THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC ..... APPELLANTS;

AND

THE DOMINION OF CANADA.....RESPONDENT.

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*Nov. 2,3,4.
1898
*June 14.

IN RE COMMON SCHOOL FUND AND LANDS.

ON APPEAL FROM AN AWARD IN AN ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Constitutional law—B. N. A. Act, s. 142—Award of 1870, validity of—Upper Canada Improvement fund—School fund—B. N. A. Act, s. 109—Trust created by—Effect of Confederation on trust.

The arbitrators appointed in 1870, under s. 142 of the B. N. A. Act, were authorized to "divide" and "adjust" the accounts in dispute between the Dominion of Canada and the Provinces of Ontario and Quebec, respecting the former Province of Canada. In dealing with the Common School Fund established under 12 V. c. 20 (Can.), they directed the principal of the fund to be retained by the Dominion and the income therefrom paid to the provinces.

Held, that even if there was no ultimate "division and adjustment," such as the statute required, yet the ascertainment of the amount was a necessary preliminary to such "division and adjustment," and therefore *intra vires* of the arbitrators.

Held further, that there was a division of the beneficial interest in the fund and a fair adjustment of the rights of the provinces in it which was a proper exercise of the authority of the arbitrators under the statute.

By 12 V. c. 200, s. 3 (Can.), one million acres of the public lands of the Province of Canada were to be set apart to be sold and the proceeds applied to the creation of the "Common School Fund" provided for in sec. 1. The lands so set apart were all in the present Province of Ontario.

Held, that the trust in these lands created by the Act for the Common Schools of Canada did not cease to exist at Confederation, so that

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

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the unsold lands and proceeds of sales should revert to Ontario, but such trust continued in favour of the Common Schools of the new Provinces of Ontario and Quebec.

In the agreement of reference to the arbitrators appointed under Acts passed in 1891 to adjust the said accounts questions respecting the Upper Canada Improvement Fund were excluded, but the arbitrators had to determine and award upon the accounts as rendered by the Dominion to the two provinces up to January, 1889.

Held, that the arbitrators could pass upon the right of Ontario to deduct a proportion of the schools lands the amount of which was one of the items in the accounts so rendered.

APPEAL from an award 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.

The arbitrators were appointed under authority of statutes passed by the Dominion Parliament and legislatures of the said provinces in 1891, namely, 54 & 55 Vict. ch. 6 (D); 54 Vict. ch. 2 (Ont.); and 54 Vict. ch. 4 (Que.) These statutes were identical in terms that passed by the Dominion Parliament containing the following provisions:—

"An Act respecting the settlement of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, and between the said provinces."

"Whereas certain accounts have arisen or may hereafter arise in the settlement of the 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 has hitherto been arrived at; and whereas it is advisable that all such questions of account should be referred to arbitration; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:"

"1. For the final and conclusive determination of such accounts, the Governor General in Council may

unite with the Governments of the Provinces of Ontario and Quebec in the appointment of three arbitrators, to whom shall be referred such questions as the Governor General and the Lieutenant-Governors of the said provinces shall agree to submit."

"2. The arbitrators shall consist of three judges, one to be appointed by the Governor General in Council and one by each of the said Provincial Governments, and all three shall be approved of by each Government."

"3. The arbitrators shall not assume to decide any disputed constitutional question; but if any are raised they will note and report them with their award, but without delaying their proceedings."

"4. Any two of the arbitrators shall have power to make an award."

"5. The arbitrators, or any two of them, shall have power to make one or more awards, and to do so from time to time."

"6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the award shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal."

"7. In case of an appeal on a question of law being successful, the matter shall go back to the arbitrators, for the purpose of making such changes in the award as may be necessary, or an appellate court shall make any other direction as to the necessary changes."

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"8. The appointment of the said arbitrators by Order in Council and their award in writing, shall be binding on Canada, save in case of appeal on question of law, in which case the final decision thereon shall be binding on Canada."

"9. In case of a vacancy by death or otherwise among the arbitrators, the same shall be filled in the same manner as the appointment was first made, any such appointment to be approved of by the other two Governments."

The Honourable John A. Boyd, Chancellor of Ontario; the Honourable Sir Louis Napoleon Casault, Chief Justice of the Superior Court of Quebec; and the Honourable George A. Burbidge, Judge of the Exchequer Court of Canada, were appointed arbitrators, in accordance with the provisions of the said statutes, and an agreement of submission was entered into on behalf of the three governments, which provided that the following, among other matters, should be submitted to them:

"1. All questions relating to 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."

"2. The accounts are understood to include the following particulars:"

"(*a*) The accounts as rendered by the Dominion to the provinces up to January, 1889."

"(*b*) In the unsettled accounts between the Dominion and the two provinces the rate of interest and the mode of computation of interest to be determined."

"(*c*) The accounts as rendered by the Dominion to the two provinces up to January, 1889, to be determined upon."

* * * * * * * *

"(*h*) The ascertainment and determination of the amount 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."

On this submission the arbitrators made and published an award in respect to the Common School Fund and Lands which, after formal recitals proceeded as follows:

"Now therefore we, the said arbitrators, exercising our authority to make an award at this time respecting some of such questions and to reserve others for further consideration, do award, order and adjudge in and upon the premises as follows:"

"1. That the sum held by the Government of the Dominion of Canada on the tenth day of April, 1893, as part of the principal of said Common School Fund, amounted to two million four hundred and fifty-seven thousand six hundred and eighty-eight dollars and sixty-two cents ($2,457,688.62), made up of the following sums, that is to say: 1st, the sum of one million five hundred and twenty thousand nine hundred and fifty-nine dollars and twenty-nine cents ($1,520,959.29), that at the Union of the Provinces came into the hands of the Government of Canada, and upon which interest has from time to time in the accounts referred to us been credited to the said Provinces; secondly, the sum of nine hundred and twenty-five thousand six hundred and twenty-five dollars and sixty-three cents ($925,625.63), for which, in 1889, the Government of

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Ontario accounted to the Government of the Dominion; and thirdly, the sum of eleven thousand one hundred and three dollars and seventy cents ($11,103.70), for which the Government of Ontario accounted to the Government of the Dominion in the following year (1890)."

"From this finding Chief Justice Sir Louis Napoleon Casault dissents, he being of opinion that the sum then held by the Dominion Government as part of the principal of the said Common School Fund was greater than has been stated by an amount of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents ($124,685.18), which sum in the said accounts has been deducted from the said fund and credited to the Upper Canada Improvement Fund."

"2. That the Province of Ontario is not liable out of the proceeds arising from the sale of the Crown Lands of the Province, other than the million acres of Common School Lands as set apart in aid of the Common Schools of the late Province of Canada, to contribute anything to the said Common School Fund."

"Mr. Chancellor Boyd dissents from so much of this finding as may imply that Ontario is under any liability in respect to the Common School Fund or lands."

"3. That, subject to certain deductions, the Province of Ontario is liable for the moneys received by the said province since the first day of July, 1867, or to be received from or on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada."

"Mr. Chancellor Boyd dissents from this finding as to liability."

"4. That from the moneys received by the Province of Ontario since the first day of July, 1867, from or on account of the Common School Lands set apart in aid

of the Common Schools of the late Province of Canada, the Province of Ontario is entitled to deduct and retain the following sums as provided by the award of the 3rd of September, 1870, that is to say":

"First,—In respect of all such moneys, six per centum on the amount thereof for the sale and management of such lands."

"Secondly,—In respect of moneys arising from sales of such lands made between the fourteenth day of June, 1853, and the sixth day of March, 1861, twenty-five per centum of the balance remaining after the deduction of six per centum for the sale and management of such lands."

"Chief Justice Sir Louis Napoleon Casault dissents from so much of this finding as relates to the deduction in the cases mentioned of the twenty-five per centum on such balance."

"5. That in respect of the matters mentioned in the four preceding paragraphs, we the said arbitrators have proceeded upon our view of disputed questions of law."

"6. With reference to the Quebec Turnpike Trust debentures in which a part of the Common School Fund was invested, we do award, order and adjudge that there is in respect thereof no liability on the part of the Dominion to either of the provinces, or on the part of the Province of Quebec to the Province of Ontario, but that whatever sums may be realized from the principal moneys due on such debentures, or from the arrears of interest due thereon, on the first day of July, 1867, shall be added to and shall form part of the principal of the said Common School Fund, and that whatever sums may be realized for interest on such debentures that has accrued due since the first day of July, 1867, or which may hereafter accrue due shall be dealt with as income arising from such fund"

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"7. With respect to the claim made by the Province of Quebec, that the Dominion is liable for interest on moneys received by the Province of Ontario from the sales of Common School Lands and retained by that province, we do award, order and adjudge that the Dominion is not liable therefor."

"8. And with respect to other questions and matters relating to the Common School Lands and Fund, we, the said arbitrators, do not now make any award, but reserve the same for further consideration."

Each of the said arbitrators published his reasons for the decision arrived at on the disputed questions of law dealt with in the said award, which reasons are as follows:

BOYD C.—"1. No claim exists on the part of Quebec, to have more lands set apart for Common School purposes than were actually set apart by Old Canada. Upper and Lower Canada, now Ontario and Quebec, were the constituents of the joint Province of Canada, and are bound by what was done, or what was left undone in this regard prior to Confederation. That the claim is a 'new one' does not for that reason bar it, but it goes a long way to discredit it; nor do I perceive any intrinsic merit in the claim which would justify us in taking it into further consideration."

"2. So far as Quebec claims to impeach the action of the first arbitrators in their award of 1870 touching the Upper Canada Land Improvement Fund, and as to what they have directed to be placed to the credit of that fund, presently and prospectively, I cannot see my way to interfere for many reasons. For one thing, the very subject matter is withheld from our jurisdiction by the terms of the reference. (See paragraph 5 of Deed of Submission of 10th April, 1893);"

"And, for another thing: Apart from the provisions of the first award of 1870, the Province of Quebec would have no *locus standi* to make any claim as to the Common School Fund out of which this Land Improvement Fund was segregated by the first arbitrators."

"3. The key to that award is the fact that all the fund was derived from land in Upper Canada, and that all the school lands were locally situate in Ontario and became or were retained as the property of Ontario on the dissolution of the Union. It was of grace to give any (much more a substantial) proportion of the future proceeds of those lands to Quebec, and the arbitrators could well modify the former proportion by withdrawing so much for the purposes of land improvement in the counties of the terrritory which furnish the lands. That was within the equity of the Act, Consolidated Statutes of Canada, Chapter 26, section 7, which provided for such a reserve being formed."

"4. But, again, if the first award is as to these lands, impeachable (as I think it is), consider the state of affairs when Old Canada ceased to exist: What became then of the Common School Fund? Now, it is not hypercritical to apply accurate rules of construction to the language used in the constituting Statute, 12th Victoria, Chapter 200, which was reserved for and obtained the Queen's Royal sanction. The Act recites that 'it is desirable to raise moneys from the public lands of this province (that is Canada) for the maintenance and support of Common Schools therein' (*i.e.*, in the Province of Canada). The same thought is repeated in the body of the Act, section 4, 'for the support, etc., of Common Schools in this Province.' Consolidated Statutes of Canada, Chapter 26."

"What became of these schools when Canada ceased to exist as a joint Province and became a new political

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entity formed by the addition of other Provinces and established as the Dominion? There were then, in truth, no Common Schools in Canada. The existing schools became Common Schools in Ontario and Common Schools in Quebec, and not, therefore, the objects of the trust. The scheme of the Act and the scope of the trust was that public lands of Canada should support the Public Schools of Canada; but it does not therefore follow that the public lands of Ontario should help to support the Public Schools of Quebec, unless clear legislation to that effect is found. But none such can be found, for it is submitted that the general words of Section 109 of the Imperial Act 'subject to any trusts existing in respect thereof and to any interest other than that of the province in the same,' do not cover the case in hand. It is no answer to say that then there would be no trust remaining for the Common Schools of Ontario *quoad* the unsold lands—granted; but Ontario having all the lands could provide for her own schools."

"In this aspect the reason and the motive of the whole scheme of support for the Public Schools of Canada disappeared when the union of the provinces was dissolved and Ontario retained her lands out of which the fund had been created and was to be maintained. When there ceased to be any Common Schools of Old Canada there ceased to be any beneficiaries for the future annual payments out of this fund. The fund itself, as it then existed, would revert in equity to the province out of whose lands it was created, if there was no legislation to the contrary, and there is none. Compare, by contrast, sections 139 and 140 of the British North America Act, making careful provision for events in the provinces after Confederation, but nothing analogous to which is found as to the trusts relating to Common Schools."

"5. The point is therefore pressed that no trust exists as to this Old Common School Fund of Canada. The Award of 1870 itself, in clause IX, shows its invalidity, for it purports to deal with moneys received and to be received by Ontario 'on account of the Common School lands set apart in aid of the Common Schools of the late Province of Canada,' but the province had disappeared politically and really and so had the schools; what remained was the Dominion of Canada and the schools of Ontario and the schools of Quebec. The annihilation of the beneficiaries appears on the face of the Award, and, therefore, the futility of the supposed trust is also manifested; hence the Award is at variance with section 109 of The British North America Act, which gives the lands in Ontario and the moneys due thereon to that province subject to existing trusts only, but this is a non-existing trust, and so the lands and moneys due for the lands go absolutely to Ontario. So far as concerns the money collected out of the lands and held by Old Canada prior to Confederation but not invested, the Imperial statute is silent. The part investment, namely, the $58,000 represented by the Quebec Turnpike Trust, is included in the fourth schedule of assets as the property of Ontario and Quebec jointly. That being mentioned, and the uninvested fund being excluded from mention, throughout the Act favours rather than makes against the present argument."

"Now the moneys collected and held by the Dominion as part of the general account are also earmarked as parts of this Trust Fund intended for the benefit of the Common Schools of (United) Canada, but when these schools ceased to exist, as such, at the date of Confederation, the moneys should, on principles of equity and fair dealing, have reverted to Upper Canada (*i.e.*,

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Ontario) from whom it was taken (1). A gift to a charity which has expired is as much a lapse as a gift to an individual, and it cannot be applied *cy-pres*—*Re Rymer* (2). Where the society intended has merged in another society then the gift fails—*Mackeown* v. *Ardagh* (3). This is a case in which the sub-division of Canada and the alteration of the Common School organization consequent upon the change of Government destroy the identity of the original beneficiaries (4)."

"6. This is not a case in which there can be or should be any application of the *cy-pres* doctrine for this one good reason, that the scheme was one wherein the property and the schools were subject to one common Legislature, but it would be a perversion of the bounty to apply the property jointly when all control of the Quebec schools has passed from (United) Canada and Ontario. When the scheme was framed and intended to be perpetual there was but one Government controlling all,—fund, trustees and beneficiaries. But now the perpetuity has ended and there are three Governments; and matters of school legislation are no longer controlled by the general Government but are remitted, as matters of local concern, to local legislation. Surely these circumstances, leaving out of sight others which might be mentioned, are sufficiently distinctive from those existing when the fund was formed to displace any equitable claim of Quebec (5)."

"The words of the Imperial Statute 'subject to existing trusts,' etc., yield a plain, intelligible mean-

(1) *Lindsay Petroleum Co.* v. *Pardee*, 22 Gr. 18; *Cunnack* v. *Edwards* [1895], 1 Ch. 489.

(2) [1895] 1 Ch. 19.

(3) Ir. R. 10 Eq. 445 [1876].

(4) *Re Joy, Purday* v. *Johnson*, 60 L. T. 175.

(5) See *Marsh* v. *Fulton County*, 10 Wall. 676; and *The Attorney General* v. *Borough of North Sidney*, 14 N. S. W. Rep., Eq. 154; *Penn* v. *Lord Baltimore*, Ridg. Temp. Hardwick, pp. 336-7; 1 Ves. 444.

ing, and call for no latitude of construction to include anything beyond what is obvious. To ascertain what are the trusts we must fall back upon prior provincial legislation, and one cannot affirm that the Legislative body which enacted 12th Victoria and sanctioned its consolidation in Chapter 26, had any trusts in view other than those pertaining to the whole body of the Canadian Public Schools in (United) Canada and that in perpetuity. If there is meant to be a continuation of that trust for schools after the constitutional disappearance of Old Canada and the practical severance of that trust to and for the benefit of the new Provinces of Ontario and Quebec, one would expect to find proper provision therefor in suitable and explicit language."

"CASAULT C.J.—The Provincial Statute 4 & 5 Vict. ch. 18, which by its sec. 23, was to come in force on the first of January, 1842, enacted, sec. 2:"

'That for the establishment, support and maintenance of Common Schools in each and every township and parish in this province, there shall be established a permanent fund which shall consist of all such moneys as may accrue from the selling or leasing of any lands which, by the legislature of this province, or other competent authority, may hereafter be granted and set apart for the establishment, maintenance and support of Common Schools in this province, and of such other monies as are hereinafter mentioned; and all such monies as shall arise from the sale of any such lands or estates, and certain other monies hereinafter mentioned, shall be invested in safe and profitable securities in this province, and the interest of all monies so invested, and the rents, issues and profits arising from such lands or estates as shall be leased or otherwise disposed of without alienation, shall be annually applied in the

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manner hereinafter provided, to the support and encouragement of Common Schools.'

"Section 3 of the same Act decreed that fifty thousand pounds should be granted annually, to be distributed amongst the several districts of the province, and that this sum should be composed and made of the revenue derived from the permanent fund to be created under the previous section, and such further sums from the unappropriated moneys which were then raised and levied or might thereafter be raised and levied by the legislature for the uses of the province as might be required to make the above mentioned sum, and that the said annual grant should be and be called 'The Common School Fund.'

"At the same session was passed the statute 4 & 5 Vict. ch. 100 for the disposition of public lands within the province, which was reserved as required by the Union Act (sec. 42 of the Imperial statute 3 & 4 Vict. ch. 35), and received the royal assent which was duly signified. That statute gave to the Government of Canada the power to deal with the public lands, but it excluded free grants excepting to the extent of ten acres for schools, school houses, etc."

"The limit put by that statute to the extent of free grants for schools, etc., etc., did not preclude the appropriation of a larger area for the maintenance of schools generally. It only limited the number of acres which could be granted to each special school, as shown by its reproduction in 16 Vict. ch. 159, sec. 10, in the Consolidated Statutes of Canada, chap. 22, sec. 11, and in 28 Vict. ch. 2, sec. 14."

But this question has no interest because the setting apart of one million of acres the price of which when sold was to constitute the Common School Fund was done under the authority of a subsequent Act."

"It has been contended that 4 & 5 Vict. ch. 18, had never been repealed and is law to this day. This contention has also for the same reason no interest. But it is incorrect. This statute was repealed, 1st, implicitly by 12 Vict. ch. 200, which covered the same grounds, and 2nd, by the Consolidated Statues of Canada, (22 Vict. ch. 29, p. xxxv), which at sec. 5, stated that the several Acts or parts of Acts mentioned as repealed in Schedule A thereto annexed, and in which we find as repealed 4 & 5 Vict. ch. 18, shall stand and be repealed. The Act 7 Vict. ch. 9 need not be noticed except in so far as it directs the sum of fifty thousand pounds granted for the support of the Common Schools to be apportioned between the divisions of the former provinces of Upper and Lower Canada in proportion to the population of each as ascertained by the next anterior census."

"Then comes, in 1849, the statute 12 Vict. ch. 200, sanction of which was reserved and granted by Her Majesty in Council on the 9th of March, eighteen hundred and fifty (1850) and communicated to the legislative council and assembly on the twenty-seventh of May one thousand eight hundred and fifty (1850), and which was law until repealed by the Revised Statutes of Canada, where all its provisions have been embodied. It is copied *in extenso* in the Ontario case. It is enacted by its first section that all moneys that shall arise from the *sale* of any public lands of the province, shall be set apart for the purpose of creating a capital which shall be sufficient to produce a clear sum of one hundred thousand pounds per annum, which said capital and the income to be derived therefrom shall form a public fund to be called the Common School Fund; by section 2, that the capital of the said fund may be invested as therein mentioned and that the fund and the income thereof

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shall not be alienated but shall remain a perpetual fund for the support of Common Schools and the establishment of township and parish libraries; by section 4, that the grant of money out of the provincial revenue for common schools shall cease when the income from the school fund shall have realized fifty thousand pounds, with, however, a proviso that, if the income from the school fund fall short of that amount, the Receiver General shall complete that amount out of the consolidated revenue and repay these advances from the said income whenever it shall exceed the said sum; and by section 3, 'that the commissioner of crown lands under the direction of the Governor in Council, shall set apart and appropriate one million of acres of such public lands, in such part or parts of the province as he may deem expedient, and dispose thereof on such terms and conditions as may by the Governor in Council be approved, and the money arising from the sale thereof shall be invested and applied towards creating the said Common School fund; provided always that before any appropriation of the moneys arising from the sale of such lands shall be made, all charges thereon, for the management and sale thereof, together with all Indian annuities charged upon and payable thereout, shall be first paid and satisfied.'

"An Order in Council of the 8th of October, eighteen hundred and fifty (1850), approved the report of the Commissioners of Crown Lands of the same date proposing the appropriation of one million acres of land for school purposes indicating and determining the lands so appropriated, to wit: in the counties of Huron, Gray, Bruce and Perth, and, as some of said lands not yet surveyed might contain swamps and lands of very inferior quality, suggesting that fifty-nine thousand six hundred and twenty-five acres in

the township of Carrick be reserved until the quality of the unsurveyed part of one million acres be ascertained, and the department be authorized to make the exchanges, acre for acre, from the disposable Crown lands in the said township or elsewhere."

"An Order in Council of the seventh July, one thousand eight hundred and fifty-two, reduced the price of school lands in the counties of Bruce and Grey to ten shillings an acre, and decided that a measure be submitted to parliament to authorize the expenditure of a sum equal to two shillings and sixpence per acre of the purchase money on the improvement of roads and harbours within the said counties. That authorization was granted on the fourteenth day of June, one thousand eight hundred and fifty-three by the following section of the Act to amend the law for the sale and settlement of public lands (16 Vict. ch. 159.)

'Sec. 14.—It shall be lawful for the Governor in Council to reserve out of the proceeds of the school lands in any county, a sum not exceeding one-fourth of such proceeds, as a fund for public improvements within the county, to be expended under the direction of the Governor in Council, and also to reserve out of the proceeds of unappropriated crown lands in any county a sum not exceeding one-fifth as a fund for public improvements within the county, to be also expended under the direction of the Governor in Council: Provided always, that the particulars of all such sums, and the expenditure thereof shall be laid before parliament within the first ten days of each session: Provided always, that not exceeding six per cent on the amount collected, including surveys, shall be charged for the sale and management of lands forming the Common School Fund, arising out of the one million acres of land set apart in the Huron Tract.'

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"On the third of July, one thousand eight hundred and fifty-four, an Order in Council fixed at ten shillings the upset price of the school lands in the counties of Huron, Perth, Bruce and Gray."

"An Order in Council of the twenty-seventh February, one thousand eight hundred and fifty-five, authorized the expenditure of thirty-five thousand five hundred and eighty-nine pounds from the improvement fund which the fourteenth section above transcribed of the Act 16 Vict. ch. 159, gave authority to establish. But it appears by an Order in Council of the seventh December, one thousand eight hundred and fifty-five (1855), that, notwithstanding the expenditure of twenty-five thousand pounds from the same, the improvement fund had not yet been set apart, and that the Crown Lands Department was directed to apprize the Inspector General of the amount at the credit of each county from the proceeds of sale of both Crown and School Lands, so that the proportions accruing to the improvement fund might be set apart by the Receiver General for that purpose."

"Such were the legislation and the Orders in Council under it relating to the Common School lands which I think important to notice at present, when the Consolidated Statutes of Canada took effect on the fifth December, one thousand eight hundred and fifty-nine. These last repeal 12 Vict. ch. 200; (ch. 29, sec. 5, and schedule A); but they incorporate at ch. 26 all the enactments of this last mentioned statute and of section 14 of 16 Vict. ch. 159, without in any way changing their sense so that it is useless to cite them again. It may be noted that the 14th section of 16 Vict. ch. 159, though forming part of that land Act, was omitted from ch. 22 of the Consolidated Statues of Canada, where the Land Act is reproduced; and that ch. 22 of the Consolidated Statutes

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of Canada was subsequently repealed by 23 Vict. ch. 2, which was still law at Confederation; and that, on the sixth March, one thousand eight hundred and sixty-one an Order in Council rescinded that above mentioned of the seventh December, one thousand eight hundred and fifty-five."

"The Common School Fund was not dealt with by the Government of the province of Canada as the law directed; most of the lands set apart were sold and proceeds realized of the same, though kept as a separate fund which was credited with interest quarterly, (see Public Accounts of the Province of Canada, 1864 ii, p. 47; 1865 ii, p. 53; 1866 ii, p. 45; 1867 ii, p. 61) were not invested as directed by law, save $58,000 of the same which were exchanged for debentures of the Quebec Turnpike Trust, nor was the interest accruing applied towards the expenses of education, but the fund and the interest were left to accumulate, and the two hundred thousand dollars which the law required to be applied yearly for the maintenance of Common Schools was furnished out of the Consolidated Fund and exclusively charged to the same. So that, at the date of Confederation the funds in the hands of the Government amounted to $1,733,224.47, including the $58,000 debentures mentioned and $29,580 interest on the same, and it appears that $1,704,738 remained due upon the lands already sold, and 8,559 acres of land had not yet been disposed of. (See Langton's Report, Long Book, pp. 4 and 8)."

"The British North America Act, 1867, (30 Vict. ch. 3), came in force on the first of July, 1867. By section 109 of the same all lands belonging to the Province of Canada and all sums then due and payable for such lands were given to the provinces of Ontario and Quebec, in which the same were situated or arose,

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subject to any trusts existing in respect thereof and to any interest other than that of the province in the same."

"It seems to be undeniable that the lands which had been set apart in execution of a special law directing it so that the proceeds of their sales should constitute a fund for the maintenance of Common Schools in the then two sections of the Province of Canada as well as the sums due or payable for the same were affected by a trust, and that Quebec, one of the sections, had in what remained unsold of these lands and in the unpaid balance of the price of those already sold, a special interest distinct from that of Ontario, where those lands were situate. We have already decided that the lands ceded by the Indians were affected with a trust for the payment of the annuities which were stipulated as the consideration of their cession, though the deeds of cession contained no stipulation to that effect, whilst the school lands were expressly set apart and dedicated to a special service required for the welfare and good government of the Province of Canada."

"The division of that province into two separate sections with distinct legislative powers could not without direct terms and did not revoke the dedication made for the common benefit of both; and far from so directing the British North America Act, as already mentioned, in giving the lands and the sums due for the same to the province in which they were situated, expressly stated that the lands and the unpaid balance of those sold did remain subject to the trust existing in respect of them and to any kind of interest other than that of the province to which they were assigned in the same."

"Was it possible to maintain in a more forcible way as against the unsold lands and what remained due of the price of those already sold, the existence of the

trust with which they had been affected, and to reserve to the late Province of Lower Canada, made Quebec by that Act, the interest which it then had in both? To my mind, it was not. I deduce, from what precedes, that the Province of Quebec owes to the law and not to the award of eighteen hundred and seventy the right which it has to a share of the proceeds of the lands in Ontario whether sold or unsold, which have been set apart for the benefit of the common schools, and that its share was independent of that award. I will hereafter examine the effect the award had on the same."

Such was the opinion of the late Auditor Langton. At page 8 of his remarks in the long book headed 'Arbitration between Ontario and Quebec,' he expresses himself as follows: 'There are, however, many questions which are not represented by any items in the statement of affairs which will necessarily come before the Arbitrators. The most important of these in amount, are the amounts not yet realized from the common school lands. They are all situated in Ontario, and are handed over to that province, but subject to a trust, in which Quebec is interested to the extent of its share according to population, or in whatever other way the realized fund may be divided. The sums must necessarily be collected by Ontario, and it might either pay over annually to Quebec its share of the collections, less expenses; or, which would be much more convenient, the lands and arrears due might be valued, a deduction being made for costs of collection, and upon Quebec's share of the capital ascertained Ontario might pay five per cent interest. The best way of arranging this would be for Ontario to pay the Dominion so much more interest, and Quebec so much less. As to the valuation from a return made to me by the Crown Lands Depart-

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ment, the outstanding instalments amount to $1,704,738.00, and only 8,959 acres remained unsold, valued at two dollars an acre, or $17,918. As all the other instalments bear six per cent interest, the whole property can hardly be valued at less than $1,700,000, or, charging twenty per cent for costs of management and collection $1,460,000. Of this sum the share of Quebec would be, on its population in eighteen hundred and sixty, about $648,000, equal to an annual sum of $32,400.'

And the treasurer of Ontario in his argument before the first arbitrators said (see Quebec case, p. 16; the whole speech is there cited as being in Vol. 220 of the miscellaneous pamphlets in the library at Ottawa): 'As to the outstanding moneys on lands sold, and the unsold lands, I think Ontario took them subject to the trust in respect of the same, and are therefore bound to collect the moneys, charging only the statutory allowance therefor, and when collected, to pay the money over to the Dominion, to be added to and held on the same trust as it holds the fund already in its hands.' And further on, speaking of the statute creating the Common School Fund, he said: 'By that Act the fund was created for the support of the Common Schools, as well in Lower Canada as in Upper Canada, and although the relations of the two sections of the late Province of Canada are now changed, yet in the Confederation Act it remains as it was before Confederation, and must be carried out in all its provisions; and therefore, Lower Canada must, in my opinion, according to law, have the same portion of the annual income from the capital of this fund as it would have had, had Confederation never taken place.'

"The several statutes authorizing this arbitration, namely, 54 & 55 Vict. ch. 6, Canada; 54 Vict. ch. 2 (1891),

Ontario, and 54 Vict. ch. 4 (1890), Quebec, at section 1 of each of them, limit the powers of the arbitrators and their inquiring into the accounts between Canada and the Provinces of Ontario and Quebec jointly and severally and between the two provinces to such questions as the three governments shall mutually agree to submit. The first agreement of submission which was approved and concurred in by the three governments, referred to the arbitrators the following questions which may have arisen from the controversy relating to the Common School Fund:

'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, said accounts being understood to include, amongst other particulars, the following:'

'(*b*) In the unsettled accounts between the Dominion and the two provinces, the rate of interest and the mode of computation of interest to be determined.'

'(*e*) The arbitrators to apportion between Ontario and Quebec any amount found to be payable by the Dominion of Canada.'

'(*f*) All other matters of account (1) between the Dominion and the two provinces; (2) between the Dominion and either of the two provinces, and (3) between the two provinces.'

'(*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.'

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'(*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 are not yet sold.'

'5. It is further agreed by and between the parties hereto that the questions respecting the *Upper Canada Building Fund*, and the *Upper Canada Improvement Fund* are not at present to form any part of this reference, but this agreement is subject to the reservation by Ontario of any of the rights to maintain and recover its claims, if any, in respect of the said funds as it may be advised.'

"The last clause reserved to the parties the right to submit, upon mutual agreement, other questions or matters."

"It appears to me that, under clause (*e*) of this submission, being empowered to apportion between Ontario and Quebec the amount found to be payable to them by the Dominion, we could not only determine the amount due by Canada to the Common School Fund, but also apportion that amount between the provinces. But as this would divide only part of that fund, and as the statutes passed by the Parliament of Canada and by the legislatures of the two provinces, in eighteen hundred and ninety-four (1894) contemplate a division of the whole, and the counsel for Quebec did not insist upon a partition of anything but the annual interest, it may be that we should not go beyond establishing the total amount of the fund and dividing the income or interest derived therefrom."

"But it seems to me that, with the exception to our powers made by clause five (5) of the submission, we

must determine the amount of the fund without any regard to the Upper Canada Improvement Fund and as if it did not exist, save by adding in the terms of the submission, that we do so under reservation to Ontario of its rights to maintain and recover its claim, if any, in respect to that fund. Both parties have argued that we have no right to pass on the question of that fund, true it is for different reasons, Ontario maintaining it has incontrovertibly been made hers by the first award, and Quebec that the award was, in that respect, a nullity. It has been argued by Ontario that what was excluded by the reference was its claims for the addition to that fund of one-fifth of the proceeds of the Crown lands sold between June, one thousand eight hundred and fifty-three (date of the sanction of 16 Vict. ch. 159, which authorized the creation of that fund), and March, eighteen hundred and sixty-one, when the fund was abolished. But the reference permits no such distinction. It excludes in plain words the Improvement Fund, without exception. I do not see how we can take upon ourselves to say that that designation does not include the whole fund and to limit its meaning to a part of it only. To urge upon us that distinction or limitation it has been argued that Quebec never objected to that part of the award. But we find that the Treasurer of Ontario, on the ninth December, eighteen hundred and sixty-eight (1868), not satisfied with the statement of liabilities prepared by the Dominion, transmitted to the Finance Minister at Ottawa one according to his views where he mentions the Improvement Fund at $5,180.04, as stated in the Dominion account, and puts down the Common School Fund at $1,733,224.47, without any deduction, and proposes that Canada should keep all investments on account of trust funds (Canada Sessional Papers, 1869, No. 46). In eighteen hundred and

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sixty-nine the same Treasurer sent another revised statement of debt where he charges $124,685.18 for the Improvement Fund, besides the $5,119.08, at which, after a small reduction therein specified, that Fund was entered in the Dominion statement of the debt. The statement so submitted by the Treasurer of Ontario was communicated to the Treasurer of Quebec, who, on the twenty-ninth of December, 1869, prepared himself a statement where he puts $5,119.08 as the only amount constituting the Improvement Fund. (Canada Sessional Papers, 1870, No. 11)."

"That was a protest against the larger amount introduced by the Treasurer of Ontario in his statement. We find Quebec still protesting after the award."

"I do not think that the mention of the sum of $124,685.18 as part of the Improvement Fund in the joint case of Ontario and Quebec on the question of interest can be taken as an admission by the counsel for the latter province, that Ontario was entitled to that amount. As Mr. Girouard did put it, the only question then mooted was that of interest; and as the Improvement Fund was excluded by the reference, what was said or written about the Fund in the joint case prepared for the two provinces by the counsel for Ontario was immaterial and its exclusion not worth an objection by the counsel for Quebec to a case which, in all other particulars, met his views."

"But, moreover, No. 49, at pp. 65, 66 and 67 of the joint case on interest, was only a citation of part of the award, followed with a statement of the funds in the hands of the Dominion for the purpose of showing how the Government at Ottawa treated it and had come to the amount of the semi-annual interest there mentioned as paid to each province by that Government."

"I wish it to be understood that I express no opinion whatever on the merits or demerits of the pretensions

of Ontario as to that Fund. What I say about the protest of Quebec is only to show that the exclusion of that fund from the matters submitted to our decision was not only to part of what Ontario claims to be the Improvement Fund but to the whole Fund."

"I now come to what, in the submission, is stated under letter (*h*), the ascertainment and determination of the amount of the Common School Fund."

"I think that Fund must be composed:

1. Of the amount which is in the hands of the Dominion		$1,733,224 47
Less investment in Quebec Turnpike Trust Debentures	$58,000 00	
And eight and a half year's interest credited, though not received	29,580 00	
		87,580 00
		$1,645,644 47
And subsequent payments by Ontario to the Dominion on account of that Fund, which were credits given Ontario for so much, and which must be debited to the Dominion from the date of the credit, 1889, December 1st		925,169 14
Of the credit, 1890, April 20th		11,103 70
		$2,581,907 31

"2. The debentures above mentioned and the interest due on the same."

