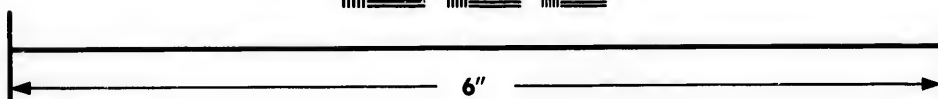
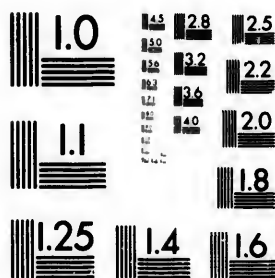


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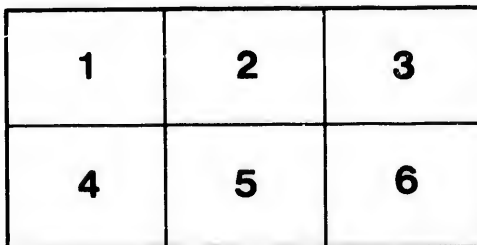
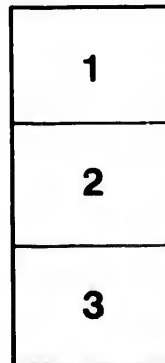
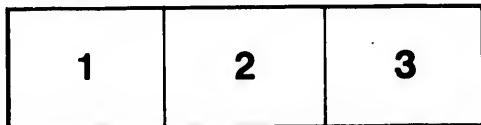
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# New Brunswick School Act.

## The Argument before the Privy Council of Great Britain.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, July 17, 1874.

### PRESENT:

Right Honorable SIR J. W. COLVILLE, Right Honorable LORD JUSTICE JAMES,  
Right Honorable LORD JUSTICE MELLISH, Right Honorable SIR MONTAGUE SMITH,  
Right Honorable SIR ROBERT P. COLLIER.

*Henry*, MAHER VS. THE TOWN COUNCIL OF THE TOWN OF PORTLAND.

Mr. Joseph Brown, Q. C., and Mr. Duff, Q. C., (of the New Brunswick Bar,) appeared as Counsel for the Appellant, instructed by Messrs. Linklater & Co.

Sir J. B. Karlake, Q. C., Mr. King, Q. C., (the Attorney-General of New Brunswick,) and Mr. Cowie, Q. C., appeared as Counsel for the Respondents, instructed by Messrs. Birham & Co.

MR. BROWN.—May it please your Lordships in this case, I appear for the Appellant, and I will give your Lordships as short an outline of the case as I can. The Appellant is a rate payer of the Town of Portland, in the City and County of St. John, in the Province of New Brunswick, and was rated and assessed for the year 1872, in the sum of \$57.83 for school purposes, under an Act of the Legislature of New Brunswick, called "The Common Schools Act, 1871," 34 Victoria, chapter 21, and a subsequent Act amending the same. The assessment was made by the Assessors of Taxes for the Town of Portland, in the said City and County in pursuance of a Warrant on Notification under the seal of the said town to levy and assess upon the said town and its inhabitants the sum of \$12,428 for the several purposes mentioned in the 9th sub-section of the 58th section of the said Act of 1871. This Warrant was issued by the Town Council in pursuance of a requisition of the Board of School Trustees of the said Town appointed and acting under the provisions of the said Acts. The order of the Town Council directing the warrant to be issued is then set out. It is: "Whereas it appears from the requisition of the Board of School Trustees of the Town of Portland, that the sum of \$12,428 is required for the purpose of the "Common Schools Act 1871" in the present year, of which \$300 is required for the repairs and alterations of Schools,—Therefore resolved and ordered that there be raised, levied and assessed upon the Town of Portland, and the inhabitants thereof in the present year, the said sum of \$12,428 by a special assessment for the several purposes mentioned in the 9th sub-section of the 58th section of the said Act, passed in the 34th year of Her present Majesty, intituled "An Act relating to Common Schools" and under the provision of said Act, and that warrant do issue under the seal of the Town to the Assessors of Taxes for the Town of Portland to levy and assess the said sum of \$12,428, for the purposes above mentioned as a separate amount. The appellant conceiving himself to be aggrieved by the said assessment, made upon him in pursuance of the said Warrant on Notification which has issued in pursuance of the said order made upon the said requisition, applied to the Supreme Court of the Province for rule nisi calling upon the said Town Council of Portland to show cause why a writ of *certiorari* should not issue to them to bring into the said Court the said order with a view of its being quashed. The rule was moved upon affidavits set forth, pages 5 and 6 of the Record, and upon the ground that the Common Schools Act 1871, in which the whole proceedings, including the said order, were founded, was void as having been passed in contravention of, and also being repugnant to the Act of the Imperial Parliament intituled, "The British North America Act 1867," 30th Victoria, chapter 3."

