

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brophy and others v. The Attorney-General of Manitoba, from the Supreme Court of Canada; delivered 29th January 1895.*

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Present:

THE LORD CHANCELLOR.

LORD WATSON.

LORD MACNAGHTEN.

LORD SHAND.

[*Delivered by the Lord Chancellor.*]

In the year 1890 two Acts were passed by the Legislature of Manitoba relating to education. One of these created a Department of Education and an "Advisory Board." The Board was to consist of seven members, four of whom were to be appointed by the Department of Education, two to be elected by the Public and High School teachers of the Province, and one to be appointed by the University Council. The Advisory Board were empowered (amongst other things) to authorise text books for the use of pupils and to prescribe the form of religious exercises to be used in schools.

The other Act which was termed "The Public Schools Act" established a system of public education "entirely non-sectarian," no religious exercises being allowed except those conducted according to the regulations of the Advisory Board. It will be necessary hereafter to refer somewhat more in detail to the provisions of this Act.

The Act came into force on the 1st of May 1890. By virtue of its provisions, by-laws were made by the Municipal Corporation of Winnipeg, under which a rate was to be levied upon Protestant and Roman Catholic ratepayers alike for school purposes. An application was thereupon made to the Court of Queen's Bench of Manitoba to quash these by-laws on the ground that the Public Schools Act 1890 was *ultra vires* of the Provincial Legislature, inasmuch as it prejudicially affected a right or privilege with respect to denominational schools which the Roman Catholics had by law or practice in the Province at the Union. The Court of Queen's Bench refused the application, being of opinion that the Act was *intra vires*. The Supreme Court of Canada took a different view, but upon appeal this Board reversed their decision and restored the judgment of the Court of Queen's Bench.

Memorials and petitions were afterwards presented to the Governor-General in Council on behalf of the Roman Catholic minority of Manitoba by way of appeal against the Education Acts of 1890. These memorials and petitions having been taken into consideration, a case in relation thereto was in pursuance of the provisions of the Supreme and Exchequer Courts Act referred by the Governor-General in Council to the Supreme Court of Canada. The questions referred for hearing and consideration were the following:—

“ (1) Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by Sub-section 3 of Section 93 of the British North America Act 1867, or by Sub-section 2 of Section 22 of the Manitoba Act 33 Victoria (1870), chapter 3, Canada ?

“ (2) Are the grounds set forth in the petitions and memorials such as may be the subject of

appeal under the authority of the sub-sections above referred to or either of them ?

“(3) Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett v. The City of Winnipeg* and *Logan v. The City of Winnipeg* dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the Union under the Statutes of the Province have been interfered with by the two Statutes of 1890 complained of in the said petitions and memorials ?

“(4) Does Sub-section 3 of Section 93 of the British North America Act, 1867, apply to Manitoba ?

“(5) Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises ?

“(6) Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority ‘a right ‘or privilege in relation to education’ within the meaning of Sub-section 2 of Section 22 of the Manitoba Act, or establish a system of separate or dissentient schools ‘within the meaning of ‘Sub-section 3 of Section 93 of the British ‘North America Act 1867,’ if said Section 93 be found applicable to Manitoba; and if so, did the two Acts of 1890 complained of or either of them affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council ?”

The learned Judges of the Supreme Court were divided in opinion upon each of the questions submitted. They were all however by a majority of three Judges out of five answered in the negative.

The appeal to the Governor-General in Council was founded upon the 22nd section of the Manitoba Act 1870 and the 93rd section of the British North America Act 1867. By the former of these statutes (which was confirmed and declared to be valid and effectual by an Imperial Statute) Manitoba was created a Province of the Dominion.

The 2nd section of the Manitoba Act enacts that after the prescribed day the British North America Act shall "except those parts thereof which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more but not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba in the same way and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act." It cannot be questioned therefore that section 93 of the British North America Act (save such parts of it as are specially applicable to some only of the Provinces of which the Dominion was in 1870 composed) is made applicable to the Province of Manitoba except in so far as it is varied by the Manitoba Act. The 22nd section of that Statute deals with the same subject-matter as section 93 of the British North America Act. The 2nd sub-section of this latter section may be discarded from consideration, as it is manifestly applicable only to the Provinces of Ontario and Quebec. The remaining provisions closely correspond with those of section 22 of the Manitoba Act. The only difference between the introductory part and the 1st sub-section of the two sections, is that in the Manitoba Act the words "or practice" are added after the word "law" in the 1st sub-section

