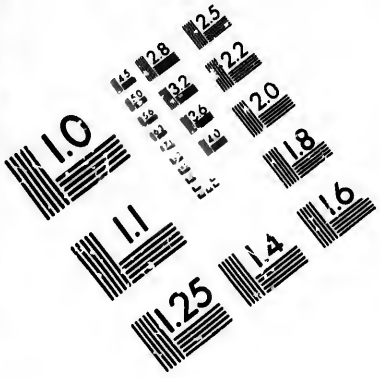

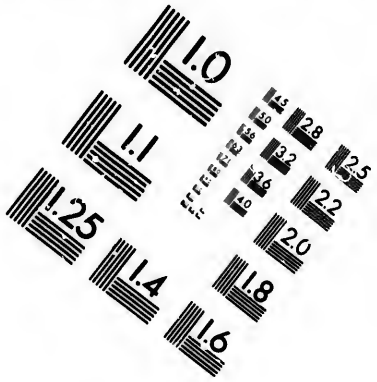

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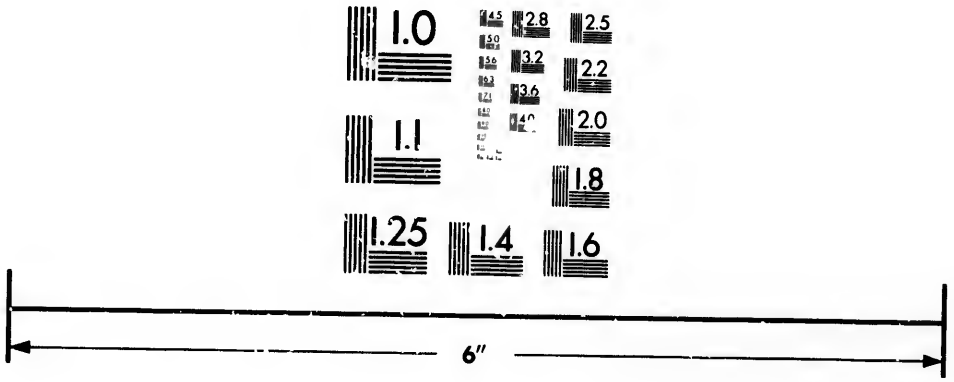

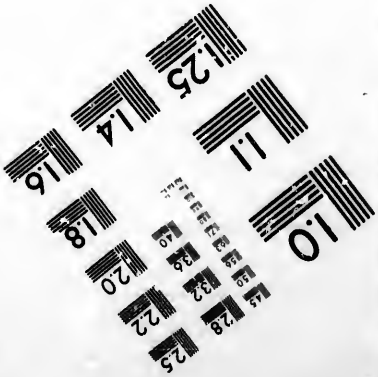

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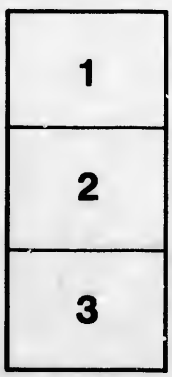

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REPORT

IN THE MATTER

OF THE

DIVISION AND ADJUSTMENT

OF THE

DEBTS AND ASSETS

OF

UPPER CANADA AND LOWER CANADA,

UNDER THE

142ND SECTION OF THE BRITISH NORTH AMERICA ACT, 1867.

