IN THE MATTER OF A PETITION OF RIGHT

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*April 20, 21, 22, 23, 25.
*Oct. 10.

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR SCHOOL SECTION NUMBER TWO IN THE TOWNSHIP OF TINY, AND THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF PETERBOROUGH, ON BEHALF OF THEMSELVES AND ALL OTHER BOARDS OF TRUSTEES OF ROMAN CATHOLIC SEPARATE SCHOOLS IN THE PROVINCE OF ONTARIO (SUPPLIANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Constitutional Law—Education—Roman Catholic separate schools in Ontario—Rights as to courses of study and grades of education in such schools—Rights at Confederation—B.N.A. Act, s. 93 (1)—Validity of Ontario statutes and regulations—Taxation for support of continuation schools, collegiate institutes and high schools—Rights of separate schools as to share in legislative grants.

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The suppliants claimed: (1) The right to establish and conduct courses of study and grades of education in Roman Catholic separate schools in Ontario such as are conducted in continuation schools, collegiate institutes and high schools; and that all regulations purporting to prohibit, limit, or in any way prejudicially affect such right are *ultra vires;* (2) The right of Roman Catholics in Ontario to exemption from taxation for the support of continuation schools, collegiate institutes and high schools not conducted by their own boards of trustees; (3) A share in public moneys granted by the Ontario legislature for common school purposes computed in accordance with what they asserted to have been their statutory rights at the date of Confederation; and asked for a declaration that certain Ontario statutory enactments prejudicially affected their rights as granted by the *Separate Schools Act,* 26 Vic. (1863), c. 5, and secured by s. 93 of the *B.N.A. Act,* and, in so far as they affected such rights, were *ultra vires.* The Appellate Division of the Supreme Court of Ontario (60 Ont. L.R. 15), affirming judgment of Rose J. (59 Ont. L.R. 96), held against their claims. On appeal to this Court, three of the six judges hearing the appeal held it should be dismissed, and it was dismissed accordingly. Anglin C.J.C. and Rinfret J. held in the suppliants' favour on all said claims. Mignault J. held in their favour except, in part, as to their claim in regard to legislative grants. Duff, Newcombe and Lamont JJ. held against them on all claims. As to a certain sum sued for, the Court unanimously held that the appeal failed.

The *Separate Schools Act,* 26 Vic. (1863), c. 5; the *Common Schools Act,* C.S.U.C. 1859, c. 64; the *B.N.A. Act,* s. 93; and other statutes, and official reports and documents, extensively reviewed and discussed.

Per Anglin C.J.C., Mignault and Rinfret JJ.: Any statute or regulation that would materially diminish or curtail the scope of the education which denominational schools were, at Confederation, legally entitled to impart, or that would tend to restrict the period during which supporters of such schools were then legally entitled to have their children's education subject to the influence of denominational control and instruction, would "prejudicially affect a right or privilege with respect to denominational schools" within s. 93 (1) of the *B.N.A. Act.* The remedy is to invoke the ordinary tribunals; the right of appeal to the federal executive under s. 93 (3) does not apply. S. 93 (3) has to do with acts of provincial authorities which, although not *ultra vires,* so affect rights and privileges theretofore enjoyed by a religious minority as to constitute, in the opinion of the Governor in Council, a grievance calling for federal intervention (*Brophy* v. *Att. Gen. of Manitoba* [1895] A.C. 202).

The effect of the legislation in force at Confederation, construing it without the aid of any extraneous evidence, was to confer on all separate school trustees, as part of, or incident to, the management and control of the schools entrusted to them, the right to determine the subjects of instruction in, and the grading of, such schools. They had the legal right to provide therein for secondary education. Curtailment of such rights was not within the regulative powers of the Council of Public Instruction. The above view as to the effect of the legislation is *prima facie* supported by the fact that it was the view accepted and acted upon by the educational authorities, as indicated by the official reports and documents in evidence. (*Clyde Navigation Trustees* v. *Laird,* 8 App. Cas. 658, at p. 670).

By virtue of the exemption to separate school supporters under s. 14 of the *Separate Schools Act* of 1863, and from the fact that the Ontario continuation schools, high schools and collegiate institutes are now doing work which formed part of that formerly legally done, or which might have been so done, by the common schools, it follows that separate school supporters are entitled to exemption from rates for the support of such continuation schools, etc. To compel Catholic separate school supporters to support the last-mentioned schools, and to use them, if they would give their children up to 21 years of age a secondary education, is prejudicially to affect the right or privilege enjoyed by Roman Catholics as a class at the Union of having such education given to their children under denominational influence and in separate schools managed by their own trustees (*Barrett* v. *Winnipeg,* 19 Can. S.C.R. 374, at p. 424, referred to).

Per Anglin C.J.C. and Rinfret J.: Every Ontario legislative enactment involving a departure from the principle of apportionment between common and separate schools *pro rata* on the basis of average attendance, as provided by s. 20 of the *Separate Schools Act* of 1863, of all legislative and municipal grants of public moneys for any purpose that was, under the law at Confederation, a common school purpose, (saving grants to high schools in continuation of former grammar school appropriations), would, if valid, prejudicially affect a right or privilege with respect to their denominational schools which Roman Catholics had by law at the Union and is, therefore, *ultra vires.* Every grant for a common school purpose, whether made for a particular school or schools, or made subject to some restrictive term or condition, is covered by s. 20 of the *Separate Schools Act,* 1863, and therefore comes within the ambit of the protection of s. 93 (1) of the *B.N.A. Act,* and cannot be made so as to preclude the right of separate schools to share therein unless compensation to them for their proportion thereof is otherwise provided. The Common and the Separate Schools Acts alike were continued in force after the Union by s. 129 of the *B.N.A. Act* as provincial legislation of Ontario, subject to repeal and amendment by the legislature, as to common schools without restriction, and as to separate schools within the limitations imposed by s. 93 (1) of the *B.N.A. Act* (*Dobie* v. *The Church Temporalities Board,* 7 App. Cas. 136, at p. 147; *Att. Gen. for Ontario* v. *Att. Gen. for Canada,* [1896] A.C. 348, at pp. 336-7). The presence of the words "this Province" and "the Province" in s. 20 of the *Separate Schools Act* of 1863 did not render that provision inapplicable after Confederation. Those terms meant after Confederation the new province of Ontario. The words "and not otherwise appropriated by law," appended in s. 106 of the *Common Schools Act,* C.S.U.C. 1859, c. 64, to the description of the legislative grants to be apportioned, do not present a formidable difficulty. S. 20 of the Act of 1863 is subsequent legislation, and, so far as there may be inconsistency, its terms must prevail over those of s. 106 of the Act of 1859. S. 20 of the Act of 1863 precludes an appropriation by law of any grants made for common school purposes which would prevent the separate schools sharing proportionately in them.

Quaere, whether the legislature could validly formulate a scheme or impose conditions for the distribution amongst the separate schools themselves, other than on the basis of average attendance, of the proportion of the total grants for common school purposes, as under-

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stood at Confederation, to which the separate schools as a whole are entitled.

Per Duff and Newcombe JJ.: Under the legislation existing at Confederation, Roman Catholic separate schools were subject to regulation by the Council of Public Instruction for Upper Canada. Giving their natural sense to the words of s. 26 of the *Separate Schools Act* of 1863, the Council had a general power of regulation. This power would be subject only to relevant enactments of the separate school law and to the limitations necessarily implied in the fact that the power was given for the purpose of enabling Roman Catholics to carry on more satisfactorily their system of denominational schools. Subject as aforesaid, there is no good reason for restricting the natural sense of the words of s. 26. Another possible view is that s. 26 subordinated separate schools to regulation by the Council in respect of all subject matters which might from time to time fall within the ambit of its jurisdiction in relation to common schools, under the existing Common School Acts or subsequent amending legislation. In any case, and even assuming (but not accepting) that the Council's regulative powers as to separate schools could be taken as confined to the subject matters which were within the field of its authority in relation to common schools at the date of the passing of the *Separate Schools Act* of 1863, those powers (even if so confined as last mentioned) covered regulation as to scope and conduct of instruction, including courses of study and text-books. Not only does this appear on a proper construction of the common school legislation itself, but it was the view which, as shown by the documents in evidence, dictated the practice of the Council in exercising its functions under the Common School Acts of 1850 and 1859, in which practice, carried out under circumstances of the greatest publicity, the legislature, in view of its re-enactments without pertinent change in the Act of 1859, and the unqualified language of ss. 26 and 9 of the Act of 1863, must be presumed to have acquiesced.

In scope of instruction common schools or Roman Catholic separate schools were not, at Confederation, on the same footing as collegiate institutes, high schools or continuation schools to-day. Viewing the school legislation as a whole as it stood at Confederation, its history, and the official acts of those charged with administration of the school law, as shown by official documents in evidence and having regard especially to the required qualifications of teachers, the provision made for training them, the programs of studies officially promulgated, and the character of the authorized text-books, it is plain that such schools were intended to be elementary schools only.

The principle of division laid down by s. 20 of the *Separate Schools Act* of 1863 assumed the existence of a fund which had been appropriated for the benefit of the common schools generally in each municipality. It was upon this fund, so appropriated for a given municipality, that the section operated; it operated only after the fund for each municipality had been ascertained under the distribution provided for in ss. 106, 120, 121 and 122 of the *Common Schools Act* of 1859. The legislature did not intend to tie its hands by s. 106 (1) of the Act of 1859 in such a way as to necessitate the apportionment of all moneys voted for common schools, according to a fixed arithmetical ratio. The qualification "not otherwise expressly appro-

priated" sufficiently manifests its intention to reserve its freedom of action. Assuming s. 20 to have created a legal "right or privilege" within s. 93 (1) of the *B.N.A. Act*, it was not a right "by law" to require the legislature to refrain from granting appropriations for special purposes or for the aid of schools reaching a certain standard of excellence or of school sections conforming to a certain standard of expenditure. There has been no deprivation of anything to which any "right or privilege" under s. 20 or under s. 20 combined with s. 106 could attach. Nor is there any evidence that the alleged right or privilege has been rendered less valuable by the impeached legislation (assuming that to be a legitimate ground of complaint under s. 93 (1)). There is no reason for supposing that the existing grants, if distributed according to the arithmetical ratios of ss. 106 and 20, would yield a larger sum for Roman Catholics as a whole. But, more important still, it is impossible to know, if under compulsion of a constitutional limitation the legislature were obliged to follow an unwise and wasteful plan of distribution, whether the grants would be as generous as they now are. There is no suggestion that by the statutes now in force Roman Catholics are placed upon a footing of inequality with the public schools. Grants are shared by all schools alike, upon identical conditions.

Quaere as to suppliants' right by petition of right to obtain a declaration that certain Ontario statutes are *ultra vires*.

Per Mignault J.: The legislative grant which the Chief Superintendent was to apportion under s. 106 (1) of the *Common Schools Act* of 1859, and of which he subsequently was to pay a share to the trustees of each separate school, was a general grant for the support of common schools or for common school purposes. A special grant, say for the rebuilding of a particular school destroyed by fire, would be "otherwise appropriated by law," and he could not deal with it in his apportionment. Such special grants could not be said to be grants "for common school purposes" within the meaning of s. 20 of the *Separate Schools Act* of 1863.

Conditions in excess of those laid down by s. 20 cannot be imposed on the separate schools to entitle them to share in the grants to which it applies. Any statute purporting to impose such conditions, as well as all statutes and regulations contravening the suppliants' first two claims, are *ultra vires*.

Per Newcombe J.: The powers of regulation which, within the scope of the Acts of 1859 and 1863, the province possessed at the Union were not reduced by the *B.N.A. Act*. The denominational schools to which s. 93 (1) refers, so far as they were Roman Catholic separate schools of Upper Canada, were regulated schools, and the provisions to which the suppliants object are within the powers of regulation which the province had in 1863, and continued to possess at and after the Union.

There is nothing in the *B.N.A. Act* to compel the legislature to make a grant, or to avoid conditions prescribed for earning it, or to prevent a specific appropriation.

Per Lamont J.: At Confederation the Council of Public Instruction had authority to make regulations, including the prescribing of the courses of study, for the common and separate schools. This appears on the proper construction of the *Separate Schools Act* of 1863 and

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the *Common Schools Act* of 1859, from the history of the legislation, and from the accepted practice carried on. It was the trustees' right to manage their separate schools subject to the Council's said regulative powers, that was confirmed by s. 93 (1) of the *B.N.A. Act.* The Council's powers would not enable it to make regulations which would wipe out, wholly or partially, the common or the separate schools. The common schools, at Confederation, had a distinct and definite place in the educational system of Upper Canada. They were intended to be the primary schools, furnishing elementary instruction, with the grammar schools as intermediate between them and the University; and the Council's duty was to make regulations prescribing courses of study which would enable the schools to provide effectively instruction covering the field which the legislature intended they should occupy. The separate schools, as to secular education, were intended to be simply common schools under denominational management, and covered the same field as the common schools. The line of demarcation between the primary and intermediate schools may not always have been definitely drawn or closely adhered to; there may have been some overlapping in instruction, due to the exigencies of particular localities; but the legislature's intention as disclosed in the various Acts, and not the manner in which the system worked out in actual practice, should be the guide in determining the sphere of operation. It cannot be said that, under the impeached legislation, the separate schools of to-day have lost their status as primary schools of the class to which the Act of 1863 intended them to belong.

The "public grants * * * for common school purposes" in which, under s. 20 of the Act of 1863, every separate school was entitled to share, were general or unconditional grants in which all schools were to share. They did not include moneys appropriated by the legislature to specific purposes, or to grants for apportionment among schools attaining a certain standard of efficiency or equipment, or made payable upon the performance of a condition. "Grants * * * for common school purposes" meant "grants for the purposes of all common schools." These would include conditional grants for the same purpose once the condition had been performed. But, as the legislature's authority to say whether or not any grant at all shall be made, or to specify the conditions upon which public moneys shall be devoted to school purposes, is supreme, the only limitation imposed by s. 20 upon the legislature's exercise of its authority, so far as conditional grants are concerned, is that the separate schools must be given the same right as the common (now public) schools, to perform the conditions and earn the grant.

APPEAL (by leave of the Appellate Division of the Supreme Court of Ontario) from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing the suppliants' appeal from the judgment of Rose J. (2) dismissing the petition of right.

(1) (1926) 60 Ont. L.R. 15. (2) (1926) 59 Ont. L.R. 96.

The original suppliant was the board of trustees of the Roman Catholic separate schools for school section no. 2 in the township of Tiny, on behalf of itself and all other boards of trustees of Roman Catholic separate schools in Ontario. At the hearing in the Appellate Division leave was given to the original suppliant to add as a party suppliant the board of trustees of the Roman Catholic separate schools for the city of Peterborough, an urban board, the latter's consent being filed; the petition of right and statement of defence were amended; and the fiat of the Lieutenant-Governor was granted to the amended petition.

The petition of right (as amended) set out, in effect, as follows:

1. Each of the suppliants is a body corporate under and by virtue of "The Separate Schools Act," R.S.O. 1914, c. 270, s. 21, ss. 3, and as such conducts a Roman Catholic separate school.

2. Under and by virtue of s. 20 of 26 Vic. (1863), c. 5, being an Act of the then Parliament of Canada entitled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools" each of the suppliants is entitled to receive from and be paid by the respondent a share in the fund annually granted by the Legislature of Ontario for the support of common schools and is entitled also to a share in all other public grants investments and allotments for common school purposes then made or thereafter to be made by the province according to the average number of pupils attending such school during the twelve next preceding months, as compared with the whole average number of pupils attending school in the township of Tiny, and in the city of Peterborough respectively.

3. (Said s. 20 of 26 Vic. c. 5 is set out).

4. (S. 22 of 26 Vic. c. 5 is set out).

5. (S. 106 (1) of c. 64 of C.S.U.C., 1859, an Act entitled "The Upper Canada Common School Act" is set out).

6. That this Act of 1859 including s. 106 was in full force and effect in the year 1863 and in the year 1867 and continued to be the law applicable to the matters referred to therein for several years subsequent to 1867; and the

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grants annually made by the Legislature were so apportioned down to and including the year 1907.

7. (S. 93 (1) of the *B.N.A. Act* is set out).

8. That the right of each of the suppliants under and by virtue of the Act of 1863, c. 5, ss. 20 and 23 thereof, and further secured to it by the *B.N.A. Act,* 1867, c. 5, s. 93, (1), to a share in the fund annually granted by the Legislature of Ontario according to the average number of pupils attending its school as compared with the whole average number of pupils attending school in the said township of Tiny and in the said city of Peterborough respectively was prejudicially affected by the following Acts of the Legislature of Ontario:

(*a*) 6 Edward VII (1906), chapter 52—The Department of Education Act, section 23.

(*b*) 7 Edward VII (1907), chapter 50, an Act entitled "An Act to amend the Department of Education Act," section 4, subsection 3.

(*c*) 9 Edward VII (1909), chapter 88, an Act entitled "The Department of Education Act," section 6.

(*d*) 10 Edward VII (1910), chapter 102, section 1.

(*e*) R.S.O. 1914, chapter 265, section 6—an Act entitled "The Department of Education Act."

(*f*) 12-13 George V (1922), chapter 98, sections 2 and 3—an Act entitled "The School Law Amendment Act, 1922."

(*g*) 14 George V (1924) chapter 82, section 2—an Act entitled "The School Law Amendment Act, 1924."

9. That so far as the said Acts purport to enact a different method for apportioning the share of the fund annually granted for common school purposes to which the separate schools conducted by the suppliants are or may be entitled other than the average attendance basis as enacted in the *Separate School Act* of 1863, c. 5, and such different method results or may result in a smaller share of said annual fund being paid to the suppliants than would be payable on the basis of average attendance of pupils, the said Acts are *ultra vires* of the Legislature of Ontario.

10. That in and for the year 1922, out of the fund granted by the Legislature of Ontario for common school purposes for the year 1922 there was paid to the various school boards or schools in Ontario, according to the report for the year 1923 of the Minister of Education, the amount of $3,401,818 under various titles as follows:

(1) To Public and Separate Schools (p. 87 of report)	$2,976,712 00
(2) To Continuation Schools (p. 90 of report)	148,217 00
(3) To Collegiate Institutes and High Schools (p. 91 of report).	276,889 00
	$3,401,818 00

11. That the said total sum of $3,401,818 was a fund granted by the Legislature for the support of common schools and for common school purposes within the meaning of s. 20 of 26 Vic. (1863), c. 5, and that the schools conducted by the suppliants were entitled to share in such fund according to the provisions of said Act, 26 Vic. (1863), c. 5.

12. That as to continuation schools and collegiate institutes and high schools above referred to in par. 10, the same are common schools within the meaning of c. 64 of C.S.U.C., 1859—an Act entitled "The Upper Canada Common School Act" and of c. 5 of 26 Vic. 1863—an Act entitled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools."

13. That under and by virtue of the Act of 26 Vic. (1863), c. 5, s. 14, and of the *B.N.A. Act* of 1867, c. 3, s. 93 (1), the class of persons being separate school supporters represented by the suppliants are exempted from payment of all rates imposed for the support of common schools, and that it is *ultra vires* of the Legislature of Ontario to impose or attempt to impose upon such persons payment of rates for the support of common schools now known and designated as either continuation schools, collegiate institutes or high schools and which are not established and conducted by the suppliants.

14. That in so far as the Act of 34, Vic. (1870-1871), c. 33, entitled "an Act to improve the Common and Gram-

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mar Schools of the Province of Ontario", and subsequent Acts respecting high schools, including c. 268 of R.S.O., 1914, ss. 33, 34, 37, 38 and 39, an Act entitled "The High Schools Act," purport to impose upon the class of persons being separate school supporters represented by the suppliants payment of rates for the support of high schools and collegiate institutes not established and conducted by the suppliants, the same are *ultra vires* of the Legislature of Ontario.

