*Privy Council Appeal No.* 158 *of* 1927.

**The Board of Trustees of the Roman Catholic Separate Schools for School Section No. 2 in the Township of Tiny and others** - *Appellants*

*v.*

**The King** - - - - - - - - - *Respondent*

FROM

**THE SUPREME COURT OF CANADA.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1928.

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*Present at the Hearing:*

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD SHAW.
LORD WRENBURY.
LORD BLANESBURGH.

[*Delivered by* VISCOUNT HALDANE.]

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Their Lordships are fully aware that this appeal is among the most important that have come before them from Canada in recent years. It relates to the interpretation of the Constitution of Canada in regard to the separate schools of a large part of her Roman Catholic population, and to the character of the rights conferred on them by the legislative settlement made at the time of Confederation under the British North America Act. So far as concerns the question brought before the Judicial Committee of the Privy Council, it will be found to be a question of pure law, turning on the interpretation and application of words in that Act. But it is none the less a question of far-reaching importance to Canada as a whole, and it has given rise to great differences of opinion among the Judges of the Canadian Courts. The tribunals of Ontario, indeed, before whom the question came in the first instance, decided unanimously against the appellants' claim. But the learned Judges of the Supreme Court, to which it was taken on appeal, were evenly divided.

Their Lordships have now to determine the point in issue as one of pure legal interpretation, disregarding every other consideration. This was the principle adopted by the Canadian Judges, and it is one which their Lordships have to apply anew,

seeking to decide the appeal on the footing of an examination of the provisions of the Constitution of Canada.

It will be necessary in the course of this judgment to refer in outline, later on, to the history of education in Canada, and particularly to the phase of that history which is concerned with the development of the provisions made in regard to religious education. But before entering on this it is desirable to formulate distinctly the real point in this appeal and the nature of the proceedings by which it has been raised. These proceedings took the form of a petition of right presented by the appellants to the Supreme Court of Ontario. The petition claimed that certain Acts of the legislature of that Province, and certain regulations purporting to have been passed under these Acts, prejudicially affected the rights conferred by the British North America Act on the appellants and were *ultra vires*. The appellants asked for a declaration that the Acts of the legislature, which had sought to alter the basis of distribution of legislative grants which existed at the date of Confederation, were *ultra vires* so far as concerned separate schools, and for judgment for a sum equal to the difference between the amount paid to the Trustees of the Roman Catholic School for School Section No. 2 in the Township of Tiny, out of the legislative grant of the Province for 1922, and the amount that would have come to it if effect had been given to the Separate School Act, 1863, which was in force at Confederation, and created (it was claimed) a right which the legislature of the Province had no power after Confederation to affect prejudicially. The appellants also claimed that they had the right to establish and conduct in their own schools courses of study and grades of education such as were being conducted in continuation schools, collegiate institutes and high schools, and that all regulations purporting to affect that right were invalid. They asked for a further declaration that the supporters of Roman Catholic separate schools were exempt from the rates imposed for the support of the former kind of school, unless established or conducted by Boards of Trustees of Roman Catholic separate schools.

All of these claims were traversed by the Attorney-General of Ontario on behalf of the Government of Ontario.

The question which has to be decided is one of far-reaching magnitude. To understand its scope it is necessary to have in mind the history of education in Canada, including that of Section 93 of the British North America Act. This section embodies a compromise. The language proposed by the conferences of delegates from the various parts of Canada, which passed resolutions at Quebec on the 10th October, 1864, was not adopted, so far as the final arrangement was concerned, in the form in which the resolutions were passed (*see* Cartwright's Cases on the B.N.A. Act, Vol. II, Quebec Resolution No. 43). Resolution 43 proposed to give power to the local legislatures to make laws as to education, saving the rights and privileges which the Protestant

and Catholic minority in both Canadas might possess as to their denominational schools at the time when the union came into operation. In the British North America Act, as passed by the Imperial Parliament, the substance of this resolution is not included in Section 92, but is embodied in a separate section, 93. The separate section enacts that in and for each Province the legislature may exclusively make laws in relation to education, subject and according to certain provisions. These were (Sub-section 1), that nothing in such law should prejudicially affect any right or privilege with respect to denominational schools which any class of person had by law in the Province at the union. (Sub-section 2), all the powers, privileges and duties at the union, conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects are extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec (on this sub-section no question arises in the present appeal).

Sub-section 3:—

> "Where in any Province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the Province, an appeal shall lie to the Governor General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

The fourth sub-section enacts that if a Provincial law which seems to the Governor-General in Council requisite to give effect to his decision is not made or the decision is not executed, then the Parliament of Canada may make the necessary remedial law.