OPINION AND JUDGMENT

OF THE

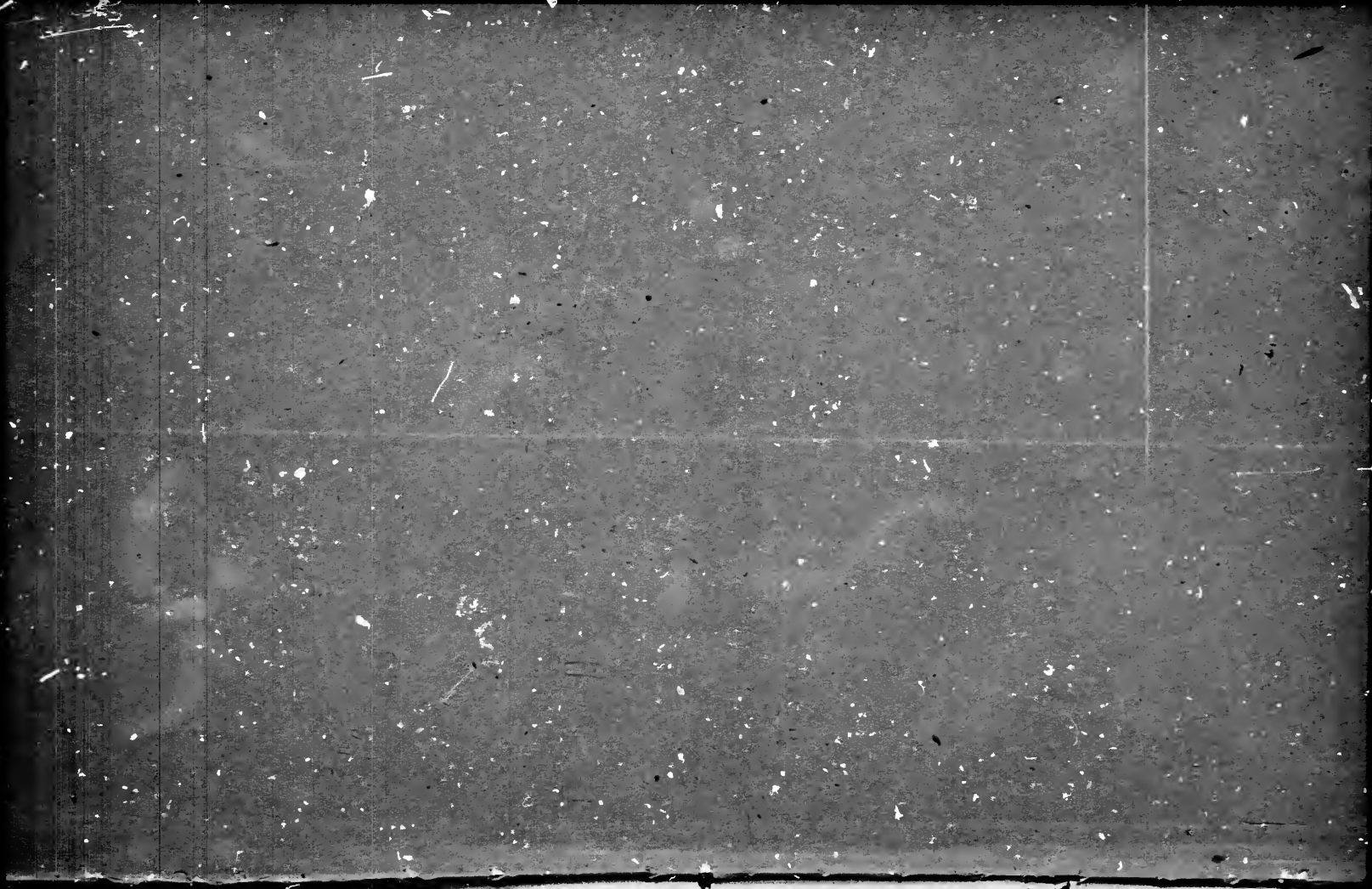
ARBITRATOR

APPOINTED BY THE

GOVERNMENT OF QUEBEC,

WITH THE REASON ASSIGNED FOR HIS WITHDRAWAL FROM THE ARBITRATION.

Montreal:
PRINTED BY JOHN LOVELL, ST. NICHOLAS STREET.
1870.



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1870.

In the Matter of the Division and Adjustment of the Debts and Assets of Upper Canada and Lower Canada, under the 142nd Section of the British North America Act, 1867.

Opinion of the Arbitrator appointed by the Government of Quebec.

The elaborate argument with which the Arbitrators have been favored, respecting the principle and mode of the division and adjustment of debts and assets to be made by them, under the provisions of the B. N. A. Act, 1867, has been carefully considered, and I think it right in stating the conclusions at which I have arrived, to explain at some length the grounds and process of reasoning, upon which these conclusions seem to me to be justified.

In the discussion of the subject we must of course start with the 142nd Section of the Act, from which all the powers of the Arbitrators are derived.

It is enacted in that section "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." The Act lays down no rule or mode for the division and adjustment, but leaves the subject with the simple provision contained in these few words.

In consequence of this silence of the law, the Counsel for the Provinces of Ontario and Quebec, respectively, have submitted several suggestions as to the principle under which the division should be carried out, and have in their printed cases presented these suggestions in the form of four distinct propositions; of these, three are presented on the part of the Province of Ontario, and one on the part of the Province of Quebec.

The first proposition, found on p. 2, of the printed case of Ontario, is that the division shall be made according to the "Proportions of local debts."

The second, that it shall be made according to the "Proportion of population in the two Provinces," and, the third, that it shall be made according to the "Proportion of capitalized assets" of each province.

The last proposition, No. 3, may be at once disposed of in order to avoid further reference to it.

It is admitted by both parties that it can only be adopted as a mode of division by mutual consent, and as no such consent has been given, it cannot of course be entertained. The only observation I have to make upon it is, that the valuation of the assets presented in the proposition is utterly unsound and delusive, and if in a later stage of the proceedings it should be found expedient in carrying out whatever principle of division may be adopted, to follow in some degree the idea which underlies the statement of figures there given, an entirely different standard of value must be adopted.

The fourth proposition, the only one submitted on the part of the Government of Quebec, is to be found on the 3rd page of the printed case under No. III. It is "to treat the case as one of ordinary "partnership, and apply the rules which govern the partition of "partnership estates." It is the business of the arbitrators, either to adopt one or other of these propositions, with such modifications as may seem to them just; or if in the course of their investigations a better rule of division should be found, to substitute such rule, although it may differ materially from them all.

Before entering upon this difficult branch of the duties of the arbitrators, it is proper to declare my opinion that their office is not representative or diplomatic. They are not delegates or commissioners to settle the question of division by negotiation and compromise, each acting for his own Government and bound to obtain for it all the advantages he can; but as arbitrators their character and duties are judicial, and this character implies that the governing rule of division, whatever it may be, must secure a true and just equality, so that one Province may obtain no advantage at the expense of the other. It follows then that the

duty of the Arbitrators is to make the division and adjustment confided to them, not according to any fanciful or arbitrary notion of expediency or convenience, but in conformity with some fixed and recognized principle. And this principle of division, be it observed, must not be confounded with the mode of division. They are very different things. The principle must be uniform, controlling the whole subject, while the mode may be varied to suit the difference of circumstances. In other words, having settled the principle upon which the whole division and adjustment shall be based it may then be allowable to apply different modes of dealing with particular debts, or assets, according to origin or locality, or other consideration, as the convenience of one or other of the parties may suggest. Taking for guidance this view of the duties to be performed, I proceed to examine the first and second propositions submitted in behalf of Ontario and afterwards that submitted on the part of Quebec.

1st Proposition.—With respect to the first of these propositions, that the divisions should be made according to the "Proportions of local debts," it may safely be affirmed that although it suggests a mode of proceeding which might under certain limits and modifications be convenient, yet it is purely arbitrary and furnishes no principle or rule upon which the whole division of debts and assets could be carried through. To give it an apparent reasonableness, it must rest upon the assumption that the local debt has been incurred by an expenditure which has been for the local and exclusive benefit of the Province against which it is charged. But in very many instances such an assumption would be unfounded. It frequently occurs that there is no asset corresponding to the debt, and that expenditures, made from mixed motives, have produced no more advantage to the section of the Province in which they were made than to the other, and too often have produced none at all.

