In the Privy Council.

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ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF NEW BRUNSWICK.

BETWEEN

HENRY MAHER . . . . . *Appellant,*

AND

THE TOWN COUNCIL OF THE TOWN OF PORTLAND . . . . . } *Respondents.*

CASE FOR THE APPELLANT.

The following is a statement of the Case for the Appellant on this Record:—

Henry Maher, the Appellant, is a ratepayer of the Town of Portland, in the City and County of St. John, in the Province of New Brunswick, and was rated and assessed for the year 1872 in the sum of 57 dollars and 83 cents, for school purposes, under an Act of the Legislature of New Brunswick, called "The Common Schools Act, 1871," 34 Vic., cap. 21, and a subsequent Act amending the same.

The assessment was made by the assessors of taxes for the Town of Portland, in the said city and county, in pursuance of a Warrant or Notification under the Seal of the said town to levy and assess upon the said town and its inhabitants the sum of 12,428 dollars for the several purposes mentioned in the 9th Sub-section of the 58th Section of the said Act of 1871. This Warrant was issued by the Town Council in pursuance of a requisition of the Board of School Trustees of the said town, appointed and acting under the provisions of the said Acts.

Exhibit A, p. 4 of Record.

Exhibit B., p. 4 of Record.

The Order of the Town Council directing such Warrant to be issued, was as follows :—

" Whereas it appears from the requisition of the Board of School " Trustees of the Town of Portland, that the sum of 12,428 dollars is " required for the purpose of 'The Common Schools Act, 1871,' in the " present year of which 300 dollars is required for the repairs and " alteration of schools : Therefore resolved and ordered that there be raised, " levied, and assessed upon the Town of Portland, and the inhabitants " thereof, in the present year, the said sum of 12,428 dollars, by a special " assessment, for the several purposes mentioned in the 9th Sub-section of " the 58th Section of said Act, passed in the 34th year of Her present " Majesty, intituled 'An Act relating to Common Schools,' and under the " provision of said Act, and that Warrant do issue under the seal of the " town to the assessors of taxes for the Town of Portland, to levy and " assess the said sum of 12,428 dollars for the purposes above mentioned, " as a separate amount."

The Appellant, conceiving himself to be aggrieved by the said assessment, made upon him in pursuance of the said Warrant or Notification, which was issued in pursuance of the said Order, made upon the said requisition, applied to the Supreme Court of the province for a rule *nisi*, calling upon the said Town Council of Portland to shew cause why a writ of *certiorari* should not issue to them, to bring into the said Court the said Order, with a view of its being quashed.

Record pp. 5 & 6.

The Rule was moved upon Affidavits set forth pages 5 and 6 of the Record, and upon the ground that "The Common Schools Act, 1871," on which the whole proceedings, including the said Order, were founded, was void, as having been passed in contravention of, and also being repugnant to, the Act of the Imperial Parliament intituled " The British North America Act, 1867," 30 Vic., Cap. 3.

See 28 & 29 Vict., cap. 63, Secs. 2 & 3.

The 93rd Section of that Act provided :—

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

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

" (2.) All the powers, privileges, and duties at the Union by law " conferred and imposed in Upper Canada on the separate schools and " School Trustees of the Queen's Roman Catholic subjects shall be, " and the same are hereby, extended to the dissentient schools of the " Queen's Protestant and Roman Catholic subjects in Quebec.

" (3.) Where in any Province a system of separate or dissentient " schools exist 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.

" (4.) In case any such provincial law as from time to time

" seems to the Governor-General in Council requisite for the due " execution of the provisions of this Section is not made, or in case " any decision of the Governor-General in Council on any Appeal " under this Section is not duly executed by the proper provincial " authority in that behalf, then and in every such case, and as far only " as the circumstances of each case require, the Parliament of Canada " may make remedial laws for the due execution of the provisions of " this Section, and of any decision of the Governor-General in Council " under this Section."

It was contended by the Appellant that the rights and privileges of the Roman Catholic Inhabitants of the Province, of whom the Appellant was one, as a class of persons, had been prejudicially affected by the said "Common Schools Act, 1871," contrary to the provisions of Sub-section 1 of the 93rd Section of "The British North America Act, 1867," above extracted.

The motion was supported by the Affidavits of the Appellant and of two Roman Catholic gentlemen, one a priest, the last two deposing to the effect that previously to and up to the passing of the said Act of 1871, and after the passing of an Act of the Province called "An Act relating to Parish Schools," passed in the 21st year of Her Majesty's reign, they had taught in schools under the last-mentioned Act, with the knowledge and consent of the Inspector of Schools, to Roman Catholic pupils the Roman Catholic Catechism and other Roman Catholic books, including the reading books published by the Christian Brothers and other books used, in the Roman Catholic schools of Quebec and named in the said Affidavits; that in the said schools the special doctrines of the Roman Catholic religion were taught, and Roman Catholic prayers used; that these schools were under Government inspection under "The Parish Schools Act, 1858;" that the annual returns thereof stated that the books mentioned in the Affidavits were used in the schools and the religion of the teachers; that after the making of the said returns they received the semi-annual allowances from public funds made under the said Parish Schools Act. One of the Deponents testified to his personal knowledge of the existence of 25 or 30 Roman Catholic schools such as that taught by himself, and to his information and belief that there were in the Province 250 schools of that description, all of which were established, and were receiving provincial allowance under the said "Parish Schools Act, 1858," when "The Common Schools Act, 1871," was passed.

It was contended that liberty of teaching sectarian or denominational doctrine to the pupils, and of using sectarian and denominational books and prayers, in the Roman Catholic Schools, which, by the said Affidavits, was proved to have been enjoyed by the teachers in Roman Catholic Schools within the province, consistently and concurrently with their receipt of allowances from public funds, has in the case of Roman Catholic Schools been seriously impaired and interfered with. Among other matters it was contended that Sub-Section 12 of Section 58 of "The Common Schools Act, 1871," prohibited in effect the grant of public aid to any but schools conducted under the provisions of that Act; and that by Section 60 it was expressly enacted that all schools conducted under the provisions of that Act should be nonsectarian.

The result of this legislation, therefore, was to withdraw from such Roman Catholic Schools, or from such schools in which Roman Catholic doctrines were distinctively taught, and which were, therefore, sectarian and denominational in their character, the enjoyment of aid from public funds, a right or privilege which, it was contended, the Affidavits proved to have been, at the passing of the said Act of 1871, enjoyed by that large class of persons—the Roman Catholics of the Province, and which "right," or "privilege," therefore, "with respect to denominational schools," was, by the operation of "The Common Schools Act, 1871," "prejudicially affected," contrary to the provisions of the said "British North America Act, 1867," Sections 2 and 3, and Section 93, Sub-section (1).

It was contended, moreover, that "The Parish Schools Act, 1858," which was repealed by the said "Common Schools Act of 1871" was, in many respects—especially in Section 8—more favorable to denominational schools, such as Roman Catholic schools than the Act of 1871.

The Supreme Court refused the Rule *nisi*, holding that "The Common Schools Act, 1871," was constitutional and valid, and that it was not repugnant, as was argued, to the provisions of "The British North America Act, 1867."

Exhibit F., Record p. 30. Leave, however, was granted to the Appellant to appeal to the Privy Council: the Town of Portland, the Respondents in this Appeal being summoned to settle the terms of the Appeal, which summons they attended.

Exhibit J., Record p. 31. The Appellant contends that the Judgment of the said Supreme Court should be reversed, and that the said Rule *nisi* should have been granted, for the following amongst other

REASONS.

That the Order was void, being founded on the said Common Schools Act, 1871, which Act, or so much of it as authorised the said Order, was void and of no effect, as being repugnant to the provisions of the said "British North America Act, 1867," Section 93.

That the terms "separate schools" and "dissentient schools," used in Sub-sections 2 and 3 of the above Section are explained by, and apply to, the schools so called in "The Consolidated Acts of Upper Canada, No. 65," and in "The Consolidated Acts of Lower Canada, Nos. 15 and 16," and do not mean the same as the "denominational schools" mentioned in Sub-section 1.

JOSEPH BROWN,
FREDERICK MEADOWS WHITE, } *Counsel for Appellant.*

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF NEW BRUNSWICK.

BETWEEN

HENRY MAHER . . . APPELLANT,

AND

THE TOWN COUNCIL OF THE TOWN OF PORTLAND . . } RESPONDENTS.

CASE FOR THE APPELLANT.

LINKLATER, HACKWOOD, ADDISON, & BROWN,
7, Walbrook,
APPELLANT'S SOLICITORS.

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In the Privy Council.

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ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF NEW BRUNSWICK.

Ex parte HENRY MAHER.

BETWEEN

HENRY MAHER - - - - - - - *Appellant,*

AND

THE TOWN COUNCIL OF THE TOWN OF PORTLAND - - - - - - - *Respondents.*

CASE ON BEHALF OF THE RESPONDENTS.

RECORD.

This is an Appeal from a Judgment of the said Supreme Court, made and bearing date the 17th June, 1873, whereby the Court refused to grant a rule to require the town of Portland to show cause why a writ of certiorari should not issue to remove a certain Order of Assessment made by the Respondents with a view to the same Order being quashed.

P. 29, L. 38, et seq.

It is to be observed that the Judgment now appealed from merely refused a rule to show cause, and that such Judgment was given ex parte and without any grounds in the way of affidavit or otherwise being laid before the Court, save on the part of the now Appellant. However, the leave of the Court of New Brunswick to appeal to Her Majesty in Council appears to have been granted on hearing Counsel for the Town of Portland, as to the terms on which such leave was given, and these Respondents have been named as such in the Petition of Appeal to Her Majesty in Council. It is submitted nevertheless in the first place that the said ex parte Judgment and Order was not pronounced in respect of any sum or matter at issue above the amount or value of £300, and did not involve any question respecting property, or any civil right, amounting to, or of

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the value of, £300, and that the matter in question did not relate to the taking or demanding any duty payable to Her Majesty, or anything whereby the rights of Her Majesty might be bound. And, consequently, that if the said Judgment and Order was the subject of appeal at all, the proper course was to have obtained, not the ordinary leave from the lower Court to appeal, but special leave from Her Majesty in Council. And these Respondents humbly crave the benefit of this preliminary objection in bar.

The printed Record in the present case contains only copies of the affidavits and other documents on which the rule for a certiorari was moved, of the Judgment and Order of the Supreme Court, and of the subsequent formal proceedings to the allowance of the Appeal. Certain acts of the Legislature of the Province of New Brunswick which are hereinafter, and in the judgment of the said Supreme Court, referred to, and also copies of certain proceedings hereinafter referred to, will be found in a return to the House of Commons of Canada, made on the 18th March, 1873, and printed by order of the Canadian Legislature in that year.

The facts of the case, so far as they appear on the printed Record and the return last mentioned, are as follows:—

P. 10, L. 2, &c., 30 Vict. cap. 3.

Prior to and down to the time of the union of the Provinces of Canada, Nova Scotia, and New Brunswick, under "The British North America Act, 1867," there existed in the Province of New Brunswick as well certain parochial schools established under a general Act of the local legislature as certain denominational schools, incorporated or recognised under various special Acts of such legislature. The parochial schools were regulated by a general Act of the local legislature, 21 Vic., cap. ix., "An Act relating to Parish Schools."

Printed Return, p. 22, &c.

Under this Act (Sections 1 to 4 inclusive) the Governor in Council was authorised to appoint a Chief Superintendent of Schools, and a Board of Education was established for the Province, consisting of the Governor in Council, with the Superintendent of Schools. The Board were empowered (among other things) to make regulations for the "organisation, government, and discipline of parish "schools, and the examination, classification, and mode of licensing teachers, and "the mode of certifying the time taught and of paying them." The Board were also to "apportion all moneys granted by the Legislature for the support of such "schools among the several parishes, not exceeding certain pecuniary limits." The Board were to provide for the establishment, regulation, and government of school libraries, and the selection of books to be used therein, but "no works of "a licentious, vicious, or immoral tendency, or hostile to the Christian religion, "or works on controversial theology" were to be admitted. The Board were also empowered to make such other regulations as might be deemed necessary to carry into effect the Act.

By Section 5 of the Act the Superintendent was (amongst other things) to have a general supervision and direction of the Parish Schools, subject to the order of the Board of Education, and was to enforce and give effect to all the regulations made by the Board.

The Act then (Section 6) provided for the annual election at the time and in the same manner as other town or parish officers, of three Trustees of Schools in each town and parish, who were to be subject to the same pains and penalties for neglect or refusal to act, or for the nonperformance of their duties as other town and parish officers, and who were to divide their respective parishes into convenient School Districts, and to give any licensed teacher authority in writing

to open a school in a district where the inhabitants should have provided a sufficient school-house, and secure the necessary salary, and who were, with the assent of the inhabitants, to agree with such teacher. The trustees were also empowered " to suspend or displace any teacher for incapacity or any improper " or immoral conduct, subject to the decision of the Board of Education, " and were also required, once a year at least, to examine the schools in " their respective parishes." The section also provided that in any town, village, or populous district the trustees might authorise such number of schools as the wants of the population might require, and, when they deemed it necessary might authorise the employment of an assistant licensed teacher in any large school. The trustees were also to " apportion among the " school districts in their respective parishes any moneys raised by county or " parish assessment for the support and maintenance of the schools therein in " such manner as they should deem just and equitable." And it was further provided that " any parish or district adopting the principle of assessment and " the sum required for a teacher being assessed and paid, should for every year such " assessment was so made and paid, receive from the Province Treasurer ten per " cent. over the allowance to schools of the same class in parishes or districts not " so assessed to be apportioned and paid the teachers therein." The 7th Section of the Act provides for the election by the inhabitants of the district (being ratepayers) of a School Committee of three persons who were to have charge of the school-house, furniture, apparatus, and grounds, and who, where necessary, were to call meetings of the inhabitants of the district for the purpose of providing a school-house, books, apparatus, school furniture, and fuel, and for the support of the school and the comfort of the scholars, and who were empowered to admit so many free scholars, and also children at reduced rates, being the children of poor and indigent parents, as they might deem prudent and just. The 8th Section contains the following clause:—" The teachers, " male and female, shall be divided into three classes qualified as follows:—

" Male teachers of the first class to teach spelling, reading, writing, arithmetic, " English grammar, geography, history, book keeping, geometry, mensuration, " land surveying, navigation, and algebra ; of the second class, spelling, reading, " writing, arithmetic, English grammar, geography, history, and book keeping ; of " the third class, spelling, reading, writing, and arithmetic.

