No. 158 , 1927.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CANADA

IN THE MATTER OF A PETITION OF RIGHT

BETWEEN:

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOL 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.

CASE FOR APPELLANTS

This is an appeal by special leave from the judgment of the Supreme Court of Canada dated the 10th day of October, 1927, affirming by an equal division the Judgment of the Appellate Division of the Supreme Court of Ontario, dated the 23rd day of December, 1926, dismissing an appeal by the Appellants from the Judgment of the Honourable Mr. Justice Rose in the Supreme Court of Ontario dated the 13th day of May, 1926, dismissing the Petition of Right of the Appellants and declaring that the Appellants were not entitled to the relief sought by the said Petition of Right. Record p. 378. Record p. 226. Record p. 177. Record p. 223.

2. The Petition of Right, as amended pursuant to the Order of the Appellate Division, was brought by the Board of Trustees of the Roman Catholic Separate School 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 Peterborough on behalf of themselves and all other Boards of Trustees of Roman Catholic Separate Schools in the Province of Ontario against His Majesty the King. Record p. 232.

3. The Petition of Right, after setting out certain provisions of 26 Vic. ch. 5 (1863), being an Act of the then Parliament of Canada, and certain provisions of an Act of the Imperial Parliament, entitled the British North America Act, being ch. 3 of 30 and 31 Vic. (1867), especially referring to sec. 93 of the said last-named Act, claimed that certain Acts of the Legislature of the Province of Ontario set out in the said Petition and certain regulations purporting to be passed thereunder, prejudicially affected the Appellants and were consequently *ultra vires*.

4. The Appellants claimed:

(1) A declaration that the acts of the Legislature of Ontario altering the basis of distribution of legislative grants which existed by law at the date of the Union are *ultra vires* so far as concerns Separate Schools and for judgment in favour of the Appellant, the Board of Trustees of the Roman Catholic Separate School for School Section No. 2 in the Township of Tiny for a sum of money equivalent to what the Appellants allege is the difference between the amount paid to it out of the legislative grant of the Province of Ontario for the year 1922 and the amount that would have come to it if effect had been given to the statute (Separate School Act, 1863, ch. 5, sec. 20) in force at Confederation, which Statute it is submitted created a right that the legislature had no power after Confederation to affect prejudicially.

(2) A declaration that they had and have the right to establish and conduct courses of study and grades of education 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 are invalid and *ultra vires*.

(3) A declaration that the supporters of Roman Catholic Separate Schools are exempt from the payment of rates imposed for the support of Continuation Schools, Collegiate Institutes and High Schools not established or conducted by Boards of Trustees of Roman Catholic Separate Schools.

(4) And for other relief.

5. The Respondent, by the Statement of Defence of the Attorney-General of the Province of Ontario, in answer to the Petition of Right and on behalf of His Majesty the King, denied all the claims set out and prayed for in the said Petition of Right.

6. The trial took place at the City of Toronto on the 24th day of December, 1925, and the 11th, 12th, 13th, 14th, 15th, 18th, 19th and 20th days of January, 1926, when Judgment was reserved, and on the 13th day of May, 1926, the learned trial Judge, Mr. Justice Rose, dismissed the Petition.

7. The Appellants appealed to a Divisional Court of the Appellate Division and the appeal was heard on the 25th, 26th, 27th, 28th and 29th days of October, 1926, by the First Divisional Court, when Judgment was reserved, and on the 23rd day of December, 1926, Judgment was given dismissing the appeal.

8. From this judgment the Appellants appealed to the Supreme Court of Canada and on the 10th day of October, 1927, that Court dismissed the

appeal, the Court being equally divided. The Chief Justice, Mignault J. and Rinfret J. being in favour of allowing the appeal and Duff J., Newcombe J. and Lamont J. being in favour of dismissing the appeal.

9. Before dealing specifically with the several claims of the Appellants, it may be remarked that it is not unreasonable to assume that at the date of Confederation the Board of Trustees of every Roman Catholic Separate School had by law some right or privilege in respect to their denominational school which it was intended to protect, otherwise there would have been no object or meaning in subsec. 1 of sec. 93 of the British North America Act. What these rights and privileges were and whether they included what is claimed by the Appellants in the Petition of Right is necessarily the subject of enquiry here. It may, however, be broadly stated that if the Judgments in the Courts below are sound, it is difficult, if not impossible, to find any right or privilege which any class of persons had by law with respect to denominational schools in the Province at the Union. In other words, sec. 93, subsec. 1, of the British North America Act, had little or nothing to operate upon and was an illusory enactment. It is submitted this is not an exaggerated statement, for the Trial Judge and the Judges in the Appellate Division have held that so far as Legislative grants of money are concerned there is nothing except in regard to the Common School Fund of the old Province of Canada, binding upon the Legislature of the Province of Ontario to comply with the provisions of sec. 20 of ch. 5, 26 Victoria (1863), the Separate School Act in force at Confederation, on the ground that "this Province" mentioned in the Act, applied only to the then Province of Canada, and that the present Province of Ontario did not assume the obligations in this respect of the Province of Canada which has ceased to exist, and that the Legislature of the Province of Ontario cannot therefore be called upon to fulfil the obligations or duties imposed by sec. 20 above referred to. The three Judges in the Supreme Court of Canada who were in favour of dismissing the appeal did not adopt this reasoning, but took the view that money grants could be made by the Legislature upon whatever conditions it saw fit and these conditions had to be complied with to entitle the separate schools to any share therein.

Appendix of Statutes, p. 120.

10. The Appellants claim that certain Acts of the Legislature of Ontario altering to their prejudice the basis of distribution of Legislative grants as fixed by law at the Union are *ultra vires*.

11. By sec. 20 of the Separate School Act, 26 Victoria, ch. 5, 1863, it was enacted that

Appendix of Statutes, p. 121.

"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."

12. By Acts passed by the Legislature of the Province of Ontario, the above basis has been entirely altered. Under sec. 6 of ch. 265 of the Revised Statutes of Ontario, 1914, as amended, it is amongst other provisions enacted that

Book of Pamphlets, Document 11.

6. (1) It shall be the duty of the Minister and he shall have power,

(*a*) to apportion all sums of money appropriated as a general grant for urban public and separate schools among the several cities, towns and villages according to the population of each as compared with the population of all the urban municipalities in Ontario according to the last annual returns received from municipal clerks;

(*b*) to divide the amount so apportioned to each city, town and village between the public and separate schools therein, according to the average number of pupils who attended such schools respectively during the next preceding calendar year;

(*d*) Subject to the regulations to apportion all sums of money appropriated as a special grant for urban public and separate schools among the several cities, towns, and villages having regard to the value of the property liable to taxation for school purposes, the expenditure of the board upon education, and to such other considerations as in the opinion of the Minister, should affect such apportionment.

(*g*) Subject to the regulations to apportion all sums of money appropriated as a general grant for rural public and separate schools among such rural schools having regard to the value of the property liable to taxation for school purposes, the attendance at the schools, the expenditure of the board upon education, and to such other considerations as in the opinion of the Minister, should affect such apportionment.

(2) The Minister shall so divide the sums appropriated for the purposes mentioned in clauses (*d*) and (*g*) of subsection 1 that out of each of them there shall be allotted to the Separate Schools a sum which bears the same ratio to the whole sum appropriated as the average number of pupils who attended such schools during the next preceding calendar year bears to the whole average number of pupils who attended both Public and Separate Schools during that year, and that the residue shall be allotted to the Public Schools, and, subject to the Regulations, shall apportion among the Public Schools the sums so allotted to them and among the Separate Schools the sums so allotted to them on the respective bases mentioned in clauses *d* and *g*.

(3) All money appropriated for any of the following purposes mentioned in clause *l* of subsection 1, that is to say:

(*a*) Fifth classes;

(*b*) Manual training, household science, art and agricultural departments;

(*c*) School gardens;

(*d*) Kindergartens;

(*e*) Night Schools;

(*f*) Free text books;

(*g*) Other educational purposes not specially mentioned in the said clause *l*;

which is applied for the purposes of primary education shall be allotted, divided and apportioned as provided by subsection 2.

(4) Primary education for the purposes of subsection 3 shall mean education in the Public or Separate Schools.

(5) Any part of the sums appropriated for the purposes mentioned in subsections 2 and 3, and allotted to the Public Schools as provided by subsection 2, which shall not be required to pay the amounts to which such schools shall be entitled on the respective bases mentioned in clauses *d* and *g* of subsection 1, shall lapse and become part of the Consolidated Revenue Fund, and in like manner any part of the sums allotted to the Separate Schools which shall not be required to pay the amounts to which such schools shall be entitled on the respective bases mentioned in clauses *d* and *g* of subsection 1 shall lapse and become part of the Consolidated Revenue Fund.

13. From a comparison of the Act of 1863 with the enactment just cited, it will be seen that there are at least three main changes in the law as it stood at Confederation. First we have special and general grants. Then we have a distinction between the distribution in urban and rural municipalities, and thirdly, an entirely different basis of distribution of the grants. They have now, except the so-called general grants for urban schools, to be earned according to a standard set up, and the amount depends upon the degree to which that standard has been attained, while under the Act of 1863 the sole basis was the average number of pupils attending.

14. The Appellants' claim is that the enactment referred to, namely, sec. 6 of ch. 265 of the Revised Statutes of Ontario, 1914, as amended by 14 Geo. V, ch. 82, sec. 2, is *ultra vires* so far as it purports to affect Separate Schools. The holding of the courts below was against this contention of the Appellants.

15. The first ground common both to the Trial Judge and to the Appellate Division, is that sec. 20 of the Act of 1863 only applies to grants made or to be made by the former Province of Canada and is not binding upon the Province of Ontario.

16. This goes to the whole root of the matter, and if sound is against the Appellants' claim that they had by law at the Union, certain vested rights to share in state aid by way of legislative grants as well as in the old Common School fund which after Union could not be prejudicially affected.

17. Another ground of the Trial Judge and of the Appellate Division for denying the Appellants relief in this respect is that the Appellants had not

shown that the whole of the Separate Schools as a class have been prejudicially affected by the change of basis of distribution, while a third ground, not taken by the Trial Judge but voiced in some of the Reasons of the Judges of the Appellate Division and of the three Judges in the Supreme Court who were in favour of dismissing the appeal, is that the Legislature, notwithstanding the provisions of sec. 20 of the Act of 1863, could make special grants and appropriations for Common School purposes which would not entitle the Separate Schools to any share in same. These several holdings will be dealt with in the order above set out:

Record, p. 227.