But even if this mode of division could be applied as a rule in dealing with the debts, it must break down in dealing with the assets. The giving to one section of the Province or the other an asset created out of the common fund, merely because it is situated in that section, is obviously not reasonable, and might lead to the greatest injustice; all the really valuable assets might be situated in one section, and those in the other be of little productive worth. The pos-

sibility of such a result of inequality shews that although this may be occasionally a convenient mode it cannot be adopted as a uniform principle of division. To answer that an equality might be preserved by making the difference of value chargeable in favor of one Province against the other, is to give up the proposition, and to adopt another rule, namely, one of equalization, and this of itself shews that it is unsound and insufficient.

But the truth is that the locality of the debts or assets has really nothing to do with the principle of division. Every asset situated in or originated for one Province, but created by the joint funds of the two, belongs *totum in toto et totum in qualibet parte* to both in equal undivided portions.

"The Upper Canada building fund" is as much the property of Quebec as of Ontario; each has contributed equally to its creation, and as the money so contributed belonged as much to the one Province as to the other, so does the fund itself. If it were a convenient arrangement in the distribution of the assets to assign the Upper Canada Building Fund to Quebec, or the Municipal Fund of Lower Canada to Ontario, there is no reason of exclusive right why it should not be done, the sole consideration being one of convenience and not of legal right. All, then, that can truly be said in favour of this proposition is that it may be convenient in some instances to assign a certain debt or asset to the one Province or the other, on account of its locality and the greater facility of dealing with it, but each of such particular assignments must be made upon reasons which are special to itself.

The foregoing detail of considerations relating to this proposition has been given in order to shew how imperfect it is, and how utterly incongruous with any correct or logical notion of the division to be made, but it might have been at once dismissed upon the broad ground that it is a mere arbitrary contrivance for dealing with the matter, or rather a part of the matter, before us, and is not based upon any principle of right, or any recognized law or usage in the partition of property held in partnership, or other form of community or joint tenancy. As, then, there is in this proposition, no principle suggested which is sufficient for carrying out a just and complete division of debts and assets under the authority of the B. N. A. Act, it cannot be accepted.

2nd Proposition.—The second proposition, that of basing the division upon the "Proportion of population," is not less liable to objection than the preceding one. In itself it is not sustained more than the other by any recognized law or usage, nor does it rest upon any fixed foundation.

The latter defect is obvious. The relative proportion of the population in the two Provinces is continually shifting. It was one thing in 1841, and is entirely another thing now. If the division had been made within a year from the former date nearly two-thirds of the debts and assets would have fallen to Lower Canada, although that Province owed nothing and the assets of Upper Canada were then of no available value; if a few years later, one-half: if in 1861, four-ninths; and if it were to be postponed for ten years longer, perhaps one-third. In short, it varies from year to year, and unless it be assumed that the rights of the parties are shifting with every death and birth, it is difficult to understand how they can be dealt with upon so unstable a basis.

This mode of division is not defensible upon the ground of equity, for it might happen that the local debt of the smaller population would be much greater than that of the more numerous, or that the debt of the larger population would far exceed in amount the proportionate difference of numbers between the two. In either of these cases the division, if by population, would work a manifest injustice. If, for example, the smaller population were in number 1,000,000, with a local debt of $2,000,000, and the larger population were 3,000,000, with a local debt of $2,000,000 also, the division by population would impose upon the latter three-fourths of the whole debt, that is to say, its own local debt and $1,000,000 of the local debt of the former.

Nor can the equity of such a rule be vindicated upon an assumption that the ability of a country to pay depends necessarily upon the number of its population, for such an assumption cannot be sustained. It would not be difficult to cite numerous cases to shew that it is not justified by experience or history.

But the conclusive objection to the proposition, as affording a rule of division in the present case, is that it is inconsistent with, and indeed contradictory to, the principle upon which the Union of 1841 was based. It is obvious that the two Provinces were treated in the

Re-Union Act of 1840, as separate Governments, with fixed rights between them as units, and without regard to the difference of population. Not only was the population of Lower Canada, then nearly one half more than that of Upper Canada (the former being in round numbers 663,000, and the latter 465,000), but its revenue and its assets were also very much greater; yet the representation was equal for both Provinces, and an absolute equality of debts and assets created during the Union was established between them. This rule of Union settles by necessary implication the rule of division. The law which in case of dissolution was to govern the distribution of the debts and assets created during the subsistence of the Union, was then fixed upon an unequivocal basis of equality, and cannot now be set aside for any other—much less for that other (namely comparative population) which was then pointedly rejected.

The chief argument in support of this second proposition (proportion of population) rests upon the fact that in several instances population or something nearly approaching it has been made a basis for the Legislative distribution of public monies.

Thus, the appropriation for common schools is made dependant upon the number of inhabitants.

The distribution of the Municipal fund in Upper Canada was according to the number of ratepayers.

And by the B. N. A. Act, 1867, the subsidy to the several Provinces was based in part, but not wholly, upon capitation.

Of all these, as well as of the sum granted to the Eastern Townships of Lower Canada, by way of indemnity under the Law for abolishing the feudal tenure, it may justly be said that they were particular rules created by the Legislature for special cases, each having some peculiarity not belonging to the other.

The first, population absolutely, as the more people there are of course the more children are to be educated; the second, ratepayers, a limited class of persons very different from general population; the third a combination of capitation with other circumstances.

The rule in each case was adapted to the special circumstances of that case, and to extend these rules or either of them, from the particular case to a general application for the regulation of rights

of an entirely different nature, would be to violate palpably the plainest laws of reason and of logical inference.

