IN THE MATTER OF THE PETITION OF RIGHT OF

JOSEPH HENRY, CHARLES M. HERCHMER, JOHN W. McDOUGALL, CHARLES W. SALT AND JOHN CHECOCK, CHIEFS AND COUNCILLORS OF THE MISSISSAUGAS OF THE CREDIT, ON BEHALF OF THEMSELVES AND ALL OTHERS THE SAID MISSISSAUGAS OF THE CREDIT, AND THE SAID MISSISSAUGAS OF THE CREDIT..... SUPPLIANTS;

1905
May 8.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Indians—Mississauga Band—Claim for restitution of moneys to trust fund—The Exchequer Court Act, sec. 16 (d)—Declarations of right—Discretion of Superintendent General—Jurisdiction to interfere—Crown as trustee—Effect of treaties.

A claim against the Crown based upon the 111th section of *The British North America Act*, 1867, and upon Acts of the Legislature of the Province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada" within the meaning of clause (d) of section 16 of *The Exchequer Court Act*. *Yule* v. *The Queen* (6 Ex. C. R. 123; 30 S.C.R. 35) referred to.

2. Where the court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the court depends upon statute and not upon common law. *Barraclough* v. *Brown*, ([1897] A.C. 623) referred to.

3. It does not follow that because the Crown is a trustee the court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority if it exists must be found in the statutes which give the court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the court has any jurisdiction with respect to the execution of the trust.

4. While under the provisions of certain treaties and of certain statutes of the Legislature of the Province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians

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in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent General of Indians Affairs having, under the Governor in Council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians is administered the Dominion Government and the Superintendent General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz: that the Crown is not bound by estoppels, and no laches can be imputed to it; neither does it answer for the negligence of its officers.

5 Under the Treaty of February 28th, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands.

6. Under Treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this Treaty is concerned the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties.

PETITION OF RIGHT for an order declaring the suppliants entitled to a certain sum of money alleged to be witheld from them by the Crown.

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

September 9th, 1902.

J. Magee, K.C., A. G. Chisholm and *R. V. Sinclair* for the suppliants;

E. L. Newcombe, K.C., for the respondent.

Mr. Magee argued that as upon the face of the legislation respecting the Indians, both before and after the Union, the Crown stands in the relation of trustee in respect of their lands and moneys, the ordinary liabilities attaching to the position of trustee apply. Not only the deeds and the statutes, but also the order in council of 1861 treats the moneys which are

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held in trust for the Indians upon the same basis as other trusts administered by the Government, and instead of being held in the usual way that trust funds are held between subject and subject, they are treated as an investment, money lent to the Crown, which the Crown owes to the *cestuis que trustent*, and upon which the interest is paid to them. Then it was and is the duty of the Crown to keep a proper and correct account of the trust funds in accordance with the terms of the trust. If mistakes in accounting are made then the Crown and not the Indians must bear the loss if there is any loss sustained.

Now, upon the facts in evidence here, some $30,000 were taken over by the Receiver General at the time of the Union which were supposed to belong to the credit of these Indians.

They did not know the origin of this fund, but it was supposed to belong to the Indians and the Government took it over and placed it to the credit of the Indians. That being so, the money being already in the Consolidated Revenue Fund, the Government having received it, it was merely transferring it from the one fund to the other.

If it was put in the Consolidated Revenue Fund by mistake, if they had the right to take it from the Indians and put it in the Revenue Fund, they ought to have the right to take it from the Revenue Fund and give it to the Indians if there was a mistake made. An order in council was passed authorizing the money to be placed to the credit of the Indians, who had been claiming a balance due them.

Now, assuming that that money had been paid out to the Indians the trustees would not have been entitled, I think, to get it back. Where money is paid upon a compromise, after a claim made and after deliberation and after enquiry, and the mistake is then

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made, a mistake originally made by the man who makes the payment, the authorities I think will bear me out in saying that it could not be recovered back, had it been paid. Here, of course, it had not been paid out to the Indians, but was debited back to the fund. It was the interest which was paid, which it was the Crown's duty to pay under the Act of 1860, under which the Indian Department was taken charge of by the authority of the Provincial Parliament, 23 Victoria, chapter 171, which provides that the Governor in Council shall direct the investments and how they are to be made, and take charge of the investments. Now, these investments under the orders in council were to be treated in the same way as others, and interest was to be credited. It was therefore not a matter of grace by which the Crown allowed the interest, but it was a matter of duty and contract, the contract originally in the trust, the duty afterwards imposed by Act of Parliament and orders in council which had been passed. So that this money which was placed to their credit as income really belonged to the Indians, if they were entitled to the money upon which the interest accumulated. It is paid out to them, distributed for the purpose of being spent by them. They are induced to believe that it is money which they are at liberty to throw into the sea if they wish. But very early after the money had been credited, the Dominion were notified that the matter was not recognized by the Ontario Government. In placing it among the claims which they had against the Ontario Government, the Dominion were not in reality acting as trustees of the Indians. They had done their duty by the Indians, as they supposed, in placing the money to their credit. In trying to make the claim upon the Province they were trying to recoup themselves of the fund they had already dis-

