Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney-General for the Province of Ontario v. *The Attorney-General for the Province of Quebec, from the Supreme Court of Canada; delivered the 12th November* 1902.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Robertson.*]

The Judgment appealed against was pronounced by the Supreme Court of Canada in the exercise of a statutory jurisdiction, and it declares that the Arbitrators whose award was before the Court had jurisdiction to hear and adjudicate upon certain claims made by the Province of Quebec. The question before their Lordships is whether that decision is right.

The Arbitrators derive their original power from certain statutes (in identic terms) of Canada, of Ontario and of Quebec; but the instrument upon which the present question turns is an Agreement of Submission dated 10th April 1893. The tribunal was established for the amicable settlement of any questions which might arise in the settlement of accounts between the Dominion and the Provinces and between the two Provinces, and is conceived in general terms applicable to the various possible questions which might

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come to be submitted for decision. The Arbitrators are not to be bound to decide according to strict rules of law, but may decide on equitable principles; but when they do proceed on their view of a disputed question of law the award must set forth the same, at the instance of either party, and the award is then subject to appeal, so far as relates to such decision, to the Supreme Court and thence to the Privy Council in case their Lordships are pleased to entertain the Appeal. The award now under consideration purports to proceed upon the view of a majority of the Arbitrators on a disputed question of law, and hence the proceedings in the Supreme Court of Canada and the present Appeal.

The questions submitted to the Arbitrators by the Agreement of 10th April 1893, with which this Appeal is concerned, relate to what is known as the Common School Fund. The origin of this fund was a statute of the Province of Canada, passed in 1850 (12 Vict. cap. 200), the object of which was to provide a perpetual fund for the support of common schools and the establishment of Township and Parish Libraries. The source of this fund was to be one million acres of public lands, which were to be set apart and appropriated by the Commissioner of Crown Lands, under the direction of the Governor in Council, in such part or parts of the Province of Canada as he might deem expedient, and were to be sold in order to the investment of the proceeds towards creating the School Fund. The purposes of this enactment were thus common to the whole Province of Canada, as it then existed; and, as the lands to be set apart were public lands, those purposes were to be accomplished at the cost of the whole province. As it happened, the lands chosen and set apart by the Commissioner under this Act were situated in the Huron Tract in what is now the Province of Ontario.

The effect of the British North America Act of 1867 was that the Province of Ontario became owner of those lands so far as unsold. Questions having, not unnaturally, arisen out of the situation thus produced, advantage was taken, in 1870, of the arbitration set up by the 142nd section of the Act of 1867 to invoke that tribunal in regard to the School Fund; and by award dated 3rd September 1870 certain things were decided and *inter alia* it was laid down (Article 9) that the moneys received by Ontario since 30th June 1867 from the Common School Lands should be paid to the Dominion to be invested as provided in the Act of 1859 and the income was to be divided between Ontario and Quebec on the principle of that statute. By Article 10 it was laid down that Ontario should be entitled to retain out of such moneys six per cent. for the sale and management of such lands. (Any question which might have arisen as to the jurisdiction of the Arbitrators in making this award has been set at rest by a decision in an early stage of the present arbitration that the award of 1870 was good and is to be followed.)

The experience of 23 years having resulted in a new set of questions, the Agreement of Submission of 1893 was entered into; and in that Agreement the third article was as follows:—

"(3.) It is agreed that the following matters shall be "referred to the said Arbitrators for their determination "and award in accordance with the said Statutes, namely:—

"(*g*) The rate of interest, if any, to be allowed in the "accounts between the two Provinces, and also "whether such interest shall be compounded, and "in what manner.

"(*h*) The ascertainment and determination of the amount "of the principal of the Common School Fund, "and the method of computing such interest."