"3. The amount received by Ontario on account of the price of school lands sold before and since the first day of July, 1867, less the two amounts above mentioned as credited by the Dominion on the first December, 1889, and the twentieth of April, 1890. In this must be included the amounts which will be established

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as erroneous entries and which are claimed by Quebec under No. 1 at p. 11 of its case, as $9,468.59."

"4. The outstanding balances due on sales of lands, which, in the reply of Quebec, are stated to have been on the thirty-first December, 1892, $485,801.65."

"5. The ascertained value of the lands unsold, if the parties agree to such valuation. If they do not agree, our award should state that the price of those lands when sold, less six per cent for management, shall form part of the Common School Fund and be accounted for by Ontario as such. I say less six per cent, though an Order-in-Council of the twenty-third June, eighteen hundred and sixty, authorized a charge of twenty per cent, because six is the amount fixed by 16 Vict. chapter 159 and by section 7, No. 2 of chapter 26 of the Consolidated Statutes of Canada, and that an Order-in-Council could not change the law. The Treasurer of Ontario admitted in his speech above in part quoted, that the statutory allowance only could be charged."

"I do not think, either, that though the investment of part in debentures of the Quebec Turnpike Trust was not one authorized by the law, that the late Province of Canada can be made responsible for the same. The dealings of the province bound its two successors, the Provinces of Ontario and Quebec, and they have all along since recognized those debentures to be what they were considered by the late Province of Canada, that is as so much to be deducted from the amount received by the Province of Canada on account of the Common School Fund and as an absolutely valueless asset."

"Quebec cannot be made responsible for the same from the decision of the Privy Council in the case of *Belleau et al* v. *The Queen* (1), that the bearers of the

(1) 7 App. Cas. 473.

debentures of the Quebec Turnpike Trust had no other recourse for their payment than against the trust."

"While on this subject, I may say that I entirely concur with the opinion expressed by my brother arbitrators at the argument, that the provinces have no recourse against the Dominion for the interest on said debentures which it appears could have been partly collected. Barring all other reasons, the two provinces having, by their dealings, concurred in the opinion that the debentures were valueless, could not afterwards, without notice to the contrary, and a request that the debentures themselves or the interest on the same should be collected, pretend that the Dominion was responsible for either."

"The claim which the counsel for Quebec qualified as a "New Aspect" is the addition to the Common School Fund of the amount from the sales of Crown lands by the Province of Ontario and Quebec since Confederation required to form, with the net proceeds of the school lands and the net proceeds of the public lands sold from the twenty-seventh of May, 1850, to the first of July, 1867, a capital sufficient at six per cent to produce an annual revenue of $400,000. It is founded on section 2 of the Statute, 12 Vict. ch. 200, which is in the following terms: 'All moneys arising after the twenty-seventh of May, 1850, from the sale of any public lands of the province, shall remain, or be set apart as part of the capital of said school fund until the same is sufficient at the rate aforesaid (six per cent) to produce the said sum of $400,000.'

"The Government of the late Province of Canada never carried that law into effect. It did not credit the Common School Fund with the proceeds of any of the public lands, but it furnished every year the whole of the $200,000 which the school law required to be applied for the establishment and maintenance of Com-

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mon Schools, not only without charging any part of it against the revenue of the school fund, as directed by law, but adding quarterly interest to the same. Quebec could not, and does not complain of what was done in that respect by the late province, but it wants us to award that the Common School Fund must be credited out of the price of public lands sold by Ontario and Quebec since the first of July, 1867, with the amount required to make, with the price of the school lands sold, the value of those unsold and the price of the public lands sold from the twenty-seventh of May, 1850, to the first of July, 1867, after deducting a percentage for administration, a sum of $6,666,666.66."

"Ontario contends that the sale of lands in 12 Vict. ch. 200, comprises the lease of lands for cutting wood. I do not think so. The license to cut wood, though renewable, were made for one year only, and conveyed no proprietary rights in the soil. They were, as they expressed it, but a permit to cut timber (12 Vict. ch. 30, sec. 1, and Consolidated Statutes of Canada, ch. 23, sec. 2,) which when cut, was the property of the licensee. His license even contained a condition that lots thereafter licensed to settlers would be excepted from the limits in which he was authorized to cut. The amounts received from the licensees to cut timber being excluded, the price of the public lands sold from the twenty-seventh of May, 1850, to the first of July, 1867, together with the price of the school lands sold and the value of those unsold, did not, after deduction of percentage for administration, amount to $6,666,666.66,"

"But Quebec has never urged what is now, and for the first time presented by its counsel as a "New Aspect." It has always limited its claim to the part of the Common School Fund in the hands of the Dominion to the balances due on the first of July, 1867, by the pur-

chasers of Common School lands, and to the proceeds of those lands sold since and the value of those unsold. This is admitted by its counsel, and the fact that they lay that part of its claim as a "New Aspect" is of itself a substantial acknowledgement that the province which they represent adopted the dealings of the Government of the late province in relation to the proceeds of the Crown lands, and consented that they should continue to be dealt with as previous to Confederation. This is made the more apparent from the fact that Quebec during the twenty-five years which have elapsed since it became a distinct province has not kept a separate account of the proceeds of its Crown lands but has continued to merge them in its Consolidated Fund, and to deal with them as part of the same. Section 2 of 12 Vict. ch. 200, affected the lands of the whole Province of Canada, and, if the lands which section 109 of the Imperial Act made the property of Ontario could still be subject to the completion of the $6,666,666.66, amount required to complete the Common School Fund, those which by the same Act were made that of Quebec, were also subject to it. And the agreement, clause 3 (i), should have joined Quebec to Ontario when it stated that in the ascertainment of the amount of the principal of the Common School Fund, the arbitrators were to take into consideration not only the sum held by Canada but also the amount for which Ontario is liable and the value of the school lands not yet sold. The exclusion of Quebec shows plainly that the liability of Ontario was intentionally limited to the price of the school lands, as otherwise Quebec would have been liable for the price of its lands sold since the first of July, 1867, required, with those sold by Ontario after that date, to make up the above mentioned capital of the said Common School Fund. I take it, therefore, that the

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submission clearly excludes from our consideration what Quebec has presented as a "New Aspect."

"The counsel for Quebec have not urged before us the claim against the Dominion for interest on collections not remitted by Ontario or moneys uncollected by that province. We have not to concern ourselves about it, save perhaps to adjudicate by the award that there is no liability in the Dominion on that score."

"As to the division of income, the assets in the fourth schedule of the Imperial Act were not the only ones which had to be divided between Ontario and Quebec. There were others as well as properties and credits of the late province which were common to the two sections of that province and which, after the loss of its distinct existence, remained the joint property of its successors, Ontario and Quebec. Amongst others of that description were the Common School Fund, the credits of which formed part of that fund, and the lands which had been appropriated to the fund, and which the Act of Confederation had assigned to Ontario subject to the trust with which they were affected. That fund, as well as all other joint properties or assets which the Confederation Act did not assign to the Dominion or specially to either Ontario or Quebec, were to remain in the possession of the Dominion until they were either divided between the two new provinces or regularly made over to one or the other."

"But though the possession of the fund remained with the Dominion until divided, the property of the same passed directly from the Province of Canada to its two successors, who hold it jointly. From the first of July, 1867, the Common School trust was the property of both Ontario and Quebec in the proportion of their respective populations, until a regular division should have changed that proportion."

"The Common School Fund had been created for a purely local service—the maintenance of Common Schools. That service after Confederation devolved on the Provinces of Ontario and Quebec, within whose jurisdiction it fell. The Dominion Government had no jurisdiction in the matter, could not continue it, or dispose of it. It was bound to hold it until divided between the two provinces and, until then, to give each province annually what on the first of July, 1867, apppeared to be the share of each province in the income produced by the fund. But the fund itself could not be left in abeyance, or its administration continued. It had to be divided and handed to the provinces in the proportions of their population at the preceding census, or perhaps in the proportion determined by the arbitrators. The law made this clear and it was so understood generally."

"In the statement of assets, which was prepared for the arbitrators, it is expressed as appearing that the part of the fund which had been allowed to accrue before Confederation should be divided as the grants were divided which should have been charged against it, viz.: according to population. In the principles upon which all transactions since the thirtieth of June, 1867, were to be introduced into the settlement of affairs of the late province, it is stated that 'the lands in each province were surrendered to them subject to existing trusts, and the Dominion is bound to see that the trusts are executed.' A very large sum, upwards of $1,700,000.00, remains outstanding on sales of Common School lands, situated in Ontario, but in which Quebec has a joint interest, and the apportionment of this asset must be left to the arbitrators. In the principles upon which the statement of affairs of June 30th, 1867, was to be revised in preparation for the arbitration between Ontario and

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Quebec, we also find, 'but as Ontario and Quebec have a joint interest in the Common School Fund, the investments for that fund and the accrued interest thereon must be handed over to Ontario and Quebec conjointly, to be dealt with by the arbitrators.'

"In the suggestions by Mr. Langton, Auditor General, speaking of the Common School Fund, he says: 'As the educational grants, which ought to have been charged against this fund so far as it would bear them, have always been distributed according to population, the fund ought to be similarly treated, and would give to Ontario $964,940.27, to Quebec $768,284.20, unless indeed the population, as it is presumed to have stood at the date of the Union, be assumed as the basis.'

"The treasurer of Ontario did not, in December, 1868, contemplate that the School Fund 'would remain as a trust in the hands of the Dominion.' Writing on the fifth of December, 1868, about the Trust Funds, which the then Minister of Finance proposed to keep on paying five per cent, and mentioning specially amongst others the Common School Fund, he wrote (Canada Sssional Papers, 1869): 'I do not think the Government of Ontario have any authority to deal with these funds as you propose. Its action would be *ultra vires*. If the people of Ontario should decide to have these funds invested it may be, and most likely would be, that they could invest them in good security at six per cent. Your Government owes these moneys. Instead of paying the principal you propose to pay five per cent in perpetuity. I am not prepared to say the people of Ontario will accept this proposition. As these funds are for public purposes, it may be that Ontario and Quebec may sweep them away altogether and merge them in the general revenues of the provinces, and provide, by annual grants

or otherwise, for the object contemplated by the creation of these special funds. By doing so it would save much labour and many complications.'

"At a subsequent conference, to be found in the same papers, he renews his objection to leaving the Common School and other funds in the hands of the Dominion.

"It was to put an end to the joint ownership and joint liability of the Provinces of Ontario and Quebec that section 142 of the Imperial Act enacted: 'The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada.'

"This section contains the extent and limit of the powers of the Arbitrators. They could adjust and divide; they could do nothing else without exceeding their authority. They could not decree that the joint property of the two provinces should forever remain undivided and be held conjointly by them in perpetuity. They could not create an everlasting trust and charge the Dominion with its execution. They could not, as they have done, assign a portion of the Common School Fund to one of the Provinces and direct that the rest should remain forever undivided and be transferred, or made over in trust to the Dominion which they charged with its execution. This was neither a division nor an adjustment of the joint property of the provinces. Adjust may have a larger meaning than divide; but it cannot be extended beyond regulating the accounts, putting them in order, making them accurate and conformable to the existing rights. In awarding that three-fourths of the Common School Fund should remain in trust in the hands

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of the Dominion to be by it invested and the proceeds paid by that Government in certain variable proportions to the provinces, the arbitrators were exceeding their authority, and what they did was *ultra vires*. This has struck one of the counsel for Canada, Mr. Ritchie, who, speaking on the interest question, remarked that the arbitrators had no such powers. Mr. Justice Burbidge seems to have been so impressed at the argument, and it is plain that they had not. The consequence of having so exceeded their authority was to make their award in relation to the part of the Common School Fund in the hands of the Dominion and the uncollected price and interest of the lands set apart for the maintenance of Common Schools whether sold or unsold, a nullity. Their award so far was ineffective and could be resisted when it came in force. These are the expressions of the Lord Chancellor about what is *ultra vires* in the argument before the Privy Council. Speaking of what the arbitrators were alleged to have done in excess of their authority, he expressed himself as follows: 'These gentlemen were executing a Parliamentary power. It is not as if it was a private arbitration under a private instrument. Either this was within their power or was not. If it was not within their Parliamentary power, it goes for nothing.' And further still, 'there is a certain thing to be done under a certain Act of Parliament by particular individuals named. If they do anything more than they are authorized to do, it cannot have any possible effect.'

"The Government of Canada, though it has paid half-yearly to the provinces the interest on the amount belonging to the School Fund which it had in its hands, cannot be said to have accepted the trust so thrown upon it; but, even supposing that it did, its acceptance could not have made valid what was void,

nor made effectual against Quebec, which was one of the parties interested, an unauthorized and illegal award to which it had not consented, and the object of which was to keep it in a kind of tutelage so far as the School Fund was concerned."

"The judgment of the Privy Council in 1878 has often been alleged as confirming the award of 1870, and barring any objection to this award. But a reference to the case submitted by the provinces, to the question which that tribunal was called to answer, to the answers it has made and to the pamphlets containing the argument before it, will make it evident that the Privy Council did not pay attention to the objections to the award which were not specifically raised in the case; and confirmed the same upon the questions propounded in the said case without in any way considering the objections, which Mr. Benjamin had invoked against the paragraphs 7, 8, 9 and 10 of the award."

"The making and publication of their award was the exhaustion of the powers and authority of the arbitrators. They could not afterwards correct it, nor complete it by providing for what they had omitted. Appointed as we are to determine and award, amongst other things, all matters of accounts between the Dominion and the Provinces of Ontario and Quebec, and between these two provinces, we have to examine the statutes and the first award; and, if we find that any part of the award is null or void, we must proceed to the determination of said accounts as if that part of the award did not exist."

"The paragraphs already mentioned, namely, 7, 8, 9 and 10 of the award of 1870, being void for excess of authority, they are inoperative, and the school trust is and has always remained, since the first of July, 1867, the joint property of the Provinces of Ontario and

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Quebec, and has ever since that date been held by them, absolutely as they then did. The income or interest which the fund produced had therefore to be divided between them in accordance with their respective rights at that date, that is, in proportion to their population, as ascertained by the then previous census, which was that of 1861."

"The division had to be complete and final, independent of any ulterior action. On that point I cannot do better than cite the opinion expressed by the late Mr. Gray, Dominion arbitrator: 'The powers of the arbitrators will close with their award, and that award must be so made that it can stand entirely *per se*, and not be dependent in any way upon ulterior action by either of the parties to the arbitration. It must give the asset, it must assign the burden—clear and unequivocal, whatever it may be, the asset must become the undoubted property, and the debt the undoubted burden of the one province or the other, as the case may be.' (Quebec Sessional Papers, 1870, No. 11.)"

"This is a correct definition of the duties of the arbitrators under sec. 142 of the Imperial Act. I cannot understand how the two of them, who must have drawn the award, came to do quite the reverse with the Common School Fund; and that, instead of dividing it, as the law directed, and giving to each of the two parties an undoubted property of its share, they decided that the fund be left in the hands of a third party forever, and the interest only be paid in variable portions to each of the two owners of the fund."

"Their award, so far as the Common School Trust was concerned, had no finality, which is an essential element to the validity of all arbitrators' award. Russell on Awards, 7 ed. part II, ch. 5, sec. 4; *Randall* v.

Randall, (1); *Ingram* v. *Milnes*, (2); *Smith* v. *Wilson*, (3); *Bhear* v. *Harradine*, (4); *Williams* v. *Wilson et al.* (5)."

"Russel cites a decision in an annonymous case, which is to be found in Dyer, p. 242*a*. That decision seems to me to be especially applicable to the case before us. It is that of a reference respecting the right, title, interest and possession of a certain parcel of land, where the award, instead of awarding the property in the land, only gave a profit out of it. It is precisely what has been done with the Common School Trust by the award of 1870. That this award, so far, was not final, is rendered more than apparent by the legislation that the Dominion and the two provinces have been obliged to originate for the division of that trust. Canada, 57 Vict., ch. 3; Ontario, 57 Vict., ch. II; Quebec, 57 Vic., ch. 3."

"I am of opinion that, if the arbitrators had not exceeded their powers and jurisdiction as I think they have, their award on the Common School Trust would be defective and void for this last reason, want of finality; and that we should award, as I have already mentioned, that the income or interest produced by the School Fund should be divided irrespective of what the award of 1870 pretends to have ordered, and according to the population of Ontario and Quebec in 1861."

"N B.—By sec. 3 of the British North America Act, 1867, the Dominion of Canada was to come into existence on the day fixed by a proclamation of Her Majesty. That proclamation was issued on the 22nd May, 1867, and fixed the first day of July, 1867, as that on which the three Provinces of Canada, Nova Scotia and New Brunswick, should be united and form the Dominion

(1) 7 East 80.
(2) 8 East 444.
(3) 2 Ex. 327.
(4) 7 Ex. 269
(5) 9 Ex. 90.

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of Canada. Paragraphs 7 and 9 of the award of 1870 profess to deal with the Common School Fund as held on the 30th June, 1867, by the Dominion of Canada. But the Dominion had then no existence, and did not hold the Common School Fund, which, at that date, was still held by the Province of Canada."

"There is a very wide difference between annulling the first award and finding that it is on its face null for being *ultra vires*—as I think it is for dealing with the School Trust otherwise than directed by law, which empowered the arbitrators to divide and adjust and not to maintain it in division forever and to create a trust in relation to the same. If so doing was *ultra vires*, the award is, in the words of Lord Cairns, already quoted in my memoranda, ineffective and without any possible effect, goes for nothing and can be resisted, and we must treat it as such not for extraneous matter but for matters appearing on the face of it."

"I admit that we must, in that case, consider the Common School Trust as it was at Confederation, that is a Trust Fund for the benefit of the Common Schools of Canada, in which the two sections of that province named in the statute were then interested to the proportion of their population at that time. The law especially mentions the two divisions Upper and Lower Canada (sec 5, C. S. C. c. 26) as the divisions of the provinces to which the income of the Fund must be apportioned, and therefore the schools for the maintenance of which the trust was created were the schools of Upper and Lower Canada. The B. N. A. Act, 1867, changed nothing in that law and in the right of the two sections, or rather of Upper and Lower Canada whose names it has changed to those of Ontario and Quebec."

"The trust was absolutely for local or provincial purposes and therefore ceased to be under the disposal of

the Governor-General, whose duties, so far as provincial matters were concerned, devolved on the Lieutenant-Governor of each province."

"But it had first to be divided as a common fund and if it has not yet been legally divided, it is still in common; and, called to establish its amount, we must do so taking it as it was on the first of July, 1867."

"The lands had, under the law, been set apart for the maintenance of Common Schools in the two sections of the province; such was their destination. It mattered not where they were situated, they were affected by the object for which they had been so set apart, and which was a trust existing in respect of them; and the successor of Lower Canada, Quebec, was one of the two beneficiaries who had an interest in the same (sec. 109). Section 129 did for the laws in force in Canada before Confederation what secs. 139 and 140 did for the proclamations. C. S. C., ch. 26 remained in force and applied to Ontario and Quebec as it had applied, before the first July, '67, to Canada and its two divisions, Upper and Lower Canada."

"The Legislature of the Province of Canada had made the trust perpetual; but it could have altered the law and ordered its division between Upper and Lower Canada. It could even have put an end to the trust and declared its extinction. The division of Canada into the two provinces by making it the distinct and separate property of Ontario and Quebec, did not affect its perpetuity, which remained an obligation on each province so long as it did not legislate otherwise. But as it was theirs, the arbitrators had no authority to award that it should remain in the hands of a third party forever."

"If the first arbitrators had exercised the powers which the law had vested in them, that is divide and adjust the trust, they could have assigned to Ontario a

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much larger share than to Quebec; but as they have assumed an authority which had not been conferred on them, the whole of their award on that Trust Fund is null and thereby without possible effect."

"I have already expressed that the fact that part of the trust consisted in lands in Ontario, which were made the property of that province subject to the trust, offered no obstacle to the division, as what was to be divided was the proceeds of the lands and all that was required for an effectual division was to award that Ontario should account to Quebec for a determined proportion of the price when realized."

"It seems to me that the cases of legacies to bodies which had ceased to exist at the death of the testator have no analogy to the case before us. Legacies take effect at the death of the testator, and as if made on that date. If the name legatee had previously lost its existence, there is nobody to receive the gift which returns to the general representative of the estate. But if the body to which the legacy was made had still its existence at the death of the testator, it received the gift, and its separation afterwards into two distinct bodies does not revoke the gift or deprive each of its share of the same, especially when each of the two continue the work which the legacy was expressly made to help."

"The statute created the trust for the maintenance of Common Schools in Canada, but directed that its income should be divided between Upper and Lower Canada, nominally, (C. S. C. c. 26, s. 3,) for the support of Common Schools in each, which is equivalent to the trust being made for both. It had been carried into effect for a number of years previous to the two sections of the province being divided, and their names, and nothing but their names changed. Even in case of a legacy the mere change before the death of

the testator of the name of the legatee would certainly not deprive it of the gift."

"If in establishing the amount of the school fund in the hands of the Dominion we deduct the $124,000, which, in the accounts submitted to our review, are deducted therefrom for improvement fund, we decide thereby that Ontario is entitled to that much for the improvement fund, and we therefore pass upon a matter which is specially excluded from our jurisdiction by the reference."

"If the arbitrators had divided, as they were directed to do, the Common School Trust Fund, however unjust the partition would have been, they would have acted within the scope of their jurisdiction, and their award, so far, would have on its face been legal; but called upon to adjust and divide that trust, they have chosen to award as to most of it what they had no authority to do, and in that, have exceeded their jurisdiction and made their award a nullity not only as to the part of it which is *ultra vires*, but as to the whole of that trust fund, as well as the amount of one hundred and twenty-four thousand dollars as the rest. The nullity of an award as to one point affects and nullifies the whole decision as to the other questions or subjects connected therewith, as admitted by the Lord Chancellor in the argument before the Privy Council."

"The Common School Trust was one complete asset. The other assets could be separated from it, and therefore, the award as to the others was not affected by the illegality of the same as to the school trust. But no part of the school fund or trust could be separated from the others. It was to be adjusted upon or divided in its entirety as one. It is upon that ground that I find null the deduction of $124,000, as well as the other deduction for improvement fund, and the whole of

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their award so far as it extends to the subject of the Common School trust."

BURBIDGE J.—His Lordship cited the matters referred and the statutes appointing the arbitrators and proceeded as follows:

"Now, it is to be observed that the arbitrators are given authority, among other things, to determine all questions relating to or incident to the accounts as rendered by the Dominion to the provinces up to January, 1889 (Par. 2) (*a*) and (*c*), and to ascertain the amount of the principal of the Common School Fund, taking into consideration the sum then held by the Government of the Dominion of Canada (Par. 3) (*h*) and (*i*); but subject to this limitation, that the questions respecting the Upper Canada Improvement Fund are not to form any part of the reference."

"Turning now to the accounts rendered by the Dominion to the provinces up to January, 1889, the first mention I find of the Common School Fund is at page eight, Schedule A of Exhibit V, or No. 56, where it is stated at the sum of $1,733,224.47, which it is conceded on all sides was at the date of the Union the amount of the fund, including therein the sum of $58,000 invested in the Quebec Turnpike Trust Debentures, and also a sum of $29,580, arrears of interest on such debentures, which at the time were considered to be valueless. Then we find the fund mentioned again in Schedule A of the same Exhibit at p. 43, where, in the Ontario and Quebec subsidy account, the provinces are credited with interest on the Common School Fund, the first credit being of an amount of $41,141.11 for a half year's interest due January 1st, 1868; that is, one half year's interest at five per centum upon a sum of $1,645,644.47, the balance of the fund mentioned after deducting the amount of the Quebec

Turnpike Trust Debentures, and accrued interest. Some of the other credits of the half year's interest on the fund, as given in this account, are stated at amounts in excess of that mentioned, but the reason therefor and the error have been explained, and not being material to the question now before us need not be further referred to."

"In Schedule C. of the same Exhibit, page 102, the Common School Fund is stated in the account in the following manner:

'Common School Fund		$1,733,224.47
Less Investments:		
Quebec Turnpike Trust	$58,000.00	
Arrears of Interest on Turnpike Trust	29,580.00	87,580.00
		$1,645,644.47'

"At page 121 of the same schedule, in a statement of the Province of Ontario account, the province is credited with the Upper Canada Improvement Fund, amounting to $124,685.18. This sum of $124,685.18 is an amount which, by the award of the third September, 1870, was deducted from the Common School Fund as held by the Dominion at the date of the Union. In the same statement of account, at page 123, in the Province of Ontario account, the province is credited on the thirty-first day of December, 1867, with its share according to population, of one half year's interest on the Common School Fund, stated to be $1,520,959.21 (it should be twenty-nine, not twenty-one cents), and at page 139 the Province of Quebec is credited with its share of the interest, the amount of the fund being stated at the same sum or figure. Like entries respecting the Common School Fund, the Upper Canada Improvement Fund, and the amount of the former fund on which the Dominion credited the provinces with

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interest will be found in other exhibits. These statements present this difficulty, that in one place we find the amount of the Common School Fund stated at $1,645,644.47, without any deduction for the Upper Canada Improvement Fund, while in two other places the fund is stated at $1,520,959.21, the balance of $124,658.18 being credited to Ontario as part of the Upper Canada Improvement Fund. Now, but for the limitation as to the matters referred, contained in the fifth paragraph of the Agreement of Submission, the arbitrators would without doubt have authority to correct this discrepancy in the statements of the accounts, according to their view of what the rights of the parties to the reference are. The parties have, however, agreed that the questions respecting the Upper Canada Improvement Fund are not at present to form part of the reference, subject to the reservation by Ontario of any of its rights to maintain and recover its claims, if any, in respect of the said fund. The reservation was, it is admitted, made at the instance of Quebec. In the proposals set out in the Order-in-Council of the twelfth of December, 1890, mentioned in the Agreement of Submission, it was stated that the outstanding question as to the Upper Canada Land Improvement Fund was not to form part of the reference unless the Quebec Government thereafter consented to include the same. There were at the time two questions relating to this fund. One had to do with the deduction from the Common School Fund of the sum of $124,658.18 made by the award of September, 1870, and the further deduction of twenty-five per cent which the Province of Ontario was thereby authorized to make from any moneys collected after June thirtieth, 1867, on School Lands sold between the fourteenth of June, 1853, and the sixth of March, 1861; and the other was a claim made by Ontario that

the Upper Canada Improvement Fund should be increased by a further sum of $101,771.68, representing one-fifth of the receipts from Crown lands sold between the dates mentioned. The first question had been dealt with by the arbitrators appointed under the 142nd section of The British North America Act, 1867, and the other had never been passed upon, and was, I think, the "outstanding claim" that it was intended to exclude Quebec had nothing to lose but everything to gain by bringing again into debate the question that had in the earlier arbitration been determined against it. The credit to Ontario of the sum of $124,658.18 on account of the Upper Canada Improvement Fund was one of the items of the accounts which in express terms were referred to the arbitrators "to be determined upon." Then we have seen that the arbitrators are empowered to ascertain and determine the amount of the principal the Common School Fund and in doing so to take into consideration not only the sum then held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable. But how is that to be done without either including or excluding the deduction for the Upper Canada Land Improvement Fund? Either there is such a fund, consisting so far as the moneys are in the hands of the Dominion of Canada of a sum of $124,658.18, or there is not; and either the Province of Ontario is liable for the total of the sums collected from school lands, less six per cent for management, without any deduction for the Upper Canada Improvement Fund, or it is not; and when we determine that liability, we must, from the necessity of the case, either make or not make the deductions. So, for myself, I should, if it had been necessary, have been prepared to hold, and so far as it may be necessary I am prepared to hold, that inci-

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dentally we have jurisdiction to deal with the Upper Canada Land Improvement Fund so far as that fund depends upon collections arising from the sale of school lands. However, for Ontario and Quebec both, it is contended that the arbitrators have no such jurisdiction, it being in substance argued for Ontario that the result is that the arbitrators must take the "sum" mentioned in clause (*i*) of the third paragraph of the Agreement of Submission, as then "held by the Government of the Dominion of Canada," to consist in the first place of the amount of $1,520,959.29 mentioned in the accounts, leaving the balance of the $1,645,644.47 to be credited as it is in the accounts to the Province of Ontario as part of the Upper Canada Land Improvement Fund; while for Quebec it is contended that the whole of the sum of $1,645,644.47 should be credited to the Common School Fund. Now, if we adopt the latter view, we must strike out of the statement of accounts submitted to us the amount of $124,685.18 that has been credited to Ontario, and add that sum to the $1,520,959.29 at which in that part of the accounts in which the statement has any effect upon the results the amount of the Common School Fund has been stated. That clearly is to deal with and pass upon the subject of the Upper Canada Improvement Fund. I do not forget that the learned Chief Justice of Quebec suggests that we could state the amount of the Common School Fund at the larger sum with an intimation that we had not determined whether or not any deductions should be made on account of the Upper Canada Improvement Fund. But that, it seems to me, is to refuse to exercise our authority. That is, not to ascertain and determine what the amount of the Common School Fund is, but to decline to determine such amount. And even if some such an expedient were open to us with reference to the $124,685.18, I do

not see how it could avail us when we come to determine the amount for which Ontario is 'liable' On the other hand, if we adopt the contention put forward on behalf of the Province of Ontario, it will not be necessary to make any changes in the items now in question in the accounts submitted, or to do or say anything with respect to the Upper Canada Improvement Fund, except to leave it in the statement of accounts where we find it. Wherever in the accounts submitted the Common School Fund is stated at $1,645,644.47, it is so stated as one of the items of a balance sheet, and to show at what the Commou School Fund stood as a liability at the union of the Provinces of Canada, and the result is all the same, whether it is so stated at the sum mentioned or whether it is divided into two parts, and one given as the amount then due to the Common School Fund, and the other as an amount owing to the Upper Canada Improvement Fund. I am of opinion, therefore, that in determining the amount of the Common School Fund, we must start out with the sum of $1,520,959.29 which we find that the Dominion held for the two provinces, and on which we find them credited with interest in the accounts submitted to us."

"Before leaving this part of the case, I wish, however, to add that whatever view may be entertained as to our authority to deal with the matter, I think the deductions from the Common School Fund made by the award of September, 1870, and those thereby authorized to be made on account of the Upper Canada Land Improvement Fund, were under all the circumstances of the case, just and proper deductions. The Common School Fund has had the benefit accruing to it from the sales of the land being made on the understanding that one-fourth of the proceeds would be set apart to make roads through such lands and other im-

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provements for the settlers, and it was only common fairness and honesty to give effect to that understanding. I agree with the learned Chief Justice of Quebec that the question as to whether or not in making and authorizing such deductions, the arbitrators exceeded their powers, is not concluded by the judgment of the Judicial Committee of the Privy Council in respect to such award. Their Lordships, in answering in the affirmative the question as to whether the award was valid or not, were careful to confine their answer to the 'objections made to the award in the special case;' and it is clear from the notes of the argument that the question as to whether or not the arbitrators had exceeded their powers in dealing as they did with the Common School Fund, was not thought to be one of the objections made to the award in the special case. But I cannot, for myself, see wherein, in making such deductions, the arbitrators exceeded their powers. It may be that in so far as the award may be taken to place the fund in the hands of the Dominion for all time, the arbitrators exceeded their powers, but that would not avoid the award in respect of matters within their powers if the view of their status and position suggested by the Lord Chancellor in 1878 should prevail. During the argument of the special case stated on the award and matters incident thereto, he gave expression to the view that the arbitrators were persons executing a "Parliamentary power;" that they were called arbitrators in the statute because they must have some description; that it was not the same as a private arbitration under a private instrument; and that if what they did was not within their parliamentary power, it went for nothing, but if it was within such power, there was no objection to it."

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"On the 11th January, 1889, by an arrangement between the Province of Ontario and the Dominion of Canada, the province was debited with, and the Common School Fund credited with, an amount of $925,625.63, that Ontario admitted to have in its hands as arising from collections made in respect of sales of School Lands, and on the 19th of April, 1890, Ontario was in like manner debited with, and the Common School Fund credited with, a further sum of $11,103.70. These two sums are, in determining 'the sum held by the Government of the Dominion of Canada' on the 31st day of December, 1892, to be added to the sum of $1,520,959.29 before referred to, making the total sum so held at that date $2,457,688.62."

"The next question to be determined is, 'the amount for which Ontario is liable' to the Common School Fund. We are not at present asked to state the amount in figures. That would not be possible with the materials before us, but we have to decide some questions preliminary to a final determination of the amount.

"And first I agree with my colleagues whose opinions I have had the great advantage of reading, that Ontario is not liable out of the proceeds arising from the sale of Crown lands, other than the million acres set apart for that purpose, to contribute anything to the Common School Fund. I also agree that out of the moneys collected or received by Ontario on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada, the province is entitled to retain six per centum for the sale and management of such lands. I am also of opinion that out of the proceeds of the said lands sold between the 14th day of June, 1853, and the 6th day of March, 1861, received by the Province of Ontario, the province is entitled, after deducting the expenses

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of management as aforesaid, to take and retain one-fourth of the balance of such proceeds for the Upper Canada Improvement Fund. The Province of 'Ontario is liable,' it seems to me, in respect of moneys received from the sales of school lands made between the dates mentioned for the amount collected, less six per cent for management, and less twenty-five per cent of the balance; and in respect of moneys received from the sales of other school lands the province is liable for the amount collected less six per cent for management. Where sales of school lands made between June 14th, 1853, and March 6th, 1861, have been cancelled and the lands resold, Ontario is, I think, liable for the amount received, less only the six per cent for management. Of the moneys collected by Ontario for school lands sold, Quebec alleges that sums amounting in the aggregate to $9,468.59 have not been credited to the Common School Fund, and Ontario claims that certain refunds chargeable against the fund have also been omitted. I agree, of course, that in respect of these or any other errors or omissions the accounts rendered by Ontario of moneys received on account of the Common School Fund are open to correction."

"Then, with respect to the sum invested in the Quebec Turnpike Trust debentures and the interest due thereon, I agree with my learned colleagues that there is in respect of such debentures no liability on the part of the Dominion to either of the provinces, or on the part of Quebec to Ontario. Whatever sums may be realized from the principal moneys due on such debentures, or from the arrears of interest due at the date of Union should be added to the principal of the Common School Fund, and whatever sums may be realized from arrears of interest that have accrued due since the Union should be apportioned between

Ontario and Quebec in the same proportion as the interest on the fund is apportioned."

"What I have said covers, I think, all the questions now to be dealt with in respect to the Common School Fund, except the claim put forward in the Quebec statement of the case, that the Dominion is liable to Quebec for interest on the moneys that Ontario should have paid into the fund from time to time. The question is of no practical importance and has not been pressed and should be dismissed. Whatever sum Ontario is found to owe to the fund as principal money, should, I suppose, be debited to Ontario in the Ontario account as of the 31st of December, 1892, unless some other date should be agreed upon, and with respect to any interest on such fund, that Ontario may at that date be found liable for, Quebec's share thereof should be debited to Ontario in the Ontario account and credited to Quebec in the Quebec account."

The Province of Ontario gave notice of appeal from said award as follows:

"Take notice that the Province of Ontario, under the provisons of the statutes above mentioned, hereby appeals to the Supreme Court of Canada from the award of the arbitrators herein, bearing date the 6th day of February, 1896, in so far as the same implies or declares any liability by Ontario in respect of the Common School Lands or Fund."

"And further take notice that Ontario will, on the hearing of such appeal, limit its contention and except as to so much of paragraphs 2 and 3 of the said award as determines the liability of Ontario."