18. First, as to there being no obligation of the Province of Ontario in regard to legislative grants; the Respondent has contended that the promise, if it may be so termed, of future state aid to Roman Catholic Separate Schools in the annual grants to be made by the Legislature for Common School purposes, came to an end immediately after Confederation and the establishment of the Province of Ontario, and that from then on, and by virtue of the passing out of existence of the old Province of Canada, all that the Appellants are legally entitled to under sec. 20 is a share in the old Common School fund, which it may be remarked only brings in all an income of some $75,000 a year and is a negligible amount compared with the millions annually voted by the Province of Ontario for Common School purposes.

Appendix of Statutes, p. 121.

19. The finding of the Trial Judge and of the Appellate Division approving of this contention is based on the language used in sec. 20, which provides "that every Separate School shall be entitled to a share in the fund annually granted by the Legislature of 'this Province' for the support of Common Schools," etc., holding that the right to share in the fund annually granted by the Legislature of "this Province" and the right to share in all other Legislative grants made or to be made by the Province, was a right to share in all such grants made or to be made by the Province of Canada and that after Confederation there was no Province of Canada and nothing binding on the Province of Ontario.

Record, p. 219, l. 19; p. 231, l. 41.

20. The Appellants' contention is that this finding is erroneous and does violence to the spirit and intention at Confederation to preserve and keep intact the rights existing by law of denominational schools at Confederation, and is contrary to the true construction of the relevant statutes. 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.

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

22. It can be said that these Acts of the Province of Ontario are voluntary, and being Acts of the Province of Ontario since Confederation, can be altered or varied from time to time at the will of the Legislature, but it is at least some evidence that the view which the Appellants are presenting was that adopted for some forty odd years after Confederation, by the Province of Ontario.

23. It is further submitted by the Appellants that the words "of this Province" in sec. 20 are not words of limitation, but can be rejected as surplusage for the reason that at that date the only Legislature that could make grants was the Legislature of the Province of Canada. If the words in sec. 20 had been the Legislature of "the Province," it would have had application to the Legislature of whatever province was existing for the time being, and the language used, namely "this Province" cannot reasonably, it is submitted, be taken to have any different effect.

24. At the time of the passage of the Act of 1863, the Province of Canada was territorially divided into Upper and Lower Canada, and the territorial division of the new Province of Ontario corresponds with the territorial division of what was at the time of Confederation the territorial division of Upper Canada.

25. By the British North America Act, sec. 129, it is enacted "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union—shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or existed under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province according to the authority of the Parliament or of that Legislature under this Act." This provision would, it is submitted, continue in force sec. 20 of the Act of 1863 and the same could not, notwithstanding the latter part of sec. 129 be repealed, abolished or altered so as to prejudicially affect rights in respect of denominational schools, by reason of the provisions of sec. 93, subsec. 1 of the British North America Act. Appendix of Statutes, p. 129.

26. By ch. 2 of the Consolidated Statutes for Upper Canada (1859), sec. 18, it is enacted: Appendix of Statutes, p. 77.

"18. Unless otherwise provided or there be something in the context "or other provisions of the Act indicating a different meaning or calling "for a different construction:

"1. The law in the last act and in the following series of Acts, is to "be considered as always speaking, and whenever any matter or thing is

"expressed in the present tense, the same is to be applied to the circum-"stances as they arise, so that effect may be given to each Act and every "part thereof according to its spirit, true intent and meaning."

27. There was no legislation from Confederation until 1877 purporting to repeal the Act of 1863, which was the law in force at the date of the Union. In the Revised Statutes of Ontario, 1877, ch. 206 (the first Separate School Act of the Province of Ontario) the Act of 1863 was purported to be repealed and a Separate School Act enacted (in the same words it may be noted as the Act of 1863) so that at the time of the Union and from 1867 to 1877, it is submitted the Act of 1863 was in force in Ontario and always speaking, and was applicable to the circumstances, of the new Provinces of Ontario and Quebec replacing the Province of Canada, that then had arisen so that "this Province" in the Act of 1863 after the date of Confederation, referred to the Province of Ontario and could only mean that Province.

28. Chap. 65 of the Consolidated Statutes of Upper Canada, 1859, after by sec. 7 of that Act referring to what must be done in order to entitle Separate Protestant or Coloured Schools to obtain "the annual Legislative Common School grant," enacted by sec. 10, Every such Separate School shall share in "such Legislative Common School Grant," according to the yearly average number of pupils attending such Separate Schools, as compared with the average number of pupils attending the Common Schools in each such City, Town, incorporated Village or Township.

Appendix of Statutes, p. 112.

29. It is submitted that this section would, after the Union, except as altered by the Legislature in regard to Coloured Schools, entitle the Protestant and Coloured Separate Schools to a share in the Legislative Common School grant of the Province of Ontario, and it can hardly be contended that the intention or meaning of the State aid to be given by way of sharing in annual grants to Roman Catholic Separate Schools was to be of any less effect than that afforded to the Protestant and Coloured Separate Schools.

30. This first ground taken by the Trial Judge and in regard to which he received the support of the Appellate Division has not been adopted or approved by any one of the six Judges in the Supreme Court. It has been expressly dissented from by the Chief Justice of Canada who deals with same exhaustively, while those Judges in the Supreme Court who are against the Appellants on their contention in respect of grants are against them for an entirely different reason, but which would have been wholly unnecessary for them to formulate if the ground above set forth had met with their approval.

Record, p. 400, l. 42; p. 401, l. 1.

Record, p. 221.

31. The second ground taken by the Trial Judge is that the Appellants had not established that the class whose rights were preserved by the British North America Act, had as a whole been prejudicially affected by the change of basis of distribution. The Appellants submit that the trustees of each and every Roman Catholic Separate School come within the designation of a class of persons entitled to the protection of the provisions of sec. 93, ss. 1 of the British North America Act, and that where, as here, the trustees of the Roman Catholic Separate School for School Section No. 2 in the Township of Tiny have shewn a loss or prejudice by the alteration in the basis of distribu-

Appendix of Statute p. 128.

tion of the Legislative grant that prevailed at Confederation, they are entitled to relief without having to shew any general loss or detriment to Roman Catholic Separate Schools generally.

32. The Appellants further submit it is the creation of the power to affect their rights prejudicially that is objectionable and *ultra vires* even though that power be never exercised and no evidence is necessary to be given of their having been prejudiced in fact.

33. Further, the Trial Judge apparently has overlooked the references to a sum of $95,000 which it was stated was the sum which in 1922 was declared not to have been earned by the Separate Schools under the changed basis of distribution and which had been declared lapsed and had either gone into the consolidated fund or had been paid into Court. Record, p. 14, l. 40; p. 21, l. 38; p. 22, l. 1 to 14.

34. It is true evidence was not given in detail of how this sum was made up, but it cannot be controverted as a fact that on the basis of distribution in force at the time of Confederation, the Roman Catholic Separate Schools as a whole would have received all of this sum in addition to what they did receive in 1922 under the present basis of distribution—should any question turn on this, the Appellants would ask leave to shew the facts as they really are.

35. The third ground taken by the Trial Judge and adopted by some of the Judges of the Appellate Division and though somewhat differently stated by the three Judges in the Supreme Court who were against the Appellants' contention in this respect, is that the Legislature of Ontario, even if bound by the provisions of sec. 20 of the Act of 1863, could make special grants and appropriations for Common School purposes which would not entitle the Separate Schools to any share in same. Record, p. 222; p. 227; p. 236. Record, p. 21, l. 20.

36. This holding, it is submitted, is contrary to the language of sec. 20, which entitled every Separate School to a share in all other public grants—for Common School purposes now made or hereafter to be made by the Province.

37. Out of any grant, therefore, which is made for Common School purposes, the Roman Catholic Separate Schools are entitled to a share. It may be that a grant by the Legislature towards the re-building 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.

38. It is found by the Chief Justice of Ontario that sec. 106 of the Common School Act of 1859 should be read with sec. 20 of the Roman Catholic Separate School Act of 1863, but the Appellants submit that this section 106 which deals only with administrative duty of the Chief Superintendent of Education to apportion to Municipalities the moneys granted by the Legislature for the Record, p. 227.

support of Common Schools in Upper Canada, cannot in any way control or affect the rights given to the Appellants by sec. 20 of the Act of 1863.

39. By sec. 120 of the Common School Act of 1859 it is provided:

ppendix
f Statutes,
. 106.

> 120. Out of the share of the Legislative School Grant coming to Upper Canada, and the additional sums of money from time to time granted in aid of Common Schools or in aid of Common and Grammar Schools in Upper Canada, and not otherwise expressly appropriated by law, the Governor in Council may authorize the expenditure of the following sums annually:

ppendix
f Statutes,
. 107.

Then follow a number of purposes and sums of money for which authority may be given, but these sums are to be paid for the purposes mentioned only from the residue of the fund left after the moneys otherwise expressly appropriated by law have been so appropriated. Therefore, the deduction of these sums could not affect the share of the Legislative grants "expressly appropriated by law" to the Roman Catholic Separate Schools. By sec. 121 of the same Act which is as follows:

Appendix
of Statutes,
. 108.

> 121. The whole of the remainder of the grants in the one hundred and twentieth section mentioned and not exclusively appropriated, in the foregoing subsections, shall be expended in aid of the Common Schools according to the provisions of this Act,

it is only this ultimate residue of the grants, after the share appropriated by law to the Roman Catholic Separate Schools and the sums authorized under sec. 120 and its subsections have been taken out that is dealt with in sec. 121 and that remains to be distributed by the Chief Superintendent to the respective municipalities in aid of the Common Schools. There is nothing therefore conflicting in the provisions of sec. 20 of the Act of 1863 and the several sections of the Common School Act relating to apportionment and distribution: but if there were any such conflict, inasmuch as the Roman Catholic Separate Schools legislation repealed the provisions of any other acts inconsistent with this legislation, such conflict, it is submitted, must be resolved in favour of such Separate School legislation.

40. A submission by the Appellants of how the share of the Legislative Grants for Separate Schools may be determined, by the Chief Superintendent, without reference to the Common School Act, is set out in the Table following:—

A SUBMISSION OF HOW GRANTS TO SEPARATE SCHOOLS MAY BE DETERMINED WITHOUT ANY REFERENCE TO THE COMMON SCHOOL ACT.

