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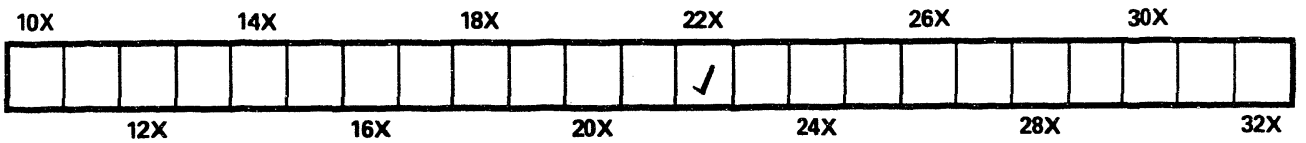

THE MANITOBA SCHOOL CASE, 1894.

EDITED

FOR

THE CANADIAN GOVERNMENT

BY THE

APPELLANTS' SOLICITORS IN LONDON.

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1895.

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EDITORS' NOTE.

The Appellants' and Respondent's Cases and the Judgment are reprinted from the official documents, and the arguments of Counsel and remarks of the learned Lords who heard the Appeal are taken from the shorthand writers' notes. Thanks are due to the Counsel who took part in the Appeal for revising the manuscript notes of their arguments immediately after the conclusion of the Case.

B. B. D. C. & B.

4, GREAT WINCHESTER STREET.
LONDON.
31 January, 1895.

In the Privy Council.

No. 21 of 1894.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

In the Matter of certain Statutes of the Province of Manitoba relating to Education.

BETWEEN GERALD F. BROPHY and Noe Chevrier and Henry Napoleon Boire and Roger Goulet and Patrick O'Connor and Francis McPhillips and Frank I. Clarke and Joseph Lecomte and Michael Hughes and Henry Brownrigg and Frank Brownrigg and Theophilus Tessier and L. Arthur Leveque and Edmond Trudel and Joseph Honoré Octavien Lambert and Jean Baptiste Poirier and George Couture and J. Ernest Cyr and François Jean and David Dussault and Charles Edouard Masse and François Hardis and Joseph Buron and Louis Fournier and Philéas Trudeau and Edouard Guilbault and Romuald Guilbault and Alphonse Phaneuf and W. Cleophas German and Edward R. Lloyd and Louis Laventure and Louis J. Collin, all of the Province of Manitoba, in the Dominion of Canada, on behalf of themselves and of all other persons forming the Roman Catholic minority of the Queen's subjects in the Province - *Appellants*

AND

THE ATTORNEY-GENERAL OF MANITOBA - - - - - *Respondent.*

CASE OF THE APPELLANTS.

1. This is an appeal from the Judgment of the Supreme Court of Canada rendered on the 20th February 1894, upon a Case referred by the Governor-General in

Council to the Supreme Court of Canada for hearing and consideration pursuant to the provisions of the Act respecting the Supreme and Exchequer Courts (Revised Statutes of Canada Chapter 135), as amended by an Act of Canada passed in 1891 (54 and 55 Vic., cap. 25, sec. 4).

2. The questions involved turn upon the construction of certain sections of the British North America Act and of the Manitoba Act and upon the effect of certain Statutes of the Province of Manitoba.

3. In the year 1890 certain Acts were passed by the Legislature of Manitoba, viz. :—Chapters 37 and 38 of 53 Victoria entitled respectively "*An Act respecting the Department of Education*," and "*An Act respecting Public Schools*" which affected very injuriously certain rights and privileges of the Roman Catholic minority of the Queen's subjects in that Province in relation to education acquired by them under various prior Statutes of the Legislative Assembly of Manitoba, as well as rights and privileges possessed by them before the creation of Manitoba as one of the Provinces of Canada.

4. Manitoba was created a Province by the Act of Canada commonly known as "The Manitoba Act 1870" (33 Vic. cap. 3). This Act was confirmed and declared to be valid and effectual by a Statute of the United Kingdom (34 Vic., cap. 28). The second section of the Manitoba Act 1870 provides that from and after a day named "the provisions of the British North America "Act 1867, shall, except those parts thereof which are "in terms made, or by reasonable intendment, may be "held to be specially applicable to, or only to affect one "or more, but not the whole of the Provinces now com- "posing the Dominion, and except so far as the same "may be varied by this Act, be applicable to the Pro- "vince of Manitoba, in the same way, and to the like "extent as they apply to the several Provinces of "Canada, and as if the Province of Manitoba had been "one of the Provinces originally united by the said "Act."

5. Provisions are made by the 93rd Section of the British North America Act, 1867, and the 22nd Section

of the Manitoba Act, 1870, for an appeal to the Governor-General in Council from Acts of the Legislative Assembly affecting the rights and privileges aforesaid.

6. Section 93 of the British North America Act, 1867, provides as follows :—

" In and for each Province the Legislature may exclu-
" sively make Laws in relation to education, subject and
" according to the following provisions :—

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

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

" (3.) Where in any Province a system of separate
" or Dissentient Schools exists by law at the Union,
" or is thereafter established by the Legislature of
" the Province, an appeal shall lie to the Governor-
" General in Council from any act or decision of any
" Provincial authority affecting any right or privilege
" of the Protestant or Roman Catholic minority of the
" Queen's subjects in relation to education.

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

7. Section 22 of the Manitoba Act, 1870, provides as follows :—

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

" (1) Nothing in any such Law shall prejudicially " affect any right or privilege with respect to Deno- " minational 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 Legis- " lature 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.

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

8. Memorials and Petitions were presented to the Governor-General of Canada in Council and among the rest one by the Appellants and by many other Roman Catholic inhabitants of the Province and on behalf of the Roman Catholic Minority of the Queen's subjects in the Province by way of appeal from the two Acts of Manitoba of 1890 before referred to, which petition prayed as follows :—

" (1) That Your Excellency the Governor-General " in Council may entertain the said Appeal and may " consider the same, and may make such provision " and give such directions for the hearing and consi-

" deration of the said Appeal as may be thought " proper.

" (2) That it may be declared that the said Acts (53 " Vic., Chaps. 37 & 38) do prejudicially affect the " rights and privileges with regard to denominational " schools which Roman Catholics had by law or " practice in the Province at the Union.

" (3) That it may be declared that the said last men- " tioned Acts do affect the rights and privileges of " the Roman Catholic minority of the Queen's subjects " in relation to education.

" (4) That it may be declared that to Your Ex- " cellency the Governor-General in Council, it seems " requisite that the provisions of the Statutes in force " in the Province of Manitoba prior to the passage of " the said Acts, should be re-enacted in so far at least " as may be necessary to secure to the Roman Catholics " in the said Province the right to build, maintain, " equip, manage, conduct and support these schools in " the manner provided for by the said Statutes, to " secure to them their proportionate share of any " grant made out of the public funds for the purposes " of education and to relieve such members of the " Roman Catholic Church as contribute to such Roman " Catholic Schools from all payment or contribution " to the support of any other schools, or that the said " Acts of 1890 should be so modified or amended as to " effect such purposes.

" (5) And that such further or other declaration or " order may be made as to Your Excellency the " Governor-General in Council shall, under the cir- " cumstances, seem proper, and that such directions " may be given, provisions made and all things done " in the premises for the purpose of affording relief to " the said Roman Catholic Minority in the said " Province as to Your Excellency in Council may " seem meet."

9. Thereafter the Case hereinbefore mentioned was referred to the Supreme Court of Canada, by which Case

various questions were submitted for the opinion of the Court. These were as follows :—

"(1.) Is the Appeal referred to in the said Memorials " and Petitions and asserted thereby, such an Appeal " as is admissable by sub-section 3 of section 93 of the " British North America Act 1867, or by sub-section " 2 of section 22 of the Manitoba Act, 33 Vic. (1870) " chapter 3, Canada?

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

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

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

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

"(6.) Did the Acts of Manitoba relating to Educa- " tion, passed prior to the session of 1890, confer on " or continue to the minority a 'right or privilege in " relation to education' within the meaning of sub- " section 2 of section 22 of the Manitoba Act, or " establish a system of separate or dissentient schools " 'within the meaning of sub-section 3 of section 93 of " the British North America Act 1867,' if said section " 93 be found 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."

10. Counsel for the Appellants and other Roman Catholics as aforesaid and for the Province of Manitoba appeared before the Supreme Court as did also the Solicitor-General for Canada who appeared to submit the Case on behalf of the Crown. The counsel of Manitoba not desiring to be heard, the Supreme Court pursuant to section 4 of the Canadian Act of 1891 before referred to, requested a counsel to argue the case as to the interest of Manitoba, and such last mentioned counsel thereupon appeared and argued the Case for Manitoba as did also counsel for the Appellants and other Roman Catholics as aforesaid, but the Solicitor-General did not desire to be heard.

11. Afterwards written Judgments were delivered by the five judges who heard the arguments. The result was to show a majority of three judges out of five for a negative answer to all of the questions.

The Chief Justice answered all the questions in the negative.

Mr. Justice Fournier answered the third question in the negative and all the others in the affirmative:

Mr. Justice Taschereau answered the third question in the affirmative and all the others in the negative:

Mr. Justice Gwynne answered the first, second, fourth and fifth questions in the negative, the third in the affirmative, and the sixth as follows :—" The Acts of 1890 do not nor does either of them affect any right or privilege of a minority in relation to education within the meaning of sub-section 2 of section 22 of the Manitoba Act in such manner that an appeal will lie thereunder to the Governor-General in Council. The residue of the question is answered by the answer to question No. 4."

And Mr. Justice King answered all the questions except the third and fourth in the affirmative, the third in the negative and to the fourth he replied :—" Yes, to

the extent as explained by the above reasons for my opinion."

12. The Appellants submit that the answers of the majority of the Supreme Court are wrong, save as to question 3, and that the answers to all the questions save question 3 should be in the affirmative; and that the judgment should be varied and it should be declared accordingly, for the following among other

REASONS.

(1.) Because there are several marked distinctions of the same character, between the language of the first and that of the second sub-section of the clause of the Manitoba Act, and between the language of the first and that of the third sub-section of the clause of the British North America Act, shewing that the first sub-section of each clause relates to a different class of cases and to a different condition from that dealt with by the later sub-section.

For example, sub-section 1 of the Manitoba Act refers to a right or privilege with respect to denominational schools; sub-section 2 to a right or privilege in relation to education.

Sub-section 1 refers to a right or privilege of any class of persons, whether such class constitutes a majority of the population or not; sub-section 2 to a right or privilege of the Protestant or Roman Catholic Minority.

Sub-section 1 relates to any right or privilege existing by law or practice at the Union; sub-section 2 to any right or privilege existent at the date of the Provincial Act or decision complained of, although created after the Union.

Sub-section 1 is limited to cases in which the right or privilege is prejudicially affected; sub-section 2 is not so restricted, and would thus extend to a case in which the relative status was altered by an improvement in the position, even though that of the minority was not in itself changed for the worse.

(2.) Because an attempted law in violation of the earlier sub-sections of each clause would be *ultra vires* and absolutely void, and any attempt to enforce it could be successfully resisted in the Courts by any person aggrieved. These sub-sections are thus complete in themselves, and no appeal to the Governor-in-Council, nor any decision or legislation by either Legislature, would be requisite, appropriate or useful. But the classes of cases dealt with by the later sub-sections are those in which the legislative action is not *ultra vires* or absolutely void, and in which an appeal and decision or legislation might be requisite, appropriate and useful.

(3.) Because the Manitoba Education Acts passed prior to 1890 did confirm or continue to the minority a right or privilege in relation to education within the meaning of sub-section 2 of the Manitoba clause, and did establish a system of separate or dissentient schools within the meaning of sub-section 2 of the British North America clause; and the Manitoba Acts of 1890 did affect a right and privilege of the minority in such sort that an appeal lies to the Governor in Council.

(4.) Because the appeal is admissible under the law; the grounds set forth in the petitions and memorials are such as may be the subject of an appeal; the decision in Barrett *v.* Winnipeg does not dispose of or conclude the contention of the minority; sub-section 3 of the British North America clause does apply to Manitoba, and His Excellency the Governor-General in Council has power to make the declaration or order prayed for, or to give other appropriate relief, if it shall seem expedient to him so to do.

EDWARD BLAKE.

JOHN S. EWART.

In the Privy Council.

(No. 21 of 1894.)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

In the Matter of certain Statutes of the Province of Manitoba relating to Education.

BETWEEN GERALD F. BROPHY and Noe Chevrier and Henry Napoleon Boire and Roger Goulet and Patrick O'Connor and Francis McPhillips and Frank I. Clarke and Joseph Lecomte and Michael Hughes and Henry Brownrigg and Frank Brownrigg and Theophilus Tessier and L. Arthur Leveque and Edmond Trudel and Joseph Honoré Octavien Lambert and Jean Baptiste Poirier and George Couture and J. Ernest Cyr and François Jean and David Dussault and Charles Edouard Masse and François Hardis and Joseph Buron and Louis Fournier and Philéas Trudeau and Edouard Guilbault and Romuald Guilbault and Alphonse Phaneuf and W. Cleophas German and Edward R. Lloyd and Louis Laventure and Louis J. Collin, all of the Province of Manitoba, in the Dominion of Canada, on behalf of themselves and of all other persons, forming the Roman Catholic minority of the Queen's Subjects in the Province - *Appellants*

AND

THE ATTORNEY-GENERAL OF MANITOBA - - - - - *Respondent.*

CASE OF THE RESPONDENT.

1. This is an Appeal by special leave of Her Majesty in Council from the Opinion of the Supreme

Court of Canada, dated the 20th February, 1894, on a certain case referred by the Governor-General to the said Court for hearing and consideration. By the case various questions were submitted for the opinion of the Court, but the substantial questions at issue were, whether either under subsection 3 of section 93 of the British North America Act, 1867, or under subsection 2 of section 22 of the Manitoba Act, 33 Vic., chapter 3 (Dominion Statute) any appeal lay to the Governor-General in Council from two Statutes passed by the Legislature of Manitoba in the year 1890, whereby a general system of nonsectarian public education was established in the place of the denominational system that had previously existed, and whether the Governor-General in Council had power to make the declarations or remedial orders which were asked for in certain memorials that had been presented to His Excellency in Council, complaining of those Statutes.

2. The case was stated and referred by the Governor-General in Council to the Supreme Court of Canada, pursuant to "The Supreme and Exchequer Courts Act," Revised Statutes of Canada, chapter 135, as amended by 54 and 55 Vic., chapter 25, section 4 (Dominion Statute), in consequence of the above-mentioned memorials, which had been presented by or on behalf of the Roman Catholic minority in Manitoba. The memorialists complained that their rights and privileges in relation to education had been affected by the two Statutes before-mentioned, and asked for a declaration that such rights and privileges had been prejudicially affected by the said Statutes, and that the Governor-General in Council should give such directions and make such remedial orders for the relief of the Roman Catholics of the Province of Manitoba as to His Excellency in Council might seem fit.

3. The Supreme Court of Canada, consisting of Strong, C. J., Fournier, Taschereau, Gwynne, and King, J. J., after argument decided by a majority that no such appeal lay from the said Statutes, and Strong, C. J., and Taschereau and Gwynne, J. J., held that no appeal lay and that the Governor-General in Council

had not the power to make the orders asked for: Fournier and King, J.J., were of the contrary opinion.

4. Manitoba joined the Union in 1870 upon the terms of the Manitoba Act, 33 Vic., chapter 3 (Dominion Statute), which Act was declared valid and effectual by the British North America Act 1871, 34 and 35 Vic., chapter 28, section 5. The questions submitted for the opinion of the Supreme Court turned upon the construction of sections 2 and 22 of the Manitoba Act and section 93 of the British North America Act 1867.

5. It is enacted by section 2 of the Manitoba Act as follows:—

> "2. On and after the said day on which the order "of the Queen in Council shall take effect as afore- "said, the provisions of the British North America "Act 1867 shall, except those parts which are in "terms made or by reasonable intendment may be "held to be specially applicable to or only to affect "one or more but not the whole of the Provinces "now composing the Dominion, and except so far as "the same may be varied by this Act, be applicable "to the Province of Manitoba in the same way and "to the same extent as they apply to the several "Provinces of Canada, and as if the Province of "Manitoba had been one of the Provinces originally "united by the said Act."

And it is enacted by section 22 of the Manitoba Act and by section 93 of the British North America Act 1867 as follows:—

The Manitoba Act.	*The British North America Act* 1867.
"22. In and for the Pro- "vince (*i.e.*, of Manitoba) "the said Legislature (*i.e.*, "the Provincial Legisla- "ture) may exclusively "make laws in relation to "education, subject and ac- "cording to the following "provisions:	"93. In and for each "Province the Legislature "(*i.e.*, the Provincial Legis- "lature) may exclusively "make laws in relation to "education, subject and "according to the following "provisions:
"(1) Nothing in any such	"(1) Nothing in any such "law shall prejudicially

" law shall prejudicially
" affect any right or privi-
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" minational 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 mi-
" nority of the Queen's
" subjects in relation to
" education.

" (3) In case any such
" Provincial law as from
" time to time seems to the
" Governor - General in
" Council requisite for the
" due execution of the pro-
" visions of this section is
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" section, and of any deci- " sion of the Governor- " General in Council under " this section."

" cution of the provisions " of this section is not " made, or in case any " decision of the Governor- " General in Council on any " appeal under this section " is not duly executed by " the proper Provincial " authority in that behalf, " then and in every such " case, and as far only as " the circumstances of each " case require, the Parlia- " ment of Canada may " make remedial laws for " the due execution of the " provisions of this section, " and of any decision of the " Governor - General in " Council under this sec- " tion."

6. The Governor-General in Council, in submitting the case to the Supreme Court, set forth the evidence in two cases, called Barrett's case and Logan's case, as the evidence on which the case was to be decided. The proceedings in those two cases were initiated in the Court of Queen's Bench for Manitoba, and the matter came on appeal before the Judicial Committee of the Privy Council. The question at issue was, whether the Public Schools Act 1890 (Manitoba Statute), which is one of the Statutes complained of by the memorialists, was void as offending against subsection 1 of section 22 of the Manitoba Act, whereby the Legislature of Manitoba is prohibited from passing any law prejudicially affecting any right or privilege with respect to denominational schools which any class of persons had by law or practice at the Union. The two cases were heard together, and it was decided by the Judicial Committee that the Public Schools Act 1890 did not prejudically affect any right or privilege with respect to denominational schools which any class of persons had

by law or practice in the Province at the Union, and was consequently intra vires and constitutional. The whole of these proceedings, and the said evidence, and the judgment delivered by Lord Macnaughten on behalf of the Judicial Committee, are to be found in the record.

7. The effect of the evidence was fully stated in the judgment of the Privy Council, and the following is a short summary thereof:—

At the time when Manitoba was admitted to the Union there was no law or regulation or ordinance with respect to education in force. There were no public schools in the sense of State schools, but there existed throughout the Province a number of denominational schools maintained by school fees or voluntary contributions, and conducted according to the tenets of the religious body to which they might belong. These schools were neither supported by grants from the public funds nor were any of them in any way regulated or controlled by any public officials. In 1871, however, the year after admission of Manitoba to the Union, a law was passed which established throughout the Province a system of denominational education in the common schools, as they were then called. A Board of Education was formed, which was to be divided into two sections—Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Each of the twenty-four electoral divisions into which the Province had by the Manitoba Act been divided was constituted a school district in the first instance, and there was to be a school in each district. Twelve electoral divisions "comprising mainly a Pro- "testant population" were to be considered Protestant school districts; twelve "comprising mainly a Roman "Catholic population" were to be considered Roman Catholic school districts. These schools, none of which could properly be called "separate or dissentient "schools," were to be maintained by grants from the public funds, to be divided equally between the Protestant and Roman Catholic schools, and contributions

from the people of each school district. Such contributions might be raised by an assessment on the property of the school district, which must have involved in some cases at any rate an assessment on Roman Catholics for the support of a Protestant school, and an assessment on Protestants for the support of a Roman Catholic school.

The laws relating to education were modified from time to time. From the year 1876 to 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Roman Catholic ratepayer for a Protestant school, and by an Act passed in 1881 it was provided that the legislative grant should no longer be divided equally between Protestant and Roman Catholic schools, but should be divided between the Protestant and Roman Catholic section of the Board in proportion to the number of children between the ages of 5 and 15 residing in the various Protestant and Roman Catholic school districts.

The system of denominational education was maintained in full vigour until 1890, when the Statutes complained of by the memorialists, viz., 53 Vic., chapter 37, and the Public Schools Act 1890 (Manitoba Statutes), were passed. The former established in the place of the Board of Education a Department of Education, and a Board consisting of seven members, known as the "Advisory Board."

The Public Schools Act 1890 repealed all previous legislation relating to public education, and enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. At the option of the school trustees for each district, religious exercises conducted according to the regulations of the Advisory Board and at the times prescribed by the Act were to be held in the public schools. The religious services were to be entirely nonsectarian, and any pupil whose parent or guardian should so wish was to be dismissed from school before the religious exercise should take place.

The Act then provided for the formation, alteration, and union of school districts, for the election of school

trustees, and for levying a rate on the taxable property in each school district for school purposes. A portion of the legislative grant for educational purposes was allotted to public schools but no school was to participate in the grant unless it were conducted according to all the provisions of the Act and the regulations of the Department of Education and of the Advisory Board.

8. After the decision in Barrett's and Logan's cases had been given by the Judicial Committee, the memorials before-mentioned were presented to the Governor-General in Council by or on behalf of the Roman Catholic minority in Manitoba, alleging that—

(1) The Statutes complained of had deprived the Roman Catholic minority of the rights or privileges of a separate condition as regards education and of organizing their schools under the system of public education in the Province which they had previously enjoyed by the Education Acts passed since the Union.

(2) That their schools had been merged with those of Protestant denominations.

(3) That they are required to contribute through taxation to the support of schools which are called public schools, but are in substance a continuation of the old Protestant schools.

(4) That the religious exercises in the public schools are not acceptable to them, and praying that the Governor-General in Council would, pursuant to the British North America Act 1867, section 93, subsection 3, and the Manitoba Act, section 22, subsection 2, hear and entertain the memorialists' appeal from the Statutes complained of.

9. The memorialists' contention was—

(1) That the Statutes complained of had prejudicially affected rights and privileges in relation to education which they had acquired since the Union.

(2) That by subsection 2 of section 22 of the Manitoba Act an appeal would lie to the Governor-General in Council from any Act of the Provincial Legislature affecting such rights and privileges, even though the Act were intra vires and constitutional.

(3) That, by virtue of section 2 of the Manitoba Act, subsection 3 of section 93 of the British North America Act 1867 applied to Manitoba, and that a similar right of appeal was provided by that section.

10. Thereupon the Governor-General in Council, pursuant to the authority of the Statutes above-mentioned, referred the matter to the Supreme Court of Canada for hearing and consideration, and desired the Court to certify to him in Council their opinion on the following questions :—

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

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

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

(4) Does subsection 3 of section 93 of the British North America Act 1867 apply to Manitoba?

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

(6) Did the Acts of Manitoba relating to education passed prior to the Session of 1890 confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22

of the Manitoba Act, or establish a system of separate or dissentient schools within the meaning of sub-section 3 of section 93 of the British North America Act 1867, if the 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?

11. The case was argued before the Supreme Court on the 17th October 1893 by counsel on behalf of the Appellants and other Roman Catholic inhabitants of Manitoba. Counsel for Manitoba appeared but did not desire to address the Court, and at the request of the Court Mr. Robinson, Q.C., argued the case as to the interest of Manitoba.

12. After such hearing and consideration the said Judges certified to the Governor-General in Council, for his information, their opinion on the questions so referred to the Court, with their reasons therefor.

To the first question: Strong, C. J., Taschereau, J., and Gwynne, J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer.

To the second question: Strong, C. J., Taschereau, J., and Gwynne, J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer.

To the third question: Strong, C. J., Fournier, J., and King, J., gave a negative answer; and Taschereau, J., and Gwynne, J., gave an affirmative answer.

To the fourth question: Strong, C. J., Taschereau, J., and Gwynne, J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer.

To the fifth question: Strong, C. J., Taschereau J., and Gwynne J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer.

To the sixth question: Strong, C. J., and Taschereau J., gave a negative answer; and Fournier, J., and King, J., gave an affirmative answer; and Gwynne, J., answered:—"The Acts of 1890 do not, nor does "either of them, affect any right or privilege of a minor- "ity in relation to education within the meaning of sub-

" section 2 of section 22 of the Manitoba Act in such " manner that an appeal will lie thereunder to the " Governor-General in Council."

The majority of the Court were therefore of opinion that no appeal would lie to the Governr General in Council from the Statutes complained of.

13. The Appellants thereupon, on behalf of themselves and the rest of the Roman Catholic minority in Manitoba, presented a petition to the Queen in Council for special leave to appeal from this decision of the Supreme Court, and such special leave was granted upon terms which have been complied with.

14. The Respondent submits that the opinions which the majority of the Judges of the Supreme Court gave upon the questions submitted to them are correct for the following, amongst other

REASONS.

1. Because the provisions of section 22 of the Manitoba Act were intended to define completely the power of the Legislature of the Province to make laws in relation to education, and the provisions of section 93 of the British North America Act do not in any way limit, or extend, or affect the power of the Legislature of the Province in that behalf.

2. Because the provisions of sub-section 3 of section 93 of the British North America Act 1867 are varied by the provisions of sub-section 2 of section 22 of the Manitoba Act, and are not therefore by virtue of section 2 of the Manitoba Act applicable to Manitoba.

3. Because, assuming all the provisions of subsection 3 of section 93 of the British North America Act to apply to Manitoba, no appeal lies under that sub-section from the Statutes complained of, the only appeal being from an " Act or decision of any Provincial authority," and a Statute passed by the Legislature of the Province is not an Act or decision of any Provincial authority within the meaning of that section.

4. Because, assuming all the provisions of subsection 3 of section 93 of the British North America Act to apply to Manitoba, there is not and never has been a system of separate or dissentient schools established by law in Manitoba.

5. Because, under the provisions of section 22 of the Manitoba Act, an appeal to the Governor-General in Council can lie only when rights or privileges existing by law or practice at the Union have been affected—and the decision in Barrett's and Logan's cases precludes the Appellants from saying that any such rights or privileges have been affected by the Statutes complained of.

6. Because, even if the rights and privilege mentioned in section 22 included rights and privileges created since the Union, the Statutes complained of have not affected any right or privilege of the Roman Catholic minority in relation to education established by law or practice since that time.

7. Because, if the appeal contended for by the Appellants lies, the Legislature of Manitoba would be deprived of the right, inherent in all Legislatures, of repealing its own laws, and the Legislature, having once passed a Statute giving a right or privilege to any denomination, could never repeal or alter that Statute.

8. Because the Appellants' contention ascribes to the Governor-General in Council, and the Parliament of Canada, a peculiar and arbitrary jurisdiction to review and rescind, according to their discretion, and without any reference to the constitutional rights of the Province of Manitoba, *intra vires* and constitutional laws passed by the Legislature of Manitoba.

9. Because the Appellants' contention reduces the exclusive right of the Legislature of Manitoba to make laws in relation to education in and for the Province of Manitoba, conferred on it by positive enactment, to a nulity.

HERBERT H. COZENS-HARDY.
R. M. BRAY.

Judicial Committee of the Privy Council,

COUNCIL CHAMBER, WHITEHALL.

PRESENT:

THE RIGHT HON. THE LORD CHANCELLOR.
THE RIGHT HON. LORD WATSON.
THE RIGHT HON. LORD MACNAGHTEN.
THE RIGHT HON. LORD SHAND.

In the Matter of certain Statutes of the Province of Manitoba, relating to Education.

BETWEEN GERALD F. BROPHY & Others *Appellants*

AND

THE ATTORNEY-GENERAL OF MANITOBA - - - - - *Respondent.*

On Appeal from the Supreme Court of Canada.

Counsel for the Appellants Mr. EDWARD BLAKE, Q.C., M.P., and Mr. JOHN S. EWART, Q.C.

Solicitors for the Appellants, Messrs. BOMPAS, BISCHOFF DODGSON, COXE & BOMPAS.

Counsel for the Respondent Mr. COZENS-HARDY, Q.C., M.P., Mr. HALDANE, Q.C., M.P. and Mr. REGINALD BRAY.

Solicitors for the Respondent, Messrs. FRESHFIELDS AND WILLIAMS.

FIRST DAY.—*Tuesday, December 11th, 1894.*

Mr. Edward Blake, Q.C. My Lords, I appear with my learned friend Mr. Ewart, of the Manitoba Bar, for the Appellants in this Case. The Case is, so to speak, the complement of a Case already before your Lordships arising under another form, and with reference to other parts of the section of the British North America Act and of the Manitoba Act which are relevant to the

subject of Education and the rights of religious minorities in respect of education in the different provinces of Canada. This particular case comes before your Lordships thus :—As your Lordships are aware, besides providing a certain restriction upon the powers of provinces generally in the first instance, and by the Manitoba Act upon the powers of that province to legislate in respect of education, an Appeal under certain conditions, in certain circumstances against Acts of the Legislature or decisions of Provincial Authorities is granted to the Governor-General in Council. Such an Appeal was taken, and was pending in a sense, that is to say, it had been presented at the time the former Manitoba school case, *Winnipeg v. Barrett*, was before your Lordships, but its consideration by the tribunal which the law had created for the purpose of dealing with it had been deferred until the decision in *Winnipeg v. Barrett*, and it was so deferred upon the express ground that the decision in *Winnipeg v. Barrett* might render any consideration of that Appeal unnecessary, and that therefore the time for dealing with it would not arise until after that decision had been reached. There were various memorials or petitions making this appeal sent to His Excellency the Governor-General in Council. Those which had been before him were supplemented in the end by a further memorial, which is the memorial of Brophy and others, the memorial in respect of which more particularly this Appeal is brought.

Perhaps I may most conveniently introduce to your Lordships the considerations of the case by reading a paper, although I am glad to believe that the very full discussion which the former case has received has rendered it not necessary that I should enter so fully into many of the particulars as it was incumbent upon counsel to do on that occasion ; yet this document to which I am about to refer your Lordships states succinctly—and I shall read only some extracts from it—what the condition of the case was upon which the Governor in Council acted, so far as he did act. At page 8 of the Case it begins. It is a report of a Committee of the Privy Council approving a Report of a Sub-committee of that Council, thus

making it a Minute of the Privy Council of Canada ; and the Report of the Sub-committee is of course what is material. That sub-committee's report states that certain Memorials addressed to the Governor in Council had been referred to them, and it gives an account which I do not know that it is necessary now to read in detail as to what these earlier Memorials were. Then at about the middle of the tenth page :

The petition of the "Congress" then sets forth the minute of Council, approved by Your Excellency on the 4th April, 1891, adopting a report of the Minister of Justice, which set out the scope and effect of the legislation complained of, and also the provisions of the Manitoba Act with reference to education. That report stated that a question had arisen as to the validity and effect of the two statutes of 1890, referred to as the subject of the appeal, and intimated that those statutes would probably be held to be *ultra vires* of the Legislature of Manitoba if they were found to have prejudicially affected "any right or privilege with respect to denominational schools which any class of persons had, by law or practice, in the province, at the union." The report suggested that questions of fact seemed to be raised by the petitions, which were then under consideration, as to the practice in Manitoba with regard to schools, at the time of the union, and also questions of law as to whether the state of facts then existing constituted a "right of privilege" of the Roman Catholics, within the meaning of the saving clauses in the Manitoba Act, and as to whether the Acts complained of (of 1890) had "prejudicially affected" such "right or privilege." The Report set forth that these were obviously questions to be decided by a legal tribunal, before the appeal asserted by the petitioners could be taken up and dealt with, and that if the allegations of the petitioners and their contentions as to the law, were well founded, there would be no occasion for Your Excellency to entertain or to act upon the appeal, as the courts would decide the Act to be *ultra vires*. The report and the minute adopting it were clearly based on the view that consideration of the complaints and appeal of the Roman Catholic minority, as set forth in the petitions, should be deferred until the legal controversy should be determined, as it would then be ascertained whether the Appellants should find it necessary to press for consideration of their application for redress under the saving clauses of the British North America Act and the Manitoba Act, which seemed, by their view of the law, to provide for protection of the rights of a minority against legislation (within the competence of the legislature), which might interfere with rights which had been conferred on the minority, *after the union*.

That is a statement of the general nature as understood at the earlier period by his Excellency in Council, of the character of the application for redress :

The memorial of the "Congress" goes on to state that the Judicial Committee of the Privy Council, in England, has upheld the validity

of the Acts complained of and the "memorial" asserts that the time has now come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under sub-sections 2 and 3 of section 22 of the Manitoba Act.

There was also referred to the sub-committee a memorial from the Archbishop of Saint Boniface, complaining of the two Acts of 1890, before mentioned, and calling attention to former petitions on the same subject, from members of the Roman Catholic minority in the province. His Grace made reference, in this memorial, to assurances which were given by one of Your Excellency's predecessors before the passage of the Manitoba Act, to redress all well founded grievances and to respect the civil and religious rights and privileges of the people of the Red River Territory. His Grace then prayed that your Excellency should entertain the appeal of the Roman Catholics of Manitoba and might consider the same, and might make such directions for the hearing and consideration of the appeal as might be thought proper and also give directions for the relief of the Roman Catholics of Manitoba.

The sub-committee also had before them a memorandum made by the "Conservative League" of Montreal remonstrating against the (alleged) unfairness of the Acts of 1890, before referred to.

Soon after the reference was made to the sub-committee of the memorial of the "National Congress" and of the other memorials just referred to, intimation was conveyed to the sub-committee, by Mr. John S. Ewart, Counsel for the Roman Catholic minority in Manitoba, that, in his opinion, it was desirable that a further memorial, on behalf of that minority, should be presented, before the pending application should be dealt with, and action on the part of the sub-committee was therefore delayed until the further petition should come in.

Late in November this supplementary memorial was received and referred to the sub-committee. It is signed by the Archbishop of Saint Boniface, and by the President of the "National Congress," the Mayor of Saint Boniface, and about 137 others, and is presented in the name of the "Members of the Roman Catholic Church resident in the province of Manitoba."

Its allegations are very similar to those hereinbefore recited, as being contained in the memorial of the Congress, but there is a further contention that the two Acts of the Legislative Assembly of Manitoba, passed in 1890, on the subject of education, were "Subversive of the rights and privileges of the Roman Catholic minority provided for by the statutes of Manitoba, prior to the passing of the said Acts of 1890, thereby violating both the British North America Act and the Manitoba Act."

This last mentioned memorial urged:—

(1.) That your Excellency might entertain the appeal and give directions for its proper consideration.

(2.) That Your Excellency should declare that the two Acts of 1890 (chapters. 37 and 38), do prejudicially affect the rights and privileges of the minority, with regard to denominational schools, which they had by law or practice, in the province, at the union.

(3.) That it may be declared that the said Acts affect the rights and privileges of Roman Catholics in relation to education.

Those are the two propositions which the Memorials set up, one which was in effect stated by the Canadian Privy Council to be an attempt to re-discuss the question which your Lordships had disposed of, the second that which is practically now before your Lordships that it may be declared that the Acts affect the rights and privileges of Roman Catholics in relation to education.

The Lord Chancellor. It is not before us what should be declared, is it?

Mr. Blake. No, what is before your Lordships is whether there is a case for Appeal.

The Lord Chancellor. What is before us is the functions of the Governor-General.

Mr. Blake. Yes, and not the method in which he shall exercise them—not the discretion which he shall use but, whether a case has arisen on these facts on which he has jurisdiction to intervene? That is all that is before your Lordships.

Lord Shand. Is there any distinction between 2 and 3?

Mr. Blake. Doubtless a most vital distinction.

Lord Shand. Is "the rights and privileges of the minority" different from "the rights and privileges of Roman Catholics"?

Mr. Blake. No, not in that respect, The distinction is this: You see the last words of 2 are "which they had by law or practice in the Province at the Union." What we have now to deal with is rights aud privileges which they allege they acquired by post-Union Legislation which rights and privileges have been interfered with by still later legislation.

Lord Shand. Then Article 2 refers to at the Union, and Article 3 post Union.

Mr. Blake. Yes. Article 2, your Lordships, will find is practically precluded in advance from discussion. The submission is a submission of the second and not of the first position. Of course that is a very brief statement of Article 3, but the substance is what I have stated. The prayer of the last memorial is:

"That a re-enactment may be ordered by your Excellency of the

Statutes in force in Manitoba, prior to these Acts of 1890, in so far at least as may be necessary to secure for Roman Catholics in the Province the right to build, maintain, &c., their schools in the manner provided by such Statutes, and to secure to them their proportionate share of any grant made out of public funds of the Province for education, or to relieve such members of the Roman Catholic Church as contribute to such Roman Catholic schools from payment or contribution to the support of any other schools; or that these Acts of 1890 should be so amended as to effect that purpose."

Then follows a general prayer for relief. Then the report of the Sub-Committee goes on to deal with these memorials, saying that they will comment only on the last one, as it embraces all and a little more than the others. They say:

"As to the request which the petitioners make in the second paragraph of their prayer, viz., 'That it may be declared that the said Acts (53 Vic. 37 and 38 do prejudicially affect the rights and privileges with regard to denominational schools which the Roman Catholics had by law or practice in the Province of Manitoba, at the time of the Union, the Sub-Committee are of opinion that the Judgment of the Judicial Committee of the Privy Council is conclusive as to the rights with regard to denominational schools which the Roman Catholics had at the time of the Union, and as to the bearing thereon of the Statutes complained of, and your Excellency is not therefore, in the opinion of the Sub-Committee, properly called upon to hear an appeal based on those grounds."

Lord Shand. What was that Sub-Committee?

Mr. Blake. It was a Sub-Committee of the Privy Council of the Dominion to which this question was referred,

Lord Shand. By His Excellency?

Mr. Blake. Yes, by His Excellency in Council, which reported to the full Council, and the full Council adopted this report, so that it now stands as the report of the Privy Council of Canada approved by the Governor. It has the virtue not merely of the report of a sub-com-

mittee, but of a minute in council of the Government of Canada.

"That judgment is as binding on your Excellency as it is on any of the parties to the litigation, and therefore, if redress is sought on account of the state of affairs existing in the province at the time of the Union, it must be sought elsewhere and by other means than by way of appeal under the sections of the British North America Act and of the Manitoba Act which are relied on by the Petitioners as sustaining this Appeal. The two Acts of 1890 which are complained of must, according to the opinion of the sub-committee, be regarded as within the powers of the Legislature of Manitoba," (that was following your Lordship's decision), "but it remains to be considered whether the Appeal should be entertained and heard as an appeal against statutes which are alleged to have encroached on rights and privileges with regard to denominational schools which were acquired by any class of persons in Manitoba, not at the time of the Union, but after the Union.

"The sub-committee were addressed by Counsel for the Petitioners as to the right to have the Appeal heard, and from his argument, as well as from the documents, it would seem that the following are the grounds of the appeal. A complete system of separate and denominational schools was, it is alleged, established by Statute of Manitoba in 1871, and by a series of subsequent Acts. That system was in operation until the two Acts of 1890 (chapters 37 and 38) were passed. The 93rd section of the British North America Act in conferring power on the Provincial Legislatures exclusively to make laws in relation to education imposed on that power certain restrictions, one of which was (sub-section 1) to preserve the right with respect to denominational schools which any class of persons had by law in the province at the Union."

Lord Shand. What is the date of the British North America Act?

Mr. Blake. 1867. As to this restriction, it seems to impose a condition on the validity of any Act relating to education, and the sub-committee have already observed that no question it seems to them can arise since the decision of the Judicial Committee of the Privy

Council. The third sub-section however is 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 Manitoba Act passed in 1870 by which the Province of Manitoba was constituted, contains the following provisions, as regards that province; by Section 22 the power is conferred on the Legislature exclusively to make laws in relation to education, but subject to the following restrictions. That enabling power is textually the same as the enabling power in the British North America Act with reference to the province to which it related. "(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." That again is textually the same as the first sub-section of the British North America Act, with the exception of the introduction of the words "or practice" which formed the main subject of discussion on the former occasion before your Lordship's Board. The restriction, the sub-committee again observe, has been dealt with by the judgment of the Judicial Committee of the Privy Council. Then follows:—"(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." It will be observed that the restriction contained in sub-section 2 is not identical with the restriction of sub-section 3 of the 93rd section of the British North America Act, and questions are suggested, in view of this difference, as to whether sub-section 3 of section 93 of the British North America Act applies to Manitoba, and if not, whether sub-section 2 of section 22 of the Manitoba Act is sufficient to sustain the case of the Appellants, or in other words, whether in

regard to Manitoba the minority has the same protection against laws which the Legislature of the province has power to pass, as the minorities in other provinces have under the sub-section before quoted from the British North America Act, as to separate or denominational schools established after the union.

The Lord Chancellor. I do not quite follow. Are the Manitoba words narrower than the British North America Act?

Mr. Blake. We hold them to be wider.

The Lord Chancellor. The suggestion here is that they are narrower,

Mr. Blake. They say the question arises whether they be narrower or not.

Lord Shand. They say it is not identical with the restriction.

Mr. Blake. And if not, whether it is sufficient, or in other words, whether in regard to Manitoba the minority has the same protection as the minorities in other provinces have?

The Lord Chancellor. That is why it puzzled me—why they say in other words unless you assume Manitoba legislation gives a more limited protection than the British North America Act.

Mr. Blake. That is really the crucial question in this case. That is the question for argument, what is the meaning of that particular section of the Manitoba Act whether it means more, as we contend, or less, as the other side contend?

The Lord Chancellor. The British North America Act gives the right of appeal from any Act or decision of any provincial authority. It might be open to question whether that applied to an Act of the Legislature—whether "Act" meant statement or enactment. That, of course, is free from any doubt in the Manitoba Act.

Mr. Blake. I shall have to trespass very much upon your Lordship's attention with a somewhat minute consideration of both the Causes. My points will be cumulative and, I hope, conclusive. At present I thought I would not enter in a fragmentary manner into that discussion.

The Lord Chancellor. I think the Privy Council say more in other words.

Mr. Blake. This is what the Privy Council meant, I think, and it is absolutely true—if Subsection 2 of Section 22 is not sufficient to maintain the Appeal by reason of its being less potent than Subsection 3 of the British North America Act, and if that Subsection 3 does not apply, then it is true with regard to Manitoba that the minority has not the same protection that the minorities have in the other provinces. That is the sense I think in which the phrase is used by the Privy Council.

The Lord Chancellor. Is it certain that you would be right under the British North America Act?

Mr. Blake. Oh, yes, absolutely beyond the slightest doubt according to my conception.

Lord Shand. Admittedly so?

Mr. Blake. I do not know that there is anything admitted in this case. I believe we are at dagger's points all through.

Lord Shand. When you say "absolutely" it looks as if it ought to be admitted.

Mr. Blake. I agree it ought to be. I think it is very wrong that they do not admit it.

The Lord Chancellor. Is there any decision upon it which binds them?

Mr. Blake. No, I would say, to adopt a phrase properly challenged a moment ago, that that construction is manifestly right.

The argument presented by counsel on behalf of the petitioners was that the present Appeal comes before your Excellency in Council, not as a request to review the decision of the Judicial Committe of the Privy Council, but as a logical consequence and result of that decision, inasmuch as the remedy now sought is provided by the British North America Act and the Manitoba Act, not as a remedy to the minority against Statutes which interfere with the rights which the minority had at the time of the Union, but as a remedy against Statutes which interfere with rights acquired by the minority after the Union.

Lord Shand. I understand you to say those rights were acquired by legislation.

Mr. Blake. Yes, surely there was no other way ?

Lord Shand. One of the expressions was "by practice."

Mr. Blake. That was prior to the Union. It does not apply to anything *post* union.

"The remedy, therefore, which is sought is against Acts which are *intra vires* of the Provincial Legislature. His argument is also that the Appeal does not ask your Excellency to interfere with any rights or powers of the Legislature of Manitoba, inasmuch as the power to legislate on the subject of education has only been conferred on that Legislature with the distinct reservation that your Excellency in Council shall have power to make remedial orders against any such legislation which infringes on rights acquired after the Union by any Protestant or Roman Catholic minority in relation to separate or dissentient schools. Upon the various questions which arise on these petitions the sub-committee do not not feel called upon to express an opinion, and, so far as they are aware, no opinion has been expressed on any previous occasion in this case or any other of a like kind by your Excellency's Government or any other Government of Canada. Indeed no application of a parallel character has been made since the establishment of the Dominion. The application comes before your Excellency in a manner differing from applications which are ordinarily made under the constitution to your Excellency in Council. In the opinion of the sub-committee the application is not to be dealt with at present as a matter of a political character or involving political action on the part of your Excellency's advisers."

Your Lordships will observe the phrase "at present." On the preliminary question which is a question whether there are grounds to entertain an Appeal the Committee thought they were going to act judicially but very properly they added the words "at present" because it is quite obvious that when they enter upon the sphere of action of entertaining an Appeal their functions must be political, of expediency and of discretion, just as much as the functions which in the last resort upon their recommendation are assigned to the Parliament of Canada

itself, of course a political body. If the recommendation of His Excellency in Council is not obeyed by the Local Authorities there devolves upon the Parliament of Canada the right to legislate to the extent that is necessary to achieve redress warranted by the recommendation of His Excellency in Council, Both these transactions the prior substantive transaction of deciding on the Action of the Government in Council, and the Action of the Parliament in Canada are of course not judicial but political.

Lord Watson. The only effective authority is the Canadian Parliament.

Mr. Blake. Yes, the only authority that can do anything; the Governor in Council can recommend only.

Lord Watson. The others may be of opinion that you ought to have it, but they cannot give it you.

Mr. Blake No, but they can do that thing without which we cannot get it, because except upon their recommendation the Parliament of Canada has no power.

Lord Watson. Except upon that condition the Parliament of Canada have no jurisdiction.

Mr. Blake. They have not. Therefore it is essential to the subject being dealt with by that body which in the last resort has the power to deal with it that it should be treated by this Tribunal.

Lord Shand. Was this sub-committee of a legal character?

Mr. Blake. If I remember rightly it included the Prime Minister, who is the Minister of Justice, and also one or two more lawyers. In point of fact the members of the Cabinet of Canada are generally lawyers. I cannot be certain whether the Prime Minister was a member of it, but there were certainly some lawyers in it.

Mr. Cozens-Hardy. It is stated at page 16.

The Lord Chancellor. Sir John Thompson was one. Is that the Sir John Thompson who is Prime Minister?

Mr. Blake. Yes; he was also the Attorney-General and Minister of Justice. Mr. Chapleau was a lawyer of some eminence and filled the office of Provincial Secretary. Mr. Bowell had the misfortune not to be of the Bar, and Mr. Daly, I think, was a lawyer though not practising.

Lord Shand. At line 42 they say,

"If the contention of the Petitioners be correct, that such an Appeal can be sustained, the enquiry will be rather of a judicial than a political character."

Mr. Blake.

"The sub-committee have so treated it, in hearing Counsel and in permitting their only meeting to be open to the public. It is apparent that several other questions will arise in addition to those which were discussed by Counsel at that meeting, and the sub-committee advises that a date be fixed."

Then they proceed to state certain preliminary questions, and these I may as well proceed to state here, because these are substantially the questions which they ultimately decided should be submitted preliminarily, under a Canadian Statute, to the Supreme Court for determination after argument, and the Judgment upon that Case so submitted to them is the Judgment which is to be discussed by your Lordships upon this Appeal. Among the questions which the sub-committee regard as preliminary, are the following :—

(1.) Whether this appeal is such an appeal as is contemplated by sub-section 3 of section 93 of the British North America Act, or by sub-section 2 of section 22 of the Manitoba Act ?

(2.) Whether the grounds set forth in the petitions are such as may be the subject of appeal under either of the sub-sections above referred to ?

(3.) Whether the decision of the Judicial Committee of the Privy Council in any way bears on the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union have been interfered with by the two statutes of 1890 before referred to ?

(4.) Whether sub-section 3 of section 93 of the British North Act applies to Manitoba ?

(5.) Whether Your Excellency in Council has power to grant such orders as are asked for by the petitioner, assuming the material facts to be as stated in the petition ?

(6.) Whether the Acts of Manitoba, passed before the session of 1890, conferred on the minority a "right or privilege with respect to education," within the meaning of sub-section 2 of section 22 of the Manitoba Act, or established "a system of separate or dissentient schools," within the meaning of sub-section 3 of section 93 of the British North America Act, and if so, whether the two Acts of 1890, complained of, affect "the right or privilege" of the minority in such a manner as to warrant the present appeal ?

I do not think those are textually the ultimate questions, but they are substantially the questions. I

may say his Lordship, the Chief Justice of the Supreme Court, in delivering judgment upon the Case, boiled down the questions.

Lord Watson. They were consulted and returned their individual opinions—not in the form of a Judgment of the Court.

Mr. Blake. They declaree those opinions to be the opinion of the Court. I suppose, perhaps, it might have been more formal if they had found a formal Judgment, but substantially we collect them, and we find the result in our Case. I read to your Lordships the concise form in which the Chief Justice (and I make no substantial complaint of it) puts the question with which your Lordships have to deal. It is at the bottom of page 165.

Lord Watson. Which of those questions did he deal with?

The Lord Chancellor. He dealt with them all.

Lord Watson. Did he knock them all into one?

Mr. Blake. Yes, and I think tolerably successfully. To put it into a concise form, the questions which we are called upon to answer are whether an appeal lies to the Governor-General in Council, either under the British North America Act 1867 or under the Dominion Act, establishing the Province of Manitoba, against an Act or Acts of the Legislature of Manitoba passed in 1890, whereby certain Acts or parts of Acts of the same Legislature, previously passed, which had conferred certain rights on the Roman Catholic minority in Manitoba in respect of separate or denominational schools were repealed. The question, therefore, is one of novelty, and one of great importance. The position of the minorities, general and local, throughout the Country render it one of very widespread interest and importance all over the Dominion. Speaking very roughly, the Roman Catholics form somewhere about two-fifths of the population of the whole Dominion. In the Province of Quebec they are in an overwhelming majority, perhaps five-sixths. In the other provinces they are in minorities, roughly speaking, of one-fifth or one-sixth, or something of that kind, so they are in a

minority everywhere except in Quebec, and in a majority there so overwhelming that the Protestants in that province occupy towards them the same relation of weakness which they occupy of strength in the other provinces of the Dominion, and in the aggregate in the Assembly of last resort, before which the ultimate decision of this question is to come, if there be a case for an appeal the Roman Catholics are still in a minority. Under the clause of the Manitoba Act which is the main ingredient of this case, section 22, which unquestionably, as I shall show your Lordships, was designed upon the face of it to give as much and more consideration to the position of the religious minority in that province than had been given or might be argued to have been given by section 93 of the British North America Act, as much at least, and in some particulars more, and in no sense, as I shall argue less, under the construction which has been placed upon that clause it has turned out that the situation of things at the time of the Union was not such as to give to the minority the rights which they or some of them hoped they would have obtained by virtue of the first sub-section. There remains only practically for consideration whether they have the minor but the not unimportant, and on the contrary, as they estimate it, the invaluable right of appealing to the Governor in Council, a political body it is true, and to the Parliament to which that Government is responsible, a Parliament in which they are in a minority very much smaller than the proportions of the population. Speaking again roughly, my recollection is that the Roman Catholics in the Parliament of Canada are and always have been about one-third of the body. It is to a body overwhelmingly Protestant that the Roman Catholics appeal for redress against acts of the Provincial Authorities which as they conceive affected the rights and privileges accorded to them by the local legislature. It is plain, as appears by the circumstances of the case, by the documents which are before your Lordships, and indeed as appeared and was stated in the judgment which was delivered by this Board on the former occasion, that the question is one of deep interest, not only

to the Province of Manitoba, but also throughout the whole of the Dominion. It is a question, cognate it is true, but entirely distinct from, and essentially differing from the question which has been already before the Board. It comes up under other clauses. It deals with a different state of things. It proposes the application of altogether a different and a very much more elastic remedy.

Lord Shand. Is it any where succinctly stated what these privileges are, or have you read anything which shows it?

Mr. Blake. I have not read anything yet. I am about to read an authentic document which states them pretty satisfactorily.

The Lord Chancellor. Do you say that these provisions relate only to rights secured by legislation subsequent to the Union?

Mr. Blake. I do.

The Lord Chancellor. By legislation?

Mr. Blake. I do.

The Lord Chancellor. Do you mean by that that when there has been an Act we will say in the direction desired by the Roman Catholic minority that Act can never be repealed?

Mr. Blake, No, not at all.

Lord Macnaghten. It may be the subject of Appeal to the Governor.

The Lord Chancellor. That is what I mean. Though exclusively created by the Provincial Legislature, the power that created it has not the power to put an end to it.

Mr. Blake. Yes, no unqualified power: that will be a part of my argument. I deny that the Provincial Legislature have any unqualified power as to any subject of legislation at all, either to legislate or to repeal legislation; but I say in this case, their power is by the express language of the clause which gives it to them subject to the special restriction.

Lord Shand. If the Appeal is before the Governor, would he be entitled to take political considerations into view.

Mr Blake. Doubtless.

Lord Shand. That is what you get into if your Appeal is a successful Appeal.

Mr. Blake. I should say so.

Lord Shand. It is not a mere construction. That is out of it. It would be purely political, I suppose?

Mr. Blake. It is not out of it. That is one of the reasons we are here. Suppose the case of post Union privileges granted and retracted more or less then the Council has to decide; first of all, whether the Case comes within the law at all; secondly, whether there has been such a retraction, and then they proceed to decide what they think ought to be done in order to give to the minority substantially the position which has been withdrawn from them.

Lord Watson. The very first question to be determined is what, if any privilege was acquired after the Union?

Lord Shand. Surely if it were not a question of political character to some extent that would be determined by Courts of law.

Mr. Blake. In my conception after His Excellency in Council has got rid of this preliminary question and by the light that the Courts of Justice throw upon the construction of the Statutes has found that there is a case for entertaining an appeal he proceeds to deal with that *ex necessitatae rei* in a political sense, because what is to be done? Counsel is to say to the Legislature of Manitoba, we think such and such things should be done in order to restore to the minority the rights which we think they had and which we think they ought to have back again.

The Lord Chancellor. All we have to see is what we think the jurisdiction of the Governor-General is.

Mr. Blake. The question whether upon the whole acting in their political capacity, the Privy Council believes that they ought not to act, or to act in what we may consider a lame and half-hearted way, or to go the whole length of our demand, is no part of the question I have to submit to your Lordships.