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posed of, and the Superintendent General strongly believed that the payment was right; and, as the evidence is, they refused to make the correction when the difficulties which might arise were pointed out to them. They go on making these payments after the Auditor-General had called their attention to the difficulties, and had refused to give his consent to the credit of the $68,000, and during all that time they never said a word to the Indians that the matter was in any way in dispute between the Dominion and them, or that there was any danger whatever in their expending the moneys which were sent to them from year to year. In 1884 they informed the Indians very promptly after the order in council was passed and after the credit was made that it had been made, and soon after that, as is evident from the correspondence, the Ontario Government repudiated the matter. But the Indians had no idea that there was any question about it, or that there was any dispute between the Province and the Dominion in regard to it. They heard nothing of the arbitration that was going on until after their payments were stopped, and their capital was gone. During all these ten years this trustee allows the *cestuis que trustent* to believe that they are in receipt of these moneys as income, to believe their capital was not being impaired, and to prejudice themselves in the very worst way. We have evidence that this capital which was at the credit of the Indians largely consists of capitalization of their annuities. If we leave that out of the capital at their credit, some $84,000, there would be precious little left of all the money received for the lands of the Indians; and it was an exceedingly fortunate thing that there was anything left at all; but the amount of the capitalization of the annuities, which one might say is only a figurative capital after all, because it

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only represents the value of the perpetuity forever of the annuity. The actuarial value of an annuity in perpetuity is the amount which would produce it at a certain rate of interest; so that in that sense the capital is there, but I mean to say there was never a sum received by the Indians to represent that capital. It was an exceedingly fortunate thing that by the debt of $29,000 that the whole of the moneys placed in trust in their hands was not used up. Then the Indians, finding that the Government are asserting that the $29,000 would be wiped out and the $68,000 principal would be wiped out, they naturally take an interest in the arbitration proceedings which are going on, and they ask to be represented; but those arbitration proceedings are not any proceedings in which they had any right to be there. They were there by the courtesy of the Government and the arbitrators, but they had no standing. It was not an arbitration between them and anybody; it was between two governmental bodies.

[THE COURT: Is not the question very simply this? If a man is trustee and overpays interest by mistake, and funds are coming in from time to time, has he a right to rectify that mistake and recoup himself from the funds?]

Yes, I think that is practically the question, my lord. And for authority in support of the view that the trustee cannot so recoup himself, I would refer to *Skyring* v. *Greenwood* (1). In *Addison on Contracts* (2) The principle is laid down that if trustees or agents represent that they have funds in their hands belonging to the parties for whom they act, and they draw out the money and spend it as their own, the trustees or agents cannot recover back the money; nor can they retain other moneys in their hands by way of indem-

(1) 4 B. & C. 290. (2) 9 ed. p. 431.

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nity. Again the law raises no implied promise to return in respect of money had and received where the rights of the receiver of the money had been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount. (*Watson* v. *Marston* (1); *Deutsche Bank* v. *Beriro & Co.* (2); *The Queen* v. *The Treasury Board* (3): *Brisbane* v. *Dacres* (4).

Mr. Newcombe: In the first place, my lord, I think the position is clear that if these plaintiffs are entitled to recover anything, it must be by reason of a mere technical rule of law, which they, of course, if such a rule exist, are entitled to invoke in their favour. It is not a case of any hardship; no injustice has been done; and the petitioners have been given a fiat because they have alleged that in the circumstances as they exist here there is a legal obligation on the part of the Crown, enforcible by petition of right, to restore these payments which have been made to them.

It is the same hardship a son suffers where the father has dissipated the estate. Those who succeed the present members of the band will become entitled by petition of right as descendants of the present band; and it may be that this money that has been paid over to them has been spent, or it may have been invested. I do not know what they did with it. If they got it and squandered it, there may be so much less for those who come after them; but there is no right in those descendants, or those who may have become descendants, there is no right vested in them which they can assert here in a proceeding of this kind. We might consider, just as that point has been suggested, the position of the case under the pleadings. "The Petition of Right of Joseph Henry, Charles Herch-"mer," and several others who are named, Chiefs in

(1) 4 DeG. M. & G. 230.
(2) 73 L. T. N. S. 669.
(3) 16 Q. B. at p. 362.
(4) 5 Taun. 143.

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"Council of the Mississaugas of the Credit," etc. (Reads from Petition of Right.) The proceeding is not taken in the name of members of the band, who, as shown by the evidence here, were parties to these payments and received and are holding the benefit of the payments which have been made. It seems to me that they have no right to come in here in any representative capacity and say that they want to do this for the members of the band who are going to succeed. It is only the members of the band insofar as they are represented here on the pleadings, the individual members of the band, who can be recognized as parties before the court, and the question is whether they have the rights which they claim to have. The basis of their action, as I understand it, must be this: that there is somewhere evidence of the creation of a fund in respect of which the Crown has undertaken by an obligation which can be enforced to hold that fund for the benefit of these individual Indians, and invest it at interest and pay the interest over to them by way of annuity. If that is not generally the nature of their case, I confess I do not understand what sort of a claim they have. Taking it in that way there is nothing proved here. There is no treaty. They speak of a treaty, they speak of a deed, of a surrender and other general expressions of that kind, but when you come to get down to it there is nothing here establishing any fund, constituting any declaration of trust, or imposing otherwise the obligation of a trustee upon the Crown. It is clear that the Indians had nothing to start with; they had no right or interest of any kind which was known to the law. It is true reserves had been set apart for the Indians by the grace of the Crown, but the Indian has no right or enforcible interest in that reserve. He has a right to hold the reserve during the pleasure of the Crown, and that is all. That plea-

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sure may be revoked at any time, and he acquires no right of action because he is dispossessed of property which he has been in the habit of occupying. That was the original position, and the position which they may have with regard to money which the Crown, at some stage in the history of the country, determines to hold for the benefit of the Indians is not any larger than the interest which they have in any reserve, in any piece of land. It has not been explained here where the money came from that they claim that the Crown holds, and it is very likely—in fact it rather appears—that the Crown does not actually hold any money at all, but that they have adopted the policy of paying amounts by way of annuities equivalent to what would be earned by the investment of certain moneys at six per cent., or five per cent., or three and a half per cent., as the case may be. But then when you take this sum of $29,000 which is in question, there is nothing whatever to connect that with any particular transaction respecting any fund.

