator
"for Ontario demanded that the counsel of both Governments shall have the
"decision communicated to them in obedience to the order made in that behalf and
"unanimously concurred in by all the arbitrators. On the first day of the meeting
"in July, at Montreal, the fact of the receipt of this communication from the
"Government of Quebec was announced. A demand was then made on behalf of
"the Government of Quebec that counsel should forthwith be heard on that point,
"and after denial by the counsel for Ontario of the right of the Government of
"Quebec to make any communication to the arbitrators which was not at the same
"time made to the counsel or Government of Ontario, and a demand made that a
"decision arrived at in May last should be first declared, the question was sub-
"mitted, and the arbitrators decided by a majority that Quebec should be heard on
"the point of unanimity. After full argument, the arbitrators adjourned until the
"7th, and then further adjourned until the 8th. At the meeting on the 8th
"the arbitrator appointed by the Dominion announced that there was a difference
"of opinion between his colleagues. That the arbitrator for Quebec expressed his
"objection to the announcement of the decision arrived at on the 28th May last,
"or of any other preliminary decision hereafter, and reiterated the views on the
"impolicy of such a course already stated by him, but which course at the request
"of the counsel on both sides had been departed from; further adding his belief
"that such announcement would tend to prevent a harmonious conclusion. That
"the arbitrator for Ontario, on the contrary, contended that at the request of both
"parties they had come to a decision; that the decision, had already been com-
"municated unofficially to both arbitrators to their respective Governments; that
"those Governments had a right to its announcement, and that it was the duty of
"the arbitrators to make the communication previously ordered. That all efforts to
"produce an agreement between his colleagues had failed, and that it was there-
"fore necessary for him to take twenty-four hours to consider the course he should
"pursue. A discussion, as you are aware, arose on this statement, but resulted in
"no amicable arrangement, and I have now to decide. If this was a private
"matter there would be no difficulty about it. Parties having agreed to a reference,
"and having requested a decision, whether interlocutory or final, must take it,
"unless by consent it is abandoned. The point now to be considered is, whether
"in an important public matter such as this arbitration between Ontario and
"Quebec, sufficient grounds exist for a departure from the ordinary mode. I have
"exhausted every effort to bring about an agreement on this point between my two
"colleagues, and have delayed giving any opinion until compelled by the necessity
"of the arbitration being either abandoned or proceeded with. A week has elapsed
"in unavailing efforts to do so, and I am most reluctantly compelled to decide. I
"have to observe that the decision of the 28th May last is not final. It is not like
"an award of the arbitrators on the division and adjustment. It is only an opinion
"of the majority of them as to the best mode to proceed in the division. If in
"working it out it is found to operate unfairly, it is open to be reviewed and
"rescinded and such other mode adopted as may be shown to lead to a fairer result.
"It is admitted by the arbitrator for Quebec that in proceeding under this mode

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"the enquiry will necessarily expend itself into the consideration of much that
"would be embraced under the view of partnership advocated by himself; but it
"does not admit the existence of a partnership or limit the investigation to the
"rules which govern a partnership. No application has been made to have the
"matter re-heard or re-argued, or any grounds taken, or alleged, to set aside the de-
"cision, or any reason assigned why it should not be pronounced at this meeting,
"save that one party does not wish it, and that its delivery may tend to prevent a
"harmonious conclusion. If both parties would assent to this there would be an
"end to the matter, for clearly every effort should be made to attain that end. The
"third arbitrator undoubtedly has a discretion, but the exercise of that discretion
"must be on reasonable grounds. It should not be the mere expression of an
"arbitrary will. One party demands the delivery of the decision at the meeting,
"as part of the compact on which the arguments were heard and the discussion
"took place. The other admits the compact, but objects to its being carried out.
"The power to withhold judgments ready to be pronounced is frequently exercised
"by tribunals and judges—when it is manifest the interests of the parties concerned
"will be promoted—but is generally by consent, and never against the will of one
"of the parties without good cause shown. The decision in this case was com-
"municated by both arbitrators to their respective Governments unofficially, and I
"cannot see any objection to doing openly what each one has in that respect under-
"taken to do in his individual capacity. When the judgment is formally pro-
"nounced, it will then be optional with either Government to assign the grounds of
"objection, and more for a re-hearing or rescinding. No party will go on with a
"reference or argument if after both parties have agreed to the submission, and
"have heard one way render it nugatory the moment he learns the result. I have
"been most desirous to concur with the views expressed by the arbitrator for
"Quebec, but I have sought in vain for some rational ground on which, if compelled
"to decide, a refusal to announce the decision on the 28th May last could be based.
"I cannot find that the decision will inflict any wrong on the party objecting. It
"is not conclusive. It is a mere mode of enquiry, and open to correction. The
"decision made by us is no iron rule, but simply in the light of a guide, to be con-
"strued literally. It is now earnestly to be hoped that in view of the great interests
"at stake, the parties will proceed without further delay, and that both will unite
"in endeavoring to effect a just distribution by the mode recommended, or failing
"that by some other mode. I agree, therefore, with Mr. Macpherson, that the
"decision arrived at on the 28th May last should be formally announced to the
"counsel and Provinces concerned." Then it goes on: "After the foregoing ex-
pression of opinion, the Honourable Charles Dewey Day stated that he could no
longer act in the arbitration, as he could not agree in the decision arrived at on the
28th May, and that he had therefore, that morning, placed his resignation in the
hands of the Government of Quebec. He thereupon handed to Messrs. Macpher-
son and Gray a written notice to that effect, and withdrew. Mr. Chauveau then
stated that his Government had received the Honourable Charles Dewey Day's
resignation. On the motion of Mr. Cameron the decision of the 28th May was
formally read and pronounced. The Honourable Charles Dewey Day's dissent
thereto was also read. Mr. Ritchie then presented and requested the following
memorandum to be filed: "The undersigned, of counsel for the Province of
"Quebec, hereby respectfully represents that the Honourable John Hamilton Gray,
"the arbitrator appointed by the Government of Canada, under the provisions of
"the B.N.A. Act, 1867, has become and now is disqualified to act as arbitrator, in-
"asmuch as the said Honourable John Hamilton Gray is now, and for a considerable
"time past has been a resident of Ontario, and prays that all proceedings upon
"this arbitration be stayed until the Government of Canada shall have appointed
"a duly qualified arbitrator in the place and stead of the Honourable John Hamilton
"Gray, so disqualified as aforesaid."

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That point as to residence having been made in the case in Canada, I shall not argue it at all. I shall leave it to your Lordships to deal with it as you think proper under the circumstances. For myself I do not propose to base any part of my argument upon this point.

SIR M. E. SMITH:—It appears he came to reside at Ontario for the purpose of the arbitration.

MR. BENJAMIN:—That is the statement at the top of page 24. Mr. Ritchie presented the following memorandum, requesting it to be filed: "The Province "of Quebec respectfully excepts to the decision now rendered by the Honourable "John Hamilton Gray and David Lewis Macpherson, two of the arbitrators, as now "being a valid judgment—not being that of the arbitrators." Now my Lords, this occurred. The Province of Quebec having heard of these proceedings, the 25th meeting took place at 4 o'clock of the afternoon of the same 8th July. The Attorney-General for Ontario proposed to proceed with the investigation. The arbitrators declined to take further proceedings that day, and decided to adjourn, to meet again at Montreal on some future day to be agreed upon, and to be notified to all parties. On the 11th July the Government of Quebec made a communication to the arbitrators, requesting a little time to determine what course they should pursue, in consequence of the action of their arbitrator. That is found at page 24. "Sir, I have the honor, by command of His Excellency the "Lieutenant-Governor, to inform you that the Honourable Charles Dewey Day has "tendered his resignation as arbitrator of the Province of Quebec, under the 142nd "Section of the British North America Act of 1867, and to request that you will "be pleased to stay proceedings until such time as the Government of Quebec, who "have to stay resignation under consideration, have come to a decision upon the "subject." My Lords, no attention seems to have been paid to that request, for on the 12th a notice was sent to Mr. Day that the arbitrators would proceed to meet on the 21st. Your Lordships will find at the top of page 25 a notice by the two arbitrators to Mr. Day: "Dear Sir,—We beg to notify you that we shall meet at "the St. Lawrence Hall Hotel in Montreal, on Thursday, the 21st inst., at 2 o'clock "in the afternoon, to proceed with the arbitration." Well, my Lords, at the foot of page 24 you find that on the 21st they did meet, and from that time forth Mr. Day never attended, and the whole of the subsequent meetings were held by the two arbitrators. "The arbitrators met at the St. Lawrence Hall, in the City of Montreal, on the 21st day of July, 1870, at 2 o'clock p.m., pursuant to notice duly given to all parties. The arbitrators present were: The Honourable David Lewis Macpherson and the Honourable John Hamilton Gray. The Honourable John Hillyard Cameron, the Honourable John Sanfield Macdonald and the Honourable E. B. Wood were present on behalf of Ontario, and the Honourable George Irvine, Solicitor-General, and T. W. Ritchie, Esquire, appeared on behalf of Quebec. The notice to the Honourable Charles Dewey Day, of the meeting to be held that day, was then produced and read, the same having been duly posted, and is as follows; "Toronto, July 12th, 1870—Dear Sir,—We beg to notify you that we "shall meet at the St. Lawrence Hall Hotel, in Montreal, on Thursday, the 21st "instant, at 2 o'clock in the afternoon, to proceed with the arbitration between "Ontario and Quebec, under B. N. A. Act, 1867. We are, dear sir, yours very "truly, D. L. Macpherson, J. A. Gray, arbitrators." A similar notice at the same time was sent to Mr. Ritchie, as counsel for Quebec, which he admitted he had received. Mr. Cameron then called for the delivery of the judgment of the arbitrators on the question of unanimity, which had been signed before them at a previous meeting in Montreal. The arbitrators then stated that they had severally received from the Government of Quebec a communication, which was read, and is as follows: "Province of Quebec, Secretary's Office, Quebec, 19th July, 1870— "Sir,—I have the honor to inform you that His Excellency the Lieutenant-Governor

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"has been pleased to accept the resignation of the Honourable Charles Dewey Day, "the arbitrator of the Province of Quebec, under the 142nd section of the B. N. A. "Act. 1867, and request that you will be pleased to stay further proceedings until "such time as you receive notice as to their intention from the Government of this "Province."

The Lord Chancellor:—Then it is no longer a question about unanimity now.

Mr. Benjamin:—No, from that day forward it is a question whether two arbitrators alone can proceed with the business of the award appointed by the Act of Parliament, because on that day Mr. Ritchie handed in the patent of revocation by Her Majesty withdrawing from Mr. Day all his power, "Victoria, by the Grace of God," and so forth, "Whereas in and by our certain Letters Patent."

Lord Selborne:—I suppose it is sufficient in form.

Mr. Benjamin:—Yes. "We have been pleased to determine our Royal will and pleasure in relation to our said Letters Patent, Now know ye that we do hereby cancel, revoke and make void the said Letters Patent, and do hereby discharge the said Charles Dewey Day from the office of arbitrator of the Government of Quebec aforesaid," then, my Lords, thenceforward the proceedings took place before the arbitrators alone.

Sir M. E. Smith:—I think notice was always given, was it not?

Mr. Benjamin:—No, up to a certain point it was given and then notice was no longer given.

Lord Selborne:—Is it denied on the other side that the authority of Mr. Day was effectually revoked?

Mr. Benjamin:—Yes, that is one of the points—they do not deny the form, but they say there was no power in the Crown.

The Lord Chancellor:—If there was a power, I do not suppose they would deny that it was exercised.

The Attorney-General:—Oh, no, my Lord—if there was a power—what we say is that there was no power.

Lord Selborne:—According to the terms of the appointment it was clearly revocable, but you say to that extent those words were void and nugatory.

The Attorney-General:—Yes. I say that under the Act of Parliament the arbitrators were to be appointed and there is no power to revoke their appointment.

Lord Selborne:—They were in fact appointed by an instrument which gave them an authority, "during pleasure." You say those words are to be rejected.

The Attorney-General:—Yes. What I contend is that it depends on the Act of Parliament and not on the form of appointment.

Lord Selborne:—That there is a sufficient appointment rejecting those words because not authorized by the Act of Parliament.

The Attorney-General:—Yes, my Lord.

Lord Selborne:—Then this point about notice may be material.

Mr. Benjamin:—Yes, I will give your Lordships the date—we will come to it presently. I may state to your Lordship that the last date at which any notice was given is, I think, the 5th August, and there were a large number of meetings afterwards. It is at the bottom of page 30. There was a notice to him to be present on the 4th August, and then he was present, I think, on the 5th, but after the 5th there is no indication of any notice of the proceedings ever having been given to him, but they proceed as if he had made up his mind not to come and it was not worth while to let him know.

Now, my Lords, at page 26, after having submitted to the arbitrators the patent of the Crown revoking the appointment of Mr. Day, thereupon Mr. Irvine rose and protested against further action being taken by the arbitrators, stating

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that he considered the arbitration determined and that he and Mr. Ritchie would withdraw from all further proceedings. The Attorney-General of Ontario and Mr. Cameron stated that they considered the arbitration in full force and in no way affected by the resignation of the Honourable Charles Dewey Day or the revocation of his authority and that they were ready and demanded that the proceedings should go on. It is in relation to that statement and the continuation of the proceedings that I call your Lordships' attention to the withdrawal of all notice and their going on without notice to us, our contention being either revocation good, and therefore you could not go on, as revocation invalid, and then it was your duty to let us know when you were proceeding to give us an opportunity of attending at any time we pleased. The arbitrator chosen by the Dominion thereupon read the judgment of himself and Mr. Macpherson upon the question of the necessity of unanimity raised and argued before them on the 6th day of July, 1870, and which is as follows:—"Judgment upon the question of unanimity.—At our last meeting, a question was raised by the counsel of Quebec under instructions from their Government (a copy of the order in council having been transmitted to each of the arbitrators), which would then have been decided but for the abrupt withdrawal of Judge Day on our subsequent immediate adjournment, namely, that it is essential to the validity on any decision to be given by the arbitrators that their judgment should be unanimously concurred in."

THE LORD CHANCELLOR:—Is it material to read this now?

MR. BENJAMIN:—I do not know that it is, except that there is a passage or two and one or two authorities referred to.

THE LORD CHANCELLOR:—If you think the authorities are material, read it.

MR. BENJAMIN:—The ground of his decision is, he says at the top of page 27: "In matters of private reference the law is plain that unless the terms of the submission provide that a majority may rule, all must agree in the award or it would not be binding. The impracticability in private affairs of working out an arbitration of unanimity so as essential led to the adoption, in almost all cases of submission, of the majority clause or the alternative provision of an umpire so essential to the successful conducting of an arbitration,—has this become that in ordinary form of arbitration bonds or of rules of reference one of those clauses is almost always found inserted without such clause in private arbitration, it is admitted unanimity is requisite. The point now is, does the same rule apply to public references or arbitrations? to which class it is conceded the present enquiry belongs. The 142nd section of the B. N. A. Act, 1867, under which the arbitration is held, containing no such clause, Mr. Irvine, the Solicitor General for Quebec, has properly narrowed the question to this point. Mr. Ritchie, in his argument for Quebec, cited *Caldwell on Arbitration*, p. 202, to prove that undoubted position as to private institutions. In the note to that page by the able American editor who republished the work in the United States, we find the following remark:—"There is a wide distinction to be observed between the case of a power conferred for a public purpose and an authority of a private nature. In the latter case, if the authority is conferred on several persons it must be jointly exercised, while in the former it may be occasioned by a majority." I think, on reference to the cases, your Lordships will find how greatly mistaken that gentleman is in his application of some of the cases—he misunderstands the decision of some of the cases. Further on, at page 204, he says: "That referees appointed under a statute must all meet and hear the parties, but the decision of the majority will be binding. The correctness of these views is sustained by the citation of many authorities." Then he quotes Johnson's report: "When an authority is confided to several persons for a private purpose, all must join in the act, *aliter* in matters of public concern, Thompson, J. A controversy between these parties was submitted to five arbitrators. The submission did not provide that a less number than the whole

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might make an award. All the arbitrators met and heard the proofs and allegations of the parties, but four only agreed on the award made, and whether the award be binding is the question now before the Court, no case has been cited by the counsel where the question has been strictly decided. I am, however, satisfied that as a submission to arbitrators is a delegation of power for a mere private purpose, it is necessary that all the arbitrators should concur in the award unless it is otherwise provided by the parties. In matters of public concern a different rule seems to prevail, there the voice of the majority shall govern." Then he quotes *Grindly vs. Barker* and one or two other cases to which I shall call your Lordships' attention in a moment if it be necessary to show that they have no sort of reference to a case like the present and that those refer to the proceedings of *quasi* corporations, such bodies as Justices of the Peace.

SIR R. P. COLLIER:—*Grindly vs. Barker* was a case as to trials of leather.

MR. BENJAMIN:—Yes, and the Court held that all must be present and try. Every Judge said that all must try though the decision of a majority might govern. The unanimous decision of the Judges in that case was that all must be present. Then, my Lords, I ask your Lordships' permission to read this judgment at the foot of page 28, because I am going to found one of my arguments in the case upon the passage at the foot of that judgment: "To work out the reasoning of the counsel of Quebec to its legitimate conclusion would place absolute power in the hands of the third as Dominion arbitrator. I have supposed that on points on which Ontario and Quebec were agreed it was my duty at once to assert and that under such circumstances whether I differed or not was of no consequence, but as the powers of all the arbitrators must be co-equal if unanimity is essential, I might, by simply disagreeing, prevent an award even when both Ontario and Quebec, the parties interested, had agreed upon it. Such a position is untenable." It appears to me, my Lords, that there lies the foundation of all the mistakes that have been made in the cause, the belief of Mr. Gray that he was an Umpire to decide only in case of difference between the two arbitrators, whereas in point of fact he was a third arbitrator bound to discuss upon all occasions the true principles with his colleagues and the three minds to act together upon the subject in dispute. This view that he had no right to dissent if the other two assented is a clear mistake as to his position and powers. He says, "I have supposed that on points on which Ontario and Quebec were agreed it was my duty at once to assent," and not to bring his mind to bear on the subject at all.

Well, my Lords, I will call your Lordships' attention simply to this, that at the 27th meeting, which is at the foot of page 28, the arbitrators met, only two met, no one appeared on behalf of Quebec Mr. Cameron stated that he wished an adjournment until 2 o'clock p.m. The arbitrators adjourned accordingly and at 2 o'clock p.m. resumed their sitting when Mr. Cameron proceeded on the part of Ontario to submit to and discuss before the arbitrators the respective debt of Ontario and Quebec for local purposes, with the view of bringing in the debts in both Provinces within the principle of their decision. After progress made the arbitrators adjourned until 10 o'clock the next day. Then, my Lords, on the 28th meeting, which was on the 23rd July, they met again and proceeded *exparte*, nobody present on behalf of Quebec, and then this occurred, the attempt was made on behalf of Quebec to stop the proceedings from going on in the absence of any representation on her part by a prohibition, and the proceedings for the prohibition failed because they were not within the jurisdiction. The attempt failed, but the prohibition is applied for at page 29. Your Lordships will find the decision upon it at page 31. Mr. Justice Beaudry dismissed the application on the 7th November, 1871, on the ground that it was not a Court, that the Courts of the Province of Quebec had power to issue prohibitions only to Courts of Justice and that this was not a Court to which he had the power of issuing a

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prohibition. Then, at the 28th meeting, your Lordships will find it is at the foot of page 30, the arbitrators, after reading the foregoing papers adjourned until Thursday, the 4th day of August then next, to meet at Osgoode Hall, in the City of Toronto, at 12 o'clock, noon, to proceed with the said arbitration, and they directed that due notice of the time and place of such meeting should be given to the Honourable Charles Dewey Day, "so that they are still giving notice to Mr. Day and Mr. Ritchie, the Counsel for Quebec, after the revocation, considering it, I suppose, to be null. At page 32 your Lordships will find the next attempt of Quebec to put a stop to the proceedings was brought before the arbitrators on the 4th August, on their 29th meeting." Mr. Cameron produced a notice which he stated he had personally posted to the Honourable Charles Dewey Day, to the Honourable George Irvine, Solicitor General for Quebec, and to T. W. Ritchie, Esq., Counsel for Quebec, which notice is as follows:—"In the matter of the arbitration between the Provinces of Quebec and Ontario. The undersigned, the arbitrators in the above matter have adjourned until the 4th day of August, 1870, then to meet at Osgoode Hall, Toronto, at 12 o'clock, noon, and to proceed with the arbitration." Your Lordships there see on the 23rd July notice to Mr. Day for the meeting of the 4th August, and this is the meeting of the 4th August. Then the Honourable John Hamilton Gray reported that after the adjournment at Montreal, on the 23rd day of July last past, just before leaving Montreal by the evening train he was served by a Bailiff or Sheriff's Officer by a writ of *quo warranto* to show cause by what authority he exercised the office of an arbitrator, he having, it was said, become a resident of Ontario. The Petition and Affidavits in support thereof alleged *inter alia* that for more than a year then last past the said John Hamilton Gray had been and then was a resident in Ontario." Then at the top of page 33 there is the statement, "The arbitrators to attend an hour, and no one appearing on behalf of Quebec, expressed their desire to the Counsel for Ontario to hear arguments upon the subject of the jurisdiction of the Superior Courts of Justice by writ of prohibition to restrain them from proceeding with the arbitration, whereupon Mr. Cameron proceeded to argue the question." After which the arbitrators adjourned until next day at 12 o'clock, noon, to meet at the same place." Then the writ of *quo warranto* is stated to have been quashed by Mr. Justice Beaudry, and then we have the statement at pages 34 and 35, by Mr. Gray, of the circumstances of his residence. I might, perhaps, call in aid here the proceedings for prohibition against Lord Penzance, in which it was held that his judgment was null because he sat on the wrong side of the river, but I do not make that point.

SIR JAMES W. COLVILE:—He would be equally wrong if he sat on the other side of the river.

LORD SELBORNE:—The curious thing is it was quashed, not because he was not within the jurisdiction, but because there was no evidence that the defendant had, since he had established his residence and domicile at Ottawa, exercised or attempted to exercise the functions of arbitrator.

MR. BENJAMIN:—Within the limits of the Province of Quebec in such a manner as to warrant the intervention and control of the Superior Court for Lower Canada. That was the ground he was not within their jurisdiction.

Well, then, on the 5th of August, at page 36, your Lordships have the 30th meeting. "The arbitrators stated that they were ready to deliver this opinion upon the question of the authority and power of the Superior Courts of Quebec to restrain them, and then they gave their opinion. I wish to call your Lordships' attention to the opinion of Mr. Macpherson, at page 39, line 15, he says: "The Government of the Province of Quebec and the arbitrator appointed by them have had due notice that the present meeting would be held for the purpose of proceeding with business. That is the last notice and that it would be competent for the arbitrators therefore to proceed in accordance with well established rules." And Mr. Gray gave his opinion that they were not bound to act.

Lord Selborne:—How does it appear that that was the last notice? I thought the last notice rather leads to the contrary conclusion.

Sir Robert P. Collier:—"Notice is now given."

Mr. Benjamin:—I am going to call your Lordships' attention now to the last notice at the top of page 42 The following order was then read: "That the arbitrators do adjourn until the 17th instant, then to meet at Osgoode Hall, at 2 p.m., and proceed peremptorily with the arbitration and that notice thereof be served on the Government and Counsel of Quebec and on the Honourable Charles Dewey Day." Then just below you have the meeting—appear to meet on the 17th of August. "Mr. Cameron produced a notice, duly endorsed by himself, as having posted copies thereof to the Honourable Charles Dewey Day," and so on, "and stated that no answer had been received." That is the notice of the 5th of August, 1870. It is dated at the date of the previous meeting, telling Mr. Day that they would proceed on that day.

Sir James W. Colvile:—That they would proceed on the 17th.

Mr. Benjamin:—Yes, and this is the 17th when the notice is produced.

Lord Selborne:—Does it appear as a fact that there was a subsequent notice?

Mr. Benjamin:—I will show your Lordship exactly what there was in relation to it. There is a long series of meetings of the two arbitrators.

The Lord Chancellor:—No further reference is ever made to Quebec or any notice given.

Lord Selborne:—Then it does not appear that there was any subsequent notice, nor that it does appear that there was not.

Mr. Benjamin:—Quite so.

Lord Selborne:—This is a special case; ought not the first to have been stated, if it is material, that there was no subsequent notice?

Mr. Benjamin:—You never state a negative in a special case. If there had been subsequent notice it would have been for the other side to have stated it. I think you never state a negative in a special case. I think that is always the rule

Lord Selborne:—I am astonished to hear you say that. What int [*inference*] is to be made in the absence of the statement?

Mr. Benjamin:—The Judges have more than once suggested that that was not the proper mode of stating the case, to state a negative, but that you should let those who state the affirmative state the fact. I do not say it is never done.

The Attorney-General:—I might point out to your Lordships that there are a great many negative statements in this case.

Lord Selborne:—No doubt; I never saw a case in which there were not.

The Attorney-General:—It is constantly stated, "no one appeared on behalf of Quebec."

Mr. Benjamin:—These are the minutes, and the minutes must speak for themselves.

Lord Selborne:—You are arguing that we ought to intend that there was no notice, seeing that up to this point notice appears on the face of the proceedings, and since that point it does not.

Mr. Benjamin:—Yes, that would be the argument, of course. These are the minutes as they are found in the books of the arbitrators. I will call your Lordship's attention to them. This is the last occasion on which we see any such notice, and I think your Lordships will infer that there was no further notice by what we are now coming to. I am now at the top of page 42, 30th meeting. "It was ordered that notice be given to appear at the 31st meeting, on the 17th August." Your Lordships will see on the 17th August, the 31st meeting, line 20, a notice dated the 5th August, which was addressed to Mr. Day, that the arbitrators would go on, on the 17th August.

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Now, my Lords, at the 32nd meeting the arbitrators were furnished with a protest to which I must call your Lordships' attention. "The arbitrators met on the 18th of August; present, the same arbitrators and parties as at the last preceding meeting. The arbitrators stated that they had that morning received a communication from the Under Secretary of State at Ottawa, enclosing a copy of a despatch from the Lieutenant-Governor of Quebec to the Governor-General on the subject of the proceedings of the arbitrators, which documents were ordered to be read and entered upon the minutes of the proceedings, and are as follows:" I begin at the lower one, which is the first in date: "Quebec, 8th August, Sir, I have the honour to transmit for the information of His Excellency the Governor-General, copy of a document signed by the Honourable Messrs. Gray and Macpherson which has been received by the Secretary of this Province. I deem it my duty at the same time to call the attention of His Excellency the Governor-General and of the Federal Government to the unjust and illegal course jointly adopted by the arbitrator appointed by the Federal Government and the arbitrator for the Province of Ontario, and respectfully to request on behalf of the Government of this Province the intervention of the Federal Government." That having been received was enclosed in the letter which is printed just above it, dated Ottawa, 16th of August, from the Department of the Secretary of State of Canada: "Sir, I have the honour, by command of the Governor-General, to transmit to you herewith copy of a protest received by His Excellency from the Lieutenant-Governor of the Province of Quebec against the course which you and the Honourable David Lewis Macpherson have notified the Governor of that Province that you proposed taking in the matter of the arbitration between the Provinces of Ontario and Quebec." The document referred to is that set out *verbatim* in the proceedings of the 17th August, the one or the previous page on which they are notified. "The undersigned will proceed with the consideration of the matter of the arbitration on the day and at the place above named, peremptorily." That is the proceeding of the 5th August.

Well now, my Lords, from that time-forth we find the arbitrators regularly proceeding *ex parte*; we find no one appearing on behalf of Quebec, as stated on the minutes. The special case simply copies from the minutes, and from beginning to the end, after that date it is constantly stated that the two arbitrators alone were present, and that they proceeded *ex parte;* they subpœnaed Mr. Langton, the Auditor-General for the Dominion of Canada, to appear before them and give evidence. He appeared at the following meeting, the 35th meeting, and gave evidence, and then Mr. Wood resumed his argument. They heard the arguments on behalf of Ontario. From the 32nd meeting down to the 38th, which is the 29th August, page 45, your Lordships will find, "adjourned to the next day," 30th August; "adjourned to the next day," 1st September; met for consultation, agreed upon the substance of the award; initiated the draft of the terms thereof. "Adjourned until next day (to-morrow), arbitrators met and discussed the form of the award," and then on Saturday, September 3rd, "arbitrators met, re-examined the award, and finally completed and executed the same in the presence of Christopher Robinson, Esquire, of Toronto, Barrister-at-Law, and Mr. Frederick Finch, of the same place, Law Stationer." The same having been executed by a majority only, viz: By the Honourable J. H. Gray and the Honourable D. L. Macpherson; the Honourable Charles Dewey Day not being present or having attended the meetings of the arbitrators since the withdrawal in July last (1870), which award is as follows:

SIR BARNES PEACOCK:--There was an adjournment of every meeting, was there not?

MR. BENJAMIN:--They adjourned every day. Each meeting was adjourned to the next day, and there is no trace whatever of any notification to Mr. Day of the adjournment.

Sir Barnes Peacock :—If he had been present at the one of which he had notice then he would have known that it was adjourned.

Mr. Benjamin :—Yes, there is no doubt about it.

Lord Selborne :—From the beginning to the end of the special case it is nowhere stated as a fact that upon any occasion Mr. Day either had or had not notice, but the minutes are stated *in extenso* by some of which, up to a certain date, it appears that directions were given to give him notice and that the notices which had been given were obeyed, and after that on the face of the minutes subsequently stated there is nothing about it.

Mr. Benjamin :—That is the fact.

Lord Selborne :—So that as a substantial fact it is nowhere stated one way or the other that he had notice at any time.

Mr. Benjamin :—It is stated that up to a certain time he had notice.

The Lord Chancellor :—He would not require notice if he had notice at any one time and they adjourned it *de die in diem*, or to one specified day afterwards.

Sir Barnes Peacock :—They might not have been able to give him notice of every adjournment, because once they adjourned to the afternoon of the same day.

Lord Selborne :—What struck me was this, that the peculiar way in which the special case is stated, being in substance merely a copy of the minutes, would make it consistent with this, that they might have continued to give notice, but not have continued to enter it upon the minutes.

Mr. Benjamin :—That is a possibility.

The Lord Chancellor :—Surely the Provinces of Ontario and Quebec have not come here to decide whether there was notice given to the arbitrator of the adjournment.

Sir Montague E. Smith :—There is a question as to notice amongst the questions pr

The Lord Chancellor :—That is not the question we have to argue here. We should not sit here to hear such a case.

Mr. Benjamin :—The question is involved in this way in one of the points on the merits : They say "you had no power to make (*revoke*); we had a right to go on." Then we say "if you went on disregarding the revocation you had no right to meet without giving us notice of the meeting."

The Lord Chancellor :—If there was power to revoke, that may be a serious impediment in the way of the award altogether, and if there was a revocation that may be an impediment : but if there was no power to revoke, and they had a right to go on upon giving notice, you surely would not think the question to be argued here is whether *de facto* that notice was given or not.

Lord Selborne :—I see no ground for coming to any conclusion. It is a mere inference from the way in which the minutes are made out.

Mr. Benjamin :—This appears that two arbitrators proceed alone.

Lord Selborne :—Oh yes, that appears.

Mr. Benjamin :—What we say is that the sole ground upon which two arbitrators, proceeding alone, can by possibility make a valid award, is by showing that the other had been notified to attend and had not attended.

The Lord Chancellor :—If these meetings were held by adjournment no notice was necessary.

Sir Montague E. Smith :—You really have not raised it in the questions, and if you had raised it the evidence might have been supplied. I do not say that it exists, but it might.

Sir James W. Colvile :—We have no jurisdiction over any matter that does not come within one or other of those questions.

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MR. BENJAMIN:—We contend that it does come within the last question whether the award is valid. However, my Lords, I will not press that point for the moment. I will proceed with the statement of the facts before I attempt any argument upon the law of the case. At page 45 you find the award. I shall have something to say in relation to it. It is too long to read now without any special purpose or point to call your Lordships' attention to. There will be a point to which I will call your Lordships' attention presently in the course of the argument. At page 52 there was a joint address of the Legislature of Canada on the 22nd December, 1870. I give your Lordships that date because it is stated afterwards in the report of the Minister of Justice.

SIR JAMES W. COLVILE:—It is by the Legislature of Quebec to the Governor General, is it not?

MR. BENJAMIN:—Yes, by the Legislature of the Province to the Governor-General, asking his interposition: "We, Her Majesty's dutiful and loyal subjects, the Legislative Council and Legislative Assembly of the Province of Quebec, in Provincial Legislature assembled, humbly approach your Excellency for the purpose of representing,—that, according to the provisions of the 142nd Section of *The British North America Act*, 1867, the division and adjustment of the debts, credits, liabilities, properties and assets of Upper and Lower Canada should have been referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and the third by the Government of Canada, the last mentioned not to be a resident either in Ontario or Quebec. That the Honourable Dewey Day having been appointed arbitrator by the Province of Quebec, the Honourable David Lewis Macpherson by the Province of Ontario, and the Honourable John Hamilton Gray by the Government of Canada, and the last named arbitrator having taken up his residence in Ottawa, the Government of the Province of Quebec have deemed it incumbent upon them to protest against his continuing in office, and to express, both to the Government of Canada and to the arbitrators themselves, their firm conviction, that to carry out the true intent and meaning of the British North America Act the decision of the arbitrators should be unanimous. That subsequently, on the 9th day of July last, the Honourable Charles Dewey Day, the arbitrator appointed by the Province of Quebec, differing in opinion with the other arbitrators respecting a preliminary judgment which appeared to him based upon pretensions at once unfounded in fact and in law, and deeming that by the rendering of that judgment, the examination of the question would be restricted by the inflexible rule of an erroneous judgment, and that it would be, therefore, impossible to arrive at any equitable and satisfactory conclusion, felt it to be his duty to resign his office. That such resignation having been accepted by the Government of the Province of Quebec, notice thereof was immediately given, to wit, on the 11th day of July last, to the Government of Canada, and to Messrs. Gray and Macpherson, the Government of the Province of Quebec at the same time, protesting against any ulterior action on the part of the arbitration commission, which was thus rendered incomplete. That, notwithstanding the representations so made to them, Messrs. Gray and Macpherson entered upon the examination of the questions submitted by the two provinces without the Province of Quebec being in any way represented, and on the 3rd day of September last rendered a pretended award, against which His Excellency the Lieutenant-Governor of the Province of Quebec, by despatch, dated the 13th day of September last, and addressed to His Excellency the Governor General, protested as unjust and illegal. That the injustice of the said pretended award is evident, from the same having been rendered wholly in the interest of the Province of Ontario, and from the fact that, while Messrs. Gray and Macpherson refused to take into consideration the relative financial positions of the two provinces at the time of the Union, they have taken into consideration

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the object and nature of certain items of expenditure as having been incurred in one or the other section of the Province of Canada, from the period of the Union to Confederation. That the said pretended award is further unjust, inasmuch as the division of the credits, properties and assets of the late Province of Canada does not even proceed upon the same basis and principles as those which appear to have been adopted in relation to the division of the balance of the debt, and does not rest upon any principle whatsoever, but is purely arbitrary, and favours the Province of Ontario at the expense of the Province of Quebec. That, lastly, the provisions of the said pretended award fully justify the apprehensions of the distinguished lawyer selected by this Province as its arbitrator, and the firm and independent line of conduct which he adopted in the interests of justice. That the said pretended award is absolutely illegal, null and void, for the reasons hereinbefore set forth, and also as having been rendered by two arbitrators, who by the resignation of their colleague remained without any power or jurisdiction, and that, therefore, the intentions of the British North America Act have been carried out, and no valid title has been conferred upon either Province in relation to the credits, properties and assets, which it was the duty of the said arbitrators to apportion and divide between the two Provinces. That the Province of Quebec can neither submit to its property being disposed of, or to any sum whatever being exacted from it, nor can it accept any property, credits or assets in virtue of the said pretended award, and that it is bound to resist by all means within its power the execution of the said pretended award, claiming as it does that justice be done, and that its rights, as recognized by the British North America Act, be maintained. Wherefore, we humbly pray that Your Excellency will be pleased to adopt such measures as are best calculated to insure justice to this Province." Then at the foot of that is: "Note.—Ontario disputes the various grounds of objection which, in the above documents, the Executive Council and the Legislative Assembly of Quebec made to the award, both those objections relating to the merits and all others, Ontario affirming that the award was made in good faith by two gentlemen of honour, experience and ability, that the award was not unjust to Quebec, that it was not made in the interest of Ontario, or to the prejudice of Quebec; and that in fact it is much less favourable to Ontario than Ontario justly demanded before the arbitrators." Then His Excellency the Governor General in Council on the 7th February adopted a report of Mr. Macdonald, the Minister of Justice, and Mr. Macdonald after proceeding to recite all that had occurred upon the matter, giving a history of the transaction, says at page 58: "The case now stands thus—The Government of Ontario contends that it is altogether illegal and void, and declares its intention of appealing for redress and justice by every constitutional mode, and the Legislature of Quebec also protesting against its validity, asks the Governor-General to adopt measures to protect the rights of that Province. Now the Government of Canada has no power or means of intervening between the parties, of enforcing the award as valid, or setting it aside as invalid, or of granting the redress, or the measure of protection sought for by the Legislature of Quebec. It is for the Government of Ontario, if it desires to enforce the award, to take such steps as it may be advised that the law allows for that purpose, and it is for the Province of Quebec to take the necessary legal steps to resist any action on the part of that of Ontario. If the question of the validity of the award becomes a matter of litigation, either Province will have the power of carrying it by appeal from the decision of any inferior tribunal to the Judicial Committee of the Privy Council, as the Court of last resort." Then the suggestion is made for a special case—and that is done—and in that manner the matter comes before your Lordships. The points in the special case are at page 59, and it is my duty now to call your Lordships' attention to them. The first is: "Whether under the circumstances hereinbefore stated the said Hamilton Gray had become disqualified

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to act, or continue, as arbitrator." The second is: "Whether, after a hearing before the three arbitrators, two of them could legally render a decision or award, and if yea, could they do so in the absence of the third."

Well, my Lords, it is difficult to separate these points, because this point assumes a hearing before three arbitrators and then two making the award in the absence of the third. But *ex concessio*, the hearing was not before three. The hearing was before two after the one had withdrawn.

Sir James Colvile:—Are they not distinct questions?

Sir Barnes Peacock:—The fifth raises the question whether he could do it after the resignation?

Mr. Benjamin:—Yes. The questions ran so much into each other that it is almost impossible to separate the authorities or to discuss them as independent questions. However, my Lords, I will call your Lordships' attention to the points which we make in the case and to the authorities in affirmance of our propositions.

We say in the first place as a matter of law that the reference under this Act of Parliament is a reference to three arbitrators and that no possible decision could be made without the concurrence of the three. Whether the absence of the third arbitrator arose from death, or illness, or lunacy, or any other incapacity or wrong doing, or commission of crime by him, or felony, or whatever you choose to suggest, there remained but two arbitrators, and two arbitrators were not a competent tribunal under this Act.

Now, my Lords, I had perhaps better call your Lordships' attention now to what we consider to be really the meaning of these three sections put together. We consider that the sections 112 and 113 amount to a distribution of certain assets and certain liabilities.

Lord Selborne:—That goes to the merits of the award.

Mr. Benjamin:—Your Lordship will find it is involved. It is difficult to go backwards and forwards, but when we come to the validity of the award the question will arise whether they have assumed jurisdiction over a subject not committed to them, or whether they have omitted or refused to exercise a jurisdiction committed to them upon the face of the award.

Lord Selborne:—You say under that general objection, number 6, all objections to the validity of the award which appear upon the face of it are open to you?

Mr. Benjamin:—Yes The case is brought before your Lordships, not as an appeal upon which according to your Lordships' rules each side would have stated a case and stated his propositions, it comes from Canada for the advice of your Lordships to Her Majesty upon the circumstances of a case stated, and there has been no opportunity, at least I have had none—I only had the record the last few days.

The Attorney-General:—It has never been drawn to the attention of Ontario that it was intended to dispute this award on the ground that the arbitrators have dealt with matters over which they had not the authority or have refused to deal with matters which they ought to have dealt with—this is all quite new to me. I certainly saw the last reason or the last question but I did not understand it to point to any such contention as this.

Mr. Benjamin:—That is the precise statement made by Mr. Day. You will not take cognizance of matters which are within your jurisdiction. Then we state the question whether the award is valid or null and void.

The Attorney-General:—This is all with reference to the preceding grounds of objection. There is nothing specific

Mr. Benjamin:—Of course nothing is specific because no case in the ordinary sense has been stated here.

The Lord Chancellor:—Is not the meaning of this point whether the

award of the 3rd September, 1870, is by reason of the matters aforesaid null and void?

Lord Selborne:—I observe your own arbitrator was quite prepared to take a line inconsistent with the argument which you seemed to put forward.

Mr. Benjamin:—I quite concur. My impression is that when your Lordships come to look into the case you will find that the arbitrators, all of them, misunderstood the Act of Parliament, and were proceeding on erroneous principles. They misinterpreted the Act of Parliament, misinterpreted their duties, misinterpreted the matters committed to them, and consequently got into a wrangle which resulted in the withdrawal of one of them.

Sir Robert Collier:—It so happened that they all agreed upon the question as to the extent of their jurisdiction.

Mr. Benjamin:—I beg your Lordships' pardon—the question is, even supposing the withdrawal to be wrongful, is the Government of Quebec to be bound by an *ex parte* award made upon false principles, where upon the face of the award you find that the arbitrators themselves declined to deal with matters which were specially entrusted to them, and dealt with others which were not entrusted to them. Your Lordships will observe the ground of Mr. Day's withdrawal is this: He says expressly in the foreground of his dissent, at page 17, because the assets specified in Schedule 4 and all other assets to be divided under the authority of the said Act ought to be divided equally according to their value.

The Lord Chancellor:—If that were his only ground he ought to have remained and seen the award made. He might have convinced his colleagues.

Mr. Benjamin:—Then he says, because the state of indebtedness of each of the Provinces of Upper and Lower Canada at the time of the Union of 1841 ought to be taken into consideration. The other two had said: "We will not take them into consideration, we have no authority."

Sir Robert Collier:—In 1841?

Mr. Benjamin:—Yes. They have said at the previous page: "We will not take them into consideration, because we have no authority."

Sir Montague Smith:—Was it not within their competence to decide whether they would take it into consideration or not?

The Lord Chancellor:—At all events, without pursuing this subject further, it would be open for you to take your other point first. This may or may not be material.

Mr. Benjamin:—About the revocation?

The Lord Chancellor:—Yes.

Mr. Benjamin:—Upon that I will now address your Lordships.

The Lord Chancellor:—If you are right upon that, the other points are immaterial.

Mr. Benjamin:—Yes.

The Lord Chancellor:—If you are wrong upon that, the fact of your arbitrator having absented himself may have a material bearing.

Mr. Benjamin:—Quite so.—Now, my Lords, as to the right to revoke. I will first ask your Lordships' attention to this. This is not the first arbitration which these Provinces have had under an Act of Parliament. I would refer your Lordships to 3rd George IV. Chap. 119, which is: "*The Canada Trade Act.* An Act to regulate the trade of the Provinces of Upper and Lower Canada, and for other purposes." And I would refer your Lordships to sections 17 to 21. There was a provision for an arbitration between those Provinces, and Parliament knew very well how to proceed and in case of discord between the arbitrators or for any other cause what should be done. After declaring in section 17 that there are certain matters in dispute, it says: "For remedy of the inconvenience occasioned

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“by the suspension of the said agreement, and for the satisfactory investigation and adjustment of the said claims, be it enacted: That it shall be lawful for the Governor, Lieutenant-Governor, or person administering the Government of each of the said Provinces of Upper and Lower Canada, as soon as conveniently may be after the passing of this Act, to appoint by commission, under the great seal of his respective Province, one arbitrator; that the said arbitrators so appointed shall have power by an instrument under their hands and seals to appoint a third arbitrator; and in case of their not agreeing in such appointment within one month from the date of appointment of the arbitrators so directed to be made on the part of the respective Provinces or the last thereof if the said appointments shall not be made on the part of the respective Provinces or the last thereof if the said appointments shall not be made on the same day His Majesty, His Heirs or Successors shall have power by an instrument under his Sign Manual to appoint such third arbitrator,” who (if appointed in manner last mentioned) “shall not be an inhabitant of either of the said Provinces and that the three arbitrators so appointed as aforesaid shall have power to hear and to determine all claims of the Province of Upper Canada upon the Province of Lower Canada.”

Then, by section 18, the arbitrators have power to send for persons and papers and witnesses are to be sworn. Then by section 20: “In case of the death, removal or incapacity of either of the said arbitrators before making an award, or in case the third arbitrator chosen or appointed as aforesaid shall refuse to act, another shall be appointed in his stead in the same manner as such arbitrator so dead, removed or become incapable or refusing to act as aforesaid was originally appointed, and that in case a third arbitrator shall be appointed by His Majesty, as hereinafter mentioned, it shall and may be lawful for the Governor-in-Council to determine the amount of remuneration.”

Then section 21: “The award of the majority of the said arbitrators, as far as the same shall be authorized by this Act, shall be final and conclusive as to all matters therein contained, but if either of the arbitrators nominated by the Governor, Lieutenant-Governor or person administering the Government shall refuse or neglect to act on due notice being given, the two remaining arbitrators may proceed to hear and determine the matters referred to them in the same manner as if he were present.” There, my Lords, it seems that Parliament had in contemplation the necessity of special enactments where three arbitrators were appointed as to what should be done in case any one of the arbitrators should fail to be present and in case there should be a division of opinion, that is to say, that the reference to arbitration was upon the condition that if they met together a majority might make an award, but there were always to be three, except in the case of either of the arbitrators named by the Governor refusing or neglecting to attend on due notice being given—then the remaining members might make an award—an express provision in the Act for the award of a majority or of two acting if one became incapable and his place was not supplied. Now, my Lords, none of these provisions are in the present Act.

The Lord Chancellor:—It does not say that if they disagree the award of the majority shall be valid.

Mr. Benjamin:—I beg your Lordships' pardon. It is in section 21—“The award of the majority of the said arbitrators, so far as the same shall be authorized by this Act, shall be final and conclusive.” There is a special enactment there to authorize a majority to make an award. The present Act omits all those provisions, and its language is that the questions shall be submitted to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec and the other by the Government of Canada. I contend that the arbitration fails the moment that you cannot get three to concur in

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the award from any cause, and I also contend that there is a power of revocation and that the power of revocation has been duly exercised.

Lord Selborne:—Do you contend that there is an implied power to make a second appointment or not?

Mr. Benjamin:—I must take the case of either Province—not carrying that out, not appointing an arbitrator at all. What would be the result? Surely there could be no arbitration.

Lord Selborne:—It is the Government which is to appoint, and when the statute says a certain duty is cast upon a Government it takes it for granted that the duty will be discharged.

Mr. Benjamin:—I am merely making the supposition. That might be said of the arbitrator too—that every one would perform his duty.

The Lord Chancellor:—No, there is a difference in that respect. The Government must be presumed to act upon the Act of Parliament. What I wanted to know was whether you contend that in case of revocation the whole thing is to fall through.

Mr. Benjamin:—I do contend for that. I think the authorities will bear me out in that.

Lord Selborne:—That there is no power to appoint a new arbitrator instead of the person who is revoked?

Mr. Benjamin:—No; I do not go as far as that, I stop short of that, because what Canada (*Quebec*) did, as I understand, was not to refuse to appoint a new arbitrator, but to ask for a little time.

Lord Selborne:—I want to know whether you could or could not do it as a matter of law.

Mr. Benjamin:—My own opinion, if I am asked that question—answering it haphazard— for I have really not considered the question, is that if Quebec had appointed no arbitrator in the place of Mr. Day, the arbitration might have gone on validly.

Lord Selborne:—Although there was no express provision for that purpose as there was in the other Act you referred to.

Mr. Benjamin:—Yes, because the other Act had a provision in relation to two acting together. There was a provision for the case of either of the arbitrators appointed by one failing to act or becoming incapable. My Lords, the reason I originally asked your Lordships' attention to sections 112 and 113 in connection with 142 was this, that we consider to be the true meaning of the Act is that there are the three arbitrators appointed in distinct interests, that is to say, that Canada had an interest, Quebec had an interest, Ontario had an interest.

Lord Selborne:—I do not quite follow you when you say the General Government had an interest. Surely the clause of arbitration would not authorize them to do anything in favor of or to the prejudice of the General Government.

Mr. Benjamin:—What were they to do was to adjust and divide the defendants' credits and liabilities.

Lord Selborne:—Between these two Provinces what the statute said was to be a joint liability of the Dominion Government would remain a joint liability of the Dominion Government.