A division according to population might be a convenient and speedy mode of bringing the present controversy to a conclusion, if such division were to be effected by negotiation and compromise; but as it neither rests upon any legal principle, nor is sanctioned by any agreement of the parties, the arbitrators, even if the objections to it were less conclusive, cannot entertain it in face of the rule clearly established by the Act of 1840, that the equality during the Union must be absolute between the Provinces as units, without reference to the difference of their population.

The foregoing propositions then suggest no principle under which the division and adjustment required by the 142nd section of the Act can be carried out. The arbitrators are, therefore, left to seek one, first, in the declared intentions of the parties, and if there be no indication of their intention, then it must be looked for in the system of law and equity common to both countries.

With respect to the intentions of the parties, it has been already shewn, on a former page, that they are indicated by the terms of the Re-Union Act of 1840. In section 12 of that Act, it was provided that the representation should be equal: in section 50, that all duties and revenues of the two Provinces should form one consolidated fund for the public service of the Province of Canada; and in section 56, that the interest upon the debt of each Province should form the second charge upon this Consolidated Revenue. But the population of the two Provinces at that period was nearly as three to two in favour of Lower Canada, and its revenue was much in excess of all its liabilities, while that of Upper Canada, burdened with a debt of over five and a-half millions of dollars, shewed an annual deficiency of over $200,000.

The provisions of the Act of 1840, in connection with these facts, shew that during the continuance of the Union there was to be an equality of advantages, without regard to the inequality of circumstances. All the liabilities of each Province were to be paid out of the Consolidated Revenue. There was, indeed, no other source from which they could be paid after the particular revenue of each Province had been merged in that general one.

As the Union was expected to be perpetual, no provision was made for its dissolution; but there can be no doubt that the equality contemplated in its formation carries with it necessarily upon severance a like equality, without reference to population or other advantages, in the division of all debts and assets created during its subsistence; and this rule of division resulting from the only source which can be regarded as authoritative and applicable to the precise question, is coincident with that which the law of both countries would afford in the absence of other guide.

In view of that law and of the Act of 1840, with the resolutions of the Legislatures of the respective Provinces which preceded it, the Union effected by the latter was certainly in the nature of a contract, and there is but one recognized denomination of contracts to which this relation of the Provinces towards each other can be assimilated; that is the contract of partnership—not a partnership in the more technical meaning which the convenience of commerce, acting upon the doctrine of the courts, has attached to the term, but in its older and broader signification—the *Societas* of the Roman Law, which is the source of the whole law of Partnership in Europe and America.

The adoption of the rules which govern the disposition of the property of such associations involves the acceptance, in a qualified degree, of the proposition submitted on the part of Quebec; but it is not to be inferred that the arbitrators necessarily accept the form and details which are presented in connection with that proposition. Indeed, it must be understood that in dealing with the questions now before them it is intended only to settle the principle of division and adjustment, and not to pronounce any opinion upon the correctness of the figures or other statements to which such principle may apply.

The Union then of Upper and Lower Canada in 1841 must be regarded substantially as an association in the nature of a partnership. It might be assimilated to a variety of associations and forms of community of property falling under this general name, such as the community between husband and wife, and certain relations of joint ownership, which are known in the older law, and are all included under the generic term *Societas*.

A definition of that contract which has been accepted by the

highest authorities as at once concise and complete is furnished by a distinguished Civilian after a review of all those which had been given by his predecessors. Under this definition, partnership (*Societas*) is a contract by which parties consent to place something in common, with a view of sharing in the gain or benefit which may arise therefrom.

The relation of the Provinces to each other was more strictly analogous to the universal partnership—the *Societas universorum bonorum*—than to any other kind of association. It answers every condition of that division of universal partnership in which the revenues and sources of income of the parties are united into a common fund for the benefit of both. In fact language, similar to that of the 50th section of the Union Act of 1840 might have been used in a private agreement for the formation of such a co-partnership. The revenues of the respective Provinces, it says, shall form a consolidated fund for the service of the Provinces of Canada. In such associations the participation in what is acquired during the partnership, in the absence of agreement on the subject, is equal under the Roman as it would be under the English law; although a different rule obtained in France, and is adopted by the modern code in that country.

This kind of community is as old as society itself, and instances of universal partnership constantly occur, not only in times of great antiquity, and under the civilization of Greece and Rome, but also in Europe during the earlier and middle ages. They have become of rare occurrence in the present day in which partnerships are mostly commercial; but a true and just spirit gives vitality to the principles which lie at the bottom of this relation and these principles, carefully and fairly applied, will carry out with absolute completeness a division of all the interests before us, as thoroughly as if the conflicting rights had been those of two obscure individuals, instead of two large and populous Provinces; for they do not rest upon any respect of persons, but upon that larger and firmer basis of abstract right which is unchanging and of universal application.

The dignity of the parties, or the character of the instrument—a public statute—by which they were united, must not be regarded as presenting any difficulty or in any manner affecting this view of their relations.

There were, of course, broad political considerations involved in the Union, but in so far as the financial position is concerned, the Provinces of Upper & Lower Canada were neither more nor less than great corporations, and the principles which apply to their joint contribution of capital in the formation of the Union, and to the partition upon its dissolution, differ in no wise from those applicable to any other corporations, which combine and use their common property for their common convenience and profit.

I think, then, it cannot reasonably be doubted that the only course which is sound in principle, and will be found safe and effectual for carrying out a true division and adjustment of the debts and assets to be disposed of, is to regard the relation of the late Provinces, substantially, as a universal partnership, without necessarily applying to it the merely technical rules which have been created by the peculiarities and requirements of commercial partnerships.