It will be observed that Sub-section 3 goes further than Sub-section 1 in material respects. In the first place, it applies not merely to what exists at the time of Confederation, but also to separate or dissentient schools established afterwards by Provincial legislatures. In the second place, the word "prejudicially," in Sub-section 1, is dropped out from before the expression "affecting," in Sub-section 3. In the third place, the right or privilege is not confined to one in respect of denominational schools, but is given in respect of education. Their Lordships think that these changes in language are significant. They show that the protection given by Sub-section 1 was deemed, if taken by itself, to be insufficient. It was not considered to be enough protection for the denominational schools to apply to them a restriction which only rendered *ultra vires* of the Provinces a law which took away what was an existing legal right or privilege at the time of Confederation in respect of denominational schools. Sub-section 3 contemplates that within the powers of the Provincial Legislature, Acts might be passed which did affect rights and privileges of religious minorities in relation to education, and gives a different kind of remedy, which appears, as has already been pointed out, to have been

devised subsequently to the Quebec resolutions of 1864, and before the bill of 1867 was agreed on. Whenever an Act or decision of a Provincial authority affecting any right or privilege of the minority, Protestant or Roman Catholic, in relation to education is challenged, an appeal is to lie to the Governor-General in Council, as distinguished from the Courts of law. No doubt if what is challenged is challenged on the ground of its being *ultra vires*, the right of appeal to a Court of law remains for both parties unimpaired. But there is a further right not based on the principle of *ultra vires*. That this is so is shown by the extension of the power to challenge to any system of separate or dissentient schools established by law after Confederation, and which accordingly could not be confined to rights or privileges at the time of Confederation. The omission of the word "prejudicially" in Sub-section 3 tends to bear out the view that something wider than a mere question of legality was intended, and the language of Sub-section 4, enabling the Dominion Parliament to legislate remedially for giving effect, "so far only as the circumstances of each case require," to the decision of the Governor-General in Council, points to a similar interpretation. What is to be dealt with is a right or privilege in relation to education.

Their Lordships are of opinion that where the Head of the Executive in Council in Canada is satisfied that injustice has been done by taking away a right or privilege which is other than a legal one from the Protestant or Roman Catholic minority in relation to education, he may interfere. The step is one from mere legality to administrative propriety, a totally different matter. But it may be that those who had to find a new constitution for Canada when the British North America Act was passed in 1867, came to the conclusion that a very difficult situation could be met in no other way than by transferring the question from the region of legality to that of administrative fairness.

There is no question before their Lordships in this case concerning any appeal to the Governor-General in Council, and they abstain from saying anything as to the principles on which, if invoked, he may think fit to proceed. But the view that the rights of the appellants are not necessarily confined to rights under Sub-section 1 has an important bearing on the construction of that sub-section, inasmuch as it no longer takes away all remedy in cases to which the principle of *ultra vires* does not apply. It may even be that the power conferred on the Governor-General in Council enables him to take into account the considerations arising out of what had been done in the course of *de facto* administration, which James, L.J., excluded in delivering the judgment of the Judicial Committee in 1874, in *Maher* v. *The Town of Portland*, reported in Wheeler's "Confederation Law of Canada," and quoted by the late Lord Chancellor in delivering his recent judgment of the Committee in *Hirsch* v. *The Protestant Board of School Commissioners of Montreal* on the 2nd February last. The question is one of administrative policy, and it is

not before their Lordships. They desire, however, to observe that the view now expressed as to the relations of Sub-section 1 and Sub-section 3 of Section 93 is substantially the same as that taken in *Brophy* v. *The A.G. of Manitoba* [1895], A.C. 202. In that case the question arose under the Constitution Act of Manitoba, 1870, a Dominion Act under which, as subsequently confirmed by Imperial statute, Manitoba became one of the Provinces of the Dominion of Canada. The Act contains in Section 22 provisions which for present purposes are identical with those of Sub-sections 1, 3 and 4 of Section 93 of the British North America Act. It is true that in the second and corresponding subsection of the Manitoba Act the appeal is expressly stated to lie against any Act or decision of the Legislature of the Province as well as of any provincial authority, thus in words saying more than in Sub-section 3 of Section 93 of the Act of 1867. But Lord Herschell in *Brophy's* case expressed his dissent from the argument that the insertion of the additional words in the Manitoba Act showed that in the Act of 1867 it could not have been intended to comprehend the Legislatures under the words "any provincial authority." Their Lordships agree with his view, and they are of opinion that the Legislatures are so comprehended. The point may prove to be one of great importance if there is hereafter an appeal to the Governor-General in Council. In *Brophy's* case the Roman Catholic minority in Manitoba appealed to the Governor-General in Council under Sub-section 2 of Section 22 of their Constitutional Act on the ground that rights and privileges of theirs in relation to education had been affected by two statutes of the Legislature of Manitoba passed in 1890, which set up a general system of non-sectarian education. The schools of the Roman Catholic minority were deprived of their previously existing proportionate share of the money contributed for school purposes out of the taxes, while for the new non-sectarian schools they were both taxed and assessed for rates. It had been held, in *Barrett's* case [1892], A.C. 445, that the statutes of 1890 did not affect any right or privilege with respect to their schools which the Roman Catholics of Manitoba had by law or practice in their Province at the Union in 1870. The only right or privilege which they then possessed was to establish and maintain for the use of members of their own Church such schools, at their own expense, as they pleased. In *Barrett's* case this was the only question before the Judicial Committee, and it was held that the Acts of 1890 were not *ultra vires*.

