1901

*Oct. 10.

*Nov. 16.

THE PROVINCE OF QUEBEC.....APPELLANT;

AND

THE PROVINCE OF ONTARIO AND THE DOMINION OF CANADA..... } RESPONDENTS.

In re COMMON SCHOOL FUND AND LANDS.

ON APPEAL FROM THE DECISION OF THE DOMINION ARBITRATORS IN THE ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Accounts of the Province of Canada—Common school fund and lands—Administration by Ontario—Remitting price of lands sold—Default in collections—Withholding lands from sale—Uncollected balances—Jurisdiction of Dominion arbitrators.

By the submission of 10th April, 1890, amongst other matters submitted to the Dominion Arbitrators were the following:

"(*h*) The ascertainment and determination of the principal of the Common School Fund, the rate of interest which would be allowed on such fund, and the method of computing such interest.

"(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold.

The Province of Quebec claimed that Ontario was liable (1) for the purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence hrd been used, have been collected from the purchasers by Ontario, but which, owing to the neglect and default of the provincial officers, have not been collected but have been lost; (3) for lands which might have been sold but have not been sold, and (4) for all uncollected balances of purchase money.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Davies JJ.

Held, Gwynne J. dissenting, that the Dominion Arbitrators have jurisdiction, under the submission, to hear and adjudicate upon the claims so made by the Province of Quebec.

APPEAL from the decision of the arbitrators appointed to adjust the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec respectively and between the said provinces, by which the majority of the arbitrators held that they had no jurisdiction, under the submission, to take cognizance of such claims as are set out in the head-note as having been made by the Province of Quebec, and for that reason, declining to entertain the question upon the merits.

The award of the 13th September, 1900, appealed against, is as follows:

"To all to whom these presents shall come:—

"The Honourable Sir John Alexander Boyd, of the City of Toronto, in the Province of Ontario, Chancellor of the said Province; the Honourable Sir Louis Napoleon Casault, of the City of Quebec, in the Province of Quebec, Chief Justice of the Superior Court of the said Province of Quebec; and the Honourable George Wheelock Burbidge, of the City of Ottawa, in the said Province of Ontario, Judge of the Exchequer Court of Canada."

Send Greeting:

"Whereas, it was in and by the Act of the Parliament of Canada, 54-55 Victoria, chapter 6, and in and by an Act of the Legislative Assembly of Ontario, 54 Victoria, chapter 2, and in and by an Act of the Legislature of Quebec, 54 Victoria, chapter 4, among other things, provided that for the final and conclusive determination of certain questions and accounts which had arisen, or which might arise, in the settlement of

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accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had theretofore been arrived at, the Governor-General in council might unite with the Governments of the Provinces of Ontario and Quebec in the appointment of three arbitrators, being judges, to whom should be referred such questions as the Governor-General and Lieutenant-Governors of the Provinces should agree to submit;

"And whereas, we, the undersigned, John Alexander Boyd, Louis Napoleon Casault, and George Wheelock Burbidge, have been duly appointed under the said Acts, and have taken upon ourselves the burdens thereof;

"And whereas, it was provided in and by the said Acts that such arbitrators, or any two of them, should have power to make one or more awards and to do so from time to time;

"And whereas, by an agreement made on the tenth of April, 1893, on behalf of the Government of Canada of the first part, the Government of Ontario of the second part, and the Government of Quebec of the third part, it was, among other things, agreed by and between the said Governments, parties thereto, that the following questions, among others, mentioned in the order of the Governor-General in Council of the twelfth day of December, eighteen hundred and ninety, be, and they were thereby, referred to said arbitrators for their determination and award in accordance with the said statutes, namely:

"The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which should be allowed on such fund, and the method of computing such interest.

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"In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold."

"And whereas it was also provided by the said agreement that all the accounts therein referred to should be brought down and extended to the thirty-first day of December, eighteen hundred and ninety-two inclusive;

"And whereas it is alleged and appears that at that date there remained to be collected by the Province of Ontario a large sum consisting of uncollected balances of the price of the Common School Lands theretofore sold;

"And whereas it is in substance claimed on behalf of the Province of Quebec that the amount of such uncollected balances should be ascertained, and that the Province of Ontario should be charged or debited, and the Common School Fund credited therewith, or with such proportion thereof as is right, fair and just;

"And whereas on behalf of the Province of Ontario it is objected that we, the said arbitrators, have no jurisdiction to entertain the claim so made on behalf of the Province of Quebec;

"And whereas we have heard the parties and what was alleged by them respectively;

"Now therefore we, the said John Alexander Boyd and George Wheelock Burbidge (the said Louis Napoleon Casault dissenting) proceeding upon our view of a disputed question of law do award, order and adjudge that we, the said arbitrators have no authority or jurisdiction to entertain the said claim.