Mr. Benjamin:—That is true. But yet the Dominion Government might have an interest in seeing how the assets and liabilities were adjusted between the two Provinces, the two Provinces being a part of the General Dominion—at all events that is the view taken of it, because your Lordships will observe that in the appointment of the commissioner for Canada he is not appointed a third arbitrator for the interests of the two Provinces alone, but he is especially appointed to be the one arbitrator chosen by the Government of Canada, not an arbitrator simply chosen by Canada to act for the Provinces, but "you are the arbitrator on behalf

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of the Government of Canada, to arbitrate together with the arbitrators chosen by the Governments of Ontario and Quebec respectively.—It is to be an arbitration by you on behalf of the General Government with the two arbitrators appointed by the Provinces respectively." That is the commission, and, my Lords, so far as that commission is concerned, it cannot be said to be in the least degree contrary to the provisions of the Act or in contravention of the intention of Parliament. Parliament has said there must be three. Why is the Dominion of Canada to appoint not an umpire but a third arbitrator? and why at the time is that third arbitrator appointed on behalf of the Government of Canada, together with the other two, in all and every the matters referred in that Act to such arbitrators? I am only referring to this to show that they consider they have an interest at the time and that that was the meaning of the Act

Sir James Colvile:—I do not see what interest they had under these earlier Sections. They defined the point, liability of the Provinces to the Dominion, and then give the Supreme Government the power of deducting the interest upon that portion of the debt of that Province.

Mr. Benjamin:—It is in this way: Sections 110 and 111—"All assets connected with such portions of the public debt of each Province, as are assumed by that Province, shall belong to that Province." So that the Act contemplates that some of the debt may be assumed by a particular Province. Then it says: "The General Government shall be liable for the debts and liabilities of each Province," and then it provides for a division of the assets and debts of Ontario and Quebec. Well, my Lords, it might so happen that in adjusting the assets and the property between the two Provinces of Ontario and Quebec, a portion of the debt should be assumed by one of the Provinces upon taking possession of an asset, and if that should be the case Canada would have a clear interest in ascertaining in what way the assets of the Province were divided out and the debts assumed, inasmuch as Canada was to take upon itself the debt of all the Provinces, and an unequal or improper distribution might affect its interest. At all events such seems to have been the contemplation, because Section 112 speaks of the liability of Ontario and Quebec, and Section 142 speaks of the debts of Upper Canada and Lower Canada, in relation to which the Governments of Ontario and of Quebec are to appoint arbitrators, which seems directly to point to the antecedent debt of the two Colonies; at least that is the way in which we interpret these 4th and 5th Sections. But going back to the question of the three arbitrators you have here no umpire appointed. In ordinary cases each party appoints an arbitrator, but no one has ever doubted that those arbitrators must be unanimous in their award upon every point, and in consequence of the difficulty of unanimity it has long been the practice in private, and occasionally in public arbitrations, to appoint an umpire; but nothing can be clearer under the authorities than the distinction between an umpire and an arbitrator. When three arbitrators are appointed all three must concur in their decision upon the subject committed to them, because it is committed to the joint judgment and consultation of all three, and in the absence of anything to state whether any majority and what majority shall govern, I think the rule of law is without exception, that all three must concur. But upon the point of revocation, which is the first point to which my attention has been called by your Lordships, the right to revoke an arbitrator is one of the oldest rights at Common Law—the right to revoke a submission, or to revoke an appointment. It goes back to *Vymois' case* in 8th Coke.

Lord Selborne:—I suppose we may take it that the law of Canada is the same.

Mr. Benjamin:—I assume that for the moment. The law of Upper Canada is the same as the Common Law. In *Vymois' case*, 8th Coke, page 299, a question arose as to the power of revocation.

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THE ATTORNEY-GENERAL:—My Lords, we agree about this that the law is to be taken to be the law of this country.

MR. BENJAMIN:—My learned friend says the Province of Ontario does not contest that it is the law of England which is to govern the case. That being the case we come back to the 8th Coke, and we find that this was decided in *Vynoir' case*, in relation to an arbitrator; the plea is that the arbitrator made no award: "The said William Wyld saith that the aforesaid Robert ought not to have his action aforesaid against him, because he saith that the arbitrator aforesaid, after the making of the writing and before the aforesaid Feast of St. Michael the Archangel, in the condition aforesaid above specified, did not make any award in writing under the hand and seal of the same arbitrator, between him the said William and the aforesaid Robert, of and upon the premises aforesaid, in the condition aforesaid, above specified, according to the form and effect of that condition, and this he is ready to verify, whereupon he prayeth judgment if the aforesaid Robert ought to have his action aforesaid against him, &c." The replication was that the defendant revoked the authority given by him to the arbitrator, upon which there was a demurrer, and then upon the demurrer there was a joinder, and the court took the matter under consideration.

SIR MONTAGUE SMITH:—Nobody disputes that in an ordinary submission to arbitration, the one party may revoke the submission, but then he is subject to an action by the other party for so doing in which he would recover damages, and an Act was passed in cases when submissions were made a rule of Court that the revocation should not be made without leave of the Judge.

MR. BENJAMIN:—I was going to call your Lordships' attention in reference to that matter, to the mode in which it is stated in the 6th Law Reports Common Pleas 212, in a case of *Rowse vs. Muir*, by Mr. Justice Willes, and perhaps the shortest way would be to read it. The question there was as to the right of revocation in arbitrations, and the general rule is stated by Mr. Justice Willes in half a dozen sentences, as follows:—"I am of opinion that this rule should be discharged. Before the passing of the 9th and 10th William III., c. 15, it was competent to either party to a reference to revoke his submission and it was not competent to either to make the submission irrevocable any more than it was competent to him to make irrevocable an appointment of an ordinary agent without an interest or to a tenant by covenant in a lease to bar away his right to replevy, for as is said in *Vynoir' case* (1) my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature irrevocable." That law as to arbitration was never questioned, and it is explained how an arbitrator was put upon the footing of an agent by a passage in Coke's Institute, where it is said that it is a good cause of challenge to a juror that he has been appointed arbitrator. In the course of time it was thought desirable that submissions to arbitration should be revocable. The 9th and 10th William III., cap. 15, was the first but an imperfect step in that direction, making it lawful for parties entering into agreements to refer that the submission shall be made a rule of Court, and making it imperative on the Court to make the submission a rule of Court and subjecting the party who refuses or neglects to perform the award to all the penalties of contravening a rule of Court. The result was that the Court in which the submission was so made a rule acquired authority over the award, and according to Lord Brougham, C.B., in *Nichols vs. Roe* (2), exclusive authority over the award made under the reference. And it might be thought that it was the intention of the Legislature to make the arbitrator a Judge. That, however, was not the construction which was put upon the statute, because it was held over and over again before the passing of Baron Parke's Act, that it was competent to either party to revoke the submission even though the submission had been made a rule of Court before the award had been made."

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The Lord Chancellor:—Supposing I sell you an estate, the price to be settled by arbitration by A B, I cannot revoke that delegation of power to A B to settle the price of the estate.

Mr. Benjamin:—That is coupled with an interest.

The Lord Chancellor:—Is not this the same thing?

Lord Selborne:—The use of the word "arbitration" may mislead.

The Lord Chancellor:—This is the sale of an estate, is it not?

Mr. Benjamin:—If A and B agree to leave to arbitration the division of a thing which is not divisible in kind—say a library of law books—you cannot divide a library of law books by taking the one-half of each author of course; and it is to be divided according to the judgment of the arbitrators. It is quite in the power of one of the parties to withdraw and say "I revoke my agreement to submit that to arbitration."

The Lord Chancellor:—Is not this a parliamentary power by which the Provinces surrender certain rights the one to the other? The price or certain items of the price are to be ascertained by what is called an arbitration; but it was for the appointment of the machinery for the purpose of determining the price. The law is this, and you may quote any number of authorities, that the death of one of the parties would revoke an ordinary submission to arbitration, but the death of one of the parties will not revoke an ordinary submission to arbitration in the case I have put. If I sell my estate, the price to be settled by one person chosen by me and another by you, and the third person chosen by both, and I die, that is quite as binding upon my representative as if I were alive, and the ordinary submission to arbitration will be gone.

Mr. Benjamin:—That is a bargain in which the other party has a special interest.

The Lord Chancellor:—Exactly.

Mr. Benjamin:—It is a bargain for a sale, but this is a direction by Parliament to arbitrators to use their discretion in dividing out assets belonging to two parties.

Lord Selborne:—Is it not a fallacy to say that the Governments of these three Provinces are the persons who refer the thing to arbitration? The Imperial Legislature has referred it to arbitration, and surely only the Imperial Legislature could revoke it.

Mr. Benjamin:—The Imperial Legislature could revoke the submission to arbitration, but the question is, when one of those Governors has appointed an arbitrator, when Her Majesty has given her patent to one of those arbitrators, whether She has or has it not in Her power to say?

The Lord Chancellor:—Is it not simply one to be named by A. B., one to be named by C. D. and one to be named by E. F. They are named and there is an end of it.

Lord Selborne:—It is the Act of Parliament that enables them to do that.

The Lord Chancellor:—It is as if their names were inserted in the Act of Parliament.

Mr. Benjamin:—Suppose after that one of them dies.

The Lord Chancellor:—That has not happened fortunately.

Mr. Benjamin:—Or suppose one withdrew. Suppose one said "I will not act." Suppose he had been named in the Act of Parliament and said "I will not act;" the arbitration could not go on; there must be another appointment.

The Lord Chancellor:—This arbitrator has assumed that he had power to resign.

Mr. Benjamin:—It does not so much depend upon his power to resign as upon the fact that his patent has been revoked.

Sir Montague Smith:—Supposing they had been appointed before, and the

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Act had decided it and said "these three persons shall arbitrate," would you say then that they might plead the revocation ?

Mr. Benjamin :—If the appointment had been during pleasure.

Sir Montague Smith :—During pleasure is beyond their powers ; they have only to exercise their power of appointment ; adding "during pleasure" cannot make any difference.

Mr. Benjamin :—There is nothing in the Act of Parliament to limit the power of the Crown as to the terms of the appointment ; they are to appoint an arbitrator.

Lord Selborne :—Do you mean that the Crown might have annexed any conditions it pleased ?

Mr. Benjamin :—No, but it limits the powers within a certain time for instance.

Lord Selborne :—Where is the authority for that ? The word is "chosen."

Mr. Benjamin :—It is the power of choice. But whoever chooses an arbitrator conveys to that arbitrator a certain power.

The Lord Chancellor :—That assumes the whole question—putting in the word "arbitrator" you mean "arbitrator" in your sense of the term.

Mr. Benjamin :—I simply use the language of the Act.

Sir Montague Smith :—It is not a submission by agreement.

Mr. Benjamin :—No, but surely it is a submission by Act of Parliament ?

Lord Selborne :—Supposing A and B agreed that a dispute between them should be decided by three arbitrators, to be named by C, D and E, could C, D and E put in that they were to have the power of revoking the nomination.

Mr. Benjamin :—An agreement of A and B that C D and E should nominate three arbitrators ?

Lord Selborne :—Yes. Could they, nominating the arbitrators, add that the arbitrators were to act during their pleasure ?

Mr. Benjamin :—It would be necessary for them in the appointment to state what the powers they gave to the arbitrators were, unless there was some other source from which they could derive them.

Lord Selborne :—They have no powers ; the persons who agreed to refer to arbitration would be the sole source of power ; what they said would determine the powers. Of course, if they named a person who would not take it upon himself there would be no nomination ; but I cannot understand how mere nominators can annex any condition, or reserve to themselves any powers.

The Lord Chancellor :—Suppose the Act had said that the sums were to be determined by three persons, one to be chosen by the Governor-General of Canada, one by the First Lord of the Treasury in England, and one by the Prime Minister, and they have chosen and named a person, such casualties as death or incapacity might have to be considered, but as regards the persons choosing, are not they *functi officio* when they have done so ?

Mr. Benjamin :—If that should be the proper construction of the Act it would amount to this, that if the Province of Ontario and the Province of Quebec each revoked their nomination it would be a nullity.

The Lord Chancellor :—I put it with the view of considering whether they could revoke. Could the Governor-General of Canada, the First Lord of the Treasury and the Prime Minister, having once exercised that power, afterwards revoke the appointment ?

Mr. Benjamin :—Supposing one of the parties said "I resign ; I will not go on with them ?"

Sir Barnes Peacock :—After he had been appointed might not he be compelled by mandamus to go on :

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Sir Montague Smith:—You see that Justices are to hear and determine, and if they did not, the Court would force them to do so.

Mr. Benjamin:—What we are contending is this, that in the absence of any special provision the statement by Parliament that these are arbitrators, and are to act as arbitrators appointed by parties who have an interest in the subject matter of the arbitration, calling them "arbitrators" is an indication of the light in which Parliament intends them to be regarded by the parties, and marks it just as if each party to this arbitration having an interest in it had named his arbitrator. It is not a submission by them, but it is a parliamentary enactment taking the place of a voluntary submission of parties.

The Lord Chancellor:—The consequence of your argument is very startling—that it was the intention of Parliament, after having provided this very careful organization of machinery, to leave the whole thing to the caprice of the Provinces with regard to revocation.

Mr. Benjamin:—This is one of the subordinate details. The whole Confederation is formed and everything is done. This is dividing one of the Provinces with two parts, and it is a machinery for dividing their assets between them.

Lord Selborne:—Which is essential to the whole scheme.

Mr. Benjamin:—I should say not, because the whole scheme has been in operation and in existence for years, and the division has not taken place. It is merely determining one of those matters which would have to be determined upon a scheme of confederation taking place, and if this mode fails, it is quite within the power of Parliament to determine afresh—a system of arbitration having failed and having been found impracticable—in what other way that is practicable, and which Parliament can control, a division ought to take place.

The Lord Chancellor:—Suppose it ran in this way—three persons, one to be named by the Government of Ontario, one to be named by the Government of Quebec and one by the Government of Canada, shall determine by an assignment in writing how the debts, credits, liabilities, produce and assets of Upper and Lower Canada are to be divided and adjusted. Then the three persons are brought into existence, then what is to be done? Can those who named them terminate their appointment? That is the first question. On what principle can such a thing be done?

Mr. Benjamin:—Supposing one of the persons named became a lunatic?

The Lord Chancellor:—That is another question; fortunately, that has not happened.

Lord Selborne:—We might all die, you know.

The Lord Chancellor:—I ask one question, and you put a totally different one. On what principle could any of the three bodies who had named the persons terminate them?

Mr. Benjamin:—If the persons who are to name the individuals are persons interested in possession, calling them a court, or arbitration, or any other name, does not change the character of their functions, which are judicial in their character; they are the chosen judges of the parties.

Lord Selborne:—Of the Imperial Legislature, not of the parties.

Mr. Benjamin:—The Imperial Legislature has caused the parties to choose their judges. If "once for all" is there, of course the argument would be at an end, but the Imperial Legislature has authorized these Governments to choose their judges. Every private individual, without an Act of Parliament, has the power to choose his judges, and in both cases it appears to me that the law must be the same.

Sir James W. Colvile:—Has it not ordered them, not authorized them?

The Lord Chancellor:—These persons when chosen were not to be the agents; that is the principle of arbitration that until an award is made the thing is *in fieri*; it is a case of principle and agent, and the thing is altogether in suspense until the award is made. That is the old Common Law principle, that you might terminate the agency at any moment you pleased, because you were not bound to go to arbitration, but there is no option here about going to arbitration; the thing must be done.

Sir Montague Smith;—The whole authority flows from the person appointing in the case of an ordinary arbitration.

Mr. Benjamin:—The Legislature gives the power to the person appointing to make the appointment, and therefore, of course, the whole power flows from the party appointing. It is to be observed that the terms used in the appointment were chosen by Ontario.

Sir Montague Smith:—The authority does not flow from the donee of the power, but from the donor.

Mr. Benjamin:—This appointment as it is made is evidenced by a patent from the Crown. May I read that patent from the Crown as being in excess of the power given Parliament, and set it aside?

Lord Selborne:—On the face of it, the intention is to act under the Act of Parliament and to do the thing which the Crown ought to do. Surely the addition of the words "during our Royal pleasure" cannot nullify that.

Mr. Benjamin:—I am not saying that it nullifies it. I am only contending that it gives the right to the Crown to replace the party by another, if it chooses to revoke its original appointment: in other words, that there is nothing in the Act of Parliament to abridge the prerogative of the Crown to deprive a party of office at the pleasure of the Crown, when that party has not the freehold in the office, or when he has not been nominated to the office for a fixed term. This is an appointment by the Crown of persons nominated to the Crown; the persons nominated are selected and named to the Crown by the different Governments, but the appointment is by the Crown.

Lord Selborne:—It is not by prerogative at all; it is by parliamentary authority.

Mr. Benjamin:—If these patents are correctly issued, they are certainly patents from the Crown, and unless the Crown has violated the Act of Parliament in some way in the terms of its commission, the terms of its commission say how this patent shall or ought to be regarded.

Sir Barnes Peacock:—It is the Government, surely, doing it in the name of the Crown.

The Lord Chancellor:—The Crown had no power irrespective of the Act of Parliament to name a person to decide this question.

Mr. Benjamin:—All I have to observe upon the matter is that the Government of Ontario, which is the adverse party in this case, and every one of these Governments, construed the Act in the same way, and acted under it in the same light and in the same view of the authority of the Crown, and it does seem to me that it is not in their power now to say: "We have all construed it wrongly, although we all acted under it in this way." Ontario being the first to set the example, and then say, "It is all a nullity; what we all have done is wrong; we had not the right to put into our commission that we would recall it at our pleasure; we have not the right to put into our commission that you must act with the other arbitrators, and that acting with one is acting with both; that all that is to be disregarded and that you are to look to nothing but the Act of Parliament." Otherwise, all that was needed was to say that the Province of Ontario or Her Majesty appointed A. B as the arbitrator, under section 142 of this Act, without limiting his powers and without fixing a term to them. Suppose the patent had said, as it might very

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well have said, "Until the arbitration is completed and a final award is made." I suppose that would be valid. The question whether the reference lasts till the final award is made is nowhere stated in the Act, and the Act does not speak of an award being made, but simply provides that the question shall be referred to the arbitrament of three arbitrators. That question being referred to the arbitrament of three arbitrators, one of the arbitrators resigns and withdraws. The question remains whether, under those circumstances, the resignation being accepted and his powers recalled, the other two are the three arbitrators who are to go on.

Sir Robert P. Collier :—That is another matter.

Mr. Benjamin :—Now, my Lord, so far as that question is concerned, the authorities that were cited in the Court below and the Common Law authorities, it appears to me, are unanimous in requiring the unanimity of the three arbitrators; where a question is submitted to three arbitrators, two of the three cannot make an award if it is submitted to the three.

Sir Barnes Peacock :—Are you now speaking of a public matter, or a private matter, or of both?

Mr. Benjamin :—I speak both of public and of private matters.

I shall contend, my Lords, under the authorities, that, with reference to all those questions which are raised about public or private arbitrators, it is a mistake in applying them. What they say as to public arbitrators is when certain powers are given to a body of public officers to act upon the individua subjects of Her Majesty then the power granted to a certain number, such as a public magistrate, to act in relation to individual subjects is exercised by that body as a *quasi* corporation, and the majority decide what is to be done. That has nothing to do with the case of an arbitration.

My Lords, the first authority which I have on this subject is to be found in Bulstrode, page 105. It is a decision in Hilary Term of the 8th of James I. The decision is this: A writ was directed to eight persons to be executed, and seven of them returned it certified. The Court held that that writ was improperly returned, and that a writ or authority being directed to eight persons the return by seven out of the eight was of no legal validity. "Upon the return of a commission to certify the Court of some proceedings, the case appeared to be this; The writ was directed unto eight *nominations* and seven of them only do certify, and whether this were good or not was the question. Henry Yelverton excepted against this return that the same was not good, for the writ being here directed unto eight specially and by name, all the eight ought to join in their answer in this return, and this was the reason which moved the Court to have the same writ directed unto Sir Henry Lynley as the eighth man; because that they intended the eight should make the return, and the return here made by seven is not good. This is to be taken as a principle of speech, that here is an enumeration of persons certain, and the same so done *now exclusive* to exclude any, but *positive* to include all; and that this should be so appears by the Book of 2 Assizes, fol. 3, pla. 5, and 2 E. 3, old impression, fol. 35, pla. 2 and Book title "Attaint." Then upon the argument the Court held that an authority directed to eight persons must be exercised by the eight and not by seven alone.

The Lord Chancellor :—That is not quite an authority.

Mr. Benjamin :—It was "a commission to certify the Court of some proceedings."

The Lord Chancellor :—To certify some fact.

Mr. Benjamin :—Yes, my Lord.

The Lord Chancellor :—If there is an authority to eight people to levy goods, and seven return *nulla bona*, the eighth might return that there are goods.

Mr. Benjamin :—That is quite so, My Lord. Then "Sir Francis Bacon, Solicitor-General, argued to the contrary, that the return here by seven of the

eight is good, for that this is a principle in reason, and that infallible *quod omne majus continet in se minus*, and upon this reason is the case in the Book of 31 Assizes, pla. 1, and Book title "Variance," pla. 37." Sir Francis Bacon's argument was unsuccessful.

Lord Selborne:—It may have been a mere ministorial act, and these may be the proper persons to do it.

Mr. Benjamin:—The case is argued at considerable length. My learned friends have not referred me to the same parts of the volume where probably the real facts will be more clearly ascertained than in the part to which I was specially referred.

Now, my Lords, in the case of *Grindley v. Barker*, 1st *Bosanquet* & *Fuller*, page 229, that was under an Act of Parliament authorizing the seizing and dealing with hides when not properly cured, and delivered to the people properly cured,—Parliament determined that there should be a tribunal of six persons, two to be appointed by each of the curriers and tanners and the other parties in the trade, who should make a report, who should try and determine whether the goods were subject to the penalties of the Act, and the six parties named all tried the goods and four found a decision against the will of the other two, and in that case the Court, all of them, held. "The true question in this case lies in a very narrow compass; it is this: What is the operation in law of a judgment of four out of six triers, six being the number constituted to be the triers, and the six being assembled to inquire and try; whether it is to be deemed the finding and the judgment of the body, or merely the finding and judgment of the four individuals who concurred? If it is the mere finding of the four who concurred then this leather is not found insufficient, but if the operation of law on the finding of four, who are the majority of the body assembled, be that their judgment is the judgment of the whole, and therefore the judgment of the triers, then the leather must be taken to be found insufficient and the defendants are justified. On the first argument I thought this question would turn on two general heads of inquiry. 1st—What the general rule of law was in the case of bodies of men entrusted with powers of this nature; whether they must all concur, or whether the decision of the majority would bind the whole? 2nd—Supposing the latter to be the general rule, whether that general rule is to be controlled by the intent of legislature, as collected from the scope and provisions of this Act? With respect to the first question I think it is now pretty well established, that where a number of persons are entrusted with powers, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole." It is on the ground that two can give a decision, but that the majority gives the act of the whole. "With a view to this case, those who have met resemble the six triers who have authority to decide, and then a question arises how they act when they have met. The case in Atkyns shows the opinion of a great Judge, Lord Hardwicke, who was much conversant with this subject, in one part of his judicial life, that the majority of persons assembled will conclude the minority, and an act by them will be the act of the whole body." That is the ground,—"And that part of the Law of Corporations applies to this case, that with regard to powers not merely private which are to be exercised by many persons, provided a sufficient number be assembled, the act of the majority concludes the minority, and becomes the act of the whole body."

Lord Selborne:—He does not say "provided all assembled." I suppose it would be a quorum.

Mr. Benjamin:—In corporations the law is so without a doubt. If you have a large body assembled the act of the majority is the act of the meeting; in other words, "if that be so, the argument drawn from the word 'triers' being used generally in the 33rd and 46th sections, will not stand much in our way, because

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the judgment of four triers in this case is the judgment of all as much as if all had concurred," the case being that all were present and four out of six voted in one way. "But the question is still open whether, on the construction of this particular statute, it does not appear that not only all the persons must be assembled but that everyone of them should concur." There was something very plausible in that last argument, but I am now clearly satisfied either that all must concur, or that a majority may decide for the whole. There is nothing in the Act which necessarily leads to a construction that the majority must be composed in any particular manner."

Lord Selborne :—In that case, if two out of the six had stayed away and the four who were present had proceeded, do they say it would have been void?

Mr. Benjamin :—They all say so. Every one of the Judges says so distinctly. I have the passages marked here. I will call your Lordships' attention to page 238.

Sir Montague Smith :—It was not necessary there to decide anything more than that a majority would do? It so happened that they were all present.

Mr. Benjamin :—With submission I think it was necessary, and that is the very ground.

Sir Montague Smith :—It was necessary to decide that because all six were present.

Mr. Benjamin :—It is only on the ground that all six were present that they said the majority could decide.

Lord Selborne :—Do not they refer to the case before Lord Hardwicke?

Mr. Benjamin :—Yes, but that is the case of corporations.

Sir Barnes Peacock :—They said this is like corporations in this respect.

Mr. Benjamin :—This case goes the whole length of our contention, and I shall therefore read it to your Lordships.

(*Adjourned for a short time.*)

Mr. Benjamin :—Now, my Lords, Chief Justice Eyre, in this case of *Grindley v. Barker*, says: "It is impossible that bodies of men should always be brought to think alike; there is often a decree of coercion, and the majority is governed by the minority, and *vice versa*, according to the strength of opinions, tempers, prejudice, and even interests." This is in answer to a suggestion that arbitrators were like a jury, that it was no more out of the way to require unanimity of arbitrators than unanimity of a jury.

"We shall therefore not think ourselves bound in this case by the rule which holds in that"—that is jury trials. "I lay no great stress on the clause of the Act which appoints a majority to act in certain cases, because that appears to have been done for particular reasons which do not apply to the ultimate trial; it relates only to the assembling the searchers. Now, there is no doubt that all the six triers must assemble, and the only question is, what they must do when assembled. We have no light to direct us in this part"—and therefore the learned Judge comes to the conclusion that as all the six are assembled, the decision of four out of six is the decision of the whole, and in that sense it is the decision of the six.

Well, my Lords, the next Judge, Buller, J., at page 239 says, that the finding is the finding of all the six triers; it seems therefore that upon the whole view of the case that the majority of the six must decide, but that is upon the ground that when the six are assembled, four out of the six deliver the judgment of the six, even if the other two do not deliver the judgments. Heath, J., says, at page 240: "All must concur in trying, and then though they may be of different opinions, some of one opinion, some of another, yet all having tried, the majority shall bind." Then Rooke J., says, at page 241, again in

the same way: "I might rest satisfied with deciding on the particular circumstances of this case, and if I did, I should agree that after the authority of *The King v. Foxcroft*, four having absolutely found in this case, and the others having only refused to concur, will amount to a finding of the whole body. But as that might lay a ground for further litigation, I think it right to be more explicit." Then he goes on to say at the top of the next page: "We shall not advance public justice by saying that though a majority of the triers, who have had the advantage of all the information to be derived from the whole six who compose the tribunal, are of opinion that the leather is unserviceable, still any one man shall have it in his power to prevent a finding by holding out against the rest. All six must undoubtedly try; but does it not therefore follow that they must all decide the same way. Each man is, after due examination and enquiry, to decide according to the best of his judgment, and the question is to be determined by the opinion of the majority."

Now, my Lords, that is that case, but when we come to the question of arbitration the nearest authority to the case before the Court to be found is in the cases of *Hetherington v. Robinson*, 4th *Meeson and Welsby* 608, and *Winteringham v. Robertson*, 27 Law Journal (Exchequer), page 301. Now, my Lords, the case in 4th *Meeson and Welsby*, page 608, shows the extreme punctiliousness of the Court in receiving an award, which is not in precise accordance with the terms of the submission. By an agreement of reference the matters in dispute in the cause were referred to two arbitrators, with a power to them to appoint an umpire. It was also agreed that the costs already incurred should abide the event of the award, and that the costs of the reference should be in the discretion of the arbitrator. Then having provided that, it went on to say: "And that the parties, and each of them, should and would well and truly stand to, obey, abide by, perform, fulfil and keep the award of the two arbitrators and their said umpire." What happened was that the arbitrators did not disagree and did not appoint any umpire. They made an award, but the Court held that because the word was "and" instead of "or" the case was quite too doubtful—that was the unanimous decision of the Court—to permit them to consider the award as binding.

The Lord Chancellor:—They did not attack the man, but they did not mean to decide the position of law.

Mr. Benjamin:—What they said was this: "The words of the agreement are not that the arbitrators or their umpire, but that they and their umpire shall act in the matter. If the word "or" had been in the place of "and," your construction might prevail. It is much doubtful to grant an attachment upon."

Sir Montague E. Smith:—The Court of Exchequer were very strict in those days.

Mr. Benjamin:—Undoubtedly, my Lord. But at all events, we find with what perfect regard to the terms of the submission and agreement the Court deals with such matters; that when the reference is to two arbitrators and an umpire, and the arbitrators have not called in an umpire because they did not disagree, the Court has held that still it is a very doubtful matter whether in the absence of the umpire the two arbitrators could give an award, in consequence of the language by which the parties agreed to abide by the award. But the same question came before the Court in the case of *Winteringham v. Robertson*, to which I just called attention in the 27th Law Journal (Exchequer), page 301.

Lord Selborne:—Those are both cases of private arbitrations.

Mr. Benjamin:—Yes, but they are cases as to the necessity of all agreeing where the reference is to three. That is the point on which I am now calling your Lordships' attention to the authorities.

Lord Selborne:—I think it would not be disputed in the case of a private arbitration, unless there is something expressly to the contrary, that that is so?

Mr. Benjamin:—If that is not contested, of course, I need not argue it further.

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The Attorney-General:—That seems to be so in the case of a private arbitration; I do not dispute that at all in the case of a private arbitration depending on the consent of the parties.

Sir Montague E. Smith:—That cannot be disputed in a private arbitration.

Mr. Benjamin:—Then in the case of a private arbitration, we have it agreed that if the submission is to three arbitrators all three must concur in the award. My Lords, I call then for any authority—because the authorities with which we have been furnished have certainly nothing to do with it- that in an Act of Parliament which directs a submission to three arbitrators, Parliament means differently in relation to the award of the three arbitrators from what private individuals mean when they submit a matter to three arbitrators.

Lord Selborne:—I suppose it makes no difference whether they are called arbitrators or commissioners?

Mr. Benjamin:—I think it does.

Lord Selborne:—If they had called them commissioners, what should you say?

Mr. Benjamin:—I should say that the law is the same, but as regards commissioners there may be a question possibly, and we should not be able to find the authorities as strong and as direct as they are in relation to arbitrators. But I do, with all submission, attach the greatest importance to the language of the Act in calling them arbitrators, as designating their powers. Parliament could call them arbitrators or commissioners at their pleasure, or valuers or a Special Court; but it has called them arbitrators, and our argument is that in calling them arbitrators it has designated by the use of that very term the principles of law which are to govern the tribunal. My Lords, our argument is this: That in stating that a certain matter is to be referred to the arbitrament of three arbitrators, Parliament has said, the powers which are granted are such powers as are granted to arbitrators; and that it is quite an inadmissible mode of construing an Act of Parliament to change the word used so as to change the construction. As Parliament has said what we do submit to judgment is to the judgment of three men who are to act as arbitrators, that is an indication that the law relative to arbitrations is to govern the proceedings of the parties so denominated by Act of Parliament, and that we should be departing from every rule or canon of sound construction if we were to say where Parliament says that three arbitrators are to decide, they mean that three commissioners are to decide, because we know what the law is as to three arbitrators, and the selection of the words "three arbitrators" carries with it the law applicable to arbitrators, how it is admitted, and I am told not to argue it by my friend; that if A and B submit their quarrel to the arbitrament of three arbitrators, all three must concur, or no valid award. Then I am told that when Parliament says a particular matter shall be submitted to three arbitrators, the meaning is not the same, and that although the three arbitrators refuse to concur in an award, the award of two is good.

Lord Selborne:—In a matter which requires, according to the Act of Parliament, for public reasons to be determined and which cannot be determined in any other manner.

Mr. Benjamin:—Cannot be determined in any other manner under the Act.

Lord Selborne:—Or without the Act, because it is clear that without the Act of Parliament it could not be determined at all.

Mr. Benjamin:—But with an Act of Parliament differently worded it might be determined.

Lord Selborne:—In these private cases the consequence of the arbitration failing is that people are left to their rights at law to be decided by the ordinary tribunals.

Mr. Benjamin:—Yes.

Sir Montague E. Smith:—And in all these cases the courts, in early times, were reluctant to have their jurisdiction ousted by means of arbitration.

Mr. Benjamin:—However that may be, what I am saying is this, that whatever may be the considerations that guide individuals in leaving questions in discussion between them to arbitrators, it was within the power of Parliament to determine one mode or another of settling these questions, between the two Provinces. It might have said each Province shall present a case before the Supreme Court of the Dominion of Canada, and there shall be a trial there, and then an appeal to Her Majesty in Privy Council; but here we are dealing with a matter before Her Majesty in Privy Council, in the way of an original, and not an appellate jurisdiction. Parliament might have decided that it was perfectly within the power of Parliament, and the question is whether they meant to say it shall be dealt with as a private arbitration. They have not said it shall be dealt with as a private arbitration, but they have said it shall be dealt with as an arbitration, and not otherwise, and the question is whether or not that declaration of the Imperial Will contained in the Act of Parliament is to be carried out by your Lordships in your advice to the Crown. Is or is not this matter to be determined upon the principle of an arbitration? If it is to be determined on the principle of an arbitration, then it is a matter upon which we must discuss what the law of arbitration is. But if we are not to deal with it on the basis that it is a question of arbitration, I am at sea in relation to the ground on which I shall argue it. I know no means of arguing the construction of this section except by taking it as it is worded, and Parliament says what we mean is this, that these questions are to be decided by arbitration, and when we once got the legal meaning of the word arbitration, and the powers of arbitrators, unless we apply that to the construction of the Act, what is there left for us to apply? Is it a matter of pure discretion in the tribunal which is to determine it? Is it a matter for your Lordships, under the circumstances of the case, to say we will treat this as if it were a matter of valuers, or we will treat this as if it were a matter of commissioners? No, says the Act, treat it as a matter of arbitration, determine what arbitration law is, and apply that law to the question you have to decide.

Lord Selborne:—The view which prevails that unanimity is necessary when power is given to three persons does not depend on anything peculiar to arbitrations. Surely it would be a general view subject to control either by something expressed in the instrument or by something to be collected from the nature of the power and the duty to be performed under it. Would not that be so?

Mr. Benjamin:—If I were to admit that, it would not be less in accordance with the purport of my argument, to say, however, it might be, if other words were used, it is sufficient for my purpose to say "arbitration" is used, and that word being used I am dealing with that alone. I do not discuss how it would be if another word were used, but I am discussing now what is meant when the word arbitration is used, because in relation to that we have distinct authority, and to that we can confine the discussion with the greatest ease, if I am right in supposing that Parliament, when it said that the powers were to be exercised by arbitrators, meant by that, as I contend they did, according to the principles which govern arbitrations. I leave out the word "private" or between private individuals. I simply take the words of the Act. This question is to be determined on principles which govern arbitrations. Then, my Lords, the next question is what are the principles which govern arbitrations, and then it is admitted that if it was an arbitration between private individuals all three must act. Then I call for that which I have a right to call on the other side to furnish—how do they distinguish, and where is the law that distinguished between a private and a public arbitration? None is given to me. I am told that when powers are confided to

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Justices of the Peace, to Commissioners, to different individuals, to perform certain acts, it has been occasionally decided that when those individuals meet all together they meet as a *quasi* Corporation or as a *quasi* Court in which, when all are present, the opinion of the majority is the opinion of the Court.

LORD SELBORNE:—Must they all be present?

MR. BENJAMIN:—That is what we contend.

THE LORD CHANCELLOR:—Is that so in the case of a Corporation? If they are all summoned and one chooses to stay away does that suspend the proceedings?

MR. BENJAMIN:—No, my Lord, not in a Corporation.

THE LORD CHANCELLOR:—I thought in the case you cited it was likened to the case of a Corporation?

MR. BENJAMIN:—The case of the six triers?

THE LORD CHANCELLOR:—Yes.

MR. BENJAMIN:—It came to be likened to a Corporation in the sense that the Court held that a majority might decide, but they also held it was unlike a Corporation in this that all must be present.

THE LORD CHANCELLOR:—That is to say they must all have an opportunity of trying. You must not exclude any of them.

MR. BENJAMIN:—They said that all must be present. I call your Lordships' attention now to the decision in *Winteringham v. Robertson*, which I mentioned just now, in the 27th Law Journal, page 301. In that case there was doubt whether a third party who was to be present at the arbitration was exercising the powers of an umpire or an arbitrator, and whether under the terms of the submission he was to be considered an umpire or an arbitrator, and the Court held that he was an umpire under the terms, and that the award was therefore good. the Court expressly stating that if he had been a third arbitrator the award would not have been good, because all three must have concurred to make it good. That was the case of two persons appointed by the parties and a third. The question was this, whether the third person was an umpire or was a third arbitrator. Held by the Court the award is good, because upon a proper construction of the agreement this third person is not a third arbitrator, but an umpire; if he had been a third arbitrator, of course the award would not have been good. They had to determine that question in order to decide whether the award was good. That is the condition precedent of the decision. In our opinion he is not an arbitrator, *ergo* award good.

LORD SELBORNE:—That does not seem to me to meet the difficulty in this case, "authority to make an award within a limited time—proviso, that in case they shall not agree in their said award it shall be lawful for them, and they are hereby empowered by writing, &c., to appoint another independent person to be umpire or to concur and join with them in considering and determining all or any of the matters hereby referred to them." I do not quite see how that bears on this argument.

MR. BENJAMIN:—Only in this way, that the Court had to determine he was an umpire before they could say the award of two was good, because they expressly say, and that is the language of Baron Watson: "I am of the same opinion. The objections urged all come to this that the third party had no authority to make the award. I think that the power given by the submission was to appoint an umpire not a third arbitrator, and that an umpire was appointed to act as such." There was no power to appoint a third arbitrator; if there had been, the effect would have been that the three must have made the award.

SIR MONTAGUE E. SMITH:—There is nothing in that case which carries you further than the admission made by the Attorney-General, that in the case of a private award all three must join.

MR. BENJAMIN: Then where is the law of the contract?

Sir Montague E. Smith:—That is the other part of the argument.

Mr. Benjamin:—I cannot find anything anywhere to the contrary.

The Lord Chancellor:—Suppose you have a provision for reference to two in the nature of a private arbitration, and if they do not agree, power to appoint a third that is tantamount to saying that the majority shall bind, otherwise what is the object of appointing a third.

Mr. Benjamin:—Of course if it is said, if they do not agree they are to appoint a third, one would say that that carries with it the idea of an umpire; but if you appoint three arbitrators then the distinction at once arises that you have not got a case in which, on a division between the two, the third may decide it; you have a case in which all three must concur from the origin as to the proper consideration to be given to the subject and the principle by which it is to be governed, and in discussing together to come to a conclusion.

The Lord Chancellor:—We cannot shut our eyes as reasonable men to the nature of this particular case here, that there were two bodies who were principally interested, Ontario and Quebec, and the third body might be considered to hold a sort of even balance between them, at all events not to be a partizan on one side or the other, and that with the circumstance that there are three referees, three persons, to ascertain the particulars of these assets—of itself suggests that it is a case where the majority is to bind, does not it?

Mr. Benjamin:—I can only say to that that on a previous occasion when three arbitrators were appointed. * * * * *

The Lord Chancellor:—We must not use words for the purpose of blinding our eyes, but we must look at what the real substance of the transaction is.

Mr. Benjamin:—I was referring to the real substance of the transaction in the previous arbitration between these two provinces, and when Parliament on a previous occasion established an arbitration between them it determined having established three arbitrators that two should decide and it has not so determined in the present case. Having that antecedent arbitration between these very two parties before them one can hardly think that that would have been omitted on the second occasion except for some purpose; having before them the precedent of what they had done in the former arbitration, where they declared that the majority of the three should decide, in this case they have abstained from so declaring, and have left the matter, therefore, to the general principle which says, that a power conferred upon or an agency granted to, or an authority given to three persons, must be exercised by the three. That is the general rule of law, and it is incumbent upon those who declare there is an exception in this case to point out on what principle that exception rests.

Now, my Lords, so far as the exception resting upon authority goes, there are two cases in 3rd Term Reports, which I may as well call to your Lordships' attention. One is the case of *The King v. Forest*, page 38, and the other is the case of *The King v. Hamstall Ridware*, page 380 of the same volume. In both those cases power had been given to two Justices of the Peace to perform a certain act, namely, the appointment of a certain officer, and they did join in appointing an officer, but they signed the appoinment *separatim*. In both those cases two Justices were to make a certain appointment.

Lord Selborne:—There could be no question of majority.

Mr. Benjamin:—No, it is not on that that I am citing these cases. It is upon this that the Court there held, that inasmuch as they were to exercise a judicial authority each must concur in considering the qualification and confer with the other in considering the qualification of the person to be appointed, and that the appointment though made by the two who signed *separatim* was null and void because they had not met together to confer over the appointment. The note in the margin is this: "Where an Act of Parliament empowers two Justices

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of the Peace to exercise a Judicial Act," (it was held that this was a Judicial Act) they must meet and execute it together. Therefore an appointment as overseer under the 43rd Elizabeth, signed by the Justices separately, is bad." The two meeting together would have made it good. The two signing the appointment separately made it bad. There was an absence of the concurrence of judicial minds, of the meeting of the minds required to make the appointment, or, as we say in our case, to make the award good. There must be if there are three arbitrators the concurrence of three minds to make the award good. The three must meet together and their minds must concur in what is done.

The Lord Chancellor :—Do you mean agree?

Mr. Benjamin :—Yes, I mean agree.

The Lord Chancellor :—Or exercised upon what is to be done?

Mr. Benjamin :—I mean agree and I say from the time, whether rightly or wrongly, there existed but two arbitrators, there did not exist in fact the elements of a possible valid decision. Whether or not the arbitrator was right or wrong in resigning, whether or not the Government of the Province of Quebec was right or wrong in accepting his resignation, as a matter of fact that was done. They may have acted wrongly, but what are the consequences of that wrongful act in the case of a Province or a Government which thus acts wrongly as contradistinguished from the case of an individual who acts wrongly in withdrawing from an arbitration after a bargain to submit to it? In the case of the individual the consequences may be that he will be liable to an action for damage which after all has been found to be nothing that is not purely nominal, and such an action no longer exists because you can show no damage from it, and, therefore, as a matter of fact in a private arbitration after an agreement to submit you can withdraw from it with perfect impunity.

The Lord Chancellor :—I should like to take it by steps, and to ask you how far you carry your argument. I understand you to say that the three minds must concur. If that is so, there is an end of it, for they did not concur here. Supposing you are not right in that, and supposing the three assembled together and expressed their views, and two take one view, and the third a different view; suppose that were valid, and suppose that were the case, then what do you say to this? The three do meet, they express their views and it turns out that two think one thing, and a third thinks the other. Suppose the third says, I see what is your view is not mine, and I will not go any further with you, and, therefore, goes away and does not come back, and the other two proceed then formally to express in an instrument which they sign the view which they have manifested. Then do you say, supposing it to be a case where the majority can bind, that one person, the dissentient, has it in his power to stop the whole proceedings by going away under that state of circumstances?

Mr Benjamin :—I should say he had.

The Lord Chancellor :—Though if he stayed in the room that would have bound him clearly.

Lord Selborne :—That is on the assumption of what has been sometimes done to make a marriage good in some Roman Catholic countries. They might have laid hands on him and locked the door.

Mr. Benjamin :—I will assume that, but with submission that is not the case before your Lordships. If the case before your Lordships was that of an interlocutory judgment on which all three were present, I should concede to the fullest extent what your Lordships' suggestion seems to imply; that if all three are present and the majority could decide, one going away could not prevent the decision of the two others from having effect, because he would not wait for it to be recorded. I should quite concede that, but in the present the presence of the three commissioners at the decision which was made, was a decision in relation to

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the basis on which they would thereafter proceed to enquire into the subject matter of the award. Thenceforward there were no three present, thenceforward you find sitting after sitting at which one was not present and in which the other two heard arguments, one being the arbitrator for Ontario, hearing his own Counsel, supporting his own view, and the other the arbitrator for Canada, listening to that unchecked—the arbitrator for Canada, who is said to be a Colonel, I see he is called Colonel Gray. Hearing nothing against it with the arbitrator for Ontario and the Counsel for Ontario preoccupying his mind and filling his ears with all the rights of Ontario, those of Quebec being kept in the back ground and the whole proceeding *ex parte*, so that it is no wonder, under such circumstances, that the result is unsatisfactory to the party against whom the decision is madé. It is perfectly certain there has been here an *ex parte* decision against Quebec, and is that *ex parte* decision on a matter concerning the interests of Her Majesty's subjects in two provinces to be considered final under proceedings such as are now developed before the Court—one party absent the other party represented by the arbitrator, one of the Judges, the second Judge present—the law requiring three, with his mind preoccupied with the idea that the conduct of Quebec has been such as in his judgment ought not to have been pursued by Quebec, and his mind preoccupied with the idea that he is there only to determine and to assent to determine when Quebec and Ontario disagree, and if they agree to assent to what they agree to, and then he hears nothing but the side of Ontario? The evidence brought before him is Ontario's evidence. The Treasurer of the Province who comes before him this third arbitrator, the arbitrator of Canada, and the arbitrator of Ontario is the witness called *ex parte*, Quebec not present, and under these circumstances these two parties proceed with the arbitration that is to bind people of another Province, one of Her Majesty's colonial possessions, and they come before your Lordships and say, this is the sort of proceeding that Parliament meant when they passed that Act. Can it be conceivable that if such a case had been submitted to Parliament as one which might occur, that Parliament under those circumstances would have said let proceedings go on *ex parte* against one of these two Provinces, let it not be heard, let it concur as the penalty of its own obstinacy, and let the other side get all the advantage it can from *ex parte* proceedings, *ex parte* arguments and *ex parte* evidence. I cannot think, my Lords, that if that result had been submitted to Parliament, as one that could possibly be entertained by any tribunal in determining the rights of these two Provinces, that the risk of a continual and rankling sense of injustice which must always abide with a colony which, under these circumstances is condemned, would have been sanctioned by Parliament or by the Crown.

Lord Selborne :—I suppose if that argument is correct under the former arbitration, with all the careful provisions that you read, one arbitrator might have defeated the whole thing at any time by choosing to go away before the meeting.

Mr. Benjamin :—There was a provison that a majority must govern, and therefore one could deliberately agree to that.

Lord Selborne :—I did not hear you read any provision that the majority were to govern in the absence of the third, and your argument seems to be, that even if the majority did govern, it was necessary for all to be present.

Mr. Benjamin :—I am now arguing that all three must concur, but if I am wrong on that point, that it might possibly be the case that if all three were present it might by possibility be held that two out of the three could decide, that it is out of the question to determine with all submission to the Court, of course I am stating my argument a little vehemently.

The Lord Chancellor :—The result of that must be unanimity, because he can prevent a decision by simply walking out of the room.

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MR. BENJAMIN :—Of course, if the decision is made when the three are present, and if unanimity is not requisite, I must concede what your Lordship seems to imply that he could not by walking out of the room prevent that particular decision from taking effect.

THE LORD CHANCELLOR :—But decisions are not given so rapidly. If he sees a decision approaching, all he has to do before it is actually delivered is to walk out of the room.

MR. BENJAMIN :—If, when it approaches the final award, he finds, notwithstanding all he can say, that it is predetermined to award against him, I say, under these circumstances, if he goes away there is no award possible.

THE LORD CHANCELLOR :—Even although it says the majority shall bind ?

MR. BENJAMIN :—No, not when it says the majority shall bind. Then he would go away at his peril ; he knows that the majority may bind.

THE LORD CHANCELLOR :—I thought you said that in cases where the majority may bind, still they must all be present.

MR. BENJAMIN :—I have the text of the Digest of the French and Roman Law, which says that where the majority must govern all three must be present.

THE LORD CHANCELLOR :—That is what I wanted to come to. Then if so, the provision that the majority shall bind is really neutralized, is destroyed, because the dissentient one may always absent himself at the critical moment, and so the majority are paralysed.

MR. BENJAMIN :—Unless provision is made, as in the Act of Parliament to which I have called attention.

LORD SELBORNE :—I do not recollect any such provision in that Act of Parliament for the absence of one. I remember your argument, which seemed to say the Act may be nullified by the man walking out of the room retaining his office.