The 3rd sub-section of section 22 of the Manitoba Act is identical with the 4th sub-section of section 93 of the British North America Act. The 2nd and 3rd sub-sections respectively are the same, except that in the 2nd sub-section of the Manitoba Act the words "of the Legislature of the Province or" are inserted before the words "any Provincial authority" and that the 3rd sub-section of the British North America Act commences with the words: "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." In view of this comparison it appears to their Lordships impossible to come to any other conclusion than that the 22nd section of the Manitoba Act was intended to be a substitute for the 93rd section of the British North America Act. Obviously all that was intended to be identical has been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier Statute they must be regarded as indicating the variations from those provisions intended to be introduced in the Province of Manitoba.

In their Lordships' opinion therefore it is the 22nd section of the Manitoba Act which has to be construed in the present case, though it is of course legitimate to consider the terms of the earlier Act, and to take advantage of any assistance they may afford in the construction of enactments with which they so closely correspond and which have been substituted for them.

Before entering upon a critical examination of the important section of the Manitoba Act, it will be convenient to state the circumstances under which that Act was passed, and also the exact scope of the decision of this Board in the case of *Barrett v. The City of Winnipeg* which seems to have given rise to some misapprehension. In 1867 the union of the Provinces of Canada,

Nova Scotia, and New Brunswick took place. Among the obstacles which had to be overcome in order to bring about that union none perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education. It had been the subject of much controversy in Upper and Lower Canada. In Upper Canada a general system of undenominational education had been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that Province. The 2nd sub-section of section 93 of the British North America Act extended all the powers privileges and duties which were then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Roman Catholic inhabitants of that Province to the dissentient schools of the Protestant and Roman Catholic inhabitants of Quebec. There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario with regard to education were shared by the members of the same communion in the territory which afterwards became the Province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church. At the time when the Province of Manitoba became part of the Dominion of Canada, the Roman Catholic and Protestant populations in the Province were about equal in number. Prior to that time there did not exist in the territory then incorporated any public system of education. The several religious denominations had established such schools as they thought fit, and maintained them

by means of funds voluntarily contributed by the members of their own communion. None of them received any State aid.

The terms upon which Manitoba was to become a Province of the Dominion were matter of negotiation between representatives of the inhabitants of Manitoba and of the Dominion Government. The terms agreed upon, so far as education was concerned, must be taken to be embodied in the 22nd section of the Act of 1870. Their Lordships do not think that anything is to be gained by the inquiry how far the provisions of this section placed the Province of Manitoba in a different position from the other Provinces, or whether it was one more or less advantageous. There can be no presumption as to the extent to which a variation was intended. This can only be determined by construing the words of the section according to their natural signification.

Among the very first measures passed by the Legislature of Manitoba was an Act to establish a system of education in the Province. The provisions of that Act will require examination. It is sufficient for the present to say that the system established was distinctly denominational. This system, with some modifications of the original scheme, the fruit of later legislation, remained in force until it was put an end to by the Acts which have given rise to the present controversy.

In *Barrett's* case the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the Province *at the Union*. Their Lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed either by law or in practice was the right or

privilege of establishing and maintaining for the use of members of their own church such schools as they pleased. It appeared to their Lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890. It was not doubted that the object of the 1st sub-section of section 22 was to afford protection to denominational schools, or that it was proper to have regard to the intent of the Legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this Board upon the 1st sub-section reduced within very narrow limits the protection afforded by that sub-section in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the Legislature, if violence were done to the language in which their legislation has taken shape, but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst however it is necessary to resist any



temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the Legislature, it is quite legitimate where more than one construction of a Statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention.

With these preliminary observations their Lordships proceed to consider the terms of the 2nd and 3rd sub-sections of section 22 of the Act of 1870, upon the construction of which the questions submitted chiefly depend. For the reasons which have been given their Lordships concur with the majority of the Supreme Court in thinking that the main issues are not in any way concluded either by the decision in *Barrett's* case or by any principles involved in that decision.