What I submit on this part of the case is that there is no evidence here, and in fact there is no obligation existing, to limit the payment out of these funds to interest. The whole matter is committed to the discretion of the Crown. It depends originally upon the grace of the Crown, and the Crown has taken a large discretion to deal with the funds, as it sees fit, for the benefit of the Indians, and when you have a question whether a payment was a judicious and proper payment to make, I submit that is not a question to be reviewed by the court after the Crown has passed upon it. There is nothing about interest in this trust at all. There is no trust for us to pay the interest, but it is out of the proceeds or sale or other disposition of the land to make such provision for the maintenance and religious instruction of the people of the Missis-

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sauga Nation of Indians, etc. Under the express words of that declaration, the natural thing to do would be to pay the principal, and I would not have thought that the Government would have undertaken to bind itself in early times with regard to how these trust funds for the benefit of the Indians were to be administered. They were a people in more or less transient stage, in a stage of progress perhaps, and the Government saw fit to adopt a certain policy of protecting them, recognizing an interest in the way of an Indian title, giving them reserves, selling these reserves and taking the money for the benefit of the Indians; but it would have been very bad policy probably for them to have undertaken to define exactly how that money was to be applied. They said, no doubt, "We will hold these moneys the same as you have held your lands of which they are the proceeds; they are to be held for the benefit of the Indians, to be administered as a matter of discretion upon the part of the Crown."

[THE COURT: Was there in any of these treaties an undertaking to pay a given sum each year?]

Mr. Magee: Yes. In the treaty of 1818 there was an agreement to pay $2,090.

[THE COURT: Assuming the Crown is a trustee, and the trust may be enforced—I am not discussing that—but in respect of that they would be entitled to have that sum paid every year; and if there is a capital sum out of which it is paid, it ought to be kept good.]

Mr. Magee: The annuities were capitalized?

Mr. Newcombe: We have always paid the $2,090, and are still willing to do it; but this has no connection with the present case.

I think our position would stand any amount of investigation with regard to a claim of this character.

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These payments were made to the Indians, and your lordship asked whether, assuming a trustee had paid too much interest, he could withhold that out of subsequent interest in dealing with his *cestui que trust*. My learned friend cited a good many cases, but I do not think he cited any that would require your lordship to hold that that could not be done. It would seem to be a reasonable thing to do where there is no wrong doing alleged as against the trustee. *Ex parte Ogle* (1). The trustee was allowed to do this in a case which my learned friend cited himself, *Daniel* v. *Sinclair* (2). This is a case binding directly on the court, and it seems to me to cover the point. But the King cannot be a trustee under the authorities at all; so that it is not perhaps necessary to look into the liability of an ordinary trustee. (*Bacon's Abridgement*, "Prerogative.") (3).

Then, following my argument that a petition of right will not lie in such a case as this, I say there is no precedent for it. There are cases where the Crown has collected money from foreign Governments and they have sued the Government, attempting to make the Crown account as a trustee, but they have always failed; and there is no case of a petition of right having been allowed to prevail where they were attempting to hold the Crown as a trustee. It is not within the class of cases in which petition of right will lie as stated in *Feather* v. *The Queen* (4).

My learned friend has referred to some statutes with regard to the application of Indian funds, authorizing payments to be made. Those statutes are not to be construed, I submit, as creating any trust or imposing any obligations upon the Crown, but merely as statutes relating to the administration.

(1) L. R. 8 Ch. 711.
(2) 6 App. Cas. 181.
(3) Vol. 8, p. 82.
(4) 6 B. & S. 257.

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[THE COURT: If there was a claim arising in favour of the Indians under any one of those statutes, then of course the court would have jurisdiction and a declaration might be made.]

Reference has been made to sections 69 and 70 of *The Indian Act*, but those are merely administrative directions as regards certain funds which the Government has in its hands appropriated to certain purposes, and they would be construed subject to the rule, I think, laid down by Lord Hobart in *Hobart's Reports* (1), where it says there are also statutes which "were made to put things in ordinary form and to ease a sovereign of labour, but not to deprive him of power" which cannot be said to bind the King. I do not think those statutes can be construed in any way as implying a charge upon the Crown. The Crown is not to be bound either by contract or statute unless it is expressly and clearly bound, and the most that they can say is that these statutes would be unnecessary if the Crown had perfect liberty to apply these moneys in any way it saw fit.

Mr. Magee replied, citing *Penn* v. *Lord Baltimore* (2); *Rustomjee* v. *The Queen* (3); *Kinloch* v. *The Queen* (4); *Clode on Petition of Right* (5).

Dec. 5th, 1902.

An order was made directing a further hearing on the question of the origin of the fund in controversy in this action.

February 15th, 1905.

The case was re-opened for the purpose above mentioned.