MR. BENJAMIN :—I do not think the previous Act is liable to that criticism. I really must say I do not shrink from those consequences. I think the law is so, and that in the case of arbitration it is a peculiar system of judging cases which is liable to be constantly defeated by the act of one party or the other. It is a known incident to submissions to arbitration that the decisions under arbitration are constantly liable to defeat by the conduct of one party or the other. Now, section 119 provides this : First, you have this provision, that "in case of the death, removal or incapacity of either of the arbitrators before making his award, or in case one of the three arbitrators chosen and appointed as aforesaid refuses to act, another shall be appointed in his stead in the same manner as such arbitrator so dead, removed or becoming incapable, or refusing to act, as aforesaid, was originally appointed. Well now, that undoubtedly can be used against us in this case, on the question of revocation. It may be said that in the former Act there was a special power to appoint another in the place of the first one who refused, but that in the Act now before their Lordships there is no such power. Well, my Lords, we must submit to that consequence. It is so, and therefore upon the question of revocation that argument may be one which we should find it difficult to meet. The former Act also provides for those contingencies which my friends say in the present Act are not provided for, and yet they wish us in the present Act to consider that the provisions of the former Act are reinserted, so to speak, so far as they are concerned, and not reinserted so far as we are concerned, because, my Lords, the Act says that the award of the majority of the said arbitrators, so far as the same shall be authorised by this Act, shall be final and conclusive as to all matters therein ascertained. Therefore, upon that I should be compelled to admit that if, under such circumstances, these three arbitrators being appointed, and all three being duly notified to attend, one declined to attend, he could not defeat the action of the majority in that way under this Act, because the Act has specifically said that the majority should decide.

Lord Selborne:—Then why should not the same consequences follow if the law implied the same power to the majority?

Mr. Benjamin:—I have never found that in any law.

Lord Selborne:—Supposing it were so?

Mr. Benjamin:—If it can be found in the law then I should have to give up my case. If the law declares that in the case of an appointment of three the majority shall decide in the absence of the third.

Lord Selborne:—I think you were a little hasty in admitting that under the Act of Parliament which you have read, which says the majority may decide, that they may decide in the absence of the third. You are not bound by that admission of course.

Mr. Benjamin:—I say if the third under the Act being appointed declined to attend upon being notified the two are authorized to give an opinion under the Act.

Lord Selborne:—Then I say why should not that equally follow if the law implied the same power to the majority though not expressed in the Act?

Mr. Benjamin:—I do not deny it.

Lord Selborne:—That reduces it to the single question whether the majority could decide?

Sir Robert P. Collier:—I thought you fell back on a second position, that even supposing two could decide if all were present, still two could not decide in the absence of the other.

Mr. Benjamin:—Not in the absence of the other; that the third must be notified to be present.

Sir Robert P. Collier:—You say either present or notified?

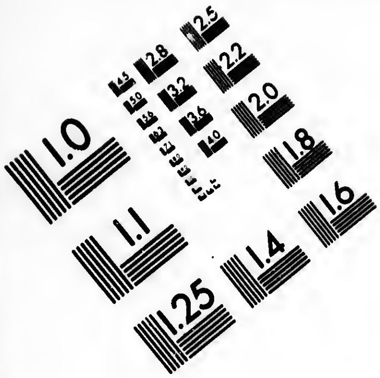
Mr. Benjamin:—Or declining to attend after proper notification. If the law says the three or the majority may decide under such circumstances I should not be prepared to contend—my juniors may be more valiant—but I should not be prepared to contend that upon the three being appointed, two agreeing upon a decision from which the third dissents, and the third refusing to come to the meeting to have the decision announced, that the two having told him they were going to make and pronounce a decision, the majority having a right to decide, I cannot say I have the courage, under such circumstances, to contend that the two could not make a decision, because I should say that the third would be, under such circumstances, considered in law as if he were in attendance, and that his refusal to be present could not prejudice the arbitration, and could not prejudice the terms on which the arbitration had been granted, namely, that two should decide, though I do insist that on no occasion could two decide on a question in relation to which the third had not been heard, nor had an opportunity of expressing an opinion, and upon which they had not conferred. In all cases in which the majority may decide they may decide upon a difference of opinion after conferring opinions and considering; but the two could not meet alone and decide a point in relation to which the third had not been consulted at all.

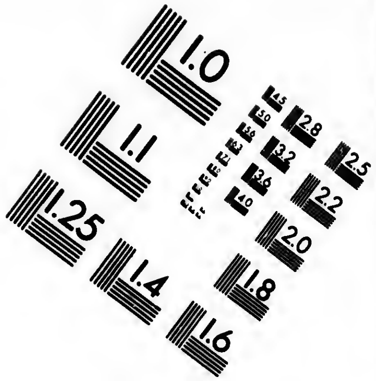
Sir James W. Colvile:—Except, as you admitted just now, having been duly notified he voluntarily absented himself.

Mr. Benjamin:—But that must be in relation to something with reference to which there must have been a conference and opinions compared, not that the two having told the other they were going to meet could decide on a subject without his presence on which they had had no conference whatever.

Sir James W. Colvile:—Then, if he dissented from something on which he had had no conference, he might by his voluntary absence put an end to the arbitration.

Mr. Benjamin:—That has been the law of arbitration from the time of the Roman Digest.





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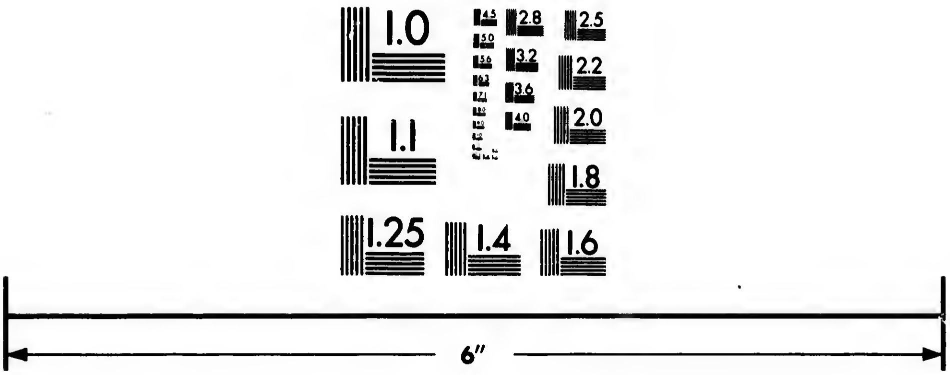

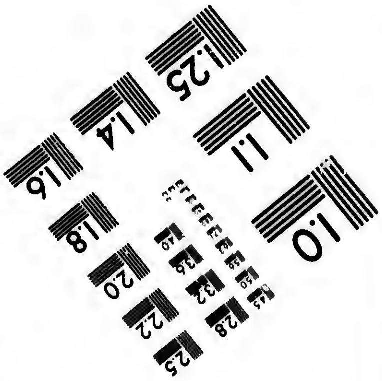

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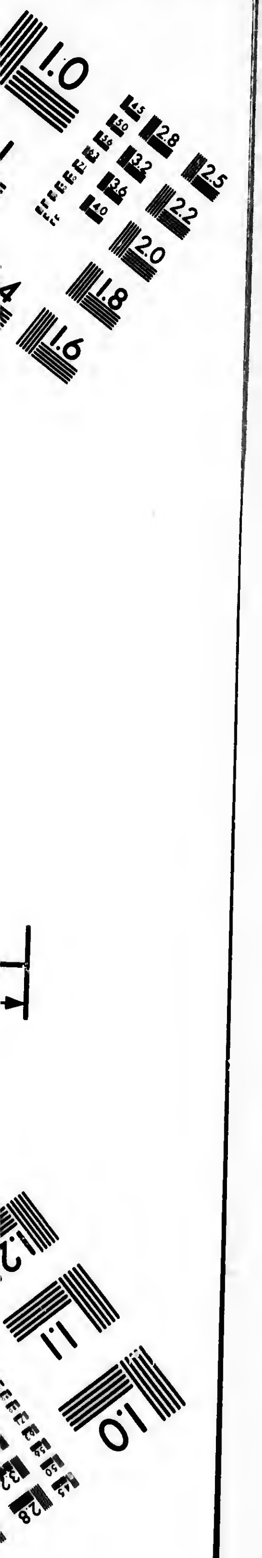
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SIR JAMES W. COLVILE:—I was only anxious to understand it, because I thought from Lord Selborne's questions you gave up that point.

MR. BENJAMIN:—As a matter of curiosity, may I read to your Lordships the text of the Fourth Book of the Digest, title 8, Section 17, Subsection 7, and Section 18: "*Celsus, lib 2 Digestorium, scribit is in tres fuerit compromissum sufficere (quidem) duorum consensum si præsens fuerit and tertius alioquin absente eo licet duo consentiant arbitrium non valere quia in plures fuit compromissum ad potuit præsentia ejus trahere eos in ejus sententiam.*" That is Celsus, but Pomponius says in relation to all Judges: "Celsus has been dealing with the case of arbitrators." Now Pomponius says: "*Si cuti tribus judicibus datis quod duo ex consensu absente tertio judicaverunt nihil valet quia id demum quod major pars omnium judicavit ratum est cum and omnes judicasse palam est.*" That is undoubtedly, my Lords, the Civil Law, and therefore it is not so shocking to assert it as also having come down to us through these sources of the Civil Law which were finally adopted into English jurisprudence.

SIR BARNES PEACOCK:—You say that if the three were present the award of the majority would be the award of the three and not the award of the majority, and this Act says the award of the majority, and you say the award made by the majority in the absence of the third would be good.

MR. BENJAMIN:—That is the construction possible under the former Act. Well now, my Lords, something has been said about the Law in the United States which undoubtedly is derived from our own, and I will trouble your Lordships with a single quotation from an author and a reference to the authorities in the note without attempting to read to your Lordships the decisions in eight or ten different States. "Morse *on Arbitrations*," which is the book of a Boston barrister, dated 1872, in which he says, in the preface, that he has been assisted to a certain extent by Judge Perkins, of Massachusetts, at page 162, says this: "The rule that all the arbitrators must unite in the award unless the statute on the submission under which the arbitrators act and derive authority provide to a contrary effect, or unless a contrary intention of the parties can be clearly and unmistakably gathered from the submission and the attendant facts—the rule is general and imperative that all the arbitrators must unite in the award in order to render it valid. A different rule is allowed to prevail in matters of public concern, where persons are charged with the performance of public duties the decision of a majority is usually accepted. So it is with a bench of Judges where the concurrence of a majority constitutes the decision of the Court, but a submission to arbitration is a delegation of power for a mere private purpose and the concurrence of those interested in the power is necessary to its due execution. The rule is thoroughly established both in England and in the United States. The submission, however, or the Statute under which the arbitrators derive their power may, of course, stipulate or declare that an award concurred in by a majority will be valid. Now, my Lords, the authorities here cited are from, I think, ten different States, the first and second are from Massachusetts, the next is from New York, the next, I think, is from Connecticut, the next is from Pennsylvania. the next is from Ohio, the next is from New Hampshire and the next is from Maine. I have here ten different States, in all of which decisions are reported of the highest tribunals in the States, laying down the law as it is laid down by Mr. Morse, the Massachusetts barrister, in his treatise,—that unless the statute or the submission under which the arbitrators act and derive their authority, provide to a contrary effect, or unless a contrary intention of the parties can be clearly and unmistakably gathered from the submission and attendant facts, the rule is general and imperative that all the arbitrators must unite in the award to make it valid. I think, my Lords, there are altogether fifteen cases cited in the note as being authorities for that proposition.

Now, my Lords, another point which my friend says is not open to me (and on which of course I must submit to what your Lordships may be pleased to decide on the subject, but I cannot conceive that the point is not open) is this, that I may not show on the face of the award and on the face of the proceedings of the arbitrators pointed out in the special case that they decline to exercise some of the authorities vested in them and that that makes their award null. We have put upon our points that the award is null and void as it appears on the face of the special case, and I propose now to point out to your Lordships that on the face of the special case the arbitrators declined to take into consideration certain matters submitted to them, on the mistaken supposition that they were not authorized to consider them. That, my Lords, is, as well known, ascertained ground on which the validity of an award may be impeached, and the argument certainly, I should suppose, may be made *ore tenus* without the necessity of supplying it in writing to the other side who will have an ample opportunity to reply.

Now, my Lords, the grounds on which I say that the award on its face and the proceedings of the arbitrators render the award null and void is this, that certain powers were delegated to them by the Act of Parliament, and they have mistakenly supposed that they had no authority to exercise them, and have declined to exercise them. The law on the subject is laid down by Lord Cottenham in the clearest manner in a case in the 4th Mylne & Craig.

THE ATTORNEY-GENERAL:—I do not want to interrupt my friend, but I must be taken to protest again that he ought not to be allowed to go into this point, because it does not seem to me to be raised at all on the case stated for your Lordships' opinion. I only want to guard myself against admitting my friend's right to go into the matter.

THE LORD CHANCELLOR:—We had better hear what the objection is and we will bear it in mind, Mr. Attorney.

THE ATTORNEY-GENERAL:—If your Lordship pleases, I did not wish to interfere further than merely to protest.

MR. BENJAMIN:—I do not know whether I ought to say so, but Judge Casault who represented Quebec in the statement of the special case, as I am informed, was present when the Court put that in for the very purpose of raising that point.

LORD SELBORNE:—Among the papers you point are the address presented by the Legislative Council to the Governor General and the Governor-General's despatch that is referred to as containing the grounds on which the validity of the award is impeached. Perhaps you would contend that the paragraph at page 53 of that address, beginning at the 10th line and ending at the 25th, does cover the ground you want to take, followed up by the words, "That the said pretended award is absolutely illegal, null and void, for the reasons hereinbefore set forth,"

MR. BENJAMIN:—Yes, my Lord, there he does expressly declare that "while Messrs. Gray and Macpherson refused to take into consideration the relative financial positions of the two Provinces at the time of the Union, they have taken into consideration the object and nature of certain items of expenditure," and so forth, "and that the pretended award is further unjust," and so forth, and therefore that it is null.

(THEIR LORDSHIPS CONSULTED)—I shall call your Lordships' attention to the point, and leave it to your Lordships' decision whether under the circumstances the point is one worthy of attention.

THE LORD CHANCELLOR:—The whole of this statement, at page 53, may turn out to be satisfied by that which is not sufficient to render the award invalid, but something going to the reasoning on which the arbitrators proceeded.

MR. BENJAMIN:—In other words, what I am contending, is that the award is invalid, not for want of any formality, leaving aside altogether the question

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whether two could make the award in the absence of the third, and whether they could go on with the arbitration *ex parte* after Quebec had withdrawn; leaving all that aside and assuming they would have the right to do it, that then what they have done on the face of the proceedings which are before your Lordships is illegal and void, and of itself ought to cause the award to be set aside, and that upon well known principles applicable to awards. Whether or not my friend is taken by surprise by this, would only be a question whether he, with his information and general knowledge of law, would want time to answer it.

THE ATTORNEY-GENERAL:—I do not understand the point at present.

MR. BENJAMIN:—Now, my Lords, the point to which I wish to call your Lordships' attention is this, at page 16 the arbitrators come to a decision as to their authority upon which they proceeded to act, and it was in consequence of their decision upon the extent of their authority that Mr. Justice Day said "I cannot go on with you; we are bound to exercise the authority which you abrogate; you say you have no authority to exercise it and I cannot go on with you in this award if you refuse the exercise of your right of judgment."

THE LORD CHANCELLOR:—You must show us something on the face of the award because they may have altered this afterwards. You must show us something on the face of the award which would show they proceeded on a wrong principle.

LORD SELBORNE:—And you will observe that the reason given by Mr. Hamilton Gray for delivering that *interim* judgment was that is was not final and did not bind them. He says: "I have to observe that the decision of the 28th May last is not final, it is not like an award of the arbitrators on the decision and adjustment. It is only an opinion of the majority of them as to the best mode to proceed in the decision. If in working it out, it is found to operate unfairly, it is open to be reviewed and rescinded and such other mode adopted as may be shown to lead to a fairer result." Of course if you chose to go away after that, you cannot complain of anything that does not appear on the face of the award.

MR. BENJAMIN:—I propose first to show that they determined deliberately after argument what was the principle, and that there is nothing to show that they deviated from that principle afterwards; but on the contrary, when we come to look at the award, I shall call your Lordships' attention, for instance, to one particular point in the award which I shall be able to impeach from Acts of the Parliament of Canada, and further to show that they were in reality declining to exercise the authority given to them by the Act of Parliament to investigate the subject matter before them. They did not investigate it, but they took for granted that they had no authority to investigate. Now, your Lordships will find that the points on which they held that they had no authority to investigate are at page 16, Nos. 2 and 6.

THE LORD CHANCELLOR:—I do not think that you can refer to that document as part of the award.

MR. BENJAMIN:—My Lords, the award can be impeached by external affidavits in ordinary cases. These proceedings are part of the special case, and state the judgment upon which the two arbitrators who have made the award determined they would proceed.

THE LORD CHANCELLOR:—They may have changed their minds.

MR. BENJAMIN:—I do not say the contrary, but then when we find that the award after this decision * * * * * *

THE LORD CHANCELLOR:—They state afterwards that the opinion delivered on the 28th May was not final, that if it was found to operate unfairly, it was open to be reviewed and rescinded, and any other method adopted. I cannot help thinking that it is not legitimate that you should treat that as putting a construction on

the award. I understood you to say that there is something on the face of the award to make it invalid.

Mr. Benjamin:—Afterwards they said if they found the principles on which they were going to work operated unfairly, they would reconsider them; but they no where say that they will go back on the extent of their authority. They began by determining, and the points at issue between Mr. Day and Mr. Macpherson, the arbitrators of the two Provinces, were as to the principles on which the rights of the Provinces should be determined. So far as that is concerned they said they would go back on it, and they here laid down in a judgment signed by them all, under which judgment the proceedings were afterwards to be continued, the principles upon which they would go. Amongst those principles were two in relation to which they were not deciding what they thought right or wrong, but there were two points upon which they decided they were without authority. I am not, my Lords, in the least degree complaining, that they acted on the principles whether right or wrong contained in the other five out of the seven points, because it is quite obvious, according to their own statement, that they might or might not afterwards apply them as they might be productive of justice or injustice, but in relation to two of the points the decision is not what their judgment on the matter is. On two of the points their judgment is that they are without authority to enquire, and, therefore, those two points are points upon which they could not afterwards come back in accordance with what they have said as to its working injustice. They said, on these we have no authority, we cannot go into them. Now the second is: "That the arbitrators have no power or authority to enter upon any enquiry into the relative state of the debts and credits of the Provinces of Upper and Lower Canada, respectively, at the time of their Union in 1841 into the Province of Canada." We will not enquire into that, it is out of the scope of our authority. But what we particularly object to and what shows from one item in the award which I will call attention to the mistake they made, is the 6th. "That the expenditure made by the creation of each of the said assets, shall be taken as the value thereof, and where no asset has been left the amount paid shall be taken as the debt incurred." Why? Not because we think that right, but, "the arbitrators having no right to enter into or adjudicate upon the policy or advantages of expenditures or debts incurred by authority of and passed upon by Parliament."

Lord Selborne:—That, I suppose, means they cannot review the decision of Parliament on the question of policy. Can they look at that?

Mr. Benjamin:—Yes. I submit so clearly. I understand that to mean this: Supposing an expenditure has been incurred in Upper Canada to build a Court House, the Court House has been burned down and nothing is left; we are bound by law to say that the money spent in building the Court House is the value of the asset, which we now appropriate to one side or the other.

Sir Montague E. Smith:—I do not understand them to say that.

Sir Barnes Peacock:—It would not be an asset then.

Mr. Benjamin:—I will show your Lordships under the award that they have converted a debt into an asset and given it to us.

Lord Selborne:—They say we will value on certain principles which may be right or wrong, but they do not say they have done it. They say they have no right to review the policy which Parliament has determined to be for public advantage.

Sir Montague E. Smith:—All they mean to say is the expenditure at the time when made we must consider to be right.

Mr. Benjamin:—If they had said that, I should not object. But they have said the expenditure at the time is the value of what now exists. Then they say that, not because we think the expenditure is the measure of value, but because

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we have no right to consider whether Parliament rightly expended it. If an attempt had been made to improve a river, and the result had been that the river had been injured instead of improved—and probably your Lordships know of many of such cases where half a million has been spent on a river and at the end the navigation is worse than it was at the beginning—they hold here that they have no right to enter into that. The improvement of the river is an asset, and that improvement is worth half a million, and they have no right to enquire any further. In reality, what has been done has been to injure the river. Or we will say that during the Union of the two Provinces, Parliament might have ordered certain expenditure to be made with reference to a certain improvement, the public officers may have been guilty of malversation, money may have been lost, and hundreds of thousands of pounds may have been spent and thrown away. They say if that occurred in Quebec we will give Quebec that which was created for the loss and wasted money, and we will not determine the value of what we give Quebec, we have no authority.

Sir Montague E. Smith :—As I understand, they say the expenditure shall measure the debt and we will still find that as a debt against Quebec, though there may be no asset to represent it.

Mr. Benjamin :—But they begin by saying if there is an asset they will take that as the value of the asset.

Sir Montague E. Smith :—And where no asset has been left the amount paid shall be taken as the debt incurred. That is what they mean.

Mr. Benjamin :—It is the first part, that where there is an asset we will not value the asset. That is the point we are complaining of. We will take it that we have no right to value the asset, because the asset having cost so much, we have no right to review the expediency of the expenditure, and then this transparent fallacy is the result.

Sir Montague E. Smith :—Surely that last reason does not apply only to the debt.

Mr. Benjamin :—I will call attention to one item of the award as an item which particularly points to that.

The Lord Chancellor :—I think you also must show us this, that it is cle and can be demonstrated as a clear proposition, that it would in all cases be an improper thing to take the expenditure upon an asset as an unfair valuation, the cost price, because it may be as good for one Province as the other.

Mr. Benjamin :—Then I must call attention to the authority to which I wish to refer, namely, the decision of Lord Cottenham in 4th Mylne & Craig, where the Court said it is quite sufficient if the arbitrators have mistaken the extent of their authority. There they declined to investigate a particular subject.

The Lord Chancellor :—You must show that they have mistaken their authority. Supposing they say, it is given to us to ascertain the value of certain assets, assuming such assets to be existing, and we do what many merchants do, take the cost price. There are a number of assets that A has got and a number of assets that B has got ; it is very difficult as to many of them to tell what they would realize if sold now ; we think it is a fair thing, considering all the circumstances of the case, to take the cost price on either side.

Mr. Benjamin :—They are perfectly at liberty to do that.

The Lord Chancellor :—Why may not the arbitrators do that ?

Mr. Benjamin :—They may. I will not impeach that for an instant. That is not what they say they do. They say they do not value because they have no right.

The Lord Chancellor :—No ; what they say is this, and there is very good foundation for it, I think. They say this cost price was incurred in every case under the authority of Parliament. We take that to be a very good test that it was rightly done and that it was proper expenditure.

Mr. Benjamin :—If they came to the conclusion that there was a right test again, I say I should not have a word to say to impeach their decision ; but what they say is just the contrary of that. What they say is, we do not take it as a test because we think it would operate fairly ; we do not exercise our judgment on it or take it as a test, but we have no right to enquire into the matter.

Lord Selborne :—Surely, if the proposition contained in the sentence beginning "The arbitrators having no right" is a true proposition, if that is a true proposition, how can you possibly take it as an error, vitiating what goes before ; and if that is not a true proposition, how can you say they have the right to go behind an Act of Parliament and enquire whether the Act of Parliament should be passed or not.

Mr. Benjamin :—No, my Lord ; but, with all submission, that is not what they are deciding at all. What they are deciding is this. A sum of money was formerly spent under the Act of Parliament in creating an asset. We are told to value the assets and divide them. We will not exercise our judgment on the value of the assets, because we are bound to consider that the asset is worth the expenditure.

Lord Selborne :—They do not say that.

Sir James W. Colvile :—It is the debt, I think.

Lord Selborne :—They give us a reason leading to this particular conclusion that they consider themselves to have "no right to enter into or adjudicate upon the policy or advantages of expenditures or debts incurred by authority of and passed upon by Parliament."

Mr. Benjamin :—And, therefore, the expenditure under each Act shall be taken as the value, not that we think it is the value. We do not think that is the value ; we do not judge that is the value ; we say it shall be taken as the value, inasmuch as we could not enquire into the value without taking on ourselves to examine the policy of the Legislature in incurring the original expenditure, which we think we have no right to do.

The Lord Chancellor :—There is no reference which guides them in ascertaining the value. What the Act of Parliament says is that the decision and adjustment of the debts, credits, liabilities, properties and assets is referred to them.

Mr. Benjamin:—Can the assets be divided between the two Provinces without ascertaining their value ?

The Lord Chancellor :—It is (*not* (?)) to be entertained entirely *sui generis* and not to be judged by the same sort of rules as you would value a horse or a house.

Mr. Benjamin :—I think that the second section of this judgment is not capable of a double construction at all. "That the Arbitrators have no power or authority to enter upon any enquiry into the relative state of the debts and credits of the Provinces of Upper and Lower Canada, respectively, at the time of their union in 1841."

Sir Robert P. Collier :—Does that amount to anything more than this, that they decide, possibly wrongly, that evidence is not legally admissible of the state of their debts before 1841. That would amount to no more than a rejection of evidence, if you please, by a wrong exercise of judgment ; but that is not a cause for setting aside an award.

Mr. Benjamin :—Perhaps I had better read the judgment of Lord Cottenham, and see on what principles awards are set aside in such cases, because, as I understand, that is distinctly a ground for setting aside an award according to that decision. The name of the case is *Bowes v. Fernie*, 4th Mylne & Craig, before Lord Cottenham. There an award was attacked and asked to be set aside by the Court on the ground that of the enquiries which were submitted to the arbitrators,

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there was one on which they thought under the terms of the submission they ought not to make an award—that they had no authority. The Court said they were mistaken in thinking they had no authority to examine into the question, and that when they made that mistake the whole award was null and void, and must be sent back; that the Court could not undertake to determine what they ought to have done even if it made no difference in the award. I will read a passage from that part of the Judgment which is at page 162.

THE LORD CHANCELLOR:—I think there is no controversy about that. If it is referred to arbitrators to decide four matters, and they only decide three of them, the award is bad. It is not final and not exhaustive.

SIR ROBERT P. COLLIER:—If they had to decide what was the state of the debts and credits of the Provinces in 1841—if that had been referred to them and they had declined to decide it, that would be a ground for setting aside the award; but it appears to me they only look on the state of debts and credits in 1841, as some evidence as to the debts and credits at the time they were deciding, and supposing they came to a wrong conclusion, to reject evidence which they ought to have admitted, that will not do.

LORD SELBORNE:—Does it mean more than this, that it was not part of the business we have to discharge to take accounts between the Provinces 26 years ago.

MR. BENJAMIN:—Perhaps that is so, and that we say is what is ordered to be done by the Act of Parliament.

SIR MONTAGUE E. SMITH:—That is what your arbitrator wanted them to do, to treat it as a universal partnership.

MR. BENJAMIN:—But under the very words of the 142nd section—and it was for that I called attention to it at the commencement, though I could not quite make your Lordships at the time understand exactly why I was calling your attention to it.—I knew that the point would arise later. They have said that they would not enquire into the condition of the debts of the Provinces of Upper and Lower Canada generally, but the 142nd section of the Act, in determining the subject of the arbitration, directs most positively that they shall.

THE LORD CHANCELLOR:—Directs what?

MR. BENJAMIN:—That they shall enquire into the respective debts of Upper and Lower Canada—not of the Province—but of Upper and Lower Canada which refers to the separate Provinces as they existed at the date of the Union in 1841.

THE LORD CHANCELLOR:—"The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada."

MR. BENJAMIN:—Of Upper and Lower Canada. They mean Upper and Lower Canada before 1840. In 1840 they were united into the Province of Canada.

LORD SELBORNE:—It seems quite clear that they continued separate down to the time of this Act; section 138 is: "From and after the Union the use of the words Upper Canada instead of Ontario, or Lower Canada instead of Quebec, in any deed, writ, process, pleading, document, matter or thing, shall not invalidate the same."

MR. BENJAMIN:—I am quite aware of that provision, but I was calling attention to the peculiarity of the language. If you compare 112 and 142, 112 speaks of the future—Ontario and Quebec conjointly shall be liable.

THE LORD CHANCELLOR:—That was speaking as to the future.

MR. BENJAMIN:—Exactly. Now we are going to the point, and the point is not what the Province of Canada owes nor what Ontario and Quebec owe, in section 142, but the arbitrators shall adjust the debts, credits and assets of Upper Canada and Lower Canada—not of the Province of Canada but of Upper Canada and Lower Canada *separatim*, and they say here we have no such power.

Lord Selborne:—Surely not. They say we have no power to go back 26 years under that clause. It does not mean those things which 26 years ago might be debts, credits, liabilities and assets of those two Provinces; but those things which were their debts, liabilities and assets at the time of the passing ot the Act.

Mr. Benjamin:—Then the Act ought to have said Province of Canada, and not Upper and Lower Canada.

Lord Selborne:—That would have defeated its whole object.

The Lord Chancellor:—Section 138 says: "From and after the Union the use of the words 'Upper Canada' instead of 'Ontario,' or 'Lower Canada' instead of 'Quebec,' in any deed, writ, process, pleading, document, matter or thing, shall not invalidate the same." That contemplates the change, surely.

Mr. Benjamin:—I really seem to be unfortunate, my Lords, in conveying my idea, because I am not answered by the observations of your Lordships. The 138th section provides that as you are bringing new words into use, if anybody to-morrow uses the wrong word just as it is a very common thing in dating the year to date the year just ended instead of the new year before you get habituated to date the new year.

Sir James W. Colvile:—If you use the old names.

Mr. Benjamin:—If you use the old names it shall not invalidate the deed. If before people get accustomed to the new names the Provinces of Ontario and Quebec they shall happen to use the words Upper and Lower Canada, that shall not invalidate the deed; but the Legislature is here pointing out the true extent of the difference between the two sets of words and the meaning of the two sets of words, and then having that very subject before them, it says in section 142, "that the arbitrators shall adjust the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada," and then the arbitrators say: "We will not enquire into that."

The Lord Chancellor:—There seems to have been a sort of settled account. I think you will get at what the controversy was if you look at pages 13 and 14. There seems to have been a sort of settled account in 1841, as to which the representative of Quebec made certain proposals, and these are his proposals:—"It is proposed that the relation of Upper and Lower Canada created by the Union Act of 1840, be regarded as an association in the nature of a universal partnership; and that the division and adjustment of the debts and assets under *The British North American Act*, 1867, be made according to the rules which govern in such association in so far as they can be made to apply. (2). It is proposed that the state of indebtedness of each of the Provinces of Upper and Lower Canada at the time of the Union in 1841 be taken into consideration by the arbitrators with a view to charge the Provinces of Ontario and Quebec respectively with the debt due by Upper Canada and Lower Canada respectively at that time, and that the remainder of the surplus debt (excess of debt of the late Province of Canada over and above $62,500,000) after such debts have been deducted from it (and charged to the respective Provinces) be equally divided between the said Provinces." Then Mr. Macpherson in answer to those propositions said that the Union of 1841 between Upper and Lower Canada was not analagous to an ordinary association or partnership, that the rules of law applicable to an ordinary partnership were not applicable to a political Union, and then he added as a second reason this, "because in his opinion the arbitrators have no authority to inquire into or consider the financial condition of Upper Canada and Lower Canada, respectively, anterior to or at the time of their Union in 1841, with a view of rectifying at the expense of Ontario any supposed advantage alleged by the Counsel for Quebec --alleged unjustly in his (Mr. Macpherson's) opinion to have accrued to Upper Canada under the Union Act of 1840." There seems to have been an effort made, perhaps legitimately, by the Counsel for Quebec to open to use a phrase known to the Court

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of Chancery—a settled account arrived at in 1841 between these two Provinces, and to undo what they had done then. They say that was not one of the things they were to enquire into, they were to take things in *statu quo* and value assets in the shape in which they found them. Can we say on the merits that that was unreasonable ?

Mr. Benjamin :— I think your Lordship misapprehends the facts although I have been glad you have stated them in that way in order that I may call attention really to what the controversy is. The real controversy, my Lord, was this: The section 142 told them to adjust the debts of Upper and Lower Canada. When Upper and Lower Canada were united in 1840 there was no account to adjust, each Province had its own debt, and under these circumstances Parliament, possibly foreseeing a dissolution of the Union afterwards, made no provision as to what should be done with the capital of the debt of each Province, but inasmuch as the Consolidated Fund which represented the revenues of the two Provinces was thrown into one common mass, it provided that the charge on the Consolidated Fund should exist for the purpose of paying the interest on the debt of the two Colonies. Then when the Colonies separated in 1867 again and Parliament provided that the debts of Upper and Lower Canada should be adjusted, Quebec said: "Well, now, we go back to where we were before; you have got your debts and we have got ours, and each was to provide for its own debts. When we were united the debts were not blended, but it was simply provided that the Consolidated Revenue should pay the interest on them." The capital of them has never been consolidated or fused, and whether that be so or not, what we complain of is this, that the Act gave express power to the arbitrators to enquire into the subject and they would not grant that they had such power."

Now, my Lords, I must call attention to the terms of the Act of 1840 which governs the provision of the debt of the two Provinces.

Lord Selborne :—Before you go to that clause it is worth mentioning that by the 46th and 47th sections, notwithstanding the Union, the same laws as previously existed are to remain in force within the Provinces; and by the 47th section the Courts of the Provinces are to remain as before, subject to further legislation, so that for those purposes the distinction of the Provinces continued notwithstanding the Union.

Mr. Benjamin :—And then you come in clauses 55 and 56 to what is to be done with the debts.

The Lord Chancellor :—This is the Act of 1840.

Mr. Benjamin :—Yes, the 3rd and 4th Victoria, Cap. 35, Sections 55 and 56. This is all that is said in relation to the public debts of the Colonies, "that the consolidation of the duties and revenues of the said Province shall not be taken to affect the payment out of the said Consolidated Revenue Fund of any sum or sums heretofore charged upon the rates and duties already raised, levied and collected or to be raised, levied and collected, to and for the use of either of the said Provinces of Upper Canada or Lower Canada, or of the Province of Canada, for such time as shall have been appointed." That preserves existing charges. Now comes Section 56, "that the expenses of the collection, management and receipt of the said consolidated revenue fund shall form the first charge thereon, and that the annual interest of the public debt of the Provinces of Upper and Lower Canada, or of either of them, at the time of the reunion of the said Provinces shall form the second charge thereon." Then the third charge is the payment to the clergy and the fourth and fifth payment to the Civil List.

Sir Montague E. Smith :—Does that consolidate the debt ?

Mr. Benjamin :—It is only to pay the interest.

Lord Selborne :—Therefore they remain till this new Act passes the separate debts of the Provinces.

Mr. Benjamin:—The consolidated revenue of the two Provinces was to pay the interest and the payments to the clergy and the Civil List. The moment the Provinces separated again there was no consolidated revenue to pay any consolidated debt, and then, that being the condition of things, the arbitrators are told in Section 142, to adjust the debts of Upper Canada and Lower Canada, not to adjust the debts of the Province of Canada, but to adjust the debts of Upper Canada and Lower Canada, and thereupon the arbitrator of Quebec, rightly or wrongly, my Lords, I am not complaining of the decision on the merits at all, the arbitrator of Quebec said, "Well, now, we are separate again; when we came together you owed a million, we will say, and we owed on our part £100,000, you must of course reassume the burthen of your million and we of our £100,000, there is no longer a consolidated revenue to pay the debts; we are separating and it is a proper thing that you assume your own debt which we have never assumed and have never been called on to assume. Quebec was never called on to assume the debt of Upper Canada, otherwise than by the application of the joint revenues of the two Provinces to the payment of the interest.

Sir James W. Colvile:—Then, as I understand, there was a subsequent debt which had been jointly incurred by the two Provinces after 1841.

Mr. Benjamin:—A subsequent debt.

Sir James W. Colvile:—That you proposed to divide.

Mr. Benjamin:—We said divide equally the debt incurred by the Province, but we said let each Province pay its own separate debt under the clause of adjustment. Now, I do not say that your Lordships could look at that decision if they had said we will not do that, but you shall pay everything according to population or pay according to this, that or the other scale. I should at once yield and say, that is the arbitrators' own work, but your Lordships are not here to revise their judgment on the merits. The complaint is that they said they would not examine the subject because it was out of their power, and they did not examine it.

Lord Selborne:—They said they would not take account of the subsequent debt, but would take it up to the present time.

Mr. Benjamin:—That is what they say, but can it be denied that they said they did not because they thought it ought not to be done, but on the express ground that they had no power to do it?

Lord Selborne:—They may have thought that that was no part of the duty given them by the statute.

Mr. Benjamin:—Yes, that is exactly what we are contending. It was part of their duty to ascertain in any way they pleased, but they were not without power to do that which we asked them to do, and which they declined to do because they said they had no power.

The Lord Chancellor:—I think it is not quite clear that they had any power. I think if they had stated, in place of estimating the value of this property now, we will go back and estimate it in 1841, and had proceeded on that principle, that it would not have been open to them.

Mr. Benjamin:—I am not speaking of the question of the value of the property. I am speaking of outstanding debt.

Lord Selborne:—The words are "the relative state of the debts and credits of the Provinces of Upper and Lower Canada respectively at the time of their union in 1841." What business had they to enter into such enquiry?

Mr. Benjamin:—By the 142nd section it is said they should adjust the debts of Upper and Lower Canada.

Lord Selborne:—Those were the debts in 1864.

Mr. Benjamin:—The debt still continued.

Lord Selborne:—Then they need not go into the account of 1841. If the

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same debt still continued they would take it not as a debt existing in 1841, but as a debt existing when the new Act of Parliament passed in 1867.

Sir James W. Colvile :—Might not they, on their own principle, have gone back in some cases to that period, because if you look at page 16, in the third paragraph, they say that the division and adjustment between the two Provinces of the debt for which the two are conjointly liable to Canada shall be based upon the origin of the several items of the debts incurred by the creation of the assets mentioned in the fourth schedule to that Act. They might find that as a matter that had been incurred in the creation of an asset before 1840.

Mr. Benjamin :—They might find that a particular asset had originated in an expenditure prior to 1841, and they say under this third section that in such a case as that they would look to the origin of the debt for the purpose of ascertaining which was liable for it. But they also say that they have no power, and if they had none, of course, all my argument drops.

Sir Barnes Peacock :—That is as to the sixth.

Mr Benjamin :—I am taking the second, "that they had no power or authority to enter upon any enquiry into the relative state of the debts and credits of the Provinces of Upper and Lower Canada respectively at the time of their Union in 1841." I think that they were appointed for the very purpose.

Sir James W. Colvile :—What you were contending for was the winding up of the universal partnership. It was to be considered that you formed a partnership in 1841, that the partnership was dissolved, that you were to take it on principles applicable to a dissolution of partnership, that the whole debt was to be divided by the two, and each pay his own debt as it existed in 1841.

Mr. Benjamin :—Yes ; so far as that is concerned, I cannot complain if they decided against us, and I do not complain that they have decided against us. If they had exercised their judgment upon the subject and said, we do not think that a proper basis, my whole argument would have had no foundation to rest upon and I should be beating the wind ; but what I am complaining of is this—not that they decided the point against us, but that they would not examine it because they thought they had no power to examine it. That is the complaint that I am now making. They would not examine the point and exercise their judgment on it. They came to the conclusion that they had no authority to examine it, and declined a part of what we say was the subject submitted to them. We may be mistaken in that, but I think the 142nd section was pointed to this very purpose. Inasmuch when you were formerly separated and we put you together again, and made no provision when we put you together again in relation to what should become of your public debt, beyond providing for the interest of it, while you were together, now we appoint arbitrators to adjust the debts of Upper Canada and Lower Canada, that is to say, their separate debts—not the debts of the Province of Canada, but the debts of Upper Canada and Lower Canada,—how Upper Canada and Lower Canada could have any debts except such as they had incurred prior to the Union ?

Sir Barnes Peacock :—Then this might be done in 1867, because they had been paying interest on their debts out of the consolidated fund.

Mr. Benjamin :—There was nothing to adjust and enquire into but the simple ascertainment, they were not asked to disturb the settled accounts, they were not asked to go into a settled account ; but they were asked to determine whether if Upper Canada owed 5,000,000 and Lower Canada 1,000,000 at the date of the Union, now that they are to be disunited, that Quebec ought not to have to pay half of the 6,000,000.

The Lord Chancellor :—They do not do that if you look at page 46 : "That the amount by which the debt of the late Province of Canada exceeded, on the 30th day of June, 1867, 62,500,000 dollars," (that was the sum named in the

Act of Parliament) "shall be and is hereby divided between and apportioned to, and shall be borne by the said Provinces of Ontario and Quebec respectively, in the following proportions, that is to say: The said Province of Ontario shall assume and pay such a proportion of the said amount as the sum of 9,808,728 dollars and two cents bears to the sum of 18,587,520 dollars and 57 cents, and the said Province of Quebec shall assume and pay such a proportion of the said amount as the sum of 8,778,792 dollars and 55 cents bears to the sum of 18,587,520 dollars and 57 cents.

Mr. Benjamin :—I am replying on that to show that they carried out their principle.

The Lord Chancellor :—How do you say they arrived at that?

Mr. Benjamin :—I do not know how they arrived at that, but what I say is this, that they arrived at it by disregarding the relative debts of the two at the time of the Union, which they were perfectly at liberty to do if they thought that the right way; but they begin by saying we have no power to look at that, and therefore we take some other basis. Now if your Lordship looks at those very passages to which you referred me a short time ago you will find that the objection of the Ontario arbitrator to the basis of the proposed division was that Quebec would have upon that basis only one-fourteenth of the debt to pay, and he says, I therefore object. This arbitration adjustment under section one shows that they absolutely carried out what they said there. That they did not inquire into the relative debts of the two Provinces at the time they came together for the purpose of proportioning it properly when they left, not because they thought that that was not a proper mode of proceeding, but because they thought they had no power or authority to enquire into it.

Sir Barnes Peacock :—I do not understand this quite clearly as defining what the debt is, as adjusting the debt at all; it only says the proportions on which they shall pay it, leaving it uncertain what they shall pay.

Mr. Benjamin :—That is true.

Sir James W. Colvile :—They give you the whole sum to be paid.

Mr. Benjamin :—They suppose the whole sum to be paid to be $18,000,000 and a half. If it turns out to be a different sum it is in that proportion that you are to determine the debt.

Sir Barnes Peacock :—Do they decide what the debt is?

Mr Benjamin :—They assume the debt at 18,587,520 dollars, and they say whatever the debt turns out to be this shall be the proportion.

Sir Barnes Peacock :—Were they not to adjust what each should pay?

Mr. Benjamin :—They were to do that.

Sir Barnes Peacock :—But they have not done it.

Mr. Benjamin :—They have not done that. That is one of the things they have failed to do. They have only determined that some time or other, when the debt is ascertained, without stating what the amount is and not adjusting the amount at which the debt is determined. That is one of the things they have failed to do in this award. They have not determined how much we are to pay of the excess over sixty-two millions, because they have not determined what the excess is.

Sir Barnes Peacock :—Supposing that they had said one should pay eight-seventeenths and the other nine-seventeenths, without finding what the debt was, would that be an adjustment of the debt? Do they find the debt? I do not quite see that they find the debt.

Sir James W. Colvile :—What is the 18,587,520 dollars?

Lord Selborne :—That seems to be the aggregate of the nine millions and the eight millions, and I should infer, therefore, as a matter of inference, that nine millions odd represents the debt of the Province and eight millions odd

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represent the debt of the other Province, and this sum which is the excess, which is the subject of that, I should guess to be a debt incurred since the Union in 1841, which, as between the Dominion and the Province, is jointly charged upon both Provinces under the Act.

Mr. Benjamin :—I think your Lordship will find it cannot possibly be so.

Lord Selborne :—Why is it jointly charged on both Provinces ?

Sir James W. Colvile :—I think it means the whole amount.

Mr. Benjamin :—This first section of the award, as I interpret it, means this: Assuming the entire debt suggested between these two Provinces to be 18,587,520 dollars, we say that Ontario is to pay nine millions and Quebec eight millions of that, and if the debt is of any other sum, then in those proportions ; you are to establish a rule of proportion if the debt should not be what we assume it there to be. Now, your Lordships will find a curious thing at page 58 ; you will find that the Parliament of Canada, on the 23rd of May, 1873, which is nearly three years after this Act passed an Act for provisional adjustment, because this is subject still to amendment, "to readjust the amounts payable to and chargeable against the several Provinces of Canada by the Dominion Government," and then they say : "Whereas by the provisions of *The British North America Act*, 1867, and by the terms and conditions under which the Provinces of British Columbia and Manitoba were admitted into the Dominion, Canada became liable," and so forth. Then they say : "Whereas the amount fixed as aforesaid in the case of the Provinces of Ontario and Quebec conjointly (as having theretofore formed the Province of Canada) was 62,500,000 dollars, and the debt of the said late Province as now ascertained exceeded the said sum by 10,506,088 dollars and eighty-four cents for the interest as aforesaid, on which the said two Provinces were chargeable in account with Canada." Then it goes on to provide in section one : "In the accounts between the several Provinces of Canada and the Dominion, the amounts payable to and chargeable against the said Provinces respectively, in so far as they depend on the amount of debt with which each Province entered the Union, shall be calculated and allowed as if the sum fixed by the 112th section of *The British North America Act*, 1867, were increased from 62,500,000 dollars to the sum of 73,600,008 dollars and 84 cents, and as if the amounts fixed as aforesaid as respects the Provinces of Nova Scotia and New Brunswick by *The British North America Act*, 1867, and as respects the Provinces of British Columbia and Manitoba by the terms and conditions on which they were admitted into the Dominion, were increased in the same proportion."

Sir James W. Colvile :—That is, they, the Dominion, take upon themselves a larger amount of debt ?

Mr. Benjamin :—Because in the meantime they had got British Columbia and Manitoba.

Sir James W. Colvile :—That is the effect of what they did.

Mr. Benjamin :—Yes; that is the effect of what they did. So that your Lordship sees by the award and the terms of the award the commissioners not only failed to adjust the sum of the debt which these two Provinces were to pay to Canada, but they said as regards the several debts of Upper Canada and Lower Canada, which by section 142 they were to adjust, that they had no power to enquire into it, that being the very thing for which they were appointed, according to our construction of the Act.

Sir Barnes Peacock :—I have read this through very often, but I am afraid I do not understand it yet. Do they find that the 18 millions odd is the excess over the 62 millions and a-half ?

Mr. Benjamin :—They do not say that, my Lord, but I judge from what they say that they guess or conjecture that that is the surplus.

Sir Barnes Peacock :—It amounts to that, but do they decide that that is

the debt, because that is quite different from what the Government put in the subsequent Act; they put it there as 10 millions.

Mr. Benjamin:—They say we do not settle what the debt is, but if it were so much, then it would be so and so divided. If it were not so much, or it is different, then divide it in the same proportion.

Sir Barnes Peacock:—Then is it anything more than saying in round numbers, one shall pay eight-seventeenths and one nine-seventeenths?

Sir Montague E. Smith:—It is hardly round numbers, because they come down to cents.

Mr. Benjamin:—I will just call attention, as the day is waning, and as I do not propose to trouble your Lordships further with my argument, to the 4th section of the award, at page 48. My friend tells me the way they got that sum was this, that that was the sum total of the assets, and they said as they divided the assets in that proportion, they divided the debts in that proportion.

Lord Selborne:—Those assets representing in substance the objects for which the debt had been contracted.

Mr. Benjamin:—We say that is not so, because there are many other assets of which there is a division, and which are found included in the 4th schedule and which are dealt with in subsequent clauses; but I call attention now to the 4th section of the award at page 48. Your Lordship will see just above section four, the 13th number given to us is the Montreal Turnpike Trust as 188,000 dollars. That is given to Quebec as an asset. Now, my Lords, the 4th section explains what that is, and without calling your Lordships' attention to the precise terms of the Acts, I will merely state to you that by the 3rd and 4th Victoria, Cap. 31, section 16, and the 4th Victoria, Cap. 7, section 16, certain tolls are created for the purpose of establishing a turnpike at Montreal and authorizing the emission of debentures, of which the interest is to be provided by those tolls. The Government of Quebec collecting the tolls is by the Acts a trustee for the debenture holders, for whose use those tolls are created, and in the terms of the Act solely created. So the Government of Quebec is a merely naked trustee of tolls for payment to the debenture holders, who are entitled to the tolls. Well, my Lords, this trust fund is by this award given to us as part of the assets for which we are charged 188,000 dollars; or in other words, we are given a trust fund belonging to other people, of which we are bare trustees, and charged with the whole amount. That is a clear mistake of principle on the face of the award itself. By the Act to which I have called attention we are bound to make up the deficiency to the debenture holders if the tolls which we are administering for their benefit do not suffice. This 4th clause says that the tolls hitherto have sufficed to meet the payments on the debentures, but there is no surplus and can be none, because the Act provides that the tolls are solely for the purpose of meeting the debentures, and yet the Province of Quebec is made to pay 188,000 dollars charged to it, as if these arbitrators could confer upon the Province property belonging to *cestuique* trusts.

Lord Selborne:—I do not know what you mean by saying "made to pay." The assets are made the property of the Province of Quebec. Then on the face of the 4th clause it is shown to be an asset. It may or may not be a beneficial asset.

Mr. Benjamin:—But they charge 188,000 dollars, as if it were our own.