15. That each of the suppliants is, and in any event the board of trustees of Roman Catholic separate schools in every city, town and village in Ontario is entitled as of right to establish and conduct in its separate schools the courses of study and grades of education that are carried on in such so-called continuation schools and collegiate institutes and high schools, and the fact is such courses of study and grades were established and conducted by certain boards of trustees of the Roman Catholic separate schools from in or about the year 1841 up to and including the year 1915 when certain regulations were enacted by the respondent under which the respondent claimed and still claims the right to limit the range and grade of the courses of study and grades of education, all of which said regulations are in derogation of the rights of the suppliants and are invalid and *ultra vires*.

16. That the respondent has no right nor authority as claimed to limit or confine the common school courses of study or grades of education which may be established and carried on by either of the suppliants in the schools conducted by the suppliants respectively.

17. That according to the last census of Ontario made in 1921, the population of the province as of the year 1921 was 2,933,622 persons, and according to the same census the population of the township of Tiny for the year 1921 was 4,026 persons.

18. That the share of the fund mentioned in par. 10 which should have been allotted to the common schools of the said township of Tiny on the basis of the proportion of the population of the said township as compared with the total population of the province was $4,669.00.

19. That the average attendance of the common schools including both common public schools and common sep-

arate schools of the said township of Tiny for the year 1922 was 629 pupils, and the average attendance for the same period of pupils of Roman Catholic school section no. 2 of the said township, being the school conducted by one of the suppliants, was 159 pupils.

20. That under and by virtue of the right granted the suppliants by the Act of 1863, s. 20, the suppliant, the board of trustees of the Roman Catholic separate school for school section no. 2, township of Tiny, was entitled in and for the year 1922 to such a share of the said sum of $4,669 mentioned in par. 18 as the average number of pupils attending the suppliant's school, namely, 159 pupils, compared with the whole average number of pupils attending school in the said township of Tiny, namely, 629 pupils;

21. That by reason of the facts referred to in par. no. 20 the said suppliant was entitled as of right to be paid the amount of $1,116 out of the said sum of $4,669.

22. The said suppliant was unlawfully held to be entitled only to and was paid the amount of $380 only out of the said sum of $4,669 and thereby suffered for the year 1922, a pecuniary loss of $736.

23. If, notwithstanding said suppliant's submission and contention as set out above, it should be held that it is not entitled to a share of the sums of $148,217 and $276,889 paid respectively to continuation schools and collegiate institutes and high schools as set out in par. 10, but is entitled only to its proportion of the sum of $2,976,712 also referred to in said par. 10 (which said suppliant does not admit but denies), then, and in such event, the said suppliant submits that on the said basis of average attendance as referred to in par. 19 it was entitled to receive from and be paid by the respondent for the said year 1922 the sum of $1,027 instead of only the said sum of $380, whereby it suffered a pecuniary loss for the year 1922 of $647.

The suppliants therefore pray:

(1) That there be paid the sum of $736 to the board of trustees of the Roman Catholic separate schools for school section no. 2, township of Tiny.

(2) That it may be declared that the Acts or parts of Acts following:

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(a) Sections 36 (subsection 1) and 40 of 34 Victoria (1870-1871) chapter 33—an Act entitled "An Act to improve the Common and Grammar Schools of the Province of Ontario."

(b) Section 23, subsection 6, of 6 Edward VII (1906), chapter 52—an Act entitled "The Department of Education Act."

(c) Section 4, subsection 3 and 4, of 7 Edward VII (1907), chapter 50—an Act entitled "An Act to amend the Department of Education Act."

(d) Section 6 of 9 Edward VII (1909), chapter 88—an Act entitled "The Department of Education Act."

(e) Section 1 of 10 Edward VII (1910), chapter 102—an Act entitled "An Act to amend the Department of Education Act."

(f) Section 6 of chapter 265 of the Revised Statutes of Ontario, 1914—an Act entitled "The Department of Education Act."

(g) Sections 33, 34, 37, 38 and 39 of chapter 268 of the Revised Statutes of Ontario (1914) and amendments thereto—an Act entitled "The High Schools Act."

(h) Sections 2 and 3 of 12-13 George V (1922), chapter 98, an Act entitled "The School Law Amendment Act, 1922."

(i) Section 2 of 14 George V (1924), chapter 82—an Act entitled "The School Law Amendment Act, 1924."

prejudicially affect the suppliants' rights as granted by 26 Vic. (1863), c. 5, and secured by the *B.N.A. Act*, 30-31 Vic. (1867), s. 93 and are *ultra vires* in so far as they affect the rights of the suppliants.

(3) That it may be declared that the suppliants and each of them have the right to establish and conduct courses of study and grades of education such as are now conducted in what are designated as continuation schools, collegiate institutes, and high schools, and that any and all regulations pur-

porting to prohibit, limit or in any way prejudicially affect such right are invalid and *ultra vires*.

(4) That it may be declared that the class of persons being separate school supporters represented by the suppliants are exempt from payment of rates imposed for the support of so-called continuation schools, collegiate institutes and high schools not established or conducted by the suppliants or by other boards of trustees of Roman Catholic separate schools.

(5) (Further or other relief).

In the statement of defence (as amended) the Attorney-General for the Province of Ontario, in answer to the Petition of Right and on behalf of His Majesty the King, said, in effect, as follows:

1. He admits the allegations contained in par. 1 of the Petition of Right, but except as hereinafter expressly admitted denies all other allegations in the Petition of Right contained and puts the suppliants to the proof thereof.

2. He denies that any right of either of the suppliants within the meaning of s. 93 of the *B.N.A. Act,* 1867, as claimed in par. 8 of the Petition of Right, has been, or is, prejudicially affected by any of the several Acts of the Legislature of Ontario as in the said par. 8 alleged.

3. He denies that any of the said Acts in said par. 8 prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law in the said Province on 1st July, 1867, when the *B.N.A. Act,* 1867, went into effect (hereinafter referred to as "at the Union") within the meaning of s. 93 of the said *B.N.A. Act,* or that any of the said Acts or any part thereof is *ultra vires* the Legislature of the Province as alleged in par. 9 of the Petition of Right.

4. By a series of legislative acts from 1843 to 1863 inclusive, the law relating to the establishment, maintenance, regulation and control of common schools, including separate schools, in Upper Canada was from time to time altered; and at the Union the law governing the establishment, maintenance, regulation and control of Roman Catholic separate schools was contained in an Act of the

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Parliament of Canada passed in 1863 (26 Vic., Canada, c. 5) and in an Act of the said Parliament entitled "The Upper Canada Common School Act" (C.S.U.C., 1859, c. 64) together with the Regulations in force made pursuant to the last-named Act.

5. In and by the said Act of 1863 relating to Roman Catholic separate schools, which recites that it is just and proper to bring the provisions of the law respecting separate schools more in harmony with the provisions of the law respecting common schools, it was, among other provisions for that purpose enacted that:

(*a*) The trustees of separate schools should perform the same duties and be subject to the same penalties as trustees of common schools (s. 9);

(*b*) The teachers of separate schools should be subject to the same examinations and receive their certificates of qualification in the same manner as common school teachers generally (s. 13);

(*c*) All judges, members of the Legislature, the heads of the municipal bodies in their respective localities, the Chief Superintendent and Local Superintendent of common schools and clergymen of the Roman Catholic Church, should be visitors of separate schools (s. 23); and—

(*d*) The Roman Catholic separate schools (with their registers) should be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and should be subject also to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada (s. 26).

6. The duties and penalties of trustees of separate schools, the qualification of teachers, and the rights and obligations of supporters of Roman Catholic separate schools in respect of the general conduct, management and control of the said separate schools, were determined and prescribed at the Union by the said "The Upper Canada Common School Act" (C.S.U.C., 1859, c. 64) and by the Regulations made and imposed in pursuance thereof by the Council of Public Instruction for Upper Canada then in force.

7. The only distinction in the law governing common schools in general at the Union and that governing the Roman Catholic separate schools related to religious instruction. In all other respects the law and regulations were the same. Any part of a legislative grant to which any school would otherwise be entitled which was not earned or was forfeited because the school was not conducted according to the School Law and Regulations remained the property of the Province.

8. In 1896 the functions formerly vested in the Council of Public Instruction and in the Chief Superintendent of Education were suspended by an Act of the Legislature of Ontario (39 Vic. 16) and vested in a Department of the Provincial Government called the Department of Education and the Minister of Education of the said Province respectively.

9. Subject to the limitation provided by s. 93 of the *B.N.A. Act,* the Legislature of Ontario may exclusively make laws in relation to education, and the several Acts referred to in the Petition of Right and alleged by the suppliants to be *ultra vires* of the Legislature are amendments to the school law made from time to time in the interests of primary education in the Province.

10. All of the said Acts are within the competence of the Province and none of the said grants authorized by or made pursuant to any of the said Acts mentioned in par. 8 of the Petition of Right are legislative grants within the meaning of s. 20 of the *Separate Schools Act* of Upper Canada of 1863 (26 Vic., c. 5).

11. He denies that the total sum of $3,401,818 mentioned in pars. 10 and 11 of the Petition of Right was or is a fund granted by the Legislature for the support of common schools and for common school purposes within the meaning of s. 20 of the above-mentioned Act (26 Vic., c. 5) as claimed in par. 11, or that the schools conducted by the suppliants were entitled to share in such fund according to the provisions of the said Act, or that the continuation schools or collegiate institutes or high schools, referred to in par. 10 thereof, are common schools within the meaning of the said Act or of the *Upper Canada Common School Act* (C.S.U.C., 1859, c. 54) as claimed in par. 12 of the Petition of Right.

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12. The high schools of the Province are in substitution for the grammar schools of the late Province of Upper Canada as re-organized and modified by Ontario legislation from time to time. The said grammar schools were not "common schools" or schools within the meaning of the *Upper Canada Common School Act,* but were secondary schools. Collegiate institutes are high schools having a prescribed number of teachers and pupils which, on complying with the Regulations of the Department of Education with respect thereto, may be raised to the rank of a collegiate institute.

13. Continuation schools, which were inaugurated in Ontario by an Act entitled "An Act respecting Continuation Schools" (1909, 9 Edward VII, c. 90) are not common schools, within the meaning of either the Upper Canada Common Schools Act or the Act relating to Separate Schools of 1863, but are intermediate schools for secondary education designed to give instruction in the courses of study prescribed for high schools in order to relieve congestion or to provide high school education where not otherwise available.

14. He denies that under and by virtue of the abovementioned Act of 1863 (26 Vic., c. 5, s. 14) and of the *B.N.A. Act,* 1867 (s. 93) the separate school supporters represented by the suppliants are exempted from payment of the rates imposed for the support of common schools or that it is *ultra vires* of the Legislature of Ontario to impose on such persons payments and rates for the support of continuation schools, collegiate institutes or high schools as alleged and claimed by the suppliants in pars. 13 and 14 of the Petition of Right. He submits that none of the said schools are "common schools" within the meaning of s. 14 of the said Act of 1863 (26 Vic., c. 5).

15. He further denies that either of the suppliants or the boards of trustees of Roman Catholic separate schools (urban) is or are entitled to establish and conduct in separate schools the courses of study and grades of education that are carried on in continuation schools, collegiate institutes and high schools, or any of them, as alleged in par. 15 of the Petition of Right, and also denies that such courses of study and grades of education were ever established by

law in connection with Roman Catholic separate schools prior to 1st July, 1867, as in said paragraph alleged.

16. He submits that the suppliants are not entitled to any of the declarations or other relief as prayed in the Petition of Right and that it should be dismissed.

I. F. Hellmuth K.C. and *T. F. Battle* for the appellants.

W. N. Tilley K.C. and *McGregor Young K.C.* for the respondent.

ANGLIN C.J.C.—This proceeding was instituted in order to determine the validity of three claims of "Roman Catholics" in the province of Ontario with respect to Education:—

(A) Their claim "to establish and conduct courses of study and grades of education in Catholic separate schools such as are now conducted in continuation schools, collegiate institutes and high schools"; and that "all regulations purporting to prohibit, limit or in any way prejudicially affect such right or privilege are invalid and *ultra vires;*"

(B) Their claim to exemption from taxation for the support of continuation schools, collegiate institutes and high schools not conducted by their own boards of trustees;

(C) Their claim to a share in public moneys granted by the Legislature of the province of Ontario "for common school purposes" computed in accordance with what they assert to have been their statutory rights at the date of Confederation.

After a long and somewhat bitter struggle, the *Separate Schools Act* of 1863 (26 Vic., c. 5) was enacted by the Legislature of the province of Canada. That statute, the appellants maintain, re-established the rights and privileges now in question. It was intituled: "An Act to restore to the Roman Catholics in Upper Canada certain Rights in respect to Separate Schools," and remained in force at Confederation. Whatever rights and privileges the Catholics of Upper Canada enjoyed under it in respect to their separate schools were made permanent by s. 93 (1) of the *British North America Act,* 1867. That section, authoritatively designated a code of legislative jurisdiction

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on the subject of Education for the older provinces of Canada (*Brophy* v. *Att. Gen. of Manitoba* (1)), reads, in part, as follows:—

93. In and for 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 * * *

As put by Magee J.A., in the present case, the safeguarding provisions of s. 93 "should be interpreted and effectuated in abounding good faith." (2) So to construe and apply sub-s. 1 of s. 93 that its manifest purpose shall not be defeated is the function of the courts.

The rights and privileges which sub-s. 1 of s. 93 of the *B.N.A. Act* protects are rights and privileges "with respect to denominational schools" which "any class of persons have by law in the Province at the Union." It is well established that the "class of persons" whose legal rights and privileges are thus safeguarded is to be determined according to religious belief and that "Roman Catholics together" form such a class. As trustees, vested in their representative character with rights and privileges of members of that class, vindication of which is sought in these proceedings, the status of the appellants to maintain their petition of right was conceded at bar. *Ottawa S.S. Trustees* v. *Ottawa Corporation* (3); *Ottawa S.S. Trustees* v. *Mackell* (4).

It is, no doubt, also abundantly clear that only "rights or privileges" which existed "by law" at Confederation are protected by s. 93 (1). The statute expressly so states;

(1) [1895] A.C., 202, at pp. 222-3.
(2) 60 Ont. L.R., at p. 24.
(3) [1917] A.C., 76, at p. 81.
(4) [1917] A.C., 62, at p. 69.

and it has been so determined by the highest authority. *Maher* v. *Portland* (1).

> Any practice, instruction or privilege of a voluntary character, which, at the date of the passing of the Act, might be in operation

is not a "legal right or privilege" (2).

On the other hand, the "rights or privileges" within s. 93 (1) are not only those "in respect to denominational teaching," as some casual expressions of Lord Buckmaster in the *Mackell case* (3) might suggest. There is no allusion in the *Separate Schools Act* of 1863 to religious instruction. There may be an invasion of a "right or privilege *with respect to denominational schools*" which, although most prejudicial to those schools, does not directly affect them in their "denominational aspect." The decision in *Ottawa S.S. Trustees* v. *Ottawa Corporation* (4), likewise delivered by Lord Buckmaster, makes this abundantly clear. A statute substituting a commission composed of Catholics, but nominated by the Government, to manage the Ottawa separate schools in lieu of the elected board of trustees was there held *ultra vires* as prejudicially affecting the right or privilege of the supporters of Catholic separate schools to have them managed by their own elected trustees.

The appellants submit that the Provincial Courts have misapprehended the scope and purpose of the Act of 1863 and also the effect upon it of sub-s. 1 of s. 93 of the *B.N.A. Act*. The view taken below is thus expressed by Hodgins J.A. (5).

> The rights in respect of *denominational schools*, generally speaking, were the establishment and conduct of them by and under the immediate supervision of the Church which desired them, either in Quebec or Ontario, subject to regulations made pursuant to statute law. Rights and privileges in such schools, so far as they were "in relation to education" (as carried on by them), if affected, were to be dealt with by the Legislatures of the Provinces, subject to an appeal, not to the Courts, but to Federal authority, which was to correct any infringement of those rights and privileges. These belonged not to a denomination as the creator and guardian of separate schools, but to the schools themselves, as part of a system of education. It was to the Provinces that education was committed and it is right that the systems of education established by them and the rights flowing therefrom, should be governed by their Legislatures and not by the Courts.

(1) (1874) Wheeler's Confederation Law, 338, at p. 367.
(2) [1917] A.C., at p. 69.
(3) [1917] A.C., 62.
(4) [1917] A.C., 76.
(5) 60 Ont. L.R. at p. 30.

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The appellants point out that there is no reference in the statute of 1863 to "immediate supervision of the Church" and contend that the view that the redress of separate school supporters against provincial legislation adversely affecting their pre-Confederation legal rights and privileges is confined to an appeal to the federal authority ignores the provisions of sub-s. 1 of s. 93 of the *B.N.A. Act.* The idea that the denominational school is to be differentiated from the common school purely by the character of its religious exercises or religious studies is erroneous. Common and separate schools are based on fundamentally different conceptions of education. Undenominational schools are based on the idea that the separation of secular from religious education is advantageous. Supporters of denominational schools, on the other hand, maintain that religious instruction and influence should always accompany secular training.

Any statute or regulation that would materially diminish or curtail the scope of the education which denominational schools were, at the date of Confederation, legally entitled to impart, or that would tend to restrict the period during which supporters of such schools, Catholic or Protestant, were then legally entitled to have the education of their children subject to the influence of denominational control and instruction, would "prejudicially affect a right or privilege with respect to denominational schools" enjoyed by the class of persons of which such supporters form a section. Catholics deem it of vital importance that denominational influence over, and instruction of, their children should continue during the period of their secondary education. Any attempted interference with such educational rights or privileges, whether by statute or by regulation purporting to be made under statutory authority, contravenes sub-s. 1 of s. 93; the remedy is to invoke "the jurisdiction of the ordinary tribunals of the country"; the right of appeal to the federal executive under sub-s. 3 does not apply. This latter subsection has to do with acts of the provincial authorities, which, although not *ultra vires,* so affect rights and privileges theretofore enjoyed by a religious minority, Protestant or Catholic (it may be under post-Confederation legislation), as to constitute, in the opinion of the Governor in Council, a griev-

ance calling for Federal intervention. (*Brophy* v. *Att. Gen. of Manitoba* (1)).

It would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision 1, and if the (statutes or) regulations impeached do prejudicially affect any such right or privilege, to that extent they are not binding on the appellants. The *Mackell Case,* (2) *ubi sup.*

It was held by Rose J. (3), with the approval of the Appellate Divisional Court, that, because the rights or privileges of the separate schools at Confederation in regard to legislative money grants depended upon legislation of the former province of Canada and such grants were therein (26 Vic., c. 5, s. 20) described as "the fund annually granted by the Legislature of *this Province*" and "all other public grants, investments and allotments for common school purposes now made, or hereafter to be made by *the Province,*" the Province of Ontario, newly created in 1867, was unaffected by any obligation in regard thereto and Catholic separate school supporters were not assured of a legal right to share in any appropriations or grants to be made by Ontario for common school purposes. This view is utterly at variance with the spirit and intent of s. 93 (1) of the *B.N.A. Act.* Unless the legislatures of Ontario and Quebec are debarred from prejudicially affecting the rights and privileges of the respective religious minorities in regard to maintenance and support which their denominational schools enjoyed at Confederation under legislation of the former Province of Canada, the protection of such rights and privileges afforded by sub-s. 1 of s. 93 becomes illusory and the purpose of the Imperial legislation is subverted.

Moreover, by s. 129 of the *B.N.A. Act,* the *Separate Schools Act* of 1863 was continued in force "as if the Union had not been made," subject only to a power of repeal or alteration "according to the authority * * * of the Legislature under this Act." That power of repeal or alteration is, like all other provincial legislative jurisdiction over education, subject to the restriction imposed by sub-s. 1 of s. 93. That the deprivation or diminution of a right to share in financial aid out of public moneys assured by law to their denominational schools at Con-

(1) [1895] A.C., 202. (2) [1917] A.C., 62.
(3) 59 Ont. L.R., at p. 150.

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federation would prejudicially affect a privilege of Roman Catholics in regard to those schools seems incontrovertible.