Lord Watson. If our duty is limited to that, it must also be limited to deciding whether *prima facie* a case has arisen.

Mr. Blake. Perhaps so.

Lord Watson. It may be that after full consideration and hearing the grievance out, we may come to be satisfied that there is no real grievance.

Mr. Blake. I ask no more.

Lord Watson. I suppose we are not asked to give any such finding or opinion as would tie the Governor-General to follow any recommendation of the Canadian Parliament.

Mr. Blake. I do not think your Lordships are. I do not like to make an absolute concession at this time.

Lord Watson. I rather took it from your statement that we are in a position in which we ought not to do that.

Mr. Blake. I think your Lordships are not bound to go further.

Lord Watson. I suppose we are bound to give him advice in this Appeal. He has asked nothing else but advice throughout. He has not asked for a political decision which shall fetter him in any way.

Mr. Blake. It could not be. The law which creates the Tribunal for the purpose of giving advice expressly states that in their political capacity they are not bound by that advice.

Lord Watson. That is a Canadian Statute.

Mr Blake. Yes.

Lord Watson. A Canadian Statute which authorised the Governor-General to consult the Supreme Court and lays a duty on the judges of the Supreme Court to give advice.

Mr Blake. Yes.

Lord Shand. Is it to be your argument that the Legislature of 1890 was *ultra vires* upon this matter?

Mr Blake. No, that is concluded.

Lord Shand. That is concluded even in this question.

Mr. Blake. I agree.

Lord Shand. It occurred to me, if that were the kind of question that would be more for a judicial tribunal, but that is concluded by the former decision, even as applicable to the present.

Mr Blake. Yes.

Lord Watson. The Governor-General is here asking us to give him our advice in the form of an appeal.

Mr. Blake. The Canadian Legislature as far as it could assimilated the finding of the Supreme Court, around which they cast all the guards and checks possible, by providing for Counsel, and so on ; they as far as they could assimilated that to a decision in an action at law and expressly allude to that question of an appeal to the Board.

Lord Shand. What was it in the result that the Judges did recommend to the Governor-General ?

The Lord Chancellor. It is impossible to say what they recommended till you read the questions and read the answers to each one.

Mr. Blake. By a majority of three to two, but differing in its composition, they answered each question in the negative. That is as far as I can say in one sentence.

Lord Watson. For reasons identical, pro and con, or for different reasons ?

Mr. Blake. Ah, no. Your Lordships know the Supreme Court. One question which they answered in our favour by this majority, and in respect of which, unfortunately, some of the Judges favouring us otherwise were against us, else we should not have been the Appellants, on this occasion, was, whether the decision of your Lordships on the former occasion had concluded the questions against us. On that question we have a negative answer by three to two. The Chief Justice was of that opinion, he was against us on the other five questions, but he was with us on that question, and was of opinion that the decision of this Board did not affect the question then before the Court. That made a majority of three to two in our favour upon that question. Therefore there is upon that no appeal by us now. I will say upon it only a very few words, which I say not so much because I even understand that the proposition is to be seriously disputed, as because it is perhaps needful to clear up from the Judgment itself and from the facts of the case what the real thing is which has been decided as contrasted with that which is now up

for Judgment. I say the point of this question which is submitted to your Lordships is substantially the question whether rights or privileges acquired by post Union legislation *intra vires*, and afterwards affected by later provincial legislation *intra vires* also, but subject as we contend to this Appeal, is subject to the Appeal or no. We do not say that this legislation is void, we say only that it is subject to this Appeal.

The Lord Chancellor. The only question before the Board before was the validity of these Acts, was it not?

Mr. Blake. The validity of the Acts of 1890, and that validity was to be tested by the condition of things by law or practice as existing at the Union. I will run very briefly over the points in support of the proposition that your Lordships have not dealt with adversely, nay, I say as far as the leanings and indications of this Board went they were favourable even when the question has not been disposed of.

Lord Shand. That is a matter which stands in your favour now.

The Lord Chancellor. Surely if the question then was the validity of the Act, and if this present argument assumes the validity of the Act, it is clear that this question cannot have been determined by the last Case. Perhaps it is a rash thing to say one sees there is a difference of opinion, that I ought not perhaps to have said that, but it strikes one so as a matter of first impression.

Mr. Blake. My learned friend tells me, as I expected, that he does not agree.

Lord Shand. It is to be maintained against you that you are precluded by this decision?

Mr. Blake. Yes.

Lord Watson. I can quite understand it is to be maintained against you that the principle upon which their Lordships proceeded in the former case if it applied in this case ought to be fatal to your agreement. I suppose that is the way it is dealt with, not that it was directly matter of decision.

Mr. Blake. I did not suppose that I did not put it in that technical form. I understood my learned friend to mean——

Lord Watson. That there were principles or rules laid down in that case which would prejudice you in your argument.

The Lord Chancellor. I think it is generally convenient not to argue a point which has been decided in your favour. It only makes the argument a great deal longer, without much benefit. We shall hear it from them, and then you will have a reply.

Mr. Blake. Very well, my Lord. Omitting, then, on that statement the consideration of that question, and assuming that the case is absolutely free, it yet devolves on me on one or more points in the argument to allude to passages in the Judgment for other reasons. I suppose that these questions, sub-dividing the single proposition, the single phrase in which the Chief Justice of the Supreme Court stated their essence, divide themselves mainly into two, one as to whether subsection 3 of section 93 of the British North America Act has application to Manitoba; I mean direct positive application, for application of the most vital consequence in all other phases of the discussion section 93 necessarily has, but whether it is directly applicable to and is a governing sentence——

The Lord Chancellor. Did Manitoba come unto the Dominion afterwards?

Mr. Blake. Yes, Manitoba came in under its Special Act of 1870. It was created in 1870 out of the Hudson's Bay Territories.

The Lord Chancellor. This may be a question of controversy or it may not. When a new Province came into the Dominion did the British North American Act *ipso facto* apply?

Mr. Blake. Not *ipso facto.* Provinces might come in in various ways. Some Provinces come in upon addresses of the Houses and of the Provinces to the Queen in Council.

Lord Watson. Certain provinces were named in the Act.

Mr. Blake. Yes, there were four. There was provision for the admission of other provinces from time to time. The general machinery was that there should be

joint addresses of the Parliament of Canada and of the provinces concerned to the Queen in Council, and those joint addresses being identical stated the terms of the Union, and then an Imperial Order in Council was passed bringing the province into the Union upon those terms, which terms introduced the clauses of the British North America Act with such slight exceptions or modifications as might be required, the main one being that there were in the British North America Act certain clauses which applied only to one or more, and not to all the provinces, and these might or might not be applied to any province. But this of Manitoba was an exceptional case, because here you had no legislative body, no representative body, in that unorganised community which was about to be induced to assume the status of a province, being at the time nominally, though not more than nominally, under the control of the Canadian Parliament, because your Lordships may remember that the Hudson's Bay Company's territories were assigned over to Cannda, that there was a resistance on the part of the population largely upon this question to the entrance of the Canadian officials, that there was a riot (dignified by the name of a rebellion), and that, ultimately, delegates came down, negotiations took place, and the Manitoba Act—the Act in question —was passed. That Manitoba Act had not the character of permanence which the constitutions of the other provinces had, because it was passed by the Parliament of Canada, which might have repealed or changed it, but it was confirmed and made permanent by the Imperial Parliament, and so that province acquired its rights by a title as solid and enduring as the other provinces. What I was saying was that the question might be subdivided into these two questions, the first applicable to Sub-section 3 of Section 93 of the British North America Act.

The Lord Chancellor. You say that the British North America did not *ipso facto* become applicable because Manitoba became a Province. How is it suggested that section 93 of the British North America Act became applicable to Manitoba.

Mr. Blake. In the Act which created the Province of Manitoba and which was confirmed as I have said, the British North America Act is made in a certain general sense and in a certain general way applicable. The question is whether these particular clauses of it are applicable. That is the whole question. I am not going to detain your Lordships more than a moment on that question, because I have to address your Lordships at great length on other points on which I can do so more usefully. My intention is to rely on the reasons of Mr. Justice Fournier given at page 177, line 29, of the Judgment (beginning with the words "Does sub-section 3 of section 93," &c.) as indicating the application of sub-section 3. [*See infra.*]

The Lord Chancellor. Do you say that this section of the British North America Act is more favorable to you than the section of the Manitoba Act?

Mr. Blake. I do not think so.

The Lord Chancellor. Supposing it differs, which prevails?

Mr. Blake. The theory was stated in that passage of the Judgment to which I have just referred your Lordships. All the sections of the British North America Act are to apply provided they refer to all the provinces except where they are varied by the Act in question. Some of the clauses of section 93 are expressly re-enacted textually by Section 22 of the Manitoba Act. Some of the clauses are re-enacted textually with a slight addition as of the words "or practice." I do not suppose it could be seriously contended in such cases that the clauses of the British North America Act were intended to have a vigour of their own because there is an express provision with a slight alteration. As to this particular sub-section 3.

The Lord Chancellor. Does that appear re-enacted?

Mr. Blake. There is another, sub-section 2 of the Manitoba Act, which we contend does as much or more but in a different phraseology.

Mr. Blake. Yes.

Lord Shand. If one failed you would fall back on the other.

Mr. Blake. Yes, the learned Judge suggests that it is in addition to it.

The Lord Chancellor. Is it not rather against that that you find some of the sub-sections textually re-enacted; some with alterations that might be a reason for putting them in? But if you find, whilst some are textually re-enacted there is one not re-enacted, and you find a special enactment which deals with that same subject matter, would not the natural inference be that that was intended to be the substitute for that?

Mr. Blake. I have no doubt that is the argument that will be addressed to your Lordships in answer to my argument?

The Lord Chancellor. You argue that the Manitoba Section is just as good for you as the other?

Mr. Blake. I do in a different form. I contend very strongly for that, but I have to proceed when I get a little further on to discuss the clauses of the British North America Act as exhaustively as if they had direct application, even those which I concede have no direct application because of this.—It is perfectly plain that in construing the Main Constitutional Act, and this graft on the Main Constitutional Act, we must look at both provisions, in order to deal first of all with that which I venture now to say is the basis of the Manitoba clause, and which is, at any rate, in *pari materia* with the Manitoba clause, and I trouble your Lordships with a full discussion upon the clauses of the British North America Act with the less reluctance because the main bulk of everything I have to say on the British North America Act has direct application to the Manitoba Act. It would have to be said even if the British North America Act were not there at all.

Lord Shand. Were you going to read that passage at page 177?

Mr. Blake. I will read it if your Lordship wishes.

Lord Shand. Not unless you intend to.

Mr. Blake. I was anxious to open my argument as soon as I could, knowing that under any circumstances I shall be taking up a great deal of your Lordships' time.

Lord Shand. This very much embraces the substance of your argument.

Mr. Blake. Yes, the substance of what my argument on that subject would be if I had stated it.

Lord Watson. A post-acquired legal right or privilege. That is what you say ?

Mr. Blake. Yes. The clauses of both Statutes are to be found in the Appellants' case—the clause of the British North America Act at page 2, and the clause of the Manitoba Act at page 3.

Mr. Cozens-Hardy. Your Lordships will find them side by side in parellel columns on page 3 of the Respondent's Case. [*Page 12 supra*].

Mr. Blake. I gave your Lordships the Appellants Case towards which I have a natural leaning.

Lord Shand. It is a great convenience to have them side by side.

Mr. Blake. Yes. Then I will take page 3 of the Respondent's Case. Now the enabling clause is "the said legislature may exclusively make laws in relation to education subject and according to the following provisions." That is the clause in both. I am reading from section 93 of the British North America Act and section 22 of the Manitoba Act. They are identical so that the power given to the Provinces of Canada originally, and to the Province of Manitoba when it was created is "exclusively to make laws in relation to education subject and according to the following provisions." The question is what those provisions are by the British North America Act, and what differences, if any exist in those provisions in the Manitoba Act. I call your Lordships attention to the phrase "in relation to education." That is the widest phrase. It is the enabling phrase. It is the all embracing phrase and the form of it and the use of it, and the circumstances in which it is used here enable me to induce an argument when I come at some I fear distant time to the end of this clause, where your Lordships will see the same phrase recurs "in relation to education." This is one of the points of distinction between sub-section 1 and sub-section 3 in which one of the elements is that "in relation to education" occurs in sub-section 3 and in sub-section 1 "a privilege with reference to denominational schools." As we say it is a larger phrase and a different phrase in

sub-section 3 from sub-section 1, and I give a colour, and strength and extent to the phrase by showing to your Lordships that it is the phrase which the legislature has adopted, that when it came to give the provincial legislature power to make laws it was "in relation to education."

Lord Watson. They had the exclusive power whatever may be its extent.

Mr. Blake. Yes.

Lord Shand. What particular force do you get by the words "in relation to education" that do not occur to me on reading them.

Mr. Blake. I ask myself in what sense the phrase was used in that clause? I answer that it is language of the widest character, and that the purposes were of the widest character, and therefore I find that it is a very wide phrase. "In relation to education" does not mean merely Elementary Schools—it means any subject affecting education at all, and then I find having given that interpretation, the natural interpretation to the language in the place in which it occurs, that the same phrase is used at the end of sub-section 3, and I ask your Lordships to regard that circumstance when you are called on to contrast it with, and by my friend on the other side, to assimilate it to the phrase—"With respect to Denominational Schools" which occurs in sub-section 1. I have come a little prematurely into that, but the contention on the other side is that sub-section 3 has a relation to or connection with sub-section 1, and, when I get to sub-section 3, I shall ask your Lordship to recur to the fact I have now stated.

The Lord Chancellor. It cannot apply only to that obviously, because sub-section 1 is to define the rights and privileges at the Union, and sub-section 3 certainly extends to things established afterwards.

Mr. Blake. There are at least four marks of distinction of which this is one which I am only illustrating at this moment, because in going through the clauses in their order the phrase "in relation to education" occurred. But that power, all-embracing though it is as to education, is yet "subject and according to provisions," and your

Lordships have already held that the effect of those words is that if the provisions which are found later are contravened by the law, the law is void. The law is void and beyond the power of the legislature to the extent at any rate of the contravention, and perhaps beyond, because it may be impossible to separate the contravening part from the other, and to give effect to the Statute. That is one of the points decided by the Board in the course of the discussion of the other cases.

Then, my Lords, I take sub-section 1 of the British North America Act, which differs only from sub-section 1 of the Manitoba Act by the addition of the words " or practice," and I ask your Lordship to refer to that phrase " with reference to denominational schools," which is the phrase which is contrasted with, or rather is alleged to be the same as " in relation to education " in the third sub-section. Now, the Imperial Parliament when they were enacting the British North America Act, were conjoining four provinces, Nova Scotia, New Brunswick, and the two provinces, newly created, or so to speak, restored provinces of Ontario and Quebec. In Nova Scotia and New Brunswick there were no pre-Union rights or privileges, unless it be alleged that the right of using the Douay Version for the Bible teaching in certain schools was a privilege in the Province of New Brunswick ; but that is not material to the present discussion as far as I can see. So that Nova Scotia and New Brunswick are to be put out of sight as being dealt with by Sub-section 1. In Ontario the general system of education was non-denominational, partly no doubt because there the overwhelming majority of the people were Protestants of different sects ; and in order that they should unite in a public school system, it was an element of necessity that the general plan should be non-denominational. There were there certain slight religious exercises subject to a conscience clause ; but while the general system was thus denominational—there were certain rights given to the Roman Catholic denomination under the Ontario Separate Schools Act. The Roman Catholic denomination had the right to set up separate schools, and these separate schools when set up were under the control of the public authorities.

Lord Watson. Upper Canada and Quebec had legislation of their own, had they, at that time?

Mr. Blake. Doubtless.

Lord Watson. They were brought in by sub-section 2 of 1893. This right is made reciprocal in these two provinces. Whatever rights the Catholics had in Upper Canada the Protestants had in Quebec.

Mr. Blake. The Protestants and Roman Catholics were protected together in Quebec.

Lord Watson. The Protestants had in Quebec the same rights of minorities.

Mr. Blake. But there the Roman Catholic local minorities were given the same rights by sub-section 2. But I was endeavouring to explain what the state of things had been in Ontario.

Lord Watson. There was no provision made with respect to reciprocal equality in any other province.

Mr. Blake. No, I do not think it ever was the intent of the British North America Act to alter the conditions in the other provinces. Ontario and Quebec were in a different position. They were being separated. They were together up to the moment of this Act,

Lord Watson. They were one province.

Mr. Blake. Yes.

Lord Watson. And had been for nearly 40 years in Union.

Mr. Blake. For 25 years or so—a quarter of a century—from 1841 to 1867. It is a long while now since the British North America Act was passed. The system which (so far as the rights which the minorities, or the rights which any class of persons at the Union had) was crystallised in Ontario, was a system under which, speaking generally, there was non-denominational education, with a right to the Roman Catholics to set up separate schools.

Lord Shand. With the right to any denomination to set up separate schools?

Mr. Blake. No, I think not.

Lord Shand. I think Lord Watson said that whatever rights the Roman Catholics had the Protestants had the same.

Mr. Blake. That was in the province of Quebec.

Lord Shand. I thought you were talking of Ontario.

Mr. Blake. Not at that point.

Lord Shand. I heard that observation made and I thought you assented to it.

Mr. Blake. No, my Lord. His Lordship perhaps overlooked one sentence as to Quebec.

Lord Shand. I am speaking of Ontario alone.

Mr. Blake. Yes, that is what I am trying to do. There was a certain condition, namely, where the teacher in a public school was a Roman Catholic in which case some limited right was given to the Protestants in the Province of Ontario. It is not worth speaking about. The Protestants were dominant. If the sects could agree amongst themselves, they were five to one, and the general system they had engrafted on themselves was non-demoninational.

Lord Shand. If that was so, surely they had the same privilege as the Roman Catholics of setting up any schools they liked.

Mr. Blake. No, they did not want it. They did not take it. They might have taken it, of course.

Lord Shand. That is all I meant. They had the same power.

Mr. Blake. No, my Lord. The Legislature could have given it to them, but it did not, They had not the power. They were dominant in the sense that they were five to one, and returned five to one of the members, and directed the course of legislation, but the legislation was not that at all.

Lord Shand. They were content, were they.

Mr. Blake. They consented to and preferred the system of non-denominational education, subject to this right to the Roman Catholic denomination, to which some of the minority, and which was indeed passed in the common Legislature by the influence of Quebec, objected, and that was the system engrafted on Ontario, and crystallized at the time of confederation. In Quebec the majority was of a different type. The majority belonged to one denomination instead of twenty or thirty as in Ontario, though I am glad to say they are reduced to five or six now, of any account, The pre-

ponderating majority in Quebec was Roman Catholic—and these of one denomination. The general system there, as one would expect from the fact of there being an overwhelming majority of one denomination, and of that particular denomination, although called a public school system, was denominational. But there was also the right to the Protestants to set up their schools, but the population was so circumstanced that there were Roman Catholic minorities in certain places and Protestant minorities in others, and any number of persons, however, differing from the faith of the majority had the right to set up what were called dissentient schools in their own locality, and when they set them up they became public schools, of their Order. They became public schools subject to the public regulations, getting their share of the public grants, and in either case in each province the ratepayer being bound to contribute to the school of his own faith, was free from contributing to the schools of the other faith. The Roman Catholic in Ontario had the right to adopt the undenominational form, and become a subscriber to the public schools. That was the state of things there. So that you find in effect the population of these two provinces, where alone there were pre-Union rights, divided in practice with reference to the schools of the country, organised by the law of the country into two bodies—the Roman Catholic denomination and the aggregate of the Protestant sects or denominations. I contend that "Denominational schools," when it appears on this first sub-section, therefore, has application to schools, as to the Roman Catholics, of course, of their denomination. In Quebec all the public schools were denominational, just as much as in Ontario all the Roman Catholic schools were separate. In each case they were denominational. I contend that the dissentient schools of Quebec where they were Protestant, and *a fortiori* where they were Roman Catholic (for as I have said there might be Roman Catholic dissentient schools), were also denominational schools within the meaning of this clause; and that, in short what has been called a monster was

more or less set up by the Statute. There is a sort of statutory aggregation for the purposes of this section of the body of the Protestants into one body, which is called a denomination, for the purpose of denominational schools. I press most strongly on your Lordships the proposition that, looking at this Act by the light of the existing facts of the school legislation, and the schools, and the rights which all had, you find nothing but the aggregation of the Protestant sects, called for the purpose of this legislation a denomination, and the Roman Catholic another denomination.

Lord Shand. I understand you to say that this section has really no operation now and is ineffectual in any way with reference to Nova Scotia and New Brunswick.

Mr. Blake. Yes ; there were no rights or privileges with respect to denominational schools given by law, and it had no operation at all as to them, and that is a very important circumstance when I come to deal with sub-section 3. Sub-section 1 had operation only as to Ontario and Quebec and the denominational schools were such as I have described to your Lordships. Of course, my Lords, there were negligable and neglected quantities, there was the question of the Unitarians, the question of the Jews, and the question of the Pagans, but the great bulk of the population, those who counted at the polls, I suppose, were dealt with in this way by these Statutes. Now that interpretation I have invited your Lordships to give to denominational schools.

The Lord Chancellor. I am not sure I see in contrast to what you suggest your interpretation of it. To what is the other interpretation applied ?

Mr. Blake. The suggestion which has been made, which was strongly pressed upon the Board on the former occasion, and which, as far as I can judge, is to be repeated, is that the necessary effect of the success of an Appeal under this section would be to render impossible any system of public national education, because it would involve rights to all the different sects of Protestants to set up separate schools in respect of which they might complain. The answer that I make is that these are rights of minorities only ; and I find what the

classes of minorities are—that these are not rights of the majority ; and the majority is a Protestant majority, and is not to be divided into five or six sects, each of whom may be relatively to the whole or to the Protestant population a minority.

The Lord Chancellor. If the majority is an undenominational majority, all that is to be protected is the denominational-school-desiring minority.

Mr. Blake. Yes, the majority protects itself.

The Lord Chancellor. And if it is a denominational majority, it is only the undenominational minority who need protection.

Mr. Blake. The privilege which is to be protected is a privilege of the Protestant or Roman Catholic minority of the Queen's subjects. I have the expression Protestant minority——

The Lord Chancellor. You aggregate them.

Mr. Blake. I aggregate them up here as non- denominational ; I aggregate them down there as Protestants ; and I hold that taking the Province of Manitoba where the Protestants are in a majority, there is no right to be protected by an Appeal, for the simple reason that they can protect themselves. They are seven or eight to one, and they can legislate as they please. The question is, whether the weaker should go to the wall to the extent to which the strong could push them there.

That contention as to Denominational schools is supported by the fact, I submit, that the separate schools of Ontario are said in sub-section 2 to be those of Roman Catholics, while the Dissentient schools of Quebec are said to be those of the Queen's Protestant and Roman Catholic subjects. You find the Denominational schools of the Roman Catholics called separate schools in Ontario, and you find the Dissentient schools, which would be usually Protestant in Quebec, called the schools of the Protestants and the schools of the Catholics.

The Ontario Roman Catholic where he is in a minority is given a right to establish a separate school, and the Quebec Protestant or Catholic, where he happens to be in a minority, is given a right to establish a Dissentient school—Dissentient meaning there simply

that he dissented from the public schools, which public schools were almost invariably, but not invariably, Roman Catholic schools.

Now, it is necessary to clear away the suggestion formerly advanced that Denominational schools, as expounded in these Statutes, resemble at all schools such as exist elsewhere under such names.

Lord Shand. You said some time ago you would mention what the privileges were which were the subject of discussion. Have you done that?

Mr. Blake. No.

Lord Shand. I should understand all this more if you could say in short what were the privileges you make the subject of contention. If it is a new subject I do not want you to do it, but perhaps you can tell me in a word.

Mr. Blake. Our privileges are not to be mentioned in a word, but I will read to your Lordship a short exposition or statement from the Judgment of this Board.

Lord Watson. What we decided last year as far as my understanding went was this. I understood the Board to determine that a right or privilege with reference to Denominational schools in Manitoba, which was asserted to have existed at the period of the Union and to be prejudicially affected by the two Statutes, which were said to be *ultra vires* had no existence in fact or law, that there was no such privilege.

Mr. Blake. I was not about to read that part of the Judgment. I was, in answer to Lord Shand, about to read that part of the Judgment which describes the state of things created by the Post Union Legislation.

Lord Watson. This is subsequent to the Union.

Lord Shand. I do not want to take you out of the order of your argument.

Mr. Blake. I am very glad to answer your Lordship's question, which is entirely pertinent, but I think perhaps I can give a more distinct statement.

The Lord Chancellor. What you want to mention is what are the rights and privileges.

Lord Shand. That is what I want to know.

Lord Watson. What is the privilege ?

The Lord Chancellor. The privilege you are supporting is the privilege of having the right to things created by the former Act.

Mr. Blake. Yes.

Lord Shand. Is that a privilege then of having schools of your own, and not being obliged to pay rates for other schools.

Mr. Blake. That is one of the things and organisation and so forth.

Lord Shand. I understand now.

Mr. Blake. I will give your Lordship a reference to the history that the Judicial Committee itself gives of it. At page 155, line 13, is the Statement.

Lord Shand. Then I will read that afterwards.

Mr. Blake. I will also give your Lordships a possibly somewhat briefer Statement, which I am able mainly—I shall have a word or two to say upon it—to adopt from the Respondents' case, page 4, line 28 down to line 32 on the following page, which gives generally speaking a tolerably correct statement of the condition of things created by the post Union Schools and afterwards changed by the latest legislation. [*Supra p. 15 "In 1871," &c., to p. 17 "and of the Advisory Board."*]

Lord Shand. I will read this afterwards.

Lord Watson. There was no question dealt with in the Judgment as to the fact of post Union Acts except to consider whether they prejudicially affected privileges existing at the date of the Union.

Mr. Blake. I quite agree. That is my argument. It is an agument which your Lordships have kindly relieved me from elaborating. At this moment I was citing the judgment only as an authentic history of that state of facts which Lord Shand wanted to be informed upon.

Lord Shand. I have got what I wanted.

Lord Watson. The first Act was an Act in 1871 after the Union, and it was said that that Act encroached upon these privileges.

Mr. Blake. No, my Lord. We should be only too pleased to get that.

Lord Macnaughten. You would like to go back to that ?

Mr. Blake. Yes. We did not complain of it at any time. We always approved of it, and would like it to be there still. What I was saying was, and the only additional observation I have to make upon this subject of denominational schools is that it is not to be understood for a moment that as meant here it includes private schools or schools which are other than State schools. The denominational schools are State schools. They are, in a sense, public schools. They are schools supported partly by the public money. They are schools subject to regulation, subject to inspection, subject to orders, obliged to keep up to a standard, and supported by rates and so forth. They are a machinery by which the public and political organization provides for the education of the mass of the whole people according, as we say, to the wishes of every part of the community. That is the sense in which you find denominational schools used in the connection in which we find it in this Act. Now I pass to sub-section 3, which is, from whatever point of view you look at it, whether as in force or whether as throwing light upon sub-section 2 of the Manitoba Act, the most important of the sections, I find there a statement of a system of separate or dissentient schools as one of the conditions on which an Appeal shall lie. "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." I ask your Lordships to observe that the meanings of these two words "separate or dissentient" are shewn by reference to the Ontario and Quebec systems I have already briefly brought before your Lordship's attention. But they are also shown by the Statute, because if your Lordship refers to sub-section 2 you find "separate" schools described and "dissentient" schools described. The separate schools are the schools of Roman Catholic subjects in Upper Canada, and the dissentient schools are the schools of the Queen's Protestant and Roman Catholic subjects in Quebec, and therefore "a system of separate or dissentient schools" is merely a way of referring to the systems which were already in existence in the provinces of Ontario and Quebec. The words

have a technical sense which is sufficiently indicated by the section. Of course I do not contend—but on the contrary I contend strongly the other way—that there is the slightest need that any system of separate or of dissentient schools which may be created, after the union under this Act or the Manitoba Act shall conform exactly to either of the systems here, because they differ. In Ontario the system is different from Quebec, at least in its relation to the schools of the majority. In Ontario you have a system in which the schools of the majority are non-denominational. In Quebec you have a system in which the schools of the majority are denominational. But in each case you have a provision for the separate instruction of the religious minority. You may therefore have a system absolutely National and common and non-denominational, in theory at any rate for the majority, as is the case in Ontario combined with separate schools for the minority, or you may have a denominational system for the majority, and separate schools for the minority—one or the other—and in either case you come within the meaning of those words. It is not necessary then that the majority system should be at all denominational. It may be one or the other, and the existence of the rights of the minorities, though they involve these separate dissentient schools is entirely consistent with the existence of a general and all embracing system of education for the people. In either case the minorities have, and minorities similarly circumstanced elsewhere are intended to have protection for their rights.

[*Adjourned to to-morrow at half-past 10 o'clock,*]

SECOND DAY.—*Wednesday, December 12, 1894.*

Mr. Blake. My Lords, having reached those sections of both the Acts which bear directly, and which are really the sections in respect of which the rights set up in this Appeal, both those we claim under the British

North America Act, and those we claim under the Manitoba Act are, as we allege, protected, it may, perhaps, be convenient if before dealing further with sub-section 3 of the British North America Act and sub-section 2 of the Manitoba Act, I should briefly refer to the state of facts upon which we allege these sections do apply, and I would refer your Lordships to the summary given by Mr. Justice Fournier, at page 176 of the position which by the post Union Legislation the Catholics occupied. It is very brief, "By referring to the legislation from the date of the Union till 1890, it is evident that the Catholics enjoyed the immunity of being taxed for other schools than their own, the right of organization, the right of self government in this school matter, the right of taxation of their own people, the right of sharing in Government grants for education, and many other rights under the Statute of a most material kind. All these rights were swept away by the Acts of 1890, as well as the properties they had acquired under these Acts, with their taxes and their share of the public grants for education. Could the prejudice caused by the Acts of 1890 be greater than it has been?" I may say that I think no one of the Judges in the Court below has doubted that the post Union rights have been affected, the doubt has been whether, post Union rights being affected, the remedy applied. Mr. Justice Taschereau was the only Judge who expressed a doubt, and that doubt, as far as I can see, is based upon what I may be permitted to call a fundamental error in his judgment, that this case had been concluded by the decision of this Board.

Then I feel it right to go a little more into detail upon this subject so that the case may be presented to your Lordships, and for that purpose I propose now to read the summary of the position which was given by the Judgment on the former case. That is at page 155.

Lord Shand. What does he mean by "rights of taxation" in that passage? That would be voluntary, would it not.

Mr. Blake. No, voluntary is subscription.

Lord Watson. We will come to the Acts by and bye.

Mr. Blake. Yes, that is a brief summary, and is open to the objections to which a brief summary is open, but I

am going to enlarge it. This is the statement which your Lordship's Board make at page 155, line 13 :—

"Manitoba having been constituted a Province of the Dominion in 1870, the Provincial Legislature lost no lime in dealing with the question of education. In 1871 a law was passed which established a system of denominational education in the common schools as they were then called."

The Lord Chancellor. Before the Union was there no educational provision of any sort?

Mr. Blake. No, that was what your Lordships decided. There was no legislature, and there was an absolutely voluntary system by which the adherents of the different churches had, no doubt, under the guidance of their spiritual pastors, done what they pleased, and done what they could. That was all, and your Lordships held that that "all" had not been infringed upon by this. That being the condition, the ground was absolutely clear and free for what was done by post Union legislation. In 1870 the power to legislate was given by the creation of the Province. Your Lordship's judgment continues :—

In 1871 a law was passed which established a system of denominational education in the common schools, as they were then called. A Board of Education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Under the Manitoba Act the province had been divided into 24 electoral divisions, for the purpose of electing members to serve in the Legislative Assembly. By the Act of 1871 each electoral division was constituted a school district, in the first instance Twelve electoral divisions, "comprising mainly a Protestant popu lation," were to be considered Protestant school districts; twelve "comprising mainly a Roman Catholic population," were to be considered Roman Catholic school districts. Without the special sanction of the section there was not to be more than one school in any school district. The male inhabitants of each school district, assembled at an annual meeting, were to decide in what manner they should raise their contributions towards the support of the school, in addition to what was derived from public funds. It is perhaps not out of place to observe that one of the modes prescribed was "assessment on the property of the school district," which must have involved in some cases at any rate, an assessment on Roman Catholics for the support of a Protestant school, and an assessment on Protestants for the support of a Roman Catholic school. In the event of an assessment there was no provision for exemption, except in the case of the

father or guardian of a school child, a Protestant in a Roman Catholic school district, or a Roman Catholic in a Protestant school district—who might escape by sending the child to the school of the nearest district of the other section and contributing to it an amount equal to what he would have paid if he had belonged to that district. The laws relating to education were modified from time to time, but the system of denominational education was maintained in full vigour until 1890. An Act passed in 1881, following an Act of 1875, provided among other things that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and a Roman Catholic district might include the same territory in whole or in part. From the year 1876 until 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Roman Catholic ratepayer for a Protestant school.

I pause there because that is the end of your Lordships' description of the system. I pause there just to make a general observation, without enlarging upon the description further. Your Lordships will see that there the Legislature was dealing with a state of facts which very soon changed as to the geographical distribution, and the amount of the population originally there was a very small population almost equal in numbers, and it so happened that the population was almost in blocks of one religion or the other, not absolutely exclusively so, but so for practical purposes. Therefore they attempted to achieve the object of a complete system of education for all the people by reference to those Geographical conditions by dividing the whole Province, which was not then so large as it has since become, but which was very large no doubt, into twenty-four school districts, corresponding to the electoral divisions which had themselves been constituted with reference to the Geographical distribution of the population into Protestant and Catholic, and by providing Protestant schools for one district and Roman Catholic schools for another district. But as time passed it became necessary, and it was possible without in the slightest degree interfering with the principle of denominational education, indeed it became necessary in order to carry it out in its force and vigour as applied to the altered conditions of the province to make various changes. There arose an inequality in the total popu-

lation which obliged alterations in the numbers of the Board. There arose differences in the distribution of the population which obliged an arrangement to be made whereby there might be a Catholic school district and a Protestant school district not absolutely identical, for I believe the fact was there was none such. There might be, however, and there were many districts which were overlapping.

All these substitutions and modifications were designed to render the legislation apt in the altered conditions to carry out an effective system of education yet preserving, as your Lordships see the denominational system in its full vigour; and of all this, there has never been any complaint on the part of the minority. They have never objected to these changes, and they do not now ask relief from any of the changes which were made from 1870 to 1890.

Now what transpired in 1890? I refer to the Judgment:—

"In 1890 the policy of the past nineteen years was reversed."

I call your Lordships' attention to that again—

"The denominational system of public education was entirely swept away."

That is your Lordships' definition of the change made by the Acts of which we complain.

Two Acts in relation to education were passed. The first (53 Vic., c. 37) established a Department of Education and a board consisting of seven members known as the "Advisory Board." Four members of the board were to be appointed by the Department of Education, two were to be elected by the public and high school teachers, and the seventh member was to be appointed by the University Council. One of the powers of the Advisory Board was to prescribe the forms of religious exercises to be used in the schools. The Public Schools Act, 1890 (53 Vic., c. 38), enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. The provisions of the Act with regard to religious exercises are as follows:—"6. Religious exercises in the public schools shall be conducted according to the regulations of the Advisory Board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place. 7. Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and, upon receiving written authority from the trustees, it shall be the duty of the teachers to hold such religious exercises. 8. The

public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided."

So that every school was to be a public school, all Catholic as well as Protestant school districts were to be turned into public school districts, and every public school was to be entirely non-sectarian. Granted that a system of denominational schools had been in force, and was in full vigour for nineteen years. Take the change which is now described by your Lordships. And is it possible to say that rights or privileges of the Roman Catholic minority have not been interfered with or prejudiced by that change?

The Lord Chancellor. The question seems to me to be this—If you are right in saying that the abolition of a system of denominational education which was created by post-Union legislation is within the 2nd Section of the Manitoba Act and the 3rd Subsection of the other, if it applies, then you say there is a case for the jurisdiction of the Governor-General, and that is all we have to decide.

Mr. Blake. That is all that your Lordships have to decide. What remedy he shall propose to apply is quite a different thing. I have already shown that it is entirely consistent with the view that certain rights may be created that there should be an elasticity in the way of moulding the system. I want even now to suggest to your Lordships what it will be my duty to endeavour to impress upon you more fully—that there is no barrier whatever to any change in a system of denominational education except in so far as it affects the acquired rights of minorities, that we have no right to complain if a denominational system of education affecting the majority has been altogether altered, has become non-denominational; it does not affect the rights which we have acquired. Under this Clause it is the right of the Protestant or the Roman Catholic minority which is preserved. The rights of the majority are left to be attended to by themselves and the legislation as to them to be moulded as they wish to mould it. I may add that we have examples of what the Legislature meant in Ontario and in Quebec, in one the general system being non-denominational in the other, the general system being

denominational, but each being consistent with the rights which were intended to be protected in the minority as to their schools. The statement then goes on to say—

"The Act then provides for the formation, alteration and union of school districts for the election of school trustees and for levying a rate on the taxable property in each school district for school purposes. In cities the Municipal Council is required to levy and collect upon the taxable property within the municipality such sums as the school trustees may require for school purposes. A portion of the legislative grant for educational purposes is allotted to public schools, but it is provided that any school not conducted according to all the provisions of the Act, or any Act in force for the time being, or the regulations of the Department of Education or the Advisory Board shall not be deemed a public school within the meaning of the law, and shall not participate in the legislative grant."

So that the legislative grant was abstracted from all that did not come within the meaning of a public school. Section 141 provides that no teacher shall use or permit to be used as text books any books except such as are authorized by the Advisory Board, and that no portion of the legislative grant shall be paid to any school in which unauthorized books are used. Your Lordship will find the contrast presently :—

Then there are two sections (178 and 179) which call for a passing notice, because, owing apparently to some misapprehension, they are spoken of in one of the judgments under appeal as if their effect was to confiscate Roman Catholic property. They apply to cases where the same territory was covered by a Protestant school district and by a Roman Catholic school district. In such a case Roman Catholics were really placed in a better position than Protestants. Certain exemptions were to be made in their favour if the assets of their district exceeded its liabilities, or if the liabilities of the Protestant school district exceeded its assets. But no corresponding exemptions were to be made in the case of Protestants. Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union.

You sweep out all this historical statement as irrelevant, and at a later passage point out that your Lordship's doubt (which was a polite way of saying that the

Supreme Court was wrong in doing it) the permissibility of referring, as even throwing a light on the subject to intermediate legislation.

"They doubt," say your Lordships, "whether it is permissible to refer to the course of legislation between 1871 and 1890 as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act."

I desire to refer at this moment, while your Lordships' observations are fresh in your memory (line 40 on page 156 dealing with the case of identical districts) to the facts on that subject. It is true that there does appear to have been misapprehension in the minds of some of the Judges of the Supreme Court, but it is also true that while special provision was made for those particular hypothetical cases of Roman Catholic and Protestant school districts being identical, I am informed such was not at all the case. and that such was not the general case was admitted on the last occasion by Mr. McCarthy. The general case was the case of overlapping to which I have referred. That was the general case as your Lordship would naturally expect. In that general case the confiscation which I refer to was accomplished substantially by the provisions of the Act, because the Roman Catholic school district was turned into a public school district. The school could no longer be used and controlled by the old school trustees. The old school trustees were made for the nonce, and until a certain short period school trustees under the new Act and the only way in which the school could be conducted was under the regulations of the new Board. So that the property and rights acquired by the taxation which they had submitted themselves to under the law were availed of, and the school was turned into a public non-Sectarian school. In that way there was—I no not want to use the invidious word "confiscation"—but there was appropriation of the old for the purpose of the new schools, differing so completely as they do.

The Lord Chancellor. You mean that where in a Roman Catholic school district they had assessed themselves, as they had power to do, from which assessment a Protestant could exempt himself, so that it would be

exclusively, except so far as the Protestants pleased, money raised by assistance of the Roman Catholics, the school built by money so raised has now become a free school.

Mr. Blake. Yes, under this Act every school has so become, and we cannot use the school otherwise. We have no right to use it for denominational purposes, and carry it on under the old regulations which are repealed, but the power to carry it on there even as a voluntary enterprise has gone. A new set of trustees are to be elected. Now, what happened? There are, or at any rate they may be still, I believe there are, but at any rate there may be, school districts exclusively or almost exclusively Catholic. As I have said they can no longer use those buildings, or levy rates upon their own people for the school in those or in any other buildings. They are thrown back on voluntary and unorganized effort, while the property which they had acquired under the old Acts is dedicated, if that be a proper word to apply, to public school purposes instead of to the purposes for which they created it. The Act calls upon them to elect trustees from time to time. Of course, if the Roman Catholics are not exclusively in possession, a very small minority of Protestants may hold a meeting and elect trustees. If the district is exclusively Catholic, they may not (I believe it is the case, but that does not appear), they may not choose to elect trustees.

The Lord Chancellor. Of course, if they elected trustees, the trustees would be only in conformity with the Act.

Mr. Blake. Yes, that is the reason they would not go on and elect them. There is a provision which covers even that case of inaction, which would not simply refuse them the right to retain a school, or for organised effect and assessment to carry on their school, but would deprive them of their right to the building. What happens? The Municipality, which has a large area containing it may be a majority of Protestants, but, at any rate, in all probability a large admixture of Protestants, has, after a certain interval of neglect on the part of the district to elect trustees, the power itself of appointing trustees who are to carry on the school.

The Lord Chancellor. That seems to me of very minor importance, because of course if the school can only be used, whoever be the trustees, in this way it does not much matter what trustees are appointed.

Mr. Blake I agree. The purpose of the school for the future is a purpose absolutely different from the purpose for which it was created under the taxation of the Roman Catholics. Of course I need not say that the question of property, although an important consideration, is relatively a minor question. The question of the immunity from taxation for the public schools, and the right to Government aid and to taxation for and organisation of their own schools, all those are benefits and great advantages obtained by the Legislation of which we are now deprived.

Lord Watson. I suppose a non-sectarian school would not be entirely approved by Roman Catholics, even if the majority of the trustees were Roman Catholics. They would still be under the Advisory Board.

Mr. Blake. The view of the Roman Catholics upon this subject is stated very clearly in the Judgment of your Lordships, and was there stated correctly, not as the view of individual Roman Catholics, not as the view even of individual members of the heirarchy, but as the view of the Church, and that was that the education must be a religious education, an education in which religion is interfused throughout. That is the purpose. It is a lesser evil if you are going to establish the law of force, disregarding rights of conscience.

Lord Watson. I suppose that is what is meant and understood by non-sectarian teaching, undenominational teaching. The statutory word here is "non-sectarian."

Mr. Blake. There are a number of statutory words There is "denominational" as well. I do not find much difficulty in finding what "denominational" means generally. As I have shown to your Lordships, I think I have proved that there is a special meaning in this Statute. Take the word "sectarian." The difficulty I have is in finding the exact shade or pale colour of that religion.

Lord Watson. It is sometimes used as a word of reproach.

Mr. Blake. Yes, but not with us, where all the sects are equal.

Lord Watson. "Denominational" does not convey the same imputation.

Mr. Blake. No.

Lord Shand. How is that as to religious exercises practically worked out. Were there different religious exercises in different districts? Do these regulations apply to all schools?

Mr. Blake. I think your Lordship will find, when I bring your Lordships to the more detailed information, that the question whether religious exercises should be carried on in any particular school was a question to be determined by the authorities of that school, but if the religious exercises were to be carried on they are stereotyped; the character of the religious exercises is given

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Lord Macnaughten. Do the Advisory Board interfere with the teaching of the particular denominations?

Mr. Blake. There is no denominational teaching.

Lord Macnaughten. The religious exercises?

Mr. Blake. The religious exercises are reading certain selected and prescribed passages of Scripture and a form of prayer. I think that is all.

Lord Shand. There was no avoidance of teaching the doctrine of a particular body.

Mr. Blake. It was an exercise—it was not a teaching.

Lord Watson. Teaching religion from which all denominational ideas were eliminated?

Mr. Blake. I wish we could find it, because then we should find the common religion.

Lord Shand. I suppose that was the effort?

Mr. Blake. There was no teaching at all. I am going to come to it. What they call religious exercises were

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Lord Macnaughten. It was part of the public education. There was no time set apart for providing teaching.

Mr. Blake. I think not.

Mr. Haldane. Section 6 defines it "after hours."

Mr. Blake. There may be something of that kind. But it is the public exercises that I was speaking of. I

thought my friend interposed to say there was a time for teaching. It is the last thing of the day, so that the boy or girl may go if they do not want it, and so that it may be received, at any rate, at a period when the infant mind is fullest of other things after a day's schooling. All that happens at the most is, as I understand it, the reading of a selected passage and a printed prayer. That happens only when the local trustees direct that it shall happen.

I was saying that under Section 89 of the Act of 1890, the last of the series, the municipal rates levied over the district, that is on the whole of the municipal district which may and does comprise several school districts, comprise a grant to the extent of 20 dollars a month per teacher. That is a tax over the whole area, and consequently where there is no public school used by the ratepayers in any particular area, because the Roman Catholics cannot use their own school for their own purposes and do not organize themselves under the Public School Act, they are taxed by a common rate over the whole area of the municipality for the purpose of paying to the public schools in the district the supplementary contribution. But they do not get any portion of it themselves, because they do not erect a public school or continue their own school as a public school, in consequence of their conscientious objections to teaching from which religion is eliminated.

Now I refer also to the other statement to which I referred your Lordships yesterday upon the altered condition, namely, that given in the Respondent's case, to which I said, with an exception or two which I wish to make, I gave a general adhesion. I refer to it as establishing from another source authentic and important from the point of view of this Appeal, the existence of privileges and the abrogation of those privileges. I get it from page 4, line 28 of the Respondent's case. [*Supra p. 15 to p. 17.*]

"In 1871, however, the year after the admission of Manitoba to the Union, a law was passed which established throughout the Province a system of denominational education in the common schools as they were then called. A Board of Education was formed

which was to be divided into two sections—Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Each of the 24 electoral divisions into which the Province had by the Manitoba Act been divided, was constituted a school distridt in the first instance, and there was to be a school in each district ; 12 electoral divisions, comprising mainly a Protestant population, were to be considered Protestant school districts ; 12, comprising mainly a Roman Catholic population, were to be considered Roman Catholic school districts."

This is a summary of your Lordships' Judgment ; perhaps it is more important that I should advert to the point which I was just reaching.

"These schools, none of which could properly be called separate or dissentient schools."

I do not think it is material under the Manitoba Act at all, nor do I think it is material in this case, as the law stood in the end, but I suppose it is founded upon the proposition that the whole province being by the first Act divided into Protestant and Roman Catholic school districts, none could be called separate and dissentient schools, each one is a separate school. At any rate, what is important to me is the Roman Catholics. You may have some difficulty in treating the Protestant schools as separate, because you may say "What sect does it belong to?" But when you find a school as to which authority is given to conduct it under the control of religious teaching, which applies exclusively to one religious body, that for which I appear, and which is the minority, can you call it other than a separate school for the denomination. It is a school having religious teaching, the religious teaching of a single denomination, the Roman Catholic denomination, authorised, erected and created by the State in order that such teaching may take place.

Lord Watson. A denomination may include a great many sects.

Mr. Blake. Here I am not dealing with the question of denomination, but with the criticism of the Respondent's case on the phrase "separate or dissentient schools."

Lord Shand. That phrase is quoted. I suppose it is taken from one of the Statutes ?

Mr. Blake. Yes ; I presume the object is to allege that the third sub-section of the British North America Act would not apply to this case, because a system of separate or dissentient schools was not created. I say a system of separate schools was created as far as Roman Catholics are concerned, which is all I have to deal with. I do not care if there were no system created as to anybody else. I do not care whether the system as to others be absolutely undenominational or strictly denominational. I am concerned only with the system of separate schools for that minority which I represent here, and which claims a continuance of the privilege created. But I point out that the subsequent legislation altered the condition and removed even that criticism as to the Manitoba Act. The moment that instead of having the whole country cut into 24 school districts, of which 12 were crystallised into Protestant and 12 into Roman Catholic districts, differing from, although framed in substance upon the distribution of the population the moment that you substituted for that the right to have school districts overlapping one another, identical with one another, Protestant or Roman Catholic, you established a system of separate and dissentient schools. In the very nature of things the school the minority established is a denominational school. The minority has a right to establish out of the whole or part of the area the school which is to be the school of the minority, conducted according to its views of Roman Catholic education.

The Lord Chancellor. The word "separate" applied before the Act only to schools in Ontario.

Mr. Blake. Yes.

The Lord Chancellor. The separate schools were a system of Roman Catholic schools as distinguished from the general non-denominational system of the whole Province.

Mr. Blake. Precisely. The separate school was the technical term applied to the Roman Catholic schools of the Province, and was grafted upon a non-denominational school system.

The Lord Chancellor. Sub-section 3 deals with separate schools existing at the time of the Union. That of course refers to the separate school in Ontario and the dissentient schools in Quebec. When it speaks of "Or as thereafter established by the legislature of the Province," that is something new, and in order to ascertain what comes within "separate or dissentient," you must look at what the nature of "separate and dissentient" was at the time of the passing of the Act.

Mr. Blake. You are not tied down to the exact forms embodied in legislation, but you must find the essence. I say the essence may be and is proved to be capable of being engrafted on a general system of non-denominational education as in Ontario, or on a system in which the general education was denominational as in Quebec, because the majority by an overwhelming preponderance were of one denomination, and therefore could have it so; non-denomination in Ontario, mainly though not exclusively, because the equally preponderant Protestant majority were of different sects.

Lord Watson. Your first proposition is a legal one on the construction of sub-section 2 of the Act. I was looking at page 3 of the case. The provisions of that sub-section are "An Appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or any provincial authority effecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." You read that as if it ran—I am putting a gloss upon it for the purpose of illustrating the contention I understand you to make—meaning thereby any right or privilege which they may enjoy under previous provincial legislation. I do not say that is exhaustive, but you say it is so.

Mr. Blake. If your Lordship says "including," I am satisfied. I do not know of anything else. I am bound to argue that it does include a right or privilege enjoyed by legislation, and I know of no right or privilege which they could get otherwise than by legislation.

Lord Watson. You say that within the meaning of this clause those are privileges which you enjoyed at the date of the Act of 1890.

Mr. Blake. Yes, that is the whole argument.

The Lord Chancellor. The difficulty is this. On that construction, inasmuch as at the time of the Union, there was no system, and, therefore, no right or privilege enjoyed by law, this system to which you take exception, could have been established after the Union without objection, if there had been no intermediate legislation.

Mr. Blake. Yes, I have been a little puzzled how to address your Lordships in the argument. I began by an attempt which I perceive was, perhaps, not a happy one, to deal with the construction of this Act hypothetically and without reference to our concrete case. On reflection, I think Lord Shand was quite correct in inviting me to state what the claimed rights were. I am going to argue all that which your Lordship has stated.

Lord Shand. I felt a difficulty in following you without getting a foundation for it.

Mr. Blake. I admit I may have made an error, but I only venture to ask that now I be not drawn into a continuance of that error in the course of my attempt to find the facts.

Lord Watson. It does not follow that it is not the meaning of the Legislature, because the Legislation may be peculiar. It would seem to follow that if the Provincial Legislature had simply begun by establishing non-sectarian education at first, it could have done so without check or hindrance.

Mr. Blake. Yes; but will your Lordship allow me not to jump till I come to the fence.

Lord Watson. It does not follow that after the privileges were established, they should not have thought it right to impose some safeguard upon subsequent legislation.

The Lord Chancellor. I do not say the second sub-section of the Manitoba Act may not be enough, but it may make it of importance to consider whether the third sub-section of 93 applies. That third sub-section applies where a system of separate or dissentient schools is thereafter established, appeal shall lie.

Mr. Blake. I have already stated that I consider it of very great consequence from my point of view, my learned friends will consider it, perhaps, of equal

consequence from their point of view to investigate the meaning of Subsection 3 whether it directly governs the case or not. I do not think that we can construe Subsection 2 of 22 without a careful consideration and exposition of the meaning of Subsection 3 of 93.

The Lord Chancellor. It is impossible to avoid considering both; you cannot avoid considering how far Subsection 3 is applicable, whether you are to treat 93 as being as a whole inapplicable because as a whole it is varied, or whether you are to treat the whole as applicable except in so far as there is an inconsistency.

Mr. Blake. Yes. Then, again, I hold, as my learned friends hold, though from different points of view, that, even if your Lordship should come to the conclusion that 93 is not applicable. yet still, as the base and foundation, it is essential to find out what is the meaning of, and what was done by, Section 93. I do not shrink from that discussion, and I am about to enter on it when I have completed this statement of the condition of things.

Lord Shand. There is that striking difference that the words "a system" are introduced into the one section and do not occur in the other.

Mr. Blake. Yes, there are several other differences. I cannot take them up in a fragmentary manner.

Lord Shand. As I understand, the result is that you cannot object to the legislation. The legislation may affect the right, and does affect the right, upon a construction of the Statute. All you say is that, if it does affect a right or a privilege, then you ought to be allowed to appeal to the Governor-General so as to get redress by some subsequent legislation.

Mr. Blake. We cannot object to it as *ultra vires. Ex concessis* it is *intra vires.*

Lord Shand. Your object is to get the Governor-General by some subsequent legislation to remedy it.

Mr. Blake. By a suggestion of subsequent legislation, for he is not a legislative body—subsequent legislation which may or may not be acquiesced in by a legislative body.

Lord Watson. The provisions of the two Acts may

throw some light on each other. Do these provisions of the Manitoba Act not supersede the other?

Mr. Blake. That is the argument on the other side—that these provisions are the complete provisions.

Lord Watson. No doubt there is something to be found in the Manitoba Act which is not in the British North America Act.

Mr. Blake. I am intending when I near it to endeavour to state to your Lordships very fully what is to be found and what is not to be found, and what the differences are. I know that I have to grapple with that subject.

Lord Shand. The majority of the Judges are against you on that point are they? Do they hold that the Manitoba Act supersedes the other.

Mr. Blake. Yes, the majority were against me on all questions except the one from arguing which your Lordships have relieved me for the moment; they are three to two against me. That one question being answered in the negative was in my favour, the others were adverse.

Now I wish to give your Lordships a reference to the series of Statutes which were dealt with.

Lord Shand. Is the purpose of this to show that they were secured privileges?