But in *Brophy's* case (*ubi supra*) the question was the wholly different one, whether the rights and privileges of Roman Catholics in relation to education had not been so affected by the Act of 1890 as to enable an appeal to the Governor-General in Council in a *quasi* administrative capacity. It was held that there was such affection, in fact although not in law, inasmuch as Roman Catholics were to be taxed and rated for the upkeep of schools

which were obnoxious to their religious opinions in regard to education. It was no point of illegality. What was decided was that the Governor-General in Council had power to entertain such an appeal under Sub-section 2 of Section 22 of the Constitutional Act, corresponding as their Lordships have already stated to Sub-section 3 of Section 93 of the British North America Act, 1867.

Their Lordships have dwelt on what was decided in *Brophy's* case in reference to the scope of the appeal against the affection of rights or privileges within the meaning of Sub-section 3 of Section 93 of the Confederation Act, with a view to bringing out the limitation which has to be placed on the expressions used in Sub-section 1. The rights and privileges there referred to must be such as are given by law, and the redress which may be given is respect of prejudice to them, caused by laws made by the Provincial Legislatures which, in other respects, have the exclusive power of legislation in relation to education, is a redress based on the principle of *ultra vires*. Such redress can therefore, for the reasons given in *Brophy's* case, be sought from the Courts of Law alone. The other remedy which Sub-sections 3 and 4 afford not only supplements the former but affords cogent reason why Sub-section 1 should be construed as being confined strictly to questions of *ultra vires*. Were the Acts and Regulations complained of in the petition of right assailable under this principle ? In order to answer this question it is necessary to understand clearly what was their nature, and to understand this it is essential to see what has been the development of the system of education in Upper Canada.

Before 1867 there were in Canada schools of three principal classes, common schools, grammar schools and separate schools. Since Confederation there have come into existence, continuation schools, collegiate institutes and high schools, which have developed out of the three kinds of school last mentioned. The claim of the appellants is that, in 1867, Roman Catholics in Upper Canada enjoyed by law the right to establish denominational schools, to be conducted by boards of trustees chosen by themselves ; that, as regards selection of text books and courses of study, the control of these belonged to the boards of trustees, who could sanction in their schools courses of study co-extensive in scope with those, since Confederation, pursued in high schools, collegiate institutions and continuation schools. The case made was that the trustees could do this in the separate schools, inasmuch as these, although common schools, were not, under the old order of things, restricted in their scope as regards education of pupils up to 21 years of age. It is argued for the appellants that under Section 93 (1) the Roman Catholics of Ontario continued to enjoy these autonomous rights, coupled with a consequential right of exemption from taxation for the purposes of the high schools, collegiate institutes and continuation schools, which, it is said, are mere forms of what fall within the scope of

existing separate schools, and are, therefore, of a kind for which the Roman Catholics were exempt from taxation.

Their Lordships may say at once that if such a right was really conferred on the boards of separate schools, the right and the title to grants dependent on it were not interrupted by the Act of 1867. It was held by Rose, J., who tried the case, and by the Appellate Court of Ontario, that the newly created Province of Ontario was not affected by any obligation in regard to this, and that the separate school trustees had consequently, after Confederation, no legal right to share in any appropriation or grants to be made by the new Province of Ontario for common school purposes. For this conclusion reliance was placed on Section 20 of the Separate Schools Act of the United Province of 1863, which enacts that " every separate school shall be entitled to a share in the fund annually granted by the legislature of *this Province* for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes, now made or hereafter to be made by the Province or the Municipal authorities, according," &c. The learned Judges of the Appellate Court, who did not differ from the judgment of the first Judge in the case, have held that the right granted by the Act of 1863 was confined to a right to a share of the grants made by the old United Province of Canada, and had no application to the new Ontario established at Confederation. It was true, they said, that under Section 129 of the British North America Act all laws in force in Canada at the union were continued in Ontario as if the union had not been made, but subject to repeal or alteration by Parliament or by the legislature of Ontario. They thought, however, that to enact that a law shall continue in force after the union is not to declare that the meaning of that law shall be changed by the union, and there was nothing to indicate that a law relating to distribution of moneys voted by the legislature of the old Province of Canada should govern legislation after the union. The Act of 1863 might not be repealed, but the fund with which it dealt was no longer in existence.