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"This award is made without prejudice to the rights and interests of the Province of Quebec in such uncollected balances and to its right to have the same saved and excepted in any final award made in the matters submitted to us.

"In witness whereof, we, the said John Alexander Boyd, Louis Napoleon Casault, and George Wheelock Burbidge have hereunto set our hands and seals this thirteenth day of September, in the year of our Lord one thousand nine hundred.

"J. A. BOYD," [Seal.]
"L. N. CASAULT," [Seal.]
"GEO. W. BURBIDGE." [Seal.]

"Signed, sealed and published in the presence of

"L. A. AUDETTE."

The reasons of the Honourable Chancellor Sir John A. Boyd and of Mr. Justice Burbidge in support of said award, were as follows:

BOYD C.—The Common School Fund is not composed in part of lands set apart for Common School purposes under Con. Stat. Canada, Cap. 26, nor is it in part composed of the uncollected proceeds of the sale of the said lands.

"It is entirely a fund represented by such moneys when collected by the Province of Ontario; but it consists of moneys in hand and not of claims to recover money by any right of action or other method of recovery.

"This und in hand is what is dealt with by the award of the first arbitratrators pursuant to the British North America Act, and in my opinion this board has no jurisdiction under the present deed of submission as to anything that does not form such fund.

"The submission to the board as to the amount of the Common School Fund for which Ontario is liable

does not, as I read it, cover the case of outstanding moneys the proceeds of the price of such lands yet uncollected.

"I do not repeat what was said on a former occasion against any 'wilful default' clause being imported into the award of the first arbitrators contrary to the expressed terms of that award. But I see no reason to change what I then said on account of anything decided in the last appeal by the Supreme Court of Canada. I think Quebec should take nothing by its motion."

(Sgd.) "J. A. BOYD."

13th June, 1900.

BURBIDGE J.—"By the fourth paragraph of the deed of submission under which this arbitration is proceeding it is provided that all the accounts referred to therein shall be brought down and extended to the thirty-first day of December, eighteen hundred and ninety-two inclusive.

"On the sales of lands set apart for the purposes of the Common Schools of the late Province of Canada there remained at that time to be collected by the Province of Ontario sums amounting in the aggregate to something less than half a million of dollars. It is now claimed for the Province of Quebec that this amount should be ascertained by the arbitrators, debited to the Province of Ontario and credited to the Common School Fund as part of the principal thereof. To that claim the Province of Ontario answers that this is a matter in respect of which the arbitrators have no jurisdiction.

"By the deed of submission the arbitrators are in general terms given jurisdiction among other things, in all matters of account between the two provinces. That is, I think, the effect of clause (*f*) of the second paragraph of the submission read in connection with

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what therein precedes it. Then follows the provision, omitting clause (*g*) which is not material to the question now under discussion:—

"3. It is further agreed that the following matters shall be referred to the said arbitrators for their determination and awarded in accordance with the provisions of the said statutes, namely:—"

"(*h*) The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which should be allowed on such fund, and the method of computing such interest; (*i*) In the ascertainment of the amount of the principal of the said Common School Fund the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada; but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold."

"Now it would appear that as there is a special submission of the question of the ascertainment and determination of the amount of the principal of the Common School Fund, it must be taken and understood that it was not the intention of the parties to submit that question by the more general reference and words preceding, and to which allusion has been made. That is made very certain, it seems to me, by the words with which the third paragraph opens: 'It is further agreed that the following matters shall be referred.' Showing clearly that it was in the minds of the parties that the general words preceding did not include this matter of the ascertainment of the amount of the principal of the Common School Fund.

"What then is the authority given to the arbitrators in respect to the ascertainment of this fund? They are to take into consideration:

(1). The sum then held by the Dominion of Canada;

(2). The amount for which Ontario was at the time liable; and

(3). The value of the school lands that have not yet been sold.