It is also urged that inherent in the conception of a legislature is the untrammelled right to make or withhold grants of public moneys and to attach thereto such conditions as it may see fit. That is, no doubt, true of every sovereign Parliament whose powers are unrestricted; it was true of the Legislature of the Province of Canada up to 1867; and it is likewise true since Confederation of a Canadian Provincial Legislature, save as otherwise provided in the *B.N.A. Act*. But, as Lord Herschell said, speaking for the Judicial Committee, in *Brophy* v. *Att. Gen. of Manitoba* (1):

> It must be remembered that the Provincial Legislature is not in all respects supreme within the province. Its legislative power is strictly limited. * * * In relation to the subjects specified in sect. 92 of the *British North America Act*, and not falling within those set forth in sect. 91, the exclusive power of the Provincial Legislature may be said to be absolute. But this is not so as regards education, which is separately dealt with and has its own code * * * in the *British North America Act*. * * * It may be said to be anomalous that such a restriction as that in question should be imposed on the free action of a Legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the Legislature to the Executive Authority? And yet this right is expressly and beyond all controversy conferred.

To impugn the efficacy of a restriction placed by s. 93 of the *B.N.A. Act* on the control of a provincial legislature over rights in regard to aid out of public moneys for denominational schools existing by law at Confederation would be to challenge the power of the Imperial Parliament, when creating a legislature, to impose on the exercise of one or more of its functions such limitations as, in its discretion, it may deem advisable.

(A) While the right of the trustees to determine the courses of study in separate schools rests primarily on the duty of management expressly imposed on them, a much discussed issue on this branch of the case was whether, in affording the secondary education undoubtedly imparted, as will presently appear, at and prior to Confederation, by schools established under the *Common Schools Act* and conducted as common schools (and not improbably in some Catholic separate schools), trustees were exercising powers

(1) [1895] A.C., 202, at p. 222.

conferred on them by law, or whether their doing so was merely a practice lacking legal sanction, but tolerated by the educational authorities.

The Trustees of a Catholic separate school, under the Act of 1863, were elected

for the management of such separate school (s. 3)

and had (s. 7)

all the powers in respect of separate schools that the Trustees of Common Schools (had) and (possessed) under the provisions of the Act relating to Common Schools (C.S.U.C., 1859, c. 64);

and they were required (s. 9) to

perform the same duties and (were) subject to the same penalties as Trustees of Common Schools.

The teachers of separate schools were required to have the same qualifications (s. 13) and were liable to the same obligations as teachers of the common schools (s. 9).

The preamble of the Act of 1863 states its purpose to have been

to restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to Separate Schools and to bring the provisions of the Law respecting Separate Schools more in harmony with the provisions of the Law respecting Common Schools.

It is, therefore, abundantly clear that, if, in 1867, trustees of common schools in Upper Canada had, by law, the right to provide in their schools for the secondary education now in question, Catholic trustees had, in the management of their separate schools, the same legal right.

Turning to the *Common Schools Act* in force in 1867 (C.S.U.C., 1859, c. 64), we find that it contains no limitation upon the scope of the education to be imparted or upon the courses of study to be conducted in the common schools.

In rural school sections school trustees were required *inter alia* (s. 27) to provide school premises; to contract with, employ and pay teachers; to permit all residents between the ages of 5 and 21 to attend their schools (sub-s. 16); to exclude unauthorized text-books; and to report the number of children over 5 years of age and under 16 years of age in the school section and the number of "children and young persons" taught (distinguishing the sexes and those over and under 16 years of age), the average attendance, the branches of education taught with the numbers in each branch, and the text-books used.

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By s. 32 provision was made for the inclusion of all the school sections of a township under a single board of five trustees, who

> shall be invested with the same powers and be subject to the same obligations as Trustees (of schools) in Cities and Towns, by the seventy-ninth section of this Act.

Urban school trustees were required, *inter alia,* (s. 79 (8))

> to determine (*a*) the number, sites, kind and description of schools to be established and maintained in the City, Town, or Village; also (*b*) the Teacher or Teachers to be employed; the terms of employing them, the amount of their remuneration, and the duties which they are to perform; (and) also (*c*) the salary of the local Superintendent of Schools appointed by them, and his duties;

(sub-s. 11) to lay before the municipal councils an estimate of the sums required for purchasing or renting school premises, buildings, sites, etc., and (sub-s. 17) to report as in the case of rural trustees.

While there was no express statement of the ages of children eligible for attendance at urban common schools, the provision of sub-s. 16 of s. 27 conferring a right of attendance on all residents up to 21 years of age, was made applicable by sub-ss. 17 and 18 of s. 79.

Every common school teacher employed by the trustees (s. 27 (8)), on terms and for a remuneration and to perform duties to be determined by them (s. 79 (8)), was obliged

> to teach diligently and faithfully 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 (s. 82 (1)).

The same obligations were imposed on teachers of separate schools (26 Vic., c. 5, s. 9).

Local superintendents were required to see that the common schools were conducted according to law (s. 91 (6)) and to report to the Chief Superintendent (sub-s. 12) the branches taught, the number of pupils in each branch, the text-books used, the average school attendance, etc.

County and Circuit Boards were also provided for and were empowered

> to select (if deemed expedient) from a list of text-books recommended or authorized by the Council of Public Instruction, such books as they may think best adapted for use in the Common Schools of the County or Circuit (s. 98 (3)).

A Council of Public Instruction, constituted in 1850 (13-14 Vic., c. 48, s. 36), was continued (s. 114) and was empowered, *inter alia,* (s. 119 (4))

to make such regulations from time to time, as it deems expedient, for the organization, government and discipline of Common Schools, for the classification of Schools and Teachers * * *

and (sub-s. 5)

to examine, and at its discretion, recommend or disapprove of text-books for the use of schools. * * *

It is noteworthy that these powers were conferred in the *Common Schools Act;* and sub-s. 4 of s. 119 of that Act appears to have been the *only* statutory provision giving jurisdiction to the Council of Public Instruction to make regulations affecting common (or separate) schools. The language of sub-s. 4 may be compared with the wider terms in which the Board of Education, the predecessor of the Council of Public Instruction, had been empowered by the statute of 1846 (9 Vic., c. 20, s. 3)

to make from time to time all needful rules and regulations for the *management* and good government of such School (s).

By s. 26 of the *Separate Schools Act* of 1863 separate schools were declared to be

subject to such regulations, as may be imposed, from time to time, by the Council of Public Instruction for Upper Canada.

These regulations were, no doubt, such as the Council of Public Instruction might legally make in exercising the power conferred upon it by s. 119 (4) of the *Common Schools Act* (the only provision which purports to confer, and define the subjects of, its jurisdiction to regulate), without derogating from the rights of management and control conferred on trustees by the *Separate Schools Act.* The *Separate Schools Act,* 1863, contained nothing corresponding to sub-s. 5 of s. 119 of the *Common Schools Act* which expressly gave supervision over text-books for common schools to the Council of Public Instruction.

Such appear to be the relevant statutory provisions on this branch of the appeal.

The trustees of all separate schools were elected for their "management." The trustees of urban common schools were explicitly required to determine the kind and description of schools to be carried on under their charge since 1847 (10-11 Vic., c. 19, s. 5 (3)), when the Legislature appears to have thought it advisable to make some distinct provisions for cities and towns, which were extended to villages in the C.S.U.C. of 1859, c. 64, s. 79 (8). In our opinion the effect of the legislation in force at Confederation, construing it without the aid of any extraneous evi-

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dence, is that it conferred on all separate school trustees, as part of, or incident to, the management and control of the schools entrusted to them, the right to determine the subjects of instruction in and the grading of such schools. In the cases of urban trustees, and of township boards, constituted under s. 32 of the C.S.U.C., 1859, c. 64, this right is expressly conferred. (C.S.U.C., 1859, c. 64, s. 79 (8); 26 Vic., c. 5, s. 7.)

There is, moreover, no doubt, as appears from the following extracts, that this view of the scope of the trustees' powers and duties was acted upon from 1847 by the provincial authorities. Indeed most of the official statements to be quoted were made after 1850, when the respondent asserts that the duty of school trustees to determine the courses of study and the books to be used in the schools under their charge, imposed by the statutes of 1841 (4-5 Vic., c. 18, s. 7 (4)) and of 1843 (7 Vic., c. 29, s. 44 (7)), was transferred to the Council of Public Instruction under the power to regulate common schools then given to it. (13-14 Vic., c. 48, s. 38 (4); C.S.U.C., 1859, c. 64, s. 119 (4)). Following a suggestion of their Lordships of the Privy Council in *Citizens' Insurance Co.* v. *Parsons* (1), we make of the official reports and documents in evidence the use indicated by Lord Blackburn in *Clyde Navigation Trustees* v. *Laird* (2). See, too, *Assheton Smith* v. *Owen* (3); *Goldsmiths' Company* v. *Wyatt* (4); and *Dunbar* v. *Roxburghe* (5). Reference may also be made to *Van Diemen's Land Co.* v. *Table Cape Marine Board* (6), and to some observations of the Lord Chancellor in delivering the report of the Judicial Committee in the recent *Labrador Boundary Case* (7).

Dr. Egerton Ryerson, from whose reports and official circulars the extracts about to be quoted are taken, had been assistant superintendent prior to 1846 and was chief superintendent of the schools of Upper Canada from that time until 1876. His statutory duties were, *inter alia,* (C.S.U.C., 1859, c. 64, s. 106)

(1) (1881) 7 App. Cas., 96, at p 116.
(2) (1883) 8 App. Cas., 658, at p. 670.
(3) [1906] 1 Ch., 179, at p. 213.
(4) [1907] 1 K.B., 95, at p. 107.
(5) (1835) 3 Cl. & F., 335, at p. 354.
(6) [1906] A.C., 92, at p. 98.
(7) (1927) 43 T.L.R., 289, at pp. 297, 298 and 299.

(5) To prepare suitable forms, and to give such instructions as he may judge necessary and proper, for making all reports and conducting all proceedings under this Act, and to cause the same, with such general regulations as may be approved of by the Council of Public Instruction for the better organization and government of Common Schools, to be transmitted to the officers required to execute the provisions of this Act;

(6) To cause to be printed from time to time, in a convenient form, so many copies of this Act, with the necessary forms, instructions, and regulations to be observed in executing its provisions, as he may deem sufficient for the information of all officers of Common Schools, and to cause the same to be distributed for that purpose;

Dr. Ryerson would appear to have used the Journal of Education, constituted by His Excellency the Governor General in Council for that purpose (Ex. 34, p. 100, n. 4.), as a medium of communication with trustees and teachers.

In his report to the Governor for the year 1847, at p. 118 (Journal of Education, 1849, Vol. II), the Chief Superintendent said, referring to conditions existing prior to the legislation of that year (10-11 Vic., c. 19):—

The statistics afford a clear but painful proof of the very elementary character of the Common Schools, and the absolute necessity of employing every possible means of elevating it.

In enumerating the number of pupils in the different branches, he said that

the 1,773 reported as pursuing "other studies" seem to have been pursuing "*higher* studies," for under this head in Abstract C will be found 41 Common Schools in which Latin and Greek were taught, 60 in which French was taught, and 77 in which the elements of Natural Philosophy were taught;

and, citing a New York report shewing the schools of that State to be more advanced in their studies, he proceeded—

The introduction of these studies into our Common Schools has been sanctioned by the Legislative department of the Government.

In his Circular of 1848, explaining the objects of the Act of 1847 in regard to cities and towns and suggested general regulations, the Chief Superintendent said, at p. 197 (Exhibit 6):—

The Board of Trustees will, of course, determine the age at which pupils will be admitted in each kind, or class, of schools, or in each department of a School comprising more than one department; the particular School which pupils in the different localities of a City, or Town, shall attend; the condition of admission and continuance in each School; the subjects of instruction and the text-books to be used in each School, and in each department; * * *

Page 6, paragraph V of the Chief Superintendent's report of 1849, dealing with the "Classification of Pupils, and Subjects taught in the Schools" shews that these subjects included:

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Mensuration, Algebra, Geometry, Elements of Natural Philosophy, Vocal Music, Linear Drawing, and other Studies, such as the Elements of the Latin and Greek Languages, etc. * * * which are taught in some of the Common Schools.

In the same report, at p. 14, we are told by the superintendent of common schools for the Simcoe District that in the schools in seven townships (which he names) including the township of Tiny,

the teachers are capable of imparting a thorough English, and, in some instances, a good classical education.

And, at p. 50 of the same report, the Chief Superintendent said:

It is also worthy of remark, that the Board of Trustees in each city and incorporated town in Upper Canada, has authority to establish Male and Female Primary, Secondary and High Schools, adapted to the varied intellectual wants of each city and town; while in each country School Section, it requires the united means of intelligence of the whole population to establish and support one thoroughly good School.

At p. 18 of his report of 1850, the Chief Superintendent said:

The board of trustees in each city, town and incorporated village, having the charge of all the schools in such municipality, is able to establish and classify them in such manner as to meet the wants of all ages and classes of youth. This is done by the establishment of primary, intermediate and high schools. In some instances, this system of the classification or gradation of such schools has been commenced by establishing a large central school under the direction of a head master, with assistants, having a primary and intermediate, as well as high school department—the pupils being promoted from one department to another according to their progress and attainments. In other instances the same object is pursued by having one high school and intermediate and primary schools in different buildings and parts of the city or town. These schools can also be male, or female, or mixed, as the board of trustees may judge expedient.

At p. 204 the Chief Superintendent repeated the observations already quoted from p. 50 of his report of 1849. At p. 309 of the same report, 1850, (Exhibit 9), speaking of cities, towns and incorporated villages, he said:

Each Board has the charge of all the Common Schools in the municipality, determines their number and kind, whether primary, intermediate or high schools, whether classical or English, whether denominational or mixed,

and, at p. 310:

In regard to the large central school houses in cities, towns, and villages, after the noble examples of the boards of trustees in Hamilton, London, Brantford, Brockville, and Chatham, etc. * * * It may often be found more economical to bring all grades of schools into one building.

In the annual report of 1852, at p. 41, Table B, is given the list of higher subjects taught in the common schools

and at p. 43, Table C, the text-books, which include Latin, Greek and Euclid. In 1863 the annual report shews 20,991 pupils over 16 years of age attending the common schools and 12,094 in "other studies", which, no doubt, included Latin and Greek.

As has been already stated, the trustees of separate schools were granted the same powers as trustees of common schools (26 Vic., c. 5, s. 7).

In *Ottawa Separate Schools Trustees* v. *Mackell* (1), their Lordships of the Judicial Committee, discussing the legal rights and privileges of separate school trustees, say that

> the "kind" of school referred to in sub-s. 8 of s. 79 (C.S.U.C., 1859, c. 64) is, in their opinion, the grade or character of school * * *

The provisions of the *Common Schools Act* were generally understood to contemplate that, at all events in cities, towns, and villages, and in rural districts where s. 32 of the Act of 1859 applied, the trustees should determine, according to their conception of local educational requirements, the subjects to be taught and the scope of the education to be imparted in the school or schools under their charge and would appear to confer upon them the legal right to do so. It was a statutory duty in 1867 to provide in all common schools education suitable for pupils ranging from 5 to 21 years of age and of both sexes.

With the law in the state thus indicated it is not surprising that in many of the larger centres, where higher educational standards were necessary to meet local requirements, common schools, at and prior to Confederation, were carrying on, with the approval and encouragement of the provincial educational authorities, courses in practically all the branches of learning now included in the curricula of high schools as well as public schools and were imparting to their pupils the education requisite to enable them to matriculate into the University, to enter the Normal School, and to take up the studies prescribed for the "learned professions".

From the official documents in evidence we learn that such secondary education—apparently a complete high school course—was being given before Confederation in the central common schools of the cities of Hamilton and

(1) [1917] A.C., 62, at p. 71.

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London, that similar courses for girls were recommended for the city of Toronto, and were contemplated for the cities of Kingston and Guelph by the common school trustees of each of those three cities—all with the endorsation and active encouragement of the Chief Superintendent of Education and, presumably, with the knowledge and sanction of the Legislature, to which his annual reports were submitted.

In the annual report of 1852 (already referred to) in Appendix A, at p. 132, the Chief Superintendent, referring to the city of London, says:

> The board of trustees deeming it proper to place within the reach of every class of the community, and of every child who might evince a taste and talent for a more extended range of studies than are generally pursued at common schools, facilities for the acquisition of literary and scientific attainments, equal to those afforded by the higher order of academies, directed the principal to introduce, in addition to the other studies, that of classics, and during the past year about twenty-five pupils have availed themselves of the advantages thus offered in the abstract sciences.

In the annual report of 1855 (Exhibit 12) the local superintendent of schools at Hamilton says, at p. 282:

> Any child under twenty-one years of age, whose parents reside within the city limits, and who is qualified for admission into the junior class, can, by applying, gain an entrance into the Central School, and can remain there, free of charge, until he has passed through the various classes, and, if desirous, qualify himself for matriculation at the University. The course of instruction includes reading, writing, arithmetic, geography, grammar, history (Canadian, English and general), history of English literature, linear drawing, vocal music, book-keeping, human physiology, astronomy, elements of natural philosophy and chemistry, algebra, Euclid and mensuration, natural history, botany and geology, and the Latin, Greek and French languages. * * * The teachers at present engaged in the city schools number thirty, and include a principal, a classical master, a French master, a writing master, a music school master, thirteen division teachers in the Central School, and thirteen primary teachers.

And, in the annual report of 1863, the Honourable Mr. Justice John Wilson, who had been local superintendent at London, at p. 154, reporting on the London common schools, says:

> The board was unwilling to be connected with the County Grammar School. At the date secondly mentioned (1855), which I look upon as a turning point in our educational affairs in this place, something was added to the English course, with a few boys in the elements of the Latin language, forming merely a classical nucleus. * * * Now the English course is at once extensive and thorough, embracing every subject of importance to the mechanic, the merchant or the professional man. The classical department has been extended so as to embrace Latin,

Greek and French, and made comprehensive enough to qualify students for entering upon the study of any of the learned professions, or to matriculate in any college or university in the province.

The annual report for 1867 (p. 89), showed in the counties, cities, towns and villages 31,132 common school pupils over 16 years of age, 72,987 doing high school work and 8,019 in the "higher studies".

While our attention was not drawn to any explicit evidence to that effect, there is little room for doubt that the attendance of pupils at the common schools who were taking the courses of high school work was included in the returns made for the purpose of ascertaining the proportion of the legislative grants to which the several school sections in which such schools were carried on were entitled (C.S.U.C., c. 64, ss. 106 (1) and 91 (1)); and also in determining the amount of public moneys to be apportioned to the separate schools (26 Vic., c. 5, s. 20). That could properly be done only if the trustees of common schools had the legal right to conduct the classes in which high school or classical education was given.

In the Journal of Education for September, 1865, (Exhibit 37), commenting on the new *Grammar Schools Act*, Dr. Ryerson (at p. 132) says:

> The Common School law amply provides for giving the best kind of a superior English education in the *High Schools*, in the cities, towns and villages, with primary ward schools as feeders (as in Hamilton); while to allow Grammar Schools to do Common School work is a misapplication of Grammar School funds to Common School purposes; Common Schools are already adequately provided for. * * *

Again, in the issue of the same Journal for May, 1867, at p. 81 (Exhibit 38)—only two months before Confederation, Dr. Ryerson writes:

> And according to the best opinions any course of studies which would attempt to be equally excellent for the higher education of both boys and girls, would be simply worthless for either. * * * It therefore becomes advisable to discourage the present unusual attendance of girls at the Grammar Schools.
>
> But it is often urged that "if our girls do not go to the grammar school there is no other provision made for their receiving an advanced education in our public schools." This is a mistake. The Consolidated Common School Act, section 79, subsection 8, authorizes the Common School Trustees of every city, town, or incorporated village "to determine (*a*) the number, sites, *kind and description* of schools to be established and maintained in the city, town or village (whether they be high schools for boys and girls, or infant schools, etc.), also (*b*) the teacher or teachers to be employed; the terms of employing them; the amount of their remuneration; and the *duties which they are to per-*

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form." There is thus every legal facility for the establishment of high schools for girls throughout the country, and it is in such institutions that those pupils ought to find the means of prosecuting the advanced studies which they now seek in the grammar schools, and which if they find there, it is at the expense of not employing their time to the best advantage, and of studying some subjects which are of very little use to them. (Italics appear in the original.)