"First, as to paragraph 2 of the said award, which states 'That the Province of Ontario is not liable out of the proceeds arising from the sale of the Crown lands of the Province other than the million acres of Common School Lands set apart in aid of the Com-

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mon Schools of the late Province of Canada to contribute anything to the said Common School Fund.'

"Ontario appeals against so much of the finding in the said paragraph 2 as implies that Ontario is under any liability in respect to the Common School Fund or Lands."

"Second, as to paragraph 3 of the said award, which states 'That subject to certain deductions the Province of Ontario is liable for the moneys received by the said province since the first day of July, 1867, or to be received from or on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada.'

"Ontario appeals against the finding in the said paragraph 3 of liability of Ontario as thereby decided."

"And Ontario asks that the Supreme Court of Canada declare that Ontario is not liable in respect of the matters set out in paragraphs 2 and 3 of the said award, whereby Ontario is declared liable, and that there is and has been no liability on the part of Ontario in respect of lands in Ontario known as the Common School Lands, or in respect of moneys received or to be received by Ontario from or on account of Common School Lands."

"And Ontario further asks that the said award be varied accordingly, or otherwise amended as the said Honourable Court may deem necessary and proper."

The Province of Quebec also appealed, the notice of appeal being the following:

"Take notice that the Province of Quebec, under the provisions of the statutes above mentioned, hereby appeals to the Supreme Court of Canada from the award of the arbitrators herein, bearing date the 6th day of February, 1896, made in respect to the Common School matter, in so far as such award permits or allows any deduction from the amount of the principal

of said Common School Fund for the Upper Canada Land Improvement, or Upper Canada Improvement Fund."

"And in this respect the Province of Quebec will contend that under the provisions of paragraph 1 of the award, the principal of the Fund should be augmented by the sum of $124,685.18, and that under paragraph 4 of the said award, the amount of twenty-five per centum referred to in the paragraph mentioned secondly, should not be deducted."

"And the Province of Quebec will ask that the said award be varied accordingly, and amended so as to not permit of any deductions from the principal of the said Common School Fund, for any sums for the said Upper Canada Land Improvement Fund, or Upper Canada Improvement Fund."

The following counsel appealed on the hearing of the appeal:

W. D. Hogg Q.C. for the Dominion of Canada.

Hon. Edward Blake Q.C., *Æmilius Irving Q.C.* and *J. M. Clark* for the Province of Ontario.

N. W. Trenholme Q.C., *F. L. Béique Q.C.* and *Hon. J. S. Hall Q.C.* for the Province of Quebec.

On behalf of the Province of Quebec a motion was made to quash the appeal of Ontario from the said award on the ground that it was limited to the question of that province being under any liability at all in respect of the Common School Fund and Lands, a question which, it was alleged, was not raised nor argued before the arbitrators, but came up for the first time on this appeal. The court reserved judgment on the motion, and directed the hearing to proceed on the merits.

Counsel for Ontario were first heard.

Blake Q.C.—The first part of my task is to show to your Lordships what was the origin and

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nature of the Common School Fund, and what was the situation at the time of the passing of the British North America Act, in order that one may discern what effect that statute produces upon the situation, so existing.

The first statute respecting the fund was 4 & 5 Vict. ch. 18, passed on 18th Sept., 1841, an Act to make further provision for the establishment and maintenance of Common Schools throughout the provinces.

It is provided by the second section, that for the establishment, support, maintenance of Common Schools in each and every township and parish in this province there shall be established a permanent fund which shall consist of such moneys as may accrue from the selling or leasing of all lands which the legislature or other competent authority may hereafter grant and set apart for the maintenance and support of Common Schools in this province.

Then it provides that "all such moneys as shall arise from the sale of any such lands or assets, and certain other moneys hereinafter mentioned shall be invested in safe and profitable securities in this province, and the interest of all moneys so invested, and the rents, issues and profits arising from such lands or estates as shall be leased or otherwise disposed of without alienation, shall be annually applied in the manner hereinafter provided to the support and encouragement of Common Schools."

Now, I call attention at the start to that which runs through the whole of these series of statutes. That is, that it was a provision by the legislature of one single province, the province of united Canada, to provide for the establishment and maintenance of a system of Common Schools in the province, and that anything that was being done in the way of a creation of a fund, whether of capital or of income, was for the

purpose of dealing with the Common and Public Schools set up by, controlled by, and capable of being moulded by the legislature of that province.

Sec. 3 provides: That for the establishment, support and maintenance of Common Schools in this province there shall be granted to Her Majesty annually, during the continuance of this Act, the sum of fifty thousand pounds currency, to be distributed among the several districts in the manner hereinafter provided, and such sum shall be composed and made up of the annual income and revenue derived as aforesaid, from the said permanent fund and of such further sum as may be required to complete the same out of any unappropriated moneys which are now raised and levied, or which may hereafter be raised and levied by the authority of the legislature, to and for the public uses of this province, and the said annual grant shall be and be called the Common School Fund."

I call attention to the fact that, from the start and throughout, the provision with reference to this fund was one which, as I shall have to show presently, was not observed, viz., that the annual proceeds of the fund, interest and profits of the fund which it was designed to raise by the sale or rental of lands, were to be applied towards the payment of a sum of £50,000; that at least the grant was to be made up to £50,000 out of the consolidated fund.

Then the fourth section provides that "it shall be lawful for the Governor of this province, by letters patent, under the great seal thereof, to appoint from time to time one fit and proper person to be superintendent of education in this province, and such superintendent shall hold his office during pleasure and shall receive such yearly salary not exceeding the sum of seven hundred and fifty pounds currency as

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the Governor may appoint; and the duties of the said superintendent shall be:—

"1st. To apportion in each and every year, on or before the third Monday in May in such year, the money annually granted by the legislature as aforesaid among the several municipal districts in the ratio of the number of children over five and under sixteen years of age that shall appear by the then last census of the province to be resident within such district respectively."

"2nd. To furnish the Receiver General of the province for his rule and guidance, with a certified statement or list of the apportionment of the money granted by the legislature under the provisions of this Act, as aforesaid, among the several districts.

"3rd. To certify the apportionment of the public money as aforesaid to the treasurer of each and every of the said districts, respectively, who shall lay the same before the district council to the end that each district council may direct, and they are hereby authorized and required to direct, such a sum to be raised and levied for the purposes of this Act, and within their respective districts, over and above all rates laid for other purposes, as shall be equal in amount to the money so apportioned from the provincial treasury."

The next Act is 7 Vict. ch. 9, and it recites once again:

"Whereas it is expedient to make further provision for the establishment and maintenance of Common Schools throughout this province, be it therefore enacted * * * that the sum of fifty thousand pounds annually, now granted by law for the maintenance and support of Common Schools in this province, shall, from year to year, be apportioned

by order of the Governor of this province in council between the divisions of this province formerly constituting the provinces of Upper and Lower Canada in proportion to the relative numbers of the population of the same respectively, as such numbers shall, from time to time, be ascertained by the census next before taken in each of the said divisions respectively."

That was a difference in detail, but not in principle. The principle of division before had been the number of children between 5 and 16 in each municipal district; the principle of division now is according to the number of the whole population as ascertained by the census.

And then there is the temporary provision because there had been no effectual census in Lower Canada, that until an effectual census was made in Lower Canada there should be a fixed division of the fund. Of course I need not say that that is immaterial, because censuses were taken, and the permanent provision came into operation shortly afterwards.

Then, on the 30th May, 1849, the Legislature determined to increase the amount, and they said it was desirable that the annual sum of £100,000 should be raised from the public lands for the maintenance and support of Common Schools, "and that so much of the first moneys to be raised by the sale of such lands as shall be sufficient to create a capital which shall produce the said annual sum of one hundred thousand pounds at the rate of six per cent per annum, should be set apart for that purpose; be it therefore enacted * * * that all moneys that shall arise from the sale of any of the public lands of the province, shall be set apart for the purpose of creating a capital which shall be sufficient to produce a clear sum of one hundred thousand pounds per annum, which said capital and the income to be derived therefrom shall

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form a public fund to be called the Common School Fund."

Then they provided by the second section, "that the capital of the said fund shall from time to time be invested in the debentures of any public company or companies in the province, which may have been incorporated by an Act of the Legislature, for the construction of works of a public nature, and which said company or companies shall have subscribed their whole capital stock, paid up one-half of such stock and completed one-half of such work or works, or in the public debentures of this province, for the purpose of creating such annual income."

And then I call your Lordships' attention to this provision:—Which said fund and the income thereof shall not be alienated for any other purpose whatever, but shall be and remain a perpetual fund for the support of Common Schools, and the establishment of township and parish libraries."

Then they provided "that the Commissioner of Crown Lands under the direction of the Governor in Council, shall set apart and appropriate one million of acres of such public lands, in such part or parts of the province as he may deem expedient, and dispose thereof on such terms and conditions as may by the Governor in Council be approved, and the money arising from the sale thereof shall be invested and applied towards creating the said Common School Fund; Provided always, that before any appropriation of the moneys arising from the sale of such lands shall be made, all charges thereon for the management or sale thereof, together with all Indian annuities charged upon and payable thereout, shall be first paid and satisfied."

Then:—"That so soon as a net annual income of fifty thousand pounds shall be realised from the said

school fund, the public grant of money paid out of the provincial revenue for Common Schools, shall forever cease to be made a charge on such revenue; Provided always, nevertheless, that in the meantime the interest arising from the said school fund so to be created as aforesaid shall be annually paid over to the Receiver General, and applied towards the payment of the yearly grant of fifty thousand pounds now appropriated for the support of the Common Schools;" Provided further, that after the said annual sum of fifty thousand pounds shall have been taken off the Consolidated Revenue, if the income arising from the said school fund shall from any cause whatever fall short of the annual sum of fifty thousand pounds, then it shall and may be lawful for the Receiver General of the province, to pay out of the said Consolidated Revenue such sum or sums of money as may from time to time be required to make up such deficiency, the same to be repaid so soon as the said income of the said school fund shall exceed the said sum of fifty thousand pounds."

And then 16 Vict. ch. 159, sec. 14, provides:—"It shall be lawful for the Governor in Council to reserve out of the proceeds of the school lands in any county a sum not exceeding one-fourth of such proceeds as a fund for public improvements within the county, to be expended under the direction of the Governor in Council, and also to reserve out of the proceeds of unappropriated Crown Lands in any county a sum not exceeding one-fifth as a fund for public improvements within the county, to be also expended under the direction of the Governor in Council."

Then ch. 26 the Consolidated Statutes is the next, and I think the last of these antecedent statutes which is to be referred to. (Here follows the recital and first five sections of the Act.)

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And then there is a repetition of the provision as to what was to happen; so soon as a net annual income of two hundred thousand dollars, from the lands has been reached, and a happy state of the case which has not arisen.

And then the Governor in Council may reserve out of the proceeds of the School Lands in any county, a sum not exceeding one-fourth of such proceeds, and out of the proceeds of unappropriated Crown Lands in any county a sum not exceeding one-fifth thereof, such sum to be funds for public improvements within the county and to be expended under the direction of the Governor in Council.

That is the condition of things under the statutes at the time of the passing of the British North America Act. And, to the result of that condition of things, as far as the statutes go, I am not for the moment dealing with what was actually done with the moneys, and how the fund which was said to exist at the passage of Confederation was created; but, under the statute I submit the result is there was a legislative provision for the Common Schools of the old province, which schools, under the control of the legislature of the whole province, were public schools, and which provision was necessarily subject to legislative action at any session of Parliament.

That being the state of the case, I now bring up the question to what the actual condition of the assets which are the subject of this contention was on the 30th June. They are to be divided into two great separate subjects. The first is the so-called Common School Fund, a sum certain which is treated as if it had been a sum of money actually in the hands of the old Province of Canada representing the sum which ought to have been collected and invested and put to interest under the statute.

The second is of an entirely different character. It is the sum which represented the purchase money uncollected but due by private purchasers of the million acres of lands which had been almost entirely within nine or ten thousand acres sold, and which purchase moneys were partly paid and partly unpaid. The considerations which are applicable to these two subjects differ, but before I reach the question of how far they differ, I want to present to your Lordships what their state was at the moment. In order to do that, I have nothing more to say at the moment on the second head of that part which consisted of uncollected purchase moneys of lands, and of a few thousand acres of unsold lands.

Something, however, I have to say with reference to the part which constituted what has been ordinarily called the Common School Fund. With the exception of one small investment, which had better probably not have been made, an investment of certain debentures of the Quebec Turnpike Trust, no investments whatever were made of the principal moneys which were collected out of the million acres; they were not invested in the debentures of the province; they were not invested in the debentures of corporations as authorized by the Act. The Quebec Turnpike Trust was a small sum. I may have to mention it for another purpose, but it has been settled, and we are fighting about it no longer.

But, something more was done, or something else; the duty was to have applied the interest from these sales of lands yearly towards the $200,000 a year, and it was only to supplement the deficiency after that application that the consolidated revenues of the provinces were to be or could be called upon. Instead of adopting that course, what was done was to pay yearly out of the consolidated funds the whole $200,000, and

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to leave in consolidated fund the whole of the revenues, principal and interest. The book account was kept, and oddly enough no account was taken of the circumstance that that book account which included the interest as well as the principal, could not truly represent a liability of the province towards this fund, so to speak, while it included that interest, or to the extent to which it included that interest, because that interest was applicable towards the payment of the $200,000 a year, and when say $50,000 of interest came in in any one year and went into consolidated fund, and when $200,000 was paid out of consolidated fund under the provisions of the statute $150,000 only really came out of consolidated, the other $50,000 was really under the statute paid out of the proceeds of the lands. Notwithstanding that, this book account, the aggregate of which makes the $1,700,000 odd, remains, which, apart from the question of the Land Improvement Fund, constitutes the fund at the time of Confederation. This book account embraces all these payments of interest, although year after year they really were used pursuant to the statute, being paid into and out of consolidated fund in the payment of $200,000 a year, as far as they went.

The next point is to emphasize before your Lordships this fact, that when Confederation came there was not a shilling in actual hand in specie put in the bank, representing this fund. It was a simple book account like other book accounts, representing not the asset in any shape or form, but only a supposed liability to itself.

There is thus no asset of the Province of Ontario or the old Province of Canada in this regard whatever, excepting the Quebec Turnpike Trust, and I call

your Lordship's attention to the fact.—The 113th section of the British North America Act prescribed:—

"The assets enumerated in the fourth schedule to this Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly."

The fourth schedule being looked at includes the Quebec Turnpike Trust. It was an asset. It was transferred; but, what was called the Common School Fund was not an asset. If it was anything it was a liability. Whether it was a liability or not is the question which is to be considered, but it was certainly not an asset, and there was nothing to transfer whatever in that connection.

Then as to the purchase moneys uncollected, or land sold. This stands for the principal part upon a wholly different footing. It depends upon another clause of the British North America Act, and it is not affected by the increase of Debt Act, or such irrevocable changes as to those to which I have referred. And, in order to ascertain what the position of things was, as constituted by the British North America Act, any difference in contrast to the funds or the lands, one has to turn of course to section 109 which does not merely by implication, but by express language include the sums due upon the lands.

So that it is clear beyond dispute that these lands and these purchase moneys for sold lands within the Province of Ontario belong to the Province of Ontario, unless it can be established that there is a trust in respect to them, or an interest of other provinces in respect of them, and the title of the Province of Ontario still subsists, notwithstanding that, except to the extent of the trust or interest. They are Ontario's, subject to whatever other interest there may be.

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Then we come to consider that question which the arbitrators had before them in the Indian annuities case, upon which they came to a conclusion which was reversed by this court, whose reversal was sustained by the judicial committee, upon the question of trust or interest.

Perhaps it may shorten things if, before I proceed to consider what the facts were as to that I would look and see what light is to be drawn as to the meaning of this trust or interest from the decisions to which I have referred.

I refer to the case of the Indian annuities (1), and to the judgment of his Lordship the Chief Justice, at page 503 and following pages. His Lordship proceeds to analyse the documents in question in order to ascertain whether there was under them any charge or lien under the surrender of the lands, and he says "there is, therefore, no ground for saying that there was any express charge, lien or trust. Then, if there is any charge it can only be on the principle of the equitable lien of an ordinary vendor of real property, and from analogy to the rules of courts of equity applicable to such liens. I think this argument entirely inadmissible."

Then the judgment proceeds to give the reasons for that, pointing out that the Indians had the highest security, and then discusses the argument upon the Privy Council decision in the *St. Catherines Milling Company* v. *The Queen* (2), and holds that that does not apply as was contended.

We have there light upon the proper consideration to be applied to the question whether there is a trust or interest.

So again in the judgment of Mr. Justice Sedgewick, at page 537 and following pages.

(1) 25 Can. S. C. R. 444. (2) 14 App. Cas. 46.

The Privy Council judgments are to be found in the Appeal Cases for '97. Counsel referred to pages 210, 211 and 213

The ground taken by the Chancellor is: (The learned counsel quoted from the Chancellor's judgment at pp. 617-621 *ante*.)

Then, following out the general line to be traced in the reasoning which I have just read, my first argument is that it is an entire misconception of this whole case to speak of there being in the time of the old Province of Canada, any trust in this matter, or any interest other than that of the province in respect of these lands.

I say there was none whatever in respect of the fund, in respect of the lands, in respect of the purchase money; there was no trust, there was no interest. But, I say secondly, if you are to assume a trust or interest, that trust or interest was such in its nature as was by Confederation, by that radical change of conditions which took place in the very subject matter, not merely destroyed, but rendered impossible of any replacement, for after that day there never could be a common school of the old Province of Canada. Such a thing was impossible and rendered impossible by the Act.

Now, my lords, I proceed to do what in the course of the arguments on these appeals I may often have to do, to argue upon the hypothesis that I fail in the argument which I have just been addressing to you. I proceed to invite your Lordships to consider, because it is very material, if there was a trust or interest: What was that trust or interest? And, I will state to your Lordships why it becomes material, because we have a major and a minor controversy. The major controversy is as to whether there is any trust or interest, in which case we contend at any rate

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with reference to the land, and subject to the considerations to which your Lordships has adverted, as to the fund, it is Ontario's. Then, there is nothing to divide. But, they contend that not merely is there a trust or interest, but that the division of that trust or interest has not been effectual, and that the true division of that trust or interest ought to be something different. They contend that the division ought to be according to the population at the late province of Canada as it stood in the year 1861, being the last census before 1867.

Now, their whole case rests upon the proposition that there was a trust or interest, and I am now in a very few words about to present to your Lordships what seems to me to be the unavoidable conclusion as to what the trust or interest was, if there was one at all. Because, it seems to me that that renders it impossible to go outside the propriety upon that theory of the case of the award of 1870. I have not yet got to that award, but I refer to it as indicating the pursuance of a course which, if the arbitrators had this matter within their power, was the only course which they could equitably and justly have taken.

I ask then: What was the trust or what was the interest? In order that there may be a trust or interest, one must assume of course a *cestui que trust* at any rate, and the power to create a trustee. One must assume an interest in some other than the proprietor of the land. How was this trust or this interest created? It was created, admittedly, only by the statute. What in respect of the question of apportionment of the fund—whether the apportionment of the principal, when authority exists in anybody to apportion the principal—or in the apportionment of the income which alone was contemplated by the trust, was the provision? The provision which with singu-

lar inconsistency Quebec sometimes asks you to speak of as a sacred and perpetual trust to be rigidly observed through all the variations of time and changes, political and otherwise. And, what was it? It was a provision that the money should be divided between the two territorial divisions of the one Province of Canada, yearly in proportion to the population as ascertained by the last preceding census. The fund itself to remain forever. The yearly fruits of the fund to be divided in this way forever. That is the provision. I need not read again the clauses of the Act. I do not suppose it will be disputed that that is in truth the provision.

Now, I want to know whether, if there be a trust or there be an interest, that trust or interest can be anything other, anything greater, anything less, than the statute which created it disclosed. I have shown I think that there is nothing, but, if there be something it is that which the statute shadows forth, and the statute shadows forth a perpetual fund, divisible year by year between the two territorial sections of the old Province of Canada in proportion to the population of each of those sections as ascertained by the last preceding census.

Now then I pass from the condition of things as it stood upon their hypothesis at the period of Confederation to the effect of the award of 1870.

And I may be permitted to make a preliminary observation with reference to that award, which is that I, for my part, am not disposed for a moment to suggest any difference of opinion from the judgment of the Chief Justice of this court in the Indian Claims Case, as I understand that judgment with reference to the general view that ought to be taken upon the subject of this award.

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I go to the main question with reference to *intra* or *ultra vires* with reference to this matter.

The theory, as I have stated, on which Quebec must rely, on which it does rely, is that there was a trust. If so, the trust must be executed, and I do not think it is pretended that in any other instance, and if not in any other, why in this, the arbitrators had power to declare or decide a trust at all. The lands are the lands of Ontario under the Act, subject to whatever may be the trust, or interest of other persons. The arbitrators were not to determine what those trusts or interests were, or how they were to be administered at all. That was left for the law, or for convention, or for statutory arrangements between the parties; but it was not left for these arbitrators.

The Province of Quebec has claimed that the right of that province depends in respect of the Common School Fund, not upon this award at all, but upon prior statutes, and upon the British North America Act alone. This is important in view of the situation in which we now find ourselves on both sides.

The Province of Quebec has filed several documents which indicate what its present relation to this award is.

Amongst them is first, the case before these arbitrators in which Quebec submits that whenever it can be shown upon any other objection, that is to say, any objection other than those made in the special case, the award is contrary to law, and that it is invalid, that it is the duty of the present arbitrators so to declare.

Our contention is that there being in truth no trust, the award of 1870 could not and did not create one. We say that there was in this respect either a trust or not a trust. That the statute had prescribed that the lands were ours, subject to existing trusts

or interests, and that those arbitrators could not either create or define trusts; but, that if the first award could create it, it could do it only according to the terms, which are not division, but perpetuity, and, as I have said, division of the income according to successive censuses. That is the thing which the first award has attempted to do. That was the only thing that could be done. But, as I have said, the function of those arbitrators was limited to division or adjustment, and the thing which was the only thing that could be done in this regard was a thing which they could not do. But, if contrary to all that, it should be held that the arbitrators had power to deal with the trust, and had power to make the appropriate declaration with reference to a trust, then I contend with the utmost confidence that if it is granted that they had the power, and if it is held that this was in point of fact, or that they had power to make it, a trust although it was not a trust then, that what they have done is literally to comply with the terms of the trust, that is to say just as literally as upon the theory of its continued existence it would be complied with. I say it cannot be complied with literally, but upon this hypothesis these objections have been overborne, and the arbitrators have adopted the cy-près doctrine, and made that as near as could be, as they were bound to make it as near as could be and in respect of the capital, perpetual, and in respect of the income being divided, and in respect of the division of the income being in the varying proportions to be found by the censuses, they have just followed the terms of the award, and if they had power to deal with it at all, they had power to deal with it in this way.

Then let us look at the award. Sections 7, 8, 9 and 10 are those which apply to this matter. Of these the 7th and 8th deal with the Land Improvement Fund, and I do not touch the other at this moment.

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First of all by the 7th, they take $124,000 out of the Common School Fund. And by the 8th, they deal not with the Common School Fund as it was, but the residue of the Common School Fund after that deduction, so that assigns to Ontario $124,000 out of the supposed assets of $1,700,000, and then they proceed to deal with the remainder of that fund. Their award is with regard to the remainder only as to its apportionment. Then, how do they deal with it? That it shall continue to be held by the Dominion of Canada, and the income realized therefrom, from the 30th day of June, 1867, and which shall be hereafter realized therefrom, shall be apportioned between and paid over to the respective provinces of Ontario and Quebec.

Then I read sections 9 and 10 of the award.

Now, as I have said, I should have pressed your Lordships very earnestly with reference to the question of the book accounts. The proposition that I have advanced as to the actuality of that, and as to the possibility of adding to the public debt of the province in the way in which it was done, that they had no power at all, but I argue that if they had a power, that there can be no doubt whatever that their disposition is final. If they had power to deal with it in this way, they have dealt with it finally, and there is no reversing it; I cannot contend against that at all.

Then as to the other parts, 9 and 10, I argue as before, that the question whether Ontario lands were subject to any trust is one of law disposed of by the British North America Act, and that the arbitrators had no power either to annul or to create or to change any trust or interest, and that if some trust or some interest might have been within their power, a trust or interest of such a character that it was not capable of being dealt with by them within their power to divide or

adjust, cannot in the nature of things be within their power.

I should have thought it was only putting it *ex majori cautelâ*, because I could not conceive nor think anybody would ever suppose it was contemplated to hand over to the province, beneficially, the lands which had been sold to somebody, and the purchase money paid, and all that remained was getting out the patents. They handed them over as they were, subject to the existing interests and rights of other people; and, it expresses that which I think would have been implied, and I do not think it expresses anything more.

Therefore our suggestion is that this was beyond the power of the arbitrators, and therefore remained an open question. And, endeavouring as far as I can to combine the different links of the argument, which apply to one thing at the same point, our secondary suggestion is that if it be held that it was within the power of the arbitrators, that there is no dispute whatever that it was to be treated as an existing trust, and on the theory that it was an existing trust, they did as near as possible apportion.

Then I come to a different allegation, which has to do with the state of things created by the award, which is, that the province of Ontario is bound because Mr. Treasurer Wood who represented the province at the time of the arbitration thought this was a trust and said so to the arbitrators.

It is well known that the public is about the worst served subject, and that it is in the public interest that the public, and high political organizations, should not be bound by defaults and negligences and admissions without authority of those who have charge of their business. I believe that is a sound view. It tells enormously against me in the argument I shall

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have to address to your Lordships in answer to my learned friend's appeal, but it is in my favour upon this argument, and having my choice of which attitude to take, I have the satisfaction of taking the attitude which I really believe is the sound one, except with reference to the increase of Debt Act; there you had other provinces who were not before the court, there you had a great settlement by statute—short of that I do not see what this long array of letters, correspondence and Orders in Council have to do with the case. The case seems to me to present very clear and simple propositions, viz.: that if the thing be within the power of the arbitrators, it is not open here, if not within, it is open and you have to decide what has to be done. So that if Mr. Treasurer Wood expressed the opinion before the first arbitrators that this was a trust, and suggested to them the way they should deal with it, he would not be making any concession which could bind the province. He might have been right, or he might have been wrong in his law. If wrong I do not think the province was bound, and I do not think his concession conferred jurisdiction.

The facts, of course, were not in dispute at all. So, again, as to the mode of dealing by the arbitrators which he there suggested should be taken. That is as to the mode of making the trust perpetual and dividing the income, ordering the income to be divided instead of dividing and adjusting the whole fund. If that was beyond their power his concession did not bring it within, and that view is put very prominently by Chief Justice Casault, although I very much quarrel with the inference, it seems to me, His Lordship draws from that view.

Then all is therefore open. Because there was no trust nor interest, because there was no power in the arbitrators to declare a trust, to do more than divide,

and they have not divided and could not divide, and therefore they could do nothing.

Well the next stage is the Privy Council judgment, which I think does not affect the decision on either point of view, and I just pass it by with that statement.

Now, I want to make a general observation. Although, as I have said, I argue that it is not material what was the attitude during this long series of years of these two Crowns towards one another, I have to point out what appears to have been their general attitude, which is explanatory I think of a good deal which might otherwise be difficult of explanation. It is well known of course that the province of Quebec repudiated the binding force of the award altogether, and that after a considerable time it remained in a sort of *impasse*, Quebec said no, the award is bad, and an effort was made to obtain a case, and it failed, and things went on for a number of years as public things do before any arrangement could be made whereby any sort of decision could be arrived at upon the points upon which Quebec contended that the award was void. That state of things lasted for a good many years until shortly before the reference to the Privy Council. During that interval different suggestions were made by the authorities. There is one letter to which I wish to refer of the then Attorney General and the Prime Minister of the province of Ontario to the corresponding authority I believe of the province of Quebec dated 10th of June '73, in which he argued out the question at great length as to the proposition which Quebec insisted still was the true proposition, the true *ratio decidendi*, and made suggestions that for peace sake Ontario would be prepared to do so and so, and that it would be as beneficial or more beneficial to Quebec than their proposition. He failed to persuade

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his adversary, as I am afraid frequently happens. Then on the 12th September 1876, is a rather important letter of the Secretary of Ontario, showing the attitude of the province.

"Under the award several hundred thousand dollars are payable by Ontario to Quebec in respect of school lands in this province realized by this Government since Confederation, but, if the award is not acted upon there would be a question for discussion and consideration, whether Upper Canada should not retain the products of all its own school lands."

"These moneys, for these and other reasons, have been retained until either the award is accepted or a new settlement made; and I am to say that this Government is very desirous of avoiding further delay in the settlement of this and all other matters between the provinces."

Then, not very long after that came the reference to the Privy Council, and the appearance of Quebec and of Ontario, and the decision against Quebec upon the points submitted in this special case.

Now, I think that the fair result of the correspondence was that Ontario was willing to accept the award on the understanding which it entertained, and which it was justified in entertaining from the course of Quebec, that Quebec did not voluntarily accept, but for the decision of the Judicial Committee was ready to act upon the award, and that both parties for a long time occupied that sort of relative notion. Quebec fancying Ontario was ready to accept the views of the award without raising any question as to the Common School Fund, Ontario fancying that Quebec was ready to accept the view with reference to the Land Improvement Fund, not as to the $101,000 which was, as was contended, to come out of Crown lands, with which the arbitrators did not deal in terms,

although we contend they did impliedly. That is an outstanding question which you have not before you, and which was really the reserved question in this award which we contend. I say that was the general attitude with the exception of that $101,000, being 20 per cent on the sales of the Crown lands, as to which the arbitrators had not in terms dealt, as to which Quebec declined to accede to any method of disposing of the question, and as to which it is not to be disposed of under this.

Then we come to this reference, and to the action under this reference—I am reserving the minute discussion of what the terms of the reference are for a moment, because I deal with the general conduct—then it turns out in that course that the province of Quebec wants to bind Ontario to the award as to the Common School Fund, in so far as it is an acknowledgement of liability, to hold itself free to contend that the award is void as to the Common School Fund altogether and that the division prescribed by the award should be replaced by a division more favourable to the province of Quebec, to tie Ontario by the hands and say you shall not say a word against the award about the Common School Fund, but we say that it is all open and free for us to contend that it is a bad award, and that in truth we ought to get a great deal more for it. That is the condition of affairs into which the situation had grown before the arbitrators made the award which is now under appeal.

As I have said to your Lordships in my answer to the motion to quash, the conclusive answer to the suggestion that this was not directly disputed before the arbitrators, the point in respect of which we now appeal, is in their certificate. If the pleadings, so to speak, the statement of the case, was defective, if there was acquiescence or admission, it was perfectly com-

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petent to the arbitrators to have called the parties before them and to have said, we consider that such and such things are open for argument, and ought to be argued. What has been done is that the arbitrators have discussed these questions as to whether there is any liability, and as to what the extent of that liability is under that award. We ask it should be found that it is nothing. But, they contend there must be something found, and if something, we are driven to find this particular amount. We say that the question is absolutely open, because you are to ascertain what the amount of the liability is.

Then upon the reference therefore, and upon the action taken before the arbitrators, and so on, I hold first of all that this is within the reference, and secondly the certificate of the arbitrators that they proceeded upon a disputed question of law is final and conclusive upon the point that my learned friend suggests, viz., that it is being raised for the first time before your Lordships.

He says that this disputed question of law, which the arbitrators have certified was raised before them, is being raised here now for the first time before a court of original jurisdiction.

I cannot conceive that these learned and eminent judges, sitting in as near an absolutely judicial capacity as men can sit, would have entered at great length which they did, particularly Judge Casault, into a point that had not been discussed before them, and points which were not relevant, and which they did not think relevant to the issue, and yet I see them all discussed fully, but my learned friend said, he had no opportunity of saying a word about it, we are going perhaps to look at the notes of the argument, and are going to say that this is not raised, and that is not raised and the other is not raised. Those were all

matters for the arbitrators, and the certificate settles all that.

I open the question from this point of view, and suggest a certificate as showing it is a disputed question of law, and that we are entitled to have that so certified disputed question of law decided; that the language of the reference wholly serves to remit the question. It does not decide the principle upon which the question should be decided. It does not impose an obligation to find a liability if there was no liability. It leaves everything open. There was a question of how much if anything, if nothing the arbitrators should find nothing. The whole suggestion is one alien to the position which I have ventured to propound, that these political corporations, to be bound by fine suggestions of pleading, delay, estoppel, neglect of counsel and so on, and therefore that the whole thing is at large, and upon this disputed question of law, viz.: whether the province of Canada is under any liability in respect of the Common School Fund, and the Common School Fund Lands, we hold that under the British North America Act, and ask your Lordships to hold, it was under no such liability, that there was no trust or interest, that first the arbitrators had no authority to decide it, that it therefore remains according to the common case of both parties, because my learned friend says, and Judge Casault says, that this award in respect of the Common School Fund is void, it remains untouched, and now to be decided, and being to be decided must be decided in accordance with the arguments which are suggested in favour of the view that there was no trust or interest, and therefore that the lands and funds of Ontario belong to Ontario.

Trenholme, Q.C., for the respondent, the province of Quebec:

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From the point of view of Quebec, the learned counsel who has opened the appeal for Ontario has introduced into the matter a great many questions which Quebec thinks have no relation whatever to the present appeal. The learned counsel has dwelt very largely upon pretentions put forward by Quebec before the arbitrators. Of all these pretensions none are in question in this appeal.

The solitary question here is this, whether Ontario has a right upon this appeal to have it declared that there has been, and that there is, no liability on her part in respect of these so-called school lands, and of this school fund. That is the question in this appeal. The pretentions that Quebec puts forward in her case before the arbitrators, no matter what those pretentions are, have all been abandoned except the one; but, no matter what they are, can they give jurisdiction to this court to determine that question in favour of Ontario? Do they give jurisdiction in any degree to this court? Surely the appeal of Ontario if it stands at all, must stand upon its own merits. It must stand upon the ground that Ontario has a right to come before this court now and ask this court to determine that there was no liability whatever on its part in respect of these school lands and in respect of this school fund. That is the whole question in this appeal. There is nothing beyond it, except matter being invoked for the purposes of illustration, for the purpose of showing that there was an estoppel, or what was in issue between the parties.

I have already argued that the statute authorizing this arbitration, and the deed of submission, recognize liability on the part of Quebec, and that the plain common sense interpretation of that deed of submission is that there is a liability, and that the arbitrators are simply to ascertain the amount of that liability. The

arbitrators are told, that in the ascertainment of that they are to take into account, not only the fund in the hands of the Dominion but the amount for which Ontario is liable. That admits that Ontario is accountable for something, no matter how small it is; if the liability exists, there is the admission of that liability; and, then if we go further we see that they are to take into account the value of the school lands. Why, that would be an absurd provision to put into a deed of submission if there were no school lands.

There is no question in this submission as to whether Ontario is under any liability or not; that question is originated here for the first time.

With regard to whether Ontario can raise this question before the courts, we maintain in the first place that it is not in the deed of reference, we maintain as we did this morning in arguing the motion that it was not in dispute between the parties, and we maintain also that the arbitrators have really not declared upon this subject at all. All they have done in their award is to recite the enunciation of what had been agreed upon in the deed of submission. They go no further in declaring or establishing the liability of Ontario than what is stated in the deed of submission itself. They simply lay down rules for ascertaining the amount of that fund, and without any declaration or any intention of declaring, that there was liability on the part of Ontario.