A. G. Chisholm and *R. V. Sinclair* for the suppliants; *E. L. Newcombe, K.C.*, for the respondent.

(1) At p. 146.
(2) 1 Ves. 453.
(3) L. R. 2 Q. B. 69.
(4) W. N., 1882, 164; W. N., 1884, 80.
(5) Pp. 78, 102, 141.

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THE JUDGE OF THE EXCHEQUER COURT now (May 8th, 1905,) delivered judgment.

The petition is brought to secure a declaration that a sum of $29,161.17 and interest thereon should be repaid or restored to certain funds that the Crown holds in trust for the Mississaugas of the Credit, a band of Indians residing on their Reserve, in the Counties of Brant and Haldimand, in the Province of Ontario, or for such further or other relief as the nature of the case may require.

By the 111th section of *The British North America Act*, 1867, it was provided that Canada should be liable for the debts and liabilities of each province existing at the Union. Among the liabilities of the late Province of Canada, for which the Dominion of Canada thereby became liable, were certain obligations in relation to the Mississaugas of the Credit. By an agreement or treaty made on the 28th day of October, 1818, between His Majesty the King and certain chiefs of the said nation of Indians, His Majesty, in consideration of the surrender of certain lands therein mentioned, promised to pay to the said nation of Indians the sum of five hundred and twenty-two pounds ten shillings in goods at the Montreal price (1). And by an indenture made on the 28th day of February, 1820, the Mississauga nation of Indians surrendered to His Majesty a parcel or tract of land therein described upon the trust and to the intent that His Majesty, His heirs, successors and assigns might out of the proceeds of the profits of the said lands and premises arising from the sale or leasing, or such other disposition of the same or any part thereof as to His Majesty, His heirs and successors might seem meet, make provision for the maintenance and religious instruction of the people of the Missis-

(1) Indian Treaties and Surrenders, No. 19, vol. 1, pp. 47 and 48.

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sauga nation of Indians and their posterity, according to His Majesty's gracious intention (2).

In 1860 the moneys that the Crown had realized from the sales of these lands, and which were then invested and bore interest at the rate of six per centum per annum, amounted to fourteen thousand one hundred and seventy-five pounds currency. And by an order in council of the 16th of January, 1861, passed, I infer, in pursuance of the 8th section of the Act 23rd Victoria, chapter 151, to which further reference will be made, the Receiver General was authorized to assume these investments, among others, on account of the Province, and to place the amount to the credit of the Mississaugas in the books of account of the Province, there to bear interest at the rate of six per centum per annum. It appears from the evidence that between the date last mentioned and the Union of the Provinces in 1867, further collections were made on account of the lands so surrendered by the Mississaugas amounting to the sum of $8,080.97. So that immediately before the Union the obligation or liability of the Province of Canada to the Mississaugas of the Credit was as follows:

First, to pay them the annuity of five hundred and twenty-two pounds, ten shillings, currency, or two thousand and ninety dollars, mentioned in the agreement of the 28th of October, 1818. Secondly, to hold for them at interest at the rate of six per centum per annum the sum of fourteen thousand one hundred and seventy-five pounds currency, or fifty-six thousand seven hundred dollars that had been put to their credit in the public accounts of the Province; and thirdly, to hold for them, at the current rate of interest, the further sum of eight thousand and eighty dollars and ninety-seven cents that has been mentioned.

(2) Indian Treaties and Surrenders, No. 22, vol. 1, pp. 50-53

These liabilities formed part of the public debt of the Province, and in the settlement of the matter between the Dominion and the Provinces of Ontario and Quebec the annuity was capitalized at the rate of five per centum, that is, at a sum of forty-one thousand eight hundred dollars, and the provinces were debited and the Dominion credited in the Province of Canada accounts with the three sums mentioned, namely, $56,700; $41,800; and $8,080.97. Thereafter, in the Dominion books of account there was to the credit of this band of Indians the said sum of $56,700 bearing interest at six per centum per annum, the said sum of $41,800 bearing interest at five per centum per annum, and the said sum of $,8080.97 with such additions thereto as arose from further collections on account of the sales of the lands of the Mississaugas, on which interest, at a rate which varied from time to time, was allowed. Between the Union and the 31st of December, 1882, the rate allowed was five per centum; and from that date to June 30th, 1892, four per centum per annum. It was then reduced to three and one-half per centum; and on the 1st of January, 1898, it was further reduced to three per centum per annum On the 1st of July, 1883, there stood to the credit of the Mississaugas, in the public accounts of the Dominion, a capital sum of $119,638.17, consisting of the said sums of $56,700, and $41,800, and a balance of $21,138.17, which sums were then bearing interest at the rates respectively of six, five and four per centum per annum. That, I understand, was the amount of the capital moneys of the Mississaugas of the Credit on that date, as shown not only by the books kept at the Department of Indian Affairs, but also by the books of account of the Audit Office and of the Department of Finance.

