Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the City of Winnipeg v. *Barrett from the Supreme Court of Canada, and the Appeal of the City of Winnipeg* v. *Logan from the Court of Queen's Bench for Manitoba; delivered the* 30*th day of July* 1892.

Present:

LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
LORD HANNEN.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Macnaghten.*]

These two appeals were heard together. In the one case the City of Winnipeg appeals from a judgment of the Supreme Court of Canada reversing a judgment of the Court of Queen's Bench for Manitoba—in the other from a subsequent judgment of the Court of Queen's Bench for Manitoba following the judgment of the Supreme Court. The judgments under appeal quashed certain by-laws of the City of Winnipeg which authorized assessments for school purposes in pursuance of "The Public "Schools Act, 1890," a statute of Manitoba to which Roman Catholics and members of the Church of England alike take exception. The views of the Roman Catholic Church

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were maintained by Mr. Barrett; the case of the Church of England was put forward by Mr. Logan. Mr. Logan was content to rely on the arguments advanced on behalf of Mr. Barrett, while Mr. Barrett's advisers were not prepared to make common cause with Mr. Logan, and naturally would have been better pleased to stand alone.

The controversy which has given rise to the present litigation is, no doubt, beset with difficulties. The result of the controversy is of serious moment to the Province of Manitoba, and a matter apparently of deep interest throughout the Dominion. But in its legal aspect the question lies in a very narrow compass. The duty of this Board is simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, 1870, having regard to the state of things which existed in Manitoba at the time of the Union, the Provincial Legislature has or has not exceeded its powers in passing "The Public "Schools Act, 1890."

Manitoba became one of the Provinces of the Dominion of Canada under the Manitoba Act, 1870, which was afterwards confirmed by an Imperial Statute known as "The British North "America Act, 1871." Before the Union it was not an independent province, with a constitution and a legislature of its own. It formed part of the vast territories which belonged to the Hudson's Bay Company and were administered by their officers or agents.

The Manitoba Act, 1870, declared that the provisions of the British North America Act, 1867, with certain exceptions not material to the present question, should be applicable to the Province of Manitoba, as if Manitoba had been one of the provinces originally united by the Act. It established a Legislature for Manitoba, con-

sisting of a Legislative Council and a Legislative Assembly, and proceeded, in Section 22, to re-enact with some modifications the provisions with regard to education which are to be found in Section 93 of the British North America Act, 1867. Section 22 of the Manitoba Act, so far as it is material, is in the following terms:—

"In and for the Province, the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the Union."

Then follow two other sub-sections. Sub-section 2 gives an "appeal," as it is termed in the Act, to the Governor-General in Council from any act or decision of the Legislature of the Province, or of any Provincial authority, "affecting any right or privilege of the Pro-"testant or Roman Catholic minority of the "Queen's subjects in relation to education." Sub-section 3 reserves certain limited powers to the Dominion Parliament, in the event of the Provincial Legislature failing to comply with the requirements of the section, or the decision of the Governor-General in Council.

At the commencement of the argument a doubt was suggested as to the competency of the present appeal, in consequence of the so-called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of Sub-sections 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

Sub-sections 1, 2, and 3, of Section 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-sections of Section 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in Sub-section 1, the words "by law" are followed by the words "or practice" which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It is not perhaps very easy to define precisely the meaning of such an expression as "having "a right or privilege by practice." But the object of the enactment is tolerably clear. Evidently the word "practice" is not to be construed as equivalent to "custom having the "force of law." Their Lordships are convinced that it must have been the intention of the Legislature to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the Union.

What then was the state of things when Manitoba was admitted to the Union? On this point there is no dispute. It is agreed that there was no law or regulation or ordinance with respect to education in force at the time. There were, therefore, no rights or privileges with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the Union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Taché, the Roman Catholic Archbishop of St. Boniface, who has given evidence in Barrett's case, has been accepted as accurate and complete.

"There existed," he says, "in the territory "now constituting the Province of Manitoba "a number of effective schools for children.

"These schools were denominational schools, "some of them being regulated and controlled "by the Roman Catholic Church and others by "various Protestant denominations.

"The means necessary for the support of the "Roman Catholic schools were supplied to some "extent by school fees paid by some of the "parents of the children who attend the schools, "and the rest was paid out of the funds of the "church, contributed by its members.

"During the period referred to, Roman "Catholics had no interest in or control over "the schools of the Protestant denominations, "and the members of the Protestant denomina- "tions had no interest in or control over the "schools of Roman Catholics. There were no "public schools in the sense of State schools. "The members of the Roman Catholic Church "supported the schools of their own church for "the benefit of Roman Catholic children, and "were not under obligation to, and did not con- "tribute to the support of any other schools."

Now, if the state of things which the Archbishop describes as existing before the Union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to Denominational Schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body, which was engaged in a similar work at the time of the Union, would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recog-

nized by positive enactment, might have had attached to it as a necessary or appropriate incident the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that if the rights of Roman Catholics, and of other religious bodies, in respect of their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the Union, they will be reduced to the condition of a "natural right" which "does "not want any legislation to protect it." Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to rights and privileges existing "by practice" has no more operation than the protection which it purports to afford to rights and privileges existing "by law." It can hardly be contended that, in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the Court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.