Lord Selborne:—That is put as the value attributed to that asset

Mr. Benjamin:—Will your Lordship allow me for a moment—the second and the third clauses are these, "that the assets hereinafter in this clause enumerated shall be and the same are hereby declared to be the property of and belonging to the Province of Ontario," and then are valued at various sums. Then the third clause, "that the assets hereinafter in this clause enumerated shall be and the same are hereby declared to be the property of and to belong to the

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Province of Quebec," and amongst them is this trust fund of 188,000 dollars which is the 13th item.

Lord Selborne:—It appears on the very face of that award that the nature of that award was understood by the arbitrators. We are not to draw inferences.

Mr. Benjamin:—I have nothing to add to that statement, my Lord.

Sir Barnes Peacock:—Do you say you are charged with a debt of 188,000 dollars?

Mr. Benjamin:—It is conferred on us as an asset. It is distributed to us as an asset, a thing that does not exist is distributed to them as an asset of 188,000 dollars, and it has been given to them as part of the division. We point out that there is no such asset in existence, that it is a nominal sum belonging to debenture holders.

Lord Selborne:—And so treated on the face of the award, so far at all events as it may be assumed that it does not exceed it.

Mr. Benjamin:—It cannot exceed it because, as I took pains to mention, by the terms of the Acts which create the tolls, they are applicable solely and exclusively to debenture holders. It is impossible for us to get anything out of the asset, and yet it is called an asset, valued to us at 188,000 dollars.

Lord Selborne:—Unless I greatly misunderstand it, it is plain enough. It is said that the charge of $188,000, which is the amount of the debentures, has not been charged by the Dominion in the debt of the late Province of Canada, which, if made, would increase by 188,000 dollars the excess of the debt above 62,500,000 dollars, and then they say the arbitrators have given the said trust as an asset to the Province of Quebec, and that Quebec is to indemnify Ontario against the debentures. It merely means that they are to take the beneficium.

Mr. Benjamin:—But what beneficium?

Lord Selborne:—The property that is to meet the charge and to meet the charge out of it. That is the substance of it, and that this sum has not been taken into account in another part of the debt because it is balanced in this way.

Mr. Benjamin:—They have divided the debt, first of the two Provinces, and then they divide the assets. Amongst the assets they give to us, at a value of 188,000 dollars, is this trust fund.

Lord Selborne:—And they go on to say that that is nullified and neutralized, and that that has to be borne by the persons interested.

The Lord Chancellor:—We must interrupt you here. The first day on which this can be resumed is this day fortnight.

[ADJOURNED.]

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Council Chamber, Whitehall,

Wednesday, February 27th, 1878.

Present—

The Lord Chancellor,
The Duke of Richmond and Gordon,
Lord Selborne,
Sir James W. Colvile,
Sir Barnes Peacock,
Sir Montague E. Smith,
Sir Robert P. Collier.

IN THE MATTER OF AN ARBITRATION AND AWARD

BETWEEN

THE PROVINCE OF ONTARIO

AND

THE PROVINCE OF QUEBEC.

SECOND DAY

Mr. Benjamin:—My Lords, at the close of the sitting on the last occasion I had reached the award, and had begun to point out to your Lordships those objections to the validity of the award which seemed to me to lie upon the surface and to be apparent upon its face. I now propose to call attention to the terms of the award as compared with the authority given to the arbitrators for the purpose of showing that the award on its face is null and void.

Your Lordships will remember that the award is to be found at the close of the case, at page 45. Now, my Lords, it is necessary to refresh your Lordships' recollection with one or two sections of the Act. I think it would be well to read the five or six sections, from 107 to 113, which provide for the disposal of the assets and debts of the two Provinces: 107 begins by giving to the Dominion all the assets of the Province except as otherwise provided in the Act, "all stock, cash, bankers' balances and security for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union." Then section 108 is "the Public Works and property of each Province enumerated in the third schedule to this Act shall be the property of Canada." Amongst those, I will say in passing, your Lordships will find the Harbour of Montreal, which is one of the subjects of the award. That is in the third schedule. Then "all lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the time of the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Bruns-

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wick in which the same are situate or arise, subject to any trust existing in respect thereof and to any interest other than that of the Province in the same." Then "all assets connected with such portions of the public debt of each Province as are assumed by that Province shall belong to the Province. Then "Canada shall be liable for the debts and liabilities of each Province existing at the Union." Then Sections 112 and 113 which are especially worthy of remark in this connection are "Ontario and Quebec conjointly shall be liable to Canada for the amount, if any, by which the debt of the Province of Canada exceeds, at the Union, sixty-two and a-half millions of dollars, and shall be charged with interest at the rate of five per cent. per annum thereon;" and then, "The assets enumerated in the fourth schedule to the Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly." The 112th and 113th appear to me to establish upon their face that whatever be the debt of the Province and whatever be the assets of the Province as specified in the fourth Schedule, the liability and the property between Ontario and Quebec are joint liabilities and joint property. Now let us see what the arbitrators have done.

The Lord Chancellor :—"Ontario and Quebec conjointly shall be liable to Canada"—that is, the Dominion of Canada.

Mr. Benjamin :—Yes, for any excess over sixty-two millions.

The Lord Chancellor :—It is the old Province.

Mr. Benjamin :—Yes : the estimate was that the new Dominion should assume the debt of the old Province of Canada ; but if it exceeded 62 millions, then Ontario and Quebec should be jointly liable for the excess, if it turned out to be more it was that they should be jointly liable for the excess, and so with regard to the other Province the same rule was established. They were conjointly liable for the assets, and the assets in the fourth schedule belonged to them conjointly.The fourth schedule is headed with those words, "assets to be the property of Ontario and Quebec conjointly." Everything in that schedule then is for the joint property of the two Provinces. If there should be an excess over sixty-two millions they shall jointly pay it, and as regards what is specified in the fourth schedule that is their joint property.

The Lord Chancellor :— It says "education." What kind of an asset is that?

Mr. Benjamin :—Those are various funds pointed out in the award, certain funds which form assets belonging to the Province, for instance, "education." There is a trust fund created for the purposes of education, that is a joint fund of the two Provinces.

Sir James W Colvile :—Money had been voted.

Mr. Benjamin :—A fund created in trust for specified purposes.

Now, my Lords, the first thing I wish to call your Lordships' attention to, is that the first, second and third paragraphs of the award profess to carry out the purposes designated in those two sections of the Act, and yet, when we come to see what they do actually provide, they neither divide the debts and assets equally nor do they divide the debts and assets upon any specified proportion or basis.

The Lord Chancellor :—What do you say the award of the arbitrators had to do with sections 112 and 113? They have a duty under section 142.

Mr. Benjamin :—Yes ; they had under section 142 to adjust what the debts were, to adjust the assets and to divide them.

The Lord Chancellor :—Of Upper and Lower Canada?

Mr. Benjamin :—Yes ; that is Ontario and Quebec now.

Lord Selborne :— As far as section 112 is concerned, I suppose you would not say that the conjoint liability would prevent adjustment *inter se*, would you?

Mr. Benjamin : I would not be prepared to argue that, but I should be prepared to argue, and I think with great fairness and propriety, that sections 112

and 113 using the same language must be read together. My view of those two sections, I may state to your Lordships frankly, is this. My impressionis that they were passed for the purpose of declaring the existence of an equality of liability and property as regards the points comprised in those two sections; but if not, if I am wrong in that, and if it were within the power of the arbitrators, under section 148, to determine a different proportion for the debts and assets as a basis of division between the two Provinces, I am now coming to what I say is the radical vice and defect in the award, which is that in the first section they divide the liabilities in one proportion, in the second and third sections they divide the assets in an entirely different proportion, and in no part of the award do they redress that in equality.

The Lord Chancellor:—Of course we have nothing to say to the merits. Why do you say that was not within their power?

Mr. Benjamin:—Because sections 112 and 113 provide that the assets specified in the schedule are joint assets, and provide that their liability shall be joint for any excess over 62 millions.

The Lord Chancellor:—An enactment that the assets in the schedule shall belong to the Provinces of Ontario and Quebec jointly, and then a direction to divide the assets of Upper and Lower Canada which you say are Ontario and Quebec,is consistent enough. They are first joined and then they are to be divided.

Mr. Benjamin:—Undoubtedly, but they must be divided in a proportion. I believe it does in these two sections imply equality: but if it does not, then I say it means that you may establish a proportion for conjoint debts and assets, but that you cannot at your discretion give one all the debts and the other all the assets, that you must establish a proportion by which the debts and assets are to be divided.

Perhaps it will be better that I should first call your Lordships' attention to the facts as they appear on the face of the award before I attempt to apply principles to them. In paragraph one of the award this is done with the debts. The first objection to that was pointed out on the last occasion. There is there no adjustment of debts at all, it is simply the establishment of a proportion according to which the arbitrators say that any sum that might be found out to be in excess of 62 millions shall hereafter be distributed between the parties; it is not an adjustment of the debts. Well now, my Lords, the proportion is thus stated: "that the amount by which the debt of the late Province of Canada exceeded on the 30th day of June, 1867, 62,500,000 dollars, shall be and is hereby divided between and apportioned to, and shall be borne by the said Provinces of Ontario and Quebec respectively in the following proportions, that is to say, we therefore establish a proportion. The said Province of Ontario shall assume and pay such a proportion of the said amount as the sum of $9.808,728.02 bears to the sum of $18,587,520.57 and the said Province of Quebec shall assume and pay such a proportion of the said amounts as the sum of $8,778,792.55 bears to the sum of $18,587,520.57." If your Lordships will take that from me, I have calculated that and disregarding minute fractions, the proportion established is that Ontario is to pay 52¾ per cent. of the debt and Quebec is to pay 47¼ per cent. of the debt. That is much more convenient than dealing with these great sums.

Lord Selborne:—That is the same *ratio* as is referred to in a clause in the Act.

Sir James W. Colvile:—You say that amount of the debt has not been ascertained?

Mr. Benjamin:—No adjustment of the debt has taken place.

The Lord Chancellor:—How is that? The division and adjustment of the debt surely in one sense is thereby effected.

Mr. Benjamin:—The proportion which they are to pay is stated when the debt is ascertained, but the amount of the debt is not stated anywhere.

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The Lord Chancellor :—They were not ordered to ascertain it.

Lord Selborne :—They could not do it, surely.

Mr. Benjamin :—The creditor was to have a claim upon Canada for the whole of the debt of the Province, whatever that debt was.

Lord Selborne :—Canada was to have a claim jointly on Ontario and Quebec, and therefore the amount could neither be reduced nor increased by the arbitrators.

Mr. Benjamin :—No; but they could find out what the excess was and divide it. They have not stated what the excess was.

Sir Montague E. Smith :—Suppose there was a dispute about the amount of the debt between the Dominion and the Province? They had no power to settle that.

The Lord Chancellor :—Suppose they had stated what the amount of debt was, it would either have been right or wrong. If it were right, it was not in the least necessary to mention it, and if it were wrong, it would have bound nobody, because they had no power under the Act of Parliament to state the debt at anything but what was the real figure.

Mr. Benjamin :—They were put there for the very purpose of stating the real figure. "to adjust the debt between the two Provinces."

The Lord Chancellor :—To adjust the debt is not to state what the debt is.

Lord Selborne :—The debt is exactly that which is stated here.

Mr. Benjamin :—I do not quite follow your Lordship.

Lord Selborne :—The debt here is the same debt which was constituted by the Act of Parliament as the joint debt.

Mr. Benjamin :—They say whatever the excess is shall be divided in a certain proportion.

The Lord Chancellor :—What the debt was was to be settled between the Provinces and their creditors, and nothing the arbitrators could say would affect it.

Mr. Benjamin :—My Lords, I am at this moment trying to get the facts. I say this first section does not settle what the amount of the debt is, it settles the proportion. I say they settled that proportion at 52¾ and 47¼ per cent.; paragraphs 2 and 3 divide the assets, assets which are declared by the Act to belong conjointly to the two Provinces. In paragraph 2 they set apart for the Province of Ontario assets which amount, if your Lordships will take my additions, to $6,990,192.63. In the 3rd paragraph they set apart assets for Quebec which amount to $4,384,297. The total assets, therefore, your Lordships will see, amount to $11,374,470. They have, therefore, divided the assets between the two Provinces in the proportion of 61½ per cent. to Ontario and 38½ per cent. to Quebec.

The Lord Chancellor .—Do you not there assume what is rather a strong assumption, that the assets are all of the nominal value?

Mr. Benjamin :—They fix the value themselves

The Lord Chancellor :—It is the nominal value. They nowhere say that is the value they put upon them.

Lord Selborne :—Take the first item: "Debt from the Upper Canada Building Fund to the late Province of Canada (enumerated in the 4th schedule to the said *British North America Act*, 1867, as Upper Canada Building Fund, lunatic asylums, normal schools,) lunatic asylums $30,800, normal schools $6,000, together $36,800. What they mean is the amount of the debt, not the value of it. It may or may not be the same.

Mr. Benjamin :—I do not know where these figures come from, but they say we divide the assets, and we give to one assets of such a value.

The Lord Chancellor :—Any stock broker would identify or ear mark the shares in that way and would carry them out to the amount of the bonded debt or the amount of share capital.

Mr. Benjamin:—The fourth schedule says that these assets belong to them conjointly, and the law says so. Then they say the assets hereinafter mentioned shall be the property of Ontario and they put figures. Surely on the face of the award that means that is the valuation of the assets.

The Lord Chancellor:—It is the most fortunate territory I ever heard of in the world if all these debts of every kind are worth their par value.

Mr. Benjamin:—There is no statement that they are worth either more or less. The sum is settled by the arbitrators. Certain assets are stated to be appropriated on both sides, and to one side they appropriate assets which on their own figures amount to $6,990,000.

The Lord Chancellor:—Just look at the 17th page. "Debt under Consolidated Municipal Loan Fund of Lower Ontario, $2,939,000." I suppose that is the nominal amount of the debt. Whether in the market it is worth 100 per cent. or 50 per cent., and whether 50 per cent. would be recovered does not appear.

Mr. Benjamin:—Then they have not adjusted?

Sir Montague E. Smith:—How could they know how much would be recovered?

Mr. Benjamin:—If the assets are to be conjointly divided, and all that you know about it is that a certain part of them has been given to A and another part to B, the arbitrators put down what they give to A without saying whether it is nominal or real at six or seven millions and to B three or four millions, can you assume on the face of that, that they have not put against each item which they distribute, what they consider the value whether they take the nominal value on both sides or the real value? There is nothing on the face of the award to show any basis beyond the sums which they have affixed.

Lord Selborne:—What necessity was there that there should be?

Mr. Benjamin:—Article 113 said that these assets belong to the parties conjointly, and their business was to divide them equally.

The Lord Chancellor:—They belonged conjointly to be afterwards divided as the arbitrators should say. If they were to belong to them equally what was the use of the arbitrators.

Mr. Benjamin:—The arbitrators were to adjust The same language is used in paragraphs 1, 2 and 3. Paragraph 1 establishes that Quebec is to pay 47½ per cent. of the debt and paragraph 3 establishes that she is only to have 38 per cent. of the property.

Sir Montague E. Smith:—Some of these assets may be worth 20 per cent. in the pound, some may be worth 15 per cent. and some may be worth 10 per cent.

Mr. Benjamin:—One would suppose that the arbitrators would find on the face of the award something which would satisfy the people of Canada that their assets had not been taken away and given to Ontario, and at the same time that they were not charged with more than their share of the debts, more especially when you find that the award was drawn up by Ontario and the Dominion together, Quebec absent; and on the face of this award, so far as anybody can judge from the face of the award, Quebec has been charged with 47¼ per cent. of the debt and is given only 38 per cent. of the assets.

Lord Selborne:—But supposing nobody can adjust it on the face of the award, is there any necessity that it should be found on the face of the award?

Mr. Benjamin:—I submit so far as the face of the award is concerned you must take the figures the arbitrators gave you, you cannot conjecture that those figures are not the value of the assets.

Lord Selborne:—You ask us to conjecture that they are and in the nature of things they seem to signify the amounts of the debts.

Mr. Benjamin: I am speaking of the assets. This is our argument which I submit to your Lordships. Either sections 112 and 113 have the same signification

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or they have different significations, if the two have the same signification, then conjoint liability and conjoint assets we say mean in the ordinary language, both of partnerships and of the law, equality; but if they do not, then they mean a fixed proportion, and you cannot under Article 112 take one proportion and under Article 113 a different proportion and make a different proportion of assets from the proportion of debts.

Lord Selborne:—I could understand your argument if they had taken the assets and divided the same asset between the two parties, for instance, if they had divided the first asset $36,800 giving so much of it to Quebec and so much to Ontario; but you see they have given the whole of a set of assets to the one, and the whole of another set of assets to another.

Mr. Benjamin:—All we know is that they have put figures opposite what they have divided and they make one party take 3 5ths, and the other party 2/5ths, according to their figures, and there is no other guide than their figures as to what they are giving.

Sir Barnes Peacock:—They are not bound to give their reasons, are they? They say we divide them in this manner—you shall take so and so, and the other shall take so and so, they are not bound to give their reasons.

Mr. Benjamin:—I do not say they are bound to give their reasons.

Sir Montague E. Smith:—They go very much on the origin of the asset, They say if the asset cost a great deal more than it is worth that is the misfortune of the Colony where the asset lies.

Mr. Benjamin:—This award covers a large amount of items which are governed by that principle, but it cannot govern these because these are provided for by the schedule.

Sir Montague E. Smith:—The principle of division is for them as well as the division itself, is it not?

Mr. Benjamin:—Under sections 112 and 113 they are to establish a proportion. They are here establishing a proportion under Article 112. They say we established a proportion, and then when you come to Articles 2 and 3 they establish no proportion, but they give at their discretion what they like of the conjoint assets to each. In Article 1 they say we establish this proportion as the liability for debt. In Articles 2 and 3 *sic volo sic jubeo*.

Sir James W. Colvile:—May not any inequality be compensated by the operative portion of the 5th and 6th Articles?

Mr. Benjamin:—I am going to call your Lordships' attention to the only two or three paragraphs of this award which, according to our contention, will bear the least examination. I come to paragraph 4, upon which I was unfortunate enough not to obtain the concurrence of Lord Selborne at the close of the last sitting, and I wish especially to call your Lordships' attention to it now, because I think your Lordships will see that I was right in what I stated in relation to that. At page 18, among the assets given to Quebec is N. B. Montreal Turnpike Trust, which is given to Quebec at $188,000. I say that on the face of the law creating that trust it is a debt, and it is so declared in the 4th paragraph, which is a further statement. Here is paragraph 4, "And as to the said Montreal Turnpike Trust the said arbitrators further find, award and adjudge as follows." They have just given it as an asset, whereas the said sum of $188,000 is secured by debentures issued upon the credit of the said trust, and guaranteed by the late Province of Canada, and the said trust has hitherto met the payments upon such debentures, and the payment thereof has therefore not been assumed by the Dominion of Canada, nor has the said sum of $188,000 been charged by the said Dominion in the debt of the late Province of Canada, which charge if made, would increase by $188,000 the excess of the said debt on the 30th day of June, 1867, above $62,000,000. "Know therefore the said arbitrators having assigned the said trust as an

asset of the said Province of Quebec, do hereby adjudge and award that the said Province of Quebec shall hereinafter indemnify, protect and save harmless the said Dominion and the said Province of Ontario against any charge upon or payment by the said Dominion in respect of the said debentures, or the said guarantee, or in respect in any way of the said trust." Now, my Lords, that trust is created by the 3rd Victoria, Cap. 31, section 16, and the 4th Victoria, Cap. 7, section 16, which are Canadian Acts. Looking to the said Acts, I need not read them to your Lordships at length. You find this, that for the purpose of establishing a certain turnpike, debentures were issued by the Province, and those debentures amounted under the first Act to £35,000, and in the second Act to £12,000, making together £47,000. By the Colonial Act a pound is four dollars, and thus £47,000 make exactly $188,000. The fact, then, is this, that while the Province was a Province it issued debentures for $188,000, which debentures are held by the public.

The Lord Chancellor :—The Province issued it merely as the hand for issuing. The primary debtors are the trust.

Mr. Benjamin :—Yes ; I had not finished my sentence. The Province issued $188,000 of debentures and established tolls upon that turnpike with a provision that those tolls were to form a trust exclusively for the redemption of the debentures, so that at the date when the Provinces were separated and this arbitration took place under the Act, the Province owed $188,000 to debenture holders.

The Lord Chancellor :—The Province ? No ; the Trust owed it. The Province had guaranteed.

Mr. Benjamin :—Well, if your Lordship pleases, either way. At all events, there was due to the public from this Trust $188,000.

Lord Selborne :—The asset and the charge were exactly the same in amount, and they are treated so here.

Mr. Benjamin :—That is exactly what I am trying very hard to say.

Lord Selborne :—The two precisely balance each other.

Mr. Benjamin :—That is exactly what I am contending.

The Lord Chancellor :—Are you right in saying that these bonds were held by the public ?

Mr. Benjamin :—They were issued under the Act.

The Lord Chancellor :—How do you infer that they were held by the public ?

Mr. Benjamin :—The Act provides for issuing these debentures and raising money on them.

The Lord Chancellor :—They may have been held by the Government.

Mr. Benjamin :—It possibly might be so, but the fact is not so, and when they are held by the Government, in another instance of the Quebec Turnpike Trust, it is so stated in the case. This is the case of a debt of the Province or a debt of the trust. The Province is a mere trustee to collect tolls to pay the debenture holders.

Lord Selborne :—The amount of the tolls cannot exceed the amount of the debt.

Mr. Benjamin :—Quite so.

Lord Selborne :—If it is an asset of precisely the same value as the liability which accompanies it, all that results is that it adds nothing to and deducts nothing from the value.

Mr. Benjamin :—That is precisely my argument.

Sir James W. Colvile :—It is an asset worth nothing.

Lord Selborne :—What follows from that ?

Mr. Benjamin :—It follows from that that the $188,000 which are nominally given to us is nothing, but it is worse than that. If your Lordships will

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look at the end of it, not only we get nothing, but we are forever afterwards to guarantee the Dominion and Ontario for any deficiency, so that a debt is given to us as an asset. Really, I think I am right in the statement I make. I cannot be wrong. I have examined it over and over again since your Lordship called my attention to it.

Sir James W. Colvile :—They could not help treating it as an asset in some sense, because it is mentioned in the 4th schedule.

Mr. Benjamin :—Yes.

The Lord Chancellor :—It only comes to this, that this direction to indemnify the Province was *ultra vires* and might be ineffective. Can it do you any harm?

Mr. Benjamin :—If arbitrators in an award exceed at any point their powers that nullifies the award.

The Lord Chancellor :—That depends on whether that in which they have exceeded their powers can be separated from the rest.

Mr. Benjamin :—This 4th section, if it is examined in connection with the 3rd, appears to me is a statement taking the two together.

The Lord Chancellor :—You may have got a better asset. You may have got an asset without an obligation.

Mr. Benjamin :—The Act that creates the trust says we cannot get a penny except to pay the debentures with. It says nothing shall be raised except so far as is necessary to pay the debentures.

The Lord Chancellor :—Then you get the trust, the property of it, and you say that it is mortgaged up to the hilt. Be that so. It only shows that the asset was worth nothing.

Mr. Benjamin :—We have got a legal title to an asset, a bare trust. We have a bare trust, not a trust coupled with any possible contingent interest, but we have a bare trust. It is given to us as an asset put opposite something which is given to Ontario.

Sir Montague E. Smith :—It must have been given to one or the other as an asset?

Mr. Benjamin :—Yes, it might be mentioned as a memorandum that there is $188,000 of a trust fund, but that it is a bare trust and that nobody gets anything out of it.

Lord Selborne :—Is it your argument that the legislature made a mistake in treating it as an asset?

Mr. Benjamin :—No, I cannot say that. I say when they examined it they had not any right to put it to us as $188,000, and particularly they had no right to make it incumbent upon us hereafter, giving us a fund burdened with a charge from which we could by no possibility ever receive a penny, and charging us with subsequent deficiencies thereafter to arise on the fund. I say that is in no sense or way a compliance with the order to divide the assets, and it is a division of assets under which that took place. They give it to us as an asset.

Lord Selborne :—I see nothing about deficiency.

Mr. Benjamin :—"Know, therefore, the said arbitrators, having assigned the said trust as an asset of the said Province of Quebec, do hereby adjudge and award that the said Province of Quebec shall hereafter indemnify, protect and save harmless the said Dominion and the said Province of Ontario against any charge upon or payment by the said Dominion in respect of the said debentures." The Dominion by the Act owes every penny that the Province owes. The Province issues debentures secured upon a trust applicable to the payment of those debentures alone. The Dominion by the Act is liable to pay those debentures. The arbitrators give us the trust fund, from which we never can get a penny. The tolls may hereafter prove insufficient; if they do, then the Dominion must pay, and then they say if hereafter the Dominion pays you shall pay the Dominion.

Sir Montague E. Smith :—Surely they are right in putting the liability where the asset is, and this, I think, is merely descriptive. You must give it as an asset to one or the other. You must describe it. They describe it and then they add this, which is merely, that where the asset is there the liability must be.

Mr. Benjamin :—The liability is to exist beyond the asset.

Sir Robert P. Collier :—They give it a nominal value.

Sir Barnes Peacock :—I do not understand it in the same way that you do. I understand that the Government of Canada were the holders of these debentures. The Turnpike Trust issued them and charged their tolls with the payment of those debentures. The Government of Canada guaranteed them, and they might have issued them, but they did not issue them. As I understand it, they hold these debentures.

Mr. Benjamin :—If it were so I would not have a word to say.

The Lord Chancellor :—All that Mr. Benjamin endeavors to show is that it was not of any value.

Mr. Benjamin :—It is a minus quantity instead of a plus quantity. If your Lordship looks at the Act you will find that I am right.

Lord Selborne :—Your argument is that for anything that appears on the face of the Award it was possible that the security might have been sufficient?

Mr. Benjamin :—Yes.

Lord Selborne :—Why are we to assume that?

Mr. Benjamin :—Because the arbitrators assume it.

Lord Selborne :—On the contrary, I see not the slightest foundation for that argument.

Mr. Benjamin :—Well, my Lord, I have nothing further to add to what I have said about it.

Sir Barnes Peacock :—I do not quite understand how, if these debentures were held by third persons and were issued, they could be an asset belonging to the Government.

Mr. Benjamin :—That is exactly what Quebec says.

Lord Selborne :—Mr. Benjamin thinks he can find here evidence that the arbitrators considered it was worth less than $188,000.

Mr. Benjamin :—Yes, they are certainly worth nothing, and we say are a minus quantity under the Act. I have not got the Act here in full, having only the Revised Statutes, but the first of the Acts mentioned provided by the 14th section that the rates should be under the exclusive management of the trustees, and the tolls were to be applied exclusively to the purposes of the ordinance, which was for the issuing of debentures. Then, "It shall be lawful for the trustees, as soon after the passing of this ordinance as may be expedient, to raise by way of loan on the credit and security of the tolls." The Government has nothing to do with it one way or the other, except to see that the tolls are applied, "and other moneys which may come into the possession of the trustees, and not to be paid out of or chargeable against the general revenue of the Province, any sum or sums of money not exceeding thirty-five thousand pounds." That is afterwards increased by twelve thousand pounds, and there is a special clause of the Act authorizing the Governor to purchase for the Province debentures to the amount of twenty thousand pounds. That is the utmost he could have purchased if he did purchase; but he did not purchase any, and in point of fact, there are outstanding debentures payable out of the tolls of a turnpike; the debentures are held by the public, the turnpike is in the hands of the trustees who are to pay the debentures, and who can raise no tolls for any other purpose than satisfying the provisions of the Act that is given to us, or it shall remain in the Province of Quebec as an asset; one hundred and eighty-eight thousand dollars is put opposite. Whether that means nominal or real value I cannot tell, and your Lord-

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ships will say the Award does not specify it; and the result of it is, that so far as we are concerned, that which is a bare trust under any possible circumstances is put down as an asset. It cannot be an asset; it is a bare trust and it does not belong to the Government at all, it does not belong to the Province in any sense in which it can be appropriated to us as an asset, and then it is encumbered with a future contingent charge, that if the tolls are insufficient to pay it, the Dominion will have to pay it, and then that Quebec is to pay it to the discharge of Ontario.

The Lord Chancellor:—If that was *ultra vires* when it came into force you would be able to resist it.

Mr. Benjamin:—Then sections 5 and 6 of the award refer to assets which are not mentioned in the Act and in relation to which we have nothing to say. Those are separate assets of the Provinces which the arbitrators have divided in their discretion, which the Act did not say belonged to them conjointly, and in relation to which the Act having said nothing, they have divided them in their discretion. We make no objections to paragraphs 5 and 6.

Then, my Lords, we come to paragraph 7.

Sir James W. Colvile:—I think one is mentioned. The first item in the fourth schedule to the Act is "Upper Canada Building Fund," and that is the second item in the 5th paragraph.

Mr. Benjamin:—My Lord, the Upper Canada Building Fund is in paragraph 2.

The Lord Chancellor:—And in paragraph 6 the first item is, "Lower Canada Superior Education Fund." The last item in the fourth schedule is, "Lower Canada Superior Education Income Fund," I do not know whether the word "Income" makes it different; but, however, you do not raise any objection to that.

Mr. Benjamin:—No, my Lord, really what is in the fourth schedule, your Lordships will find has all been divided in paragraphs 2 and 3, except the Quebec Turnpike Trust, which is what I am now coming to. Your Lordships will see near the foot of the fourth schedule there is a Quebec Turnpike Trust, and that is dealt with in paragraphs 7, 8 and 9, and it is certainly dealt with in a manner which is exceedingly complicated, so much so that I am afraid I shall have some difficulty in making it plain to your Lordships, for I have had the greatest difficulty in going through it to understand what is meant; but, I think I do understand taking 7, 8 and 9 together, what is meant by these three paragraphs. They purport to dispose of that fund, the Quebec Turnpike Trust, which under the 4th schedule is the conjoint property of Ontario and Quebec. Now, my Lords, this is what is said there: "That from the Common School Fund as held on the 30th June, 1867." I call your Lordships' attention to that date. You will remember that the Act was passed on the 29th March, 1867, but it provided in the 3rd section that Her Majesty should be authorized to issue a proclamation as to the date for putting the Act into force, and that is the date, I think, on which the Act was by proclamation put into force. The 30th of June, 1867, was the date of the proclamation putting the Act into force. "That from the Common School Fund as held on the 30th June, 1867, by the Dominion of Canada"—therefore, that recognizes that the Dominion had taken possession of the Common School Fund—"amounting to $1,733,224.47 (of which $58,000 is invested in the bonds or debentures of the Quebec Turnpike Trust, the said sum of $58,000 being an asset mentioned in the fourth schedule to *The British North America Act*, 1867, as the Quebec Turnpike Trust.") Now they are dealing with that—"the sum of $124,685.18 shall be, and the same is hereby taken and deducted and placed to the credit of the Upper Canada Improvement Fund"—that is the Ontario Improvement Fund—"the said sum of $124,685.18 being one-fourth part of moneys received by the late Province of Canada between the 6th March, 1861, and the

1st July, 1867 on account of Common School Lands sold between the 14th July, 1853, and the said 6th March, 1861." Your Lordships will see that is exceedingly complicated, and these dates will require further elucidation, but I hope to put you in possession of what the meaning of this really is. Then paragraph 8 goes on and says: "That the residue of the said Common School Fund, with the investments belonging thereto as aforesaid, shall continue to be held by the Dominion of Canada, and the income realized therefrom from the 30th June, 1867, and which shall be hereafter realized therefrom shall be apportioned between and paid over to the respective Provinces of Ontario and Quebec, as directed by the 5th section, chapter 26, of *The Consolidated Statutes of Canada* with regard to the sum of $200,000 in the said section mentioned." I know your Lordships cannot yet understand what is meant by it. I shall have to show you by the statute what is meant. Then paragraph 9: "That the moneys received by the said Province of Ontario, since the 30th June 1867 or which shall hereafter be received by the said Province from, or on account of, the Common School Lands set apart in aid of the Common Schools of the late Province of Canada, shall be paid to the Dominion of Canada to be invested, as provided by section 3 of said chapter 26 of *The Consolidated Statutes of Canada* and the income derived therefrom shall be divided, apportioned and paid between and to the said Provinces of Ontario and Quebec respectively, as provided in the said 5th section, chapter 26, of *The Consolidated Statutes of Canada*." Now I will stop there because paragraph 10 will be subject to a different comment. The said paragraphs really are only intelligible when we refer to that chapter 26 of *The Consolidated Statutes of Canada*, published in 1859, and upon reading that, we are able to understand what the arbitrators meant. This is a short statute fortunately containing only 6 or 7 sections. It is: "*An Act respecting the Public School Lands and Fund for Education.*" That is when the two Provinces were together. Then the first section appropriated one million of acres. "The Commissioner of Crown Lands, having under the provisions of the Act 12 Vic., cap. 200, and under the direction of the Governor-in-Council, set apart and appropriated one million of acres of public lands for common school purposes, and portions thereof having been disposed of under the said authority the remainder shall be disposed of," and so forth, "and the money arising from the sale or disposal of any portion of the said lands shall remain or be invested and applied towards creating a capital sum sufficient at the rate of six per cent. per annum interest to produce a clear sum of $400,000 per annum, and such capital and the income therefrom shall form the Common School Fund." Then certain moneys shall be paid. Then the 2nd section says: "All moneys arising after the 27th May, 1850, from the sale of any public lands of the Province, shall remain or be set apart as part of the capital of the said Common School Fund until the same is sufficient, at the rate aforesaid, to produce the said sum of $400,000 per annum." Then the 3rd section: "For the purpose of creating such annual income, the capital of the said fund shall from time to time remain or be invested in the public debentures of this Province or in the debentures of any public company or companies in the Province incorporated by Act of the Legislature." Under that 3rd section, it is stated, therefore, by these arbitrators that $58,000 of the Quebec Turnpike Trust had been bought by the Commissioners and formed part of the capital of the fund. Then comes this: "And the said fund, and the income thereof shall not be alienated for any other purpose whatever, but shall remain a perpetual fund for the support of Common Schools." Then the 4th section: "For the establishment, support and maintenance of Common Schools in this Province, until the said Common School Fund produces a net yearly income of $200,000 or upwards, there shall be granted to Her Majesty yearly the sum of $200,000, and such sum shall be composed and made up of the annual income and revenue derived from the

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ermanent Fund" — and the deficiency to be made up. Then section 5—and is is the one the arbitrators refer to : " The said sum of $200,000 annually shall, om year to year, be apportioned by order of the Governor of this Province in uncil, between Upper and Lower Canada, in proportion to the relative numbers the population of the same respectively." Now the arbitrators have said that School Fund, being put in the possession of the Dominion of Canada, the come of it shall be divided in the proportion established by that 5th section, d, so far, of course, it is in exact accordance with the statute. But, my Lords, 7th section of the statute provides this: "The Governor-in-Council may serve out of the proceeds of the School Lands in any county a sum not exceedg one-fourth of such proceeds, and out of the proceeds of unappropriated Crown nds in any county a sum not exceeding one-fifth thereof,—such sums to be nds for public improvements within the county, and to be expended under the rection of the Governor-in-Council." Now, my Lords, take section 12 of the Act of 1867—the Dominion Act—and that section provides as follows in connecn with this 7th section of the the School Lands Act : "All powers, authorities d functions, which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legistures of Upper Canada, Lower Canada, Canada, Nova Scotia or New Brunswick, at the Union vested in or exercisable by the respective Governors or Lieuant-Governors of those Provinces, with the advice, or with the advice and sent of the respective Executive Councils thereof, or in conjunction with those uncils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence capable of being exercised, after the Union in relation to the Government of nada, be vested in, and exercisable by the Governor-General, with the advice with the advice and consent of, or in conjunction with the Queen's Privy Council Canada, or any members thereof, or by the Governor-General individually the case requires"—subject, of course, to Acts of Parliament. We have, then, 7th section of the School Lands and Education Fund Act, which vests in the ernor-in-Council a discretion to reserve out of the proceeds of the School nds of any particular county a sum not exceeding one fourth to be given for lic improvements within the county to be expended under the direction of Governor-in-Council, that power being one perfectly susceptible of exercise er the Union, is a power vested in the Governor-General of Canada by the 12th tion of the Dominion Act. Now, my Lords, in direct violation of those visions, and of the provisions of the 12th section of the Act under which the itrators are appointed, they have assumed to exercise the power reserved for Governor-General in this 7th section, and they have exercised it in excess even the powers which he had, for they have by the 7th paragraph provided that the fourth of the moneys received is "taken and deducted and placed to the credit the Upper Canada Improvement Fund." They have taken from the proceeds the land one-fourth, and have not in any way or shape even exercised the discren authorized by the 7th section of the Act, which if they had the right to exercise powers of the Governor...........

LORD SELBORNE :—Do you say that they have taken out from the proceeds one-fourth, I do not quite follow that?

MR. BENJAMIN :—It says so in the seventh paragraph.

LORD SELBORNE :—Yes. I see it does.

MR. BENJAMIN :—"Being one-fourth" "and the same is hereby taken and ducted and placed to the credit of the Upper Canada Improvement Fund."

LORD SELBORNE :—Do you know anything about the previous history of at had been done under those powers?

MR. BENJAMIN : I have just read to your Lordship the Act which creates Education Fund.

Lord Selborne:—When was that passed?

Mr. Benjamin:—It is in the Revised Statutes.

Sir James W. Colvile:—1859.

Lord Selborne:—Then it was passed eight years before this statute with which we are dealing, and in the meantime something might have happened which, if we knew about it, might possibly explain it.

Mr. Benjamin:—We have this Act which explains it. The Act of 1859 explains in what cases one-fourth of the proceeds of the lands which are appropriated to the Education Fund may be abtracted from that fund and used for improvements.

Lord Selborne:—It gives a power in the terms you have read. What I want to know is, whether we have any information as to the manner in which that power has been exercised in the eight years which had elapsed before the Dominion Act was passed, or whether it had been exercised before?

Mr. Benjamin:—I have none.

Lord Selborne:—If we knew those facts, might it not completely explain this seventh paragraph of the award?

Mr. Benjamin:—I do not think so.

Lord Selborne:—Perhaps you will show it was impossible.

Mr. Benjamin:—That is what I hope to do. The provision that authorizes any diversion of the Education Fund from education purposes, is the seventh section of the Act which provides the fund. If there is any other law authorizing a diversion from the fund, my friends must show it.

Lord Selborne: Supposing, before this award was made, the proper authority had taken this sum of $124,685 and practically there had been that which is mentioned in the seventh section here?

Mr. Benjamin:—I would answer that in two ways; first, that this does not profess to ratify anything that has been done, but professes to be an act of the arbitrators in the exercise of their own authority: and secondly, I would answer that no one could have done it without violating the law.

Lord Selborne:—If you can show that, then your observation would be very material; but supposing that is not so I should say, comparing the seventh paragraph with the two that follow it, that it is quite possible they might think that the terms of that previous Act were to be applied to the division between the two Provinces.

Mr. Benjamin:—When you have before you the previous Act, you will see that the suggestion your Lordship makes, is an impossible one, as I submit. This is what the previous Act says may be done. The Governor-in-Council may reserve out of the proceeds of the School Lands in any county a sum not exceeding one fourth of such proceeds, such sum to be a fund for public improvements within the county. That is to say, there were a million of acres appropriated to public education. There may be circumstances under which the Governor might think that a sum not exceeding one-fourth of the lands sold in a county might properly be used within that county for the improvement of the county.

Lord Selborne:—Suppose that the Governor-General in the exercise of that power had appropriated lands in every county in Upper Canada to make such a reservation, and that that amounted to $124,685.

Mr. Benjamin:—If that was the fact, but that is precisely the contrary of what they are saying. They say that we award out of the money they have received they shall be entitled to deduct a fourth. They do not say that the Governor has authorized that that one-fourth shall be deducted, but they say we award that that fourth shall be withdrawn, and withdrawn not from the sale of lands in a county for the improvements in a county, but to form a general fund for the improvement of the Province.

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Lord Selborne:—It is not so, and the same is hereby taken and deducted, and placed to the credit of the Upper Canada Improvement Fund. "That is a fund supposed to be known and understood."

Mr. Benjamin:—But that is a fund for Upper Canada, and the law does not authorize any deduction for the General Improvement Fund. It authorizes a deduction from the proceeds of specific lands in a county for improvements in that county.

Lord Selborne:—There is nothing whatever here which shows what is to be done in the administration of the Upper Canada Improvement Fund, and for all we know there may have been an external law that determined it, and there is nothing to interfere with that.

Mr. Benjamin:—Surely your Lordships are not to imagine a law that does not exist and is not produced.

Lord Selborne:—Nor are you to imagine facts which are not on the face of the award.

Mr Benjamin:—I may be wrong, but I read the facts to be so stated here. Let me read it again. I cannot read it in any other way. I try hard to read it otherwise. This is the award, that from the Common School Fund, a portion of which is invested in this Quebec Turnpike Trust, "the sum of $124,685 shall be and the same is hereby taken"—not has been taken, nothing has passed—"and the same is hereby taken and deducted, and placed to the credit of the Upper Canada Improvement Fund". Now I say that the law does not authorize that. They say why they do it. "The said sum of $124,685, being one-fourth part of moneys received by the late Province of Canada, between the sixth March, 1861, and the first July, 1867, on account of Common School Lands, sold between the fourteenth June, 1853, and the said sixth March, 1861." There can be nothing plainer than that. We hereby declare that we take out of the Common School Fund that is now in the hands of the Dominion of Canada, which they say in the beginning has been placed in the hands of the Dominion of Canada. We now take out $124,000 and give it to the General Improvement Fund. Then when I look at the law which provides for what the Common School Fund shall be, I find that all the proceeds of the lands are the School Fund and that the exception in relation to one-fourth of the lands sold being appropriated to improvements, is a specific exception with power given to the Governor-in-Council, not for the Province in general, but in the case of a particular county to allow one fourth of the proceeds of the land of that county to be used for improvements in that county, and there is no other power in the Education Fund Act to deal with the proceeds of the lands, except to put them in the Education Fund. They must be put in the Education Fund. They can only be retained out of it in the manner the Act points out, and that is in a mode which the Governor-in-Council has discretion to use. Now what is done here is this, the School Fund is already in the hands of the Dominion, and these arbitrators assume to withdraw from the Common School Fund, in which we have a common interest, $124,000 and give it to Ontario.

Sir Montague E. Smith:—Is this School Fund mentioned in the Act at all?

Mr. Benjamin:—No. That School Fund is not part of the Act. The reason is this, that when you look at chapter 26, you find that that School Fund was not anything in the possession of the parties with which they could deal. It was a Trust Fund. The money was directed by the Act to be invested in debentures. The Consolidated Fund is to be invested in debentures and the interest is to be appropriated in proportion to the inhabitants; and then it says, as fast as any more land is sold—it was not all sold—the proceeds shall go into the fund until you get $200,000 a year in the fund, and then it says, when you sell lands, if in a particular county there is a claim that one fourth of the proceeds of the lands in

that county ought properly to be devoted to improvement purposes in that county, you can make application to the Governor, and the Governor-in-Council may, if he thinks right in his discretion, keep out one-fourth of the proceeds of the county lands for improvements in the county.

Sir Montague E. Smith:—What is your argument? that they ought not to have dealt with that at all?

Mr Benjamin:—That they have no right to take out of that fund the $124,000.

Sir Montague E. Smith:—Had they any right to deal with the School Fund?

Mr. Benjamin:—Yes; they must do something with it.

Sir Barnes Peacock:—Under which clause of the Act do you say they are dealing with this? The 142nd Section?

Mr. Benjamin:—Yes.

Sir Barnes Peacock:—But it is not in the schedule at all?

Mr. Benjamin:—No; you observe each of the Provinces had a great deal of separate property.

Now they say they have dealt with everything in the fourth schedule except the Quebec Turnpike Trust, and as to that, this is what they say: These Quebec Turnpike Trust debentures are in the hands of the Education Commissioners who have invested the education money in them under the authority given by chapter 26; being in the hands of the Education Commissioners we say that the whole fund in the hands of the Education Commissioners shall be held by them, the Dominion of Canada remains trustee of the fund because by the orginal constitution of the fund it was never to be alienated. It was to be a fund in trust for education. The Dominion was made trustee. The Dominion has been in possession according to the statement since June, 1867. We here in 1870 order $124,000 to be taken out of that fund and given to Ontario. Now we ask for the authority, because it is a trust fund established by law. When we do look at the law we do find an authority to withdraw one-fourth of the proceeds under certain circumstances. And what is that authority that in a particular county the Governor-in Council may do a particular thing?

Lord Selborne:—You want us to assume that that is wrong in total ignorance of what had been the administration of that Act and what had been the acts of previous authorities in the interval. It it quite possible if we knew those facts it would appear that this is merely an adaptation of an existing state of things.

Mr. Benjamin:—But it is impossible under this Act that the Governor can have done or can be presumed to have done anything but what the Act allows.

Lord Selborne:—I agree.

Mr. Benjamin:—The Act only allowed him in the case of a particular county to deal with the proceeds of the land in that county for improvements in that county.

Lord Selborne:—But supposing that the proceeds from the sale of all lands in any county in Upper Canada had been constituted in Upper Canada an 'Improvement Fund, of which there would be books of account kept in which it would be entered to what county particular sums belonged. What is there that would be inconsistent with that?

Mr Benjamin:—That is not what the arbitrators say.

Lord Selborne:—You infer from the words "shall be and the same is hereby taken and deducted and placed to the credit of" that there is an alteration, not of form but of substance.

Mr. Benjamin:—They begin by saying there is a School Fund which has been in the hands of the Dominion since 1867. They are now in 1870. They are therefore speaking of a fund from which no deduction has yet been made.

Lord Selborne:—How does that appear?

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Mr. Benjamin:—Let us read it. "That from the Common School Fund as held on the 30th day of June, 1867, by the Dominion of Canada," that is, the new Government has got it, "amounting to $1,733,224.47, of which $58,000 is invested in the bonds or debentures of the Quebec Turnpike Trust, the sum of $124,685.18," has that reference to anything antecedent?

Lord Selborne:—There is nothing in that language which is inconsistent with the Act for dealing with it.

Mr. Benjamin.—The fund had got into the hands of the Dominion of Canada. The Education Act provides that you may reserve out of the proceeds one-fourth in a county, but this is in the hands of the Dominion.

Lord Selborne:—It might still be in the hands of the Dominion after that reservation and it might still stand to the general head of the Common School Fund. That $58,000, which is clearly part of the funds now standing, is really dealt with as a specific asset. It is distinguished for some reason, though we do not know what.

Mr. Benjamin:—It is said in the Act to be a joint asset. It turns out that it is a joint asset, but a joint asset in this sense: That these debentures have been bought by the Public School Commissioners, which Public School Commissioners have a fund belonging to the two Provinces, and, therefore, it became necessary for the arbitrators, in order to dispose of this Quebec Fund, to say something about it. What they say about it is this: that it is included in the Education Fund, and, therefore, we do not distribute it directly. That is the first they say about that fund.

Sir Montague E. Smith:—It is only a small part of the Education Fund.

Mr. Benjamin:—Only a mere flea bite out of the total.

Sir Montague E. Smith:—I see it is only put in a parenthesis.

Mr. Benjamin:—It is merely to show they have not overlooked that particular joint asset. I am not complaining of their dealing with that. They are accounting for the reason why they are not dividing it; that it belongs to the Education Fund, and the Education Fund belonging to the two, they deal with the Education Fund, and in that fund is the $58,000 which the Act says is the joint property.

Lord Selborne:—It seems to be a very inconvenient thing to be raising objections of this sort which might be elucidated if we knew the facts.

Sir Montague E. Smith:—There is no reference to it in the case.

Mr. Benjamin:—There were fifteen or twenty meetings of the arbitrators for Ontario and Canada when we were not present.

Sir Montague E. Smith:—I mean that in the case there is no reference to it.

Lord Selborne:—You are coming to a body ignorant of the facts and with no statement of the facts. Then you desire certain inferences to be drawn from what appears on the face of the award.

Mr. Benjamin:—I only refer to the statutes. I do not refer to a fact outside the statutes.

Lord Selborne:—But in this interval of several years a great many things might have been done which would throw light on it, to say the least.

Mr. Benjamin:—No doubt the Governor might have given some county some of the fund; but that does not affect this question which is not giving a fund to a county by a Governor but an assumption of authority by the arbitrators, which by the Act under which we are dealing is reserved to the Governor-in-Council. What is done under section seven is to be done by the Governor-in-Council. They usurp the powers of the Governor-in-Council and deal with the subject matter which by the Dominion Act is specially reserved to the Governor-General of the Dominion, and which the Crown said was to be so reserved. They

deal with it, and deal with it in a manner in which by law he is not authorized to deal with it, because by law he could not do this; the law only authorizes him to take into consideration what is done in a particular county.