In 1883 the Mississaugas put forward a claim to have a considerable additional sum placed to their credit,

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the claim being based upon a report, made in 1858, by the Special Commissioners who were appointed for the purpose of investigating Indian matters in the Province of Canada. The claim was taken up and considered by the Superintendent General of Indian Affairs, and enquiries made at the Crown Lands Department of Ontario, with the result that he came to the conclusion that the claim was well founded; and that the Mississaugas of the Credit were entitled to have a further sum of $68,672.01 placed to their credit in the public accounts of the Dominion. And on a report from him an order in council was passed on the 30th of June, 1884, giving authority for the transfer of the amount mentioned from the Consolidated Revenue Fund "to the credit of the Indian "Fund, with a view to the Mississauga band receiving "the benefit thereof and of which they had so long "been improperly deprived." The Mississaugas were informed of the passing of this order in council and a copy of it was sent to the Indian agent at their Reserve. On the 29th of August following the Department of Indian Affairs requested the Auditor-General to cause an entry warrant to be passed debiting the Consolidated Revenue Fund and crediting the Indian Trust Fund with the amount of $68,672.01 being, as stated, proceeds ot sales of lands at one time the property of the Mississaugas of the Credit, together with interest to the 30th December, 1883, as set forth in the order in council of the 30th of June, 1884. It was also stated in the communication that the amount mentioned had been placed to the credit of Indian Funds in the Department of Indian Affairs for the fiscal year ending the 30th of June. There was no Parliamentary authority for debiting the Consolidated Revenue Fund with this amount, and it does not appear that the Auditor-General took any action in respect of the matter beyond asking to

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be furnished with the statement and papers relating thereto. On the 7th of October following, on a memorandum from the Superintendent General of Indian Affairs, dated the 8th of September, 1884, another order in council was passed whereby that of the 30th of June, 1884, was amended by giving authority to include the said amount of $68,672.01 amongst the items of account to be considered in the settlement between the Treasurers of Ontario and Quebec, respectively, and the Dominion of Canada, instead of charging the same to the Consolidated Revenue Fund. This claim, if good, was one against which the Provinces of Ontario and Quebec, as representing the Province of Canada, would have had to indemnify the Dominion. But these Provinces refused to recognize the claim, and on further search and enquiry being made certain old documents were discovered that showed the claim not to be well founded. In the meantime the Indian Department had from year to year credited the Mississaugas with the interest on the sum of $68,672.01 and had used or distributed the income for their benefit; while the Audit Office and the Department of Finance had only allowed interest on the actual balances at their credit, with the result that there was an annually increasing difference between the books of account of the Indian Department, on the one hand, and those of the Audit Office and Department of Finance, on the other; and in consequence an impairment increasing from year to year of the capital funds of the Band was shown in the books of the Audit Office and of the Department of Finance. By a minute of the Treasury Board of the 12th of May, 1893, after reciting that the Board had had under consideration a report from the Auditor-General with regard to the difference between the books of the Department of Indian Affairs and those of

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the Audit Office and of the Finance Department, caused by the Indian Department taking credit for an amount of $68,672.01 under authority of an order in council, dated 30th June, 1884; that this difference had continued to increase on account of the interest compounding from year to year, so that on June 30th, 1892, the total difference due to this cause was $93,982.53; and that the amount in question had never been collected by the Dominion but formed one of the unsettled and disputed accounts between the late Province of Canada and the Dominion,—it was directed that until the final settlement of the Provincial accounts the original entry made by the Indian Department be reversed and that steps be taken to make good, if possible, the over-expenditure of interest. Then on the 26th of October, 1894, an order in council was passed giving authority to charge the capital account of the Mississaugas of the Credit on the 30th June, 1894, until such time as the claim of the Indians was finally decided, with the amount of interest, $29,161,19, on the sum of $68,672.01 credited to the capital account of the Band under the order in council of the 30th of June, 1884, and distributed among the Indians under the authority of such order in council. The minute of the Treasury Board and order in council referred to had reference to the accounts of the Mississaugas as kept in the books of the Department of Indian Affairs; and not to such accounts as shown by the books of the Audit Office and of the Department of Finance, in which by reason of the payments made to and for this Band of Indians there had been, as stated, an annually increasing impairment of their capital funds. It will be observed that in the minute of the Treasury Board cited the difference between the amounts shown to the credit of the Mississaugas in the books of the

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different departments is stated to have increased on account of the interest compounding from year to year. The reason given is not altogether accurate or adequate. But as it was the practice of the Crown to allow the Indians interest on any balance standing to their credit in current account, as well as interest on their capital moneys, it came very much to the same thing; but the difference was in fact due in the first place to the Indian Department crediting, and the Audit Office and Department of Finance refusing to credit, the Mississaugas with interest on the sum of $68,672.01 mentioned; and in the second place, to the Department of Indian Affairs crediting the Indians with interest (not allowed by the other two departments) on capital moneys that had already been paid out to and for these Indians. Of the sum of $29,-161.17, at which the difference stood, after debiting in the books of the Indian Department the capital sum of $68,672.01 that had been credited in the mistaken view that the Indians were entitled thereto, an amount of $23,777.68 represented interest credited by the Department of Indian Affairs on the capital sum mentioned; and the balance of $5,383.49 represented the aggregate of credits for interest allowed by the latter department on the amounts by which from time to time the balances of capital moneys exceeded in their books the balances as shown in the books of the Audit Office and Department of Finance. For the same reason the order in council of the 26th of October, 1894, does not express the true position of the matter when the sum of $29,161.17 is referred to as interest on the amount of $68,672.01. It is also to be observed, as has been noticed, that the authority given to charge the sum of $29,161.17 to the capital account of the Band had reference only to the account as it appeared in the books of the Indian Department, and there the