"The value of the latter, it turns out, is not considerable, and one may be at some loss to see why it should have been thought necessary to refer this matter, and make no allusion to the large sum that represented at that date the uncollected balances in respect of lands that had been sold. But the reason or motive for the omission is not a matter with which the arbitrators should concern themselves. The important consideration is that they are not by the deed of submission given any power to value these uncollected balances. It is suggested, however, that the arbitrators may in effect do that by declaring and awarding that Ontario is liable for this amount, or for such a portion of it as may be thought to be fair and just. With that view I cannot agree. Up to the thirty-first day of December, 1892, beyond which date the arbitrators cannot go (at least without the agreement of parties) the Government of the Province of Ontario had, so far as the facts before us show, done nothing that would prevent them from collecting all of the portions of such moneys as would constitute the Province of Quebec's share therein, As to the share of the Province of Ontario, that being their own, the Government could, with the authority of the legislature, which they had, do what they thought best. Nor do I see any reason to believe that because of the delays that have taken place, these uncollected balances were at the time mentioned uncollectable. I do not think we have jurisdiction, by holding the Province of Ontario liable therefor, or for some proportion thereof, in substance and effect, to value these outstanding moneys, the parties themselves not having given us by their submission any such power.

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"And I am confirmed in that view by the fact that the deed of submission having been executed on the 10th of April, 1893, the Legislature of the Province of Quebec on the 8th of January, 1894 (57 Vict. c. 3), and the Legislature of the Province of Ontario on the 5th of May, 1894 (57 Vict. c. 11) passed statutes in which, among other things, it was provided that the Governments of the two provinces might agree upon a price to be paid by the Province of Ontario for the acquisition by it of the uncollected balances of the price of the Common School Lands."

(Signed) "GEO. W. BURBIDGE.

The reasons of the Honourable Chief Justice Sir Louis Napoleon Casault in support of his dissent from said award were as follows:—

CASAULT C.J.—"By her claim bearing date the 9th December, 1899, Quebec asks:

"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 and 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 determining 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 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," and concludes that her claim be maintained, as set forth, or that the arbitrators make such other award in the premises as law or equitable principles may authorise."

"Ontario objects that the claim of Quebec is not within the terms of the submission under which the Board of Arbitrators acquired jurisdiction.

"The submission as agreed by the Dominion and the Provinces of Ontario and Quebec referred 'the following questions, as mentioned in the order of the Governor General in Council, of the twelfth day of December, 1890,' namely:

'1. All questions relating or incident to the accounts between the Dominion and the Provinces of Ontario and Quebec and to accounts between the two Provinces of Ontario and Quebec.

'The accounts are understood to include the following particulars:

(*a*), (*b*), (*c*), (*d*) and (*e*) are omitted because they refer only to accounts between the Dominion and the provinces.

'(*f*) All matters of account (1) between the Dominion and either of the two provinces, and (2) between the two provinces.

'3. It is further agreed that the following matters shall be referred to the said arbitrators for their determination and award, in accordance with the provisions of 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, the rate of interest which should be allowed on such fund, and the method of computing such interest.

'(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the

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arbitrators are to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold.'

"It is true that 'The Common School Fund' under the statute 12 V. ch. 100, which gave it existence, and ch. 26 of the Consolidated Statutes of Canada, was the moneys arising in principal and interest from the sale of the 1,000,000 acres of lands set apart for that object. But the reference itself shows that afterwards 'The Common School Fund' was meant to include moneys uncollected and even the unsold lands, since it directed that, in the ascertainment of the principal of the Common School Fund, the arbitrators were directed to take into consideration not only the sum then held by the Dominion, but also the amount for which Ontario was liable and the value of the lands not then sold. This direction makes it evident that the parties intended 'The Common School Fund' to mean and comprise not only the moneys received on the price of land sold, but also the uncollected balances and the lands unsold. And the statutes of Quebec, 57 V. ch. 3, and that of Ontario 57 V. ch. 11, both recognizing the fund to be composed of lands unsold, uncollected balances and amounts collected on price and interest of lands sold, leave, in my mind, no possible doubt upon that point.

"It appears, by the deposition of Mr. Hyde, that the uncollected balances on the school lands sold were, on the 31st December, 1892, $485,801.65, and the accounts and correspondence show that from the 31st of June, 1867, to the 20th of April, 1890, Ontario had collected $936,729.33, for which she had accounted to and been debited by the Dominion, on the 1st December, 1889, for a part, and on the 20th April, 1890, for the rest. From this latter date to the 20th of December follow-

ing, date of the Order in Council mentioned in the fifth paragraph of the submission, the amount collected, if any, could have been but a trifle compared to the almost half million outstanding. Is it possible to suppose that the parties to the submission, and especially the representatives of Quebec, had only in view that trifle, and that other, the value of the 3,383 acres of land unsold, which is all that is proved by Mr. Hyde to have remained unsold on the 31st December, 1892, of the 1,000,000 acres, and not the half million of uncollected balances?