Sir Barnes Peacock:—Does not this parenthesis with reference to the $58,000 throw some light on the one you were previously discussing as to the $188,000? They say the $58,000 have been invested in debentures of the Quebec Turnpike Trust, and they are described in the fourth schedule as "The Quebec Turnpike Trust." Therefore if that sum was to be invested in the Quebec Turnpike Trust, and the debentures are described as the Quebec Turnpike Trust, may not the $188,000 be an investment by the Government in the debentures of the Montreal Turnpike Trust? Does not that throw some little light on the $188,000? This paragraph seems to throw some light on the meaning of the other paragraph?

Mr. Benjamin:— It shows that the $188,000 did not belong to the Governor.

Sir Barnes Peacock:—It rather showed me that the $188,000 there meant that the Governor had invested $188,000 in the debentures of the Turnpike Trust, and that they were described in the schedule as "the Montreal Turnpike Trust," because when he has moneys invested in debentures of the Quebec Turnpike Trust, they are described in the same schedule, under the head of "Quebec Turnpike Trust."

Mr. Benjamin:—I understand the fact is not so, and it is not stated in the case to be so.

Sir Barnes Peacock:—You know what the facts are and we do not.

Mr. Benjamin:—That $188,000 is held by the public?

Sir Barnes Peacock:—Then, I do not understand how it can be an asset.

Mr. Benjamin:—That is the complaint of Quebec, that you are putting on us things which are not assets.

Lord Selborne:—Are you going to attack the 10th paragraph?

Mr. Benjamin:—The 10th paragraph I said I would deal with separately. It says: "That the Province of Ontario shall be entitled to retain out of such moneys six per cent. for the sale and management of the said lands." So far as that is concerned, we do not quarrel with it. Somebody must manage and sell the lands. The arbitrators said that Ontario should sell and manage the lands and should have six per cent. for it but they then go on and give them this one-fourth. "And that one-fourth of the proceeds of the said lands, sold between the 14th day of June, 1853, and the said 6th day of March, 1861, received since the 12th day of June, 1867, or which may be hereafter received, after deducting the expenses of such management as aforesaid, shall be taken and retained by the said Province of Ontario, per the Upper Canada Improvement Fund." Now, my Lords, that is what will hereafter be received.

Sir James W. Colvile:—That only contemplates what was done under the two previous paragraphs?

Mr. Benjamin:—It amounts to this. I think it is impossible not to see, when you compare the statements of the arbitrators with the Acts, that the power given to the Governor-in-Council, to be exercised in a certain way, under certain restrictions in his discretion, with reference to making an allowance to particular counties from the proceeds of lands sold in the county for improvements in the county, has been usurped by the arbitrators and taken away from the Governor in spite of the 12th section of the Act; and that they have there dealt with the Improvement Fund in a manner contrary to law, and contrary to the very sections of the Act which authorizes them to execute the award.

Now, my Lords, the 11th paragraph we do not complain of. The 11th is in exact accord with paragraphs 10, 9 and 8, and the 13th paragraph is perfectly right

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Lord Selborne:—I want to understand this if possible. It seems that as between Upper and Lower Canada, they take all the lands sold, or to be sold, and give one-fourth apparently to the Upper Canada Improvement Fund.

Mr. Benjamin:—And the rest remains in the common fund, out of which Ontario is to get its share.

Sir James W. Colvile:—Under the 5th section of the old statute?

Mr. Benjamin:—Yes, and under this award. The 9th paragraph says: "That the moneys received by the said Province of Ontario since the 13th day of June, 1867, or which shall hereafter be received by the said Province, from or on account of the Common School Lands, set apart in aid of the Common Schools of the late Province of Canada, shall be paid to the Dominion of Canada, to be invested as provided by section 3 of the said chapter 26, of *The Consolidated Statutes of Canada*, and the income derived therefrom shall be divided, apportioned and paid between and to the said Provinces of Ontario and Quebec respectively, as provided in the said 5th section, chapter 26 of *The Consolidated Statutes of Canada*, with regard to the sum of $200,000." That we are not complaining of, but then what we are complaining of is that, whereas the Governor had not deducted from certain sums one-fourth which, by the 7th section of the original Act, we had authority to deduct, they assume the power in his place to deal with the whole subject matter for ten or fifteen previous years, and say that the whole of that is to be divided in this way. Ontario to take one fourth, and the rest to go with the common fund of the two Provinces, of which Ontario will get its share. We say that that is a direct violation, not only of the Education Act, but of the 12th section of the Act under which the award is made.

Lord Selborne:—You say that this gives to Ontario a portion not only of the proceeds of the land sold in Upper Canada, but also of proceeds of lands sold in Lower Canada.

Mr. Benjamin:—Of all lands, it is without limit, and then it gives it its share of the Education Fund.

Lord Selborne:—And that by the Act of Parliament regard should be had to the county in which the lands were situated.

Mr. Benjamin:—And that the power was given to the Governor-in-Council and reserved to the Governor-in-Council by the 12th section of the Dominion Act. The Dominion Act reserves that power to the Governor-General and it is taken by the arbitrators.

Sir Barnes Peacock:—Then I suppose you would say also that Ontario could not apply to a particular county because it does not know out of which county this general fund has come. They could not, if they wished it, apply it in the way pointed out in the Act.

Mr. Benjamin:—It is in every way in excess of the power granted to the arbitrators, and that is as to a fund of $1,590,000.

Lord Selborne:—If I rightly understand you now, you say it is even more than what the Governor could have done.

Mr. Benjamin:—Yes; it is in excess of what the Governor could have done. It usurps his powers, and then it goes far beyond what he could have done himself if he had exercised the power. I ought to tell your Lordships one thing which I have just been informed of by my clients, and so that I should not deceive you in any way. I am told that all the public lands that were sold were situated in Ontario.

Lord Selborne:—Then, of course, every county in which any land that was sold was situated must have been in Ontario.

Mr. Benjamin:—No doubt; but I do not think that that affects my argument. Your Lordship asked me the question just now and I answered it without any idea that the lands were all in one Province, which, of course, it is proper that your Lordships should be told.

Lord Selborne:—Then the reservation authorized by the 7th section could only be improvements in Ontario.

Mr. Benjamin:—And only of the lands in one county, the improvements in that county.

The Lord Chancellor:—Do you say all the School Lands were in Upper Canada?

Mr. Benjamin:—Yes; so my client tells me.

The Attorney-General:—And all in one county?

Mr. Benjamin:—No.

The Attorney-General:—There is not a single fact about this in the case.

Mr. Benjamin:—I am now putting something in the case in your favour.

Lord Selborne:—This shows the extreme inconvenience of dealing with the subject without any facts. That fact at once removes what seemed a very formidable objection, so far as that objection went.

Mr. Benjamin:—It did not seem to me to remove the objection as to the usurpation of the power.

Lord Selborne:—It removes the particular objection that they would be giving to Ontario what the statute gives to Quebec.

Sir James W. Colvile:—Quebec could have got nothing under that.

Mr. Benjamin:—Quebec could have got nothing, but the reservation is to be made out of the proceeds, and not to be taken from the School Fund after the School Fund has been formed and invested in the hands of the Dominion. This is a power assumed by the arbitrators to take it back even where there has been no reservation.

The Attorney-General:—I would submit to your Lordships if the parties had really intended such a question as this to be raised, they would have stated some facts with reference to it. There is not a single fact stated in the case that can throw any light upon it, not one.

Sir Montague E. Smith:—Nor is it referred to in the questions.

The Attorney-General:—Ontario is left entirely in the dark as to what the facts are.

Sir Robert P. Collier:—I suppose it would come under the general head that the award is bad.

Mr. Benjamin:—That the award is null and void on its face.

Sir Montague E. Smith:—But it does not say "on its face." I read it as being null and void from the specific facts stated.

Mr. Benjamin:—My friend raised the same objection in the beginning, and your Lordships have determined that we should be heard on all the points and then your Lordships would determine whether they should be taken into consideration. Your Lordships will see that the case as stated does not tell us what occurred behind our backs after we had no arbitrator, and consequently the whole of this that we are complaining of occurred during these 20 or 30 sittings, when it appears that Ontario had the opportunity of urging its own case.

The Lord Chancellor:—The joint case is stated by both parties and that is the form in which you have been content to state your case. Their Lordships did not stop the course of the argument, but they did keep open the question how far anything was intended to be raised and is really meant to be raised by this case.

Mr. Benjamin:—If your Lordships should think the facts brought to your notice are grave facts on which you ought to be informed as to the real state of the facts, of course it is entirely in the power of your Lordships to have the case stated over again.

The Lord Chancellor:—I do not think their Lordships desire to be informed on anything that the parties did not desire them to be informed on in the first instance.

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Mr. Benjamin:—I was only arguing from the facts. I always thought that an argument on the face of the Acts of Parliament was open to anybody on any occasion.

[Their Lordships Consulted.]

I told your Lordships, just now on turning to my client, that the whole of the land was in Ontario. I think we have the right also to state that the very points I am now making were raised between the parties in Canada and that the last clause of the questions was put in for the purpose of covering them. I suppose your Lordships will take against me what I admit against my side and that I have no right to believe what is stated in our favour. My Lords, the twelfth paragraph of the award is open to the same objection as paragraph 1. Montreal Harbour is in the third schedule of the Act, and in the third schedule of the Act Montreal Harbour is a Provincial work to be the property of Canada—that is in the second of those items in the third schedule "Public Harbours." Then, my Lords, "the said arbitrators find that the debt due on account of $481,425.27 secured by debentures issued by the Montreal Harbour Commissioners has not been charged in the statement of the debt of the late Province of Canada." It therefore remains to be dealt with. "And they award, direct and adjudge, that should the Dominion of Canada hereafter pay anything by reason of the liability of the said Dominion on account of the said debentures, the said two Provinces shall repay to the said Dominion any sum so paid in the same proportions, respectively, as the said Provinces are hereinbefore directed to bear and pay the excess on the 30th day of June, 1867, above $62,500,000 of the debt of the late Province of Canada." That is in section 1, and it is to be paid in that proportion.

Sir James W. Colvile:—If the guarantee should become a debt then it is to be divided as above stated?

Mr. Benjamin:—Yes. Then the 14th paragraph is the same. It takes the same basis.

The Lord Chancellor:—You see there again, if you are right about that, these gentlemen were executing a parliamentary power. It is not as if it was a private arbitration under a private instrument. Either this was within their power or was not. If it was not within their parliamentary power it goes for nothing, if it is within their parliamentary power to do what is done within section 12, what is the objection to whether they have done it?

Mr. Benjamin:—If that be the true principle, the result will be that all arbitrators may on all occasions do whatever they like, leaving it to be said what you have done in excess of your power goes for nothing.

The Lord Chancellor:—You cannot deal with it upon what might happen in the case of a private arbitration, because, though these people are called arbitrators, as was pointed out on the former occasion, it is merely because they must have some description. There is a certain thing to be done under a certain Act of Parliament by particular individuals named. If they do anything more than they are authorized to do, it cannot have any possible effect.

Mr. Benjamin:—Your Lordships will recollect that I submitted on the last occasion that when Parliament selects the word "arbitrators" I have the right to say that the word was selected *ex industriâ*, and that, therefore, it is to be treated as an arbitration and not as a valuation or appraisement of any sort. That Parliament might have said, they shall appraise all the assets and ascertain the amount of the debt, but that they have said they shall arbitrate. Then on paragraphs 12 and 14 there is nothing objectionable, except what I have said; but now I call attention to paragraph 15. Paragraph 15 does not profess to be a final award on the matters with which they are dealing. They are only authorized to make a final award, and this paragraph 15 says: "That the said several sums

awarded to be paid and the several matters and things awarded and directed to be done by or with regard to the parties to this reference respectively as aforesaid, shall respectively be paid, received, done, accepted and taken as and for full satisfaction and discharge, and as a final end and determination of the several matters aforesaid"—not of the entire subject committed to them by Parliament. They select these particular matters and they adjudicate upon them.

LORD SELBORNE:—You do not show that there are any debts, credits, liabilities, properties or assets which they do not deal with.

SIR MONTAGUE E. SMITH:—Is this expressing more than is implied that their determination is final, and they say it is final.

MR. BENJAMIN:—They say it is final upon the several matters which they have decreed.

SIR MONTAGUE E. SMITH:—That is implied and they have only expressed what is implied. If you can show that they have not decided matters which were submitted to them, that would be a different question.

MR. BENJAMIN:—I think, I have done a great deal more, that is what I think about it.

Then, my Lords, I do not know that I can occupy usefully the time of your Lordships any further. I have stated the different points that have suggested themselves to me, and they amount to this: First, that this is a duty committed by the Act of Parliament to three individuals with no indication of any right on the part of two to act in the absence of the third, and with no indication that any judgment of two shall be binding; whereas in antecedent Acts between the same parties those provisions were inserted. I have also called your Lordships' attention to the fact that even if it could be held, if it could properly be held, that in a case of this kind, between the Provinces and the Dominion, any majority could bind a dissentient minority, that that could never be the case, unless all three were present, because the Act does not provide that anything less than the whole shall be a *quorum*. In an ordinary case, I do not suppose anybody would for one instant say if an Act of Parliament required that for doing certain things a certain number should be a *quorum*, that it would be an answer to an allegation of the invalidity of the award that a *quorum* was not present, that you should be told one of them was notified and would not come. That would not change the fact that the *quorum* was not present, so that if the *quorum* consisted of the three, and there is nothing in the Act which says that the quorum shall consist of less than three, I apprehend it is entirely material, as I cannot possibly influence the judgment of your Lordships whether the third was away from illness, from death, from lunacy, from incapacity of any sort, or from sheer misconduct, and that if by misconduct, one of the three arbitrators refuses to attend to form a quorum, there is none the less the absence of the quorum essential to do the business. Either the arbitrator for Quebec was or was not authorized to give in his resignation under the circumstances which he did. If he was authorized, *cadet questio.* We were entitled to put one in his place, and we had no time given us for that. If he was not authorized to give in his resignation, he has been guilty of misconduct, and surely the people of Lower Canada are not to suffer for his misconduct in withdrawing from an arbitration against his duty, and without their will, whether the Government of Quebec were right in making that requisition or not; it was all they could do. They asked for time to see whether or not they would replace the arbitrator. Some say that we could, and some say that we could not. I apprehend that under any circumstances, an appointment of a new arbitrator was perfectly within the power of Lower Canada, and that Lower Canada had a right to time to determine what course she would take on the sudden withdrawal of the arbitrator in whom they had confidence. The Counsel for Lower Canada remained after the arbitrator had withdrawn, and asked for time to determine

what course Lower Canada would take; but the answer to the application for the stay of proceedings was to go on with the arbitration, whereupon Counsel withdrew and everything else has occured absolutely *ex parte*, and for two or three months together, Ontario and the Dominion together have dealt with the interests of Lower Canada as they pleased, without check or hindrance, and with the result that is before your Lordships, that there is intense dissatisfaction and discontent amongst the people of Lower Canada with the way in which their rights have been dealt with. That the case now comes before your Lordships is proof of that. It does seem to me, that an arbitration of this sort, under such circumstances, is one that ought not to be made final against them.

MR. BOMPAS:—May it please your Lordships I am with my learned friend, Mr. Benjamin, and in the circumstances of a case like this, of so much importance, I must not hesitate to trespass a little upon your Lordships' time. I should ask your Lordships in the first place to consider the true interpretation of this British North American Act. That Act is an Act of the British Legislature, and one, therefore, which your Lordships are more able to interpret than those who are in Canada and accustomed only to Canadian ways. It is not an Act of the Canadian Legislature, of which it might be said, as has been said justly of the award, that the parties on the spot can most justly judge of it; but it is an Act passed here, and the first question I submit to your Lordships you have to determine is what on a close but fair interpretation of the Act was the meaning of that 142nd section.

Now, to understand that section it is necessary to consider what was meant by what is called the 8th division of the statute, the division regarding the revenues, debts, assets and taxation. Now, what I have to submit to your Lordships is that it is clear that the effect of such of the sections as relate to the debts and assets between the 102nd and the 126th sections is this, that whereas at the time of the passing of this Act the Old Province of Canada was possessed of certain assets and liable to certain debts, the effect of the Act was to divide those into three parts, not to divide them into two parts, but to divide them distinctly into three parts. One of those parts was given to the Dominion of Canada. The second of these parts was given to the Province of Ontario, and the third of those parts was given to the Province of Quebec; and I should like to call attention to those sections which so divide the debts and assets of the Old Province of Canada into these three parts, because the contention I shall humbly submit to your Lordships is that it was that tripartite division which was referred to—the division of the assets and debts in the 142nd section, and that it is an entire mistake to suppose that that section authorized an arbitration between Ontario and Quebec for the dividing between them of those assets and debts which were theirs only. I submit that the true reading, when your Lordships come to it, will be that it is a division of the debts and assets of Old Canada—the old Province of Canada—into the three parts which had been defined by the previous sections—a certain part for the Dominion, a certain part for Ontario and a certain part for Quebec; and that a representative of each of those which were to take part in the assets and debts were accordingly appointed for the arbitration that was to follow.

LORD SELBORNE:—You say it is a division contemplated between the Dominion and these two Provinces?

MR. BOMPAS: Yes, my Lord.

SIR ROBERT P. COLLIER:—Or rather among the three?

MR. BOMPAS:—Among the three; and I think I shall show your Lordships that it is impossible to divide and adjust the debts and assets of the two without dividing them into the three parts; that you cannot adjust the debts of the two without saying how much of the debts which you have already got to deal with shall go to the Dominion as well as how much shall go to Ontario,

Now the first section of the 8th part of the Act deals with the assets. Perhaps I had better take it in this way. I will first deal with the debts and show your Lordships how the debts were divided into three parts. The 104th section provides only for the annual interest on the debts. "The annual interest of the public debts of the several Provinces of Canada, Nova Scotia and New Brunswick at the Union shall form the second charge on the Consolidated Revenue Fund of Canada." Then the 111th section deals with the debts themselves, and it provides that Canada, which by the interpretation clause means the Dominion of Canada, "shall be liable for the debts and liabilities of each Province existing at the Union." That charges, no doubt, the debts of the Dominion. But then when you come to look back to the 102nd section there is a provision that notwithstanding the charging of the whole upon Canada, certain portions of the public debts may be assumed by the public Provinces. The 110th section does not describe exactly which portion shall be assumed and the only instance I can give to your Lordships is a portion which we know and which has been very much discussed. "All assets connected with such portions of the public debts of each Province as are assumed by the Provinces shall belong to that Province."

SIR JAMES W. COLVILE:—That is only dealing with assets.

MR. BOMPAS:—"Portions of the public debt of each Province as are assumed by the Provinces"—not the assets.

LORD SELBORNE:—Which Province, the new or the old?

MR. BOMPAS:—The New Provinces. They are all along mentioned as Ontario, Quebec, Nova Scotia and New Brunswick.

LORD SELBORNE:—The difficulty which at present strikes me is that at the time the Act passed I suppose the public debt existing was the debt of Canada and not of Ontario and Quebec.

SIR BARNES PEACOCK:—The 104th section rather shows what is meant by the Province. "The annual interest of the public debts of the several Provinces of Canada, Nova Scotia and New Brunswick." There are only three there?

MR. BOMPAS:—Yes; the three Provinces are specially named.

SIR BARNES PEACOCK:—It may be a question whether when they use the term Provinces afterwards they change the term and mean four.

MR. BOMPAS:—I think your Lordships will find they necessarily do. Your Lordships will remark that these assets shall belong to that Province. Therefore that Province is the thing which shall exist and hold those assets.

LORD SELBORNE:—That would be a just remark if nothing followed which would subdivide as between one Province and another. This particular clause would be quite sensible to read it as Nova Scotia and New Brunswick, for instance. All assets relating to their own share of the debt and their subsequent clauses, it may be, subdivide what is to be taken by Canada.

MR. BOMPAS:—It is possible, but, I think, for my argument, wholly immaterial that there are certain debts which do not belong to the Dominion, but certain debts assumed by the Provinces, that although section 111 seems to give the whole debts to Canada, yet it mentions that certain debts may be assumed notwithstanding certain portions of the debt by a particular Province. The instance that occurs to me is that debt of the Montreal Trust Fund, which under the award is to be assumed entirely by Quebec and as to which we are told in the award it was not assumed by Canada. Then in section 112 we have the division which your Lordships' attention has been so much called to that the Dominion is to be generally liable in respect of $62,500,000, and that Ontario and Quebec conjointly are to be liable for the rest. Therefore, in effect the debt of the old Province of Canada is given at $62,500,000 to the Dominion of Canada, the residue is kept by the old Province of Canada, or rather I should say, kept by the two divisions of Ontario and Quebec subject to this. That by the 110th section there may be—though it

not distinct what they are—portions of the public debt assumed by particular Provinces.

Sir James W. Colvile :—There is nothing in the Act which shews what debts made up the 62,000,000.

Mr. Bompas :—No. Your Lordships will see it is quite clear that there is something fixed on for New Brunswick and Nova Scotia.

Sir James W. Colvile :—It begins by taking all the debts, and then it says our liability shall not exceed 62 millions; but if the debt of the old Province of Canada was greater than 62 millions, there is nothing in the Act which shews what particular debts form the 62 millions.

Mr. Bompas :—No, my Lord : it is apparently merely a part of the general scheme, because it is fair to point out to your Lordships that the whole was to be paid in the first instance by Canada and the Provinces were to repay Canada that sum. I submit the effect is that the debts are divided between the Dominion and the three Provinces, perhaps your Lordships may say, of Canada, Nova Scotia and New Brunswick ; or the debts of Canada are divided between the Dominion and the two new Provinces of Quebec and Ontario, not in the first instance to be held by them conjointly, but still divided in that way.

Sir Barnes Peacock :—The Dominion is to be responsible to the public for the whole and they are to be responsible to Canada for a certain amount and to pay the interest on it.

Mr. Bompas :—To the public the Dominion guarantees the whole, but as between themselves there is a division into two : in the first place, between the Dominion and the two Provinces, except as to any parts that may be separately assumed between the two Provinces.

Sir Barnes Peacock :—Which section relates to that ?

Mr. Bompas :—Only the 110th.

Sir Barnes Peacock :—No other than that ?

Mr. Bompas :—No other than that as regards the debts.

Then we come to the assets, and I submit to your Lordships in the case of the assets it is quite clear that the statute points to the division of these assets into three parts. It gives certain of those assets to the Dominion, and certain of those assets to Quebec and certain of those assets to Ontario,—no doubt in some cases giving them to Quebec and Ontario conjointly and in some cases giving them to Quebec and Ontario separately, but, as I understand dividing them into three parts in that way.

Sir Barnes Peacock :—Which clause gives them separately ?

Mr. Bompas :—I will come to that in a moment. I should like to call attention to that section in the order in which it seems to me to come. In the first place, the 107th section vests in the Dominion "all stocks, cash, bankers' balances and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned." Therefore, your Lordship sees that that is not a clear vesting of all stocks, cash, bankers' balances and securities, so that it could be said there was no difficulty or that nothing remains for adjustment, but it is the vesting of all such stocks, cash, bankers' balances and securities, excepting a certain portion which under later sections it is said are not to go to the Dominion, leaving, of course, the terms perfectly general, with no definition of what shall be included in the term "securities for money belonging to each province." Then the 108th section vests certain public works and property mentioned in the 3rd schedule. Thus entire classes of the assets of Canada vested in the Dominion are vested under somewhat general terms. If your Lordships turn to the schedule and take the fifth heading, it is "Rivers and Lake Improvements." Lake improvements is not a distinct term which would admit of no doubt as to what were the lake improvements. The lake improvements might give rise to a great many questions

as to whether a particular matter formed part of the lake improvements. So is the ninth heading, "Military Roads." Your Lordships can well understand that grave questions might be raised as to whether a road was a military road or not. Then the 10th heading, "Armouries, Drill Sheds, Military Clothing and Munitions of War and Lands set apart for General Public Purposes." Surely lands set apart for general public purpose is of a most indefinite description, and, according to that description, these various works and property out of the total possessed by Canada formerly is to be given to the new Dominion of Canada.

Then when you come to clause 109, you get certain things which are vested in the separate Provinces, and there can be no question here, about which Provinces are meant—the old or the new, because they are mentioned by name. "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise." So that they are not to be held conjointly. Those situate in Ontario are to belong to Ontario, and those situate in Quebec are to belong to Quebec—"subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same."

Lord Selborne:—You do not mean to say it was to be the duty of the persons called arbitrators under the 142nd section to give a specification of these lands, mines, minerals and royalties.

Mr. Bompas:—It is very difficult to say precisely what the term adjustment means, but I presume if by the Act no lands are vested in the Dominion, except such as are included in schedule 3 that their duty would be to define and limit, as far as was thought necessary, the various lands mentioned in schedule 3.

Lord Selborne:—You think the words "division and adjustment" are apt words to use for that purpose.

Mr. Bompas:—I should have thought so, the words are very general, "debts, credits, liabilities, properties and assets," and "division and adjustment."

Sir Robert P. Collier:—Between these two Provinces?

Mr. Bompas:—Not between these two Provinces.

Sir Robert P. Collier:—"The assets of Upper Canada and Lower Canada."

Mr. Bompas:—When I come to that section, I am going to say that the words are of the very strongest kind to show that Upper and Lower Canada do not mean between Quebec and Ontario.

Lord Selborne:—You say it is between Ontario and Quebec and the Dominion.

Mr. Bompas:—I say between those three parties mentioned at the end of that section, whose parliaments must be summoned to give consent before the arbitration can be held. They are not mere parties appointing like the Governor-General might appoint an umpire, but they are three parties whose parliaments are summoned to assent to this mode of determining their rights, and the persons appointed had then to divide and adjust, not the debts and credits of Ontario and Quebec, but the debts and credits of what was expressly defined so as to show that what is meant is the old Province of Canada, and not the new Upper and Lower Canada. Those names are used throughout this Act with the most careful distinction, and they are names which were felt by the person who drew this Act to be so distinct from Ontario and Quebec, that in the 138th section he makes a special provision that the use of the names Upper and Lower Canada by mistake is not to invalidate any deed. The debts and assets being not of Ontario and Quebec, but the debts and assets of Upper and Lower Canada, instead of the old Province of Canada, in order to indicate that it was to include things belonging specially to the different parties as well as to the old Province.

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Sir Montague E. Smith:—Did anybody ever suggest this to the arbitrators?

Mr. Bompas:—My answer to that is two-fold. In the first place I have not the slighest idea of what was suggested to the arbitrators.

Sir Montague E. Smith:—Mr Gray treats himself throughout as filling the position of umpire.

Mr. Bompas:—I should submit your Lordships would not think he is the conclusive person to interpret a British Act of Parliament, but the Government of Canada did not treat him so. The Government of Canada in their patent to him expressly said he was to be an arbitrator for them and not an umpire between the other two. The wording of the patent expressly gives to him the authority to act for them.

Lord Selborne:—Then do I understand your argument to be this, that nader the 142nd section the arbitrators are bound to state on the face of their award what debts were to be assumed by the Dominion and what assets were to belong to the Dominion.

Mr. Bompas:—The main object of my argument is this. If I am correct in my statement that this is an arbitration between the three, then I apprehend that it is perfectly clear that there must be unanimity in order for the arbitrators to make a good award, and that a majority would not govern.

The Lord Chancellor:—I do not think Mr. Benjamin contended this.

Mr. Bompas:—Yes, my Lord, with all respect, he did.

Sir Robert P. Collier:—I did not understand him so for me.

Lord Selborne:—He put one meaning on the words Upper and Lower Canada, and wished us to hold that a division was contemplated, not of existing debts and assets, but of what had been debts and assets of former Provinces.

Sir Robert P. Collier:—He never suggested that there was a third party to the arbitration?

Mr. Bompas:—It was his view when he first went through the statute. With all respect, my Lords, I have got up this case with Mr. Benjamin, and Mr. Benjamin and I in consultation expressly agreed that we should argue that. It may not have struck your Lordships, and I was conscious it did not strike your Lordships, because it came when your Lordships had not had the case well opened to you, and your Lordships were not aware of the effect of what he was arguing; but that my learned friend did argue and put this point, my learned junior perfectly agrees with me, and reminds me that Mr. Benjamin used the express phrase that it was a tripartite arbitration, and in answer to that Lord Cairns said, "No, Mr. Benjamin, it occurs to me that the third arbitrator was an umpire and not a mere third arbitrator," therefore it occurred to me very forcibly, feeling very strongly the argument to be adduced on this point, as an argument that I should press on your Lordships.

Lord Selborne:—You recall to my mind an argument that I think we did hear from Mr. Benjamin, different from what you are presenting, that the Province was not entirely disinterested in the matter because it had an interest in the proper adjustment between Ontario and Quebec, that argument he did use.

Sir Robert P. Collier:—Your argument is that they totally misunderstood their functions and never had any conception of the real nature of their functions or duties.

Mr. Bompas:—That is my present argument.

Sir Robert P. Collier:—I did not understand Mr. Benjamin to go so far as that.

Mr. Bompas:—I understood him to go as far as that he did what I was proposing to do when I had presented this argument, namely, assuming we are wrong in this to endeavour to show your Lordships, as I am afraid I must endeavour to do, that even apart from this question upon the other points that have been argued

this is not an award that can be sustained. I do submit to your Lordships that my learned friend did argue it, but I do hope, even if my learned friend did not argue it, that I may ask your Lordships to take the matter into consideration.

THE LORD CHANCELLOR:—I did not mean to say you were excluded, but of course we must bear in mind that that was not a point considered as we understood by your leader as a point in this case.

MR BOMPAS:—I am sorry your Lordship should think that.

SIR BARNES PEACOCK:—His argument was that they were to appoint a third arbitrator and not an umpire, and that no award could be made except by the three, but he does not say it was necessary to decide as to all matters between the three.

MR. BOMPAS:—I may have misunderstood how strongly he intended to press it.

THE LORD CHANCELLOR:—We must interrupt you here.

(Adjourned to Thursday, March 7th.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Council Chamber, Whitehall,

Thursday, March 7th, 1878.

Present—

The Lord Chancellor,
The Duke of Richmond and Gordon,
Sir James W. Colvile,
Lord Selborne,
Sir Barnes Peacock,
Sir Montague E. Smith,
Sir Robert P. Collier.

IN THE MATTER OF THE ARBITRATION AND AWARD

BETWEEN

THE PROVINCES OF

ONTARIO

AND

QUEBEC.

Mr. Bompas:—May it please your Lordships: When your Lordships rose last week I was asking your attention to the British North American Act, and while I hope I shall not forget the words of the Lord Chancellor that I am perhaps carrying the interpretation rather further than my learned leader did, and having no desire to do that, I must ask your Lordships' attention to one or two further remarks upon the Act before I go to the general question of what is the quorum necessary in a case of this kind.

Now, my Lords, I did not intend to argue, and I do not think it is at all necessary for my purpose to argue that the meaning of that 142nd section is that the Court there constituted was bound to divide every asset and every debt of the old Province of Canada. What I submit to your Lordships is the true interpretation of that section is that it was a Court constituted to settle such disputes as might arise in the division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada. I call your Lordships' attention to the fact that the earlier sections, the Division No. 8 of the British North American Act had distinctly provided that the debts and assets of Canada should be divided between the Dominion and Ontario and Quebec. Your Lordships will remember, and I think I had not called your Lordships' attention to that particular section, that the 117th section is a section which winds up by saying that the several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada, that is the Dominion,

to assume any lands or public property required for fortifications or for the defence of the country. Your Lordships see that subject to that one section every conceivable property of Canada is distinctly given to somebody; it is given to the Dominion, or it is given to Quebec, or it is given to Ontario, or it is given to Quebec and Ontario jointly. There is no provision in the Act requiring the joint property of Quebec and Ontario to be divided. One of your Lordships remarked, when the sections 112 and 117 were first read, surely those two sections cannot be within the present arbitration, because it expressly says that they shall be held conjointly by the new Province, and as far as words go it would seem to say that they are not to be divided. When we turn to the 142nd section I submit it is not a section which expressly is intended to declare and enact in terms that the whole property lately belonging to Upper Canada and Lower Canada shall necessarily be held in severalty. The difficulty, as I submit, is to give a fair interpretation to the 142nd section combined with the 113th section. If the 142nd section meant that the property of Lower and Upper Canada is to be necessarily divided and divided by this process between the new Provinces of Ontario and Quebec, which in size corresponded to the old Provinces of Upper Canada and Lower Canada, then I apprehend it would be clear that the 113th section excluded from that division those particular assets which are mentioned in that section, and that the 142nd section applied to the assets mentioned in the 117th section which appear to have been left in the hands of what your Lordships might possibly think was the Province of Canada and which might therefore require division. I cannot conceive that if the 142nd section is an enacting clause enacting that everything must be divided it can include assets which in the same Act, only a few sections before, it is expressly said shall be property conjointly. Of course, my Lords, if that were the true interpretation then the award would be bad because the award principally goes to dividing the assets mentioned in the 113th section which according to that interpretation would not be intended to be divided. On the other hand I submit that it is another interpretation that the 142nd section constituted a Court for the purpose of settling any disputes that might arise in the division and adjustment of the debts, credits and liabilities and properties and assets of Upper Canada and Lower Canada, which were likely to arise. It is clear that the Act [illegible] divide the property, as I said, into various parts. In the carrying out of that [illegible] disputes and difficulties as to the exact amount which was really to go to one party or the other party might arise, and it seems to me that it is a natural interpretation that a Court should be established to represent the three parties between whom that division was to be made, in order that if disputes arose in any matter relating to the rights of the three parties those rights might be determined. It is obvious that a very important dispute might have arisen between Quebec and Ontario and the Dominion of Canada as to what was the amount of the joint debt above the sum of $62,500,000. I rather gather from the Act of the Canadian Parliament, at page 58 of the Record, it was an Act of Parliament readjusting the amounts payable in respect of the debts of the Provinces, that the amount by which the total debt did exceed 62 millions was settled by agreement between the Provinces and the Dominion and no question arose regarding it.

LORD SELBORNE:—Is not the effect of the Act at page 58 that the whole of that was assumed by the Dominion, in exoneration of the Province?

MR. BOMPAS:—Yes, the whole debt was assumed, and the debts of the other Provinces were increased.

SIR JAMES W. COLVILE:—The Dominion assumed the 62 millions of debt in round numbers and the excess of the debt above that is to be apportioned between the two Provinces. There may be a question upon the materials before [illegible] debts of Canada before the Dominion Act fell within the 62 million.

but it is clear that when they set about this arbitration both parties knew that, and you find the representative of the Province of Quebec proposed that the dispute is as to the mode of apportioning the excess of debt, and it is quite clear that both parties knew what that excess of debt was.

MR. BOMPAS: —With all submission, it appears that that was so difficult to determine that the arbitrators were not asked in the first instance to determine it, and never have determined it, and I submit it was because there were certain claims which were then undecided, and the total amount of the debt, excepting as far as some years afterwards, it has been said to have been settled by this subsequent Act of Parliament; the total amount of the debt never was ascertained. My contention before your Lordships is this. True it may be, and true as I submit to your Lordships it was, that finally the questions that were submitted to this Court were the division between the two Provinces of certain assets and certain debts. As to the debt which Quebec and Ontario owed to the Dominion of Canada, I submit, with all humility to Sir James Colvile, that there was no express provision in the Act that that debt should arise, that is a debt created conointly, the parties seem to agree that it should be divided between them.

SIR JAMES W. COLVILE: —Then do you suppose the Dominion does not know this day what debts were included in the 62 millions?

MR. BOMPAS: —It was not any particular debts that were included in it. They do not assume the 62 millions as part from the rest, they assume every debt f Upper and Lower Canada. That is expressly provided by the 111th section. The only provision of the 112th section is to create a new debt which had never xisted before, a new debt from the two Provinces to the Dominion, which it is rovided should amount to the excess above 62 millions. Supposing any petition f right were presented now against Canada if the debt were proved to exist, hat debt would be a debt to Canada in excess of any sum which is contemplated ven by this Act.

THE LORD CHANCELLOR: What is the precise point you are addressing yourself o?

MR. BOMPAS: It is this. I submit that the Court constituted was a Court or deciding all disputes between the three parties.

THE LORD CHANCELLOR: A Court constituted for deciding all disputes?

MR. BOMPAS: With regard to debt and assets between the three parties. am addressing myself to a remark of your Lordship, I think it was that it ppeared from this section that there were two arbitrators, one to represent Quebec, d one to represent Ontario, and that there was what was equivalent to an mpire appointed by the Dominion. I submit that the constitution of the Court as a representative of the three parties, Quebec, Ontario and the Dominion; ecause the questions that might come in before them were questions affecting ther of those three bodies; that it was not necessary under that section that ere should be a definition of every debt or every asset assigned to either Quebec, Ontario or the Dominion, but that certain questions were left in point of ct to that Court so constituted. It does seem that these questions were mainly estions between Quebec and Ontario, although I should ask your Lordships to ok at the award to see to how large an extent even those questions necessarily volved the interests of the Dominion itself. The point I am addressing myself is that it is not a true interpretation of the section to say that it was a section ssed for the purpose of settling disputes between Quebec and Ontario only, it was Court constituted for the purpose of hearing any questions that might arise in division of certain assets, namely assets of Lower Canada and Upper Canada ich were not to be divided between Quebec and Ontario, but in three parts, d if it does happen that the point upon which a difficulty arose was a difficulty een Quebec and Ontario that does not any the less make the Court a Court

constituting the three, each for the protection of the property which he was appointed to represent; that that is carried out by the patent which equally appointed an arbitrator on behalf of the Dominion to represent the Dominion Legislature by the award which deals with the rights of the Dominion of Canada as well as with the rights of the two parties.

THE LORD CHANCELLOR:—Does your argument go to this that those three persons must be unanimous?

MR. BOMPAS:—Yes.

THE LORD CHANCELLOR:—Is there any authority for that?

MR. BOMPAS:—I call your Lordships' attention shortly to the argument that whenever three persons are appointed to do a work they must be unanimous except in excepted circumstances by the law of England. There are certain exceptions in which they need not be unanimous, but the general rule is that they must be unanimous. I submit that where these three persons represent distinct interests, they must be unanimous. Where there are two persons representing two parties and a third party represents an umpire, then it may be said to be a presumption that it was intended that the umpire should by his vote be sufficient to give effect to it; but where there are three parties representing three interests there I submit the inference is that each arbitrator was intended to protect the interests of his own party and that it was not intended that any one party should be overridden by the other two.

THE LORD CHANCELLOR:—The Act of Parliament has not used the word umpire, but has used the word arbitrator. The question is whether that meant anything more than this, that the division and adjustment of these debts, whatever they are should be referred to three persons, should be settled by three persons. What does that mean? How are they to do it?

MR. BOMPAS:—Supposing I can carry your Lordships with me to the extent of its being three persons, I am prepared to show your Lordships, on the clearest authority, that that would necessarily require the three persons and would require, I submit, their unanimity except in the case of certain public trusts of which I should submit this is not one. What I was afraid your Lordships were inclined to hold was not that this was a mere Court appointed by three persons, but that this was a Court appointed for the division between the two Provinces.

THE LORD CHANCELLOR:—It is not called a Court. Why should we call it a Court, when it is not called a Court by the Act of Parliament.

MR. BOMPAS:—I do not wish to call it a Court. I thought your Lordships had thrown out that we must not treat this as an ordinary arbitration.

THE LORD CHANCELLOR:—At present I rather demur to importing a technical term such as "Arbitration" which at once raises in one's mind the idea that certain technical rules which we have established as to our arbitrations between parties are to be applied to this.

MR. BOMPAS:—It is to avoid that that I used the word which I thought was larger, the word "Court."

LORD SELBORNE:—That introduces another technical term.

MR. BOMPAS:—The term as far as I am concerned is perfectly immaterial because the authorities I shall cite to your Lordships will show, and my contention is, that we are not relying upon any question which is at all peculiar to arbitration.

THE LORD CHANCELLOR:—Supposing the Act of Parliament had said it shall be left to A, B and C to say how the debts, credits, liabilities and assets of Upper Canada are to be divided and adjusted.

MR. BOMPAS:—Then I should have said that without overruling authorities from the very earliest times down to now without going against the law of almost every civilized country, your Lordships could not hold that a decision by A and B, or B and C, absence of the other, was a good decision.

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The Lord Chancellor:—That is a different observation. I thought you were speaking at present of unanimity.

Mr. Bompas:—The point I shall most strongly urge is that the three must be present.

The Lord Chancellor:—If you can show they must be unanimous it is not necessary to consider their presence because they cannot be unanimous unless they are present.

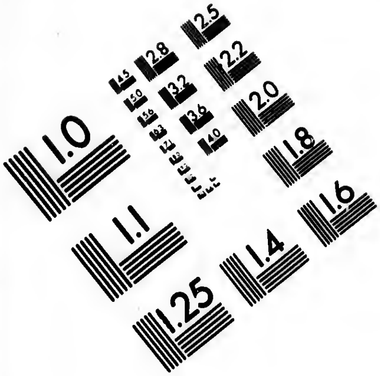
Mr. Bompas:—I will state very shortly to your Lordship what my contention is, and I have the authorities here. My contention in the first place is that whether or not they must be unanimous depends upon whether this is a body appointed to exeute a public trust, by which I understand a body appointed to control others on behalf of the governing body, and not a body merely to settle disputes between the two individuals, however important or however high may be the nature of the individuals. Then my contention is that whether or not this was a public or a private matter, whether therefore they were or were not required to be unanimous in all cases, it is required that they should be all present together and that there is no authority in English Law or in Roman Law or any law, as far as I can find, except the Canon Law which seems to have made an exception, there is no authority, for saying that where a power is given to a certain number to be exercised by them whether they need or need not be unanimous that it can be exercised by any less number, and I shall cite to your Lordships authorities of all sorts and kinds of persons to whom powers had been given, in which it has been held that the presence of the whole was necessary to constitute a quorum. The question of what is a quorum is, I submit, a wholly distinct question from the question whether or not that quorum must be unanimous and the fact that when you have the quorum those there need not be unanimous, does not touch the question whether or not there should be a quorum. Then I shall have to meet the possible argument that supposing the three are a quorum and less than three cannot act, if one of them wilfully stays away that is equivalent to his presence. I shall shew to your Lordships that that has not been held in any case, except in the case of the Canon Law, ever to be sufficient, and I hope to shew your Lordships that reason as well as law would render such staying away not equivalent to presence in the present case.

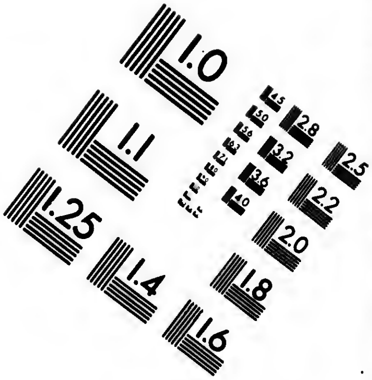
I will not labour longer the Act of Parliament, but will only just in passing call your Lordships' attention to this, that the award does itself in five or six of its terms deal with the property and rights of Canada, the Dominion, as well as the property and rights of the different Provinces; for example, the 7th, 8th, 9th and 10th sections of the award, I think, deal with the property which by the very terms of the Act and by the terms of the award are vested in Canada. My contention that the Act intended the rights of all three parties to be dealt with is confirmed by the award, which, although the particular questions left to the arbitrators seem to have been questions for dividing assets and property between Quebec and Ontario, necessarily touch upon the rights of Canada. For example, the Act of Parliament, as your Lordship remembers, vests expressly all securities for money in the Dominion. Accordingly, the award itself treats the $58,000 which are invested in the Quebec Turnpike Trust as being the property of the Dominion of Canada; the 8th says the residue of the said Common School Fund shall continue to be held by the Dominion of Canada.

Lord Selborne:—The 7th and the 10th were subject to much remark by your learned leader, and the, facts bearing upon them do not seem to be stated to us.

Mr. Bompas: The 8th and 9th are simply an affirmance of the law.

Lord Selborne:—I see no division whatever. It simply refers to the particular statute and says it is to remain according to that statute. Is it not so?





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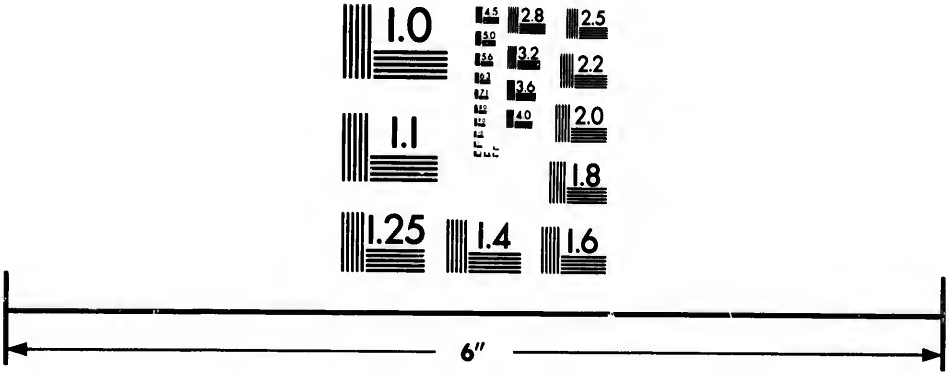

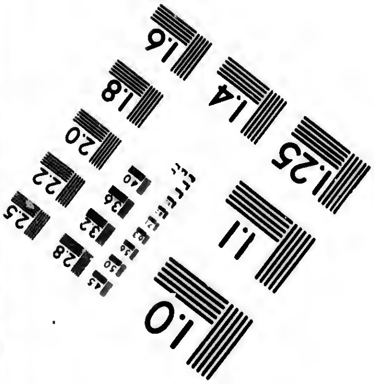

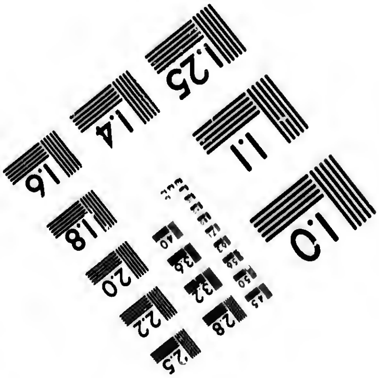

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Mr. Bompas:—In one sense it may be so. The Act says that this residue of the Common School Fund shall be the property of Canada.

Sir James W. Colvile:—That is contemplated by the Act.

Lord Selborne:—It is not that the arbitrators are doing anything. It is simply their award. They do nothing at all.

Sir Robert P. Collier:—The income is to be divided between Ontario and Quebec.

Mr. Bompas:—They do surely, my Lord.

Lord Selborne:—"Shall be appointed between and paid over to the respective Provinces of Ontario and Quebec, as directed by the 5th section, chapter 26, of *The Consolidated Statutes of Canada*."

Mr. Bompas:—It deals with this property which is vested in Canada and expressly provides that it shall be divided in a manner which the arbitrators think is in accordance with the provisions of a certain Act of Parliament, and it takes away with reference to them as well as with reference to the 10th section.

Lord Selborne:—Without knowing the facts we cannot really possibly deal with it.

Mr. Bompas:—I am not contending that that is wrong.

Lord Selborne:—We cannot assume what was done or what was not done without knowing the facts.

Sir James W. Colvile:—Are you not a little inconsistent with Mr. Benjamin's argument? I understood him to contend that it was inconsistent with the power given in the Act of Parliament.

Mr. Bompas:—I do not think I am wilfully or in fact inconsistent with Mr. Benjamin. What Mr. Benjamin said was that there was a certain Act of Parliament which overruled all the authority of the arbitrators, and which provided that a part of this Fund should be left in the absolute discretion of the Governor General.

Whether the arbitrators could deal with the property of Canada, as well as with the property of Ontario and Quebec, clearly they could not deal with the provisions of an Act of Parliament which gave certain authorities to the Governor-General. It was in that that he submitted they had exceeded their authority. I am not on that point now. I am only submitting that they did in fact that which that my learned friend Mr. Benjamin I am sure submitted to your Lordships, also when he said it was a tripartite arbitration, that the award did in point of fact touch the rights of Canada as well as the rights of Quebec and Ontario, and your Lordships remember that the 11th paragraph expressly gives to the Dominion of Canada the right to buy certain property at $200,000. Questions might arise. It is not perhaps for me to say they have arisen, but questions clearly might arise as to whether that $200,000, which mainly consists of the Library of the Parliament at Ottawa, was the Dominion property without any buying. It seems very doubtful under the terms of *The British North America Act*, which expressly provides that all the public buildings at Ottawa should vest in the Dominion, whether the public Library would not be the property of the Dominion.

The Lord Chancellor: Do you say that something wrong has been done to the Dominion of Canada by the award?

Mr. Bompas: Yes. The award finds that the Library belongs to Ontario and Quebec jointly, and that the Dominion of Canada may have it on payme of $200,000. I do not like to say what they have done or not done, but I say that it might very well be a proper contention under the 3rd Schedule of the Act, which provides that the custom houses, post offices and all other public buil ings, except such as the Government of Canada appropriate for the use of the Provincial Legislature and Governments, are to be the property of Canada th

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the Government House at Ottawa, which your Lordship remembers, was where the Dominion Government was for the future to meet. That this being a Library in this Government House, it might be contended that with the Government Houses that Library passed, and that that was a question in which the Dominion of Canada was interested, whether or not that Library was to be allotted to Ontario, and it being provided that unless the Dominion Government paid $200,000 they should not be entitled to the Library at Ottawa.