The law in force at Confederation was continued by s. 129 of the *British North America Act* and remained practically unchanged until 1871.

In the Journal of 1868, p. 84 (Exhibit 24), Dr. Ryerson says:—

I regret to observe that the evil of inducing girls to enter the Grammar Schools, with the apparent object of unduly swelling the number of pupils, has not diminished but has increased, although there are still several schools which are not open to this reproach. It therefore becomes the duty of the Department, in its administration of the law, to take care that no encouragement is offered to a course of action which is contrary to the intention of the Grammar School Law and Regulations, and injurious to the best interests of the schools and pupils.

The law invests School Trustees with ample powers for the establishment and maintenance of schools or departments of schools in which girls, who have passed through the elementary Common School studies, may obtain that higher culture and instruction which they may require. But the organization and studies of the Grammar Schools are not adapted for mixed classes of grown up girls and boys, nor is it desirable that such mixed classes should exist.

The matter is of so serious an aspect, that I felt it my duty to consult the Principal Law Officer of the Crown in this province as to the proper interpretation of the Law, and the following is the opinion he has given:—

"My interpretation of the Grammar School Act in relation to the question submitted by you is that boys alone should be admitted to those schools, and that consequently, the Grammar School Fund was intended for the classical, mathematical and higher English education of boys."

It therefore became my duty, as thus instructed, to apportion the grant of 1868 on the basis of the boys' attendance.

As against all this evidence indicative of the view current and acted upon by the provincial educational authorities about the time of Confederation, that trustees of common and separate schools had the legal right to provide for the secondary education of pupils attending their schools up to matriculation, the only document in the printed record on which the respondent relies shews the adoption by the Council of Public Instruction in 1858 of a regulation prescribing the courses of study for common schools, which was declared in the Separate School Manual of 1863, issued by the provincial educational authorities, to be applicable to Roman Catholic separate schools

(Exhibit 5A). These "prescribed studies" may be regarded as those "*required* to be taught" in the common schools (Exhibit 34 (1864), p. 75), i.e., as a minimum and not exclusive. While the curriculum of studies so prescribed was comparatively restricted, it included the first six books of Euclid and mensuration of surfaces and solids, and, for boys, trigonometry, and other matters in the discretion of the trustees. Indeed it comprised most, if not all, that is obligatory in the curriculum prescribed for high schools to-day.

Our attention has been drawn to extracts (not printed in the Record) from a letter of the Chief Superintendent, published in *The Globe* newspaper of the 27th of March, 1866, copied in the Journal of Education and reprinted in Exhibit 33, intituled "Grammar School Manual" (compiled by J. George Hodgins, LL.B., Deputy Superintendent), at pp. 73-4. The main purpose of this letter was, as indicated by its heading in the Manual, to emphasize "The Necessity for Uniform Text-books in all Common Schools." Incidentally the writer alludes to the power and duty of the Council of Public Instruction

> to prescribe the subjects of instruction in the public schools and the text-books which shall be used in giving that instruction.

It is then pointed out that

> teachers of public schools are not employed, therefore, to teach what subjects or books they please, but to teach those subjects and books which are prescribed by law.

The Statute (C.S.U.C., 1859, c. 64, s. 79 (8)) declares it to be the duty of the trustees "to determine * * * the duties which (teachers) are to perform" and (s. 82 (1)) of the teacher

> to teach diligently and faithfully all the branches required to be taught * * * according to the terms of his engagement with the trustees and according to the provisions of this Act.

If, upon a proper construction of the statutory law (C.S.U.C., 1859, c. 64, ss. 27 (8) and (16), 79 (8) and 82 (1), and s. 32, and 26 Vic., c. 5, ss. 3, 7, 9), separate school trustees were given the right, as part of the management of the schools entrusted to them, to determine that secondary education should be given in their schools, the power of regulation conferred on the Council of Public Instruction could not be utilized to prevent or restrict the exercise of that right. The subjects of that power were confined (C.S.U.C., 1859, c. 64, s. 119 (4)) to "the organization,

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government, and discipline of Common Schools" and "the classification of Schools and Teachers. * * *" We assume a like power of regulation over separate schools. The Council was not empowered to curtail the courses of studies to be pursued or to determine the extent of the education to be imparted in the schools. "Organization, government and discipline" are not apt terms to confer such jurisdiction; and "classification" does not imply anything of the kind. It had reference rather to the distribution of the pupils in classes according to the degree of advancement each had attained in his education and to the due arrangement of the courses of study so as to provide for the teaching which the several boards of trustees might deem suitable for local requirements and to ensure that the time of both teacher and pupil might be utilized to the best advantage, that there should be no overlapping in the work and that for each class and for each term of the course there should be provided a sufficient, but not an excessive, amount of work.

The system was voluntary; local self-determination was fundamental in it; there was the minimum of governmental control.

> The character of the instruction given in every educational establishment is an expression of the people themselves upon the question of education. * * * The system begins and ends with the people. No school-house can be built, no teacher employed, no rate levied, except by the concurrence of the people. It was true that it was not voluntary as to the individual, but it was certainly voluntary in regard to the municipality. (Journal of Education, March, 1860, p. 34.)

It is significant that while the cognate matter of the recommendation and disapproval of text-books for use in common schools is entrusted to the Council (s. 119 (5)), the delimitation of courses of study in those schools is not mentioned in the enumeration of its functions. When the Legislature intended to give the Council the right to determine the courses of study it readily found language apt for that purpose, as in the case of the grammar schools, for which the Council was empowered to "prepare and prescribe a list of text-books, programme of studies, etc. * * *" (C.S.U.C., 1859, c. 63, s. 15.)

More noteworthy still is the fact that the recommendation and disapproval of text-books is treated as something not comprised within the power of regulation. The two matters are kept distinct, being dealt with in different sub-

sections (s. 119, sub-ss. 4-5). While the Act of 1863 subjected the separate schools to regulations to be imposed by the Council of Public Instruction (s. 26), it contained no provision committing to that body any supervision over the text-books to be used in those schools. In the selection of text-books, as in the determination of the courses of study to be pursued in each separate school, the discretion of the trustees elected for its management was untrammelled.

The statutes which entitled pupils up to the age of 21 years to attend the common and separate schools were certainly not designed to enable the Council of Public Instruction, under the guise of regulation, so to restrict the courses of studies for which the trustees might provide that they would be suitable only for pupils up to the age of, say, 12, or even 16 years.

As was forcibly pointed out during the argument, that would be to prohibit, not to regulate. (*Corporation of City of Toronto* v. *Virgo* (1). If the power of regulation of the Council of Public Instruction could be so exercised, the work of the schools could be indefinitely cut down. No doubt, in the case of common schools, that might since Confederation be done directly by provincial statutes, or by regulations authorized by them, because as to schools other than denominational schools legally established no limitation is imposed on the jurisdiction of the Legislature. But that an emasculation of the courses of study which Catholic separate school trustees were at the Union entitled to provide in their denominational schools for pupils up to 21 years of age would prejudicially affect a right or privilege with respect to such schools legally enjoyed by them is indisputable; and it would also affect the privilege of denominational teaching in separate schools, because parents desirous of having their children receive such training in those schools up to the age of 21 years would be obliged to submit to the hardship of their obtaining only an inferior secular education. Legislation purporting to authorize such an injustice would contravene s. 93 (1) of the *British North America Act;* and it is obvious that what the legislature cannot do by direct action its creature may not do by regulation.

(1) [1896] A.C., 88.

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For the respondent it is contended that in the pre-Confederation public school system of Upper Canada the legal right to give secondary education was vested solely in the grammar schools—that they were designed to be the intermediate schools between the common schools and the university; and that if the common schools carried on "high school" work it was only by toleration and not by legal right.

The latter part of this argument has already been dealt with.

The grammar schools were classical schools, Latin and Greek being compulsory subjects in their courses; but, while they were, no doubt, designed to impart secondary education, they also did primary and elementary school work. They were not really a part of the public school system. In 1867 they were governed by the provisions of the C.S.U.C., 1859, c. 63, which embodied, without material change, the Acts of 1853 (16 Vic., c. 186) and of 1855 (18 Vic., c. 132). The grammar schools were intended for boys only (Journal of Education, 1868, p. 84; Exhibit 24); when united with common schools (16 Vic., c. 186, s. 11 (4); C.S.U.C., 1859, s. 64, s. 27 (7) and s. 79 (9)) children of separate school supporters could not attend them (C.S.U.C., 1859, c. 64, s. 27 (16))—and there was no provision for the union of grammar schools and separate schools. The more advanced common schools refused to unite with the grammar schools and themselves carried on "high school" work with official approval. Unions were discouraged. Grammar schools were departmentally controlled as to their courses of study (16 Vic., c. 186, s. 6); there was no statutory right to attend them—they were in fact select schools; and in many localities in Upper Canada, where secondary education was necessary, grammar schools were not accessible, and, if such education was to be available in those places, the common schools must impart it—as in fact they did.

Matters continued in that position for several years after Confederation, the changes complained of by the appellants having begun only in 1871. The common schools and the grammar schools then disappeared *nominatim* and there came into existence high schools (including collegiate institutes) for secondary education and public schools for

primary and elementary education solely. It is now very generally assumed by "the man in the street" that the public school of to-day has replaced the common school and that the high school is the successor of the grammar school. But that is only partially true. At Confederation the common schools were by law unrestricted in their courses of study and were obliged to provide for pupils up to 21 years of age, and in many cases, furnished secondary education suitable for pupils proceeding to matriculation. The public schools, when created in 1871 (34 Vic., c. 33), were obliged to provide education only for children up to the age of 12 years (s. 3) and were required to comply with regulations (s. 37), which restricted the courses of study to primary or elementary education. The high schools (including collegiate institutes) since 1871 do not engage in primary or elementary work; on the other hand Latin and Greek are not compulsory subjects in them (59 Ont. L.R., at p. 126, and Exhibit 21; Document No. 4, "Book of Pamphlets", pp. 7, 8, 9); boys and girls alike have a statutory right to attend them (R.S.O., 1914, c. 268, s. 24 (c)); they are not select schools, but are common schools in the proper sense of that term.

From this brief statement it is clear that, while the public schools of to-day do that part of the work formerly done in the lower classes of the common schools, i.e. the work of primary or elementary education, and the high schools (including collegiate institutes) have taken over the work of secondary education formerly done by the grammar schools, they have also taken over the same class of work which was concurrently done in the upper or high school classes of the more advanced pre-Confederation common schools, in which 72,987 pupils were being trained in 1867, of whom 8,019 pursued "the *higher* studies". (Ex. 14 pp., 88-9). In many particulars the high schools of to-day have the characteristics of the old common school. They are in fact quite as much the successors of those schools as they are of the superseded grammar schools. In so far as the legislation and the regulations governing high schools may interfere prejudicially with the rights and privileges legally enjoyed in 1867 by the Roman Catholic separate schools they are *ultra vires*.

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It is not surprising that the Chief Superintendent of Education, when transmitting to trustees, inspectors and teachers, in 1872, the regulations made under, and his instructions for the carrying out of, the Act of 1871, warned them that the

> new School Act and Regulations do *not* in any way affect the Separate Schools. It was not intended to affect them when the Act was passed; and it would be unjust to the supporters of these schools thus to legislate for them indirectly, and without their knowledge. The Inspectors will, therefore, be particular not to apply the Act, or any of the new Regulations to Separate Schools. (Exhibit 52, p. 64.)

The rights and privileges of Roman Catholic separate school supporters and the scope, intent and effect of the perpetuation of them by s. 93 (1) of the *B.N.A. Act* were probably better understood and appreciated by the provincial educational authorities in 1872 (five years after Confederation) than they are now. Emphasis was given to the above-quoted warning by its repetition in 1873 (Exhibit 23, p. 80); and the Minister of Education expressed the same view in 1876. (Exhibit 49).

Inasmuch as continuation schools were the outgrowth of the continuation classes provided for long after Confederation in connection with the public schools, they do not call for any special consideration.

It would, therefore, seem to be abundantly clear that in 1867 the trustees of Catholic separate schools, charged with their management and clothed with the powers of trustees of common schools, had the right by law to provide in them the secondary education requisite to enable the children of their supporters to matriculate, to enter the Normal School, or to take up the study of any of the "learned professions". Such education, then imparted by many common schools, included most, if not all, of the obligatory work now done in the Ontario high schools and was designed to meet the requirements of ordinary pupils up to the age of 21 years. While the obligation of the trustees to provide for pupils up to that age is set forth in the current Ontario *Separate Schools Act* (R.S.O., 1914, c. 270, s. 45 (d)), the present law and regulations would restrict the teaching to be given in Catholic separate schools to what is prescribed for the public schools of to-day, which are not required to provide for pupils over the age of 16 years. (R.S.O., 1914, c. 266, s. 73 (d)). (Under the Act

of 1871 the public school obligatory age limit was 12 years of age). In other words, the present law and regulations of Ontario forbid Catholic separate schools to impart the high school education which they were legally entitled to furnish at Confederation. Under them, if Catholic pupils are to remain subject to the religious control and influence of their denominational schools, as in pre-Confederation days, until they reach the age of 21 years, it must be at the cost of acquiring in those schools only such education as is deemed suitable for pupils not over 16 years of age attending the public schools. (59 Ont. L. R. p. 133). It would seem to be very plain that a right or privilege enjoyed at Confederation by the Roman Catholics of Ontario in respect of their denominational schools is thus prejudicially affected.

(B) The exemption of the separate school supporters under s. 14 of the Act of 1863 (26 Vic., c. 5) was

> from the payment of all rates imposed for the support of Common Schools, and of Common School Libraries, or for the purchase of land or erection of buildings for Common School purposes, within the City, Town, Incorporated Village or section in which he resides.

From the fact that the Ontario continuation schools, high schools and collegiate institutes are now doing work which formed part of that formerly legally done, or which might have been so done, by the common schools, it follows that separate school supporters are entitled to exemption from rates for the support of such continuation schools, high schools and collegiate institutes. To compel Catholic separate school supporters to support the Ontario high schools, etc., and to use them, if they would give their children up to 21 years of age a secondary education, is prejudicially to affect the right or privilege enjoyed by Roman Catholics as a class at the Union of having such education given to their children under denominational influence and in separate schools managed by their own trustees. As put by Patterson, J., in *Barrett* v. *Winnipeg* (1).

> The right of a class of persons with respect to denominational schools is injuriously affected if the effect of a law passed on the subject of education is to render it more difficult or less convenient to exercise the right to the best advantage.

(C) Sections 20, 21 and 22 of the *Separate Schools Act* of 1863 (26 Vic., c. 5) read as follows:

(1) (1891) 19 Can. S.C.R., 374, at p. 424.

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20. Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

21. Nothing herein contained shall entitle any such Separate School within any City, Town, Incorporated Village or Township to any part or portion of school moneys arising or accruing from local assessments for Common School purposes within the City, Town, Village or Township, or the County or Union of Counties within which the City, Town, Village or Township is situate.

22. The Trustees of each Separate School shall, on or before the thirtieth day of June, and the thirty-first day of December of every year, transmit to the Chief Superintendent of Education for Upper Canada, a correct return of the names of the children attending such school, together with the average attendance during the six next preceding months, or during the number of months which have elapsed since the establishment thereof, and the number of months it has been so kept open; and the Chief Superintendent shall, thereupon, determine the proportion which the Trustees of such Separate School are entitled to receive out of the Legislative grant, and shall pay over the amount thereof to such Trustees.

Section 33 of the *Separate Schools Act* in the C.S.U.C., 1859, c. 65, which embodied the material parts of s. 13 of the Taché Act of 1855 (18 Vic., c. 131), was in these terms:

33. Every such Separate School shall be entitled to a share in the fund annually granted by the Legislature of this province for the support of Common Schools, according to the average number of pupils attending such School during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

There is a striking difference between this provision and s. 20 of the Act of 1863. The basis of division remained the same—*pro rata* according to the average attendance. But the Taché Act of 1855 and the C.S.U.C., 1859, c. 65, both gave the right to share only in "the fund annually granted by the Legislature of this Province for the support of Common Schools" (i.e. the fund known as "The Common School Fund"), while by the Act of 1863 the like right is given to

share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities.

All three statutes pointedly distinguish legislative and municipal grants of public moneys (which belonged to supporters of common schools and separate schools alike) from moneys raised for common school purposes by local assessments, to which separate school supporters did not contribute because they were exempt. In the former only were separate school supporters given the right to share. The policy of the Legislature up to Confederation plainly was to put both kinds of schools on an equal footing in regard to sharing in the appropriation of public money.

The language of s. 20 of the Act of 1863 is most comprehensive in describing the public grants in which the right to share was assured to the separate schools. Formerly restricted to a right to share in "The Common School Fund" (a well-defined annual grant of long standing, which had been the subject of much legislation, and as to the distribution of which no complaint is made by the appellant), separate school supporters were in 1863 given the added right to "share in all other public grants," etc. There is no allusion to "general grants" or "special grants"—"grants for urban schools" or "grants for rural schools"—"conditional grants" or "unconditional grants." All such grants are "public grants," i.e., grants of public moneys, in which common and separate school supporters have identical interests. Legislative and municipal grants for common school purposes differ widely from the annual legislative grant of "The Common School Fund." The latter is, to a substantial extent, a vote of the income of public moneys already set aside for educational purposes, while the former are wholly gratuitous grants of public moneys not so earmarked. In s. 20 of the *Separate Schools Act*, 1863, instead of merely adding the words "and in all other public grants," etc., immediately after the words in the Taché Act "shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools," the Legislature made the additional grants, to which the right of sharing was then extended, the subject of a distinct clause in these words:

> and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities.

Not only are the words "shall be entitled to a share" unnecessarily repeated, if the additional benefits conferred

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be restricted to grants *ejusdem generis* with the grant of "The Common School Fund," but an intention to exclude the application of that rule of construction, or of the kindred maxim "*noscitur a sociis*" (which would, if applicable, cut down the comprehensive words "all other public grants," etc., to mean only "general grants," i.e., grants for common school purposes generally), is further evidenced by the fact that the added clause deals with investments and allotments as well as grants and with municipal as well as provincial grants, etc. A distinction is also made, no doubt advisedly, in regard to the expressed purposes of the respective grants, the object of the earlier grant of "The Common School Fund" being designated "for the support of common schools," while that of the latter is stated in the broader terms "for common school purposes." As observed by Lopes L.J., in *Anderson* v. *Anderson* (1):—

> The doctrine of *ejusdem generis* is a very valuable servant, but it would be a most dangerous master.

In the same case Lord Esher, M.R., said, at p. 753:—

> *Prima facie* you are to give the words their larger meaning.

To exclude from the additional monetary benefits in which the right to "a share" was conferred on the separate schools in 1863 grants "for a common school purpose," made to particular schools, or otherwise restricted, and conditional grants for any such purpose, would defeat the apparent intention of the Legislature in 1863 to put separate schools on a footing of absolute equality with common schools in regard to all grants, municipal or legislative, of public moneys. Given such an application, the doctrine *ejusdem generis* would indeed be "a dangerous master." The only qualifications which the Legislature attached to the educational grants, legislative and municipal, in which it gave the separate schools the right to share, were that they should be "of public moneys" and should be made "for common school purposes."