We say that Ontario is estopped from bringing up this question in this appeal in the way stated by the admission of liability in the deed of reference, and also by the admission in her answer.

Now, if your Lordships will turn to the case, your Lordships will see the attitude that Ontario has taken with regard to this question of liability, and that there is no denial on the part of Ontario that there is a

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liability in respect to the million acres of school land. The denial is simply with regard to the Crown lands, the new aspect as it has been called here, the claim of Quebec to have a large sum appropriated on account of the sales of other Crown lands. In all these places we find that Ontario, as in her answer, never raised this question as a part of her answer, as a part of her defence. She has never raised this question that there was no liability on her part from one end of the answer to the other. There is not a clause that could have been struck out before the arbitrators on the ground that it was not included in the reference or for any other reason, because there is no such allegation in the answer. Ontario does say that Quebec has only a right, if any, to this fund under the award.

Has Ontario a right in this appeal to go into that matter? Must not her appeal here stand upon its own merits? For instance, suppose Quebec were to discontinue her appeal altogether, would Ontario have any right to come here and maintain an appeal? What Quebec pretends and all that Quebec pretends in her present appeal is this: that in her appeal, that if it be the case, as there seemed to be some authority in the dicta of the learned members of the Privy Council—if it be the case that the part of the award by which the Improvement Fund is deducted or claimed to be deducted from the School Fund can be separated from the rest of the award, and it is *ultra vires*, it may be disregarded, and that that item representing the Improvement Fund may be considered as still forming a part of the School Fund, but what I maintain is that the pretentions of Quebec have nothing to do with this appeal. This appeal has to stand upon its own merits and Ontario must come here and must show that she is appealing against something that the arbitrators had jurisdiction in; that this matter was before the arbi-

trators; and cannot come here and raise it for the first time, as in a court of original jurisdiction.

The award then of 1870 is invoked by Ontario. She asks to have this set aside. So long as the award stands it seems to me that it is a complete estoppel to Ontario; and especially, as it has not, as I said, been assailed by the proceedings before the arbitrators. She has taken no steps whatever to have this award set aside. Now for the first time she seeks to ignore this award.

We claim that Ontario is estopped, and we think there is estoppel as between provinces which are litigants. We maintain that she is estopped by the whole past course, thirty years conduct, in relation to these matters, not only by the opinions and admissions of Mr. Wood, who appeared before the arbitrators of 1870. Mr. Wood's opinion is there. The Hon. Mr. Mowat, Premier of the province of Ontario, gives his opinion, which is also there. Your Lordships will see that Mr. Wood says distinctly that Quebec has an interest in this fund and in these lands. That was the opinion of Ontario's representative at least at the time of the award, and the lines laid down by Mr. Wood at that time were actually followed, substantially, in the award made by the arbitrators of 1870.

Then in a letter which the learned counsel has quoted to the court, of the Premier of Ontario, Mr. Mowat, to the Premier of Quebec, the court will see that Mr. Mowat says also in the most distinct manner that the fund, including the school fund which belonged to the two provinces before Confederation, belongs to them still. Your Lordships will see the very words used by the Premier of Ontario are these:—

"The various funds from time to time set apart by the Parliament of old Canada, for either section, belong to that section still."

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That was an admission of liability, but we say Ontario was right in her interpretation of that transaction. She was right in her interpretation then, and she is not right now. Her whole course for thirty years is conformable to that opinion and opposed to the position that she is now taking before this court.

Not merely have we the expression of opinion of individuals, servants of the Government of Ontario, but we have got the same acknowledgements in the statutes of Ontario.

The first statute is the statute of 35 Victoria, in 1872 (Ontario):—

"An Act relative to arrears due upon Common School land sold previously to 1st July, 1867."

Your Lordships will see that this is an act to reduce the price of these lands.

Paragraph 2 of the statute says:—(Reads section.)

Then the next statute is still more important for this reason, that it not only acknowledges the right of the Province of Quebec, but it recognizes the right of the Province of Quebec under the statute, not in virtue of the award of 1870, but it recognizes that Quebec had a right to share in this fund under Consolidated Statutes of Canada, chapter 26. That is 46 Vict. ch. 3.

Then still later. Look at the next statute, 57 Vict. ch. 11 of Ontario in 1894. Here is a statute passed by Ontario since this deed of submission was signed by the parties in 1893; actually, pending the proceedings before the present arbitrators, Ontario passes a statute, which contains in its preamble the same recognition. And then it goes on to make provision for a settlement of this matter, and in all these statutes we have the most formal admissions by this province, even while this arbitration is going on, that the fund exists, and that it exists under the consolidated statutes of

Lower Canada, and that Quebec is entitled to a share of this fund.

We claim that that is an estoppel of the province by admission, and conduct, and that Ontario cannot come now and take the reverse position, especially as these statutes are in strict conformity with the position taken before the arbitrators.

As I say, these statutes are in strict conformity with her whole conduct for thirty years. Ontario collected large sums of this money. She paid over in January, 1889, no less than $925,000 of these uncollected balances on these lands to the Dominion Government, and paid other sums since. She paid large sums of interest to Quebec, $250,000. The provinces have dealt upon the basis that Quebec had an interest, as these statutes state, in this fund. During all these years it has never been questioned before by Ontario until we arrived at the present appeal.

Your Lordships will see that payments have been made between the provinces, based upon this common assumption that the fund exists and that Quebec is entitled to a share in this fund, and did get a share. She was recognised, and was paid a share. That has been the basis upon which the province and the Dominion have acted during all these thirty years.

Now apart from the question of estoppel, we come to what may be called more strictly the *merits of the case*, that is, whether the argument which Ontario now presents, suppose it is open to Ontario to present that argument in this court, which we maintain it is not—but suppose it were, are the arguments that Ontario adduces to maintain her position that there is no fund, no liability, well founded? Quebec maintains that they are not well founded.

The present argument, as I understand it, of Ontario, is that no trust existed or exists; that no fund exists

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and that no school lands exist; that there are no beneficiaries, no *cestui que trust*, and, that therefore the trust fails, comes to an end. That is the argument of Ontario on what may be called strictly the merits of the case.

I propose to call the attention of the court to a few statutory provisions bearing upon the matter.

First, take this section 109 of the British North America Act itself. That section provides that the lands in each province shall fall to the province, with the unpaid balances on them, subject to any trust or interest other than the province in them at the time.

That very clause, it seems to me, means and implies that wherever there are existing trusts at the time, these trusts are not destroyed, but continued. That clause is not calculated to end or destroy existing trusts, but to perpetuate them. The meaning of that clause is that they are to be continued, because the existing trusts are to be respected.

That is conformable to the other provisions of the B. N. A. Act. For instance, section 129, in the most comprehensive terms, continues all laws and all authorities in force at the time of Confederation, to the fullest extent. There was nothing lost. All the existing institutions of the country, that were based upon law, were continued. They were not destroyed by Confederation.

The same was the case with regard to the executive powers under the constitution. These executive powers were placed in different hands, but there was no loss of executive power. All that existed before Confederation continue to exist after Confederation, only in different hands, according to the jurisdiction of the legislature. Section 12 of the British North America Act, and particularly section 135, is specific upon this point. There was no loss, either of legislative

power, or executive power by the British North America Act, and there was no destruction of the institutions of the country, or no failure of ability to carry out, or provision to carry out the laws of the country by the executive, because it is all covered by those provisions of the British North America Act, and other provisions which I might refer to.

At the time of Confederation there was in force in respect of these Common Schools in Quebec and in Ontario, the Common School Act creating the system of schools in Quebec, 7 Vict. ch 27, embodied in the 15th chapter of the C. S. L. C. That Act was in full force. The schools created under that Act were in full force at the time of Confederation. The schools existed there at the time of Confederation, and by the law which set aside this million acres of land, that is the law and the Order in Council—observe there is a marked distinction between this million acres of school lands and the fund that was claimed out of the Crown Lands—there were no Crown Lands set aside. The statute was passed, but as regards the Crown Lands, was not acted upon, but as regards these school lands was acted upon. The Order in Council was made. The lands were described and defined, definitely established and were set aside for this school fund. That makes a marked distinction. They were appropriated definitely for this School Fund, set aside, which was not the case with regard to the Crown Lands.

Now we come to chapter 15 of the Consolidated Statutes of Lower Canada. This is the chapter under which the schools of Lower Canada were existing at the time of Confederation. It is the law under which those schools still exist.

Now, what did this statute do? This statute was the work of both the provinces. It was the same legislature that had passed the other Acts that passed this

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ch. 15 of C. S. L. C. This statute, constantly, throughout its whole length, refers to the Common School Fund. The statute is tied up, so to speak, with it, and the system of the schools provided for there, are intimately dependent upon this school fund, as I shall presently point out. It recognises that a part of that fund belongs to Lower Canada. It says so. It agrees with the Consolidated Statutes of Canada in dealing with Lower Canada as an entity, and as entitled to a part of this fund.

For instance, in sec. 99, ch. 15, we have language like this, speaking of what should be done with the balance of this fund:—

"The balance remaining unexpended or unclaimed out of the portion of the Common School Fund, belonging to Lower Canada."

Now, there was some Common School Fund that belonged to Lower Canada. And it speaks in another place of the—"Permanent and additional Common School Fund," the provincial grant being the permanent fund created under the statute, setting aside these million acres of land, and the Order in Council.

Now, I want to call your Lordships' attention to a few other provisions of this ch. 15, which is an important chapter.

Why should we say that no portion of this was vested in Lower Canada schools, if the statute, which was the work of the two provinces united, says that a part of that fund belonged to Lower Canada and to the schools of Lower Canada?

Section 27 establishes, following 7 Vict., this system of schools in Lower Canada under commissioners and trustees. Sections 53 and 54 declare that these commissioners and trustees shall be corporate bodies.

Section 99, which I have just cited, states that a portion of the fund belongs to Lower Canada.

Sections 14 and 95 deal with the establishment of Normal and Model schools and appropriate a certain portion of the fund for their support.

Then section 64 provides for the case of donations and gifts for the endowment of these schools by private individuals. That was not an exclusively public system. It was a system in which individuals were encouraged to make gifts and endowments. Section 64 provides for that, and so does section 60, subsection 2, and also section 115 recognizes that some of the schools that were being conducted under this statute were not public property, and as a matter of fact all through Lower Canada, where schools existed prior to the establishment of these public schools, they often existed by the joint efforts of neighbours, and when this system was established these schools handed over their school property as a contribution, dependent upon this very statute, dependent upon this provision that had been made by the Parliament of Canada for the support of the public schools of the country.

More than that. Poor scholars and poor school districts were to be assisted out of this fund. Poor scholars were to be educated without any charge, and there was local assessment, corresponding to the portion of each municipality, in this fund, and poor scholars had to be educated free in these schools. It was imposed upon them as a condition.

Your Lordships will see how distinctly these schools of Lower Canada are recognized as having rights in this fund. This fund is spoken of as belonging to them. See sec. 88.

The Lower Canada Common School Fund means this fund. A portion of this fund belonged to Lower Canada. Not the portion raised by local assessment, but the portion of the fund belonging to Lower Canada of this Common School Fund Sec. 88 says:—"And

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the superintendent shall deposit the said sums in such bank as the Governor in Council may direct, and shall apportion the same according to law among the municipalities, and shall pay to the school commissioners and trustees of dissentient schools the respective shares belonging to the municipalities." That is to the several municipalities. They formed corporations. Every one of these were corporations just as much as the University of Toronto. There were more of them, but they were existing corporations, declared perpetual. They could incur obligations, and could sue and be sued. They were legal entities, and these were the beneficiaries of this fund. Why, if there was one set of institutions more than another that Confederation was careful about preserving, it was the right of these schools—the schools of the country. Schools of the minority were represented by trustees who were corporate bodies, and all their rights it surely was the intention of the Act of Confederation to preserve.

Now this appropriation of a million acres of Crown lands was in the nature of a compact between the two provinces. Here was the old Government of Canada setting aside this by mutual consent of both provinces; it was in the nature of a compact between these provinces, and the beneficiaries were the schools of Lower Canada, and the schools of Upper Canada.

There was an understanding between the two divisions of old Canada and there is authority for saying such an understanding as that is valid, to support trusts in equity at least; but here we have, I say, a complete system of schools established by the same authority that appropriated these million acres of land, and throughout this Act Lower Canada is spoken of as owning a portion of this fund, as entitled to a portion of this fund, and the municipali-

ties are the school bodies of Lower Canada, are declared to have rights in this fund, and to be entitled to this fund, and they were perfect legal entities that could be sued and sue.

These million acres of land were held by the Crown, and the beneficial interest in them was in the old Province of Canada containing both Upper and Lower Canada, and the million acres of Crown Lands were appropriated as a school fund for the support of the schools in each division of the old province, that is, in Upper Canada and in Lower Canada. They were not the lands of the Province of Ontario. They were the lands of the Crown and if the Crown appropriated this million acres of land on these occasions from Upper Canada, they might have appropriated lands in Lower Canada for some other objects, and they did actually pass statutes to that effect. For instance, one of the first statutes promoting the construction of the Intercolonial Railway provided for setting aside a large amount of land in the province of Quebec in support of that scheme. And there was nothing extraordinary in the Crown setting aside this million acres of land for the support of the schools in the two sections of the province—nothing that gives any claim to Ontario now, either in equity or in law, in that. They were Crown lands, they were not Ontario lands, nor Quebec lands. They were Crown lands belonging to the whole province, and were set aside for the benefit of the two provinces or the schools in the two provinces, which were the real beneficiaries in the matter. And the terms used to appropriate this million acres of land to the benefit of these schools are exactly the same as were used in appropriating Indian Reserves. For instance, in the very statute of Lower Canada preceding this C. S. L. C. ch. 14, sec. 12, we have a provision made for appropriating lands to the

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Indians, Indian Reserves, and the language is exactly the same as in the case of this statute. There was authority given to appropriate and set apart lands by Order in Council, for the Indians. Now such reservations were made under the old Province of Canada. The Indians had an interest in those lands at the time of Confederation. In the Ontario lands case the Privy Council laid it down distinctly that there was no necessary connection between control over those lands and an interest in those lands.

Now, the ground I take is this: The language being the same, these lands in each case being set apart and appropriated, the result upon these lands should be the same. Now, in the case of the Indians, it is undoubted that that created a reservation belonging to the Indians. It was an appropriation of those lands to the Indians. The Indians acquired an interest in them, and if the question for this court was whether such Indians had a vested right or interest in those lands which had to be respected under section 109 I imagine the decision of the court would be very different from what it was in the case of the Indian annuities where the obligation of the Crown was a personal obligation, where it was held there was no lien whatever on the lands; but here the lands are set aside and appropriated to the Indians, and they give an estate to the Indians, an estate that this court would respect, and so, if the lands are set apart and appropriated as a school fund, it gives to the beneficiary of that school fund an estate and an interest. That was the condition of affairs at the time of Confederation. Now, did a change of legislative control over the Indians, and over these Indian lands—did it in the least degree affect the rights or interests of any parties to this land? Not in the least. The old Province of Canada had the legislative control over

these Indian lands and over these Indians, and that legislative control passed out of the hands of the old Province of Canada to the Dominion. And the Privy Council held that this change in no way affects the right or interest of any party. The Indian rights remain. In other words, the Dominion took over the Indians and the Indian lands and the Indian fund, everything belonging to the Indians. They took it all over into their hands just as in this case. Quebec and Ontario took over the schools and took over the property of the schools, with all the attendant rights belonging to these schools, just in the same way, and we might just as well argue that because the old Province of Canada has lost its control over these Indian lands and these Indian funds, there is some change of interest; there is no change of interest. The legislative control is no measure and no limit to the rights of the parties under our Act of Confederation. The idea was to perpetuate all rights and all obligations, and when the two provinces took over the schools they took over all belonging to these schools, they assumed the burden of these schools, and they assumed it as heirs of the old Province of Canada, and with all the rights, all the obligations, except the one of the annual grant from year to year, but all permanent existing trusts passed, they were transmissable obligations and rights, and they passed to the new provinces as successors in that department of the old Province of Canada. Therefore I think that the effect given to this Indian Act is applicable to our case.

Now another point is this. It is argued there is a difference between the Indians and the schools. As I show to the court the schools were capable of having rights just as much as the Indians. This action of the old Province of Canada in setting apart and appropriating this million acres of land, was done in favour of

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two distinct and separate systems of schools. There was one distinct and separate system existing in Upper Canada and there was another existing in Lower Canada under totally different statutes. Now it was in favour of these schools respectively that this appropriation was made of this million acres of land. It was not schools of the Province of Canada in any other sense than it was in favour of the system of schools existing in Lower Canada and in favour of the system of schools existing in Upper Canada, which were distinct and different from schools under different Acts.

Ch. 26 of the Consolidated Statutes says:—

"The said sum of $200,000 annually shall from year to year be apportioned by order of the Governor of this province in council between Upper and Lower Canada, in proportion to the relative numbers, &c."

Now there was a portion of that fund affected in favour of Lower Canada; if it was not defined it was capable of being easily defined. Lower Canada's share was assigned to her and permanently assigned to her by this statute.

Now, a division is made of it permanently, I claim, by this statute, and also by the subsequent statute, the School Act of Lower Canada, C. S. L. C. ch. 15. That apportionment is recognized. In section 99 of that School Act of Lower Canada we have the language used by the same legislature that a portion of this fund does belong to Lower Canada. They use the words 'belonging to Lower Canada." Therefore there was a definite portion assigned to Lower Canada, and there was a definite portion vested in Lower Canada as a distinct division of the old Province of Canada, and that language is used, I say, by the same legislature throughout this School Act of Lower Canada; not only is it declared to belong to Lower Canada, but the statute, 15 Vict., goes further; it creates all the

machinery, and all the provisions necessary to carry that apportionment onward down to the ultimate beneficiaries, the schools of every school district in Lower Canada, and these school districts are declared to be entitled to a certain share of this fund, provided they comply with the conditions on which it is granted. They have to raise a corresponding amount by local assessment. The schools were instituted and all the machinery was provided. I call your Lordship's attention to the machinery that was provided.

Section 24 of the School Act says "it shall be the duty of the Superintendent of Education—now that Superintendent of Education is styled in the previous section 'The Superintendent for Lower Canada,' showing a keeping of the distinct system—to receive from the Receiver General all sums of money appropriated for Common School purposes, and to distribute the same among the school commissioners and trustees of the respective municipalities according to law." And in proportion to the population of the same as ascertained by the then last census. Then section 88 says something more.

Now, not only does the same legislature say a portion of this belongs to Lower Canada, but that it belongs to the school municipalities—to the municipalities they represent.

Section 94 carries out the same idea.

I will have to call your Lordships' attention to this, that these were not exclusively supported by public funds. Sec. 94 provides that the money shall be divided among the several school districts in the municipalities in proportion to the number of children between seven and fourteen.

Now we have got the complete machinery for carrying this fund on and vesting it for the benefit of every school district, and it is vested in the school commis-

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sioners and school trustees of these schools by the Act and by the same legislature. Now, the language of the statute is that the schools are entitled to this. For instance in section 90 we have language like this:—

"To entitle any school to its allowance out of the general or local school fund, it shall be requisite and sufficient," to do the following things.

Now, then, the school was entitled to a share of this fund, if it complied with the requirements. It had a legal right and a legal status to enforce its right to this fund if it complied with the requirements. Sections 96 and 97 carry out the same idea.

Now, there are reasons for which the Superintendent of Education may refuse, and without which he could not refuse. He was bound to pay it over to these schools. And therefore we have the complete machinery, and we have the language used throughout here that the municipalities owned this fund, and that if they comply with certain conditions they are entitled to have their share of that school fund.

Now we come to the next point: What was this fund? I propose to direct attention to that point: What was the nature of this fund?

The same statute, ch. 26, sec. 5, embodying what had gone before, says this:

"And the said fund and the income thereof shall not be alienated for any other purpose whatever, but shall remain a perpetual fund for the support of Common Schools and the establishment of township and parish libraries."

Now, there is a distinct and clear declaration that this fund is inalienable. Section 3, subsection 2. That is as clear a declaration that this fund is inalienable and permanent, the public faith pledged to that, as clear as anything can be, in favour of any person having an interest in that being permanent.

Now, what I say is that every person having an interest in the public faith being kept in that declaration, can ask that that be carried out under the circumstances, especially when the Government did undertake to carry it out. They may not have carried it out in the strict letter of the law, but they did in the spirit as Mr. Wood says. This fund was always behind the annual grant, and this fund was allowed to accumulate in that way. The law did not say that the Dominion Government were absolutely obliged to invest this in other securities than their own; they might invest in their own debentures under the statute. Instead of that they invested it in their own indebtedness. It was their own debt anyway. If they chose to ignore a minor part like that, they had a perfect right to do it, to treat it as a debt due by them. It would be a debt due by them if it had been invested in the debentures of the debt. Behind it stood this permanent fund, this million acres of land, and the proceeds of what had been sold of these million acres of land. That was the nature of the fund. It was a permanent endowment for the Common Schools in the Province of Quebec as regard the portions assigned to the Province of Quebec, and for the schools in the Province of Ontario as regards the portions affected by Ontario—I mean Lower Canada and Upper Canada.

Now let us see what it was an endowment for. It was not the sole support of the schools of Lower Canada.

The School Act, C. S. L C. ch. 15, says it is:—

"An Act respecting provincial aid for superior education—and Normal and Model Schools."

It is a permanent endowment in aid of the Common Schools. It is not the sole course of support of these schools, nor anything like it, because there were local

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taxes and private contributions to these local schools that made the Government grant a minor portion of the support of these schools necessarily. Why, the schools were nearly all built by local assessment and local taxation by different localities, places building their own schools, it was all done by local effort, and not by this public fund. This public fund is only in aid of the Common Schools. It was a public endowment in aid of the schools mentioned in the Act. It was simply a perpetual inalienable endowment in aid of the system of schools mentioned in the statute.

Let us see now what these schools were—these beneficiaries that are said to have been extinguished at Confederation.

Now, in sec. 27 of the School Act, C. S. L. C., ch. 15, we have got the provision under which these schools were established, and your Lordships will see that we have got the divisions between schools of the majority and the schools of the minority; the schools of the majority are the schools managed by the Commissioners, the minority those managed by Trustees.

Now what were these Commissioners and trustees? I call your Lordships' attention to section 53 of the same statute. There were a set of School Commissioners in each municipality, they were elected, I may say, by the people of the locality, the municipality, under the statute. They were not appointed by the Government except to fill vacancies, and they continue so to this day with some amendments.

This sec. 53 constitutes them corporate bodies.

Then the next section declares that they shall not become extinguished by failure to appoint trustees. The corporate body shall not become extinguished. They are made perpetual.

Now as regards trustees, they too were made a corporate body and given the same powers as the Commissioners. I refer to section 57, subsection 3.

Now, both these were corporate bodies, created by the State, but elected, managed by local electors, residents in the school districts and proprietors, and they were made perpetual corporations, and they were not purely public, so that the State could wipe them out when they liked, and take the school property and treat the whole thing as if it belonged to the public, and as if no one else had right to these schools. They were not of that character, and the statute does not show to us that they were of that character. For instance, there were local assessments raised.

Now, my argument is, if there was nothing but the local assessments, each school district could assess itself for the erection and maintenance of its schools.

Now, surely where a locality had assessed itself heavily and built a fine school house at the local expense, it cannot be pretended that no faith of the public was pledged not to destroy or nullify that property. That created an interest distinct from the State. There were local rights and local interests, and it was by local contributions, either by way of special assessments or voluntary contributions, because the statute provides for voluntary contributions to erect these schools and support this system, instead of local assessments, and I say this created an interest that took them out from being mere agencies. These schoolhouses, erected in that way, we could not treat as belonging to the State and ignore these local rights and interests. To this day they belong to these local school corporations. I say that created an interest that took them out of the category of beneficiaries that disappeared with the change of the old governments. It would be an act of vandalism to step in and treat the whole thing as if it was public property that could be swept away without affecting any interests that ought to be protected.

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I call your Lordships' attention to section 64 of the statute. I am speaking always of the statute, C. S. L. C., ch. 15 :—

"It shall be the duty of the school commissioners or trustees in each municipality :—

"1. To take possession of lands and school houses, acquired, given to, or erected by the school trustees or commissioners, and to which the province may have contributed by virtue of any former Act or by the royal institution." And so on.

The province may have contributed. Here it is recognized that there are school houses to which the province is only a contributor, coming under this system, and under the management of these school trustees. Surely there were private interests there that ought to be respected. Then further :—

"To acquire and hold for the corporation, by any title whatsoever, all real or personal property, moneys or income for the purposes of education, until the power hereby given be taken away or modified by law, and to apply the same according to the instructions of the donors."

Now , there is an express provision for dealing with gifts—private endowments.

Then section 60, subsection 2, provides that the secretary-treasurer shall give security, not only for the funds he receives from the school, the local assessments, but from these contributions or donations paid into his hands for the support of the schools.

Now, we do not know to what extent it has gone, as I have said we had no power to go into this question, but the statute makes ample provision for these schools being anything but mere public schools. There are private interests here that ought to be respected, and that take these out of the category of

being mere agencies of the State—local assessments and private contributions.

I think the legitimate consequence of the ground taken by Ontario, is that all these school properties have been confiscated practically to the Crown; because the title of the schools to this grant, it seems to me, stood upon the law quite as much as the title to these school properties.

On this question of what creates an interest that the State must respect, I might perhaps be permitted to call your Lordships' attention to Cooley on Constitutional Limitations (6 ed.), at pages 253 and following, and page 328 and following.

In the United States, of course, we understand perfectly that the individal states have not the same unlimited power of legislation that our provincial legislatures have—the same omnipotent power, so to speak, within their own sphere. There is a limitation on their powers. They cannot impair the existing obligations or contracts, but the argument I think might be used, that where in the United States a State could not change the position without violating the provisions of the Constitution, that there is an interest there that ought to be respected; that there is an interest there that under system ought to be respected, an interest in respect to supporting a trust, and I think the court will see from Cooley and the authorities cited by Cooley that unquestionably these schools are in that position where they could not be treated as mere agencies of the Crown or of the Government.

Another point is this. Not only have the Dominion, Ontario and Quebec, and all the provinces in fact recognised this fund and acted upon it, but I maintain that the Imperial Parliament itself has recognised that this fund belongs to the two provinces, and I maintain that they have done that in assigning the

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Turnpike Trust debentures to Ontario and Quebec as their joint property. That was a part of this fund. It stood on no better ground than any other portion of that fund.

The Imperial Parliament has recognised the joint title of Ontario and Quebec in that fund. The reason why the rest of the fund was not charged was its anomalous position. It is explained I think in the basis which the parties laid down for the dividing of the assets. This is from the principles upon which the statement of affairs of June 30th, 1867, is to be revised in preparation for the arbitration between Ontario and Quebec.

Now this feature of it was accepted, was acted upon by the arbitrators, and I point out to the court was accepted and in fact has become *chose jugée* against Ontario :

" The investments for trust funds are to be deducted from the capital of the funds which are invested in them, and the unpaid interest, which has been allowed to the funds and charged against the Quebec Turnpike Trust and the City of Hamilton on these investments, are to be similarly deducted from the corresponding income funds, the investments themselves, with the coupons being handed over to the provinces interested in the funds, but as Ontario and Quebec have a joint interest in the Common School Fund, the investments for that fund and the accrued interest thereon must be handed over to Ontario and Quebec conjointly, to be dealt with by the arbitrators."

Now all parties have acted upon that, the two provinces, the Dominion, and all provinces in fact. It was the basis as it were, of the legislation which took place regarding the public debt. Who will say that this statement of affairs did not influence that legislation, and that it would probably have been different

had it been known that Ontario was going to receive the whole of this large fund that she is now claiming? Who will say that that did not influence the Dominion legislation in the settlements of affairs between the provinces? Therefore, I maintain that by the Imperial statute itself the interest of Lower Canada in this fund is recognised and that it has been accepted by Ontario.

Now, Upper Canada received funds that it seems to me on its own principle it had no right to receive; like the Upper Canada Grammer School Fund. There are a large number of funds for the municipalities of the province, at the time, that stood just on the same principle. Many of them were not invested at all. Most of them were not, and yet the existence of these funds has been recognised; they have been paid over, even payments to the municipalities since Confederation. Why should Upper Canada pay over any portion of this Improvement Fund to the municipalities if the municipalities became extinct?

Now there is another point upon which I wish to speak. The court will see the position that Ontario took with regard to the award of 1870 in answer to the claim of Quebec.

"Ontario denies that Quebec can re-open the award of the 3rd September 1870 in this arbitration in respect of the Common School Fund."

"Ontario considers that the award was not just to Ontario, nor in accordance with the spirit or intention of the British North America Act in giving Quebec any share of the Common School lands, or the proceeds of Common School lands, which are wholly situate in Upper Canada, that Quebec was no more entitled to a share of these lands than of other Crown lands in Upper Canada, but Ontario accepted the award as a whole, and the Privy Council decided that the award

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was a valid award and Ontario objects to the same being opened for the purpose of enabling Quebec to have some points reconsidered of which Quebec may suppose there is a chance of the arbitrators taking a view more favourable to Quebec than that taken by the first arbitrators."

Now, Ontario objects to open this award, and I think she had good reasons for considering the award binding on her at least, because before the arbitration of 1870 your Lordships will see that Ontario took distinctly in her written answer before the arbitrators the position that these lands belonged to her, the very position that she is seeking to take in this appeal. Now that was answered by Quebec and that issue was before the arbitrators in 1870, and the arbitrators made an award against the pretentions of Ontario. That award of the arbitrators was never appealed against by Ontario.

Now, if the arbitrators were within their jurisdiction there, and it was not clearly *ultra vires*, that is binding, and we claim it is binding on Ontario because she has accepted it in the most formal manner by statutes, and every other way. Surely it is *chose jugée* against Ontario. She never appealed against that feature of the award and never appealed against it at all. It is true that Mr. Wood when he came before the arbitrators with his oral arguments, that he did not take that position, but whether that award was given against Ontario upon contestation or upon confession it does not make any matter, it is equally a judgment binding upon Ontario, and she does well to say she accepted the award because it is an award she cannot help but accept.

Now I may say to the court that Quebec will not believe, is not prepared to think, that your Lordships will reach the stage that you will feel it necessary to deter-

mine upon the merits of the case itself, as if it were free for Ontario to raise this question of the extinction of the beneficiaries. I believe your Lordships on consideration will see that this question is excluded on every ground; excluded by the very terms of the reference; excluded by the fact that it was not placed before the arbitrators; excluded by the fact that the arbitrators have not passed upon it; excluded by the fact that Ontario is estopped in the most complete way; I believe your Lordships will say that you will not find it necessary to pass a decision on the merits of the case, which merits we have not been able to discuss here as I have stated, for the want of proper evidence and information.

I do not think your Lordships will say that there is any jurisdiction given to this court, if the arbitrators had not jurisdiction; if it was not a subject that was within their jurisdiction, that the arbitrators could not give jurisdiction to this court by their finding.

Mr. Justice Gwynne asked me yesterday whether the subject of liability of Ontario had probably been discussed by the arbitrators. I have no doubt it was, because Mr. Chancellor Boyd discussed it, and Mr. Justice Casault discussed it, and Mr. Justice Burbidge says that he has the benefit of reading the opinions of both of these arbitrators.

Now if your Lordships will refer to Mr. Justice Burbidge's remarks at pages 652, etc., etc., *ante*, I think your Lordships will see conclusively that this question has never been discussed by Mr. Justice Burbidge, and that it is not part of the ground of his award. He professes to have dealt with all the questions which the arbitrators considered they had to deal with, and there is not a word in all his remarks in which he discusses this question, whether there is any liability on the part of Ontario or not. He speaks of a liability in this way, and that way, but nowhere does he speak of

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liability in the sense in which it is brought up by this appeal, the question of whether there is no liability whatever, and he is citing these clauses of the deed of submission, it seems to me, to show why he considered those clauses excluded that question, and he did not deal with the question in his opinion, and his opinion is the opinion of the arbitrators in this case, because without him the award could not have been given in the case.

One other point, and I will not trouble your Lordships longer in this case.

I want to call your Lordships' attention again to the statute of Ontario of 1894, 57 Vict. ch. 11. This is a statute to which the Crown is a party, binding upon Ontario, and passed in 1894. Your Lordships will remember that the Deed of Submission was passed in 1893. These arbitrations were going on in 1894.

Now, what are the points stated in this statute?

"Whereas this province is interested with the Province of Quebec in a fund commonly called 'The Common School Fund,' existing under the provisions of Chapter 26 of the Consolidated Statutes of Canada."

They admit it exists under this statute.

"And whereas this fund originally consisted of one million acres of public lands situated in the Huron tract in the Province of Ontario."

That was the fund.

"And whereas at the time of Confederation a large portion of the said lands had been sold and partly realized by the late Province of Canada, for the purposes of the said fund, and the proceeds thereof passed to and are still in the possession of the Dominion of Canada, to the credit of the said Provinces; and whereas since Confederation this Province has sold some of the remaining portion of the said lands, and collected amounts, both on account of the price of such

sales, and on account of the balances remaining unpaid of sales made prior to Confederation;"

"Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:"

1. "The Lieutenant Governor in this Province in Council is hereby authorized to agree with the Government of the Province of Quebec, upon an amount to be paid by this Province for the acquisition by it of the uncollected balance of the price of the lands mentioned in the preamble of the Act, and for the payment by this Province of what may be considered the value of the lands remaining unsold."

2. "It shall be lawful for the Lieutenant Governor in Council to enter into an agreement with the Government of the Dominion of Canada and that of the Province of Quebec respectively, for the purpose of effecting a final division and distribution between the said provinces and final payment of principal of the said Common School Fund, and to enter into such an agreement with the Dominion of Canada and the Province of Quebec as may be necessary for the division, distribution and payment of the said principal, and for granting and giving to all parties concerned such receipts and discharges, and signing such deeds as may be necessary in the premises."

Did Ontario at that time understand that this question of whether there was any liability for this school fund existed or not? Could Ontario have believed that in the Deed of Submission she had submitted the question whether she was liable for these very things which she acknowledges her liability in this statute, and for which it provides? Could she have believed it? Could the province of Quebec have believed it? Is it possible in the face of this statute, and the corresponding statute on the part of Quebec, that the Pro-

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vince of Ontario could have believed or intended any such thing, in the face of such a statute at this? I maintain your Lordships will never reach the stage of being called upon to decide this question on the merits; that the appeal does not lie, under all the circumstances of this case.

Hall Q.C. follows:

I propose to be very brief in dealing with this question. But what I would like to do is to put before the court, if I can, at the various stages, the circumstances of how this fund has been dealt with by the parties, in order to show the action of the parties, and how far the parties are estopped now, or how far it may be included in the deed of submission.

In the reasons offered by Mr. Chancellor Boyd, he attached apparently a great deal of importance to what might have been the wording of the constitution of these schools and the inference that from the wording of the statute that these are called Common Schools of the province of Canada.

Now, a mere examination of the preambles and the titles of 4 & 5 Vict. ch. 18, 7 Vict. ch. 9 and ch. 26 of Consolidated Statutes of Canada, shows that those schools are schools in this Province. Not schools belonging to the Province of Canada. And, this statute, C. S. C., ch. 26, recites in section 1, that the land was set apart for Common School purposes. There is nothing in the language, and if you refer back to the preambles of the others, to the statutes to which it refers, there is nothing to show that these were Common Schools which might be said to be exclusively the property of Canada, but they were Common Schools throughout the province, and it was a Common School fund for a Common School purposes, and it designated throughout the provinces, although

it might have made a more limited designation than that as regards territory.