Total Legislative Grant in which each Separate School is to share as provided for in sec. 20 of (1863) 26 Vic. ch. 5. = (A) {
1. Fund annually granted by the Legislature of this Province for the support of Common Schools.
2. All other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province.

$$\frac{\text{(A) Total Legislative Grant}}{\text{(B) Population of (Upper Canada) Ontario.}} = \text{(C) cents per capita of the population.}$$

(C) cents per capita × (D) population of any municipality in which there happens to be a Separate School = (E) share of Legislative Grant (A) proportionate to that particular municipality.

$$\left\{\frac{\text{Average attendance at Separate School in that particular municipality for previous 12 months}}{\text{Average attendance at all the schools in that particular municipality for previous 12 months}}\right\} \text{ of } \left\{\text{(E) Share of Legislative Grant (A) proportionate to that particular municipality}\right\} = \left\{\text{(G) Amount of Legislative Grant (A) payable to the Separate School in that particular municipality as provided for in sec. 22 (1863) 26 Vic. chap. 5.}\right.$$

likewise the amount (G) is found for each and every Separate School in the Province so that a total (H) is arrived at, to provide for whatever Separate Schools there may be. The total (H) being an amount appropriated to Separate Schools by (1863) 26 Vic. chap. 5, is an amount "appropriated by law" within the meaning of the words in sec. 120 of (1859), ch. 64, the Common School Act, and it is only a residue that the Governor in Council is authorized to deal with in said section 120, namely (A) less (H);

Further amounts may be deducted from this residue by virtue of the subsections of 120, leaving (I) the "remainder" referred to in section 121.

It is submitted section 106 of the Common School Act now operates and provides an apportionment on a population basis of what remains (I) "to be expended in aid of Common Schools, according to the provisions of this Act" (sec. 121), (as sec. 106 expressed it "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") (sec. 106) and it is the equivalent of these respective amounts so apportioned that the respective municipalities must raise locally in order to be entitled to their respective shares of the Legislative Grant and which together with such shares comprise the Common School fund of that particular municipality (sec. 123) (and in which Separate Schools are prohibited from sharing—sec. 21 of (1863) 26 Vic. chap. 5 the Separate School Act), subject also to a liability on a failure to raise locally an equivalent amount, to suffer a proportionate deduction of the share of the Legislative Grant (sec. 124): which liability can in no way affect Separate Schools (sec. 22 of (1863) 26 Vic. ch. 5.)

Moreover, sec. 106 of Common School Act (1859) deals only with the administrative duty of the Chief Superintendent and does not apportion any moneys to schools, but only to the Treasurers of the respective municipalities (sec. 106— s.s. 1 and 2): a further apportionment to the several school sections is to be made by the Local Superintendents and even then the Boards of Trustees do not receive the money, which is payable to Teachers only on the order of the Trustees upon the County Treasurer (sec. 91, s.s. 1 and 2): whereas in the case of Separate Schools the share of the grant is paid direct by the chief superintendent to each Board of Trustees for the general purposes of the school (sec. 22 of (1863) 26 Vic. ch. 5—The Separate School Act).

The Chief Superintendent has always before him the previous census of the Province; also the previous census of the various municipalities; also the returns of the average attendance of pupils for the "twelve next preceding months" (referred to in sec. 20 of the Act of 1863), so that so soon as the Legislative Grant is voted by the Legislature he has sufficient data upon which to determine the share payable to any Separate School in any municipality.

Appendix of Statutes, p. 108.

41. The Appellants' contention, it is submitted, is further borne out by sections 123 and 124 of the said Common School Act.

42. What the Appellants specially complain of is the total change of the basis of distribution whereby they are now obliged in a sense to earn their share of the grants, whereas previously, while the Common or Public Schools had to earn their share, the Appellants were not subject to any such obligation.

43. The law apparently assumes the financial ability of school supporters generally to continue improving their schools by raising by local assessment larger and larger sums of money for school purposes and the legislation and regulations seem to be framed as a stimulant to spur them on so to do, by making so-called special grants contingent thereon. This assumed financial ability does not exist so far as Separate Schools are concerned for these schools, as the law is construed, are denied the right to receive any school taxes payable by publicly owned companies or properties, and by incorporated companies (except so far as the limited and impracticable provisions of the present Separate School Act. R.S.O. (1914) ch. 270, sec. 66, extend).

Book of Pamphlets, Document 14.

44. For the purpose of consideration of the other questions involved in this appeal, it may be stated that there were, at and immediately prior to Confederation by law in Upper Canada, three classes of schools: Common Schools, Grammar Schools and Separate Schools, in which latter class the Roman Catholic Separate Schools occupied an independent position.

Appendix of Statutes, p. 80.

45. The Act in force in respect of Common Schools was the Common School Act, Consolidated Statutes of Upper Canada, 1859, ch. 64; that in regard to Grammar Schools was the Grammar Schools Act, Consolidated Statutes of Upper Canada, 1859, ch. 63, and an amending Act, (1865) 29 Vic., ch. 23, while that in respect of Roman Catholic Separate Schools was 26 Victoria, ch. 5 (1863), intituled "An Act to Restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools."

Appendix of Statutes, p. 120.

46. Prior to the several Acts above referred to, there had existed both Common Schools, Grammar Schools and Roman Catholic Separate Schools, and these were all constituted and controlled from time to time by appropriate Acts. The history and dates of these earlier Acts dealing with the several schools are set forth in the Reasons for Judgment of the Trial Judge, Mr. Justice Rose.

Record pp. 178, l. 33, to 193, l. 23.

47. The Acts and provisions to which attention may be directed are as follows:

The first Common School Act after Union in 1840 of Lower Canada and Upper Canada was passed in 1841: 4-5 Vict. Chap. 18, which repealed the previous Common School Acts of Upper Canada and of Lower Canada respectively. Section 7 thereof provided that the duty of the Common School Commissioners, amongst other things, was to regulate for each school under their jurisdiction the course of study to be followed and the books to be used. Section 11 of this Act made the first provision for Separate Schools. In 1843 by 7 Vict. Chap. 29, the Common School Act of 1841 was repealed in so far as Upper Canada was concerned and separate provisions were made for the establishment and maintainance of Common Schools in this part of

Appendix of Statutes, p. 16.

Appendix of Statutes, p. 25.

the Province of Canada. In each township, town or city there was to be a superintendent of Common Schools appointed by the district municipal council. This local superintendent was entrusted with the examination of persons desirous of appointment as teachers; the regulations that might be made by the trustees of the school districts, governing their courses of study, the books to be used and the conduct of the school, were to be subject to his approval; if the teacher of a school was a Roman Catholic the Protestant inhabitants might have a school with a teacher of their own religious persuasion upon the application of ten or more freeholders or householders resident in the school district; and where the teacher should happen to be a Protestant the Roman Catholics had a similar right. Any Separate School was to have its share of the public appropriation according to the number of children in attendance and was to be "subject to the visitations, conditions, rules and obligations provided in (the) Act with reference to other Common Schools." By Section 6 the chief superintendent was authorized to issue instructions for the better organization and government of the Common Schools. The Act of 1843 was replaced in 1846 by the Common School Act, 9 Vict. Chap 20. The chief superintendent was to issue instructions for the better organization and government of Common Schools; to discourage the use of unsuitable and improper books; and to use all lawful means to provide for and recommend the use of uniform and approved text books. Each district municipal council was to appoint a district superintendent of Common Schools. Each district superintendent was to examine candidates for positions as teachers; to prevent the use of unauthorized foreign books in the English branches of education and to recommend the use of proper books. The Common School Trustees were to appoint the teacher; to select the books to be used in the school from a list of books made out by the Board of Education under the sanction of the governor-in-council; to see that the school was conducted in accordance with the regulations; and to report the branches taught and the books used. The same provisions for Separate Schools were continued in the Act of 1846 substantially as in the Act of 1843.

Appendix of Statutes, p. 31.

48. In 1847 an Act 10-11 Vict. Chap. 19, amending the Act of 1846 was passed constituting each city and incorporated town a corporation for all Common School purposes and giving to the councils of the cities and to the Boards of Police Commissioners of the towns, the powers which in the districts were exercisable by the district municipal councils. The councils and the Boards of Police Commissioners were to appoint Boards of Trustees. The Trustees were also (Sec. 5 (3)) to determine the number, sites and description of schools to be established and maintained.

Appendix of Statutes, p. 38.

49. On the 30th of May 1849, an Act, 12 Vict. Chap. 83, was passed repealing the previous Common School Acts and making no provision whatever for Separate Denominational Schools but this Act was never put into operation.

50. In 1850 the Common School Act, 13-14 Vict. Chap. 48 was passed, the same being substantially a consolidation of the Acts of 1846 and 1847. This Act restored the rights to Separate Schools. A Separate School whether for Roman Catholics, Protestants or Negroes was to be under the same regula-

Appendix of Statutes, p. 40.

tions "in respect to the persons for whom such school (was) permitted to be established, as (were) Common Schools generally"; and it was to share in the school fund according to the average attendance of the pupils attending it as compared with the whole average attendance of pupils attending the Common Schools in the same local municipality. The Trustees were to see that no unauthorized books were used in the schools and that the pupils were supplied with a uniform series of text books authorized and recommended according to law; and to report the branches of education taught, the number of pupils in each branch and the text books used. One of the duties of the city and town boards was to determine the number, sites, kind and description of schools to be established and maintained. Each County Council was to appoint a local superintendent of schools for the County and County Boards of Public Instruction were set up composed of the Trustees of the County Grammar Schools and the local superintendents. These County Boards were to examine and give certificates of qualification to the Common School teachers; and they might (if deemed expedient) select from the books recommended by the Council of Public Instruction such books as they should think best adapted for use in schools under their jurisdiction. The local superintendent was required to see that the schools were managed and conducted according to law; to prevent the use of unauthorized and to recommend the use of authorized books; and to report to the chief superintendent stating the branches taught in each school. The chief superintendent was to transmit to the authorized officers such general regulations as should be approved by the Council of Public Instruction for the better organization and government of Common Schools; and to provide for and recommend the use of uniform and approved text books in the schools generally. The Council of Public Instruction was to make regulations for the organization, government and discipline of Common Schools, the classification of schools and teachers; and to examine and recommend or disapprove of text books for the use of schools. As before, no school using books publicly disapproved of by the council could share in the legislative grant.

51. In the case of Hayes vs. Toronto School Trustees 3 U.C.C.P. 478 being an application on behalf of the Roman Catholics for a mandamus to the Board of Common School Trustees of the City of Toronto to authorize the establishment of a Separate Roman Catholic School in Section 9 in St. James Ward of said City it was held that the Common School Trustee Board and not the applicants should prescribe the limits of Separate Schools, and that the application should therefore be for one or more such schools in general terms leaving it to the Board of Common School Trustees to define the same.