But, it is said, if the Legislature of Ontario should see fit to restrict a grant to a particular common school or schools, or to make a grant for a particular purpose—such as, to aid schools in which "Darwinism" shall be taught —to apportion a share of any such special grant, in the

(1) [1895] 1 Q.B., 749, at p. 755.

former case to separate schools, and in the latter to schools in which "Darwinism" is not taught, would be to make a grant which the Legislature had not made. No doubt moneys so granted cannot be appropriated otherwise than as the Legislature directs; but the consequence is that any grant of that kind which prejudicially affects the right of separate schools under s. 20 of the *Separate Schools Act*, 1863, is *ultra vires*—whether it be provincial or municipal. Since Confederation for the purposes of s. 20, no distinction can be made between the powers of municipal councils and the powers of the Provincial Legislature. Section 93 (1) of the *B.N.A. Act* admittedly forbids any invasion of the legal rights of denominational schools as existing at Confederation. In regard to the particular matter now being dealt with, the situation thus created is precisely the same as if the *British North America Act* had contained a provision in these words:—

> Out of every grant of public moneys to be made by the Legislature of the Province of Ontario, or the municipal authorities of that Province, for common school purposes, there shall be paid to every Separate School a share thereof proportionate to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which have elapsed since the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

If, therefore, a grant of public moneys is made by the Legislature or by a municipal authority to aid or assist in the carrying out of what would in 1867 have been deemed a common school purpose, either it must be so made that it is apportionable between the common schools (or their present day successors) and the separate schools, or compensation to the latter for their proportion of such grant must be provided for.

It may be that under s. 20 of the *Separate Schools Act* of 1863 there was no assurance that any grants other than that of "The Common School Fund" would be made in the future for common school purposes; but a definite right to share *pro rata* in such other grants, if and when made, was thereby assured to the separate schools. After 1863 municipal authorities in Upper Canada could not grant public moneys for any common school purpose except on the basis provided by s. 20 of the *Separate Schools Act*. They were absolutely bound by its provisions. Of course until Confederation the Legislature of Canada retained full power

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to repeal or amend s. 20 of the *Separate Schools Act*. It could, either expressly or by implication, direct that s. 20 should not apply to any grant which it, or a municipal council, might make to a particular school, or for any common school purpose or purposes, or subject to any condition. But the Ontario Legislature cannot do so since 1867 if the consequence would be to affect prejudicially the right of separate schools to share, on the basis prescribed by s. 20, in all provincial or municipal grants of public moneys for common school purposes. The Ontario Legislature may deal as it pleases with the proportion of its grants for "common school purposes" in which separate schools are not interested. It may divide or dispose of that "proportion" in any way it sees fit amongst "public schools" and "high schools" etc.; but every dollar appropriated by it to aid those schools or the work done in them, whether by way of general grant or special grant, (saving moneys granted to high schools in continuation of former grammar school appropriations) must be taken into account and treated as a payment to them "for common school purposes" in determining the share of "public grants" to which the separate schools are entitled.

The protection assured to separate schools by s. 93 (1) of the *B.N.A. Act* in regard to public aid is that their right to share *pro rata* on the basis of average attendance in all public moneys devoted to common school purposes should not be prejudicially affected by provincial legislation. Assuming the utmost good faith, and excluding any idea of a design to circumvent the provision of s. 20 of the Act of 1863, every grant for a common school purpose, whether made for a particular school or schools, or made subject to some restrictive term or condition, comes within the ambit of the protection of s. 93 (1) of the *B.N.A. Act*. The right to share in all such grants is given by s. 20 of the Act of 1863 in the plainest possible terms; and the power of the Provincial Legislature to defeat that right or to affect it to the prejudice of the supporters of such schools has been categorically negatived by the Imperial Parliament. The question is purely one of legislative power.

The Common and the Separate Schools Acts alike were continued in force after the Union by s. 129 of the *B.N.A. Act* as provincial legislation of Ontario, subject to repeal

and amendment by the legislature, as to common schools without restriction, and as to separate schools within the limitations imposed by s. 93 (1) of that Act. *Dobie* v. *The Church Temporalities Board* (1); *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). The presence of the words " this Province " and " the Province " in s. 20 of the *Separate Schools Act* of 1863 did not render that provision inapplicable after Confederation to the changed conditions which it brought about, as is argued for the respondent. Those terms meant after 1867 the new Province of Ontario which, as erected by s. 6 of the *B.N.A. Act,* comprises that part of the Province of Canada which had, prior to 1841, constituted the Province of Upper Canada and to which alone the *Common Schools Act* (C.S.U.C., 1859, c. 64) and the *Separate Schools Act* (26 Vic., c. 5) applied. Indeed it might be contended with equal force that, because " the Legislature " mentioned in s. 106 of the *Common Schools Act* (C.S.U.C., 1859, c. 64) had meant the legislature of the Province of Canada when that section was enacted, it could not after Confederation mean the legislature of the Province of Ontario, and that common schools in Ontario after the Union (1867-1871) were no longer the " Common Schools in Upper Canada " for the purposes of s. 106, since Upper Canada had ceased to exist. As is truly stated in the appellants' factum (pp. 28-9):

> Confederation was the result of a compromise wherein the religious minority in both Upper and Lower Canada were guaranteed protection for their denominational or separate state-aided schools, and it would have startled and shocked the statesmen of that day had it been suggested that the obligations resting upon the then Province of Canada in respect to such state aid could be ignored by the Provinces to be established in place of the old Province, or, in other words, of the division of the Province of Canada into two Provinces, with the result that in Upper Canada or the Province of Ontario and in Lower Canada or the Province of Quebec, there was no guarantee of the Separate Schools sharing in state aid from annual grants for Common School purposes, but that after the Union the Legislature of Ontario and that of Quebec could make grants for Common School purposes without the Separate Schools being entitled to a share.
>
> It may be reasonably assumed that there was then no intention or desire by the Province of Ontario to evade the obligation that in that respect rested upon the Province of Canada, and that it was assumed that this obligation did continue is evidenced by the Separate Schools

(1) (1882) 7 App. Cas., 136, at p. 147.

(2) [1896] A.C., 348, at pp. 366-7.

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Acts passed from time to time by the Legislature of the Province of Ontario down to 1906, as appears in the Statutes.

Nor do the words, "and not otherwise appropriated by law", appended in s. 106 of the *Common Schools Act* (C.S.U.C., 1859, c. 64) to the description of the legislative grants to be apportioned by the Chief Superintendent, present a formidable difficulty. Section 20 of the Act of 1863 is subsequent legislation and, so far as there may be inconsistency, the terms of that section must prevail over those of s. 106 of the Act of 1859. Section 20 of the Act of 1863 precludes an appropriation by law of any grants made for common school purposes which would prevent the separate schools sharing proportionately in them.

Whether the legislature could validly formulate a scheme or impose conditions for the distribution amongst the separate schools themselves, other than on the basis of average attendance, of the proportion of the total grants for common school purposes, as understood in 1867, to which the separate schools as a whole were entitled, is, perhaps, a debatable question. The facts that s. 20 of the *Separate Schools Act* of 1863 gives the right to share "to every separate school" and that s. 22 requires that payment be made by the Chief Superintendent directly to the trustees of each separate school of its proportion of the legislative grant, should not be lost sight of in considering this aspect of the matter. Having regard to the primary apportionment amongst the municipalities of moneys to be granted by the legislature for the support of common schools, directed by s. 106 of the *Common Schools Act* (C.S.U.C., 1859, c. 64) to be made "according to the ratio of population in each" municipality, it would seem probable that where there is but one separate school in the municipality it is entitled absolutely to its entire *pro rata* share on the basis of average attendance of the moneys appropriated to such municipality and that the question suggested can arise only where there are several separate schools in the same municipality. But in no event may the share of any grant to which the separate schools of the Province are entitled be entirely or partly withheld from them so that the total amount payable to them as a whole will be lessened.

With the rights of separate schools *inter se* in the distribution of the grants of public moneys, however, we are not presently concerned. That the separate schools throughout the province, taken as a whole, have the right to receive annually a share in all public moneys validly granted for common school purposes (as understood in 1867) proportionate to the average attendance at such schools and that any such grants so made as to preclude the separate schools so sharing therein and without compensation being otherwise provided, are void, are, in our opinion, the certain consequences of the perpetuation by s. 93 (1) of the *B.N.A. Act* of the rights and privileges conferred by s. 20 of the *Separate Schools Act* of 1863. To hold otherwise would be to render illusory in a most material particular the substantial protection to religious minority rights in regard to education which the Imperial legislation of 1867 was designed to assure.

The parties agreed that in the event of the original suppliants being entitled to any proportion of the grants for common school purposes in the year 1922 (to which the suppliants' monetary claim is presently confined), payment of which was withheld for non-fulfilment of some conditions attached to them, their recovery should be for the sum of $736 demanded in the petition. Possibly for that reason no particulars were given as to the items of which this sum is composed. We are, therefore, unable to determine whether the grants of which portions were withheld from the original suppliant were or were not so made as to prevent "every separate school" from sharing in them. If so made, they were void and no part of them is recoverable. The claim for $736, therefore, cannot succeed.

We are, for the foregoing reasons, of the opinion that the appellants are entitled to the following declarations for which they pray, to wit:—

1. Every board of trustees of the Roman Catholic separate schools has the right to establish and conduct in the school or schools under its jurisdiction courses of study and grades of education such as are conducted in what are now described as continuation schools, collegiate institutes and high schools and any and all such regulations

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purporting to prohibit, limit, or in any way prejudicially affect that right are invalid and *ultra vires*.

2. Supporters of Roman Catholic separate schools are exempt from the payment of rates imposed for the support of any continuation school, collegiate institute or high school not conducted by the board of Roman Catholic separate school trustees for the municipality or school section in which they reside. Section 39 (1) of the *High Schools Act* (R.S.O., 1914, c. 268) is invalid as to supporters of separate schools.

3. Every statutory provision enacted by the Legislature of the Province of Ontario, which involves a departure from the principle of apportionment between common and separate schools *pro rata* on the basis of average attendance at such schools, as provided by s. 20 of the *Separate Schools Act* of 1863 (26 Vic., c. 5), of all legislative and municipal grants of public moneys for any purpose that was, under the law as it stood in 1867, a common school purpose, (saving grants to high schools in continuation of former grammar school appropriations), would, if valid, prejudicially affect a right or privilege with respect to their denominational schools which Roman Catholics had by law at the Union and is, therefore, *ultra vires*. Each of the statutory provisions enumerated in paragraph (2) of the prayer of the Petition of Right falls within this category.

The appeal should accordingly be allowed to the extent indicated.

DUFF J.—The claims of the appellants reduce themselves to two. The first concerns the right, which they allege the Roman Catholics in Ontario possess, to establish and conduct, free from control or regulation by the Legislature as respects the scope of instruction, denominational schools of the character of those known as "common schools" in 1867, which designation would include, it is contended, schools of the type and status of the present high schools, collegiate institutes and continuation schools; coupled with a consequential exemption from all taxation for the support of such last mentioned schools.

The second concerns the rights of such denominational schools in relation to public grants in aid of education.

It is important, first of all, to state, succinctly, but with some precision, the propositions of law and fact which the appellants advance in support of these claims.

As to the first, it is said that at the date of Confederation Roman Catholics, in Upper Canada, enjoyed, by law, the right to establish denominational schools and to conduct them by boards of trustees chosen by themselves; that, as respects text-books and courses of study, free and unfettered control of such schools was vested, by law, in the several boards of trustees, whose authority was sufficient to enable them to sanction courses of study coextensive in scope with those now pursued in high schools, collegiate institutes and continuation schools.

That by force of s. 93 (1), Roman Catholics of Ontario now enjoy these same autonomous rights coupled with the consequential right of exemption from taxation above indicated; that these rights are constitutional rights, and that any legislation is void, which, if valid, would prejudicially affect them.

As to the second claim, it is said that, by the *Separate Schools Act* of 1863, which remained in force at Confederation, every separate school, that is to say, every Roman Catholic denominational school established pursuant to law, was entitled to receive a part of every sum of money granted by the Legislature for "common school purposes" (which phrase included, by the appellants' construction of it, the maintenance of schools of the types of the present secondary as well as elementary schools), and that this part was determined (without regard to the purpose or conditions of the grant) by an arithmetical ratio, based upon the number of pupils attending the school and having no relation to the subjects taught, the text-books used or the efficiency of instruction—every separate school being entitled to its part, calculated according to the alleged statutory ratio, however advanced, however rudimentary, the nature of the education imparted might be. This right to share in the public grants, it is said, is now also a constitutional right, guaranteed by s. 93 (1) of the *British North America Act.*

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It will be convenient to consider these two sets of propositions separately; but before proceeding to do so, it is well to observe that they seem to entail this consequence: that every supporter of a separate school, however elementary the character of the education may be, which is imparted by the denominational school or schools in his section or municipality, is exempt, not only from taxation for the support of public schools, but from all taxation also for the support of secondary schools; an exemption that was valid fifty years ago, if valid to-day. The appellants' propositions also involve this further consequence, that every separate school, as to courses of study and text-books, is under the independent dominion of its board of trustees, who may prescribe only the most rudimentary studies; and yet each separate school, however rudimentary the studies pursued, is entitled to its part of all sums granted by the Legislature for "common school purposes", which purposes include, I repeat, as the appellants contend, the maintenance of schools of the type of the present collegiate institutes.

We are concerned only with rights protected by s. 93 (1) of the *British North America Act,* rights relating to denominational schools existing at the date of the Union and established by law; rights, that is to say, which could be maintained, as the trial judge observes, "in face of opposition", rights which the courts would be bound to enforce or protect; and which were, moreover, declared in some statutory enactment in operation at that date.

I shall first consider the appellants' propositions touching the character of the schools they were entitled to maintain and the extent to which they were under an exclusive denominational control; the question of the public grants will be examined separately. The Attorney-General takes his stand upon the conclusion unanimously adopted in the Ontario Courts, that the rights bestowed upon Roman Catholics by the statutes in force at the relevant date in relation to their denominational schools were no wider than this: they were entitled to establish schools of the class known as "common schools", to manage them by boards of trustees nominated by themselves, but with respect, *inter alia,* to the courses of study to be followed, it was their duty to proceed in obedience to such regulations as

might be promulgated by the central educational authority of the province, the Council of Public Instruction.

It will be observed that the appellants' propositions divide themselves into two branches: first, schools known as "common schools" were intended to provide, where that was desirable in the view of the local authorities, courses of study sufficiently advanced to enable the pupils to obtain the necessary preparation for entrance to the provincial university or the learned professions; to provide, it is said, let me repeat, a programme of studies not inferior in scope to the programmes now defining the courses of study in the secondary schools of to-day.

Second, within the superior limit, thus indicated, each board of trustees had supreme discretionary power as to the courses of studies to be pursued in the schools within its jurisdiction, and, in the case of separate schools, this authority extended to the use of text-books.

The appellants, in order to succeed, must make good their propositions on both these branches; they must establish that the legislation on the subject of common schools contemplated schools of the advanced character mentioned, and they must also establish that, in the conduct of such schools, boards of trustees were, as regards text-books and programmes of study, independent of the regulative authority of the Council of Public Instruction. Obviously, if such schools were in these respects subject to an over-riding authority in the Council, the appellants have no legal ground for inpeaching legislation upon these subjects, or regulations upon them, of a character which could lawfully have been put into force by the Council of Public Instruction in exercise of its controlling powers.

Primarily, we must look to the *Separate Schools Act* of 1863 to ascertain the measure of control Roman Catholics were entitled to exercise over their denominational schools; and also the degree in which such schools were subordinated to the dominion of the Council of Public Instruction.

Four sections of the statute (the 4th, 9th, 13th and 26th) require attention here, but of these we are at present chiefly concerned with the 26th.

The language of that section is this:

> The Roman Catholic Separate Schools shall be subject to such inspection, as may be directed, from time to time, by the Chief Super-

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intendent of Education, and shall be subject also to such regulations, as may be imposed, from time to time, by the Council of Public Instruction for Upper Canada.

The view of this section, which naturally first presents itself, regards it as investing the Council with a comprehensive authority to pass general regulations governing the management and conduct of separate schools.

The first member, dealing with inspection, purports, independently of any other legislation upon the subject, to entrust the Chief Superintendent with complete discretionary power. So, also, in this view, the second member, *ex proprio vigore,* imports the bestowal upon the Council of the fullest authority to formulate regulations, which it is the duty of the separate school authorities to observe—"such regulations as may be imposed from time to time."

Two other views suggest themselves as to the effect of the second branch of s. 26. First, that the authority thereby given does not include control by the Council over separate schools in matters other than those in relation to which jurisdiction may, from time to time, be entrusted to the Council, under the Common Schools Acts or other legislation; that the section envisages the Council as a body charged with public duties and endowed with powers of regulation in respect of defined subject matters under the existing Common School Acts or under subsequent amending legislation, and that in all such matters (but only such) the separate schools are subordinated to the Council. According to the other view (and subject to one qualification, this construction is adopted in Mr. Hellmuth's argument), the office of the section is merely to declare that the Council's functions, as affecting separate schools, have relation to the subject matters (and those only), which, at the date of the statute, were within the field of its authority under the Common School Acts—so that in exercising those functions, it would always remain subject to the limits fixed by those Acts at that date.

The appellants' argument adopts this last mentioned construction, with the qualification that the Council's authority does not, by force of s. 26, extend to the subject of text-books.

Either the first or second of these three interpretations, as it seems to me, is preferable to the third. The section places separate schools under the dominion of regulations

put into force from time to time; in terms there are no limits as to subject matter or otherwise. In fulfilling its duties under the section, the Council would, of course, be bound to observe any limitations governing it by force of the pertinent enactments of the Separate School law, as well as those necessarily proceeding from the nature of the subject matter; the duty being a duty to regulate only, must be performed in good faith for the purpose for which it is imposed, and, especially, with a vigilant eye to the fact that the purpose of the legislation was to make better provision for a system of Roman Catholic denominational schools. But, subject to this, there appears to be no very potent reason for restricting the natural sense of the words. Resort to other legislation seems unnecessary. And if the section is said to contemplate the Council, in exercising its powers thereunder, as acting within the field marked out by the Common School Acts, the words, on the more natural reading of them, would seem to direct us, for our guidance, to the provisions of those Acts at the time of the exercise of the power, rather than at the date of the Separate Schools Act.

In my own view of the Common School Acts, further discussion of the relative merits of these three readings would be superfluous. I shall proceed, for the present, upon the footing that the construction advocated by the appellants (except as touching the subject of text-books) is the right construction. Even on this assumption, it will sufficiently appear from a strict examination of the provisions of the Common School Acts, invoked by the appellants, that they furnish no reliable ground for overturning the conclusion of the Ontario judges as to the scope of the Council's powers; a view which, it will appear, dictated the practice of the Council itself in exercising its functions under the statutes of 1850 and 1859—a practice, which was, it will further be seen, acquiesced in by the Legislature itself.

The relevant provisions of s. 119 of the *Common Schools Act* of 1859 are to be found in clauses 2, 3, 4 and 5, which are in these words:—

119. It shall be the duty of such Council, and they are hereby empowered

2. To adopt all needful measures for the permanent establishment and efficiency of the Normal School for Upper Canada, containing one

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or more Model Schools for the instruction and training of Teachers of Common Schools in the science of Education and the art of Teaching;

3. To make from time to time the rules and regulations necessary for the management and government of such Normal School; to prescribe the terms and conditions on which students will be received and instructed therein; to select the location of such school, and erect or procure and furnish the building therefor; to determine the number and compensation of teachers, and of all others who may be employed therein; and to do all lawful things which such Council may deem expedient to promote the objects and interests of such school;

4. To make such regulations from time to time, as it deems expedient, for the organization, government and discipline of Common Schools, for the classification of Schools and Teachers, and for School Libraries throughout Upper Canada;

5. To examine, and at its discretion, recommend or disapprove of text-books for the use of schools or books for School Libraries.

Clause 4, if alone, could hardly be susceptible of debate. There are two subject matters for regulation, or rather perhaps, two phrases designating a group of subject matters: "the organization, government and discipline of common schools," and the "classification of schools and teachers." These phrases in their unstrained meaning denote subject matters of regulation which include branches of instruction; and "classification of schools," in the ordinary purport of the words, embraces the function of determining the different classes and their several typical characteristics.