The Supreme Court of Canada did not adopt this view. The Chief Justice of Canada emphatically dissented from it, and none of the other learned Judges who sat with him, not even those who were in favour of approving the judgment, expressed themselves as differing from his dissent. The Chief Justice of Canada thought the conclusion reached below on this question to be at variance with the spirit and intent of Section 93 (1) of the Act of 1867. Unless the legislatures of Ontario and Quebec were debarred from prejudicially affecting the rights and privileges which the religious minorities possessed in regard to their denominational schools in regard to maintenance and support, the protection given by the section would be illusory. On this point their Lordships are in full agreement with the Chief Justice of Canada. Section 93 was, in their view, obviously meant to apply to the future as well as to the past, and to the new Province of Ontario.

This consideration leads up to the crucial point in this appeal. Did the trustees of the separate Roman Catholic schools secure at Confederation a right to maintain, free from control or regulation by the legislature of Ontario, as respects the scope of instruction, denominational schools which could embrace the subjects formerly taught in the separate schools on their higher sides, and afterwards taught in the undenominational high schools, collegiate institutes and continuation schools, as developed after Confederation, or analogous subjects taught in the Roman Catholic Separate Schools before Confederation, and to exemption from taxation for the support of such undenominational educative organisations? And did the trustees secure a title to receive a share of every grant by the legislature for common school purposes, construed as extending to the maintenance of education of the type given in post-Confederation secondary schools, as well as in those that were merely elementary, based on the number of pupils attending the separate schools, and independent of the subjects taught, or the text books used, every separate school being entitled to its share, calculated according to a statutory rate, however advanced, however rudimentary, the education and books might be? If these questions are answered in the affirmative then it was *ultra vires* of Ontario to take away the right either to regulate the schools in a manner inconsistent with this freedom, or to diminish the grants or to tax for the support of the undenominational schools, by legislation, or administratively, so far as control was concerned, by State regulation.

The question is a very serious one. Before Confederation the common schools and with them the separate schools were left free, by statute (see Upper Canada Common Schools Act, 1859, section 16), to educate pupils up to the age of 21, and some of them were in the habit of giving to the older pupils advanced teaching such as would fit them to enter the University. But Roman Catholics find a great difficulty in sending their sons and daughters to the higher schools which have now been established for the purposes of this advanced teaching. As the Chief Justice of Canada has said, undenominational education is based on the idea that the separation of secular from religious education may be advantageous. But Roman Catholics, at least, hold that religious instruction and influence should always accompany secular training.

What, then were the rights of the supporters of the separate schools at the time of Confederation? To answer this, and the question of *ultra vires* which arises out of it, it is necessary to look at the history of the development of education in Canada.

In the end of the eighteenth century there had been grants made for the establishment and support of schools for the children of the inhabitants of the Province of Upper Canada. These grants were at first grants of land, and the schools to be established were to be such as appear then to have been somewhat loosely called grammar schools. The schools were put on a statutory

basis by an Act of the Legislative Council and Assembly of Upper Canada, passed in 1807, and were in that Act called "public schools," which were to be managed by trustees nominated for each school district. In 1816, under another Act, grants of money were made by the legislature for the benefit of the schools, which were in that Act and the subsequent Acts re-named common schools, and local Boards of Education were set up. The trustees were to manage the schools and make regulations for them, but they were to report every three months to the proper Board as to the regulations and the books used in the schools, and the Board was to control the regulations and the books.

By an Act of the Province in 1820, further moneys were granted from the taxes for the use of common schools, and by a later Act of 1824, still more money for the extension of moral and religious instruction, and for the development of the common schools, was directed to be applied. Yet further grants were made by a statute of 1833. By a later statute of 1839, provision was made for the assistance of a university college, as well as for the grammar schools which had grown up in the Province, and for the appropriation of the proceeds of land granted for their maintenance.

In 1840 an Imperial Act was passed uniting Upper and Lower Canada into a single Province of Canada, with one Legislative Council and Assembly. Up to this date what had been established were common and grammar schools. They appear to have been undenominational, although provision was made for moral and religious instruction. In 1841 a change in policy was made, for in that year an Act was passed which not only provided for the further organisation and endowment from provincial funds of the common schools, but enabled a Superintendent of Education to be appointed who was, among other things, to promote uniformity in the conduct of common schools throughout the Provinces. There were to be Commissioners elected for each township and parish, who were to regulate the courses of study to be followed and the books to be used. The chief change in policy made by this Act was that where a body of the inhabitants of a township or parish dissented from the regulations of the Commissioners, they could appoint trustees to take over the powers of common school Commissioners and to establish and maintain common schools "in the manner and subject to the visitation, conditions, rules and obligations" provided for other common schools, and to receive a due proportion according to their number, of the moneys coming from taxes and rates for the support of common schools. By a later section the Governor was to appoint a Board of Examiners for each city and town corporate, one-half of them to be Roman Catholics and the other half Protestants, each half to perform the duties in respect of the schools attended by children of its own religion.