" Female teachers of the first class to teach spelling, reading, writing, and arithmetic, English grammar, geography, history, and common needlework; of the " second class, spelling, reading, writing, arithmetic, English grammar, geography, " and common needlework ; of the third class, spelling, reading, writing, arithmetic, " and common needlework."

And such section also contained the following clause:—

" Every teacher shall take diligent care and exert his best endeavours to " impress on the minds of the children committed to his care the principles of " Christianity, morality, and justice, and a sacred regard to truth and honesty, " love of their country, loyalty, humanity, and universal benevolence, sobriety, " industry, and frugality, chastity, moderation, and temperance, order, and cleanliness, and all other virtues which are the ornaments of human society ; but no " pupil shall be required to read or study in or from any religious book, or join " in any act of devotion objected to by his parents or guardians, and the Board of " Education shall, by regulation, secure to all children whose parents or guardians " do not object to it, the reading of the Bible in parish schools ; and the Bible,

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The 11th and following sections of the Act made provision for assessment wherever any county, parish, district or municipality determined to provide for the support of schools therein by assessment "such assessment to be levied and collected "in the same manner in all respects as other county or parish rates." A public meeting of the rateable inhabitants of any parish or district might be called by the trustees for the purpose of determining upon the propriety of raising the necessary amount of money required for school purposes by assessment. If a majority of ratepayers present should agree to raise a sum by assessment either for the support of the teacher or certain other purposes specified in the Act, the Chairman of the meeting was to transmit the vote or resolution, specifying the sum to be raised to the assessors of rates for the parish, and the assessors were to make out the assessment list as near as might be in the form prescribed for county or parish rates, and deliver the list to the collector of rates, with a precept endorsed thereon in the form prescribed for county or parish rates.

The 24th Section of the Act provided that any district school supported by assessment should be free to all the children residing therein. By the 27th Section the Governor in Council was to issue warrants on the Province Treasury for the payment of the several allowances and salaries provided in the Act.

It is to be observed that the parish schools contemplated by the Act, of which the main provisions have been above set forth in substance, were of two kinds—1st, schools supported by an assessment on the ratepayers, and also receiving grants from the Provincial Treasury, and 2nd, schools not supported by assessment, and receiving grants from the Provincial Treasury to an amount less by ten per cent. than in the case of schools in which the principle of assessment should be carried out. And it is submitted, as regards as well the parish schools supported as those not supported by assessment, that such schools were to be in no sense sectarian or denominational, that on the contrary they were general public schools, organised and regulated for the benefit of all the inhabitants of the Province, and in respect of which no class of persons had any special right or privilege whatever.

Return, p. 36. So far as appears from the printed Record, or from the printed return to which reference has already been made, the only schools in the Province of New Brunswick other than the Parish Schools, which down to and at the time of the passing of "The British North America Act, 1867," had any statutory constitution or recognition were "The Wesleyan Academy Sackville," incorporated by a Local Act, 12 Vic., cap 65, "The Varley School" which formed the subject of another Act, 13 Vict., cap. 2, "The Madras School," constituted by charter on the principle of the Schools of the National Society in England, and certain Baptist and Roman Catholic Schools recognised by various Local Acts anterior to the said "Parish Schools Act," and which are enumerated in the Judgment of the said Supreme Court, at page 10, line 38, &c., of the Record.

Record, P 11, L. 18. The Schools last mentioned, and which were of the nature of denominational Schools, were in no way affected by the "Parish Schools Act," nor have they been in any way affected by the "Common Schools Act," to which reference will be presently made.

Section 93 of "The British North America Act, 1867," by which the Province of New Brunswick became incorporated into the Dominion of Canada, is as follows:—

"EDUCATION.

"93. In and for each Province the Legislature may exclusively make laws in relation to education subject and according to the following provisions :— Legislation respecting Education.

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

"(2). All the powers, privileges, and duties at the Union by law conferred and imposed on Upper Canada, on the separate schools and School Trustees of the Queen's Roman Catholic subjects, shall be, and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

"(3). When 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 an 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.

"(4). In case any such provincial law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council, on any Appeal under this section, is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section."

Sections 55, 56 and 90 relating to the allowance or disallowance or laws passed by the Dominion and Provincial Parliaments are as follows:—

"MONEY VOTES—ROYAL ASSENT.

"55. Where a Bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's Assent, he shall declare according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's Assent, or that he reserves the Bill for the signification of the Queen's pleasure. Royal Assent to Bills, &c.

"56. Where the Governor-General assents to a Bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council, within two years after receipt thereof by the Secretary of State, thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General by speech or message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the day of such signification." Disallowance by order in Council of Act assented to by Governor-General.

"THE FOUR PROVINCES.

"90. The following provisions of this Act respecting the Parliament of Application to

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Legislatures of Provinces respecting money, votes, &c.

"Canada, namely—the provisions relating to Appropriation and Tax Bills, the "recommendation of money votes, the assent to Bills, the disallowance of Acts, "and the signification of pleasure on Bills reserved shall extend and apply to the "Legislatures of the several Provinces as if these provisions were here re-enacted "and made applicable in terms to the respective Provinces, and the Legislatures "thereof, with the substitution of the Lieutenant-Governor of the Province for "the Governor-General, of the Governor-General for the Queen, and for a "Secretary of State of one year for two years, and of the Province for Canada."

"The Common Schools Act, 1871."

On the 17th May, 1871, an Act was passed by the Lieutenant-Governor, Legislative Council and Assembly of the Province of New Brunswick, entitled "The Common Schools Act, 1871." This Act (Sec. 61) repealed the hereinbefore mentioned Act, 21 Vic., c. 9, as to Parish Schools, and also a subsequent Act amending the same (26 Vic., c. 7), and another subsequent Act (30 Vict., c. 27), to neither of which more particular reference seems necessary in the present case.

Section 3.

"The Common Schools Act" (Sec. 3) provides for the appointment by the Governor in Council of a Chief Superintendent of Education, and (Sec. 5) appoints the Governor, the Members of the Executive Council, the President of the University of New Brunswick, and the Superintendent of Education, as a Board of Education, who were (among other things) "to make regulations for "the organisation, government, and discipline of Schools, and for the classi-"fication of Schools and teachers, to appoint examiners of teachers, and to grant "and cancel licenses," and "to prescribe text books and apparatus for the use "of Schools, books for School libraries, and plans for the construction and "furnishing of School houses."

Section 7.

Under Section 7, the Superintendent is "to have, subject to the Board of "Education, a general supervision and direction of the inspectors and schools, "and to enforce the provisions of the Act and the regulations and decisions of "the Board of Education."

Section 8

By Section 8, the Inspectors to be appointed by the Board of Education were (among other things) "to aid in carrying out an uniform system of "education, and generally in giving effect to the Act and the regulations of the "Board of Education."

Section 9.

The 9th Section provides for the salaries of teachers from the three following sources:—1stly, the Provincial Treasury; 2ndly, the County School Fund; 3rdly, District Assessment. All other items of expenditure were to be provided for by district or local assessment.

Sections 10 and 11.

The 10th and 11th Sections provide for the rates at which legally qualified teachers employed in schools supported and conducted in conformity with the Act are to be paid out of the Provincial Treasury. The 12th Section contains the following provision with regard to County Assessments in aid of Schools:—

Section 12.

"12. The Clerk of the Peace in each county shall add to the sum annually "voted for general county purposes at the General Sessions, a sum sufficient, "after deducting costs of collection, receiving, and disbursing and probable loss, "to yield an amount equal to thirty cents for every inhabitant of the county "according to the last preceding census, and the sum so added shall form and be "a portion of the county rates, and shall be levied and collected as other county "rates, and shall form a County School Fund. And the Clerk of the Peace

" shall forthwith notify the Superintendent of the amount so ordered to be " levied, and when the same shall have been collected, the County Treasurer shall " notify the Superintendent of the amount thereof. Such sum shall be " held by the County Treasurer, subject to the order of the Superintendent." "The Common Schools Act, 1871."

The 14th Section contains the following provisions with regard to district assessment:— Section 14.

" 14. Any sum required by any district in further payment of teachers' " salaries over and above the sums as above provided by the Province and " county, and any sum required for other school purposes during the year, " including the purchase, rent, or improvement of school grounds, the purchase, " erection, repair, furnishing, care and insurance of school-houses and out- " buildings, the purchase of fuel, maps, or apparatus prescribed, and books, the " payment of interest on money borrowed by the district, or any other expenses " required in providing an efficient school, shall be determined by the school " district in its school meeting as hereinafter provided, and any amount so " determined upon shall be a charge upon the district, and shall be levied as " follows:—Every male person twenty-one years of age and upwards, having " resided in such district for the period of one month next previous to the " levying of such assessment shall be assessed, and shall pay the sum of one " dollar as a poll tax. The balance of the sum authorised to be assessed shall " be levied on the real and personal property within the parish and income of the " residents of the districts according to the taxable valuation of the same on the " parish assessment list for the year, and upon the real and personal property " situate within the district of non-residents of the parish according to such " valuation. Nothing herein shall render a person liable to pay for the support " of the schools of the district more than one such poll tax in any one year."

Special provision is made in Section 58 for the management of schools in St. John and Fredericton, which, previously to the 1st January, 1872, were extended to the town of Portland under the provisions of Section 59. And a Board of School Trustees of the town of Portland were duly appointed. Section 53.

Section 58, Sub-Section 9, is as follows:—

" 9. Any sum required for the yearly support and maintenance of the " schools, and for the due execution of the different powers and trusts vested in " the Board by this Act, other than for the purposes mentioned in sub- " Section 7, including, amongst other things, the sums required for the payment " of the teachers' salaries, over and above the amount payable out of the legis- " lative grant and county school fund, the rental of lands and buildings, the care " of school property, fuel, light, and insurance, the purchase of school books for " indigent pupils, and of maps and apparatus, the interest payable on debentures " issued by the Board, the contingent expenses of the Board, including the salary " of its Secretary, with all the other current expenses and expenses of mainte- " nance, shall be determined upon annually by the Board, which shall, previous " to the order for assessment for general city purposes, notify the Council of the " aggregate of such amounts, but such aggregate, exclusive of the interest " payable on debentures, shall not, without the sanction of the Council, in any " one year exceed twice the amount received by the district in the year then next " preceding, from the Provincial Treasury and county school fund, or in the first " year after the passing hereof four times the amount received by the district in " the year then next preceding from the Provincial Treasury."

"The Common Schools Act, 1871."

The 20th and following sections of the Act relate to the action of school districts who are to have power to elect trustees, and to determine upon all questions af local or district support of schools in conformity with the Act. By the 23 sections, the persons qualified to vote at school meetings are to be ratepayers resident or owning property in the district, and (Section 24) a majority of the ratepayers present are to decide.

Section 42.

The duties of the trustees appointed by the School District with regard to schools, school teachers' books, &c., are declared by Section 42 of the Act as follows:—

"42. It shall be the duty of the trustees, and they are hereby empowered—

"(1). To provide school privileges free of charge for all children from five "to twenty years of age inclusive, who may be resident in the district, and, "when authorised by the School Meeting, improved school accommodation, as "far as possible in accordance with the provisions of Section 29, with power to "admit to school privileges pupils from other districts, and if the trustees shall "deem it necessary, they may exact from such pupils a reasonable tuition fee.

"(2). To regulate from time, to time with the aid of the teachers, the "attendance of pupils in the several departments, according to attainments, and "to suspend or expel any pupil from school whom the teacher may report to the "trustees as persistently disobedient, or addicted to any vice likely to affect "injuriously the character of other pupils, until the trustees and teachers shall "receive from such pupil assurance of reform.

"(3). To employ teachers for the district (the contract to be in writing), "and to suspend or dismiss any teacher for gross neglect of duty, or for immo-"rality, and they shall forthwith transmit a written statement of the facts to the "Superintendent, who, if satisfied of the correctness of such dismissal, shall not "allow such teacher further payment from the Provincial Treasury.

"(4). To visit, at least monthly, each school under their charge, and see "that it is conducted according to this Act and the regulations of the Board "of Education, to notify the district of the opening or re-opening of the schools, "to provide for the health of the school, and to see that the schools are "properly supplied with the books prescribed by the Board of Education, and "that no unauthorised books are used.

"(5). If any parent, master, or guardian, after notice from the trustees that "a child under the care of such person is unprovided with the necessary school-"books, shall refuse or neglect to furnish such child with the books required the "trustees shall, subject to the power to exempt indigent persons, furnish them at "the expense of the district, and the cost thereof may be collected from the "parents, master, or guardian by warrant of the trustees as in case of assessed "rates."

Sections 47, 48, and 49 of the Act contain the following provisions with regard to teachers:—

Section 47.

"47. Every teacher shall call the roll every morning and afternoon, and "otherwise keep a daily register of the scholars in the manner prescribed by the "Board of Education, which shall be open to inspection at all times; be shall "diligently and faithfully teach all the branches required to be taught in the "school according to the terms of his engagement with the trustees, and according "to the provisions of this Act, and shall maintain proper order and discipline "therein, and any teacher neglecting to keep an accurate register as aforesaid "shall forfeit the amount otherwise payable to him out of the Provincial Treasury."

"48. He shall have a care to the health and comfort of the school, and to "such end shall enforce cleanliness, and report to the trustees the appearance of "any infectious or contagious disease in the school. "The Common Schools Act, 1871." Section 48.

"49. He shall during each half-year hold a public examination of the school, "of which notice shall be given to the trustees, and to the parents through the "pupils; he shall, through the pupils, give notice of all school meetings "advertised by the trustees." Section 49.

The 60th Section of the Act declares that "All schools conducted under "the provisions of the Act shall be non-sectarian." Section 60.

The 62nd Section provides as follows:—

"(62). This Act shall come into operation on the 1st day of January, in "the year of our Lord 1872, but the Board of Education and Superintendent "under the Act relating to parish schools are hereby empowered to take such "preliminary action as they may deem necessary in pursuance of Section 6. "Sub-Sections 3, 4, and 5, and Section 7. Sub-Sections 4 and 5, and Sections "58 and 59 shall be operative so far on the passage hereof as to permit the "appointment of the Boards of Trustees, and in incorporated towns the adoption "of the provisions relating to the cities of St. John and Fredericton, and the "appointment of Boards of Trustees in such town as contemplated by such "sections, and such preliminary action by such Boards as may be necessary to "secure school accommodation; and if in any county the sessions shall, previous "to the said 1st day of January, order the assessment for general county purposes "for the year 1872, the Clerk of the Peace of such county shall at such time proceed, "as provided by Section 12 of this Act to secure a county school fund." Section 62.