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entry was in substance and in fact one of adjustment only, and not a substantial charge on the funds occurring at that time. The capital moneys against which this sum was then charged had long before been paid out to or for the Mississaugas. With regard to these moneys the Crown, through the several departments of the Government mentioned, stood in more than one relation It was the office of the Audit Department (whether alone or in connection with the Department of Finance, is perhaps not quite clear) to determine from year to year what amount of interest was due, and should be credited to this Band of Indians. Any interest credited by the Indian Department in excess of the amount so allowed was credited without due authority; and if there had been nothing except income that the latter department was entitled to disburse, the difference could never have arisen as the payments made would not have been honoured by the Audit Office after the balance at current account had been exhausted. But the Indian Department was from year to year collecting and expending moneys for these Indians on capital account as well. The Superintendent General of Indian Affairs, or the Governor in Council, determined what amounts might from time to time be paid out for the Indians on capital account. To illustrate this matter by the accounts in evidence it will be seen therefrom that in addition to the two sums of $56,700 and $41,800 there was, as has been mentioned, to the credit of the Mississaugas on capital account on the first of July, 1883, the sum of $21,-138.17. Between that date and the year 1894 the department collected on their account, from sales of the lands, sums amounting in the aggregate to $7,035.76. But it also from year to year made expenditures from capital account, which, including a loan of $6,000, amounted to more than $13,000; and this altogether

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apart from any question as to the amount of $29,161.17 now in issue here. As the Department of Indian Affairs had capital moneys at the credit of the Indians which it was entitled to disburse on their account, the Audit Office had no check. When the annual expenditure by the Indian Department on account of the Indians exceeded the amount of their income, or the amount to their credit on current account, the payments fell upon and were charged by the Audit Office and the Department of Finance to capital moneys at the credit of the Band. So it happened that of the moneys annually distributed for the maintenance of these Indians between the years 1884 and 1894, which the Department of Indian Affairs intended to pay out of income, and which the Indians received and used as being income, a part each year was in fact taken from, and constituted an impairment of, the capital funds. Against this impairment of the capital moneys of the Band the suppliants for themselves and the Band now seek relief.

First, with regard to the parties to the action, it will be seen that the petition is brought by certain chiefs and councillors of the Mississaugas of the Credit, for themselves and other members of that Band of Indians. That, according to the practice of the court, is the proper course to follow where, as in this case, there are a considerable number of persons having the same interest in the cause or matter; and with respect to the incident that the suppliants are Indians it is only necessary to refer to the statute which gives them the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them; or to compel the performance of obligations contracted with them (1).

Then with regard to the nature of the relief sought by the petition, it is obvious, that any judgment to be

(1) R. S. C. c. 43, s. 79.

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entered must take the form of a declaration of the rights of the parties. But that does not of itself constitute an objection to the proceedings, for it is in accordance with the procedure prescribed by the twelfth section of *The Petition of Right Act*, whereby it is provided that the judgment on every petition of right shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or to some specified portion, of the relief sought by his petition, or to such other relief and upon such terms and conditions, if any, as are just (1). At the same time the fact that the judgment in such cases takes the form of a declaration does not in any way enlarge the authority of the court, or give it jurisdiction in any case in which it would not otherwise have jurisdiction. Where a court has no jurisdiction to give relief in an action it has no authority to make a declaration binding the rights of the parties. *Barraclough* v. *Brown* (2). And that rule should be strictly followed in all cases where the jurisdiction of the court depends upon statute and not upon the common law. If the statute does not give jurisdiction no declaration can be made, and no judgment given.

Then with regard to the moneys arising from the sale of the lands surrendered by the Mississaugas of of the Credit, it is clear, I think, that the Crown holds them in trust for that band of Indians. By the terms of the surrender of the 28th of February, 1820, to which reference has been made, the lands were to be held upon the trust therein mentioned. By the second section of the Act of the Legislature of the Province of Canada, 23rd Victoria, chapter 151, respecting the management of Indian lands and property, it was provided that all lands reserved for the Indians, or for any tribe or band of Indians, or held in trust for their

(1) R. S. C. c. 136, s. 12.

(2) [1897] A. C. 623.

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benefit, should be deemed to be reserved and held for the same purposes as before the passing of the Act, but subject to its provisions. By the third section of the Act it was further provided that all moneys or securities of any kind applicable to the support or benefit of the Indians, or any tribe or band of Indians, and all moneys accrued or thereafter to accrue from the sale of any lands reserved or held in trust as aforesaid, should, subject to the provisions of the Act, be applicable to the same purposes, and be dealt with in the same manner as they might have been applied to, or dealt with, before the passing of the Act. And by the eighth section of the Act it was provided that the Governor in Council might, subject to the provisions of the Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands should be invested from time to time, and how the payments to which the Indians might be entitled should be made, and should provide for the general management of such lands, money and property, and what percentage or proportion thereof should be set apart from time to time to cover the cost of and attendant upon such management under the provisions of the Act, and for the construction and repair of roads passing through such lands and by way of contribution to schools frequented by such Indians. In the distribution of legislative powers under *The British North America Act*, 1867, the Parliament of Canada was given authority to make laws for the peace, order and good government of Canada in relation, among other things, to "Indians and lands reserved for the Indians" (s. 91, (24) and in the statutes of the Dominion relating to that subject the provisions mentioned have from time to time, with some

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alterations and additions, been re-enacted (1). There are a number of other provisions of the Acts relating to the Indians and Indian Lands in which reference is made to lands or moneys being held by the Crown in trust for the Indians or to their use (2). But it does not follow that because the Crown is a trustee for the Indians in respect of such lands or moneys, that the court has jurisdiction to enforce the trust, or to make any declaration as to the rights of the parties. That authority, if it exist, must be found in the statutes which give the court jurisdiction. There are a number of authorities and cases in which the question as to whether the Crown may be a trustee has been considered (3), and there has been some difference of opinion on the subject. But the real question in any such case is not, it seems to me, whether the Crown may or may not be a trustee, but whether the court has any jurisdiction in respect of the execution of the trust. Where the jurisdiction to grant the relief sought is expressly given by statute, no difficulty arises in respect of either question. That was the position of matters in the case of *The Canada Central Railway Cy.* v. *The Queen* (4). There the company was entitled, under an Act of the legislature, to the lands in respect of which a declaration of its rights was sought, and the court had been given authority by the legislature to declare in such a case that the