Although the term "separate" is not in this Act applied to any school, it is plain that the Act initiated the principle of

separate schools. And it is also plain that, so far as control by the State was concerned, the new separate schools were in all material respects under the same control as the ordinary common schools.

In 1843 the policy described was further extended. The supervision of education by the Government of the United Province was developed. The establishment of Protestant and Roman Catholic schools, with teachers of their respective persuasions, was again provided for, and such schools were in this Act described as " separate " schools. But all such " separate schools " were to be subject, by Section 56, to the visitations conditions, rules and obligations of common schools. Normal schools for the training of teachers, and model schools in which the principal teachers were to be certified by a normal school, were also provided for. In 1846 this Act was superseded by a new Common Schools Act. A Superintendent of Schools for Upper Canada was to be appointed, whose powers extended, among other things, to the provision and recommendation of uniform and approved text books in all the schools. There was to be also a Board of Education for the Province. The limits of age for children attending the common schools were to be from 4 to 16. The principle of separate schools, with a right to receive a share of appropriations proportionate to the number of children attending the respective separate schools, was continued, and the separate schools were declared to be subject to the regulations obtaining with regard to other common schools.

Their Lordships do not think that the statutes which were subsequently passed down to 1855 bear materially on the question before them. It is plain that the policy laid down from the commencement of the nineteenth century up to 1855 was to place all the common schools, including the separate schools, which were merely a special form of these, under ultimate State regulation. By the Grammar Schools Act of 1853 the instruction in a grammar school was to extend to the higher branches of practical English and commercial education, including the elements of natural philosophy and mechanics, and also to Latin, Greek and mathematics, so as to prepare students for University education. There was also provision for uniting some of the common schools with grammar schools, a provision which indicates that, subject to regulation, there was no very definite limitation imposed on what might be taught in a common school. The tendency of the legislature up to this point was to bring education in Upper Canada, subject to minor variations, into a single system.

By 1855 the Roman Catholic population in Upper Canada had apparently increased in numbers and importance. For an Act was passed in that year, known as the Taché Act, which put the separate schools for Roman Catholics on a new footing. Meetings could be convened of persons desiring to establish separate schools, and they could select trustees, who became bodies corporate, and might become boards for the united

separate schools of a city or town. The trustees were to have all the powers of rating and collection from persons sending children to their schools that the trustees of common schools had in respect of their schools. They were to be bound to perform all duties required of the latter, and their teachers were to be subject to similar regulations. The supporters of the separate schools were exempted from rates for future common schools and common school libraries. Each of the new separate schools was to be entitled to a share in the fund annually granted by the legislature for the support of the pupils attending it, proportionate to the average numbers attending it. The trustees were to report to the Chief Superintendent of Education as to the average attendance, and he was to determine the share of grants to be received.

Meantime, statutory grants were made for improving the position of the grammar, normal and model schools. In 1859 a Consolidating Act was passed by what had become the Legislative Council and Assembly for the now United Province of Canada. This Act related to common schools. It did not make any important changes in the law, but aimed, for the most part, at bringing together the existing statutory provisions relating to common schools. Many of the provisions of this Act were embodied by reference in the Act respecting separate schools passed in the same years as stated below. The office of Chief Superintendent of Education was reconstituted. He was to be under the direction of the Governor. The duty of the Chief Superintendent under the General Consolidating Act now cited was among other things, under Section 106, to apportion in each year

> "all monies granted or provided by the legislature for the support of common schools in Upper Canada, and not otherwise appropriated by law, to the several counties, townships, cities, &c," according to ratio of population.

There was also to be a Council of Public Instruction of nine persons, appointed by the Governor. Among other things it was to make regulations for the organisation, government and discipline of common schools, for the classification of schools and teachers, and for school libraries, and to examine, and at its discretion to recommend or disapprove of text books for the use of schools or school libraries. By Section 120 the Governor could authorise the expenditure, in Upper Canada, out of the share of the legislative school grant and the additional monies granted in aid of common and grammar schools "and not otherwise expressly appropriated by law" of certain sums for purposes which were not connected with the separate schools. By Section 121, the whole of the remainder of the grants mentioned in Section 120 and not exclusively appropriated in its sub-sections, were to be expended in aid of the common schools according to the provisions of the Act. There was a Conscience Section (129) in the Act.

In the same year (1859) the Separate Schools Act, already referred to, was passed. The main provisions of the Common

Schools Act of 1859 were thereby made applicable to the separate schools, but the new Act was designed in Sub-sections 18 to 36 to make clear what was the position in particular of Roman Catholic separate schools. The existing provisions for these were repeated with variations, and it was enacted that the trustees of each separate school should perform the same duties and be subject to the same penalties as trustees of common schools. By Section 33 every separate school was again to be entitled to a proportionate share in the annual grant for common schools. The trustees were to report the names and attendance of the children attending these schools to the Chief Superintendent, who was thereupon to determine what they were entitled to receive out of the legislative grant.

