MANITOBA SCHOOL CASE.

The Minority Cannot Appeal to the Governor in Council.

From the Globe's Correspondent

OTTAWA, Feb. 20.—A majority of the Judges of the Supreme Court of Canada expressed the opinion to day that the Roman Catholic minority of Manitoba had no appeal to the Governor-General in Council under the remedial clauses against the school act of 1890. The minority, consisting of two Judges, said there was an appeal. The case came before them on a reference under the statute, and they were asked by the Cabinet to answer the following questions.

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

(2) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them?

(3) Does the decision of the Judicial Committee of the Privy Council in the case of Barrett v. the City of Winnipeg dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority, which accrued to them after the union under the statutes of the Province, had been interfered with by the two statutes of 1890, complained of in the said petitions and memorials?

(4) Does sub-section 3 of section 93 of the British North America act of 1867 apply to Manitoba?

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

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

The sections of the law above referred to are as follows:—

Under section 22 of the Manitoba act it was provided that the Legislative Assembly of the Province should have the exclusive right to make laws in regard to education, subject to the following provisions:

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

(2) An appeal shall lie to the Governor-General in Council from any act or decision of the Legislature of the Province, or of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

There is a very important difference between sub section 2 and the analagous sub section of the British North America act, which reads as follows:—

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

The words "or is thereafter established by the Legislature of the Province" are omitted from the Manitoba act, as is also the word "prejudicially."

CHIEF JUSTICE STRONG.

Chief Justice Strong, after some preliminary remarks, said that the proper answers to the questions submitted to them depended principally on the meaning to be attached to the language "any right or privilege in relation to education" found in sub section 2. Did these words include rights or privileges not existing at the time of the union, and thereafter established, or was the right or privilege mentioned in sub-section 2 of section 22 of the Manitoba Act the same right of privilege previously referred to in sub-section 1 of the same section namely, one which any class of persons have by law or practice at the union? The learned Judge went on to say that the divergence of language noted above with respect to the Manitoba Act of union and the B.N.A. Act was significant of an intention to make some change in regard to Manitoba. The Manitoba Act gave a right of appeal from any act of the Legislature as well as from any Provincial authority, but the B. N. A. act only gives an appeal from "any act or decision of any Provincial authority." He could refer this difference of expression to nothing but a deliberate intention to make some change in the operation of the respective clauses. He did not see why there should be a departure in language unless it was intended there should be some change. He did not see why a different view should prevail with regard to Manitoba than applies to the other Provinces; on the other hand, there was some force in the consideration that while organic laws should preserve vested rights, yet every presumption should be made for the inherent right of the Legislature to repeal laws which it enacts. He admitted, however, that the general Legislature could put a restraint or impose a direction on a local Legislature, as for instance, the prohibition in the United States of a State Legislature passing laws in violation of contracts. It was a *prima facie* assumption that every legislative enactment is subject to repeal by the same body which enacts it. Every statute contains an implied provision that it can be revoked by the power which passed it unless that right is taken away in express terms by the power-creating Legislature. The point was a new one, but, remembering the assumption that every Legislature has the power to repeal its own laws, would it be arbitrary or unreasonable to hold as the canon of constitutional construction that such inherent right to repeal its own act cannot be deemed to be withheld from the legislative authority unless the constitution by express words takes away that right? I am of opinion that in considering the Manitoba Act we should proceed upon this principle and on the belief that they have absolute power over their own legislation, untrammelled by appeal, unless some express term in the constitutional act provides for appeal. The learned Judge then proceeded to consider whether there was anything in the terms of sub-section 2 of section 22 of the Manitoba Act by which the right of appeal is enlarged, bearing in mind that in the B.N.A. Act appeal is confined from any Provincial authority only. If the words "or is thereafter established by the Legislature of the Province" had been transcribed from the B.N.A. act to the Manitoba Act, then the Legislature would have no right to appeal its own act; but if it was intended only to restrain them from interfering with rights existing at the time of the union, that would have been attained by omitting from the Manitoba act the words "or is thereafter established," which was done. His Lordship then proceeded to consider the cases of Ontario and Quebec in relation to education, and while holding that by the express terms of the B.N.A act they were precluded from abolishing Separate Schools existing by law at the time of the Legislatures of Ontario or Quebec, if they conferred increased rights by statute after the union, there was no reason why they should not repeal such portions of their legislation without it being subject to an appeal from the Federal authorities. His Lordship did not consider the phrase "Provincial authority" an apt term to describe the Legislature, and he did not think that it included the Legislature. In the case of Manitoba the Provincial powers in relation to education would not be restricted, but somewhat enlarged, by variations from the positions of other Provinces. They must hold that it was not the intention of Parliament to limit the right of the Legislature by the organic law of Parliament. The Privy Council had decided that there was no right or privilege existing at the time of the union affected by the school act complained of, and that decision had therefore a very remote bearing on the present case. If then, as he held, it was not the intention of Parliament to circumscribe the Legislative powers of the Province in this regard, the right of appeal to the Governor-General in Council must be limited to a certain class of subjects, namely, rights or privileges not conferred by the Legislature itself, but conferred prior to Confederation, as referred to in sub-section 1 of section 22. The right of appeal, therefore, must be confined to actions of the Legislature affecting rights or privileges mentioned in the first sub section of section 22. Then there was a right of appeal from "any Provincial authority;" assuming that that did not apply to any judicial authority. No doubt an appeal would lie from their acts; in that case Manitoba will be in the same position as Ontario and Quebec. Still he did not think there would be an appeal even from these acts when done under any act of the Legislature passed since the union. It followed from what he had said that the right of appeal must be limited with respect to law affecting rights or privileges existing at the time of the union, and this view would have the effect of putting all the Provinces on the same footing. That the words "any Provincial authority" does not include the Legislature was a conclusion he had reached not without real difficulty. The reason that the words "or is thereafter established" were omitted in the Manitoba act was to him plain. These words did not tie the hands of the Legislature. When the Dominion Parliament gave the right of appeal to the Governor General in Council it omitted these words, with the intent to avoid placing the Legislature under a disability or subjecting it to any appeal in regard to the repeal of its own legislation. In his opinion therefore all the questions must be answered in the negative.