Sir Barnes Peacock :—Do you mean the books or the building?

Mr. Bompas :—The books as I understand. I adduce that as another instance, and I think your Lordships will find those are not the only ones, but it is sufficient to call attention to the point.

Lord Selborne :—Which is the clause of the Act of Parliament under which the Library is passed to the Dominion?

Mr. Benjamin :—It is the 108th which says that " the Public Works and property of each Province enumerated in the third Schedule of this Act shall be the property of Canada."

Lord Selborne :—Is this in the third Schedule? That particular clause is limited to things enumerated in the third Schedule?

Mr. Bompas :—Yes, my Lord.

Sir Barnes Peacock :—The award has treated it as the joint property of the two Provinces of Upper and Lower Canada. As the personal property of those two it ought to have been divided between them, instead of which the arbitrators say it is not expedient to divide it, but it shall go over to the Dominion.

Sir Robert P. Collier :—But the third Schedule specifies what shall be the property of Canada.

Lord Selborne :—The 108th section does not refer to the Dominion at all, and secondly, it only refers to the property in the third Schedule.

Mr. Bompas :—Why does your Lordship say it does not refer to the Dominion at all?

Lord Selborne :—Because it says Canada, and Canada does not mean the Dominion, does it?

Mr. Bompas :—Yes, my Lord; in the interpretation clause the Dominion is always to mean Canada.

Lord Selborne :—Yes, you are quite right. I had forgotten that. It is a confusion which does arise in one's mind.

Sir James W. Colvile :—This it not appropriated by *The British North America Act.*

Mr. Bompas :—Quite so. They say it is clear that a Schedule of this sort which passes a building, which has been used for the purpose of the Legislature, does not pass it as furnished, but that it passes the mere building.

Lord Selborne :—Would the word "building" carry with it the books?

Mr. Bompas :—I should have thought so, in the collection it would pass the fixtures.

Sir Montague E. Smith :—They would be of very little use if they were fixtures.

Mr. Bompas :—Quite so, but they are not fixtures in that sense. All I am submitting to your Lordship is that it was a point on which a question might have been well raised and argued, and that it was one of those questions in which the arbitrators could not deal with the property of Quebec and Ontario without deciding whether or not certain sections of the Act of Parliament relating to the Dominion Legislature did or did not include it. Your Lordship will see that this does not deal only with that Library. It deals with all other properties of Quebec and Ontario.

Lord Selborne : "As to all personal property being the joint property of

the said Provinces of Ontario and Quebec, not hereinbefore mentioned or dealt with and not appropriated by the said *British North America Act*, 1867." The Library seems plainly to have been a thing which before the Act did not belong to the Dominion, because New Brunswick and so on had nothing to do with it, and if the Act does not give it to the Dominion, it would be beyond their power to give it.

MR. BOMPAS :—Unless it came within the general words it would not pass to the Dominion, and the Award would be correct.

LORD SELBORNE :—And your argument would fail.

MR. BOMPAS :—It would at any rate go to this extent. It may be said they have given a power to the Dominion. They have been dealing with these things in which the Dominion are interested, and settling the price at which they should be sold, and I should think the Dominion would be entitled to be heard on that point. Your Lordship sees they do not adjust in any sense this remainder. It is a remainder, the whole of which is to be offered for $200,000. They make no adjustment of it, but merely deal with it in that general way as any thing not appropriated.

SIR ROBERT P. COLLIER :—It is to go to the Provinces in the same proportion as is mentioned in the first paragraph.

SIR BARNES PEACOCK :—It might be said that the arbitrators had exceeded their authority with reference to the award of the Library. The Library being the joint property of Ontario and Quebec they were to divide it between those two by their award: but instead of that, the Act of Parliament having said it was expedient it should be divided, or directing them to divide it, they say it is not expedient to divide it, but they give it to the Dominion if they like to take it at a certain price, and if the Dominion do not choose to take it, then the other may take it at a certain price, whereas they were directed to divide it. That is the fourteenth paragraph of the award.

SIR ROBERT P. COLLIER :—They divide the purchase money.

MR. BOMPAS :—I do not propose to call attention further to that. My submission on the Act is that the real effect is that which was put so clearly by the Lord Chancellor, that the Act provides that A B C shall hold an arbitration and shall decide certain divisions and adjustments in this matter.

Then, my Lords, my first submission to your Lordships is that wherever authority is given to A B and C to do anything that there that authority must be pursued strictly by A B and C, and that the *quorum*, unless a *quorum* is mentioned in the Act of Parliament, is the three, and less than the three cannot act. For example, supposing there is an Act of Parliament which says that three gentlemen shall be appointed railway commissioners and shall decide certain disputes between the various railways. In the absence of any words to the contrary in the Act of Parliament, the three must sit, and two of them cannot decide any disputes between the railway companies. But supposing it is said, if I may humbly adduce an instance nearer home, supposing it is said in this Court certain ecclesiastical cases can be heard only by the Court with the assistance of three bishops, then this Court with the assistance of two bishops cannot, whatever be the cause from which the third bishop is not present here, decide any case. The Act of Parliament having said that a case is to be decided by three persons, it must be shown that there is an express provision, or a distinctly implied provision, in the Act of Parliament giving power to a less number to act, or an act done by two only is absolutely *ultra vires* and void.

THE LORD CHANCELLOR :—Do you say—I should like to hear your argument on the two points separately—that in the case you put, the three must be unanimous?

MR. BOMPAS :—No. I say in some cases they must and in some they need

The Lord Chancellor:—Supposing the case you put of the three railway commissioners.

Mr. Bompas:—I should say not unanimous certainly, because they are appointed by public authority to exercise a public duty over, if I may so say, inferiors, over the public, and I find in all the cases the distinction is drawn.

The Lord Chancellor:—Do you say, taking the case before us, that supposing all were present they must have been unanimous?

Mr. Bompas:—In this case I submit to your Lordship that they must.

The Lord Chancellor:—Then explain the distinction between this case and the case of the railway commissioners.

Mr. Bompas:—The distinction I draw is that the commissioners are a public body to decide questions between all the public who bring questions before them.

The Lord Chancellor:—Do you say this is not a public body?

Mr. Bompas:—I submit not, because they are appointed to decide one particular dispute between two persons.

The Lord Chancellor:—Between the two Provinces. If they are not the public, what *residuum* of public is there?

Mr. Bompas:—What I submit to your Lordships is that the question is not whether the particular Provinces or parties between whom the dispute is to be settled, are persons of so great importance that the public is interested or that they are the public even.

The Lord Chancellor:—But they are the public.

Mr. Bompas:—If it was a dispute between two parishes, or a dispute between Scotland and England, or a dispute between any division, although those divisions may be public, that I submit is not within the phrase, "authority appointed for a public purpose" in that sense. It is really more like the case of triers who are appointed to decide whether leather or loaves are according to order or according to the law or not, than a tribunal over all sorts and kinds of individuals.

The Lord Chancellor:—Do you mean to say the commissioners appointed to settle questions between England and Scotland are not public commissioners for a public purpose?

Mr. Bompas:—Not I should submit within the rule which decides whether they are to be unanimous or not.

The Lord Chancellor:—What are they—private?

Mr Bompas:—For shortness, the words public and private are used, but I think it must be seen as far as possible what is the reason of that distinction. I do not think the reason of the distinction can be because of the importance of the questions to be decided.

Lord Selborne:—Is not one reason for the distinction, that in the public interest it is necessary the thing should be decided and that your argument would bring it to a dead-lock?

Mr. Bompas:—I think with all respect that is one of the main reasons and because it seems to be clear here that there is nothing which need be decided; that the Act of Parliament has provided for the meaning of the 113th section.

The Lord Chancellor:—Private individuals may make whatever stipulations they like, but if the public, through the legislature which represents the public, make a provision for the well being and benefit of the whole State, that must have a reasonable interpretation by the State or by those who represent the State and it is not as if they were dealing with the private affairs of two individuals, but as if they were dealing with affairs with respect to the State.

Mr. Bompas:—The answer I should give to that is that this is a question of what is the general rule of law; of course private individuals may make stipulations in any way they like.

The Lord Chancellor:—But we have not heard what the rule of law is.

Mr. Bompas:—In France, the general rule of law is that in private, as well as in public, the majority may bind, and any party may stipulate that they shall be unanimous; but the common law of England, originally, subject to the exception of public matters, is that where persons are appointed they must be unanimous, and the exception is made of public interest in public matters. Of course if your Lordships put the interpretation that a public matter means every case where the authorities are appointed by the public, that would be a very clear distinction, but I certainly have not found it laid down in the cases in that way. I think there are cases in which the appointment has been by public authority. Of course your Lordships see that, for example, all arbitrations ordered by judges' order are not ordered by the party. They are ordered compulsively, against the will of the party, and yet there is decision after decision that in that case they must be unanimous. Even in the case of arbitrations under the Lands Clauses Act, the Act of Parliament has put in an express provision as to whether they shall or shall not be unanimous, and I find no trace anywhere of any suggestion in any case that where the Act of Parliament did not expressly say that the majority should bind or that an umpire should be appointed any doubt as to the necessity of the unanimity of the whole. But undoubtedly the question of unanimity, in all these questions, depends on whether or not the matter is within the sense of the authorities a public or a private matter, and the larger question which I am proposing first to call your Lordships' attention to, and upon which I am afraid I must cite to your Lordships a few authorities. The larger question in the first instance is what is the quorum? because, as I shall submit to your Lordships, assuming that those three arbitrators were not required unanimous, and I should have thought, with all respect, that that depended partly upon whether they were a public body and partly also upon whether they represented three different interests—because I should have thought that for the benefit of the public, that where Parliament appointed three persons to represent three different interests, presumably that would mean that each of those three interests should have a veto on any arrangement made, and that in public matters between kingdoms, it was necessary order that an award should not create ill feeling between the two, that each should have a veto on the question: but whether or not they must be unani I submit all the authorities go to this, that, with the exception which I shall submit is not an exception strictly speaking, leaving out of sight for a moment the case of a corporation, and leaving out of sight for a moment the cases in which by the express terms of the Act of Parliament expressed or implied a different rule is laid down, with the exception possibly of a *dictum* in one case, I have found no exception to the rule laid down, that in all cases where a power is given to a certain number of persons, all those persons must be present to perform the duty, and that the absence of any one of them prevents the power being exercised.

Now my Lord, to go back in the first instance to the old authority of *Viner's Abridgment* which I may read to your Lordships.

The Lord Chancellor:—I do not think we require authorities to prove that. If a power is given by Act of Parliament it must be executed independent of the meaning of the word power. In the case of a power being given to a father and son, and a third person if you like, to revoke a settlement of property, two out of the three could not do it.

Mr. Bompas:—I am not using the word power in the technical sense of a power under a will, I am taking for example this case: A commission to twenty Justices of the Peace and no special mention in the commission of what number shall be a quorum. The whole twenty Justices must meet before a single act can be done, although the majority when they bind, that is surely a public matter.

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There is no question of a power under a settlement or anything of that kind. There is a distinct court created not of three but of twenty.

The Lord Chancellor :—Suppose it was the case of twenty Justices of the Peace meeting to do so and so, do you mean to say if they were duly convened and one chose to stay away that that paralyses the action of the remainder?

Mr. Bompas :—So I understand.

The Lord Chancellor :—What is the authority for that?

Mr. Bompas :—The authority for that is this, at least as I understand it, the case of *The Queen v. The Burgesses, Bailiffs and community of the Town of Gippo*, in second Lord Raymond, page 1233.

The Lord Chancellor :—That is the name of an extinct town, I should think.

Lord Selborne :—It is Ipswick, no doubt.

Mr. Bompas :—I suppose it is, Gippo, in the County of Suffolk. Yes, my Lord, it is Ipswick. The passage I quote is at page 1237 : "To the cause of forfeiture assigned in not holding a Session of the Peace two exceptions were taken." The case itself was a question of forfeiture by a Recorder because he was not present at the Sessions where he ought to have been. It was a mandamus to restore Sergeant Whitaker to the place and office of Recorder of the town of Ipswick, and they made a return.

Sir Robert P. Collier :—Was it because he was not present?

Mr. Bompas :—A great many objections were taken—"to the cause of forfeiture assigned for not holding a Session of the Peace, two exceptions were taken; first, that a Session of the Peace might be held without him, he not appearing to be of the quorum, and two Justices of the Peace may hold a Session of the Peace; and secondly, admitting it could not, yet first they ought to have sent for him, and secondly they ought to have shown some special damage to the Corporation by the not holding the Sessions. To this it was answered and resolved by the court: first, that admitting the presence of the Recorder were not necessary by the Charter to the holding a Session of the Peace, (Holt, the Chief Justice, observed that it did not appear by this return that there was any quorum of the Justices of the Peace, and where a commission is granted to twenty persons to be Justices of Peace, and there is no quorum, they must all attend at the holding of a Session, and if so, then the sergeant's absence must be a forfeiture), yet he must attend, for it was the intent of the Charter in making such an officer that he should assist the Corporation in matters of law; and the Justices of Peace, though they had power, yet they might be afraid to proceed to the holding of a Session without their Recorder."

Sir Robert P. Collier :—Could not a prisoner be tried unless they were all there?

Mr. Bompas :—So the Chief Justice held, certainly.

Lord Selborne :—You lay great stress on the words which were not necessary for the decision.

Mr. Bompas :—It is so stated by the Chief Justice and so cited. Then I will take another case not dealing perhaps with so public a body.

Lord Selborne :—I suppose it would be very difficult to reconcile that case as you interpret it with other well known authorities. Where are the words you refer to?

Mr. Bompas :—At page 1237 of my edition.

Sir Barnes Peacock :—Was it the judgment of the Lord Chief Justice that you were reading?

Mr. Bompas :—It is an interlocutory reason of the Chief Justice for the decision, one answer that he gives to the contention.

Sir Robert P. Collier :—This was an observation of the Chief Justice put in parenthesis. "They must all attend at the holding of the session," he does not say they must attend during the whole continuance of the session,

LORD SELBORNE: He means those that attend must attend at that time, all those that ought to be there.

SIR MONTAGUE E. SMITH:—There seems to be a most technical answer to all this, that you did attend at first, and all the other meetings were by adjournment.

MR. BOMPAS:—No, with respect, all the other meetings were not by adjournment, I should have submitted that that made no difference.

SIR MONTAGUE E. SMITH:—Do not let me take you off the point you are now upon.

MR. BOMPAS:—It appears by the case that there was no adjournment at the time when they met for the consideration of the award and for giving their decision which was the most important of all. That was not by adjournment lent by apparently a separate summons.

Then, my Lords, another case is the case of *Brown v. Andrew*, in the 13th Jurist, page 938. There, "the defendant, a member of the Provincial Committee in a Railway Company, took part in a resolution appointing eight specified persons to be a managing committee, and directing them to take the most energetic measures for carrying on the scheme. There was no provision in the resolution as proved that any number less than the whole might act; there was no evidence of any usage that any number less than the whole usually acted in such cases, or of any intention on the part of the defendant, that any number less than the whole should act in the present case:—Held that the authority must be taken, on the evidence given, to have been a simple one to the eight specified persons to act; and that, therefore, the defendant was not bound by a contract, within the scope of the authority, made by only six of them, with the plaintiff." I apprehend the whole eight might have been summoned.

LORD SELBORNE:—That in the first place is a private matter, and in the second place it depended on the special evidence by which the court thought the question was narrowed.

MR. BOMPAS:—It came to this, that there being no evidence to the contrary—

LORD SELBORNE: And no evidence of any usage to the contrary.

MR. BOMPAS:—Not in the sense that a majority could not bind, in the sense of binding the minority—Lord Denman, Chief Justice, said: "In the absence of any evidence of what was the intended constitution of this committee, or of what the defendant knew as to any general practice in such cases, we cannot take any notice either of what was intended or of custom. It is very likely that the defendant did in point of fact intend that the majority of the eight whom he named to be of the committee who might be present at any meeting should exercise the authority which he delegated, but in the absence of all evidence as to his intention, we cannot say what it was. All that we see is an authority to eight persons to act and an act done by six. That is not sufficient to bind the defendant.

LORD SELBORNE:—That clearly is, that upon the evidence it being a private matter the agency must be of the whole eight, not merely that they must all be present, but that they must all concur.

MR. BOMPAS:—I know of no distinction given between private and public as regards the number who should be present; of course, it is more difficult to find cases of persons appointed under Act of Parliament. As I said before, I can find no authority for the distinction.

LORD SELBORNE:—Do you know the case of *The Queen v. Whitaker?*

MR. BOMPAS:—Yes, my Lord: I was going to call attention to those four cases in a minute. I think you will find one of them, namely, *Blacket v. Pelizard*, in the 9th *Barnewall and Cresswell*, is to some extent an authority against me. Your Lordships will find in the two other cases of *Withnell v. Gartham* and *The King v. Whitaker* the judges expressly say, we decide it because we understand the Act of Parliament to have said that a less number shall be a quorum, and they decline

to decide it on any general principle that they were a public body, and I should submit, so far as it goes, it is not an authority against me, but an authority in my favour.

Lord Selborne:—In that case of *The King v. Whitaker* the judges were very cautious not to suppose that all must be present.

Mr. Bompas:—They were cautious; but your Lordship remembers the other case of *Grindley v. Barker*, where they were not cautious when they decided in a case as similar to this as could well be imagined that they must all be present, the one being only a *dictum*, while the other is an express authority in my favour. Of course, if your Lordships are going to make a new distinction, which, as I said before, I have not found that a body appointed by Act of Parliament is different from a body appointed by the court and a body appointed by individuals. There is a case which *Viner* shortly gives: "A commission was directed to eight persons by name and seven of them only made the return. It was adjudged that the authority given to these eight persons was joint and not several and ought strictly to be pursued."

Sir Montague E. Smith:—A commission for what?

Mr. Bompas:—The case is one cited from *Bulstrode*. All it says here is, "A commission was directed to eight persons by name and seven of them only made a return." It was a commission issued from the court, evidently—to take evidence or something of that sort, I think.

Then, my Lords, there is a case which I submit to your Lordships is in my favour, and I looked it out because it seemed to me to bear on what one of your Lordships said with reference to this being in the nature of a commission from Chancery to partition. The case, no doubt, is well known to your Lordships of *Watson v. The Duke of Northumberland*, in the 11th *Vesey*, page 153. Your Lordships no doubt knew, which I did not, that a Commission of Partition expressly gives the power to four, three or two, and Lord Eldon says therefore a return by four, three or two is valid; but he says that the Common Law rule that the exact terms of the power must be definitely and actually carried out is one which ought to be kept up. The express decision there was when four commissioners were present and two made one return and two another, you could not treat the return as good although it was a return by two. The Lord Chancellor says, at page 158: "I thought it had been perfectly settled that if a Patent Writ of Commission of this sort had gone to four persons in these terms and the four commissioners had divided themselves in this way in contemplation of the law and of this court, there is no return whatsoever; not being aware of the case lately decided at the rolls. First, if this was the Common Law Writ there would be no denying that where four persons are authorized to do a thing with power for three or two of them to act, the meaning is that if all four act three may make the return and if three act two may make the return. The commission under which the judges of the Court of King's Bench act illustrates that. If a difference of opinion takes place among them, if three are in court and two concur in opinion against the third that is sufficient; but if all four are in court and two are of one opinion and the other two are of a different opinion, their commission does not authorize two out of four to act; therefore, in law it is the judgment of none of them". I only cite that as showing that his Lordship held that there must be a strict compliance with the Common Law rule of powers. My Lords, the Common Law rule of powers, as I understand your Lordships to admit, is that where power is given to three persons, then three persons may do it. Then the question comes to be whether that means that the three being present, the act of the majority is the act of the whole, or whether it can be said that three persons having to do a thing, when one of them does not do it, but stops away, the other two can do it.

Then my Lords, before going to the case of *Grindley v. Barker,* I should like to cite to your Lordships one case that has not yet been cited, *Guthrie v. Armstrong,* 5 *Barnewall and Alderson,* page 629. This is as to a private matter so that perhaps it will not much affect your Lordships. It is a case "where a power of attorney was given to fifteen persons jointly or severally therein named to execute such policies as they or any of them should jointly or severally think proper," and that the old cases cited in *Viner's Abridgment* were expressly applied; but it was said that the express terms of that power enabled the four persons named to execute it.

Lord Selborne:—"Jointly or severally," how could any question arise?

Sir Montague E. Smith:—All things they say is, it is either all or one.

Mr. Bompas:—The case states: "In order to prove this a power of attorney signed by the defendant was produced by which he constituted fifteen persons there named his true and lawful attorneys jointly and separately for him and in his name to sign and underwrite all such policies of insurance as they, his said attorneys or any of them, should jointly and separately think proper."

Sir Montague E. Smith:—It would be either one or all.

Mr. Bompas:—It was admitted that that would be perfectly true except for the words in the latter part "or any of them". It was said that if they had been constituted his true and lawful attorneys, jointly and separately, they could not have done it, but inasmuch as it went on to say "as his attorneys or any of them should jointly or separately think proper" that those words explained the former ones and overruled the effect of them in Common Law.

Lord Selborne:—It seems a very odd decision because those words "or any of them" are followed by "jointly and separately." How could those words in the second place have a different effect to what they had in the first place? What does it matter if when they are used in the second place they are followed by the words jointly and separately?

Mr. Bompas:—Because jointly and separately had been expressly held to mean all or one. The case in *Viner's Abridgment* is cited by Mr. Williams. "If a letter of attorney to make livery of *seizin conjunction et division* be made to three, and two of them make livery, the third being absent, it is not good for it is not *conjunction* nor *division.*" May I call your Lordship's attention to what was laid down in this case in the 5th *Barnewall and Alderson,* by Chief Justice Abbott. "The law undoubtedly is as stated by Mr. Williams, but we are not disposed to extend the rule further." Then he says "The argument is that the latter words only apply to the persons who are to exercise the discretion that would have been quite correct if this had been different from the persons entrusted with the power. But they are the same; those latter words, therefore, control the meaning of the former and the verdict is right." That is a case illustrating that the law has always held strictly to the enforcing the exact terms of the power and that it was held that two could not in the absence of the third, even in that case, act.

Then, my Lords, your Lordships will remember that in *Grindley v. Barker,* in 1 *Bosanquet and Puller,* page 229, it was expressly held that the whole number having met for the purpose of trying, the trial was good because the majority then included the minority and made it a judgment of the whole. Your Lordships will remember that the Chief Justice there pointed out that the six triers being made up of representatives of three different parties, there would be good ground for an argument that they must be unanimous, except for the fact that the matter could be accounted for by their all being obliged to be present, and he held that where there were representatives of three parties, though it was obvious from the terms of the Act of Parliament that something must be intended on behalf of all three, that as it could not be interpreted as necessarily requiring the presence of the whole six, then the true interpretation of the Act of Parliament would be that the whole six must be unanimous.

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Lord Selborne:—But it was decided by a majority who were present. They were as a fact all present.

Mr. Bompas:—They were in fact all present. But it went further than that, Chief Justice Eyre says: "With regard to the general question it has been argued most weightily that, as the leather might be seized in all the stages of the manufacture, it was right that the authority which was to determine should be delegated to persons of all the different trades, in order that the body might be aided and assisted by the united experience of all the branches, whenever the enquiry should come before them. But it struck me that when the body was so constituted and had assembled, and could have the assistance of the united experience of all, the necessity of all concurring in the final judgment was not so apparent, and might be attended with inconvenience. It is indeed the truth, that in a body composed of the classes of trade, those who are of the particular trade to which the owner of the goods happens to be, may feel an inclination to favour the member of their own trade, and may hesitate to condemn, when they themselves might be liable to condemnation the next time. And this might be attended with a great deal of inconvenience, since the searchers are obliged to execute a public duty, and the validity of their acts must depend upon the judgment of the triers. It seems better that when all the knowledge which each class can afford has been communicated, the whole should be governed by the majority."

Lord Selborne:—They must all act apparently.

Mr. Bompas:—He says: "If this be so, then the reasons drawn from the Act and which have been supposed to demand that the whole body should unite in the judgment have no sufficient avail, and consequently the general rule of law will take place, viz: that the judgment of four out of six being the whole body to whom the authority is delegated regularly assembled and acting is the judgment of all.

Lord Selborne:—It does not say that at every meeting they must all be present.

Mr. Bompas:—As I understand it, that is the very gist of his judgment.

Lord Selborne:—The words have been read, "all six must undoubtedly try," but I do not know that that necessarily means that having acted, they must attend every meeting.

Mr. Bompas:—The Chief Justice says: "The true question in this case lies in a very narrow compass. It is this: What is the operation in law of a judgment of four out of six triers, six being the number constituted to be the triers, and the six being assembled to enquire and try whether it is to be deemed the finding and judgment of the body or merely the finding and judgment of the four individuals who concurred. If it is the mere finding of the four who concurred, then this leather is not found insufficient; but if the operation of law on the finding of the four who are the majority of the body duly assembled be that their judgment is the judgment of the whole, and therefore the judgment of the triers, then the leather must be taken to have been found insufficient, and the defendants are justified. On the first argument, I thought this question would turn on two general heads of inquiry. First, what the general rule of law was in the case of bodies of men entrusted with powers of this nature, whether they must all concur or whether the decision of the majority would bind the whole? Secondly, supposing the latter to be the general rule, whether that general rule is to be controlled by the intent of the Legislature as collected from the scope and provisions of this Act?" Then he says that inasmuch as the whole were present he thinks that that will satisfy the terms of the Act which requires them to be appointed from three classes of persons, and, therefore, it was not necessary to hold that when all were present, they all should concur.

Sir Barnes Peacock:—Mr. Benjamin read from Mr. Justice Heath's judg-

ment: "All must concur in trying, the majority shall bind," and from Mr. Justice Rooke: "All must try, but they need not all decide the same way."

Mr. Bompas:—That is the last expression of Mr. Justice Heath "All must concur in trying, and then, though they be of different opinions, some of one opinion, and some of another, yet all having tried, the majority shall bind." That is what Mr. Justice Keath says. "We shall not advance public justice," says Mr. Justice Rooke, "by saying that though a majority of the triers who have had the advantage of all the information to be derived from the whole six who compose the tribunal are of opinion that the leather is unserviceable, still any one man shall have it in his power to prevent a finding by holding out against the rest. All six must undoubtedly try, but it does not therefore follow that they must all decide the same way. . Each man is after due examination and enquiry to decide according to the best of his judgment, and the question is to be determined by the opinion of the majority.

Lord Selborne:—Are there any words which unquestionably show that? because if all six must undoubtedly try, they must all be unanimous.

Sir Barnes Peacock:—There are some words, I think, to the effect that they must have the opinions of each.

Lord Selborne:—You attended a great number of meetings.

Sir Robert P. Collier:—You read something to the effect that one could not defeat the decision of the others by holding out. Where is that?

Mr. Bompas:—That is in Mr. Justice Rooke's judgment.

Lord Selborne:—Supposing all met and exchanged these opinions, the principle that all must try and contribute their knowledge is satisfied; and if one cannot defeat the others by holding out, is he to defeat the others by going away?

Mr. Bompas:—I was going to treat that as a separate point. The only cases I find conclusive with respect to that point are these two. In the first case it was held distinctly in the case of corporations that where the corporation is made up of three classes, the mayor, aldermen and burgesses; just as this authority was made up of an arbitrator so called from Quebec, Ontario and the Dominion—that the representatives of each—the majority of each must be present, the mayor must be present, and the majority of the aldermen and the majority of the burgesses: and it has been expressly held that if when a meeting has been held and the work begun and a motion has been made and the voters have voted, and before the result is proclaimed the mayor gets up and leaves the room, it is absolutely void.

The Lord Chancellor:—It is like the case of a dean and chapter, because he is the head of the corporation

Mr. Bompas:—Not because he is the head of the corporation, but because he is one of the constituent parts, and if a majority of the aldermen left it would have the same effect,

Lord Selborne:—Have you any authority for that proposition? It seems to me that that by no means follows.

Sir Montague E. Smith:—The mayor is the sole representative of his class. If he goes away his class is not represented.

Mr. Bompas:—That, of course, is my argument in this case.

Sir Montague E. Smith:—These are not different classes of arbitrators.

Mr. Bompas:—I should have thought they were, because the Act of Parliament so expressly provides, as your Lordship sees, that the Dominion Legislature shall not appoint an umpire from Ontario or Quebec, so that there shall not be two from Quebec or two from Ontario, showing that they treated the arbitrators of Ontario and Quebec as having special and peculiar characteristics.

The Lord Chancellor:—If your argument is right, you must say at once they must be unanimous, because the one in the minority is master of the situation if he simply takes his hat and walks out of the room.

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MR. BOMPAS:—In one sense that is so, but it would be a very much stronger proceeding, I apprehend. Supposing you make them unanimous, then supposing one of them differs, unless he chooses to give up his opinion and express different opinion, which he thinks is an untrue opinion, no decision can be arrived at. That is the difficulty I apprehend in the unanimity of a jury. You very often now get no verdict of a jury because the jury say we cannot be unanimous; but it does not follow that in Scotland, where you need not have a jury unanimous, but where there must be twelve jurymen, if one were to be taken ill or one got out of court and got away, a less number would bind. It is no doubt a great advantage in the sense of procuring a verdict that the majority may bind. Here, I apprehend, supposing your Lordships were to hold as I should humbly ask your Lordships to hold.

LORD SELBORNE:—A juryman cannot leave the box *proprio motu.*

MR. BOMPAS:—There is a certain amount of difference in that case, but surely it is a different thing a juryman leaving the box and an arbitrator or person having authority distinctly withdrawing himself altogether from the Arbitration or Court and changing his opinion sufficiently to say I will assent and sign an award which I apprehend is not true.

THE LORD CHANCELLOR:—My observation is this, that if your view of the actual bodily presence being necessary under all circumstances is correct, it would be just as easy to say at once the three persons must be unanimous, if anyone withdrawing his bodily presence puts an end to the arbitration.

MR. BOMPAS:—It would not be the same thing, because no doubt it does render it in the power of any one person named to put an end to the trial or arbitration. Yet on the other hand by requiring them to be unanimous you put increased difficulties in the way of getting a certain judgment. There are three persons appointed by the Crown. It can hardly be supposed, I should submit to your Lordships, it was with a reasonable supposition that these persons would wilfully and of malice aforethought break up a reasonable arbitration, I should have thought it most, reasonable that there should be a veto in cash of the Provinces in a case of this sort, in extreme cases. But if there is no such veto, then I should have thought your Lordships would have supposed that a person properly appointed by the Crown would not have mistaken his duty and wilfully broken up an arbitration, because it was the interest of all the Provinces that some award should be made. It seems to me it may very well be of importance that the majority should decide although it was necessary for the whole to be present. Let me take the law of other countries as an illustration. Take the Law of France which is the Law of Lower Canada.

THE LORD CHANCELLOR:—It is agreed that this must be decided by the Law of England.

MR. BOMPAS:—It is, but I humbly ask your Lordship to let me give it as an illustration.

THE LORD CHANCELLOR:—If the law of other countries is one way and the Law of England is the other way, the Law of England must decide.

MR. BOMPAS:—Your Lordship puts it to me that great inconvenience will arise from holding that the bodily presence of a third arbitrator is necessary, because he can defeat the arbitration at any moment by leaving the room when the award was about to be pronounced. It seems to me I meet to some extent that argument by showing you that in a neighbouring country the same state of things has always existed, and that no difficulty in fact has arisen, because what is done in France, and in all countries where the Roman law prevails, I believe, is that supposing the third arbitrator refuses to go on then you get a mandamus or there are some means of compelling him to be present.

THE LORD CHANCELLOR:—Supposing that to be so, I do not think that advances

your argument unless you show there are some means to compel these arbitrators.

Mr. Bompas :—In the first place, I should have thought it was a strong observation that these persons whom your Lordships now are supposing are going to act in this improper manner are persons appointed by the Crown because they are fit persons. One of your Lordships said, at an early period, that we must not treat this as if these persons were mere individuals chosen by a private person, but we must remember that this is a proceeding by the Crown. If there be any exception to the general rule that the arbitrators or persons constituted can be compelled by mandamus to be present at a proceeding of this kind, then the only exception can be because these are appointed by the Crown of England and are executing their duties in Canada out of the Realm of England ; but I apprehend it is quite clear that the courts of Lower Canada, if this particular person, Judge Day, is executing his office in Lower Canada, or the courts of Upper Canada, if he is executing his duties in Upper Canada, could compel him, a private individual—

The Lord Chancellor :—Surely you cannot be serious in putting that, that any court could have made Judge Day take part in these proceedings.

Mr. Bompas :—With all respect to your Lordship, I am serious. I confess I cannot see the difficulty.

Sir Montague E. Smith :—The only ground would be that he is a public officer and acting in a public capacity, and so *pro hâc vice.*

Mr. Bompas :—Yes. I am assuming for this purpose he is a public officer.

Sir Barnes Peacock :—Which court do you say could have done it ?

Mr. Bompas :—The court of Lower Canada if he was executing his duties in Lower Canada, or the court of Upper Canada if he was executing his duties in Upper Canada.

Sir Montague E. Smith :—Your argument is that there must have been a mandamus to hear, not a mandamus to determine and determine in a particular way.

Mr. Bompas :—Not in a particular way, because that is not necessary.

Sir Montague E. Smith :—He must be bodily present, though he might shut his ears and shut his mouth.

Mr. Bompas :—What I say is he is to have power of objecting to the decision of the other persons, and that proceedings are not to go on behind his back. Test it by what is done in other countries.

Sir Montague E. Smith :—He would have the power of being there and he chooses not to go.

Mr. Bompas :—Then it is to be said that an Act of Parliament constituted for the protection of certain public persons, because I am assuming that your Lordships hold that this is a public proceeding, because if it were a private proceeding then, as I understand, it is admitted that would have to be unanimous and that the award would be invalid. I am assuming that this is a public body, and then what I do submit is, that Parliament having provided for the protection of the public of Lower Canada, that one of the tribunals to be appointed should be a person appointed by the Crown under the advice of the Government of Lower Canada;—that Parliament, therefore, having given a certain definite protection to the inhabitants of Lower Canada, misconduct on the part of Judge Day cannot deprive them of that right if Judge Day wilfully stops away. Whether he may be punishable or may be indictable and may be subject to mandamus does not matter; but the protection which Parliament has given to the inhabitants of Lower Canada cannot be taken away from them. Parliament has said that Lower Canada shall not be deprived of this protection and subjected to extra taxation, except on certain conditions laid down by the Act of Parliament for the purpose of the protection of the inhabitants of Lower Canada, and then it is said that because Her

Majesty, under the advice of the Government, appoints a person who chooses to neglect his duty and to avoid being present and taking part in the proceedings, that therefore the inhabitants of Lower Canada are to be deprived of the protection which the Act of Parliament has given them. Your Lordships see that the question must at any rate surely come to what are the circumstances under which Judge Day could have defeated the intention of the Act of Parliament. In the case of corporations it is quite clear that a majority being present, a corporation being of a definite number, a majority of that majority can decide any question. That is to say, if a quarter of the whole number have absolute power and control over the whole affair,--and the cases go so far as to say that in cases of that sort it is not even necessary to summon members of a corporation unless they are in a condition in which you may reasonably expect them to attend---of course if your Lordships hold that these being three persons appointed by the Act of Parliament to perform this power, supposing summonses are sent out, two of them can act without any enquiry as to why the third is not present. Supposing Judge Day happened to have a headache one day, or happened to be busy or happened to have some occupation which prevented him being there, that the two could proceed at once---that is the law with reference to corporations, no doubt—that is the law laid down in *Blacket v. Blizard* which is the only authority which I have found for less than the whole of the number being able to act.

SIR ROBERT P. COLLIER :—Where is that case ?

MR. BOMPAS :—In the 9th Barnewall and Cresswell, page 851 : "The commissioners for building and enlarging churches having, pursuant to the statutes 58 George III cap. 45 and 59 George III, cap. 30 appointed 26 persons to be a select vestry for the care and management of a church and all matters relating thereto, held that in order to constitute a good assembly of the select vestry so appointed there must be present a majority of the number, namely 14, named in the appointment, and therefore that a rate for the repair of the church made at a meeting where there was not such a majority was illegal and the payment of such a rate could not be enforced in the Ecclesiastical Court." Now, my Lords, surely your Lordships would not hold that the fact that that select vestry were treated as being subject to the ordinary rules of an ordinary vestry, and that, therefore, if notices were given of the meeting a majority coming was sufficient, though the majority, it being a definite number, must be present in that case : of course if 15 had come, though the others had stopped away merely from idleness or without any reason whatever, the rate made by the 15 would have been good if your Lordships are going to apply to this case the rule laid down in those cases, and I apprehend exactly the same may be said of the *King v. Whitaker*, and exactly the same of *Witnell v. Garthum* in the 6th Term Reports, page 388. Cases in which it has been held that the majority might act.

SIR MONTAGUE E. SMITH :—What is *Witnell v. Garthum*?

MR. BOMPAS : That was a case in which "a power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens (of whom there were 11) and in case of their neglect in appointing then to devolve to two corporate bodies in succession and to result in the *dernier ressort* to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, is well executed by the vicar and a majority of the churchwardens, especially if such an election be supported by usage." There the judgments rest on the express provisions of the deed which provided that in a last resort it should come back to them again, and the court held that the appointment being by the corporation and the terms of the deed by the intention of the testator and held the intention of the testator must have been that a majority should decide. Of course in that case if a majority had been present, and there was no need that that there should be an express reason why they were absent, the majority could

act as a matter of course. If I were to go into the American authorities, it has been laid down again and again there that the meaning of the law is that the whole must be present where an authority is given to a certain number of persons, and the exceptions are exceptions, as I submit to your Lordships, from a particular wording of the statute or a particular wording of the deed and are not authorities for saying that where an authority is committed to three or four then the whole three or four need not act.

Lord Selborne:—Surely you cannot say that so far as this relates to the grounds on which *Blacket v. Blizard* was decided. Mr. Justice Parke says: "I think, therefore, in all other cases the general rule of construction applied to charters, whereby the King has committed to a definite body the care of executing a public trust, ought to prevail." Here the trust to be executed is one in which the public have an interest. Unless we were to hold that a majority of the number required to constitute the select vestry should be present, it is possible that they might be reduced to a number so small as to be unfit to manage the affairs of the parish. That never could have been the intention of the Legislature.

Mr. Bompas:—Your Lordships see the authority there is that there be so many in a majority. Then there were less than fourteen, and they held it bad, because they said the general rule was that you could never have less than a majority present to do an act. The Act of Parliament appointed twenty-six and the general rule laid down in all cases is that in the case of a corporation, where a corporation consists of a certain number, the majority must be present to constitute a meeting. That is the rule they decided in that case. In point of fact there were only twelve, nine, or eight present.

Lord Selborne:—The language of the judges plainly shews that they had no notion of any such rule that the whole twenty-six must be present.

Mr. Bompas: I should not have thought the language went to that point. The language must be taken with reference to the circumstances. What was there argued was that if this is to be treated in the nature of a corporation still the majority must be present, and the general rule his Lordship refers to is undoubtedly referred to by corporations and which he does no doubt extend to the case of a public trust in that instance where the majority must be present. It is a *dictum* and I cited it as the only case that I find against me.

Lord Selborne:—Surely it is not a *dictum* in the sense of an *obiter dictum*, every learned judge speaks of it as a known rule.

Mr. Bompas:—A known rule that not less than fourteen will do.

Lord Selborne:—That is not his language there. In two places he says: "It is quite clear that to constitute a good select vestry capable of doing any act which such a body was authorized to do, it would be essential that there should be present a majority of the number of twenty-six," and again, "Unless we were to hold that a majority of the number required to constitute a select vestry should be present, it is possible that they may be reduced to a number so small as to be unfit to manage the affairs of the parish.

Mr. Bompas:—He has treated the select vestry as a corporation and the general rule, he says, is that the majority of a corporation of a definite number shall be present, and certainly he is acting, I submit, contrary to all the other cases.

Lord Selborne:—In *The King v. Whitaker* it is exactly the same, for the opinion of Mr. Justice Parke is: "The majority must meet and the majority must certainly concur."

Mr. Bompas:—*The King v. Whitaker* in the sense in which the judgment says the whole must be present. In the first instance the Chief Justice said the whole must be present, and then one of the judges present expressed a doubt and he corrected himself by saying at any rate a majority must be present.

Lord Selborne:—You are mistaken, Mr. Bompas. Lord Tenterden says:

"We think an appointment made by the two was good," and then he goes on to say that the rule cannot be made absolute and then Lord Tenterden, after consulting with the other judges, added: "Perhaps it may not be necessary that all should meet, certainly a majority must meet." In this case all the three had met. Mr. Justice Bayley: "A majority of those who meet must concur," and then Mr. Justice Parke, afterwards Lord Wensleydale, says: "The majority must meet and the majority must certainly concur."

MR. BOMPAS:—The Chief Justice says, "perhaps it may not be necessary for the whole."

LORD SELBORNE:—He speaks more doubtfully than the others. The other judges seem to indicate their opinion that it is sufficient that a majority must meet and concur.

MR. BOMPAS:—In that case it was wholly unnecessary for the decision and it was a statement without argument. No doubt that is so, but your Lordship will remember that in that case it was a case in which, by the Act of Parliament, no fixed number were to be appointed, but a number absolutely undefined and undetermined were to be appointed, and I apprehend that that may have been very likely, judging by the other authorities, a ground on which Lord Wensleydale and Mr. Justice Bayley thought that a majority would be sufficient; but supposing a large number were appointed it would be very inconvenient to require the presence of all. That was not the case of an Act of Parliament appointing a particular number of persons to do a certain act.

My Lords, the American cases are very strong on this point, and American law being founded on English law I would cite for example one case from Binney's Reports, 5th vol., p. 481. That was a case of a Turnpike Road by Chads Ford to the State line. The decision there was that a majority might act it being a public matter. The head note is: "Where several persons are authorized to do private acts they must all join: but when they are authorized to do an act of a public nature which requires deliberation they all should be convened and a majority may decide."

LORD SELBORNE: All shall be convened.

MR. BOMPAS:—The judgment is "The principal error assigned in this case is that six persons were appointed by the court to view the road and adjudge the damages and only five of them joined in the report. The Act of Assembly directs that the person sustaining damage by the laying out of the road may make application to the Court of the County in which such damage is sustained, and thereupon the court shall appoint six disinterested persons to view and adjudge the amount of the damages so done, which, if approved by the court, shall be paid by the Company. It may be material to ascertain in the first place whether all the six persons appointed by the court met and viewed the land. The report is made by five of them and it is not contended on the part of the Turnpike Company that this court must take for granted that no more than five met and viewed, because there is no mention of more in the record. They consider the proceedings brought up under the *Certiorari* process in the same point of view as proceedings under a Writ of Error." Then he says, enquiry has been made, and goes on "I think it is consistent with the spirit of our rule to make the enquiry and we find by the depositions filed that all six of the persons appointed actually met and viewed the road as was confessed in the court below." Then he says: "The only point of serious difficulty is that the Act requires six persons to view and adjudge the damages six viewed but five only adjudged." Then he goes into the distinction of whether it was a public or a private matter and held in that case that it was a public matter and that therefore a majority could decide.

My Lords, then there was a case in which there were three canal commissioners and there they held that, as the whole had met: "We are warranted in saying his

counsel had been bestowed and that the other members had heard and appreciated his advice; because every officer is presumed to have done his duty. Such advice is the object of the rule which requires all to associate, but at the same time allows a majority to decide." In this case there was an actual signing after the judgment was actually settled. The case I am now referring to is *Ex parte Rogers*, in the 7th Cowens Reports, p. 526. The head note is: "Where any number of persons are appointed to act judicially in a public matter they must all confer, but a majority may decide though the minority dissent and refuse to be further considered members of the Board." There one of the parties, I think, remained but stated that he did not consider himself acting. He remained in the room while the actual judgment was given.

Sir Robert P. Collier:—You think that was important his remaining in the room, if he declined to act?

Mr. Bompas:—Well, *de minimis non curat lex*. It is possible after the whole thing had been completed, if the room had been left while the actual signing of the award was going on, it might have been immaterial on the ground that it did not infringe the substance of the matter, that is not this case.

Sir Robert P. Collier:—I only asked the question He declined to act?

Mr. Bompas:—He declined to act, and the court said that, as the whole of the substance of the matter had been previously gone through, they would not give weight to the mere fact of his being absent, and I think they would have held if he had left the room, if the whole matter had been previously gone through, that his absence made no difference: but I understand them to have expressly held that it would have been invalid, and your Lordships remember that is one of the special questions asked in this case, unless there had been an express consultation over the whole of the matter

Lord Selborne:—Here they acted together till the principle on which the award was made was determined.

Mr. Bompas:—Hardly the principle on which the award was to be made.

The Lord Chancellor:—That is the difficulty you have to deal with here. It is as plain as anything can be on the face of the documents that what happened was this:—Mr. Day attended till a decision was come to, not formulated in the shape of any official document, but which clearly expressed the opinion of those who came to it, a decision from which he differed. He argued that he could not consent or remain in a minority of one, and, therefore, he said as there is no longer any chance of convincing my colleagues, I will bring another *modus operandi* to bear upon them, I shall leave them and resign my office, and that, I think, will paralyze their action. The thing was done in the most candid and frank way.

Mr. Bompas:—Certainly, my Lord. Your Lordship sees if Judge Day had been the party and was the person to suffer, I am not going to contend for one moment that the absence of a party, where notice of a meeting had been served on him, prevents an award being valid because the principle of the absence of the party is that it is inequitable to decide in his absence, and, therefore, if you make it equitable by giving him notice, and he is stopping away wilfully, then the arbitration is equally valid. But here is the case of a person appointed under the Act of Parliament and he is stopping away, and the question is whether his wilfulness is to be to the detriment of the parties who, in this case, are not the parties who appointed him but the people of Canada who will have to suffer in their daily taxation—not the Crown who made the appointment—and, therefore, the question is whether or not the stopping away of one of these persons, let it be as improper as you like, is to be visited on them. It is quite true that the principle provisionally had been carried out. Your Lordships will remember that that provisional decision was against the expressed opinion of the arbitrator for Ontario, and, therefore, it is not at all clear that, though in the case of the three, that was the opinion

settled, that that would be carried out, being only a provisional decision. I do not think your Lordships would be inclined to hold it as being clear that that provisional decision was carried out in full. But what the people of Lower Canada, as I apprehend, desire through me to submit to your Lordships is that there are two matters in this award of very great importance. One is, what is the principle on which the assets shall be divided, and the other is, what are the assets that are to be divided and what is their value. My friend, Mr. Benjamin, has already submitted to your Lordships that the commissioners, mistaking the terms of that 4th section, have awarded to us as of great value certain assets of no value at all. That is a matter that most certainly almost have occurred somewhere or other, whether that is the case in that particular instance or not. If you have two judges, one of whom is practically at any rate on behalf of the other side, and had no majority, therefore, excepting by yielding to his suggestions, if no one is present to point out the arguments in favour of the other party, it almost necessarily follows that there will be errors in estimating the amount. Certainly, my Lords, it would seem to be an astonishing proposition if your Lordships should hold that because Judge Day was present just during the first meeting that, therefore, he was substantially present during the whole time and during the final meetings, which were three in number, to draw up the report; which were meetings by special summons and not by adjournment, of which no notice apparently was given to him—it would be astonishing if it should be held that he had yet been substantially present during the whole time. I submit to your Lordships, and your Lordships remember how the questions put it, as a separate question that this was emphatically a case in which the third question would apply—"whether after the subsequent *ex parte* hearing before two arbitrators, in the absence of the third, these two could legally render a decision." Whether the wilful absence of the third can be taken to the detriment of those whom he represented.

Now, my Lords, for better or for worse, I should just like to quote to your Lordships, if your Lordships will allow me, the decision which expressly decides what is the case under the old Roman law. It is laid down in *Voet's Pandectus*, Book 4, Title 8, Section 16, that, according to Roman law, if three arbitrators were elected and one of them was wilfully absent he still thereby defeated the arbitration: but that the Canon law finding that this power was often used as a means of defeating improperly, or if not used as a means of defeating improperly was tried to be used as a means of defeating improperly, held for the sake of justice that where one of the parties appointed wilfully stopped away, that the other two after due notice given to him could proceed in his absence.

THE LORD CHANCELLOR:—I suppose the case that Voet puts is the case of a private arbitrator?

MR. BOMPAS:—I suppose it was a private arbitration in that case; but Pigeau in the French law, which is derived from the Roman law, expressly puts the rule as to arbitrators as being similar to the rule as to judges and says that in the case of arbitrators, as in the case of judges, the rule is that the whole judges appointed shall be present to decide and then the majority can govern.