"If the possible amount collected by Ontario, after the 20th April, 1890, had been what the parties meant, they would have been written '*the sum now held by* '*the Governments of the Dominion of Canada and of the* '*Province of Ontario*" in lieu of, *but also the amount for* '*which Ontario is liable.*'

"The word 'liable' is construed by the counsel for Ontario as meaning the moneys which that province had received and had in hand. I have just shewn that the parties to the submission did not attach that meaning to the use they made of that expression; but moreover under the law as it stood, it appears to me to have a larger one. Section 109 of 'The British North America Act' made, not only the lands situated in Ontario the property of that province, but also 'all sums then due and payable for such lands, subject to any trust existing in respect thereof and to any other interest than that of that province in the same.' The uncollected amounts then due for school lands were thereby made the property of Ontario subject to the trust in favour of the common schools of both Ontario and Quebec representing Upper and Lower Canada. Being made the owner of said uncollected amounts, Ontario became the debtor of the portion which was to be applied to the Common Schools of

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Ontario and Quebec, and liable towards the same. It is the view which the framers of the submission seem to have taken and the meaning which they have attached to the word 'liable' as comprising not only what Ontario had collected, but all sums then due and payable for the school lands which she was not entitled to retain for collection or otherwise.

"Quebec in claiming that we do award that said uncollected balances are moneys held and received by Ontario on account of the Common School Fund and moneys in her hands bearing interest from the 31st of December, 1892, or from such other date which we should decide, appears to me to be asking more than we are authorized to do, and we may so decide.

"But I cannot concur in the opinion expressed in the note which The Honourable Sir John Boyd has sent me, nor agree to the draft of award submitted and which appears to adopt the same idea.

"I have twice already expressed the opinion that in determining, under the reference, the amount of 'The Common School Fund' the arbitrators were bound to take in consideration those uncollected balances. I have not changed my opinion.

"Quebec, in the last paragraph of her claim, concludes that, if we do not allow what is her principal demand, we make such other award as in law and equity she may be entitled to, which means in relation to said uncollected balances.

"I think that this includes a request that, in the ascertainment of the amount of the principal of the said 'Common School Fund' we should take into consideration those uncollected balances. I am of opinion that so far we have jurisdiction, and I think that we should so award. I therefore think that in rejecting the part of the Quebec claim which demands that Ontario be debited of the said uncollected balances as

of moneys which she had received on the 31st December, 1892, we should appoint the two provinces to proceed to the ascertainment of the amount of the said uncollected balances which, after deduction of five per cent for management and twenty-five per cent from such of them as are subject to the improvement fund, we should decide to form part of the principal of the said 'Common School Fund.'

"The statutes 57 Vict. ch. 11, of Ontario and 57 Vict. ch. 3 of Quebec do not appear to me to afford argument against that determination. The object of those two statutes is to establish the value of said uncollected balances, which is not within our powers, and to discharge Ontario from any further responsibility to Quebec for said balances and the unsold school lands, by making over to Ontario the interests of Quebec in the same, and that, for a consideration which the arbitrators have no right to fix or even to consider at present.

(Signed), "L. N. CASAULT."

Duffy K.C. (Treasurer of the Province of Quebec), and *Lafleur K.C.* for the appellant.

Æ. Irving K.C. and *Shepley K.C.* for the Province of Ontario, respondent.

Hogg K.C. for the Dominion of Canada, respondent.

The judgment of the majority of the court was delivered by:

THE CHIEF JUSTICE.—In a judgment in a former appeal arising out of this arbitration relating to the Common School Fund, (reported in 28 Can. S.C.R. 609, at page 804), I have stated the nature of the questions submitted to the arbitrators relative to the fund in question.

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In proceedings before the arbitrators since that judgment was delivered, a question which a majority of them, (Mr. Justice Burbidge and Chancellor Boyd), have treated as a question of jurisdiction, has arisen and has been determined adversely to the Province of Quebec. The arbitrators having certified that they proceeded on a disputed question of law, the matter has been brought by appeal to this court.

By the agreement or submission of the tenth of April, 1890 (1), amongst other matters referred were the following:

(*h*) The ascertainment and determination of the principal of the Common School Fund, the rate of interest which would be allowed on such fund, and the method of computing such interest.

(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable and also the value of the school lands which have not yet been sold.