LORD JUSTICE JAMES.—Is not that the whole point?

MR. BROWN.—The whole point is whether or no the Act of the Province of New Brunswick called the Common Schools Act of 1871 is void as being unconstitutional. Your Lordships may remember this British North American Act of 1867 is the Act by which the Provinces of Upper and Lower Canada, and New Brunswick, and Nova

Scotia were united in the Dominion of Canada, having a Dominion Parliament and also separate Legislatures of their own. The 93rd Section of that act provided "in each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions: 'Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational Schools which any class of persons have by law in the Province at the Union. We may pass over the other subsections. "It was contended by the Appellant that the rights and privileges of the Roman Catholic inhabitants of the Province of whom the Appellant was one, as a class of persons, had been prejudicially affected by the said 'Common Schools Act, 1871,' contrary to the provisions of sub-section 1 of the 93 section of the 'British North American Act, 1867,' above extracted. The motion was supported by the affidavits of the Appellant and of two Roman Catholic gentlemen, one a priest, the last two deposing to the effect that previously to and up to the passing of the said Act of 1871, and after the passing of an act of the Province called 'An Act relating to Parish Schools,' passed in the 21st year of Her Majesty's reign, they had taught in schools under the law mentioned Act, with the knowledge and consent of the Inspector of Schools, to Roman Catholic pupils the Roman Catholic catechism and other Roman Catholic books, including the books published by the Christian Brothers, and other books used in the Roman Catholic Schools of Quebec and named in the said affidavits; that in the said Schools 'the special doctrines of the Roman Catholic religion were taught, and Roman Catholic prayers used; that these schools were under Government inspection under 'The Parish Schools Act, 1858;' that the annual returns thereof stated that the books mentioned in the affidavits were used in the school and the religion of the teachers; that after the making of the said returns they received the semi-annual allowances from public funds, made under the said Parish School Act. One of the Deponents testified to his personal knowledge of the existence of 25 or 30 Roman Catholic Schools such as that taught by himself, and, to his information and belief, that there were in the Province 250 schools of that description, all of which were established and were receiving provincial allowance under the said 'Parish Schools Act, 1858, when 'The Common Schools Act, 1871' was passed. It was contended that liberty of teaching sectarian or denominational doctrine to the pupils and of using sectarian and denominational books and prayers in the Roman Catholic Schools, which, by the said affidavits, was proved to have been enjoyed by the teachers in Roman Catholic Schools within the Province, consistently and concurrently with their receipt of allowance from public funds, has, in the case of Roman Catholic Schools, been seriously impaired and interfered with. Among other matters, it was contended that sub section 12 of section 58 of 'The Common Schools Act, 1871' prohibited, in effect, the grant of public aid to any but Schools conducted under the provisions of that Act; and that, by section 60, it was expressly enacted that all Schools conducted under the provisions of that Act should be non-sectarian. The result of this legislation, therefore, was to withdraw from such Roman Catholic Schools—or from such Schools in which Roman Catholic doctrines were distinctively taught, and which were, therefore, sectarian and denominational in their character—the enjoyment of aid from public funds, a right, or privilege, which, it was contended the affidavits proved to have been at the passing of the said Act of 1871, enjoyed by that large class of persons—the Roman Catholics of the Province—and which 'right' or 'privilege,' therefore, 'with respect to denominational Schools,' was, by the operation of 'The Common Schools Act, 1871,' 'prejudicially affected,' contrary to the provisions of the said 'British North American Act, 1867,' sections 2 and 3 and sections 93, sub-section 1. It was contended, moreover, that 'The Parish Schools Act, 1858, which was repealed by the said Common Schools Act of 1871,' was, in many respects, especially in section 8, more favorable to denominational schools, such as Roman Catholic Schools, than the Act of 1871. The Supreme Court refused the Rule nisi, holding that 'The Common Schools Act, 1871' was constitutional and valid, and that it was not repugnant as was argued, to the provisions of 'The British North American Act 1867.' Leave, however, was granted to the Appellant to appeal to the Privy Council. The Town of Portland, the Respondents in this appeal, being summoned to settle the terms of the appeal, which summons they attended. The Appellant contends that the judgment of the said Supreme Court should be reversed. The first point taken on the other side is a preliminary one. They say that although the Supreme Court has granted us leave to appeal it had no power to do so, the amount being under the amount mentioned in the orders of this Council, and that we ought to have obtained special leave from your Lordships. I do not know whether that is seriously to be insisted on now. Your Lordships see the enormous importance of the case.