52. In 1851 was passed an Act, 14 and 15 Vict. Chap. 111, to remove certain doubts that had arisen as to the meaning of the Separate School provisions of the Act of 1850 and authority was given therein to have more than one Separate School in any one municipality. In 1853 the City of Belleville Roman Catholic Separate School Trustees made application for a mandamus to the Board of Belleville Common School Trustees as reported in 10 U.C.R., 469, to compel the School Trustees of the City of Belleville to pay over to them

a certain sum claimed as the Roman Catholic School Trustees share of the Common School fund for the reason apparently that what a Separate School established under Section 19 of 13 and 14 Vict. Chap. 48 (The Common School Act of 1850) was entitled to share in was the sum apportioned by the chief superintendent and a sum at least equal in amount raised by local assessment for the payment of teachers. The Court on that occasion refused the mandamus, for amongst other reasons, because it could not be said to be clear and without question what sum the applicants were entitled to or in what fund they had a right to share under the Act.

53. In 1853 by 16 Vict. Chap. 185 the Act of 1850 was amended and supplemented and Separate Schools were therein dealt with to the effect that persons of the religious persuasion of any Separate School, sending children to such school, or supporting such school by contributing thereto annually an amount equal to what (if such school had not existed) they would have been liable to pay on any assessment to obtain the annual Common School grant for the municipality, were exempted from the payment of Common School rates, each Separate School was to share in the legislative Common School grant only (and not to any school money raised by local municipal assessments) according to the average attendance of pupils attending such Separate Schools as compared with the whole average attendance of pupils attending the Common Schools in the same municipality; the Trustees of each Separate School were made a corporation with the same power to impose, levy and collect school rates or subscriptions upon and from persons sending children to or subscribing towards the support of the Separate School as the Trustees of a school section had in respect of persons sending children to or subscribing towards the support of the Common School of the section. Hitherto under the Statutes both Common School supporters and Separate School supporters paid the same tax rate into the one treasury of the Common School Board of Trustees under a rate levied by the Common School Board. Hitherto the Common School fund of a municipality was made up of the share of the legislative grant apportioned under the Act to that municipality plus at least an equal amount raised locally by assessment on all school supporters. In this Common School fund of the municipality the Roman Catholic Separate School Trustees as set forth in the Belleville case above referred to claimed a share. This amending Act of 1853 for the first time gave Roman Catholic Separate School Trustees power to levy their own rates and deprived them of any share in any school money raised by local municipal assessments but gave them a share in the amount of the legislative school grant on the basis of average attendance of pupils provided they contributed to such Separate School annually an amount equal to what they would have been liable to pay on any assessment to obtain the annual Common School grant for the municipality. In this event they were exempted from the payment of Common School rates. No person belonging to the religious persuasion of such Separate School and subscribing towards the support thereof was allowed to vote on the election of any Trustee for a Common School in the same municipality in which said Separate School is situate. Section 19 (4) of the Common School Act of 1850, 13 Vict. was still in effect, "That no Protestant Separate School shall be allowed in any school

Appendix of Statutes, p. 54.

Appendix of Statutes, p. 44.

division except when the teacher of the Common School is a Roman Catholic, nor shall any Roman Catholic Separate School be allowed except when the teacher of the Common School is a Protestant." By the same Section 19 it was provided, "It shall be the duty of the municipal council of any township, and of the Board of School Trustees of any city, town, or incorporated village, on the application in writing of 12 or more resident heads of families to authorize the establishment of one or more Separate Schools for Protestants, Roman Catholics, or coloured people; and in such case it shall prescribe the limits of the divisions or sections for such schools and shall make the same provisions for the holding of the first meeting for the election of Trustees of each such Separate School or Schools as is provided in the 4th Section of this Act for holding the first school meeting in a new school section; provided always that each such Separate School shall go into operation at the same time with alterations in School Sections and shall be under the same regulations in respect of the persons for whom such school is permitted to be established, as are Common Schools generally."

54. By this same amending Act of 1853 for the first time power was given to Rural Common School Trustees in concurrence with the Trustees of Grammar Schools to unite one or more Common Schools with a Grammar School. In the same year (1853) by 16 Vict. Chap. 186, the Trustees of a Grammar School were authorized to agree with the Common School Trustees for uniting one or more Common Schools with the Grammar School—provided ample provision was made for giving instruction to the pupils in the elementary English branches.

Appendix of Statutes, p. 60.

55. In 1855 was passed 18 Vict. Chap. 131 commonly called The Taché Act, intituled "An Act to amend the laws relating to Separate Schools in Upper Canada," which recites "Whereas it is expedient to amend the laws relating to Separate Schools in Upper Canada so far as they affect the Roman Catholic inhabitants thereof." The first Section is in the words following:—

Appendix of Statutes, p. 65.

1. "The 19th Section of the Upper Canada School Act of 1850 and the 4th Section of the Upper Canada Supplementary School Act of 1853 and all other provisions of the said Acts or of any other Act inconsistent with the provisions of this Act are hereby repealed so far only as they severally relate to the Roman Catholics of Upper Canada."

56. By this Act Roman Catholic Separate schools were established on a basis of their own and if hitherto it might have been claimed that Separate Schools for Roman Catholics were, being creatures of the Common School Acts, in some aspects branches of the Common Schools or were themselves Common Schools such a claim cannot be made after this Taché Act of 1855. By it all provisions of the previous Common School Acts and all laws inconsistent with this new Act were repealed so far as they relate to the Roman Catholics of Upper Canada, and now special provision is being made for the establishment of Roman Catholic Separate Schools. Hitherto application had to be made by those desiring to establish such schools, to the municipal council or to the Board of Common School Trustees of the municipality to authorize the establishment of one or more Separate Schools and to have the limits of such schools defined. Hereafter the required number of persons desir-

ing to establish such school were given authority to establish and manage such school without reference to anybody else.

57. Hitherto such a Separate School could have been established only if the teacher of the Common School of the municipality was a Protestant. Hereafter such a school could be established regardless of the religious persuasion of the teacher of the Common School. Hitherto supporters of Separate Schools had to pay an amount equal to the local assessment in order to obtain their share of the legislative school grant. Such Separate School in a sense had to earn its share of the legislative school grant the same as a Common School. Hereafter every Separate School established under this Act was to 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 attendance of its pupils as compared with the average attendance of pupils attending school in the same town, city, village or township regardless of the amount raised locally by taxation of its supporters. Such Separate School was not to be entitled to share in any part or portion of school moneys arising or accruing from local assessment for Common School purposes within any city, town, village or township or the county or union of counties within which said town, village or township is situate.

58. Hitherto the teachers in Separate Schools for Roman Catholics had to obtain their certificates of qualifications from the County Boards provided for in the Common Schools Act. By this Act of 1855 a majority of the Board of Trustees for Roman Catholic Separate Schools are given power to grant certificates of qualification to teachers of Separate Schools under their management. Hitherto each Separate School received its share of the legislative grant through the treasurer of the municipality. Hereafter upon the Trustees of each Separate School transmitting on or before the 30th day of June and the 31st day of December of each year, to the chief superintendent of schools for Upper Canada a statement of the average attendance at said school and the number of months such school has been kept open, the chief superintendent shall thereupon determine the proportion of which the Trustees of such Separate School will be entitled to receive out of such legislative grant and shall pay over the amount thereof to such trustees.

Appendix of Statutes, p. 65.

59. It is submitted that no matter what may have been the relation to Common Schools of Separate Schools for Roman Catholics prior to this Taché Act of 1855 (18 Vict. Chap. 131) from and after this act a Roman Catholic Separate School was an institution distinct and apart from a Common School with an existence independent of the Common School and with a code of its own.

60. In 1859 the Statutes for Upper Canada were consolidated. The Common School Act appears as Chap. 64 of those consolidated statutes and without any of the provisions for Roman Catholic Separate Schools or other Separate Schools. The law as to Roman Catholic Separate Schools was consolidated in Chap. 65 of these consolidated statutes and continued the enactments of the Taché Act (18 Vict. Chap. 131) relating to Separate Schools for Roman Catholics with only some unimportant verbal changes.

Appendix of Statutes, p. 78.

Appendix of Statutes p. 112

Appendix of Statutes, p. 118.

61. In 1863 by an Act, 26 Vict. Chap. 5, the sections referring to Roman Catholic Separate Schools of the Consolidated Statute of 1859, Chap. 65, were repealed and other sections were substituted in lieu thereof and declared to form part of the said Chap. 65 of the Consolidated Statutes of 1859.

Appendix of Statutes, p. 118.

62. It is submitted that from the passing of the Act of 1855, known as the Taché Act, 18 Vic. ch. 131, and perhaps as early as the supplementary Act of 1853, the Roman Catholic Separate Schools were not Common Schools, but became and were educational institutions constituted, established and maintained separate and apart from Common Schools. This further appears from the preamble to the Act of 1863, 26 Victoria, ch. 5, which is as follows: "Whereas it is just and proper to restore to Roman Catholics in Upper Canada certain rights 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." The words "more in harmony" shew, as indeed must be deduced from the Act itself, that there was one law having application only to Roman Catholic Separate Schools and another law having application only to Common Schools; that except where an express reference might be found in either Act to the other Act the law governing Common Schools had no application at all to Roman Catholic Separate Schools.

63. This distinct and independent status, it is submitted, the Courts below have failed to appreciate, but on the contrary have treated the matter as though the Roman Catholic Separate Schools were Common Schools or at any rate only a branch of the Common Schools.

64. In regard to the management of the Roman Catholic Separate Schools, and the courses of study and subjects of instruction, the Courts below have held that these are matters which under the right of the Council of Public Instruction of Upper Canada to pass "regulations" rest with the Legislature of Ontario or its Minister of Education and that it or he can say and enforce upon the trustees of each Roman Catholic Separate School what shall or shall not be taught in same, and can decide on the grade or character of the school and curtail its curriculum; and that alterations may be made from time to time and the standard of education lowered in such school or schools to any extent that may be deemed advisable, not merely without assent by the Trustees of such Roman Catholic Separate School or Schools but in spite of their protests or opposition; that this over-riding power or authority of the Council of Public Instruction existed at Confederation and that according to law, the kind or character of school, so far as subjects of instruction or courses of study are concerned, did not rest with the Trustees.

Book of Pamphlets, Doc. 2, p. 56 (c).

65. One of the regulations objected to and claimed to be *ultra vires*, prohibits instruction proceeding beyond the Fifth Form, but under the judgments below a regulation halting education at the first form would be equally valid and a school might be degraded to an infant school or kindergarten without any right or privilege that such school had at Confederation being legally invaded. That is to say, there was, according to the findings, no right or privilege by law in this respect possessed by the Trustees of Roman Catholic Separate or denominational schools at Confederation.