The treatment of the Union as an association of the description indicated above, involves an examination of the rights and liabilities of each of the Provinces under the general rules of law appertaining to that kind of relation, and the consideration, among other questions, of one which is deemed to be of so much importance that it has been submitted in an isolated and prominent form, and the arbitrators have been urged by both parties to give a distinct preliminary opinion upon it. It is the question of the disposal of the debts and assets of the Provinces which existed at the time of the Union in 1841. It has been presented and argued chiefly with reference to the debt then due by Upper Canada. The amount of that debt was between five and six millions of dollars. It had been contracted chiefly in the construction of public works which were then unfinished and unproductive, and there were no avalaible assets for meeting the debt or the annual interest upon it.

The pretention of Quebec respecting this debt is, that it makes part of the debts and assets which are to be dealt with, and that the arbitrators cannot disregard it in distributing the liabilities which each Province is to assume.

On the other hand it is contended in behalf of Ontario that the arbitrators cannot deal with this debt because it existed prior to 1841, within which date, it is said, their investigation must be confined, and beyond which they cannot go without exceeding the

authority conferred upon them by the B. N. A. Act. Moreover that the debt, together with all the assets, were merged into the common fund and liabilities of the the new province of Canada created in 1841, and that it can no longer be distinguished from the general debt, and has, in fact, been paid and discharged. From these conflicting pretensions arise two questions:

1st. Whether the arbitrators are restricted by the terms of the B. N. A. Act from going at all into the examination of any particulars of debt, or asset of either Province, which existed before 1841.

2nd. If they can go into such examination, whether by any particular circumstances or general rule of law, they are debarred from taking this debt into consideration in the division and adjustment of the debts and assets under the provisions of section 142.

If the former of these questions be decided in the negative it will of course render unnecessary any answer to the latter.

It is to be observed, with respect to these questions, that although they naturally arise in dealing with the relation of the Provinces as a partnership, yet they exist independently of that relation and must have come up for consideration even if origin of debt or comparative population could have been made the basis of the division.

1st.—The first question then is whether the Arbitrators are restricted, by the terms of the B. N. A. Act, from going at all into an examination of any particulars of debt or asset of either Province which existed before 1841.

It is urged by the counsel for Ontario that the terms of the Act preclude an enquiry into any matters anterior to 1841, in the same way that Arbitrators would be confined within the limits of time specified in a submission of conflicting accounts between private parties.

It cannot be pretended, however, that there are in the Act any words of direct and express limitation of the investigation to debts and assets which have originated since 1841.

The argument on the subject rests upon inferences deduced from the character and general purport of the whole Act, and the comparison and construction of different portions of it.

In support of the view taken in behalf of Ontario, the preamble and the 6th section of the Act seem to be chiefly relied upon; but after a careful consideration of both these I am unable to discover

in either or in both together, whether taken in connection with section 142 or alone, any words or form of expression from which the conclusion contended for could, by the most liberal implication, be derived. The inducements in the preamble, and the provision in the 6th section appear to me to relate to subjects entirely unconnected with that under consideration and not in any degree to affect it, except perhaps that the names Upper Canada and Lower Canada, contained in that section, may help to explain the meaning of the same names in section 142.

The fact is that the question must be decided upon the terms of this section (142.) If the authority given by it does not include a right to examine and decide all the debts and assets, whether they originated before 1841 or since, it cannot be supplied by implication from other portions of the law. These other portions may be used to explain and interpret the true meaning of that section, but they cannot be used either to extend or to restrict the authority which is given by it.

Bearing in mind, then, that the section 142 is the only source and measure of the authority of the arbitrators, let us enquire what it says :

" 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."

These terms i must be admitted are of the broadest and most comprehensive character—debts and liabilities, credits, property and assets—no qualification as to character or origin of any of them, no mention or indication of any limited time. Do not these terms necessarily convey an authority, and impose a duty of dividing and adjusting all the debts and assets, not a part of them only ? Can the arbitrators, in the face of words of such large import, refuse to consider any particular of these debts and assets, or place upon themselves a restriction as to time which the law has not placed?

But not only has the law not placed such a restriction, its language is positive in the opposite sense. Observe that the debts and assets to be divided are not those of Canada but are those of *Upper Canada* and *Lower Canada.*

The use of these names is an unequivocal expression of the intention of the law. Had the term, debts and assets of *Canada*, been

used, there might possibly have been a colourable ground for argument—that those debts and assets which originated in that Province during the Union were alone intended; but the use of the terms "debts and assets of Upper Canada and Lower Canada," put the matter beyond controversy.

This form of designating the debts is the same as that found in the Union Act, 1840, particularly in the 56th section, by which the interest of the public debt of the Provinces of Upper Canada and Lower Canada, "or either of them," is made a charge upon the Consolidated Revenue of Canada, and unless the debts and assets of those Provinces, anterior to the Union of 1841, as well as since, were intended by the B. N. A. Act, the form of expression adopted in it is grossly inaccurate.

But that these names, Upper Canada and Lower Canada, were not used unadvisedly in this connection will be manifest from a reference to other portions of the Act.

In section 6, we have the first definition in the Act of the names Upper Canada and Lower Canada. They were respectively parts of Canada, and are now Ontario and Quebec. This section as well as the language of the act, and indeed the whole course of legislation from 1841 to 1867 establish beyond the possibility of reasonable controversy the identity of Upper Canada with Ontario, and of Lower Canada with Quebec. In section 104 we have a reference to the public debt of the late Province of *Canada*. In section 109 the same form of expression is used, "Lands, &c., of the Province of *Canada*." In section 112 Ontario and Quebec are made conjointly liable to the Dominion for the "debt of the Province of *Canada*," and in section 113, the assets are described as "assets of the Province of *Canada*."