Mr. Blake. Yes. I am continuing this portion of the argument and concluding it with what I am now about to state. I am endeavouring to enable your Lordships to master what the situation was and how it has been changed. The first Act was the Manitoba Act of 1871, 34 Victoria, chapter 12. Under that the Government was to appoint the members of the Board of Education, of whom one half should be Protestants and one half Catholics. The 7th section gives to the Board power to make regulations for the general organisation of the public schools, to select books, maps, &c., other than those relating to religion and morals, English books for English schools and French for French schools, to alter and subdivide school districts; each section of the Board to have under its control and management the discipline of the schools of the section. The section regulates the licensing of teachers, it prescribes books relating to religion and morals, and so on.

The Lord Chancellor. How is assent given to the Provincial Act ? By the Lieutenant-Governor ?

Mr. Blake. Always.

The Lord Chancellor. Is there any control over them by the Governor-General.

Mr. Blake. Yes, there is a power of disallowance. I was about to bring that before your Lordships. Certain divisions to be Catholic districts the people to elect the trustees, the trustees to determine how to raise moneys and to assess the property in the district, the teachers to be licensed, Protestant or Catholic to send his child to the nearest school of his faith, and if he contribute to be free from payment in the district of his residence. There was no provision for the establishment of a school district of another denomination than that prescribed in the same district. But in 1875 by the 38th Vic. Cap. 27 (and that, I am sorry to say, is not in the Book of Statutes) it was enacted that the establishment of a school district of one denomination shall not prevent the establishment of a school district of the other in the same place. There you get "Roman Catholic" and "Protestant" described as denominations obviously, and you get a provision for overlapping or identical school districts. The Act of 1877 is not in the book, 40th Victoria Cap. 12. That provides by the 10th section that in no case a Protestant ratepayer shall be obliged to pay for a Catholic school, or a Catholic ratepayer for a Protestant school. He was not obliged to pay elsewhere ; no one was obliged to pay except for the school of his faith. Then comes 1881, 44 Victoria, which is in the Book of Statutes, chapter 4. It repeals the former Statutes and makes the same provision for the appointment of a Board of Education. except that I think it was in a different majority, viewing the preponderance which had come about the Protestant population. The joint board was made to consist of 21, 12 and 9, but the powers of that joint board as a whole were reduced, the former power of selecting books, maps and so forth and altering districts being given to the sections.

The Lord Chancellor. It is section 5, sub-section C.

Mr. Blake. I was endeavouring to refer to the powers of the board as a whole. Certain powers were taken

away and given to the sections, and as your Lordship sees, section 5 provides that the board shall resolve itself into sections, and to each section is given complete control over its own school with this exception, that in the case of books having reference to religion and morals the selection of the Catholic section of the board shall be subject to the approval of the competent religious authority.

Lord Shand. What is that?

Mr. Blake. I suppose the Hierarchy. I do not know whether that goes to St. Peter's in the end.

Lord Shand. It is their own denominational authority. I thought it might be some general authority.

Mr. Blake. Surely it was intensifying the denominational characteristics, if possible. There is no generally competent authority there or anywhere else that I know of. Once again we are reaching after a common religion. Each section is to have control and management of its schools, to examine, grade, and license teachers, to select all books and maps with the above provision and to appoint inspectors. I refer also to sections 78 and 79. Then under section 12 the school districts were regulated by the Municipal Councils. It was provided that schools of both kinds may occupy the same territory.

Lord Shand. That had been provided for.

Mr. Blake. Yes. This is a repeal and recast of the law. It gives you the law as it stood at the time of the Act of 1890.

Lord Shand. Then it is not of much value looking back to anything if that is a repeal and recasting. It gives the history of it, but if this is repealed and recast you get in substance in this Act what you say were the privileges.

Mr. Blake. This is the condition of things as it stood in 1890, and it contained our existing privileges. For the purpose of showing how we stood, the Act of 1881 is apt. Under that Act, section 13, five heads of families with 15 children may be a school district so that although the districts were to be arranged by the Municipal Councils any five heads of families with fifteen children were entitled to have a school. The school trustees of

each district were to be elected ; the Municipalities were to raise by taxes the amount required by each district. The ratepayers were to pay to the schools of their own denomination, and in no case otherwise. Then there is the provision for the cases of corporations and of property held jointly, a provision as to how their rates should be divided. That is, 28 to 32, 1884, gives the legislative grant to be divided between the sections in proportion to the number of children. Those are the most material provisions, and although there were slight amendments even of this Act, yet there was no subtantial amendment nor anything as I understand tbat interfered with any of the questions your Lordships have to deal with until the Act of 1890 came and swept all away and substituted the system now in vogue. Well, now, by that Act, as I have stated, the Roman Catholic school property was practically confiscated, not by changing the ownership of the property in one sense, because it was in the hands of school trustees appointed under the old law, but by changing the character of the trustees in whom it was to be for the future, by providing for trustees who were to administer a non-sectarian or non-denominational system being elected, and for the property being so controlled. Thus, by so altering the character of the education, the Roman Catholics could no longer make use of the property, and in some cases, where the population was mixed of course, the complexion of the constitution of the Boards was changed. Wherever you had a district in which Roman Catholics had their separate school, and in which under the new regulations a public school was to be managed, the trustees of that school being chosen by the whole of the district, might be Protestant in whole or in part. The 3rd section of the Act of 1890 provided, in fact, that all school districts agreements and assessments should be subject to the provisions of the Act. By Section 4 the old trustee was to continue as if his term had been created by virtue of an election under the Act, and by Sections 6 and 7 certain limited religious exercises were to be permitted. By Section 8, public schools were to be entirely non-sectarian, and no religious exercises allowed, except as above provided.

By Section 108 "Any school not conducted according to all the provisions of the Act, shall not participate in the Grant." (4) "No teacher shall use or permit to be used as text books any books in a model or public school, except such as are authorised by the Advisory Board, and no portion of the legislative grant shall be paid to any school in which unauthorised books are used."

Now I wish to observe this also that it has been suggested on a former occasion—although the argument has not in my mind as direct an application as it had upon that occasion—it has been suggested that whereas the right of the Roman Catholics formerly was to be free from assessment to denominational schools, their right now is to be free from assessment to non-sectarian schools, and that is a different sort of business. Of course the right to be free from taxation for the schools other than schools of their own faith, is a very important part of the whole, one of the most important parts of the whole. I submit it would be absurd to say that the difficulty was removed by making the schools to which the Catholics are to subscribe what is called non-denominational or non-sectarian. What was their privilege? Their privilege was that the public taxes should be devoted to the education of the children of the country in proportion to the population of the different faiths, and therefore (which is all they are interested in) that they, the minority, should get the proportion due to the proportionate number of children of their faith that they should raise such local taxes as they required for carrying out their part of that system educating the children of that religious minority, and that the rest, the majority, should raise such as they required for carrying out the education of their children. And to allege that because under the new system—the fundamental objection of the Roman Catholics being against a system in which denominational and dogmatic religious teaching is not admitted and is not interfused with the whole of the education—because for that is substituted a non-sectarian system of education which they object to, therefore no right or privilege of theirs secured to them under the law in respect of immunity from taxation is

obviated, is to my mind nothing less than futile and absurd. They are to be exposed under this view to double taxation which they had not before———

Lord Shand. Can you call it double taxation? They are exposed to taxation, but if they wish it they must provide another school. You cannot call the second a taxation, can you? If you are not content with the schools that are now established, you have voluntarily to provide others. I was challenging your expression "double taxation;" the second is not taxation but voluntary payment.

Mr. Blake. Very well, my Lord.

The Lord Chancellor. It is clear under the British North America Act that the privilege of having a separate system, and not being brought within an undenominational system, is one of the rights and privileges intended to be preserved.

Mr. Blake. That was the Ontario system. It existed. It was there. You had a public school system non-denominational. The futility of this argument is to be shown from the facts proved in the case presented on this Appeal, because all the material which was before your Lordships in the other case was laid by the Order of the Governor in Council before the Supreme Court. The undisputed fact is that the practical operation and working under the new law of so-called non-sectarian public schools is the same as was the practical operation and working under the old law of the so-called Protestant schools. So that the thing obligation to contribute to which we escaped in practice was the same thing which is now erected. It may be that there was a power to have additional religious education in the old Protestant schools, but the particular proofs to which I shall refer your Lordships, and which your Lordships accepted as stating the facts, in truth they could not be contradicted, indicate that under the new and under the old the rule was the same. In a word, the condition of things foredoomed a common system of education conducted for the benefit of the various Protestant denominations to something next door to secularity. It was impossible in practice to provide for fervent, energetic, strictly

outlined dogmatic teaching in a school which should concentrate and enlist the loyalty and sympathy and support of Anglicans, of Presbyterians, of Methodists, and some of the other denominations which were there. So that the conditions of the case show that for all practical purposes your statutory Protestant denomination is, and must be, a denomination which can only stand together as a denomination because it gives up for the occasion the distinctive features of denominational teaching, and, in fact, gives up everything but the religious exercises to which I have referred. That was the condition of things before. That is the condition of things now. And that under the condition of things there should be any doubt that we have in 1881 important rights and privileges of a minority in relation to education secured by Statute, which rights and privileges have been swept away, of which we have been divested, does seem to me to be a futile argument.

I pass on now to the construction of the two sections that are most important. The two sections which deal with this subject as applied to Manitoba either together or exclusively. As to section 22 I am now arguing the case on the theory that I have to rely on section 22 having already referred to your Lordships the only observations I can make, those contained in the judgment of Mr. Justice Fournier as to the applicability in that sense of sub-section 3 of the British North America Act. I have said that I entirely concede the absolute necessity of grappling with the meaning of this sub-section both from my point of view and from the point of view of my learned friends.

Lord Shand. If you get it under either section it serves your purpose, does it not?

Mr. Blake. Certainly.

Lord Shand. Which do you say is the wider section?

Mr. Blake. I think the Manitoba section is the wider section. That is the view I intend to press upon your Lordships. If I were to commence to construe sub-section 2 of 22, I should be met at once by such observations as these: "You must look back and see what is the effect of the other Act. You must construe it by

the light of the other Act," and so forth. Therefore, inconvenient in one sense as the course is, and quite ready as I am to adopt any intimation from your Lordships as to your preference in the argument, I have thought it better——

Lord Shand. It had not occurred to me that you could narrow the meaning of Section 2 of the Act of 1870 by the terms of Section 3 of the previous Act of 1867, if it is wider in its terms.

Lord Watson. It seems to me to be a good deal wider in its terms. Sub-section 2 of the Manitoba Act refers to any Act or decision of the Legislature of the province or of any provincial authority, sub-Section 3 of the British North America Act does not deal with any Act or decision of the Legislature.

The Lord Chancellor. It removes the doubt, but it is by no means certain that "provincial authority" does not include the Legislature.

Lord Watson. It uses the word "Legislature." Your Advisory Board is a provincial authority.

Mr. Blake. If your Lordships think it more convenient to pass away from the construction of sub-Section 3.

Lord Watson. I am not sure, if within the same clause, the word "Legislature" is used as having enacted a Statute that it is not intended to include the same Legislature; it may mean simply that the Governor-General is to have control over these provincial authorities, which are constituted for the purpose of carrying out the Act. I do not wish to give a final intimation of opinion, but I do say that the two clauses are not in similar terms.

Mr. Blake. Doubtless.

Lord Watson. And that sub-Section 2 of the Manitoba Act will obviously serve your purpose better than the other.

Mr. Blake. "How happy could I be with either." Your Lordship, before arriving at a conclusion upon that restricted meaning of sub-Section 3 would, I think, enter into a number of considerations, including, for example, sub-Section 4, which to my mind adds a good deal of

colour to sub-Section 2 of Section 22. It is altogether in my favour to give a narrow construction to this one.

Lord Shand. What do you say is the meaning of the words "Provincial Authority"?

Mr. Blake. If your Lordship asked me, I should have said that you could not throw any light on the construction of an Act of the Imperial Parliament passed in 1867 by the language used in an Act of the Canadian Parliament in 1870. I should say, going back, therefore, unenlightened as to the intentions of the Imperial Parliament in 1867 by the expressions of the Act of Parliament of Canada of 1870, and dealing with this Section with the light thrown upon it by Section 4, that any provincial authority did include the highest provincial authority—that provincial authority which moulds all others.

Lord Shand. Namely?

Mr. Blake. The Legislature. I should have thought that the word "Act" was a word appropriate to the conclusions and findings of the Legislature. I should have said that the circumstance that a provincial law is by the 4th Section indicated as being perhaps called for in order to carry out an Appeal, and that ultimately a remedial law of the Parliament of Canada is indicated as the proper remedy for the execution of an Appeal, indicates something much stronger than the mere dealing with provincial authorities, officers, Administrative Boards and so forth, under the control of and susceptible of being handled by the Provincial Legislature itself. There are numerous observations which I should have made, and my intention had been to enter into an enquiry on that subject, but perhaps your Lordships would prefer that I should——

The Lord Chancellor. Take your own course, Mr. Blake.

Mr. Blake. I will state as briefly as I can the line of observation in part, I daresay, favouring my learned friend's views, which I would make with reference to sub-section 3. I am endeavouring to curtail the elaboration of that as much as possible. I have said that I suggest that the Appeal is to be from an Act which is

the appropriate word for an Act of Legislation an Act of any provincial authority, and that the Legislature is included, it being the chief provincial authority. I have said that the provision in sub-section 4 of the remedy "in case a requisite provincial law is not made" indicates that something which the Provincial Legislature had done could be complained of. To place the Acts of the Legislature outside of the Appeal would be to give the Appeal only from decisions of officials created by and acting under the authority of Acts of the Provincial Legislature. Such decisions would be either warranted or unwarranted by the law under which they were created. If they were warranted there would be no ground for an Appeal whatever. If they were unwarranted the Local Legislature putting upon its Statute Book, and keeping upon its Statute Book, the law, and the local Courts administering the law, would, of course, enforce the observance of their own law by their own officers, and therefore there would be no need for nor any use of an Appeal. But if you are to assume that this Appeal is solely in order to prevent the danger of local officers of the Province disobeying local laws of the Province, and to force local officers to obey local laws, to what use? Because if the Legislature thinks that the local officers in their neglect are acting in the best interests of the country they will alter the law so as to make it conform to the action of the local officers, and as there is on the hypothesis no Appeal from legislation you reach absolute futility. Unless you get an Appeal from that which controls all laws, which governs all laws, which may make all that is wrong right and all that is right wrong, you get no effective Appeal whatever.

The Lord Chancellor. It seems clear that it contemplates a remedy for a state of things done in and according to the law existing in the Province. It must contemplate that apparently, because if it did not, new legislation would not be required. It contemplates certainly that the only effectual remedy may be new legislation.

Lord Shand. Has there been any difficulty in the

decision in the Court below as to the meaning of the words "any Provincial authority?"

Mr. Blake. Oh, yes. When they come to deal with the British North America Act, they find as one of their grounds, that "Provincial authority" in the British America Act does not include it. The Chief Justice rests his decision very largely on the light which he says is thrown by the words used there.

Lord Shand. Take the later Act, the words are, "or any Act or decision of the Legislature of the Province, or of any Provincial authority." Have the Judges in the majority given any narrow meaning to that expression?

Mr. Blake. No, it is impossible. There is no such attempt. The Legislature of the Province is the Legislature of the Province. They have concluded by a majority that the British North America Act, although it is doubtful—the Lord Chief Justice says he is very doubtful; he finds very great difficulty in arriving at that conclusion—yet that the British North America Act does not embrace an appeal against the law.

The Lord Chancellor. Certainly it *may* embrace it. If it is intended to embrace it the language is not happy.

Mr. Blake. That is an observation which is not infrequently made with reference to Acts of Parliament.

The Lord Chancellor. It certainly is not conclusive against its having been intended.

Mr. Blake. No.

Lord Watson. The two Acts are not the products of the same Legislatures.

Mr. Blake. No.

Lord Watson. Therefore we cannot argue from one Act to another.

Mr. Blake. I thought not; at any rate from the later to the earlier.

Lord Watson. If it had been a British Act, of course, it would have been said by one side that the second Act was in order to make things plain. It would have been said against that that it shewed that they recognised the distinction.

Mr. Blake. Yes, I shall have when I read the Judgment of the Chief Justice to recur to some extent to that.

Lord Watson. The Legislature, the body which is supreme, when Provincial legislation is spoken of, is the Provincial Authority?

Mr. Blake. I should have said it was the Provincial authority.

Lord Watson. I do not think they speak of this in that way.

Mr. Blake. In the second Act it says, "The Provincial Legislature or any Provincial authority," and that is one argument used against me. They say it is clear that there was an interpretation by the Canadian Parliament, that high and competent authority, upon the phrasing of Imperial Legislation, showing that "Provincial Legislature" was not included in "Provincial authority," because they speak of the one or the other.

The Lord Chancellor. It is very difficult indeed to rely upon such an indication as that If anybody had said it is not clear that the "Provincial authority" includes "the Legislature," it might be said, "Oh, well, we will make it clear."

Mr. Blake. That is the argument I intended to use.

I go on now to a point which is absolutely common to both Acts, and therefore has added importance. It is absolutely common to both the sub-sections. The arguments seem to me to be just the same. Grant me for argument's sake that the Appeal in the British North America Act extends to Acts of the Legislature: I want to know to what kind of Acts it extends, whether to Acts *ultra vires* or to Acts *intra vires?* This question arises here, because the argument on the one side is that in the result an Appeal is only an additional sanction for sub-section 1, and that it has not to do with any contravention or rather change made by the Legislature in Acts which were *intra vires.*

Now there are various arguments which to my mind make a cumulative case absolutely conclusive against that interpretation.

Lord Shand. If an Act is *ultra vires*, you do not require an appeal to the Governor.

Mr. Blake. I was about to say so.

The Lord Chancellor. Moreover, you cannot require another Act, because there would be no end to it in that case.

Mr. Blake. That is a construction against which I have to contend. I think it is absolutely clear the other way, but I say so with great diffidence, having regard to the opinions expressed.

Lord Watson. Sub-section 1 in both are imperative, "Nothing in any such law shall prejudicially affect."

The Lord Chancellor. Is it disputed that under that first sub-section you could obtain a decision that the Act was *ultra vires* in that respect?

Mr. Blake. Oh no, my Lord. We have obtained a decision that it was *ultra vires* below, and your Lordships reversed it here.

Lord Watson. If we had held it to be *ultra vires* the result would have been that the law would have been inoperative.

Mr. Blake. Surely.

Lord Watson. The Act, sub-Section 1 does not appear to me to raise any case of the discretion of the Governor-General.

Mr. Blake. Your Lordships, I am happy to observe, are anticipating all that I was about to say. Looking at the enabling clause and sub-Section 1, the enabling clause gives power to enact subject to certain provisions. So far as an attempted law may contravene those provisions it is *ultra vires* and is absolutely void. It cannot be used against anyone. The Courts will hold it waste paper, just as they set aside the bye-law in Barrett's case below on the erroneous idea that the law had contravened the provisions, but on the accurate idea that if it had contravened the provisions it would have been void. It was not argued before your Lordships that the law would not have been void if it had contravened the provisions. The question was whether a case of contraven-

tion has arisen. If the case which the Court below assumed had arisen, the contravention being shown, there would have been an end of the law.

Lord Shand. There must be a marked difference with reference to anything interfering with what was the state of matters at the Union, and anything interfering with the state of matters which had been changed by the Legislature after the Union. In the one case it would be bad in point of law and *ultra vires*, in the other you can destroy the right, but that destruction of the right is liable to appeal.

Mr Blake. That is precisely the line which I am about to adopt.

Lord Watson. It may be qualified or abrogated.

Mr. Blake. The case does not arise if there are privileges which have not been broken. I suggest that the provision of the enabling Clause with sub-section 1, is absolutely complete in itself. It requires in its nature no supplement of any kind—no appeal to a political executive Tribunal as the Privy Council of Canada—no appeal to a legislative Tribunal as the Parliament of Canada, is wanted. Nothing exists for the executive tribunal or for the legislative tribunal to operate upon. No question of expediency, no question of discretion arises. The course of law is all, and it is enough. That is the whole theory. I ask your Lordships to attach force to that view. The general cast of the British North America Act forbids the construction that an appeal of this nature shall exist against an Act *ultra vires* of the local Legislature, because there may be and there have been innumerable attempted excesses *per incuriam* or otherwise of their legislative powers by the Provincial Legislature and by the Dominion Parliament. It must have been foreseen that under a Statute like this, with its difficulties of construction, with its interlacings, and over lappings of jurisdiction, such excesses might take place. But no special remedy is given for any of those excesses whatever. The law is held to be sufficient. The attempt is void. You depend on your

common right to attack, if necessary, or to defend if necessary, before the Courts of Justice of the land, who compare the Provincial or the Dominion Act as the case may be, with the Supreme Law, the Constitution, and who find whether it is within or without the power. If it is without the power, the Act is at an end. That was deemed adequate to all the people of Canada in order to deal with all excesses of jurisdiction. Why should there be any necessity, if that be so, for the establishment of this particular tribunal to deal with this dry legal question of excess of jurisdiction? What propriety would there be in setting up the political tribunal of the Privy Council of Canada to deal not with any question of political expediency (as whether legislation should be dealt with in a special way,) but to deal with the question of law whether a particular Act accorded with or went beyond the Constitutional limits of the powers of the provincial Legislature?

These are general considerations. They apply to the question whether you ought to expect any further protection in this regard, but if you look at the language the argument is overwhelming, and of course the same observations apply absolutely to sub-section 2 of the 22nd section of the Manitoba Act. There is no intention needlessly to supplement by this extraordinary and inapt remedy the absolutely and complete provisions of sub-section 1. The remedy is an appeal; but you do not appeal from null or void legislative Acts. You resist in Court an attempt to make them a reality. You demand justice with reference to any man who sets up a document which is a void Act. The appeal which is given applies to Acts or decisions which "affect any right or privilege;" but a void Act affects nothing. It only makes an ineffectual attempt to affect. It is a futile and absolutely void attempt to affect, which the Courts do not regard. The Appeal is against something which does affect the right. The appeal is to a political and non-judicial tribunal. Could it be said that it was deliberately intended by the British North America Act to change the course of justice by giving an appeal on a question of law to a tribunal like that? What does *this*

appeal aim at. It aims at obtaining from the Privy Council of Canada a declaration that some provincial legislation is required to remedy an accomplished wrong. Legislation is required for something that has been done which is wrong; but no legislation is required to remedy an unsuccessful attempt, an abortive attempt to do a wrong, as would be the case if you were dealing with something that was beyond the powers of the legislature. If there had been privileges by law or practice in Barrett's case, no appeal of this kind would have been required, as Sir John Thompson put it in the memorandum upon the theory of which he deferred until this stage the proceedings in this appeal. No appeal is required at all, because the law has power to deal with the case.

Lord Macnaghten. No appeal would lie because it says "from anything affecting any right or privilege." Subsection 1 does not affect it.

Mr. Blake. That is what I say. I say this Appeal is from a transaction which does something. That would be an appeal from an abortive attempt to do something.

Lord Macnaghten. An appeal from something as affecting the rights and privileges which the Statute itself says does not affect them.

Mr. Blake. Yes. On the theory of the case, nothing in the law shall prejudicially affect, and therefore any case which appeared to affect would be void, and would in fact not affect; but the Appeal is from something which does affect.

Lord Watson. It simply shews that there may be legislation affecting the interests of the denominations, which is permitted.

Mr. Blake. Certainly. The legislation I complain of is permitted.

The Lord Chancellor. It is quite clear legislation which affects minorities is permitted if it does not affect something which exists prior.

Mr. Blake. Quite so. It is permitted, and the only safeguards we have are two, and I am coming to them presently. There is the safeguard of Appeal, and that is the check against the effectuating of that legislation. It is good law if assented to by the Lieutenant Governor;

it comes upon the Statute Book properly; and no one can properly contest it. Now the Appeal is to end how? In case the Provincial Legislature does not act in pursuance of the views of the Governor in Council it depends on the determination of the Canadian Parliament whether or not they will pass a remedial law, "make remedial laws."

To remedy what? To remedy something which has gone wrong. To remedy something affecting a right, not to remedy something abortive, not to deal with waste-paper, with something which by the Statute has already been in effect declared waste-paper, but to remedy, as I say some existing wrong.

As I submit the class of cases in the mind of Parliament in sub-section 3 of the British North America Act and sub-section 2 of the Manitoba Act was another class altogether from that which was dealt with by the first sub-section. It was a class in which the Legislature or the authorities acted *intra vires*, but in such a manner that they did affect certain rights or privileges existing at the date of the action complained of. Now I will refer your Lordships to your Judgment at page 153, line 34, as throwing some light also upon this point.

"At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so-called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of sub-sections 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the Country."

I do not say that your Lordships will consider that as conclusive, and of course to the extent to which it favors me it might be conceded in a certain sense to be *obiter*. But there it is. Your Lordships thought that this particular Appeal did not affect the appeal to the ordinary tribunals of the country in the case on hand, which was the case of a suggestion that the law had contravened the fundamental law. Then again as to an appeal from the provincial authorities on pre-Union laws, is the decision of the provincial authority on the pre-union law not according to law?

If so the local authorities should of course maintain and enforce the local law. Is the decision within the local law? Then no successful appeal is possible. But I acknowledge and I suggest that it may be that cases of enormously wide discretion may exist under the law in administrative bodies with reference to the class of subjects which I aver are covered by this Appeal.

The Lord Chancellor. The law might not in itself if administered in a particular way affect any rights or privileges, but you might have such power vested in an individual as enabled him to affect them.

Mr. Blake. You give such a power to make regulations without, perhaps going beyond the law in a way which would make Courts of Justice say you were going beyond them, that the practical effect would be to *thwart* what you found was the intention of the law; I fancy it was to meet that. There is no doubt that in some provinces of Canada, and I believe examples are to be found elsewhere, a very large proportion of the educational system has by the law been entrusted to administrators, the administrators being responsible of course to Parliament, who will amend and alter the law in case they find the authority is abused. The administrators may have power to colour and change the system to a very great extent.

Lord Shand. Have there been appeals of that kind—not from an Act or decision?

Mr. Blake. No, there is no instance of any appeal. This is the first.

Lard Shand. A pretty large question would arise afterwards if there should be any future legislation and a prospect of other discussions.

Mr. Blake. That would be an additional good fortune, my Lord.

Lord Shand. "Or in case any decision of the Governor-General in Council on any Appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws." It is very curious.

Mr. Blake. Now all that I have said up to this applies as expressly to sub-section 2 of Section 22, as to sub-section 3 of Section 93. But what I am now about to point out to your Lordships has a more limited application, although I think it throws some light upon the other statute. If your Lordships will look now at sub-section 3 you will find that the draughtsman, as too often perhaps happens, has attempted to mass together——

The Lord Chancellor. Do they say that Sub-section 2 only applies as regards legislation for the purpose of enforcing No. 1 ?

Mr. Blake. Yes.

The Lord Chancellor. Only.

Mr. Blake. Yes, my Lord, only. Of course it is enough for me if it applies to both.

The Lord Chancellor. If so upon the construction which has been put upon sub-section 1 by this Board the whole has no application at all.

Mr. Blake. The whole protection given to the minority might just as well be blotted out. It would be blotted out. Your Lordships have established that there was no occasion for the first sub-section, and then there would be nothing whatever for the Manitoba minority at all.

The Lord Chancellor. This is not a general enactment applicable to the Provinces, to some of which it might apply and to others not; it is a special enactment applicable only to Manitoba.

Mr. Blake. And that is part of the light which is to be thrown upon it by the argument I am now about to adduce. I want to find what the effect of the general provision was over the other provinces. My argument is that although it was by no means intended by the British North America Act to establish a general equality of condition where pre-Union conditions differed, yet, subject to the one arrangement made between Ontario and Quebec, it was intended to apply a similarity of conditions of protection and of check to Provinces similarly circumstanced ; and I find thus in this case as in other cases of the British North America Act a general attempt to deal with one plain and level condition which was to be created for the Provinces, though not an attempt to put them all in the same condition by some

forced enactment at the time of the passage of the Act. Your Lordships will please to look at sub-section 3, and allow me to divide it up into the two classes of cases with which it clearly and on its face deals. "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."

Will your Lordships permit me to take first of all the second provision, and to read the clause with it, "Where in any province a system of separate or dissentient schools is after the Union established by the Legislature of the Province an Appeal shall lie from any Act or decision." I ask your Lordship to say that is a perfectly fair reading. Now is it not absolutely clear———

The Lord Chancellor. In the third sub-section as regards the first part of it, "Where in any province a system of separate or dissentient schools exists by law at the Union," a consideration of the state of things created by subsequent legislation could not exist according to you, because it would be prevented by sub-section 1.

Mr. Blake. There might be some changes.

The Lord Chancellor. I mean a change which prejudicially affects by taking away their rights or privileges.

Mr. Blake. I wish to put to your Lordships an argument in a moment which involves the question of "prejudicially affecting." There is a distinction adverted to before on that, which I intend to deal with later. Shortly it is this: In the case of rights and privileges protected from being affected by a subsequent change in the legislation—additional legislation—new legislation—which did not alter absolutely to our disadvantage but which gave, as for example, an added grant upon principles which gave more absolutely to us than we had before, but gave less to us relatively to the majority than we had before—might involve an "affecting," by putting us in a position which could not be said to be "prejudicially affecting," because we got more money.

The Lord Chancellor. Could you say that there would ever be an Appeal against something which affected you beneficially? Your argument suggests that—that although there is more money, on the whole there is a prejudice

otherwise you would not appeal against a benefit?

Mr. Blake. I have just endeavoured to state——

Lord Watson. We were dealing with the question under that sub-section—whether an Appeal is not given to the Governor-General from a decision of any Provincial authority constituted by this same Act.

Mr. Blake. Upon that I have already addressed the argument to your Lordships which occurred to me.

Lord Watson. The clause is perfectly intelligible as giving an Appeal against the administration of existing Acts. The decision of a Board appointed by one of these Acts establishing denominational schools and separate schools, might very well be appealed.

Lord Shand. Do you contend that under sub-section 1 and the first part of sub-section 3, there would be an alternative remedy in case of legislation which went too far?

Mr. Blake. I do, as a possible construction.

Lord Shand. And you might have an action in Court to say that is bad—that is absolutely struck out, or, I may go to the Governor about it.

Mr. Blake. My view is, that though the clause may be wide enough to embrace these things, the mind of Parliament had reference to other things.

Lord Shand. I do not know what benefit or use these may be.

Mr. Blake. They are no use. I was desirous to be allowed to point out to your Lordships what is the necessary result of the division into its two parts of this clause, beginning with the case of post Union Acts. Your Lordship will see at once why I am going on sub-section 2 of 22, and contending that it should be held to apply in a case in which there are no pre-Union rights or privileges at all. Your Lordships have so decided. I have got the case of no pre-Union rights. Now, is there in the British North America Clause, any provision for a case in which there are no pre-Union rights? I say, yes, expressly, and I read this clause in that way. "Where in any Province a system of separate or dissentient schools is after the Union established by the Legislature of the Province an Appeal

shall lie." Is it not perfectly clear? And it is enough for my purpose that the Imperial Parliament contemplated giving an Appeal to the Governor in Council in cases in which there were no pre-existing rights, no pre-Union rights, no rights protected by sub-section 1 at all, no rights, a contravention of which would be a null Act. That is perfectly plain. These were the cases of Nova Scotia and New Brunswick.

Lord Watson. The difference becomes material having regard to sub-section 2 of the Manitoba Act, at least to my mind. The Appeal in the two cases is of a different kind. The Appeal against an Act of the Legislature it may mean, and does mean, I take it. The Act of the Legislature which has become law would be the law of the province if it were not modified on appeal to the Governor-General. The effect of that is that if the Governor-General decides that it is wrong that law will stand modified.

The Lord Chancellor. It must be modified by legislation.

Lord Watson. It must be modified by legislation, and if it is not modified by the Provincial Legislature in itself, then provision is made for the modification being enforced by an Act of the Parliament of Canada. In the other case the Act or decision of the Legislature of the province, or of any provincial authority affecting the right can be abrogated without touching upon the legislation which established that provincial authority. On the other hand it might very well be that abrogating an Act of the provincial authority which affected the right or privilege of the Protestant minority, might be effected without in the least degree touching upon educational legislation.

Supposing the Advisory Board laid down that certain Roman Catholic books should be used in those schools where Roman Catholic publications were to be permitted. The Governor-General would have a right to say I cancel that ordinance, and I say that such other books substituted by the Roman Catholics themselves shall be substituted. The grievance might consist in the selection of books by an authority constituted for the

purpose of administering the Act. That might very well be so. It challenges what is done by those who are administering the law. I quite admit their actions may be of such a kind that one runs very closely to the other. There might be a challenge of both. First against the statute giving too great latitude, and secondly against the action of the Administrative Board.

Mr. Blake. I say at this moment, my Lords, I am engaged upon the argument of the meaning of this Clause.

The Lord Chancellor. What you are saying is this, that the third sub-section of Section 93 clearly pointed to the protection of rights acquired by legislation subsequent to the Act of Union.

Mr. Blake. Yes.

The Lord Chancellor. That is what you are upon.

Mr, Blake. That is all I am upon, and respectfully ask your Lordships that I may be permitted not to further discuss the question whether this includes legislation or not, because I think I have already dealt as fully with that whole subject as I am able. I do not think I can usefully add anything further upon that. What I maintain is this, that I have submitted to your Lordships that the Imperial Parliament designed that in a case where there were no pre-Union rights or privileges whatever, where, therefore, there was nothing which could make any law in relation to education void under sub-section 1, where by consequence the Provincial law would be effective law, it yet provides an Appeal against post Union legislation———

The Lord Chancellor. Or the effects of post Union legislation———

Mr. Blake. Or the effects of post Union legislation: one or the other, affecting any right or privilege of the Protestants, of the Protestant or Roman Catholic minorities. No pre-Union right could in that case be established. From the very language of the Act the right affected was to grow out of the power exercised subsequent to the Union by the legislation of the Province to set up separate schools. The section is, "Where in any Province a system of separate or dis-

sentient schools * * * * is after the Union established by the Legislature of the Province an Appeal shall lie * * * * from any Act or decision * * * * affecting any right or privilege." Therefore an Act or decision passed subsequent to the post Union legislation. An Appeal was given from an Act affecting things created by the Legislature of the Province, *intra vires* of the Province, in the case of the two Provinces, Nova Scotia and New Brunswick.

The Lord Chancellor. That might be satisfied supposing you had a system of non-denominational education previously which was open to all, a system we will suppose somewhat similar to that which was created in 1890 in Manitoba, and then you afterwards establish a denominational system. It might be intended to preserve the rights which existed by that legislation to a conscience clause, or something of that sort. It can hardly be said that those words would be purposeless, unless they intended and included rights created by post Union legislation. They may be a protection from post Union denominational education?

Mr. Blake. Not so, my Lord.

The Lord Chancellor. I understand what you say. It could not be so, because the first sub-section deals with that case.

Mr. Blake. Not only that, but because this section in the limb with which I am now dealing deals only with the case of the creation of privileges after the Union.

The Lord Chancellor. Is it necessarily the creation of the privilege? It does not say the creation of the privilege. They set up after the union these denominational schools, we will suppose. These denominational schools may be so administered as to affect rights then existing—persons who desire undenominational education. It is true denominational schools have come into existence, but there are two sides to this question. You may injure denominational people by non-denominational education, you may injure non-denominational people by denominational education, and therefore the words would be satisfied by an application (I do not say there was such a case) to a case where post Union denominational education affected the rights of those who desired and had theretofore enjoyed non-denominational education.

Lord Shand. That does not in the least affect your argument that you are putting.

The Lord Chancellor. Well, it affects the argument Mr. Blake is putting, but it does not affect his argument under Section 22. I understood the argument to be this—and if it can be established there would be force in it as throwing light on the other—that sub-section 3 must have been designed to protect rights acquired under denominational legislation of a post Union character. It does not seem to be certain that that must be so, and, if so, the force of the argument is gone as assisting you.

Mr. Blake. Will your Lordship, then, allow me, for the purpose of meeting your argument, to refer to the other limb as throwing light on this one. The cases provided for are two in class. They are exhaustive. There is to be Appeal in no other than either of these two classes of cases. The first class is where a system of separate or dissentient schools exists by law at the Union. Now that is already protected. It is protected by the prior clauses. It cannot be struck at.

The Lord Chancellor. Well, it is protected so far as regards the law. It cannot be altered by law, but it may be most materially affected by the administration of the law.

Mr. Blake. Yes, my Lord, but your Lordship is dealing with it in the sense of protection of the non-denominational part of the community, but it is the protection of those who go for the system of separate schools such as the Roman Catholic denominational school, or the dissentient school, which was the title mainly of the distinctively Protestant separate school in the Province of Quebec. Those were the two systems which were referred to.

The Lord Chancellor. Yes, but then you may have thereafter what I will call the Quebec system, where the majority is denominational and creates a denominational system. You might have that created afterwards, not having existed at the time of the Union.

Mr. Blake. Doubtless.

The Lord Chancellor. And by its creation affecting the educational rights which were existing at the time of the Union.

Mr. Blake. Not affecting it with regard to this Appeal because upon that theory it is a general system which is to be altered—the general system applicable to the majority of the population, but this Appeal is only from Acts which affect the minority of the population.

The Lord Chancellor. I am putting the case where you had a non-denominational system existing.

Mr. Blake. Take Ontario.

The Lord Chancellor. Very well, we will suppose that afterwards the cases were reversed, and that in Ontario the Roman Catholics became the majority and the Protestants the minority. Of course we cannot take that particular case, because Ontario and Quebec are provided for by the special provisions, but I am taking the case of another province.

Mr. Blake. Will your Lordship allow me to interpose. It is utterly impossible for your Lordship, knowing all the circumstances of the case, to omit Ontario and Quebec, because there were four provinces covered by the British North America Act, and you know what their laws were. These clauses show that there was a system of denominational schools in Ontario and Quebec.

The Lord Chancellor. What were there in the other provinces?

Mr. Blake. There were none, my Lord. In Nova Scotia and New Brunswick there was no system of separate or dissentient schools.

The Lord Chancellor. Was there an educational system?

Mr. Blake. Yes there was; but one, which did not provide for separate or dissentient schools.

The Lord Chancellor. But in one of the provinces there might have been a system which did establish a separate system, and you might have needed, owing to the establishment of that separate system, a protection for the minority who were outside it, or did not want it—just as much as a protection for the persons who were in the minority.

Mr. Blake. Your Lordship suggests that the application of it would be to a case in which the majority in the provinces established a system of separate or dissen-

tient schools—separate or dissentient schools which in all cases are schools of the minority—for the majority, and so oppressed the minority by making the general public school system a system to which they could not send their children.

Lord Watson. I think it was intended to give an equal remedy.

Mr. Blake. I ask your Lordship to consider that it is the establishment of a system of separate and dissentient schools, which means schools for the minority, and once that is established, whether they were established before the Union, or if they had been established after the Union, then an Appeal lies.

The Lord Chancellor. You say that separate or dissentient cannot mean a general system; that separate or dissentient implies that it is a separate part.

Mr. Blake. You are separate. What are you separate from? From the bulk. You are dissentient. You are dissentient from the majority.

The Lord Chancellor. I think that may be an answer.

Lord Shand. There is that idea of the minority which occurs afterwards.

Mr. Blake. Yes, my Lord, it is all the same.

The Lord Chancellor. The point I was putting to you would equally affect the minority. If you had a general system established, we will suppose, in Nova Scotia, and the Roman Catholics got the upper hand and established a system of denominational education and said, "We will have nothing but Roman Catholic schools, where nothing but the Roman Catholic religion shall be taught," of course, there the Protestants must be most materially and prejudicially affected by it.

Mr. Blake. Doubtless.

The Lord Chancellor. Do you say that there would be no remedy in such a case as that?

Mr. Blake. The case never occurred to me, because it is so absolutely opposed to all the traditions and feelings and actions of the people concerned.

The Lord Chancellor. It may be that it was not anticipated, and therefore it may be an answer to say that it was so improbable that nobody contemplated it,

and therefore they did not provide for it, but your construction would leave it unprovided for.

Mr. Blake. I have not thought it out. It never occurred to me as within the realms of conjecture.

Lord Shand. The rights and privileges of the Protestants are as well guarded here as the Catholics.

Mr. Blake. Certainly. The intention was to guard them as well.

The Lord Chancellor. Certainly, you are so far justified that the provision relating only to the establishing of a system of separate or dissentient schools does seem to indicate that it was only applying to an educational system thereafter created for the benefit of the minority.

Mr. Blake. For the benefit of the minority.

The Lord Chancellor. I quite agree that the use of the words "separate and dissentient" points to it.

Mr. Blake. Yes, because you have got systems created——

The Lord Chancellor. You say that it is a matter that could uot be contemplated because it is impossible that it ever could come about, but it would be a curious result if there were no protection to either a Protestant or a Roman Catholic minority if you had a denominational system unpalatable to the minority created without any separate system.

Mr. Blake. That is true, my Lord; but I really think that it never occurred to anybody to suppose that it could be done.

The Lord Chancellor. Quite so; they were dealing with places where they had these schools in Quebee and Ontario, and, as to the others, still you might have, of course, a Protestant system.

Mr. Blake. For instance, my Lord, it passes the wildest dreams of conjecture to suggest that there would be a Roman Catholic majority in the Province of Nova Scotia or New Brunswick,

The Lord Chancellor. Supposing that they established a general system of schools, the Roman Catholic majority might be prejudicially affected, and there wotld be no redress.

Mr. Blake. It may be so, but I really conceive that that was a case not thought of. What was apprehended as possible was that the privileges given to the minorities by the existing legislation might be affected or impaired by the majority, but nobody thought of the majorities changing colour, creed or complexion; but that to the full extent all these existing privileges were intended to be guarded by sub-section 1. Then, as I conceive, the intention of this one was to deal with the post Union creation of rights.

The Lord Chancellor. I am not sure that attempting to illustrate the 2nd sub-section of Section 22 by this one is not *obscurum per obscurius.*

Mr. Blake. Perhaps so.

The Lord Chancellor. Although I quite appreciate your point.

Mr. Blake. Then my Lord, I was endeavouring to point out to your Lordships that under that, considering the system of separate or dissentient schools as expounded by the whole clause, the prior parts of the clause and this one, and by reference to the existing plans of separate or dissentient schools, the foundation of the rights acquired in future and intended to be protected, is the establishment of a system of separate or dissentient schools later on in either of the Provinces of Nova Scotia and New Brunswick. That done, an appeal lies from any Act or decision affecting any right or privilege so acquired whether by the Protestant or the Roman Catholic minority. Now, if that be so, and I submit that any reasonable construction is conclusive of that proposition, why should the minority of the Queen's subjects, Protestant or Roman Catholic, in Quebec or Ontario, be deprived of the same right of appeal in the case of any subsequent privileges granted to them, although they had a system of separate or dissentient schools at the Union. I get an application for the first limb of the sentence from the consideration of what the second limb does for those provinces in which there was no pre-union system.

The Lord Chancellor. That of course is on the assumption, I do not say it is well or ill founded, that the privileges and rights intended to be protected by

the third sub-section in the case of the post-Union Legislation, are the privileges and rights acquired under that Legislation which so establishes the separate or dissentient schools.

Mr. Blake. My Lord, in the case of pre-Union legislation it is just the contrary.

The Lord Chancellor. I say you are applying now post union to pre-union legislation. That application, so far as it assists you, depends upon your making good your contention that the rights and privileges intended to be protected by sub-section 3 in the case of post Union Legislation, are the rights and privileges acquired by that Legislation.

Mr. Blake. Granted, my Lord. Then, on that assumption, I point out that it may happen, and, as a matter of fact, it has happened, that in both Ontario and Quebec where there were systems—in the one of separate, and the other of dissentient, schools—at the Union, there has been further legislation granting additional privileges to the Protestant minority in Quebec, to the Catholic minority in Ontario. It is enough for me to say it might have happened, as a matter of fact it has happened. I ask on what principle, on the assumption which your Lordship is making and which I concede, could that minority in Ontario and Quebec be deprived of that same protection for post-Union added rights and privileges granted to them which is given to the Protestant and Roman Catholic minorities in other provinces for rights and privileges created after the Union? And so you get a reasonable meaning and construction for the two limbs without dealing with the pre-Union rights at all. You have two cases of pre-Union legislation where certain rights and privileges have been granted, and are absolutely protected. You have two cases where there were none, and in both those classes of cases it was possible that after the Union, in the one a system might be created giving rights and privileges to the minority and in the other further rights and privileges might be given to the minority. Both these transactions would be *intra vires* but liable to repeal. Acts repealing these rights and privileges would be *intra vires*; but as to repealing, these rights once

created are subject to possible check under an appeal. That is the suggestion I have to make on that subject.

Now one last observation. In sub-section 4 you find "In case any such provincial law as from time to time seems to the Governor in Council requisite for the due execution of the provisions of this section" and so on. The phrase "from time to time" would rather indicate an idea that from time to time there might be transactions affecting the minority, and that from time to time remedial laws might be required, than that it refers to one single set of transactions before the Union, sought to be and sought ineffectively to be struck at, by transactions after the Union.

Now, I do not at this moment turn to sub-Section 2 of 22, because I propose to treat sub-Section 2 separately, so far as it requires separate treatment. I want to finish my examination of the British North America Act on points which are common to it and to sub-Section 2 of Section 22. There are other reasons I aver against 3 and 4 being a remedy for breach of the prohibition in sub-Section 1, and they are to be found in both subsections, in the marked differences between the subsections themselves. First, as to the persons who can take advantage of, or who are within the benefit of the sections respectively. The persons who can take advantage of the first sub-section are "any class of persons" whether the majority or the minority, or any individual as I suggest, belonging to any class, or perhaps any one at all, although he stands alone if he is attempted to be touched or affected by the void law. If he is attempted to be touched or affected by the void law he has a right to complain on being so attempted to be touched or affected. If he is struck at he has a right to set up that the law is void, and this by its nature—by the nature of the provision—and by the definition.

The Lord Chancellor. I suppose you would say that if you had an undenominational system in Nova Scotia or New Brunswick which gave educational rights to all persons of undenominational character it would be an interference with this sub-section 1 if you were to create an entirely denominational system. The words are, "any right or privilege with respect to denominational

schools," but I suppose that would as much cover a right to have education undenominational as a right to have it denominational.

Mr. Blake. That may possibly be, my Lord. I do not know I am sure, I have not considered that question.

Lord Macnaghten. They were guarding denominational schools.

Mr. Blake. I am convinced that the legislation had the aspect of guarding denominationalism.

The Lord Chancellor. It made provision for a denominational system.

Mr. Blake. Theoretically ; what practical men were dealing with was this—that the trend of thought, if there was a trend of thought, was rather in favour of the uniform system, and those who thought that uniform system an abominable injustice in the sense of its allowing denominational education, and compelling children to attend schools where they were taught no religion or a religion which they did not profess, and those who feared the danger of its offending the views of the minority, who insisted on religion being mixed with education——

Lord Watson. I think the difficulty I had in following the argument in connection with this is that sub-section 1 of the Manitoba Act seems to me to be conceived in terms which *prima facie* show that a certain subject was to be excluded from the field of legislation—altogether shut out.

Mr. Blake. Yes, my Lord.

Lord Watson. Well, I think it is hardly probable that the Legislature would proceed to deal with legislation upon that forbidden topic, legislation liable to be revised and altered by the Governor-General to such an extent as he shall think fit.

Mr. Blake. I am very glad to hear your Lordship say so.

Lord Watson. I think the power of the Governor-General must have reference to some subject matter which was within the competency of the provincial Legislature to make laws upon.

Mr. Blake. Yes, my Lord.

Lord Watson. They are subject no doubt to it and they may be constrained by *force majeure* in the shape of the Governor-General and the Canadian Parliament, but until that is done their legislation stands.

The Lord Chancellor. Are there instances of laws of the provincial Legislature having been disallowed on the ground that they were *ultra vires.*

Mr. Blake. Yes, my Lord, there are rare instances of that kind. I may touch upon the subject afterwards.

Now, as I was saying to your Lordship, your Lordship's proposition is that what the Legislature was thinking of and trying to guard against, was the creation of a system by the majority, by which they should compel the minority to attend schools in which religious doctrines in which they did not believe were taught, and would be crammed down their throats. Now that we looked upon as an impossibility. We are not past the age in which it is thought that the proper system may be, (and it is in some places thought to be) one which is absolutely non-denominational, if it can be so framed, and without religion in that sense. That is another question. But the idea of a majority, whether Catholic or Protestant, using or abusing power to force the minority to come to schools and be taught, if Protestants, by a priest——

The Lord Chancellor. No, no ; I do not know that it is an inconceivable case that the Roman Catholic, if in a majority, might create a system of purely denominational schools, with a Conscience Clause. There is nothing extraordinary in that.

Mr. Blake. No ; because the very system of education, as your Lordship finds from the admitted state of facts, is not a mere question of sacred images being stuck up on a wall or concealed in a cupboard, or of the children staying away if they do not wish to attend, but what they contend for is the question of interfusing religion all through the teaching.

The Lord Chancellor. I believe there are Roman Catholic schools in parts of Ireland which are available for Protestant children, and where their only protection is the Conscience Clause.

Mr. Blake. It may be, my Lord ; but of course in this case we are dealing with a state of facts, so far as the facts are concerned, as to doctrines held——

The Lord Chancellor. But it was looking to the future, it was not intended for a time, if I may say so.

Mr. Blake. No, I do not make myself clear. What I

mean is that the doctrine of the Church and the view of the Church, is to teach religion throughout the teaching in the schools. I refer to the evidence which was accepted and upon which your Lordships acted on the last occasion. I will refer your Lordships later to passages of the evidence of the Archbishop which were accepted as common ground, and as correct as to the Roman Catholic view. And I think your Lordships will see that such a view is absolutely inconsistent with the idea that the full development of the Roman Catholic plan which they assert as their right under denominational schools, could be effected by them without doing violence to the consciences of Protestants.

Lord Macnaghten. If an Act, similar to the Act of 1890, had been passed in 1871, you would have had no privileges at all.

Mr. Blake. Granted, my Lord.

Lord Macnaghten. It would have been the first Act. Would you have had any privileges ?

Mr. Blake. I do not think so. I have not considered the subject ; my impression is that your Lordship is correct.

Lord Shand. I think that is quite clear, because it must be a privilege that has been affected by subsequent legislation.

Lord Macnaghten. You say such a thing was not in contemplation at that time.

Mr. Blake. I was not saying that, my Lord, at the moment ; what I say was not contemplated at that time, and is not contemplated now. Much as I may object, the Act of 1890, is the creation of a system in which a distinctly dogmatic teaching contrary to the opinions of those who have to attend the schools would be forced upon them.

The Lord Chancellor. Of course you might have this state of things. This is a Manitoba Act. It is framed with a view to the condition of things there. It may have been known that at that time the parties were as nearly balanced that to take for instance the Roman Catholics, they were quite able to protect themselves against legislation which would deal with them unfairly, but that the character of the population as it grew by

emigration and so on, would change, and that in that way the legislation which was then obtained, and which they knew they were in a position to obtain, might be prejudicially obtained.

Mr. Blake. That is what I was about to argue later on. Take the circumstances of Manitoba as to population, take the contentions that were raised, follow up the power given in relation to education with what was at once done, and you find the Legislature itself recognizing the condition of equality by the Roman Catholic claims, and dealing with education in this way. It was in contemplation that it should be so. There was no difficulty about it then, and that state of things continued for 19 years. I think if we are to enter into the realms of conjecture, we may well conjecture that the people of Manitoba and the people of the Dominion in framing this provision framed it on the theory that that would be done which was done, and that being so, the question was whether at some future time a condition of things altogether different might not arise in which the expected legislation might be altered, and whether there should not be some protection against the danger of that alteration. There is no doubt that it would be a reasonable conjecture in view of the circumstances of the Province, and of the other Provinces, and viewing the sources from which emigration might be expected, that those who were then the majority would become the minority, that the Protestants would be overwhelmingly in that majority. Nobody conceived anything else as within the realms of possibility, and that being so, it was expected that laws thought just and at any rate acceptable to the population at the time would be passed, and it was intended to give some security against their subsequent repeal. Now, when one of your Lordships took up that other question, I was asking your Lordships to take three or four points of distinction which add to the force of the proposition that this sub-section and the Manitoba sub-section are not additional means or sanctions for the observance of sub-section 1, but are directed to something else. The first one is that the persons who can take advantage of or come within the benefit of sub-section 1 are all classes of persons,

whether of the majority or the minority. Logan, for example, who was before your Lordships in the former case, was one of the Protestant majority. In Barrett's case there was another intervener. Logan, who appeared under singular circumstances in favour of the Anglican Church. Logan was one of the majority, but nobody denied that he was within the benefit of this section, and could complain that this law was void if it had violated rights or privileges with regard to his denominational school. Thus any person touched by the void law, and any class of persons according to the express language, although that class may be the majority, can strike at the law and avail themselves of the protection of the law under the first sub-section. But who are saved by the later sub-section? You are not to affect any right or privilege of the Protestant or the Roman Catholic minority of the Queen's subjects. The law alters the class of persons; anyone, whether of the minority———

The Lord Chancellor. That Sub-section 2 seems to indicate the view that what was the minority, whether the Roman Catholic or the Protestant might from time to time be changed.

Mr. Blake. Yes, my Lord, it may be, and probably was, the case, that it was uncertain which was in the majority at that moment. They were about on an equality.

Lord Macnaghten. About 25,000 each.

Mr. Blake. I do not think there was as many, though I do not remember now.

Lord Macnaghten. It is only my recollection. I dare say I am wrong.

Mr. Blake. I do not remember clearly how that was.

Lord Macnaghten. It was very small, they were very equally balanced.

Mr. Blake. They were very equally balanced, as everything shews. The Board is made equal by the subsequent legislation. The districts are made equal—there are 12 Protestant and 12 Catholic districts. I do not know really which was in the majority at the time. but it was well known that that condition of things would not remain.

Lord Macnaghten. I rather think that the Roman Catholics were slightly in the majority.