It is submitted that by the said "Common Schools Act," the grant from the Provincial Treasury which had previously depended on annual votes in supply became fixed by law, and that under the Act, as under the former law, the imposition of district assessments was left to be decided by the vote of a majority of the ratepayers of the district. Under the new Act, as under the former Act, the schools were to be subject to such regulations as might be issued by the Board of Education, and it is submitted that the new Act did not, more than did the Parish Schools Act, in any way affect or deal with denominational schools, and that the new Act left any right or privilege which any class of persons by law previously had with respect to denominational schools, wholly untouched. Such rights or privileges, would, it is submitted, not be affected by reason that the "Common Schools Act, 1871," created new possible liabilities in respect of non-denominational schools.

It appears that on the 14th April, 1873, the Board of School Trustees of Portland, in pursuance of the provisions of "The Common Schools Act, 1871," notified in writing to the Respondents that the sum required for the coming year's support and maintenance of the Schools in the district under the control and management of the said Board had been determined on by the Board, and that the aggregate of such sums was 12,128 dollars, and the Respondents were thereby requested to cause that sum to be assessed and levied according to law. Accordingly the Respondents issued a resolution and order that there be raised, levied, and assessed upon the said Town of Portland, and the inhabitants thereof, in the then present year, the said sum of 12,128 dollars (and also the sum of 300 dollars required for the repair and alteration of Schools) by a special assessment for the several purposes mentioned in the 9th sub-Section of Section 58 of the Record, P. 4.

RECORD. said Act, and that Warrant should issue under the Seal of the Town to the Assessors of Taxes to levy and assess the said sum as a separate amount.

On or about the 16th June, 1873, the now Appellant caused the said Supreme Court of New Brunswick to be moved for a rule to show cause why a writ of certiorari should not issue to remove into Court the said order of assessment, in order that the same might be quashed. In support of this motion, three affidavits were filed. The first was that of the Appellant himself, and stated that he was a ratepayer in the Town of Portland, and was rated and assessed for the year 1872 in the sum of 53 dollars 83 cents for School purposes under "The Common Schools Act, 1871," and was subject to assessment for the current year 1873. The affidavit, after verifying copies of the said notification and order of assessment, proceeds to state that the appellant "is one of "Her Majesty's Roman Catholic subjects residing in the said Town of Portland," and the Appellant thereby "claimed that his rights in relation to the education of
P. 5. his children are prejudicially affected by the said Act," and that those rights were or how they were prejudicially affected the affidavit did not disclose. Another affidavit was filed, sworn by one Robert McCann, a former teacher of a
P. 6. "common school" in the Town of Portland, and the third affidavit was sworn by one Francois Cormier, a Roman Catholic priest, one of the Curates in the city of St. John. These affidavits are set forth at length in the printed Record to which these Respondents crave reference.

The application of the Appellant for a rule to show cause why the said order of assessment should not be set aside was decided by the Supreme Court on the
P. 7, L. 10. 17th June, 1873, when the Court unanimously refused the rule. It would appear that the sole ground on which the rule was moved was that the Legislature had no power to enact the law under which such assessment was made—"The "Common Schools Act, 1871"—inasmuch as it contravened "The British North America Act, 1867," and was consequently void and of no effect. It was not contended that "The Common Schools Act, 1871," prejudicially affected any right or privelege which any class of persons at the time of the union had with respect to any of the then existing special denominational schools, such as the "Wesleyan Academy," and the others hereinbefore more particularly referred to. The contention appears to have been that, irrespective of these particular schools, the Parish Schools Act had reference to and created rights and privileges with respect to schools which were properly to be termed denominational. The
PP. 7, to 29. Judgment of the Judges of the Supreme Court negociating this contention, and holding that the schools contemplated by the Parish Schools Act were entirely undenominational is set out at length on the Record, and these Respondents crave reference thereto.

PP. 30—31. On the 7th day of July, 1873, leave to appeal to Her Majesty in Council was granted by the said Supreme Court. Such leave appears to have been granted as in ordinary course, and not specially, save that Counsel for the Province appear to have been heard as to the terms of security for costs.

The Respondents humbly submit that this Appeal ought to be dismissed for the following

REASONS.

1. Because if any Appeal could be had to the Privy Council it should have been granted on a

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At the Court at Osborne House, Isle of Wight

The 6th day of August 1874

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
MR. SECRETARY CROSS
MR. DISRAELI

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 17th day of July last past in the words following viz:

" YOUR MAJESTY having been pleased by Your General Order in Council of the 20th November 1873 to refer unto this Committee the matter of a humble Appeal from the Supreme Court of the Province of New Brunswick between Henry Maher Appellant and the Town Council of the town of Portland Respondents and likewise a humble Petition of the said Henry Maher an inhabitant of Portland in the city and county of St. John in the abovementioned Province the Appellant setting forth that the Appellant is a ratepayer in the said town of Portland and was rated and assessed for the year 1872 in the sum of 57 dollars 83 cents for school purposes under the Common Schools Act 1871 and was and is subject to assessment under the said Act and the amendments thereof for the current year 1873: that on the 14th day of April in the year of our Lord 1873 a Notice and Requisition was issued in pursuance of the said Acts by the Board of School Trustees of Portland constituted in pursuance of the said Acts under their seal and signed by their chairman addressed to the Town Council of the town of Portland aforesaid and notifying that the sum required for the then coming years' support and maintenance of the schools in the district under the control and management for school purposes of the said Board and for the due execution of the different powers and trusts vested in

"the said Board by the said Acts (exclusive of the amount required for the permanent repair and furnishing of school buildings) had been determined on by the said Board in the terms of the said Acts and that the aggregate of such sums was 12,128 dollars and requesting the said Town Council to cause that sum to be assessed and levied according to law: that in pursuance of the said Notice and Requisition the said Town Council resolved and ordered that the said sum and also the sum of 300 dollars required for the repairs and alteration of schools making together the sum of 12,428 dollars should be raised levied and assessed upon the said town of Portland and the inhabitants thereof by a special assessment for the several purposes mentioned in the 9th sub-section of the 58th section of the said Common Schools Act 1871 and that a warrant should issue under the seal of the town to the assessors of taxes for the said town to levy the said sum of 12,428 dollars as a separate amount: that the Appellant maintaining that the said order for assessment made by the said Town Council as aforesaid was illegal and void inasmuch as the said Common Schools Act 1871 was and is as he contends and maintains illegal and unconstitutional as being in violation and contravention of the British North America Act 1867 and therefore of no binding effect moved the said Supreme Court for a rule calling upon the said town of Portland to show cause why a writ of certiorari should not issue to remove into the said Supreme Court the said order for assessment with a view to its being quashed: that on the 17th day of June 1873 the said Supreme Court gave Judgment and made an Order whereby they refused the rule holding that the said Common Schools Act 1871 did not contravene the said British North America Act 1867 and was legal valid and binding: that thereupon the said Appellant feeling aggrieved by such Judgment and Order refusing the rule moved the said Supreme Court for leave to appeal to Your Majesty in Your Privy Council from their said Judgment and Order and such leave after hearing Counsel for the said town was by order dated the 7th day of July in the year of our Lord 1873 granted on the usual conditions which have since been duly complied with and humbly praying that Your Majesty in Council will be pleased to take his said Appeal into consideration and that the said Judgment and Order of the said Supreme Court bearing date the 17th day of June 1873 may be reversed altered or varied or for other relief in the premises THE LORDS OF THE COMMITTEE in obedience to Your Majesty's said General Order of Reference have taken the said humble Petition and Appeal into consideration and having heard Counsel for the Appellant their Lordships do this day agree humbly to report to Your Majesty as their opinion that the Decree or Judgment of the Supreme Court of the Province of New Brunswick of the 17th June 1873 ought to be affirmed and this Appeal dismissed with costs.

"And in case Your Majesty should be pleased to approve of this Report and to dismiss the said Appeal then their Lordships do direct that there be paid by the Appellant to the Respondents the sum of two hundred and seventy eight pounds thirteen shillings and eight pence sterling for the costs thereof."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the said Decree or Judgment of the Supreme Court of the Province of New Brunswick of the 17th June 1873 be and the same is hereby affirmed and this Appeal dismissed with two hundred and seventy eight pounds thirteen shillings and eight pence sterling costs. Whereof the Governor-General or Commander-in-Chief of the Dominion of Canada and the Lieutenant-Governor of the Province of New Brunswick for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

ARTHUR HELPS.

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special leave to Appeal of Her Majesty in Council, and not by Order of the Supreme Court.

2. Because there is no evidence on the Record that the Appellant at the time of the union possessed any right or privilege with respect to any denominational school.

3. Because "The Common Schools Act, 1871," was a valid Act and does not prejudicially affect any right or privilege with respect to denominational schools which any class of persons possessed by law at the time of the union, and the order of assessment complained of was legal and valid.

4. Because under the circumstances the Supreme Court were right in refusing the rule *nisi*.

T. H. COWIE.

In the Privy Council.

On Appeal from the Supreme Court of the Province of New Brunswick.

BETWEEN

HENRY MAHER - - - - - *Appellant.*

AND

The TOWN COUNCIL of the TOWN of PORTLAND - - *Respondents.*

CASE

ON BEHALF OF THE RESPONDENTS.

BIRCHAM & CO.,
46, Parliament Street,
Westminster,
England.

Metchim & Son, 20, Parliament Street, Westminster, S.W.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF NEW BRUNSWICK.

BETWEEN

HENRY MAHER . . . . . *Appellant,*

AND

THE TOWN COUNCIL OF THE TOWN OF PORTLAND . . . . . *Respondent.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF NEW BRUNSWICK.

BETWEEN

HENRY MAHER . . . . . *Appellant,*

AND

THE TOWN COUNCIL OF THE TOWN OF PORTLAND . . . . . *Respondent.*

RECORD OF PROCEEDINGS.

RECORD.

In the Supreme Court of the Province of New Brunswick.

No. 1.
Affidavit of Henry Maher, sworn 16th June, 1873, with two Exhibits.

A.

In the Supreme Court.

Ex parte Henry Maher.

Henry Maher of the Town of Portland, in the City and County of Saint John, Merchant, maketh oath and saith, That he is a rate-payer in the Town of Portland, and was rated and assessed for the year One thousand eight hundred and seventy-two, in the sum of fifty-seven dollars, eighty-three cents of lawful money of the Province of New Brunswick, for school purposes, under the Common Schools Act, 1871, and he is subject to assessment under the same Act, and the amendments thereof for the current year, One thousand eight hundred and seventy-three. That this deponent, on the fourteenth day of June instant, made search in the office of the Town Clerk for the said Town of Portland, and there found on the files of Documents in his custody as such Town Clerk, the original Notice from the Board of School Trustees for the said Town of Portland, to the Town Council of the said town, of the sum required by the said Trustees for the current year, for the support and maintenance of schools under the control and management of the said Board, and for the due execution of the powers and trusts vested in such Board by the said Acts (exclusive of the amount required for the permanent repair and furnishing of school buildings) and hereunto annexed, marked "A," is a true copy of the said Notice. And this deponent further saith

RECORD.

In the Supreme Court of the Province of New Brunswick.

No. 1. Affidavit of Henry Maher, sworn 16th June, 1873, with two Exhibits. —*continued.*

that he also found on the file in the office of the said Town Clerk, the original Order for assessment for school purposes, made by the Town Council of the said Town of Portland upon the said Notice, a true copy of which order is hereunto annexed, marked "B." And this deponent lastly saith, that he is one of Her Majesty's Roman Catholic subjects, residing in the said Town of Portland, and he claims that his rights in relation to the education of his children are prejudicially affected by the said "The Common Schools Act, 1871," and the Acts in amendment thereof.

Sworn before me, at the Town of Portland, in the City and County of Saint John, this 16th day of June A.D., 1873.

HENRY MAHER.

G. F. ROUSE, Commr., &c., in the Sup. Court, &c.

EXHIBITS.

A.

No. 2. Notice, dated 14th April, 1873, by Board of School Trustees of Portland to the Town Council of Portland, to assess sum for school purposes for the ensuing year.

To the Town Council of the Town of Portland:

You are hereby notified by the Board of School Trustees of Portland, in pursuance of the provisions of "The Common Schools Act, 1871," and the Act in amendment thereof, that the sum required for the coming year's support and maintenance of the schools in the district under the control and management for school purposes of the said Board, and for the due execution of the different powers and trusts vested in the Board by the said Acts (exclusive of the amount required for the permanent repair and furnishing of school buildings) have been determined on by the said Board in the terms of the said Acts, and that the aggregate of such sums is twelve thousand one hundred and twenty-eight dollars; and you are hereby requested to cause that sum to be assessed and levied according to law.

In witness whereof, the said Board has caused its seal to be affixed thereto, and this Notice to be signed by the Chairman this 14th day of April A.D., 1873.

(Seal) (Signed) F. B. BARKER, Chairman.

B

No. 3. Order of Town Council of Portland assessing the Town of Portland and inhabitants in the sum of $12,428 for school purposes.

Whereas it appears from the requisition of the Board of School Trustees of the Town of Portland, that the sum of twelve thousand four hundred and twenty-eight dollars is required for the purpose of "The Common Schools Act, 1871," in the present year, of which three hundred dollars is required for the repairs and alteration of schools; therefore resolved and ordered that there be raised, levied, and assessed, upon the Town of Portland and the inhabitants thereof, in the present year the said sum of twelve thousand four hundred and twenty-eight dollars by a special assessment for the several purposes mentioned in the ninth sub-section of the fifty-eighth section of said Act, passed in the thirty-fourth year of Her present Majesty, intituled "An Act relating to Common Schools," and under the provision of said Act, and that warrant do issue under the seal of the town to the assessors of taxes for the Town of Portland, to levy and assess the said sum of twelve thousand four hundred and twenty-eight dollars for the purposes above mentioned as a separate amount.

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RECORD.

In the Supreme Court of the Province of New Brunswick.

No. 4. Affidavit of Robert McCann, sworn 16th June, 1873.

A.

In the Supreme Court.

Ex parte Henry Maher.