66. In order to arrive at this conclusion it was necessary to hold, as Mr. Justice Hodgins has held, that the Separate Schools were educational institutions, part of the Common School system, and in all the changes of educational policy even after Confederation, and in the classification and division of schools, whatever was a Common School from time to time, was also a Separate School, and again he says "All schools were Common Schools and were to continue so, but the initiation, establishment and internal management of those known as denominational schools were permitted to religious bodies, members of which desired such a school. These schools were to be staffed by teachers qualified as common school teachers while the educational authority indicated and controlled the secular education given in them. . . . . I find no trace, except as to religious instruction, of any intention to allow the education given therein to be more or less extensive or different in character from that which obtained in the Common Schools. Apparently all were to remain in the same category and advance or recede as the educational policy of the Province dealt with its Common School education."

Record, p. 23, l. 12.

Record, p. 233, l. 12

67. The fallacy, it is submitted, in the above quotation, namely, that these Roman Catholic Separate Schools were to "advance or recede as the educational policy of the Province dealt with its Common School education," lies in the fact that while prior to Confederation, the Legislature could change the character of both the Common Schools and the Roman Catholic Separate Schools, that power after Confederation, could not be exercised by the Legislature of Ontario, in respect to Roman Catholic Separate or denominational Schools, so far as to prejudicially affect any right or privilege possessed by law at the time of the Union.

68. If the view of Mr. Justice Hodgins, which is shared in by the other Judges of the Appellate Division is correct, it would necessarily follow that if as a matter of educational policy the Legislature should abolish the Common School and substitute some other form of school, in its place, which it certainly would have power to do, it would by so doing also abolish the Roman Catholic Separate or Denominational School as a medium of secular education.

69. Substantially the same view was taken by Mr. Justice Duff in the Supreme Court of Canada who holds that the Act of 1850 brought about "a striking transformation" in the school system and the changes then made "point to an intention to improve the efficiency of Common Schools by subjecting them to an over-riding central control" and again "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."

70. Mr. Justice Newcombe agrees with the reasons expressed by Mr. Justice Duff.

Record, p. 424,

71. Mr. Justice Lamont was of opinion "that it was the intention of the Legislature prior to Confederation in order to secure greater uniformity, to vest in the Council of Public Instruction authority to prescribe the courses of study for the Common Schools."

Record, p. 429, l. 1

72. The contention of the Appellants on this branch of the case is that the Roman Catholic Separate Schools were at Confederation under the establishment, management and control of the Trustees of each such Separate School, subject only to such limitations as could be specifically imposed by the then existing Legislation, and that after Confederation no right or privilege existing by law at the Union could be taken away or prejudicially affected.

73. In the Judgments below the view is taken that except as to religious teaching, Roman Catholic Separate Schools were in all other respects Common Schools, and that so long as religious teaching was not interfered with, the Legislature of the Province was free to deal with all other rights that Roman Catholics had in respect of Separate Schools. It might be pointed out that in the Act governing Roman Catholic Separate Schools above referred to, there is nothing in reference to religious teaching. Indeed, if the Trustees of any given Separate School decided to omit in such school all or any religious teaching, there is no legal remedy or authority to compel them to provide same. Such Separate School it is submitted would nevertheless continue to be a denominational school with all the rights and privileges pertaining thereto and within the protective provisions of Sec. 93, Sub-sec. 1 of the B.N.A. Act, 1867.

74. This brings one to the consideration of what constituted at Confederation, a Roman Catholic Separate or Denominational School, by whom was it to be established, managed, and controlled, what powers had its trustees and what were the limitations, if any, on such powers?

Appendix of Statutes, p. 118.

75. For this purpose, one must turn to the Act of 1863, 26 Victoria, ch. 5, being the Act regarding Roman Catholic Separate Schools which was in force at the time of Confederation. By the second section of this Act, it is provided that any number of persons, not less than 5, etc., being Roman Catholics, may convene a public meeting of persons desiring to establish a Separate School for Roman Catholics in the school section or ward, for the election of Trustees for the management of same.

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76. Section 3 deals with the election at such meeting of Trustees for the management of such Separate School.

77. Section 4 directs the giving of notice of the election to certain officers in the municipality in which such school is about to be established and enacts that thereafter the Trustees shall be a body corporate under the name of the Trustees of the Roman Catholic Separate School for.....

78. Section 5 provides that the Trustees of Separate Schools heretofore elected, or hereafter to be elected, according to the provisions of this Act in the several wards of any City or Town, shall form one body corporate under the title of The Board of Trustees of the Roman Catholic Separate Schools for the City (or Town) of .....

79. Section 7 gives to the Trustees of Separate Schools power to levy rates, and "all the powers in respect of Separate Schools, that Trustees of Common Schools have and possess under the provisions of the Act relating to Common Schools."

80. Section 9 provides that the Trustees of Separate Schools "shall perform the same duties and be subject to the same penalties as the Trustees of Common Schools; and teachers of Separate Schools shall be liable to the same obligations and penalties as teachers of Common Schools."

81. Section 11 enacts that after the establishment of any Separate School the Trustees shall hold office for a certain period, etc.

82. Section 13 enacts that the teachers of Separate Schools under this Act, shall be subject to the same examinations, and receive their certificates of qualifications in the same manner as Common School teachers generally, with certain exceptions as provided therein.

83. Section 14 provides for the exemption of supporters of Separate Schools from the payment of all rates imposed for the support of Common Schools, and further enacts that it shall be the duty of the Trustees of every Separate School to transmit to the Clerk of the Municipality or Clerks of Municipalities (as the case may be) on or before the first day of June in each year a correct list of the names and residences of all persons supporting the Separate Schools under their management.

84. Section 24 declares that "the election of trustees for auy Separate School shall become void unless a Separate School be established under their management within three months from the election of such trustees."

85. Section 25 enacts that supporters "of a Separate School established as herein provided, or sending children thereto," shall not be allowed to vote at the election of any trustee for a Common School.

86. Section 26 enacts that "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."

87. It is submitted that the sections above quoted from the Act of 1863 make ample provision for the creation or establishment in any rural municipality or in any ward of a city, town or incorporated village of a Roman Catholic Separate School under the management of the elected trustees. There is no right or authority to create a Separate School given anywhere to anyone else than the corporation brought into being by the election of trustees, nor can the management or control of such Separate School rest with anyone but the elected trustees, save for such specific limitations as may be found embodied in the Separate School Act or in those portions of the Act respecting Common Schools, ch. 64 of the Consolidated Statutes of Upper Canada, 1859, defining the powers and duties of Common School Trustees which where appropriate and not provided for in the Separate School Act are in addition conferred and imposed upon Separate School Trustees by secs. 7 and 9 of the Separate School Act. There is no limitation whatever as to the character or grade of the Separate School so to be established and managed, and when once a Separate School has been established under the management of the trustees, its character or grade is for the trustees to determine and it is submitted there

Appendix of Statutes, p. 80, p. 121.

is nowhere any power given to any body to interfere with the discretion of the trustees in that respect or to prohibit the existence of or the carrying on of such a school, or to say in effect a school of another grade or character must take its place. The creature brought into being under the powers conferred by the Separate School Act is entitled to exist and to function in that form and shape without let or hindrance by any other person or body.

88. By sec. 26 the Roman Catholic Separate Schools are subject to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada, but the Council of Public Instruction cannot do more than regulate such kind or description of schools as the trustees have seen fit to establish and maintain. To do more would amount to a power of prohibition, not regulation. In other words, the right to regulate presupposes the existence and the continued existence of the thing to be regulated. Mr. Justice Duff expresses the view that the Appellants adopted the following construction of this section, namely, that the Council of Public Instruction'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" . . . . but not so as to include in such authority the subject of text books. The Appellants respectfully submit that the learned judge has overlooked that the main contention of the Appellants was that Sec. 26 invested the Council with authority to make and impose regulations upon Separate Schools observing any limitations governing it by force of the provisions of the Separate School Act itself, as well as those necessarily proceeding from the nature of the subject matter; the duty being a duty to regulate only must be performed strictly for the purpose for which it was conferred and especially in the light of the fact that the purpose of the legislation was to make better provision for and render efficient the Roman Catholic denominational schools, without derogating from the rights of management and control conferred on trustees by the Separate School Act.

Record, p. 406, l. 18, *et seq.*

89. In the courts below "regulation" has been extended to not merely interfere with or limit the management by the trustees, but to authorize curtailment of the education provided by the trustees in the school already created and maintained. There is nothing in either the Separate School Act or the Common School Act in force at Confederation defining the courses of study, grades of education, or branches of instruction constituting a Common School or a Roman Catholic Separate School or placing any limit whatever up or down upon the education that may be given in such school or schools, but there is a provision for educating pupils between the ages of five and twenty-one years of age. The question is, in the absence of any such limiting legislation, whether there was at the date of Confederation a legal right in the Trustees of a Separate School to provide for the teaching of such courses of study or branches of instruction as the Trustees might deem suitable in the locality in which the school was established and to meet the educational needs and intellectual wants of the youth of such locality.

90. For the Appellants it is contended that there was no limitation in this respect; that in each locality, whether Township, City, Town or Village, the trustees locally and not any central authority, had the sole power of deciding as to the character of school to be established and managed by them, and that when and only when such school had been established, could the Council of Public Instruction make "regulations" applicable to such school, but that it could not under the guise of "regulations" prohibit such school or alter its character.

91. This right of the trustees of Roman Catholic Separate Schools at the date of Confederation, was, it is submitted, a right in respect of education in denominational schools. It was not confined in any way to denominational teaching. It was a right to denominational schools and the school was denominational because it was conceded to a class of persons distinguishable by religion—not by language or colour—*e. g.*, coloured people could have separate schools at the time of the Union, but no right then existing by law was perpetuated to them or protected by the British North America Act because those schools were not denominational schools, that is, belonging to a class of persons distinguishable by religion. Protestant Separate Schools, however, were protected by the British North America Act because they belonged to a class of persons distinguishable by religion, but while the class of persons in the present case, Roman Catholics, can through the elected trustees establish and manage a denominational school, there is no legal obligation to afford denominational teaching and notwithstanding the absence of all denominational teaching the school would be none the less a denominational school with all the rights and privileges attaching to such a denominational or separate school. Under the Separate School Act, the trustees have the management of the school, and in addition by sec. 7 of the Roman Catholic Separate School Act above referred to, have all the powers in respect of Separate Schools that the Trustees of Common Schools have and possess under the provisions of the Act relating to Common Schools.

Appendix of Statutes, p. 130.