Mr Blake. That was the vague impression I had, but they being my clients I did not like to say so ; the vague impression I had was that they were slightly in the majority, but everybody knew that that state of things would not continue. Now, as I say, the second class of persons who could alone take advantage of this later sub-section were the Protestant or Roman Catholic minorities ; so that, while a member of the religious majority of the population can take advantage of No. 1, he cannot at all take advantage of No. 2. You have different classes. Then the rights protected are different. In sub-section 1 they are rights with respect to denominational schools existing by law at the Union, but in sub-section 3 they are rights in relation to education, and here comes in an observation I made yesterday pointing out to your Lordship how wide the phrase " in relation to education " is. There is a different phrase adopted, and, of course, there is no limitation of time. Nothing is said about " at the Union." On the contrary, as I have argued, there is an express indication of post-Union rights being intended to be dealt with. There certainly is no limitation, so that you have a new phrase used as to the rights and a new phrase as to the persons.

Lord Watson. If you confine it to these cases under Sub-section 2, it looks very like prescribing rules for taking Appeals in Actions which cannot be completely brought.

Mr. Blake. Yes, my Lord, no doubt.

Lord Watson. In other words, Appeals for the purpose of correcting legislation, which is *functus incompetens ;* it may be so. It may be an awkward way of saying it.

Mr. Blake. So that you have in the first rights with regard to denominational schools existent at the Union, and in the second you have rights in relation to education in cases in which certainly after the Union, though also possibly owing to the width of the language, but not according to my conception in the mind of Parliament before the Union, a separate and dissentient class is established. Then thirdly, the character of the Acts

guarded against is different: sub-section 1 says shall "prejudicially affect;" sub-section 3 says only "affecting," and as I have already said to your Lordships, a case might arise in which there might be an "affecting" under this clause of the privileges of the minority without putting them positively in a more disadvantageous position with reference to existing grants; a case which should put them relatively in a less good position, as for example, if an added money grant were made, but made in different proportions from the existing money grants —made in proportions which did not conform to the proportions of the existing money grants, giving them less and the majority more. Their existing rights and privileges would be "affected," but they would not, perhaps, be "prejudicially affected." At any rate your Lordships find that word "prejudicially" omitted, and very strong observations were made by Lord Watson on the occasion of the last argument on the utter impossibility of ignoring the fact that the word "prejudicially" was omitted and the need of giving some other interpretation to the word "affecting," in consequence of its standing without "prejudicially."

Now, these observations apply also to the second sub-section of the Manitoba Act.

I turn now, my Lords, to that section of the Manitoba Act, and, in construing it, I ask your Lordships to take into consideration the general principle which I submit is applicable to the interpretation of any doubtful phrases. I submit that the general view of the original British North America Act, and the general view of the Manitoba Act was to put all the provinces as near as may be on the same footing as to the rights given by the Act. As I have said before, I never have suggested anything so absurd as that it was intended by a stroke of the pen to alter the conditions which existed in different provinces on many local points. But when the British North America Act was providing for their inclusion in the federation, the general intent of that Act as indicated by its provisions, is to put the provinces as near as may be on the same footing with reference to their rights under the Act. So you find in Section 93 it

is "Nothing in any such law shall prejudicially affect any right or privilege with regard to denominational schools which any class of persons shall have by law in the province" That is general in its application. In some of the provinces there may be no rights.

Lord Watson. All that I am disposed to infer from the terms of the Act of 1867, are that these conditions as to education which are embodied in Section 93 were such as the provinces considered suitable for themselves at that period, and were willing to submit to—that is one of the terms of confederation upon which they were agreed. I can quite easily conceive that another province coming in at a more recent date, such as Manitoba, should stand out for terms which that province considered more suitable for their own position.

Mr. Blake. Doubtless. I do not dispute that proposition.

Lord Watson. I do not think there is any absolute desire on the part of any to inflict the same rigidly on each province. I do not see why it should be so. You may assume that they were willing to do what was just and right in each case with as near an approach as possible.

Mr. Blake. Very well, I am not unwilling to accept your Lordship's phrase "with as near an approach as possible."

Lord Watson. The confederation of the provinces was the result not of compulsion but of agreement.

Mr. Blake. Doubtless.

Lord Watson. It is really a confederation by consent and there were no means of compelling it. Of course the Imperial Legislature might have it in their power, but it certainly never was the intention of the Imperial Legislature to compel it, and certainly the adjustment of the terms were left to the contracting parties.

Mr. Blake. They did in point of fact compel one province but they did not intend to and I have no doubt they will never compel another, having regard to the unfortunate circumstances which ensued.

Lord Watson. I think you must read that Act in order to see what was intended.

Mr. Blake. Yes, and I was reading it when your

Lordship interposed. I was reading it in order to show that the clause does deal with the subject in that spirit.

Lord Watson. This contract was really made, I suppose, between the Legislatures of Canada and the new Province.

Mr. Blake. The Act of 1870?

Lord Watson. Yes.

Mr. Blake. Well, my Lord, there was no Legislature of the Province at that time. The Legislature was first created under this Act.

Lord Watson. There is a change in the relations between the one and the other, whatever was intended by it.

Mr. Blake. Yes, that I am not at all prepared to deny.

Lord Watson. It cannot be said that they intended to legislate in the same terms, or they would have legislated in the same terms; they have legislated in slightly different terms—there may not be much difference. You must discover what was intended from the construction of that Clause.

Mr. Blake. Yes, my Lord; I am not even asking your Lordship——

The Lord Chancellor. You are on that Clause?

Mr. Blake. Yes, my Lord, I am endeavouring to deal with that Clause.

Lord Watson. You are asking us to extend that right of Appeal by Sub-section 2 to a class of injuries against the privileges of minorities other than those which are provided against by Section 1. That is the first point, is it not?

Mr. Blake. Yes, my Lord. I must ask your Lordship's indulgence to be allowed to state some few considerations, which I will state as briefly as I can.

Lord Watson. Certainly. You were proceeding to state those considerations, but I am afraid I interrupted you, Mr. Blake.

Mr. Blake. I welcome, my Lord, all interruptions because I quite recognize that they are the way to elicit the truth and to get at the root of the matter. I should be very sorry indeed if your Lordships thought that I objected to interruptions. But what I was trying to do

was to argue that the British North America Act in itself shews in its general features, and also in this clause which I have discussed, that the Manitoba Act also shows in its general features and in this clause—I do not say an absolute determination, but a general disposition—not unnatural but eminently reasonable and eminently calculated to promote the great purposes of the Union—to put the Provinces as near as might be on the same footing with reference to positions created for them by the Act. I do not say there may not be some one case different, because I know of differences in which special circumstances involve special considerations. That does not in the slightest degree interfere with, nay, perhaps it rather enhances, the force of my argument as to the general intent, and that general intent is shown even in this section, which attempting to act no doubt in the legislation by the Imperial Parliament at the suggestion of the Provincial Legislatures, yet attempts, with one necessary exception in subsection 2 of Section 93, to clothe them in general language. It deals with the rights which any persons in any Province have in respect of denominational schools at the Union; it deals with the case of any Province having a system of separate or denominational schools, and of any Province having no such system; and it puts them, each such Province, in the same position. Now the Manitoba Act of 1870 makes a general provision. Section 2 of the Manitoba Act applies the British North America Act generally.

The Lord Chancellor. It is set out at the bottom of page 2 of the Respondent's case before the comparative view of the Sections. [*Supra, page 12.*]

Mr. Blake. Yes, my Lord, I refer to that as confirming this argument.

Lord Shand. Was not there some argument founded on that section, as being peculiar in the way it is worded, or is it quite clear that there is no question of construction of that section.

The Lord Chancellor. There is in this way—that it depends on that section how far the Act of 1867 applies; the words are "The provisions of the British North

America Act, 1867, shall, except those parts which are in terms made, or by reasonable intendment, may be held to be specially applicable to or only to affect one or more, but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the province of Manitoba." And the question is whether this 22nd Section is to be treated as an alternative scheme to Section 93, and so as varying it, or whether you can read into Section 22 so much as would not be inconsistent with it.

Mr. Blake. Yes, my Lord.

Lord Macnaghten. Then there is also the exception of those that are specially applicable to one or more provinces, and this reference to separate and dissentient schools seems to be particularly applicable.

Mr. Blake. I should say that that eliminated Sub-section 1, but I should not say that it eliminated part of Sub-section 1 or 3.

The Lord Chancellor. Sub-section 3 which is "Where a system of separate or dissentient schools is in any province by law at the Union, or is thereafter by the Legislature of the province established" would apply to New Brunswick and Nova Scotia.

Lord Macnaghten. It is specially made applicable by the Act.

Mr. Blake. Sub-section 3? Oh no, my Lord, Sub-section 3 is exhaustive, because it deals with the two possible cases.

The Lord Chancellor. It is only the second part of Sub-section 3 that can be applicable to Manitoba.

Mr. Blake. Certainly, by your Lordships' finding.

Lord Watson. I do not know whether there is any canon of construction to that effect, but I have always had an impression that when there is a question whether certain statutory provisions are to be concurrent with, or are to supersede this previous legislation, it always affords an argument in favour of the intention to supersede the provisions of the earlier statute, (that is the provisions of the British North America Act) when you find that there is an identity between the provisions of the two Acts and they are repeated.

Mr. Blake. Yes, my Lord, I have said from the beginning that my impression——

Lord Watson. If they were merely intended to qualify and alter, for the purposes of Manitoba, the provisions of the British North America Act, why repeal all these? There is not the least occasion for it.

Mr. Blake. Yes, and I think that is a very strong argument. My Lord, I have already stated that my opinion is that the difference between the two clauses is that the Manitoba clause is wider than the other, and I am about to endeavour ——

Lord Watson. To the extent of the difference they must take effect, whether they supersede the provisions of the other Act, or do not.

Mr. Blake. I think so, my Lord. I cannot, I think, blot them out of the Statute Book altogether. Then as to the Manitoba Clause, as I have pointed out, the enabling clause is the same as the British North America one, and the first sub-section is the same with the exception of the addition of the words " or practice." Here I may pause to say that you begin to find variations which show added tenderness for the rights of classes. Where you find a change, it is not a change indicating a determination that the rights of classes in respect of denominational schools shall be less, but that they shall be greater. The reasons for this particular difference which occurs in sub-section 1 were suggested in the last case. There had been a little before, the beginning of trouble about the New Brunswick law, in which, under administrative or elastic powers, greater latitude was given in Roman Catholic communities within the province to conduct schools more according to their own views, and in which there had been a change, but it was decided that there was no law at the Union, and that there was, therefore, no legal objection to the Act under sub-section 1. Then came the Manitoba local trouble, to which I have alluded in connection with the acquisition of that territory by the Dominion, the rebellion, the sending of a mission to Ottawa, the discussion of terms of Union suggested by a so-called legislative assembly, organized *ad hoc*, these terms con-

taining express reference to this question and making demands upon the Dominion, and therefore the question being expressly before the consideration of the Legislature. Then there was also the situation of Manitoba, or rather of that piece of Rupert's Land which became Manitoba, which was absolutely unorganised as a community before the Union, and therefore had not anything in the proper sense of local laws. All those considerations were propounded on the former argument, and are now, without further repetition of them, urged as reasons for the addition of the words "or practice," giving an added right to these whom I represent. Now, that being the policy indicated by sub-section 1, I ask your Lordships to say that it would be a strange thing if that policy of added tenderness, enlarged consideration for the rights of classes with respect to denominational schools, were to be reversed by the alterations made in the second sub-section. When we find a clear indication at the beginning of the Clause that an enlargement of this class of rights was the object of the Legislature, and when we are told that in the second clause the Legislature had departed from that policy and given a less extended set of rights than were given in that class of cases in the older Act, the first sub-section sheds a light, I think, which may guide us in the exposition of the remainder, and may lead us to avoid the construction. Now take sub-section 2, "An appeal shall lie to the Governor-General in Council (I will discuss the absence of the prefatory words presently) from any Act or decision of the Legislature of the province or of any Provincial authority." There you find the same principle of enlargement. Either it was believed that the British North America Act did not include or it was believed that it was doubtful whether or not it included the Provincial Legislature. It was determined to settle the question, and to settle it in whose interests? In the interest of those whom I represent. It was determined to make it abundantly plain and clear that in the case of that province at any rate, whatever doubt might hang over the cases of the other provinces, this Appeal should be

from the Acts of the Legislature. If the view of Lord Watson be correct, that the words of the 93rd Section do not include an Act of the Legislature, then there was an enlargement of the British North America Act in favor of the Province of Manitoba. If it be only that it was doubtful in the minds of the Legislature, then there is a determination to make it clear that the mind of the Legislature was that an Appeal should lie from the Acts of the Manitoba Legislature. So that we find the same intent.

Lord Watson. I am upon the question whether the words "Provincial authority mean the legislature of the province." My authority is not worth much I must confess, all that I know is that I have never met with the expression "Provincial authority," as intending to include the Government or Legislature of the country.

Mr. Blake. Of two things, one the right——

Lord Watson. You put it alternatively.

Mr. Blake. Yes, the Parliament of Canada thought either that it was not included, as your Lordship has suggested, or that it was doubtful whether or not it was included; and they decided if it was not included, there to include it here, they decided if it was doubtful to make it clear it was included, and in either view there was a tenderness of consideration for the rights of the minority, and either an enlargement or a settlement on a sure and certain foundation of those rights and privileges, making them inclusive of a right of appeal against a Legislative Act. Now the words "Where in any province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the province," disappear in this recasting of the clause. Why should they appear? The original clause was dealing with a number of provinces, and with different cases in those provinces, some of them hypothetical and conjectural cases. It attempts, as draughtsmen too often do, to deal with the whole of them together; and it makes provisions which enact that the section is to apply both in the case of pre-existing dissentient schools, and in the case of post-Union establishments. The prior parts of the British North

America Section had been dealing with some of the Provinces only, and the language was used to make clear that now it was dealing with all, and that it included the cases of pre-Union separate schools and also of possibly post-Union systems. But here, as I say, they were dealing with one Province only. As the result has shown the pre-Union position of Manitoba must be regarded to have been at the least doubtful. It has been judicially decided that there were no rights of this nature upon which sub-section 1 operated. Had they attempted to draw this Section on the lines of sub-section 3 they would have had either to affirm that in Manitoba there were pre-Union rights of some kind or another and to define them, or to speak hypothetically of the question of pre-Uuion rights. They designed not to do so. They designed to leave that question open, and so designing what could they have done? They would have had either to declare that Manitoba had pre-Union rights or to say what would be a peculiar thing for the Legislature to say, "In case it be found judicially that Manitoba had by law or practice before the Union some rights, no rights shall be contravened without the chance of Appeal, and in case any system is established afterwards those rights shall not be contravened without a like chance." But by the simple omission of both these conditions they leave an absolute generality for the application of the Section. Now what is the Appeal from? It is from "Any act or decision of the Legislature of the province or any Provincial authority." Take sub-section 1. It speaks of any right or privilege which they have by law or practice at the Union. Take sub-section 2. It is an appeal which lies from "any act or decision of the Legislature of the Province, or any Provincial authority," and therefore you find a limitation in Sub-section 1 which does not exist in Sub-section 2. The word "any" is general, and it is not limited by any question of time. Then there is another distinction: In the Manitoba Clause, as has been already pointed out, the question is not limited by the existence of separate or dissentient schools at all. The prefatory words being omitted, the right is general

without suggesting the question of separate or dissentient schools. The right is absolute, therefore, to appeal from any act of the Legislature, or from the decision of any Provincial authority affecting any right or privilege (which must be a right or privilege created by or under the operation of the provincial legislation) of the Protestant or Roman Catholic minority. It touches therefore any right or privilege of the Protestant or Roman Catholic minority created by the Legislature.

The Lord Chancellor. It really strikes me that the whole of this case will turn on two questions depending on this second sub-section. First, is sub-section 2 meant to do something more than afford a remedy in cases within sub-section 1? Secondly, if it is, does it apply a remedy in the case of rights acquired by post-Union legislation?

Lord Watson. I think that is the question.

The Lord Chancellor. I think those will turn out really to be the only two questions in the case.

Lord Watson. I should say, those two points being decided in your favour, even Mr. Haldane would find himself hampered in his argument.

Mr. Haldane. Subject to the question whether there has been any question of interfering with the right and privilege of the minority. That will be another question.

Lord Watson. I do not know how that question is one for us.

Mr. Haldane. We do not desire to make any admission on that point.

Lord Shand. Of course it is a condition of the clause coming into operation that there shall have been such a right or privilege interfered with.

Mr. Haldane. That is what I mean.

Lord Watson. I should say that a privilege established by post-Union legislation would constitute such a privilege.

The Lord Chancellor. It will not be for us to consider the extent to which the decision operates.

Mr. Haldane. I should not ask your Lordships to do that.

Lord Watson. I should not like to say that it is a privilege interfered with.

Mr. Haldane. All we say is that your Lordships must look at the kind of Act which is complained of, in order to see whether the conditions of the Appeal to the Governor-General have arisen.

Lord Watson. I am prepared to advise the Governor-General, and decide on the meaning of this clause, but I am not prepared to relieve him of the duty of considering how far he ought to interfere.

Mr. Haldane. That may be.

Lord Watson. That would be trenching upon very dangerous ground. However, we will see about that by-and-bye. We must decide these two points first, or the other will never arise.

Mr. Blake. My Lords, I was endeavouring to find what this Appeal was, and I was pointing out to your Lordships that it was an appeal from "Any act of the Legislature of the province" or "any 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." I have stated already to your Lordships in connection, it is true, with section 93, but expressly stating that the observations apply to section 22, the reasoning which, as it seems to me, and as I understood, with the concurrence of some of your Lordships, render it impossible to say that the appeal provided for in sub-section 2 is a sanction for sub-section 1. I do not propose to trouble your Lordship with even the briefest statement by way of repetition of that argument, but all the differences which I pointed out in that connection in the Manitoba Act exist here and all the reasons, and the choice therefore that you have is between a harmonious construction——

Lord Watson. What occurs to me very much on one point upon this (which is rather in your favour than otherwise) is that if upon taking the North British America Act, there seems to be in sub-section 1 an absolute prohibition of certain legislation any Act would be null and *ultra vires.* No doubt Sub-section 3 gives no remedy

against it unless it be an Act or decision of a Provincial authority. If it is not referred to in that sense, then the only remedy is to have it declared null. In the other it is not null. It would not be null under the Manitoba Act. It would only be subject to appeal, and in the other provinces it would be a nullity.

The Lord Chancellor. You would have to go for the purpose of getting rid of that which was not within their legislative power in the last resort if they would not get rid of it by themselves by legislation, to the Parliament of Canada to legislate upon it.

Mr. Blake. It is all absolutely futile, because it is not there. It is non-existent. It is on paper, but that is all.

[*Adjourned for a short time*].

Mr. Blake. Now, my Lords, I desire to refer your Lordships in connection with this particular branch of my argument to the judgment of your Lordships at page 153, line 40 :—

"Sub-sections 1, 2, and 3 of Section 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-sections of Section 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act in sub-section 1, the words 'by law' are followed by the words 'or practice,' which do not occur in the corresponding passage in the British North America Act."

These words were, no doubt, introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It seems to me that that observation must imply the view then taken by your Lordships' Board that the British North America Act embraces in the words "provincial authority" the Legislature, because, certainly, if your Lordships held otherwise, it would be a very important difference; and yet your Lordships refer to the words "or practice" as the only important difference. It seems to me that these observations imply that your Lordships held that the 2nd sub-Section of Section 22 did deal with post Union cases inasmuch as I have shown, as I submit that the 3rd sub-section of Section 93 does deal with such cases, and it would be a very important difference indeed if

the 2nd sub-Section of the Manitoba Act had not dealt with them.

Lord Watson. It comes to this, that it would rather indicate that whether an Appeal is taken or not, you may have procedure that follows legislation that violates the provisions of the sub-section 1.

Mr. Blake. Unquestionably the power to legislate is restricted.

Lord Watson. We did not decide whether you could appeal against it.

Mr. Blake. I have read what your Lordships have said as to the difference between the two Acts which your Lordships limited to the introduction of the words "or practice" as being the only important difference.

Lord Macnaghten. For the purpose that we were then considering.

Mr. Blake. That may be, my Lord.

I now advert to another argument which has been pressed as an aid to the adverse construction, and as properly inducing the Court to limit the construction which we desire to press on your Lordships, the argument namely, that it is an extraordinary thing that an Act should be passed interfering with the power of a legislature to repeal or amend anything which it is given a power to enact, that is an argument that has been pressed all through, and which was adverted to yesterday by one of your Lordships. On this subject I want to submit to your Lordships that the Provincial Legislature have no absolute and conclusive power of making effective legislation on any subject, because any law may be disallowed under the general provisions of the British North America Act by the Governor-in-Council, and may be thus nullified; and of course therefore there is no more conclusive power to repeal or amend than there was originally to enact.

Of course the whole of this argument has as its basis the suggestion that it is almost impossible to conceive that the Provincial Legislature should be authorised to make laws and not have the power of repealing.

Lord Watson. Sub-section 2 unquestionably appears to contemplate an Appeal against a complete Act, not merely an Act that is in its inception.

Mr. Blake. Certainly not.

The Lord Chancellor. You are trying to meet the objection that it could not have contemplated an Appeal in the case of an Act which merely repealed or modified an Act already passed.

Mr. Blake. Yes. The theory presented against me is this ; you acknowledge that the Legislature had power to pass the primary Act ; the Legislature being given power to pass an Act, is it not absurd to say it should not have power to repeal, amend, or modify the Act it is empowered to pass. That is the general proposition. I am desirous of meeting, by several considerations, that argument.

Lord Watson. The Governor was unquestionably given some power unless he is to be impotent. It is clear when you read the whole provisions of the section that the Governor has power in some cases. A question may arise as to what those cases are, but, when the Governor is in the position to exercise the power given him, on appeal as against an Act by sub-section 2, he can qualify the Act of the Legislature, and, if they will not pass an Act amending it in conformity with his suggestion on appeal, it is in his power to apply to the Canadian Government to compel them to do it, or do it for them.

Mr. Blake. To the Canadian Parliament to pass themselves a remedial law. I hold that in any written constitution it is the frame of the writing that——

Lord Watson. It is a power given undoubtedly to amend and revise.

Mr. Blake. Perhaps your Lordships will think it well that I should await the argument on the other side before troubling your Lordships with any further argument on this point.

Then, my Lords, I pass to the last portion of my duty, namely, the reference to the Judgments in the case. At page 165 is the Judgment of the Chief Justice. After stating the questions as I read them a long while ago he puts them in a concise form, and says :—

"To put it in a concise form, the questions which we are called upon to answer are whether an appeal lies to the Governor-General

in Council, either under the British North America Act, 1867, or under the Dominion Act establishing the province of Manitoba against an Act or Acts of the Legislature of Manitoba passed in 1890, whereby certain Acts or parts of Acts of the same Legislature previously passed, which had conferred certain rights on the Roman Catholic minority in Manitoba in respect of separate or denominational schools, were repealed." Then he says, "The proper answers to be given to the questions propounded depend principally on the meaning to be attached to the words 'any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education' in sub-section 2 of section 22 of the Manitoba Act. Do these words include rights and privileges in relation to education which did not exist at the Union, but (in the words of section 93, sub-section 3, of the British North America Act) have been thereafter 'established by the Legislature of the province,' or is the right or privilege mentioned in sub-section 2 of Section 22 of the Manitoba Act the same right or privilege which is previously referred to in sub-Section 1 of Section 22 of the Manitoba Act, viz., one which any class of persons had by law or practice in the province at the Union, or a right or privilege other than one which the Legislature of Manitoba itself created?"

Then his Lordship states sub-section 3 of section 93 of the British North America Act, and says,

"It is important to contrast these two clauses of the Acts in question, inasmuch as there is intrinsic evidence in the later Act that it was generally modelled on the Imperial Statute, the original Confederation Act, and the divergence in the language of the two Statutes is therefore significant of an intention to make some change as regards Manitoba by the provisions of the later Act. It will be observed that the British North America Act, Section 93, sub-Section 3, contains the words 'or is thereafter established by the Legislature of the province' which words are entirely omitted in the corresponding section (Section 22, sub-Section 2) of the Manitoba Act."

Yes, but also are omitted the words referring to the existence of a pre-Union system of separate schools. His Lordship refers to the one without the other. The omission of both neutralises the

effect to be derived from the omission of one only.

"Again, the same sub-section of the Manitoba Act gives a right of appeal to the Governor-General in Council from the Legislature of the province as well as from any provincial authority, whilst by the British North America Act, the right of appeal to the Governor-General is only to be from the Act or decision of a provincial authority. I can refer this difference of expression of the two Acts to nothing but to a deliberate intention to make some change in the operation of the respective clauses. I do not see why there should have been any departure in the Manitoba Act from the language of the British North America Act unless it was intended that the meaning should be different."

The Lord Chancellor. There is a possible reason—to make it certain that it did include.

Mr. Blake. Certainly. That is my contention; that they thought it was doubtful, and they wanted to make it clear.

"On the one hand it may well be urged that there was no reason why the provinces admitted to confederation should have been treated differently, why a different rule should prevail as regards Manitoba from that which by express words applied to the other provinces. On the other hand, there is, it seems to me, much force in the consideration that, whilst it was reasonable that the organic law should preserve vested rights existing at the Union from spoliation or interference, yet every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted."

I may say that his Lordship, as your Lordship will find, lays much stress on that proposition, the contrary of which I was about to elaborate a moment ago.

"No doubt this right may be controlled by a written constitution which confers legislative powers, and which may restrict those powers, and make them subject to any condition which the constituent legislators may think fit to impose. A notable instance of this is, as my brother King has pointed out, afforded by the Constitution of the United States according to the construction which the Supreme Court, in the well-known Dartmouth College case, put upon the provision prohibiting State Legislatures from passing laws impairing the

obligation of contracts. It was there held, with a result which has been found most inconvenient. that a Legislature which had created a private Corporation could not repeal its own enactment granting the franchise, the reason assigned being that the grant of the right of franchise of a Corporation was a contract. This has in practice been got over by inserting in such Acts an express reservation of the right of the Legislature to repeal its own Act. But as it is a *prima facie* presumption that every Legislative enactment is subject to repeal by the same body which enacts it, every statute may be said to contain an implied provision that it may be revoked by the authority which has passed it unless the right of repeal is taken away by the fundamental law, the overriding constitution which has created the legislature itself."

The Lord Chancellor. You do not dispute that. You do not say that the Legislature of Manitoba could not repeal the Act.

Mr. Blake. No, my Lord.

The Lord Chancellor. Only that when it has repealed there is an Appeal from its conduct or act in repealing the Act.

Mr. Blake. Yes.

The Lord Chancellor. That is all.

Mr. Blake. Yes. It is possible that the repeal may be made in the end more or less inefficient by virtue of this Appeal and the remedial legislation upon it, but they can repeal. I had a great number of considerations which, out of respect to this Judgment, I was prepared to address to your Lordships in support of my proposition that there is no such strong presumption with reference to the Provinces, and particularly with reference to Manitoba as to this Act as his Lordship suggests here.

Lord Watson. I do not think this illustration throws any light whatever on it. It results from the fundamental law of this constitution that a statute interfering with the particular rights must be passed by the Federal Legislature. This seems to be a suggestion for evading it.

Mr. Blake. I do not think the Federal Legislature would have any such power. The decision left these charters untouchable and unattackable altogether by any legislation. Once you embraced a charter granted by the Legislature within the definition of a contract, you applied the principle of the clause as to impairing the obligation of contracts, and nobody could overset it. But they got round it as people will get round things they cannot get over. After half a century or so they found a way round. Then he says,

> "The point is a new one, but having regard to the strength and universality of the presumption that every legislative body has power to repeal its own laws, and that this power is almost indispensable to the useful exercise of legislative authority since a great deal of legislation is of necessity tentative and experimental, would it be arbitrary or unreasonable or altogether unsupported by analogy to hold as a canon of constitutional construction that such an inherent right to repeal its own acts, cannot be deemed to be withheld from a legislative body having its origin in a written constitution unless the constitution itself by express words takes away the right."

And yet that very illustration he has given was one of a right taken away not by express words, but taken away by a construction, which may be perhaps strained construction which embraced in the word "contract" a Legislative Act, namely, a charter.

Lord Watson. That really is a question whether a certain device is a constitutional way of getting over a constitutional difficulty. That is not the sort of question we have to deal with here at all. I do not know how it can be regarded as a strict constitutional rule.

Mr. Blake. This was a very easy way of over-riding all this difficulty.

Lord Watson. I think it would require some discussion before that point is settled, and I do not think we require to settle it now.

Mr. Haldane. We shall not cite the Dartmouth College Case.

Mr. Blake. No, because it would be quite against you.

Lord Watson. No device of that sort requires to be resorted to here.

The Lord Chancellor. With all deference I do not see at present the applicability of this at all. The question at issue was not the power of the Manitoba Legislature to repeal all these Acts. It is assumed that it has the power.

Mr. Blake. Yes.

The Lord Chancellor. But the question is whether when by repeal it has altered the position of certain persons who had rights under the previous Act, there may be an appeal to the Governor in Council on the ground that that affects in a way it ought not to affect the rights of the minority.

Mr. Blake. Yes.

Lord Shand. That is subject to this observation, that under sub-section 3 of the Manitoba Act, you cannot say there is an absolute right to appeal, because it says : " In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made."

Mr. Blake. That is afterwards.

Lord Shand. He can practically say the repeal is bad, " or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances in such case require, the Parliament of Canada may make remedial laws."

The Lord Chancellor. He cannot say the repeal is bad ; the repeal stands. He can no doubt say that you ought not to have created the state of things you have created by the Act of repealing ; but in any case, all he can do as regards any Act, whether a repealing Act or any other Act, is to say it is an interference with the original Act of Parliament of the Legislature of Manitoba, and he can say this state of things will not do, and unless you by legislation will do what I think necessary to remedy it, the Parliament of Canada then has the jurisdiction to legislate within your province.

Mr. Blake. If it chooses.

The Lord Chancellor. It seems to me no stronger to introduce such a power to control a state of things

created by an ordinary Act, than to control a state of things which, *ex-hypothesi*, it can do created by an original Act. I say *ex-hypothesi*, that is if the second sub-section is not merely a mode of enforcing what is contained in the first sub-section.

Mr. Blake. Of course, there are all sorts of limitations of the power of the Legislature. Sub-section 1 is a limitation, and when you provide this power of enacting, you may limit the power of repeal. That was not done here. The repeal itself may be modified under certain special conditions, and to a certain limited extent. Then his Lordship goes on, keeping in constant view this canon of construction that he has set up, that you must find in express terms some restriction of the power of the Legislature.

"Then keeping the rule of construction just adverted to in view, is there anything in the terms of sub-section 2 of Section 22 of the Manitoba Act by which the right of appeal is enlarged, and an appeal from the Legislature is expressly added to that from any provincial authority, whilst in the British North America Act, Section 93, sub-section 3, the appeal is confined to one from a provincial authority only, which expressly or necessarily implies that it was the intention of those who framed the constitution of Manitoba to impose upon its Legislature any disability to exercise the ordinary powers of a Legislature to repeal its own enactments."

All the phrasing of the judgment seems to me to give an extreme and incorrect view of the extent to which it is necessary to go, and to which we ask the Court to go.

"I cannot see that it does, and I will endeavour to demonstrate the correctness of this opinion. It might well have been considered by the Parliament of the Dominion in passing the Manitoba Act that the words 'any provincial authority' did not include the Legislature. Then, assuming it to have been intended to conserve all vested rights—'rights or privileges, existing by law or practice at the time of the Union,' and to exclude or subject to federal control even legislative interference with such pre-existent rights or privileges, this prohibition or control, would be provided

for by making any act or decision of the Legislature so interfering the subject of appeal to thc Governor-General in Council."

So that your Lordships see the application he boldly makes in order to avoid a violation of this newly-created canon of construction is a violation of the first sub-section.

Lord Watson. He puts this, that the intention of the Dominion Parliament was to extend the right of appeal to Acts of the Legislature. He was evidently of opinion in the outset of his Judgment that in the British North America Act the right of appeal was only as to the provincial authority.

The Lord Chancellor. It has this curious effect that, if he is right, and if from the wording of section 93, sub-section 3, there is no appeal to the Governor from a provincial Act upon the people's rights being affected by a provincial Act, then, in the case of any of the provinces incorporated under the British North America Act, and subject to its provisions, the only remedy in case of a breach of the first sub-section is to treat the law as null, because, if the third sub-section does not apply to the Acts of the Legislature, then there is nothing for it but to say that the law is null.

Mr. Blake. No doubt.

The Lord Chancellor. Then you would have this curious result, that exactly the same provision in the same terms relating to the subject matter dealt with by the first sub-section is found in the Manitoba Act, which *ex hypothesi* could make the legislation null, which is the only protection, and which is considered a sufficient protection in the British North America Act, and you add in the case of Manitoba a provision for an appeal to the Governor with all the machinery which was considered necessary in the case of the other provinces.

Mr. Blake. Yes.

Lord Watson. That is, that in Manitoba alone has the Governor the power to take action which can in any way qualify or alter an Act passed by the Legislature. The learned Judge seems to distinctly express an opinion that by the earlier Act the right of appeal to the Governor-General is only to be from the Act of the provincial authority, and then he says he can refer this

difference of expression in the two Acts to nothing but a deliberate intention to make some change in the operation of the respective clauses. There cannot be any change in the operation of the clauses unless the Manitoba Act brings in the Governor-General, whereas he was not before included in the words "provincial Legislature" at all.

The Lord Chancellor. If in the British North America Act an Act of the Legislature was not included, you would have this curious state of things. By sub-section 2 "all the powers or privileges and duties at the Union by law conferred and imposed in Upper Canada" are extended to dissentient schools in Quebec. That was a new right then acquired.

Mr. Blake. Yes.

The Lord Chancellor. It was not a right existing at the Union because it was a right given by that.

Mr. Blake. Yes.

The Lord Chancellor. As far as I can see according to the contention that "Act" does not include an Act of the Legislature, there would have been nothing to prevent an Act taking away those rights from the Protestants of Quebec, and then inasmuch as it was done by an Act of the Legislature and was not an act or decision of a Provincial Authority there would have been no Appeal to the Governor-General. What remedy would there have been?

Mr. Blake. May I venture to suggest to your Lordship that inasmuch as by that sub-section those Acts were extended they were Acts at the time of the Union? They were not pre-Union.

The Lord Chancellor. "At the Union" would include what was then obtained?

Mr. Blake. Yes, at the moment of the Union they were applied.

The Lord Chancellor. Perhaps so.

Mr. Blake. I should say that that was the intention, and I rather think your Lordships would come to the conclusion that the intention did not fail. The palpable and plain object was to give those rights and to put those rights under the same protection as the rights under the analagous clauses in the Province of Ontario.

The Lord Chancellor. It is a curious thing "All the powers privileges and duties at the Union by law conferred and imposed in Upper Canada," and so on shall be, and the same are hereby, extended.

Mr. Blake. "Are hereby."

The Lord Chancellor. It treats "at the Union" as a time prior to "hereby."

Mr. Blake. It could not be, because the Union only took effect by the terms of the Act some months later on a proclamation.

The Lord Chancellor. That may carry it out. They would if comprised in this be extended at the Union.

Mr. Blake.

If, however, the words of Section 93 Sub-section 3: "Or is thereafter established by the Legislature," had been repeated in Section 22 the Legislature would have been in express and unequivocal terms restrained from repealing laws of the kind in question which they had themselves enacted, except upon the condition of a right to appeal to the Governor-General.

This is a slight limitation of the too-wide phrase used by his Lordship in the former part of his judgment.

If it was intended not to do this but only to restrain the Legislature of Manitoba from interfering with "rights and privileges" of the kind in question existing at the Union, this end would have been attained by just omitting altogether from the clause the words "or shall have been thereafter established by the Legislature of the province." This was done.

I have already made the observation that occurs to me on this, namely, that the British North America Act contains provisions as to both pre-Union and post Union rights. Both are omitted; but his Lordship seems to give potency ronlyto the omission of the latter words.

"Next it is clear that in interpreting the Manitoba Act the words any provincial authority do not include the Legislature for that expression is there used as an alternative to the Legislature of the province."

I quite admit that that is true. Taking the Manitoba Act by itself, you have the two expressions, and unquestionably "any provincial authority" does not include the Legislature, because it is "or" one or the other.

"It is not to be presumed that Manitoba was intended to be admitted to the Union upon any different terms from the other provinces, or with rights of any greater or lesser degree than the other provinces."

Lord Watson. He has just demonstrated you were to be admitted on terms somewhat different.

Mr. Blake. But he says it is not to be presumed. I suppose his Lordship was putting forward the suggestion I made some time ago as to a general sort of presumption.

Lord Watson. What is the use of speculating about presumptions.

Mr. Blake.

"Some difference may have been inevitable owing to the differences in the pre-existing conditions of the several provinces. It would be reasonable to attribute any difference in the terms of Union, and in the rights of the province, as far as possible to this and by interpretation to confine any variation in legislative powers and other matters to such requirements as were rendered necessary by the circumstances and condition of Manitoba at the time of Union."

Lord Watson. He said they would not presumably make any alteration in the different provinces except to introduce such alterations as were suitable in the case of each, or were necessary to provide for pre-existing conditions within the province which might not be the same in all. That is his argument, and therefore I suppose he goes on to argue against you that presumably they did not intend to legislate at all as to any state of things subsequently created by Parliament.

Mr. Blake. Your Lordship will find later on he adopts a construction which altogether contradicts this premiss, that he adopts a varying construction, a construction which gives an additional variation instead of a harmonizing construction.

"Now let us see what would be the effect of the construction which I have suggested of both Acts—the British North America Act, Section 93, and the Manitoba Act, Section 22, in their practical application to the different provinces as regards the right of provincial legislatures to interfere with separate or denominational schools to the prejudice of a Roman Catholic or Protestant minority.

First then, let us consider the cases of Ontario and Quebec, the two provinces which had by law denominational schools at the Union. In these provinces any law passed by a provincial legislature impairing any right of privilege in respect of such denominational schools, would by force of the prohibition contained in sub-Section 3 of Section 93 of the British North America Act, be *ultra vires* of the legislature and of no constitutional validity.

Should the legislatures of these provinces (Ontario and Quebec) after confederation have conferred increased rights or privileges in relation to education or minorities, I see nothing to hinder them from repealing such Acts to the extent of doing away with the additional rights and privileges so conferred by their own legislation without being subject to any condition of appeal to federal authority."

I have already combatted that proposition.

Lord Watson. That is quite clear from the construction the learned Judge put before on Section 3.

Mr. Blake. I have already combatted the accuracy of the proposition, because I have pointed out that Section 3 is quite wide enough to include the case of prior privileges conferred on Ontario and Quebec.

Lord Watson. Has the learned Judge not made a mistake where he says " In these provinces any law passed by a Provincial Legislature impairing any right or privilege in respect of such denominational schools would by force of the prohibition contained in sub-section 3 of Section 93, &c." I think that must be a mistake and must mean sub-section 2.

Mr. Blake. No, my Lord.

Lord Watson. I doubt it.

Mr. Blake. I think it must be sub-section 1.

The Lord Chancellor. He has referred to the first part of sub-section 3, which deals with existing denominational schools.

Mr. Blake. Well, but then, my Lord, he would not say that it was made *ultra vires*, and of no constitutional validity by means of sub-section 3 ; sub-section 3 says nothing as to *ultra vires*.

The Lord Chancellor. It must be sub-section 1.

Mr. Blake. Yes, it is a misprint for 1. Then I have pointed out to your Lordships with regard to that paragraph below line 40 (commencing "Should the Legislatures, &c.") that increased rights or privileges conferred by post-Union legislation in Ontario and Quebec on educational minorities may be well protected and are protected to the extent of the right of an appeal under sub-section 3 of the British North America Act.

"What is meant by the term provincial authority? The Parliament of the Dominion, as shewn by the Manitoba Act, hold that it does not include the legislature," (his Lordship reflects the light of that candle on the Imperial Legislation)—"for in sub-Section 2 of Section 22, they use it as an alternative expression and so expressly distinguish it from the Legislature. It is true the British North America Act did not emanate from the Dominion Parliament, but nevertheless the construction which that Parliament has put on the British North America Act, if not binding on judicial interpreters, is at least entitled to the highest respect and consideration. Secondly, the words "provincial authority" are not apt words to describe the Legislature, and in order that a provincial Legislature should be subject to an appeal, when it merely attempts to recall its own Acts, the terms used should be apt, clear, and unambiguous. To return then to the case of Ontario and Quebec, should any 'provincial authority' not including in these words the Legislature, but interpreting the expression as restricted to administrative authorities (without at present going so far as to say it included Courts of Justice) by any Act or decision affect any right or privilege, whether derived under a law or practice existing at the time of confederation, or conferred by a provincial Statute since the Union still remaining unrepealed and in force, that would be subject to an appeal to the Governor-General."

So that he agrees that post-Union action is subject to appeal, but he says that it must not be post-Union legislation, though it may be post-Union action under a provincial Statute since the Union.

Lord Watson. Yes, but then he introduces the important qualification on your proposition in the word "un-

repealed." It must be a Statute alive and in effective operation at the time.

Mr. Blake. Yes.

Lord Watson. His conclusion is based on the introduction in the British North America Act of the words, "Or is thereafter established by the Legislature of the province." The learned Judge is evidently of opinion that there was some change made upon that law applicable to Manitoba, that these clauses were adjusted to fit Manitoba, and that Manitoba, whilst it gets Acts of Parliament post-Union which are struck at by sub-section 1, at the same time loses the benefit of the words "or is thereafter established by the Legislature of the province."

Mr. Blake. In the portion I am reading his Lordship is not dealing with the Manitoba Act at all.

Lord Watson. I may be wrong.

Mr. Blake. He is dealing with the British North America Act. and not with the Manitoba Act.

Lord Watson. But he is shewing what the British North America Act is.

Mr. Blake. He is dealing with Ontario and Quebec under the British North America Act, and not with Manitoba at all.

"Secondly, as regards the provinces of Nova Scotia and New Brunswick, those provinces not having had any denominational schools at the time of the Union, there is nothing in their case for sub-section 1 of Section 93 to operate upon."

Lord Watson. Did they come in under section 93?

Mr. Blake. Surely, four provinces come in under Section 93.

The Lord Chancellor. They came in at once. They were two of the four who came in under Section 93.

Mr. Blake. Yes, they were two of the four original provinces.

Lord Watson. I had forgotten that.

Mr. Blake.

"Should either of these provinces by after confederation legislation create rights and privileges in favour of Protestant or Catholic minorities in relation to education, then so long as these statutes remain unrepealed and in force, an appeal would lie to the Governor-

General from any Act or decision of a provincial authority affecting any of such rights or privileges of a minority, but there would be nothing to prevent the Legislature of the provinces now under consideration from repealing any law which they had themselves enacted conferring such rights and privileges, nor would any Act so repealing their own enactments be subject to appeal to the Governor-General in Council."

Of course I have already pointed out the absolutely nugatory character of the power so limited. If you do not include an appeal from the Legislative Act itself, as long as you acknowledge that the right of a provincial Legislature to mould the law is not within the provisions of an appeal, it is to little, and I may say to no purpose, to provide this special remedy with reference to the case of other provincial authorities.

The Lord Chancellor. That is true, but, nevertheless, the Legislature may have overlooked that fact and not given such an appeal, but given an appeal from the acts of authorities not meaning the Legislature. I cannot help thinking that by these continual throwings together of Section 93 and Section 22 one only confuses and does not assist, I should have said that the logical method of dealing with it would be to look and see what Section 22 gives, and then to ask whether there is anything in Section 93 which, having regard to the like provision of Section 22 of the Manitoba Act, must be added to the provisions of Section 22.

Mr. Blake. I should not at all object to that method of treating the case.

The Lord Chancellor. Because Section 22 is the guiding, governing and special provision relating to Manitoba. Whatever was done under the British North America Act, that is what is done for Manitoba. Whatever is the true construction of those sections Manitoba has got, and Manitoba is to be governed by them. The question then arises, whether there is something more to be added to these, and that depends upon whether having regard to the fact that all provisions of the British North America Act are to apply to Manitoba when it becomes a member of the Union unless they are varied by the

Manitoba Act, the Code (if I may so say) relating to education, in Section 22, is to be taken as a substitute for the whole Code of Section 93, or whether there is something in Section 93 which, not being dealt with by Section 22 by way of substitution, may be added to it. But to assume that they must be meant to be practically the same, and then to make up your mind what is given by Section 93, and therefore to conclude that Section 22 cannot give substantially more than Section 93 gives, seems to me to have a tendency to lead one off the path rather than guide one to it.

Mr. Blake. I agree.

Lord Watson. If you come to the conclusion that both sections applied, it would be different, but when you are starting from the conclusion that only the Act of Manitoba applies to Manitoba, I think that the assumption of what the Legislature presumably wanted to do in assimilating, is only calculated to mislead. The first question to determine is what is meant by the words of the Act of 1870. If there are any ambiguities you may refer to the other.

The Lord Chancellor. The only part of the British North America Act which could be applicable, would be the latter part of sub-section 3.

Mr. Blake. And that is the only question that is put.

The Lord Chancellor. That would be the only part that would be applicable; but if the effect of that would be to limit (if its operation be more limited than what is contained in sub-section 2 of Section 22) then sub-section 2 of Section 22 must prevail, because it is varied.

Mr. Blake. Yes.

The Lord Chancellor. If you add to it it must only be not because it any way diminishes or detracts from what is given by Section 22 sub-section 2, but because it adds to it. If so, we must see what it adds.

Mr. Blake. That is precisely the argument. We have all that is contained in Section 22 without any limitation on the more general words by means of sub-section 3 of Section 93. We may possibly have something more if we find that there is in the latter sub-section something extra, and not included in or excepted out of Section 22.

Lord Watson. I think that approaching the consideration of Section 22 for the first time, with a great cloud of probabilities and suppositions and analogies from other systems of Governments, is only capable of misleading. If it does not mislead it creates confusion, which is a very admirable way of misleading.

Mr. Blake. Then the Chief Justice continues :—

"Thirdly, we have the case of the Province of Manitoba; here applying the construction before mentioned the Provincial powers in relation to education would be not further restricted but somewhat enlarged in comparison with those of the other Provinces.

"Acting upon the presumption that in the absence of express words the Act of the Dominion Parliament which embodies the constitution of the Province withholding from the Legislature of the Province the normal right of altering or repealing its own Acts, we must hold that it was not the intention of Parliament so to limit the Legislature by the organic law of the Province."

His Lordship lays down the canon of construction which he says is to govern.

The Lord Chancellor. It is what he has already laid down.

Mr. Blake. Yes.

"What, then, is the result of the legislation of the Domion as regards Manitoba? What effect is to be given to Section 22 of the Manitoba Act? By the first sub-section any law of the Province prejudicing any right or privilege with respect to denominational schools in the Province existing at the Union is *ultra vires* and void. This clause was the subject, and the only subject, of interpretation in Barrett and Winnipeg, and the point there decided was that there was no such right or privilege as was claimed in that case existing at the time of the admission of the province into the Union. Had any such right or privilege been found to exist. there is nothing in the Judgment of the Privy Council against the inference that legislation impairing it would have been unconstitutional and void. That decision has, in my opinion, but a very remote application to the present case."

Then he reads the second sub-section of Section 22 of the Manitoba Act, and says :—

"I put aside as entirely irrevelant here the question whether it was not intended by this sub-section 2 to confer on the Privy Council of the Dominion Appellate jurisdiction from the provincial judiciary, a question the decision of which I may say in passing might well be influenced by the consideration that the power given to Parliament by the North British America Act to create federal Courts, had not at the time of the passage of the Manitoba Act been exercised."

I will not trouble your Lordships with that passage.

The Lord Chancellor. We have not to deal with that.

Mr. Blake. Then

"The first subject of appeal is then, any act or decision of the Legislature of the province affecting any right or privilege of the minority in respect of the matters in question. Now if we are to hold, as I am of opinion we must hold, that it was not the intention of Parliament by these words so to circumscribe the legislative rights conferred by them on Manitoba as to incapacitate that Legislature from absolutely and without any subjection to Federal control, repealing its own enactments, and thus taking away rights which it had itself conferred, the right of appeal to the Governor-General against legislative Acts must be limited to a particular class of such Acts, viz., to such as might prejudice rights and privileges not conferred by the Legislature itself, but rights and privileges which could only have arisen before confederation being those described in the first sub-section of section 22."

Your Lordships find the canon of construction is inexorable, and its application compels you to limit this to acts which interfere with pre-union rights.

The Lord Chancellor. And so, compelling you, it compels you to say that an elaborate system of appeal provided by the Legislature specially applicable to Manitoba meant nothing because the circumstances to which it was applicable never could have arisen.

Mr. Blake. Has no result at all.

"That we must assume, in absence of express words, that it was not the intention of Parliament to impose upon the Manitoba Legislature a disability so anomalous as an incapacity to repeal its own enactments except subject to an appeal to the Governor-General in Council and, possibly, the intervention of the Dominion Parliament as a paramount Legislature, is a proposition I have before stated."

The Lord Chancellor. I confess myself I have a difficulty in seeing why to limit the power to make an Act which repeals is a tremendous interference with the Legislature, while a power to prevent their making an Act in the first instance is no serious limitation of it. I have a little difficulty in seeing why the one is worse than the other.

Lord Watson. The one is a total negation of all right to legislate, the other appears to me to be a good deal within it; that the main purpose of the Legislature may be maintained, but to be amended in such a way as not to trample on the rights of particular classes.

Mr. Blake. In fact, it cannot be interfered with except so far as it has trampled on rights.

Lord Shand. Which is the section which gives the Governor General a right to interfere?

The Lord Chancellor. Sub-section 2 of Section 22.

Lord Watson. In the next sentence you are about to read, the Learned Judge appears to me rather to change his position a little, for what it really comes to is, that if he is right he goes on to say that the right of Appeal is confined to what existed at the Union; if that be so, legislation, which is struck at by Sub-section 1, may become the subject of a process of rescission in the ordinary course, and may be cut down as *ultra vires*, or alternatively, according to the learned Judge's view, may be treated as not *ultra vires*, but as *intra vires* and mendable by appeal. It seems to give an alternative.

Mr. Blake. Yes, that is the view.

Lord Watson. I can hardly conceive that the Legislature of Canada intended first to absolutely declare that particular Legislation on a particular subject, was a nullity, and then to allow the nullity to be the subject of appeal.

Mr. Blake. An appeal on the question of its validity.

The Lord Chancellor. I suppose the other side would say, I do not know whether they would, and that is not what has been said, that it does not make it null. It is only a direction to the Legislature that nothing they do is to have that effect, and the remedy, if they do legislate, is to appeal to the Governor-General.

Mr. Blake. That has never been said anywhere. In all the various mazes of the controversy and its various forms, that has never been put forward.

Lord Watson. That is a view which, if the Learned Chief Justice is correct, I think is a more plausible and reasonable way of putting the case. He says it is absolutely *ultra vires.*

The Lord Chancellor. Yes, he says it is null.

Mr. Blake. All throughout it has been conceded that the power of the Legislature was limited by this sub-section 1.

Lord Watson. I could quite understand if sub-section 2 was a sort of warning to naughty boys not to do a particular thing, but if they do it so and so will happen. That is not an ordinary mode of legislation.

Mr. Blake.

"Therefore the right of Appeal to the Governor-General in Council must be confined to acts of the Legislature affecting such rights and privileges as are mentioned in the first sub-section, namely, those existing at the Union when belonging to a minority, either Protestant or Catholic."

That is to say, it is more limited in the future as to the purpose of the Appeal, it is more limited as to the classes that can use it, and more doubtful as to the result, and it is based on the theory that the Act is bad, except to the extent that special laws may be passed leaving out the portion which had made the Act void altogether.

Lord Watson. Not the Act altogether, only the provision of the Act.

Mr. Blake. Yes, the provision of the Act. The Act would not be void if the provision is separable. It might strike at the root of the enactment and so avoid it altogether. In the large majority of cases it has occurred that the *ultra vires* provisions in the Act of Parliament objected to affected only a part, and left the Act itself good.

Then there would also be the right of Appeal from any provincial authority. I will assume that the description "provincial authority" does not apply to the Courts of Justice. Then these words "provincial authority" could not, as used in this sub-section 2 of section 22 of the Manitoba Act, have been intended to include the provincial Legislature, for it is expressly distinguished from it being mentioned alternately with 'the Legislature.' An appeal shall lie from any Act or decision of the Legislature, or of any 'provincial authority,' is the language of the section. It must then apply to the provincial, executive or administrative authorities. No doubt an appeal would lie from their Acts or decisions upon the ground that some right or privilege existing at the date of the admission of the province to the Federal Union was thereby prejudiced. In this respect Manitoba would be in the same position as Ontario and Quebec. Unlike the cases of those provinces, and also unlike the case of the two maritime provinces, Nova Scotia and New Brunswick, there would not, however, in the case of Manitoba, be an appeal to the Governor-General in Council from the Act or decision of any provincial authority upon the ground that some right or privilege not existent at the time of the Union, but conferred subsequently by legislation, had been violated. This construction must necessarily result from the right of appeal against Acts or decisions of provincial authorities, and against Acts or decisions of the Legislature being limited to such as prejudiced the same class of rights or privileges. The wording of this sub-section 2 shows clearly that only one class of rights or privileges could have been meant, and that the right of Appeal was therefore to arise upon an invasion of these, either by the Legislature or by a Provincial authority. Then as the impossibility of holding" (it has become now an impossibility) "that it could have been intended to impose fetters on the Legislature or to incapacitate it from repealing its own Acts requires us to limit the Appeal against its enactments to Acts affecting rights and privileges existing at the Union. it must follow that the right of Appeal must be in like manner limited as regards acts or decisions of Provincial authorities. This, however, although it makes a difference between Manitoba and the other Provinces, is not a very material one. The Provincial authorities would, of course, be under the control of the Courts; they could therefore be compelled by the exercise of judicial authority to conform themselves to law.

Lord Watson. One observation that occurs to me on that reasoning is this. It may be right or wrong, but I think the learned Judge overlooks the fact that in Sub-section 3 of Section 93 the words of the Section contain words of limitation which make it necessary to bring in that expression. You have not the words of limitation "existing by law at the Union" in Sub-section 2. It is absolutely necessary—if all legislation, whether prior or post-Union as you call it, was to be brought in effectively then it was absolutely necessary to put in these words "or may be after established,"

Mr. Blake. Certainly.

Lord Watson. But in Sub-section 2 of 22 you start with the limitation of the general words.

Mr. Blake. But your Lordship places force on the omission of one set of descriptions.

Lord Watson. It was rendered necessary if they meant to make it necessary.

Mr. Blake. If you omit both, the generality is maintained.