Robert McCann, of the City of Saint John, Merchant, maketh oath and saith :— that he taught a common school in the parish of Portland (now the town of Portland) in the City and County of Saint John, under the Provincial Board of Education, for upwards of twenty years previous to the month of January, in the year of Our Lord, One thousand eight hundred and seventy-two when the Common Schools Act, 1871 went into operation. That he ceased teaching when that Act came into force, feeling that he could not, as one of Her Majesty's Roman Catholic subjects, conscientously continue to teach Roman Catholic Pupils and comply with the requirements of that Act. That after the Act made and passed in the twenty-first year of Her Majesty's reign, intituled "An Act relating to Parish Schools" went into force this Deponent taught a School under that Act and during all the time he so taught under the said Act he taught the Roman Catholic Catechism to his Roman Catholic Pupils with the knowledge and consent of the Inspector of Schools, and without any objection from the parents of his Protestant Pupils; and he taught the Protestant Pupils out of the different Protestant Catechisms. That from the year One thousand eight hundred and sixty to the year One thousand eight hundred and sixty-six this deponent, in addition to teaching the Roman Catholic Catechism as aforesaid used the reading books published by the Christian Brothers, exclusively for all the children. That the schools so taught by this deponent were examined semi-annually by the Inspector of schools and were visited by the Trustees of Schools on which occasions all the books used by this deponent as such Teacher were open to the examination of the Inspector and Trustees and were examined by them. That this deponent, as such Teacher, made the semi-annual returns under oath to the Board of Education, under the said last-mentioned Act, which returns contained true statements, amongst other things of the books used for his school, including the Roman Catholic Catechism and the said books of the Christain Brothers. That in due course after such returns were made, this deponent received his semi-annual allowances from the Province under the said last-mentioned Act. And this deponent lastly saith that during the time that he so taught school in the said Parish of Portland he remembers ten other Roman Catholic Teachers who taught schools in the same place under the said last-mentioned Act.

Sworn before me, at the City of Saint John, this
16th day of June A.D., 1873.

ROBERT MCCANN.

WM. B. WALLACE, a Commissioner, &c,
for taking Affidavits.

No. 5. Affidavit of François X. Cormier, sworn 16th June, 1873.

A.

In the Supreme Court.

Ex parte Henry Maher.

François X. Cormier of the City of Saint John, a Roman Catholic Priest, one of the Curates in the City of Saint John maketh oath and saith That in or about

RECORD.

In the Supreme Court of the Province of New Brunswick.

No. 5. Affidavit of François X. Cormier, sworn 16th June, 1873 —*continued.*

the year of our Lord One thousand eight hundred and sixty-four this deponent was examined by the Examiners of Teachers for Schools under the Act of the General Assembly of the Province of New Brunswick made and passed in the twenty-first year of Her present Majesty's Reign intituled "An Act relating to Parish Schools" and obtained a Licence to teach a School under the said Act. That amongst other books in which he, this deponent, was examined, with a view to his qualification to teach a school was *Le Nouveau Traité des Devoirs du Chrétien* a book published by the Christian Brothers, which professes to explain the Catholic doctrines and dogmas and which is used as a reading book for children in the Schools of Quebec. That this deponent, under such Licence from the Board of Education taught a school in the parish of Dorchester and County of Westmoreland for upwards of eighteen months and in the school taught by him he used *Le Petit Catéchisme de Québec*, the Roman Catholic Catechism, *Le Nouveau Traité des Devoirs du Chrétien*, and the other school books used in the Roman Catholic Schools of Quebec; that he also commenced the school by Roman Catholic prayers and closed it with similar prayers and during the school hours every day explained to the pupils Catholic doctrines and dogmas. That during the greater part of the time which this deponent so taught a school at Dorchester aforesaid, the school which he, this deponent, taught was as exclusively Roman Catholic as the Roman Catholic Schools of Quebec, in which this deponent himself received a portion of his education. That the school which this deponent so taught in Dorchester aforesaid, received the periodical examination and inspection by the School Inspector under the said Act of Assembly above-mentioned, and on the occasion of such examination all the books which this deponent used in the school were open to inspection, and this deponent remembers that the Inspector examined the children in *Le Nouveau Traité des Devoirs du Chrétien* and heard the pupils reading in that book. That this deponent as such Teacher made semi-annual returns under oath to the Board of Education, under the said Act, and in such returns set forth among other things a true statement of the number of pupils attending his school, of their average attendance, the religion of the Teacher and the names of the books used. That shortly after making such semi-annual returns this deponent received his semi-annual allowance under the provisions of the above-mentioned Act of Assembly relating to Parish Schools. That this deponent is aware of the existence at that time of about twenty-five or thirty schools of the same description as the one taught by himself, which were taught in the County of Westmoreland and in which the same school books were used, and he is informed and verily believes that there were upwards of two hundred and fifty schools of the same description in the Province all of which were established and received Provincial Allowance under the said Act when the Common Schools Act, 1871, was passed.

Sworn before me, at the City of Saint John,
this 16th day of June A.D, 1873. FRANÇOIS X. CORMIER, Priest.
G. F. ROUSE, a Commissioner, &c.

INDORSEMENTS.

Ex parte Henry Maher.

Affidavits to move for *rule nisi in certiorari.*

Filed in Court, 17th June, 1873. C. DOHERTY, Attorney for Maher.

B

RECORD.

In the Supreme Court of the Province of New Brunswick.

No. 6. Judgment of Chief Justice Ritchie and Justices Allen and Weldon, delivered 17th June, 1873.

In the Supreme Court, 17th June, 1873.

Ex parte Henry Maher.

His Honour, Mr. Chief Justice Ritchie, delivers the following as the Judgment of himself and of Messieurs Justices Allen and Weldon.

This was an application for *a certiorari* to remove into this Court an Order for an assessment upon the Town of Portland under the Common Schools Act, 1871, in order that the same may be quashed, upon the grounds that this Act contravenes the British North America Act, 1867, and is consequently void and of no effect. We have never doubted that when a Provincial Act and an Imperial Statute are repugnant, so far as such repugnancy extends, but no further, the Provincial Act is void, and this principle has been since the passing of the British North America Act, 1867, on several occasions enunciated and acted on by this Court, and we should not have thought it necessary now to refer to it, still less to support by authorities the views we have always entertained on this point (without any doubts) were it not that we observe that in the neighbouring Province of Quebec the question has been much discussed, and the Court divided in their opinions on the subject, though the majority arrived at the same conclusion as that which has hitherto governed this Court. We have always thought it a constitutional principle, too clear to be seriously questioned, that the subordinate legislative power of a colonial legislature must succumb to the supreme legislative power and control of the Parliament of Great Britain, and therefore have heretofore considered it wholly unnecessary to cite any authority; but as there is a clear statutory recognition as well as the highest judicial declaration in support of the accuracy of the view we have acted on, we think it as well now to name them. In the Imperial Act, 28th and 29th Vic., cap. 63, sec. 2, it is enacted "That any "colonial law which is or shall be in any respect repugnant to the provisions of "any Act of Parliament extending to the colony to which such law may relate, or "repugnant to any Order or Regulation made under authority of such Act of "Parliament, or having in the colony the force and effect of such Act, shall be "read subject to such Act, Order or Regulation, and shall, to the extent "of such repugnancy, but not otherwise, be and remain absolutely void "and inoperative," and sec. 3 says: "No colonial law shall be or shall "be deemed to have been void or inoperative on the ground of repugnancy "to the law of England unless the same shall be repugnant to the provi- "sions of some such Act of Parliament, Order or Regulation as aforesaid." And this statute has undergone judicial comment in the case of Phillips *v.* Eyre (Law Rep., 6 Q. B. 20) where Willes, J., in delivering the Judgment of the Exch. Ch., in stating the effect of this statute, after putting forward what has always been considered law in this province, viz., that an English statute only binds the province when it is by the express words of the statute, or by necessary intendment, made clearly applicable to the province, says:—"It was argued that "the Act in question (an Act passed by the Legislature of Jamaica) was contrary "to the principles of English law, and therefore void. This," he says, "is a "vague expression, and must mean either contrary to some positive law of England

RECORD.

In the Supreme Court of the Province of New Brunswick.

No. 6. Judgment of Chief Justice Ritchie and Justices Allen and Weldon, delivered 17th June, 1873 —*continued.*

" or to some principle of natural justice, the violation of which would induce the " Court to decline giving effect even to the law of a foreign sovereign state. In " the former point of view it is clear that the repugnancy to English law which " avoids a colonial Act means repugnancy to an Imperial Statute or Order made " by authority of such Statute applicable to the colony by express words or " necessary intendment, and that so far as such repugnancy extends, and no further, " the colonial Act is void."

But long prior to the passing of either the 28th and 29th Vic., cap. 63, or "The British North America Act, 1867," the judiciary of England authoritatively declared what the law was on this subject in answer to a question propounded to the Judges by the House of Lords.

On the fourth day of May, 1840, the Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the Judges (with the exception of Lord Denman and Lord Abinger, who did not attend the meeting of Judges) upon the questions of law propounded to them respecting the Clergy Reserves (Canada) Act. In answer to the question lastly propounded (question 3), which is as follows: Whether the Legislative Council and Assembly of the Province of Upper Canada having, in an Act, "to provide for the sale of the Clergy Reserves, and for the distribution of the proceeds thereof enacted that it should be lawful for the Governor, by and with the advice of the Executive Council to sell, alienate and convey in fee simple all or any of the said Clergy Reserves; and having further enacted in the same Act that the proceeds of past sales of such reserves which have been or may be invested under the authority of the Act of the Imperial Parliament, passed in the seventh and eighth years of the reign of His late Majesty King George the Fourth, intituled "An Act to authorise the sale of part of the Clergy Reserves in the Provinces of Upper and Lower Canada, shall be subject to such orders and directions as the Governor in Council shall make and establish, for investing in any securities within the Province of Upper Canada, the amount now funded in England, together with the proceeds hereafter to be received from the sales of all or any of the said reserves, or any part thereof, did, in making such enactments, or either of them, exceed their lawful authority." His Lordship said, "In answer to the question lastly propounded " we all agree in the opinion that the Legislative Council and Assembly of the " Province of Upper Canada have exceeded their authority in passing the Act " to provide for the sale of the Clergy Reserves, and for the distribution of the " proceeds thereof in respect of both the enactments specified in your Lordship's " question, as to the enactment that it should be lawful for the Governor, by " and with the advice of the Executive Council, to sell, alienate and convey, in fee " simple, all or any of the Clergy Reserves; we have in answer to the second question " already stated our opinion to be such, as that it is inconsistent with any such " power in the Colonial Legislature; and as to the enactment that the proceeds " of all past sales of such reserves, which have been or may be invested under the " authority of the Act of the Imperial Parliament, passed in the 7th and 8th " George IV., for authorising the sale of part of the Clergy Reserves in the " Provinces of Upper and Lower Canada, shall be subject to such orders and " directions as the Governor in Council shall make and establish for investing in " any securities within the Province of Upper Canada, the amount now funded in

"England, together with the proceeds hereafter to be received from the sales of "all or any of the said reserves; we think such enactment is in its terms inconsistent "with, and contradictory to, the provisions of the Statute of the Imperial Parlia- "ment, 7th and 8th George IV., and therefore void, there being no express "authority reserved by that Act to the Colonial Legislature, to repeal the "provisions of such latter Statute."

Assuming, then, that it is not only the right, but the bounden duty of this Court to deal with questions of this nature when legitimately presented for its consideration, we must endeavour to ascertain whether there is such a repugnancy in this case as will constrain us to declare the Common Schools Act, 1871, void in part or in whole.

By the 93rd section of The British North America Act, 1867, it is enacted that "In each province the legislature may exclusively make laws in relation to "Education subject and according to the following provisions:—

1. "Nothing in any such law shall prejudicially affect any right or privilege "with respect to denominational schools, which any class of persons have by "law in the province at the union.

2. "All the powers, privileges and duties at the union, by law conferred "and imposed in Upper Canada, on the separate schools and School Trustees of "the Queen's Roman Catholic subjects, shall be, and the same are hereby extended "to the dissentient schools of the Queen's Protestant and Roman Catholic "subjects in Quebec.

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.

4. "In case any such provincial law as from time to time seems, to the "Governor General in Council, requisite for the due execution of the provisions "of this section is not made, or in case any decision of the Govenor-General in "Council on any appeal under this section, is not duly executed by the proper "provincial authority in that behalf, then, and in every such case, and as far only "as the circumstances of each case require, the Parliament of Canada may make "remedial laws for the due execution of the provisions of this section, and of "any decision of the Governor-General in Council under this section."

It is now contended that the rights and privileges of the Roman Catholic inhabitants of this province, as a class of persons, have been prejudicially affected by the Common Schools Act, 1871, contrary to the provisions of sub-section (1) of section 93 of the British North America Act. We have now to determine whether any class of persons had by law in this province, any right or privilege with respect to denominational schools at the union, which are prejudicially affected by the Common Schools Act of 1871. This renders it necessary that we should, with accuracy and precision, ascertain exactly what the state of the law was with reference to denominational schools and the rights of classes of persons in respect thereto at the union. At that time what may fairly and legitimately be called the common school system of the province, was carried on under an Act

passed in the 21st Vict., cap. 9, intituled "An Act relating to Parish Schools." There were, no doubt, at the same time in existence, in addition to the schools established under the Parish School Act, schools of an unquestionably denominational character, belonging to and under the immediate government and control of particular denominations, and in which there can be no doubt, or it may reasonably be inferred, the peculiar doctrines and tenets of the denominations to which they respectively belonged were exclusively taught, and therefore had, what may rightly be esteemed, all the characteristics of denominational schools, pure and simple. We do not here refer to collegiate institutions, which it has been strongly and with great force urged, were not within the contemplation of the Imperial Parliament, or intended to be affected by the British North America Act, 1867, but we refer to such schools as the Wesleyan Academy, Sackville, as incorporated by the 12th Vict., cap. 65, amended by 19th Vict., cap. 65, a Corporation entirely distinct in law, as we presume also in fact from the college, which the Trustees of that academy are authorised to found and establish under the 21st Vict., cap. 57, an institution entirely under the control of the Wesleyan denomination, and in which, or in any department thereof, or in any religious services held upon the said premises, it is enacted that no person shall teach, maintain, promulgate, or enforce any religious doctrine or practice contrary to what is contained in certain notes on the New Testament, commonly reputed to be the notes of the Rev. John Wesley, A.M., and in the first four volumes of sermons commonly reputed to have been written and published by him. The Varley School, endowed by the late Mark Varley, who bequeathed certain property "To the Trustees of the Wesleyan Methodist Church of the City of Saint John "for the establishment and maintenance of a day school," which devise was confirmed by the 13th Vict., cap. 2, and the property vested in certain persons, viz., the Trustees of said Wesleyan Methodist Church in the City of Saint John, in connection with the British Conference upon the trusts, &c., in said will. The Madras School, which by its charter is to be conducted according to the system called the Madras system, as improved by Dr. Bell, and in use and practice in the British National Education Society, incorporated and established in England; which National Society, established in 1811, was incorporated in 1817 for promoting the education of the poor in the principles of the Established Church throughout England and Wales; the school established by such society being purely denominational, in which the children are to be instructed in the Holy Scriptures, and in the liturgy and catechism of the Established Church, and "with respect to such instruction the schools are to be subject to the superintendence of the parochial clergyman, and the masters and mistresses are to be members of the Church of England." And the Baptist Academy or Seminary, the Roman Catholic School established in the City of Saint John, the Free School in Portland under the Board of Commissioners of the Roman Catholic School in Saint John, the Roman Catholic School in Fredericton, the Roman Catholic School in Saint Stephen, the Roman Catholic School in Saint Andrews, all of which are recognised by name by the Legislature in various Acts anterior to the 21st Vict., cap 9, and received specific annual grants from the public provincial funds outside the Parish School Act.