This form of expression is critically correct in all the places where it is used. The words, *of Canada*, are carefully chosen to indicate the precise thing intended; but, on coming to the 142nd section, in which the Act was dealing with the rights of the two Provinces *inter se*, there is a marked difference of expression. It is no longer the debts and assets of *Canada*, but the debts and assets of each section which comprised that Province, *Upper Canada and Lower Canada*, thus plainly taking away any ambiguity which the use of the name Canada might possibly have caused as to the com-

prehensiveness, both with regard to matter and to time of the authority and duty of the arbitrators. Indeed, if in putting a meaning upon the words of the 142nd section, it were necessary to exclude an examination, either of the debts and assets existing prior to the Union of 1841, or of those created during its subsistence, the exclusion under a strict reading would be rather of the latter than of the former; for in this section alone are they designated as debts and assets of Upper Canada and Lower Canada, while throughout all the other portions of the B. N. A. Act they are called debts and assets of Canada. The sound and complete interpretation, however, undoubtedly is, not to adhere to the letter but to accept the broader signification, and regard both the separate rights and interests which existed before the Union of 1841, and any others which may have originated afterwards, as making together the true subject matter with which the arbitrators have to deal.

There are certain general circumstances which might be stated to show that not only is the pretention that the arbitrators cannot deal with any matter which originated anterior to 1841 negatived by the terms of the B. N. A. Act, but that on less technical grounds that pretension is inadmissable. These considerations, however, may more properly be taken up under the second question, which must now be considered.

2nd. Whether by any particular circumstances, or by any general rule of law, the arbitrators are debarred from dealing with this debt in the division and adjustment of the debts and assets under the provisions of section 142.

It is urged in behalf of Ontario that by the law of Partnership, in the absence of any agreement or declaration to the contrary, the contributions of the two Provinces, parties to the Union, are presumed to have been equal, whatever may have been the actual inequality of their assets at the time ; that these assets and the debts were joined and merged in one common stock, and the equality so established by presumption of law cannot now be examined or disturbed.

In support of such conclusive presumption, and recognition of the equality of contribution, reference is made to several sections of the Act of 1840, and more particularly to section 56, by which both

interest and principal of the public debt of each of the Provinces of Upper and Lower Canada are made a charge upon the Consolidated Revenue of the Province of Canada.

In this view of the subject it is evident from what has already been said that I cannot concur. It seems to me that a sufficient answer is given to it by the exposition on the preceding pages of the clear import of the language used in the 142d section of the B. N. A. Act; that *all* the debts and assets of Upper and Lower Canada, as well before as since 1841, are to be divided and adjusted. This answer would dispose of the conclusive presumption of equality of contribution, even if that rule were applicable in the present case. But it does not apply, for a debt which one partner owes before he enters the partnership, and for which the partnership becomes liable to the outside creditor, is not a contribution to the capital stock. In other words, debts are not assets, and the rule cannot be stretched from the one to the other so as to treat a debt as a contribution to the common fund.

To say that by law, the contributions shall be presumed equal, when the contrary is not specially declared, is a very different thing from saying that on dissolution of the partnership one of the parties shall be charged with the debt or a portion of the debt due by the other before the partnership began.

The contributions are presumed to be equal in order to justify the rule that, in the absence of special agreement, the shares in the profits are equal, but the equality of the shares does not create a presumption of equality of contributions so conclusive that it may not be overthrown by patent facts. The true meaning then of the rule invoked is not that the contributions shall be presumed to be equal when the inequality is certain and the degree of it manifest and precise, but that, in the absence of special agreement, the shares in the benefits of the partnership shall, by presumption of law, be equal notwithstanding the inequality of contributions. For instance, if the contribution of one partner were formally declared to be $10,000 and of the other $5,000, but without any stipulation as to the proportion of their respective shares in the profits, the rule of equality of shares might perhaps be applied; but it will not be contended that in such case there would be a presumption of

equality in the contributions which would override the positive declared fact of their inequality.

Now what are the facts before us? Documents of the gravest authority—the public accounts—shew what the debts and what the assets of the Provinces of Upper Canada and Lower Canada respectively were at the time of the Union in 1841. These accounts were made up officially by the two Governments, and are, therefore, to be received as formal declarations by the parties of the precise condition of the affairs of each at that time. They shewed a great inequality, and notwithstanding that inequality it was settled by agreement direct or implied, and part of which took the form of statute law, that the benefits and liabilities of the partnership, arising from their political Union and the consolidation of their revenues were to be equal during its continuance, which was then expected to be perpetual. But this agreement did not change the patent and declared fact of the inequality of contributions, and much less did it constitute an undertaking on the part of Lower Canada to pay out of its separate revenue, after the dissolution of the partnership, the half or any other portion of this debt of Upper Canada. It may be added, that, even if the amount of this debt had been really paid during the Union, which it was not, it would make no just difference in the present position of the parties toward each other, for the result of such payment would be that so much was taken out of the common fund for the payment of the particular debt of Upper Canada, which would otherwise have been applied to the discharge of the common debts, and thus the present amount to be divided has been increased to the sum, in round numbers, of $10,500,000, instead of the $5,000,000, which it would have been, supposing the debt of Upper Canada to have been $5,500,000.

But to pursue this branch of the question a little further. By the terms of the Union Act, 1840, sec. 56, the debts of Upper Canada and Lower Canada are spoken of, and certain provision is made for them, under the description of the "public debt of the Provinces of Upper and Lower Canada, or either of them," out of the Consolidated Revenue of Canada. They are kept apart, two debts, one of each Province—the precise amount of each was known, and there is no declaration in the Act by which they are

fused together, or their identity as separate and distinct liabilities is lost. They were kept distinct in the public accounts of 1841, made up after the Union, and were brought before the Legislature in the same distinct form, upon a motion to that effect in 1847, and this distinction is recognized and preserved in statutes posterior to that period. By one of these Statutes (12 Vict. C. 5) authority is given to issue debenture to redeem the debt of Upper Canada and by another (22 Vic. C. 84, 1858) provision is made for issuing Provincial stock for redeeming such debentures.