Going on then to the second point in connection with section 1, and which the province of Quebec has always maintained, it is this, that by 12 Vict., ch. 200, and by the Order in Council, and by this chapter 26, these million acres of land were adequately appropriated, taken out of the Crown's domain, and set apart and belonged to the Common Schools throughout the province of Canada. We say they no longer remain Crown lands, and the description and the designation given throughout by the late Province of Canada to these lands calls them school lands, and we not only say that by that section or chapter 26 that they had been appropriated and set apart, but your Lordships will see that that section provides that the Commissioners of Crown lands, under the authority of the Governor in Council, administers them and collects the proceeds, and pays these proceeds into the Common School fund for these Common Schools. There was an absolute appropriation, instead of a million dollars in cash, and if we were discussing it on the basis of a million dollars in cash, there would not be any difficulty at all. Instead of that the Province of Canada gave one million acres of land out of the Crown domain into the hands of the Commissioner of Crown Lands as a sort of administrator or trustee, and he was to sell these lands and put every dollar of the cash into the Common School fund for the benefit of the Common Schools of the province.

It must be borne in mind that under two distinct statutes there had been created the Common Schools for Upper Canada and the Common Schools for Lower Canada. My learned friend who preceeded me has given you the consolidation of the legislation as

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regards Lower Canada in Chapter 15 of the Consolidated Statutes of Lower Canada.

Now, there was the corresponding or almost corresponding legislation to be found at chapter 64 the Consolidated Statutes of Upper Canada, providing for the Common Schools and their management and the disposition of this fund and of the remainder, the creation of corporations, but under these Common Schools, who had power to sue and be sued for Upper Canada, with a superintendent of education for Upper Canada, with a local board of education for Upper Canada, and with provision made that the superintendent of education of Upper Canada drew from the Receiver General the portion of the grant of this Common School Fund.

Now these two statutes,, C. S. U. C, ch. 64, and C. S. L. C., ch. 15, were in force on the 1st of July, 1867, and continued in force for years afterwards, and as regards the Province of Quebec—I cannot speak so definitely for the Province of Ontario—they are in force yet, but they have gone into the revision of 1888.

Now, there was the constitution then of the fund, and the constitution of this corporation, and these Common Schools, as of date of Confederation, 1st July, 1867, and at that time there was the $1,645,000 in cash, and while it is quite true that the late Province of Canada did not invest that money in the public securities, they used it for their own purposes, for all we know, but it remained there, not what my learned friend who opened for Ontario said, a mere book account, and a mere nonentity, that could not be touched. Every dollar of that $1,645,000 represented cash or the interest that should be added to it, and was a solid, substantial fund at Confederation.

Now, after Confederation came the arrangements that were made for the arbitration under section 142

of the British North America Act. And the object of the few remarks I wish to make on this point is to show that before the arbitrators of 1870, the question of this Common School lands was referred to them for division and adjustment by all the parties.

Now if your Lordships can take up the principles as enunciated in what we call part 3 of this long book, page 9, which is headed: 'Principles upon which the statement of affairs of June 30th are to be made up in preparation for the arbitration between Ontario and Quebec."

Now at page 9, one of these principles sets out this:

"The lands in each province were surrendered to them, subject to existing trusts, and the Dominion is bound to see that the trusts are executed. A very large sum, upwards of $1,700,000 remains outstanding on sales of Common School Lands, situated in Ontario, but in which Quebec has a joint interest, and the apportionment of this asset must be left to the arbitrators."

Now, in so far as any concurrence could possibly have been given to that, Mr. Wood who was then the treasurer, and acting on behalf of the executive of Ontario, expressly in his letter consented to that. When some difficulties arose between the parties, Ontario, Quebec and the Dominion, with reference to what statement should be presented before the arbitrators in connection with the debt of Canada, a conference took place at Montreal. Now, we submit that the parties are bound by this conference and in that conference there were representatives of Quebec and of the Dominion and of Ontario. Your Lordships will see that the treasurers of Ontario and Quebec agreed to the fairness of these principles, and in connection with these principles the Dominion passed an Order in Council and a statement of the debt of the late Province of Canada was made up and submitted to the arbitrators in 1870.

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Now, as my learned friend Mr. Trenholme stated, when the parties in 1870 were before the arbitrators submitting this question of the School Lands, Ontario in its written and printed statement before the arbitrators, which we say must be taken as an Act of Ontario, following up the conferences that took place leading to this arbitration, raised the question that there was no trust in connection with these lands, and that she was entitled to them all. Well, good, bad or indifferent Mr. Wood orally said "I think Ontario is liable. I think," he said, "that I should do violence to the statutes, if I could have taken them away from the Common Schools which still existed." I think he was right. Ontario submitted that question to these arbitrators in 1870 and the arbitrators decided against that. It was a question of law the arbitrators had a right to decide. Ontario has never appealed from that. From 1870 down to the present argument, or rather perhaps I should say down to the rendering of the judgment of Mr. Justice Boyd, there has never been directly or indirectly any suggestion or act of Ontario but that this award of 1870 was valid, and that they had to carry it out.

We come now say to the year 1878 when the Privy Council rendered their award, and your Lordships will see from the quotations I have given in the factum of the joint case before the Privy Council, the counsel for Ontario, the Attorney General for the time being, contended that the award was perfectly good.

Now, we say, not having appealed from the award of 1870, having stated before the arbitrators in 1870 the question which they are stating now, they are *chose jugée* as to the question of liability, and the arbitration is absolutely at an end and Ontario is without a right to go any further. And I would go so far as to say, if there was error on the part of the arbitrators at

that time in the disposition of that Common School fund, that as regards Ontario, by her minister, by her legislature, by every act that it was possible to conceive of having been done, she has acquiesced in the award, and made it a good award.

Your Lordships will see that from 1879 to 1887 Ontario paid direct to the province of Quebec $250,000 in various sums as interest on Quebec's share of collections on the Common School lands made by Ontario and which Ontario had kept in her pocket up to that time.

Can there be any more direct admission? Could we ask for any other circumstances that would operate as an estoppel, as great as that? Taking $250,000 out of the public funds of the province passed through their public accounts, and passed through their estimates, passed under the review of the legislature, not one isolated act, but going over six different years; recognising Quebec's interest in the Common School fund after Confederation, recognising Ontario's obligation to pay interest on that, and Ontario actually paying the interest to Quebec; that is, to 1889.

Now, that brings us down to 1890, and it, practically speaking, terminates the recital of acts by means of payments of money.

Your Lordships will see from the correspondence, if you went into that, after the confirmation of the award in 1878, the Treasurers of Ontario and Quebec and the Finance Minister got together and they commenced this legislation. What for? To divide the principal and the income of this fund. All parties admit that they were bound by the award of 1870 as regards this being a trust, as being a fund, and an asset—first of all an asset belonging to Ontario and Quebec, and as being a fund which rightly or wrongly had been declared by the arbitrators of 1870 to go on in perpetuity, and the correspondence shows that all parties,

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both Ontario and Quebec, felt bound by it. They met together in 1883, and there is a statute by Ontario, and a statute by Quebec, to arrive at a settlement and a division of this fund, to permit Ontario to buy or to pay Quebec a certain sum of money for the outstanding balance for the lands unsold.

Then we come to 1890 as a matter of legislation, when these various acts of payment of moneys by Ontario took place. The last item was $11,000. In 1890 they introduced the legislation under which this present arbitration took place. At that time Quebec had repealed the Act of 1883 by substituting an arbitration Act as it is called, and it was found that as regards the division of the fund Quebec was without authority.

In 1891 Quebec, the Dominion and Ontario, each one of them passed Acts recognizing again everything that had gone before, recognising as clearly as can be recognised by words, as Mr. Trenholme has put it, that the principal of the fund ought to be divided, that the parties hands were tied by the award of 1870 which said it must go on forever, and they adopted legislation to do it.

Now, that is concurrent legislation. It is not legislation of a private individual. It is legislation we may say of the Crown, Quebec, Ontario and the Dominion.

Now then we come down purely to the question of the deed of submission of 1893. I do not think that any construction can be put upon it further than that the parties who signed that and the Lieutenant-Governor-in-Council of the province of Quebec who approved of it, believed and could only believe that what he was agreeing to submit was the amount of a fund that every one had recognised and admitted. The deed is signed and the parties go before the arbitrators.

Quebec makes this claim which is printed in the joint case. That says, that we are entitled in the making up of this amount of this principal of the Common School fund—we are entitled that you should take as cash on hand what the Dominion have got; we say Ontario must render up an account of these remissions she has made; if any remissions have been made for improper causes we wish to investigate it.

The parties there clearly recognised there was a fund, composed of the amount at Confederation, of the value of the proceeds of sales of land since, of the value of lands remaining unsold, but of course as against these general amounts there might be some legal deductions in connection with the existence of the fund, but there never was a suspicion that there was no fund. And, I say that the language cannot possibly convey that, but that the language conveys that there was a fund composed of the amount on hand at Confederation, of the cash received by the Dominion since, of the cash in the hands of Ontario, of the value of the lands remaining unsold, and it was that amount that the arbitrators were going to divide, and it was that claim that Quebec formulated there before the arbitrators. We did formulate a claim with reference to the division of the fund and income about which I will speak in one moment.

Now, what was the answer of Ontario to that? I challenge my learned friends to show in their answer that they filed to that claim, and which is what we argued before the arbitrators, which must be taken to be the line or the action of the parties—not one word —not only not one word that there is no liability since Confederation, but line after line that Quebec cannot re-open its award, this award of 1870 must stand, Quebec's rights are bound by that award of 1870. That is what we argued on behalf of Quebec. That was the contest before the arbitrators.

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To sum up in a few words, the contention of Quebec is that as regards that Common School Fund, all parties have accepted the award of 1870, less the contention that Quebec will make in this counter appeal; in all other respects the award of 1870 has been followed in every particular; not only in the clause regarding the Common School Fund, but the other, and as regards the Common School Fund all these acts have been done by the legislature, by the officers, by the executive council, by the premiers of Ontario and Quebec, and it brings us then down to this question:—Is it possible that Quebec, with all these views or acceptations on the part of Ontario before it, with the circumstances of the award of 1870, ever thought by the deed of submission it was putting in doubt again or putting before the arbitrators the question whether there was a trust? The circumstance of it never being mentioned before the arbitrators in the answer of Ontario, seems to Quebec to be absolutely conclusive that this court would not for a moment allow Quebec, or allow any litigant to be taken by surprise in a matter so serious as this, not only without any opportunity of making evidence on a point that might be obscure, but being called upon to make evidence and to support its claim before the arbitrators, Ontario claiming that the award of 1870 was good.

We contend that the motion to quash the appeal should be granted, and certainly that on the merits there is no foundation for the present appeal, and it is not included in the deed of submission.

Blake Q. C. in reply. The question whether the award is *extra* or *intra vires* is a question which certainly was brought by the Province of Quebec on discussion before these arbitrators, and not merely was it brought up, but it is still in that portion of this whole matter which remains at present unargued,

insisted upon. It is also insisted upon with reference to one or two points upon the matter which is now before your Lordships. The question whether Ontario under these circumstances is to be prevented from affirming on its part that some class of contention with reference to the award which Quebec proposed to affirm and insist upon on its part, is the question which is laid before your Lordships at the opening. That is the ground upon which I put the case.

As one of your Lordships has observed, it would be monstrous to suppose that if in point of fact this award is bad in respect to its dealing with this fund, bad as *ultra vires*, the Province of Quebec should be permitted to insist upon that for the purpose of inducing a different adjudication upon the subject from that which the award of 1870 prescribed, and the Province of Ontario should not be permitted to affirm that same proposition with all its results and limitations on its side. That is really the contention which my learned friends bring forward.

Now I repeat with conviction the view that the attitude of Quebec upon the points which are set up in its case, are being prosecuted in the appeal, are points which touch in the different aspects in which I stated them in my opening, the question of the *extra* or the *intra vires* of the award of 1870 with reference to this matter, and I re-affirm as a proposition indisputably that it is utterly impossible for Quebec to maintain those positions without Ontario being absolutely free for its part to say—well, if the award is null and void it is so for us as well as for you; you cannot affirm that we are bound by it and that you are not; you cannot affirm that these things which were *extra vires* of the arbitrators as you say, and which affect the whole of this portion of the award, still leave it binding to the extent to which it touches us. The whole question is open.

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If the award in this respect, on points not separable, is *ultra vires*, it is *ultra vires* as a whole with relation to the subject matter of the Common School Fund out of which was carved the Land Improvement Fund.

Now, my learned friends say, and say with justice, that there was a general action of both the parties to this discussion for a very considerable time based upon the theory of the validity of the award.

I maintain that the conclusion is that it might be fairly stated that the parties thought, in their action, that Ontario was seeking for the carrying out of the award of 1870 in all its particulars, and that in the transactions which it entered into later on, such as my learned friend has alluded to, the transactions namely with reference to the payment of money to the Dominion, with reference to the payment of money to Quebec, with reference to the Land Improvement fund itself, as we will show in full detail when we come to deal with that, it was upon the idea that Quebec, which had up to the time of the Privy Council decision litigated the validity of the award, after that time was not disputing the validity of the award upon these subjects.

I say, speaking for the Province of Ontario, that in my opinion a fair and reasonable view, taking the whole of the correspondence, legislation and everything, would have been to say both parties understood when the submission was made that the award of 1870 with reference to both the Land Improvement Fund and the Common School Fund which the Land Improvement Fund was carved out of, was to stand, and that was what was being done, but I cannot understand how the province of Quebec can set up for itself the right to dispute those fundamental bases, as far as it is concerned, and to say that we are bound. Is this ratio of division to bind Ontario when it does

not bind Quebec? Is it to be *intra vires* as far as Ontario is concerned, and *extra vires* as far as Quebec is concerned?

The position seems to me impossible to state without the very statement being its actual refutation. You cannot make it good and bad at the same moment. You cannot make it good for one of the parties and bad for the other. It is said Ontario did not appeal. Certainly it did not appeal. Ontario did not say the award was *extra vires*. Its silence on that subject does not debar its right to say that it is *extra vires*. Certainly silence does not bind and make the award good for one and bad for the other. It cannot be that Ontario shall be bound by the award, although it is *extra vires* and beyond the powers of the arbitrators a nullity as far as the province of Quebec is concerned.

Now, allegations have been made by the learned counsel who opened for the respondents that there was a disadvantage because they had not some evidence, but I did not hear any very tangible statement of any evidence that was missing, or any suggestion, On the contrary, the learned counsel asked your Lordships to infer from the statement in the statute that there existed those corporations and those private schools and those donations, which were suggested by the statute. I agree that that is a fair inference. It is a fair inference that those subject matters to which the consolidated statutes of Lower Canada alluded did exist, and for the purpose of this case they are fairly to be taken to exist, and there is really no foundation for the suggestion that the whole question was not before the arbitrators and is not before the court. The statutes of the Province of Ontario are analogous to the statutes of the Province of Quebec. What binds one binds the other. If this statute for the Province of Ontario dealt

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with the case in such a manner as to be formal admissions which bind, of course they were not admissions made to the other side. They were in part in connection with the propositions for settlement, which propositions turned out to be abortive, and the reason for their being abortive can be discerned very plainly, for the moment it was made to appear that the Province of Quebec was claiming that the division of the fund should not be on the basis of the principle of the award of 1870, that moment it was obvious that no settlement could be reached at all, and that to refer the question at large from the award of 1870 to arbitrators would be an absurd thing. The province of Quebec contends now that the division ought to be made on the basis, not of the award, because it is *extra vires* as far as Quebec is concerned, though *intra vires* as far as Ontario is concerned—but on the basis of the census of 1861. While that contention is made there can be no settlement or agreement. The law, and those things to which the parties have by themselves bound themselves, is the only way of adjustment.

Now the learned counsel suggested, I do not know whom, as the *cestuis que trusts*, sometimes it was the municipality, sometimes it was the schools, sometimes it was the territorial locality of Upper Canada in the one case and Lower Canada in the other, that were beneficiaries.

My argument will gain no force from reiteration. I only remind your Lordships that the suggestion which I have made was that all these were agencies of the state. The learned counsel alleged indeed that there were persons who had created private schools in the localities before this aid had been given, and that they actually surrendered these valuable properties to the public corporation on the faith of the annual grant and acquired interest. Well, I dare say there were. I have

already said I agree that one must infer from the existence of the statute that there may have been such private schools, and I hope one may exercise a little degree of common sense and one's knowledge of human affairs in such a matter as that, and one knows that those schools that were established in the early history of this country by public spirited individuals privately, before the legislature of the country or the means of the country were adequate to discharge the public duty, were schools established at a sacrifice, and were run at a loss year after year in order that the children of the people of the country might be educated, and there was no question of private right or interest in the way we speak of private property, and that what happened was an enormous relief from the unjust burden that was imposed upon the individual by the general school system which made the ratepayers of the locality and the general revenues of the whole community contribute share and share alike towards the education and instruction of the children of the country.

So that to suggest that the existence in early days of schools maintained at this sacrifice, and school houses built at this sacrifice, is a suggestion of private property, which was handed to the State, upon some theory that the beneficiaries still remained vested with some right or interest which entitled them to assert a special right of their own, seems to me to be out of the question.

Then the learned counsel brought in the Indian. We all know that an Act of Parliament may, by proper phrases, make a conveyance. Lands may be granted by an Act of Parliament, and if land is granted and appropriated for A. B., that this creates a trust for A. B., or passes the land to A. B. according to the language of the Act. The question is whether what was being

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defined to be created, what the legislature had in view was the assistance of the agencies of the State. Public or Government Schools, in each of these two territorial divisions of the one province were agencies of the State created under the legislation of the State, not controlled by private individuals, except also as creatures of the State who derived their authority from being the elected representatives of the people under the authority of the State itself also.

The learned counsel suggested that the fund was inalienable and remained a perpetual fund. I noted as the first admission that was made that really the fund if it did exist at all, must exist according to the tenor of the statute. That has been my argument to your Lordships. I will just re-state it. If this fund survived the British North America Act, it survived in its entirety, and in accordance with the terms of the statute.

In reference to the position taken by Ontario before the arbitrators, as far as it appears by their case, I desire to cite two lines:

"Apart from the said award Quebec has no right whatever to participate in the proceeds of the public lands of Ontario or of the said Common School Lands received by Ontario subsequent to 1867." I read that to show your Lordships that Ontario then took up the position distinctly that any right that Quebec had was under the award, and if the award is repudiated then of course she has a right to argue that there is no right under any other contingency,

Then in the factum of Quebec before this court is this:

"It is submitted that it is shown throughout the history given in this factum that Quebec's rights are under the original statute which have never been altered."

It is submitted in the same factum:

"That the deductions allowed by the first arbitrators in the award of 1870 should also be set aside as being *ultra vires*." So that the position of Quebec was that the award was *ultra vires*, while they contend that as far as Ontario is concerned it is to be treated as *intra vires*.

As to the discussion before and by the arbitrators, and to the arguments of the learned counsel who opened the appeal with reference to Mr. Justice Burbidge's remark, I do not think I am called upon to enter into an inquiry as to whether Justice Burbidge's certificate, that the court was unanimous that this was a disputed question of law, is correct or not, still less to enter into a minute examination of his own judgment in order to find whether it did or did not contain elements from which it is to be assumed that the certificate was wrong, and that this was not a disputed question of law. I maintain my learned friend is battling against a certificate of that kind, and that the certificate settles that question.

And then my learned friend Mr. Hall pointed out that the award was *chose jugée* and even if there was error on the part of the arbitrators Ontario had made it a good award. I agree, in so faras it would require a proceeding to set it aside, as I have said often and often, but I say that nothing Ontario has done or said or Ontario has admitted or omitted would make it a good award if it was waste paper from the beginning.

Then amongst these things are suggested a payment of a quarter of a million of interest in several different years. Your Lordships will find that that was claimed upon the basis of the award, and therefore the very things which are now being suggested are things which cease to be of any force or effect the instant it is suggested that Quebec is entitled to repudiate the

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award of 1870 upon the basis upon which all these payments were made, because the collection of interest has all been upon the theory of the award itself. Then Quebec alleges that she is now entitled to insist that all that is wrong, all those principles are wrong, but that Ontario is bound. By what I wonder? By the award which Quebec says is bad? By that principle of division which is there stated? No, but by some other principle of division to be ascertained by those arbitrators. We must give equal weight to like transactions of both parties, or no weight at all to these transactions, and in giving equal weight what Quebec is now insisting upon as binding Ontario binds herself also.

Now, my learned friend has rightly said that the provinces found themselves tied by the provisions of the award of 1870 which I have strongly contended, if the arbitrators had a jurisdiction to deal with this matter—though they had a wide jurisdiction they might have dealt with it probably in any other way—was the most natural and reasonable and proper way of doing it, namely, carrying out the statutes. They felt themselves tied by it, and wanted to get relief, and therefore they passed certain statutes. They passed certain statutes to get relief from what? From the principle upon which the arbitrators of 1870 had acted? Not at all. But in order to get relief from the consequence of the fund being perpetual, to get hold of the money, and the question of the division of the money was to be in the apprehension of Ontario and in the apprehension of all reasonable men I should think consequential upon the principle which had been defined as the constitution of the fund itself by the award of 1870.

The appeal of the Province of Quebec was then proceeded with.

Béique Q.C. opens :—I feel that your Lordships are possessed of most of the facts, and there will remain only to me to call the attention of your Lordships to a very few as bearing on this appeal.

"Your Lordships will find that the notice of appeal of the Province of Quebec states that Quebec appeals in so far as such award permits or allows any deduction from the amount of the principal of said Common School Fund for the Upper Canada Land Improvement Fund, or Upper Canada Improvement Fund."

"And in this respect the province of Quebec will contend that, under the provisions of paragraph 1, the principal of the fund should be augmented by the sum of $124,685.18, and that under paragraph 4 of the said award the amount of 25 per cent referred to in the paragraph mentioned secondly should not be deducted."

Now, on referring to the deed of submission your Lordships will find that the only portions of it bearing on the present appeal, are the following :

Par. 3. "It is further agreed that the following matter shall be referred to the said arbitrators for their determination and award 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 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 not 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."

Then 5 :

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"It is further agreed by and between the parties hereto that the questions respecting the Upper Canada Building Fund, and the Upper Canada Improvement Fund, are not at present to form any part of this reference; but this agreement is subject to the reservation by Ontario of any of its rights to maintain and recover its claim, if any, in respect of the said fund, as it may be advised."

I need not say that it was open to either province to consent or not to a deed of submission, to consent or not to an organization of a board of arbitrators, and that the board of arbitrators, or the award must stand or fall on the deed of submission itself, because the parties have decided and had to decide on the questions they would submit to the arbitrators, and what questions would not be submitted.

I think it is incumbent upon me at the outset to show your Lordships what is covered by these words: "The questions respecting the Upper Canada Building Fund," at the date of the submission, and I say I am prepared and am going to show that at the time of the signing of the deed of submission, as appears from the record, the questions that were in dispute between the two provinces, Quebec and Ontario, were the accounts in connection with $124,000.00 and the question which covered the 25 per cent of the proceeds of lands sold from June 1853 to the 6th March, 1861, and collected previous to the time of Confederation. And second, as to whether Ontario would be entitled to retain for the Improvement Fund the 25 per cent of any future collections from these sales made between the two dates, but collected subsequent to Confederation.

And, in this connection I desire to draw your Lordships' attention to the following portions of the record. I might go a deal further back, but I think it is sufficient to commence with 1889. I refer to a letter ad-

dressed by Mr. Shehyn, the Treasurer of Quebec, to Mr. Courtney, Deputy Minister of Finance, dated 4th July, 1889.

"The views of Mr. Robertson were evidently accepted as correct by the Privy Council, as the improvement fund remained in the statement confirmed by them at the sum of $5,119.08 as originally prepared by the auditor of the late province of Canada."

"The arbitrators appointed by Ontario and the Dominion—the arbitrator of the province of Quebec, having resigned—awarded the Upper Canada Improvement Fund to the province of Ontario, and, with reference to the disposition of it the Government of this province has nothing whatever to do."

"If it is proposed in submitting this question to the Supreme Court of Canada to re-open the question raised by Ontario respecting the fund and disposed of by the then Privy Council of the Dominion, the Government of this province protests against the Government of the Dominion sanctioning the submission of such a case to any court."

"The claim of the municipalities for one-fourth of the amount of the sales of school lands and one-fifth of the amount of the sales of Crown Lands made between the 14th June, 1853, and the 6th March, 1861, was twice decided against by the Government of the late province of Canada, first when the fund was supposed to have been abolished by Mr. Vankoughnet's Land Act of 1860, and secondly, when it was actually abolished by Order in Council. The late Mr. Langton, auditor of the late province of Canada, in his report at the time of Confederation on the subject, says:

'In 1860 an Act was passed, which was intended to repeal the clauses which establish the Improvement Fund, and from the date of that Act all further ap-

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portionment of the receipts towards the Improvement Fund was stopped.'

'It was afterwards discovered that the repealing Act had quoted the old Land Act repealed by its title in the Consolidated Statutes, while in that compilation the clauses establishing the Improvement Fund had been inserted in another Act which remained in force. An Order in Council was then passed in March, 1861, abolishing the Fund, and at the same time a fresh distribution was ordered by the proportion of the receipts from the date when the former distribution had been stopped to that of the Order in Council finally abolishing the fund. In both cases the Governments of the day were guided by the date at which the payments on the land were received, and not by the date on which the sales were made.'

"A statement and recommendation submitted on the 17th September, 1863, to the Executive Council by the then Commissioner of Crown lands sets forth that:—

'The said fund has been regularly paid (with the exception of some few balances that remain to certain municipalities) down to the end of 1859, at which date the then Commissioner of Crown lands considered it expedient to stop further payments to the fund. With this view he omitted on the amended Land Act of 1860 the clause authorizing the creation of the fund, but in March, 1861, it was ascertained that the authority for the fund existed at the date of the Amended Land Act in the School Act, and not in the Land Act, as had been supposed. On the 6th March, 1861, an Order in Council was passed recinding that of the 26th July 1856.)'

"It appears to the undersigned that the Improvement Fund continued to accrue legally, and may be fairly claimed by the various municipalities of Canada West, down to the above date of 6th March, 1861, and he therefore respectfully recommends that the distribution

thereof be made to them accordingly. Signed, William McDougall, Commisssioner.'

And then Mr. Shehyn continues :—

"The arbitrators appointed by the Ontario and the Dominion—the arbitrator of the province of Quebec having retired—treated the Common School Fund as an asset that they had power to divide and apportion in such manner as seemed to them right. They transferred to the province of Ontario as belonging to the Upper Canada Improvement Fund the amount of the sales of the Common School lands made between the 14th June, 1853, and the 6th March, 1861, including $124,685.18, stated to have been received on account of these sales between the 6th of March, 1861, and the 30th June, 1867. The Province of Quebec has always contended that the transfer of any portion of this asset to Ontario, excepting the amount to which Ontario was entitled in proportion to population, was unwarranted and unfair."

"It should be borne in mind that the arbitrators had no power whatever to change in any way the statement of the debts and assets of the late Province of Canada as sanctioned by the Honourable the Privy Council after the conferenee held on the subject between the Dominion and the two provinces."

"Therefore in the award that they made while they unfairly, as Quebec contends, gave to Ontario a portion of the Common School Fund under the plea of transferring it to the Upper Canada Improvement Fund, they really had no power to increase the indebtedness of the late province of Canada to the Upper Canada Improvement Fund, a fact which their silence on the subject of the claim of Ontario respecting the one-fifth of the Crown lands sold as above mentioned, show that they themselves recognise."

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"The government of this province therefore declined to join in any way in the proposed litigation or to make any changes or suggestions respecting the proposed case which has been submitted."

It is perfectly plain from this, that wrongly or rightly, the Province of Quebec by this letter, puts forth its contention that they were not bound by the award of 1870 in that respect, and that there was no occasion to make any deduction, that the Improvement Fund did not exist, and that there was no occasion to credit to the Improvement Fund either the $124,000, or 24 per cent of any future collections.

Then I refer to Ontario's Order-in-Council of the 25th April, 1888, and Mr. Mercier's draft report to the Lieutenant Governor of Quebec of 24th October, 1888,

It seems to me that these documents show, and clearly show, that at that time, therefore, previous to the signing of the submission, that question was disputed between the Province of Quebec and the Province of Ontario. On the one hand Ontario seems not to be satisfied with the finality of the award of 1870 as to that question, and was demanding that the question be included in a new submission to be made to a new board of arbitrators. On the other hand Quebec was contending that Quebec was not bound by the award of 1870, and was refusing to submit that question to a board of arbitrators.

I must say that when these negotiations took place they were not in connection with the board of arbitrators that were appointed in 1890, they were in connection with another board of arbitrators, or in other words, that the negotiations fell through, but when the negotiations were revived in 1892, and when the submission was signed, it seems to me that there was clearly before the parties the fact that there was in dispute that question between them, and therefore I

say that when the deed of submission excludes all questions having reference to the Upper Canada Land Improvement Fund, that the question in connection with the $124,000 as well as the 25 per cent of the future collection formed part of and included in these questions respecting the Upper Canada Land Improvement Fund which were excluded from the reference, and therefore that the arbitrators had no power to take it into consideration.

Then your Lordships have no doubt noticed that by the deed of submission the arbitrators are instructed to take into consideration, amongst other things, the sum now held by the Government of the Dominion of Canada as forming part of the School Fund. They were instructed not to inquire what the Improvement Funds were, but to ascertain the amount of principal of the Common School Fund, and when doing that 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 the value of the lands, and so forth. Therefore it was incumbent upon them to ascertain, as their first operation, what was the Common School Fund which had been transmitted by the old Province of Canada to the Dominion at the time of Confederation, and to ascertain, as a second operation, what amount had been collected since and what remained to be collected. And, as a third operation, to make such deductions as they were allowed to make under the submission. That is, the submissions provided that they were not deductions in virtue of this Improvement Fund which had been taken away from their consideration; Ontario reserving by the submission their right to their claim if they were entitled to make any such claim under that head.

Now, I say that if your Lordships will refer to the public accounts of the Province, as well of the Province

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of Canada as of the Dominion proper, you will find that at the date of submission the amounts that stood in the books of the Dominion as belonging to the Common School Fund was $1,733,000, less the amount invested in the Quebec Turnpike Trust, $50,000, plus some $30,000 of interest, and reducing therefore the amount at the credit of the Common School Fund in the books of the Dominion to the sum of $1,644,000, but no deduction at all of the $124,000. In this connection I will have to refer your Lordships to the following portions of the accounts.

I take first Exhibit 56 accounts of the late Province of Canada and the Provinces of Ontario and Quebec. These accounts are under the heading of schedule from 1st July, '67, to 30th June, 1882. Second, Province of Ontario accounts for the same period. Third, Province of Quebec account for the same period.

Schedule B of this exhibit contains accounts prepared by Mr. Langton. I will have to call your Lordships' attention to the fact that these accounts that were prepared by Mr. Langton and in which my learned friend may be able to find—not a deduction of the $124,000 as made from the Common School Fund, but a credit of the amount of the Upper Canada Land Improvement Fund, to that amount of $124,000, were prepared at the special request of the Treasurers of Ontario and Quebec for a special purpose, and that they were not the regular accounts of the Dominion.

I refer your Lordships, as far as this account Exhibit 56 is concerned, to Schedule A, page 8 where under date June, 1868, the Common School Fund is entered as $1,733,244.47, and the Upper Canada Land Improvement Fund at $5,100 odd.

Then we have on page 10 of that same exhibit, where the entry as to the Upper Canada Land Improvement Fund is $5,119.08.

In the other account there is no trace at all to be found of any deduction, and I would refer your Lordships to pages 10 and 11 in Roman figures of the paging to the memorandum respecting the unsettled accounts of the late Province of Canada, giving the history and so on. And, in this at page 10 will be found a memorandum without prejudice in which the treasurers of the two provinces propose the preparation of a statement of the various accouuts between them.

This is to explain how this Appendix B. happens to be found in these accounts, and how it came to be prepared in that special way. They were irregular accounts, prepared for a special purpose, at the special request and without prejudice, of the treasurers of both provinces, and Mr. Justice Burbidge seems to have lost sight of that, because he seems to have gone on these accounts.

The ground I take is that this special account did not form part of the accounts of the Dominion, did not form part of the accounts of the late Province of Canada which were continued by the Dominion, and that in this account proper no deduction whatever is to be found, and that they were the only accounts to which the arbitrators should have or were entitled to look.

Again, in Schedule C, of the same exhibit 56, your Lordships will find that $1,733,244.47 as being the amount of the Common School Fund in the hands of the Dominion, and the $5,119.08 as being the capital of the Improvement Fund in the hands of the Dominion. And it is only in the Province of Ontario account, with which surely Quebec can have nothing to do whatever, that the Canada Improvement Fund is credited with the $124,685.15.

Next is an account of the late Province of Canada, and the Provinces of Ontario and Quebec, with the

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Dominion from the 1st July, 1867, to the 30th June, 1885. The first one to which I refer is extended only to 1882. This is a continuation of the previous one to 1885, and your Lordships will find in that one again, in schedule A there is no reference at all; it is the mere continuation of the previous account, and there is no reference at all to the Common School Fund, but in schedule B on page 10 of the same exhibit 18, your Lordships will find that the Common School Fund stands at the sum of $1,733,244.47.

The same appears in other accounts in that exhibit.

Now, I might be allowed to refer as a last reference on this subject to the Canada public accounts. Surely this is what should have guided the arbitrators. Here are the public accounts for the year 1892, therefore the public accounts as they stood at the time of the signing of this submission, in which your Lordships will find that the trust fund is stated, Common School Fund, at the sum of $2,582,373.80, and which is made up of the $1,645,644. These figures are not given, but I am giving them for the purpose of showing that the $2,582,373 was the amount of the fund without any deduction for Improvement Fund.

I do not ask, nor do I expect, your Lordships will go into calculations, but this part of my argument is merely intended, and it seems to me an important part of the argument on this appeal, to show that the arbitrators were instructed to take into consideration the amount of the Common School Fund as it existed. Mr. Justice Burbidge seems to have gone on this principle, to say, well, we find it deducted in the account, we find $124,000 deducted in the account, and therefore we had not to make the deduction. It was already made. I propose to meet that argument later on, but now it seems to me that it is a much stronger ground if I can show that Mr. Justice Bur-

bidge, as a matter of fact, is mistaken, and that he has not referred, in basing his statement, to the proper books.

There is no question at all that the arbitrators have dealt with this question of the Improvement Fund, as your Lordships will see by referring to the first paragraph and paragraph 4 of their award.

In arriving at these figures, they have made or taken into consideration the deduction of $124,000, and it is the reason of the dissent of Chief Justice Cassault, who says he is of opinion that the sum then held by the Dominion Government as part of the principal of the said Common School Fund was greater than has been stated by the amount of $124,680, and so on.

I have referred to the correspondence and to the Orders in Council of the Government of Ontario for the purpose of showing that it was well understood that it was a question in dispute between the two Governments as to whether the award of 1870 was binding or not, was or was not *intra vires*, and it was always desired by the Government of Ontario to bring that question before the new arbitrators, and that Quebec was not consenting to it, and if I have succeeded in showing that it was one of the questions in dispute between the two provinces at the time, it seems to me that I may logically say, that all questions having been excluded, that this question must equally be included in the wording of the exclusion as well as the one of the $101,000; and, in connection with this question there was the same reason for Ontario in making the reservation as there was for the other amount, because Ontario did not want to be exposed to have these new arbitrators passing upon the Common School Fund without taking the Improvement Fund into consideration, and as a result of their decision to be open to this contention

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that they were not entitled to the deduction that had been ordered to be made by the first arbitrators.