Lord Watson. I merely mention that I do not think it is conclusive, but it rather weakens the force of the criticism.

Mr. Blake.

"Much greater would have been the difference between Manitoba and the other provinces, if we were to hold that, whilst as regards the provinces of Nova Scotia and New Brunswick, their Legislature could enact a separate school law one session and repeal it the next without having their repealing legislation called in question by appeal, and whilst as regards Ontario and Quebec, although rights and privileges existing at confederation were made intangible by their Legislatures, yet any increase or addition to such rights and privileges which these Legislatures might grant could be withdrawn by them at their own pleasure subject to no Federal revision, yet that the legislation of Manitoba on the same subject should be only revocable subject to the revisory power of the Governor-General in Council."

The Lord Chancellor. It might have been strange, but if the provincial authority does not mean the Legislature, they have not dealt with the Act of Legislature. In

Manitoba they have dealt with an Act of the Legislature, and therefore, however strange it may be, they have done it. They have made that difference. I am not dealing with what the extent of the rights are that are alluded to, and there is this broad and substantial difference. In the one case you are allowed to appeal under the Act of the Legislature on this hypothesis, and in the other you are not, and that is brought about by the plainest enactment in the world.

Mr. Blake. His result after all this strained argument and these canons of construction is this :

"I have thus endeavoured to show that the construction I adopt has the effect of placing all the provinces virtually in the same position with an immaterial exception in favour of Manitoba, and it is for the purpose of demonstrating this that I have referred to appeals from the Acts and decisions of provincial authorities which are not otherwise in question in the case before us."

My opinion is he has aggravated the differences instead of diminishing them by the construction.

The Lord Chancellor. If he is right in his construction of the words "provincial authority," why the Legislature has made the marked distinction between them and why there should be an endeavour to fritter away such a distinction as that in the one case an appeal to the Governor-General against the Legislative Act is allowed, and in the other it is not, I do not know.

Mr. Blake. No.

The Lord Chancellor. I should say the more you fritter it away, the more you are destroying the apparent intention of the Legislature to make a difference.

Mr. Blake.

"That the words 'provincial authority' in the third sub-section of Section 93 of the British North America Act do not include the Legislature is a conclusion which I have reached not without difficulty. In interpreting the Manitoba Act, however, what we have to do is to ascertain in what sense the Dominion Parliament in adopting the same expression in the Manitoba Act, understood it to have been used in the British North America Act. That they understood these words not to include the Provincial Legislatures is apparent from

Section 22 of the Manitoba Act, wherein the the two expressions 'provincial authority and legislature of the province' are used in the alternative, thus indicating that in the intendment of Parliament they meant different subjects of appeal. Again, why were the words contained in the 3rd sub-section of Section 93 of the British North America Act, 'or is thereafter established by the Legislature of the province' omitted, when that section was in other respects transcribed in the Manitoba Act."

His Lordship, once again, I think for the fourth or fifth time, treats the post-Union arrangements as the only thing omitted, and says that the section is in other respects the same, whereas, as his Lordship, Lord Watson, has pointed out that inference is obviated by a reference to the provision including pre-Union arrangements. The two are omitted. His Lordship thinks there was only one.

"The reason it appears to me is plain. So long as these words stood with the context they had in the British North America Act, they did not in any way tie the hands of the Legislatures as regards the undoing, alteration, or amendment of their own work, for the words 'any provincial authority' did not include the Legislature. But when in the Manitoba Act the Dominion Parliament thought it advisable for the better protection of vested rights—rights and privileges—existing at the Union, to give a right of appeal from the Legislature to the Governor-General in Council, it omitted the words 'or is thereafter established by the Legislature of the province,' with the intent to avoid placing the Provincial Legislature under any disability, or subjecting it to any appeal as regards the repeal of its own legislation, which would have been the effect if the third sub-section of section 93 of the British North America Act had been literally re-enacted in the Manitoba Act, with the words 'of the Legislature of the province' interpolated as we now find them in sub-section 2 of the latter Act. This seems to me to show conclusively that the words 'rights or privileges' in sub-section 2 of Section 22 were not intended to include rights and privileges originating under the provincial legislation since the Union, and that the Legislature of Manitoba is not debarred from exercising the common legislative right of abrogating laws which it has itself passed relating to denominational or separate schools or educational privileges, nor is such repealing legislation made subject to any appeal to the Governor-General in Council."

Lord Shand. I do not see anywhere in his Lordships opinion that he touches the question of what really would be the advantage of an appeal to the Governor in Council, in addition to an enactment that the thing itself should be null.

Mr. Blake. No, I do not find anyone touches on it. I am not able to see the advantage.

Lord Shand. If you have an enactment that the thing is null, then the Court of Law would declare it so, and you do not want the necessity of an appeal to the Governor.

Lord Watson. If you are referring to these alternatives that are given, I think it shews considerable lack of ingenuity not to be able to suggest some reason. It might be said to give to persons an option whether they wished to get rid of it *in toto*, or have it amended.

Lord Shand. So far as it is *ultra vires* they could proceed to the Court of Law to declare so much *ultra vires.*

Lord Watson. I think there is a certain amount of improbability about it.

Mr. Blake. Then I come to *Mr. Justice Fournier's* Judgment—

By the Statute 33 Vic. ch. 3 sec. 2 (D) the Manitoba Act the provisions of the British North America Act except so far as the same may be varied by the said Act are made applicable to the Province of Manitoba in the same way and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the provinces united by the British North America Act. This Act was Imperialized so to speak by 34 Vic. ch. 38 Imp. which declares that 32 & 33 Vic. ch. 3 (D) shall be deemed to have been valid and effectual for all purposes whatsoever.

If we are now called upon to construe certain provisions of this Statute, it seems to me that the same considerations will apply as if the provisions appeared in the British North America Act itself under the heading "Manitoba" and therefore, as stated by the late Chief Justice of this Court, in the case of Severn v. the Queen [2 Can. S. C. R. 70] "in deciding important questions arising under "the Act passed by the Imperial Parliament for federally uniting "the Provinces of Canada, Nova Scotia and New Brunswick, we "must consider the circumstances under which that Statute was "passed, the condition of the different provinces, their relations to "one another, as well as the system of government which prevailed "in those provinces and countries." For convenience therefore I will place in parallel columns the sections of the Manitoba Act and the corresponding sections of the British North America Act in relation to education upon which we are required to give an answer. [*Supra p. 12.*]

What was the existing state of things in the territory then being formed into the Province of Manitoba? Rebellion, as I have already stated in the case of Barrett v. Winnipeg, had thrown the people into a strong and fierce agitation, inflamed religious and national passions caused the greatest disorder, which rendered necessary the intervention of the Federal Government, and, as matters then stood on the 2nd March, 1870, the Government of Assiniboia in order to

pacify the inhabitants appointed Rev. W. Ritchot and Messrs. Black and Scott as joint delegates to confer with the Government of Ottawa, and negotiate the terms and conditions upon which the inhabitants of Assiniboia would consent to enter confederation with the Provinces ofCanada.

Mr. Ritchot was instructed to immediately leave with Messrs. Black and Scott for Ottawa, in view of opening negotiations on the subjects of their mission with the Government of Ottawa.

When they arrived at Ottawa, the three delegates, Messrs. Ritchot, Black and Scott, received on the 25th April, 1870, from the Hon. Mr. Howe, the then Secretary of State for the Dominion of Canada, a letter informing them that the Hon. Sir John A. Macdonald and Sir George Cartier had been authorised by the Government of Canada to confer with them on the subject of their mission, and that they were ready to meet them.

The Rev. Mr. Ritchot was the bearer of the conditions upon which they were authorised to consent for the inhabitants of Assiniboia to enter confederation as a separate province.

These facts appear in Exhibit L, Sessional papers of Canada, 1893, 33 D, and in Exhibit N of the same Sessional paper we see that the following conditions, Articles 5 and 7 read as follows :—

"5. That all properties, all rights and privileges possessed be respected, and the establishing and settlement of the customs, usages, and privileges be left for the sole decision of the local legislature."

"7. That the schools shall be separate, and that the monies for schools shall be divided between the several denominations *pro rata* of their respective populations."

Now, after negotiations had been going on, and despatches and instructions from the Imperial Government of Canada on the subject of the entrance of the Province of Manitoba into the Confederation had been received, the Manitoba Constitutional Act was prepared and section 22 inserted as a satisfactory guarantee for their rights and privileges in relation to matters of education as claimed by the above articles 5 and 7. And until 1890 the inhabitants of the Province of Manitoba enjoyed these rights and privileges under the authority of this section and local statutes passed in conformity therewith.

However, it seems by the decision of the judicial Committee of the Privy Council in the case of Barrett *v.* Winnipeg, that the delegates of the North-West and the Parliament of Canada although believing that the inhabitants of Assiniboia had before the union "by law or by practice, certain rights and privileges with respect to denominational schools "—for the words used in sub-section 1 of this section 22 are "which any class have by law or practice in the province at the union "—had in point no such right or privilege by law or practice with respect to denominational schools, and therefore that sub-section 1 is, so to speak, wiped out of the Constitutional Act of Manitoba, having nothing to operate upon.

But if the parties agreeing to these terms of union, were in error in supposing they had by law or practice, prior to the union,

certain rights or privileges, they certainly were not in error in trusting that the provincial legislature as the Legislature of Quebec did *after* confederation for the Protestant minority which was being created would forthwith settle and establish their usages and privileges and secure by law and in accordance with articles 5 and 7 of the bill of rights, separate schools for the Catholics of Manitoba, and would make provision so that the moneys would be divided between the Protestant and Catholic denominations *pro rata* to their respective populations. Then once established and secured by their own local legislature in accordance with the terms of the union, is not the minority perfectly within the spirit and the words of the Constitutional Act in contending that rights and privileges so secured by an Act of the Legislature are at least in the same position as rights secured to minorities in the Provinces of Quebec and Ontario under section 93 of the British North America Act and that sub-sections 2 and 3 were inserted in the Act so that they might be protected by the Governor-General against any subsequent legislation by either a Protestant or Catholic majority in after years.

In the present reference being again called upon to construe this same Section 22, but as if sub-Section 1 was repealed or wiped out by judicial authority, we must, I think, take into consideration the historical fact that the Manitoba Act of 1870 was the result of the negotiations with parties who agreed to join and form part of the Confederation as if they were inhabitants of one of the Provinces originally united by the British North America Act, and we must credit the Parliament of Canada with having intended that the words "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" (which are also the words used in the 93rd Section of the British North America Act) should have some effect. The only meaning and effect I can give them is that they were intended as an additional guarantee or protection to the minority, either Protestant or Catholic, whichever it might happen to be, that the Laws which they knew would be enacted immediately after the Union, by their own Legislature in reference to education, would be in accordance with the terms and conditions upon which they were entering the Union, this guarantee was given so as to prevent later on, interference with their rights and privileges by subsequent legislation without being subject to an appeal to the Governor-General in Council should such subsequent Act of the Legislature affect any right or privilege thus secured to the Protestant or Catholic minority by their own Legislature.

In my opinion the words used in sub-Section 2 "an appeal shall lie from any Act of the Legislature" necessarily mean an appeal from any Statute which the Legislature has power to pass in relation to education, if *at the time* of the passing of such Statute there exists by law any right or privilege enjoyed by the minority. There is no necessity of appealing from Statutes which are *ultra vires* for the assumption of any unauthorised power by any local Legislature

under our system of Government is not remedied by appeal to the Governor-General in Council, but by Courts of Justice.

Then, as to the words "right or privilege" in this sub-Section, they refer to some right or privilege in relation to education to be created by the Legislature which was being brought into existence, and which, once established, might thereafter be interfered with at the hand of a Local majority so as to affect the Protestant or Catholic minority in relation to education. It is clear, therefore, that the Governor-General in Council has the right of entertaining an appeal by the British North America Act as well as by sub-Section 2 of Section 22 of the Manitoba Act. He has also the power of considering the application upon the merits. When the application has been considered by him upon its merits if the Local Legislature refuses to execute any decision to which the Governor-General has arrived in the premises, the Dominion Parliament may then under sub-Section 3 of Section 22 of the Manitoba Act, pass remedial legislation for the execution of his decision.

In construing, as I have done, the words of sub-Section 2 of the 22nd Section of the Manitoba Constitutional Act, which is as regards an appeal to the Governor-General in Council, but a reproduction of sub-Section 3 of Section 93 of the British North America Act, except that the clear unequivocal and comprehensive words "from any act or decision of the Legislature of the Province" are added, I am pleased to see that I am but concurring in the view expressed by Lord Carnarvon in the House of Lords on the 19th February 1867 when speaking of this right of appeal to be granted to minorities when a Local Act might affect rights or privileges in matters of education, as the following extract from Hansard's Parliamentary Debates, 3rd Series, February 19, 1867, shows:—"Lord Carnarvon. —Lastly, in the 93rd Clause, which contains the exceptional provisions to which I referred, your Lordships will observe some rather complicated arrangements in reference to education. I need hardly say that the great question gives rise to nearly as much earnestness and division of opinion on that as on this side of the Atlantic. This clause has been framed after long and anxious controversy in which all parties have been represented, and on conditions to which all have given their consent. It is an understanding which, as it only concerns the local interests affected, is not one that Parliament would be willing to disturb, even if in the opinion of Parliament it were susceptible of amendment, but I am bound to add, as the expression of my own opinion, that the terms of agreement appear to me to be equitable and judicious. For the object of the clause is to secure to the religious minority of one Province the same rights and privileges and protection which the religious minority of another Province may enjoy. The Roman Catholic minority of Upper Canada, the Protestant minority of the Maritime Province, will thus stand on a footing of entire equality. But in the event of any wrong at the hand of the local majority, the minority have a right of appeal to the Governor-General in Council, and may claim the application of any remedial laws that may be necessary from the central Parliament of Confederation."

This being so, the next point of enquiry is whether the Acts of 1890 of Manitoba affect any right or privilege secured to the Catholic minority in matters of education after the Union, for we have nothing to do with the enquiry whether the Catholic minority had at the time of the Union any right by law or practice, that point as I have already stated having been decided adversely to their contention by the decision of the Privy Council in the case of "Barrett *v.* Winnipeg." By referring to the legislation from the date of the Union till 1890, it is evident that the Catholics enjoyed the immunity of being taxed for other schools than their own, the right of organization, the right of self-government in this school matter, the right of taxation of their own people, the right of sharing in Government grants for education and many other rights under the statute of a most material kiud. All these rights were swept away by the Acts of 1890, as well as the properties they had acquired under these Acts with their taxes and their share of the public grants for education. Could the prejudice caused by the Acts of 1890 be greater than it has been? The scheme that runs through the Acts of 1871 and 1881 up to 1890, as Lord Watson of the Privy Council is reported to have so concisely stated on the argument of the case of "Barrett v, Winnipeg" (which is printed in the sessional papers of Canada, 1893) appears to have been that "no ratepayer shall be taxed for contribution towards any school except one of his own denomination"; and I will add that this scheme is clearly pointed out in Articles 5 and 7 of the Conditions of Union above already referred to which were the basis of the Constitutional Act.

Now is this a legal right or privilege enjoyed by a class of persons? In this case the immunity from contributing to any schools other than one of its own denomination was acquired by the Catholic minority *quâ* Catholics by statute, and Catholics certainly at the time the legislation was passed represented a class of persons comprising at least one-third of the inhabitants of the Province of Manitoba. It is unnecessary, I think, after reading the able Judgments delivered in the case of "Barrett v, Winnipeg" to show by authority that the right so acquired by the Catholic minority after the Union by the Act of 1871 was a legal right, and that, if it is shown by subsequent legislation enacted by the Legislature of the Province of Manitoba that there has been any interference with such right, then I am of opinion that such interference would come within the very words of this Section 22 of the Manitoba Constitutional Act, which gives a right of appeal to the Governor-General in Council from "any Act of the Legislature (words which are not in Section 93 of the British North America Act, but are in sub-Section 2 of Section 22 of the Manitoba Act) affecting a right acquired by the Roman Catholic minority of the Queen's subjects in relation to education."

The only other question submitted to us I need refer to is the 4th question.

Does sub-Section 3 of Section 93 of the British North America Act, 1867, apply to Manitoba? The answer to this question is to be found in the second section of the Manitoba Act, 32 and 33 Vic., cap. 3 which says "from and after the said date the provisions of the British North America Act shall apply, except those parts thereof

which are in terms made, or by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole of the Provinces now comprising the Dominion and except so far as the same may be varied by this Act and be applicable to the Province of Manitoba in the same way and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act." The Manitoba Act has not varied the British North America Act, though sub-section 2 of Section 22 has a somewhat more comprehensive wording than sub-section 3 of Section 93 of the British North America Act in relation to appeals in educational matters. A Statute does not vary or alter if it merely makes further provision, it is simply an addition to it. The second sub-section is wider but does not vary at all from the third sub-section of the 93 section of the British North America Act, save in this that there is an addition to it, that it includes it and goes beyond it by adding the words " and from any Act of the Legislature." The third sub-section of the British North America Act provides that in two cases there is to be an Appeal. There is nothing inconsistent in the Manitoba Act which says that in *all* cases there shall be an Appeal, it goes beyond the British North America Act, it does not vary it, it leaves it as it is and adds to it.

We see by the opinion expressed by some of the Lords of the Privy Council how far the right of Appeal extends under Section 2 of the Manitoba Act, for in the argument on that question before the Privy Council (Sessional papers 1 8 No. 33a, 33b, 1893) we read at page 134, that when Mr. Ram, Counsel, was arguing on behalf of Mr. Logan in the case of " Winnipeg *v.* Logan " he said " I venture to think that under sub-section 2 what was contemplated was this, that apart from any question *ultra vires* or not, if a minority said, 'I am oppressed' that was the party who had to come under that sub-section 2 and appeal to the Government.

" Lord Hannen : It has a right to appeal against *any* Act of the Legislature.

" Lord Shand : Even *ultra vires*."

This being also my opinion, I will only add that, having already stated that I think that we should read the Manitoba Constitutional Act in the light of the British North America Act, and that it was intended as regards all civil rights in educational matters to place the Province of Manitoba on the same footing as the Provinces of Quebec and Ontario, and that sub-section 1 of Section 22 having been enacted for the purpose of protecting rights held by law or practice prior to the Union, but which have been declared not to exist. I am of opinion that sub-section 2 of Section 22 of the Manitoba Constitutional Act provides for an Appeal to the Governor-General in Council by memorial or otherwise, on the part of the Roman Catholic minority, contending that the two Acts of the Legislative Assembly of Manitoba passed in 1890 on the subject of education, are subversive of the rights and privileges of the Roman Catholic ratepayers not to be taxed for contribution towards schools, except one of their own denomination, and that such right has been acquired by Statute subsequent to the Union.

For the above reasons I answer the questions submitted by His Excellency, the Governor-General in Council, as follows :—

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

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

(3.) Does the decision of the Judicial Committee of the Privy Council in the cases of "Barrett *v.* The City of Winnipeg" and "Logan *v.* The City of Winnipeg," dispose of or conclude the application for redress, based on the contention that the rights of the Roman Catholic minority which accrued to them after the Union under the Statutes of the Province have been interfered with by the two Statutes of 1890, complained of in the said petitions and memorials? No.

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

(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? Yes.

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

Then *Mr. Justice Taschereau* says :—

I doubt our jurisdiction on this reference or consultation. Is section 4, of 54 & 55 Vic., ch. 25, which purports to authorize such a reference to this Court for hearing "or" consideration *intra vires* of Parliament? By which section of the British North America Act is Parliament empowered to confer on this Statutory Court any other jurisdiction than that of a Court of Appeal under section 101 thereof? This Court is evidently made, in the matter, a Court of First Instance, or rather I should say, an Advisory Board of the Federal Executive substituted *pro hac vice* for the law officers of the Crown and not performing any of the usual functions of a Court of Appeal, nay, or any Court of Justice whatever. However, I need not, at present,

further investigate this point. It has not been raised, and a similar enactment to the same import has already been acted upon. That is not conclusive, it is true : but our answers to the questions submitted will bind no one, not even those who put them, nay, not even those who give them, no Court of Justice, not even this Court. We give no judgment, we determine nothing, we end no controversy : and whatever our answers may be, should it be deemed expedient, at any time by the Manitoba Executive, to impugn the constitutionality of any measure that might hereafter be taken by the Federal authorities against the provincial legislation, whether such measure is in accordance with or in opposition to the answers to this consultation, the recourse, in the usual way, to the Courts of the country remains open to them. That is, I presume, the consideration, and a very legitimate one, I should say, upon which the Manitoba Executive acted by refraining to take part in the argument on the reference, a course that I would not have been surprised to see followed by the Petitioners, unless indeed they are assured of the interference of the Federal authorities, should it eventually result from this reference that constitutionally the power to interfere with the provincial legislation as prayed for exists. For if as a matter of policy, in the public interest, no action is to be taken upon the Petitioners' application, even if the Appeal lies, the futility of these proceedings is apparent.

Assuming, then, that we have jurisdiction, I will try to give as concisely as possible the reason upon which I have based my answers to the questions submitted. In the view I take of the application made to His Excellency, the Governor-General in Council, by the Catholics of Manitoba I think it better to introvert the order of the questions put to us, and to answer first the fourth of these questions, that is, whether sub-section 3 of section 93 of the British North America Act applies to Manitoba. To that question the answer, in my opinion, must be in the negative. That section of the British North America Act applies to every one of the Provinces of the Dominion, with the exception, however, of Manitoba, for the reason that, for Manitoba, in its special charter, the subject is specifically provided for by section 22 thereof. The maxims *lex posterior derogat priori* and *specıala generalibus derogant* have both here, it seems to me, their application. If it had been intended to purely and simply extend the operations of that section 93 of the British North America Act to Manitoba, section 22 of its charter would not have been enacted. The course since pursued for British Columbia and Prince Edward Island would have been followed. But where we see a different course pursued we have to assume that a difference in the law was intended. I cannot see any other reason for it and none has been suggested. True it is that words "or practice" in sub-section 1 of section 22 are an addition in the Manitoba Charter which the Dominion Parliament desired to specially make to the analogous provision of the British North America Act, but that was no reason to word sub-section 2 thereof so differently as it is from sub-section 3 of section 93 of the British North America Act. Then this difference may be easily explained, though its consequences may not have been foreseen. I speak cautiously and

mindful that I am not here allowed to controvert or even doubt, anything that has been said on the subject by the Privy Council. It is evident, to my mind, that it was simply because it was assumed by the Dominion Parliament that separate or denominational schools had previously been in that region, and were then, at the Union, the basis and principle of the educational system; and with the intention of adapting such system to the new province, or rather of continuing it as found to exist, that in the Union Act of 1870 the words of sub-section 3 of section 93 of the British North America Act: "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"—were stricken out as unnecessary and inapplicable to the new province. And I do not understand that the Privy Council denies to the Petitioners their right to separate schools. However, the reason of this difference between the constitution of the Province and the British North America Act cannot, in my view of the question, bring much assistance in the present investigation; the fact remains—whatever may have been the reason for it—that no appeal is given to the minority in Manitoba in relation to the rights and privileges conceded to them since the Union as distinguished from those in existence at the Union. They have no rights but what is left to them by the judgment in the Barrett case; and, if I do not misunderstand that judgment, the appeal they now claim to (*sic*) is not, as a logical inference, thereby left to them.

And in vain now, to support their appeal, would they urge that the statute so construed is unreasonable, unjust, inconsistent, and contrary to the intentions of the law-giver; uselessly would they contend that to force them to contribute pecuniarily to the maintenance of the public non-Catholic schools is to so shackle the exercise of their rights as to render them illusory and fruitless; or that to tax not only the property of each and every of them individually but even their school buildings for the support of the public schools is almost ironical; uselessly would they demonstrate the utter impossibility for them to efficaciously provide for the organization, maintenance and management of separate schools, and the essential requirements of a separate school system without statutory powers and the necessary legal machinery; ineffectively would they argue that to concede their right to separate schools and withal deprive them of the means to exercise that right is virtually to abolish it, or to leave them nothing of it but a barren theory. With all these and kindred considerations, we here, in answering this consultation, are not concerned. The law has been authoritatively declared to be so, and with its consequences we have nothing to do. *Dura lex, sed lex, judex non constituitur ad leges reformandas. Non licet judicibus de legibus judicare, sed secundum ipsas.* The Manitoba legislation is constitutional, therefore it has not affected any of the rights or privileges of the minority; therefore the minority has no appeal to the federal authority. The Manitoba legislature had the right and power to pass that legislation, therefore any interference with that legislation by the federal authority would be *ultra vires* and unconstitutional.

The Lord Chancellor. That is a very wide extension, as it seems to me, or rather a broad interpretation of what was decided by this Board in that case.

Mr. Blake. Yes, I quarrel very much with this Judgment.

Lord Watson. I think it might be more briefly stated in the proposition.—A minority has no rights.

Mr. Blake. His Lordship did not like to say your Lordships had decided that in so many words.

The Lord Chancellor. Then he goes on to discuss that.

Lord Watson. It is applicable to either view of the case. As I read these remarks they are equally applicable.

Mr. Blake. Then they must be very admirable remarks.

I take up now the first of these questions. Does the right of appeal claimed by the Petitioners exist under Section 22 of the Manitoba Act? And here again, in my opinion, the answer must be in the negative for the reason that it is conclusively determined by the Judgment of the Privy Council that the Manitoba legislation does not prejudicially affect any right or privilege that the Catholics had by law or practice at the Union, and if their rights and privileges are not affected there is no Appeal.

The Lord Chancellor. I suppose he is right in saying that the decision does not go that length if sub-section 2 only applies to Acts affecting rights existing prior to the Union.

Mr. Blake. I quite agree.

The Lord Chancellor. And that, I think, is his hypothesis?

Mr. Blake. I think so. His hypothesis is that the Section we are now dealing with has to do only with rights and privileges existing at the Union.

Lord Watson. The learned Judge is in error in saying that the Judgment of the Privy Council determines anything to the effect he states. It would be conclusive to that effect I quite admit if you add to the Judgment of the Privy Council in the Winnipeg case the further decision that the provision as to Appeals under sub-section 2 against Acts of Legislature only applies to those Acts of the Legislature which fall under sub-section 1.

Mr. Blake. Yes.

Lord Watson. Unfortunately, we did not decide that. That is an open question.

Lord Shand. I think you get in the next sentence exactly what the Lord Chancellor has said.

Mr. Blake.

The rights and privileges mentioned in sub-Section 2 of Section 22 are the same rights and privileges that are mentioned in sub-Section 1 that is to say, those existing at the Union upon which sub-Section 3 provides for the interference in certain cases of His Excellency the Governor-General in Council, and it is as to such rights and privileges only that an appeal is given. The appeal given in the other Provinces by section 93 of the British North America Act as to the rights and privileges conferred on a minority after the Union is, as I have remarked, left out of the Manitoba Constitution. Assuming, however, that the Manitoba Constitution is wide enough to cover an appeal by the minority——

Here I quarrel very much with his Lordship's judgment—

upon the infringement of any of their rights or privileges created since the Union, or assuming that Section 93 of the British North Amercia Act sub-Section 3 applies to Manitoba, I would be inclined to think that, by the *ratio decidendi* of the Privy Conncil there are no rights or privileges of the Catholic minority that are infringed by the Manitoba legislation so as to allow of the exercise of the powers of the Governor-in-Council in the matter as the Manitoba Statutes must now be taken not to prejudicially affect any right or privilege whatever enjoyed by the Catholic community.

Your Lordships decided no such thing. Your Lordships decided that they did not affect any right or privileges enjoyed by the Catholic community at the time of the Union, which was the only question before you, and was so stated by your Lordships.

Lord Watson. What the learned Judge means to say rightly or wrongly, is that that which was not a right or privilege before cannot be a right or privilege after. It does not at all follow there would not have been a right or privilege if there had been prior to 1870 the same legislation in Manitoba that there was between 1870 and 1890.

The Lord Chancellor. I should have said reading the Judgment on this part of that previous case that if there had been such legislation the *ratio decidendi* would have indicated that the Act of 1890 would have been void.

Mr. Blake. Certainly that is the whole argument of the case, and I hold that that is to be deduced from the statement by your Lordships of the character of the legislation.

It would seem, no doubt, by the language of both Section 93 of the British North America Act and of Section 22 of the Manitoba Charter, that there may be provincial legislation which though *intra vires*, yet might affect the rights or privileges of the minority so as to give them the right to appeal to the Governor-in-Council. For it cannot be of *ultra vires* legislation that an appeal is given. And the Petitioners properly disclaiming any intention to base their application on the unconstitutionality of the Manitoba Statutes, even for infringement of rights conferred upon them since the Union, urge that though the Privy Council has determined that the legislation in question does not affect the rights existing at the Union so as to render it *ultra vires* yet that it does affect the rights conferred upon them by the Provincial Legislature since the Union, so as to give them though *intra vires*, an appeal to the Governor-in-Council. I fail to see, however, how this ingenious distinction, for which I am free to admit, both the British North America Act, aad the Manitoba Special Charter give room, can help the Petitioners. I assume here that the Petitioners have an appeal upon the rights and privileges conferred upon them since the Union as contra-distinguished from the rights previously in existence. The case is precisely the same as if the present appeal was as to their rights existing at the Union. They might argue that though the Privy Council has held this legislation to have been *intra vires*, yet their right to appeal subsists, and, in fact exists because it is *intra vires*. But what would be this ground of appeal? Because the legislation affects the rights and privileges they had at the Union. And the answer would be one fatal to their appeal, as it was to their contentions in the Barrett case that none of these rights and privileges have been illegally affected. Now, the rights and privileges they lay claim to under the provincial legislation anterior to 1890 are, with the additions rendered necessary by the political organization of the country to enable them to exercise these rights, the same in principle, that they had by practice at and before the Union, and which were held by the Privy Council not to be illegally affected by the legislation of 1890.

The Lord Chancellor. This Board said there was really no practice before the Union, which could be said to give any right to avoid taxation.

Mr. Blake. It was all voluntary and by individual action.

The Lord Chancellor. Any practice in the nature of law governing the school rates.

Mr. Blake. That was the trouble. There was no legal organisation of any kind but the exercise of a common right of A. and B. and C., who were of one faith, to subscribe together for the education of their children.

Lord Watson. There was no positive law, and there was no practice having the force of law.

Mr. Blake. That was all.

The Lord Chancellor. And further what was said was that whatever the effect of the practice was that was left untouched, that if all that existed was power to subscribe to schools of their own, and pay for them, that power remained—that is the ground.

Mr. Blake. That is the ground of the decision. But you have a series of statutes now creating the rights and privileges your Lordships have described, and you have got an Act which your Lordships have described in that judgment as sweeping away all those rights and privileges, and yet his Lordship finds himself constrained by the effect of the decision of the Privy Council to decide obviously contrary to what would have been his view otherwise.

The Lord Chancellor. He did not like the decision of the Privy Council.

Mr. Blake. That is tolerably obvious.

The Lord Chancellor. And it may have looked blacker to him than it really was.

Lord Watson. It is not quite correct to say that what the Board held in the Winnipeg case was that these privileges and rights at the Union had not been illegally affected. What the Board determined was that they had at that date no privileges which were capable of being affected.

Mr. Blake. I am not certain about that.

Lord Watson. They were not possessed of any privileges within the meaning of sub-section 2.

Mr. Blake. It was not before your Lordship to decide, but a question of this kind might have arisen. Supposing there had been subsequent legislation prescribing voluntary denominational schools. It is very absurd to suppose it, for the considerations I have already stated; but I can conceive a right or privilege of that kind being violated if we were not living at the close of the nineteenth century. Then he says:—

The Petitioners, it seems to me, would virtually renew their impeachment of the constitutionality of the Manitoba legislation of 1890 upon another ground than the one taken in the Barrett case, namely upon the rights conferred upon them since the Union, whilst the controversy in the Barrett case was limited to their rights as they existed at the Union. But that legislation, as I have said, is

irrevocably held to have been *intra vires*, and it is not to the Petitioners to argue the contrary even upon a new ground. And if it is *intra vires* it cannot be that it has illegally affected any of the rights or privileges of the Catholic minority, though it may be prejudicial to such right. And if it has not illegally affected any of those rights or privileges they have no appeal to the Governor-in-Council.

It has been earnestly urged, on the part of the Petitioners, in their attempt to distinguish the two cases, that in the Barrett case it was only their liability to assessment for the public schools that was in issue, and consequently that the decision of the Privy Council, binding though it be, does not preclude them from now taking on appeal from the provincial legislation of 1890, the ground that this legislation sweeps away the Statutory powers conceded to them under the previous Statutes, and without which their establishment and administration of a separate school system is impracticable. But here again it must necessarily be on the ground that these rights and privileges or some of their rights and privileges have been prejudicially affected that they have to rest their case, and from that ground they are irrevocably ousted by the Judgment of the Privy Council, where not only the Assessment Clauses thereof were directly in issue, but each and every one of the enactments of the Statutes impugned, were as I read that Judgment, held to have been and to be *intra vires*.

Of course they were.

The Lord Chancellor. There is some little inconsistency, is there not, because I think in a previous part the learned Judge said that the Appeal was in cases where it was *intra vires*, but it was not confined to that case.

Mr. Blake. There is some part of his Judgment which seems to be a sort of excrescence in which he does say that :—

Were it otherwise, and could the question be treated as *res integra* it might have been possible for the Petitioners to establish that they are entitled to the Appeal claimed on that ground, namely, that the Statutes of 1890, by taking away the rights and privileges of a Corporate body vested with the powers essential to the organization and maintenance of a school system that has been granted to them by the previous Statutes are subversive of those rights and privileges and prejudicially affect them.

They might cogently urge in support of that proposition, and might perhaps have succeeded to convince me, that to take away a right, to cancel a grant, to repeal the grant of a right, to revoke a privilege, prejudicially affects that grant, prejudicially injuriously affects that privilege. They might also perhaps have been able to convince me that the license to own real estate, the authorisation to issue debentures, to levy assessments, the powers of a Corporation that had been granted to them, constituted for them rights and privileges. And to the objection that no appeal lies under Section 22

of the Manitoba Charter, but upon rights existing at the Union, they might perhaps have successfully answered, either that Section 93 of the British North America Act extends to Manitoba, or, if not, that the legislation of Manitoba in the matter, since the Union, prior to 1890, should be construed as declaratory of their right to separate schools, or a legislative admission of it, a legislation required merely to secure to them the means whereby to exercise that right and that consequently their appeal relates back to a right existing at the Union so as to bring it, if necessary, under the terms of Section 22 of the Manitoba Union Act.

However, from these reasons the Petitioners are now precluded. If any of their rights and privileges had been prejudicially affected, this legislation would be *ultra vires*, and it is settled it is not *ultra vires*. And the argument against their contention is very strong, that it being determined that it would have been in the power of the Manitoba Legislature to establish in 1871, at the outset of the political organization of the Province, the system of schools that they adopted in 1890 by the Statutes which the Petitioners now complain of, it cannot be that by their adopting and regulating a system of separate schools, though not obliged to do so, they for ever bound the future generations of the Province to that policy, so that as long at least as there would be even only one Roman Catholic left in the Province, the Legislature should be, for all time to come, deprived of the power to alter it, though the constitution vests them with the jurisdiction over education in the Province.

There again, of course, there is a most extreme view taken of the meaning to be attached to the legislation. The Appeal is not taken away. The Appeal is subsisting.

Lord Watson. This is merely the conclusion, granting his premises.

Mr. Blake. Yes, my Lord.

To deny to a legislative body the right to repeal its own laws it may be said is so to curtail its powers that an express article of its constitution must be shown to support the proposition, it is not one that can be deductively admitted. If this legislation of 1890, it may still be further argued against the Petitioners' contentions, had been adopted in 1871, it would, it must now be conceded, have been constitutional, and that being so, would the Catholic minority then, in 1871, have had a right of appeal to the Governor in Council? Certainly that is partly the same question in a different form. But it demonstrates, put in that shape, that the Petitioners have now no right of appeal.

Of course things are just the reverse.

Lord Shand. The general ground of the Judgment seems to be the decision of this Board.

Mr. Blake. Yes, it is perfectly obvious that if it had not been for an inaccurate conclusion——

Lord Watson. What is given in one sub-section is

entirely different from what is given in the other. It is not in the nature of a privilege, but you have to give it to them first. Is there nothing given you by law?

Mr. Blake. It is quite a different thing not to give, and having given to take away.

Lord Watson. It is quite a different thing getting a privilege and getting none.

Mr. Blake. Then Mr. Justice Gwynne sets out the questions and states the memorials and petitions at very great length. Perhaps your Lordships would hardly desire me to trouble you with them. That goes on at page 190, where he makes a statement :—

The learned members of the Judicial Committee of the Privy Council who advised Her Majesty upon the Appeals in the cases of Barrett *v.* Winnipeg and Logan *v.* Winnipeg, adopting the evidence of the Archbishop of St. Boniface as to the rights and privileges in relation to denominational schools enjoyed by Roman Catholics before the passing of the Manitoba Act in the territory by that Act erected into the Province of Manitoba, say in their report :—

Lord Watson. He merely gives an account of it.

Mr. Blake. Yes, my Lord. Then he adds—

The judgment then summarily rejects the contention that the public schools created by the Acts of 1890 are in reality Protestant Schools, and concludes in declaring and adjudging that those Acts do not prejudicially affect the rights and privileges enjoyed by Roman Catholics in the territory now constituting the Province of Manitoba, prior to the passing of the Manitoba Act, taking those rights and privileges to have been as represented by the Archbishop of St. Boniface, and even assuming them to have been secured or conferred by positive law, and so that they are not enacted in violation of Section 22 of the Manitoba Act, but are within the exclusive jurisdiction of the provincial legislature to enact.

Their Lordships of the Privy Council in Barrett *v.* Winnipeg, and Logan *v.* Winnipeg put a construction upon this Section 22, which independently is to my mind sufficiently apparent, but which I quote as a judicial enunciation of their Lordship's opinion. They say :—

"Their Lordships are convinced that it must have been the intention of the Legislature to preserve every legal right or privilege with respect to denominational schools, which any class of persons practically enjoyed at the time of the Union."

The language of the Section is, I think, sufficiently clear upon that point and all its sub-sections are enacted for the purpose of securing the single object, namely, the preservation of existing rights.

Lord Watson. The then existing rights.

Mr. Blake. Yes, that is the key note of his Lordship's judgment. Then he proceeds to state the section, and says :—

If any law should be passed in violation of the qualification contained in the first sub-section upon the general jurisdiction conferred by the section to make laws in relation to education, that is to say in case any Act should be passed by the provincial Legislature prejudicially affecting any right or privilege with respect to denominational schools which any class of persons had by law or practice in the Province at the Union, such an Act would be *ultra vires* of the provincial Legislature to enact and would therefore have no force, and as it was to preserve these rights and privileges with respect to denominational schools whatsoever they were which existed at the time of the Union, that the 22nd Section was enacted, it is obvious, I think, that it is against such an act of the Legislature and against any decision of any provincial authority acting in an administrative capacity prejudicially affecting any such right that the Appeal is given by the second sub-section, and so likewise the remedies provided in the third sub-section relate to the same rights and privileges, and to the better securing the enjoyment of them. The second and third sub-sections are designed as means to redress any violation of the rights preserved by the section. To subject any act of the legislature to the Appeal provided in the second sub-section and to the remedies provided in the third sub-section it is obvious that such an Act must be passed in violation of the condition subject to which any jurisdiction is conferred upon the provincial legislature to make laws in relation to education, and must therefore be *ultra vires* of the provincial legislature, for the language of the section expressly excludes from the provincial legislature all jurisdiction to pass such an Act. The jurisdiction, whatever its extent may be, which the provincial legislature has over education being declared to be exclusive there can be no appeal to any other authority against an Act passed by the legislature under such jurisdiction and any Act of the legislature passed in violation of any of the provisions in section 22, subject to which the jurisdiction of the legislature is restricted is not within their jurisdiction and is therefore *ultra vires*. The appeal, therefore, which is given by the second sub-section must be only concurrent with the right of all persons injuriously affected by such an Act to raise in the ordinary Courts of Justice the question of its constitutionality.

Here your Lordships are cited again.

If any doubt could be entertained upon this point it is concluded in my opinion by their Lordships of the Privy Council in Barrett *v.* Winnipeg and Logan *v.* Winnipeg (1892 A.C. 445) in the following language :—

"At the commencement of the argument a doubt was suggested as to competency of the present appeal in consequence of the so-called appeal to the Governor-in-Council provided by the Act, but their Lordships are satisfied that the provisions of sub-Sections 2 and 3 do not operate to withdraw such a question as that involved

in the present case from the jurisdiction of the ordinary tribunals of the country."

I am quite certain there was no intention of making any deliverance whatever upon the question we now have, and that no such deliverance was at any rate made by the passage I have now cited. I cited it in effect for the purpose of shewing that the Court indicated rather a leaning the other way, but not more——

If an Act of the provincial legislature which is impeached upon the suggestion of its prejudicially affecting such rights and privileges as aforesaid is not made by the 2nd section of the Manitoba Act, *ultra vires* of the provincial legislature, it cannot be open to appeal under sub-Section 2 of that section. The section does not profess to confer upon the executive of the Dominion or the Dominion Parliament any power of interference whatever with any Act in relation to education passed by the provincial legislature of Manitoba which is not open to the objection of prejudicially affecting some right or privilege with respect to denominational schools, which some class of persons had by law or practice in the province at the Union.

But it does not profess to alter it at all. That was the phrase in the first. The phrase is omitted in the second, and his Lordship says it does not profess to do the thing which I submit it does profess to do.

All Acts of the provincial legislature not open to such objection are declared by the section to be within the exclusive jurisdiction of the provincial legislature , and as the Acts of 1890 are declared by their Lordships not to be open to such objection and to have therefore been within the jurisdiction of the provincial legislature to pass, those Acts cannot, nor can either of them, be open to any appeal under the 2nd sub-section of this section.

It has been suggested, however, that the rights and privileges whether conferred or recognised by the Acts of the Legislature of Manitoba in force prior to and at the time of the passing of the Acts of 1890, and which were thereby repealed, were within the protection of the 22nd section and that this was a matter not under consideration in Barrett *v.* Winnipeg and Logan *v.* Winnipeg, and that therefore the right of appeal under sub-Section 2 of the 22nd Section against such repeal does not exist, notwithstanding the decision of the Privy Council in Barrett *v.* Winnipeg and Logan *v.* Winnipeg. This contention appears to have been first raised expressly in the Petition presented in October 1892, although it is impliedly comprehended in the paragraphs of the Petition of April 1890 which is repeated verbatim in that of October 1892, wherein the Act of the provincial legislature of 1871 is relied upon as having had the effect to continue to the Roman Catholics that separate condition with reference to education which they had enjoyed previous to the creation of the Province, and in so far as Roman Catholics were concerned merely to organize the efforts

which the Roman Catholics had previously voluntarily made for the education of their own children and for the continuance of schools under the sole control and management of Roman Catholics and of the education of their children according to the methods by which alone they believe children should be instructed.

But this Statute of 1871 and all the Statutes passed by the legislature of Manitoba in relation to education prior to 1890 were specially brought under the notice of their Lordships of the Privy Council, and were fully considered by them in their judgment as already pointed out, and if the repeal by the Act of 1890 of the Acts of the Provincial Legislature then in force in relation to education, constituted a violation of the condition contained in section 22, subject to which alone the jurisdiction of the Provincial Legislature to make laws in relation to education was restricted, it is inconceivable to my mind that their Lordships having all these Statutes before them could have pronounced the Acts of 1890 to be within the jurisdiction of the Provincial Legislature to pass.

The Lord. Chancellor. That is quite right, so they did. They did not consider that a violation of the conditions. The condition referred to is in sub-section 1.

Mr. Blake. Certainly.

The Lord Chancellor. If that sub-section is only a remedy for sub-section 1 *cadet quaestio* it is settled by the previous decision.

Mr. Blake. I quite agree.

Lord Watson. We did not decide, and I do not think we necessarily laid down or found by our Judgment that the Act was *intra vires* and effectual but simply that it did not sin against sub-section 1.

Mr. Blake. Your Lordships thought that it was not *ultra vires*, and you expressly stated that you doubted whether it was permissible in considering the question before you to look at the course of intermediate legislation. That is expressly stated, and yet he says that, although your Lordships adjudge that it is not permissible to look at the course of intermediate legislation, you were looking at it and deciding on it.

Lord Watson. There is a want of discrimination occasionally between what we do decide and what would be the logical result of our decision if you were to take in connection with it one or two propositions established by the Judges themselves and not by us.

Lord Shand. The Learned Judge could scarcely have intended to mean those words to refer to the Act of 1890.

Mr. Blake. It is somewhat difficult to suppose that he could have read the decision, and have written those words which he has written.

Lord Watson. I do not think the Board have the least right to complain of the Judgment. It may be erroneous but they speak of the logical result of our Judgment, and it would be the logical result, I think, in most cases if we assumed additional law and facts. We are not responsible for that. The Judgment is what we have got to review and consider.

Mr. Blake. Yes, my Lord. That is his Lordship's Judgment, and then we come to Mr. Justice King. He says :—

It may be convenient first to regard the constitutional provisions respecting education as they affect the original Provinces———

Then he states them. I think that a large part of it your Lordships have already had a good deal too much of.

Lord Watson. Did the learned Judge suggest any new view or concur in the other views ?

The Lord Chancellor. You had better read any parts of his judgment you would like to read.

Mr. Blake. Mr. Justice King's was a judgment which favoured my view, and I should like your Lordships to hear it. It will be a variety, at any rate.

The Lord Chancellor. Yes, otherwise you would have accepted the suggestion.

Mr. Blake. I hope not. My effort before your Lordships is to give you all the assistance that I ought to give you.

Lord Watson. Then Mr. Justice Fournier and Mr. Justice King are those in your favour ?

Mr. Blake. Those are the Justices in favour of my argument. The Learned Judge points out that the 3rd sub-section of section 93 and the 2nd sub-section of section 22 deal with a like subject the right of a religious minority, and so on. Then I will go to page 196, line 33, which is where I think the substantial part commences.

One difference is, that whereas by the clause in the British North America Act the appeal lies from an " act or decision of any provincial authority " affecting any right or privilege of the Protestant or Roman Catholic minority in relation to education, in the Mani-

toba Act the appeal lies from "any act or decision of the legislature of the province" as well as from that of any provincial authority. This was either an extension of the right of appeal or the getting rid of an ambiguity, according as the words "any provincial authority" as used in the British North America Act did not nor did extend to cover "acts of the provincial legislature."

The addition to the first sub-section of the Manitoba Act of the words "or practice" and the addition in sub-section 2 of the words "of the legislature of the province," would (so far as the context of these words is concerned) seem to show an intention on the part of Parliament to extend the constitutional protection accorded to minorities by the British North America Act, or at all events to make no abatement therein.

Then there is another difference between the language of the third sub-section of the British North Amercia Act and that of the second sub-section of the Manitoba Act. The former begins as follows:— "Where in any province a system of separate and dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie," etc., while in the Manitoba Act the introductory part is omitted and the clause begins with the words "an appeal shall lie," etc., the two clauses being thereafter identical, with the exception that in the Manitoba Act (as already mentioned) the Appeal in terms extends to complaints against the effect of Acts of the Legislature as well as of Acts or decisions of any provincial authority.

After this reference to points of distinction, I cite sub-section 2 of the Manitoba Act again in full for sake of clearness.

"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."

On the one side it is contended that in order to give the appeal, the rights or privileges of the religious minority need to have been acquired and to have existed prior to and at the time of the passage of the Act. On the other side it is contended that it is sufficient if the rights and privileges exist at the time of their alleged violation irrespective of the time when they were acquired.

Then there is a considerable portion of Sir Horace Davey's argument.

Lord Shand. You do not quite adopt that argument now, I think?

Mr. Blake. No, my Lord.

The Lord Chancellor. Sir Horace Davey was on the other side?

Lord Shand. Was he?

Mr. Blake. Yes, he was on the other side.

The Lord Chancellor. You have to deal with cases which are *intra vires.* You say they are clearly *intra vires?*

Mr. Blake, Yes, my Lord. Then I go to page 198 :—

In the Judgment their Lordships say that * * * there would be a marked and very considerable difference between the corresponding clauses, if in the one case rights and privileges of the religious minority were recognized as subjects of protection whenever acquired, while in the other case they were not recognized as subjects of protection, unless they existed at the time of the passing of the Constitutional Act. Not wanting to put undue stress upon this, let us look at the clauses for ourselves. In sub-Section 1, Manitoba Act, there is an express limitation as to time, the rights and privileges in denominational schools that are saved are such as existed, by law or practice, at the Union. But in sub-Section 2 nothing is said about time at all, and the natural conclusion upon a reading of the two clauses together is that with regard to the rights and privileges referred to in the latter clause the time of their origin is immaterial. Such also is the ordinary and natural meaning of sub-Section 2 regarded by itself. Read by itself, it extends to cover rights and privileges existent at the time of the act or thing complained of. The existence of the right and not the time of its creation is the operative and material fact.

The Lord Chancellor. If all that was intended by sub-Section 2 is what has been suggested by the learned Judges whose Judgments you have read, one would rather have expected to find language simply "affecting any such right or privilege as aforesaid."

Mr. Blake. That is the whole.

The Lord Chancellor. That is, according to them, what it means.

Mr. Blake. Yes, My Lord. That is the whole, and they were shortening up the clause, as your Lordship sees. The draftsman was shortening from the British North America Act. Why does he proceed to deal with it in that way ?

And this agrees with the corresponding provisions of the British North America Act where sub-section 1 refers to rights, &c., acquired before or at Union, while sub-section 3 in terms covers rights, &c., acquired at any time. In any other view there was clearly no necessity to add the words "or any act of the legislature" in the remedial provision of the Manitoba Act, for such act would be wholly null and void under sub-section 1.

which is of course quite true.

There is indeed an undeniable objection to treating as an appealable thing the repeal by a legislature of an Act passed by itself. Ordinarily all rights and privileges given by Act of Parliament are to be enjoyed *sub modo*, and are subject to the implied right of the same legislature to repeal or alter if it chooses to do so. But the fundamental law may make it otherwise.

Then he cites the Legislation and the Constitution of the United States which has been already referred to.

It is certainly anomalous, under our system and theory of Parliamentary power, that a legislature may not repeal or alter in any way an Act passed by itself.

Still, weighty as this consideration is, I can give no other reasonable interpretation to the Act in question than that, under the constitution of Manitoba, as under the constitution of the Dominion, the exercise by the Provincial Legislature of its undoubted powers in a way so as to give rights and privileges by law to the minority in respect of education lets in the Dominion Parliament to concurrent legislative authority for the purpose of preserving and continuing such rights and privileges if it sees fit to do so.

By the British North America Act it was not clear whether the words "act or decision of any Provincial authority" covered the case of an Act of the Provincial legislature, or was confined to administrative Acts, but in the Manitoba Act the words explicitly extend to an Act of that legislature,

Any ambiguity in sub-section 2 of the Manitoba Act is I conceive to be resolved in the light of the corresponding provisions of the British North America Act. As the provisions of the British North America Act are to be applicable unless varied I think it reasonable that ambiguous provisions in the special Act should be construed in conformity with the general Act.

Passing, however, from it as a matter of construction it does not seem reasonable that Parliament in forming in 1870 a constitution for Manitoba intended to disregard entirely constitutional limitations such as were three years before established as binding upon the original members of the Confederation. On the contrary by the addition of the words "or by practice" in first sub-section, and of the words "or any Act of the legislature" in the second sub-section, and by the provision of Section 23 providing for the use of the French and English languages in the courts and legislature there is manifested a greater tenderness for racial and denominational differences. Further unless sub-section 2 has the meaning suggested the entire series of limitations imposed by sub-sections 1, 2 and 3 are entirely inoperative. For the Judicial Committee has in effect declared that no right or privilege in respect of denominational schools existed prior to the union, either by law or practice, and therefore there was nothing on which sub-section 1 could practically operate and as there was clearly no system of separate or dissentient schools established in Manitoba by law prior to the Union, the provisions of sub-sections 2 and 3 are inoperate if the rights and privileges in relation to education are to be limited to rights and privileges before the Union. There is no doubt that this construction limits the powers of the legislature and restrains the exercise of its discretion, but the same thing may be said of the effect of an Appeal against "any act or decision of any provincial authority" in Nova Scotia or New Brunswick, in case either of such provinces were to adopt a system of separate schools. The legislature might not choose to pass the remedial legislation necessary to execute the decision of the Governor-

General in Council and the Dominion Parliament could then exercise its concurrent power of legislation, in effect overriding the legislative determination of the provincial legislature. The provision may be weak one-sided as giving finality to a chance legislative vote in favour of separate schools inconsistent with a proper autonomy, and without elements of permanence, but if it is in the constitutional system it must receive recognition in a court of law.

Assuming then that clause 2 covers rights and privileges whensoever acquired, the next question is as to the meaning of the words "rights and privileges of the Protestant or Roman Catholic minority in relation to education." Here again, I think, we are to go to clause 3 of Section 93 British North America Act. I think that the reference is to minority rights under a system of separate schools, and that it is essential that the complaining minority should have had rights or privileges under a system of separate or dissentient schools existing by law at the Union, or thereafter established by the legislature of the Province. The generality of the words under clause 2 of the Manitoba Act is to be explained by clause 3, section 93 British North America Act, and to have the same meaning as the corresponding words in it. The two remaining questions then are: Was a system of separate or dissentient schools established in Manitoba prior to the passage of the Manitoba Education Act of 1890? And have any rights or privileges of the Roman Catholic minority in relation thereto been prejudicially affected? One of the learned Judges of the Queen's Bench of Manitoba thus succinctly summarises the school legislation of Manitoba in force at the time of the passing of the Act of 1890.

The Lord Chancellor. That we need not have. Then you go to line 41?

Mr. Blake. Yes, my Lord.

Now, the system of education established by the Act of 1881 was not in terms and *eo nomine* a system of separate or dissentient schools, and if the constitutional provision requires that they should be such in order to come within the Act, then the minority did not have the requisite rights and privileges in respect of education. As to this, I have had doubts arising from the opinion that where rights and privileges have no other foundation than the legislative authority whose subsequent acts in affecting them is impeached, the restraint upon the general grant of legislative authority should be applied only where the case is brought closely within the limitation. At the same time, we are to give a fair and reasonable construction to a remedial provision of the constitution, and are to regard the substance of the thing.