Various reasons are propounded by the appellants for ascribing to these phrases a narrower compass. I shall first consider those reasons which derive any substance they possess from the terms of the common school legislation itself.

The provision of the *Common Schools Act* to which the appellants appear to ascribe the greatest force is clause 8 of section 79, which defines the powers of urban boards of trustees. By that clause such trustees are authorized and required to determine the several kinds and descriptions of schools which shall be maintained under their jurisdiction. This clause, it is argued, is incompatible with the attribution to the Council of supreme control over courses of study and "classification of schools."

To each board of trustees the task, it is said, is committed of classifying the schools under its charge, and this clause, it is argued, empowers the board to do this by reference to the character of the instruction in them; and this, it is further said, conveys the right to prescribe the

branches of study. And again, the argument runs, in fulfilling this mandate, the trustees are invested with an independent discretion, untrammelled by superior authority.

I have searched the statute without success for something to justify this version of sections 79 and 119. The intention to subordinate boards of trustees to the Council in matters over which the Council has the power of regulation is positively declared by clause 16 of section 79, which directs such boards to see that the schools under their care are "conducted according to the authorized regulations." In light of this provision, clause 8 of section 79, and clause 4 of section 119 must not be read as conflicting or mutually exclusive but as complementary enactments. We need not stop to discuss the precise effect of clause 8. This seems beyond dispute; it is the duty of trustees, in "classifying" (to quote the phrase of the Chief Superintendent) the schools within their jurisdiction, to observe the regulations upon that subject proceeding from the Council. If, as the appellants argue, they are entitled, in performing their duty under that clause, to act according to a canon based, as suggested, upon subjects of instruction—then, they are, it cannot be doubted, subordinate to the paramount jurisdiction of the Council in relation to the subject "classification of schools."

The argument of the appellants virtually deletes the phrase "classification of schools" from clause 4. The phrase can hardly, in this context, be read as denoting the classification of pupils; which seems rather to fall under the wider subject "government and discipline of schools." As this reading, however, is the only alternative reading suggested by the appellants, it is proper to observe that, if adopted, it would not at all advance the argument. "Classification of pupils," if these words have any substance at all, includes the arrangement of classes by reference to the subjects of instruction and the stages of advancement which the pupils have reached. It would not be easy to reconcile the possession by the Council of final authority in relation to the subject so described with the possession by the boards of trustees of completely autonomous jurisdiction in relation to subjects of instruction and "classification of schools" in the proper sense of the words. Indeed, there seems little room for doubt that the ordinary

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and natural reading of clause 4 is the true reading. "Classification," as applied to "schools" in the sentence in which it here occurs, can have no other force than that which it has when applied to "teachers"—grouping them into classes and ascribing its appropriate qualifications to each class. Furthermore, this argument which attributes to clause 8, section 79, the effect of so limiting the natural meaning of clause 4 of section 119 as to exclude courses of study from the regulative jurisdiction of the Council, seems to ignore the fact that no such clause as clause 8 forms any part of s. 27, in which the powers of rural boards of trustees are enumerated. The nearest approach to clause 8 to be found in that section is clause 6 by which such trustees are empowered to establish a female as well as a male school.

If the argument be sound and the subject matter of courses of instruction be not within the scope of s. 119, then the Act is silent upon the regulation of that subject matter in rural schools. It is nothing to the purpose to say, as appears to have been contended in the courts below by the appellants, that, by force of s. 7 of the Act of 1863, all the powers of urban trustees, under s. 79 of the *Common Schools Act*, are entrusted to rural as well as to urban boards of separate school trustees. Even if this proposition could be accepted, it leaves untouched the difficulty, just mentioned, as to the regulation under the *Common Schools Act* of the conduct of instruction in rural schools. But the proposition itself is inadmissible. By s. 7 of the Act of 1863, trustees of separate schools are to have as respects separate schools the powers that trustees of common schools "have and possess, under the provisions of the Act relating to Common Schools." There is nothing in the *Common Schools Act* investing any board of trustees with authority to direct the conduct of instruction in rural schools. Assuming clause 8 to have the meaning put forward, it confers no jurisdiction on anybody, over any rural school; and there is nothing in s. 7 of the *Separate Schools Act*, which can properly be read as endowing the board of trustees of such schools with authority to ignore, in the exercise of their powers, the limits necessarily imposed, by the terms in which such powers are defined in the *Common Schools Act*.

Another argument must be noticed, which is derived from the form of s. 6 of the *Grammar Schools Act* of 1853, where the powers of the Council, as touching such schools, are set forth. By that section the Council is required to "prescribe a list of text-books, programme of studies and general rules and regulations for the organization and government of the County Grammar Shools." In this context, it is argued, the general words "Organization and government" as applied to schools cannot include text-books and programmes of studies, which are specifically mentioned. And the use of the phrase "organization and government" in this sense, supplies a reason, it is urged, for similarly restricting the meaning of the same phrase in the clause we are considering. This argument, by which we are invited to resort to a statute passed in 1853, for the construction of an enactment, passed in 1850, I do not find convincing. It is always unsafe to construe the general and unambiguous language of one enactment by reference to phrases found in another. *McLaughlin* v. *Westgarth* (1). Phrases and even clauses are so often introduced into Bills on their passage through Parliament in response to importunities from various quarters, that such discrepancies can seldom be safely relied upon as furnishing a clue to the intention of the legislature. The history of grammar schools in Upper Canada, disclosed in the material before us, suggests an adequate explanation of the explicit mention of text-books and studies.

The common school legislation provides other much more apposite and useful contrasts. The system of common schools was instituted by a statute of 1841; and, by that statute, the regulation of courses of study and text-books was committed to the local authorities (the School Commissioners) who, in townships and parishes, were annually elected, and, in incorporated cities and towns, were appointed by the several corporations. The Act provided for a Superintendent of Education, who was invested with no regulative authority over text-books or studies of any kind in respect of the conduct of schools; but (s. 4, sub-s. 5) was required to address to the persons employed in carrying out the provisions of the Act "such suggestions

(1) (1906) 75 L.J.P.C. 117

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as may tend to the establishment of uniformity in the conduct of the Common Schools throughout this Province."

Section 7, subsection 4, of this statute may usefully be quoted in full. By it the Commissioners were entrusted with a duty

> to regulate for each school, respectively, the course of study to be followed in such school, and the books to be used therein, and to establish general rules for the conduct of the schools, and communicate them, in writing, to the respective teachers.

Complete local autonomy in relation to studies, text-books and generally in the management and conduct of the schools was a dominant principle of the common school system as first established. But, in 1850, this system has undergone a striking transformation. Local authority to regulate studies, to regulate text-books, "to establish general rules for the conduct of the schools and communicate them in writing to the respective teachers" finds no place in the statute of that year. For this local control there is substituted the central authority of the Council of Public Instruction to pass regulations under the terms of clause 4, section 119, and to deal with the subject of text-books as provided in clause 5; coupled with the enactments requiring local authorities to see that the regulations of the Council are observed. These changes point to an intention to improve the efficiency of the common schools by subjecting them to an over-riding central control. The progress of legislation in these years, at all events, gives little countenance to the surmise that it was the design of the legislature in 1850 and later to leave each school to exclusive control of the local board of trustees in the primary essentials of education.

I come now to a branch of the appellants' argument to which the appellants themselves attach a high degree of importance. The argument is that the provision of section 119 (clause 5 of that section), entrusting the Council with certain functions therein defined, in respect of the use of text-books in schools, justifies, by reason of the frame of it, an inference that the subject matters of regulation designated in clause 4 were not intended to include programmes of study. The presence of clause 5, according to the argument, containing, as it does, a special disposition upon the subject of text-books, requires us to read clause 4 as excluding that subject from its purview; and,

it is said that if the general language of clause 4 does not embrace that subject, it must also exclude the kindred matter, programmes of study. When the structure of section 119 is examined, and in particular the structure of clause 5, and especially when the history of the two clauses is also taken into account, it will be seen that there is little substance in this contention.

Clause 4 is concerned with a power of regulation which *ex facie* is an unrestricted power, or restricted only by reference to the designated subject matters; it is a power to make "such regulations, from time to time" as the Council "deems expedient". This power extends to subject matters defined by comprehensive, general terms, "organization, government and discipline of schools", "classification of schools and teachers". While *ex facie*, the various matters comprehended under these general expressions are all within the ambit of the clause, no emphasis is laid upon any particular matter, nor is any duty imposed in terms to deal with any particular matter in any special way or at all. The Council are given the fullest discretion as to the time and manner in which they shall discharge any particular branch or phase of the responsibilities committed to them. Clause 5, on the other hand, is concerned with a particular subject—text-books, and, in connection with that matter, a duty is imposed upon the Council; the duty to examine text-books. And then the Council is invested with a discretion to recommend or to disapprove of text-books examined with a view to the use of them in schools.

Of all matters which *ex facie* are comprehended within the general words in clause 4, one matter is singled out for special treatment, under clause 5. This clause does not, as clause 4 does in itself, endow the Council, *simpliciter*, with a general authority to make regulations. As to the subject with which it is concerned, the functions of the Council are stated with much greater particularity: to examine; to recommend; to disapprove, under a sanction nominated in another section. The draughtsman has carefully avoided any words which might be construed as imparting a general authority to regulate. This clause, then, treats the subject matter with which it deals as standing in a special category; the Legislature, in order to express

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its intention has selected language which shows that the object of clause 5 would not have been attained, had that clause been omitted, and the subject of text-books left at large, under the general jurisdiction of the Council under clause 4. The presence of such a clause would appear to justify no inference leading to any restriction of the applicability of the general words of clause 4 in relation to any subject other than text-books.

This conclusion becomes even less doubtful when one looks at the origin and history of the two clauses. Provision was first made in the Act of 1846 for the Council of Public Instruction (under the name of the Board of Education), and in that Act clause 5 of the statutes of 1850 and 1859 first appeared as clause 2 of section 3—the subject of text-books having been, as already mentioned, by the earlier statute of 1841, committed to the independent control of the local authorities.

Before the passing of the statute of 1846, the Chief Superintendent, and others concerned for the welfare of the recently established popular schools, had come to realize some of the evils arising from a diversity of text-books, which are discussed at length in the reports of the Chief Superintendent during the twenty succeeding years. It was then determined that some authority over the subject must be vested in a central body. It was considered that, at the beginning, at all events, it would be sufficient to give that body a power of recommendation only; and the Act of 1846, when it took the form of law, contained a clause corresponding with that which appears in the Act of 1859, except that in the clause itself the sanction attached to the use of a disapproved text-book (loss of the government grant) appears in the clause itself, and not in a separate section, as in the later Act of 1859.

The policy which inspired this clause did not go into effect without vigorous opposition. This subject of school books had aspects other than the educational aspect. There were numerous interests, as appears from the material before us—some of them, no doubt, powerful—which did not welcome the views of the Chief Superintendent and Council, who, shortly after the Act of 1846, published a list of recommended books. Indeed, notwithstanding the recommendations of the Council, and the provisions of the

law designed to bring about the observance of such recommendations, unrecommended text-books continued to be used for many years; and it was not until twenty years after the passing of the Act of 1846 that the Council, being satisfied that the policy of uniformity of text-books had won a "common consent" in the province, felt itself warranted in declaring that all books other than those recommended were disapproved. As late as 1866, a most determined effort was made by a well known publishing house in Great Britain, represented by Canadian publishers and backed by most powerful Canadian influences, to bring about the abrogation of this system, and a reversion to the old plan of the Acts of 1841 and 1843, by which the choice of text-books for each school was left to the local board of trustees.

It is hardly surprising, therefore, that when, in 1850, a Bill to consolidate and re-enact the School Law was introduced into the Legislature, the clause in the earlier statute of 1846, defining in carefully selected words the special rôle of the Council, in the matter of text-books, was left unaltered, or that it remained unaltered down to the date of Confederation. In view of all these considerations I can perceive little to recommend it in the argument that the presence of clause 5 justifies the inference contended for.

I am not suggesting that under clause 5 there is no authority to regulate. In disapproving of a text-book or list of text-books, the Council executes a power of disallowance under the sanction of a grave penalty, and is, of course, exercising a power of regulation; a power to make a rule, of a defined character, it is true, but still a rule, governing the use of text-books in schools. In recommending, also, the Council, by naming a book or books recommended, creates a situation from which, by force of other sections, duties arise that are incumbent upon the local authorities and officials responsible for the execution of the Act. Sections 27 (18), 79 (15), 91 (6), 98 (3).

The recommendations of the Council, once made, become, by force of these other sections, rules binding on local authorities and officials in the sense that their discretion is thereby limited; although s. 119 does not, in entrusting the Council with the duty of recommending.

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confer, *ex proprie vigore,* a power to prescribe; and, as already observed, the power to disallow is a power to regulate which can be executed only in a limited specified way.

And here we may conveniently examine the contention of the appellants that s. 26 of the Act of 1863 does not extend to the subject of text-books. I will not for this purpose dwell upon the view sketched above, according to which this section gives a general power of regulation, subject only to relevant enactments of the separate school law, and to the limitations necessarily implied in the fact that the power is given for the purpose of enabling Roman Catholics to carry on more satisfactorily their system of denominational schools; and that, at least, that section subordinates such schools to regulation by the Council in respect of all subject matters, which may from time to time fall within the ambit of its jurisdiction in relation to common schools.

I shall assume, for the present, that section 26 authorizes only such regulations as the Council might, at the date of the Act of 1863 have put into force under their existing powers in relation to common schools—but assuming that, I can discover no satisfactory reason for denying that such an authority would embrace the power to make recommendations as to text-books, and to disallow such text-books under clause 5 of the Act of 1859. I shall not repeat what I have said as to clause 5, I can think of no reason for excluding—under the construction contended for—the authority given by that clause from the power of regulation which is the subject of section 26.

Section 9 of the *Separate Schools Act* must not be overlooked. By that section trustees of such schools "shall perform the same duties and be subject to the same penalties as the trustees of Common Schools." There is no exception of the duties incumbent upon common school trustees under sections 27 (18) and 79 (15).

I have said that the view above stated as to the jurisdiction of the Council under the statutes of 1850 and 1859 (and incidentally, of the argument of the appellants that under those statutes the local boards of trustees were invested with completely autonomous powers in relation to the courses of study to be pursued in their several municipalities and school sections) was the view which dictated

the practice adopted by the Council and the Chief Superintendent in executing their duties under those statutes.

This is demonstrable from the documents in evidence. In 1855, a manual was published under the authority of the Council for the guidance of "trustees, teachers and local superintendents," giving the statutes of 1850 and 1853 (the *Grammar Schools Act*), "together with the forms, general regulations and instructions" for executing the provisions of those statutes. The publication was issued, no doubt, pursuant to the duty of the Chief Superintendent under section 35 (3) of the Act of 1850, which required him to "cause forms, instructions and general regulations of the Council to be printed from time to time," and distributed for the information of the officers of common schools; and the manual included "general regulations for the organization, government and discipline of the common schools of Canada" as well as a programme of studies entitled "The Order and Classification of Studies for the Common Schools in Upper Canada." Again, in a similar publication, issued under the authority of the Council, in 1861, and edited by the Deputy Superintendent of Schools, there appears the same programme, which is described as the "Order and Classification of Studies Prescribed for the Common Schools of Upper Canada, as observed in the Upper Canada Model Schools, Toronto," and it is stated that this programme had been adopted by the Council on the 31st December, 1858.

This programme directs, or at all events assumes, that the pupils are to be classified in three divisions, and it is stated that, in the Model Schools, pupils in these divisions are arranged in five classes, corresponding to the five reading books of the Irish National Series of Readers, which had been recommended by the Council. In the manual of the same description, published in 1864, compiled by the same editor, this programme again appears. It is not without importance to notice that certain subjects—trigonometry and some of the physical sciences—are given in this curriculum as "extra" subjects, which may be taught *at the discretion of the school authorities,* but not more than one in any single term. Still again, in a manual printed for the Council in 1863, after the enactment of the *Separate*

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Schools Act of that year, this same programme is reproduced and it is there said to be applicable to separate schools.

No inconsiderable weight attaches to these publications, issued successively under the authority of the Council, in the years 1856, 1861, 1863 and 1864, as indicating the view accepted by the Department as to the powers of the Council, and carried out with circumstances of the greatest publicity. It is impossible to suppose, moreover, that those responsible for the legislation of 1859 were ignorant of the proceedings of the Council. We have already seen that the enactments of the Act of 1850 touching the powers of the Council were reproduced without pertinent change in the Act of 1859; and it seems to be a fair inference from this, taken together with the unqualified language of s. 26 of the Act of 1863, as well as of s. 9 of that statute, that the Council had not misunderstood the scope of the powers with which it was intended to invest them. The Council, in professing to prescribe this programme of studies for the direction of those responsible for the conduct of the common schools, was assuming in the most public manner an over-riding authority in relation to such matters. In this the Legislature must be presumed to have acquiesced.

The appellants have not, I conclude, established their contention as to the autonomous jurisdiction of boards of trustees, and they fail equally, I think, in adducing satisfactory reasons for holding that, in scope of instruction, the common schools of 1867 were on the same footing as collegiate institutes, high schools or continuation schools to-day.

The system of public instruction, at Confederation, included a provincial university, grammar schools, a normal school with model school attached, common schools and separate schools, which, admittedly, for the present purpose, may be grouped with common schools.

On behalf of the appellants, it is argued that it was one of the functions of the common schools, at that date, to train pupils for entrance to the university and the learned professions, and for that purpose to provide the necessary instruction in Greek and Latin, mathematics and what were called the "higher branches of English"; that, in

this respect, they were, in truth, co-ordinate with the grammar schools.

The *Common Schools Act* of 1859 nowhere defines in terms the scope of the instruction to be imparted in such schools, but the type of school contemplated by the common school legislation may be inferred with confidence from the school legislation as a whole, and the official acts of the Council of Public Instruction and the Chief Superintendent, who were mainly charged with the administration of the school law.

Obviously, for our present purpose, the qualifications of teachers, the provision made for training them, the programmes of studies, officially promulgated, the character of the authorized text-books, may supply useful *indicia*. The Council of Public Instruction, which was entrusted with the office of regulating the conduct of the grammar schools and with the management of the Normal School, was also charged with duty, as we have seen, of regulating the programmes of study and prescribing text-books for common schools, and of prescribing the qualifications of teachers of such schools.

The programmes of study promulgated by the Council are in evidence, so, also, are the regulations prescribing the qualifications of teachers. The programmes are not framed with the view of fitting pupils for the university, as at once appears from a comparison of the list of subjects taught with requirements for matriculation; the qualifications for teachers are just as plainly not designed to provide instruction for any but the most elementary schools, and of the Normal School training, it is sufficient to say that Latin and Greek find no place in the curriculum. But, most important of all, are the lists of text-books recommended by the Council of Public Instruction for the common schools.

I have already mentioned that it was the duty of the local authorities to provide the schools with authorized text-books, and to see that no unauthorized books were used. It is true, as already observed, that there was, for years, much laxity in the enforcement of these rules, but it is beyond doubt that the school books necessary for effective instruction of pupils reading for matriculation in the university or for entrance into the learned professions,

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could not, if the law were observed, be used in common schools, at any time after 1847, when the first list of recommended books was sanctioned; and, after the year 1866, the use of a text-book in Latin or Greek, in a common school, would, by force of the regulation passed in that year, have entailed the loss of the government grant.

The position of the grammar schools in the system is also of considerable significance. The *Grammar School Act* of 1853 required each grammar school to make provision for instruction in the higher branches of a "practical English Education" in Latin, Greek and mathematics, so as to prepare students for the University of Toronto.