**MR. COWIE.**—It is considered so desirable by the Town of Portland that the general question should be heard by your Lordships, that I shall not insist on any technical point, I thought it right to raise the point, but I do not mean to insist upon it.

**LORD JUSTICE JAMES.**—That is quite right. This Court would give special leave.

**MR. BROWN.**—It raises a great constitutional question whether we are right or wrong. The question may be introduced in this way.

**LORD JUSTICE MELLISH.**—It is a question whether we ought not to make an order now.

**SIR J. W. COLVILLE.**—There was a case the other day where we made a special order, but we laid down the principle that when these objections, which ought to be taken long before the case is called on, are made before us that we shall refuse the party who took the exception costs.

**SIR M. SMITH.**—However, Mr. Cowie does not now raise it.

**MR. COWIE.**—No I do not.

**SIR J. W. COLVILLE.**—He merely places it on the Record.

**MR. BROWN.** I could have shown that the question involved 12,000 dollars.

**LORD JUSTICE MELLISH.**—Is the whole rate beyond the appealable amount.

**MR. BROWN.**—Far beyond it.

**LORD JUSTICE MELLISH.**—The objection goes to the whole rate.

**MR. BROWN.**—Yes. It exceeds 12,000 dollars, but I do not think there is anything in it. I may introduce the question by reminding your Lordships that in 1867 there was an Act of the Imperial Parliament for the union of Canada, Nova Scotia, New Brunswick and the Government thereof. That Act, as your Lordships may remember, united all the four Provinces, the two Provinces of Upper and Lower Canada, New Brunswick and Nova Scotia, into one Dominion, under the name of Canada, and it divided them at the same time into four Provinces, Ontario, Quebec, Nova Scotia and New Brunswick.

**LORD JUSTICE JAMES.**—It created a Federal union, leaving the old Legislature in possession of certain of their powers.

**MR. BROWN.**—Yes. I may just state that division 6 of that Act of Parliament is headed "Distribution of Legislative Powers," and section 91 gives a long enumeration of the powers which are to belong to the Parliament of Canada, that is, the Federal Parliament. There is an enumeration of 29 different subjects which are to belong to them. I need not go through them, they include a variety of very important matters, but it will be enough for the argument to state that section 91 enumerates at length the powers which are to belong to the Parliament of Canada, which is the Federal Parliament.

**LORD JUSTICE MELLISH.**—They have not power respecting education in the Province except under the 29th.

**MR. BROWN.**—That is so.

**LORD JUSTICE MELLISH.**—What I rather want to know is whether neither the Imperial nor the Local Legislature could infringe against this 1st sub-section of the 93rd section, or whether the General Parliament might have done it.