At the outset this question presents itself. Are the 2nd and 3rd sub-sections, as contended by the Respondent, and affirmed by some of the Judges of the Supreme Court, designed only to enforce the prohibition contained in the 1st sub-section? The arguments against this contention appear to their Lordships conclusive. In the first place that sub-section needs no further provision to enforce it. It imposes a limitation on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the Provincial Legislature, and therefore null and void. It was so decided by this Board in *Barrett's* case. A doubt was there suggested whether that appeal was competent, in consequence of the provisions of the 2nd sub-section, but their Lordships were satisfied that the provisions of sub-sections 2 and 3 did not "operate to withdraw such a question as that involved in the case from the jurisdiction of the ordinary tribunals of the country." It is

hardly necessary to point out how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor-General in Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If for example the Supreme Court of Canada, and this Committee on Appeal, declared an enactment of the Legislature of Manitoba relating to education to be *intra vires*, and the Governor-General in Council on an appeal to him considered it *ultra vires*, what would happen? If the Provincial Legislature declined to yield to his view, as would almost certainly and most naturally be the case, recourse could only be had to the Parliament of the Dominion. But the Parliament of Canada is only empowered to legislate as far as the circumstances of the case require "for the due execution of the provisions" of the 22nd section. If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared *ultra vires* by the Courts which had decided that the provisions of the section had not been violated by the Legislature of the Province. If on the other hand the Governor-General declared a Provincial law to be *intra vires*, it would be an ineffectual declaration. It could only be made effectual by the action of the Courts, which would have for themselves to determine the question which he decided, and if they arrived at a different conclusion and pronounced the enactment *ultra vires* it would be none the less null and void because the Governor-General in Council had declared it *intra vires*. These considerations are of themselves most cogent to show that the 2nd sub-section ought not to be construed as giving to parties aggrieved an appeal to the Governor-General in Council concurrently with the right to resort to the Courts in case the provisions of the 1st sub-section are contravened, unless no other

construction of the sub-sections be reasonably possible. The nature of the remedy, too, which the 3rd sub-section provides, for enforcing the decision of the Governor-General, strongly confirms this view. That remedy is either a Provincial law or a law passed by the Parliament of Canada. What would be the utility of passing a law for the purpose merely of annulling an enactment which the ordinary tribunals would without legislation declare to be null, and to which they would refuse to give effect? Such legislation would indeed be futile.

So far the matter has been dealt with apart from an examination of the terms of the 2nd sub-section itself. The considerations adverted to would seem to justify any possible construction of that sub-section which would avoid the consequences pointed out. But when its language is examined, so far from presenting any difficulties, it greatly strengthens the conclusion suggested by the other parts of the section. The first sub-section is confined to a right or privilege of a "class of persons" with respect to denominational education "at the Union," the 2nd sub-section applies to laws affecting a right or privilege "of the Protestant or Roman Catholic minority" in relation to education. If the object of the 2nd sub-section had been that contended for by the Respondent, the natural and obvious mode of expressing such intention would have been to authorise an appeal from any Act of the Provincial Legislature affecting "any such right or privilege as aforesaid." The limiting words "at the Union" are however omitted, for the expression "any class of persons" there is substituted "the Protestant or Roman Catholic minority of the Queen's subjects," and instead of the words "with respect to denominational schools," the wider term "in relation to education" is used.

The 1st sub-section invalidates a law affecting prejudicially the right or privilege of "any class" of persons, the 2nd sub-section gives an appeal only where the right or privilege affected is that of the "Protestant or Roman Catholic minority." Any class of the majority is clearly within the purview of the 1st sub-section, but it seems equally clear that no class of the Protestant or Catholic majority would have a *locus standi* to appeal under the 2nd sub-section, because its rights or privileges had been affected. Moreover to bring a case within that sub-section it would be essential to show that a right or privilege had been "affected." Could this be said to be the case because a void law had been passed which purported to do something but was wholly ineffectual? To prohibit a particular enactment and render it *ultra vires* surely prevents its affecting any rights.

It would do violence to sound canons of construction if the same meaning were to be attributed to the very different language employed in the two sub-sections.

In their Lordships' opinion the 2nd sub-section is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it. The question then arises, does the sub-section extend to rights and privileges acquired by legislation subsequent to the Union? It extends in terms to "any" right or privilege of the minority affected by an Act passed by the Legislature, and would therefore seem to embrace all rights and privileges existing at the time when such Act was passed. Their Lordships see no justification for putting a limitation on language thus unlimited. There is nothing in the surrounding circumstances, or in the apparent intention of the Legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the

Governor-General in Council against an Act passed by the Provincial Legislature because it abrogated rights conferred by previous legislation, whilst if there had been no previous legislation, the Acts complained of would not only have been *intra vires* but could not have afforded ground for any appeal. There is no doubt force in this argument, but it admits, their Lordships think, of an answer.