Appendix of Statutes, p. 119.

92. The Common School Act expressed somewhat differently the powers and duties of Common School Trustees in Townships and in Cities, Towns and incorporated Villages, and while the trial Judge thought that sections of the Common School Act which relate to what may be termed Township Trustees apply to Separate School Township Trustees, and those relating to City, Town and incorporated Village School Trustees apply to Roman Catholic Trustees of City, Town or incorporated Village, the submission of the Appellants is that the Separate School Trustees of every school, whether Township, City, Town or incorporated Village, have all the powers that are possessed by both classes rural and urban of Common School Trustees.

Appendix of Statutes, p. 96, p. 84.

93. Whether that be so or not, there is in regard to Common School Trustees for Townships by sec. 27, subsec. 8 of the Common School Act a right "to contract with and employ teachers for such School Section, and determine the amount of their salaries," while in regard to the powers of the Common School Trustees for each City, Town and Incorporated Village under sec. 79, subsec. 8 of the said Act, the Trustees are "to determine the number, sites,

Appendix of Statutes, p. 83.

P. 94. kind and description of schools to be established and maintained in the City, Town or Village; also the teacher or teachers to be employed; the terms of employing them; the amount of their remuneration, and the duties which they
P. 96. are to perform," while by sec. 82 of the said Actit is enacted, "It shall be the duty of every teacher of a Common School, (1) 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."

Appendix of Statutes, p. 94. 94. It is submitted this shews that the "kind of description" referred to in subsec. 8 of sec. 79 means the character or grade of the schools which would necessarily include the courses of study or branches of education. This construction is not dissented from by the courts below. It is adopted by the Trial Judge who, after discussing the matter, comes to the conclusion that "My opinion is that it must be found there was a power to grade," but that the
Record p. 212, l. 11. grading must be confined to such work as the "regulations" of the Council of Public Instruction should declare to be the work of Common Schools; and the Chief Justice of Ontario in his Reasons for Judgment, after quoting certain provisions from both the Separate School Act of 1863 and the Common School
Record, p. 231, l. 28. Act of 1859, comes to the conclusion that "The Act of 1859 required Trustees of Common Schools to conduct education in them in accordance with the "regulations" of the Chief Superintendent of Education (now the Minister of Education), and under sec. 7 a like duty rests upon the Trustees of Separate Schools," but does not deny the power to grade subject to such "regulations."

95. The Appellants submit that the capacity of Rural Trustees to provide education for the youth of their school sections was co-extensive with that of Urban Trustees although Subsec. 8 of Section 79 of the Common School Act of 1859 provided that Urban Trustees could "determine (a) the number, sites, kind, and description of schools to be established and maintained in the City, Town or Village;" if it were otherwise then the youth of the Townships could not receive as good an education as the youth of a village, town or city.

It is submitted that when in the Common School Amendment Act of 1847 it was provided that instead of having separate Boards of Trustees for each ward or school section in each City, Town or Village there would be one Board of Trustees for the whole of such urban municipality, this provision enabled the Urban Trustees to thereafter grade the schools throughout the Urban Municipality by having primary schools in the wards and one or more Central or High Schools which all advanced pupils might be compelled to attend, whereas heretofore each Board of Trustees in each ward operated only one school and graded the classes within that one school; so that heretofore such ward school had pupils in it from the lowest grade to the highest grade of education that the Trustees saw fit to provide for the youth within their jurisdiction. Hereafter there being one Board for the whole Urban Municipality the Trustees could determine which schools would take in only pupils up to a certain grade and which schools alone would take in only pupils in the advanced grades.

The density of population in Urban places enabled this grading of schools to be carried out by the Trustees as a matter of efficiency, economy and management, "whilst in each country school section it required the united means of intelligence of the whole population to establish and support one thoroughly good school." This is the view expressed by the Chief Superintendent of Education at the time. In the one instance Urban Boards of Trustees grade the schools within their municipality; in the other instance Rural Board of Trustees grade the classes in their school. The Chief of Justice of Canada in substance comes to this conclusion, and points out that in the cases of Township Boards constituted under Sec. 32 of the Act, this right is expressly conferred.

Record, p. 267, l. 22.

Record, p. 385, l. 1.

96. Mr. Justice Hodgins, after setting out the claim of the Appellants as being one "to completely control save as to text books, all education in Separate Schools," (passing by the inaccuracy of the learned judge in his statement that the Appellants concede the right of any over-riding authority as to text books) does not deal at all with the power to grade, but holds that the educational authorities (presumably the Council of Public Instruction) indicated and controlled the secular education given in them, and further states that he finds "no trace except as to religious instruction, of any intention to allow the education given therein to be more or less extensive or different in character from that which obtained in the Common Schools. Apparently all were to remain in the same category and advance or recede as the educational policy of the Province dealt with its Common School education," and again he says "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, in so far as they were in relation to education and (as carried on by them) if effective were to be dealt with by the Legislature of the Province subject to an appeal, not to the Court, but to Federal authority which was to correct any infringement of those rights and privileges," and again, he further says, "It is not to my mind conceivable that it was intended by sec. 93 (1) to create and preserve as a right by law, the power to forbid any alteration in the Act of 1863, needed or expedient in the interests of expanding education, not affecting Separate Schools in their establishment or in their nature as denominational schools, but as dealing with them in their aspect of purely educational institutions as part of Common School education which was after Confederation their only ambit. In this aspect, whatever the Province made the Common Schools, it also made the Separate Schools," and again "I cannot imagine a more chaotic system of education than would result if the claim made by Plaintiffs before us were given effect to. Separate Schools established before 1867, it was contended, were so completely autonomous that any regulations that prevented them from carrying on their schools so as to include all subjects from the teaching of the alphabet to preparing pupils for matriculation examination, became not regulation but prohibition." The Chief Justice of Canada deals with this view and it is submitted demonstrates its fallacy.

Record, p. 232, l. 39.

Record, p. 233, l. 18.

Record, p. 236, l. 40.

Record, p. 239, l. 12.

Record, p. 241.

Record, p. 380, l. 1.

Record, p. 245, l. 7. 97. Mr. Justice Grant holds that "the determination of the education which was to be made available to all children, was placed in the hands of the Central authority, the Council of Public Instruction, appointed by the Legislature" and he says, "By sec. 93, subsec. (1) of the British North America Act, there is preserved to any denomination the right to carry on schools, taught by its own (duly qualified) teachers, using authorized text books surrounding the children with a denominational atmosphere and giving them denominational instruction, but always the Legislature is supreme and shall determine the education to be furnished," and he might have added and the age when the denominational atmosphere shall be dispelled, and after dealing with the language used in sec. 93 of the British North America Act, he says "the denomination may carry on the schools, but the Province controls the education," and almost at the conclusion of his Reasons, he says, "As I understand the provisions of the British North America Act, what is forbidden to the Province is interference with the rights respecting schools in their denominational aspect and does not touch upon the educational features."

Record, p. 245, l. 23. Record, p. 245, l. 41. Record, p. 247, l. 43.

Record, p. 247, l. 16. He interprets "kind of school as referable to the persons who are to attend the school rather than to the education to be furnished therein," and in this respect differs from Mr. Justice Rose, the trial judge.

98. Mr. Justice Lamont also adopts the view that "kind" of school is referable to the persons attending same rather than to the course of study to be taught in such school and that it ('kind') also covers the right to determine whether the school should be a central, branch or ward school, but he fails to consider that a central school implies a higher or more advanced grade of education than the ward school.

Record, p. 431, l. 24

99. The citations from these Judgments make it clear that the Courts below hold that under the power given to the Council of Public Instruction to make "regulations," the grades of education and the courses of study, that might be taught in the Separate Schools, rested not with the Trustees of each such school, but with the Council of Public Instruction.

100. The Appellants take issue with this view and submit that the sole power in this regard rests with the Trustees of each individual Separate School; that the power was local not departmental; that the grades of education in one Separate School might easily differ from the grades of education in another Separate School, and that the Trustees are the only parties to decide in this regard. They are responsible to the Roman Catholics who have elected them. They may engage many or few teachers. They may, under their powers lay down the duties which the teachers are to perform, while the teachers, on their part, are to teach the branches required to be taught in the school according to the terms of their engagement with the Trustees. The Trustees are those who are best acquainted with the educational needs of their particular locality. They know whether the youth of their locality require more or less advanced teaching. In another aspect this is a question of local finances, the trustees are the sole judges of how much money shall be provided.

101. The Appellants do not admit but deny that the Powers and duties of the Council of Public Instruction for Upper Canada as defined by sec. 119

of the Common School Act, Con. Stat. of U.C., c. 64, 1859, are applicable to or have any necessary reference to Separate Schools, but as these powers and duties have in the Courts below been so treated the Appellants submit the following.

Appendix of Statutes, p. 106.

102. The Constitution of the Council of Public Instruction for Upper Canada is dealt with by sec. 114 of the Common School Act, Consolidated Statutes of Upper Canada, ch. 64, 1859, and its powers and duties are defined by sec. 119.

Appendix of Statutes, pp. 105, 106.

(119). It shall be the duty of such Council and they are hereby empowered:

1. To appoint a Chairman, and determine the times of its meetings, and the mode of conducting its proceedings;

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

103. Such statutory authority it is submitted could not have the effect of authorizing the Council of Public Instruction to recommend or disapprove text books or books for School libraries for Roman Catholic Separate Schools since these schools being in their essence, their establishment and their management, denominational it would be subversive of their distinctive character and the purpose of their institution if an authority outside that denomination could exercise control over the books to be used and read by the pupils in the same and on the same reasoning the Appellants submit that Subsection 15 of Section 79 of the Common School Act of 1859 had no application to Roman Catholic Separate Schools. It is begging the question to say this outside authority extends to some books, such as those used in secular education and not to books used in denominational education. The Statute makes no such distinction—and it might further be pointed out that it is difficult if not impossible to draw any exact line between denominational and secular education, for instance, history has its denominational aspects and authors

might be recommended by the Council of Public Instruction which would be objectionable for use in Roman Catholic Separate Schools.

104. But this authority which did apply to Common Schools does not it is submitted imply that even in the Common Schools the grades of Education and the Courses of Study are to be within the control of the Council of Public Instruction. If, however, there had been given to the Council of Public Instruction power to determine the courses of study, the authorization of text books might perhaps be implied, but the apparent necessity of granting specifically the lesser right is an implication that the larger right was not intended to be given even in regard to Common Schools.

Appendix of Statutes, p. 80.