In the year 1857, and subsequently thereto, the money intended for educational purposes has been annually granted in a lump sum, viz., so much to

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provide for certain educational purposes, not specifying any particular school or purpose, as had been theretofore customary. But the estimates of the public expenditure which appear in the public journals, show that appropriations of a similar character have been since annually made. Thus, in the year 1867, but before the 1st day of July (the day of the union) it will be seen by the journals of the House of Assembly, page 45, that in addition to the amount authorised by law, the following schools among others received special grants, viz.—The Madras School, the Wesleyan Academy, the Baptist Seminary, the Roman Catholic School, Fredericton; the Presbyterian School, St. Stephen; the Roman Catholic School, St. John; the Varley School, St. John; the Roman Catholic School, Miltown; the Roman Catholic School, St. Andrews, male and female; the Roman Catholic Schools, Carleton, Woodstock, Portland and Bathurst; the Presbyterian School, Chatham; Roman Catholic School, Newcastle, and the Sackville Academy; and in the journals for 1871, the year the Common School Law passed, are to be found special appropriations for the above schools, so that it is obvious there were in existence at the time of the Union, and have been ever since, in this province, apart from schools established under the Parish School Act, denominational schools recognized by the Legislature and aided from the public revenues. But as it is not contended that the Common School Law prejudicially affects any right or privilege with respect to these schools, which any class of persons had by law at the union, it will be necessary to examine minutely and critically the Parish School Act of 1858, under which it is contended rights and privileges existed, which it is alleged have been so affected. By that Act the Governor in Council, with a Superintendent appointed by the Governor and Council, constituted the Board of Education; the province was to be divided into districts by the Governor and Council, who were to appoint an Inspector for each district, and to the Board of Education was confided the power of making regulations for the organization, government and discipline of the parish schools, and for the examination, classification and mode of licensing teachers; to appoint examiners of teachers; to grant and cancel licenses, and to hear and determine all appeals from the decision of Trustees; to prescribe the duties of Inspectors of Schools; to apportion all monies granted by the Legislature for the support of such schools among the several parishes in proportion, &c., and to provide for the establishment, regulation and government of school libraries, and the selection of books to be used; but no books of a licentious, vicious or immoral tendency, or hostile to the christian religion, or works on controversial theology, were to be admitted. To the Superintendent was confided, subject to the order of the Board, the general supervision and direction of the Inspectors and the enforcement and the giving effect to all the regulations made by the Board; he was to collect information on education; hold meetings in different parts of the province, to which he was to invite the attendance of the Inspectors, teachers and inhabitants; to address such meetings on the subject of education, using all legitimate means to excite an interest therein; to cause Trustees, School Committees and teachers to be furnished with copies of the regulations of the Board of Education, &c.; to adopt measures to promote the establishment of school libraries; to provide plans for the construction of school houses, &c., with power to sue for books, &c., purchased for the use of parish schools, and for all monies due on sale thereof, and he was

required annually to prepare a Report upon the condition of the schools and school libraries, with information upon the system and state of education generally; the amount expended in promoting it, with suggestions, accompanied with a return of moneys received for the sale of books, &c., to be laid before the Legislature within ten days after the opening thereof. Provision was then made that three Trustees of Schools should be annually elected in each town or parish, at the time and in the same manner as other town and parish officers, who should be subject to the same pains and penalties for neglect or refusal to act, or the nonperformance of their duties as other town and parish officers; and when any town or parish failed to elect, the sessions should appoint as in other cases. In incorporated towns, cities or counties, the Council were to appoint the Trustees. The duties of the Trustees were pointed out: they were to divide parishes into convenient school districts; to give any licensed teacher authority in writing to open a school in a district where the inhabitants had provided a school-house and secured a salary, and with their assent to agree with such teacher; to suspend or displace teachers for incapacity, &c. They were required, immediately after ratifying the engagement of a teacher and annually thereafter to call a meeting of the rate-payers of the district for the purpose of electing a School Committee of three persons; they were to accompany the Inspector in examination of schools; they were, at least once a year, to examine all schools; to authorise such number of schools in any town, &c., as the wants of the inhabitants might require; and if they deemed it necessary, authorise the employment of an assistant licensed teacher in any large school; to apportion among school districts any money raised by county or parish assessment for support, &c., of schools. The election of a School Committee by the ratepayers was then provided for, and their duties pointed out, viz., to have charge of school-house furniture, &c.; to call meetings of inhabitants for providing school-house books, &c.; to have control of any library and appointment of a Librarian, &c.; to receive and appropriate all money raised in the district for providing a library, &c.; to admit free scholars and children at reduced rates, being children of poor and indigent parents, &c.

The duties and qualifications of teachers are minutely detailed in section 8. That section is as follows: -

" 8. The teachers, male and female, shall be divided into three classes, qualified as follows:—

" Male teachers of the first class, to teach spelling, reading, writing, arithmetic, English grammar, geography, history, book-keeping, geometry, mensuration, land-surveying, navigation and algebra; of the second class, spelling, reading, writing, arithmetic, English grammar, geography, history and book-keeping; of the third class, spelling, reading, writing and arithmetic.

" Every teacher of the first and second class shall be qualified and enjoined to impart to his pupils a knowledge of the geography, history and resources of the Province of New Brunswick, and of the adjoining North American Colonies.

" Female teachers of the first class to teach spelling, reading, writing, arithmetic, English grammar, geography, history and common needlework; of the second class, spelling, reading, writing, arithmetic, English grammar, geography and common needlework; of the third class, spelling, reading, writing, arithmetic and common needlework.

"Every teacher shall keep a daily Register of the scholars, which shall be "open for inspection at all times; a Visitor's Book, and enter therein the visits of "the Inspectors, Trustees and School Committees respectively; maintain proper "order and discipline, and carry out the regulations made for his guidance.

"Every teacher shall take diligent care, and exert his best endeavours, to "impress upon the minds of the children committed to his care, the principles of "christianity, morality and justice, and a sacred regard to truth and honesty, "love of their country, loyalty, humanity and a universal benevolence, sobriety, "industry and frugality, chastity, moderation and temperance, order and clean- "liness, and all other virtues which are the ornaments of human society; but no "pupil shall be required to read or study in or from any religous book, or join in "any act of devotion objected to by his parents or guardians; and the Board of "Education shall, by regulation, secure to all children whose parents or guardians "do not object to it, the reading of the Bible in parish schools; and the Bible, "when read in parish schools by Roman Catholic children, shall, if required by "their parents or guardians, be the Douay version, without note or comment."

Provision is then made for provincial assistance for support of superior schools and libraries; and the subsequent sections of the Act, provide for assessment whenever the majority of rate-payers in any county, parish, district or municipality, determine to provide for the support of schools therein by assessment, with a provision that any district school supported by assessment, shall be free to all the children residing therein. As these latter sections do not touch the questions we are discussing, it is unnecessary to refer to them more particularly. This Act was amended by the Act, 26 Vic. cap. 7, which, however, merely gives to the Board of Education authority to order a re-division of districts improperly divided, and to limit the number of teachers, &c. This, then, was the state of the law relating to parish or common schools at the time of the passing of The British North America Act, 1867, and continued so until repealed by The Common Schools Act, 1871, and because it is alleged that rights and privileges secured by or enjoyed under this Act have been prejudicially affected by the Common Schools Act, it is contended that the latter Act is void.

The Parish School Act clearly contemplated the establishment throughout the province of Public Common Schools for the benefit of the inhabitants of the province generally; and it cannot, we think, be disputed, that the governing bodies under that Act were not in any one respect or particular "denominational." The Board of Education was the Governor and Council, with a Superintendent appointed by them. The Trustees were elected or appointed, as the case might be, as other parish officers, and they were put, in other respects, on precisely the same footing as other parish officers; and the School Committee was elected by the rate-payers; and in nothing pertaining to the organization, regulation or government of the schools had any class of persons or denomination whatever, as such, the slightest voice or right of interference. The Board of Education, on behalf of the inhabitants of the province at large, being responsible for the general working of the system, and the Trustees and School Committees having the management and direction of certain matters under the Board of Education, in the particular localities for which they were respectively elected, but (without reference) so far as can be gathered from the Statute, in any or either case to class or creed.

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The schools established under this Act, were then, public parish or district schools, not belonging to or under the control of any particular denomination, neither had any class of persons nor any one denomination, whether Protestant or Catholic, any rights or privileges in the government or control of the schools that did not belong to every other class or denomination, in fact, to every other inhabitant of the parish or district; neither had any one class of persons or denomination, nor any individual, any right or privilege to have any peculiar religious doctrines or tenets exclusively taught, or taught at all in any such school. What is there then in this Act to make a school established under it a denominational school or to give it a denominational character. A good deal has been said as to the intention of the Imperial Parliament in using the words "denominatial schools" in sub-section (1). There seems to be no difficulty in giving a legal construction or definition to these words if they are read in their ordinary sense. It is a well established canon of construction, that an Act is to be construed according to the ordinary and grammatical sense of its language, if precise and unambiguous; and it is likewise a rule, established by the highest Appellate authority, that the language of a Statute, taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide for construing its enactments. See Philpott *versus* St. George's Hospital (6 H. Lords Cases 338, 3 Jur. N. S., 1269). And in the great Sussex Peerage Case (11 C. and F. 86, 8 Jur., 793), the Judges declared the law to be, that if the words of the Act are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense, that the words themselves do in such case best declare the intention of the Legislature.

The 5th paragraph of section 8 of the Parish School Act has been very strongly relied on as establishing a right in respect to denominational schools. Under that paragraph the teacher is most certainly enjoined to take diligent care and exert his best endeavours to impress on the minds of the children committed to his care the principles of *christianity, morality, &c., &c.* As we think it cannot be denied that the Schools under this Act were to be public parish schools, for the benefit of all the inhabitants of the parish or district in which they might be established, and the pupils attending the schools would necessarily, in a vast majority of cases throughout the province, be children of parents belonging to different denominations; can it be supposed, with any reason, that the Legislature could have intended that the teacher, who might possibly himself belong to a persuasion differing from all his pupils, should impress on the minds of his pupils the principles of christianity by instructing each one in the peculiar doctrines of the denomination of its parents; still less do we think it could have been intended that the principles of christianity to be impressed should be those of a denomination to which any of the pupils did not belong, simply because they might happen to be those of a denomination to which the teacher, or even a large majority of his pupils, may have belonged. It seems to us, that in view of the entire scope, object and policy of the Act, that the duty imposed on the teachers by the 5th paragraph of section 8, was a duty outside of the educational teaching of the school (which is specifically provided for in paragraphs 1 and2), to be performed as opportunities occurred, by precept and example, rather than by any direct or continuous system of dogmatic teaching; that the principles of christianity, honesty,

&c., to be impressed, were to be principles of general applicability, interfering with the peculiar religious views of none: doctrines, precepts and practices, which all Christian people hold in common, rather than the dogmatic teachings or tenets of a particular denomination or sect. This view would seem to be strongly confirmed by the last clause of the fourth paragraph, because, while under the first clause of that paragraph, the duty referred to is to be discharged by the teacher in respect to all the children committed to his care, without any exception in favour of any class or creed; the provision in the last clause is—"But no pupil "shall be required to read or study in or from any religious book, or join in any "act of devotion objected to by his parents or guardians," leaving the duty still on the teacher "to impress on the minds of the children committed to his care, "the general principles of christianity, morality, justice, a sacred regard for truth "and honesty, &c., &c.;" and the paragraph ends by providing that the Board of Education shall "By regulation secure to all children whose parents or guardians "do not object to it, the reading of the Bible in parish schools; and the Bible "when read in parish schools by Roman Catholic children, shall, if required by "their parents or guardians, be the Douay version, without *note or comment.*" This paragraph so far from making the schools denominational, or giving any rights or privileges in respect to a denominational school, appears to us to be directly opposed to the idea of denominational teaching in schools. Does not the very last clause (that most relied on at the argument), permitting the use of the Douay version by the addition of the words "without note or comment," show, that with the Bible read from that version no denominational views of any kind shall be put forward; and is not the whole in this view entirely consistent with the exclusion from the school library and from use of all works on controversial theology. But it has been said that, under the Parish School Act, schools were in fact established in certain localities, where all, or a large majority, of the rate-payers happen to belong to one particular persuasion, in which the catechisms of particular churches were taught, prayers peculiar to a particular religious body were used, and books inculcating the doctrines, views and practises of a particular denomination were used as class books; and that these schools were therefore denominational, and consequently the class of persons belonging to any such denomination had a legal right or privilege with respect to denominational Schools. Assuming what is alleged to have been the case, surely it is begging the whole question. How can the mere fact that in exceptional cases certain schools under the Parish School Act, drawing provincial aid, may have been made for the time being with or without the knowledge or sanction of the Board of Education, denominational by reason of the teacher instructing the children exclusively in doctrines of a particular denomination or using the prayers or books or daily teaching the catechism peculiar to such denomination, confer any legal right or privilege on any class of persons with respect to denominational schools, or give the denomination whose tenets may have been so taught in any such schools, rights or privileges other than those proposed by all and every the humblest inhabitant of the parish in which such school existed, free and independent of all denominational connection?