Those who were stipulating for the provisions of section 22 as a condition of the Union, and those who gave their legislative assent to the Act by which it was brought about, had in view the perils then apprehended. The immediate adoption by the Legislature of an educational system obnoxious either to Catholics or Protestants would not be contemplated as possible. As has been already stated, the Roman Catholics and Protestants in the Province were about equal in number. It was impossible at that time for either party to obtain legislative sanction to a scheme of education obnoxious to the other. The establishment of a system of public education in which both parties would concur was probably then in immediate prospect. The Legislature of Manitoba first met on the 15th of March 1871. On the 3rd of May following the Education Act of 1871 received the Royal Assent. But the future was uncertain. Either Roman Catholics or Protestants might become the preponderating power in the Legislature, and it might under such conditions be impossible for the minority to prevent the creation at the public cost of schools which, though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions. The change to a Roman Catholic system of public schools would have been regarded with as much distaste by the Protestants of the Province as the change to an unsectarian system was by the Catholics.

Whether this explanation be the correct one or not, their Lordships do not think that the difficulty suggested is a sufficient warrant for departing from the plain meaning of the words of the enactment, or for refusing to adopt the construction which apart from this objection would seem to be the right one.

Their Lordships being of opinion that the enactment which governs the present case is the 22nd section of the Manitoba Act, it is unnecessary to refer at any length to the arguments derived from the provisions of section 93 of the British North America Act. But in so far as they throw light on the matter they do not in their Lordships' opinion weaken, but rather strengthen the views derived from a study of the later enactment. It is admitted that the 3rd and 4th sub-sections of section 93 (the latter of which is, as has been observed, identical with sub-section 3 of section 22 of the Manitoba Act) were not intended to have effect merely when a Provincial Legislature had exceeded the limit imposed on its powers by sub-section 1, for sub-section 3 gives an appeal to the Governor-General, not only where a system of separate or dissentient schools existed in a Province at the time of the Union, but also where in any Province such a system was "thereafter established by the Legislature of the Province." It is manifest that this relates to a state of things created by post-Union legislation. It was said it refers only to acts or decisions of a "Provincial authority," and not to acts of a Provincial Legislature. It is unnecessary to determine this point, but their Lordships must express their dissent from the argument that the insertion of the words "of the Legislature of the Province" in the Manitoba Act shew that in the British North America Act it could not have been intended to comprehend the Legislatures under the words "any Provincial authority." Whether they be so comprehended

or not has no bearing on the point immediately under discussion.

It was argued that the omission from the 2nd sub-section of section 22 of the Manitoba Act of any reference to a system of separate or dissentient schools "thereafter established by the "Legislature of the Province" was unfavourable to the contention of the Appellants. This argument met with some favour in the Court below. If the words with which the 3rd sub-section of section 93 commences had been found in sub-section 2 of section 22 of the Manitoba Act, the omission of the following words would no doubt have been important. But the reason for the difference between the sub-sections is manifest. At the time the Dominion Act was passed a system of denominational schools adapted to the demands of the minority existed in some Provinces, in others it might thereafter be established by legislation, whilst in Manitoba in 1870 no such system was in operation, and it could only come into existence by being "thereafter established." The words which preface the right of appeal in the Act creating the Dominion would therefore have been quite inappropriate in the Act by which Manitoba became a Province of the Dominion. But the terms of the critical sub-section of that Act are, as has been shown, quite general, and not made subject to any condition or limitation.

Before leaving this part of the case, it may be well to notice the argument urged by the Respondent that the construction which their Lordships have put upon the 2nd and 3rd sub-sections of section 22 of the Manitoba Act is inconsistent with the power conferred upon the Legislature of the Province to "exclusively "make laws in relation to education." The argument is fallacious. The power conferred is not absolute but limited. It is exerciseable only

“subject and according to the following provisions.” The sub-sections which follow, therefore, whatever be their true construction, define the conditions under which alone the Provincial Legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. Their right to legislate is not indeed, properly speaking, exclusive, for in the case specified in sub-section 3 the Parliament of Canada is authorised to legislate on the same subject. There is therefore no such inconsistency as was suggested.