(1) 31 Vict. c. 42, ss. 6, 7 and 11; 39 Vict. c. 18, ss. 4, 29, 58 and 59: 43 Vict. c. 28, ss. 15, 40, 69 and 70; R. S. C. c. 43, ss. 14, 41, 69 and 70; 58-59 Vict. c. 35, s. 2; and 61 Vict. c. 34, s. 6.

(2) C. S. C. c. 9, s. 10; 29-30 Vict. c. 20; 39 Vict. c. 18, s. 65; 43 Vict. c. 28, ss. 33 and 76; R. S. C. c. 43, ss. 37 and 77; 51 Vict. c. 22, s. 13.

(3) Bacon's Abridg. Prerogative, E. 1, vol. 8, p. 82; Lewin on Trusts, 11th Ed., pp. 2, 7 and 29; *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 452; *Canada Central Railway Co.* v. *The Queen*, 20 Grant, 289, 293; *Rustomjee* v. *The Queen* L. R. 2 Q. B. D. 74; *McQueen* v. *The Queen*, 16 S. C. R. 1, *per* Gwynne J. at page 58, and *per* Taschereau J. at page 117, and *The Canadian Pacific Railway Co.* v. *The Municipality of Cornwallis*, 7 Man. R. 1, *per* Killam J. at pages 21 to 23.

(4) 20 Grant, 289, 293.

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company was so entitled. With respect to the matters in controversy in this case any jurisdiction that the court has is derived from the provisions of the fifteenth and sixteenth sections of *The Exchequer Court Act* (1). By the fifteenth section of the Act it is provided that the court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might in England be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown. Now, so far as it is sought to maintain this petition upon the ground only that the Crown is a trustee for the Indians, it is conceded that there has been no case in England in which any relief has been given against the Crown as a trustee, and the general provision with which the section begins may, I think, be passed over without further consideration But it is contended that the case is one in which the money of the suppliants is in the possession of the Crown, and that the court has on that ground the jurisdiction that is invoked in support of the petition. With that contention I am not able to agree. It seems very clear that relief is not sought in respect of moneys now in the possession of the Crown, but in respect of moneys which have been paid over to the Indians and which are no longer in the possession of the Crown, but which it is alleged ought now to be in the possession of the Crown. If the subject's money is in the possession of the Crown the court has undoubted jurisdiction to declare that he is entitled thereto, and the

(1) 50-51 Vict. c. 16.

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amount so awarded to him is payable out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada (1). But that provision is not applicable to the present case where the suppliants seek to have a sum of money transferred from the Consolidated Revenue Fund to the Indian Trust Fund. It was suggested in argument that the sum of $29,161.17, in question in this case, had gone into the former fund when it was charged to the latter. But that is not the case, and even if it were, I do not see how the amount could now be taken out of the Consolidated Revenue Fund and restored to the Indian Trust Fund, without the authority of Parliament.

With respect, however, to the provision of the section that gives the court jurisdiction in any case in which the claim arises out of a contract entered into by or on behalf of the Crown, it seems to me that the court has jurisdiction so far as the claim set up is supported by the agreement or treaty, or by the surrender, to which reference has been made. Then by clause (*d*) of the sixteenth section of the Act (2) the court is given exclusive jurisdiction to hear and determine every claim against the Crown arising under any law of Canada. That provision was considered in the case of *Yule* v. *The Queen* (3), in which it was held that a debt or liability of the late Province of Canada, arising under an Act of the Legislature of that Province for which debt or liability the Dominion of Canada became liable under the 111th section of *The British North America Act*, 1867, was a claim arising under a law of Canada. So here, I think, that in so far as the present claim rests upon that section and upon the Acts of the Legislature of the Province of

(1) 50-51 Vict. c. 16, s. 47. (2) 50-51 Vict. c. 16.
(3) 6 Ex. C. R. 123; 30 S. C. R. 35.

Canada, and of the Parliament of Canada, it is a claim arising under a law of Canada, and to that extent within the jurisdiction of the court.

The Crown, however, does not in respect of Indian lands and moneys stand in the position of an ordinary trustee. In the first place the Crown does not personally execute the trust. Its administration thereof is vested in a department of Government, over which a Minister of the Crown responsible to Parliament presides. That has been the position of Indian affairs since the year 1860, when by virtue of the Act 23rd Victoria, chapter 151, s. 1, the Commissioner of Crown Lands became the Chief Superintendent of Indian Affairs. After the Union, the Secretary of State was Superintendent General of Indian Affairs from 1868 to 1873 (1), and since the latter year the office has been held by the Minister of the Interior (2). Subject to the terms and conditions of the several agreements or treaties with the Indians, or of the surrenders from them, and to the provisions of the statutes from time to time in force respecting Indians and Indian Lands, the Superintendent General of Indian Affairs has, under the Governor in Council, the management and control of Indian lands, property and funds (3).