It is not by what the Board of Education, Superintendent, Inspectors or Trusees may have done or allowed to be done under the Act, nor is it from

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the mode in which the principles of christianity may have been actually practically taught in one or a hundred schools which may have drawn public money under the Parish School Act, that the question in a legal view must be determined; we must look to the law as it was at the time of the union, and by that, and that alone, be governed. Where then do we find any legal exclusive right or privilege conferred on any denomination to any school established or that might be established under that Act, or any right or privilege conferred on any class of persons to deal with such a school as belonging to such persons as a class or denomination, or as being under their control as such or that as a class they had any right to have taught therein the peculiar doctrines of their denomination? The assumption that the character or status of the school could be legally altered or affected, or rights gained by reason of the religious opinions or feelings of the inhabitants of a district or a majority of them, because in such a case Trustees and a School Committee might perchance be elected from a particular denomination, and so that then the school might be made denominational, is in our opinion entirely erroneous. To the Board of Education is entrusted the controlling governing power. By those rules and regulations, made and ordained within the letter and spirit of the Act, must all acts under them be controlled and governed, wholly independent of the religious opinions of the electors of the district, or of the Trustees elected by them. It appears to us, then, that in passing the Parish School Act, the Legislature contemplated a general system of education for the benefit of all the inhabitants of the province, without reference to class or creed; that such schools were to be organised, regulated and governed by public bodies, not owing their existence to or being in any way under the control of any class or denomination; that the Act made no provision for any schools established thereunder being denominational, and did not provide that any sect or denomination whatever, as such, was in any such schools to have control or precedence, nor in any way give or recognise any right in any class of persons to have, in the schools established thereunder, the doctrines, precepts or tenets of their denomination taught as part of the system of instruction, or to have such schools in any other respect denominational in their character. That with reference to religion, the Act simply recognises the duty of impressing on the minds of the pupils the general principles of christianity, honesty, &c., common alike to all christians, and simply required to be secured by regulation. The reading of the Bible as the inspired Word of God, accepted by all Christians as the basis of their faith, securing always to the Roman Catholics the use, when read by Roman Catholic children if required by their parents, the version recognised by their church, but without note or comment, but at the same time with the greatest apparent caution and scrupulous care lest the religious principles of any should be interfered with, providing that, even with respect to the inculcating the principles of christianity, morality, &c., as indicated, no pupil should be required to read or study in or from any religious book, or join in any act of devotion, objected to by his parents or guardians. And so, even with respect to the reading of the Bible, it is to be secured only to those children whose parents and guardians do not object. If, then, the establishment of denominational schools, or the teaching of denominational doctrines, was not recognised or provided for by the Act, and the Roman Catholics had therefore no legal rights, as a class, to claim any control over, or to insist that the doctrines of their church should be taught in all or any

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schools under the Parish School Act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that as a class of persons they have been prejudicially affected in any legal right or privilege with respect to "denominational schools," construing those words in their ordinary meaning, because under the Common Schools Act, 1871," it is provided that the schools shall be non-sectarian?

But it is contended in this case that the words "denominational schools" were not used by the Legislature, and should not be construed by us in their ordinary grammatical sense and meaning, but should have a much broader interpretation. While freely admitting that though the general rule is that every word must be understood according to its legal meaning, in construing an ordinary, as opposed to, a penal enactment, where the context shows that the Legislature has used it in a popular or more enlarged sense, Courts will so construe the language used. We are at a loss to discover anything in the British North America Act, 1867, indicating a legislative intention of using the words otherwise than in their ordinary meaning. It is clear enough that the reference in sub-section 2, to separate and dissentient schools in Ontario and Quebec, is especially to schools of Protestants and Catholics; and it is, perhaps, equally clear that sub-section 3 applies only to schools of a like character existing in any of the four provinces. But we are at a loss to understand why sub-sections 2 and 3 should be held to control or in any way limit or affect a previous distinct enactment, couched in plain and unambiguous language, and which, by quite as clear and unequivocal terms, has relation to all classes of persons or denominations, and to all the provinces of the dominion; or why, because separate and dissentient schools as between Protestants and Roman Catholics, not only in Ontario and Quebec, but in any province in which they may exist at the union, or be thereafter established, are provided for and protected, therefore we must necessarily infer therefrom, that in using the term "denominational schools" in sub-section 1, the Legislature intended to legislate only as between Roman Catholics and Protestants, and then also as to schools not necessarily denominational in the ordinary acceptation of the term. We think that the term "denomination" or "denominational," as generally used, is in its popular sense more frequently applied to the different denominations of Protestants than to the Church of Rome; and that the most reasonable inference is that sub-section 1 was intended to mean just what it expresses, viz.:—that "any" that is every "class of persons" having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants or Roman Catholics, should be protected in such rights. If it had been intended that the clause was to be limited in its application to Roman Catholics and Protestants only as dissentient one from the other, and apply to schools other than those usually understood as denominational schools, is it not fair to presume that the Legislature would have used some expression in the sub-section itself indicating such a particular sense, especially as we have seen there were at the union, in this province at any rate, strictly denominational schools, both Protestant and Roman Catholic, to which such a clause would be applicable; and for the very reason also, that when dealing with schools as between Protestant and Roman Catholic in sub-sections 2 and 3, the language chiefly confines it to those bodies respectively.

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But assuming that the term "denominational schools" is not to be construed in what has been called its narrow signification, perhaps the most favourable position to assume would be to read sub-section 1, as meaning substantially that nothing in any such law shall prejudicially affect any right or privilege which any class of persons as a denomination had by law with respect to schools in the province at the union. Let us endeavour to ascertain whether in such a case we would be justified in pronouncing the Common Schools Act, 1871, *ultra vires*, and therefore void.

Except in the matter of compulsory taxation there is no very great difference in principle that we can discover between the Parish School Act of 1858 and the Common Schools Act of 1871. The general government, superintendence and control of the schools are under both laws vested in a Board of Education almost similarly composed, the only difference being that to the Governor and Council and Superintendent is added the President of the University under the latter Act; in fact, the power to make regulations for the organization, government and discipline of the schools, appointment of Examiners of Teachers and the power of granting or cancelling licenses, and of making such regulations as may be necessary to carry into effect the Act and generally to provide for any exigencies that may arise under its operations, are precisely the same in both. (See sec. 4, paragraphs 3 to 10, of the Parish School Act, and sec. 6, sub-sections 4 to 8, of the Common Schools Act); and the details are to be carried out by a Superintendent, Inspectors and Trustees, alike substantially, under both Acts; and the duties and powers of these officers do not in principle substantially differ. But there are, of course, differences. Those relied on are, that the Common Schools Act has no enactment similar to section 8 of the Parish School Act; that the Parish School Act had no enactment similar to section 58, sub-section 12, of the Common Schools Act; and this section, it is alleged, prohibits the granting provincial aid to any but schools under the Common Schools Act; and that by the 60th section of the Common Schools Act, all schools conducted under its provisions shall be non-sectarian—a provision not to be found in the Parish School Act; and it is contended that the omission in the one case and the express enactment in the other, prejudicially affect the rights and privileges which the Roman Catholics as a class of persons and a denomination, and in the schools established or which might have been established under the Parish School Act, in other words that the rights and privileges which they had under the one, the omission and the enactments referred to prevented their claiming or obtaining under the other.

With reference to the omission, the Parish School Act, no doubt, declares that the Board of Education shall secure to all children, whose parents do not object, the reading of the Bible, and that when read by the Roman Catholic children, if required by their parents, it shall be in the Douay version, without note or comment. Here we have expressly directed it to be secured to all children, what many persons, no doubt, consider a great right and privilege, and Roman Catholic parents have a great right secured to them, viz., to have, if they require it, a particular version of the Bible read. As to the reason why a similar provision securing these important rights, in which Protestants and Catholics were both interested, was excluded from the Common Schools Act, it is not our business to inquire, what we have to determine is, does this omission make the law void, if,

in other respects, unobjectionable? We think not. If this was a right or privilege which existed at the union, the Legislature certainly have not protected it by an express enactment. But is the right taken away? May it not still exist, provided always it is a right which legitimately comes under sub-section 1, section 93? Because that section declares that nothing in any such law shall prejudicially affect any such right; and in such case, reading the Common School Law by the light of this section, would it not be the duty of the Board of Education, under the Common Schools Act, instead of making Regulation XXI., declaring as follows:—"That it shall be the privilege of every Teacher to open and close the "daily exercises of the school by reading a portion of Scripture (out of the "common or Douay version, as he may prefer), and by offering the Lord's "Prayer—any other prayer may be used by permission of the Board of Trustees— "but no Teacher may compel any pupil to be present at those exercises against the "wishes of his parents or guardian, expressed in writing to the Board of Trustees." To secure by regulation just what the Board of Education were bound to secure under the Parish School Act, 1858, that is, to make just such a regulation as the Parish School Act required to be made, we have seen they have precisely the same, and only the same, powers to make Regulations as the Board had under the Parish School Act. By this simple means the rights of all the children and their parents in the province, as well Protestant as Roman Catholic, which existed at the union, would be preserved, and all just cause of complaint on this head removed. Why the Board of Education should have departed from the principle and policy of the Parish School Act, and taken from the parents of all the children of the country, Protestant and Roman Catholic alike, the great boon and privilege of insisting on the Bible being read in schools, as they have done, and should have conferred on the Teacher not only the privilege of reading the Bible or not, as he likes, but out of the common or Douay version, not as the children or their parents may choose, but as the Teacher may prefer, though he cannot compel the attendance of the pupils, is not for us to attempt to explain; we simply point out the fact. But if the right secured by the Parish School Act is protected by the British North America Act, 1867, we fail to see, because the Board of Education may not have made such a regulation as they ought in such case to have made, or have made a regulation they ought not to have made, that the action of the Board or its non-action can render the Act of the Legislature inoperative.

If the right and privilege fall under section 93, and if there is no power to compel the Board of Education to make such a regulation, or the Legislature should have inserted a clause in the Common Schools Act requiring them to do it, is not this just a case where sub-section 4 of section 93 of the British North America Act, 1867, applies? viz:—"In case such provincial law as, from time to time, "seems to the Governor-General in Council requisite for the due execution of the "provisions of this section, is not made, then, as far only as the circumstances of the "case may require, the Parliament of Canada may make remedial laws for the "due execution of the provisions of this section." In this connection we may refer also to the 20th Regulation, which, it has been contended, prejudicially affects the rights and privileges which the Roman Catholics had under the Parish School Act. This Regulation declares that "symbols or emblems distinctive of

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" any national or other society, political party or religious organization, shall not " be exhibited or employed in the school room, either in its general arrangement " or exercises, or on the person of any Teacher or pupil." It may be that the Board of Education have disregarded the general policy of the Common Schools Act, and interfered with the rights of Teachers, parents and children, in excluding from the schools alike Teachers and pupils who may exhibit on their persons, in dress or ornament, symbols or emblems distinctive of any national or other society, political party or religious organization; for, however clear the right of the Board of Education may be to make regulations necessary for the good government and discipline of the schools, to make arbitrary restrictive regulations as to the dress or personal adornment of the Teachers and pupils, or which are calculated unnecessarily to interfere with their feelings, national, social or religious, in matters not calculated to give any such cause of offence to others, or to interfere with good order in the schools, is quite another question. And while it is by no means clear to us that any power exists in the Board of Education under the Common Schools Act by regulation, to deprive Teachers, parents and children of their rights of access to the free schools of the country, to the support of which they and all others are forced to contribute unless they submit to such regulations, and though the assumption of such a power of practical expulsion by the Board of Education raises a question involving important and delicate rights—rights which, in this land of civil and religious freedom, few may be willing to see infringed—or, at any rate, raising discussions which must be unpleasant to those engaged in them, and calculated to result in consequences which can scarcely fail to produce acrimonious feelings, and in the end be injurious to the cause of free education, which, we must presume, the regulation objected to was intended to further, all we can say is, as the case stands, the regulations are not before us in such a way that we can deal with them, and therefore we are not called upon to express any decided opinion as to their validity, because the constitutionality of the Act cannot, in our opinion, be affected by any regulation made under it, there being nothing unconstitutional in the Act itself that we can discover.

The second objection is easily answered. The provision in section 58, sub-section 12, of the Common Schools Act, declaring that no public funds shall be granted, would seem to apply to the schools particularly referred to in the preceding part of that section, and not to all schools. But if it was intended to apply generally to all schools, as Mr. Duff's argument assumes, what does it amount to? It cannot take from the Legislature the right to make such grants. Thus, we see in the estimates of the year 1872 grants were recommended by the Lieutenant-Governor, and no doubt made, for all the denominational schools before specifically referred to (*see* "Journal of House of Assembly," page 124); and if such clause was *ultra vires*, and we declared it void, *cui bono*, it would not affect the other parts of the Act; and what would practically be attained? The Legislature could, whether the clause stands or is declared void, do just as it pleases about granting or withholding the public funds.

But it is contended that the 60th section, declaring—"That all schools conducted under the provisions of this Act shall be non-sectarian," prejudicially affects the rights and privileges which the Roman Catholics as a class had in the Parish schools at the time of the union. It cannot be denied that to the pro-

vincial legislature is confided the exclusive right of making laws in relation to education, and that they, and they only, have the right to establish a general system of education applicable to the whole province and all classes of denominations, provided always that they have due regard to the rights and privileges protected by section 93 of the British North America Act, 1867.

Now what in this case is the right or privilege claimed to have been prejudicially affected? Is it a legal right or privilege that could have been put forward and enforced by the Roman Catholics, as a class, under all circumstances, and in every parish or common school, or is it a legal right confined to the Roman Catholics as a body, or does it belong equally to all and every of the other denominations of Christians in this province, and capable by them of enforcement, or, on the contrary, was it not the mere possible chance of having religious denominational teaching in certain schools, dependent entirely on accidental circumstances, as on what might happen to be, the religious views of a majority in a parish, and then on the accidental result of the election of Trustees and School Committee, and on the views of the parties so elected as to religious denominational teaching, and their willingness to permit it in the schools (admitting that the Trustees or Committee had any discretion in the matter, which, perhaps, is more than doubtful), was it not also dependent on the Board of Education, who had the general controlling power? If dependent on circumstances such as these, how can it be considered such a legal right as could have been contemplated by the Imperial Parliament in passing the 93rd section of the British North America Act, 1867? Where is there anything that can with any propriety be termed a legal right? Surely the Legislature must have intended to deal with legal rights and privileges. How is it to be defined—how enforced?