The Province of Quebec having claimed that Ontario is liable; (1) for purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence had been used, have been collected from the purchasers by Ontario, but which, owing to the neglect and default of the provincial officers, have not been collected but have been lost; (3) for lands which might have been sold but have not been sold; and (4) for all uncollected balances of purchase money, the majority of the arbitrators held that they had no jurisdiction under the submission to take cognizance of such claims and, for that reason, declined to entertain the question on the merits.

As intimated on the argument, a majority of the court consider the decision to be erroneous. The clear and distinct words of the reference, which require the

(1) 28 Can. S. C. R. 804.

arbitrators "to take into consideration the amount for which Ontario is liable" seem to us to make it impossible that a claim that Ontario is liable for uncollected balances of purchase moneys as well as for the wilful default and neglect of its officers can possibly be outside the terms of the reference.

Whatever may be the result upon the merits, at least the Province of Quebec, when it asserts a claim for these moneys remitted and lost to the fund, or not realised, by the omissions of Ontario, is entitled to be heard and cannot be repelled *in limine* upon the pretention that there is a want of jurisdiction when in the very words of the submission it is referred to the arbitrators to ascertain the amount of Ontario's liability. In order to support the ruling of the arbitrators rejecting the claim without hearing the parties, it is not now competent for counsel for Ontario to travel into the merits of the case and show that, as a matter of law, upon the construction of the submission, of previous awards, and of legislative acts, the Province of Ontario cannot be made liable for these claims. Quebec has a right to urge this liability before the arbitrators in the first instance and this they have been prevented from doing by the denial of jurisdiction. We need not amplify these reasons for our decision as we agree in the arguments stated by Chief Justice Casault in his dissenting opinion so far as it bears on the question of jurisdiction.

The appeal is allowed and it is referred back to the arbitrators with a declaration that they have jurisdiction to hear and adjudicate upon the claims made by the Province of Quebec.

GWYNNE J. (dissenting).—This appeal is made in assertion of a right on the part of the appellant to apply to the arbitration between the Provinces of Quebec

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and Ontario under the terms of a submission entered into by the provinces, a principle which the Court of Chancery applies and applies only in cases of accounts ordered to be taken between *cestuis que trustent* and their trustees having imposed on them a duty to collect, receive and apply to the uses of their *cestuis que trustent* moneys belonging to them; and between mortgagors and their mortgagees in possession. The appellant claimed before the arbitrators a right to have an inquiry made as to whether or not the Government of the Province of Ontario had by wilful default and neglect failed or delayed in collecting any money which when received would belong to the Common School fund in which both provinces have a common interest, and if it should appear that they had, then the appellant claimed to have the right to charge against the Province of Ontario in the arbitration, the amount which should be so ascertained as if in fact this money had been received by the Government of the province. The arbitrators declined to enter upon any such inquiry for the reason that in their judgment such an inquiry did not come within the terms of the submission under which they acquired jurisdiction. From that decision this appeal is taken. In the arguments before us the appellant, by its learned counsel, pressed upon us that it does not charge the Government of Ontario with having been guilty of any such wilful default or neglect, nor does it allege that any loss has accrued to the school fund by reason of any moneys not having been collected and received by the Province of Ontario—that all that the appellant asked is an inquiry into the matter—and of course *consequential* directions, as it should appear, and that the appellant insisted that not to allow the appeal would be, in effect, an adjudication in the negative upon the merits of the question,

whether or not Ontario had been guilty of such unlawful default and neglect. I endeavoured to point out at the time what appeared to me to be, and what still appears to me to be, the fallacy of this contention. It needs no argument; all may be summed up in this short sentence—it is difficult to understand how the declining to enter upon an inquiry into any subject for the reason of want of jurisdiction can be construed into a determination of the subject matter upon its merits either in the affirmative or the negative. This, however, was the sole argument used before us.

Regarding then the question as it is, as one only of the construction of the submission to arbitration it is simply this: Did the Government of the Province of Ontario by the submission to arbitration, in which it has concurred with the Government of the Province of Quebec, submit to the judgment of the arbitrators the determination of the question whether or not it is liable to account as a defaulting trustee as being guilty by wilful default and neglect in not having collected money which when collected and received by the Government belongs to the school fund? The arbitrators have as I have said expressed their opinion that no such question is by the submission remitted to them to determine. In this opinion and in the reasons upon which it has been founded I concur, and I am therefore of opinion that the appeal should be dismissed with costs.

Appeal allowed.

Solicitor for the appellant: N. *W. Trenholme.*

Solicitor for Ontario, respondent: *Æ. Irving.*

Solicitor for Canada, respondent: *W. D. Hogg.*