Lord Shand. That seems to be the main point. When you are asked what the privilege is, I think it is that which is mentioned there.

Mr. Blake. Yes, my Lord; this set of privileges. I do not say "that" but "these," there are several of them.

Now, the Roman Catholics were in the minority in 1881, and are still, and a system of schools was established by law, under which they had the right to their own schools—Catholic in name and fact—under the control of trustees selected by themselves, taught by teachers of their own faith, and supported in part by an assessment ordered by themselves upon the persons and property of Roman Catholics, and imposed, levied and collected as a portion of the public rates; the persons and property liable to such rate being at the same time exempt from contribution to the schools of the majority—*i.e.*, Protestant schools. This, although not such in name, seems to me to have been essentially a system of separate or dissentient schools, of the same general type as the separate school system of Ontario, and giving therefore to the minority rights and privileges in relation to education in the sense of sub-Section 2, Section 22, Manitoba Act, and sub-Section 3, Section 93, British North America Act.

It is true that the schools of the majority were Protestant schools, and that the majority had the same right as the minority; but I do not think that this renders the minority schools any the less essentially separate schools of the Roman Catholics. In Quebec the majority schools are distinctly denominational.

Then was the right and privilege of the Roman Catholic minority in this system of separate schools prejudicially affected by the Act of 1890? And if so to what extent.

The Lord Chancellor. Then they quote the Judgment of the Judicial Committee?

Mr. Blake. Yes.

Lord Shand. It is worthy of noting, before you pass on, that the Archbishop, in the description of the privileges does not describe anything like the privileges which are founded on here.

Mr. Blake. How could he? He had none of them. He was referring to the condition at the time of the Union. That shows how much more we have got since.

Lord Shand. That is what distinguishes the two cases.

The Lord Chancellor. Then I think the next passage is on page 202, line 10.

Mr. Blake. Yes, my Lord.

The question then is whether the language of their Lordships is applicable to this state of things, and whether or not it can be said (changing their Lordships' language to suit the facts) that the establishment of the national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain, by the aid of public taxation upon the denominational minority, a system of denominational schools, that the two cannot co-exist, or that the existence of the system of denominational minority schools (supposing it still in existence) necessarily implies or involves immunity

from taxation for the purpose of the other. It rather seems to me that no reasonable system of legislation could consistently seek to embrace these two things, viz.: the support of a system of denominational schools for the minority, maintainable through compulsory rating of the persons and property of the minority, and, second, the support of a general system of unsectarian schools, through the compulsory rating of all persons and property, both of the majority and the minority. The effect of such a scheme would be to impose a double rate upon a part of the community for educational purposes.

The logical result of this view would be that by the establishment of a general non-sectarian system (as well as by the abrogation of the separate school system) the rights and privileges as previously given by law to the denominational minority in respect of education were necessarily affected. Of course the minority would obtain equality by giving up their schools, but the present enquiry at this point is whether a right acquired by law to maintain a system of separate schools had been affected by an Act which takes away the legal organization and status of such schools and their means of maintenance, by the repeal of the law giving these things, and which subjects the persons and property of the denominational minority to an educational rate for general non-sectarian schools, instead of leaving them subjected to an educational rate for the support of the separate and denominational schools. It is true that by the Act of 1881 and amending Acts, the exemption was an exemption from contribution to the Protestant schools, and the schools under the Act of 1890 are not Protestant schools, but the substantial thing involved in the exemption under the Acts of 1881 and amending Acts was, that the ratepayers to the support of the Catholic schools should not have to pay rates for the support of the schools established by the rest of the community, but should have their educational rates appropriated solely to the support of their own schools. This was an educational right or privilege accorded to them in relation to education under a system of separate schools established by law, which the Legislature, if possessing absolute or exclusive authority to legislate on the subject of education without limitation or restraint, might very well withdraw, abrogate or materially alter, but which under the constitutional limitations of the Manitoba Act can be done only subject to the rights of the minority to seek the intervention of the Dominion Parliament, through the exercise of the concurrent legislative authority that thereupon becomes vested in such Parliament upon resort being first had to the tribunal of the Governor-General in Council.

Although there are points of difference between this case and what would have been the case if the prior legislation of Manitoba had established a system of separate schools following precisely the Ontario system, I cannot regard the differences as other than nominal, and treat this case as though the Act of 1881 and amending Acts distinctly established a system of separate schools, giving for the general public a system of undenominational public schools and to the Catholic minority the right to a system of separate schools. In such case I do not see how the passing of such an Act as the Act of 1890 could fail to be said (by abolishing the separate schools) to

affect the rights and privileges of the minority in respect of education. With some change of phraseology and some change of method, I think that what has been done in the case before us is essentially the same.

If the clauses of the Manitoba Act are to have any meaning at all, they must apply to save rights and privileges which have no other foundation originally than a statute of the Manitoba legislature.

The constitutional provision protects the separate educational status given by an Act of the legislature to the denominational minority. The view that the effect of this is to restrain the proper exercise by the legislature of its power to alter its own legislation is met by the opposite view that there is no improper restraint if it is a constitutional provision, and that in establishing a system of separate schools the legislature may well have borne in mind the possibly irrepealable character of its legislation in thereby creating rights and privileges in relation to education.

Lord Shand. I understand that this learned Judge takes the provision as being quite *intra vires* of this later Act.

Mr. Blake. Certainly, my Lord. That concludes the Judgments.

[*Adjourned till to-morrow at 10.30.*]

THIRD DAY.—*Thursday, December 13, 1894.*

The Lord Chancellor. Before proceeding with this Appeal, which arises on a reference from the Government of Canada, I cannot refrain from alluding to the painful event which has deprived that country of its chief minister. He had received at the hands of Her Majesty a signal mark of appreciation of the high services which he had rendered, He had just been sworn a member of this Council. In a few minutes the hand of death was upon him, and the country he served so well has been deprived of his most valuable aid. This is not the time or place for eulogy or for an estimate of the services he rendered, but in the great trouble which has fallen upon the Dominion of Canada, I desire on behalf of myself and my colleagues to express our deep sympathy with the government and people of that country, and to associate ourselves with their sorrow.

Mr. Blake. Perhaps your Lordships will allow me, as a resident of that country to which your Lordship has just alluded, to say how grateful I am that your Lordships have thought fit to say a word upon the very tragic event which has occurred, and to assure you that I believe, without distinction of party, the inhabitants of the Dominion of Canada will receive with gratitude the expression of sympathy with a grief which they entertain in common.

Mr. Ewart. My Lords, I desire to add a few words upon the two principal points in the case. First upon the question whether sub-section 2 was intended and devised as a remedy merely for cases coming within sub-section 1. In considering that question I think it will be perfectly fair to regard the section and the first sub-section as declaring and limiting the jurisdiction of the Legislative Assembly. They are both necessary for that purpose and together they complete and finish the subject. The section gives jurisdiction over the whole subject of education which may be represented (say) by the figure 9. The first sub-section is a subtraction of certain powers which may be represented by the figure 1, leaving the net result of 8 or 8-9ths of education. It is with this result—8-9ths of the education—that we pass on to sub-section 2. The question, then, is whether it is from the 8-9ths the net result, or from the 1-9th, the part subtracted, that the Appeal lies. I venture to think that if any one who had never seen these Statutes were asked from which of these he thought it more probable that an Appeal would be given, he could not hesitate to reply that an Appeal would no doubt be in respect of those things with which the Legislature was going to deal, and he would be much surprised if he were told that he was quite wrong, that extensive powers of appeal were to be given from the Legislature in respect of subjects over which the Legislature had no control and with which presumably it would never in all time to come attempt to deal. If the Statute had been giving jurisdiction to a Court, instead of to a political body, I do not think there could be any doubt as to the construction. If a Statute gave to a Court jurisdiction, say, in matters of debt, and pro-

vided that it should not have jurisdiction if over £1,000 were involved, and then an Appeal was given from any decision affecting anybody's rights, I think there could be no reason to doubt that an Appeal was from those matters which were within the jurisdiction of the Court and not from those which were withdrawn from that jurisdiction. The only appearance of difficulty, as it seems to me, arises from the superficial resemblance between the language used in limiting the jurisdiction, and the language used in describing the circumstances under which an Appeal will lie. Roughly it may be said, if rights are affected, then there is *ultra vires*, and roughly again, if rights are affected, then there is an Appeal. But the language is not identical. If it were identical we should be then left to imagine how we could possibly succeed upon an Appeal in convincing His Excellency that an *ultra vires* Statute had affected us, and how possibly we were in need of legislation to remedy something which really had not happened. But the language, as is pointed out by my learned leader, is very far from identical. On the contrary, as it seems to me as he has pointed out, it is in almost every point of view in contrast ; for instance, if we are to ask who is to complain or who may complain under the different sub-sections, the answer is that anybody can complain under the first sub-section. The Statute is *ultra vires ;* anyone can plead that the Act is *ultra vires ;* anyone who is brought into an Action in which that clause comes in question can contend that it is *ultra vires;* but in Sub-section 2 it is only a member of a particular religious body, and then only in case that religious body be in a minority that anyone can appeal. I say the persons are entirely different. Then, if we are to ask what rights are protected we find again a contrast. Under Sub-section 1 they are rights "at the Union," under Sub-section 2, "any rights," leaving out the words, "at the Union ;" and then if one regards the circumstances under which complaint can be made under Sub-section 1, it is if "rights with respect to denominational schools" have been "prejudicially affected," and under Sub-section 2 it is if "rights relating to education are affected." So with reference to

every element there is more of contrast than there is of identity.

Lord Watson. Sub-section 2 of Section 22, and Sub-section 3 of Section 93, admittedly are different in expression. Whether they are or are not substantially identical, it seems to me not going too far to say we have been shewn is a debateable question. If the language of Sub-section 2 is by itself intelligible, and free from ambiguity, we have no occasion to solve that question.

Mr. Ewart. No. These two clauses are not associated. The section, and the first sub-section together make up the jurisdiction, and then we pass on to have an Appeal. I am confining my remarks to the Manitoba Act at present, and I am shewing the difference between the first and the second sub-section.

Lord Watson. Whether they differ in substance or not, the question still remains a question upon Sub-section 2 of the Act of 1870. If they differ in substance the one throws no light on the other. If they are identical in substance, the one may throw light to lead you to the conclusion that the two Legislatures meant the same thing. But that does not help you to construe the Statute.

Mr. Ewart. No, I admit all that. What I was trying to do was to point out the point of contrast between the sections of the Manitoba Act, showing that they had nothing in common. I desire to point out that if that was devised as a remedy for an *ultra vires* Statute, that is the only example we have of such an extraordinary remedy; that yet there are plenty of cases of *ultra vires* Statutes, and under the scope of the British North America Act there are clauses which would have invited the provision of an Appeal if that were thought to be the best or proper way of getting rid of an *ultra vires* Statute. For instance, under Section 92 of the British North America Act, Sub-section 10, I find a clause worded in somewhat the same fashion; at all events constructed on the same principles, namely, the subject of legislation given to the Provincial Legislature "Local Works and Undertakings" and then a subtraction from that wide gift, "Other than such as

are of the following classes;" and yet we never have any appeal, although it is plain that that might be violated in the same way as this clause might be violated. On the other hand we have examples of appeal somewhat at all events of the same nature.

Lord Watson. There are two cases in which resort may be had to the Parliament of Canada. The first is, where provincial laws from time to time are requisite for the due execution of the section. The second is, where any decision of the Governor-General on Appeal is not given effect to by an Act. There are two different cases, and only two cases. They are put alternatively in sub-section 3 of the Manitoba Act. Under the second it is perfectly clear, and there can be no doubt as to what is meant. The Governor-General says that such and such an enactment must be modified or altered. If effect is not given to that ordinance or ruling of the Governor-General by the Provincial Legislature, then he may appeal to the Canadian Legislature —the Dominion Legislature to give effect to it, to do what the Provincial Government ought in deference to the Governor's ruling, to have done. The language used seems to give by the third sub-section to the Canadian Legislature more than power simply to repeal a particular clause of an Act, or to declare it null. Perhaps we need not distress ourselves with that. I do not know what to say that particular provision points to. They are empowered to pass laws which appear to the Governor General to be requisite for the due execution of the provisions of the section. One of the things which is to be done in due execution of the section is to avoid legislating to certain effects prohibited by Subsection 1.

Mr. Ewart. In that case there would be no appeal at all. They would not require to pass remedial legislation.

The Lord Chancellor. It seems to suggest that there might be on the part of the Canadian Legislation some prohibitory Act.

Mr. Ewart. To take effect in the future—that they must not do so and so. It seems to me that the Appeal lies only in case our rights have been affected, and we

have to show, as a ground for our Appeal, that some rights have been affected.

Lord Watson. It may be; the language is tolerably wide; remedial measures obviously for the purpose of preventing any departure from the terms of this particular clause.

Mr. Ewart. The first clause?

Lord Watson. That includes the whole section. It is the two preceding clauses.

Mr. Ewart. My point is that the first relates to *ultra vires* and the second to *intra vires*, and that the third is wide enough to embrace both. Yet in its application it is necessarily confined to the second, because we could only say it was affected by an *intra vires* statute.

I desire to point out that this is not the first instance of an appeal from an *intra vires* statute. My learned friend may suggest that it is somewhat of a novelty, but I can give at least two examples from our constitutional history of something at all events of the same nature. The very early Constitutional Act of 1791, 31 George III., Cap. 31, Sec. 12, had a provision for the purpose of safeguarding the rights of persons with respect of controversial matters. It is a long section, but the gist of it is to this effect, that whenever any bill shall be passed containing any provisions which shall in any manner relate to or affect the enjoyment or exercise of any form or mode of religious worship, or shall impose or create any penalties, &c., in respect of the same, or shall in any manner relate to or affect the payment, recovery or enjoyment of any of the accustomed dues or rights—the royal assent was to be withheld for 30 days after the Bill was laid before the Parliament.

Lord Watson. The Provincial Parliament does not hold quite the same relation to the Province as the Dominion does.

Mr. Ewart. This was an Act of the Legislature of Quebec.

The Lord Chancellor. You are speaking of a case in Appeal in a matter *intra vires?*

Mr. Ewart. Yes.

Lord Shand. What followed besides that they were to allow 30 days to elapse?

Mr. Ewart. The assent shall not be given, in case either House address Her Majesty to withhold it.

Lord Shand. Read the rest of the clause. The substance of it was that during that time there might be an address presented.

Mr. Ewart. Yes, within the 30 days. In fact, there would be an Appeal to both Houses, or to either House, from *intra vires* legislation in Canada under this Statute. Your Lordships will find the same provision, or one almost identical with it, carried into the Union Act of 1840 (3 and 4 Vic. C. 35, Sec. 42). That provision was in force right down to Confederation.

Lord Watson. In both these Statutes the Imperial Legislature seems to have laid down the rule for Provincial or Canadian Legislation.

Mr. Ewart. Yes.

Lord Watson. That is quite within their competence. The Dominion Parliament have, so far as I can see, no power to interfere with Provincial legislation upon the subject of education, except in so far as it is given them by these two clauses.

Mr. Ewart. Quite so. It is only an example of the right of Appeal given.

Lord Watson. A right of Appeal to the Governor, and in a sense an Appeal to the Parliament of Canada.

Mr. Ewart. The next highest legislative power. Another example may be given from the British North America Act.

Lord Watson. The power given of Appeal to the Government, and upon request by the Governor to the Legislature of Canada, seems to be wholly discretionary in both.

Mr. Ewart. No doubt.

Lord Watson. Both in the Governor and in the Legislature,

Mr. Ewart. Yes. Another example I desire to give is to be found in Section 95 of the British North America Act where something in the nature of an Appeal was given in connection with the subjects of "agriculture and emigration." Legislative control is given to the Legislatures in connection with those subjects, but it is provided that such legislation is only to have effect in

and for the Province, as long and as far only as is not repugnant to any Act of Parliament of Canada. So that if any minority found itself improperly dealt with or harshly dealt with in any Province there would be an Appeal over to the Parliament of Canada.

Lord Shand. I suppose there is no question upon this; from sub-section 3 of the Act of 1867, there is no doubt that in some cases an Appeal would lie to the Governor-General from any Act or decision of the Provincial authority?

Mr. Ewart. Yes.

Lord Shand. The only question is whether "Provincial authority" does or does not include the Legislature?

Mr. Ewart. Yes.

Lord Watson. If it were clear that in sub-section 4 of Section 93 of the Act of 1867 the legislation of the Parliament of Canada was not to extend to the subject matter of sub-section 1, it would be almost convincing evidence that the Provincial authority was meant to include the Provincial Legislature, because in that case, on the assumption I put, what would be the use of invoking the power of the Dominion Parliament except for the purpose of over-riding Provincial legislation?

Mr. Ewart. That is all.

Lord Watson. It is not clear that sub-section 4 does not refer to legislation connected with sub-section 1. The argument on the other side, I understand, is that the introduction of the Dominion Parliament (and that is the view taken by some members of the Court) is to be explained by reference to sub-section 1.

Mr. Ewart. I was going to summarize what I have to say. The reasons I offer are in the first place because if 2 was intended as a remedy for 1, the language of 2 would have been very different. It would have been "affecting any *such* right." And if it had been thought necessary to describe the rights again it would have been done in the same language as before. (2) Because if 2 be a remedy, it would be given to the same persons mentioned in 1. (3) Because if 2 is a remedy, it would be given in respect of the same rights as 1. (4) Because if 2 is a remedy, it would be given under the

same circumstances. (5) Because no such remedy is necessary in respect of void Acts. (6) Because such a remedy is wholly inappropriate—an appeal on a dry legal question of *ultra vires* to a political body without any reason for its withdrawal from the Courts. (7) Because no such remedy is given in respect of any other *ultra vires* legislation. (8) Because the relief to be given is not that which would follow upon an appeal from an *ultra vires* act—remedial laws are to be made. If the Governor-General thought an act *ultra vires* against which we were appealing, he would not request local legislation to pass an act, and would not ask the Dominion Parliament to legislate upon default, (9)—which I think was suggested by the Lord Chancellor—because if "provincial authority" does not include "legislature," then the Appeal given by the British North America Act is clearly not a remedy for cases within 1; for in that case there would be no appeal from an Act at all.

Lord Watson. The Governor might be of opinion to-day or this year that it was not desirable in the interests of the community that certain previous privileges given by Parliament should be repealed; but ten years hence he might be of a different opinion. If there were legislation of a prohibitive kind included in this remedial legislation, there would be an Act of Parliament in the way of his exercising his discretion on the subject.

Mr. Ewart. He would have to exercise his discretion to begin with to give Parliament jurisdiction.

Lord Watson. Is there any further jurisdiction given to the Dominion Parliament than to pass measures which would give effect to the opinion or determination of the Governor upon points that are completely brought before him by appeal.

Mr. Ewart. I should think not,

I now wish, my Lords, almost as shortly to summarize the reasons why I contend that sub-section 2 applies to post Union rights. In the first place, I point to the generality of the Statute. It says "An appeal shall lie to the Governor General from any Act," and there is nothing in the section itself to limit the generality of that phrase. It seems to be the requisite of an appeal that some rights should have

existed, and it is not material as to the date of their birth. Then I point out also in that connection the absence of the words "at the Union." Thirdly I would suggest that the scope of the Act is to protect minorities, and that not merely in respect of rights that are enjoyed at the time of the Union; but it is an Act which is intended to last for a great length of time. It might go on lasting for ever, at all events for a great period of time. In the course of time rights would no doubt be very much changed, the whole system might undergo a change in various respects, and it can hardly be, I should submit, the intention that only rights conserved at the Union were to be protected, although those rights would have been supplanted by others which had been accepted by all the denominations of the community, and which were now held in substitution. It would be a bar to the acceptance of any charges of that kind, no matter how beneficial if all safeguard was given up. It seems to me therefore that the first sub-section relates to pre-Union rights and the second to post-Union rights. Then the fourth point I make is that the corresponding section of the British North America Act, clearly applies to post Union rights so far at all events as Nova Scotia and New Brunswick are concerned. Then I would urge also that this being a constitutional Statute, and in some measure a Treaty, a very large and a liberal interpretation ought to be given to the language, rather than a narrow and subtle construction, which would have the effect of producing a nullity.

Before closing I would like to say a word or two as to what we are seeking. As it has been already remarked, we are not asking for any declaration as to the extent of the relief to be given by the Governor General. We merely ask that it should be held that he has jurisdiction to hear our prayer, and to grant us some relief if he thinks proper to do so. It may be that the Dominion Authorities may not choose to re-establish us in all the rights and privileges which we enjoyed prior to this Act of 1890, although that was a system that had been approved of by the more important religious bodies, and acquiesced in by everybody, and it remained

as a good working Act for a period of nineteen years, and although I may say also that that is the system, or almost the system, which has existed in the Province of Quebec for more than a quarter of a century. It may be that the Dominion Authorities may prefer the Ontario system, under which there is a closer Governmental control — a system under which Government control is very complete, under which books are chosen by the Government Inspectors appointed by Government, and all school regulations are made by Government. Or it may be that some other system may be devised which will enable the Roman Catholics to teach in schools to which no Protestant child now goes, the religion of its parents under limited circumstances, without thereby being penalised by ostracism from the public school provisions. We cannot tell, nor have I come here instructed to state what the measure of relief will be which will be asked if it be held that the Governor General has jurisdiction to deal with the matter, but this much I think I may properly say that we have no desire to withdraw from the operation of State Statutory control. That position we never did possess under the Manitoba Statutes, and we do not seek—nor, indeed, can we ask—to be placed in any better position than the position which we occupied prior to the Act of 1890.

Mr. Cozens Hardy. My Lords, I appear with my learned friends, Mr. Haldane and Mr. Bray, for the Government of Manitoba, and although it will not be necessary for me, I hope, to trouble your Lordships at any very great length, having regard to the fact that all the Judgments and almost all the documents have been read to your Lordships, I am sure your Lordships will pardon me in a case of so much interest and importance to the Dominion if I think it my duty to put before you in some detail the various points which arise.

My Lords, the point, and I submit the only point, which is before your Lordships now may be divided into two; in the first place, is there any Appeal from a post-Union *intra vires* Act of the Legislature, and next, even if that be so, there is the further point whether this post-Union legislation including in that term the Act of

1890 affects any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects? Both those points have to be answered in the affirmative if this Appeal is to succeed. I propose to suggest to your Lordships that Section 22 of the Manitoba Act is the only Section which has to be considered. It may be right to refer to Section 93 of the British North America Act, but Section 22 I submit to your Lordships completely defines the power of the Legislature of Manitoba, and no part of Section 93 of the Act of 1867 is operative in the sense of having express or definite legislative effect.

Lord Watson. It was the intention of the Legislature to substitute in the case of Manitoba Section 22 of the Act of 1870 for Section 93 of the Act of 1867.

Mr. Cozens-Hardy. Your Lordship has put the proposition which I am endeavouring to submit. That is the view I take—Section 22 says this at the beginning of it: "In and for the province the provincial Legislature may exclusively make laws in relation to education subject and according to the following provisions." Those are the provisions following in Section 22, and it seems inconsistent with that to say that it is not only subject and according to the following provisions, but also subject and according to such provisions of Section 93 of the British North America Act as in any way are not identical.

Lord Watson. It might be suggested that in 1870 this province is brought in the same way within the provisions of the Act.

The Lord Chancellor. You must take it with this, that Section 93, unless there is reason shewn to the contrary, would *primâ facie* be applicable to Manitoba. You have to shew that Section 93 has been varied by the Manitoba Act in order to make it inapplicable. It does not rest on them to make it applicable; it rests on you to make it inapplicable by shewing that it has been varied by the Manitoba Act.

Mr. Cozens-Hardy. Is that quite so having regard to Section 2? Section 2 says: "The provisions of the British North America Act, 1867, shall, except those parts which are in terms made or by reasonable intend-

ment may be held to be specially applicable to or only to affect one or more, but not the whole, of the provinces now composing the Dominion." Section 93 does not affect the whole of the provinces in the Dominion.

The Lord Chancellor. Yes, surely, Section 2 says "now composing," that is at the time that that Act was passed. At that time Section 93 applied to the whole of the provinces.

Mr. Cozens-Hardy. Sub-section 3 of Section 93 which is the only material point of difference, does not apply, because that is "where in any province a system of separate or dissentient schools exist by law at the Union."

The Lord Chancellor. "Or is thereafter established." That sub-section applied to all the provinces forming the Dominion.

Mr. Cozens-Hardy. There are no separate or dissentient schools in Manitoba.

The Lord Chancellor. This has nothing to do with Manitoba; "now composing the Union" did not include Manitoba. It was the then provinces. Sub-section 3 applied to all the then provinces of the Dominion.

Mr. Cozens-Herdy. No, I think my learned friend admitted that it did not. It did not apply to Nova Scotia and New Brunswick.

The Lord Chancellor. Sub-section 3 clearly applies to all the provinces of the Dominion.

Lord Watson. The Imperlal Legislature in the Act of 1867 left niches to be filled by other provinces. As soon as those other provinces came in they were within the terms of Section 93, but I quite admit, in this case, the terms upon which Manitoba came into the Federation were settled by the Dominion Parliament, otherwise they could not have exempted Manitoba from the provisions of Section 93.

Mr. Cozens-Hardy. Let me now proceed with Section 2. I stopped at those words "now composing the Dominion." Then we come to this: "and except so far as the same may be varied by this Act." Then when you come to Section 22, I suggest to your Lordships that it is varied by this Act, because there is an express assertion that the exclusive power to make laws

relating to education is subject and according to the following provisions.

Lord Shand. To what extent do you concede that you look at Sub-section 3 in the construction of Sub-section 2 of the Act of 1870.

Mr. Cozens-Hardy. I say you must not look at it at all, except so far as it may be, and I suppose is, legitimate in a Constitutional Act of the Province of Manitoba to look at the general legislation of the whole Canadian Dominion.

The Lord Chancellor. Beyond that you must surely look at it for this purpose. The only thing that makes it inapplicable is that it is varied by this Act of 1870. In order to see whether it is varied or not you must see what it says, and therefore you must see what the variation is, otherwise you cannot come to the conclusion that it is varied and inapplicable. It is something more than looking to a piece of general legislation.

Mr. Cozens-Hardy. Your Lordships will bear in mind the point I was endeavouring to make was that on the face of Section 22 it is exhaustive and complete, because it says they may make laws subject and according to the following provisions.

The Lord Chancellor. Is that conclusive? On the other hand, if 93 is applicable, it is conceivable that it might import a further condition. Supposing there were some condition entirely different from those with which we are dealing, those found in 93 and in 22, and that that separate and independent condition were found in 93, I am not at all sure that it would be clear that that would be inapplicable. You see, *primâ facie*, it is incorporated. *Primâ facie*, all the conditions of 93 apply to Manitoba. You have got to see whether they do or do not, by seeing whether they have been varied "except so far as the same," that is, except so far as the provisions to be found here and the conditions to be found have been varied. It is quite conceivable that there might be certain conditions added in the case of Manitoba, and yet that some of the conditions of the British North America Act might still be applicable.

Lord Watson. What I think was the intention of the Dominion Parliament in enacting that Statute of 1870

was this, they meant to re-enact Section 93 with alterations which would make it suitable to the circumstances of Manitoba at the time.

Mr. Cozens-Hardy. Yes, and to make it a complete code of legislation with respect to education for Manitoba.

Lord Watson. I think that is so. If they had left out a substantive provision that would have otherwise applied to Manitoba, I think that omission would probably show that they did not intend that particular provision to apply in the case of Manitoba.

Mr. Cozens-Hardy. That of course is my submission.

Lord Watson. They have left out that which obviously does not apply.

Mr. Cozens-Hardy. But, my Lord, even if that be not so, on the mere face of Section 22 I submit it is.

Lord Watson. Your contention is, and I feel very much inclined to agree with it, and I do not think it was seriously disputed on the other side, and I do not think it very materially affects the question we have to decide —I think it was intended that that Clause 22 should comprehend the whole code of legislation with respect to education in Manitoba.

Mr. Cozens-Hardy. No doubt.

The Lord Chancellor. That there should be, in short, a variation of Section 93. If it is not a variation of Section 93 then Section 93 would be applicable.

Lord Watson. They have repeated these provisions in 93 which they have intended to apply, and have left out those provisions in 93 which they intended not to apply, and have inserted provisions which, whether differing or not, in substance are certainly differently expressed.

Mr. Cozens-Hardy. That is the first point which I desire to make, and that is the point on which I think three Judges took the view I am addressing to your Lordships, and two took the other view.

Lord Shand. Do you mean the two Judges in minority would not have come to the same conclusion without Sub-section 3 of the British North America Act?

Mr. Cozens-Hardy. I do not know that I can quite say that; I am not putting my case so high as that.

Lord Shand. I think it could not be put so high as that.

Lord Watson. There are some strong statements to the effect that it ought to be assumed; that the intention was to assume it.

Lord Shand. I rather read the two Judges, as putting it alternatively, that with the Act of 1870 alone they would come to the same result, but with the light of the Act of 1867, it was made clearer.

Mr. Cozens-Hardy. I venture to think they were influenced undoubtedly by the conviction which they formed that Sub-section 3 of Section 93 so far as it differed from Section 22 assisted their view and enabled them to arrive at the decision which they did arrive at.

Now, my Lords, dealing with Section 22, and with Section 22 alone for the present, what is its object? I venture to submit to your Lordships that its object is to define and to limit the exclusive powers of legislation which were given to the Provincial Legislature of Manitoba in and for Manitoba. It shows an intention to preserve the rights and privileges with respect to denominational schools which existed at the Union and those only. It enabled the Legislature to pass a law affecting and prejudicially affecting any right or privilege with reference to denominational schools which was created only by post-Union legislation and which was not in existence at the date of the Union. And further that the only effect of sub-Section 2 is to give a special means of testing whether the Legislature has or has not gone outside of the limits imposed upon it by Sub-section 1. Now my learned friends have argued that cannot be. They say that cannot be because if the Act is *ultra vires* that is a point which may be raised, and properly raised, in proceedings in the ordinary Courts of Law.

Lord Watson. Then it really and truly comes round to this contention that in construing Sub-section 2 you must read the words "affecting any right or privilege of the Protestant or Roman Catholic minority" just in the same way as though they ran "affecting the aforesaid right or privilege."

Mr. Cozens-Hardy. Yes.

The Lord Chancellor. Aforesaid does not say anything about majority or minority—"affecting the rights

aforesaid" you substitute for "affecting any right or privilege of the Protestant or Roman Catholic minority relating to education." Is not there rather an objection at the outset to such a construction from the altered language of Sub-section 2? The words at the end are very much wider than the words of Sub-section 1. Would it be according to ordinary rules of construction to limit them in that way?

Mr. Cozens-Hardy. I suggest to your Lordships there was a special reason for giving this means of testing.

The Lord Chancellor. I am not on the "means of testing." Suppose you are right in saying you can shew reasons which would justify them, what I am calling your attention to is your argument that this second Sub-section relates only to matters referred to in the first. What I am pointing out is that where you have such a change of language as you have here for the words "any right or privilege which any class have by law or practice in the province at the Union," and when you find instead of those the words "affecting any right or privilege of the Protestant or Reman Catholic minority in reference to education," the ordinary rules of construction suggest that the second *primâ facie* means something different from the first.

Lord Watson. If the Legislature had chosen so to limit the right of Appeal expressly to the aforesaid right without saying anything more, I should not have been prepared to challenge the propriety or reasonableness of what they had done, but it does not in the least follow that I am to be guided by that circumstance.

Mr. Cozens-Hardy. In considering Sub-section 2 and Sub-section 3 also, it may be necessary, and probably is necessary, to consider what are the functions of the Governor General. Has he any judicial character?

The Lord Chancellor. I think the primary question is to determine what the second applies to, which is independent of the functions of the Governor General. The functions of the Governor General come in later.

Mr. Cozens-Hardy. Section 2 begins by saying: "An Appeal to the Governor General shall lie."

The Lord Chancellor. The question is, from what? You say only from an Act which infringes the rights

which are protected by Sub-section 1. That is the first step you have to take.

Mr. Cozens-Hardy. I do not deny that "Act" includes "Statute" here, but "Act" does not mean "Statute." "Act or decision of any Provincial Authority" means something done by the Legislature or Provincial Authority.

The Lord Chancellor. The only way in which the Legislature acts is by Statute, is it not?

Mr. Cozens-Hardy. Is that quite so? Certainly that would not be the case with a Provincial Authority. The same words apply to both.

Lord Watson. And Provincial Authority under this clause is distinguished.

Mr. Cozens-Hardy. Yes, it is. I submit, although the word "Act" would include a Statute of the Legislature, yet it is not in terms so described, but it is said to be subject to an Appeal because it is something which is contrary to the main purpose, object and intent of the Act.

The Lord Chancellor. As applied to the Legislature does not that mean Statute?

Mr. Cozens-Hardy. It would include it.

The Lord Chancellor. What else can the Legislature do but enact?

Mr. Cozens-Hardy. There may be resolutions passed. There may be various acts. They might have done some things not in the shape of an Act.

The Lord Chancellor. We are not talking of an assembly which may have some prerogatives at common law.

Lord Watson. I do not think any resolution of the Assembly which was not in the form of an Act and not sanctioned by the Crown would affect private rights.

Mr. Blake. The Legislature is composed of the Lieutenant-Governor and the Assembly. It is an Act of the Legislature.

Mr. Cozens-Hardy. That still leaves open a question which I desire to submit to your Lordships. My friends say this cannot apply to an *extra vires* Statute.

The Lord Chancellor. I do not think they said it cannot apply.

Mr. Cozens-Hardy. I think my friend's argument went to that length.

The Lord Chancellor. They said it cannot apply in this sense that the provision affecting them, if it were void under Sub-section 1, could not be described as an Act of the Legislature, because an Act of the Legislature must mean something which it effectually does and not something which it purports to do and does not.

Mr. Cozens-Hardy. Is that right? It is not of course usual to provide any machinery for deciding the abstract question whether a bye-law of a corporation or an act of a subordinate legislative authority is or is not valid?

Lord Watson. It does not seem very probable *prima facie* that there should be a reference given to the Governor to consider whether an Act which this Statute declares to be *ultra vires* shall be retained on the Statute Book or shall be modified. What is given to the Governor is a discretion to do what he thinks fit on appeal. How is he to exercise that discretion in the case of an Act which has been declared by the Imperial Legislature itself or the Dominion Legislature, acting under the authority of the Imperial Legislature to be in itself *ultra vires*?

Mr. Cozens-Hardy. I should answer your Lordship's question by saying that he is judicially to determine. Of course he had the opportunity of taking the opinion of the Court, and ultimately the opinion of your Lordships of the Privy Council.

Mr. Blake. He had not at the date of the Act.

Mr. Cozens-Hardy. That is true.

Lord Watson. I should think that was the only case in which an Appeal contemplated—if that case is included it is the only case in which an Appeal contemplated by Sub-section 2 would be judicial.

The Lord Chancellor. You would have a rather curious state of things, because supposing the Governor said that it was *ultra vires*, and accordingly told them to pass an Act, and they did not, and then the Canadian Parliament proceeds to legislate, and then the matter goes on as it might before a Court of Justice ——

Lord Watson. And both Acts are invalid?

Mr. Cozens-Hardy. That may be.

Lord Watson. I apprehend that the Appeal to the Governor is an Appeal to the Governor's discretion. It is a political administrative Appeal and not a judicial Appeal in any proper sense of the term, and in the same way after he has decided the same latitude of discretion is given to the Dominion Parliament. They may legislate or not as they think fit.

Mr. Blake. Only within the limits of his discretion; they cannot go beyond.

Mr. Cozens-Hardy. He has to decide whether it affects any right or privilege.

Lord Watson. That is not before us now.

Lord Shand. Suppose both were legitimate, an Appeal to the Court of Law and an Appeal to the Governor General in Council even in the case of an *ultra vires* Statute that would not settle this question by any means. It might quite well be so.

Mr. Cozens-Hardy. I was now dealing with the matter by steps. I say first of all this does include an Appeal in respect of an *ultra vires* Act.

Lord Shand. You must no doubt look to the exact language of the Section, but then you must see how it is controlled by the reason of the thing. I do not think it at all shuts out the question we have to deal with, even supposing it was done as you were suggesting.

Mr. Cozens-Hardy. That may be so, but now what light does Sub-section 3 throw upon it? Sub-section 3, I venture to think, throws a great light upon it and helps us very much. "In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this Section." That must mean, I submit to your Lordships, to give effect to Sub-section 1 of Section 22.

Lord Watson. It does not require legislation to give effect to the leading part, the introductory part of that Section.

Mr. Cozens-Hardy. Legislation might be necessary to wipe out an Act, whether wholly or in part.

The Lord Chancellor. To annul the Act altogether.

Mr. Cozens-Hardy. To clear the Statute Book of that which was null and void, which was *ultra vires.* It goes on, "Or in case any decision of the Governor-General in

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

The Lord Chancellor. Do you suggest that the Dominion Act of Parliament is to be an Act annulling a void enactment of the Provincial Parliament?

Mr. Cozens-Hardy. That is my submission, because Sub-section 3 is divided into two parts, as Lord Watson pointed out, The first gives the Canadian Parliament power to legislate on the recommendation of the Governor-General without any Appeal to him under Sub-section 2. It is a separate and distinct power. The Governor-General may say, "This Act which has been passed by the Legislation of Manitoba is one which is *ultra vires*, one which is inconsistent with Sub-section 1. That ought not to be a matter of doubt that ought to be left to be decided by a private Action which might be raised between a subject of Manitoba and some rating authority or otherwise, but it ought to be got rid of by the Parliament of Canada in order to secure "the due execution of the provisions of this section." The first part of Sub-section 3, I submit to your Lordships, must plainly apply and apply only to Sub-section 1.

The Lord Chancellor. I do not see why.

Mr. Cozens-Hardy. My Lord, the first part of Sub-section 3 contemplates a case where no Appeal has been made to him at all.

Lord Macnaghten. I do not quite follow that. You say the first part of Sub-section 3 applies to a case where there has been no Appeal to him.

Mr. Cozens-Hardy. I suggest so.

Lord Macnaghten. Why is that?

Mr. Cozens-Hardy. The words are: "In case any such Provincial Law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section."

The Lord Chancellor. But the "due execution of the provisions of this scheme" means when there has been

an Appeal made to him, it is in order to carry out his views upon that Appeal, that is all.

Mr. Cozens-Hardy. With submission, is that consistent with the following words : " Or in case any decision of the Governor General in Council on any Appeal under this section is not duly executed by the proper Provincial Authority."

The Lord Chancellor. Yes, because there might be a decision which would not be a legislative Act. They might be affected in two ways, they might be affected by an administrative Act, they might be affected by a legislative Act, and in both cases therein is an Appeal given.

Mr. Cozens-Hardy. But Sub-section 3 deals with remedial laws in both cases.

The Lord Chancellor. It might be, if there was an Appeal against an administrative Act which was not put right, you might have to have a remedial law in order to take away that power which had been abused.

Mr. Cozens-Hardy. I submit to your Lordship that Sub-section 3 is merely intended to provide for the due execution of the exclusive power of Legislation in the matter of education which is given to the Province of Manitoba, and that it has no reference whatever to anything except a matter which is outside the powers of Manitoba in this Section, and something which is necessary to secure the due execution of the provisions of this Section.

The Lord Chancellor. On that point of course we cannot but look to the effect of Section 93 if that view be correct, because if " provincial authority " in Section 93 does not include " Legislature " in Sub-section 3, then it is quite clear—at least it strikes me so—that the Appeal which is given by Sub-section 3 must apply to Sub-section 1.

Lord Watson. I do not understand this altogether. There was a good deal of argument and a great deal of expression of opinion in the Court below, which I hardly follow, upon the improbability of the Dominion Legislature superseding the Provincial Legislature. They have done so in some cases, and the question is in what cases. They have most unquestionably substituted the

Dominion Legislature, and laid upon them the duty of considering and doing everything proper to be done to effect that which the Provincial Legislature ought to have done. That is to a very large extent at any rate affecting their legislative powers.

Mr. Cozens-Hardy. This brings me, my Lord, to the next point I was coming to, which is this—I say it is contrary to principle that an admittedly *intra vires* Statute cannot be revoked by the legislative body which creates it. Now, there is no similar restriction so far as I am aware to be found in the legislation of Canada. I have looked through the Act carefully, and I am not aware of any instance, nor have my learned friends referred to any instance in which an admittedly *intra vires* Act cannot be revoked by the body which admittedly rightly passed it originally.

Mr. Blake. I was stopped on that point.

The Lord Chancellor. The revocation might give a right to appeal on the ground that it destroyed certain rights. For example let me take a case. You say that it is applicable to the provisions of Sub-section 1. Supposing that there had been in Manitoba some rights and privileges (it was clearly thought there were) existing at the time of the Union. Supposing that immediately after that the Provincial Parliament had passed a law putting into the shape of an enactment all the rights that existed, and repealed any pre-existing law. At that time those rights and privileges would have been perfectly secured by that Act, and they would have been secured by that Act alone. Suppose they had repealed that Act, it would not have revived the former law. You say they have perfect power to repeal it, so they have, but the question would arise, what was the effect of that repeal.

Mr. Cozens-Hardy. It would not be competent for them to interfere with a right existing by law prior to the Union.

The Lord Chancellor. Quite so, and when you are saying that there must be an absolute right to repeal, it might be that their repeal would be effectual as to certain provisions, and ineffectual as to others. This right of repeal would not be complete, because there were certain

rights which they could not affect, even by a repealing Act.

Lord Watson. You seem rather to ignore this fact that whilst it was not competent for them prejudicially to affect or to repeal rights and privileges with respect to denominational schools which were possessed by anybody prior to the Union, it was entirely within their legislative competency to do anything to give effect to those rights.

Mr. Cozens-Hardy. The view I present to your Lordships is this, not that there were no rights and privileges at the date of the Union, because I do not understand your Lordships in the Barrett case decided that there were no rights or privileges existing with regard to denominational schools at the date of the Union. The only decision was this, that there were no rights or privileges which were affected by the Act of 1890.

The Lord Chancellor. But those rights and privileges must have been of a very limited character.

Lord Shand. Can you suggest any rights or privileges prior to the Union?

Mr. Cozens-Hardy. I can suggest to your Lordships many rights which they had then which could have been interfered with. For instance, if an Act were passed compulsorily requiring every child to attend the public schools, and disabling any child attending denominational schools, that would be an interference with a right or privilege, and I apprehend that would have been an *ultra vires* Act, and that this Board would have so decided.

The Lord Chancellor. Is that quite certain that they enjoyed the right or privilege of not going compulsorily to a public school.

Mr. Cozens-Hardy. No, but they enjoyed the right or privilege of going to a denominational school, and if they are compelled to go to another school it necessarily follows that they cannot go to a denominational school. My construction, therefore, does not render Sub-section 2 nugatory, it leaves it perfectly operative, and there are many cases to which it might apply.

The Lord Chancellor. If you look at the corresponding Sub-section of Section 93 and see what was the nature

of the rights of the minority which it was intended to protect, it does not go very near that, I think, because you cannot look at Section 93 of the original Act without seeing that the separate class, whether by that was meant the Catholics where the Protestants were in the majority or whether it was meant specially for Protestants where Catholics were in the majority, it was the rights in respect of that particular class which were intended to be protected. Practically speaking, there is no such protection in Manitoba if you are right.

Mr. Cozens-Hardy. That may be so, but of course the language of Section 22 is very different from that of Section 93 on that point.

The Lord Chancellor. I mean it is very difficult to shut one's eyes to the fact that at the time the Manitoba Act was passed—one is entitled to look at the circumstances—you had a Catholic and Protestant population nearly balanced ; you had notoriously (for *that* you may certainly look at this legislation, and indeed it is common knowledge) the Catholic part of the population set upon separate schools for their denomination. It is with a view to the protection of rights of that sort that this legislation is passed. Practically your contention would place Manitoba in a worse position for the Catholic minority as it might be or the Protestant minority as it might be in a position of less protection than you get in Ontario.

Mr. Cozens-Hardy. I accept that. It is undoubtedly so. That is the effect of the legislation according to my submission. They are put in a different position, and it may be in a worse position. Now the opposite view lands my learned friends, I venture to think, in this difficulty——

The Lord Chancellor. You have not yet grappled with my difficulty, it is not touched by any observations you have made. It is true that the language of Sub-section 2 seems to indicate that the Act of the Legislature which is to be the subject of the right of Appeal is not that which affects the rights referred to in Sub-section 1, because the language is altogether different. Sub-section 1 deals with affecting "any right or privilege with respect to denominational schools which any class of

persons have by law or pratice in the province at the Union ;" Sub-section 2 in terms gives an Appeal from "any Act of the Legislature affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." The words are different, presumably they mean a different thing. It is for you to show that they must mean the same. The onus is entirely on you when those wide words are used.

Lord Watson. There is not only a change in the language used, but whereas in Sub-section 1 the right and privilege referred to is a specific and limited right and privilege, in the other it is in the widest possible terms, "any right or privilege." There are no words of reference back to Sub-section 1.

The Lord Chancellor. You are asking us to limit very general wide words, and to construe them as if they were much narrower and applied only to the right referred to in the 1st sub-section. Now, I do not say that in some cases there may not be arguments for saying that you must put, and that you cannot help putting, upon wide words a narrow meaning, but that meaning is only to be given if you are driven to it, if from some part of the Act you see that you cannot read it or give effect to it reasonably without doing so ; *prima facie*, however, you have the words, and that is the point you have to grapple with.

Lord Watson. You infer some coercive words into the Act which imply that a more limited meaning must be given.

Lord Shand. The words of Sub-section 2 are "affecting any right or privilege." That is very general, but then it is "affecting any right or privilege of the Protestant or Roman Catholic minority." That is different language to the language of Sub-section 1.

Mr. Cozens-Hardy. I am coming to that as a separate point, if your Lordship will pardon me.

Lord Watson. The limitation is in point of time in Sub-section 1 ; there is no limitation in point of time in Sub-section 2.

Mr. Cozens-Hardy. The way I desire to put this to your Lordships is, that from the nature of the powers

and from the context and from the reason of the thing, Sub-section 2 must be limited to an Act which infringes such a right or privilege as could not be touched by an *intra vires* Act, and I ask your Lordships to come to that conclusion, because in Section 22 the exclusive power of making laws relating to education is given to the Provincial Legislature. I gather that the Canadian Parliament would have no power to pass a new Education Act: it could not do that.

The Lord Chancellor. Why not?

Mr. Cozens-Hardy. All it could do was to make remedial laws.

The Lord Chancellor. It is not given exclusively. It is given exclusively, "subject to the following provisions," and if you find the following provisions in certain cases enabled the Parliament of Canada to legislate, it seems to me that it means that so far it is not exclusive.

Mr. Cozens-Hardy. But it is only "remedial laws for the due execution of the provisions of this section."

The Lord Chancellor. That is if an Act has been passed which on Appeal is thought to contravene rights which are intended to be protected, that is intended to enable the Dominion of Canada to pass, if the Legislature of the Province will not pass a law relating to education which will set that right.

Lord Macnaghten. If the authority of the Dominion Parliament is once properly invoked, what limit is there to their powers of remedying any mischief that has been created?

Mr. Cozens-Hardy, All it could do would be to make "remedial laws for the due execution of the provisions of this Section" in order to see that nothing goes beyond the provisions of this Section, but they could not pass a new Educational Act.

Lord Macnaghten. It might be necessary, surely?

The Lord Chancellor. It might be necessary to determine that certain officials should only have certain limited powers, or it might be necessary to vest rights in trustees. There are a hundred cases where it might be necessary to give effect to the intention of this Section and to protect the rights acquired (I am not dealing

with the question whether there are any) denominational schools.

Lord Shand. Supposing the Legislature passed an Act which admittedly did affect these privileges prejudicially, your argument is that that is not a matter intended to be within their Province at all.

Mr. Cozens-Hardy. Does your Lordship refer to the question of dealing with an ante-Union privilege?

Lord Shand. I understand that the contemplation of these Sections is that in and for the Province of Manitoba the Provincial Legislature is to have exclusive power?

Mr. Cozens-Hardy. Certainly.

Lord Shand. But if they were to proceed to pass an Act of Parliament which admittedly and avowedly was intended to prejudice the rights of certain persons with regard to education, your argument is that it would be beyond their power?

Mr. Cozens-Hardy. Yes.

Lord Watson. You start this part of your argument by saying that the Legislature of Manitoba is to have exclusive legislative powers in the matter. But that is not in the Act. They are to have exclusive power except in so far as it is qualified by the provisions of the Act, and that leaves it open. We cannot assume that the Legislature meant to give them the entire exclusive power without the qualification of these provisions, and the only question really is to what extent is their exclusive right qualified by the provisions of the Section. You cannot take any benefit from the assumption that the Legislature did give or meant to give them the whole power. They did not mean to give them the exclusive power.

Lord Macnaghten. They had the exclusive power till they overstepped the limits of the Section. When they did that I do not see any limit to the remedy which the Dominion Parliament might apply, except the mischief which had to be remedied.

Lord Watson. I think they have gone rather beyond that. Unless your construction of Sub-section 2 is right, in other words if "any right or privilege" include the other rights, they have a legislative power and can

affect those rights, but their legislation affecting those rights may be set aside by the Governor General, and if they will not give effect to the Governor General's ruling then effect can be given to it by the Dominion Parliament.

Lord Shand. At the same time the expression used in giving power to the Dominion Parliament is "then and in every such case and as far only as the circumstances of each case require the Parliament of Canada may make remedial laws."

Mr. Cozens-Hardy. That is my point. I am now using this, of course, to meet the Lord Chancellor's observation.

Lord Shand. That would mean putting things back as far as they could by remedial laws, not initiating a new law that might be mischievous in itself.

Lord Watson. I do not think it necessarily means that. I think "remedial laws" here means to do what the Provincial Legislature ought to have done in the execution of the Act.

Mr. Cozens-Hardy. There is a limit imposed upon the exclusive power of the Manitoba Legislature to correct laws.

Lord Watson. If it is anything it is a qualification of their exclusive power. It is simply to correct something that has been wrongly done, not to legislate themselves upon the subject of education one hair's-breadth further than to set right what has been wrongly done.

Mr. Cozens-Hardy. Exactly. Nothing is wrongly done which is *intra vires.*

The Lord Chancellor. That of course is the whole question.

Mr. Cozens-Hardy. This Board has decided of course that the Act of 1890 was not wrongly done.

The Lord Chancellor. They have decided that it is *intra vires.* That is not saying that it is not wrongly done. I think there has been some confusion of view in some of the Judgments below. It is said that this Board has decided that the Act was *intra vires*, and that therefore it follows that they cannot infringe the provisions of Sub-section 2, but that of course is the whole question.

Mr. Cozens-Hardy. What I desire to urge is, not that the Barrett case decided this. I do not think it did.

The Lord Chancellor. They have said that it did not infringe Sub-section 1 because it did not 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." They have not said that it did not affect the rights or privileges of a Roman Catholic minority in relation to education.

Mr. Cozens-Hardy. But what are the provisions of this Section which can be applicable to a case like the present? There is no "remedial law" required in dealing with a Statute of the Manitoba Legislature which is *intra vires.* There is no "remedial law" necessary.

The Lord Chancellor. I confess the words "remedial law" point, to my mind, to legislation and not to merely annulling something which the Legislature has said shall be annulled. You cannot call the mere execution of the Section a "remedial law." And they are not to go beyond what is necessary.

Lord Shand. And it is "in every such case and as far only as the circumstances of each case require."

The Lord Chancellor. Yes. Now it does not require at all remedial legislation to annul an *ultra vires* law.

Mr. Cozens-Hardy. Except that it is the mode of getting rid of an Act.

Lord Watson. You suggest this would be a mere declaratory Act, declaring that the original law was wrong.

Mr. Cozens-Hardy. Yes.

The Lord Chancellor. Is that not rather straining the words, "as far as the circumstances of each case require?" In that case "the circumstances of the case" would always "require" precisely the same thing—simply to annul the law.

Mr. Cozens-Hardy. The circumstances might not require the annulment of the whole law. They might require a declaration of the invalidity of a part of the law.

The Lord Chancellor. But in each case it would be annulling a law; there would be no variation from case to case.

Mr. Cozens-Hardy. No, it would be declaring that the law was either wholly or, as the circumstances of the case might require, partially void.

The Lord Chancellor. If that is all that was meant it would have been very simple to have put it in very different language. That is not a conclusive argument I quite agree, but the language does not seem to be very appropriate language. You say Sub-section 3 tends to show that Sub-section 2 must mean something less than at first sight it says. So far from that the language of Sub-section 3 seems to me rather to point in the contrary direction.

Mr. Cozens-Hardy. The way I endeavour to meet the Lord Chancellor's observation is this. I say that Section 22 anxiously provides that the Manitoba Legislature is exclusively to have the power within certain limits, but that it is not intended to confer any general legislative power upon the Canadian Parliament.

Lord Watson. It is just the same as if it had been "subject to the exceptions hereinafter enacted, the Provincial Legislature shall have exclusive power."

Lord Shand. But the exception is that they are to remedy anything as to which the Manitoba Legislature goes wrong.

Mr. Cozens-Hardy. Exactly.

The Lord Chancellor. Is it not conceivable legislation to say "We will trust to you the Provincial Legislature the power of dealing with education, but this is a question upon which there is known to be a keen feeling and a difference of opinion, and you are not to destroy any privileges or rights existing at the time of the Union. Further than that, if you legislate within your powers the minority shall not be without protection; there shall be then an Appeal to a superior authority, the Governor-General in Council, and if he thinks that within your powers you have been depriving the minority of any right or privilege in relation to education then he may express that decision, and effect shall be given to that decision or may be given to that decision by the Dominion Parliament." I do not see anything extraordinary or inconceivable or revolting to one's notions in such legislation. I don't say that it follows, that that

is the legislation; but then you are asking us apparently to abstain from giving to wide words their apparent meaning, because there would be something repugnant to ordinary notions in legislation of that description.

Mr. Cozens-Hardy. Yes, that is the way I put it.

Lord Watson. As far as I can see, and as far as I understand, the Dominion Parliament have no power whatever to originate legislation with regard to education in the Province. They have power to interfere, and that for remedial purposes only, when their attention is called to certain grievances by the Governor-General accompanied with the statement that the Governor-General is of opinion that these grievances ought to be remedied in a particular way. Whether the Governor-General must point out what that way is or leave it to the Parliament I do not think it is necessary to determine.

Lord Macnaghten. And that the Provincial Legislature has declined to set matters right.