Grammar schools had been established long before, but the object of this Act was to cause them to take their proper place as intermediate schools between the common schools and the University. The Chief Superintendent repeatedly emphasizes the relative status of the two systems of schools. "The Grammar School should be a connecting link between the common schools and the University; the common schools should be the feeders of the grammar schools, and these should be the feeders of the University" (Report for 1850, p. 22). Such expressions occur frequently in the reports in evidence. In 1865, after the enactment of the *Grammar School Act* of that year, Dr. Ryerson addressed a number of circulars to local authorities explaining the object of the new statute, 19 Doc. History, pp. 41, 42, 43 and 44 (Exhibit 46). "The object of the Act is to make Grammar Schools what they were intended to be * * * * intermediate schools between the Common Schools and University College * * * * prepare pupils for matriculation in the university—to impart to others the higher branches of an English education, including the elements of French." These schools are not, he says "in any way the rivals of common schools, nor permitted to do common school work * * * * but a higher educational work which can be done by neither the common school on the one hand, nor by the College on the other." "The object of the Act," he says, "is to make your grammar school what it ought to be, a High School for your City—an intermediate school between common schools and the University", and pro-

viding a higher "English" education for those not desirous of studying Greek and Latin. "They are," he says, not to "poach upon common school ground," but to provide instruction supplementary to the "elementary" education of the common schools. The Act of 1865 and the new programme of studies under it, together with the regulations already mentioned, disallowing for common schools all text-books not recommended by the Council (a regulation having the effect of excluding grammar school subjects from the common schools, under penalty of loss of the government grant) finally marked in a decisive way the distinction between the respective rôles of the two classes of schools. The high schools and collegiate institutes of to-day are the decendants of the grammar schools, the "public schools" of the common schools.

It seems necessary to refer to the mass of quotations from the Chief Superintendent's reports adduced by the appellants for the purpose of shewing that common schools were subject in the matter of courses of study to the exclusive control of the boards of trustees, and in support of the contention, I have just been considering.

In reading these extracts, it is important, first of all, to remember that local autonomy was the rule for some years, and that it was only in 1850 that the Council received general powers of regulation; and, most important of all perhaps, that even in the vital matter of text-books it took years to bring the practice into conformity with the regulations. Then extracts, separated from the context, are apt to mislead.

I shall mention only a few of the passages quoted.

In his report for the year 1847, Dr. Ryerson states that there were, in that year, in Upper Canada, forty-one common schools in which Latin and Greek were taught, seventy, French, and seventy-seven, the elements of natural philosophy; 1847 being the year in which the first list of recommended books was published, a list not including a text-book in any of these subjects. The figures produced are in themselves of little value, but the change which occurs in a few years is important. By 1852, the last year for which the figures are available, seven schools were teaching Latin and two Greek. In the report of the year 1867, there is a significant statement. In that year,

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it appears from a table in the appendix, that in none of the cities (and these include Hamilton and London) were any text-books but authorized text-books in use—the result, perhaps, of the regulation, above mentioned, of 1866. Mr. Hellmuth, naturally enough, dwelt with some emphasis upon the report of the local Inspector for Hamilton for 1853, and that for London in 1863, as giving two conspicuous instances of common schools engaged in training pupils for matriculation in the University, and maintaining efficient clases in Latin, Greek and French. In 1867, as the report shews, this had ceased. I refer to one more extract. It is from a circular of the Chief Superintendent in the year 1847. In this circular, addressed to mayors of cities and towns, he appears to say that the local board of trustees is to determine (inter alia) "The subjects of instruction and the text-books to be used in each school" and this passage is adduced as supporting the appellants' contention as to the powers of boards of trustees. A circular issued a month later shews that, as to text-books, the Chief Superintendent only meant to say that trustees were entitled to select text-books from a list recommended by the Provincial Board of Education.

As to subjects of instruction, this circular was issued before the Act of 1850, in which clause 4 of section 119 of the Act of 1859 conferring on the Council, for the first time, general powers of regulation, first appeared.

My conclusion, after examining these extracts, with some attention, is that when read with due regard to date and context, and to the circumstances in which they were published, they afford little support to the appellants.

As against the argument the appellants seek to found upon these passages from a communication of 1847, may be set the official acts of the Council is prescribing programmes of studies, and the following passage from a letter published in March, 1866:

> Of private schools and their teachers, the law takes no note; but the Legislature, that provides by law funds for the support of public schools, has the undoubted right of prescribing the condition on which such schools shall be entitled to public aid. The Legislature has invested a body called the Council of Public Instruction, with the power and imposed upon it the duty to prescribe the subjects of instruction in the public schools, and the text-books, which shall be used in giving that instruction. A teacher of a public school is not, therefore, employed to teach

what subjects and books which he pleases but to teach those subjects and books which are provided by law, and no school is entitled to public aid which is not conducted according to law.

* * * *

The Legislature has authorized the Council of Public Instruction to prescribe and sanction text-books for the national schools, and to prohibit the use of others; and every school corporation and county boards are required to select text-books from the authorized list of such books; and if any such Board has recommended any text-book not in the authorized list, it has acted without authority and has violated the third clause of the Common School Act. With the law-abiding people, the law should be supreme.

On the first branch of the appeal, therefore, the appellants fail.

The appellants' claim in relation to the public grants rests upon s. 20 of the Act of 1863.

The principle of division laid down by that section assumes the existence of a fund, which has been appropriated for the benefit of the common schools generally in each municipality. It is upon this fund, so appropriated for a given municipality, that the section operates. The Act of 1863 contains no provision for the distribution among municipalities of public moneys granted for school purposes. In the absence of some specific appropriation it is necessary to resort to the provisions of the Act of 1859 to ascertain the fund in which, under s. 20, a given separate school is to share.

That statute deals with the distribution of moneys voted for common school purposes in sections 106, 120, 121 and 122. These sections enact, in effect, that moneys annually granted, in aid of common schools, shall, after providing for certain specific appropriations set forth in s. 120, and for any other express appropriations, be divided among the municipalities, according to population. The fund for each municipality having been thus ascertained, s. 20 comes into play.

It seems quite clear that the Legislature did not intend to tie its hands by s. 106 (1) in such a way as to necessitate the apportionment of all moneys voted for common schools, according to a fixed arithmetical ratio. The qualification "not otherwise expressly appropriated" sufficiently manifests the intention of the Legislature to reserve its freedom of action. A special appropriation directing the disbursement of moneys voted for the common schools on a different principle would, therefore, have involved in

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point of law no departure from or inconsistency with s. 106 or s. 20, and this applies to the methods of distribution now attacked. The fact that they are laid down in a general Act is, of course, immaterial.

Assuming s. 20 to have created a legal "right or privilege" within the meaning of s. 93 (1), it was not, and in the nature of things could not be, a right "by law" to require the Legislature to refrain from granting appropriations for special purposes or for the aid of schools reaching a certain standard of excellence or of school sections conforming to a certain standard of expenditure.

To none of the appropriations affected by the rules of apportionment, to which the appellants object, could a claim have been made under that section, or under that section combined with s. 106. The appellants have been deprived of nothing to which any "right or privilege," under those sections, could attach.

It may be said that although strictly the "right or privilege" in itself is not prejudiced by the legislation impeached, it is nevertheless rendered less valuable thereby. But, assuming that to be a legitimate ground of complaint, under s. 93 (1), there is no evidence of such prejudice, as affecting either the Roman Catholics as a whole or the representative plaintiffs. There is not the slightest reason for supposing that the existing grants, if distributed according to the arithmetical ratios of s. 106 and s. 20, would yield a larger sum for Roman Catholics as a whole. But, more important still, it is impossible to know (if under compulsion of a constitutional limitation, the Legislature were obliged to follow an unwise and wasteful plan of distribution) whether the grants would be as generous as they now are, under a system designed to ensure a fruitful expenditure. There is, of course, no suggestion that by the statutes now in force, separate schools are placed upon a footing of inequality with the public schools. Grants are shared by all schools alike, upon identical conditions.

During the argument it was suggested that it was not competent to the appellants by means of a Petition of Right to obtain (as they are attempting to do) a declaration that certain statutes of the Ontario Legislature are *ultra vires*. The question is important, and the appellants' right to maintain their petition in its present form is not

at all free from doubt. The Attorney-General, however, is content to have the questions raised passed upon in the present proceedings, and no such objection has been taken by him at any stage. A speedy determination of those questions is, moreover, obviously desirable in the wider public interest, and, in the circumstances, it would appear that the Court is not under a duty to consider the technical question, upon which no opinion is pronounced.

The appeal should be dismissed.

MIGNAULT J.—Three claims, which are thus summarized by the Chief Justice, are advanced on behalf of the appellants:—

(A) Their claim "to establish and conduct courses of study and grades of education in Catholic separate schools such as are now conducted in continuation schools, collegiate institutes and high schools"; and that "all regulations purporting to prohibit, limit or in any way prejudicially affect such right or privilege are invalid and *ultra vires*";

(B) Their claim to exemption from taxation for the support of continuation schools, collegiate institutes and high schools not conducted by their own boards of trustees;

(C) Their claim to a share in public moneys granted by the Legislature of the Province of Ontario "for common school purposes" computed in accordance with what they assert to have been their statutory rights at the date of Confederation.

As to claims (A) and (B), I fully accept the judgment of the Chief Justice, and I feel that I cannot usefully add anything to what he has said in allowing these two claims. It seems to me inconceivable that when it granted to the Roman Catholics of Upper Canada the privilege of having their own separate schools, the Legislature could have intended to render this privilege valueless by allowing the Council of Public Instruction of that Province to restrict, by regulations, the scope of the education to be given in these schools. The educational systems both of Ontario and Quebec were established by the same Legislature, and it is a matter of common knowledge that in Quebec the religious minority of that province has always had full control of its own schools, including its high schools.

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To my very great regret, however, I find myself unable to accept in its entirety the decision of the Chief Justice with regard to the third claim. As briefly as possible, I will explain wherein my views differ from those of my Lord.

The appellants' case must be that a right or privilege with respect to denominational schools which the class of persons whom they represent had by law in the province at the Union has been prejudicially affected by the legislation of which they complain.

The crucial question therefore is: what was the right or privilege which this class of persons had by law at the Union to claim for their separate schools a share of public moneys granted by the Legislature for the support of common schools or for common school purposes? To answer this question, reference must be had to sections 20, 21 and 22 of the *Separate Schools Act* of 1863 (26 Vict., c. 5) which reads as follows:—

20. Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

21. Nothing herein contained shall entitle any such Separate School within any City, Town, Incorporated Village or Township, to any part or portion of school moneys arising or accruing from local assessment for Common School purposes within the City, Town, Village or Township, or the County or Union of Counties within which the City, Town, Village or Township is situate.

22. The Trustees of each Separate School shall, on or before the thirtieth day of June, and the thirty-first day of December of every year, transmit to the Chief Superintendent of Education for Upper Canada, a correct return of the names of the children attending such school, together with the average attendance during the six next preceding months, or during the number of months which have elapsed since the establishment thereof, and the number of months it has been so kept open; and the Chief Superintendent shall, thereupon, determine the proportion which the Trustees of such Separate School are entitled to receive out of the Legislative grant, and shall pay over the amount thereof to such Trustees.

There is no difficulty, nor is any complaint made, as to the distribution between common (or public) schools and separate schools of the Common School Fund, which

s. 20 describes as "the fund annually granted by the Legislature of this Province for the support of common schools".

The point on which, with great deference, I have been unable to agree with the Chief Justice is with respect to the character, either general, or both general and special, of "all other public grants, investments and allotments for common school purposes", of which, under s. 20, "every separate school" is entitled to a share.

In other words, what is the meaning and effect of the following language of s. 20: "Every separate school * * * shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the Province or the municipal authorities"?

Sections 20, 21 and 22 of the *Separate Schools Act* of 1863, I think, must be read with section 106 of the *Common Schools Act* of 1859, Consolidated Statutes of Upper Canada, 1859, chapter 64.

Section 106 is a long section, but I need specially refer only to subsection 1, the effect of which is to empower the Chief Superintendent of Education to apportion annually, on or before the first day of May, all moneys granted or provided by the Legislature for the support of common schools in Upper Canada, and not otherwise appropriated by law, to the several counties, townships, cities, towns and incorporated villages according to the ratio of population in each as compared with the whole population of Upper Canada.

Consistently with this enactment, s. 20 of the *Separate Schools Act* of 1863 states that every separate school shall be entitled to a share in the fund annually granted by the Legislature of the Province for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the Province or the municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months * * * as compared with the whole average number of pupils attending school in the same city, town, village or township.

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That is to say, the Chief Superintendent, as directed by s. 106 of the *Common Schools Act* of 1859, having apportioned all moneys granted or provided by the Legislature for the support of common schools in Upper Canada, and not otherwise appropriated by law, to the several counties, townships, cities, towns and incorporated villages according to the ratio of population in each as compared with the whole population of Upper Canada, every separate school is entitled to share in the amount thus apportioned, according to the average number of pupils attending such school during the twelve next preceding months, as compared with the whole average number of pupils attending school in the same city, town, village or township.

Consistently also, s. 22 of the *Separate Schools Act* of 1863, after requiring the trustees of each separate school to transmit twice annually a correct return of the names of the children attending such school, together with the average attendance during the six next preceding months, directs that the Chief Superintendent shall, thereupon, determine the proportion which the trustees of such separate school are entitled to receive out of the legislative grant, and shall pay over the amount thereof to such trustees. The trustees thus receive the share of the legislative grant to which their separate school is entitled from the Chief Superintendent, and the latter, in his apportionment, cannot apportion moneys otherwise appropriated by law.

In my opinion, the legislative grant which the Chief Superintendent apportions, and of which he subsequently pays a share to the trustees of each separate school, is a general grant for the support of common schools or for common school purposes. A special grant, say for the rebuilding of a particular school destroyed by fire, would be otherwise appropriated by law, and the Chief Superintendent could not deal with it in his apportionment. Section 20 of the *Separate Schools Act* places legislative grants on the same footing as municipal grants, and I cannot understand how the latter could be apportioned among the common and separate schools of the municipality unless they also are general grants.

Section 20, as I read it, embodies an undertaking, which is now binding on the Legislature of the Province of

Ontario by virtue of s. 93, sub-s. 1, of the *British North America Act,* that there should be then or thereafter no discrimination against the separate schools with regard to the common school fund and "all other public grants, investments and allotments for common school purposes". The grants, investments and allotments contemplated must have been of a general character, for "every separate school," as explained above, was entitled to claim a share therein. If the Legislature, after the passing of the *Separate Schools Act* of 1863, made such a grant, investment or allotment for common school purposes, no new enactment was required to entitle "every separate school" to a share therein, and in that sense there existed, at the Union, a "right or privilege by law" which could have been enforced before the courts. But, in my judgment, nothing in s. 20 would have entitled "every separate school" to claim a share in a grant made in favour of a particular common school. If, for instance, to refer again to the same illustration, the Legislature had granted $10,000 to rebuild a school in the city of Ottawa which had been destroyed by fire, it is to me inconceivable that "every separate school" in Ottawa could have asserted a claim, under s. 20, to a share in such a grant. Such special grants cannot be said to be grants "for common school purposes" within the meaning of s. 20. The generality of the apportionment contemplated, I think, indicates the generality of the grants which were to be apportioned among the common and separate schools respectively.

The appellants seem to concede this point. In their factum, they say:

> It may be that a grant by the Legislature towards the rebuilding of a school that has been destroyed by fire, or something of a like nature, might be construed not to be a grant for common school purposes. * * *

There is indeed an obvious distinction between a particular common school purpose, and common school purposes generally. It may be further observed that the whole context of s. 20 shews that both the Common School Fund and the other public grants referred to were general in their character, and were made in favour of all common and separate schools, since all of them participated therein. This admittedly was true of the Common School Fund, and I see no reason for doubting that the other public grants contemplated were also general grants.

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This is further shewn by the extract from the supply bill of 1865, at page 125 of the Appendix of Statutes. The grants for common schools thereby made were general grants. I think we have here an illustration of the contemporaneous practice at or near the time when these statutes were enacted.

It is said that the Legislature of Ontario may evade the obligation which results from s. 20 by the simple device of making special grants to each public school designated by its name. That a power may conceivably be abused is, however, no reason for denying its existence if it be clearly granted by law. But I do not think we should assume that this power to make special grants will be abused. The obligation undertaken by the Province, and rendered intangible by s. 93 of the *British North America Act,* is one of the safeguards stipulated by the religious minorities both of Quebec and of Ontario. It is even more than a legal obligation, it is, if I may say so, an obligation binding in honour. And I cannot assume that it will be deliberately evaded in the manner suggested.

In full agreement with the Chief Justice, I may add that conditions in excess of those laid down by s. 20 of the *Separate Schools Act* of 1863 cannot, in my opinion, be imposed on the separate schools in order to entitle them to obtain a share in the grants to which the section applies. That section is still in force and cannot be changed by the Legislature. I also agree that any statute which purports to impose such conditions, as well as all statutes and regulations which are in contravention of claims (A) and (B) of the appellants, are *ultra vires.*

NEWCOMBE J.—The suppliants, the board of trustees of the Roman Catholic separate schools for school section no. 2 in the township of Tiny, and the board of trustees of the Roman Catholic separate schools for the city of Peterboro, on behalf of themselves and the other boards of trustees of Roman Catholic separate schools in the province of Ontario, claim, by their amended petition of right,

(1) Payment of the sum of $736 to the first named board, that being the sum to which, under the Act of the former Province of Canada respecting Separate

Schools, c. 5, of 1863, s. 20, the board claims to be entitled for the year 1922 in excess of that which it has received.

(2) That it may be declared that certain Acts or parts of Acts of the legislature of Ontario respecting education, which are enumerated, and which were enacted in 1871 and subsequently, prejudicially affect the rights or privileges of the suppliants as claimed to have been conferred by the *Separate Schools Act* of 1863 and secured by s. 93 of the *British North America Act,* 1867, and that these provincial enactments are *ultra vires* in so far as they affect the rights of the suppliants.

(3) That it may be declared that the suppliants have the right to establish and conduct courses of study and grades of education such as are now conducted in the continuation schools, collegiate institutes and high schools of Ontario, and that any and all regulations purporting to prohibit, or in any way prejudicially to affect, such right are *ultra vires.*

(4) That it may be declared that the supporters of Roman Catholic separate schools are exempt from the payment of rates imposed for the support of the continuation schools, collegiate institutes and high schools not established or conducted by the suppliants or other boards of trustees of Roman Catholic separate schools.

(5) Such further or other relief as may be requisite.

The petition was dismissed at the trial, and the judgment was affirmed by the Appellate Division, from which it comes to this Court.

I agree that the appeal should be dismissed and with the reasons for that result which are expressed by my brother Duff, but perhaps I may usefully add the following.

I am satisfied that, even if the procedure by petition of right were available for the trial of the issues which the parties have presented, the suppliants' case must fail in all particulars. I shall consider presently the first claim of the petition, by which it is sought to recover the sum of $736. But, as to the other branch of the case, relating to the field within which a right is said to be secured to the trustees of the Roman Catholic separate schools of

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Ontario to carry on these schools, one cannot read the Statutes of 1859 and 1863 and the earlier Statutes, which must be read together, without realizing that the trustees are not at large, and that there were powers of regulation existing in the legislature at the time of the Union, and which were then carried forward, by the exercise of which the separate schools, equally with the common schools, were to be regulated and governed. The Council of Public Instruction had the comprehensive power, conferred by section 119, clause 4, of the Act of 1859,

> to make such regulations from time to time as it deems expedient for the organization, government and discipline of Common Schools, for the clasification of schools and teachers, and for school libraries throughout Canada.

And, when, by the Act of 1863, provision was made for the establishment and conduct of the Roman Catholic separate schools, it was declared by s. 26 that they

> shall be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and shall be subject also to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada.

I have examined carefully the post-Union Statutes and Regulations of which the suppliants complain, but I am unable to perceive that any of these operates prejudicially to affect any right or privilege which the suppliants, or the class of persons they represent, had by law in the province at the Union. If these provisions had been prescribed by the Council of Public Instruction previously to the Union, there could have been no sound objection to their validity, and the powers of regulation which, within the scope of the Acts of 1859 and 1863, the province possessed at the Union were not reduced by the *British North America Act*. The denominational schools to which s. 93 (1) refers, so far as they were Roman Catholic separate schools of Upper Canada, were regulated schools, and I do not doubt that the provisions to which the suppliants object are within the powers of regulation which the Province had in 1863, and continued to possess at and after the Union.