**MR. BROWN.**—I am not quite sure how that is, Section 92 deals with the exclusive powers of the Provincial Legislature and exacts that in each Province the Legislature can make laws exclusively coming within the class of subjects next hereinafter enumerated, then it enumerates 16 general subjects which I need not read. Then comes a clause headed "education" and that is the clause with which your Lordships have to deal. That matter of education has not been provided for in any of the previous sections; apparently section 93 is this,—“In each Province the Legislature may exclusively.” I do not know exactly what that means unless it means exclusively of the Dominion Parliament.

**LORD JUSTICE MELLISH.**—It is exclusively of the general Legislature.

**MR. BROWN.**—Probably so—“May exclusively make laws in relation to education subject and according to the following provisions.” The first is the most important one. “Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.” Your Lordships know these Provinces are inhabited by persons of different faiths, and the Imperial Parliament had considerable difficulty in dealing with this subject, when the Earl of Carnarvon introduced this Bill into the House of Lords.

**LORD JUSTICE JAMES.**—You do not suppose that we shall be influenced in construing the section by any thing that the Earl of Carnarvon said, and it is no use our having any history which is not to effect us.

**MR. BROWN.**—Just as your Lordship pleases.

**SIR M. SMITH.**—The way in which the Public Worship Bill was introduced led one to think that it was a different Bill from what it turns out to be.

**MR. BROWN.**—No doubt that is so. There are two questions which arise in this case, the first question will be what is meant by Denominational Schools, and I think the second question will be has the Common Schools Act of 1871, of which we complain and under which this order of taxation was made, prejudicially affected any right or privilege in the respect to Denominational Schools which the Roman Catholics had by Law in the Province at the time of the Union.

**LORD JUSTICE MELLISH.**—And then whether that makes the rate bad.

**MR. BROWN.**—I do not think there will be much difficulty about that.

**LORD JUSTICE MELLISH.**—If you mean it was beyond their power to pass an act creating Common Schools and saying there should be a rate for them, that is not beyond their power. The rate is good I should think.

**MR. BROWN.**—I think the rate being made for the support of Schools. If I succeed in establishing that it is a rate made alike on Roman Catholics and Protestants,



**Lord Justice MELLISH.**—Do you mean to say they could not pass an Act of Parliament creating Common Schools and making a rate? If they have interfered with your schools so much as interfere with Denominational Schools and making a rate will be perfectly good.

**Mr. Brown.**—It will be found when we come to the provisions of the Act of Parliament that we are deprived of the application of any portion of the funds raised under the Act to Denominational Schools, which was the privilege we enjoyed at the time the Act of Union passed.

**Lord Justice JAMES.**—Have you any legal vested right in them?

**Mr. Brown.**—I say the right is saved to us.

**Lord Justice JAMES.**—What right was there existing at the time? What was there, if this Act had not passed, to give you a vested right?

**Mr. Brown.**—We say it was given by the Parish Schools Act, which was before the Union.

**Sir M. Smith.**—You are going to shew that?

**Mr. Brown.**—Certainly.

**Lord Justice MELLISH.**—Then you say by the Parish Schools Act they could give funds to the Denominational Schools.

**Mr. Brown.**—Certainly; and they did so, as I shall shew by the affidavits. We are deprived of that right by the Act, and in addition to that we are compelled by the present Act. I represent the Roman Catholics in this case, and the Roman Catholics say, they are compelled to pay taxation for the support of schools where they are prohibited from giving that religious instruction to their children which they had a right to do under the previous Parish Schools Act.

Now, my Lords, I think probably the first question that arises, What is a Denominational School under this section? Upon that I submit that a Denominational School is a school in which the religious branch of the teaching represents the tenets of some religious body. Upon that subject I have thought it proper to look into the dictionaries.