I was asked by your Lordships as to whether our position is altered by this judgment, and I think the best test to see whether our position is altered by this award of 1896, and in other words as to whether the present award has passed upon this question of the Canada Improvement Fund or not, is to suppose this: —Suppose that Quebec to-morrow would appeal, would obtain by grace or otherwise, an appeal to the Privy Council from the award of 1870, without appealing from the last award, the award of 1896, would they not be told when they came to argue before the Privy Council that their appeal was insufficient because the question was settled not only by the award of 1870, but it was also settled by the award of 1896? Well, it is what I object to, and it is the only objection—the main point of the appeal of Quebec is, we never consented, and were willing to stand by our position as to the award of 1870; whether we were bound or not by that award we were willing to stand by that award, to stand by our position such as it was made, but we never were willing or a consenting party to submit to another board of arbitrators to pass upon that question of the Improvement Fund, and we say, you have passed upon that fund, you have exceeded your powers, and we object to the award, we appeal from the award only in so far as we have done so. Of course if I do not succeed in showing to your Lordships that in the deed of submission it was stated that all questions having reference to the Upper Canada Land Improvement Fund were excluded—if I do not succeed in convincing your Lordships that this comprised the question of $124,000, the balance of the 25 per cent collections out of the collections to be made, of course I must fail, but I cannot see a reason upon

which that part of the judgment of Mr. Justice Burbidge may be maintained, especially when I show that the Government of Ontario was trying to obtain the consent of Quebec to submit that question again. Why? Because Quebec has repeatedly expressed its opinion that the award of 1870 would not avail, that it was on its face *ultra vires*, so far as that portion of the award was concerned. Now, Quebec was not willing. Quebec was taking that position; in the face of that decision they made a submission, and they say all questions, not only one question; if there was only $101,000 that was excluded, why not refer to that one question? I submit that under the words "the questions," the whole of the questions which were in dispute between the parties at the time are covered.

My contention is to this effect, that the affirming of a previous award or a previous judgment involves dealing with the question. What we expected, what I claim that we were entitled to, was not to have the arbitrators to ignore, to decide against the award of 1870, but to establish, to find out or ascertain what was the Common School Fund in the hands of the Dominion and leaving it, reserving all rights under the award of 1870, or under any other judgment or any other rights in the terms of their reservation as appearing in the reference, but that we have never consented to be submitted to another judgment on the part of this board of arbitration, any more affirming the judgment of 1870, than disapproving of it.

As suggested to me by my learned friend Mr. Hall, the Ontario factum admits that the Land Improvement Fund is entirely excluded; and, I do not think that in the factum as it was filed before the arbitrators that it was limited to the $101,000. There was the admission that it was excluded, and no such interpre-

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tation as has been put on this by Mr. Justice Burbidge was put by Ontario, and I refer your lordships to page 12 of the Ontario factum where it is stated:

"That Ontario reiterates the objection to the jurisdiction of such arbitrators to deal with the Upper Canada Improvement Fund taken in Ontario's answer, whereby it appears that it was expressly agreed between the different parties that the questions with reference to the Upper Canada Building Fund and the Upper Canada Improvement Fund are not at present to form part of this reference."

I call your Lordships' attention to the fact that the fund is not created by the statute, but section 7 gives power to the Governor-in-Council to create a fund.

Let us assume for illustration that 16 Victoria instead of giving authority to create the Improvement Fund, had created the Improvement Fund, that the statute itself had created the Improvement Fund, and let us assume again that a few years after the passing of 16 Victoria, that is to say in 1868 or 1869, but before the rendering of the award of 1870, the Act of 16 Victoria had been entirely repealed, and that the arbitrators of 1870, losing sight of the fact that 16 Victoria which had created the Improvement Fund had been repealed, had proceeded as they have proceeded, deducting from the Common School Fund the sum of $124,000.00 or the 25 per cent; would it not be plainly a nullity on the face of the award? They were instructed what to do, to divide the common property between the provinces; and if they went under an erroneous assumption that the statute was in existence, which was repealed, their action would have been altogether null for want of jurisdiction, altogether *ultra vires*. That is the only extent to which we are arguing. We have no intention to attack the award so far as it deals with the Common School Fund, but we

say that if there was no Common School Fund that was ever created, or that ever existed, that that part of the award, if it can be separated from the rest, and we claim it can be, must fall to the ground.

Now what are the facts that we have before us here? I have assumed a state of things that does not exist, a statute creating the fund, and the repealing of the statute, but have we not virtually the same thing? We have the fact that the statute only authorized the creating of the fund, but that the Order in Council was never passed to create it, that the arbitrators have assumed that it was created, and on that assumption that they have set aside a fund that had no existence. And, this Order-in-Council, even if it had the effect of creating the fund, never intended to create the fund from the date of the 6th June, 1853, but from the 7th December, 1855, and therefore there is no question whatever, if this Order may be read as creating the fund, that there was no Improvement Fund until the 7th December, 1855, and the award has gone on the assumption that the fund existed and was not set aside, that the 25 per cent was set aside from the date of the 14th June, 1853.

Now I say the same principle applies; that the fact that even if the Improvement Fund was created that the moment it was repealed in 1861, that the repeal was a complete repeal. It was supposed to have never existed from the date of the repeal. If there was a fund, and if it was as is admitted repealed, the repeal was not conditional, was not partial; it was an entire repeal; it was intended to be so, and it was treated as such by the Government of the Province of Canada up to the time of Confederation. The question was passed upon by the executive on two or three different occasions, and it was treated as such, and the reason assigned by Mr. William MacDougall

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as Commissioner of Crown lands, was that there was a Colonial fund which was intended to take its place.

The position we take does not go any further than that. We did not assail the award of 1870 quoad the Common School Fund. The parties have accepted the award. We assail it merely if it was to be held that this question was not excluded from the reference which I claim is the case, and that therefore, either as the appellant or the respondent, the Province of Ontario has no right to call upon this court to go into that question at all on the present appeal. But, if it is not excluded from the reference, our action is free before this court, and was free before the arbitrators, and we were entitled to call upon the attention of the arbitrators—who were appointed specially for the purpose of establishing and ascertaining what was the amount of the Common School Fund—to establish that Common School Fund, irrespective of any such erroneous deductions for a thing that had no existence whatever.

Now, a word only to make my position clear.. As I understood, from the outset, the first question was as to whether by the deed of reference it was intended to exclude the question—the question not only of the 20 per cent of the Crown lands, but also the 25 per cent of the school lands for the Improvement Fund. That is the first question. Whether it was intended by the parties.

I directed your Lordships' attention at the outset to the fact that it was a question in dispute; it was a question in dispute between the provinces when the submission was signed; that in 1870 or 1873, Quebec went before the Privy Council attempting through Mr. Benjamin to have the very contention that I have raised, taken into consideration; the Privy Council said "the reference does not allow us to inquire into

that question, and we will not pass upon that question." So that there is no doubt at all that at that time it was known to the two provinces that Quebec was disputing the effect of the award of 1870 quoad the setting aside of the 25 per cent out of the proceeds of the Crown lands.

Now, I have called your Lordships' attention to another important fact, that as late as 1889, in the correspondence exchanged between the representatives of the two provinces, the question was stated as one of the questions and was recognized as one of the questions that were in dispute between the provinces.

Now, I have something stronger than that. I have the opinion of Mr. Chancellor Boyd in this case, in this award, and I have something stronger still the undoubted admission of the Province of Ontario before this court in their factum that it was intended by the parties to exclude this question from the reference. And, to make that clearer, I have only to call your Lordships' attention again to our notice of appeal. Our notice of appeal is not raising at all the question of the $101,000, that is the question of the 20 per cent in connection with the Crown lands. It is raising only this question of Improvement Fund.

Well, what is the answer of Ontario in their factum as to that? In the face of this question raised, and it is limited, Ontario reiterates the objection to the jurisdiction of the said arbitrators to deal with the Upper Canada Improvement Fund taken in the Ontario answer whereby it appears that it was expressly agreed between the parties that the questions respecting the Upper Canada Building Fund and the Upper Canada Improvement Fund are not at present to form part of this reference.

If there was an exclusion, I say that the exclusion affects both parties, that it is for both parties and that

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both parties were prevented from arguing that question before the arbitrators, and that it was not within the province of the arbitrators to enter upon that question or to consider it in any shape or form.

Now, it has been stated by Mr. Justice Burbidge, and, may be, the same difficulty apparently has passed in the minds of some of your Lordships, that it was a difficult operation, that from the fact that they were obliged, that they were instructed to ascertain what was the Common School Fund, that the arbitrators, as of necessity, had to inquire into that question. Well, let us see as to that. It will not be contended that it will not have been open to the parties to agree upon a reference to this effect, that the arbitrators were not to pass directly or indirectly on the question as to whether the $124,000 were to be deducted from the Common School Fund as stated in the first award. Suppose that the reference had read in that way, surely it would have been open to the parties to make a submission in those terms. There could have been no question it seems to me that if the reference or the submission had read in those terms, that the duties of the arbitrators would have been this. They were called upon to ascertain what was the amount of the principal of the Common School Fund at the time of submission as held by the Government of the Dominion of Canada. Well, they would have proceeded to ascertain what was the sum transmitted or handed over by the Province of Canada on the 1st July, 1867, to the Dominion of Canada. They would have proceeded as a second operation to find what was the amount collected since, and they would have had to stop there and to report that this was the amount of the principal school fund, subject to whatever deduction might have to be made by virtue of the award of 1870 or otherwise, and that is the whole of our

contention. We say we are willing to stand, to take our position as our position was before we consented to this last deed of submission, but we do not want our position to be aggravated. If we have to face the first judgment, we do not want to be called upon to have to face the second judgment. The subject matter was excluded from the reference, and we will call upon you, the arbitrators, not to pass upon it, to reserve all the rights of Ontario, either by reason of the award of 1870 or otherwise, all the rights as they may be, but not to go and state and render a judgment—a new judgment which if not assailed, might be binding on us. And, to show to what expedient the arbitrators had to go to proceed in the way they have proceeded, to try in appearance not to pass upon the question, I will have to refer your Lordships to the first paragraph of their award.

On referring to the award of 1870 your Lordships will find that in clause 7 the arbitrators reported thus: "That from the Common School Fund as held on the 30th day of June, 1867, by the Dominion of Canada amounting to $1,733,224.47" there is to be deducted so much. The first arbitrators have held, as was the case, that the amount of the Common School Fund as reported as transmitted from the Province of Canada to the Dominion was $1,737,000.00. Now, if your Lordships refer to the award in question here you will see how it agrees—the first paragraph of the award:

"That the sum held by the Government of the Dominion of Canada on the 10th day of April, 1893, as part of the principal of said Common School Fund amounted to $2,447,688.62 made up of the following sums, that is to say, 1st, the sum of $1,520,959.29 that by the union of the provinces came into the hands of the Government of Canada."

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In one case we have it $1,733,000.00, and in the other we have it as of the same date at $1,520,000.00. That is the expedient to which they had to go to appear not to touch the subject matter.

I have stated that Mr. Chancellor Boyd has expressed his opinion to the effect that the subject matter was excluded, and I have only to call your Lordships' attention to his opening remarks.

"So far as Quebec claims to impeach the action of the first arbitrators in their award of 1870, touching the Upper Canada Land Improvement Fund, and as to what they have directed to be placed to the credit of that fund, presently and prospectively, I cannot see my way to interfere for many reasons. For one thing the very subject matter is withheld from our jurisdiction by the terms of the reference."

If the subject matter is withheld from their jurisdiction surely they are not to pass upon it by way of affirming it, because it is passing upon it. They are not to take it into consideration at all.

Trenholme Q.C. follows: There appears to have been two views on this subject of the Improvement Fund, as to whether it was excluded or not. Mr. Chancellor Boyd and Chief Justice Casault evidently appeared to think it was excluded altogether from the reference by the terms of the deed of submission. On the other hand Mr. Justice Burbidge appears to be of opinion that it is not this particular Improvement Fund arising out of the school lands; that another item of that fund is excluded, and that the arbitrators have the power to take up this matter and deal with it if necessary incidentally to the main object of the arbitration, namely, the ascertainment of the amount of the debt.

Now, my learned friend's argument has proceeded, on the view that this fund is excluded, but the appeal

of the Province of Quebec, it seems to me, is quite susceptible of being sustained upon either view. The appeal of the province of Quebec is that this Improvement Fund, in arriving at the amount of the School Fund, should be treated as a nullity in either case; whether it has been excluded by the deed of reference or whether it is not, the arbitrators in discharge of their duty in ascertaining the amount of this fund should treat it as a nullity.

Now, the authorities or citations that will be made in support of either of these views,—that is whether it is excluded or not from the record—are, I think, somewhat numerous. There is a good deal to support each of these views. There is a good deal to support the view of Mr. Justice Burbidge that the Improvement Fund that was excluded—the questions respecting the Improvement Fund—were the questions respecting the $101,000 and the Building Fund. There is no doubt about that. And it cannot be stated that Quebec has been perfectly consistent throughout in saying that this $124,000, which is the item in question now —in maintaining that that is an open question, that that was not settled by the award, because there is an Act of the Province of Quebec passed in 1883, 46 Victoria, of record here—in which there is distinct recognition it seems to me by way of recital at least of the right of Ontario to this deduction of 25 per cent. That Act, however, was repealed in 1888, before this submission came up. It was not in force at the time the deed of submission was entered into between the parties. It had been set aside.

And then there is correspondence between the Honourable Mr. Mercier and Sir Oliver Mowat, premiers, in which we cannot pretend it is not apparent, that Mr. Mercier was disposed to accept the $124,000 and that he looked upon "questions in dispute" as the $101.000.00 and the building fund also.

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Now, we do not pretend that the position of Quebec has been perfectly consistent throughout upon this question, but as the learned counsel for Ontario said in his opening remarks, these were simply abortive attempts at settlement that were not carried out, were not acted upon, and I think if we want to arrive at what the parties really must be supposed to have considered in dispute, we must see what their language was at or as near as possible to the time they entered into the deed of submission, and while that deed of submission was being acted upon between them.

Now, if we take that, another matter may arise, and the parties may take a totally different view upon the subject. I may say as regards Quebec there was this, if any excuse is required for inconsistency in this matter, that there were changes of administration, changes of public men who were dealing with this. It is quite evident on the face of this record, that these public men had not a full grasp of the whole subject in connection with this, in many cases being new to their positions. Ontario had a decided advantage in the unity of administration and direction of this matter, and was consistent throughout in acknowledging the fund as we said, but Quebec had public men at that time who did not understand this and hence this would account for the inconsistency ; but whatever inconsistency there was, I say it arose from attempts at settlement that were abortive. But the language of the parties used at or nearest before they entered into this deed of submission, and which they were acting on this deed of submission—that language I think is most properly invoked in order to show what the real intentions of the parties were.

Now, from that point of view, the court will see that the position taken by Quebec in the letter of Mr.

Shehyn, in 1889, is the position of opposition to this $124,000. I maintain that the Province of Quebec takes the position that this $124,000 should not be allowed. I maintain that that was in dispute—all that $124,000, and that was almost immediately before the submission was entered into.

Then, we come to the deed of submission, and I suppose as a rule all that the parties have been negotiating about before is generally supposed to be summed up in that deed of submission, just as whatever private parties may agree to in a private contract is summed up in the terms of the contract, and if we take that deed of submission on its face it seems to me it excludes these questions. There is no exception there made, and Chancellor Boyd and Mr. Justice Casault say "it seems to me to exclude these questions."

If we go back to immediately after Confederation when the movement was set on foot to adjust the liabilities and assets between the provinces, we find that statements are made out by the Dominion executive exhibiting all the different items of liabilities and assets, and made out for the purpose of placing the case before the arbitrators. We find that conferences took place between all the governments; that extensive correspondence took place, and in these first statements and in the statements that the Dominion put before the arbitrators, simply a balance of some $5,000 odd put down as constituting the balance due to this Improvement Fund, and the $124,000 does not appear at all; and Mr. Wood, in his own statement, in his own letter first takes exactly the same position on behalf of the province of Ontario. Subsequently Mr. Wood puts forward this claim in his written claim before the arbitrators; when Quebec was not there he urged this claim, and

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it was allowed by the arbitrators, but here we have the position of Quebec and we have the Treasurer of Quebec protesting against this item, and we have him protesting constantly and the award, in 1878, after a long series of protests, was carried to the Privy Council upon a statement of [the case under which it appears that Quebec understood she had a perfect right to raise this question, under the general question as to whether the award was valid or not. That appears to have been the opinion of the counsel then employed on the part of Quebec to prepare the case, I suppose; at any rate he appears to have tried to urge that view before the Privy Council, and Quebec did bring up this very question. She tried to urge this and other questions before the Privy Council, but it appears their Lordships took the view that they could not decide the merits of the case.

If that is the case, then we say that the arbitrators should not have dealt with it as they have dealt with it in this award; they should not have put the sanction of their own approval upon that deduction and Quebec should not be prejudiced by having the sanction of the present arbitrators put upon that; and should not be put in a worse position than before in respect of that award. And it was quite competent under the statute which gives your Lordships jurisdiction here, which gives your Lordships the right to substitute the decision, as you did in the Indian annuities case—the decision of this court for that of the arbitrators who have decided—and to put the judgments or the matter in such a position that Quebec will not be prejudiced by what the present arbitrators have done or said in respect of this deductions in respect of this Improvement Fund, in their present award.

Now, I wish to say this, that whatever view is taken of this matter, unless this Improvement Fund is a

nullity, and unless we can invoke that in the present case consistently with the maintenance of the award of 1870 as a whole, I do not think Quebec can succeed in her appeal. The main object of the arbitration was to ascertain the amount of this fund. Now, did not that larger object naturally include every minor detail that was necessary to arrive at that conclusion? We might argue that that is the case, and if they came to an item that had been deducted from this fund, and that this item was a nullity, would not the present arbitrators in arriving at that fund have a right to say we find this nullity to exist as regards this item. There is a great difference between whether it is absolutely null and void, or whether it is a mere voidable thing, just as it is in the case of contracts. A contract may be an absolute nullity. No court would give a judgment on something that has no existence; but a court might well refuse to set aside a transaction that was simply voidable, which might have been set aside for grounds, but if this fund had absolutely no existence, if it was a nullity in point of law, then we say that the arbitrators had a right to say so, whichever view is taken, and had a right to ignore that item as an item to be carved out of the fund.

Now, the learned counsel who spoke for Ontario, spoke of the indecency of Quebec putting forward a claim to attack this award while denying that Ontario could also do the same. I think it is easy to shew that Quebec is not open to such a remark as that, and if it was necessary to make any such remark upon the litigation of this case, that it could be made with much better effect with reference to the appeal of Ontario in this case, where she has sought, without any warning to Quebec, to raise such a question as she has raised in her appeal; but, I want to shew now that the position of Quebec is not open to any such

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remark. I want to show that the position of Quebec has been *bonâ fide* throughout this matter, and I begin here: When this matter came before the Privy Council on the award of 1870, consistent with all she had done before, and protesting against the award in this respect, it was raised there, and the Lord Chancellor in the Privy Council gave expression to remarks, laid down as it were rules.

It is the principle enunciated by the Lord Chancellor that we maintain Quebec has acted upon. I will call your Lordships' attention to one or two passages in that connection to show the idea under which Quebec has been proceeding in this matter. The idea that Quebec has had of her right to question this Improvement Fund as a mere nullity, and the authority which she cites, existed in the remarks of the Lord Chancellor in that appeal case. Here is what the Lord Chancellor says. "If it was not within their parliamentary powers, it goes for nothing." Now that would apply to the Improvement Fund as much as to any other item.

Then again he says: "If they do anything more than they are authorized to do, it cannot have any possible effect."

Then if it cannot possibly have any effect, when the question came up of ascertaining the amount of this School Fund, could we not say, the arbitrators here did something which was an absolute nullity, they acted as if there was a fund that existed that had no existence; can we not say that too, consistently with what the Lord Chancellor says in another place, when it is sought to enforce that part which is a nullity, that the Province of Quebec could resist it?

The two points that we submit are these. We say in the first place, taking the view that it is excluded, the view taken by Mr. Chancellor Boyd, and in the Ontario

factum, and Chief Justice Casault—we say then that the present arbitrators have dealt with the matter, and have put us in a worse position by their award, and that we should be protected against that. If the other view is taken, that it is not excluded, and that the arbitrators had, as Mr. Justice Burbidge says, incidentally a right to go into this question, then we say that the award is bad in allowing the deduction of $124,000 and in allowing Ontario to make the deduction from the sums which she collected for sales between those dates.

Hogg Q.C. for the Dominion :—The Dominion is not, as your Lordships have mentioned once or twice, really interested in the contention existing as between the several provinces but the Dominion is interested in maintaining the award of 1870 in its integrity. The present award, the Dominion submits, should also be sustained. The Dominion is satisfied with that award, because it carries out and was intended to carry out what was arrived at under the award of 1870.

Now, just a word or two with reference to the award of 1870. I submit, first of all, that no question can arise in this appeal as to any isolated amount in that award, that is, that it cannot be attacked in any way for the purpose of shewing that an amount should not have been awarded. The award of 1870 was made under the 142nd section of the British North America Act. What the arbitrators had to do under that statute was to adjust and divide the assets, credits and liabilities. What they did do, so far as this particular fund is concerned, that is the Common School Fund, was, I submit, to adjust that fund, to ascertain it, and to adjust as between the provinces amounts which they thought under that statute should be placed in one fund or another. That is, they ascer-

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tained that there was $1,733,000 of the Common School Fund, and they, amongst other things, said, we will place to the credit of another fund $124,000, thereby it may be said either dividing a liability, or adjusting an asset. These so far as the Common Schools were concerned, were assets. So far as the Province of Canada was concerned at that time it was a debt or liability; so that they must have either considered under the 142nd section that they were adjusting an asset or dividing a liability, but whatever may have been the reasons that actuated the arbitrators of 1870, there is do doubt about this, that they were the statutory arbitrators, they were the final and supreme forum for the purpose of making this award. There is nothing in the 142nd section which gives any right of appeal or any right to question—that is as a matter of law—what they can do. In other words, the award which is made under the 142nd section becomes as much a matter of law as the 142nd section itself. It is binding, and therefore cannot be interfered with or questioned or criticized afterwards.

The short history of it is this:—In 1870 the arbitrators were appointed to divide the assets and adjust the liabilities and credits. They did to a certain extent. There were a large number of items particularly these referred to in schedule 4 of the British North America Act which were not dealt with, and what was intended by the submission of 1893 was to take up, and to take up upon the same principles and rules that guided the arbitrators of 1870, and finish, the business which had been left unfinished by them. So much is that the case, that in all the matters that have come before this board of arbitrators, those principles and rules which govern the ascertainment of the account are being constantly referred to, and have been made the rule of guidance

both of counsel in arguing the cases and by the arbitrators who sat to decide upon these questions. These were the rules and principles that are in the long book, that were submitted to a council of all the representatives of the different Governments of the time, that were decided upon as the rules and principles to govern in the ascertainment of the account in 1870, and they are the rules and principles that are governing to-day this arbitration.

That is another reason why I submit that what was intended by this submission to arbitration was to carry out what was left undone, being thoroughly understood, agreed, as I say, by acts, statutes, Orders in Council and correspondence in every way that it was possible to conceive an award being adopted, and to continue the settlement of those accounts and to complete it under the statute of 1891.

It seems to me that what was said in the Indian Case is just as applicable and may be applied to this case just as strongly as it was to that, and probably more so, because all the acts of the parties, the provinces accepting the interest from time to time, dealing with the Dominion upon the basis of the award, the Dominion paying it over, publishing their accounts from year to year, their public accounts containing these items, the acceptance of these amounts by the provinces, is the strongest possible evidence of the interpretation which the provinces themselves must have put upon that award, and therefore it should not be disturbed, and I repeat the words of his Lordship the Chief Justice in which he says the award of 1870 must be conclusive upon all the parties to it, it has stood for 25 years, unimpeached except upon the points referred to the Judicial Committee, and to re-open it and disturb one of these provisions upon which other dispositions may have depended, would not only be

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most unfair, but would be a proceeding without legal warrant, statutory or otherwise. There is no doubt that award cannot be impeached. There is no court of appeal. There is no method of impeaching that award, and I submit that the award should be maintained.

Blake Q.C. for the respondent Province of Ontario:—I must begin by saying in answer to an observation that was made by the learned counsel, that I have no intention of criticising the conduct of counsel at present concerned or heretofore concerned in this case. I suggested that it would be an indecent result that Quebec should be able to insist upon, on the one hand holding this award as the award of 1870 a nullity as far as it was concerned, and at the same time shut up the province of Ontario and say that it was bound by it. The learned counsel, before and now, have acted upon their instructions and are not exposed to any criticism, but I must repeat my observation with reference to that result.

As far as I can judge it is rather recoiled from now, and there is a greater degree of tenderness with reference to the award of 1870 in the latter part of this discussion than might have been expected from the language used on former occasions.

Now, your Lordships will observe that upon this appeal my argument is entirely from a different standpoint in one respect than the argument before, because this appeal becomes material only upon the theory that my appeal fails. If my appeal succeeds, there is no fund out of which the Land Improvement Fund can be formed, and it is immaterial what happens to it. It is only then upon the theory that my appeal fails that it becomes material to consider this question.

Upon that theory I must assume that there was a Common School Fund, or that there must be held, for

the award of 1870, to have been a Common School Fund, which was an asset to be divided and apportioned, and if so there was a jurisdiction. If there was a jurisdiction, as Chief Justice Casault himself observed in the long and able judgment which he delivered, it was entirely within the power of these arbitrators to have divided the asset in any way which they pleased between the provinces. It might have proceeded upon a mistaken assumption that facts existed that did not exist, that Orders in Council had one interpretation or the other, or statutes had created the fund instead of only authorizing the creation, but it was within their power to determine that one dollar or a million, should go to the one province or the other; so that learned judge points out with clearness, that he is only able to sustain his objection to this particular action upon the ground that it is excluded from the reference, or upon the ground that the action of the arbitrators themselves was *ultra vires* because they had only power to divide, but as to their power to apportion in any proportion which they deemed just, however unjust it might be upon any assumption which they made, however unjustifiable there is no difficulty.

Well, if so, what was the result? Let us get at the state of facts which was created, which was created by the award of 1870, that there was carved out of the Common School Fund, the sums mentioned in the award of 1870. It was taken out. Mark the language of the award of 1870. The arbitrators began by carving out of the Common School Fund what they say really does not belong to it, the $124,000, and they deal with the residue only.

Now, that is what is done. Was it right? I believe it was right if they had any power to act at all. As I said before, it was the nearest and the most accurate perpetuation of the fund which they as-

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sumed to exist which the wit of man can devise. Right or wrong was it done? It was done. Done conclusively and produced a new state of things. That it produced that new state of things depended upon the validity of the award as a whole, and whether the award as a whole was a valid instrument in view of the objections taken by Quebec, remained uncertain until the period of the decision of the Privy Council. That decision, although it partakes of the characteristics which have been referred to, having regard to the fact that there was no tribunal in the world before which the question could be raised, of course did practically and substantially end the matter, and was assumed to end the matter to the extent to which it went, of course that is to say dealing with the objections taken by Quebec in the special case.

My learned friend Mr. Béique flung a pebble at the award, but he expressly said I am not going to attack the award. Since then there has been, with the usual inconsistencies that characterise the parties in this case—there has been a little more mud flung at the award, but, after all doesn't it come down to this, that it is impossible to contend that there was other than an error in judgment? My learned friend says they wrongly construed the statutes and the Order-in-Council, and he says they assumed things to exist which did not exist, and they came to a wrong judgment. That is not a question of *extra vires* or *intra vires*; that is an appeal from the judgment of the arbitrators on a matter within their jurisdiction.

Then mark the other limitations my learned friends make. There is nothing they are more anxious about than that the award should stand in those main elements. Nothing, we will say, they say, which shall attack the award, if it is going to impugn

the action as to the Common School Fund. Therefore it is only, if your Lordships hold that this particular of the dealing of the Common School Fund is separable from the rest, that we attack it at all. They earnestly implore your Lordships to note that they do not attack it, if your Lordships should conclude that you could not separate that from the rest. It is only a sort of conditional attack, because they feel the delicate and difficult ground on which they stand if once they open the award.

Now, is it possible to seriously contend—have my learned friends, with all the temerity of argument which in other respects they displayed, ventured seriously to contend—that this item is separable from the distribution by the parties of the Common School Fund? Grant to me this, that the arbitrators were of the opinion which they have expressed by their award, that it was a just and proper thing to carve out $124,000 and 25 per cent from the subsequent collections—is it possible to aver with a straight face before a court that that conception and view of theirs, acted upon by them, is not a part of their dealing with the Common School Fund, and that you can divide and eliminate that portion of their dealings and disposition of the $124,000 and the 25 per cent of the other collections. How? They have not disposed of it. Is an award good which leaves part of the subject undisposed of? Is that portion of it in which you destroy the award, as a portion of the whole subject, to be set aside and the remainder to stand. I cannot divine a case in which there is a greater intimacy of action between the part they attack and the part they desire to maintain. I find it difficult to comprehend how any man can seriously argue that the one can stand and the other fall as a nullity, and if it does what is to happen? As I have said, it is undisposed

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of. They have not divided that. They have not dealt with it. Are you going to deal with it? We know that the failure to dispose of the subject matter referred is a fatal defect in an award. So that the very attack which my learned friends make, this sort of conditional and hypothetical attack which they make upon the award of 1870, makes that attack its failure. They cannot attack in that way. They must attack with a whole heart and with more fairness. They must strike with the knowledge of the consequence of their attack, and that is the ground which I took in my opening on the other appeal, and which I repeat now, that the Province of Quebec cannot attack this award without the whole of the subject of the Common School Fund being open, and we being free as well, if they are free.

Now, one word before I proceed to deal with the other matters which are relevant to this question. One word upon two isolated points. Your Lordships adverted to, and my learned friend Mr. Hogg adverted to, the attitude of the Dominion. And irrespective of the long course of dealing which was pursued by the Dominion, I called my learned friend's attention, and I called your Lordships' attention to a specific act with reference to this particular matter.

I refer to an Order in Council of October 15th, 1891, in whieh an allotment to Ontario was recommended in payment of principal owing to that province, which principal was included in this $124,000, so that you have a specific Act of the most cogent kind by the Dominion upon this theory, and while of course the representations of Mr. Mowat do not bind the Province of Quebec—I do not set them up as binding it—they are accepted by the Dominion, they represent the state of facts, and it was present to the minds of the

Dominion Government, and upon which the Dominion Government acted at that time.

I am going to deal with the course and conduct of Quebec in reference to the $124,000 by itself. I was about dealing with the isolated question, the question of the Dominion, and in the same sense and connection, and although I am affecting the part of Quebec, and affecting it expressly, I also refer to exhibit 56 A and exhibit 18 and exhibit X, each of which are accounts by the Dominion commencing in 1884, a triennial extension, in each of which the account of the Province of Ontario is credited with $124,000 in making the account. My learned friend proposes to neutralise the importance of those accounts by saying that the first of them proceeded upon a request from the treasurers of both provinces that the account should be prepared in this form, which request was headed without prejudice. And he says that those accounts are of no consequence because the treasurer of his own province asked that they should be prepared in that form. I should have said, that if there was a circumstance which gave them cogency and importance, it was that circumstance; but, so it is that they were prepared and continued, and they are in the official papers of the Dominion showing the Province of Ontario credited with $124,000.

Now then, another isolated point before I proceed with the main subject. Here is a very important paper. It is an extract from the account called Z, prepared by the Dominion accountant by direction of the board of arbitrators in August, 1893. This was a general account of affairs, and what is given? The subsidy' statement gives: To Ontario, increased deduction one year's interest; one half year's interest; half year's subsidy. Then come Trust Funds for Ontario; Common School Fund from 1st July, 1867, to 11th January,

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1889, $1,520,595.29. Add on 11th January, 1889, $925,625.63. Add on 19th April, 1890, $11,103.70. Total $2,457,688.62.

It thus gives, not the apportioning of the capital as a divisible sum which was impossible to divide belonging to Ontario, but it gives the whole of that Common School Fund as they understood it, and then it proceeds to deal with that alone which they could deal with the interest upon the Ontario side, the proportion of interest payable semi-annually to Ontario calculated according to the award and population after the decennial census from 1st July, 1867, to 31st December, 1870, $21,169.14. From 1st January, 1871, to 31st December, 1880, $21,914.35. From 1st January, 1881, to 31st December, 1890, $22,280.04.

And on the accretion of $925,625.63, 11th January, 1889, to 31st December, 1890, $13,559.19, and so on. And the total to 31st December, 1892, $36,057.10.

Then it gives the Upper Canada Grammar School Fund, the Upper Canada Land Improvement Fund, capital $124,685.18, interest $3,117.13, giving a total of interest of $47,746.14.

Now, by the direction of the arbitrators, at this early stage, this statement is prepared for the guidance of the board according to those principles which they laid down, principles which deduct from the Common School Fund, the Land Improvement Fund, which makes a total of capital of the Common School Fund to be dealt with in the aggregate of 1867, less the $124,000, adding to that the two payments made by Ontario in the interval, which range according to the decennial censuses for each period, the interest payable to Ontario on that account, and which proceeds to give to Ontario the $124,000 of the Land Improvement Fund. And then for Quebec Common School Fund, the principal is the same as for Ontario, and the amounts pay-

able for interest are $16,000, and then according to the decennial censuses diminishing instead of increasing, because the proportion of the increment or population were different, and they find their total for Quebec.

Now, then, I hold that from the period of the award of 1870 which settled this matter, the effect was that the amount held by the Dominion Government for the Common School Fund was the $1,520,000. I hold that it had been conclusively adjudged upon the theory—that I am bound to assume—that it was a trust fund, it had been conclusively settled and adjudged at $1,520,000.

Now, I ask what the language of the reference is. The language of the reference is to ascertain what the amount now held by the Dominion Government on account of the Common School Fund is. And, if I have shown to your Lordships that the amount by the Dominion Government on the 30th June, 1867, or 31st July, when it existed, was $1,520,000, that is the first item in the accounts. What my learned friends want to do is to say that the arbitrators should find that the amount now held is composed of $1,733,000 plus the subsequent payments by Ontario. I say that the amount at that time held by the Dominion Government was the amount which the award had found was the true Common School Fund amount and that they did not hold the Upper Canada Land Improvement Fund as part of the Common School Fund at all, they held it as Upper Canada Land Improvement Fund for Ontario as they acknowledged by this Order in Council, to which I have referred, and by these accounts which were prepared by the treasurer. Therefore I say the reference is impossible of execution upon any other theory.

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Now, my learned friend Mr. Béique rather boldly stated that he would establish by the record, by the Acts and correspondence, that this was a matter in dispute, and that circumstance he deemed of vital importance to his case.

