Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney-General for the Province of Quebec v. *The Attorney-General for the Province of Ontario, from the Supreme Court of Canada; delivered the 29th July* 1910.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD MERSEY.

[DELIVERED BY LORD SHAW.]

The question in this case arises under an arbitration between the Dominion of Canada, the Province of Ontario, and the Province of Quebec, pursuant to the statute of Canada, 54 & 55 Vict., cap. 6, the statute of Ontario, 54 Vict., cap. 2, and the statute of Quebec, 54 Vict., cap. 4. These three statutes are in the same terms and provide that questions arising on the settlement of accounts between the Dominion and the two Provinces named may be referred to arbitration for final determination.

The present Appeal is from a Judgment of the Supreme Court of Canada, dated the 28th May 1909, confirming an award of the arbitrators appointed under the authority of the three Colonial Acts above-mentioned. The award appealed from had itself adjudged that certain findings and directions of two previous awards of the arbitrators were in excess of their jurisdiction, and that no effect should be given to

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them. This situation, at least partly, arose in consequence of the application to their proceedings of the principle set forth in the case of *The Attorney-General for Ontario* against *The Attorney-General for Quebec*, reported in 1903 Appeal Cases, p. 39. The majority of the Judges of the Supreme Court held that the decision just cited was applicable to the circumstances and ruled the proceedings of the present arbitration; and they accordingly confirmed the award of the arbitrators which had been based on the same ground.

In the year 1859 an important statute was passed in Canada for the regulation of the administration of the revenues arising from a large and important public educational endowment, "the Commissioner of Crown Lands "having, under the provisions of the Act 12 Vict., "cap. 200, and under the direction of the "Governor in Council, set apart and appro- "priated one million acres of public lands for "common school purposes." Directions as to the appropriation of revenue and the accumulation of a common school fund until it is sufficient to produce a revenue of $400,000 per annum, together with other administrative provisions, are contained in the Act. The question in the present case has reference to the shares to which the provinces of Ontario and Quebec respectively are entitled, of this common school fund.

The Canadian Confederation took place on the 1st July 1867; and by the British North America Act of that year, Section 142, it was enacted that the division and adjustment of the debts, credits, liabilities, property, and assets of Upper Canada and Lower Canada were to be referred to the arbitrament of three arbitrators.

These arbitrators duly appointed under the Act made their Award on the 3rd September 1870.

This document is one of the most important public documents regulating inter-provincial rights in the Dominion of Canada. And in the opinion of their Lordships its terms provide the radical element for the consideration and settlement of the dispute in the present case.

It should be premised that the lands which had been set apart by Government, from whose sale and realization the Common School Fund was to be built up, were all in Upper Canada and became the property of Ontario at the Confederation, subject to the liability to account and pay over to the Dominion of Canada and to the apportionment between Ontario and Quebec. As stated, it is upon the point of that apportionment that Quebec in the present cause has challenged the proceedings of the province of Ontario.

The fundamental provision of the Award is Section 9, which provides that "the moneys " received by the said province of Ontario since " the 30th June 1867, or which shall hereafter " be received by the said province from or on " account of the common school lands set apart " in aid of the common schools of the late pro- " vince of Canada, shall be paid to the Dominion " of Canada . . . and the income derived " therefrom shall be apportioned and paid between " and to the said provinces of Ontario and " Quebec " in certain proportions; and provision is made for an allowance of 6 per cent. to Ontario for collection.

So far as the management and ingathering of this fund is concerned, two things are plain. In the first place, Ontario as a province was not unnaturally selected as the administrator of the lands,—no doubt for the reasons that the proprietary rights therein being in that province and that the situation of the lands being also there, presumably Ontario could administer with

all the advantages of local knowledge. In the second place, Ontario as a province was itself deeply interested in correct administration, not only on account of its direct liability to the Dominion Government, but of its individual right to its share in the apportionment and division. These circumstances are not without a bearing upon those arguments used by the Appellant in this case, which are founded upon the strictest principles of trust accounting.

In the year 1891 the provinces of Ontario and Quebec made what is pleaded to be a legislative contract (under the Acts referred to) for the reference to arbitrators of matters in difference between them. Following thereon, on the 10th April 1893, the Dominion Government and the two provinces entered into an agreement of submission which narrated the previous legislation. This agreement of submission was the document which fell to be construed in the previous case before the Privy Council between the two provinces. As already stated, the whole of the provisions of this agreement appear to be executive of the Award of 1870, defining what was the Common School Fund, its destination, distribution, &c. In their Lordships' opinion, the agreement is not, and was not really intended to be, wider in its terms and effect than the Award.