It by no means follows, as a necessary legal consequence, that because a majority of the inhabitants of a parish or school district may belong to a particular persuasion, they would necessarily vote for Trustees favourable to denominational teaching, nor could they be compelled by any legal process so to vote; nor does it follow that Trustees, when elected even by a majority of one denomination, would necessarily prove favourable to denominational teaching; and by what legal process could they be constrained to assent to its introduction in the schools? And again, suppose up to this point all were favourable, might not the whole scheme be ignored by the Board of Education, and how, then, could any class of persons, as such, no matter to what denomination they may belong, claim of right to control or direct the acts or doings of any of these parties? or how could Electors, Trustees, School Committees, or the Board of Education be compelled to make any school in any sense denominational, or, in other words, to confer on any such class denominational rights. Surely the rights contemplated must have been legal rights, in other words, rights secured by law or which they had under the law at the time of the union. If any such existed they must have been capable of being clearly and legally defined, and there must have existed legal means for their enforcement, or legal remedies for their infringement, for it is a clear maxim of law that *ubi jus ibi remedium*. It was said long ago in a celebrated case that, if a man has a right he must have a means to vindicate and maintain it, and a remedy if he is aggrieved in the exercise and enjoyment of it, and that it was indeed a vain thing to imagine a right without a remedy, for want of right and want of

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remedy are reciprocal. What possible legal means could any denomination have invoked under the old Parish School Act to compel any one school to be made denominational or to require and insist that in any one school denominational tenets, doctrines, precepts or practices should be taught or used? But, then it was repeatedly urged upon us that, under the Parish School Act circumstances might, and very often did, occur where schools might, and in numerous cases did, become denominational; but that, by reason of section 60 of the Common Schools Act, such was not now possible. The answer is simply this:—The inability of a class of persons to have under the Common Schools Act that which possibly they might, under certain exceptional and accidental circumstances, have had under the Parish School Act of 1858, but which they had no right to insist on having, is a damage not occasioned by anything which the law esteems an injury—a kind of damage termed in law *damnum absque injuria*, and for which there is no remedy. And so in this case, as there was no legal right to have denominational schools or denominational teaching, there is no injury in legal contemplation committed by the legislature dealing with the question in such a manner as to prevent the possibility arising, and consequently no right to have the action of the legislature abrogated. It may be a very great hardship that a large class of persons should be forced to contribute to the support of schools to which they are conscientiously opposed, or be shut out from what they have hitherto under certain circumstances enjoyed, and be without remedy, but by any such considerations, Courts of Justice ought not to be influenced, hard cases, it has been repeatedly said, are apt to make bad law, and it has also been justly remarked that if there is a general hardship affecting a general class of cases or persons, it is a consideration for the Legislature not for a Court of Justice.

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No. 7. Judgment of Mr. Justice Fisher, delivered 17th June, 1873.

In the Supreme Court, 17th June, 1873.

Ex parte Henry Maher.

His Honour Mr. Justice Fisher delivers the following Judgment.

I concur in the Judgment of my brethren as to the constitutionality of the Common Schools Act, 1871; but, as there are some sentiments in it in which I do not agree, I have thought, in a matter of so much delicacy and importance, it was better to read the Judgment that I had written than to attempt to qualify opinions which my brethren had so fully considered.

The right to impose this assessment is objected to on the ground that it includes a sum for the support of schools under the authority of the Act relating to Common Schools, 34 Vict., cap. 21, which it is contended is unconstitutional; that the Legislature have no power to pass it, because it contravenes the exception in the Act of Union.

By the 93rd section of the British North America Act, 1867, it is declared—"That in and for each province the Legislature may exclusively make laws in relation to education, subject and according to the following provision:—

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.

2. All the powers, privileges and duties at the union by law conferred and imposed in Upper Canada on the separate schools and School Trustees of the Queen's Roman Catholic subjects, shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

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.

4. In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council, or any Appeal under this section, is not duly executed by the proper provincial authority in their behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

The exclusive power of legislating upon the subject of education is thus conferred upon the Legislature of each province, subject to the reservation of the rights of any class of persons with respect to Denominational schools.

Everyone acquainted with the history of the provinces which comprised Canada before the union, knows the reason for the insertion of some of the provisions of this section. It was found to be the only mode of solving a question that had caused serious difficulty with the Government and Legislature of that province.

Paragraphs two and three were constructed to solve and settle these difficulties, and at present only apply to that province now consisting of Ontario and Quebec, where schools were in operation at the union answering the description given them in these paragraphs.

Whether the fourth paragraph applies to any other law than such as is referred to in the third paragraph it is not necessary to consider, as the constitutionality of the School Act depends entirely upon the meaning of the first paragraph.

The simple question for solution is, does the Common Schools Act, 1871, prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the province at the time of the union? It is not merely a right or privilege. A denominational right or privilege of itself, if any such existed, would not alone make the Common Schools Act unconstitutional. It must be a right or privilege with respect to a denominational school, which a class of persons had by law at the union, which is prejudicially affected by this Act to render it unconstitutional.

It appears to me that the first inquiry is—What is a denominational school? In my opinion it is a school under the exclusive government of some one denomination of Christians, and where the tenets of that denomination are taught. But assume that a school answering either of these requisites is a denominational school, and this is the lowest ground upon which it can be put, and then examine

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the laws in force at the time of the union, to ascertain if any such school then existed by law, and if the right of any class of persons therein has been prejudicially affected by the Common Schools Act.

There were denominational schools in existence at the union, such as the Varley School in St. John, the Sackville Academy, the Madras School, and the like but they are not touched by the Common Schools Act, 1871,—they remain in the enjoyment of all the rights they had at the Union.

The Act 20 Vic., cap. 9, intituled "An Act relating to Parish Schools," with some unimportant amendments not affecting the present question, was in force at the union. As it has been superseded by the Common Schools Act, 1871, which is objected to, we must refer to its provisions, to ascertain whether it authorised any denominational school, for if it did not, then the Act under consideration has not in any of its provisions prejudicially affected any right or privilege any class of persons enjoyed at the union.

The very title of the Act proclaims its unsectarian character as fully, to my mind as the positive enactment in the Act of 1871. That the schools conducted under its provisions should be non-sectarian—a useless provision in an Act which alone provided for the establishment of such schools.

Parish Schools, that is schools in and for every parish in the Province, according to the political division of the Province into Counties, Towns and Parishes, distributed and sustained by public and according to the population and extent of each parish, the number and classes of the schools must, in the very nature of things, be other than denominational.

I will now refer to the provisions of the Act, and see if there is any authority for the establishment of a denominational school under it, or any countenance in the Act for such a school.

The Governor in Council appoints the Superintendent of Schools, who, with the Governor and three Members of the Executive Council, constitute the Board of Education. The Inspection of the schools is done altogether by political agency. The Governor in Council is authorised to divide the Province into four districts, and appoint one Inspector for each district.

The Board of Education, a purely political body, make rules and regulations for the organisation and government of the schools, and such other regulations as may be deemed necessary to carry the Act into effect. There was no restriction whatever upon the power of the Board in this respect. The Board regulates the mode of licensing, examining, classifying and paying the Teachers, and prescribes the duties of the Inspectors. The Superintendent, a political officer, has the general direction and supervision of the schools, subject to the order of the Board.

Each parish was to be divided into school districts, by three Trustees annually elected by the ratepayers, at the same time and in the same manner as other town or parish officers were elected, and subject to the same penalties and disabilities, with the same provision for appointing them in case of failure in the election. They employ the Teachers and may dismiss them, subject to an appeal to the Board of Education. They are to examine the schools and apportion the money raised by assessment, when so raised, amongst the different schools.

Each school was under the immediate supervision of a School Committee, elected annually by the ratepayers of the district. They were empowered to admit free scholars, and children of poor parents at a reduced rate.

The law also provided for a superior school in each parish, thus also supplying the means for higher education.

The teachers, both male and female, were divided into three classes, with an appropriate allowance to each class from the Provincial Treasury, and with duties as to the subjects taught prescribed in the Act for each class.

It provided for a school library in each district, by a money grant in aid of the amount raised in the locality for that purpose, and placed the selection of books under the control of the Board of Education; but expressly excluded works of a licentious, vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology. This is the only part of the law in which anything of a denominational character is referred to in any way; and it shows how zealous the Legislature was in guarding the law, and in preserving the schools from any denominational or sectarian tendency. Provision was made for the education of the children of the whole people in schools of every grade, and by teachers of both sexes; and by the superior school, the wants of higher education were provided. The whole machinery of the Act is designed to make the schools common to the children of every man, irrespective of his religious opinions. The Act recognises the agreement of the inhabitants of any locality with a teacher licensed by the Board of Education, when they have provided a sufficient school house and secured the necessary salary, raised by voluntary contribution or tuition fee. It contains provision for voluntary assessment in the district, parish, or county, where the ratepayers determine to adopt that mode of supporting the schools, and in such case the schools are declared to be free to the children of all the inhabitants. The system is prescribed by the Board of Education; the localities take an active part in the establishment and government of the schools, subject to the general control of the government.

The local agency is exercised, and the local officers appointed, in the same manner as for the government and support of the poor, the highways, or any other local or parochial objects. Neither class, creed, nor colour affect or influence one more than the other. The only qualification for the electors of any officer is, that they are to be ratepayers upon real or personal property, or income. No class or creed had under the Act any peculiar right, either in the general government of the whole Province, or in any parish or school.

Now, when all this machinery for working the Act relating to parish schools had been made, is it not a striking proof of the determination of the Legislature to avoid the very thing which it is contended the Act authorises, by restricting the power of the Board of Education to make rules and regulations in this respect, and expressly excluding from the school libraries works hostile to the Christian religion, or works on controversial theology; while it left the inhabitants free to elect their local agents, who should employ the Teachers, and look after the schools. To secure to every man and the child of every man, a just equality with regard to his religious faith, it enacted, in effect, that the great leading principles of christianity should be inculcated in the schools; but there should not be in the library a book upon controversial theology, or in other words, with denominational teaching.

What sort of denominational school would that be, where the Master would not be aided in his dogmatic teaching by the writings of men of his own faith? When a denominational school is established, how strictly this is provided for.

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Take any one of the Acts on our Statute Book, and examine its provisions. I will refer to the Act incorporating the Trustees of the Wesleyan Academy at Mount Allison, Sackville, (12 Vic. cap. 65); the 11th section is as follows:—

"No person shall teach, maintain, promulgate, or enforce any religious doctrine or practice in the said Academy, or any department thereof, or in any religious service held upon the said premises, contrary to what is contained in certain notes of the New Testament, commonly reported to be the notes of the said Rev. John Wesley, A.M., and in the first four volumes of sermons commonly reported to have been written and published by him."

Take the Charter of the Madras School, or any other Act, and the same strict provision for dogmatic teaching is made. I pass by the Colleges, which were referred to by the Counsel on the argument for this rule, as not material to the inquiry, if they are within the category contended for.

I can hardly imagine any stronger illustration of the principle that pervades the whole Act relating to Parish Schools, than the language of the eighth paragraph of the fourth section, which thus restrains the large legislative power of the Board of Education. It is as follows:—

"To provide for the establishment, regulation and government of School "Libraries, and the selection of books to be used therein; but no works of a "licentious, vicious, or immoral tendency, or hostile to the Christian religion, or "works on controversial theology, shall be admitted."

It has been urged that the sixth paragraph of section eight countenanced denominational teaching. I think no one can read that section and fail to discern that it enacts the very contrary. The words of the paragraph are:—

"Every teacher shall take diligent care and exert his best endeavours to "impress on the minds of the children committed to his care the principles of "christianity, morality and justice, and a sacred regard to truth and honesty, love "of their country, loyalty, humanity, and a universal benevolence, sobriety, in- "dustry and frugality, chastity, moderation and temperance, order and cleanliness, "and all other virtues which are the ornaments of human society."

Surely it cannot be disputed that this can be done without any denominational teaching, or, in the language of the Statute, without entering upon controversial theology.

There are certain great fundamental principles of christianity, common to all, that may be enforced without trenching upon debateable ground. Take the Sermon on the Mount, or any of the lessons of the Great Teacher himself, for example.

To avoid any abuse of this duty or privilege of the teacher in the parish Schools, the Legislature proceeds further to enact: "but no pupil shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians." Here is a positive enactment against denominational teaching.

Knowing it to be possible for a designing teacher, under colour of the authority to impress upon the minds of the children the principles of christianity, and all other virtues, stealthily to teach doctrines of a denominational or sectarian character, and to protect the child from the influence of such teaching, the parents are empowered to interfere and withdraw the child from any such teaching, or from joining in any act of devotion having such a tendency.

The paragraph then proceeds thus:—"And the Board of Education shall, by regulation, secure to all children, whose parents or guardians do not object to it the reading of the Bible in parish schools."

What is there denominational in thus inculcating the principles of christianity and all other virtues which are the ornaments of human society? What better mode could be adopted than by reading portions of the Bible? It certainly is not a denominational book. It is the common standard of faith and practice to all christians, to it they all appeal. Where are such ennobling thoughts as in the Bible? It is said to be an historical fact, that when the question of reading the Bible in the Common Schools of one of the cities on this continent was debated, the Jews voted for it, on the ground that it was well adapted to the instruction of children, because of the sublime principles of morality it contained.

Though the Bible is regarded as the great charter of our salvation, as the revelation of the will of God to man, eminent divines in one branch of the Church Catholic object that some words, some expressions, some sentences, are incorrectly rendered in our ordinary English version, and recognize another version as being a more correct interpretation of such words, expressions and sentences.

The Legislature, with the same object of preventing any denominational right, enacts—"And the Bible, when read in parish schools by Roman Catholic children, shall, if required, by their parents or guardians, be the Douay version, without note or comment; the very words "without note or comment," of themselves are significant proofs of the intention of the Legislature.

Assuming that the Bible is a denominational book, and I cannot think any one will seriously contend that it is, and that this provision created a right, a denominational right if you please, that will not help the *ultra vires* argument, because if it were so, it is a right or privilege which a class of persons had by law at the union, to have the Bible read in a parish school, not in a denominational school, and that is not a right secured by "the British North America Act, 1867," even if it existed.