I undertake to prove from the documents that the course of Quebec has not been inconsistent since the period of award of 1870, or inconsistent at all. I admit, with my learned friends, that during the period of the arbitration of 1870, while Quebec was present, it contested the Land Improvement Fund, I admit with my learned friends that after that period and up to the period of the reference to the Privy Council, and its decision, it contested the Land Improvement Fund, but I aver that from the day on which that decision was reached up to the time at which this question was started in this arbitration, I find nothing at all to justify that aspersion, if it is to be called one, upon the Province of Quebec, which has been cast upon it by its counsel who sought to excuse it by changes of administration, and ignorance of political administrators. They have never contested, they accepted as just, the award of 1870 upon the Land Improvement Fund, they have always since the decision of the Privy Council admitted that there was an end of the question, that it had been forced upon them by circumstances over which they had no control. Admitted it in terms and admitted it by their action.

Now, I have to trouble your Lordships by running, as rapidly as I can, through the relevant correspondence. I shall not extract from the mass of this correspondence, three letters in the middle each of them susceptible, as I shall demonstrate to your Lordships, of an entirely different, and properly to be given an entirely different, interpretation from that

which has been given to them by my learned friends. I shall bring your Lordships to them in their proper sequence. I shall give you the whole correspondence for or against, and I rely with confidence upon bringing your Lordships irresistibly to the conclusion that the attitude of Quebec has been one and continuous in favour of the view that however much she might dislike it, she was bound by the award of 1870 to the extent to which that award proceeded, and the attitude, I agree, of stern resistance to any concession of any kind which might enable Ontario to gain any means of pressing her claim to the $101,000 to the Crown lands part of the Improvement Fund; there is the attitude. Unwilling assent to the fact that she is bound to the Common School portion of the fund.

Now on the 25th March, 1879, Harris, assistant treasurer of Ontario, writes on the Premier of Quebec, Mr. Joly, saying that he sends a statement showing Quebec's share of the Common School Fund as requested in his communication addressed to the Attorney General, and what is material in that is the enclosure.

"Memorandum.—Quebec's share of Common School Fund:

Collections on account of land sold between the 14th June, 1853, and 6th March, 1861	$673,834 42	
Less 5 per cent cost of management	$ 40,430 06	
One fourth for Land Improvement Fund	165,958 60	
		$ 206,388 66
		$467,445 76

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Collection on account of land sold since 6th March, 1861..	$ 262,675 39	
Less 6 per cent cost of management.....	15,760 52	
		$ 246,914 87
		$714,360 63
Quebec entitled to interest as provided by award and statute, on.....		$ 302,652 68

Mark the distinction. Cut into two pieces. The portion of the lands sold during the continuance of the fund as found by the award of 1870, deduction made for the awarded share, the portion since without any such deduction, except the 6 per cent for the cost of management.

That was replied to on 31st March, 1879, accepting in terms the principle upon which the amount had been stated, and asking for further details in order to ascertain what interest was due to the Province of Quebec in respect of the moneys, which according to that principle were received by the Province of Ontario on joint account.

On 28th November, 1882, Mr. Wurtele, the Provincial Treasurer, wrote to the Treasurer of Ontario for payment.

And that was answered. On January 26th, 1883, Wurtele wrote to Wood, Provincial Treasurer, another request for money. Sessional Papers, Ontario, 1884, No. 43, page 2.

Now, your Lordships have referred to the Act of 1873. I want to show you its genesis. I read the letter. The provincial treasurer of Quebec introduced a bill, and he asks the Province of Ontario to consider it and say whether they think it is right, and he is willing to take into consideration any reasonable amendment, and that is the Act assented to on the 30th March, 1873. That is the genesis of it. That is

the spirit in which it was conceived, and the terms of it.

Now, what is the answer. It is found in the preamble to the Act, 46 Vict. ch. 22 (Que.) (Reads first recital.)

I have here the interpretation of the legislation of Quebec of the original right, I have a recital that that was true, that that was the state of the case, not unwillingly in this instance, but because it was correct, they state that as the true state of the facts.

(The learned counsel then read the other recitals in the preamble and the first five sections of the statute.)

The Act of the Province of Ontario passed in this connection was a short one. They had none of these matters to settle, but they did pass an Act, 46 Vict. ch. 3, reciting a proposal to try and settle the shares and giving authority to the Lieutenant-Governor-in-Council to enter into an agreement.

There followed some time after that a conference to which my learned friend Mr. Béïque has referred and which is reported to his Government by the Treasurer of the Province of Quebec, and Order-in-Council approving of that report. That conference indicates the memorandum without prejudice to which my learned friend Mr. Béïque referred, sets it out, under which the accounts were requested to be prepared by the Dominion arbitrator, and the Government of Quebec approved of the course taken in making that arrangement. And this was the genesis of these three triennial statements, roughly speaking, which I have referred to.

Then on the 27th April, is a letter from the assistant treasurer of Quebec on behalf of the treasurer to the treasurer of Ontario. Ontario Sess. Papers, 1884, No. 43, page 3.

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Once again consecutive, no matter how many administrations change, or how much or how little they know of the affairs of the province, you still have the same recognition of this state of things continuing.

Then the answer given and the enclosure are to be found in Ontario Sess. Papers 1884, No. 43, page 4, shewing the amounts collected on account of Common School Lands for each year between the 1st July, 1867, and 31st December, 1882, shewing the amounts received on account of Land Improvement Fund (*i.e.* land sold between 14th June, 1853, and 6th March, 1861), and amounts collected on lands sold before 14th June, 1853, and since 6th March, 1861.

Next is the transmission by the Assistant Treasurer of Quebec on the 15th October, 1883, to be found in Ontario Sess. Papers, 1885, No. 45, page 3 of the memrandum asked by the Treasurer. That is the memorandum without prejudice which required a statement of the amount coming to each province under the award, for Library and Common School, and Crown Land Improvement Fund. A letter from the Deputy Minister of Finance of Canada to the Treasurer of Ontario on May 8th, 1884, shews that the Dominion then was recognising the fact, and acting upon it.

I next refer to the memorandum for executive council of interview with Minister of Finance, Ottawa, on October 21st, 1884, as to the settlement of the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec.

At this conference Treasurer Robertson, of Quebec, gave a lot of extracts from his contention and pretention before the award of 1870 directed to the fight that he was then making, but the fight then was limited to that about which a fight alone might be made, viz., the $101,000.

In the Ontario Sess. Papers, 1886, No. 37, page 3, is a letter dated February 26th, 1885, from the Treasurer of Quebec to the Treasurer of Ontario.

On March 16th, 1886, the Treasurer of Quebec wrote to Treasurer of Ontario. Ontario Sess. Papers, 1887, No. 60, page 3.

It is *ad nauseam*. It is repeated over and over again.

All the correspondence shows the same thing. The inquiry for these particulars, useful only in order to make the deduction from the gross necessary to ascertain the net share of Quebec.

Then Machin again, 5th April, 1886, protests strongly "against the withholding of the amount of interest due on its share of the proceeds of the sales of Common School land, collected and retained by the Government of Ontario, and trusts that the Government of Ontario will reconsider its conclusion that it is advisable that no further payments on account of this fund be made until a settlement is arrived at between the Provinces and the Dominion, as such a determination would be a distinct violation of the conditions of the 9th section of the award, the acceptance of which was forced upon this Province by Ontario."

But they say they expected it, and they complain that Ontario is not paying the interest as they conceive according to it, and they say that the delays are not their fault. Of course everybody always throws the delay upon the other party.

Now we come to a letter of 18th March, 1887, from Treasurer Shehyn to Treasurer Ross in which he asks for a detailed statement of collections on Common School Lands.

It does not look very much like disputing at that time.

Again the Assistant Treasurer writes on the 19th January, 1888. Ontario Sess. Papers, 1888, No. 49, page 8.

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On 3rd February, 1888, the statement asked for was furnished.

Then Prime Minister Mercier comes upon the scene. On April 14th, 1888, he writes to Mr. Mowat :—

"My dear Mr. Mowat,—I send you a copy of our statutes of 1883 in which at page 79, chapter 22, you will find an Act to provide for the final settlement of the Common School Fund."

He refers to the Act of 1883, and they make much of the repeal. I will show your Lordships the circumstances of the repeal. Now he says :—

"That law is still in force and has been passed by Mr. Wurtele as the result of an agreement with you at the time."

"Of course I understand the insufficiency of that law now, but could you suggest me a way to amend it in order to meet the case?"

There was then a desire to close up the whole matter by a division of the fund, and that the law was inadequate, because the law kept the fund perpetual, although the proportions were to be ascertained.

"You know that an amendment of an opponent's law is still better for that opponent than any wise new law."

"I suppose you are now quite ready to send me your case in this matter of the School Fund in order that we might agree to submit one at our session in May."

Your Lordships will observe that there is the suggestion on the part of Mr. Mercier to his friend the Prime Minister of Ontario that the statute was all wrong, that it had made admissions, that he wanted to raise new subjects of controversy. It is a friendly letter, wanting to know what suggestions the Prime Minister of Ontario could make in order that this further idea of getting hold of all by the provinces might be carried

out, and he wants to amend it. He does not want to repeal it. He would like to amend it, so as to amplify it a little, and make it all right.

Then Mr. Mowat, 25th April, 1888, on the same page, says:

"I send you our proposed Order in Council re appointment of arbitrators. Please return it to me with any changes which you would suggest, in order that the orders of the two Governments may be expressed in the same terms."

The proposed Order-in-Council provided for appointment of three arbitrators to settle questions between the two Provinces arising from the award of 1870.

"The questions which have arisen between the Governments of Ontario and Quebec are as follows:"

"Relating to the claim made by Ontario that on the 30th June, 1867, the Upper Canada Improvement Fund, which, by the 5th paragraph of the award, was declared to be the property of and to belong to the Province of Ontario for the purposes for which that fund was established and composed of the sum of $124,685.18 as procceds of the Common School lands and of the sum of $101,771.68 as proceeds of the Crown lands in respect of sales made between the 14th June, 1853, and the 6th March, 1861, and that this latter sum should be credited to Ontario by the Dominion Government together with interest thereon from 1st July, 1867, and the total added to the debt of the late Province of Canada."

There was the contention. My learned friends say that Mr. Mowat was acknowledging that there was in dispute the question of the $124,000, and your Lordships see perfectly well the question was whether there should be added to that the $101,000, which sum, not like the $124,000, would have to be added to the debt of the old Province of Canada. And the result

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of adding to the debt would have been that Quebec would have had to bear its share. That was the objection of Quebec. That is the first question, and that first question, instead of being such as my learned friend contends, is a question naturally and reasonably raising the point still undisposed of by the award, the point as to the $101,000, and leaving the other where it was.

Then there is a second question about interest which I need not read, and a third question about interest upon part of the Upper Canada Building Fund, and that is one of the questions afterwards omitted.

Now, we are beginning to get at the genesis of the changes. You find two questions out of three. One, interest on building fund, one, the $101,000 and interest, and the third, interest allowed on Common School Fund; whether Ontario is liable, which of course had to be referred.

Then Mr. Mercier writes on October 24th, 1888, hoping that Mr. Mowat would be able to come to Ottawa to discuss the arbitration the next day, and ends:

"Under all these circumstances and with the view chiefly to agree on matters to be submitted to the Common School Fund arbitration, I hope you will come."

"I have prepared a draft for an Order-in-Council which is a little different with yours."

"Our two Treasurers have met the Minister of Finance and the Minister of Justice, and seem to be satisfied with the interview."

And then his draft is this, and it is important.

It recites that three arbitrators were appointed to effect the division and readjustment of the debts,

credits, liabilities, properties and assets of Upper Canada and Lower Canada, to wit:

"That the Government of the Dominion of Canada and the Government of the Province of Ontario acquiesce in the said decision or award of the arbitrators."

"That the said award divided the assets and liabilities of Upper and Lower Canada to the 30th day of June, 1867, leaving still to be divided between the provinces of Ontario and Quebec such sums as remained to be collected by the Government of Ontario from and after the said last mentioned date, the 30th of June, 1867, on account of the Common School Fund, upon the price of sale of the lands set apart for the said fund and sold before or since the said last mentioned date or which might be sold thereafter."

"Since the 30th June, 1867, the Government of Ontario has collected various sums of money being the proceeds of the sale of the said land, and which under the provisions of the said award should have been paid into the hands of the Dominion Government and the revenue whereof divided between Ontario and Quebec."

"That there still remain due divers other sums of money on the sale of the land set apart for the said fund."

"That there are certain lands set apart for the Common School Fund which still remain in the possession of the Government of Ontario, and which have not been sold."

"That the Government of the Province of Ontario consents to purchase and the Government of the Province of Quebec consents to sell at such price as may be determined by award of arbitrators the share of the Province of Quebec in the lands set apart for the Common School Fund which have not yet been sold as well as its share in the amounts which remain to

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be collected on the price of sale of the lands set apart for the said fund sold since the establishment of the fund. That by the Act passed at the last session of the legislature of Quebec entitled, an Act to provide for the settlement of certain questions in dispute between the Provinces of Quebec and Ontario by the means of arbitration, it is enacted that for the final and conclusive determination of certain questions still pending between the Province of Quebec and the Province of Ontario, the Lieutenant Governor in Council may unite with the Government of Ontario in the appointment of these arbitrators to whom shall be referred such of these questions which the Governments of both provinces shall mutually agree to submit."

"1. What is the capital amount collected by the Government of Ontario since the 30th June, 1867, on the sale of lands set apart for the Common School Fund, and which is the share belonging to the Province of Quebec on such amount?"

"2. Does the Province of Ontario owe any interest on the balance of the moneys which it has collected on the sale of lands set apart for the Common School Fund after deducting 6 per cent on moneys collected by it, for the sale and management of the lands set apart for the Common School Fund, and also one-fourth of the balance of the proceeds of the said lands sold between the 14th day of June, 1853, and the 6th day of March, 1861, for the Upper Canada Improvement Fund?"

And my learned friend actually has cited this Order-in-Council as proving that the question was in dispute.

"3. If Ontario owes any interest, from what date and at what rate should the same be calculated? Should such interest be simple or compound? Should it be added to the capital yearly or half-yearly?"

"4. What is the extent and what is the value of the land set apart for the Common School Fund and still unsold?"

"5. What should be the share of the Province of Quebec in the value of such lands?"

"6. What is the amount and what is the value of the sums of money remaining unpaid on the price or sale of the lands set apart for the Common School Fund?"

Well, of course all this was abortive, but I am bringing your Lordships straight along through the whole negotiations to find one consecutive, continuous course of recognition of this by the Province of Quebec.

Then, on December 6th, Mr. Mercier writes to the Hon. Mr. Mowat:

"I have your letter of the 30th ultimo, to which I could not answer sooner for reasons that I need not explain here. The first remark of your letter is in these words: 'Your letter of the 22nd instant makes no reference to my letter of the 7th with regard to the arbitrations embracing all questions in difference, and not merely those relating to the school lands. I also spoke in that letter of the technical difficulty of taking the other questions before the court without the consent of both parties, though there must be some way of doing so.'"

"In my letter of 22nd November last I said:

'Of course I understand that if we do not insist on the arbitration on these two points, your and Mr. Ross's other objections are not insisted upon, and our draft of Order in Council will be accepted, these two items being struck off.'"

The letter of Mr. Mowat's, to which this letter of Mr. Mercier's is a reply, is dated 7th November, 1888. It says:

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"I understand the principal questions—besides those relating to the school lands—to be as follows:

"The Land Improvement Fund, that is the right of claim of certain of our municipalities in respect of Crown lands sold between the 14th June, 1853, and the 6th March, 1861.

"Whether interest on the $600,000 payable to Upper Canada under the Seignorial Acts should be 5 per cent or 6 per cent.

"Possibly there may be some other minor matters between the two provinces which may not be agreed to in settling the accounts."

"I have already mentioned to you that Mr. Treasurer Ross is strongly of opinion that the arbitration should embrace all the questions or none. One, though not the only reason for this, is that any sums found to be owing by your province should be set off against what may be payable to you by this province in respect of these school lands. Before the Treasurer had mentioned his view to me I thought we might go on with the arbitration which you desired, and have the other matters disposed of by the courts, but on looking into this matter I have not found any authority for a province being sued without its own consent. The Ontario Legislature passed an Act, now R. S. O., 1887, ch. 42, consenting that the Supreme Court of Canada and the Exchequer Court should have jurisdiction amongst other things in controversies between this and the other province, but I believe no such Act was passed in Quebec."

"You suggested in our interview that the old award decided against Ontario the question of the Land Improvement Fund, but this Government and the municipalities concerned have always taken a different view, and after an arbitration had been verbally agreed to at our interview here, the treasurer communicated

to these municipalties and the public that such an arbitration would include this question, and the municipalities have since employed counsel of their own to see to their interests before the arbitrators, as, whatever comes to the province under this head belongs to these municipalities and is to be paid over to them."

Then as I have said, we have the reply in which Mr. Mercier says:

"I understand your treasurer wants to strike off the items 4, 5, 6 and 7 and if he insists we must consent, although I may repeat here my remarks made in my letter of the 22nd November last. * * *

"I must, I suppose, understand that Mr. Ross persists in his objection, and that the only way to settle the difficulty on these two items is a meeting of our two treasurers. The only objection now to arbitration is therefore your desire not to limit the questions submitted to the School Lands Fund, but to include in it:"

"The Land Improvement Fund—that is the right or claim of certain of our municipalities in respect of Crown Lands sold between the 14th June, 1853, and the 6th March, 1861."

"2. Whether interest on the $600,000 payable to Upper Canada under the Seignorial Act should be 5 per cent or 6 per cent."

"3. Some other minor matters between the two provinces which may not be agreed to in settling the accounts."

"I put these three questions in the terms you do it in your letter of the 7th November, 1889. You agreed with me that according to the declarations officially made in our house by the treasurer and myself, we must limit as far as Quebec is concerned the arbitration to the first five questions mentioned in our draft of Order in Council, and you suggest to settle this

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difficulty by submitting the other questions before the court, and as we have no laws similar to yours, to allow our province to be sued in cases as the one mentioned by you, to have such law passed at the next session."

"I am very sorry indeed to have to inform you that this is not practicable for the following reasons:—"

"1. The arbitration between Ontario and Quebec took place by virtue of section 142 of the British North America Act."

"2. We understand in Quebec that the award has been very unjust to us, but being unfortunately bound by it, we cannot consent to re-open any question outside of the School Lands Fund, being afraid that our interests might still be endangered."

"3. The only questions that may be arbitrated now, we understand, are those mentioned in our draft of Order in Council as deriving from the disposition of section 9 of the award, which having left this question open, makes a necessity of a new arbitration on that point."

He wants to make the consequential arrangements, which from the necessity of the case the arbitrators of 1870 could not settle, because they had to do with undetermined amounts, assets of collections which were not yet got in. And, your Lordships will see he does not want to go outside of that.—

"4. All the other questions pending between the two provinces have been settled, although against us, we believe by said award, the first section of which divides the amount by which the debt of the late Province of Canada exceeded on the 30th day of June, 1867, $62,500,000 and the 15th section of which states:—

'That the several sums awarded to be paid and the several matters and things awarded and directed to be done by or with regard to the parties to this refer-

ence respectively as aforesaid shall respectively be paid, received, done, accepted and be taken as a final end and determination of the several matters aforesaid.'

And he cites the French version as being still more clear.

And then he goes on to deal with the Upper Canada Building Fund item of Mr. Mowat's proposed reference:—

"5. We do not find any record of Ontario having ever claimed the one per cent additional on the $600,000 from May 5th, 1869, before the arbitrators' award was made. It is not included in the revised statement of debts admitted by Ontario on the 11th day of December, 1869, which contains the addition of the Upper Canada Improvement Fund, this last one being specially mentioned at page 17 of the arbitration pamphlet.

"6. As regards the last item we claim that it having been specially demanded before the arbitrators and they having thought proper not to grant it, it must be considered as having been legally refused."

"7. In your letter dated Toronto, 24th September, 1873, and addressed to the Hon. Mr. Ouimet, then Prime Minister of the Province of Quebec, you stated:

'I have already intimated that we are prepared to recognize the interests of Quebec in the Common School Fund and in the school lands yet undisposed of, and I may now add that we are ready to purchase this interest at a fair price as part of a final settlement of all questions between the provinces."

"8. Your declaration made in the name of your Government was contained in a letter in which you claimed that the award was just, legal and equitable, and to render it complete you were ready to settle the Common School Fund; all the other difficulties between the two provinces were to be regarded as settled."

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"Under all these circumstances we don't think we would be justified to consent to re-open any question outside of that Common School Fund, because,

"1. It would put in danger the interests of the province on matters that we considered settled; and

"2. It would give our opponents the chance of making a very strong argument against us."

"You close your letter of the 30th November last by the words, 'and I fear that the result must be that the whole subject of a settlement between us will have to stand over for further friendly negotiations. In that case Sir William Ritchie and Judge Senkler should be notified, as they will be making or perhaps may have made arrangements upon the assumption of the arbitration proceeding about the middle of next month.'

"I quite agree with you on these remarks, but I would be sorry indeed if your Government refused the arbitration on the first three questions mentioned on our draft of Order in Council; of course if you come to that decision we cannot help it and must submit to such refusal."

"In conclusion allow me to draw your attention to the very important fact that your Government has in its possession moneys that should have been placed long ago into the hands of the Federal Government for the common use of both provinces according to the award of 1870, and that you will see the injustice to continue this state of things, only because the Province of Quebec is not ready to re-open questions considered by its Government as having been settled by the award of 1870."

Now, there is a very clear and plain statement of his attitude. Sir Oliver Mowat wanted to bring forward two subjects, the Upper Canada Building Fund and the Crown Lands Improvement Fund. He says

of both of them, he considers them practically settled, either by inaction, or otherwise, by the award of 1870. He says "we do not agree with the justice of the award of 1870, but it has settled everything, and we are forced to abide by it, and there is an end of it. We deal with these questions which grow out of that award, and which it is necessary to determine in order that that award may be implemented, and that is all with which we will deal, we re-open nothing further."

Is it conceived as possible under these conditions, without any proposition or suggestion, that matters which were settled by the award in favour of Ontario should be opened by the Province of Quebec, that a document capable of another interpretation is to be interpreted as practically opening those questions and abandoning the position of the award?

Then on 15th December, 1888, Mr. Mowat replying to Mr. Mercier says:

"I observe that your objection is that submitting to arbitration the questions relating to this fund would be a re-opening of the questions already decided by the award, but this is not so. We do not propose to re-open any question that the award has decided, or that the arbitrators or courts may hold that the award has decided. Our proposition is to ascertain what the award gives. The award did not settle or state the amount of this fund or other funds awarded to the one province or the other. Section 5 of the award names the funds which are to go to this province and declares that the moneys thereby payable, including the several investments in respect of the same due on them, are to be the property of Ontario."

That is our proposition as to the terms of the award, because they are consequential.

Then he proceeds to argue that the award did not settle the $101,000, and he proceeds to argue about the

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investment fund and to try to get Mr. Mercier to agree notwithstanding the joint definition of objects, that these things should become the subject of a reference. He says:

"In the same way the award alloted to Ontario the Upper Canada Improvement Fund, whatever that should consist of. The award mentions no amount. Ontario claims that the $101,000 arising from Crown lands was and is a part of the fund as much as was the $124,000 on school lands, and was intended to be given and is given by the award to Ontario. We do not propose to open up the award or claim anything not provided by the award. We only suggest, as a difference of opinion between Quebec and Ontario exists as to the effect and interpretation of the award on certain points, that a friendly arbitration should take place as to what is the true interpretation of it."

"Then in regard to the unsold school lands and the amounts still uncollected in respect of school lands, the matter seems to my colleagues and myself a proper subject for negotiation rather than for arbitration, though if the arbitration were to settle all matters, this might be included."

Then by a letter from Ross to Shehyn, January, 11th, 1889, Ontario Sess. Papers, 1889, No. 46, page 26, the Dominion is asked to transfer the sum of $925,625.63, the total collections to 31st December, 1888, to the said Common School Fund.

Then Mr. Ross deals with Mr. Shehyn's applications for a remittance on the account of interest and he points out that Ontario has always considered that great injustice was done by the award in giving Quebec any claim on this amount, every acre of which was in Ontario. Ontario has good grounds for contending that interest should not run against the province until after the confirmation of the award by the Privy Council (26th

March, 1878). Quebec disputed the award and carried an appeal to the Privy Council and until the final judgment of that tribunal was given Ontario had no authority to pay the collections into the Dominion or any authority to recognise Quebec as having any interest at all in this fund.

Then by Order-in-Council of January, 15th, 1889, the Dominion Government is asked by Ontario to carry out the transfer of $925,625.63 to the credit of the Common School Fund.

The next letter is that of 24th January, 1889, from Mr. Shehyn to the Treasurer of Ontario expressing satisfaction with said transfer "as Quebec will now receive its share of the interest on these collections every six months."

In the letter to which this is a reply the Treasurer of Ontario had stated that the award was unjust to Ontario in that it had given the entire land to the two provinces. And, Mr. Shehyn proceeds to answer that observation.

"The injustice that was done by the award in this matter was done to Quebec by giving to Ontario a certain portion of the proceeds of these lands in excess of the amount which by statute belonged to the Common School Fund for Ontario, under the plea that it belonged to the Upper Canada Improvement Fund. It would be useless however, for me to enter into this question in the present letter."

So that he repels the charge of injustice to Ontario by alleging injustice done and accomplished in Quebec. Land was given, or proceeds of land, which ought not to have been given.

And then comes the letter, upon which my learned friend so strongly relied, of Mr. Shehyn and which requires a little analysis, because it is perfectly plain that the situation was consistent throughout. That

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is the letter of the 4th July, 1889, to Mr. Courtney, Deputy Minister of Finance.

The letter of Mr. Courtney was one in which he submitted to the Government of Quebec for their consideration, a case which had been proposed to be submitted to this court at the instance of the Government of Ontario by the Dominion Government, and that case had reference to the $101,000 of the Land Improvement Fund. I have the case before me which Mr. Shehyn was answering, the suggestion being made that Quebec should assent to the submission of the case.

Of course it is important in reading a man's letter to know what he was writing about, what is the application made to which he was responding. My only purpose in referring to this case is to show your Lordships, it being a case submitted or proposed to be submitted at the instance of the Province of Ontario, that it had regard to that which the Province of Ontario had this long time been trying to get decided the question of the $101,000. It proceeds to state the facts, and it states that it " was represented by the Province of Ontario before the arbitrators, that in dealing with the Common School Fund, and determining how it should be disposed of to comply with the Consolidated Statutes of Canada ch. 26, before any division of it could be made between Ontario and Quebec under section 5 of that Act, the proportion of it derived from sales between the 14th of June, 1853, and the 7th of March, 1861, and appropriated by the Act of 1853 to the Improvement Fund, should be added to such fund and so applied."

" The arbitrators acceded to this claim and directed (section 7 of the award) that from the Common School Fund as held on the 30th of June, 1867, by the Dominion of Canada, amounting to $1,733,224.47, the

sum of $124,685.18 should be and the same was thereby taken and deducted and placed to the credit of the Upper Canada Improvement Fund, the said sum of $124,685.18 being one-fourth part of the moneys received by the late Province of Canada between the 6th of March, 1861, and the 1st July, 1867, on account of Common School Lands sold between the 14th of June, 1853, and the 6th of March, 1861."

"It is contended by the Province of Ontario on behalf of the municipalities that the principle adopted by the arbitrators must be applied to the proceeds of similar sales of Crown Lands, and the province, for the benefit of the municipalities concerned, claims the aggregate sum of $101,771.68 as the one-fifth of the proceeds of the same sales of Crown Lands, which had been withheld by the late Province of Canada in the same manner as they had withheld the proceeds of the school lands."

"They claim, therefore, that the Upper Canada Improvement Fund on the 30th of June, 1867, was composed of these two sums, $124,685.18 and $101,771.68, the proceeds of Common School and Crown lands respectively, and that this latter sum should be declared to have always been part of the fund, and should be credited to Ontario by the Dominion Government, with interest from the 1st of July, 1867, for distribution among the said municipalities according to their respective rights and interests therein; and that the total amount of principal and interest aforesaid should be added to the debt of the late Province of Canada; that the accounts between Canada and Ontario and between Ontario and Quebec under the B. N. A. Act are not settled and have remained open, and that this claim is one of the unsettled cases, and has been, with other questions, one of negotiation ever since Confederation."

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"Ontario and Quebec being conjointly liable to the Dominion for the amount by which the debt of the late Province of Canada exceeds the sum fixed, and there being an excess over this sum, the effect of allowing this claim will be to increase *pro tanto* that excess, and thus to add to the liability of the Province of Quebec to the Dominion."

"That province objects to the allowance claimed and insists that the said claim was submitted to the arbitration, and has been, and must be deemed to have been, disposed of and concluded by the award."

"The question for the opinion of the court is whether such claim should be allowed by the Dominion or not."

"In addition to the documents in the case mentioned, there is also submitted an Appendix of Statutes and papers bearing upon the question."

Now, I have shown what that case was, that the Province of Ontario having tried in every way to obtain some solution of the question of the $101,000, at last, at the instance of the ministers who were present, adopted this view, they appealed to the Dominion Government to state a case and the Dominion Government very properly, having got the case and having verified as they thought its accuracy as a just statement of facts, with all the important documents, sent it down to Mr. Shehyn, and Mr. Shehyn answered, and that is the answer which my learned friend says shows that $124,000 was in dispute, and I say the subject as to which he was replying was the $101,000. What did he say? :

"I beg to say that in the statement of the debt of the late Province of Canada as agreed to and sanctioned by the Honourable the Privy Council in 1870, the Upper Canada Improvement Fund is stated at an amount of $5,119.08; that previous to the sanctioning

of this statement by the Privy Council, Ontario claimed that the Improvement Fund should be increased by $226,456.86, which amount should be added to the debt of the late Province of Canada; that on the 22nd January, 1870, the Honourable J. G. Robertson, then Treasurer of the Province of Quebec, protested against this pretention of Ontario, saying that the introducing of such pretentions, not alluded to in the conference at Montreal, would involve the re-opening of the whole question as respects the surplus debt."

"The views of Mr. Robertson were evidently accepted as correct by the Privy Council, as the Improvement Fund remained in the statement confirmed by them at the sum of $5,119.08 as originally prepared by the auditor of the late Province of Canada."

"The arbitrators appointed by Ontario and the Dominion—the arbitrator of the Province of Quebec having resigned—awarded the Upper Canada Improvement Fund to the Province of Ontario and with reference to the disposition of it the Government of this province has nothing whatever to do."

That is to say, they have nothing to do with whether it goes to the municipalities, or what is to be done.

"If it is proposed in submitting this question to the Supreme Court of Canada to re-open the question raised by Ontario respecting this fund and disposed of by the then Privy Council of the Dominion, the Government of this province protests against the Government of the Dominion sanctioning the submission of such a case to any court."

"The claim of the municipalities for one-fourth of the amount of the sales of school land and one-fifth of the amount of sales of Crown Lands made between the 14th June, 1853 and the 6th March, 1861, was twice decided against by the Government of the late Province of Canada."

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Then a considerable amount of statement is made of events which had taken place before Confederation borrowed from the proceedings before the arbitrators. And, the conclusion is this:—

"It should be borne in mind that the arbitrators had no power whatever to change in any way the statement of the debts and assets of the late Province of Canada as sanctioned by the honourable the Privy Council after the conference held on the subject between the Dominion and the two provinces."

Which they do not do, as your Lordships know, by their dealing with the Common School Fund; they merely altered the distribution; they did not increase the debt.

Mr. Béique:—Will you read the preceding paragraph?

Mr. Blake;—Certainly:

"The arbitrators appointed by Ontario and the Dominion—the arbitrators of the Province of Quebec having retired—treated the Common School Fund as an asset that they had power to divide and apportion in such manner as seemed to them right. They transferred to the Province of Ontario as belonging to Upper Canada Improvement Fund the amount of the sales of the Common School Land made between the 14th June, 1853 and the 6th March, 1861, including $124,685.18 stated to have been received on account of these sales between the 6th March, 1861, and the 30th June, 1867. The Province of Quebec has already contended that the transfer of any portion of this asset to Ontario, excepting the amount to which Ontario was entitled in proportion to population, was unwarranted and unfair."

"It should be borne in mind that the arbitrators had no power whatever to change in any way the statement of the debts and assets of the late Province of

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Canada as sanctioned by the Honourable the Privy Council after the conference held on the subject between the Dominion and the two provinces."

"Therefore in the award that they made while they unfairly, as Quebec contends, gave to Ontario a portion of the Common School Fund under the plea of transferring it to the Upper Canada Improvement Fund, they really had no power to increase the indebtedness of the late Province of Canada to the Upper Canada Improvement Fund, a fact which their silence on the subject of the claim of Ontario respecting the one-fifth of the Crown lands sold as above mentioned, shows that they themselves recognised."

"The Government of this province therefore declines to join in any way in the proposed litigation or to make any changes or suggestions respecting the proposed case which was submitted."

So that the interpretation of the letter upon which my learned friend mainly relies is against him when you read it, and when you look at it, it is confined to the $101,000.

Now, the next thing that happened is a most important document as bearing upon the present contention of Quebec. It is an Order-in-Council of the Dominion:

"On a report dated 5th December, 1890, from the Minister of Finance stating that an interview held at Toronto on the 28th November, 1890, between the Minister of Justice and the Deputy Minister of Finance on behalf of the Dominion Government, Mr. Francois Langelier and the Assistant Treasurer of Quebec on behalf of the Government of Quebec, and the Attorney General of Ontario and other members of the Executive Council of that province on behalf of the Government of Ontario, among the matters discussed was the unsettled condition of the accounts of the old Province

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of Canada, and all present agreed to recommend to their respective Governments the following proposals :—

1. All questions relating or incident to the accounts between the Dominion and the two Provinces of Ontario and Quebec, and to accounts between the two Provinces of Ontario and Quebec to be referred to a board of arbitrators consisting of three of the judges to be chosen as hereinafter mentioned.

2. The accounts are understood to include the following particulars :—"

"(*e*) The arbitrators to apportion the amount which should go to each of the provinces in the event of the principal of the Common School Fund being paid over to the two provinces."

"(*h*) The outstanding question as to the Upper Canada Land Improvement Fund not to form part of the reference unless the Quebec Government hereafter assent to include the same."

Now, is there any doubt what was meant by that? Nobody can contend that what was meant by that was not in express terms this question as to the $101,000. My learned friend, I do not think, will venture to contend it, or if he alleges it, he will be utterly unable with all his skill and ability, to give a single argument which will lead to any other conclusion; it is indisputable that the outstanding question there mentioned in the Order in Council and the subject of agreement was the $101,000 only.

Then the Acts under which the settlement should take place are passed. Those settlements leave the particular subject to be disposed of by agreement between the Governments, and then we come down to the agreement of submission under which this arbitration is held, and now I associate that Order-in-Council of the 12th December with this particular

agreement of submission by its own language. That first agreement of submission provides:

"Whereas certain questions have arisen in relation to the settlement of the accounts between the Government of the Dominion of Canada, the Governmentof the Provinces of Ontario and Quebec, both jointly and severally, and also as between the two provinces. * * * ° * *

"Now, therefore, it is agreed by and between the said several Governments, parties hereto, that the following questions, as mentioned in the Order of the Governor General in Council, of the 12th day of December, 1890, be and they are hereby referred to the said arbitrators for their determination and award, in accordance with the said statutes, namely:"

So that the very submission which we now have adverts to and enables me to ask your Lordships to look at that Order in Council as throwing light upon this question, if it be a question of doubt, and then you find, 5:

"It is further agreed by and between the parties hereto that the questions respecting the Upper Canada Building Fund and the Upper Canada Improvement Fund are not at at present to form any part of this reference; but this agreement is subject to the reservation by Ontario of any of its rights to maintain and recover its claims, if any, in respect of the said funds, as it may be advised."