Now, my Lords, there is one other question upon which I should like to say a few words to you Lordships. I do not know that I can wisely add anything to what I have already said on the other part of the case. Your Lordships understand my point, and the remaining point really comes to the question of the power of revocation in this case. I should submit to your Lordships, in any case, whether of wilful absence, or even if your Lordships hold that where three persons are appointed and notice is given to the three, two of them can act without the third, that still if the whole court ceased to exist, by which I mean if one of the parties dies or is legally and lawfully deprived of his authority and power, that then at any rate the remaining two could not act. In the first place no notice could be given to him and he could not be put in a default.

The Lord Chancellor:—I do not say anything about death, but do you contend under this clause of the Act of Parliament that the persons who are directed to appoint continue to hold any authority over the persons appointed—that they can treat them as their agents and revoke their authority?

Mr. Bompas:—I was going to put it to your Lordships in the alternative. In the first place I should, with all humility, contend that it was a void appointment, and an appointment revocable at the pleasure of the person appointing; but I was going to say next that supposing the party appointing could not appoint during pleasure but was bound to appoint absolutely, that there was no valid appointment and that the right course then to pursue is to make a fresh appointment. I think I can show your Lordships without difficulty that wherever an appointment is made which is insufficient it is not the case in which one exercise of the power prevents a subsequent exercise, and that the duty will be imperative on the Quebec Government to make another appointment.

Lord Selborne:—You say they never made a valid appointment?

Mr. Bompas:—That is my contention.

Lord Selborne:—If they originally made a valid appointment do you say they could revoke it and make another?

Mr. Bompas:—Yes, I put it in the alternative. My first proposition is that when an Act of Parliament says that persons shall be appointed for a particular purpose that that gives power to the persons making the appointment to appoint with a right of revocation, that the greater includes the less, and that in the absence of some express rule to the contrary the party making the appointment, especially if that party be the Crown in which case the custom of the Crown to make in such cases revocable appointments would probably come into play, that in such a case the revocable appointment would be good; but what I submit to your Lordships in the alternative is that if a revocable appointment is not good, then the other appointment, except the revocable appointment has been made, that your Lordships cannot construe a revocable appointment as an irrevocable one, treating the clause making it revocable as surplusage and that in that case the appointment is invalid.

Sir James W. Colvile:—That there has been no valid appointment at all.

Mr. Bompas:—That there has been no valid appointment at all in either case. In case the revocable appointment is valid then I say it has been lawfully revoked and that two arbitrators alone existed at the time the award was made; if a revocable appointment could not be made then I say it was an unlawful appointment.

Lord Selborne:—I do not see any power of revocation in the Act of Parliament.

Mr. Bompas:—Yes, my Lord.

The Lord Chancellor:—Supposing that under the Act in pursuance of the 142nd section they said we appoint A. B. to be one of the three persons mentioned in that section and hereby reserve power of revocation, what possible effect would that have?

Mr. Bompas.—I should have thought that it had just the same effect as supposing for example in private cases there had been a power to lease and instead of a power to lease for years a grant at will was made.

The Lord Chancellor:—Different considerations arise there.

Mr. Bompas:—Or it is like the case, as I submit to your Lordships, the well known case in Coke of the appointment of the keeper of the Marshalsea who could only be appointed for life and the Crown appointed for a term of years and it was held that the appointment was invalid.

The Lord Chancellor:—Of course because there was no appointment for life.

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Mr. Bompas:—Then what I submit to your Lordships is that an appointment during our royal pleasure is not an appointment for life. The case of the judges is a case in which from time immemorial, partly by the common law and partly by usage, the Crown always made appointments during pleasure. Even now when the appointments are otherwise regulated, those appointments are made with a power in the Crown at any time to accept a resignation of the learned judges who are so appointed, and supposing a learned judge at any time in the middle of a case that is being heard tenders his resignation, such judge, from the moment his resignation is accepted, ceases to be able to act or to continue the trial of any case coming before the court. There is nothing in this action, I submit to your Lordships, which says that these persons are appointed irrevocably or for life or until the completion of the work. I apprehend that the general rule is that appointments by the Crown may be made during the Queen's pleasure, unless there is an express provision to the contrary. If your Lordships say that the words "shall be referred to the arbitrament of three arbitrators" bring with it the expression that they are to be appointed to hold office till they have made their award, then I apprehend it would also have with it the power of revocability, which is one of the special qualities of an ordinary arbitration. I submit to your Lordships you cannot incorporate one without incorporating the other. If your Lordships hold that this is a tribunal or a body appointed with the certain authority and appointed under the Act of Parliament, then I submit to your Lordships that the ordinary rule would apply and that the Crown, just as a Court appointing an officer, has the inherent power to revoke the appointment of that officer; so I apprehend the Crown, in whom the power of appointing was conferred, would have the power of appointing revocably during Her Majesty's pleasure and that it is clear that that is what has been done in the present case. Your Lordships see it is not a mere unimportant surplusage appointing only during our Royal pleasure. It may very well have been that the Government of Lower Canada would not have advised the appointment of a man of the character of Judge Day if it was to be held that supposing things went wrong there was not a power of substituting for him another and a different arbitrator. I should like to call attention to the very last case on the subject, in the Court of Appeal in England, which has pointed out (in the case of a private arbitration no doubt) the difference between a submission to a particular person, in which case where the submission comes to an end by making the award or by the revocation of the party, or any other reason, there is an end of the whole matter, and a case where there is an agreement to refer and then a subsequent appointment of the particular arbitrator. It is the case of *Randall v. Thompson* in the Law Reports, Vol. 1, Queen's Bench Division, 748. I will tell your Lordships first shortly what the question was. The question was whether a party could be stayed in an action which he had brought at law, because of an agreement to refer which had come to an end by the arbitrator being revoked, the court below held yes he could and that still the agreement to refer was in existence sufficient to oust the action. The Court of Appeal, consisting of the Master of the Rolls, the Lord Chief Baron, Lord Justice Mellish and Mr. Justice Denman, held that the distinction was this, that where the only agreement to refer was an agreement to refer to a particular person, that then on that submission being revoked there was an end of the whole matter and an action could still go on; but where there was an agreement to refer, then, although the particular appointment was revoked or from some reason came to an end, there would still be the agreement to refer compelling a fresh appointment of a fresh arbitrator and there the action at law would still be liable to be stayed. What I submit is that the 142nd section is merely an enactment that these questions shall be tried in a particular way; but supposing the court fails in any respect to be duly formed or to be able to carry out the particular award, that that does not in the least alter or

affect the powers of reconstituting the court of different individuals, it does not at all or in the least affect the duty of the parties to provide for the further division or adjustment of the assets or at all affect the completeness of the Act of Parliament in its purpose. One of your Lordships seemed to be pressed with the difficulty that supposing this arbitration and award were to fail, that that would be really a failure in the means of dividing and adjusting the debts and credits. My Lords, I apprehend that that is not so. In the first place supposing you have got this time a bad appointment, because the Act meant an appointment not during pleasure but during life, in which case I do submit to your Lordships that it is not a condition superimposed that there is a power of revocation, but it is an original appointment for a limited period only, namely for so long as the Queen's pleasure shall last; if it is a wrong appointment in that respect, then there is our inherent power and a necessity under this 142nd section of making a fresh appointment, and the Government of Quebec is ready at any moment to appoint any one whom it shall see fit. Or if this was an appointment which your Lordships held was valid and subsisting, then what I should ask your Lordships to do is this: Supposing your Lordships held that the proceedings subsequent to the time when Judge Day left were invalid on account of his absence, or that the final award was invalid because he was not only absent but abroad, as I submit, without notice, because there was no adjournment as your Lordships will find of the 38th meeting, I think it was,—they met without adjournment and, therefore, as I submit, there ought to have been a fresh notice which appears not to have been given.

Lord Selborne:—After a certain stage in the proceedings the minute of which we have copies seemed not to mention the notice.

Mr. Bompas:—I think, as far as I can see, the notices are always mentioned when they exist. There were adjournments on the other occasions and therefore, as has been pointed out, notice would be unnecessary except when the meeting adjourned not for hearing the parties but only for the meeting of the arbitrators. At page 45, the arbitrators met for consultation, apparently by notice to one another, and there is no note there of a notice to the parties, and I apprehend there is no ground for saying there was any notice as it is not mentioned.

Lord Selborne:—I think you are in error in saying that there were only the notices which are mentioned and no others. The cases where they cease to mention the notices are equally applicable to adjourned meetings and to others.

Mr. Bompas:—That is so, my Lord.

Lord Selborne:—You cannot ask us to infer without a statement one way or the other of the fact that notices always have been given, whether there was an adjournment or not, up to that time and were never afterwards given.

Mr Bompas:—I should have thought it was a strong thing to ask your Lordships to infer without any statement in the case that a notice which, in the absence of the arbitrator, was necessary to make the award good was given although it was not so stated. It is for my learned friends to show that this award is good, and if it be necessary, we have shown that our arbitrator was absent. If it is necessary in order to controvert that, that there should have been a valid notice to him, then it was for my learned friends to have put in this case a statement that such was the fact. Your Lordships will not assume anything took place which is not mentioned in this statement and which is essential to the validity of the award.

Lord Selborne:—You really do not see my point; we are dealing with this as a special demurrer.

Mr. Bompas:—Is it a special demurrer? A fact is not stated one way or the other. If there had been a fact one way or the other there should have been some suggestion in the case as to this.

Sir Barnes Peacock:—It is a mere technical point that he was not summoned after you had revoked his authority to act, if he had been summoned.

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Mr. Bompas:—In that view it is to some extent a technical point.

Sir Montague E. Smith:—And I think you said in the case of adjournments no notice would be necessary.

Mr. Bompas:—I think no notice would be necessary then; but one of your Lordships seemed to lay stress on the fact that there were adjournments, and I thought, in passing, I ought to point out to your Lordships that such was the state of the case. The point, with all humility, which I do insist and rely upon is the fact or mainly the two facts that in the first place there were three appointed to do an act, that then, with the exception of corporations, in which case the corporate act is what there is power to do and the corporate act is done by the corporation, but the voices of the corporation are by law, by the meeting of a majority, but with the exception of two or three cases in which it has been held that where select vestries and persons of that sort have been appointed, or where an Act of Parliament gives power to appoint a definite number of persons to hold certain enquiries, it may have been held that a majority, after notice, were not present. But the general rule has never been carried to this extent that where three persons have been appointed to do a particular act, that on notice to the third, whether the third stops away for a good or bad reason, the two can proceed in his absence, and the mere fact of notice is to make the two the three. That case in ***Bosanquet & Puller*** is a distinct authority in a case very similar to this, that where there was an appointment of three parties that therefore there was an act which ought to have been done in the presence of all. I do submit to your Lordships, if your Lordships are influenced in the interpretation of this Act of Parliament by what would be the result of holding one way or the other, if it amounted to a question of the fraudulently keeping away one of the arbitrators by one of the parties, then it might be said that the party might be bound by the fraud. I apprehend here that the acts, both of the revocation and of the appointment, having been done by the Government it would hardly be found that there was any fraudulent keeping away. Then if it comes to a question of what is just and equitable in a case of this sort, I ask your Lordships to consider that the parties who are really interested are the Provinces—the people—that this is not a case in which this is a mere appointment by the Government.

Sir James W. Colvile:—You appear for the Government of Quebec?

Mr. Bompas:—Yes, I appear for the Government of Quebec.

Sir James W. Colvile:—They adopted all that their arbitrator did?

Mr. Bompas:—That I submit they have not done. Your Lordships see as my learned friend pointed out to your Lordships what took place was this, and I do ask your Lordships to consider it because I think I am speaking of substance, and not only of form. What took place was that Judge Day of his own accord, and evidently without consultation with the Government because the Government wrote to ask for time.

Sir James W. Colvile:—They approve afterwards of all he has done?

Mr. Bompas:—Only in this sense that when the other arbitrators gave notice that they were going to hold another meeting, they do what is the only thing they could do, what is the only thing they could do, namely, they try to strengthen themselves. The question was whether they might revoke his appointment or have the thing held in his absence, trusting to improper conduct for a defence.

Sir James W. Colvile:—They protest by the voice of the Legislature. Against that they say: "That such resignation having been accepted by the Government of the Province of Quebec, notice thereof was immediately given, to wit, on the 11th day of June last to the Government of Canada and to Messrs. Gray & Macpherson: the Government of the Province of Quebec at the same time protesting against any ulterior action on the part of the arbitration commission

which was thus rendered incomplete." Notwithstanding, however, their representation the arbitrators went on and they say : "That the said pretended award is absolutely illegal, null and void for the reasons hereinbefore set forth, and also as having been rendered by two arbitrators, who by the resignation oft heir colleague, remained without any power or jurisdiction."

Mr. Bompas :—Not by the revocation, but by the resignation.

Sir James W. Colvile :—But a resignation accepted by them.

Lord Selborne :—In fact, on their own statement, in the document just referred to, it rather seems as if Judge Day was forced by them to resign, because at page 52, line 27, it is said : "The Government of the Province of Quebec have deemed it incumbent upon them to protest against his continuing in office, that is the Honourable John Hamilton Gray, the Dominion Officer, and to express, both to the Government of Canada and to the arbitrators themselves, their firm conviction that to carry out the true intent and meaning of *The British North America Act* the decision of the arbitrators should be unanimous."

Mr. Bompas :—I say that neither of those were the grounds on which Judge Day retired, but he retired after the provisional decision as to the way in which the matter should be dealt with.

Lord Selborne :—I only meant that on the face of their own document it looks as if they themselves were responsible for the course taken by their officer.

Mr. Bompas :—With all respect to their officer, I think when you consider the whole case, your Lordships will find my instructions are correct, that that is not so, and it appears clear that this protest—of course I can only go by this case to which your Lordship refers—is a protest made to Judge Day as well as to the others, and no doubt it was intended that the court of three ought to act on that protest ; but Judge Day on some of those points seems not to have dissented, but it was after a subsequent judgment, and that subsequent judgment is not the judgment referred to by the Government, but it was after the subsequent judgment that Judge Day resigned. No doubt as he had resigned they did the best thing they could do in their judgment, viz., accepted that resignation.

Sir Robert P. Collier :—And expressed their approval of his conduct?

Mr. Bompas :—I think they did not do that ; what I was submitting to your Lordships was, that even assuming the Government of Quebec had approved this conduct, the Government of Quebec were trustees for the parties upon whom the result of this award really falls, and that it is a case in which, therefore, the conduct, whether of their arbitrator or of their Government ought not to be visited on the Province, unless your Lordships can see that the strict necessary legal effect of it is so to do, that it is not like a case in which the party who is to gain or lose the advantage of a particular transaction, takes a risk by adopting a particular line of conduct, but that this English Act of Parliament has provided not for the protection of the Government of Quebec, not for the protection of Judge Day, but for the protection of the public, as the Lord Chancellor has said the Province of Quebec has provided for their protection a particular tribunal, and made up in a particular way ; that the judgment which is now given against them, or the decision which is now given against them, is the decision not of a tribunal so constituted ; first, because one of the parties, whether wilfully or by the act of the Government, or in any other way, took no part in what was a very important section of the proceedings, and in the second place, because the arbitrator was appointed only during Her Majesty's pleasure, that he tendered his resignation, which Her Majesty even then had the power, as I apprehend, even with those words but certainly with those words, to accept ; that Her Majesty having accepted such resignation, the court was not constituted as required by the section, and that it required a renomination by the Government of Quebec to

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make it valid, that no evil result can happen from your Lordships advising Her Majesty to give to the inhabitants of Quebec the protection which the Act of Parliament intended them to have, of one arbitrator having been chosen by the Government of Quebec, because if your Lordships hold that there was no power of revocation and that Judge Day, therefore, is still personally legally appointed; if your Lordships decide that this award, made in his absence, is bad, he will immediately go and sit, and with the other arbitrators will draw up a fair and legitimate award, which will create union between the two Provinces, instead of disunion; if your Lordships hold that his resignation is valid, the Government of Quebec are prepared to appoint a fresh arbitrator, and the three arbitrators would then gladly proceed, having the direction from your Lordships that this was such a public matter that the majority had power to bind the minority, the absence of which knowledge has been to a great extent the cause of all this unfortunate difficulty. With that direction the arbitrators would be able to meet and carry out the law so laid down by your Lordships, and we should have an award, as I submit to your Lordships, in accordance with the Act of Parliament instead of an award which does not fulfil, as I apprehend, the conditions which the very words of the Act of Parliament show it was intended it should fulfil, of being the award of persons appointed to protect the interests of the Government of Quebec as well as the Government of Ontario.

My Lords, on these grounds I humbly submit that the award is invalid and must be set aside.

The Attorney-General:—May it please your Lordships, my learned friends in the discussion of this case seem to have given up the point that Mr. Hamilton Gray had become disqualified, owing to the fact of his residing where he did reside from accident. That is a point which, I think, I shall not need to address myself to, and if that be so it seems to me that there are three questions which have to be dealt with. First, was the appointment or the choice of Judge Day as an arbitrator under this Act of Parliament revocable by the Government of Quebec? Secondly, could in such a case as this a majority decide? And thirdly, if a majority could decide could one arbitrator after a certain period, by saying I will not take any further part in the proceedings, prevent the majority from deciding? It seems to me that those are the three questions which the two Governments were anxious that your Lordships should decide. I cannot think that the Governments desired your Lordships' opinion upon any question of the validity or non-validity of the award arising from such reasons as my learned friend, Mr. Benjamin, has put before your Lordships. However, with your Lordships' permission, I will deal with these three questions before I come to the question of whether there is anything on the face of the award or anything in the proceedings stated in the case that shows that that award is invalid.

Now, my Lords, it seems to me that those cases of private arbitration to which my learned friends have referred have nothing to do with this matter. It may be that when a man appoints or two men agree to appoint private arbitrators, it is intended that one shall be able to revoke the appointment if he chooses, or it is the intention that all the arbitrators shall decide, and that the majority shall not decide. It appears to me the courts have proceeded on the ground that, in the case of a private arbitration, the parties who appoint the arbitrators do intend in the first place that it shall be open to them to revoke that appointment, and in the second place, that all the arbitrators shall decide, and that the decision of the majority shall not be binding. But when you come to a case where the arbitrators or commissioners or whatever else they may be called——

The Lord Chancellor:—What I think in a private arbitration, apart from the Act of Parliament, is revocable is not the appointment of the arbitrator, but it is the submission

The Attorney-General:—Yes, my Lord.

The Lord Chancellor:—Until arbitrators were taken up by Act of Parliament that which was revocable was the submission because it was a question of agency.

The Attorney-General:—There is this to be observed in the case of a private arbitration. Supposing a man agrees to submit a matter to arbitration and he appoints an arbitrator, if he says I will revoke the authority I have given, I will withdraw from this agreement.

The Lord Chancellor:—I have changed my mind?

The Attorney-General:—Yes.

Sir Montague E. Smith:—In very early days death was a revocation, the death of the part submitting.

The Attorney-General:—Yes. There you will observe both parties are remitted to their rights. They have their remedies. They can resort to the courts, and rather a strict construction was put on the acts of persons appointing arbitrators by the courts, simply because the courts originally did not like being ousted of their jurisdiction and were rather jealous of being ousted of their jurisdiction; but it seems to me the whole matter depends in the case of private individuals on the question of agency. So I would submit in the case of an arbitrator being appointed under an Act of Parliament, it is again a question of intention, and the intention is the principle on which you must decide the whole matter. Now here the question I should submit for your Lordships would be: Did the Legislature when this Act of Parliament was passed intend that that appointment should be revocable? Now, just let us consider how the matter stands. This *British North America Act* of 1867 was passed for settling all the affairs of Canada and for appointing the Dominion Government, and then it was necessary that certain debts and credits and liabilities and assets belonging jointly to the Provinces of Ontario and Quebec, which were then constituted separate Provinces, should be divided between the two. Now, it was necessary for the Legislature to make provision with reference to the division of these properties and liabilities, and the adjustment of the properties and liabilities, and that was the only way in which it could be done. Now, the Imperial Legislature does make provision for that, and it makes this provision: That the division and adjustment shall be made by three arbitrators, one to be chosen by the Government of Ontario, one by the Government of Quebec and one by the Government of Canada. Surely the Legislature intended when they made provision that this division and adjustment of the debts should take place, and if they intended that the division and the adjustment of the debts should take place, it seems to be perfectly obvious that they did not intend it should be in the power of either or any of the Governments to revoke the choice which they had once made of an arbitrator, because there is no provision in the Act of Parliament that there shall be any other choice of any arbitrator, or that there shall be any mode except in this mode of dividing and adjusting the debts and assets between these two Provinces, and if the division and adjustment does not take place, under the provisions of this Act of Parliament, it cannot take place at all, because there is no remedy to which either of the Governments can resort. Their courts cannot take action in this case. Therefore, we have this fact that the only way in which the division and adjustment could be brought about was by the Act of Parliament, and the Act of Parliament provides that it should be effected by three arbitrators. There is no provision for any further or fresh appointment or anything else. I should submit to your Lordships that it is perfectly obvious that it was the intention of the Legislature that this division and adjustment should be effected by three persons to be chosen in the manner described, and that if that were so, one cannot conceive that it was the intention of the Legislature that if an appointment was once made it should be revoked.

The Lord Chancellor:—If revoked, there is no power to make a fresh appointment—

The Attorney-General:—There is no power to adjust at all. If one Government should revoke the power given to an arbitrator—I will call him an arbitrator for the moment—then, although the arbitrator had gone on till the day before the signature—

The Lord Chancellor:—The difficulty is in what way are these different bodies called here Governments the *dominii* of these arbitrators? They are to bring them into existence, not for purposes of their own, but for the purposes of the Act of Parliament; but what power had they to annihilate?

The Attorney-General:—I do not see any power. The Act of Parliament does not say they are to appoint them. It does not contemplate an appointment in the ordinary sense but it says the arbitrators are to be chosen.

The Lord Chancellor:—They are not agents.

The Attorney-General:—They are not agents in any sense of the word.

The Lord Chancellor:—Parliament might have said, one to be chosen by the Archbishop of Canterbury, one to be chosen by the Speaker of the House of Commons and one by somebody else; but would these persons when they had once appointed retain any rights over them, would they be their agents and could they terminate their appointments at any time?

The Attorney-General:—One of your Lordships said if the names of these gentlemen had been inserted in the Act of Parliament, if the Legislature had known that Mr. McPherson was a man of eminence in Ontario, and that Judge Day was a man of eminence in Quebec, and that the other gentleman was well known as interested in the matter of the Dominion, and these names had been inserted in the Act of Parliament, could anyone have contended for a single moment that any Government could say Judge Day shall not be one of the arbitrators? In that case it would have been perfectly obvious that the gentlemen named in the Act of Parliament were not agents for any body or any Government.

Lord Selborne.—Do you say it would make any difference if the words had been added, "chosen on behalf of the Government of Upper Canada."

The Attorney-General:—None whatever. It would be a description of the arbitrator or umpire.

Sir Montague E. Smith:—Or nominated by the Government.

The Attorney-General:—Simply because the Act of Parliament allows the Government the privilege of nominating; but the Act of Parliament does not make him an agent of the Government, and indeed I do not conceive that it can be argued. I do not understand my friend to have argued really and truly that these arbitrators were in the character of mere agents of the Government in an ordinary sense. Indeed, if they had been, this would seem to me, this would be almost like a bargain between two private individuals. Supposing one man was selling an estate to another and he said: I will sell you an estate, not for ten thousand pounds, but I will sell it to you for such sum as A. B. and C. D. shall say I ought to take for it, and the other man says, very well, so be it, I will abide by the decision of A. B. and C. D. in this matter, that, I take it, would clearly not be revocable. Neither party could revoke the authority given to A. B. and C. D., because it is the bargain between them. It is not the mere constituting of A. B. and C. D. their agents to do a particular matter, but it is a term, the bargain between those two individuals, that A. B. and C. D. shall fix the price. So, if we put it on this low ground, a ground on which I am not willing at all to base the argument, but if I were driven to base it on this low ground, that this was as it were an arrangement between individuals, nevertheless it is an arrangement for fixing the amount of property which each Government shall receive or each

Province shall receive. Does an arrangement that that shall be divided, that the assets and liabilities and so on shall be divided by three persons, and it would be exactly the same in principle as the illustration I have just ventured to give to your Lordships, but I would far prefer to put it on the higher ground that we are to treat this Act of Parliament as though the names of these gentlemen, the arbitrators, were read into it and if the names of these gentlemen, the arbitrators, were read into it, it seems to me perfectly clear that there could be no possibility of any revocation, and I should submit to your Lordships that it is abundantly clear that the Legislature, dealing with this matter in the only way it could be dealt with, not having provided for any other means of effecting their object if the means they resorted to failed. When your Lordships consider that you must come to the conclusion that the Legislature did not intend that the power and authority, and if it be a power and authority, of any of these arbitrators should be revoked.

Then, my Lords, I really do not know that I can say more on that point, I put it upon the intention of the Legislature and the reason of the thing.

Then we come to that which was apparently considered by the Governments or rather the Government of Quebec apparently come to the conclusion, perhaps on the advice of Judge Day, that the arbitrators in order to come to a binding decision must be unanimous. Your Lordships will find at page 24 that is the view which is expressed. That is after the majority of the arbitrators had come to the decision as to the principle on which the whole arbitration should proceed. Then Mr. Ritchie, at the top of page 24, presents the following memorandum requesting it to be filed. "The Province of Quebec respectfully excepts to the decision now rendered by the Honorable John Hamilton Gray and David Lewis Macpherson, two of the arbitrators, as not being a valid judgment, not being that of the arbitrators." Then one sees what their contention was. This was the decision as to the principle, the decision at which you have arrived is not valid because it is not the decision of all three. Their contention apparently was that the rule which prevails generally, I do not say universally, but which in ordinary cases prevails when arbitrators are appointed by individuals, namely, that the arbitrators must concur, prevails in this case and that was their ground of objection. Now, my Lords, I say that it does not prevail in this case, that in an instance like this it is good sense and it is also law that the decision of the majority shall prevail and here again I say that the principle which underlies it is this, what was the intention? These matters were to be dealt with and dealt with effectually, there were no means of dealing with them except under the provisions of an Act of Parliament and I submit to your Lordships clearly that it was the intention of the Legislature that the matters referred to in the 142nd section should be dealt with by those arbitrators, and it would be only possible that the matters should all be disposed of in any event by providing either expressly or impliedly that the decision of the majority should prevail. When they have pointed out no means for dividing and adjusting the debts and credits and liabilities and assets, except the means specified in the 142nd section, the means of the arbitration, therefore, it must be obvious to everybody that the Legislature intended that in any event and every event the arbitrators should be able to dispose of the matters, and they could only be said to dispose of such matters, in any event and every event, if the decision of the majority should prevail.

Now, my Lords, on this point there seems to be several authorities, which, in truth, practically decide it: some English authorities, and some American authorities. The American authorities are the most distinct about the point. Perhaps your Lordships, as I am desirous of not occupying any undue portion of your time, will allow me to point out the American authorities first. There is a case which has been quoted by my learned friends upon this subject which seems to

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me to be decisive upon the matter, always providing that the law laid down in this authority, which is a decision of the American court, is correct. It is the case of *Ex parte Rogers* which my friend Mr. Bompas cited to your Lordships, and which is reported in Cowen's Report, Vol. 7, page 526. This was a decision of the Supreme Court of Albany. I will just read your Lordships a portion of the head note. "An appraisal of damages done by the canal, made by the two Canal Appraisers appointed pursuant to the Act of 1825, is valid, provided one of the Canal Commissioners be associated with them in hearing and conferring on the merits of the claim, though he finally dissents from the appraisal and declares himself absent and not a member of the Board. Where any number of persons are appointed to act judicially in a public matter they must all confer, but a majority may decide though the minority dissent and refuse to be farther considered members of the Board. If your Lordships will forgive me for reading a little of the judgment, I should like to read it, because it seems to put the matter in a very plain way. The court said, "we have looked into the various statutes cited by the counsel for the relators, and find that the Canal Commissioners are the persons whose duty it becomes to pay assessments of damages occasioned by either of the canals, when such assessments are regularly made. No change has taken place in this respect since the statutes of 1817, though several alterations have been made by the Legislature from time to time as to the persons who were to make the appraisal. First the appraisal was by Commissioners under the appointment of this court, then by the Canal Commissioners, and finally, by two persons appointed permanently by the Senate, on the Governor's nomination, and specially for that object to be associated with a Canal Commissioner." Your Lordships see how very near the present case this is—two persons who were commissioners, and the third a Canal Commissioner, were to decide this question, with reference to the canals under an Act of Parliament. This was by the Act of 1825, under which the relators sought to have their damages appraised. Whether they have been successful is the question in controversy. These three persons, the Canal Commissioners and the two appraisers, constitute a judicial body, a tribunal appointed by law, to act in a matter of public concern in the decision of controversies or causes of a certain character between individuals and the State. That is entirely applicable to the present case. I should think no one could really and truly dispute that the arbitrators in the present case are a judicial body appointed to decide a matter of public concern. One would think you could have no matter more clearly of public concern than the question with reference to the property of two great Provinces in the Dominion of Canada. Then the court goes on: "This is not then a question arising upon a private arbitration when the Judges are chosen by the parties. The party injured has no voice in their selection. In case of a private arbitration, unless provision be made by the submission that a majority may decide, the whole body must be unanimous. But in regard to a public judicial body, it is clearly settled that, though no provision be made giving a binding effect to the decision of a majority, yet where they all convene and act, the majority may decide, notwithstanding the express dissent of the minority. What was done in this case, short of that? The commissioner, one of the three appraisers dissents and declares himself absent and not a member of the Board. He had assumed the trust delegated to him by the Legislature, and had been actively engaged in its execution, as a member, for a long time. After a full investigation he had, it is to be presumed, joined in carrying on the deliberations of the Board from time to time till the eve of the final decision. Can this simple declaration of absence at that point of time subvert his character as a member of the appraising body? We are warranted in saying his counsel had been bestowed, and that the other members had heard and appreciated his advice, because every officer is presumed to have done his duty.

Such advice is the subject of the rule which requires all to associate, but at the same time allows a majority to decide. After so full a compliance with the spirit of the rule, we cannot admit that this desertion of the Board should have the effect to invalidate the assessment. It is no more in effect than a ceasing to confer further on the question, a point to which every discussion must come when the arguments for and against are exhausted. The actual absence of the dissenting minister then ceases to be material, unless his presence be required for formal or other purposes by some positive provision or rule." That case in truth deals with two of the points which my learned friends set up. I am citing it on this question whether or not in such a case as the present the majority can decide. It seems to me perfectly clear from that decision, that the majority can decide. As to the absence of Judge Day in this particular case, that is a different question with which I shall deal in a moment.

My Lords, there are several other cases, some American, as I have said, and some English, on this point. As I have ventured to cite an American case first I think I might go on with the American cases for a moment. There is a case of *McCready v. The Guardians of the Poor*, in 9th *Sergeant and Rawle* in the Pennsylvania Reports, page 95, and this is an extract from the case. It is in this way, "Where a number of persons are entrusted with powers of a general nature and all are assembled, a majority may act if regular notice has been given. But where a certain number of Justices are by Act of Assembly to be appointed and sworn, all must be appointed and sworn before a majority can act,"—of that I think there is no dispute, if they are all to be appointed and though the law vests in the majority all the powers of the whole. Then Judge Duncan says in the course of his judgment: "In matters of public concern the voice of the majority must govern. Whether the statute expressly authorizes a majority to act or is silent, the principle to be extracted from the numerous cases on this head is that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general character and all of them are assembled, the majority will include the minority."

Then in *Damon v. The Inhabitants of Granby*, in 2nd *Pickering*, page 346, there was a committee appointed by the town to procure a master builder and superintend the erection of a meeting house. Held that a majority must be present to form a quorum, and that the act of a majority of a quorum is the act of a committee

LORD SELBORNE:—Is there anything expressed in the constitution of the committee there as to the quorum or is it merely an inference of law?

THE ATTORNEY-GENERAL:—I have not unfortunately the book here.

MR BOMPAS:—Here is the case, my Lords, and I was going to cite it as strongly in my favour on another point where it says that three being appointed to choose the site of a meeting house they must be unanimous. That is somewhat of a public nature.

THE ATTORNEY-GENERAL:—My learned friend will look at the report and I shall be able to answer your Lordship's question in a moment.

Then, my Lords, upon this point I turn to the English cases for a moment. There are in several text books statements to the effect that where the matter is of a public nature and not at all private then the majority shall decide. I will not trouble your Lordships with the text books, but I will pass on to the cases. There is first of all the case of the *Wadham College*, in *Cowper's Reports*, p. 377 There the seal was to be affixed to a certain instrument with the consent of the warden and majority of fellows Then there was a mandamus to compel the seal to be affixed against the will of the warden. The statute ordered the seal not to be affixed by the warden without the consent of the warden and the majority of fellows, he being by name associated with a majority of fellows, he had a negative

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on them. But the King's Bench held he was but one with the majority of fellows, who with him constituted the body that should act and a majority of such body having voted that he should affix the seal, he was bound to do so even against his own consent." The majority in that case had power to decide even against the will of the warden.

Lord Selborne:—That was a college of the University.

The Attorney-General:—Yes. Then the next case I find is *The King v. Beeston*, in 3rd Term Reports, 592. The decision is that the majority of churchwardens and overseers could bind the minority. "Under section 4 of a statute which enables churchwardens and overseers, with the consent of the major part of the parishioners, to contract for providing the poor, it is not necessary that all the churchwardens and overseers should concur, the contract of a majority will bind the rest." Lord Kenyon says this: "The construction contended for, that is for unanimity, must have prevailed if the Legislature had in express terms provided it as it would be attended with manifest inconvenience, the argument *ab inconvenienti* ought to have great weight in this case when the Legislature have not so required it."

Then we come to the next case of *Withnell v. Gartham*, in the 6th Term Reports, page 388. I think that was cited by Mr. Bompas. That was a question as to the power to appoint a schoolmaster by the vicar and churchwardens and that, it was decided, was well executed by the concurrence of the majority especially if such practice is sanctioned by usage. When my learned friend cited this case, a number of expressions by the learned Judges who decided the case were referred to by your Lordships, but I think there was an expression by Mr. Justice Lawrence which was not referred to, and it is this: "In general it would be the understanding of a plain man that where a body of persons is to do an act, the majority will bind the rest."

Then we come to the case of *Grindley v. Barker* which seems to be the leading case on the subject in England. That has been brought to your Lordships' attention several times, and I should not be justified in going through it again with any minuteness. There the decision was that the majority of the triers could decide. Something was said during the course of the argument and during the course of the judgment about all being present, and so on.

Sir Robert P. Collier:—All must meet no doubt.

The Attorney-General:—All must meet and bring their judgments to bear at all events to a certain extent. It was not necessary for the purpose of that case to decide that they must all be present at the time the decision was pronounced, nor did they decide it.

Sir Robert P. Collier:—It is said it would be very unreasonable if one man had power to defeat the finding by holding out against the rest. If he could defeat it by merely going away that would give him exactly the same power.

The Attorney-General:—Supposing for a moment, I do not say I am right, but supposing for a moment I am right in saying that the principle is what was the intention? It is clear that if it were the intention of the Legislature that the majority should decide, then there would be no question at all. Supposing the Legislature had said so in so many words by this section of the Act of Parliament: "This matter shall be dealt with by these three arbitrators and the majority shall decide," who could question then but that the majority could decide? I say that it is the intention of the Legislature, and although it is not expressed it is to be implied, and all these cases are authorities to that effect, still it comes back to this that the cases decide that where nothing is said and where three arbitrators or three commissioners or three gentlemen are appointed, or a number of arbitrators or commissioners are appointed to deal with a matter of public concern, it is to be implied from the Act of Parliament appointing them or from the instrument appointing them that the majority of them may decide.

Then I think your Lordships have had during the course of this argument, at one time or another, the whole of the judgment in that case of *Grindley v. Barker* read. The Judges in deciding that case refer to what is the law with reference to corporations, and liken the case to the case of a corporation. Now, it is *confesso* if we are dealing with a corporation, the majority of a majority of a corporation assembled can bind.

Then there is the case of *The King v. Whitaker* and others, in the 9th *Barnewall and Cresswell*, page 648. That has also been cited by my learned friends. "There by a Local Act for drainage of a district, the commissioners were authorized to assess and tax upon the whole district such sums as should be necessary for carrying into effect the objects of the Act and to elect assessors," this is the part which is important "to apportion the money between the several townships, parishes and places within the district. The three assessors having been appointed. the three met to agree upon an apportionment, two out of the three agree, but the third would not concur." Then it was "held that the apportionment being a matter of a public trust and duty, an apportionment made by two at a meeting of three was valid."

I think it is in that case where it is said that the trust being delegated to a number of persons, they must embark upon the performance of their duties, they must meet; but it is not necessary that they should concur, but that a majority of them may decide.

Then there is the case of *Cortis v. Kent Waterworks Company*, 7th *Barnewall and Cresswell*, page 314, to the same effect. "The Act directed that the commissioners"—this is not quite so strong, I admit—"or the majority of them assembled at any meeting, not being less than 13, might by writing under their hands appoint a Treasurer: *Held* that an appointment of Treasurer signed by a majority of 17 commissioners present at a meeting was valid, and that it need not be signed by 13." I say this is not so strong, perhaps, because the question in this case was what did the Act of Parliament mean by using the term "or the major part of them assembled at any meeting, not being less than 13?" That perhaps would have been the question in the case, but Mr. Justice Bayley in giving his judgment says this which is important: "The general rule is that where a power of a public nature is committed to several who all meet for the purpose of executing it, the act of the majority will bind the minority and in this case the fourth section of the Act contains an enactment to that effect." He makes that declaration of the law on the authority of *Grindley v. Barker*, showing it is perfectly well known and understood and recognized by the court that that authority was binding and it goes to this, that in the case of persons appointed to deal with a public matter there the majority may bind.

THE LORD CHANCELLOR:—We must break off here but we propose to resume and, I hope, conclude on Monday next.

(*Adjourned to Monday next, March 11th, at* 10.30 *a.m.*)

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

COUNCIL CHAMBER, WHITEHALL,

Monday, March 11th, 1878.

Present—

THE LORD CHANCELLOR,
THE DUKE OF RICHMOND AND GORDON,
LORD SELBORNE,
SIR JAMES W. COLVILE,
SIR BARNES PEACOCK,
SIR MONTAGUE E. SMITH,
SIR ROBERT P. COLLIER.

IN THE MATTER OF THE ARBITRATION AND AWARD

BETWEEN

THE PROVINCES OF

ONTARIO

AND

QUEBEC.

(*Transcript from the Shorthand Notes of Messrs. Martin and Meredith.*)

THE ATTORNEY-GENERAL :—My Lords, I was endeavoring, when the court rose the other day, to establish the proposition that in cases of public interest the law was that where several arbitrators or several commissioners or several trustees are appointed, the majority of them may decide. I had for the purpose of establishing that proposition cited to your Lordships a number of cases; I think it will be sufficient if I cite two others upon this point. I am now dealing simply with the question whether a majority can decide. I am not now upon the point what is the effect of one of the trustees or one of the body absenting himself, that is a separate and distinct point. Upon the question whether the majority could decide, in addition to the authorities I have already cited, I pray leave to call attention to *Wilkinson v. Malin*, in the 2nd *Tyrwhitt*, page 544. The head note is this, or the substance of it : "Under an ancient deed in the time of Henry VI., land was conveyed to trustees for public purposes in a parish and, *inter alia*, for the relief of the poor and payment of a school rate: Held that where the whole number of existing trustees assembled to elect a schoolmaster, the act of the majority is to be considered as the act of the whole body, for the trust to be performed is of a public nature." In that case most of the authorities which have been already cited before your Lordships were cited.

LORD SELBORNE :—The doctrine is as old as Lord Coke, is it not?

The Attorney-General:—It is. In fact I think your Lordship will find a reference to Lord Coke in the earliest cases.

The Lord Chancellor:—Is not after all the difference between a trust and a power that a trust is to be performed strictly? If a power is not performed, there is an end of it. If the trust is created it must be executed. Is not that the distinction between public and private?

The Attorney-General:—Yes.

The Lord Chancellor:—That which is done by a private person is looked upon as in the nature of a dedication—an agency.

The Attorney-General:—If a private person appoints two or three persons to do a particular act.

Sir Robert P. Collier:—There was a statute in Lower Canada, with which we have dealt once or twice, whereby the judges were empowered to appoint three commissioners who were to assess the compensation in respect of expropriated lands. There was no clause in the Act to the effect that the majority should bind the minority, but it was never even contested before us that they could.

Mr. Bompas:—Is your Lordship sure there is no such clause? I am speaking from memory. I thought there was an express clause.

Sir Robert P. Collier:—I think not. If I am wrong you will correct me.

Sir Barnes Peacock:—And they were to have the power of experts, and I do not find that the majority of experts could act under the Code. The commissioners in that case had the power of experts under the Code of Lower Canada.

Sir Robert P. Collier:—I am speaking of the last case before us.

Sir Barnes Peacock:—It was an assessment of compensation where they divided the amount of compensation after they had made their award, after the award had been homologated.

Mr. Bompas:—The experts are mere witnesses, but these other commissioners had, no doubt, similar powers. I will get the Act.

Sir Barnes Peacock:—I do not know that it is very important.

The Attorney-General:—The case I was about to cite is *Perry v. Shipway*, 1st *Giffard's* Reports, p. 1. The head note is this: "The minister of a dissenting chapel, although duly elected, is at law only a tenant at will of the trustees in whom the legal estate is vested, and the majority of trustees in a trust constituted for such a purpose can bind the minority." Then the Vice-Chancellor said: "The minority of the trustees are defendants, but it is well settled that where the trust is for a public purpose, the opinion of the majority of the trustees must prevail. This principle is essential for the management of such trusts." Then he states what was said by Lord Lyndhurst in the case of *Wilkinson v. Malin*, to which I have already drawn your Lordships' attention.

Now I think from those authorities it is abundantly established that in a case of public trust or where some commissioners or arbitrators are appointed for the purpose of carrying out any public matter, the majority of the body can decide. I take it that really and truly it depends upon the question of intention. If the Legislature establishes a public body, or if the Crown establishes a body for the purpose of carrying out a matter of public interest, and so on, it is obvious that as the business in hand can only be accomplished by the persons who are appointed for the purpose of carrying it into effect, it must have been the intention, either of the Legislature or of the Crown or of whatever the authorities may be appointing the commissioners or the trustees, that a majority of such commissioners or trustees should bind.

Now we come again to the question, and it seems to me that this is really the last question upon which I have to trouble your Lordships, I come to the question whether if it is the law in this case, if it were in fact the intention of the Legislature that these three arbitrators should be appointed and that the majority of

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them should be able to come to a decision, a binding decision, whether they can be prevented from so doing, in consequence of one of them. Judge Day, deliberately absenting himself, and after a certain period keeping away. The facts seem pretty clear. The three arbitrators originally met and they discussed the principle on which the award should be made, and then they differed as to the principle which should be adopted. After full discussion, Judge Day came to a different opinion from his fellow arbitrators, and thereupon he took himself away from the arbitration and would not attend again, and the Government of Quebec adopted, as far as they could, his acts because they revoked, or purported to revoke, the authority.

Now, my Lords, my position to begin with is that under this Act, the Act of 1867, those three arbitrators were appointed and it was the intention of the Legislature that the majority should decide. Assume for a moment that I am right in that position. If that is so, then we may treat this Act of Parliament as though we read in it words to this effect, that the arbitrators shall be appointed to adjust the credits and liabilities and assets and so on, and that a majority of those arbitrators shall decide. We must assume that in fact the Act in question contained similar provisions to the statute of 3rd George IV, chap. 119, to which my learned friend, Mr. Benjamin, referred your Lordships and upon which he founded an argument. That was the statute which provided on a former occasion for an arbitration. Now, supposing the statute did absolutely contain the words that the majority should decide, what would follow? That although the statute says that the majority should decide, nevertheless one of the arbitrators may prevent the operation of the statute by simply absenting himself.

The Lord Chancellor:—He may remain during all the discussion down to the moment the document evidencing the decision was going to be signed, then if he remained in the room his dissent would be unimportant according to your argument. According to the other side, if he goes to the other side of the door he destroys the effect of the whole thing.

The Attorney-General:—Such a decision is so absurd that it cannot be conceived that it could be seriously contended that your Lordships could arrive at such a conclusion, and indeed my learned friend, Mr. Benjamin, very candidly confessed that that could not be, because during his argument upon 3rd George IV, chapter 119, your Lordships will remember that my friend founded an argument of this sort upon that statute. He says "see when the Legislature desires to give a power to the majority to decide they can easily do it, and they have done it in the 3rd George IV, chapter 119, and because they have done it in express words in the third George IV."

The Lord Chancellor:—What was that Act?

The Attorney-General:—That was an Act which provided for an arbitration between two of these very Provinces. My learned friend's argument was this, it was not directed to the point I am now upon, but my learned friend argued in this way, he said it was not the intention of the Legislature that the majority in this particular case should decide because the Legislature had not said so. If the Legislature intend that, they say so And then he points to the Act of George IV in which the provisions are certainly more elaborate than they are in the present instance, and in which the Legislature undoubtedly do say that they intend a majority to decide, but then when my learned friend was upon that point I believe it was Lord Selborne who put to him this very pertinent question. Well, but in that case, the case you place before the court under this statute, could one of the arbitrators, if he had chosen to go away, to absent himself and to say I will have nothing more to do with this arbitration, could he have paralysed the action of the arbitration altogether? And to that question my learned friend says: "If a majority may decide, I admit that if one stays away he cannot prevent an award,

that is if he declines to attend upon being notified." If that admission may be taken against my learned friend upon this point with which I am dealing, my learned friend admits himself out of court. Because if we read into this statute the provisions which I say are implied, namely, that the majority of the arbitrators may decide, then you have my learned friends admitting that if such is the case then it would be impossible for one of the arbitrators to paralyse the action of the arbitration by absenting himself. My learned friend felt the force or rather the difficulty of the position in which he would then be placed, or the difficulty of the question which was put to him and he candidly admitted that the result which I have mentioned would follow. Therefore, if we deal with the reason of the thing it seems perfectly obvious that if I am right in saying that the Legislature intended that the majority of the arbitrators in this case should decide, the reason of the thing is altogether against the notion of one of the arbitrators being able by obstinacy and headstrong action to prevent any award being made. It would be monstrous if he could do so.

Then my learned friends have referred very cursorily, I must say, and not laying much stress upon them, to several authorities or some authorities which speak about the trustees or the commissioners or the body that is to transact the business being assembled and so on. I admit that there are in various cases expressions of this sort that the commissioners or the members of the body that is to decide must assemble and confer. These expressions are very loosely made use of and I think I shall satisfy your Lordships from the authorities themselves, English and American, that those authorities decide that it is not necessary for all the members of the body to concur. All that is necessary is that all the members of the body having the power to deal with the question shall have an opportunity of being present if they think proper and an opportunity of expressing their opinions.

Now, my Lords having dealt with the matter in a general way and pointed out to your Lordships, as well as I am able, how monstrous the conclusion is to which my learned friends invite your Lordships to come, and how utterly against any such argument as that which my learned friends submit to your Lordship is the reason of the thing. I now refer your Lordships to a few cases on the subject.

In the case of *Grindley v. Barker* there is something said upon this point. I am now upon the point of whether it is necessary that all the trustees or all the commissioners should from beginning to end meet and confer together. I am not going to trouble your Lordships with much of this case, but in the judgment of Chief Justice Eyre there is this passage, at page 236, 1st *Bosanquet and Puller*: "With reference to the first question I think it now pretty well established that where a number of persons are so trusted with powers not of mere private confidence but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority and their acts will be the act of the whole. The cases of corporations go further. There it is not necessary that the whole number should meet, it is enough if notice is given and a majority or a lesser number, according as the charter may be; may meet, and when they have met they become just as competent to decide as if the whole had met. With a view to this case those who have met resemble the six triers who have authority to decide and then a question arises how they may act when they have not." Therefore, what the Chief Justice says is that this case with which he is dealing, that is the case of the six triers of leather, is the same as the case of the corporation.

LORD SELBORNE: No, I think not: I think he says the six are in the position of those who have met in the case of the corporation.

THE ATTORNEY GENERAL: It is enough if notice be given and a majority or

lesser number, according as the charter may be, may meet and when they have met they become just as competent to decide as if the whole had met.

Sir Montague E. Smith :—That is a case of a corporation.

The Attorney-General :—With a view to this case those who have met resemble the six triers who have authority to decide. No doubt it is as Lord Selborne says "and then a question arises how they may act when they have met. The case in *Atkins* shows the opinion of a great judge, Lord Hardwick, who was much conversant with this subject in one part of his judicial life, was that the majority of persons assembled will conclude the minority and an act done by them will be the act of the whole body." All that I cite that for is this, I only cite it to show that the opinion of the Chief Justice was that the case was analogous to the case of a corporation. I do not say that it is anything like conclusive on the subject, but I think it right to draw your Lordships' attention to it.