Manitoba having been constituted a province of the Dominion in 1870, the Provincial Legislature lost no time in dealing with the question

of education. In 1871 a law was passed which established a system of Denominational Education in the common schools as they were then called. A Board of Education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Under the Manitoba Act the province had been divided into 24 electoral divisions, for the purpose of electing members to serve in the Legislative Assembly. By the Act of 1871 each electoral division was constituted a school district, in the first instance. Twelve Electoral Divisions, "comprising mainly a Protestant population," were to be considered Protestant School Districts; twelve, "comprising mainly a Roman Catholic "population," were to be considered Roman Catholic School Districts. Without the special sanction of the section there was not to be more than one school in any School District. The male inhabitants of each School District, assembled at an annual meeting, were to decide in what manner they should raise their contributions towards the support of the school, in addition to what was derived from public funds. It is perhaps not out of place to observe that one of the modes prescribed was "assessment on the "property of the School District," which must have involved, in some cases at any rate, an assessment on Roman Catholics for the support of a Protestant School, and an assessment on Protestants for the support of a Roman Catholic School. In the event of an assessment, there was no provision for exemption, except in the case of the father or guardian of a school child, —a Protestant in a Roman Catholic School District or a Roman Catholic in a Protestant School District—who might escape by sending the child to the school of the nearest district

of the other section, and contributing to it an amount equal to what he would have paid if he had belonged to that district.

The laws relating to education were modified from time to time. But the system of denominational education was maintained in full vigour until 1890. An Act passed in 1881, following an Act of 1875, provided among other things that the establishment of a School District of one denomination should not prevent the establishment of a School District of the other denomination in the same place, and that a Protestant and a Roman Catholic District might include the same territory in whole or in part. From the year 1876 until 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Roman Catholic ratepayer for a Protestant school.

In 1890 the policy of the past 19 years was reversed; the denominational system of public education was entirely swept away. Two Acts in relation to education were passed. The first (53 Vict. c. 37) established a Department of Education, and a Board consisting of seven members known as the "Advisory "Board." Four members of the Board were to be appointed by the Department of Education, two were to be elected by the public and high school teachers, and the seventh member was to be appointed by the University Council. One of the powers of the Advisory Board was to prescribe the forms of religious exercises to be used in the schools.

The Public Schools Act, 1890 (53 Vict., c. 38), enacted that all Protestant and Roman Catholic School Districts should be subject to the provisions of the Act, and that all public schools should be free schools. The provisions of the Act with regard to religious exercises are as follows :—

"6. Religious excerises in the public schools shall be conducted according to the regulations of the Advisory Board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place.

"7. Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees, it shall be the duty of the teachers to hold such religious exercises.

"8. The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided."

The Act then provides for the formation, alteration, and union of School Districts, for the election of School Trustees, and for levying a rate on the taxable property in each School District for school purposes. In cities the Municipal Council is required to levy and collect upon the taxable property within the municipality such sums as the School Trustees may require for school purposes. A portion of the legislative grant for educational purposes is allotted to public schools; but it is provided that any school not conducted according to all the provisions of the Act, or any Act in force for the time being, or the regulations of the Department of Education, or the Advisory Board, shall not be deemed a public school within the meaning of the law, and shall not participate in the legislative grant. Section 141 provides that no teacher shall use or permit to be used as text books any books except such as are authorised by the Advisory Board, and that no portion of the legislative grant shall be paid to any school in

which unauthorised books are used. Then there are two Sections (178 and 179) which call for a passing notice, because, owing apparently to some misapprehension, they are spoken of in one of the judgments under appeal as if their effect was to confiscate Roman Catholic property. They apply to cases where the same territory was covered by a Protestant School District and by a Roman Catholic District. In such a case Roman Catholics were really placed in a better position than Protestants. Certain exemptions were to be made in their favour if the assets of their district exceeded its liabilities, or if the liabilities of the Protestant School District exceeded its assets. But no corresponding exemptions were to be made in the case of Protestants.

Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the Province at the Union.

Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the Province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case), to send their children to public schools where

the education is not superintended and directed by the authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned Judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the Union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public schools under the Act of 1890 are in reality Protestant schools. The Legislature has declared in so many words that "the public "schools shall be entirely unsectarian," and that principle is carried out throughout the Act.

With the policy of the Act of 1890 their Lordships are not concerned. But they cannot help

observing that, if the views of the Respondents were to prevail, it would be extremely difficult for the Provincial Legislature, which has been entrusted with the exclusive power of making laws relating to education, to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the Legislature, which on the face of the Act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary conditions of school houses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort.

In the result their Lordships will humbly advise Her Majesty that these appeals ought to be allowed with costs. In *the City of Winnipeg* v. *Barrett* it will be proper to reverse the order of the Supreme Court with costs, and to restore the judgment of the Court of Queen's Bench for Manitoba. In *the City of Winnipeg* v. *Logan* the order will be to reverse the judgment of the Court of Queen's Bench, and to dismiss Mr. Logan's application, and discharge the rule nisi and the rule absolute, with costs.