The learned Chief Justice of the Supreme Court was much pressed by the consideration that there is an inherent right in a Legislature to repeal its own legislative acts and that “every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted.” He returns to this point more than once in the course of his judgment, and lays down as a maxim of constitutional construction that an inherent right to do so cannot be deemed to be withheld from a legislative body having its origin in a written constitution, unless the constitution in express words takes away the right, and he states it as his opinion that in construing the Manitoba Act the Court ought to proceed on this principle, and to hold the Legislature of that Province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless it could find some restriction of its rights in that respect in express terms in the Constitutional Act.

Their Lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other. It must be remembered that the Provincial Legislature is not in all respects supreme within the



Province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament. In relation to the subjects specified in section 92 of the British North America Act, and not falling within those set forth in section 91, the exclusive power of the Provincial Legislature may be said to be absolute. But this is not so as regards education, which is separately dealt with and has its own code both in the British North America Act and in the Manitoba Act. It may be said to be anomalous that such a restriction as that in question should be imposed on the free action of a Legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the Legislature to the Executive Authority? And yet this right is expressly and beyond all controversy conferred. If, upon the natural construction of the language used, it should appear that an appeal was permitted under circumstances involving a fetter upon the power of a Provincial Legislature to repeal its own enactments, their Lordships see no justification for a leaning against that construction, nor do they think it makes any difference whether the fetter is imposed by express words or by necessary implication.

In truth, however, to determine that an appeal lies to the Governor-General in Council in such a case as the present does not involve the proposition that the Provincial Legislature was unable to repeal the laws which it had passed. The validity of the repealing Act is not now in question, nor that it was effectual. If the decision be favourable to the Appellants the consequence, as will be pointed out presently, will by no means

necessarily be the repeal of the Acts of 1890 or the re-enactment of the prior legislation.

Bearing in mind the circumstances which existed in 1870 it does not appear to their Lordships an extravagant notion that in creating a Legislature for the Province with limited powers it should have been thought expedient, in case either Catholics or Protestants became preponderant, and rights which had come into existence under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority as the case might be.

Taking it then to be established that the 2nd sub-section of section 22 of the Manitoba Act extends to rights and privileges of the Roman Catholic minority acquired by legislation in the Province after the Union, the next question is whether any such right or privilege has been affected by the Acts of 1890? In order to answer this question it will be necessary to examine somewhat more closely than has hitherto been done the system established by the earlier legislation as well as the change effected by those Acts.

The Manitoba School Act of 1871 provided for a Board of Education of not less than 10 nor more than 14 members, of whom one half were to be Protestants and the other half Catholics. The two sections of the Board might meet at any time separately. Each section was to choose a chairman, and to have under its control and management the discipline of the schools of the section. One of the Protestant members was to be appointed Superintendent of the Protestant schools, and one of the Catholic members Superintendent of the Catholic schools, and these two were to be the joint secretaries of the Board, which was to select the books to be used

in the schools, except those having reference to religion or morals which were to be prescribed by the sections respectively. The legislative grant for common school education was to be appropriated, one moiety to support the Protestant, the other moiety the Catholic schools. Certain districts in which the population was mainly Catholic were to be considered Catholic school districts, and certain other districts where the population was mainly Protestant were to be considered Protestant school districts. Every year a meeting of the male inhabitants of each district, summoned by the Superintendent of the section to which the district belonged, was to appoint trustees, and to decide whether their contributions to the support of the school were to be raised by subscription, by a collection of a rate per scholar, or by assessment on the property of the district. They might also decide to erect a school house, and that the cost of it should be raised by assessment. In case the father or guardian of a school child was a Protestant in a Catholic district or *vice versa*, he might send the child to the school of the nearest district of the other section, and in case he contributed to the school the child attended a sum equal to what he would have been bound to pay if he had belonged to that district, he was exempt from payment to the school of the district in which he lived.

Acts amending the education law in some respects were passed in subsequent years, but it is not necessary to refer to them, as in 1881 the Act of 1871 and these amending Acts were repealed. The Manitoba School Act 1881 followed the same general lines as that of 1871. The number of the Board of Education was fixed at not more than 21 of whom 12 were to be Protestants and 9 Catholics. If a less number were appointed the same relative proportion was

to be observed. The Board as before was to resolve itself into two sections, Protestant and Catholic, each of which was to have the control of the schools of its section, and *all* the books to be used in the schools under its control were now to be selected by each section. There were to be as before a Protestant and a Catholic Superintendent. It was provided 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 Catholic district might include the same territory in whole or in part. The sum appropriated by the Legislature for common school purposes was to be divided between the Protestant and Roman Catholic sections of the Board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts in the Province where schools were in operation. With regard to local assessments for school purposes it was provided that the ratepayers of a school district should pay their respective assessments to the schools of their respective denominations, and in no case was a Protestant ratepayer to be obliged to pay for a Catholic school, or a Catholic ratepayer for a Protestant school.