The change of form of this debt, by putting it in the shape of debentures or securities for public loans, which may have been used to pay off its precise figures, makes no difference. It is still the debt which Upper Canada added to the joint indebtedness of Upper and Lower Canada, and the question now is not whether Upper Canada shall pay it to Lower Canada, but substantially whether Lower Canada shall pay the debt of Upper Canada to a third party. It is true that by the section 56 of the Union Act of 1840, the payment of the interest on the debts of Upper Canada and Lower Canada was made a second charge on the Consolidated Revenue; and the principals of these debts were included in the general terms of the sixth charge upon it. This was a matter of course, for, as the revenues of each Province made up the revenue of United Canada, there was no other source from which the interest could be paid or the principal be guaranteed; but this necessary arrangement was made for the protection of the public creditor, and has no influence or bearing upon the rights of the Provinces *inter se*. Of course the creditor was to be paid, and he was paid the interest out of the Consolidated Revenue during the Union; but the principal was never paid out of the consolidated revenue or really discharged, it was only carried on by new loans, and when, on the separation of the Consolidated Revenue into the two particular revenues, the question arises out of which of these this debt of Upper Canada is to be paid, the answer surely cannot admit of hesitation as between the two Provinces that the debt of Upper Canada is to be paid out of the revenue of Upper Canada.

Before concluding the investigation of the subject of the liability of one Province for the debts of the other, after the dissolution of

the union, more particular reference should be made to the specific provisions of several sections of the Act of 1840. These are sections 50, 55, and 56. In the first of these, section 50, it is provided that all the duties and revenues of the said Provinces shall form one consolidated fund to be appropriated for the public service of the Province of Canada and subject to the charges mentioned in the following sections. These charges are specified in the sections numbered from 51 to 56, and are all made charges specifically upon the "*Consolidated Revenue Fund.* They embrace of course all the liabililities which at that time and before were charges on the separate revenue of each Province, and some others created by the Act itself. Among them, in section 56, was the interest on the public debt of each of the Provinces of Upper and Lower Canada, which was the second charge; and at the end of the clause is a general declaration that all other charges, which may be construed to include the principals of these debts, should form the sixth charge *upon the rates and duties levied in the Province of Canada.* Now the result of this phraseology is not that the Province of Upper and Lower Canada individually were made jointly liable for each other's debts then existing, but the liability was charged upon a special fund, that is, upon "*the rates and duties levied in the Province of Canada* and making up its *Consolidated Revenue Fund.* But by the dissolution of the Union this special fund ceased to exist before any payment had been made out of it, of the principals of the debts, and with its extinction, the charge upon it necessarily terminated. The extinction of this fund is so absolute that not only has the consolidation ceased, but the rates and duties from which the common revenue was derived have ceased to appertain to either Province. The separate revenue of each being now derived from newly created sources of an entirely different character. I do not believe that any law can be found, or any legal inference be suggested under which after this extinction (and in the absence of express stipulation) one Province can be held to pay the debt of the other from its particular revenue derived from sources which did not, and could not exist at the date of the union of 1841, or at any time during its continuance. On the contrary, it seems to me clear that the effect of the dissolution was not to leave either Province liable for the debt of the

other, but to replace each in so far as its particular liabilities were concerned, in the same position in which it was prior to the formation of the Union.

The silence of Lower Canada during the Union, with respect to this debt has been urged as amounting to a kind of waiver by that Province, or rather as an acknowledgment and admission of its joint liability; but the fact, if fact it be, that no claim was made, can have no such signification; no claim was possible, it would have been a simple absurdity. The basis of the Union, as has been shewn, was an absolute equality in the benefits to be derived from the common revenue during its continuance. Upon that basis Lower Canada had no right to demand anything from Upper Canada, on the score of its debt. The latter Province was not then and is not now the debtor of the former. Indeed, there could be during the Union no creditor and no debtor as between the two sections of the Province of Canada, for that Province alone represented the whole debt. The common revenue was applied to the common liabilities, and the question of the separate liabilities of the one Province or the other to outside creditors, could only come up after they were severed and each had resumed its original individual condition. To sum up the statement in a few words: the debt of Upper Canada was chargeable to the Consolidated Revenue while the Consolidated Revenue subsisted, but when it became extinct and the revenue of each Province became separate and returned to it, the debt of each Province also returned, and is chargeable upon its particular revenue.

I have thus explained my view of the legal aspects of the questions submitted; and upon a careful consideration of the relation of the parties and of all the circumstances, it seems to me that the equity of the case is also in favor of admitting an examination of the debts and assets existing at the time of the Union in 1841. As a test of the reasonableness of this, let us suppose that the Union, instead of enduring for 26 years, had been severed within a few months after its formation, would not the pretension in such case that Lower Canada was bound in the division to assume half of the great debt of Upper Canada have been manifestly and startlingly unjust? But the injustice is in reality the same now as it would have been then.

It is matter of history that Upper Canada, whatever her undeveloped resources may have been, was in a condition of great financial embarrassment, in 1841, and it is not too much to say that she was rescued from a calamitous crisis by the union with Lower Canada.

It is stated in the life of Lord Sydenham, pp. 133-4, upon the authority of the Parliamentary papers of 1840, that:

"In the summer of 1839, Upper Canada was on the eve of bankruptcy, with an annual revenue of not more than £78,000. The charge for the interest of its debt was £65,000, and the permanent expense of its Government £55,000 more, leaving an annual deficiency of £42,000 while the want of a seaport deprived it of the power of increasing its revenue in the usual and least onerous way by the imposition of duties * * * and the ruinous expedient which had been adopted of late of paying the interest of the public debt out of fresh loans could no longer be repeated."