Now, as mentioned above, it is fundamental in the matter of accounting that what Ontario is to account for is "moneys received." It has transpired that, in the course of the development of the province, Ontario,—pleading that it has been administering in the best interests of the colony and of the settlers,—has made certain deductions and remissions from the amounts due by them under their original contracts for purchase of land. Quebec challenges these deductions and remissions, and maintains that,

if made, they must form an abatement from Ontario's own share of the Fund, but cannot enter into the account as being in any respect a debit falling upon the share due to Quebec.

In their Lordships' opinion, a controversy of this nature has reference to the administration which preceded the receipt or possible receipt of funds, and is of the nature of a challenge of that administration, but is not a matter of arbitration as to the distribution of "moneys received."

Further, it cannot be said that the questions raised on this Appeal were not before the Privy Council on the occasion mentioned. If it were possible to put in a few sentences the clear and cogent argument addressed to the Board by Mr. Lafleur, those sentences would be found in the condensed report of the argument for Quebec presented in the former case. These are that Counsel "for the Respondent contended that, by "reason of Ontario's neglect or omission to collect "purchase moneys, the Common School Fund "had been largely diminished. Accordingly, in "the settlement of accounts referred between "the two provinces, and as a question arising "out of or relating or incident to the settlement "of those accounts, the arbitrators had juris-"diction to deal with Quebec's claims. The "terms of the reference were wide enough in "their scope to confer it; and the arbitrators "were bound to take into consideration, not only "the amount of the Common School Fund "actually in hand, but also 'the amount for "'which Ontario was liable,' words which were "not limited in their meaning to moneys actually "received."

The same argument is presented. But it has, of course, to be noted that the actual point of accounting in the former case was as to the uncollected prices of lands sold by Ontario,

which prices ought to have been, but had not been, collected. Upon this Lord Robertson remarked :—

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 un- " collected 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."

The question in the present case is whether, when the claim of Quebec is examined, it does not fall to be ruled by the principles laid down in this Judgment. It is an admitted fact in the case that Ontario has not received the moneys. Failing actual receipt, however, Quebec puts forward the contention that the accounting should proceed upon the footing of constructive receipt, because,—so runs the argument—unless each individual remission and deduction can be justified by evidence, Quebec is entitled to maintain that Ontario must be treated as liable to account for the moneys due under the original contracts with the settlers. It is unnecessary to make a pronouncement upon this now, for it appears to their Lordships, to use the language of Anglin, J., that :—

"No other ground has been suggested upon which it " could be held that these moneys not actually received by " Ontario should be treated as having been constructively

" received. Unless actual or constructive receipt of the " moneys is established, any claim that Ontario should " account for them as if they had been so received must " be a claim 'founded on wilful neglect or default and in " ' the nature of damages,' and as such not within the " scope of the reference."

To which may be added Mr. Justice Idington's observation :—

" Nor can I see how the grant of titles to the purchasers " thus relieved from payment can convert the legal wrong " as regards the Appellant, if any, into anything but wilfu " default."

Ontario's conduct is wilful; it maintains the high expediency of the course which it has pursued, and accordingly the moneys have not been received by it,—on account of what is maintained by it to have been sound public administration. Whether this be so or not it is not for their Lordships to determine, nor, in their opinion, was it for the arbitrators to do so. They hold that their judgment here falls to be ruled by the judgment of Lord Robertson above cited, and that the principles thereof apply to the present situation

The one fact that is entirely clear is the non-receipt of the moneys. As has been mentioned, the assumption of the original Award of 1870, which is the fundamental document, was that Ontario, which administered and had itself great interest in the receipts, but, on the other hand, was presumably acquainted with the circumstances of its own territory, would not deplete its revenue, but administer for the best for all concerned. If it has not done so, it may be for the question to be raised legislatively or otherwise: but when in the circumstances described the cardinal fact of non-receipt is admitted, it appears to their Lordships that the attempt to force a contribution as from a larger constructive receipt is simply another way of claiming

damages—a thing which, first, is not provided for by the original Award, and, secondly, is ruled out by the decision cited.

Their Lordships will humbly advise His Majesty that the Appeal should be refused.

There will be no order as to costs.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC

v.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO.

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