For the manner in which the affairs of the Indians are administered the Government of the Dominion and the Superintendent General are at all times responsible to Parliament; and whenever in respect of such matters any power, authority or discretion is vested in and exercised by the Governor in Council, or in the Superintendent General of Indian Affairs, Parliament alone has the authority to review the decision come to or the action taken. In all such cases the court has

(1) 31 Vict. c. 42, s. 5.
(2) 36 Vict. c. 4, s. 3; 46 Vict. c. 6, s. 1; and R. S. C. c. 43, s. 4.
(3) 31 Vict. c. 42, s. 5; 36 Vict. c. 4, s. 3; 39 Vict. c. 18, ss. 2 and 29; 43 Vict. c. 28, s. 40; 46 Vict. c. 6, s. 1; and R. S. C. c. 43, ss. 4 and 41.

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no jurisdiction. Then there is this further difference between the Crown as a trustee and an ordinary trustee; the Crown is not bound by estoppels; and no laches can be imputed to it; neither is there any reason why it should suffer from the negligence of its officers. (*Chitty's Prerogatives of the Crown* (1). In short it adds nothing to the argument to state that the Crown is a trustee Where it is a trustee the court has no jurisdiction to impose any obligation upon it, or to declare that any such obligation exists, unless the statute gives jurisdiction, and where the statute gives jurisdiction it is immaterial whether in the particular case the Crown is held to be a trustee or not.

With regard then to the moneys in question in this case, there is no occasion at present to make any further reference to the sum of $56,700 for which since 1860 the Crown has been a debtor to the Mississaugas of the Credit. That amount stands to their credit today, and the interest thereon has been credited to them from year to year. The balance of other capital moneys arising from the sales of their lands, collected before and since the Union, has been exhausted. Part of this has been expended in payments that it is conceded are proper charges against capital moneys, and part has been distributed to the Mississaugas for their maintenance and support. So far as appears there was no intention on the part of the Superintendent General of Indian Affairs to pay any part of their capital moneys to the Band for their maintenance. The general policy of the department has been against doing that. But in the present case, through error or mistake, that, as has been seen, has happened. Was such a distribution contrary to any contract or law of Canada, so as to raise a claim in favour of the Indians over which the court would have jurisdiction? That question I

(1) Pp. 379-381.

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answer in the negative. The contract between the Crown and the Indians in respect of these moneys is to be found in the Indenture of Treaty of February 28th, 1820; and there is, I think, nothing therein to prevent the Crown from making provision for their maintenance out of any of the moneys arising from the sale or leasing or other disposition of the surrendered lands. And no statute has been cited, and I know of none, prior at least to July, 1894, that would make any such distribution of capital moneys unlawful. In the year last mentioned, by the Act 57-58 Victoria, chapter 32, section 11, a number of sections were added to *The Indian Act*, by one of which (s. 139) the Governor in Council was authorized, with the consent of a Band, to make certain specified expenditures out of any capital moneys standing to the credit of the Band. In terms that is an enabling enactment, but its effect possibly is to limit the authority and discretion which otherwise the Governor in Council and the Superintendent General of Indian Affairs would have had in respect of such expenditures. But I express no opinion as to that. The question does not arise in this case, as the capital moneys in question had been distributed to the Mississaugas before that provision was enacted.

With regard to the Crown's obligation under Treaty No. 19, made on the 28th day of October, 1818, to which reference has been made more than once, the case stands, it seems to me, on a different footing. There the Crown's obligation was to pay to the Mississaugas of the Credit a fixed annuity of two thousand and ninety dollars. In respect of that obligation which, by virtue of *The British North America Act*, 1867, now rests on the Crown, as represented by the Government of Canada, the Crown is not a trustee, but a debtor; and the obligation is not to pay to the Indians the

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revenue arising from any sum of money, but to pay a fixed and definite sum annually. The capitalization of the Indian annuities was no doubt a convenient arrangement to adopt in settling the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, as representing the old Province of Canada, and no doubt it is also convenient in keeping the books of account of the Dominion to credit the Indian Trust Funds with the amount of such capitalization. But that does not affect the right of the Indians in any way. They were not parties to the arrangement. And in the present case it makes no difference in my opinion whether the capital fund that represents the principal of the annuity in question stands at ten thousand or at one hundred thousand dollars. What the Mississaugas are entitled to in that respect is an annual payment, or credit in current account of the sum of two thousand and ninety dollars, —neither more nor less. And as their right thereto rests upon the treaty or contract between the Crown and them, and upon *The British North America Act*, 1867, the court has, I think, jurisdiction so to declare.

The fiscal year 1889-1890 was the last year in which the Mississaugas were credited with the full amount of this annuity. Since that time something less than the full amount has been credited in each year, while the full amount should in my opinion have been credited. To that extent the suppliants and those for whom the petition is brought are, I think, entitled to relief. Whether any such relief will work out to the advantage of the Indians or not, is another question. I do not go into that matter. The office of the court is to define, as best it may, the legal rights and relations of the parties. All other matters arising out of the case are for the consideration of those upon whom rests the responsibility of advising the Crown, and of inviting the action and

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co-operation of Parliament, if it is found that such action is advisable.

There will be judgment for the suppliants, and a declaration that the Mississaugas of the Credit have been and are entitled to be paid or credited each year with the full amount of the annuity of two thousand and ninety dollars, payable under the agreement or treaty No. 19 dated the 28th day of October, 1818, and that they are in that respect and to that extent entitled to relief.

Judgment accordingly,

Solicitor for the suppliants: *A. G. Chisholm,*

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