Mr. Cozens-Hardy. With submission, is that last qualification right? The first part of Sub-section 3 does not seem to require that.

Lord Watson. That indicates that the legislation of the Provincial Parliament is not to be treated as *ultra vires.* They are to have a chance, if the Governor-General thinks right, of remedying their defective legislation by putting in a clause for the protection of those rights snd privileges referred to in Sub-section 2. If they decline to give protection in the way suggested, or in any way, then it becomes matter of reference to the Dominion Parliament.

The Lord Chancellor. Can you say that under the first part of Sub-section 3 the Governor-General is to keep a sort of constant eye upon the legislation of the Province? Is not that part of Sub-section 3 only applicable where there is an Appeal under Sub-section 2, and where it is brought by means of that Appeal to the notice of the Governor-General? You suggest something much wider?

Mr. Cozens-Hardy. Yes. The second part deals with cases where the provisions have not been duly executed. The first part is not limited to that.

Lord Watson. What is the meaning of these words?

This is an exception from the exclusive powers of the Province and an exception in favour of the Dominion Parliament. What power have the Dominion Parliament to interfere at all or to legislate upon the subject unless the Governor-General has taken the initiative and expressed to the Provincial Legislature his opinion that certain legislation is necessary and the Proviucial Legislature has declined to pass it?

Mr. Cozens Hardy. Your Lordship does not find that limitation in the first part of Sub-section 3, though you do in the second part.

Lord Shand. But suppose you are right in that, does it make any difference? It does not affect the construction of the previous clause. The mischief must occur before there can be any appeal.

Lord Watson. Your first contention is that the only Appeal given by Sub-section 2 is an Appeal in respect of an interference with a right or privilege referred to in Sub-section 1.

Mr. Cozens-Hardy. Yes.

Lord Watson. If your interpretation of Sub-section 2 is right *cadit questio*, no such Appeal has been made to the Governor General in this case. On the other hand, if their Lordships should be of opinion that your construction is not right, and that Sub-section 2 brings in what have been called post-Union rights and privileges acquired through legislation by the minority, it does not appear to me to be a very important inquiry whether under that general classification, including all those rights a case falling under Sub-section 1 may or may not be also included. It becomes simply an Academic question.

Mr. Cozens-Hardy. Yes. I was only using it to make my point clear.

The Lord Chancellor. Your case is that the only portion of the Section which is effective is the first, but what is the meaning of saying "any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this Section" as distinguished from the decision of Governor-General in Council on any Appeal.

Mr. Cozens-Hardy. It may not, of course, be a law.

It may be some administrative act of some administrative body.

That, my Lords, is what I desire to say on the first part of the case. Now I come to another part of the case to which I am not sure that my learned friends on the other side have quite so fully directed your Lordships attention. Even if we are wrong and your Lordships should hold that an Appeal does lie from a post-Union Statute it only lies of course if it affects any right or privilege of the Protestant or Roman Catholic minority in relation to education. On that it is necessary to ask your Lordships' attention to the legislation from 1870 up to and including the Act of 1890, because it is only that legistion which is stated to be interfered with or prejudicially affected by the Act of 1890.

Lord Watson. But how can you apply the words "provincial authority" if the rights and privileges are limited to those specified in Sub-section 1?

Mr. Cozens-Hardy. There might be many administrative Acts interfering with them.

Lord Shand. Then may I ask with what object you are going to refer to the legislation? Is it for the purpose of showing that there is no privilege interfered with?

Mr. Cozens-Hardy. Yes; there is no right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education which has been interfered with. Your Lordships will observe that these words are very peculiar. It is not "any right or privilege in the matter of education," it is only "any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;" that is to say, it must be some right or privilege which a minority, as such, has under the Acts as against a majority in a particular locality.

The Lord Chancellor. Not necessarily.

Mr. Cozens-Hardy. I mean it is not a right or privilege which any one has, it must be some right or privilege which persons in the character of a minority have. The language is very peculiar.

The Lord Chancellor. Is not light thrown upon that by what we are certainly entitled to look at—Sub-section 3 of Section 93?

Mr. Cozens Hardy. They are identical words there.

The Lord Chancellor. Yes, but the identical words there are preceded by certain words the insertion of which of course was natural, having regard to the provinces with which they were dealing, and the insertion of which was necessary in this section. But seeing that they are identical words, might not one look at the preliminary part of Sub-section 3 of Section 93 to see what their object was?

Mr. Cozens-Hardy. Yes, except this, of course—your Lordship rather anticipated my observation—you do not find those words at the beginning of Sub-section 2.

The Lord Chancellor. You of course would not, because Section 93 was dealing with the provinces then in or that might thereafter come in, to which those words would be applicable; Section 22 of the Act of 1870 was dealing with a state of things in which they knew exactly what the provinces were. You do not need the general words applicable to an existing or future state of things in one or other of several provinces.

Mr. Cozens-Hardy. No. It is legitimate, no doubt, to look at Sub-section 3 of Section 93, but still the fact remains that your Lordships must find as a fact, not merely that rights and privileges given to the whole community come under the Act, but it must be the rights and privileges of the Protestant minority or the Roman Catholic minority, as the case may be, in different parts of Manitoba.

Lord Watson. You say it must be conferred *eo nomine*?

Mr. Cozens-Hardy. Yes. Just as your Lordships in the Barrett case held that the only rights and privileges which were preserved were privileges that any class of persons had, so here the only privileges which are in any way to be considered are the rights or privileges of the Protestant or Roman Catholic minority of the Queen's subjects.

Lord Shand. But supposing in any district there is a minority, and that that minority is injured by the legislation?

Mr. Cozens-Hardy. If they are injured, not as a minority, but if every member of the community is treated alike——

The Lord Chancellor. With the result that the minority, Protestant or Catholic is injured.

Lord Watson. With the result that the minority are not quite so well treated as they were before.

Mr. Cozens-Hardy. My submission will be when I take your Lordships through the Acts, which I hope to do very shortly, that there is no part of this legislation which in any way does confer any right or privilege upon the Protestant or Roman Catholic minority.

The Lord Chancellor. Is it a privilege with reference to education to tax your own pockets and so have denominational education?

Mr. Cozens-Hardy. The privilege of paying the taxes?

Lord Shand. The privilege of imposing taxes.

Mr. Cozens-Hardy. The whole taxing system of these Acts is gone. They had a certain exemption from liability to pay taxes to schools of another faith.

Lord Watson. They had a subvention.

Mr Cozens-Hardy. Every school had a subvention.

Lord Watson. Not in their character as a minority.

The Lord Chancellor. This does not mean surely in their character as a minority, but it means those who from time to time form the minority who may be Roman Catholics at one time and Protestants at another, and perhaps Roman Catholics in one place and Protestants in another.

Lord Watson. I should doubt if minority has the sort of meaning you attribute to it. I think it plainly contemplates where the majority was powerful enough to carry in the Provincial Legislature measures which took away that which the majority were willing to surrender, but which the minority in the Legislature did not agree to.

Mr. Cozens-Hardy. Your Lordship is interpreting the word "minority" as meaning a minority in the Legislature.

Lord Watson. A minority in the state. They do not have to go into every village and find who is the minority there, or into every district and find who is the minority there, and give the minority in that district, because they happen to be a majority in the other place, no remedy.

Mr. Cozens-Hardy. If that be, your Lordships, true, your Lordship is striking out the words "Protestants or Roman Catholics."

The Lord Chancellor. No, because it might be at any future time. At one time being a Protestant majority and at another time a Catholic majority. At the time this Act was passed it may have been contemplated that the Catholics were likely to become a minority.

Lord Watson. It is quite obvious from the division into districts under the Act of 1890 that there are Catholic and Protestant districts, and in some places you find under the administration of that Act they are all Catholics together, and in a great majority, but they are the Legislative minority, and they feel aggrieved because they have not any denominational schools. They have unsectarian schools with certain rules, and they are advised by an Advisory Board to use their discretion of saying what books Catholic children shall be allowed to use in the course of education, and such religious exercises as are permitted.

Mr. Cozens-Hardy. I was going to refer to the passage which Lord Watson has alluded to, namely that in Manitoba it was perfectly notorious there were certain districts in which there was a Protestant minority, and certain other districts where there was a Catholic minority. If that be the view I quite admit that there may be provisions in those intermediate Statutes——

Lord Watson. They are people who, if they had been a majority in the State instead of a minority, would have taken care that that legislation would not have become law.

Mr. Cozens-Hardy. Then, my Lords, I have put to your Lordships such observations as occur to me.

Lord Shand. Has it any different meaning than this—that if in any district a minority, Protestants or Catholics, are injuriously affected—that raises a question.

Mr. Cozens-Hardy. That is the view I desire to put before your Lordships.

The Lord Chancellor. That may be, but it is not necessary to determine that. It may be it includes local minorities, but it is perhaps not necessary to determine that. It includes also the total population.

I do not say it might not be applicable to local minorities but local minorities if on the poll a majority have protection in their own hands. It is not for the Governor or the Dominion Parliament to interfere and set it aside. It may be the wishes of the majority of Catholics.

Lord Watson. One should not expect any person to admit he had the matter in his own hands. He could not establish, no matter how much he was in the majority anything but a non-sectarian school.

Mr. Cozens-Hardy. He could not. He can open as many denominational schools as he likes.

The Lord Chancellor. But he would have to pay his quota to the other schools.

Lord Watson. He cannot create a State-aided school.

Mr. Cozens-Hardy. No. State aid can only be given to such public schools as are contemplated by the Act.

Lord Watson. He would have to contribute to the State-aided schools as well.

Mr. Cozens-Hardy. My Lords, these are the grounds on which, on behalf of the Legislature of Manitoba, I submit to your Lordships that the Supreme Court of Canada were right, and that the powers of the Legislature cannot be interfered with in a matter which is *intra vires* of the Legislature by an Appeal to the Governor-General of Canada, who apparently claims to exercise his powers not in his judicial character but from political considerations, which may be, and probably must be, foreign to those which would have weight in Manitoba.

Mr. Haldane. My Lords, if I had been following my learned friend, Mr. Cozens-Hardy, in an ordinary Appeal I should not have presumed to add much to what he has said, but the magnitude of the case and, I may add, its difficulty makes me desire again to touch upon some of the grounds which he has already gone over. I promise your Lordships I will not occupy an undue or long period of your time.

The Lord Chancellor. The case is such, and its difficulty such, that no excuse need be made for any assistance you can render.

Mr. Haldane. I am sure I shall have your Lordships' indulgence. Now, my Lords, there are two points which my learned friend has stated at the opening of his

address, and on those two points not only am I bound to concur with him but I do most sincerely concur with him. We are here to argue two matters of substance, and two matters of substance only. The *first* is whether Sub-section 1 does not exhaustively define the limits which are set to the legislative powers of the Provincial Legislature and whether the provisions of Sub-section 2 are not merely provisions expressed in general terms, covering, it may be, a wider field, but which are to be read as consistent with, and not as cutting down the language of Sub-section 1. That is the first point. The *second* is whether the conditions of an Appeal to the Governor-General have actually arisen by reason of the fact that a right or privilege of the minority within the meaning of Sub-section 2 has been affected?

My Lords, there was a further question which has been much discussed in the course of this case, and that is whether we have any thing to do on this Appeal with the British North America Act, 1867, or whether the question was exclusively governed by Section 22 of the Manitoba Act. To my mind that is a very important question. Your Lordships perhaps may be taken to have indicated that probably Section 22 contains the complete code of the provisions subject to which exclusive power in educational matters is given to the Provincial Legislature. Whether it be so or not seems to me to matter very little for the purposes of this Appeal. I do not think on the one hand it much assists the Respondents to say that it does; and on the other hand it makes very little difference to the Appellants.

The Lord Chancellor. Do you concede or dispute that in the 93rd Section "provincial authority" includes the Legislature?

Mr. Haldane. I think, my Lord, that under Sub-section 2 it does indicate the Legislature for some purposes.

The Lord Chancellor. One further question. Suppose in accordance with the provisions of Sub-section 3, or within the terms of the provisions of Sub-section 3, denominational schools or separate or dissentient schools were established in the province thereafter would the rights intended to be protected in that case be only those that had existed at the time of the Union.

Mr. Haldane. Yes, I think so.

The Lord Chancellor. What is the use or meaning of putting in the words "or is thereafter established" if Sub-section 3 only applies in either case to retain that which exists at the time of the Union? Why should the preservation of those rights be in any way dependent on an Appeal, or be dependent on an Act of the Dominion Parliament?

Mr. Haldane. Because it was not merely to control the Provincial Legislature; it was meant to control Acts of the executive and the judicial authorities, as I read the Section.

The Lord Chancellor. Admitting that, would those words have been inserted, "or is thereafter established by the legislature," if it had been intended and had already been enacted that you were to protect all those rights existing at the time of the Union, which is quite independent of whether separate or dissentient schools had been established or not.

Mr. Haldane. As I read these words they are words limiting the right of Appeal, and not very apt words, and it seems to me that it is probable that it is for that reason the expression is omitted when you come to Sub-section 2 of the Manitoba Act

The Lord Chancellor. Why should they have meant to have limited the right of Appeal in the case of provinces other than Ontario and Quebec to a province which afterwards established separate or dissentient schools? The right of Appeal was a right of Appeal to secure the protection given by Sub-section 1 to all of them alike at the outset.

Mr. Haldane. I answer that by saying that it appears to me that the draftsmen of these Constitutional Acts changed their minds when they came to Sub-section 2 of the Manitoba Act. My explanation of the omission of those words in the Manitoba Act is that it was made when they found they had introduced an inapt limitation to the right of Appeal. Why in the world should there be that limitation in Sub-section 3 of the British North America Act, and yet when you come to look at it they are words of limitation.

The Lord Chancellor. In one view it is perfectly

intelligible if what was intended to be protected by Sub-section 3 were rights then existing or thereafter created in relation to denominational schools ; then it is perfectly intelligible why they put in both limbs of the Appeal part in Sub-section 2.

Mr. Haldane. They have not said that in terms of Sub-section 3 as drawn.

The Lord Chancellor. Something very much like it. They have said " 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."

Mr. Haldane. There is to be an Appeal.

The Lord Chancellor. An Appeal shall lie from what?

Mr. Haldane. From any Act or decision of any Provincial authority.

The Lord Chancellor. " Affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." The system of schools which was first referred to was a system of schools for the benefit of the minority. The words " separate or dissentient " indicates it. " Thereafter established " appears to apply to separate or dissentient schools, namely to schools of the minority. Does not that indicate an intention where such schools are established to give an appeal against any infringement of rights in relation to such schools.

Mr. Haldane. I am not entitled to put a question, but if I were I would ask why does not " right or privilege " in that 3rd Sub-section mean right or privilege for the time being, leaving the operation of Sub-section 1 uncontrolled? That at any rate is my submission on the construction, but I must come back to that in dealing with my first point.

Now, my Lords, we have to construe provisions which are admittedly and on the face of them difficult to construe, and ambiguous, and for that purpose it seems to me important we should bear in mind what the scheme of the British North America Act was, because obviously the Manitoba Act, which as your Lordships know by the statute of the subsequent year was made an Imperial Act, was passed on the lines of the British North America Act. The British North America Act had a perfectly

distinct plan. That plan is expressed in the preamble to the Act—to establish a federal constitution in Canada called the Dominion, including in the term the "Dominion" the aggregate of the Provincial Legislatures as well as the Dominion Parliament itself, and to provide for the federal distribution of the executive power as well as of the legislative power. The scheme of the Act is not to make the Dominion Parliament in any sense sovereign or supreme over the Provincial Legislatures. The scheme of the Act is to distribute. "Federally" is an inaccurate and inapt term, and how it came to be used in this statute it is difficult to conceive; but what really took place was this: The Imperial Legislature intended to part with certain functions which I suppose theoretically are as much its functions to-day as they were then, but which were delegated with the indication that the Imperial Legislature did not intend to interfere in Canadian matters. They were delegated to the Dominion Parliament on the one hand and to the Provincial Legislatures on the other hand.

Lord Watson. The intention was obviously to distribute the whole complement of legislative power between the two Legislatures.

Mr. Haldane. Yes; there is nothing reserved in terms to the Imperial Parliament, and it has been only in rare cases, in some matters relating to copyright and merchant shipping and other international matters, that there has been legislation which would affect the subjects which were so distributed or delegated.

Now, my Lords, the scheme of the distribution was not to make one Parliament supreme over the other in matters which were delegated. The scheme of the distribution was distribution proper by creating co-ordinate Legislatures; the Provincial Legislature exercising such legislative functions as were, properly speaking, of a provincial nature and the Dominion Parliament exercising the other functions. There are certain cases, two occur to me at this moment, in which there was a slight departure from this, but these two were perfectly specific. The case of agriculture is mentioned in Section 95. The Provincial Legislature may make laws as well relating to agriculture as to

immigration. But that, however, is subject to this, that the Dominion Parliament if afterwards it should think fit to interfere may take that subject out of the hands of the Provincial Legislature. Then there is another instance, which is a little different. You will remember that some of your Lordships sat and heard an Appeal in a case that came before this Board last year about bankruptcy and insolvency.

Lord Watson. There have been a great number of cases. There are a great number on the articles in the specification in the Clauses 91 and 92 which interlace.

Lord Shand. Section 95 is subject to this qualification, "And any law of the Legislature of a Province relating to agriculture or to immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of Parliament of Canada." Parliament seems to be the supreme authority there.

Mr. Haldane. When it is supreme it is said it is to be supreme, and the question of agriculture is so far as I am aware the only one in the Act in which there is a provision analogous to that. When it is intended that the Dominion shall have power to take matters out of the hands of the provinces, as it was in that case, it was so said. With reference to the observation of my Lord Watson as to the subjects interlacing, your Lordships have laid down more than once that they do not theoretically interlace, but that subjects that are within Dominion cognizance in one aspect (I am endeavouring to quote the words of one of the decisions of your Lordships' Board) are within provincial cognizance in another aspect.

Lord Watson. So long as the Dominion do not legislate.

Mr. Haldane. The Dominion, of course, having regard to the provisions of Section 92 cannot legislate in anything properly provincial. You have only to look at Section 92 to see it has no such power. What there is is this. All matters which are of a provincial nature or of a nature exclusively under Section 92, are within the competence of the Provincial Legislature, and your Lordships have ruled time after time at this Board that attempted legislation by the Dominion is absolutely *ultra*

vires if once you get that condition established. Therefore it cannot be said that there is any indication in the Act of any intention on the part of the Imperial Parliament that the Dominion Parliament should have an overhauling power. That is not the scheme. It is only when you get what is outside Section 92—it may be it is another aspect of the same subject, but still it is an aspect that is outside—that you find it in Section 91; and I was reminding your Lordships of your decision last year in the insolvency case in which you held that notwithstanding bankruptcy and insolvency belong to the Dominion it still was competent so long as there was no Dominion legislation for the province under "Property and Civil Rights" to deal with some things, which in one aspect would belong to bankruptcy and insolvency. But that is not an interference with the absolute co-ordinate power of the Provincial Legislature. It is simply this, that your Lordships held that on the true construction a certain matter came within Section 91.

Now, my Lords, that being the Scheme of Sections 91 and 92, and all other cases such as that of agriculture being specially dealt with, what your Lordships would expect to find, if it had been intended or even contemplated that the Dominion Parliament should in the present case have authority in respect of the legislation of the provinces, would be that that should be given in clear language. It may be that it has been given in clear language. That is the question to be determined.

The Lord Chancellor. Education has a code to itself. I am not sure that what you have been saying really tells in favour of your argument particularly, because that is dealt with exactly. Educational questions would come within "Property and Civil Rights" in the provinces. I suppose legislation as to education would come within legislation as to civil rights.

Mr. Haldane. It might be so, or "local matters" at the end.

The Lord Chancellor. But you have it taken out of the general provisions dealing with either the power of the Dominion Parliament or the exclusive power of the Provincial Legislature as a thing which cannot be dealt

with under either of them. It must be dealt with by itself.

Lord Watson. I have no doubt the province would have power under the 16th head "Generally all matters of a merely local or private nature in the provinces"

Mr. Haldane. I think it is possible it might have been held to come under that.

Lord Watson. It is a matter purely local.

Mr. Haldane. It is treated separately, but the point of my argument is not quite that. It is this, that the Scheme being that of co-ordinate distribution when you come to the Code of Education in the 22nd Section of the Manitoba Act, which I will take as the section on which I shall argue, you have the matter assigned in the first instance to the Provincial Legislature, I quite admit "subject and according to the following provisions," but you begin by having education assigned as a matter with which the provincial authorities deal.

The Lord Chancellor. Would you dispute that the whole of the educational code of this Act suggests a distrust in this issue of the Provincial Legislature; that there is a fear that they may not deal fairly with the rights of the minority?

Mr. Haldane. With the rights of the minority as particularly specified. How are they specified, is the question.

The Lord Chancellor. That is another thing. Is not that the basis of these educational provisions, that it was not proposed to trust entirely, as in other cases, to the power of the majority to determine what the legislation should be.

Mr. Haldane. I think it is so. I think it is intended certainly to make some special provision. But now, my Lords, that does not so far affect the point which I am upon, which is, that we start with the assignment of education to the Provincial legislative authority, and certain limitations and certain limitations only defined as limiting that right, and when you come to the construction of the limitative provisions, we suggest to your Lordships as the canon of construction, that things must be presumed to be within the competence of the Provincial Legislature, excepting in so far as they have

been taken away by the limitative provisions.

Lord Watson. I think you are entitled to make that observation by the terms of the clause itself.

Mr. Haldane. Yes.

Lord Watson. Then it has on the other side to be shewn that this is one of the matters excepted.

Mr. Haldane. The burden must be on them to shew it is so.

Lord Watson. It does not rest on that only.

Mr. Haldane. Of course it is always a question of construction and a question of construction merely; but we start with that.

Now, my Lords, that being so, and bearing that in mind, I pass to the construction of the Section, and this is the construction which I suggest for your Lordships' consideration: that Sub-section 2 exhausts the limitations upon the legislative powers of the Provincial Legislature. Starting with that presumption that the Legislature is to have the supervision of educational matters and the power of legislation, and starting with this that you have got these words specifying the provisions according to which the right is limited, you come in Sub-section 1 to what I suggest is the only limitation upon the power of the Legislature to make laws. It is not to 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. If those words had stood alone there would have been no doubt they would have been equivalent to an affirmative statement that in respect of any other legislation the Provincial Legislature had complete competence. Then we come to Sub-section 2, and the question is whether Sub-section 2 cuts down what has already been stated in Sub-section 1.

The Lord Chancellor. Cuts down? I do not understand that.

Mr. Haldane. Yes.

The Lord Chancellor. Do you say it cuts down?

Mr. Haldane. I say it does not, but in Sub-section 2 you have merely general provisions to be read consistently with what has gone before.

The Lord Chancellor. I do not think anybody suggests

it cuts down, I thought the suggestion had been that it enlarged.

Mr. Haldane. On Sub-section 1 I have stated what my argument is: that you have got an exhaustive definition of such limitations as there are upon the legislative power of the Provincial authority.

Lord Shand. You are going on to say that Sub-section 2 deals merely with rights which persons had at the Union?

Mr. Haldane. No, my Lord, not necessarily so in the case of non-legislative Acts and decisions.

Lord Shand. It is contended on the other side that it deals with rights that persons may have acquired *post* Union.

Mr. Haldane. That is not quite my argument. In Sub-section 1 you have negatively a restriction upon the power of the Legislature and affirmatively a statement by implication that the Legislature has complete power to make any law as to education it pleases provided they do not infringe rights and privileges at the Union, and as incident to that there is an Appeal if a law is so made.

The Lord Chancellor. You cannot separate it from this, that these powers are all subject to the whole of the following provisions.

Mr. Haldane. I am taking it step by step, and I am asking whether it is not possible to come to a construction of these two sections, which will leave the language of Sub-section 1, which it is to be observed expressly limits the restrictions of the legislative powers to such rights as there are existing at the Union—whether it is not possible to so construe the language of Sub-section 2 as to leave Sub-section 1 operative as fully as according to its language it would have been if it stood alone. My objection is that there is no inconsistency between Sub-section 2 and Sub-section 1; that Sub-section 2 in no sense cuts down what is given by Sub-section 1. Sub-section 2, I suggest to your Lordships has a much wider operation and bearing and is of much wider scope than Sub-section 1. It is intended to deal not merely, perhaps not even primarily, with legislative matters but with the executive and judicial authorities in the Province.

The Lord Chancellor. Judicial, do you say?

Mr. Haldane. I think so. A Court would be a provincial authority, and I will tell your Lordships why. Let me remind your Lordships first that at the date of the passing of this Act in 1870 and in 1871 when the Imperial Legislature confirmed it, there was no Supreme Court in Canada. There was power under the British North America Act to organise one, but none had been organised. On these federal questions the Appeal would have had to come straight to your Lordships' Board, and that would have been a very serious and onerous thing for the Catholic minority to have undertaken.

The Lord Chancellor. What the Judge did would be the interpretation of the law *intra vires.*

Mr. Haldane. Yes.

The Lord Chancellor. Then was the Governor-General in Council to decide that the Judge had misinterpreted the law?

Mr. Haldane. Yes.

The Lord Chancellor. That is rather startling!

Lord Macnaghten. A Court of Appeal on matters of law from the decision of a competent Judge?

Mr. Haldane. A Court of Appeal from a decision of a Provincial Court, which was the only Court which could give Judgment.

Lord Macnaghten. It is a most startling suggestion.

The Lord Chancellor. An absolute Court with an appeal to this Board. Supposing the Governor-General in Council said it was *ultra vires* and requested the Dominion Legislature to legislate, and then it came up to this Board and this Board held it *intra vires*, that would create an awkward situation.

Mr. Haldane. The position which the Governor-General and the Dominion Legislature would have been in would be a matter for them to consider, but it seems to me these words are wide enough to cover the reference. It is called an appeal in terms and it is spoken of as a decision. Take the words from the beginning, "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." Supposing the Governor-General under that Act were deciding a question of the validity of a bye-law, how could it have been raised as

an answer to him that there was a decision of a Judge of the Queen's Bench in Manitoba affirming the validity of the bye-law.

The Lord Chancellor. There are only two remedies given: The first is in case they do not pass the Provincial law he requires them to pass, or in case a decision of his is not duly executed by the proper provincial authority; that is to say, if he has reversed the judgment and effect is not given to it by the Court below.

Mr. Haldane. It may be unusual, but the whole situation is unusual. You have here a position of matters in which it was desirable to protect the rights of minorities and in which there was no way of dealing with the Acts of the local authorities of the Provinces, except by the expensive process of Appeal to your Lordships here, and further than that, in which there was no machinery by which the minority, whether Protestant or Catholic, could bring the question of the validity of legislation before any tribunal at all.

Lord Watson. In the Winnipeg case it was said, "Their Lordships are satisfied that the provisions of Sub-sections 2 and 3," that is the Manitoba Act, "do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country."

Lord Macnaghten. Mr. Haldane says it does not withdraw it, but it makes the Governor a Supreme Court of Appeal from the decisions, and if the Court below will not make the order of the Governor-General an order of that particular Court, then he has to apply to the Legislature—a most extraordinary position to put Judges in—there being also a right of Appeal I suppose to her Majesty in Council.

Mr. Haldane. A right of Appeal, no doubt, if the prorogative is exercised.

Lord Macnaghten. That would get them in a very nice mess.

Mr. Haldane. Your Lordships put that difficulty, but I put another difficulty.

Lord Watson. Supposing the Legislature were to say, "We will abide by the decision of the Court. The Court have held this wrong. We will take it off the

Statute Book." And then you Appeal, and the Governor-General says, "This must de amended and made an Act."

Mr. Haldane. Lord Watson suggests it to me as if it were a difficulty that arose out of my argument, but it must arise out of the terms of the Statute whenever an Appeal is brought on the allegation that a right or privilege has been infringed. What is that in nine cases out of ten but a question of law. Supposing there has been a decision of a Magistrate at Manitoba on the subject, is the Governor-General bound, or his action fettered? Can the Dominion Parliament be excluded from legislating?

Lord Watson. The Statute may be made consistent in that view by reading it in this way, that Sub-section 1 gives an absolute remedy for every interference that falls within it, every interference with a right or privilege existing at the date of the Union, and a separate provision was made for rights and privileges springing up afterwards which are not dealt with in Sub-section 1.

Mr. Haldane. That is a possible construction, but there is another construction equally possible, and that I venture to submit. It is the one I am suggesting to your Lordships. It may involve in the functions of the Governor General that he might decide constitutional questions and questions of law. It may involve in it that he may not be obeyed.

Lord Watson. It had ceased to be a constitutional question, and resolved itself into a mere question of fact. The decision is such that in one way it necessitated the application of the Act which made the Act of the Provincial Legislature void. When that provision was made in Sub-section 1 that question appears to me to have ceased to be a constitutional question, and to have resolved itself into a simple question of fact.

Mr. Haldane. Take it upon the construction which has been expressed by some of your Lordships, and which I am endeavouring to combat.

Lord Watson. What constitutional question has the Court to consider when it is merely determining whether such privilege existed——

Mr. Haldane. Perhaps I used the word "Constitu-

tional" inaccurately there; it is a question of law——

Lord Watson. Whether a state of things existed that brought into operation a condition of nullity imposed by Act of Parliament.

The Lord Chancellor. If you were once to concede that Sub-section 2 applied to rights and privileges acquired by post-Union legislation, or including them at all events, the question whether a right or privilege had been affected really would be a question of fact in a sense. You may say it is a question of law possibly in a sense, but not in the ordinary sense, because there would be no difficulty in any person of common sense determining whether what had been given, which was for his benefit, was taken away. It would not be a question of law.

Mr. Haldane. It would be a question whether this was a right or privilege of the minority always. That is a question of law.

The Lord Chancellor. It may be in that sense a question of law.

Mr. Haldane. So much so that it is submitted, and the sixth question on which the Governor-General has asked your Lordships' assistance and advice is whether this particular Act of 1890 does infringe a right or privilege of a minority within the meaning of Sub-section 2.

The Lord Chancellor. Because the contention is that that covers the point that the second Sub-section does not cover any right or privilege acquired after the Union.

Mr. Haldane. I think more than that. It is not put so. That is not the way the question is put. The question which is put is this ——

Lord Watson. That is splitting one question, or two at the outside, into six.

Mr. Haldane. "Did the Acts of Manitoba relating to education passed prior to the session of 1890 confer on or continue to the minority a 'right or privilege in relation to education' within the meaning of Sub-section 2 of Section 22 of the Manitoba Act." And then it puts a number of alternatives, I need not consider it yet in detail, but that seems to me to be the question which your Lordships, I will not say are bound to advise upon, because you are not bound by any Canadian Statute at

all, but which the Canadian Statute which makes you a Court of Appeal *ad hoc* from the Supreme Court, necessitates your answering.

Lord Watson. It is a mere corollary of answers given by the previous questions——

Mr. Haldane. I think so——

Lord Watson. If these words in Sub-section 2 include any right or privilege conferred by a Statute intermediate between the date of Union and that of 1890.

Mr. Haldane. I misunderstood your Lordship in suggesting an affirmative answer. Still there remains the point; but it is an abstract and academic question which nobody may ever raise.

Lord Watson. All we have got to say is whether it raises such a *prima facie* case that the Governor-General ought to proceed with the Appeal.

Mr. Haldane. The Government of Manitoba is not here to argue at your Lordships' Bar an abstract or academic question on the Constitution. They are only here because they hold that a condition precedent to a right of Appeal to the Governor-General has not arisen.

Lord Watson. If there is any intermediate privilege conferred it is unnecessary for us to decide whether it is struck at by the Act of 1890.

Mr. Blake. Yes, that is one of the questions. If your Lordship will look at the latter part of the sixth question, it is the last limb of the sixth question.

Lord Watson. Whether the Act of 1890 affects any right only in such manner as that an Appeal will lie. That is all.

Mr. Blake. Quite so.

The Lord Chancellor. It seems to me that if Sub-section 2 refers to privileges and rights created by post Union legislation, then it is a question of fact for the Government to determine, rather than a question of law, whether any privileges or rights acquired by post Union legislation were being interfered with by the Acts of 1890.

Mr. Haldane. Can it be said to be a question of fact? If we are dealing simply with the right or privilege which is the creation of Statute, surely the condition precedent of the Governor-General's Appeal arises on the consideration of the two Statutes.

The Lord Chancellor. But it may be a question of fact, and not one of law. There is no mystery about the words "right or privilege." A right is a right and a privilege is a privilege, and the question is whether a man's rights become less or his privileges become less. If so they are affected.

Mr. Haldane. The learned Judges in the Court below who assumed a good many things, seem to have assumed that this was a simpler question than we venture to suggest to your Lordships it is. I will keep that point, and say a few words on it when I come to Sub-section 2. I am anxious to follow out just now a point that arose a few minutes ago on the position of the Governor-General. As I understand the other side it involves this, that if the meanest Court of Manitoba had given a decision that a Statute was *intra vires* the jurisdiction of the Governor-General was ousted. It comes to that.

The Lord Chancellor. Nobody suggests that though *intra vires*, it might still be matter of appeal to him.

Mr. Haldane. Well, my Lord, that is hardly our proposition.

The Lord Chancellor. No, your proposition is not that.

Mr. Haldane. Still—matter of appeal to your Lordships here. Let me point out this. It might have been some man in humble circumstances sued for his school fees or school rate that he had not paid up, and he would not be likely to incur the expense of coming here. In that case it might well be that it was not competent to the Catholic minority as distinguished from the individual party to raise the question. It might well be in the contemplation of those who framed the Act that it was desirable to give to the Catholic minority an appeal to another tribunal, that tribunal being the Governor-General, who as we know is not only able to get the assistance of his Council and now of the Supreme Court, but even if necessary to get the advice of this Board. It may well be that that was the intention of those who framed those provisions, and I suggest that that was so, that when you come to these questions involving the rights of minorities, it was intended to constitute the Governor-General a special tribunal to deal with them, dealing it may be to a limited extent

with matters of policy, but probably dealing with these questions which indeed were the only questions which, in the first instance were submitted to him, whether the right or privilege of a minority had been interfered with.

Now observe how consistently that construction works out. Taking the first Section it exhaustively defines the competence of the Provincial Legislature. The second sub-section deal with all sorts of acts. It would deal primarily with executive and administrative acts.

The Lord Chancellor. Not primarily, because the other is mentioned first.

Mr. Haldane. I will tell your Lordship why I say primarily. Because in Sub-section 3 of Section 93 of the British North America Act it seems, whatever may be the scope of the words they have used, that in using the words "Act or decision of the Provincial authority" the Legislature was contemplating executive and administrative authority.

The Lord Chancellor. When they come to deal with Manitoba, if that is the principle, they put the legislative in the fore front to show there is no mistake about it, and that they are thinking of that first.

Mr. Haldane. Quite true. But they take the words "Act or decision," which are the words they have selected in contra-distinction to "law" in the beginning of the Section from the British North America Act, and they make use of them in a sense still contra-distinguished from "law," which I suggest shows they primarily had in view executive and administrative acts.

Lord Shand. What administrative or execvtive act do you suggest as an act of the Legislature?

Mr. Haldane. It may be that the Legislature may pass a Resolution.

The Lord Chancellor. The Legislature consists of the Lieutenant-Governor and the House, and therefore no Resolution would be an Act of the Legislature.

Mr. Haldane. Supposing that was so, and supposing that the Legislature meant nothing short of the three component elements?

Mr. Blake. Two.

Mr. Haldane. I thought there was an Upper Chamber.

Mr. Blake. That was abolished many years ago. I did it.

Mr. Haldane. I only knew it from what it was under the original Statutes.

Mr. Blake. There was an Upper House of seven ; a nominated House.

Mr. Haldane. My friend, Mr. Blake, amongst the interesting things he told us, did not tell us how it was abolished. I was under the impression that at the time when the Legislature of Manitoba was constituted there were two Houses.

The Lord Chancellor. There were two at this time, in 1870.

Mr. Haldane. I think there were.

Mr. Blake. Yes, it was so till it was abolished.

The Lord Cnancellor. Then the Legislature here meant the Lieutenant Governor and the two Houses.

Mr. Blake. That is quite true.

Mr. Haldane. That is so. Assume the Legislature meant the complete Legislature, and that that term was not wide enough to cover the resolution of one House or two Houses, without the assent of the Lieutenant-Governor, still that leaves me scope for the section, and abundant scope. If I am right in saying that the Governor-General was not to be bound by the decision of the Manitoba Tribunal in the conclusions he came to as to what I have called constitutionality, perhaps I had better call it *ultra vires* to avoid confusion, it might well be that an Act was passed by the Manitoba Legislature which contravened the provision of the Sub-section 1 and was theretore void, and yet had been pronounced by the Manitoba Tribunal, taking too friendly a view of the rights of the Province, to be *intra vires.* My Lords, then you would leave upon the Statute Book administered by the Courts an Act of the Manitoba Legislature which it would be extremely expedient to get rid of. It is obvious it would be desirable to have something more than a bare abstract decision, and that there should be legislation following upon that which should declare the true position of matters upon the question of *ultra vires* or *intra vives* by way of enforcing the decision of the Governor-General, and what I am suggesting to your

Lordships is that Sub-section 2 has been drawn in wide and general terms, wide and general enough to cover acts or decisions of the Legislature, not really "laws," because void, for the word "decision" applies to the Legislature, too, of that nature. It was also primarily intended to cover executive and administrative acts of the authorities in the province.

Now, my Lords, if that construction is the right one it harmonises both. It makes Sub-section 1 a complete code of the limitation of the power of the Legislature ; it makes Sub-section 2 deal with those other matters which the Governor General had to be cognizant of, and which might be concerned with rights or privileges for the time being existing, and the infringement of those by the executive.

The Lord Chancellor. Why ? How for the time being existing ? All that Sub-section 1 deals with is those which existed at the Union.

Mr. Haldane. I am talking of Sub-section 2.

The Lord Chancellor. If Sub-section 2 deals with others than those existing at the Union you must concede that it deals with rights that have arisen after the Union came into existence.

Mr. Haldane. But subject to the power of the Legislature to repeal or alter.

The Lord Chancellor. If you concede that rights of the minority in relation to education include rights acquired by post Union legislation, then an appeal against an Act depriving them of any of those rights would come within the language of Sub-section 2.

Mr. Haldane. An Appeal from the administrative or executive authority, but not an Appeal from the legislative authority.

The Lord Chancellor. The Act of the Legislature, and the Act of the Judicial Authority are put on the same footing exactly.

Mr. Haldane. There is no difficulty in reading the section as I put it, because I am merely asking your Lordships to read it so as to leave intact what I have called for short, the code contained in Sub-section 1 as to rights and privileges at any time, but rights and privileges only so long as they exist. It does not take

away the right of a paramount and exclusive authority to alter those rights and privileges.

The Lord Chancellor. That is a very feeble protection. As long as the Legislature has left them, you can appeal against an administration which contravenes the intention of the Legislature, but the Legislature may sweep them altogether away, and against that you have no protection at all. That is a very imperfect protection.

Mr. Haldane. My answer to that is that when responsible Government and when representative Government were given, as they were by these Acts, to the Province of Manitoba, it was intended to enable the majority to prevail, subject to such limitation as in this Act is introduced. If you were going to introdnce such restrictions as would confer the whole jurisdiction over its educational laws on another authority, surely it would have been natural to say so. It is a very substantial if not a very strong protection on the one hand. I do not think it is very strong, and I doubt whether it was meant to be, and anything else would certainly be a most unusual and extraordinary way of dealing with the matter.

The Lord Chancellor. Is it so extraordinary when yon remember that this was an arrangement made as one of the terms on which the Union was to be effected? It would be shutting one's eyes to the most obvious facts which were exhibited on the face of the British North America Act itself, if one were not to see that one of the obstacles to this Federation Scheme was the fear of educational legislation in the separate or distinct provinces which might affect the position of those who desired a denominational education. That runs through all the provisions of Section 93, and it appears to me to be on the face of Section 22 also. Therefore it is not extraordinary in that case to find limitations and safeguards and superior legislative power given to the Dominion Parliament, which represents the country as a whole. It does not strike me as extraordinary.

Mr. Haldane. The general proposition, I agree, is not so anomalous, but it is the way that it is carried out. That is if it was meant to be done, my submission is it would have been done in some specific form.

The Lord Chancellor. Is it carried out in such an anomalous way? What it does is this. It gives the ultimate remedy in this form by legislation by the Dominion Parliament, which otherwise has no power to legislate on any such matter in the province. That is the ultimate remedy. It interposes between the Action of the Dominion Parliament and the Provincial Legislature, the Governor, and his consideration of the matter, and his decision, and therefore it is a check upon the interference by the Dominion Parliament in its legislative capacity with the province as regards education.

Lord Macnaghten. And the Dominion Parliament cannot interfere, I suppose, unless it is asked to do so, and they are not bound even then.

Mr. Haldane. You could not bind them. Nobody ever heard of binding a legislative body. If it had been intended to adopt a scheme of that kind I could have understood it, but that is not the scheme.

The Lord Chancellor. That is just the question. I thought you were saying that that could not be the construction of this section, because that would be such an extraordinary and anomalous scheme. It was to that my observation was directed. If it is not the scheme, there is an end of it.

Lord Watson. Were those provisions really a matter of arrangement between the Dominion Parliament and the province? The provisions of the British North America Act do not include Manitoba, but it was admitted on no other terms. It is Section 146, "It shall be lawful for the Queen, by and with the advice, and so on," on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland and Prince Edward's Island and British Columbia," which have all been admitted, and then on other Addresses respecting Rupert's Land and the North Western Territory to admit, and so on, "all or each of them into the Union on such terms and conditions in each case as are in the Addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act." It is a voluntary arrangement made, and

the parties to the arrangement are on the one hand the Dominion Parliament, and on the other hand the provinces seeking admission. This Act embodies the terms on which Manitoba was admitted.

Mr. Haldane. If we were dealing with a question that was peculiar to Manitoba there would be more force in your Lordship's observation than I venture to submit there is, but if you take what we are dealing with here in Sub-section 3 of the Manitoba Act and Sub-section 4 of Section 93 of the British North America Act, which are the relevant Sections for the purpose of giving an answer to the question the Lord Chancellor put, they are identical in both cases. They are meant to be of general application, and they are identical clauses, and if it were intended to carry out the general proposition to which the Lord Chancellor has referred they would have been framed differently.

Lord Macnaghten. I do not understand how you would have framed them differently. When you once see the object they are framed very well and are not unreasonable. They leave as much room for consideration and negotiation before the Governor-General steps in and requests an Act of the Dominion Parliament *in invitum* of the Provincial Legislature as could be.

Mr. Haldane. What is it the Dominion Parliament comes in for?

Lord Macnaghten. As the last resort.

Mr. Haldane. To give effect to a decision of the Governor-General on Appeal.

Lord Macnaghten. Which has been set at naught by the Provincial Legislature.

Mr. Haldane. Be it so, but they do not come in for the purpose of giving the Dominion Legislature seisin of the educational question.

The Lord Chancellor. They give them seisin of the educational question in so far as it is necessary to prevent what are called oppressions of the minority by making remedial laws.

Mr. Haldane. To the extent of making them a Sheriffs' Officer to enforce the Governor-General's decision.

The Lord Chancellor. No, it is by legislation.

Mr. Haldane. I quite agree, but it was only by legis-

lation that this could be enforced if it was the appropriate remedy. Look at it. "An appeal shall lie to the Governor-General in Council from any Act or decision." That is the first thing. Then "In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made."

The Lord Chancellor. That I take it to be a provincial law which prevents the affection of a right or privilege of the Protestant or Roman Catholic minority in relation to education. That is the law he submits to them they ought to make. Then if they do not make it, such a law can be made by the Dominion Parliament.

Mr. Haldane. Is not that another way of providing an appeal on some law that has been passed by the provincial authority to prevent a right or privilege being affected, that cannot be affected till there has been provincial law.

The Lord Chancellor. No ; you might leave the provincial law existing and yet you might add to it an enactment that might prevent the rights of the minority being affected.

Mr. Haldane. My answer to that is, that it is "only in so far as the circumstances of each case may require." It is strictly limited—First there is what I have read and then, "or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section." It looks as if all that was intended was to give the Dominion Parliament, not general seisin of the educational question, but power to enforce the decision of the Governor-General.

The Lord Chancellor. It is a little beyond that. It is the execution of this section. That depends on what the section was intended to give. If you are right that the section was intended to give no more than is given by Sub-section 1, that would be something less. If, on the

other hand, it extends to privileges and rights beyond that, that would be something more; but whatever it was intended to give, the Provincial Legislature is to be invited in the first place to pass such legislation as will protect all the rights intended to be protected, and if they will not do it, then it is left to the Dominion Parliament to devise any remedial law they please that will have that effect.

Lord Shand. Do I understand that you say there is an appeal both to the Courts of Law and from those Courts to this Board, and an appeal to the Governor-General in Council at the same time with reference to any infringement of Sub-section 1?

Mr. Haldane. Yes.

Lord Shand. Supposing this Board were of opinion and gave the opinion and the decision that the law did not prejudicially affect any rights or privileges with regard to the denominational schools, and the Governor-General a different opinion, what then?

Mr. Haldane. The Governor-General would be bound by the opinion of this Board. The Governor is only a servant of the Queen.

Lord Shand. Why so?

Mr. Haldane. Because the Governor is ultimately only a servant of the Queen.

The Lord Chancellor. I do not know; because it says such law as "seems to the Governor-General in Council requisite." It has been generally held that does not mean what *is*, but what *seems*. If it seems to him requisite, it comes within his functions, though, in point of fact, it may not be.

Lord Watson. The power given in those other cases, if it be given, appears to me to be unquestionably a power to be exercised in the discretion of the Governor. I cannot conceive, if he is made a Court of Appeal to determine whether it is *ultra vires* or no, that it is to be a matter depending on his discretion. It is a matter to be determined judicially, whoever determines it.

Mr. Haldane. Why is it to be said it is a matter of discretion?

Lord Watson. The question is whether it complies with or sins against a positive enactment of the Legislature.

Mr. Haldane. There is not a word about discretion.

Lord Watson. I do not think if a question of that kind is raised for decision there can be anything of what I call discretion.

Mr. Haldane. There is no question of discretion by the Governor General in these cases.

Lord Watson. It is all other cases than an Appeal, and the words of Sub-section 3 still more strongly suggest it.

Mr. Haldane. He is to be a tribunal of Appeal in relation to Provincial authorities, and if that covers judicial authorities it is not unnatural, because he appoints the Provincial Lieutenant-Governor and some of the Judges.

Lord Watson. If he is a Court of Appeal at all in matters falling under Sub-section 1 that is making two concurrent Courts of concurrent jurisdiction, and the general rule with regard to two Courts of concurrent jurisdiction is that when the one is fairly seised of the case the jurisdiction of the other is ousted. I do not know of any concurrent jurisdiction which consists of two going on at the same time. That is quite novel to me. There may be such things, but I have never heard of them before. I have heard of concurrent jurisdiction very often.

Mr. Haldane. The Appeal here is to the Sovereign. The supreme authority directing the Governor-General is the Sovereign. With regard to what the Lord Chancellor said about the expression "seems," it cannot be that the Governor-General could make a mistake and invite the Dominion Parliament to pass, and that they did pass some legislation that was grossly *ultra vires*, without its being subject to the jurisdiction of the Queen and the jurisdiction of your Lordships. Surely it would require much stronger words to do that.

The Lord Chancellor. It means "as in the opinion of the Governor-General in Council is requisite." That is what it seems to me to be.

Mr. Haldane. If the Governor-General is to be in a position to enable the Dominion to go wrong, and go far over the line as it would be with regard to educational matters in legislating, surely there must be some way of challenging that? It is not to be assumed there is not

in the absence of some words taking it away. I do submit it is a possible construction of these sections and a consistent construction of them to say there was to be some judicial authority which might be more trusted and more apt for the protection of the minority, whether Protestant or Catholic for the time being, than the mere ordinary tribunals of the land. It seems to me to be quite natural it should be so, and if that is once established, then you get it quite plain and distinct what the construction of the Section must be. As regards Subsection 2 all questions of control over provincial authorities, taking the expression in the widest sense, and it might well be all questions directing the repeal of Acts which were not within the competence of the Provincial Legislature by reason of their being *ultra vires* under Section 1, but which might be decided by some judicial authority to be *ultra vires*, would come within the competence of the Dominion Parliament on the initiation of the Governor-General, but the functions of the Dominion Parliament would be confined, and strictly confined as they are, I submit by Sub-sections 4 and 3 under both Acts to giving effect to the decisions which the Governor-General had come to—not to the exercise of his discretion, but to his position as an authority, who is made supreme.

Now, my Lord, there is very little which I wish to say further about that section. My learned friend, Mr. Blake, referred to various matters, and amongst others the question of the veto of the Crown. Why was it necessary, if these matters were legislative as distinguished from judicial, to deal with them at all upon this view if it had been intended to bring in the larger legislative authority and the power of the Dominion Parliament. But for the mere purpose of annulling an Act, if it was intended to give a discretionary power to the Governor-General, the answer is he had got it; because at any time within two years after assent given by the Lieutenant-Governor to the Act he might under Section 90 disallow it.

The Lord Chancellor. He disallows it as a whole, and could not disallow a section.

Mr. Haldane. That is so.

The Lord Chancellor. It might be a very subordinate point, and yet it might be very objectionable to defer the beneficial legislation.

Lord Watson. And it might be very desirable in the public interest that the Act should be retained, but yet certain provisions ought to come out and clauses be introduced for the protection of the minority. He could not effect that legislatively but for the enactment of this Statute.

Mr. Haldane. But it would be a powerful instrument in his hand for the purpose of putting pressure to attain the object.

The Lord Chancellor. Still you would not dispute this—if these provisions are stipulated for the protection of those who have particular views with regard to education, they might well have stipulated for such an Appeal to the Governor, even though he had the power of disallowing the Act.

Mr. Haldane. It might have been so.

Lord Watson. He would not otherwise have the power to decide what ought to be done and to have it legislatively enacted, though the Provincial Legislature refused to be a party to the Act.

Mr. Haldane. All I say is if it is so it is a circumstance to be taken into account in construing this Section that the matter was not one which, having regard to the limitations of Sub-section 1, was wholly within the power of the Province.

Now, my Lords, if the other construction is taken there is rather a curious state of things, because in 1871, immediately after this Act got Imperial validity, it was unquestionably possible for the Provincial Legislature to have passed the Act of 1890, and no question could have been raised about it. Then comes the consequence, if the construction contended for by my learned friends is right, that what the Legislature had power to do, and what in ordinary circumstances they would have the power to undo, or alter, or vary at their pleasure, as the necessities of the changing condition of the persons entrusted to their jurisdiction demanded, they are deprived of having power to do by their own Act. I do not say it is not a possible conclusion to come to, but it is not a very usual one.

Lord Macnaghten. I suppose you must bear in mind the situation of the parties and the population at the time. I suppose an Act like that of 1890 could not have been passed, and I suppose it was necessary to pass some Acts with reference to education at that time.

Mr. Haldane. There might have been Acts of a different kind in New Brunswick and Nova Scotia. The Acts passed have been purely undenominational.

The Lord Chancellor. In the very next year after the admission of Manitoba to the Union, there was a law passed. They began at the outset by passing a law relating to denominational education, and one knows that it was an arrangement between Protestants and Roman Catholics. Each of these classes must have been consulted before you could arrive at any agreement in favour of the Union, if they were coming into the Union. Is it an unfair inference that at that time both parties understood one another, and that denominational education with protection to the other party would be provided in Manitoba? We find they did so legislate the next year; and if that be the case, may not that explain their not having made any demand which would have prevented such an Act being passed, because it was a matter they had reason to know was not within their contemplation at all. Is it not shown that that is not a mere speculation, but probably well grounded, by the fact that they did in the next year pass this denominational system,

Lord Watson. I do not think it is at all surprising in the circumstances that such should be the outcome of the Union.

Lord Shand. The point you are making now, as I understand, is that it is a remarkable thing they should not be able to repeal a Statute that they themselves had passed.

The Lord Chancellor. That if they had passed this Statute at once before they passed any denominational education at all it would not have affected any right.

Lord Watson. May not it be suggested—I know nothing about it—if it is open to speculate about it that you could not have passed any statute going this length. If the non-Sectarian portion of the community were of

that strength in 1871, why did they pass an Act the very reverse of the Act they wished to have? Why did they pass a denominational statute when they were all for non-Sectarianism—assuming they were so at that time? If they were not all for non-Sectarianism I do not see how they could have passed it.

Mr. Haldane. This Act gave non-denominational education to all.

Lord Watson. I think a change has come over the spirit.

The Lord Chancellor. What you are entitled to look at is the condition of the population, this being a Parliamentary bargain, and the condition of the parties at the time, when you are dealing with an Act which speaks of majorities and minorities. I do not know which had the superiority, but at all events they were pretty evenly balanced.

Mr. Haldane. All I am saying is that if it had been intended to impose the restriction on the power of the Manitoba Legislature which has now been contended for by the Appellants, that restriction ought to have been put in some different language to what it is here. It might well be said that any right and privilege once constituted by legislation was not to be taken away or repealed without the consent of the Governor-General. It is such an unusual thing to put in, that I do submit that if it was intended to insert it there, it would have been put in some language that was plain, and not in language which, to say the least of it, is ambiguous.

[*Adjourned for a short time*].

Mr. Haldane. My Lords, I have said all that I feel justified in saying on the first point. I will simply sum up my propositions—that Sub-section 1 exhaustively defines the powers and the limitations of the Provincial Legislature—that Sub-section 2 is a sub-section in general language which ought to be construed, as all sub-sections in general language in Acts of a similar kind would be construed, consistently with Sub-section 1—that the position of the Governor-General is that of a person having a power of determining on appeal questions of

law, and not a person vested with an administrative discretion—that to hold otherwise would be to put him at the mercy of any judgment of any tribunal which might or might not be appealed from to this Board before the Supreme Court of Canada was constituted —that he must be put in a position to deliberate and decide upon questions of *ultra vires*—and that being so, he is not a person vested with a discretion, he is a person who has to exercise a judicial authority which is the condition precedent of the Dominion Parliament coming in and giving effect to his decision whatever it may be, That is my submission to your Lordship as to the proper construction of Section 22 of the Manitoba Act.