Well, then, there is a case which has been decided by your Lordships in the 9th *Barnewall & Cresswell. The King v. Whitaker*, and others. There commissioners were authorized to assess and tax upon the whole district such sums as should be necessary for carrying into effect the objects of the Act, and then their Act directed that assessors should be elected and that the assessors should apportion the money between the several townships, parishes and places within the district. Then it was held that the majority of the assessors could decide and Lord Tenterden says that it was an application for a mandamus under an Act of Parliament, by which Act the commissioners acting under it were authorized to appoint assessors and so on, and three had been appointed. Then he decides on the authority of *Grindley v. Barker* that the majority may decide. This is the part of the judgment to which I wish to call your Lordships' attention. It is at the very end. "we, therefore, make the rule absolute for a mandamus." Then Lord Tenterden, after consulting with the other judges, added, "perhaps it may not be necessary that all should meet. Certainly the majority must meet. In this case all the three had met." Now I do not say that that is a conclusive authority in my favour. Here there evidently was a consultation among the judges as to whether it was necessary that all three should meet. The question was whether they should all three meet. The question apparently was not whether they should meet, consult and confer to the very end of the proceedings, but upon that the judges consulted, and apparently they came to the conclusion, as one would think a reasonable conclusion, that it might not be necessary that all should meet, but certainly a majority must meet.

The Lord Chancellor :—The question I suppose would be whether if there is a deliberation which proceeds by way of adjournment and if all present at the beginning are aware of the adjournment, whether that is not a meeting of the whole.

The Attorney-General :—One would think it was one meeting from beginning to end.

The Lord Chancellor :—In the middle of a certain meeting one might withdraw.

The Attorney-General :—I have looked carefully through the statement of the case upon the question of notice and it seems to me here that this was done wherever there was a meeting of the arbitrators and they adjourned *sine die*, there was notice given to Judge Day of when the next meeting was fixed. He had notice and was asked to attend, but after the 17th of August they met and adjourned from day to day, or if they adjourned they fixed the following day or the day after, or something of that kind, and then apparently there is no statement that there was not a notice given, and there is no statement that there was.

Lord Selborne :—Upon one occasion it is not mentioned that they did adjourn, and that is an occasion very nearly preceding the award. It is at page 4[illegible].

The Attorney-General:—The statements here seem to be simply copies of the minutes.

Lord Selborne:—That is the only break that I can see in the series

The Attorney-General:—"The arbitrators met on the 27th day of August, 1870. Present Mr. Langton. Mr. Wood resumed his argument and closed it," and then there is nothing more said.

Lord Selborne:—On the next day but one they met again.

The Lord Chancellor:—The intervening day was a Sunday.

Lord Selborne:—Yes. So in fact they meet as soon as they possibly can afterwards.

The Attorney-General:—If it is necessary I may say a word as to whether Judge Day had notice, but his position is, "it did not matter whether I had notice or not, if I chose to stay it was enough. I put an end to the whole thing by staying away."

Now, my Lords, there are several cases from the decision of which I think I may infer that the point I am endeavoring to make is a good one. Take the case of *Blacket v. Blizard, 9th Barnewall & Cresswell*, 851, which is a case referred to by my learned friend. "The commissioners for building and enlarging churches having, pursuant to certain statutes referred, appointed 26 persons to be a select vestry for the care and management of a church and all matters relating thereto: *Held* that in order to constitute a good assembly of the select vestry so appointed there must be a majority of the number, namely 14, named in the appointment, and, therefore, that a rate for the repair of the church made at a meeting where there was not such a majority was illegal and that the payment of such rate could not be enforced in the Ecclesiastical Court." Mr. Justice Bayley says: "I take it to be a general rule of law, that where a public trust is to be executed by a definite number of persons, it must be executed by a meeting where a majority of that number is present, unless there be a usage or custom to the contrary. It is different from a trust or power of a private nature for that must be executed by all the persons to whom it is given." Now let me draw your Lordships' attention to what is the decision. A power or a duty was entrusted to 26 persons, to a definite number, and the decision was not that all those persons must meet but that it was enough if a majority of them met and conferred. Other cases go to show that a majority of the whole body may decide the question. That is a distinct authority for the proposition I am laying down to your Lordships.

Well, then there is another case, an American case, in 21 *Pickering*, of *Williams v. Lunenburg*, p. 75. The report begins at page 75. The passage which I wish to cite is at page 82. The part of the judgment which I wish to read to your Lordships will really explain what the case was about. The court says, at page 82: "Another exception was taken that the assessment was made by two only of the three assessors. It appears by the case that the other assessor received notice and was requested to act with them but refused to do so. Where a body or board of officers, whether constituted by law to perform a trust for the public or to execute a power or perform a deed prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body, and where all have due notice of the time and place of meeting in the manner prescribed by law if so prescribed, or by the rules and regulations of the body itself, if there be any, otherwise if reasonable notice is given and no practice or unfair means are used to prevent all from attending and participating in the proceedings, it is no objection that all the members do not attend if there be a quorum." I take it that means if the statute or the charter, whatever it is, constitutes a quorum.

Lord Selborne:—Or a majority of the whole if there be no expressed quorum.

The Attorney-General:—A majority would be a quorum if there is no

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quorum. They say "and no practice or unfair means are used to prevent all from attending and participating, it is no objection that all the members do not attend if there be a quorum." In the present case all three having had notice and an opportunity to act, the act of the two is sufficient.

THE LORD CHANCELLOR :—In these cases where it was held that the majority was sufficient it must be intended that the whole body was summoned.

THE ATTORNEY-GENERAL : —Yes, the whole body no doubt would be summoned, but in those cases it is clear that where it was decided that the majority could come to a decision that was binding upon the rest and then if my learned friend's argument were correct he would say, oh! but those cases must have been wrongly decided because although a majority can bind, a majority can only bind when all the members of the body are summoned and meet and assemble and confer from beginning to end. That is my learned friend's position.

SIR BARNES PEACOCK :—What was the nature of that case? What were the assessors to do?

THE ATTONEY-GENERAL :—It is rather difficult to make out from the head note what their exact duties were.

Well then, my Lords, there is another case, also an American case, on the same point, *The People v. Batchelor*, 28th Barbour's Reports, page 310. I regret to say I have not got these reports, but this is an extract containing the substance of the case: "When a power is to be exercised by several persons, a majority of the whole number may proceed to act and their action will be legal, providing all the members composing the body are summoned to attend or have notice of the time and place of meeting:" Then again, my Lords, there is a distinct authority on the subject and surely that is reasonable. The contention of my learned friend Mr. Bompas, because my learned friend Mr. Benjamin does not seem to have gone into that question, my counsel friend Mr. Bompas, as I understand, will contend for this, that if there are three arbitrators and if they meet together and confer and after a certain time one of them says to the other, well I have explained my views, I have nothing more to say, I will not have anything to do with you, and he remains obstinately and stupidly silent and sits in the corner in dudgeon, but he does sit in the corner and he attends every meeting of the arbitrators from beginning to end, the majority of the arbitrators then come to a conclusion and sign the award, that award is good and binding: but if instead of acting in the way I have described the obstinate member takes his hat and walks out of the place and goes and sits in an adjoining room, the award is not binding. Is it conceivable that any such ridiculous conclusion can be arrived at? Now, my Lords, I have endeavored to establish, and I hope I have established, my three propositions: first, that it was not competent for the Government of Quebec to revoke the authority of Judge Day; secondly, that it was the intention of the Legislature when these three arbitrators were appointed that the majority of them should be able to decide and that that is the law that the majority should be able to decide; thirdly, that Judge Day could not paralyse the action of the arbitration by absenting himself in the way he did. He had notice, with the exception which Lord Selborne has been kind enough to point out. I think up to the 17th of August there is a distinct notice sent to him, because up to that time the adjournment had not been made to a definite period. Up to that time the adjournments seem to have been almost *de die in diem*. There is certainly that omission to e the day to which the adjournment took place on the 37th meeting of the arbitrators. I do not think your Lordships will come to the conclusion that, because nothing is said as to the day to which the meeting was adjourned that, therefore, it was not adjourned in the same way as the others, indeed the next meeting took place two days afterwards, the intervening day probably being a Sunday.

Lord Selborne:—It was so.

The Attorney-General:—Well then, my Lords, I have endeavored to establish my three propositions. I hope I have established them. If I have established them as a fact, I have done enough, because I take it it is perfectly clear, with the exception as to the question of the residence of Mr. Hamilton Gray, the questions which I have dealt with are the only questions which the Provinces intended to ask your Lordships. The question upon the residence of Mr. Hamilton Gray is given up by my learned friends. They say nothing about it and I say nothing about it. It seems clear beyond all argument that nothing can be alleged by my learned friends upon that point. I hope your Lordships will excuse me if I decline to go into the other questions that my learned friend has raised and for this reason, it is obvious on the face of this case that it never was the intention of the Province of Ontario or of the Province of Quebec to submit to your Lordships these various questions which my learned friend Mr. Benjamin has raised upon the award. He has gone into a variety of matters upon the award, but surely if it had been the intention of the Province to submit any such questions as these, they would have submitted them specifically to your Lordships and they would have given your Lordships a specific statement of the facts which your Lordships would require to be informed of, in order that the questions might be raised. I confess I am not in a position to deal with them. I do not know what the facts are. I know this, that on the face of the award itself there is nothing to show that it is wrong. And I know this, that the two litigating Provinces, if I may so call them, the two Provinces in dispute who have agreed to state this generally to your Lordships in order to get your Lordships' opinion, have not referred in the remotest way to any one of these contentions which my learned friend makes. I am informed that it never was their intention, and the only question that they originally intended to refer to your Lordships was the question of unanimity and then that further question about the residence of Mr. Hamilton Gray was added.

Sir Barnes Peacock:—What do you say as to the petition to the Governor-in-Council? There was a petition presented by Lower Canada to the Governor-in-Council stating that this award was unjust and illegal not only upon the ground that Mr. Justice Day had not attended, but also upon other grounds. That is at page 53. In consequence of that petition having been presented to the Governor-in-Council that point was referred to the Minister of Justice, and then the Minister of Justice suggested that a case should be stated. Surely you cannot say that in that case they intended only to raise the question as to whether an award was had or not in consequence of the non attendance, because at page 53 they went into the whole case.

The Lord Chancellor:—At page 53 they allege certain matters, but not at all matters which Mr. Benjamin referred to.

The Attorney-General:—Just let me see what they do allege.

Sir Montague E. Smith:—The question is what both Provinces intended us to decide.

Sir Robert P. Collier:—It is not what one Province chooses to allege but what both Provinces have submitted to us.

Sir Montague E. Smith:—The question is, when this case was stated what did both Provinces intend to submit?

Lord Selborne:—At page 59 the sixth question is: "And whether the award of the 3rd September, 1870 by the said Honourable David Lewis Macpherson and John Hamilton Gray, is valid save as affected by the Dominion Act above set forth or is null and void." What has been passing through my mind is that there might be a certain amount of difficulty in expressing an opinion to the effect that the whole thing is valid save as affected by the Dominion Act.

The Attorney-General:—I take it that that is a general question which in truth embraced all the others. I submit if the Province had intended to ask your Lordships whether the award was void for any other reason than those suggested in the other questions, they would have done so. They would have said, is the award bad because of the provisions of the seventh paragraph?

Mr. Bompas:—I want to call your Lordships' attention to the top of page 54, in which in answer to the application of Lower Canada, Ontario expressly says: "Ontario disputes the various grounds of objection which in the documents the Executive Council and the Legislative Assembly of Quebec made to the award, both those objections relating to the merits and all others."

Lord Selborne:—That would seem to cover the objections which have been raised at page 53, between lines 10 and 28; but do these objections at all extend to the matters which Mr. Benjamin referred to?

The Attorney-General:—If your Lordships have any doubt about it I will endeavor to deal with it as well as I can.

Sir Barnes Peacock:—In the joint case to the Privy Council it is also asked as one of the questions whether the award is valid in the terms of the special case.

The Lord Chancellor:—It is the same question. There is nothing whatever in these papers suggesting anything beyond what is at page 53. I do not express any opinion as to whether you are bound, but you may relieve yourself of those things which are at page 53.

The Attorney-General:—If your Lordships take me as having protested strongly against going into these matters I will deal with them as well as I possibly can: I mean my learned friends' objections.

The Lord Chancellor:—Take for example the first: "That while Messrs. Gray and Macpherson refused to take into consideration the relative financial positions of the two Provinces at the time of the Union, they have taken into consideration the object and nature of certain items of expenditure, as having been incurred in one or the other section of the Province of Canada from the period of the Union to Confederation." A question arises upon that, were they not the judges of that question?

The Attorney-General:—There are two answers to that, or there may be three. In the first place it does not appear, on the face of the award, that they had ever taken it into consideration at all. My learned friend is obliged to refer back to some opinion which they state in some preliminary judgment which they gave long before the award was made, and for anything that we knew it may be that they did take these matters into their consideration.

Lord Selborne:—Were they bound?

The Attorney-General:—Whether they did or did not, I say, they were not bound to take them, and it seems to me they would be very wrong to take these matters into consideration as to what was the financial position of these two Provinces before they were united.

Lord Selborne:—Nearly thirty years before?

The Attorney-General:—Yes, before they were united. What they had to do was really this: That whereas two territories had formed one Province, and that one Province was split up and made into two Provinces, they had to adjust the credits, assets and liabilities and so on of the two Provinces which were thus formed, and which had originally been for the last thirty years one Province. But why they should take into consideration the financial position of each of these Provinces thirty years before, or rather of the respective territories of which that one Province was comprised, I cannot tell.

Sir Montague E. Smith:—Was it not for them to show whether that was a proper basis?

The Attorney-General:—I think your Lordships would come to the conclusion that they were right in the view they took of it, supposing that view had been incorporated in the award in so many words.

Sir James W. Colvile:—It is clear that the reference to us is not to sit by way of a Court of Appeal on the merits of the award.

The Lord Chancellor:—Was it *ultra vires* for them to come to a determination on this point?

The Attorney-General:—Certainly not. If it was a question of law, they were to decide the question of law.

Lord Selborne:—If I understand it rightly, it really came to this, and this is the only argument I can understand about it. It was suggested that the words debts and so forth of Upper Canada and Lower Canada, at section 142, meant the debts and so forth not at the date of the Act but thirty years before.

The Attorney-General:—But can that be so?

Sir Barnes Peacock:—Before they were united in 1840 they were separate.

The Attorney-General:—In 1840 they were two Provinces, Upper Canada and Lower Canada.

Sir Barnes Peacock:—At the time they were united they each had a separate national debt or a provincial debt, a public debt due from the Provinces, and when they were united there was a consolidated revenue of the united Province of Canada. The interest on the separate debts of the two Provinces was the second charge upon that consolidated revenue, but the debts were not discharged, nor were the debts wholly charged upon the revenue, it was only the interest which was payable. Then when they were joint there would still remain the two separate national debts, and the question is—at least as I understood—the question they wished to have raised was this: whether, when they were separate again, Lower Canada was to pay a proportion of the separate debts of Upper Canada, or whether Upper Canada ought not to pay its own separate debts and Lower Canada its own separate debts prior to the Union, and a division of any national debt which had been contracted jointly after the Union. We all know that Lower Canada had expended upon the Province a much less sum of money than Upper Canada. They had not improved their Province so much, it remained still to be improved; and then the question is, whether Lower Canada is to pay a proportion of that debt which is to be contracted by Upper Canada for the purpose of improving its Province.

The Attorney-General:—If that was the question it was a question of law, and the arbitrators have to decide it.

Sir Barnes Peacock:—It may be a question in another way. It appears to me that there might be a question whether if the Government had a right to revoke the appointment of the arbitrator it might do it either with cause or without cause. I do not know whether you contend that the Government had no power to revoke the appointment of the arbitrator for good cause.

The Attorney-General:—I contend that they had no power to revoke it for any cause whatever.

Sir Barnes Peacock:—If they were authorized to do it for good cause, then this might be a question whether when the arbitrators met together—

The Attorney-General:—I will go much higher than that. I contend they had no power whatever to revoke it. It must be read just as though the names of the arbitrators were read into this statute, and if you treat it in this way, then they are the authority which has to decide. If this is to be a question of fairness and right, I submit even then that the arbitrators have decided correctly. It really and truly would be a question of law they have to deal with, and they have dealt with it and decided it.

Sir Barnes Peacock:—They did decide a principle upon which they would

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act. At one of their meetings they decided upon a principle upon which they would act, upon which the arbitrator for Lower Canada tendered his resignation, and the Government thought fit to accept that resignation, and subsequently to revoke his authority, and they gave notice to the other arbitrators that they had revoked the authority. Well now, if the arbitrators having laid down the principle upon which they would go on to decide, having laid that down by a majority, the Government thought that that was not the correct principle, they may have been right or they may not have been right in revoking authority and putting an end to the reference. I do not mean to say at present what my view is, but that is a point which has occurred to my mind. You see it is not merely the arbitrator desiring to retire, but the Queen, by means of the Executive Government of the Province, having by letters patent revoked the authority of the arbitrator.

THE ATTORNEY-GENERAL:—I take it that was only a mode of choosing the arbitrators.

SIR BARNES PEACOCK:—It is revoking it and putting an end to it.

THE ATTORNEY-GENERAL:—When you appoint arbitrators they are appointed by letters patent, and they purport to revoke it in that way. Now I will not trouble your Lordships with any more observations upon that point. I say that this was a matter for the arbitrators to decide, and really if your Lordships were to be called upon to say whether the view they take was fair and right, or whether it was not, how could your Lordships by any possibility decide this question upon the information before you? You have not before you what was the financial position of these two Provinces; we have nothing in the world to guide us. I submit it would be a question as to what was the debt originally before the original union and what had been the original expenditure in the Province.

SIR MONTAGUE E. SMITH:—We can easily conceive it would be very inequitable to take what was the state of things thirty years ago.

THE ATTORNEY-GENERAL:—One has nothing in the world to act upon or to guide one.

LORD SELBORNE:—It was argued by your opponents that the words, in clause 132, "Upper Canada" and "Lower Canada" mean the same thing as what in clause 136 are called the Provinces of Upper Canada and Lower Canada respectively, before their union. I have looked through the Act. I find that in eight clauses the words "Upper Canada" and "Lower Canada" are used in a manner which cannot possibly bear that sense, and there are only four clauses, besides 136, in which the context shows that they do bear that sense, but it is imposed upon them by the context and not otherwise.

SIR BARNES PEACOCK:—The 118th section appears to be an important one with reference to this point. The revenues of Lower Canada depend upon the divisions of the debt. United Canada is divided into four Provinces—Ontario, Quebec, Nova Scotia and New Brunswick: and then it states what is the revenue of each of these Governments, besides the taxes which they were authorized to raise by their Legislative Council. It says: "The following sums shall be paid yearly by Canada to the several Provinces, for the support of their Governments and Legislatures: Ontario $80,000, Quebec $70,000, Nova Scotia $60,000, New Brunswick $50,000—total $260,000, and an annual grant in aid of the Province shall be made, equal to 80 cents per head of the population, as ascertained by the census of 1861, and in the case of Nova Scotia and New Brunswick by each subsequent decennial census, until the population of each of these two Provinces amounts to 400,000 souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the public debt of that Province, in excess of the several amounts stip-

ulated in this Act." It must be ascertained what is the separate debt of Quebec. Well then comes a subsequent clause, that arbitrators shall be named to divide these debts between the two, and the Dominion is made a party to that reference, so that the Dominion will be bound or ought to be bound by that decision. When the arbitrators say the amount of Lower Canada is so much, and the amount of the debt of Upper Canada is so much, then you will know how much is to be deducted for interest from the $80,000 or the $70,000 payable to the Provinces respectively, and until they know that they do not know what their revenue is.

THE ATTORNEY-GENERAL:—But, my Lord, they will know that because, as your Lordships will remember, by section 112 Ontario and Quebec jointly shall be liable to Canada for the amount, if any, which the debt of the Province of Canada exceeds at the Union $62,500,000 and shall be charged with interest at the rate of 5 per centum per annum. And then there is a provision subsequently that that which is a joint debt to begin with is to be separated.

SIR BARNES PEACOCK:—And separated so as to bind the Dominion as well as the Provinces.

THE LORD CHANCELLOR: I do not know that it is very material, but you must assume that the [illegible] is to be made from the fixed sum to be payable from the Government of [illegible] Province [illegible] deductions from the Capitation Grant.

THE ATTORNEY-GENERAL:—However, whether it is so or not, whatever may be the way in [illegible] this is [illegible] when you are ascertaining how much of the debt [illegible] is to be attributed to Quebec and how [illegible] Ontario. [illegible] question which is raised by my learned friend [illegible] it [illegible] or does it bear upon that matter, to ascertain [illegible] to use the words of the case, [illegible] thirty years [illegible]. It was a matter for the arbitrators [illegible] dealt with it. The Lord Chancellor [illegible] may continue my attention to what appears in this page 58. [illegible] point: "That the said pretended award is [illegible] in [illegible] of the credits, properties and assets of the late Province of Canada [illegible] even proceed upon the same basis and principles [illegible] been adopted in relation to the division of the [illegible]

LORD SELBORNE: [illegible] that there was valuation of each asset.

THE ATTORNEY-GENERAL: [illegible] assets have been taken at their original value [illegible] been much less or much more, you cannot tell.

LORD SELBORNE: So that [illegible] which alone seems to be unintelligible one way or the other without facts which we do not know is not included here at all.

THE ATTORNEY GENERAL:—It is removed in favour of Ontario—in favour of the award.

SIR BARNES PEACOCK: All the assets connected with such portions of the public debt of each Province as are assumed by that Province, all belong to that Province.

THE ATTORNEY-GENERAL: Yes, but the arbitrators have to decide how the assets shall be divided. There are a number of assets set out in the schedule of the Act of Parliament [illegible] which are not set out in the schedule. They [illegible] at its nominal value, shall belong to Quebec and [illegible] Ontario. [illegible] the assets, if they were valued, [illegible] have [illegible]. Well, [illegible] provisions of [illegible] award [illegible] Province.

SIR ROBERT P. COLLIER:—I do not think you need deal with that.

THE ATTORNEY-GENERAL:—I would really not deal with anything further in the award, except just to point out to your Lordships how impossible it would be to come to any conclusion upon the point raised by my learned friend, Mr. Benjamin, without having some further information about it. He made a great point under paragraph 71, certainly, I must say, without any disrespect to my learned friend who explained it very distinctly, and it was very difficult to follow.

LORD SELBORNE:—That really does not seem to be opened on these objections at page 53.

THE ATTORNEY-GENERAL:—Then, my Lord, I will leave it. I think I could shew your Lordships in a moment it is quite untenable. However, I will not do so, because it might make it necessary that I should state some facts which do not appear here, which I am informed are the facts, and I do not wish to do so. I wish to confine myself strictly to the facts in the case. I will not trouble your Lordships further.

MR. WATKIN WILLIAMS:—I do not think I can usefully occupy your Lordships' time by entering into any general arguments on these questions, and I propose only to answer two questions. One I think of Lord Selborne's put the other day to my learned friend, the Attorney-General, with, I think, an invitation that it should be answered by myself. The Attorney-General cited the case of *Damon v. Granby*, and read to your Lordships a passage from the judgment of Chief Justice Parker in that case. I may remind your Lordships what the marginal note of the case was. It was an American case cited from the 2nd *Pickering's* Reports, page [illegible]. The question put, I think, was this, whether in that particular case, an expression of the Chief Justice in giving judgment had any reference to the condition of the committee. That was the case in which the Chief Justice said that the major part of the committee is necessary to constitute a quorum, and that the act of a majority of a quorum is the act of the committee. The question was put, whether there was anything in the constitution of the committee there to lead the Judges to the conclusion whether a majority of the entire body would constitute a quorum, of which quorum a majority would decide. I have looked carefully through the case, and there is nothing in the constitution of the committee there to lead to that conclusion. It is laid down by the Chief Justice, as a general rule of law, applicable to every case where there is no provision to the contrary, and what he said about it is this: It is true that all the members being assembled, perhaps; if only duly satisfied a majority of those present have authority to proceed, if a majority of the whole number are present; but we cannot think that if a major part withdrew in the belief that they, or any of them, are prevented from acting, the majority can assume the powers of the whole body. A major part of the whole is necessary to constitute a quorum and a majority of such quorum can sit. In this respect, I think there is a difference between the consistent Body and the Agent, in the former, those who assemble, all being duly warned, have the power of the whole, unless some number is established by Charter or by law as a quorum. In the latter, the power is delegated to the whole number constituting the agency. That is all I intended to cite to your Lordships from that case. Then there is one case which I think the Attorney General has also left to me, at least by omitting to refer to it, I suppose he means me to call your Lordships' attention to it. It is, I think, rather an important case. It shews this, that when the authority of the arbitrator has been revoked, and especially if it has not been effectually revoked, further notice is not necessary, notice to proceed is not necessary. That is an English case before Lord Eldon, the case of *Harcourt v. Ramsbottom*, in the first of *Jacob & Walker's* Reports, p. 505. That was a motion to restrain a sale which had been agreed to between the parties a sale of property to secure the balance which

was to be ascertained by an arbitrator. The proceedings are rather long. It is a case where a man owing a certain sum of money, a judgment at law was obtained against him, which they agreed not to act upon, and it was agreed that some property of the debtor should be sold to realize the amount, the amount to be ascertained by arbitration. There was an arbitration, and in the course of the arbitration one of the parties revoked the appointment of the arbitrator. This is what Lord Eldon said, after some general considerations applicable to the subject, at page 511: "It is said the award is not good because the authority was revoked: my answer is, that if it is revoked at law, I could not have considered it as revoked in equity, whether it was made a rule of court or not. If the award was not enforced, the court would leave the parties to deal with the matter at law; and if at law you can restrain them from these estates, do it; but you have no equity to come here. Supposing the revocation to be good in law, this is a case in which a Court of Equity would not act. I am not saying it is good at law, but I agree entirely that it is bad in equity, under these circumstances. If so, what is the case of the plaintiff? He has said, for many reasons stated in the deed of revocation, I have revoked the authority. Mr Cullen says you cannot. Now, when a party informs the arbitrator that he revokes his authority, if the arbitrator is of opinion that his authority is gone, he has nothing more to do with it; but if the arbitrator thinks he has no right to do so, and the party will not submit, is that to stop him? Supposing his opinion to be right, that his authority is not revoked in equity, see what the consequences would be; because one party says it is revoked, then, although it is a matter of justice to the other party, yet the arbitrator is not to hear him on the other parts of his case; but is to say at once, this party will not let me go on; or he is to say, I will decide upon the case of a person who has not brought before me the whole of it. It is impossible to maintain that. Unless he proceeds *ex parte*, the other will be shut out from stating his case, except as to what has already passed. It is not of importance whether notice was or was not given. It is said that at the meeting of the 22nd December, Mr. C. was not at his chambers, and the person sent on behalf of the plaintiff waited there: but it was not for the purpose of attending him in the arbitration, but to tell him, by letter, that the plaintiff's solicitor would not attend him, because he said he had no authority. How could it be expected after that, or how could it be necessary in point of law, to give notice of subsequent meetings to parties who had declared they would not attend? I am, therefore, of opinion, if strictness be insisted upon, I have no right to prevent the sale." The purpose of notice, I apprehend, is nothing more than to give the party an opportunity of attending, if he will and can attend.

THE LORD CHANCELLOR:—There are other cases of the same kind as *Harcourt v. Ramsbottom* referred to by Lord St. Leonard. "And if a party having agreed to sell at a price to be fixed by referees who are named, without cause, revoke his authority before the price is fixed, equity will not interfere by injunction to prevent the purchaser from taking possession of the like under the agreement, as the plaintiff acted against good faith."

MR. WATKIN WILLIAMS:—I was going to give your Lordships the references to them. They all seem to proceed upon Lord Eldon's judgment in *Harcourt v. Ramsbottom* as the fountain head, as far as I have traced them.

THE LORD CHANCELLOR:—There is a case of *Morse v. Merest*.

MR. WATKIN WILLIAMS: Yes, I thought the reason given by Lord Eldon seems to be the foundation of the subsequent cases and I give it to your Lordships. The case of *Pope v. Lord Duncannon* is in 9 *Simon*, page 177.

MR. L[illegible]:—I do not propose to add anything more to the Attorney-General's argument.

MR. B[illegible]:—My Lords I have very few words to say, in reply, with reference to the cases that have been cited by my learned friends.

In the first place, with regard to the question of revocation and whether it is revocable or not, my learned friend says that you may stand to the Act of Parliament, and he bases his argument in the first place on the 142nd section and says one must enquire what is the meaning of that section, I confess I should have been perfectly willing to leave it upon the meaning of that section, because, as I read it, what that does is to constitute a tribunal of a particular character. It seems to me that section may, no doubt, be read in two ways. It may be read as saying that it shall be referred to the decision of three arbitrators and instead of naming them it gives them a description, but I submit to your Lordships that the true reading of the section is that it constitutes a tribunal, the members of which are described not as if you inserted their names, but are described by their characters —that it is said that there must be in that tribunal one appointed by the Government of Canada, one appointed by the Government of Ontario, and one appointed by the Government of Quebec, and that that is the meaning, and if the authority of one arbitrator is revoked so long as there is a tribunal constituted by a successor, the tribunal which is provided by the Act of Parliament exists and is able to act and, therefore, it is a mistake to say that if the authority of Judge Day is revoked and ceases, therefore no proceedings can be taken. I submit the words are descriptive of the character of the tribunal, but that, as I submit, is shown by the latter part of the section upon which my learned friend has made no remark, to which my learned friend has given no meaning, as I submit, namely, the proviso which says that the Parliaments of the three parties shall meet before any proceedings are taken. Now, if this appointment is a mere formal appointment by the Governments of Quebec, Ontario and Canada, why was the express proviso made that the Legislature should meet? I submit it is obvious for this reason, that in a case of this sort this country does not legislate for the Provinces without their consent, that it does not deprive a Province of its property without the consent of the Province, and that the meaning of that proviso is that the three Provinces shall consent to this arbitration through their Legislatures before the arbitration shall have existence.

The Lord Chancellor:—Do you mean to say that the Act of Parliament made any provision that the consent of the Legislature should be obtained?

Mr. Bompas:—Only in this way. My learned friend himself admits that supposing no appointment had been made, the arbitration could not have taken place, and it provided that no appointment should be made until the Legislature expressed their opinion on the subject.

The Lord Chancellor:—No, no, it is just like what we do every day here. We provide that a certain rule shall not be acted upon until it has lain on the table of Parliament for a month, merely to give Parliament an opportunity of expressing its opinion.

Mr. Bompas:—I always thought it did give Parliament *ipso facto* an opportunity of preventing those rules coming into force.

Lord Selborne:—As a general rule it is expressed that if within a certain time there should be an address presented it may be suspended.

Mr. Bompas:—Surely if the power of appointment is given to a particular person who is acting under the authority of Parliament and it is provided that Parliament shall first meet before that authority is exercised.

The Lord Chancellor:—Parliament might desire to pass a vote of want of confidence on the first day of the Session.

Mr. Bompas:—No doubt. Is it not clear that this Act of Parliament contemplated the possibility of the Government of Quebec refusing to make the appointment, and if the Government of Quebec did not make an appointment, then my learned friend expressly admits that the tribunal could not have come into force. Your Lordships are well aware of the statutes, like the Railway Clauses

the number of which is sufficient to do business." Then the quotation is from Addison: "They were a parcel of mummers, and being himself one of the quorum in his own county."

Mr. Bompas:—I humbly take that definition as the true one in the sense in which I was using it, as the number necessary to do business. In corporations of indefinite numbers any number form a quorum in the sense of being a sufficient number to do business; in corporations of a definite number the rule has been laid down that the quorum, in the absence of any fixed number, shall be one-half, and in answer to an observation of the Lord Chancellor that the whole number must in that case be summoned there is a case in 5th *Burrows*, page 2599. I am afraid I have not the book with me now. It is the case of *The Queen v. Grimes*, in which Lord Ellenborough, I think it was, laid down that supposing any of the parties were at a distance so that you could assume that they would not meet even if summoned it was unnecessary to summon them.

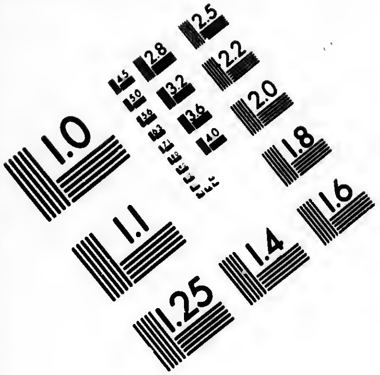
Lord Selborne:—That is to say that every opportunity should be given where it could be given.

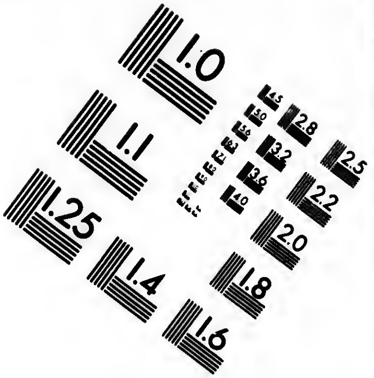
Mr. Bompas:—In that case no doubt the Law of Corporations practically is that a quarter of the whole number can decide any point, and whatever may be the reason that keeps the others away, a half only need be present. If one less than the half is present, as in the case cited from the 9 *Barnewall and Cresswell*, the whole thing is void however much they may have been summoned, however much they may have been wilfully kept away, and I apprehend if they come to the meeting and go away, so that there is less than a quorum by the reason of their keeping away, the remainder cannot do their business.

Well then, my learned friend the Attorney-General cited a passage from *Grindley v. Barker* which I am much obliged to him for calling your Lordships' attention to, in which it is expressly said that to a case like that the Law of Corporations as to half forming a quorum does not apply, but it was said that in that case the whole number took the place of the half in the case of the Law of Corporations.

Lord Selborne:—I thought the Attorney-General did not put it quite correctly and I think you do not. What was said there was that the triers in that case take the place of those who might be present at a meeting of the corporation.

Mr. Bompas:—With all respect to your Lordship, I should have thought it really amounted to what I was saying, if half the number were present then they can act by a majority. This, as I understand, says that the six triers take their place, supposing half were present, if one went away the others would be powerless. If the six triers take the place of the half who are present, then if any one of them goes away it would be so. At any rate I might carry it thus far. He expressly says the cases of corporations go further, therefore it is clear that the law of corporations does not apply. If the law of corporations does not apply, I know of no other rule by which you can fix the number that shall be present, except the old rule that where a power is given to a certain number of persons they must all of them exercise it, either by being present and voting against it or in its favour. In the case, in the 7th *Cowen*, which I cited, your Lordships remember that the judges expressly put their decision on the fact that the whole body had been present throughout the proceedings and the particular commissioner referred to had only left at the end. That would apply in the English courts I happened only the other day to be in the Court of Appeal in a case heard before three judges, the minimum who can hear a case, and one of those judges retired before judgment was given, but after the whole of the argument, and the remaining two judges gave the judgment. And I apprehend by the principle of the case in the 7th *Cowen* they were able to do so. Supposing one of the judges had retired when the argument was half finished, could it be held for one moment that the





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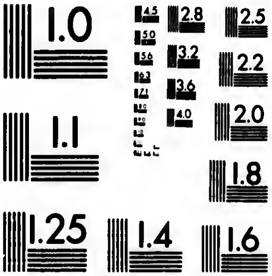

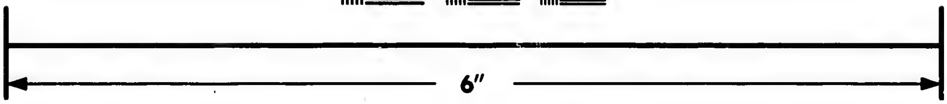

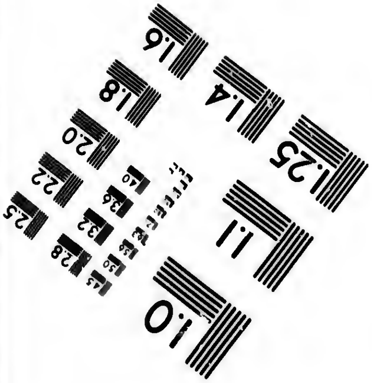

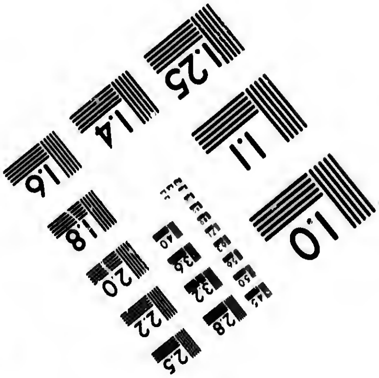

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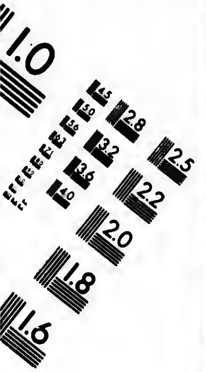
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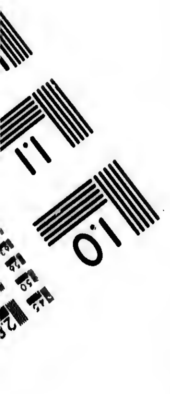
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other two judges could have gone on? put it that *Grindley v. Barker* certainly has laid down that the whole must be present. I am willing to take what my learned friend says and to ask your Lorships what must have been the intention of this Act of Parliament. Can it be cceived that when an express proviso is made that the three arbitrators should nt even have to live in the same Province as either of the other two. When a tribnal of this kind is constituted. the characters of the different arbitrators havingeen defined by Act of Parliament, can it have been contended that any two shod be able to proceed although the third was kept away by a mere headache, althgh he received notice and happened to be busy, can it be said that that was a deion of the tribunal? May we not read it, "shall be referred to the arbitrament three arbitrators." Is it not the same as "shall be decided by the three person, and as this has been decided by the three persons, I apprehend it has been ecded by two of them that the first part of the question as to what their princies should be was decided by the three, because where three people talk over al dicuss a thing the decision which they come to through the majority is the decison; but I humbly submit to your Lordships, it is an abuse of language say that the latter part of the award has been decided by these three arbitrat merely because if that has been the case a notice has been given to one who htayed away. It has been a decision come to in the absence of the third with hearing what he has had to . . . . . your Lordships his having had an opportunity of idering the matter . . . . . "Well, he might have sat anyh . Still . . . . . been misconduct on his part and would in that if he had done so that woul void as much as if he had kept away altoall probability have made the a hich was cited, of *Harcourt v. Ramsbottom* in gether. It is not like the case the party. Notice to the party undoubtedly is which the question was notic sent, because that is a question of equity of the equivalent to the party bein n of whether or not the tribunal is constituted, party, but where it is a que ifferent thing, and mere notice is not equivalent to there I apprehend it is a v it to your Lordships that in this case there was not presence, and I humbly s e a tribunal constituted of three arbitrators to whose at the latter part of the sion alone the parties are bound to submit. arbitrament and whose

I do again humbly bmit to your Lordships that if Judge Day kept away, the right course was n to proceed in his absence and enforce upon the parties an award by two inst of by three, but to take means of compelling his presence. If the Lord Chancell will permit me humbly to say so, I have vainly endeavoured since your Lordshi last sat to understand what was the objection felt by his Lordship to a Wri f Mandamus to compel Judge Day to take part in these proceedings. As understand, it is a matter of daily procedure to grant a mandamus in the ourt of Queen's Bench to Justices to hear and determine a cause, which, fr a mistake in law, they may have refused to hear. It is a form of mandamus anted by the Queen's Bench, I suppose as commonly as any form.

THE LO CHANCELLOR:—The Court of Queen's Bench is the head of all magistrates, d can issue orders which the magistrates are bound to obey, but is that so with reference to Referees appointed under an Act of Parliament?

MR. MPAS:—Yes, in the case of any statutable Referees, the Court of Queen's Bnch may at once grant a mandamus to them to hear and try.

SIR ONTAGUE E. SMITH:—Your argument now assumes that they are arbitrato s.

MR. BOMPAS:—That they are statutable arbitrators. The rule as to a mardamus is that it should be a statutable duty. I am only anxious to bring your Lordships to this difficulty. If they are private arbitrators then I succeed, because admittedly they must be unanimous; if they are public arbitrators, then I submit I am equally entitled to succeed, because then the wrong course has been taken.

The course that ought to have been taken would be to enforce it upon them, either by the Queen's Bench in Canada, whic has the same powers as the Queen's Bench in England, or by the Dominion urt, which is constituted in this very British North American Act, or, in the l t ressort, if there was any difficulty, I have always understood that this court st d to the Province in the same relation as the Queen's Bench stands to England, nd I think I can cite to your Lordships, with a little looking up, many cases in ich orders have been granted by this Court to the Colonies to do certain thin . And if there be a great public duty resting upon a man I cannot conceive hat there is any difficulty, because he happens to be in a Colony and not in E and, in enforcing upon him the performance of that duty.

Lord Selborne:—Do I understa you to suggest that the Court of Queen's Bench in this country would ga a mandamus?

Mr. Bompas:—The Court of Qu en's ench in the Colony, as I understand; an individual is subject to the court f th nd in which he is domiciled.

The Lord Chancellor:—But assum that, could the Court of Queen's Bench in the case of a similar Act of Parl ent to this in this country grant a mandamus?

Mr. Bompas:—I apprehend beyond all stion.

The Lord Chancellor:—Compelling t Referee to attend.

Yes; I apprehend so. I not conceive there being a mo-

Lord Selborne:—What is the precedent have upon that subject?

Mr. Bompas:—The whole of the Quarter S ons and the Recorder seem to me, as I understand——

Lord Selborne:—This is not a court constit for the Administration of Justice.

Mr. Bompas:—There is the case of *Fletcher v. enison* under the Clergy Discipline Act.

Lord Selborne:—If your argument is not rig that his presence was necessary, there is nothing to prevent the arbitration goi on in his absence. How could the Court give a mandamus to compel him to be t e if his presence was not necessary?

Mr. Bompas:—Of course I am not urging that if he a man who had no statutable duty to attend, that is to say, if this tribunal was e a corporation, and it was sufficient for two out of the three to be present and the was no duty on the third, then I should see great difficulty in holding that a man mus would lie. I am answering the argument, as I understand it to be on the o r side, that two must be sufficient, because otherwise the third could defeat the whole object of the Act by keeping away. I say it is not necessary to hold th interpretation, which, I submit, is contrary to *Grindley v. Barker* and *Ex parte Ro rs*, in 7 *Cowen* and to the *dicta* in one or two of the other cases which were cited y my learned friend. It is not necessary to hold it, because if your Lordships we to hold that this was a tribunal appointed, of which the three must meet to per m the acts of the tribunal, then it would follow that the power of enforcing tha attendance is, as I pointed out to your Lordships, exercised constantly in ordinary bitrations by the French courts and was by the Roman courts under the Roma law, and is not only in the courts of justice of which the Court of Queen's Benc may be considered to be the head, but in the case of inferior tribunals which certainly, I submit, differ little from a tribunal constituted by Act of Parliament, that the power exercised by the English Court of Queen's Bench in such cases would be equally exercisable by the Court of Queen's Bench in whatever Province the arbitrator was domiciled. It would be a statutable duty which he having accepted is cast upon him and a statutable duty which I apprehend could without difficulty

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be enforced upon him in the courts of the country in which he had taken up his abode.

One word only with regard to the case cited by my learned friend from the 2nd *Pickering*. I think your Lordships will find that although no express reason is given for the attendance of the majority in that case being held sufficient when your Lordships read the case, you will find the Chief Justice puts it upon this. It was a committee of a Corporation: Corporation Law applied to the body who appointed the committee, and as I read it, the Chief Justice there said that a committee of the Corporate Body had presumably the power of the Corporation itself, in so far that a majority might be present, and being present, could decide: but in the same case where three commissioners were appointed to choose a place where the chapel that was to be built should be located, and where they were not a committee of a Corporation but an independent body of commissioners, it was expressly held that not only they must all be present, but that they must actually be unanimous, and all the cases cited showing that unanimity was necessary the whole proceedings were set aside because the three commissioners appointed by the Corporation were not unanimous in their decision as to where the chapel should be located. I have not had an opportunity of looking at the case in the 2nd *Pickering*, and I cannot, therefore, give your Lordships the solution of it, but I would ask your Lordships' attention to this principle, which may be the principle in that case. I have not seen the case, and therefore I cannot say, but in many cases where commissioners or arbitrators are appointed, the reference is expressly to three or any two of them, and the right of the majority to decide is put in that form; then I apprehend, that is the conferring of a power upon the two, the two are thereby constituted the body to decide, and it is because of that power in them, as in the case cited by Lord Eldon, where the commissioners, or four, or three, or two of them were to decide; it is because the power is conferred upon the two, that the two constitute a quorum and can act without the third. Here there is nothing of that kind but the power is given simply to the three, and if, by the Common Law rule, this majority of those three can bind the other one, that I humbly submit does not in the least imply that there is any power in the two to act in the absence of the third.

I will now pass very shortly to the last of the questions which were raised before your Lordships as to the question of substance and merits so far as they are raised on page 53, and I have again humbly to submit to your Lordships that some meaning must be given to the mention of Upper Canada and Lower Canada. But it is quite true, as pointed out by Lord Selborne, that Upper Canada and Lower Canada are not always used in the Act of Parliament as meaning Lower Canada and Upper Canada before their Union—that is clear they are not; but I think it is equally true that they see no single case throughout the whole Act in which the words Lower Canada and Upper Canada are used in respect of the Provinces after the separation; they are never used as equivalent to Quebec and Ontario, and therefore it cannot mean that the assets and debts of the two new Provinces shall de divided; it means that the assets and debts of Canada, no doubt, but, as we submit, of Canada viewed as consisting of two separate parts which were united, shall be divided. What we argue is, that the use of that expression must mean something, and while we could not assume that it means Canada at the time immediately before the passing of the Act, we say that it means Canada viewed as a union of those Provinces, and while we are quite prepared to admit that if the arbitrators had taken that into account and considered the matter had adjudged that the debts of Lower Canada and Upper Canada ought to be divided equally and not divided according to the amount of these debts at the time of their union in 1840, they might have

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had power to do so; but what we submit is that they could not do that. The words of their judgment are expressly strong that they had no right to take into consideration that matter, that they were bound to divide the assets and debts solely according to the existing state of affairs. Now, my Lords, what we do say is that they were bound to act upon some legal principle. This was not a case in which certain debts and assets were thrown at their heads, they were allowed to toss up and say—upon no principle, but because you and I think fit, we will divide it in certain ways. They were intended in some sense to be a court to decide according to principles. We say the Act pointed out to them certain two principles, at any rate they were bound to act on one principle that they were to view these debts and assets in relation to Upper and Lower Canada; that that was to be the foundation of the principle upon which they were to decide, and that they were to consider what was their relation to those two old Provinces still existing as separate entities just as England and Scotland do, and meant in Acts of Parliament down to the year 1867, for I looked up the Acts of Parliament and see that that was so, that they were bound to take into consideration the relations of those debts and assets of those Provinces in making their division. That I think was the first principle.

The second principle, I submit, is that by the 112th and 113th sections, it was said that particular debts and assets should be held by them jointly, and we say, therefore, divided between these two equally—at any rate, we say divided between them proportionably. Now, whether or not those numbers at the end of the different items meant their real value or not, their real value, I apprehend it is clear that they had not divided those assets and debts proportionably between the parties, they do not profess to have divided them equally, they do not, as I understand, profess to have divided them proportionably—I say those two sections must mean something, and that the second principle laid down by them was that those particular debts and assets should be divided proportionably between the new Provinces, not between Upper and Lower Canada, but treated as if they belonged to Quebec and Ontario. We say that they have gone aside from this principle and have acted merely apparently upon no fixed rule whatever, and that therefore, as has been suggested by Sir Barnes Peacock, whether or not without reason the Crown could have revoked the appointment, at any rate, there being reason, the Crown was entitled to revoke that appointment.

I understood your Lordships to say that the other points touched upon by my learned friend, Mr. Benjamin, are not open to us, but only such as come within page 53, therefore I abstain from going at length into those other matters. We submit that they have not divided, that they have not adjusted the debts as they were bound to do. I humbly submit that Sir Barnes Peacock has shown conclusively what I submit to your Lordships, that Canada was a party to the arbitration and was interested in the adjustment of those debts, and, as Sir Barnes Peacock pointed out, the second head directly affects the amount of money to be paid to each particular division of the old Province of Canada by the Dominion of Canada, and I submit to your Lordships that they were bound to divide them according to this case, that they have failed to do so, and that, therefore, the award on its merits is wrong. I therefore humbly submit to your Lordships that the Province of Quebec is entitled to the protection which the Act of Parliament gives her, of these three arbitrators, and that if Mr. Justice Day has failed to perform his duty as part of that tribunal, we have a right to the tribunal constituted by the Act of Parliament before our property is taken away from us.

THE LORD CHANCELLOR:—Their Lordships will submit their humble advice in this case to Her Majesty.