On 6th March 1896 an award was pronounced of which the following is the part which is relevant to the present narrative:—

"2. That in computing the amount of principal money of "the Common School Fund, for which the Province of Ontario

" is liable, the following sums shall be deemed to be and shall " be treated in all respects as moneys received by the Province " from or on account of the Common School Lands set apart " in aid of the Common Schools of the late Province of Canada, " that is to say :

" (*a*) Any sum of money due for principal or interest from " any purchaser of said Common School Lands, " remitted by the Province of Ontario to the pur- " chaser, unless it be shown by the Province that " such remission was made in a fair and prudent " administration of the Common School Lands and " Fund ; and

" (*b*) Any sum of money due for principal or interest from " any purchaser of said Common School Lands, at " the time when letters patent for such lands were " issued to him by the Province of Ontario, and " not collected by the Province, unless it be shown " by the Province that there was good cause for not " collecting the same.

" 3. That where in a fair and prudent administration of the " Common School Lands any sale of such lands has been " cancelled by the Province of Ontario, and the same resold at " a price less than that first obtained, the Province shall not " be liable for the loss resulting therefrom.

" 4. That in computing the amount of interest due from the " Province of Ontario to the Common School Fund on the " thirty-first day of December, eighteen hundred and ninety- " two, such interest shall be computed and made up at the " rate of five per centum per annum, and shall be compounded " half-yearly."

On the 9th December 1899 there was placed before the Arbitrators the statement of claim by the Province of Quebec which is the subject in dispute, and the question before their Lordships is whether that claim is within the jurisdiction of the Arbitrators. The paper is a long one, but the first seven articles are expressed as representing the claim, the remaining thirteen articles being introduced by the words, " And in support " of her present claim Quebec further says." The first seven articles are as follows :—

" 1. Inasmuch as Quebec claims that by law and statutes " governing the same, and particularly by Chap. 26 of the " Consolidated Statutes of Canada, the British North America " Act, 1867, the awards of 1870 and of this Board, and the " judgment of the Supreme Court, and also on equitable " principles, Quebec and her people were and are entitled to " have and enjoy Quebec's share of all moneys arising or " capable of being derived from the sale or disposition of the

" one million acres of Common School Lands mentioned in " Chap. 26 of the Consolidated Statutes of Canada as fully and " beneficially in all respects as Ontario and her people were " and are entitled to have and enjoy Ontario's share of the " same.

" 2. And inasmuch as Quebec claims that she and her " people have not so enjoyed her share of said moneys but " have been and are kept by Ontario illegally, inequitably and " unjustly out of Quebec's share and enjoyment of a large " portion of said moneys, to wit, that portion represented by " the uncollected balances due on said Common School Lands " and mentioned in Statement No. 6 of Mr. Hyde, filed herein, " which Ontario and her people, in effect, have had and have " the exclusive use benefit and enjoyment of, and which " Ontario by her acts and conduct has virtually and in effect " appropriated and applied to the use and benefit of herself and " her people.

" 3. Therefore in order that Quebec and her people may " obtain the benefit they are entitled to on account of their " share of the amount of said uncollected balances to the " extent of *at least herein asked, and the amount of the " Common School Fund be further declared and ascertained.

* *Sic.*

" 4. Quebec hereby gives notice of, and asks the Honourable " Arbitrators to determine in due course in her favour, the " following claim which Quebec makes against Ontario on " account of said uncollected balances mentioned in said " Statement No. 6.

" 5. Quebec asks—without prejudice to her right to make " further proof should she see fit or this Honourable Board " so order—that the long delay of upwards of a quarter of a " century on the part of Ontario to collect in said balances, " with other facts of record before this Honourable Board, be " of themselves taken and held a presumption and proof " against Ontario of her failure to carry out her obligations " to collect in said balances and render Ontario at least *primâ* " *facie* liable as herein asked by Quebec.

" 6. That the said uncollected balances, to wit, both of " principal and interest, mentioned in said Statement No. 6, " ought to be and be deemed, held and treated, in all respects " as moneys received by Ontario from or on account of the " Common School Lands and as part of the principal of the " Common School Fund or moneys in the hands of Ontario " on the 31st December 1892, at the latest, and for which " Ontario then was and still is liable with interest.

" 7. That in default of the Honourable Arbitrators deter- " mining that the said 31st of December 1892 is a proper date " by which said balances are to be deemed as part of the " principal of the said Common School Fund in the hands of " Ontario, and for which she is liable, that they do fix and " determine the proper date or dates at or by which Ontario " ought to be considered to have received said balances ; " Quebec alleging that Ontario ought to have collected in the " said balances long prior to 1892."