105. The distinction between the powers of the Council of Public Instruction in regard to even Common Schools in this respect, and Grammar Schools on the other hand, is made clear by secs. 12 and 15 of the Grammar School Act, Consolidated Statutes of U.C. c. 63, By sec. 12 it is declared what is to be taught in the Grammar School and after setting out certain branches of education the section proceeds, "according to a programme of studies and general rules and regulations to be prescribed by the Council of Public Instruction for Upper Canada, and approved by the Governor-in-Council;" and by sec. 15, it is further provided that the Council "shall prepare and prescribe a list of text books, programme of studies and general rules and regulations for the organization and government of the County Grammar Schools, etc." The omission from either the Separate School Act or the Common School Act of any allusion to a programme of studies in view of the inclusion of same in regard to the Grammar Schools, is, it is submitted, significant. This has been dealt with by the Chief Justice of Canada in his reasons for judgment.

Record, p. 393, l. 1.

Record, p. 205, l. 32 to 39.

106. The trial Judge found and his finding has not been disapproved of by the Appellate Division or by the Judges in the Supreme Court of Canada, that the trustees of Separate Schools are, under the existing regulations, prohibited and unable by reason thereof to prepare their pupils for examination for admission to the Normal School, and for matriculation into the University. These so-called points of contact the Appellants contend their schools are entitled to maintain, the same being enjoyed as of right prior to and at Confederation.

107. It is submitted that at Confederation, upon a true construction of the relevant Acts, the Board of Trustees of each Roman Catholic Separate School had, by law, a right or privilege to determine the courses of study and branches of instruction to be taught in its school, and that no regulative power possessed by the Council of Public Instruction could prohibit or limit such right or privilege.

108. It is clear from the evidence and exhibits put in at the trial, that as a fact this power of the Trustees was claimed, and exercised prior to and down to Confederation and while it is admitted that what was done or practiced, even without objection, cannot be the test of a legal right whether such action makes for or against the Appellants, nevertheless the fact above stated shows that the view now submitted by the Appellants is not something novel or by way of afterthought.

109. The Appellants submit that it is clear from the Judgment of the Judicial Committee of the Privy Council, in the case of the Trustees of the Roman Catholic Separate Schools for Ottawa vs. The Ottawa Corporation, (1917). Appeal Cases, 76, that the rights and privileges referred to in sec. 93, ss. 1, are not confined to denominational teaching, that case upholding the right of Trustees to the management of their schools, and also the right or privilege conferred by the Act of 1863 upon the supporters of the Roman Catholic Separate Schools to elect Trustees for the management of such schools.

110. The Appellants submit that at Confederation under the relevant Acts there was granted to the Roman Catholic minority through the Trustees to be elected a right or privilege to conduct and maintain schools or educational institutions in which they could furnish in their discretion all necessary education in secular subjects in a denominational atmosphere. That these rights and privileges existing at Confederation were by the British North America Act rendered free from any legislative action and free from action by any subordinate body created by and deriving its authority from the Legislature directly or indrectly cutting down or limiting the grades of education and courses of study that could then be given so as to bring about the result that the trustees must lose the right to afford education to pupils who, but for such action would have been able to continue and complete their education in the atmosphere of a denominational school, and now by reason of such legislation or regulation can only in such a school receive a part of their education and must seek the balance of their education in an undenominational school or go without. Such legislation or regulation is, it is submitted, not merely prejudicial to a class of persons being Roman Catholics represented by the Appellants in respect of their denominational separate schools, but contrary to the whole tenor and meaning of the Acts above referred to. This view is further and better expressed in the judgment of the Chief Justice of Canada. Record, p. 380, l. 17.

AS TO THE RIGHT OF THE SUPPORTERS OF ROMAN CATHOLIC SEPARATE SCHOOLS TO BE EXEMPT FROM THE PAYMENT OF RATES IMPOSED FOR THE SUPPORT OF CONTINUATION SCHOOLS, COLLEGIATE INSTITUTES AND HIGH SCHOOLS

111. The High Schools and Collegiate Institutes can be dealt with together since Collegiate Institutes are merely certain High Schools to which a special name is given, but Continuation Schools must be treated separately.

Exhibit 17, p. 153, Journal of Education, 1863.

112. At the time of Confederation several of the more advanced Common Schools, as the exhibits shew, were pursuing courses of study and doing educational work leading their pupils up to the same points of contact as do the High Schools of to-day. The only rival of the Common School or Separate School up to 1871, four years after Confederation was the Grammar School of that day. This Grammar School was governed and controlled at the date of Confederation by the Grammar School Act, ch. 63 of the Consolidated Statutes of Upper Canada, 1859. and the amending Act of 1865.

113. The Grammar School, as appears from extracts already given, was specifically departmentally controlled as to courses of study. Provisions were made in the Grammar School Act and corresponding provisions in the Common School Act for a union of Grammar and Common Schools, and these provisions arose from the absence of any other means to provide for the financial support of Grammar Schools. In effect, the taxing power of the Common School Board was to be used to provide money for the support of the Grammar School, but this taxing power could have no application to Separate School supporters. There was never any provision for the union of Grammar and Separate Schools, and the children of Roman Catholic Separate School supporters were inhibited from attending this non-denominational Union School.

Exhibit 38, Journal of Education, 1867, p. 82.

114. Sec. 25, ss. 7 of the Grammar School Act, ch. 63 above mentioned and sec. 79, ss. 9, and sec. 27, ss. 7 and 16, of the Common School Act, are the relevant sections dealing with Union of Common and Grammar Schools and the inhibition of the children of Separate School supporters to attend these Union Schools. The attempt, if it was an attempt, to co-ordinate in any way the Grammar and Common Schools had made little or no progress at the time of Confederation. Up to that time there had never been any analagous provisions in regard to the Grammar Schools and the Roman Catholic Separate Schools. As will appear from the evidence and exhibits, the possible union of Grammar and Common Schools was not apparently received with any favour, the leading or more advanced Common Schools declining to lose their independent status by being united with Grammar Schools.

Appendix of Statutes, p. 96, p. 86.

115. While, as has been stated there was no compulsory taxation for Grammar Schools, it was provided by sec. 16 of the Grammar School Act, ch. 63, that the Municipal Council of each County, Township, City, Town and incorporated Village might collect, by assessment, such sums as it judged expedient for the purposes of building or renting Grammar Schools and providing the

salary of teachers and other necessary expenses and that the sums so collected should be paid over to the treasurer of the County Grammar School for which the assessment is made.

116. In 1871 the Legislature of Ontario passed an Act which declared that thereafter "Common Schools" should be known as "Public Schools," and "Grammar Schools" should be known as "High Schools." The contention of the Appellants is that what was really done by the Act of 1871, was to abolish Grammar Schools, and to rearrange or divide Common Schools into two divisions; one to be thereafter called Public Schools, and the other to be thereafter called High Schools, and that consequently High Schools are Common Schools within the meaning of the Act of 1863, and therefore Roman Catholic Separate School supporters are exempt from rates levied for the support of High Schools. Appendix of Statutes, p. 129.

117. In support of this view the Appellants submit that:

(1) The Common School at the Union was a school intended and empowered to provide education for the whole public (except Separate School supporters) that is, education of every kind which in the judgment of its Trustees it might be desirable to give.

(2) While the exercise of the discretion of the Trustees as to the extent of the education to be given varied according to locality and circumstances, many urban Common Schools were known as High Schools and in several of them the extent of teaching equalled that of any Grammar School, including that in Latin, Greek and French and going far enough to qualify for matriculation or entry on the study of any of the learned professions, or entrance to the Normal School to qualify as teachers.

(3) The work which the regulations assumed to prescribe for the Common Schools at the Union (a right denied by the Appellants) was substantially that prescribed for High Schools after the Act of 1871. Exhibit 23, p. 108.

(4) There was, under the Act of 1871, compulsory taxation for High Schools and it was officially notified by the Chief Superintendent of Education that the Act of 1871 did not affect Separate School supporters. Exhibit 23, p. 89. Exhibit 52, p. 64.

(5) The effect of the Act of 1871 was really to split the Common Schools into two divisions, "Public Schools," which were thereafter to do the inferior Common School work and "High Schools" which were thereafter to do the superior Common School work. Both Public Schools and High Schools were in fact (whatever may have been said of them in the Act of 1871) just divisions of the pre-Confederation Common Schools.

(6) While the Act of 1871 says that thereafter "Common Schools" shall be known as "Public Schools," "Grammar Schools" shall be known as "High Schools," and Boards of Grammar Schools trustees shall be designated High School Boards, this language cannot change the effect of what was really done, and while the title of the Act is "to improve the Common and Grammar Schools of the Province of Ontario," the Grammar Schools were actually being absorbed by Common Schools. Appendix of Statutes p. 130.

(7) The Grammar Schools were essentially select schools, not schools for the masses, while the new High Schools were like the Common Schools, not select schools, but schools for the common people.

(8 As to the Grammar Schools no one had a statutory right to attend them. The reverse was the case in the new High Schools.

Exhibit 60 p. 89.

(9) The Grammar Schools were, according to the accepted view of the law and the consequent practice, for boys only. The new High Schools were for boys and girls.

(10) The Grammar Schools were essentially classical schools in which the teaching of a prescribed course, including Latin and Greek was always compulsory. In the new High Schools, Latin and Greek were not compulsory, but along with French and German were optional at the desire of the parents of pupils, not even at the instance of the Department.

(11) For the Grammar Schools there was no compulsory taxation. For the new High Schools, there is.

(12) High Schools and Public Schools may now be managed by a Board of Education elected by Public School supporters only.

118. It is submitted that Common Schools and Grammar Schoo s constituted at the Union parallel schools officially isolated from each other, and were not primary and secondary parts of one school.

119. It is submitted that while the legisl ature was in 871, competent to legislate in any way it chose in regard to either Grammar Schools or Common Schools. and to limit the scope of Common Schools and to make a combination of Common and Grammar Schools, nevertheless no such power exisited as to Roman Catholic Separate Schools; that the Act itself, that is the Act of 1871, and any regulations made by virtue thereof, had no application whatever to Roman Catholic Separate Schools (as was officially notified), and that no amalgamation or union of Common and Grammar Schools can have the effect of infringing the right of exemption from taxation of Roman Catholic Separate School supporters for Common School purposes. They were exempt from taxation for Common Schools. They were, it is submitted, exempt from taxation for union schools composed of Common and Grammar Schools, and it is further submitted they are equally exempt from the combination, if one may term it that, resulting from the Act of 1871.

Exhibit 23, p. 80.

Exhibit 52, p. 64.