The Imperial Government to help Upper Canada out of the "condition in which it was impossible to continue," brought about the union of Upper Canada and Lower Canada.

And again Lord Sydenham in his letters of 20th November and 8th December, 1839, pp. 144, 150, says:

"The finances are more deranged than we believed even in England. The deficit £75,000 a year, more than equal to the income. All public works suspended. Emigration going on fast from the Province. Every man's property worth only half what it was. The Union offered the only means of recruiting its finances by pursuading Great Britain to help the Upper Canada Exchequer."

The foregoing extracts, to which others equally strong might easily be added, shew how urgent the necessity was, from which the Union relieved the Upper Province. How then can it be pretended that Lower Canada, without any stipulation to that effect and without having received any ostensible compensation or equivalent, ought to bear half of the debt of Upper Canada—and that—notwithstanding that free from debt herself, she brought with her in her treasury nearly $190,000 against nothing in that of the other Province.

It is true that while the Union lasted this debt remained a common liability, and would always have so remained, if the union had been, as was intended, perpetual ; yet now that the severance has come and the debt has to be paid to the outside creditor represented by the Dominion, it does not seem reconcileable with any standard of reason or justice that it should be paid by Lower Canada.

The debt was the debt of Upper Canada, and it makes no difference that it has changed its form once or twice or oftener during the Union ; for if the figures be correctly stated at five and a half millions, the fact stands out that at this day it more than doubles the amount of the surplus of debt to be divided.

I am of opinion, then, upon the whole case—

1st. That the propositions Nos. 1, 2, 3, submitted in behalf of Ontario, are inadmissible.

2nd. That the rules of division and adjustment should be those which govern certain partnerships or associations, to which the Union of the Provinces must be assimilated, in so far as those rules can be made applicable to the circumstances of the case.

3rd. That the arbitrators have authority, under the provisions of the B. N. A. Act, to examine into the state of indebtedness of each of the Provinces of Upper Canada and Lower Canada as it existed at the time of the Union of 1841.

4th. That they are not legally debarred by any particular circumstances of the case or any general rule of law from entering upon such examinations.

C. D. DAY.

DISSENT AND JUDGMENT BY THE ARBITRATOR APPOINTED BY THE GOVERNMENT OF QUEBEC.

The undersigned Arbitrator dissents from the judgment of the Hon. D. L. Macpherson and the Hon. J. H. Gray, two of the Arbitrators appointed under the B. N. A. Act of 1867.

1. Because the said 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.

2. 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 associations in so far as they can be made to apply in the present case.

3. 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.

4. 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.

5. And thereupon, the undersigned presents an award and judgment based on his foregoing propositions, and upon the reasons assigned in his printed opinion in the terms following, which, in accordance with his view of the case, ought to be rendered.

The arbitrators under the B. N. A. Act, 1867, having seen and examined the propositions submitted on the part of the Provinces of Ontario and Quebec respectively, for the division and adjustment of the debts and assets of Upper and Lower Canada, under the authority of said Act; and having heard Counsel for the said Provinces respectively upon each of the said propositions; after due consideration thereof, are of opinion that the propositions submitted on behalf of the Province of Ontario do not, nor does either of them, furnish any legal or sufficient rule or just basis for such division and adjustment, and they do award and adjudge that the said division and adjustment ought to be made according to the rules which govern the partition of the debts and property of associations known as universal partnerships, in so far as such rule can be made to apply. And the Arbitrators having also heard counsel for the Provinces of Ontario and Quebec respectively upon the objection made on behalf of the former Province to the "jurisdiction and

authority" of the Arbitrators to "enquire into the state of debts or credits of the Provinces of Upper and Lower Canada, prior to the Union of 1841, or to deal in any way with either the debts or credits with which either Province came into the Union at that time" and duly considered the same, are of opinion that the said objection is unfounded, and that they have authority and are bound by the provisions of the said Act to enquire into the state of the debts and credits of the Provinces of Upper Canada and Lower Canada, existing at the time of the Union of 1841, and so to deal with them as may be necessary for a just, lawful and complete division and adjustment of the debts and assets of the said Provinces. And thereupon it is ordered that the counsel for the Province of Ontario and Quebec do proceed, in accordance with the foregoing judgment, to submit such statements in support of their respective claims as they may deem expedient.

(Signed) C. D. DAY,
Arbitrator.

SUMMARY of reasons assigned by the Arbitrator appointed by the Government of Quebec, for his resignation and withdrawal from the Arbitration.

My reason for withdrawing from the Arbitration is that I regard the decision adopted on the 28th May last by the Honorable Messrs. Macpherson and Gray, Arbitrators, as erroneous and unjust in its character and tendency.

The decision, as shewn by the reasoning in my printed opinion, is not based on any known or recognized principle, and cannot be sustained by any legal precedent or argument. It is an invention for the particular case, suiting well the interests of one of the Provinces but irreconciliable with the rights of the other. In carrying out such a decision I could, of course, take no part.

But until the decision was officially pronounced it had not the irrevocable binding force of a Judgment. The opinion was known, but it did not become the property of the parties until its formal promulgation. This it was the duty of the Arbitrators in the discharge of a great public trust to withhold, for so long as it was not given, they might in their endeavour to arrive at a just conclusion

upon the whole case, control the decision and admit other rules and modes which would aid in that endeavour.

In the form which the investigation was likely to assume upon a known difference of opinion, liberty for taking a wide range was indispensably necessary for arriving at a harmonious result, and when this object of paramount importance was sacrificed by narrowing down the examination and confining it to the inflexible rule of this erroneous Judgment, I became satisfied that no final result could be arrived at which would satisfy the honest claims of Quebec or the general sense of justice in the Dominion, and that it was my obvious duty to withdraw from the Arbitration and tender a resignation of my appointment.

Montreal, 9th July, 1870.

C. D. DAY.