I have endeavoured to ascertain the true construction of the Act relating to parish schools, as the only Act affecting the question. I include the amendments, which are not important. Every other Act which confers upon any denomination a right or privilege with respect to denominational schools is left unrepealed, so that no right or privilege enjoyed by any class of persons under any such Act is prejudicially or in any way affected by the Act under consideration.

I will now refer very briefly to the 34th Vic., cap. 21, intituled "An Act relating to Common Schools." It is substantially the same as the Act of 1858, relating to parish schools.

The Board of Education is the same, with the addition of the President of the University. It has the same large powers.

The duties of the Superintendent are the same.

The number of Inspectors is increased, with smaller districts to each, but with duties very similar to what they discharged under the old law.

The Trustees are appointed in the same manner as under the old law, and discharge much the same duties, including the duties of the School Committee.

The teachers are classified and paid as in the old law. Superior schools are

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provided for, and libraries, upon the same principle. The only real difference that I can discover arises from the different modes of supporting the school.

Under the Act of 1871, the portion of the support furnished by the inhabitants is raised by assessment; and in the machinery and provisions necessary for working this out, and the different modes of paying and supporting the schools that it involves, is the only difference. In other respects this Act provides for the attainment of the same object by the same means.

It is said that there is no provision requiring the reading of the Bible in the schools. The Board of Education may by regulation provide for it, as in the Act relating to parish schools. If it were otherwise, it would not help the *ultra vires* argument, unless the schools could be shown to be denominational.

Upon the argument it was contended that some of the regulations interfered with the rights of a class of persons

I confess I was unable to discover the bearing of that argument upon the question. How, if the law were good, a bad regulation, if such there was, would affect it? Assume that this contention is correct, and that it prejudicially affects the right that a class of persons had at the union, such a right, if it existed, is not saved by the British North America Act, 1867, because it would be a right or privilege with respect to a parish school, and not to a denominational school.

I cannot discover that the regulations have anything to do with the question of the power of the Legislature to pass the Act, or can form any guide in the interpretation of it. It appears to me, that under either of the Acts of 1858 or 1871, it was competent for the Board of Education to make any of the regulations referred to; whether they exercised their powers wisely or unwisely under the Act of 1871, is another question.

The propriety of the regulations objected to is a question of public policy, upon which I am not called upon to express an opinion. I may, as an individual, entertain a very strong opinion as to its policy. As a judge, all I feel called upon to do is to consider its legality, and for myself, on that point, I entertain no doubt.

I am therefore of opinion that the rule should be refused.

No. 8. Judgment of Mr. Justice Wetmore, delivered 17th June, 1873.

D.

In the Supreme Court, 17th June, 1873,

Ex parte Henry Maher.

His Honour Mr. Justice Wetmore delivers the following Judgment:—

While fully concurring in the opinion of my learned brethren as to the constitutionality of the Common Schools Act, 1871, I do not wish to be understood as expressing a participation in any doubt whatever as to the regulations of the Board of Education.

I think the only question properly before the Court is, as to the Act itself and not as to the regulations. We are only called upon to decide whether or no the Schools Act, or any part of it, is *ultra vires*, and upon the decision, the order for assessment, to set which aside the application is made, is to be affected.

If the Act itself is not *ultra vires*, I do not see how the promulgation of any Regulation, even supposing it to be one which the Schools Act would not warrant, or to be in violation of the provisions of section 93, sub-section 1, of the British North America Act, 1867, can affect the case any more than assessors acting in violation of the law under which an assessment is imposed, would affect the law authorising the assessment. In such case, if the assessment is imposed in a manner not warranted by law, parties aggrieved would have their remedy for obtaining relief; and so, with reference to a regulation sought to be established by the Board of Education, if that body should exceed the power given by law in such case, the regulation would not have the support of law to uphold it, and therefore could not be maintained, but the law nevertheless, would remain in full force and authority.

The application to this Court is simply to set aside the order for assessment in consequence of the invalidity of the law, it does not touch the regulations, and though they have been referred to by Counsel in the argument, it does not seem to me they are before us in such a way as to call for a decision, or the expression of an opinion upon any one of them. Indeed, I do not see that a most positive and direct expression by the Court, as to the legality or illegality of any of the regulations, would in the slightest degree affect the constitutionality or unconstitutionality of the law; and I therefore purposely abstain from expressing my opinion upon any one of the regulations. Should a question arise respecting the regulations, or should a decision upon them be necessary for any other matters before the Court, then, of course, I would be required to express my opinion; until it does arise I decline doing so; to use an expression of Cockburn, C. J., in Rimini *versus* Van Praagh (L. Rep., 8 Q. B. 4). It will be time enough to do so when the necessity arises."

Per curiam. The Rule will be refused.

E.

No. 9. Rule refusing *writ of certiorari.*

In the Supreme Court, Trinity Term, 36th Victoria.

Ex parte Henry Maher.

Upon hearing Mr. Duff of Counsel for Henry Maher, a rate-payer in the Town of Portland, in the City and County of St. John, in moving for a rule to require the Town of Portland to show cause before this Honourable Court why a writ of *certiorari* should not be issued to remove herein a certain order for assessment for the year One thousand eight hundred and seventy-three, made by the Town Council of the said Town of Portland, in the words and form following:—"Whereas "it appears from the requisition of the Board of School Trustees of the Town of "Portland that the sum of twelve thousand four hundred and twenty-eight "dollars is required for the purpose of the Common Schools' Act, 1871, in the "present year of which three hundred dollars is required for the repairs and "alteration of schools, therefore resolved and ordered that there be raised, levied

RECORD.

In the Supreme Court of the Province of New Brunswick.

No. 9. Rule refusing *writ of certiorari* —*continued.*

" and assessed upon the Town of Portland and the inhabitants thereof, in the " present year the said sum of twelve thousand four hundred and twenty-eight " dollars, by a special assessment for the several purposes mentioned in the ninth " sub-section of the fifty-eighth section of said Act, passed in the thirty-fourth year " of her present Majesty, intituled "An Act relating to Common Schools," and under " the provision of said Act, and that warrant do issue under the seal of the town " to the assessors of taxes for the Town of Portland to levy and assess the said sum " of twelve thousand four hundred and twenty-eight dollars for the purposes " above-mentioned as a separate amount," with a view to the same being quashed, and upon reading the several affidavits of Henry Maher, Robert McCann and François X. Cormier it is ordered that the said rule be refused.

By the Court.

E. L. WETMORE, Deputy-Clerk of the Crown.

No. 10. Order of Court that Henry Maher have leave to Appeal.

F.

In the Supreme Court.

Trinity Term, 36th Victoria, and on the 20th June, 1873, in this same term.

Ex parte Henry Maher.

Upon motion of Mr. Duff, of Counsel for the above-named Henry Maher, it is ordered that the said Henry Maher have leave to appeal to Her Majesty in Her Privy Council from the Judgment and Order of this Honourable Court, delivered and made in this matter on the seventeenth day of June, in this same term.

By the Court.

E. L. WETMORE, Deputy-Clerk of the Crown.

No. 11. Summons, dated 2nd July, 1873, to settle terms of Appeal.

H.

In the Sepreme Court.

Ex parte Henry Maher.

Let the Town of Portland, or its attorney or agent, attend before me at the Wiggins Building at Saint John, on Monday, the seventh day of July instant, at three o'clock in the afternoon, to settle the terms of the Appeal in this matter to the Judicial Committee of the Privy Council.

J. W. WELDON.

Dated this 2nd day of July, A.D. 1873.

1001

No. 12. Affidavit of Timothy Donovan of service of Summons, sworn 4th July, 1873.

In the Supreme Court.

Ex parte Henry Maher.

Timothy Donovan, of the City of Saint John, in the City and County of Saint John, writing clerk, maketh oath and saith:—That on the fourth day of July instant he, deponent, personally served John F. Goddard, Esquire, town clerk of Portland, in the City and County of Saint John, with the annexed Summons, by delivering a true copy thereof to him. And deponent at the same time showed to the said Mr. Goddard the said annexed Summons.

Sworn before me at the City of Saint John this fourth day of July, A.D. 1873.

TIMOTHY DONOVAN.

DANIEL JORDAN, Commr., &c., in the Sup. Court.

INDORSEMENTS.

Supreme Court.

Ex parte Henry Maher.

Summons and Afft. Service, filed 10th July, 1873.

I

No. 13. Order of Mr. Justice Weldon, dated 7th July, 1873, settling terms of Appeal.

In the Supreme Court.

Ex parte Henry Maher.

On due return of the summons in this cause, and on hearing Mr. Morrison, of Counsel for the Town of Portland, and Mr. Duff, of Counsel for Henry Maher, I do order that the Appeal in this matter to Her Majesty in Her Privy Council shall and may be preferred and prosecuted upon a Bond being executed by the Right Reverend John Sweeney, Roman Catholic Bishop of Saint John to the Town of Portland, in the penal sum of five hundred pounds sterling, conditional for the prosecution of the Appeal, and for the payment of all such costs as may be awarded by Her Majesty, Her Heirs or Successors, or by the Judicial Committee of Her Majesty's Privy Council to the said Town of Portland in the matter of this Appeal.

Dated this 7th day of July, A.D. 1873.

J. W. WELDON.

INDORSEMENTS.

In the Supreme Court.

Ex parte Henry Maher. Order for perfecting Appeal.

Filed 10th July, 1873.

RECORD.

In the Supreme Court of the Province of New Brunswick.

No 14. Bond for Security of Costs, dated 7th July, 1873.

J

Know all men by these presents, That I, the Right Reverend John Sweeney, Roman Catholic Bishop of Saint John, am held and firmly bound unto the Town of Portland in the sum of five hundred pounds sterling money of Great Britain to be paid to the said Town of Portland, its successors or assigns, for which payment well and truly to be made I bind myself and my successors in office firmly by these presents, sealed with my seal, and dated this seventh day of July in the year of our Lord One thousand eight hundred and seventy-three.

Whereas the Town Council of the said Town of Portland, in compliance with a requisition from the Board of School Trustees for the said town, has ordered that there shall be levied upon the said Town of Portland and the inhabitants thereof, in the present year, the sum of twelve thousand four hundred and twenty-eight dollars, by special assessment, for the several purposes mentioned in the ninth sub-section of the fifty-eighth section of an Act made and passed in the thirty-fourth year of the reign of Her present Majesty, intituled "An Act relating to Common Schools," and that a Warrant shall issue under the seal of the said town, to the assessors of taxes for the Town of Portland, to levy and assess the said sum of twelve thousand four hundred and twenty-eight dollars, for the purposes above mentioned, as a special assessment. And whereas, The Supreme Court of the Province of New Brunswick was moved in Trinity Term last, on the part and behalf of Henry Maher, a rate-payer in the said Town of Portland, and subject to be assessed under the said order of the said Town Council, for a *rule nisi* to the said Town of Portland, to show cause why a *writ of certiorari* should not be issued to the said Town of Portland, to remove into the said Supreme Court, the said in part recited Order of the said Town Council, with a view to its being quashed. And whereas, it was ordered by the said Court, that such *rule nisi* should not be granted, and whereas, the said Henry Maher, having asked and obtained the leave of the said Court to appeal from the said decision to Her Majesty in Her Privy Council, and the Court having within the time allowed by Her Majesty's orders in Council, approved of the Bond of the Right Reverend John Sweeney, conditioned as hereinafter contained as security for the prosecution of such Appeal: now the condition of this obligation is such, that if the said Henry Maher shall prosecute his Appeal before Her Majesty in Her said Privy Council, and shall pay to the said Town of Portland all such costs as shall or may be awarded by Her Majesty, Her heirs or successors, or by the Judicial Committee of Her Majesty's Privy Council, in the matter of the said Appeal, then this obligation to be void, otherwise to be and remain in full force and virtue.

Signed, sealed and delivered in presence of John Willet. ✝ J. SWEENEY. (L.S.)

INDORSEMENTS.

In the Supreme Court.

Ex parte Henry Maher.

Bond for security to prosecute Appeal. I approve of within Bond.

F. A. MORRISON, Counsel and Attorney, Town of Portland, in the matter of within-mentioned Appeal.

Filed, 10th July, 1873.

1003

RECORD.

In the Supreme Court of the Province of New Brunswick.

No. 15. Certificate of Clerk of the Crown of Documents in Transcript Record, dated 18th September, 1873.

PROVINCE OF NEW BRUNSWICK.

Supreme Court.

Ex parte Henry Maher.

I, William Henry Tuck, clerk of the Crown in the Supreme Court of Judicature for the Province of New Brunswick, do hereby certify that the accompanying documents are true and correct copies of all evidence, proceedings and judgments had or made in the above matter, to wit:—

The papers marked "A" are respectively copies of the several affidavits used upon making the motion for a *Rule Nisi* for a *Certiorari* in this matter.

"B" is a copy of the opinion of the Chief Justice and Judges Allen and Weldon.
"C" is a copy of the opinion of Judge Fisher.
"D" is a copy of the opinion of Judge Wetmore.
"E" is a copy of the Order of the Court, refusing the *Rule Nisi* for a *Certiorari*.
"F" is a copy of the Rule of the Court, granting leave to Appeal.
"H" is a copy of Judge Weldon's appointment of time and place for settling the terms and conditions of the Appeal, with the Affidavit of Service thereof.
"I" is a copy of Judge Weldon's Order, approving the security and allowing the Appeal.
"J" is a copy of Bond, approved of by Judge Weldon, indorsed with the approval of F. A. Morrison, Counsel and Attorney for the Respondents.

Given under my hand and the seal of the said Court, this eighteenth day of September, in the year of our Lord One thousand eight hundred and seventy-three, and in the thirty-seventh year of Her Majesty's reign.

(L.S.) W. H. TUCK, Clerk of the Crown in the Supreme Court, Province of New Brunswick.

In the Privy Council.

On Appeal from the Supreme Court of the Province of New Brunswick.

BETWEEN

HENRY MAHER . . . . *Appellant,*

AND

The TOWN COUNCIL of the TOWN of PORTLAND . . *Respondent.*

RECORD OF PROCEEDINGS.

LINKLATER, HACKWOOD, ADDISON & BROWN,
For Appellant,

BIRCHAM & Co.,
For Respondent.