It is now necessary to refer to the final Separate Schools Act, passed in 1863, which substituted a new set of provisions in the Act of 1859, in place of Sub-sections 18 to 36 which were by this Act repealed, Amongst those new provisions was Section 20, a re-enactment with additions of the old Section 33 of the Act of 1859; and a section which their Lordships set out later in this judgment.

The appellants contend that the words in Section 106 of the Common Schools Act of 1859 "not otherwise appropriated by law" includes the share of the apportioned fund to which they are entitled under Section 20 of the Act of 1863, and shows that they are not excluded from sharing in all the moneys appropriated outside those "granted or provided by the Legislature for the support of Common Schools." But their Lordships think that this is erroneous and that the learned Judges were right who thought that the separate schools are only entitled to share in the moneys "granted by the Legislature for the support of Common Schools not otherwise appropriated by law," and also by the Act of 1863 in all other public grants made for common school purposes. The appropriations form in short a first debit item against the money grant. After that, after the appropriations have been made and the debit item satisfied, comes the second stage, namely, that of apportionment; and it is in this apportionment that the separate schools have their share. The apportionment mentioned in Section 106 (2) is not that of the total fund, but only of that fund after the trustees of the separate schools had received their share. This their Lordships regard as the true meaning of the Act.

This statute of 1863 is an important one. Its declared purpose was to restore to Roman Catholics in Upper Canada certain rights in respect of separate schools, and to bring the law respecting separate schools more into harmony with the law respecting common schools. It was in force at Confederation, and it has been spoken of as the Charter of the denominational schools. The chief points in it were that separate school sections, whether in the same or in adjoining municipalities (not only, as in the earlier Act, the schools in one ward of a city or town), might be joined in a separate

school union section. The teachers of separate schools were to be subject to the same examinations, and to receive certificates of qualification in the same way as common school teachers generally. Supporters of separate schools were to be exempt from payment of municipal rates for common schools and libraries, while they continued to be supporters of separate schools, and not merely for the current year, as under the old legislation. The Roman Catholic separate schools were to be subject to such inspection as might be directed by the Chief Superintendent of Education, and were to be subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada. All Judges, members of the legislature, heads of local municipal bodies, the Chief Superintendent and the Local Superintendent of Common Schools, and clergymen of the Roman Church, were to be visitors of these separate schools. Section 20 is a section to which much of the argument at their Lordships' Bar was directed. It is in these terms :—

> " Every separate school shall be entitled to a share in the fund annually granted by the legislature of this Province for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the Province or the municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new separate school, as compared with the whole average number of pupils attending school in the same city, town, village or township."

By Section 21, local assessments for common school purposes were excluded from the money to which the separate schools were to be entitled. By Section 26 the Roman Catholic separate schools were to be subject to such inspection as might be directed from time to time by the Chief Superintendent and were to be " subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada."

The questions which arise on this Act are, first of all, whether, having regard to the provisions quoted, laws have been enacted by the Province which prejudicially affect any legal right or privilege with respect to denominational schools which the Roman Catholic community (a class of persons) had obtained under these statutes at the union. The second question is whether under these statutes the Roman Catholic schools had become entitled at the union to grants which were fixed and could not be taken away or interfered with by the authorities of the Province. It has been to render the nature of these questions clear that their Lordships have considered it necessary to examine at some length the history and character of the legislation before Confederation.

The petition of right claims that the suppliants have a legal title to establish and conduct courses of study, with grades of

education, such as are now conducted in what are designated as continuation schools, collegiate institutes, and high schools, and that any statutes and regulations purporting to limit or prejudicially affect this title are *ultra vires*. The petition further claims that the class of persons represented by the petitioners are exempt from payment of rates imposed for the support of these organisations when not established by trustees of Roman Catholic separate schools. Consequentially on their claim the petitioners ask that the trustees of the Roman Catholic separate schools for Section 2, Township of Tiny, may have paid to them certain monies to which it is said that they would have been entitled on the footing that the general claim as to validity is properly established.