Against this claim the Province of Ontario, on 22nd May 1900 filed an interim plea, alleging that the matters embraced in the claim are not nor is any of them cognisable by the Arbitrators and that the said matters are not nor is any of them within the terms of the submission and that the Arbitrators had no jurisdiction nor power to inquire into or make any award upon them. Quebec having filed a formal replication, asked the Arbitrators to award and adjudicate on the issues raised by Ontario's answer; and on 13th September 1900 the Arbitrators issued the award in question, by which the majority viz. Sir John Boyd and Mr. Justice Burbidge (Sir Louis Napoleon Casault dissenting) awarded, ordered and adjudged that the Arbitrators had no authority or jurisdiction to entertain the claim of Quebec. It was declared that this award was made without prejudice to the rights and interests of Quebec in the uncollected balances and to its right to have the same saved and excepted in any final award made in the matters submitted. An appeal having been taken by Quebec to the Supreme Court of Canada, that Court (Mr. Justice Gwynne dissenting) allowed the Appeal and declared that the Arbitrators had jurisdiction to hear and adjudicate upon the claim in question.

The controversy upon which this difference of opinion has taken place, alike among the eminent Arbitrators and in the Supreme Court, depends primarily upon what is the true import of the claim itself. The judgment delivered by the Chief Justice on behalf of the majority of the Supreme Court can hardly be supported as presenting an accurate statement of the claim; for of the four elements into which he analyses it only one is actually present, viz. a claim for uncollected balances of purchase money. It is also to be observed that in expressly adopting the arguments stated by Sir Louis Casault, the

majority of the Supreme Court have accepted arguments which led to the rejection by that learned Arbitrator of all the specific applications expressed in the claim of Quebec.

In ascertaining the true nature of the claim of Quebec, it is necessary to observe that the claim relates to the uncollected prices of lands sold by Ontario and to nothing else. The case, be it understood, is that of lands sold but no title to which has yet been granted. The gravamen is that those sales ought to have been completed and the prices ought to have been collected long ago and that those prices have not been collected. Apart from this, Quebec has no case and does not profess to have one. The Respondent endeavoured to make out that he was not necessarily committed to the very strong statements, made in the claim, of wilful violation of duty. Now while it may not be of the essence of the claim to advance, as the Respondent has done, the theory that those moneys have not been collected because it is the settled purpose of Ontario to keep them in the province, the facts set out in the claim amount to a case of wilful neglect and default and to nothing else, and the remedy sought is that those moneys which are not in the hands of the defaulter shall be treated as if they were and shall be debited against him. This is the gist of the claim, a claim against a trustee who whether from intention or from negligence leaves moneys uncollected which he ought to have in his hands. The remedy claimed by Quebec is that Ontario shall be debited with a specific sum to wit, $485,801. 65 interest to run on it from a stated date. This is an appropriate remedy for breach of trust but it can be justified on no other ground.

Now the question is whether such a claim falls within heads H. and I. of the Submission. "The Common School Fund," the principal of which is to be "ascertained and determined," according

to the conception of the statutes which relate to it, consists of moneys in the hands of Government. Now the substance of the claim of Quebec is that the Ontario Government is to be debited with what in fact is not in their hands and is alleged to be uncollected owing to the fault of that Government. Their Lordships are unable to hold that a claim of this nature is to be found within the language of articles H. and I. of the Submission when there is no recital or suggestion of it in the rest of the Submission. The question is not whether the claim is suitable for arbitration, but whether it has been submitted by this instrument. As their Lordships read the claim, it is a claim founded on wilful neglect and default and of the nature of damages, and is heterogeneous to the questions which are clearly included in the Submission. The specified matters which the Arbitrators are to take into consideration do not include the present claim and the fact that they are mentioned makes it impossible to suppose that the parties would have omitted to mention the matter now in question, if it had been within the scope of the reference.

Their Lordships will humbly advise His Majesty that the Judgment of the Supreme Court of Canada ought to be reversed and the award of the Arbitrators restored.

There will be no order as to the costs of this Appeal.