But now, assuming against myself for the sake of argument, that on the proper construction of this section, the rights and privileges so far as they are legislative, are not rights and privileges for the time being, as I contend they are, but are rights and privileges which have once been established by the Manitoba Legislature, and which cannot on the hypothesis in question be abolished by the Legislature ; I still contend before your Lordships that the conditions which alone enable an appeal to the Governor-General have not arisen, and that that is a question which your Lordships in the exercise of the duty which you have taken upon yourselves of advising the Governor-General are bound to answer. My Lords, as formulated by the Governor-General, the question which he addresses to your Lordships is, whether the Act of 1890 constitutes such an infringement and affection of the rights and privileges conferred by the preceding Acts as to give ground for his interference under Section 22. Now, my Lords, upon that it is important to observe—I shall not have occasion to trouble your Lordships with a detailed argument upon it—but it is important to observe what the provisions of the previous Statutes really are in order to see whether they constitute a right or privilege of the minority, and as I submit to your Lordships, of the minority as such. It is not enough, for instance, that there is a right to rate for education, because that would be a right which was given to the community as a whole. The question is whether there is a right or

privilege given to the minority as such, and what I suggest to your Lordships as the true interpretation of the rights and privileges conferred by these previous Statutes is that they are rights and privileges of exemption from liability which is created by these Statutes upon the whole community; that, in other words, there is a system which is passed for the whole community, and that dependent upon that system there is a right or privilege of exemption which has meaning, validity and effect so long, and so long only, as the system continues in effect. The system may be taken away, if the argument is well founded, because the system in itself was not an infringement of a right or privilege, but if the system disappears then the ground for the exemption disappears, and accordingly if the Legislature abolishes the system no question arises as to the right or privilege which had only this contingent and conditional existence.

Lord Watson. The right given to the whole community by a Statute of this year you say does not confer any right or privilege when it is taken away by an Act next year—it does not give any right or privilege to those who under next year's Statute become a dissentient minority. Is that the proposition?

Mr. Haldane. Yes, but I should like to state it a little more fully.

The Lord Chancellor. Your point is that those Statutes between 1871 and 1890 do not give any right or privilege at all to the minority in relation to education?

Mr. Haldane. That is it. They do give what I have called contingent and conditional rights and privileges of exemption from the system which had been established.

Lord Watson. The privilege was to be given in the shape of exemption from the general rule as to education.

Mr. Haldane. Yes.

The Lord Chancellor. But had not they power to tax in the first place; and in the next place to tax all with the exception of those who were contributing to some other schools not of their faith for the support of the schools?

Mr. Haldane. They had power to tax, and they did tax, but the contributions of those of a particular faith were allowed to go under that system to the support of their particular schools.

The Lord Chancellor. Is not the power to tax for the support of schools where that kind of education is given which is in accordance with the view of the minority, a right or privilege of the minority?

Mr. Haldane. One must look at the Statute to see what it is. It is really a power or right to claim exemption from a tax which is levied on the whole community for a system of education for the benefit, not of a minority, but of the whole.

The Lord Chancellor. There was a division in the first instance, into separate districts—Catholic districts and Protestant districts—although there was some overlapping, and the people who managed the education in the Catholic districts would be Catholics.

Mr. Haldane. Not exactly so. In the first place there was a General Board of Education which managed the whole, but certain subjects were taken out of the jurisdiction of that Board and transferred to particular sections of that Board, and I say that was an exemption; but if you take away the Board which had control of the whole, I say the exemption is taken away. That is the way I put it.

Lord Macnaghten. Before 1890 had not the Roman Catholics schools of their own which were appropriated for the purpose of the Public Schools Act?

Mr. Haldane. There were unorganised schools. They were not appropriated.

Lord Macnaghten. Appropriation is proposed by the Act of 1890.

Mr. Haldane. Only by paying for them.

Mr. Blake. No.

Mr. Haldane. I know what my friend has in his mind, and I have a distinct recollection of the question which the Lord Chancellor put. The Lord Chancellor said that it might be that at all events as to those schools which have been built out of rates which are contributed by the Roman Catholics, those have been taken. That is true, but my answer is that those never belonged to the Roman Catholics. It is quite true they were built out of rates that were levied on the community, except that what the Roman Catholics contributed for the building of those schools to those

rates was applied to the building of Catholic Schools, but they were not schools belonging to the Catholics. It was only that the rates which were a liability on the whole community, were in this case used for the building of Roman Catholic Schools.

Mr. Blake. No.

Mr. Haldane. I will go into that. My friend, I gather, dissents from that.

Mr. Blake. I dissent entirely that the rates are levied on the whole community.

Mr. Haldane. I will go into that. The first thing I wish to ask your Lordships to bear in mind is the definition of the kind of interference which your Lordships laid down on the last occasion. It is only one sentence of the Judgment at page 157 :

But then it is said that it is impossible for Roman Catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case), to send their children to public schools where the education is not superintended and directed by the authorities of their church, and that, therefore, Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault; it is owing to religious convictions, which everybody must respect, and to the teaching of their church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike. Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of Union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public schools under the Act of 1890 are in reality Protestant schools. The Legislature has declared in so many words that the public schools shall be entirely unsectarian, and that principle is carried out throughout the Act. With the policy of the Act of 1890 their Lordships are not concerned. But they cannot help observing that, if the views of the Respondents were to prevail, it would be extremely difficult for the Provincial

Legislature, which has been entrusted with the exclusive power of making laws relating to education, to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the legislature, which on the face of the Act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary conditions of school-houses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort.

Now. my Lords, that I start from. The Act of 1890, but for what may or may not be the effect of these immediate interpositions by the Legislature between 1871 and 1890, is an Act which is unobjectionable. It infringes no right or privilege which existed at the Union. It does not establish a denominational school system.

Lord Shand. That shuts you up to the question of what is the effect of those intermediate Acts.

Mr. Haldane. It does.

Lord Shand. There is one Act which embraces the whole of the previous Acts together—the Act of 1881.

Mr. Haldane. Yes ; really nothing turns on anything except the Act of 1881, which, as your Lordship knows, repeals the Act of 1871. Now just let us turn for a moment to that. First of all I should like to look at the Act of 1871 for a moment because it contains terms and expressions which recur again in the Act of 1881.

Lord Shand. Shall we not get them in the Act of 1881 ?

Mr. Haldane. I think it is desirable to glance at the Act of 1871.

The Lord Chancellor. Where is it to be found ?

Mr. Haldane. I have it in a separately printed book at page 21. The Act of 1871 which is now repealed, but which is the foundation of the code of legislation contained in the Acts which began in 1881, "The Manitoba School Act," and the amending Acts, first of all begins by establishing a Board of Education which is to consist of not less than 10 or more than 14 persons, half are to be Protestant and the other half are to be Catholics. Then one of the Protestant members is to be Superintendent, and one of the Catholic members is to be Superintendent of the schools of their respective denominations. Then the next important provision is the provision of a Chair-

man. The duty of the Board is first of all (and this is the Board as a whole) to make regulations as they think fit for the general organization of the common schools, then to select books and so on, but not dealing with religion or morals. Then there is a sub-division of school districts, and then we come to Section 10, which I say does confer rights and privileges upon the minority in what is really the shape of exemptions from the general provisions of the Act. Each section of the Board as a whole (the Board as a whole being for the general regulation) is to select teachers; this is a denominational system, and the selecting of the teachers is very important. It is to prescribe the books; this is a denominational system where religious books may be used, and it is very important that the Catholics should have the selection of their own books.

The Lord Chancellor. Why do you say it is an exemption. It is an express provision. It is an enabling or an empowering provision. It is not an exemption from anything. Each half gets exactly the same thing. It is not a thing that the whole gets from which any portion is exempted, but the same thing is given to two halves. Of which is it an exemption?

Mr. Haldane. The system of denominational education is given to the Board as a whole, the selection of the books and the selection of the teachers is given to the various sections.

The Lord Chancellor. But that is not an exemption from anything.

Mr. Haldane. No, but what the right or privilege of the minority is——

Lord Watson. Your contention is that the right or privilege must be conferred in the form of an exemption.

Mr. Haldane. Yes, I say it comes to that.

Lord Watson. But that anything given in the form of a right or privilege common at the time it is given to the whole of the community of Manitoba, is not a right or privilege such as is contemplated in the 3rd Subsection.

Mr. Haldane. That is my proposition.

Lord Watson. Unquestionably it does not seem to admit of doubt that before 1871 there was no de-

nominational teaching, and there were no privileges or rights whatever until the Union. There were none before the Union, or at the Union, but immediately after the Union, from 1871 and downwards to the Act of 1890, there was repeated legislation, and during the whole of that time the legislation made State education denominational.

Mr. Haldane. Yes, that is so.

Lord Watson. I think it hardly admits of doubt that the privilege which was conferred was not an exceptional privilege. It was given all round.

Mr. Haldane. It was given all round. That is my proposition, that the system of denominational education——

Lord Watson. Each denomination had a State-aided school, in which a particular religion was taught.

Mr. Haldane. Yes. I do not know that it matters, but I prefer to put it in a different way.

Lord Watson. I do not object to your putting it in another way.

The Lord Chancellor. Can you tell me, as a matter of fact, when the Manitoba Legislature came into existence? The Manitoba Act is the 12th May, 1870, but I suppose they would have to have a Lieutenant-Governor appointed, and to have an Assembly elected.

Mr. Haldane. I cannot tell your Lordship from information, but your Lordship notices the Act of 1871, and therefore I think I am right in saying 1871.

The Lord Chancellor. They existed I know, because they existed in time to pass the Act by June, 1871. What I wanted to know was how early in their existence that Act came upon the carpet.

Lord Shand. Which Act is that, the Act of 1870?

The Lord Chancellor. The Act of 1871.

Mr. Haldane. That I cannot say, my Lord. I do not know whether my friend can inform your Lordships.

Mr. Blake. The 15th of July, 1870, as my friend informs me, is the period at which the Union came into force, but neither of us are aware when the Legislature was first convened.

The Lord Chancellor. Of course that must have taken some time.

Mr. Blake. Yes.

The Lord Chancellor. Because, of course, you had to elect the Legislature?

Mr. Blake. Certainly. I am not aware whether there was one elected in the fall of that year or not.

Mr. Haldane. There was the Imperial Act in June, 1871.

Mr. Blake. My learned friend tells me that this was the first Session; the Session in which this Act was passed was the first Session of the Legislature. That is what my friend tells me.

Lord Shand. This Act of 33 Victoria, cap. 3, which is in the copy I have before me, was assented to on the 12th May, 1870.

The Lord Chancellor. Yes, but I want to know when the Legislature came into being?

Mr. Blake. All that we know is that this Act in question was passed in the first Session of that Legislature. My learned friend so tells me.

Mr. Haldane. The existence of the province as a province was not finally set at rest until the 29th of June, 1871, which was the date when the Imperial Act forming Manitoba received the Royal assent.

The Lord Chancellor. But there was no doubt a Legislature elected before.

Mr. Haldane. No doubt there was a Legislature elected before. It must have been so.

Lord Shand. Was not the establishment of a system of denominational education a privilege of the minority?

Mr. Haldane. No, my Lord. It was given to the community as a whole.

Lord Shand. No doubt, but still they got that notwithstanding, whatever might be the vote of the majority.

Mr. Haldane. What the Legislature did was this, they said "It is in the interests of the whole that the community as a whole should have denominational education."

Lord Shand. If you assume a very small minority of one class it is a great privilege to them to have that.

Mr. Haldane. Even though it has certain rights and privileges, which I say——

Lord Shand. But for that privilege they would have

been out-voted. The schools might have been made all Protestant, for example, if the minority was Catholic.

Mr. Haldane. That is possible.

Lord Macnaghten. Supposing it was a privilege conferred on all, but one of the large sects did not consider it a privilege, is not it a privilege to the minority?

Mr. Haldane. It is so difficult to answer these things in abstract terms.

Lord Shand. But it is the very question which is raised—whether you are not in fact giving a privilege to a minority.

Mr. Haldane. I will put a case, my Lord. Supposing there was an Act which said——

Lord Watson. Surely a privilege may be a privilege without being appreciated as such.

Lord Macnaghten. It is not a privilege to a man who does not consider it a privilege, but it is a privilege to a man who does consider it a privilege.

Mr. Haldane. I think, my Lord, something more than that is involved. Suppose that the State says "We are going to rate for education." Well, one section of the electorate, or one section of the population may consider that a privilege.

Lord Macnaghten You say that there is no privilege in one man being obliged to put his hand into his pocket to support his particular school.

Mr. Haldane. The other man never putting his hand into his pocket at all. My submission is that that was not a right or privilege conferred upon the minority which was contemplated by the Act. I agree that what was meant was to protect the minority against the legislative majority——

Lord Watson. They came to require the protection, it appears to me, being in the minority.

Mr. Haldane. Yes, being in the minority.

Lord Watson. I do not see how that bears on the question. Surely it is a privilege to have denominational schools established if you are denominational. I can no more understand that than this: That if a nobleman or merchant prince admits the whole of the public to his domain for one day in the week, that is not a privilege, but if he keeps out the public and lets in half-a-dozen of them, that is a privilege.

Mr. Haldane. Yes, something that is given to them exclusively as a class is a privilege, and the class we want in this case is the minority.

Lord Watson. Privilege is very often used as a mere exceptional privilege, but that is not the meaning.

Mr. Haldane. It is not every kind of privilege. It is the privilege of the minority.

Lord Watson. I quite concede that.

Mr. Haldane. All that I am submitting to your Lordships is that, to take Lord Macnaghten's case, if we were dealing with the question of whether it was a right or privilege of the minority to have rates levied upon the community as a whole for the purposes of education, however great a privilege the persons who were Catholics and in the minority and were going to be overruled by the majority might consider that, that would not be a right or privilege of the minority within the meaning of Sub-section 2 of this Act. That is my proposition.

The Lord Chancellor. Certainly, if we are to allow the 1867 Act to throw any light upon it. If you look at the first Sub-section of Section 93, it can hardly be doubted that there the rights and privileges intended to be protected were the rights and privileges of having either separate schools or denominational schools, as distinguished from a general system which was not in accordance with their views.

Mr. Haldane. Your Lordship refers to that system of separate schools?

The Lord Chancellor. Yes.

Mr. Haldane. That is in Sub-section 3.

The Lord Chancellor. No, I mean if you look at Sub-section 1. You are looking at Sub-sections 1, 2 and 3 together. If you look at Sub-section 1 you can hardly dispute that as regards Quebec and Ontario, one of the objects, at all events of Sub-section 1, was to preserve their rights to the then existing system of denominational education.

Mr. Haldane. Certainly, because those were rights they had by law.

The Lord Chancellor. Yes, they were rights they had by law, but what was the nature of the right? It was only the right to get assistance from the State funds for

their separate schools as distinguished from the schools in consonance with the views of the majority: Protestants in the one case and Catholics in the other.

Mr. Haldane. There was a system then which the Catholics as a whole in Quebec claimed the benefit of.

The Lord Chancellor. The Catholics who were in the majority.

Mr. Haldane. Who were in the majority.

The Lord Chancellor. But the Protestant minority had what were called Dissentient schools?

Mr. Haldane. Yes.

The Lord Chancellor. What was intended was to preserve the rights of the minority amongst other things, certainly.

Mr. Haldane. Yes.

The Lord Chancellor. What was the right of that minority except this? It was not merely that they might send their children to dissentient schools, but that the schools specially in accord with the views of the minority should receive State assistance and be part of the general system of education.

Mr. Haldane. That was a right which a class of persons had by law at that time.

The Lord Chancellor. Yes, but I am pressing upon you your own argument. According to you Sub-section 2, which speaks of affecting the rights of the minority, refers to rights given by Sub-section 1. Therefore I am pressing upon you that according to your construction of Sub-section 2 the right of a minority to have denominational schools supported at the State expense, and being part of the school system of the province, was a right affecting education in relation to the minority within Sub-section 2.

Mr. Haldane. I did not limit it to the rights conferred by Sub-section 1, because then I should have struck on the rock which your Lordship points out.

Lord Watson. I cannot help thinking that it was intended by that clause to give to a certain class of the community when they were in the position of being in a minority, the right of defending the privilege which they had conferred upon themselves when they were in the majority.

Mr. Haldane. Which they had conferred on themselves?

Lord Watson. Yes.

Mr. Haldane. Yes, that is so, my Lord.

Lord Watson. It was not a privilege to all, because I suppose some might be at one time and for a considerable period the minority, and then might become the majority,

Mr. Haldane. I do not want to take an illustration as being exhaustive of all the individual cases which might come within the category, but take the case I put. There is a system of denominational education under which the Catholics may have their own teachers and rule themselves—that is to say, apply their own rates to the provision of their own teachers and their own books. That is a very valuable right or privilege which they have got, and which they conferred upon themselves while there was a system of denominational education.

Lord Watson. What occurs to me is this, that where a privilege is conferred upon themselves by the legislative majority, that privilege must devolve upon the original majority, as the minority, before there can be legislation contrary to their interests. At the time that Act was passed, and on the eve of passing it, the persons who enjoyed the denominational schools and regarded them as a privilege were in the minority.

Mr. Haldane. Yes.

Lord Watson. That was the condition at the time the Act was passed. No doubt it may have been due to their own actions whilst they constituted a majority in the balance of the political power of the State. That may be quite so. At the time when the original minority having become the majority proceeded to legislate, the condition was that the original majority were the minority.

Mr. Haldane. That only carries you so far.

Lord Watson. It does.

Mr. Haldane. It does not carry you the whole length.

Lord Shand. The legislation, you say, provided equally for all—is not that the point?

Mr. Haldane. Yes, my Lord.

Lord Shand. Very well, assume that, but in providing

equally for all there thereby resulted from that mode of legislation privileges or rights in the minority, and you deprive it of that—surely that is a benefit?

Mr. Haldane. A special privilege.

Lord Shand. It resulted in a benefit.

Lord Watson. It put them all on the same footing. The non-sectarian education party did not regard it as a right or privilege. They regarded it as an infliction to be got rid of by Statute.

Mr. Haldane. They did, and they had their remedy because they were not bound to send their children to schools in the district in which they lived; they might send them to any other schools.

Lord Watson. We cannot go into the considerations which entered into their minds.

Mr. Haldane. I am suggesting that there is a contrast between the words of Sub-section 2 and the words of the Section to which the Lord Chancellor has referred, under which there is a preserving of the privileges conferred by law or custom on any class. In Sub-section 2 it is an Act or decision.

Lord Watson. At the time when this new legislation of 1890 was passed the persons who valued denominational education were the minority. They regarded it as a privilege, and they held to it as a privilege, whilst others were seeking to upset it. Nobody else got a privilege. It was a privilege which they had at that date. It resulted to them from their own Act in the former time whilst they were the majority. Does that make any difference? That is the short point. You must look to the origin of it. You never could have a privilege created in that view of it by intermediate legislation, because that legislation must be the act presumably of the majority.

Mr. Haldane. You must see what Sub-section 2 means. Obviously it points to something different from what is in Sub-section 1.

Lord Watson. You must look at the two, because that would rather turn into ridicule Sub-section 3 of Section 93.

Mr. Haldane. Sub-section 3 of Section 93 seems to point to something different. It seems to limit the right of Appeal to the case where there is actually existing a

system of separate or dissentient schools which no doubt might be oppressed by the act of the majority, and might have their rights and privileges interfered with, and in those cases, and in those cases only, they are to have a right of Appeal. But going back to Sub-section 2 as it is in Section 22, it is clear that something specific is meant by "right or privilege of the minority," and I read and I submit that the meaning of it is, that there is not to be anything done which can affect the position of a minority—a minority in legislation who are at the mercy of the majority. Nothing is to be done which can affect any right or privilege which they had in relation to education. Now what right or privilege did these people have? Standing by itself, it is clear that the Act of 1890 is no infringement of their rights and privileges. Standing by itself, I say—that your Lordships have decided in Barrett's case. That is clear ground to start with.

Lord Shand. I do not understand that. Standing by itself compared with the state of matters at the time of the Union, there is no privilege; but standing by itself in comparison with the state of affairs afterwards, there is a privilege.

Mr. Haldane. I have not made myself clear. I meant standing apart from any other legislation.

Lord Shand. Nobody had any privilege before of course.

Mr. Haldane. Unless there had been some statutory privilege conferred, it must have been so.

Lord Watson. Having no intermediate Statutes there could not be any privilege. I do not know whether the words "or practice" may have raised any privilege. I do not know, but I think presumably that would not arise.

Mr. Haldane. The simple question is whether there is a right or privilege which has been conferred on persons who have become the minority under any intermediate Statute. Now my submission to your Lordships is that such rights and privileges as the minority have within the meaning of the Section ———

Lord Watson. You cannot refer that phrase "the Protestant or Roman Catholic minority" to some temporary

proportion which is a fluctuating one. Does not it mean the minority at the date when the Act that is said to infringe on their privilege becomes law?

Mr. Haldane. I think it may be that. I am content to take it so.

Lord Watson. I think you must fix some period, otherwise they may have been the minority half-a-dozen times, and the majority time and time about.

Mr. Haldane. But still it is a right or privilege which they are to have in their capacity of a minority. I mean to go back to Lord Macnaghten's illustration. It cannot be that the Roman Catholics, who had to pay rates equally with everybody else to support an undenominational system, could say, "Oh, we have a right or privilege. We object to this undenominational system being swept away, and we have a right or privilege to have education organised by the payment of rates." That will not do. If that will not do, then you have to say into which category the Statute you are construing falls— whether it falls into the category of a Statute of that kind which confers rights and privileges on the community as a whole, or whether it falls into the category of a Statute which confers rights and privileges upon some sort of class, who may *quâ* class become the minority afterwards. My submission to your Lordships is that these intermediate Statutes are of a kind which created rights and privileges of the first order, which came upon the community as a whole. It is not necessary for me to go into the details of them. I only point out to your Lordships this, that starting with the Act of 1871, which is a good illustration of what happened later, the control of education was given to a Common Board, and it was only when you came to what you may call the minority rights, when you came to the question of the provision of religious books, and the selection of teachers, that Catholics *quâ* Catholics or Protestants *quâ* Protestants, had any recognition at all. For the rest, the teaching was indifferent on the General Board. There might have been Mahommedans or Unitarians, or members of any sect. There is no religious qualification, and for that reason I say, that while you have a denominational system there within

the meaning of Sub-section 2, the rights and privileges conferred were conferred on the community as a whole, and never did become the rights and privileges of any class who could assume the position of a minority. Now when you pass to the Manitoba School Act of 1881, which contains a code, you have some things which illustrate what happened very strikingly. In the first place the Act re-constitutes the Board, making its members 21, and giving a majority to the Protestants. Nobody complained of that. Of course it may be observed that they did not think it worth appealing against; but at any rate they did not appeal against it, and they apparently construed that alteration not as one which affected the rights and privileges of a minority.

The Lord Chancellor. Supposing they had passed an Act saying that no Roman Catholic should be eligible to be on the Board, what would you have said then? It did not interfere with any right or privilege they had at the time of the Union, because no such Board existed. The Board was only, as you say, a creation of the legislation.

Mr. Haldane. I will give your Lordship my answer. It would have been open to the Legislature of Manitoba to sweep away the whole system.

The Lord Chancellor. But still before we come to that there is the prior question, would there have been any Appeal to the Governor-General in Council?

Mr. Haldane. Is your Lordship speaking of a Statute which was passed for the first time or an amending Statute? Because if it is a Statute passed for the first time——

The Lord Chancellor. The first time they provided for equal numbers, because at that time they were about equal, and I suppose it may have been considered that they could protect themselves, but one or the other grew —I am supposing the Protestants to grow, as was the case—and supposing instead of merely increasing the number of Protestant representatives they had excluded all Roman Catholics. That, of course, would have been *intra vires.*

Mr. Haldane. Yes.

The Lord Chancellor. Would they have been without redress in such a case?

Mr. Haldane. I do not see how they could have had redress.

The Lord Chancellor. Your objection must go that length.

Mr. Haldane. Yes, I do not think they could, and apparently so they thought, because although they did not exclude Roman Catholics, they put them in a minority.

The Lord Chancellor. But the general Board still had powers which they might have been quite content to leave to a Board of Protestants alone. You say the Sections had less power.

Mr. Blake. The Board's powers were reduced; the Section powers were increased.

Mr. Haldane. I do not think they were. My friend suggested something of that sort in the course of the argument, but on looking at the schedule what I found was this, that while the Board might regulate the general organisation of common schools, and so on, the Section was to have under its control the management of the schools, and the Section is to arrange for the examination of the teaching and the selection of the books and maps and so on. There is that difference, and then there was given a reference to religion and morals. It is quite true that the Board on that occasion did not have the selection of what I may call the non-sectarian books. There was that difference, but the argument must go to this, that that Act was *ultra vires* and would have been *ultra vires* if it had gone further.

The Lord Chancellor. And not only that, but that there was to be no Appeal.

Mr. Haldane. That it was within the uncontrolled competence of the provincial legislation. Well, my Lords, the Act of 1881 went a very long way, because it established compulsory education. It did not merely establish free education. It established rate aided education, it established education which was aided by grants, and it established a provision for compulsory education. The whole of that machinery was swept away by the Act of 1890, and under the Act of 1890 what was substituted was a system which was purely undenominational, as your Lordships have held, which

was not compulsory, and which consists of free education out of the rates and grants out of the funds of the Province of Manitoba. I say that, standing by itself, was within the competence of the Provincial Legislature, and I say that there was nothing that interfered with the Provincial Legislature passing it by reason of the legislation which had taken place intermediately, because that legislation was legislation, as I venture to submit on its construction, in the interests of the community as a whole, and because the rights and privileges which a class of persons who afterwards became a minority had, were rights and privileges which were in the nature of privileges or rights relatively only to the existence of the general system, and the system not being a system which was given in the interests of any class or section of the community which had come to be the possession of any minority *quâ* minority, was a system which could competently be swept away.

My Lords, that seems to me to exhaust all that is to be said upon the subject of this second point which I have spoken of. If your Lordships should take any other view it comes to this, that there is scarcely any educational system of a denominational character which the Manitoba Legislature has set up that it could competently alter without interference at every turn.

Lord Shand. No, it must be something that may affect one body of religionists, Catholics or Protestants.

Mr. Haldane. If your Lordships were to take this very wide construction——

The Lord Chancellor. It would not be inconsistent with a system such as works in Ontario, where you have an undenominational system, as I understand, for the majority of Protestants coupled with a separate school system for the Catholics.

Mr. Haldane. My Lord, is that certainly so? Under this Act of 1881, amongst other things which happened, the grant from the taxes, not from the rates, which used before to be distributed evenly between the Catholics and Protestants, was distributed unevenly in proportion to the children. Well the result of that, of course, is that the Catholics have to pay more in other ways in order to make up the *quantum* of money which was

necessary for their education. There you have, if you will take what I will call the wider construction against which I am contending, an infringement of a right or privilege of the Catholics. More money is going to the Protestants at the expense of the Catholics. Again, there are other illustrations of the same kind of thing. I could multiply them. Suppose there had been a three-penny rate established, and it had been increased to a fourpenny rate by reason of the different distribution of the grant, the rate in a Catholic district being bigger than it used to be by reason of less money coming from the State. the imposition of the fourpenny rate would be another illustration of interference with a right or privilege.

Lord Macnaghten. Although the Act may give a right of Appeal to the Governor-General in every case in which rights or privileges are affected, the Governor-General surely must consider whether the complaint is a substantial complaint or not, must not he ?

Mr. Haldane. Does not that bring us back to what we were dealing with before ? In the first place it is anomalous that a matter of that kind should be taken out of the competency of the Legislature, a matter of the specific kind I am speaking of now, and handed over to the Governor-General. In the second place, for whatever reason Sub-section 3 of the Manitoba Act and Sub-section 4 of the British North America Act are so drawn as to speak of the function of the Governor-General to give a decision on an Appeal on the question of whether a right or privilege of the minority is affected——

Lord Macnaghten. Do you mean to say that if there was a technical and unsubstantial interference with a privilege the Governor-General would have to feel bound to have recourse to this extraordinary remedy.

Mr. Haldane. I do not think it is any more technical or unsubstantial than the functions of your Lordships, who often have to declare than an Act is *ultra vires.* The Governor-General would give his decision.

Lord Macnaghten. We are a judicial body, and he is not sitting as a judicial body.

Mr. Haldane. There come in those considerations which I will not venture to repeat.

Lord Macnaghten. He is to take into consideration many things which we have not to.

The Lord Chancellor. He cannot do anything himself. At the last resort the only person or body who can do anything more are the Parliament of Canada, who are certainly not under legal compulsion to act, and certainly would not act unless they conceived there was some substantial ground for it.

Mr. Haldane. Certainly not; but he is the authority which by making pronouncements gives them power to make legislation.

Lord Macnaghten. He is the judge in the first instance. You do not suppose that he is to go to the Parliament of Canada and say "There is an infraction, please pass a law." He would have power to say, "that is such a trumpery matter that I am not going to do anything."

Mr. Haldane. I suppose the maxim "*De mininis non curat lex*" applies to him as much as to anybody else. But I am putting it that *quâ* this class of things his business is to declare his opinion.

The Lord Chancellor. That would not seem "requisite for the due execution" if he thought that there had been an infringement, but that it was so unsubstantial that in substance they had all the rights which were intended to be preserved to them.

Mr. Haldane. That would be a question for the Parliament of Canada.

The Lord Chancellor. The words are "As seems to the Governor-General in Council requisite for the due execution of the provisions of this Section." It would not seem to him requisite if he thought there was no substantial right interfered with.

Mr. Haldane. That might be; but I am putting cases which might be more substantial such as the question of the grant, and I press upon your Lordships that if you do construe the sections in this very wide sense, and unless you limit them in the direction which the Respondents contend for at your Lordships' Bar, the consequences are such as not lightly to be taken to have been in the contemplation of those who framed this Act, and that the Provincial Legislature would be hampered at every turn. I submit upon the whole case that it is

possible so to construe Section 22 and its various subsections as to give effect to the whole of the matters which require to be provided for, and yet so as to leave the Legislature of Manitoba in the free and untrammelled possession of the powers which *prima facie* were given to it under the initial words of the section.

(Mr. BLAKE was then heard in reply).

The Lord Chaucellor. In the old Canada, before the separation into the Provinces of Ontario and Quebec, the old Province of Quebec—I think it was called Quebec?

Mr. Blake. Yes, at one time.

The Lord Chancellor. Included Ontario and Quebec?

Mr. Blake. Lower Canada and Upper Canada is at present Quebec and Ontario.

The Lord Chancellor. Had they latterly separate Legislatures?

Mr. Blake. No, my Lord, the province was a united province.

The Lord Chancellor. It remained so down to?

Mr. Blake, From 1841 to 1867. They had a sort of double system. They attempted to create an imperfect federation and a common Legislature; for instance they had an Attorney-General for Upper Canada and an Attorney-General for Lower Canada, but the Legislature was common.

The Lord Chancellor. At that time if you take Ontario and Quebec together. would there be an opposite policy in regard to religious faith?

Mr. Blake. That depends upon the time your Lordship takes, because the population of Ontario was increasing fast, much faster than the population of the Province of Quebec; but at the end of the time, I should think I am right in saying that in the aggregate there would by a Protestant popular majority, but the circumstances were such that perhaps that might not answer the question that is in your Lordship's mind, because the distribution of the population has a good deal to do with it.

The Lord Chancellor. It is not so material which party is actually in the majority, because at all events if the Protestants were in a majority in the Commons

House, the Catholics would be in so large a minority that they would be a very substantial power in opposing legislation.

Mr. Blake. A very substantial power.

The Lord Chancellor. Of course when they came to be separated into two provinces a totally different state of things arose, because in such case, though in opposite directions as regards the opposite creeds, there would be a very large majority and a very small minority in each separate province.

Mr. Blake. Your Lordship has just hit the point.

The Lord Chancellor. At all events there was a predominant majority in Quebec of Catholics and a predominant majority in Ontario of Protestants.

Mr. Blake. Yes, and they were in a Common Legislature, with equal numbers in the Legislature, although the Protestant province had the larger population. The practical result was that with the division of parties and so forth, it was impossible for the Protestants of Ontario to abolish the separate schools which had been, after a long contest, established in that province, and on the other hand the Protestants were sufficiently powerful to protect their brethren in Quebec from any encroachment on their rights.

Lord Watson. Legislation became impossible except on the footing that they were to be dealt with as two separate States.

Mr. Blake. Yes, but each side agreed before the separation which, as your Lordship said, left a very small minority of a different faith in each province, each side agreed to stereotype the situation. That is public and notorious.

The Lord Chancellor. It appears on the face of the legislation.

Mr. Blake. Yes, it appears on the face of the legislation ; and the public documents preceding the legislation show that fact.

Lord Macnaghten. You do not know what the population in Manitoba amounted to, and how it was divided when the Province of Manitoba came in ? I thought it was in the pleadings in the former case, but I cannot find it.

Mr. Blake. No, my Lord, I do not know how many there were; there were very few. My friend, Mr. Ewart, who knows, says about 15,000 ; of course that excludes Indians.

Lord Macnaghten. Yes, 15,000 of each.

Mr. Blake. No, my Lord, I think—I think it was only 11,000 or 12,000 altogether; but he says 15,000 altogether.

Lord Macnaghten. I thought the Catholics were rather in a majority at that time.

Mr. Blake. My friend is not able to say. We know that they were about equal, but which had the slight majority we are not able to tell your Lordship, but it was quite palpable that that condition of things was a temporary condition, and would be changed in one obvious direction. So thought all those who had great expectations of the rapid settlement of the country, and therefore the future there certainly offered even more cause for anticipatory provision than the case of the old provinces.

Now I do not know that my duty is to detain your Lordships at any length in reply.

Lord Shand. I think your argument anticipated all the points that have been put.

Mr. Blake. There was just one single observation that I desired to make in reference to a suggestion made by one of your Lordships.

Lord Watson I do not think there was any part of the argument which was not anticipated, with the exception of one point. I do not know how far you think it necesaary to deal with it, and that was the suggestion last made that a particular right or privilege, or a condition of matters which was created in favour of all the community could not be resolved into a privilege or right of the majority at the time when it was created who had become the minority under the new legislation.

Mr. Blake. Before answering your Lordships question I have just had a book put into my hands which shows that my recollection was nearly correct. "The population of the Red River Settlement in 1870 was composed of 2,000 whites, 5,000 English half-breeds, and

5,000 French half-breeds," making 12,000 as the population in 1870.

The Lord Chancellor. The French half-breeds were presumably Catholics and the English half-breeds were probably Protestants, and the whites might have been some of one and some of the other.

Mr. Blake The English half-breeds would be partly Protestants and partly Catholics. I should gather that there was probably a slight preponderance of Catholics.

Lord Watson. You must make some allowance for those who were indifferent.

Mr. Blake. Then, my Lord, I own that I think my learned friend's suggestion, to which Lord Watson has directed my attention, has no value unless you apply it in the concrete; in the abstract it has no value. What is your system? The Legislature is always legislating presumably for the benefit of the whole community. Even although it legislates in respect of a part of the community it legislates in respect of that part in accordance, as it believes, with the interest of the whole, and when the legislation comprehends the whole it still may be of a character which specially affects part, by recognizing a division of the whole into parts and by granting rights and privileges to parts of the community. My learned friend has not been able to shew by any arguments appreciable by a less subtle intellect than his own that there were not rights and privileges of the Roman Catholic minority accorded to it by this legislation.

Lord Watson. I think under these Acts that it is obvious that they are referring to what are considered by these parties to be privileges.

Mr. Blake. Yes, my Lord. Of course your Lordship must remember that it is their judgment which is to prevail.

Lord Watson. Privileges conferred by Acts of Parliament sometimes——

Mr. Blake. Yes. It may be *damnosa hereditas;* but they wanted denominational schools, and those denominational schools were considered a privilege. Their right to be separated in respect of education is a presumable privilege which they were certainly granted by this law, and that has been removed. I may add

this. My learned friend suggested that the Board under the last of the Acts was differently constituted. and yet there had been no Appeal; but it is quite clear that both with reference to the division of the school sections, and with reference to the school books and so forth, the Board was deprived of authority on the later occasion. It was a very remote argument. The Roman Catholics were well aware that the Appeal in this case was not to be a technical Appeal, and unless they could prove substantial injustice they could not get redress. And to say that because when the population was about equal, the whole of the legislation was based on the theory of equality—twelve Roman Catholic school districts and 12 Protestant school districts—and the school rate equally divided because the school population was equally divided, it wouldbe a substantial iniquity to recognise the later and changed conditions, and to make true equality continue by a division of the rate in proportion to the population, which was the actual result realised originally would have been a pretension, which before a political tribunal, such as the Governor in Council or the Parliament of Canada, would of course have met with no favour whatever. Therefore I am not surprised that these amendments passed, not merely without remonstrance or appeal on the part of the Roman Catholics, but without objection in the Legislature as far as we know. We do not know that they caused any commotion, or that there was any dissent from these changes. They appear to have passed with general consent and assent, still they altered the conditions so far as the whole community was concerned, so as to make them agree with the altered conditions as to population of that community; they were in truth framed to continue in the same relation, and in the same circumstances, the specific rights of the minority.

There was, as I have said, one observation I wished to make, and that is that I venture to suggest to your Lordships that the 6th question requires a determination whether there were any rights or privileges created for the minority under these intermediate Statutes, and whether any such rights or privileges have been infringed, and that is a question which arises, not upon

any evidence, but upon a comparison of the two Statutes, and must be in this sense a question of law, that it is fit for the determination of a legal tribunal. Your Lordships have before you one law, which provides one state of things, you have before you another law which it is alleged alters that state of things injuriously to the minority.

The Lord Chancellor. Having in view the contention of the Respondents, it does show that there is a question of law.

Mr. Blake. Yes.

The Lord Chancellor. Their contention is that supposing the question is whether rights and privileges are affected, they are not affected, because there were no rights of the minority within the meaning of the section.

Mr. Blake. Quite so.

Lord Shand. I understand the rights you refer to are these, that about the books, and that about the assessments.

Mr. Blake. I go further than that. I find a system under which there are facilities for organizing, maintaining and regulating our schools by law, and as an incident to that system, there are compulsory rates for our schools and immunity from other school rates; and also as an incident to that system a right to obtain certain grants.

Lord Shand. When you talk about the system does it go much deeper than what I have been now saying on the organization of the schools. It goes that depth also.

Mr. Blake. Quite so.

Lord Shand. It goes this depth. You find that they had during that period State schools, which were denominational schools.

Mr. Blake. Yes, I find a system of State schools supported by the Catholic minority——

Lord Watson. Supported by State money.

Mr. Blake. Supported partly by State money and partly supported by money levied on the Roman Catholic minority.

Lord Watson. What struck me in the discussion is the point about the assessment of rates and the books.

Mr. Blake. Of course that does include the action of the bodies which have the right to "strike" the rate, and

the authority to regulate the schools—the Board and the school trustees.

Lord Shand. Do you think it is necessary for us to go much deeper: that there was established a system of denominational education which was regarded as a privilege by all the parties who were in the minority.

Mr. Blake. No; but I should not like to be taken as acceding to any view or statement which is put to me which might be held by any perverse ingenuity as telling against me later,

Lord Shand. It would be a very different thing to go to the Governor-General to ask him to establish a denominational system, or get him to ask the Legislature to do it. I do not think you would ask that. You would ask the Governor-General to do it.

Mr. Blake. What we ask your Lordships is, what the privileges were and how far they have been infringed; and then we propose to ask the Governor-General to determine how far he will go. I do not ask your Lordship to make any suggestion as to his action, which I conceived from the beginning is political. He is to be instructed as to the law; aud then his action and the action of the Parliament will carry the thing out.

Lord Shand. I was not asking for a moment as to that I was looking to see what your steps would be afterwards.

Mr. Blake. Yes. One step at one time. If your Lordships will allow me to advance a step by reversing this decision I shall be content.

The Lord Chancellor. We will consider our judgment.

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

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD MACNAGHTEN.
LORD SHAND.

[*Delivered by the Lord Chancellor.*]

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

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

The Act came into force on the 1st of May 1890. By virtue of its provisions, by-laws were made by the Municipal Corporation of Winnipeg, under which a rate was to be levied upon Protestant and Roman Catholic ratepayers alike for school purposes. An application was thereupon made to the Court of Queen's Bench of Manitoba to quash these by-laws on the ground that the Public Schools Act 1890 was *ultra vires* of the Provincial Legislature, inasmuch as it prejudicially affected

a right or privilege with respect to denominational schools which the Roman Catholics had by law or practice in the Province at the Union. The Court of Queen's Bench refused the application, being of opinion that the Act was *intra vires*. The Supreme Court of Canada took a different view, but upon appeal this Board reversed their decision and restored the judgment of the Court of Queen's Bench.

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

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

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

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

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

"(5) Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorials and

petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises?

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

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

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

The 2nd Section of the Manitoba Act enacts that after the prescribed day the British North America Act shall "except those parts thereof which are in terms made or "by reasonable intendment may be held to be specially "applicable to or only to affect one or more but not the "whole of the Provinces now composing the Dominion, "and except so far as the same may be varied by this "Act, be applicable to the Province of Manitoba in the "same way and to the like extent as they apply to the "several Provinces of Canada, and as if the Province of "Manitoba had been one of the Provinces originally "united by the said Act." It cannot be questioned therefore that Section 93 of the British North America Act (save such parts of it as are specially applicable to some only of the Provinces of which the Dominion was in 1870 composed) is made applicable to the Province of

Manitoba except in so far as it is varied by the Manitoba Act. The 22nd Section of that Statute deals with the same subject-matter as Section 93 of the British North America Act. The 2nd Sub-section of this latter section may be discarded from consideration, as it is manifestly applicable only to the Provinces of Ontario and Quebec. The remaining provisions closely correspond with those of Section 22 of the Manitoba Act. The only difference between the introductory part and the 1st Sub-section of the two sections, is that in the Manitoba Act the words "or practice" are added after the word "law" in the 1st Sub-section. The 3rd Sub-section of Section 22 of the Manitoba Act is identical with the 4th Sub-section of Section 93 of the British North America Act. The 2nd and 3rd sub-sections respectively are the same, except that in the 2nd Sub-section of the Manitoba Act the words "of the "Legislature of the Province or" are inserted before the words "any Provincial authority," and that the 3rd Sub-section of the British North America Act commences with the words: "Where in any Province a system of "separate or dissentient schools exists by law at the "Union or is thereafter established by the Legislature "of the Province." In view of this comparison it appears to their Lordships impossible to come to any other conclusion than that the 22nd Section of the Manitoba Act was intended to be a substitute for the 93rd Section of the British North America Act. Obviously all that was intended to be identical has been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier Statute they must be regarded as indicating the variations from those provisions intended to be introduced in the Province of Manitoba.

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

Before entering upon a critical examination of the important section of the Manitoba Act, it will be convenient to state the circumstances under which that Act was

passed, and also the exact scope of the decision of this Board in the case of *Barrett* v. *The City of Winnipeg* which seems to have given rise to some misapprehension. In 1867 the union of the Provinces of Canada, Nova Scotia, and New Brunswick took place. Among the obstacles which had to be overcome in order to bring about that union, none perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education. It had been the subject of much controversy in Upper and Lower Canada. In Upper Canada a general system of undenominational education had been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that Province. The 2nd Subsection of Section 93 of the British North America Act extended all the powers privileges and duties which were then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Roman Catholic inhabitants of that Province to the dissentient schools of the Protestant and Roman Catholic inhabitants of Quebec. There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario with regard to education were shared by the members of the same communion in the territory which afterwards became the Province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church. At the time when the Province of Manitoba became part of the Dominion of Canada, the Roman Catholic and Protestant populations in the Province were about equal in number. Prior to that time there did not exist in the territory then incorporated any public system of education. The several religious denominations had established such schools as they thought fit, and maintained them by means of funds voluntarily contributed by the members of their own communion. None of them received any State aid.

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

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

In *Barrett's* case the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the Province *at the Union.* Their Lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed either by law or in practice was the right or privilege of establishing and maintaining for the use of members of their own church such schools as they pleased. It appeared to their Lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890. It was not doubted that the object of the 1st Sub-section of Section 22 was to afford protection to denominational schools, or that it was proper to have regard to the intent of the Legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language

used. The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this Board upon the 1st Sub-section reduced within very narrow limits the protection afforded by that Sub-section in respect of denominational schools. It may be that those who were acting on behalf of the Roman Cotholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the Legislature, if violence were done to the language in which their legislation has taken shape, but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst however it is necessary to resist any temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the Legislature, it is quite legitimate where more than one construction of a Statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention

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

At the outset this question presents itself. Are the 2nd and 3rd sub-sections, as contended by the Respondent, and affirmed by some of the Judges of the Supreme Court, designed only to enforce the prohibition contained

in the 1st sub-section? The arguments against this contention appear to their Lordships conclusive. In the first place that sub-section needs no further provision to enforce it. It imposes a limitation on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the Provincial Legislature, and therefore null and void. It was so decided by this Board in *Barrett's* case. A doubt was there suggested whether that appeal was competent, in consequence of the provisions of the 2nd sub-section, but their Lordships were satisfied that the provisions of sub-sections 2 and 3 did not "operate to withdraw such "a question as that involved in the case from the juris- "diction of the ordinary tribunals of the country." It is hardly necessary to point out how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor-General in Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If, for example, the Supreme Court of Canada and this Committee on Appeal declared an enactment of the Legislature of Manitoba relating to education to be *intra vires*, and the Governor-General in Council on an appeal to him considered it *ultra vires*, what would happen? If the Provincial Legislature declined to yield to his view, as would almost certainly and most naturally be the case, recourse could only be had to the Parliament of the Dominion. But the Parliament of Canada is only empowered to legislate as far as the circumstances of the case require "for the due execution of the pro- "visions" of the 22nd section. If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared *ultra vires* by the Courts which had decided that the provisions of the section had not been violated by the Legislature of the Province. If, on the other hand, the Governor-General declared a Provincial law to be *intra vires*, it would be an ineffectual declaration. It could only be made effectual by the action of the Courts, which would have for themselves to determine the question which he decided, and, if they arrived at a different conclusion and pronounced the enactment *ultra vires*, it would be none the less null and

void because the Governor-General in Council had declared it *intra vires*. These considerations are of themselves most cogent to show that the 2nd sub-section ought not to be construed as giving to parties aggrieved an appeal to the Governor-General in Council concurrently with the right to resort to the Courts in case the provisions of the 1st sub-section are contravened, unless no other construction of the Sub-sections be reasonably possible. The nature of the remedy, too, which the 3rd Sub-section provides, for enforcing the decision of the Governor-General, strongly confirms this view. That remedy is either a Provincial law or a law passed by the Parliament of Canada. What would be the utility of passing a law for the purpose merely of annulling an enactment which the ordinary tribunals would without legislation declare to be null, and to which they would refuse to give effect? Such legislation would indeed be futile.

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

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

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

In their Lordships' opinion the 2nd Sub-section is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it. The question then arises, does the Sub-section extend to rights and privileges acquired by legislation subsequent to the Union? It extends in terms to "any" right or privilege of the minority affected by an Act passed by the Legislature, and would therefore seem to embrace all rights and privileges existing at the time when such Act was passed. Their Lordships see no justification for putting a limitation on language thus unlimited. There is nothing in the surrounding circumstances, or in the apparent intention of the Legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the Governor-General in Council against an Act passed by the Provincial Legislature because it abrogated rights conferred by previous legislation, whilst, if there had been no previous legislation, the Acts complained of would not only have been *intra vires* but could not have afforded ground for any appeal. There is no doubt force in this argument, but it admits, their Lordships think, of an answer.

Those who were stipulating for the provisions of

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

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

Their Lordships being of opinion that the enactment which governs the present case is the 22nd section of the Manitoba Act, it is unnecessary to refer at any length to the arguments derived from the provisions of section 93 of the British North America Act. But in so far as they throw light on the matter they do not in their Lordships' opinion weaken, but rather strengthen the views derived from a study of the later enactment. It is admitted that the 3rd and 4th sub-sections of section 93 (the latter of which is, as has been observed, identical with sub-section 3 of section 22 of the Manitoba Act)

were not intended to have effect merely when a Provincial Legislature had exceeded the limit imposed on its powers by sub-section 1, for subsection 3 gives an appeal to the Governor-General, not only where a system of separate or dissentient schools existed in a Province at the time of the Union, but also where in any Province such a system was "thereafter established by the Legis- "lature of the Province." It is manifest that this relates to a state of things created by post-Union legislation. It was said it refers only to acts or decisions of a "Pro- "vincial authority," and not to acts of a Provincial Legislature. It is unnecessary to determine this point, but their Lordships must express their dissent from the argument that the insertion of the words "of the Legis- "lature of the Province" in the Manitoba Act show that in the British North America Act it could not have been intended to comprehend the Legislatures under the words "any Provincial authority." Whether they be so comprehended or not has no bearing on the point immediately under discussion.

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

Before leaving this part of the case, it may be well to notice the argument urged by the Respondent that the construction which their Lordships have put upon the 2nd and 3rd sub-sections of section 22 of the Manitoba Act is inconsistent with the power conferred upon the Legislature of the Province to "exclusively make laws in relation to education." The argument is fallacious. The power conferred is not absolute but limited. It is exercisable only "subject and according to the following provisions." The sub-sections which follow, therefore, whatever be their true construction, define the conditions under which alone the Provincial Legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. Their right to legislate is not indeed, properly speaking, exclusive, for in the case specified in sub-section 3 the Parliament of Canada is authorised to legislate on the same subject. There is therefore no such inconsistency as was suggested.

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

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

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

In truth, however, to determine that an appeal lies to the Governor-General in Council in such a case as the present does not involve the proposition that the Provincial Legislature was unable to repeal the laws which it had passed. The validity of the repealing Act is not now in question, nor that it was effectual. If the decision be favourable to the Appellants the consequence, as will be pointed out presently, will by no means necessarily be the repeal of the Acts of 1890 or the re-enactment of the prior legislation.

Bearing in mind the circumstances which existed in 1870 it does not appear to their Lordships an extravagant notion that in creating a Legislature for the Province with limited powers it should have been thought expedient, in case either Catholics or Protestants became preponderant, and rights which had come into existence

under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority as the case might be.

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

The Manitoba School Act of 1871 provided for a Board of Education of not less than 10 nor more than 14 members, of whom one-half were to be Protestants and the other half Catholics. The two sections of the Board might meet at any time separately. Each section was to choose a chairman, and to have under its control and management the discipline of the schools of the section. One of the Protestant members was to be appointed Superintendent of the Protestant schools, and one of the Catholic members Superintendent of the Catholic schools, and these two were to be the joint secretaries of the Board, which was to select the books to be used in the schools, except those having reference to religion or morals which were to be prescribed by the sections respectively. The legislative grant for common school education was to be appropriated, one moiety to support the Protestant, the other moiety the Catholic schools. Certain districts in which the population was mainly Catholic were to be considered Catholic school districts, and certain other districts where the population was mainly Protestant were to be considered Protestant school districts. Every year a meeting of the male inhabitants of each district, summoned by the Superintendent of the section to which the district belonged, was to appoint trustees, and to decide whether their contributions to the support of the school were to be raised by subscription, by a collection of a rate per scholar, or by assessment on the property of the district. They might also decide to

erect a school house, and that the cost of it should be raised by assessment. In case the father or guardian of a school child was a Protestant in a Catholic district or *vice versa*, he might send the child to the school of the nearest district of the other section, and in case he contributed to the school the child attended a sum equal to what he would have been bound to pay if he had belonged to that district, he was exempt from payment to the school of the district in which he lived.

Acts amending the education law in some respects were passed in subsequent years, but it is not necessary to refer to them, as in 1881 the Act of 1871 and these amending Acts were repealed. The Manitoba School Act 1881 followed the same general lines as that of 1871. The number of the Board of Education was fixed at not more than 21 of whom 12 were to be Protestants and 9 Catholics. If a less number were appointed the same relative proportion was to be observed. The Board as before was to resolve itself into two sections, Protestant and Catholic, each of which was to have the control of the schools of its section, and *all* the books to be used in the schools under its control were now to be selected by each section. There were to be as before a Protestant and a Catholic Superintendent. It was provided that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and Catholic district might include the same territory in whole or in part. The sum appropriated by the Legislature for common school purposes was to be divided between the Protestant and Roman Catholic sections of the Board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts in the Province where schools were in operation. With regard to local assessments for school purposes it was provided that the ratepayers of a school district should pay their respective assessments to the schools of their respective denominations, and in no case was a Protestant ratepayer to be obliged to pay for a Catholic school, or a Catholic ratepayer for a Protestant school.

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

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

With the policy of these Acts their Lordships are not

concerned, nor with the reasons which led to their enactment. It may be that as the population of the Province became in proportion more largely Protestant, it was found increasingly difficult, especially in sparsely populated districts, to work the system inaugurated in 1871, even with the modifications introduced in later years. But whether this be so or not is immaterial. The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the Province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools provided for by the Statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

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

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

It is true that the religious exercises prescribed for public schools are not to be distinctively Protestant, for they are to be "non-sectarian," and any parent may withdraw his child from them. There may be many too who share the view expressed in one of the affidavits in *Barrett's* case, that there should not be any conscientious objections on the part of Roman Catholics to attend such schools, if adequate means be provided elsewhere of giving such moral and religious training as may be desired. But all this is not to the purpose. As a matter of fact the objection of Roman Catholics to schools such as alone receive State aid under the Act of 1890 is conscientious and deeply rooted. If this had not been so, if there had been a system of public education acceptable to Catholics and Protestants alike, the elaborate enactments which have been the subject of so much controversy and consideration would have been unnecessary. It is notorious that there were acute differences of opinion between Catholics and Protestants on the education question prior to 1870. This is recognised and emphasised in almost every line of those enactments. There is no doubt either what the points of difference were, and it is in the light of these that the 22nd Section of the Manitoba Act of 1870, which was in truth a Parliamentary compact, must be read.

For the reasons which have been given their Lordships are of opinion that the 2nd sub-section of section 22 of the Manitoba Act is the governing enactment, and that the appeal to the Governor-General in Council was admissible by virtue of that enactment, on the grounds set forth in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that Sub-section. The further question is submitted whether the Governor-General in Council has power to make the declarations or remedial orders asked

for in the memorials or petitions, or has any other jurisdiction in the premises. Their Lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded, but the particular course to be pursued must be determined by the authorities to whom it has been committed by the Statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd Sub-section of Section 22 of the Manitoba Act.

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

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

There will be no costs of this appeal.