The appellants say that the old common schools were allowed to give such education as was found suitable to pupils up to 21, who were thereby prepared for the University, and that the separate schools enjoyed the right thus permitted, and possessed it at Confederation. For this purpose the classes in the schools were in point of fact "graded." The Courts of Ontario have held in the present case that while this grading was *de facto* permitted it was always subject to the regulations by which the State authorities might from time to time alter and define the work in the common (including the separate) schools. Subject to this supervision, "grading" might take place either in the classes of a single school, or by distributing the teaching where there was a group of schools, as in urban municipalities. It is said for the appellants that the only rival of the common and separate schools as they were up to and after Confederation, was the grammar school, which was not under the common school Acts, but was always organised under separate statutes. The appellants further argued that an Act passed after Confederation in Ontario in 1871 for the improvement of the common and grammar schools really transformed both the common and the grammar schools. They were re-arranged in two divisions, in one of which free education was to be given up to the age of 12, such division to be called a "public school." The other division was to be a "high school," and to give higher instruction with the aid of the old grammar school grant, and of contributions from local revenues by the municipal authorities. The Boards of grammar school trustees were to take over these high schools, and to administer them under regulation.

The appellants contend that the common school was at the union entitled to provide for the public, other than separate school supporters, education of every kind which in the judgment of its trustees it was desirable to give, and that some of the urban common schools were then known as high schools, in which the teaching extended as far as that in the grammar schools, and was substantially that prescribed for the new high schools after the Act of 1871. The new public and high schools were, it is argued, just divisions of pre-Confederation common schools, with com-

pulsory taxation for the new high schools. From such taxation, it is said, the Roman Catholic separate school supporters must be exempt, and they cannot be affected by the combination brought about by the Act of 1871.

Of the post-Confederation continuation schools, which were established by statutes of 1896 and 1908, it is said that these began by being only continuation classes in public schools in municipalities in which no high school had been established, but were by the Act of 1908 made into continuation schools supported by grants and rates. In any view, as they cannot be given the form of separate schools, Roman Catholics should be free from taxation for them. Of collegiate institutes, it is said that they are only certain high schools to which a special name has been given.

The petition also claims that certain sections in various statutes which infringe the principles thus contended for are *ultra vires*.

The Provincial Legislature is supreme in matters of education, excepting so far as Section 93 of the British North America Act restricts its authority. Sub-section 1 preserves as they stood any rights and the privileges given in relation to denominational schools by law in 1867. The question, therefore, is whether the Province could then as the law stood so control the courses of study and the general range and quality of the textbooks used, as to enable the educational authorities of the Province to prescribe the gradation of the separate school and the stages in which instruction should be given in it. Examination of the statutes and of the history of the subject have satisfied their Lordships that, while a settlement was come to in 1863 with both Roman Catholics and Protestants, a settlement which in so far as it remained unaltered at Confederation, must be strictly maintained, the Province showed in the wording of the successive earlier statutes the intention to preserve for the rest the power to mould the educational system in the interests of the public at large, as distinguished from any section of it, however important. This consideration does not relieve a Court of Law from the obligation to confine itself strictly to the meaning of the words which define the legal rights, but it must be borne in mind in the interpretation of the language relating to regulation.

The examination of the series of statutes relating to education from 1807 onwards has led their Lordships to the view that the Province did provide for the regulation, in the full sense, of its common or public schools. It is not necessary to repeat the citations which have already been made. It is sufficient, for showing what regulation means, to refer to Section 6 of the Act of 1816, which delegated to the trustees of the common schools the power to make rules and regulations for their good government, the condition of the schools to be reported to the Board of Education, with the branches taught, the state of education, the number of the scholars, and things that might benefit the schools

directed by the trustees. The Board was to have power to superintend these common schools and to make reports to the Governor, which should be laid before the legislature. This policy was maintained through the Acts which followed. In 1841 a Superintendent of Education for the Province was appointed to visit the schools and apportion the monies voted. Common School Commissioners were set up for the various districts, with instructions to regulate for each school the course of study to be followed in it, and to establish general rules for the conduct of the school, to be communicated to the teachers. There were also to be appointed by the Governor boards of examiners (half to be Protestant and half to be Roman Catholic) to examine persons recommended as teachers, and to regulate for each school separately the course of study to be followed, the books to be used, and the general rules for the conduct of the schools. The Act of 1841 enabled, indeed, dissentient inhabitants to call for separate common schools and to appoint their own trustees, but these schools were to be subject to the " visitation, conditions, rules obligations and liabilities " of ordinary common schools. This provision was repeated in the Act relating to common schools of 1843 (Section 56), and in the Act of 1846 (Section 33). In the Act of 1850 it is expressly provided (Section 19) that the separate schools are to be under the same regulations as to the persons for whom the school is permitted to be established as common schools generally, and by Section 9 of the Separate Schools Act of 1863 it is provided that the trustees of separate schools are to perform the same duties and be subject to the same penalties as the trustees of common schools. Section 26 subjects these schools to such inspection as the Chief Superintendent may direct, and also to such regulation as the Council of Public Instruction may impose.