The scheme embodied in this Act was modified in some of its details by later Acts of the Legislature, but they did not affect in substance the main features, to which attention has been called. While traces of the increase of the Protestant relatively to the Catholic population may be seen in the course which legislation took, the position of the Catholic and Protestant portions of the community in relation to education was not substantially altered, though the State aid which at the outset was divided equally between them had of course to be

adjusted and made proportionate to the school population which each supplied.

Their Lordships pass now to the Department of Education and Public Schools Acts of 1890 which certainly wrought a great change. Under the former of these Roman Catholics were not entitled as such to any representation on the Board of Education or on the Advisory Board, which was to authorise text books for the use of pupils and to prescribe the forms of religious exercises to be used in schools. All Protestant and Catholic school districts were to be subject to the provisions of the Public Schools Act. The public schools were all to be free, and to be entirely non-sectarian. No religious exercises were to be allowed unless conducted according to the regulations of the Advisory Board, and with the authority of the school trustees for the district. It was made the duty of the trustees to take possession of all public school property which had been acquired or given for public school purposes in the district. The Municipal Council of every city, town, and village, was directed to levy and collect upon the taxable property within the Municipality such sums as might be required by the public school trustees for school purposes. No Municipal Council was to have the right to exempt any property whatever from school taxation. And it was expressly enacted that any school not conducted according to all the provisions of the Act, or the regulations of the Department of Education, or the Advisory Board, should not be deemed a public school within the meaning of the law, and that such school should not participate in the legislative grant.

With the policy of these Acts their Lordships are not concerned, nor with the reasons which led to their enactment. It may be that as the

population of the Province became in proportion more largely Protestant, it was found increasingly difficult, especially in sparsely populated districts, to work the system inaugurated in 1871, even with the modifications introduced in later years. But whether this be so or not is immaterial. The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the Province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools provided for by the Statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which

they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected.

Mr. Justice Taschereau says that the legislation of 1890 having been irrevocably held to be *intra vires* cannot have "illegally" affected any of the rights or privileges of the Catholic minority. But the word "illegally" has no place in the sub-section in question. The appeal is given if the rights are in fact affected.

It is true that the religious exercises prescribed for public schools are not to be distinctively Protestant, for they are to be "non-sectarian," and any parent may withdraw his child from them. There may be many too who share the view expressed in one of the affidavits in *Barrett's* case, that there should not be any conscientious objections on the part of Roman Catholics to attend such schools, if adequate means be provided elsewhere of giving such moral and religious training as may be desired. But all this is not to the purpose. As a matter of fact the objection of Roman Catholics to schools such as alone receive State aid under the Act of 1890 is conscientious and deeply rooted. If this had not been so, if there had been a system of public education acceptable to Catholics and Protestants alike, the elaborate enactments which have been the subject of so much controversy and consideration would have been unnecessary. It is notorious that there were acute differences of opinion between Catholics and Protestants on the education question prior to 1870. This is recognised and emphasised in almost every line of those enactments. There

is no doubt either what the points of difference were, and it is in the light of these that the 22nd section of the Manitoba Act of 1870, which was in truth a Parliamentary compact, must be read.

For the reasons which have been given their Lordships are of opinion that the 2nd sub-section of section 22 of the Manitoba Act is the governing enactment, and that the appeal to the Governor-General in Council was admissible by virtue of that enactment, on the grounds set forth in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that sub-section. The further question is submitted whether the Governor-General in Council has power to make the declarations or remedial orders asked for in the memorials or petitions, or has any other jurisdiction in the premises. Their Lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded, but the particular course to be pursued must be determined by the authorities to whom it has been committed by the Statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd sub-section of section 22 of the Manitoba Act.

It is certainly not essential that the Statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these Statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies the wants of the great majority of the inhabitants of the Province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which



would remove the grievance upon which the appeal is founded, and were modified so far as might be necessary to give effect to these provisions.

Their Lordships will humbly advise Her Majesty that the questions submitted should be answered in the manner indicated by the views which they have expressed.

There will be no costs of this appeal.

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