With regard to the $736, that is claimed as part of the appropriations sanctioned by the legislature in aid of the schools for the year 1922. But the money appears to have been applied in the manner authorized by the Statutes as expressed, and I can find no sanction for diverting any part of it to a different purpose. There is nothing in the *British*

North America Acts to compel the legislature to make a grant, or to avoid conditions prescribed for earning it, or to prevent a specific appropriation. Therefore, to put cases which appear to be very plain and simple, if the grant be for the sole benefit of one of the common schools, or if it be payable only to those schools which comply with a condition, for example, that they have a specified attendance, or a certain standard of efficiency, it is nevertheless an effective grant, and it would require the authority of the legislature to direct that it shall be shared by other schools, or by those which do not comply with the legislative conditions imposed.

It is said in effect, and this branch of the case depends upon the proposition, that, when such a grant is made, the board of trustees of a Roman Catholic separate school has, by force of the legislation as it stood at the Union, and by the effect of s. 93 (1) of the *British North America Act,* 1867, a legal right or privilege to enforce against the Provincial Government payment of a share of the grant in the proportion of the average number of pupils attending that separate school to the whole average number attending school in the same city, town, village or township; and, strangely enough, that contention is put alongside of another which maintains that the Special Act, or the Act which imposes the condition, is *ultra vires* of the legislature. I can understand, although I cannot justify, the latter suggestion. It involves the argument that legislative capacity for the grant in question has been withheld. But I confess I do not see how it is that, if, as must be the case, the authority of the legislature is necessary to the making of a grant, that grant can operate for a purpose which was not authorized by the provisions which sanction it. The court cannot take the place of the legislature to make a grant. The *British North America Act* has been productive of some results which perhaps were not anticipated, but it has not, I am persuaded, created anything so difficult of conception as a present legal right to share in a future legislative grant, and still less when the grant is by its terms not shareable, nor capable of distribution in the manner claimed. Therefore in this particular also the petition must fail, whether its

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object be to enforce payment of the $736, or to obtain a declaration of the invalidity of the grants.

RINFRET J. concurs with Anglin C.J.C.

LAMONT J.—The question for determination in this appeal is whether certain legislation enacted by the Legislature of the Province of Ontario was beyond the power of the Legislature to enact.

For the appellants it is contended that it was; that it amounted to a contravention of s. 93 (1) of the *British North America Act* of 1867. That section reads as follows:—

> 93. In and for 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."

The particular respects in which the appellants contend that their rights were invaded by the impeached legislation, are:—

1. That it takes away the right of the Roman Catholics to have taught in their separate schools all the courses of study and subjects of instruction which are now being taught in the continuation schools, collegiate institutes and high schools of Ontario and that as a consequence thereof the Roman Catholic ratepayers are taxed for the support of these institutions, from which taxation they should be exempt.

2. That it altered the basis of the annual grants made by the Legislature for public school purposes in a manner which prejudicially affects the share thereof which each separate school is entitled to receive.

The argument on behalf of the appellants on the first branch of the case, briefly put, is as follows: That prior to Confederation the Roman Catholics of Ontario had, by law, the right to have their denominational schools managed by trustees of their own faith and choosing; that, as part of the management thereof, the trustees of each separate school had the right to prescribe the courses of study to be taught in their school; that this right was confirmed to them by s. 93 (1), above quoted, and, as a

consequence of such confirmation the Legislature after Confederation was powerless to validly impose any restriction or limitation upon their said right, or to prevent the trustees of such schools from causing to be taught therein all the subjects now being taught in the continuation schools, collegiate institutes and high schools. That these institutions are to-day teaching only the subjects taught in the common schools prior to Confederation, and, as by law separate school supporters are exempt from contributing to the support of common schools, they are exempt from contributing to the support of institutions doing common school work. What we have to ascertain in the first place, therefore, is: Did the trustees of the separate schools at Confederation have an unqualified and unfettered right by law to prescribe the courses of study to be taught in their schools. If so the legislation impeached in this action is an infringement of that right and, therefore, invalid.

The rights and privileges in respect to denominational schools which the Roman Catholics of Ontario had by law at Confederation, were those given to them by the Act of 1863 (26 Vict., c. 5). Section 2 of that Act provided that any number of persons, not less than five, and being heads of families and Roman Catholics, might convene a public meeting of persons desiring to establish a separate school for Roman Catholics and for the election of trustees thereof. Section 3 provided for the election of three of such persons present to act as trustees "for the management of such separate school". The trustees were declared to be a body corporate and to have power to impose, levy and collect school rates from persons sending children to or subscribing toward the support of such schools, but persons paying rates to separate schools were declared exempt from contributing to the support of the common schools. In addition the trustees were to have all the powers in respect of separate schools that the trustees of common schools had and possessed under the Act relating to common schools (s. 7). It was also enacted that the trustees of separate schools should perform the same duties and be subject to the same penalties as the trustees of common schools (s. 9).

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Then s. 26 reads as follows:—

26. The Roman Catholic Separate Schools (with their Registers), shall be subject to such inspection, as may be directed from time to time, by the Chief Superintendent of Education, and shall be subject also, to *such regulations* as may be imposed, from time to time, by the Council of Public Instruction for Upper Canada.

Turning now to the Act respecting Common Schools (C.S.U.C. 1859, c. 64) we find therein set out the powers, duties and obligations of the trustees of common schools (ss. 27 and 79). There it is expressly stated to be the duty of the trustees to see that the schools under their charge were conducted according to the authorized regulations and to see that no unauthorized text books were used.

By s. 119 (4) it was expressly declared to be the duty of the Council of Public Instruction

To make such regulations from time to time, as it deems expedient, for the organization, government and discipline of Common Schools, for the classification of Schools and Teachers, and for School Libraries throughout Upper Canada.

Does the authority to make regulations for the "organization, government, discipline and classification" of schools, include authority to make regulations prescribing the courses of study to be taught therein? The language of the section is, it seems to me, sufficiently wide to cover such authority. Furthermore, both before 1859 and afterwards until Confederation, the Council of Public Instruction had not only been in existence with the duty and authority set out in s. 119 (4), but, acting under that authority, had prescribed the courses of study in the common schools. This shows that prior to Confederation it was understood and accepted that the Council's authority to make regulations for the common schools embraced that of prescribing the studies to be taught therein. Then again the history of the legislation is instructive:

Under the *Common Schools Act* of 1841 (4-5 Vic., c. 18) it was the duty of the trustees (then called commissioners):

To regulate for each school, respectively, the course of study to be followed in such school, and the books to be used therein, and to establish general rules for the conduct of the Schools.

At that date the local authorities had an unrestricted control over the courses of study. Two years later, however, a restriction was placed upon their powers. By 7 Vict. c. 29 (1843), it was declared to be the duty of the trustees

To regulate for such School the course of study, and the books to be used therein, and to establish general rules; subject, nevertheless, to the approval of the Township, Town or City Superintendent.

This Superintendent was appointed by the council of the township, town or city.

Under this Act the power to prescribe the courses of study could only be exercised by the joint concurrence of the trustees and the local superintendent. But although this Act restricted the control of the trustees there was, as yet, no attempt at central control.

In 1846 (9 Vict., c. 20) it was enacted that the Governor might appoint a fit and proper person to be superintendent of schools in Upper Canada, whose duty it was to be

To prepare suitable forms and regulations for making all Reports, and conducting all necessary proceedings under this Act, and to cause the same, with such instructions as he shall deem necessary and proper for the better organization and government of Common Schools, to be transmitted to the Officers required to execute the provisions of this Act. * * *

Section 27 of the Act provides as follows:—

And be it enacted, that it shall be the duty of the Trustees of each School section: * * * To see that the School is conducted according to the regulations herein provided for; * * *

A comparision of the Acts of 1843 and 1846 shews that in both Acts the duties of the trustees are set out at length, but, while in the Act of 1843 express authority was given to the trustees to prescribe the courses of study, with the consent of the local superintendent, no such authority appears in the Act of 1846; but in that Act it was declared to be the duty of the trustees to conduct their schools in accordance with the regulations therein provided for, which regulations were those authorized to be made by the Superintendent of Schools for Upper Canada for "conducting all necessary proceedings under this Act."

In 1850 a further step was made by the appointment of the Council of Public Instruction with the powers set out in s. 119 (4), above quoted, which council took the place of the Superintendent of Upper Canada so far as the question under discussion is concerned.

Considering the wide language in which the authority of the Council of Public Instruction to make regulations is expressed, the course of the legislation and the practice prevailing over many years, I am of opinion that it was the intention of the Legislature prior to Confederation, in

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order to secure greater uniformity, to vest in the Council of Public Instruction authority to prescribe the courses of study for the common schools. That being so and the Roman Catholic separate schools being, by s. 26, expressly made subject to such regulations as might from time to time be imposed by the Council of Public Instruction, the trustees of each separate school at Confederation were in duty bound to see that their school carried out such programme of studies as the Council of Public Instruction might, by virtue of the authority vested in them to make regulations, impose.

For the appellants it was argued that, even if that were so, it was incumbent upon the Council of Public Instruction to exercise their authority and actually make regulations for separate schools before the right of the trustees to prescribe the studies would be displaced and that as, up to Confederation, no such regulations had been made, the effect of s. 93 (1) was to confirm the right of the trustees unfettered by any regulation which might afterwards be made.

In my opinion this contention cannot be supported, for even assuming (which is disputed) that up to Confederation no regulation as to the courses of study in separate schools had been made by the Council of Public Instruction, the authority of the Council to prescribe these courses by regulation was always there, and the right of the trustees was always subject thereto. It was the right of the trustees to manage their separate schools subject to the right of the Council to step in and make regulations relating (*inter alia*) to courses of study, that was confirmed by s. 93 (1).

The right of the Council to prescribe the subjects to be taught did not mean (as the appellants seem to fear) that in the exercise of the right the Council could, by forbidding the teaching of subjects beyond those required—say for a Kindergarten class—in effect destroy the separate schools. No authority, in my opinion, was ever given, either to the Superintendent of Upper Canada or to the Council of Public Instruction, to make regulations which would wipe out, wholly or in part, either the common or the separate schools. Prior to Confederation the Legislature could have done this, but after Confederation even the Legislature

was powerless to abolish separate schools. The power bestowed upon the Council was to make regulations for the organization, government, discipline and classification of common schools. At Confederation the common schools had a distinct and definite place in the system of education of Upper Canada. They were to furnish the elementary instruction for the pupils of their respective school districts; while the grammar schools were to furnish instruction

> in all the higher branches of a practical English and Commercial Education, including the Elements of Natural Philosophy and Mechanics, and also in the Latin and Greek Languages and Mathematics so far as to prepare students for University College or any College affiliated to the University of Toronto. * * * (*Grammar Schools Act*, 1853, 16 Vict., c. 186, s. 5.)

As was stated by the Chief Superintendent in a circular issued by him in 1866, the object of the Grammar School law was

> to make the Grammar Schools the High Schools of their respective localities—intermediate schools between the Common Schools and the University, in arts, in law, and in the department of civil engineering, to give to intended surveyors their preliminary education, and to impart the higher branches of an English and commercial education to those youths whose parents do not wish them to study Greek and Latin.

In the educational system of Upper Canada the common schools were, therefore, intended to be the primary schools, with the grammar schools as intermediate schools between the common schools and the University. These were their respective fields, and the duty of the Council was to make regulations prescribing courses of study which would enable the schools to effectively provide instruction covering the field which the Legislature intended they should occupy, but not to destroy or limit their usefulness by restricting the field of their operations.

In the actual working out of the system no doubt there were common schools which taught subjects that were intended to be taught in the grammar schools, and, no doubt, some grammar schools gave instruction in subjects covered by the primary course, but this over-lapping was, I think, due to the exigencies of the particular localities. It must not be forgotten that at that time the province was young and in process of being settled. Some settlements grew more rapidly than others, with the result that they required educational facilities beyond those which the common schools were intended to supply, before sufficient

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provision was made in these settlements for secondary education; while in other settlements, whatever may have been the cause thereof, the grammar schools, instead of confining themselves to the work of intermediate schools, were found to be furnishing instruction in subjects some of which belonged properly to the intermediate course, while others belonged to the elementary course of the common schools. It is not, however, to the manner in which the system worked out in actual practice that we must look for guidance in determining the sphere of operation of the primary and intermediate schools, but to the intention of the Legislature as disclosed in the various Acts.

Once we know the limits of the field which it was intended the common schools should occupy, we know the field to be covered by the separate schools, for, in my opinion, in so far as secular education was concerned the separate schools were intended to be simply common schools under denominational management.

The right of the Roman Catholics, however, to have separate schools carries with it, in my opinion, the right to have separate schools of the class of the common schools at Confederation, and covering the same field so far as secular education is concerned; that is to say, primary schools furnishing elementary instruction.

The line of demarcation between the primary and intermediate schools may not always have been definitely drawn or closely adhered to, for the reason that it was at times difficult to keep, or to induce the ratepayers to keep, the educational facilities up to the requirements of the respective localities, but I do not think it can reasonably be said that the separate schools of to-day under the impeached legislation have lost their status as primary schools of the class to which the Act of 1863 intended them to belong.

The appellants also relied upon s. 79 (8) of the *Common Schools Act* of 1859, which declared it to be the duty of the board of school trustees of every city, town and village

> To determine the number, sites, kind and description of schools to be established and maintained in the city, town or village.

They contended that "kind and description" in this subsection meant the "grade or character" of the school

which would necessarily include the courses of study and branches of education taught therein, and they referred to the decision of the Privy Council in *Ottawa Separate Schools Trustees* v. *Mackell* (1), as supporting their contention.

In that case their Lordships, at page 71, say:—

> The "kind" of school referred to in sub-s. 8 of s. 79 is, in their opinion, the grade or character of school, for example, "a girls' school," "a boys' school," or "an infants' school," and a "kind" of school, within the meaning of that subsection, is not a school where any special language is in common use.

By the examples given their Lordships have indicated that the "kind," "grade or character" of a school which the trustees have a right to determine refers rather to the class of persons for whose education the school was to provide than to the courses of study to be taught in such school. The term, in my opinion, would also cover the right to determine whether the school should be a central, branch or ward school. I am, however, unable to find anything in the judgment which lends support to the appellants' contention that the "grade or character" of the school implies a right to grade in the sense of prescribing the courses of study. The examples given, in my opinion, point to the opposite conclusion.

I am, therefore, of the opinion that the impeached legislation so far as this branch of the case is concerned, does not prejudicially affect any right or privilege guaranteed to the separate schools by s. 93 (1) of the *British North America Act,* 1867.

This conclusion disposes of the further contention of the appellants that the Roman Catholic ratepayers were not liable to taxation for continuation schools, collegiate institutes and high schools.

The only exemption they had under the Act was that they should not be liable to contribute toward the support of common schools, that is, as I have said, schools furnishing elementary instruction.

The continuation schools, collegiate institutes and high schools under the legislation and regulations in force, all furnish instruction in matters pertaining to secondary edu-

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cation and they cannot, in my opinion, be classed as common schools. The Roman Catholic ratepayers are, therefore, not exempt from taxation for the support of these institutions.

On the other branch of the case the contention of the appellants is that the impeached legislation has altered to their prejudice the basis of distribution of legislative grants which prevailed at Confederation.

The right of a separate school to share in the legislative grants is governed by s. 20 of the Act of 1863. That section reads as follows:—

> 20. Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such School during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending school in the same City, Town, Village or Township.

The object of this section was to enable the separate schools to obtain a share of the legislative grants for common schools.

It will be observed that there is no obligation on the legislature to make any grant, but the section provides that such grants as the legislature shall make for common school purposes are to be distributed upon the basis set out in the section.

The difficulty, in my opinion, is not with the basis of distribution but in determining what moneys are to be deemed grants within the meaning of the section. As to the "fund annually granted by the Legislature for the support of common schools", both respondent and appellants appear to be agreed that it relates to a fund known as the "Common School Fund" concerning which no question arises in this litigation. It is as to the construction to be placed upon the words "all other public grants for common school purposes" that the parties differ. To my mind the question involved, stated briefly, is: Are "public grants * * * for common school purposes" to be limited to general grants in which all schools are to share, or do they include grants made for a specific purpose or grants made conditional upon their being earned.

The respondent contends that a grant for a specific purpose or a grant made conditional upon its being earned, is not a grant for common school purposes within the meaning of s. 20.

The contention of the appellants as set forth in their factum is as follows:—

It may be that a grant by the Legislature towards the rebuilding of a school that has been destroyed by fire, or something of a like nature, might be construed not to be a grant for Common School purposes, but that a grant to Common, now called Public, Schools, dependent upon their attaining a certain standard of efficiency or equipment or raising a sufficient amount of money to pay expensive teachers, is not such a grant as will entitle the Roman Catholic Separate Schools to share in, is denied by the appellants, and it is submitted such a grant is distinctly a grant for Common School purposes, whether called special or general.

It will be observed that under s. 20 the distribution is to be made between the common and separate schools in each city, town, village or township.

At the time s. 20 was enacted the statutory provision governing the apportionment of the legislative grants was s. 106 (1) of the *Common Schools Act* of 1859, which reads as follows:—

106. It shall be the duty of the Chief Superintendent of Education and he is hereby empowered—

1. To apportion annually, on or before the first day of May, all moneys granted or provided by the Legislature for the support of Common Schools in Upper Canada, and not otherwise appropriated by law, to the several Counties, Townships, Cities, Towns and Incorporated Villages according to the ratio of population in each, as compared with the whole population of Upper Canada.

The sum, therefore, which the Chief Superintendent had for apportionment was not the whole of the moneys voted by the Legislature for the support of common schools, but only such portion thereof as remained after deducting the amounts "otherwise appropriated by law." Having made the apportionment on the basis of population among the counties, townships, cities, towns and villages, it was then the duty of the Chief Superintendent to determine the proportion of the moneys allotted to each city, town and village or township, which the trustees of the separate schools situate therein respectively, were entitled to receive (s. 22 of the Act of 1863). As the sum total of the moneys apportioned did not include the portion of the grant "appropriated by law", that is specifically appropriated by the Legislature, the separate schools were not entitled to share in such portion. That the separate

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schools cannot rightfully claim a share of the moneys appropriated by the Legislature to specific purposes seems to me to be clear and is, I think, practically admitted by the appellants in their factum. If, for example, the Legislature were to make a grant to assist in rebuilding a certain school house destroyed by fire, would the trustees of a separate school in the same township be entitled to a share thereof by virtue of s. 20? In my opinion they would not. If the trustees brought an action to enforce such a claim it would be a good answer thereto that the Legislature had voted the money for a specific purpose and that it could not be properly applied to any other purpose. In such a case a court could not properly direct that the moneys be applied in a manner other than that specifically directed by the Legislature. The same reasoning applies to a grant for apportionment among schools attaining a certain standard of efficiency or equipment, or made payable upon the performance of a condition. Unless the required standard be attained or the condition performed the grant would not be available for distribution.

I am, therefore, of opinion that by "Public grants * * * for Common School purposes" in s. 20, the Legislature meant general or unconditional grants in which all schools were to share. In other words, "Grants * * * for Common School purposes" meant "Grants for the purposes of all Common Schools". These would include conditional grants for the same purpose once the condition had been performed. But as the authority of the Legislature to say whether or not any grant at all should be made, or to specify the conditions upon which public moneys shall be devoted to school purposes, is supreme, the only limitation imposed by s. 20 upon the exercise by the Legislature of its authority, so far as conditional grants are concerned, is that the separate schools must be given the same right as the common (now public) schools, to perform the conditions and earn the grant.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellants: *Thomas F. Battle.*

Solicitors for the respondent: *Tilley, Johnston, Thomson & Parmenter.*