It is this principle and purpose which appear to their Lordships to be dominant through the statutes, and the language used in the sections just quoted has brought this Committee to the conclusion that the power of regulation must be interpreted in a wider sense than that given to it in the judgment of the Chief Justice of Canada. They are not at one with him in thinking that separate school trustees could give secondary education in their schools otherwise than by the permission, express or implied, of the Council of Public Instruction. The separate school was only a special form of common school, and the Council could in the case of each determine the courses to be pursued and the extent of the education to be imparted. A full power of regulation, such as the purpose of the statutes quoted renders appropriate, is what suggests itself, and this is the natural outcome of a scheme which never appears to have really varied. Such expressions as " organisation," " government," " discipline," and " classification," do, in their Lordships' interpretation of them, imply a real control of the separate schools. The duty of the Judicial Committee is simply to interpret the words used. It may be that even if the contention of the appellants as to the scope of Sub-section 1 is shut

out, there will remain to them a remedy of a wholly different kind in the shape of an appeal under Sub-section 3 to the Governor-General in Council in an administrative capacity. That question does not arise in this appeal and is in no way prejudiced by the conclusion to which their Lordships have come.

What has been said on the subject of *ultra vires* in regard to regulation also applies to the title to fixed grants. The appellants rely on Section 20 of the Separate Schools Act of 1863, a section which has been already quoted. It declares every separate school to be entitled to a share in the fund annually granted by the legislature for the support of common schools, and also to a share in all other public grants, investments and allotments for common school purposes, according to a defined proportion. It is argued that their share of these grants is being withheld from the appellants and from the Roman Catholic separate schools generally. But the question really turns on whether the authorities of the Province had power to make apportionments and payments out of the funds granted before the balance was arrived at which should be available for common school purposes. In their Lordships' opinion it is clear that there was such power. Section 106 of the Common School Act of 1859 defined as the duty of the Chief Superintendent to apportion the moneys granted or provided by the legislature "and not otherwise appropriated by law" in a manner analogous to that subsequently provided by Section 20 of the Act of 1863. Section 120 of the 1859 Act enabled the Governor to make a number of appropriations out of the sums granted, and Section 121 provides that the whole of the remainder of the grants mentioned and not exclusively appropriated in the earlier sub-sections are to be expended in aid of the common schools according to the provisions of the Act.

In their Lordships' view, in the face of the provisions referred to, it is impossible to contend successfully that it was *ultra vires* after Confederation to make new appropriations out of the grants which would diminish what would otherwise have come to the appellants. Whether the case is looked at from the point of view of regulation, or whether it is regarded from that of discretion in power of appropriation, the result is the same. It is indeed true that power to regulate merely does not imply a power to abolish. But the controversy with which this Board has to deal on the present occasion is a long way from abolition. It may be that the new laws will hamper the freedom of the Roman Catholics in their denominational schools. They may conceivably be or have been subjected to injustice of a kind that they can submit to the Governor-General in Council, and through him to the Parliament of Canada. But they are still left with separate schools. which are none the less actual because the liberty of giving secondary and higher education in them may be abridged by regulation. Such an abridgment may be in the usual course when a national system of education has attained a certain stage in its development, and it would be difficult to

forego this power if the grading which may be essential is also to be possible. Their Lordships do not think grading is in itself inconsistent with such rights to separation of schools as were reserved at Confederation.

Copious reference has been made in the argument to the reports, circulars and instructions which were issued with reference to educational administration by the Chief Superintendent and other officials, from time to time, before Confederation. These documents are not relevant in construing Section 93, but they do show what the administrative system was, and as doing so, they have been legitimately referred to. In the report in 1846, Dr. Ryerson, who was then Assistant Superintendent and shortly afterwards became Chief Superintendent, gave his first account of the system which was being progressively built up. He laid stress on the control of text books and on the provision of normal schools in which to train teachers. His activities, and the work of those who were setting themselves to the same task of developing the administrative side of the education problem, are fully summarised in the elaborate judgment of Rose, J., who tried the case. While their Lordships do not agree with that learned Judge in the view, taken by himself and the other Ontario Judges, that there was no Province of Canada after 1867 to which the principle of *ultra vires* applied, they observe the thoroughness of his judgment in other respects and the way in which he has covered in detail the field of controversy. He devoted much of his judgment to pointing out that the real question is whether the legislation subsequent to 1871 has prejudicially affected the appellants' rights, firstly, by depriving separate school supporters of the power to conduct such schools as were actually being conducted at Confederation by common school trustees in certain localities, and secondly, by making separate school supporters liable for rates for the support of schools which have been set up to do some of the work which separate schools had a legal right to do.

It is a satisfaction to have had the advantage in a case so important and complicated as this, of judgments so thorough and exhaustive as these, both in the Supreme Court of Canada and in the Ontario Courts.

For reasons which now sufficiently appear, their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

**In the Privy Council.**

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THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR SCHOOL SECTION No. 2 IN THE TOWNSHIP OF TINY AND OTHERS

*v.*

THE KING.

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DELIVERED BY VISCOUNT HALDANE.

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