CONTINUATION SCHOOLS

120. Continuation Schools had their origin in "Continuation Classes" in the "Public Schools." In the Public School Act 1896 59 Vic. Chap. 70, sec. 8, provision was first made for "Continuation Classes" in Public Schools situated in a municipality in which no High School has been established. The object of these classes was to enable pupils who had passed the entrance examination to a High School or who had finished a Public School course to continue their studies in the Public School as far at least as the second form of the High

Appendix of Statutes, p. 135.

School. The Boards of Trustees were at liberty to collect reasonable fees except from pupils who had passed the entrance examination. The County Council might aid such schools by a grant equal to the legislative grant or such further sums as it deemed expedient. The Minister of Education was authorized to pay for the maintenance of each pupil the average amount paid for High School pupils. No provision was made for "Continuation Classes" in Separate Schools until 1899, 62 Vic. (2) Chap. 36, Section 1 (1) and this by way of amendment to the Public School Act R.S.O. 1897, Chap. 292. In 1902 by 2 Edw. VII, chap 41, an amendment to the Separate School Act, Separate School Boards were given power to establish under similar restrictions Continuation Classes. In 1908, 8 Edw. VII, Chap. 67, being an Act to amend the Public Schools Act "Continuation Schools" were first established and for Public Schools only. The regulations of 1907 (circular No. 37) were rescinded in 1908 and under the substituted regulations Continuation Classes, Grade A of 1907 became Continuation Schools and the Continuation Classes, Grades B and C became fifth classes. Thereafter the course of study for the fifth class was that prescribed for the fifth form of the Public Schools. From the other subjects of the fifth form and the subjects of the Middle School of the High School, the Board of Trustees might select subjects which would be taught in the new Continuation Schools. No Continuation School was permitted where there was a High School; books authorized for Public Schools might be used in the Lower School of Continuation Schools, High Schools and Collegiate Institutes. In 1909 9 Edw. VII, Chap. 90 came the first Continuation Schools Act proper. By Section 4 thereof, subject to the regulations the Public School Board of any municipality or School Section might establish and maintain a Continuation School in connection with any Public School under its control. By this Act County Councils were also authorized to establish Continuation Schools with the approval of the Minister of Education, by creating and constituting Continuation School districts—in which case the County Council appointed part of the trustees and the local municipality the remainder and this Board had the powers and duties exercised by High School Boards in general. No continuation school, however, was to be established or maintained in a High School district. The course of study for Continuation Schools was to be that prescribed for the High Schools.

121. In the Annual Report of the Minister of Education for 1909 it is set forth on page 220 that "the name Continuation School" is applied not to the whole Public School but to the particular division or divisions thereof in which Continuation School work is taught and this is again repeated in the Minister's report of 1910 at page 135. Exhibit 18.

122. By the Continuation Schools Act of 1913 3-4 Geo. V, chap. 72, Sec. 7, the Council of the County in which the Continuation School is situate shall pay towards the maintenance of such School a sum equal to the amount apportioned to the School by the Minister out of the legislative grant. By Section 11 (2) it was enacted that "every Continuation School which has been established under the provisions of part 2 of the Continuation Schools Act passed in the 9th year of the reign of Edw. VII, Chap. 90 (this refers to those

established by county councils) shall on and after the 1st day of July 1913 become and be a High School and except as hereinafter expressly provided shall be subject to the provisions of the High Schools Act." The Trustees for Continuation Schools holding office at the time it became a High School shall be the Trustees of it until Trustees are appointed under the provisions of the High Schools Act.

Exhibit 20.

123. According to the Annual Report of the Minister of Education for 1915 at page 22, "Since the mid-summer of 1913, thirteen Continuation Schools have become High Schools and several others will become High Schools during the coming year."

Book of Pamphlets, Document 3.

124. By the regulations of 1914 it was provided in regulation 1 (4) "where practicable Public and Separate School Boards which desire to establish a Continuation School should unite as provided in Section 3 (3) of the Continuation Schools Act. Where, however, such union is impracticable by reason of either a Public or Separate School Board being unable or unwilling to bear its share of the cost of establishing and maintaining a Continuation School the Minister may approve of the establishment of Continuation Schools under one of the Boards; but in that case the School shall be open to the children of the supporters of both Public and Separate Schools on the terms provided in Section 5 (2) and (3) of the Continuation Schools Act and subject to the Minister's decision in the case of disagreement shall be conducted under conditions as to staffs and accommodations that are acceptable both to Public and to Separate School supporters."

Exhibit 19.

It is submitted that such a School would not be a separate denominational Continuation School.

Book of Pamphlets, Document 12.

125. By the Continuation School Act R.S.O. 1914, Chap. 267, Sec. 6, it was enacted, "A Continuation School shall not be established or maintained in a municipality in which a High School is maintained or in any other part of a High School District."

It will be noted a High School District would be an area including more than one municipality or School Section. It is submitted the effect of this enactment would be that upon an area being declared a High School District a Separate Continuation School previously established would thereupon cease to exist.

126. It is submitted that Separate School supporters being exempt from taxation for these Continuation Schools when established and maintained by Public School Boards should not be liable to taxation for these same Continuation Schools when they have been declared to be High Schools there being no difference except in the name.

127. It is difficult to understand, inasmuch as the Lower School (or First Form) of the High School and also of the Continuation School is doing what was always the work of the Fifth Form of the Common Schools of pre-Confederation days and of the Public School of to-day, why Separate School supporters should not be exempt from taxation for at least this portion of the so-called High School and Continuation School.

128. The Appellants submit that the judgment of the Supreme Court of Canada should be reversed and set aside and that judgment should be entered for the Appellants as follows:

(1) That the Respondent pay to the Appellant, the Board of Trustees of the Roman Catholic School for School Section No. 2, Township of Tiny, the sum of $736.00.

(2) A declaration that the Appellants have and each of them and 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 including such as are conducted in what are now described as Continuation Schools, Collegiate Institutes and High Schools, as such Board of Trustees may determine, and any and all statutes or regulations purporting to prohibit, limit, or in any way prejudicially affect that right are invalid and *ultra vires*.

(3) A declaration that the class of persons being Separate School supporters, represented by your Appellants and all other supporters of Roman Catholic Schools, are exempt from the payment of rates imposed for the support of Continuation Schools, Collegiate Institutes and High Schools not established and conducted by your Appellants or by other Boards of Trustees of Roman Catholic Separate Schools.

(4) A declaration that the Acts or parts of Acts following

(*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, Subsections 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";

do prejudicially affect the Appellants' rights as granted by 26 Victoria (1863), Chapter 5, and secured by the British North America Act, 30-31 Victoria (1867), Section 93, and are *ultra vires* in so far as they affect the rights of the Appellants.

REASONS

1. Because out of the amount of $3,401,818, being the fund granted by the Legislature of Ontario for Common School purposes for the year 1922, the Appellant, the Board of Trustees of the Roman Catholic Separate School for School Section No. 2, in the Township of Tiny, was entitled as of right according to the provisions of the relevant Acts, namely, the Separate School Act (1863), 26 Victoria, Chapter 5, and the British North America Act (1867), 30 and 31 Victoria, Chapter 3, to be paid an amount of $736.00 in addition to the sum of $380.00 received by it.

2. Because on the basis of distribution of the amount granted by the Legislature, provided for in the Separate School Act, 1863, being the average attendance of pupils, this Appellant should have been paid for the year 1922 the sum of $1,116.00; whereas on the basis of distribution provided in the Acts complained of, this Appellant was paid the sum only of $380.00 and was thereby prejudiced.

3. Because the Legislature of the Province of Ontario had so far as it might prejudicially affect any Roman Catholic Separate School, no power or authority to enact Section 6 of Chapter 265, Revised Statutes of Ontario (1914), as amended by (1924) 14 George V, Chapter 82, Section 2, altering or changing the basis of distribution of moneys granted by the Legislature for Common School purposes from that provided for in the Separate School Act (1863).

4. Because the Legislature of Ontario had no power or authority to enact as it purports to enact that the Minister of Education might make regulations and apportionments of grants altering to the prejudice of Roman Catholic Separate Schools the basis of distribution provided for in the Separate School Act, 1863.

5. Because the creation of such power is prejudicial to the right possessed by the Appellants at the Union whether such power is or is not exercised.

6. Because at the Union under the relevant Acts the Appellants and every Board of Trustees of Roman Catholic Separate Schools had the right to prescribe the courses of study and grades of education to be pursued in the schools to be established and managed by them.

7. Because after the Union the Respondent had no power either by legislation or regulation to prejudicially affect the above right by limiting or curtailing the courses of study or grades of education prescribed by Boards of Trustees of Roman Catholic Separate Schools.

8. Because at the Union under the relevant Acts the Board of Trustees of Roman Catholic Separate Schools were the persons and the only persons having authority to establish and manage such schools and the Respondent had only a regulatory authority in regard to such kind of schools as the Trustees so established.

9. Because the legislation and regulations complained of constitute a prohibition of the exercise by the Trustees of the rights referred to and which they had at the Union and consequently are *ultra vires*.

10. Because at the Union, Roman Catholic Separate School supporters represented by the Appellants being exempt by law from the payment of all rates for the support of Common Schools and Common School Libraries including land and buildings for Common School purposes are now exempt from payment of all rates imposed for so-called Continuation Schools, High Schools and Collegiate Institutes not established by Boards of Trustees of such Separate Schools.

11. Because these so-called Continuation Schools, High Schools and Collegiate Institures are in fact merely divisions or departments of the pre-Confederation Common Schools.

12. Because in any event as the Lower School (or First Form) of the so-called High Schools and also of the so-called Continuation Schools is doing what was always the work of the Fifth Form of the Common Schools of pre-Confederation days and of to-day, Separate School supporters are exempt from taxation for this portion, comprising a period of two years or practically one-half of the High School and Continuation School course.

13. Because the provisions of all Acts inconsistent with the provisions of the Separate School Act in force at the Union were repealed so far as they relate to the Roman Catholics of Upper Canada.

14. Because the judgment at the trial, of the Appellate Division and of the Supreme Court of Canada are erroneous and should be reversed.

15. Because the reasons of the Chief Justice of Canada concurred in by Mr. Justice Rinfret and those of Mr. Justice Mignault so far as they are in favour of the contention of the Appellants are sound and should be sustained.

I. F. HELLMUTH.

T. F. BATTLE.

In the Privy Council.

No. 158 of 1927.

On Appeal from the Supreme Court of Canada.

In the Matter of a Petition of Right.

BETWEEN

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*) *Appellan*

AND

HIS MAJESTY THE KING - (*Respondent*) *Responde*

CASE FOR THE APPELLANTS

LAWRENCE JONES & CO.,
16, St. Helen's Place,
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