MR. JUSTICE FOURNIER.

Mr. Justice Fournier took the directly opposite view, holding that there was an appeal. He recited the conditions precedent to Confederation, and the circumstances surrounding the delegates from Assiniboia, who came to Ottawa and met Sir John Macdonald and Sir George Cartier in conference, out of which was evolved the Manitoba Act of 1870. In his opinion the words of sub-section 2 of section 22 meant that an appeal should lie from any statute the Legislature has power to pass, because there would be no necessity of appealing from any statute the Legislature had power to pass, as it would be voided by the courts of law. *To his mind it was* clear that the Governor General in Council had the right of entertaining an appeal under section 93 of the B.N.A. act, as well as under section 22 of the Manitoba Act. He had also the power of considering the application upon its merits, and when the application had been considered on its merits and the local Legislature refused to execute a decision of the Governor General in Council, then the Dominion Parliament may under subsection 3 of section 22 of the Manitoba act, pass remedial *legislation to enforce* its decision. He was pleased to say that he was in this view only concurring *in the opinion expressed* by Lord Carnarvon in the House of Lords at the time of the passage of the B.N.A. act. That statesman had said that the terms of the agreement with regard to education appeared to him to be equitable and judicious, and that the object of the clause was to secure to the religious minority of one Province the same rights and privileges enjoyed by the inhabitants of other Provinces, *and that the minority* would thus stand on a footing of entire equality. Lord Carnarvon had added that the minority *had the right* of appeal to the Governor-General in Council if there was any need for it. By the legislation of Manitoba from 1870 to 1890 it was evident, Judge Fournier went on, that the Catholics enjoyed immunity from taxation for schools other than their own, and this privilege was swept away by the act of 1890, as well as property they had acquired out of their own taxation. The B.N.A. act *did not* vary the Manitoba act in respect to education, but there were additions to it, and it went beyond it, *but in both cases* it was provided that there should be an appeal. He therefore answered all the questions in the affirmative, with the exception of No. 3.

MR. JUSTICE TASCHEREAU.

Mr. Justice Taschereau, before delivering his opinion, said it might be asked under what section of the B. N. A. act has the Parliament power to confer on this court anything but appellate powers. This court was made an advisory board of the Federal Executive in matters of reference, such as the one before them. However, he need not at present press that point. *Their answers would bind no* one, not even those who put the questions. No courts of justice, not even this court, were bound by their answers. They ended no controversy, and, whatever their answers might be, should be deemed advisable by the Manitoba authorities to impugn any order of the Federal authorities, an appeal to the courts of the country remains open to them, notwithstanding the opinion of this court. *If, as a* matter of public policy, no action is to be taken upon the petitions, even if there is an appeal, then the absurdity of these proceedings was apparent. Coming to the question submitted, his Lordship held that the B. N. A. act did not apply. It applied to every one of the Provinces except Manitoba. It was simply a case where it was assumed by Parliament that Separate Schools had previously existed in that region, and, with the intention of adapting that system to the new Province and *continuing it, the words* "or is thereafter established by the Legislature" were struck out and not made applicable to the new Province. He did not think that the Privy Council denies to the people of the Province the right to Separate Schools. Whatever the reason, no appeal was given to them with respect to rights or privileges granted since the union, unless the minority demonstrated the impossibility of providing for organization and the maintenance of Separate Schools without statutory power. It was no use to concede the right to Separate Schools and practically to abolish it by leaving them without