Now, who can doubt that this statement, tedious though it has been, has at any rate this advantage, that it has as I have said, demonstrated what the meaning of that is. You have found by the former correspondence that there was one question about the Land Improvement Fund, namely, as to the Crown Lands, you have also found that there was a question which had dropped out of sight by the time the Order-

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in-Council of the 12th December, 1870, was passed, but which had been in dispute, which Mr. Mercier had refused to allow to be included, namely, the question of the Upper Canada Building Fund. Upon further consideration they looked and they say that that question which Mr. Mercier insisted should not be included had not been put in, and they put in that question too, and to allege that that means all questions respecting the Land Improvement Fund is absolutely refuted by this statement. Even if it was, I say there was no question as to the Common School Fund. I have demonstrated to your Lordships that from the period of the decision in 1870 the Province of Quebec never raised the question; that every word, every act, every proceeding, every claim that it took was otherwise.

I have therefore shown to your Lordships clearly and plainly, that upon this record to which my learned friend himself appealed, the three papers from which he read, it is indisputable, that the question relating to the Improvement Fund and to the Building Fund means the question as to the $101,000 as to the Improvement Fund, and that question as to interest as to the Building Fund.

I say the major order to this arbitration was to find out what the amount of the Common School fund was. I say my learned friend's construction of this submission is a construction which renders it impossible that they should do that thing. It is quite easy to take out the Improvement fund because it has nothing to do with the Common School fund I admit, my Lords, that it does not pass the wit of man to devise words which would have abstracted this question from the jurisdiction of the arbitrators, but it would be the wit of the most foolish man in the world which would have tried to devise such words, and unless the words

were so plain and clear that they could not be got over, your Lordships would not give such a limited and impotent conclusion to this affair as would be by that.

I say that there is a sense in which it is excluded from the consideration of this arbitration; it is excluded because it was not in dispute; because it was a settled thing; It is excluded because as I have demonstrated to your Lordships if the award is to be taken as valid, if this thing cannot be separated, if it was within the jurisdiction of the arbitrators, the Common School Fund did not at the time which this submission was made, consist of $1,733,000.00, it consisted of $1,500,000.00 odd, it was excluded therefore from consideration because there was no intention that these arbitrators should pass upon it at all; it is excluded because the common concurrent sense of both the powers which were parties to this action, ever since the action of the Privy Council, thought that it was a settled question.

Practically the claim of Ontario if it be a good one is lost, and the power to assert that claim does not exist, although to-day for the purposes of this argument your Lordships are told that what the arbitrators should do, and what your Lordships are asked to do, is to declare that the Common School Fund is such and such an amount subject to any claim that Ontario may have, and thus to leave undeclared what the Common School Fund is. I conjecture and I ask your Lordships to conjecture, as soon as that standing ground is reached, why of course it would be said, well we must act upon the Common School Fund as a whole, and leave you to whistle for the $124,000 and your $224,000. That would be the next stage in this proceeding, a stage which I am sure would be unwelcomed by all who value the reputation of the country. Therefore, I hold that it is possible and certainly just, that which

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has been the common mind of both parties with reference to the $224,000, should be recognised. and that that which is true, namely, that the Common School Fund did consist on the 30th June, 1867, as conclusively settled by the award of the $1,500,000 should also be recognized, and that this thing which is done by these arbitrators, that that also should be recognised.

I may be allowed to say that nine and twenty years ago I asserted this claim in the Provincial Legislature for these settlers, and that the report of the select committee on the Land Improvement Fund gives your Lordships what the merits are.

It was a claim then prosecuted, since maintained, always acted upon by the Province of Ontario, not as a claim for a fund which that province was entitled to devote for general purposes, it was a claim asserted on behalf of those who went into these waste places of the earth and dwelt, upon a stipulation announced to them by the Crown Lands agents from whom they bought the property, that one-fourth and one-fifth of their prices, according as they were Crown or school lands, should be devoted to the primeval interests of a new country, the making of roads and bridges and different local improvements of the country. They said to the Government, this was to be done through you the central authority, but we had our individual rights in it; we bought our land at ten shillings an acre upon the agreement that fifty cents of that should be devoted to the things which were necessary to our clearing land and making an existence. As one of the learned judges has said—as the Chancellor has well said—the Common School Fund had the advantage of it. These lands could not have been sold; this fund could not have been realised.

They had the benefit of it in the sales that were made, and we have not claimed that it was not com-

petent without a breach of good faith, for the Government to change its policy, and with reference to new sales to say we will no longer make that allowance; something might be said in favour of that view, but it has never been said—what has been claimed and what is claimed, is that in the highest view of equity, honour and good faith, in the discharge of what would be a fundamental moral duty between man and man, aye, a question or matter of contract between man and man, it was impossible by an arbitrary act of the executive to destroy the vested rights and interests of the settlers, to suggest another use for that portion of his purchase money than the making of these public improvements, in which he was interested, as had been contracted for by him at the time they were sold. That was the claim made on behalf of the settlers. That was the claim which the arbitrators of 1870 thought was a just and reasonable claim. That was a claim which they recognised and insisted on, and I have no doubt, that at this day, after thirty years, it is not a claim which this court will reject.

Béique Q.C. in reply:

I must say that I have expressed my full views in opening the case on the position that I took, and the few words that I will address to your Lordships will be confined to calling attention to one or two references given by my learned friend.

Let me say at once that with the last consideration, as an equitable consideration, we think this court has nothing to do. It may be a consideration which goes to this effect, that the Governor in Council of the Province of Canada should have created the Improvement Fund, or it may go to the effect that the Governor in Council should not have abolished it. It seems to me it is a matter altogether foreign to the present appeal, and I will not dwell any further upon it.

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My learned friend has referred to the accounts which he calls the accounts between the Dominion and the Province of Ontario. I say that these accounts, I have stated why, I have given the reference as my authority, were speculative accounts; they were prepared in a speculative way for a certain purpose, and with these accounts we have nothing to do.

I have called your Lordships' attention to the fact that in the public accounts of the Dominion of 1892 the Common School Fund stands intact without any deduction of the $124,000.

Another reference to which my learned friend has called your attention is that letter of Mr. Shehyn. I need not read the letter. I submit, that Mr. Shehyn took the ground that it was unwarranted, and that it was unjustified, and that he had not to go any further; that he was unwilling to go with the reference any further than it had gone.

I do not claim, and I have never pretended, that Ontario ever intended to submit to the present arbitrators, the question as to whether the award of 1870 was valid or not. That is not my contention. But I say that the position of the parties was settled or not by that first award. It does not appear that either party was demanding from the present arbitration a new judgment on that question. If the question has been settled, as is contended, I do not see what is the interest of Ontario in provoking a new judgment upon a question, if Ontario had already won the judgment.

Now, the only point to which I should call your Lordships' attention is to the wording of the reservation.

It has not escaped your Lordships' attention in the draft of submission referred to as prepared by the Dominion Government, that the word is "the

question," and I admit there that the question in that submission had reference merely, as my learned friend has stated, to the Crown Lands, not to the Common School Lands; there the word was "question," but here we have the "questions," and we have in the reservation "in respect of the said funds," therefore, in respect of both the Common School Fund and of the Crown Lands and of the School Lands.

Now, I have rested my contention on the wording that the questions respecting this, in a general way, were not intended to be submitted; and I have rested it on the contention that it had been disputed before the Privy Council, and I have rested it on the contention that it has been disputed, and I still claim that there is enough to justify my pretention in the letter of Mr. Shehyn, and I have not heard a word in reply to that, on the interpretation of Ontario in their own factum and on the opinion of the learned Chancellor Boyd.

One further word, as far as the other branch of the case is concerned. We have admitted all along that the question of this Improvement Fund was limited to this, as to whether it could be dealt with independently, as a separate part of the award. And my contention has been, and I repeat it that the question should be approached merely in this light:—Suppose that the arbitrators of 1870 had awarded that sum or had deducted from the Common School Fund, which was acknowledged to be the property of the two provinces, $124,000 for a corporation that had no existence whatever, what would have taken place as a result of any award of that kind? Would that sum have been lost? Would it not have been open to the two provinces to go back behind this award and say the corporation is extinct, there is nobody to claim the amount, and therefore it must fall back into the fund as forming

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part of the fund from which it was taken. We take no other position than that.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This appeal is from certain parts of the award of the arbitrators appointed under statutes of the Dominion of Canada and of the Provinces of Ontario and Quebec (Canada 54 & 55 Vict., ch. 6; Ontario 54 & 55 Vict., ch. 2; Quebec 54 Vict., ch. 4), respecting the settlement by arbitration of accounts between the Dominion of Canada and the Provinces, and between the two provinces.

The agreement of submission of the 10th of April, 1893, under which the arbitrators proceeded, contained amongst others the following references and provisions adopted by Order in Council of the Dominion and the 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:

(*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.

(5) It is further agreed by and between the parties hereto that the questions respecting the Upper Canada Building Fund and the Upper Canada Improvement Fund are not at present to form any part of this reference; but this agreement is subject to the reservation by Ontario of any of its rights to maintain and recover its claims, if any, in respect of the said funds as it may be advised.

In exercise of the power to make a partial award conferred by the statutes under which the arbitration took place, the arbitrators on the 6th of February, 1896, awarded as follows respecting the subjects of reference before mentioned:

(1) That the sum held by the Government of the Dominion of Canada on the tenth day of April, 1893, as part of the principal of the said Common School Fund, amounted to two million four hundred and fifty-seven thousand six hundred and eighty-eight dollars and sixty-two cents ($2,457,688.62), made up of the following sums, that is to say: First the sum of one million five hundred and twenty thousand nine hundred and fifty-nine dollars and twenty-nine cents ($1,520,959.29) that at the union of the provinces came into the hands of the Government of Canada, and upon which interest has from time to time in the accounts referred to us been credited to the said provinces: Secondly, the sum of nine hundred and twenty-five thousand six hundred and twenty-five dollars and sixty-three cents ($925,625.63). for which, in 1889, the Government of Ontario accounted to the Government of the Dominion; and thirdly, the sum of eleven thousand one hundred and three dollars and seventy cents ($11,103.70) for which the Government of Ontario accounted to the Government of the Dominion in the following year (1890).

From this finding Sir Louis Napoleon Casault dissents, he being of opinion that the sum then held by the Dominion Government as part of the principal of the said Common School Fund was greater than has been stated by an amount of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents ($124,685.18), which sum in the said accounts has been deducted from the said fund and credited to the Upper Canada Improvement Fund.

2. That the Province of Ontario is not liable out of the proceeds arising from the sale of the Crown Lands of the Province, other than the million acres of Common School Lands set apart in aid of the Common Schools of the late Province of Canada, to contribute anything to the said Common School Fund.

Mr. Chancellor Boyd dissents from so much of this finding as may imply that Ontario is under any liability in respect to the Common School Fund or lands.

3. That subject to certain deductions, the Province of Ontario is liable for the moneys received by the said province since the first day of July, 1867, or to be received from or on account of the Common School Lands set apart in aid of the Common Schools of the late Proeince of Canada.

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Mr. Chancellor Boyd dissents from this finding as to liability.

4. That from the moneys received from the Province of Ontario since the first day of July, 1867, from or on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada, the Province of Ontario is entitled to deduct and retain the following sums as provided by the award of the 3rd of September, 1870, that is to say :

First. In respect of all such moneys, six per centum on the amount thereof for the sale and management of such lands.

Secondly. In respect of moneys arising from the sales of such lands made between the fourteenth day of June, 1853, and the sixth day of March, 1861, twenty-five per centum of the balance remaining after the deduction of six per centum for the sale and management of such lands.

Chief Justice Sir Louis Napoleon Casault dissents from so much of this finding as relates to the deduction in the cases mentioned of the twenty-five per centum on such balance.

5. That in respect of the matters mentioned in the four preceding paragraphs we the said arbitrators have proceeded upon our view of disputed questions of law.

From these findings the provinces have both appealed. The Province of Ontario as follows:

First. As to paragraph 2 of the said award which states "That the Province of Ontario is not liable out of the proceeds arising from the sale of the Crown Lands of the province other than the million acres of Common School Lands set apart in aid of the Common Schools of the late Province of Canada to contribute anything to the said Common School Fund."

Ontario appeals against so much of the finding in the said paragraph 2 as implies that Ontario is under any liability in respect to the Common School Fund or lands.

Second. As to paragraph 3 of the said award, which states "That subject to certain deductions the Province of Ontario is liable for the moneys received by the said province since the first day of July, 1867, or to be received from or on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada"

Ontario appeals against the finding in the said paragraph 3 of liability of Ontario as thereby decided.

And Ontario asks that the Supreme Court of Canada declare that Ontario is not liable in respect of the matters set out in paragraphs 2 and 3 of the said award, whereby Ontario is declared liable and that there is and has been no liability on the part of Ontario in respect of lands in Ontario known as the Common School Lands, or in respect of moneys received or to be received by Ontario from or on account of Common School Lands.

The Province of Quebec limits its appeal as follows, namely:

In so far as such award permits or allows any deduction from the amount of the principal of said Common School Fund for the Upper Canada Land Improvement or Upper Canada Improvement Fund.

And in this respect the Province of Quebec will contend that under the provisions of paragraph 1 of the award, the principal of the fund should be augmented by the sum of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents ($124,685.18), and that under paragraph four of the said award, the amount of twenty-five per centum referred to in the paragraph mentioned secondly, should not be deducted.

And the Province of Quebec will ask that the said award be varied accordingly, and amended so as to not permit of any deductions from the principal of the said Common School Fund for any sums for the said Upper Canada Land Improvement Fund, or Upper Canada Improvement Fund.

Each of the learned arbitrators has appended to the award an opinion embodying the reasons for the conclusion arrived at by him. Chancellor Boyd and Chief Justice Casault have respectively set forth the arguments which they consider to establish the correctness of their dissenting findings, and Mr. Justice Burbidge whose opinion prevailed has stated the reasons for his non-concurrence in either of the dissenting conclusions.

The Province of Quebec moved to quash the appeal upon the ground that this court had no jurisdiction to entertain it, but we are all of opinion that this objection entirely fails and that the jurisdiction conferred by the statutes upon this court has been properly invoked as regards all that portion of the award

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tained in the four first paragraphs in which the arbitrators have declared that they proceeded upon their view of disputed questions of law.

I now proceed to give as concisely as possible a history of the legislation of the former Province of Canada which is material to be considered.

By the statute of Canada, 12 Vict. ch. 200, it was enacted

> That all moneys which shall arise from the sale of any of the public lands of the province shall be set apart for the purpose of creating capital which shall be sufficient to produce a clear sum of £100,000 per annum which said capital and the income to be derived therefrom shall form a public fund to be called "The Common School Fund."

By the second section after making provision for the investment of the fund thus formed, it is declared that the

> Said fund and the income thereof shall be and remain a perpetual fund for the support of Common Schools and the establishment of Township and Parish Libraries.

By the third section it was enacted:

> That the Commissioner of Crown Lands under the direction of the Governor-in-Council, shall set apart and appropriate one million of acres of such public lands, in such part or parts of the province as he may deem expedient, and dispose thereof on such terms and conditions as may by the Governor-in-Council be approved, and the money arising from the sale thereof shall be invested and applied towards creating the said Common School Fund; Provided always that before any appropriation of the moneys arising from the sale of such lands shall be made, all charges thereon for the management or sale thereof, together with all Indian annuities charged upon and payable thereout, shall be first paid and satisfied.

The fourth and remaining clause of the Act is as follows:

> So soon as a net annual income of fifty thousand pounds shall be realized from the said School Fund, the public grant of money paid out of the Provincial Revenue for Common Schools, shall forever cease to be made a charge on such revenue; Provided always, nevertheless, that in the meantime the interest arising from the said School

Fund so to be created as aforesaid, shall be annually paid over to the Receiver General and applied towards the payment of the yearly grant of fifty thousand pounds now appropriated for the support of the Common Schools; Provided further, that after the said annual sum of fifty thousand pounds shall have been taken off the Consolidated Revenue, if the income arising from the said School Fund shall from any cause whatever fall short of the annual sum of fifty thousand pounds, then it shall and may be lawful for the Receiver General of the Province to pay out of the said Consolidated Revenue such sum or sums of money as may from time to time be required to make up such deficiency, the same to be repaid as soon as the said income of the said School Fund shall exceed the said sum of fifty thousand pounds.

Under this Act an order-in-council dated the 5th November, 1850, was passed whereby one million acres of the public lands were set apart and appropriated for the purposes of the Common School Fund. These lands were all situated in that part of the Province of Canada now forming the Province of Ontario.

This Act was subsequently, upon the revision of the statute law of the Province of Canada in 1859, embodied in the Consolidated Statutes of Canada, chapter 26.

Another Statutory Fund which is of great importance in the consideration of this appeal is the Upper Canada Improvement Fund.

This Fund was created for the purpose of opening roads and making other improvements required to render the lands set apart to form the School Fund which were situated in a large tract of wild and unreclaimed land known as the "Huron Tract," available for settlement or to meet the necessary requirements of the original settlers.

It was created by the fourteenth section of the Statute of Canada, 16 Vict. ch.159, which received the royal assent (for which it had been reserved by the Governor) and became law on the 14th June, 1853. The fourteenth section is in these terms:

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It shall be lawful for the Governor-in-Council to reserve out of the proceeds of the School Lands in any county a sum not exceeding one fourth of such proceeds as a fund for public improvements within the county, to be expended under the direction of the Governor-in Council, and also to reserve out of the proceeds of unappropriated Crown Lands in any county a sum not exceeding one-fifth as a fund for public improvements within the county to be also expended under the direction of the Governor-in-Council. Provided always, that the particulars of all such sums, and the expenditure thereof shall be laid before Parliament within the first ten days of each session. Provided always, that not exceeding six per cent on the amount collected, including surveys, shall be charged for the sale and management of lands forming the Common School Fund, arising out of the one million acres of land set apart in the Huron Tract.

It is to be observed that this section authorized for the purpose of an Improvement Fund not only a reservation of one-fourth of the proceeds of the school lands, but also a reservation of one-fifth of the proceeds of the unappropriated Crown Lands not set apart for school purposes. With these Crown Lands and the reservation out of them we are not directly concerned in this appeal, but as will be seen hereafter the reservation of the one fifth of Crown Lands sales becomes incidentally of much importance.

The 14th section of the Act of 1853 is in its terms permissive, and in order to the constitution of the Lands Improvement Fund an order of the Governor-in-Council was requisite. Such an Order-in-Council was accordingly passed on the 7th December, 1855. It is to be remarked of this Order-in-Council that it is informally and loosely worded, but it has always been recognized as having created the Lands Improvement Fund. Further, it has been treated as having had a retroactive effect carrying back the right to deduct the one-fourth from the proceeds of School Lands to the date of the statute itself (14th of June, 1853.) These observations are made merely to shew that the peculiar form of the Order-in-Council has not escaped

attention, for no point has been made of this either upon the argument of the appeal or before the arbitrators. It seems to have been conceded on all hands that the Lands Improvement Fund so far as it was made up of contributions from School Lands consisted of one-fourth of the moneys produced by the sales of those lands in the interval between the fourteenth of June, 1853, and the sixth of March, 1861, when by an Order-in-Council of the latter date (6th March, 1861), the Order-in-Council of the 7th December, 1855, was absolutely rescinded.

Therefore, in 1867, when the confederation of the Provinces took place and the Province of Canada was divided into the two new Provinces of Ontario and Quebec, there existed two funds, the School Fund and the Upper Canada Improvement Fund.

These funds therefore were subject to be dealt with by the arbitrators whose appointment was provided for by section 142 of the British North America Act, for it cannot be and never has been pretended that the 113th section of that Act was exhaustive or that the assets enumerated in the fourth schedule to the Act included all the assets belonging to Ontario and Quebec conjointly, which these arbitrators were empowered to deal with; nor can it be pretended that these funds, the Common School Fund and the Lands Improvement Fund, were included under any of the heads of "stocks, cash, bankers' balances and securities" which the 107th section of the Act transferred to the Dominion. It need scarcely be said that the Provinces other than Ontario or Quebec were not entitled to share in these funds arising from lands in the former Province of Canada, and devoted, the one to Common Schools in that Province, and the other to local improvements designed to facilitate the sale and settle-

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ment of the million acres in Upper Canada set apart for Common School purposes.

The funds must therefore necessarily have been assets belonging to Ontario and Quebec jointly.

The arbitrators appointed under section 142 therefore treated these funds as such joint assets and dealt with them accordingly.

As regards the Upper Canada Improvement Fund, the award of this statutory tribunal constituted by the 142nd section which was made on the third September, 1870, adjudged (by the 5th section) as follows:

> The following special or trust funds and the monies thereby payable including the several investments in respect of the same, or any of them, shall be and the same are hereby declared to be the property of and belonging to the Province of Ontario for the purposes for which they were established, viz.:
>
> (6) Upper Canada Improvement Fund:

Then in the 7th, 8th, 9th and 10th sections of the same award, both the Common School Fund and the Upper Canada Improvement Fund are further dealt with in these terms:

> VII. From the Common School Fund as held on the thirtieth day of June, one thousand eight hundred and sixty-seven, by the Dominion of Canada, amounting to one million seven hundred and thirty-three thousand two hundred and twenty-four dollars and forty-seven cents (of which fifty-eight thousand dollars is invested in the bonds or debentures of the Quebec Turnpike Trust, the said sum of fifty-eight thousand dollars, being an asset mentioned in the fourth schedule to the British North America Act, 1867, as the Quebec Turnpike Trust) the sum of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents shall be, and the same is hereby taken and deducted and placed to the credit of the Upper Canada Improvement Fund, the said sum of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents being one-fourth part of moneys received by the late Province of Canada, between the sixth day of March, one thousand eight hundred and sixty one, and the first day of July, one thousand eight hundred and sixty-seven, on account of Common School Lands, sold between the fourteenth day of June, one thousand eight hundred and fifty-three,

and the said sixth day of March, one thousand eight hundred and sixty-one.

VIII. That the residue of the said Common School Fund, with the investments belonging thereto, as aforesaid, shall continue to be held by the Dominion of Canada, and the income realized therefrom, from the thirtieth day of June, one thousand eight hundred and sixty-seven, and which shall hereafter be realized therefrom, shall be apportioned between and paid over to the respective Provinces of Ontario and Quebec as directed by the fifth section, chapter twenty-six of the Consolidated Statutes of Canada, with regard to the sum of two hundred thousand dollars in the said section mentioned.

IX. That the moneys received by the said Province of Ontario since the thirtieth day of June, one thousand eight hundred and sixty-seven, 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 Province of Canada, shall be paid to the Dominion of Canada to be invested as provided by section three of said chapter twenty-six of the Consolidated Statutes of Canada. and the income derived therefrom shall be divided, apportioned and paid between and to the said Provinces of Ontario and Quebec respectively as provided in the said fifth section, chapter twenty-six of the Consolidated Statutes of Canada, with regard to the sum of two hundred thousand dollars in the said section mentioned.

X. That the Province of Ontario shall be entitled to retain out of such moneys six per cent for the sale and management of the said lands, and that one-fourth of the proceeds of the said lands, sold between the fourteenth day of June, one thousand eight hundred and fifty-three, and the said sixth day of March, one thousand eight hundred and sixty-one, received since the thirtieth day of June, one thousand eight hundred and sixty-seven, or which may hereafter be received after deducting the expenses of such management as aforesaid shall be taken and retained by the said Province of Ontario for the Upper Canada Improvement Fund.

It is to be borne in mind that the office of the present arbitrators under the agreement of reference of the 10th of April, 1893, already set forth, is limited to the ascertainment of the principal of the Common School Fund and the arbitrators are directed to take into consideration not only the sum held by the Dominion at the date of the present reference, but also the amount for which Ontario is liable and also the

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value of the unsold School Lands. And it was by the same agreement provided that:

> The questions respecting the Upper Canada Building Fund and the Upper Canada Improvement Fund were not then to form any part of the reference, but that the agreement was subject to the reservation by Ontario of any of its rights to maintain and recover its claims, if any, in respect of the said funds as it might be advised.

Then proceeding to take up the objections now made to the award under appeal in the order in which they are to be found on the face of the award in the dissents there recorded, we find first the objection of Chief Justice Casault that the deduction of $124,685.18 from the amount of the Common School Fund credited by the award of 1870 to the Upper Canada Improvement Fund was wrong. The grounds of this objection may be included under two heads. First, it is said that it is beyond the scope of the authority of the present arbitrators to deal with the Upper Canada Improvement Fund. Secondly, that it was *ultra vires* of the arbitrators of 1870 to allot the last mentioned fund to the Province of Ontario and to deduct its amount from the Common School Fund.

No doubt there is to be found in the agreement of reference an exclusion in terms of questions respecting the Upper Canada Improvement Fund. We find, however, as is well demonstrated in the opinion of Mr. Justice Burbidge, that effect could not be given to the express terms of the submission which impose upon the arbitrators the duty of determining and awarding upon

> (*a*) & (*c*) The accounts as rendered by the Dominion to the two provinces up to January, 1889,

if this exclusion was to apply to the $124,685.18, inasmuch as this was one of the items in the accounts which had been rendered by the Dominion. Further, the arbitrators were expressly required not only to

ascertain and determine the amount of the Common School Fund, but also the amount for which Ontario is liable. Then how could these requirements of the submission be complied with if the arbitrators were not to pass upon the right of Ontario to deduct one fourth of the moneys derived from School Lands sold between 14th June, 1853, and 6th March, 1861? It appears therefore that, according to the construction put upon the reservation in question by the learned Chief Justice, the agreement of submission would upon its face contain clauses which were repugnant to each other.

Mr. Justice Burbidge has, I think, found a solution of this difficulty which we may well adopt. That portion of the learned judge's opinion in which he sets forth the argument on this head appears to me to be unanswerable. I refer particularly to the full and clear explanation of it which he has given. It may, however, be summarized by saying that the terms of the submission may be reconciled by the explanation that there were two questions respecting the Upper Canada Improvement Fund—one which had been passed upon by the arbitrators of 1870, as to the right of Ontario to that fund as it existed, and to make further deduction from the sale of School Lands to be carried to the credit of the Improvement Fund to the amount of the one-fourth of the collection from sales made in the interval between the 14th June, 1853, and the 6th March, 1861, the other as to the right of Ontario to have credited to the fund the one-fifth of sales, not of School Lands, but of ordinary Crown Lands sold subsequent to the Act of the 14th June, 1853, up to the date of the rescission of the Order-in-Council establishing the fund. The first question had been adjudicated upon by the arbitrators of 1870, the latter question was wholly untouched.

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Apart from this it is extremely improbable that the Province of Ontario ever could have intended to have abandoned any rights which had been assured to it by the award which for the present purpose I assume to have been *intra vires*, a conclusion which I shall presently attempt to demonstrate when I come to the second head of the Chief Justice's argument.

Further, there is nothing in the statutes under which the present arbitration has been had warranting the inference of an intention to derogate from the Imperial Act, even if parliament and the two Provincial Legislatures could do away with rights so assured, and there would clearly have been such a derogation if the arbitrators of 1870 were within their powers in awarding the Improvement Fund to Ontario, for in that case the right of Ontario to that fund is to be considered to be established just as it would have been if the 142nd section of the British North America Act instead of delegating the apportionment and adjustment to arbitrators had embodied in terms the same distribution of these funds as that which was made by the award of 1870.

The learned Chief Justice, however, goes furthe than this, for he insists that the award of 1870 was *ultra vires* of the arbitrators.

The arbitration, or (as it is called in the statute itself) the "arbitrament" of 1870 was a statutory proceeding not subject to the general rules of law applicable to private arbitrations. The persons to whom the authority to exercise the power conferred by section 142 was given were designated as arbitrators merely by way of convenience in expression. No such objection as that of want of finality could apply to their decision. When the award of 1870 was before the Judicial Committee in 1878, on a reference from

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the Crown upon an application made through the Secretary of State, the Lord Chancellor says:

> These gentlemen were executing a parliamentary power. It is not as if it was a private arbitration under a private instrument. Either this was within their power or it was not. If it was not within their parliamentary power it goes for nothing. * * * * * * There is a certain thing to be done under a certain Act of Parliament by particular individuals named. If they do anything more than they are authorized to do it cannot have any possible effect.

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The learned Chief Justice founds his opinion that the award of 1870 was *ultra vires* as regards the deduction of the Upper Canada Improvement Fund upon the ground that the arbitrators did not pursue their statutory authority which according to the 142nd section was to "divide" and "adjust," when they directed the principal of the Common School Fund to be retained in the hands of the Dominion who were to pay over the income only to the provinces and that this not being authorized the direction that Ontario should be entitled to the Lands Improvement Fund was *ultra vires*. Now in the first place it is to be remarked that the arbitrators under the present reference have not to make any disposition of the Common School Fund or to inquire if any proper disposition of it has already been made. Their functions are limited to the ascertainment of its amount. I have already shewn that both the Common School Fund and the Improvement Fund were assets of the old Province of Canada when that province ceased to exist upon Confederation; that they were not conclusively disposed of by the Act itself; and that consequently their disposition fell within the 142nd section which provided a parliamentary mode of dealing with such assets. For the present purpose it would seem to be sufficient to say that even if there was no ultimate "division and adjustment" such as the statute requires, yet so far as the ascertainment of the amounts of the two funds

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went, and the allotment of the whole of the Improvement Fund in the only way in which it could reasonably be disposed of, namely, to Ontario, the arbitrators of 1870 were clearly within their powers. Such an ascertainment was a necessary preliminary to any "division and adjustment" under the statute. Therefore without going further it seems to me that the whole argument of *ultra vires* fails.

I do however go further, for it appears to me impossible to hold that the disposition they made of the fund was not covered by the direction "to divide and adjust."

There existed in 1870 difficulties in the way of an absolute division of the Common School Fund which made a division of the capital at that time almost impossible. The lands had not all been sold. The amount of the fund depended on future collections of the purchase money derived from sales already made within the dates before given of the statute and the Order-in-Council. The arbitrators or commissioners then did not see their way to dividing the capital, the amount of which, however, so far as it was then realized they ascertained and fixed, and they directed the fund to be vested in the Crown in the right of the Dominion in trust for the Provinces to which the interest was to be paid. I cannot agree that this was not within their powers. It was a division of the beneficial interest in the fund, and a fair adjustment of the rights of the Provinces in this fund which by the statute creating it was declared to be a perpetual fund the capital of which was to remain intact in perpetuity and the income of which alone was given to the Province of Canada. The arbitrators may therefore well have considered, as they appear to have done, that the asset they were dealing with which belonged to the Provinces jointly was only the income which they ap-

portioned placing the capital itself *in medio* in the hands of the Dominion, which might perhaps, but did not, object to be burthened with its management. This mode of proceeding certainly seems to have been consistent with the terms of the Act 12 Vict. ch. 200. If this is so the argument of *ultra vires* entirely fails.

The learned Chancellor based his dissent from the award on a totally different ground. In his opinion the fund realized from the sale of these lands, and the monies to arise from sales theretofore made, but in respect of which the purchase monies had not been paid, as well as the unsold lands remaining at the date of Confederation, all reverted on that event happening to the Province of Ontario.

This view proceeds upon the theory that the original trust of the one million acres of part of the domain of the Province of Canada was one for Common Schools of Canada which ceased to exist at Confederation; and the trust failing the unsold lands reverted under section 109 of the British North America Act as public lands, not subject to any trust, to the new province within whose limits they were situated. Further, that the monies constituting the Common School Fund also so re-vested in the same province as having been derived from lands locally situated in that division of the old province.

I am unable to agree in this conclusion. I do not think that the trust necessarily failed on division of the old province by the British North America Act. I see no reason why the Common School Fund and the unsold lands should not have continued to be impressed with a trust in favour of the Common Schools of the new Provinces of Ontario and Quebec. Had it been supposed that any difficulty could have arisen on this head no doubt some provision would have been

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made for the case. But even supposing that the original beneficiaries ceased to exist, the funds and lands were still assets belonging to Ontario and Quebec. The lands were impressed with a trust in the loose general sense in which that word is used in section 109, and the money of which the fund consisted also was bound by a trust which prevented it from vesting in the Dominion as "stock, cash, bankers' balances or securities for money" under section 107. The word "trust" as used in section 109 is not to be interpreted literally and technically. This is apparent from the consideration that it relates to lands which were as regards the legal estate vested in the Crown which cannot strictly speaking be bound by a trust. It must therefore receive a secondary and more general interpretation which authorizes us in applying it to lands held and set apart for some special purpose. If this is so then both lands and funds were assets to be dealt with by the arbitrators under section 142. I have already given the reasons for the conclusion that the arbitrators of 1870 were not without jurisdiction in making the disposition of both the funds here in question—the Common School Fund and the Upper Canada Improvement Fund—as well as of the lands. I need not therefore repeat them. The arbitrators were sovereign judges of all questions of law and fact in all matters within the scope of the authority given them by the statute, and I think they have well exercised their powers in dividing the income as they have done. In other words it appears to me that their award was final. If they were within their powers the mode in which they have exercised them cannot now be questioned. No right of appeal from them is conferred on any court of judicature. The proceeding in the Privy Council of 1878 was not an appeal but a reference by the Crown sought by the

Provinces and the Dominion principally to ascertain if the award had been properly executed by two out of the three arbitrators, and if one of the arbitrators was properly qualified to act.

It has remained unimpeached as regards the question now raised for nearly twenty-eight years, and during that time has been acted upon, and it could not now be set aside without deranging the whole scheme upon which it proceeded and thereby doing great injustice to one or other of the Provinces.

The arbitrators finding these assets which they had to deal with to be the joint property of the two new Provinces treated them impliedly as impressed with a trust which as the final judges of both law and fact it was within their power to do, and they executed this trust by directing the division of the income between the beneficiaries in accordance with the intention indicated in the Act of the Legislature which originated the fund. But even if they did not go so far as they might and ought to have done by dividing the capital itself, and apportioning the unsold lands, I am unable to see that their proceedings were wholly void or that their award can be impeached like a private award for want of finality.

But so far as the present reference is concerned all we are concerned with is the ascertainment of the amount of the fund and as regards this purpose it is immaterial whether the arbitrators properly executed their power to divide and adjust or not. The very object of this reference may be to establish a basis for further legislation, and I do not think that any object of this kind should be frustrated by holding that although there is in fact a Common School Fund the amount of which it is desirable to ascertain, yet as such a fund does not exist *de jure*, the arbitrators should

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decline to exercise the jurisdiction conferred upon them.

The learned Chancellor, if there is such an existing fund as a Common School Fund, does not object in that case, in which the majority is against him, to the deduction from it of the amount of the Improvement Fund as it has been found in the award of 1870 and in the accounts rendered by the Dominion, but in this view of the case he agrees with Mr. Justice Burbidge.

The "new aspect" as it was termed before the arbitrators by which Quebec sought to have the fund augmented beyond the one million acres to an amount sufficient to produce an income of £100,000 per annum, is conclusively shown to be an erroneous view in the opinion of Chief Justice Casault, and it has not been raised in this appeal and is not before us. A question relating to an investment in some Quebec Turnpike Trust Debentures is also not before us, inasmuch as the arbitrators do not state that their finding in that respect proceeded on a disputed question of law.

On the whole we are all of opinion that the award so far as it is controverted by these appeals is correct and ought to be confirmed. The appeals of both the Provinces are therefore dismissed.