**Lord Justice MELLISH.**—From what has taken place lately, we know what Denominational Schools are pretty well.

**Sir R. P. COLLIER.**—It is a term of recent introduction in a great measure.

**Mr. Brown.**—Yes; and it is used of course in a technical sense. It appears that the word "denomination" is not found in Johnson's Dictionary—it is so recent as that. It is not found in Todd's Johnson's Dictionary of the date of 1827, but when you come to 1861, I find in Dr. Webster's Great Dictionary, which is deemed by many to be the best of all, that "denomination" is described thus: The third meaning given is, "a class, a sect, particularly of Christians," and then he cites "philosophy, dividing it into sects and denominations." That is a quotation by Southey. Then he gives "denominational" as relating to "denominations or sects of religion," for which he cites Pye Smith. Well, then, in Dr. Latham's Dictionary, published in 1865, Dr. Latham gives "denomination," he describes as an adjective relating to, or consisting of, or constituting a denomination, its chief application being to divisions in the way of religious doctrines, whence it often coincides with sectarian, than which it is a less invidious term. There is a similar definition in Webster's Dictionary, the edition of 1864.

**Lord Justice JAMES.**—A Denominational School must *ex vi termini* mean a school established by and exclusively belonging to a particular denomination.

**Lord Justice MELLISH.**—The mere fact that you had a Conscience Clause would not prevent a school being denominational. The fact of a child in the village not being present during the religious instruction, if the religious instruction was that of a particular sect, would not prevent a school from being denominational.

**Lord Justice JAMES.**—A Denominational School must be a school established by a sect or denomination for the purposes of that denomination. There might be a denominational School for Mohammedans or Parsees.

**Lord Justice MELLISH.**—A school where the peculiar tenets of peculiar sects are taught and the tenets of no other sect are taught, because if you allow all sects to come at their own hours and teach their own tenets, that would not make it a Denominational School.

**Mr. Brown.**—I understand it to be a school where the religious teaching is that of a particular denomination of Christians.

**Sir M. Smith.**—If you tell us what the Schools are, probably, without reading the definitions we shall see whether this is a Denominational School.

**Mr. Brown.**—Before doing that would you allow me to say that the word seems to be used in the sense that I was using it. In the Consolidated Statutes of Lower Canada, chapter 15, section 103, where I see "There shall be in each of these cities in Quebec and Montreal a Board of Examiners composed of 14 persons chosen in as fair and equitable a manner as possible from among the different religious denominations." Then the next article says that "half of them shall be Roman Catholics, and a half of them Protestants," and they are to form the Board of Examiners to examine teachers. In dealing with this question, what are the Denominational Schools? I submit it should be borne in mind that the Denominational Schools here contemplated appear to be

such as have some kind of legal establishment, in other words not to relate to any private school established by any religious body, such as a private Methodist School or a Baptist School. That argument seems fortified strongly by the consideration that it is not to be supposed that the legislatures would have any disposition to interfere with private schools established by religious bodies such as Wesleyans, Baptists or Independents, but with such schools as had legal establishment.

Having permitted these remarks, I will call your Lordships attention to the nature of the schools that existed at the time of the Union. These schools existing at the time of the Union were governed by an Act called the Parish Schools Act, which is an Act of New Brunswick of the 21 of Vict. Chapter 9. This is the Act passed before the Union and in force at the time of the Union. The general scope of this Act appears to be to encourage the establishment of schools all over the Province of New Brunswick while holding out to various parishes and districts in the Province, that if they established these schools, and if they voluntarily assessed themselves for the support of these schools, they shall receive a certain contribution from an annual grant of the Provincial Legislature, but it provides for a Board of Education, for a Superintendent of Schools, Trustees of Schools. Those are the three bodies who manage the Schools; and it provides also for the duties and qualifications of teachers. Then there are a number of clauses relating to that and on every important clause relating to the teaching in the school. Under this Act of the Provincial Parliament, you will find that the general government of these Parish Schools was vested in a Board of Education comprised of the Governor and Council and the Superintendent of Schools. That will appear in Sections 1 and 2. Section 1 is "The Governor and Council may appoint a Chief Superintendent of Schools," and Section 2 is "The Governor and Council with the Superintendent of Schools shall constitute a Provincial Board of Education." Section 3 empowers the Governor and Council to divide the province into 4 districts and appoint an Inspector of Schools for each district. Then comes some clauses headed "Board of Education." You will see the powers of the Board under that head. They were to have power to establish a Training School. Then they were to make regulation for the organization, government and discipline of Parish Schools, and the examination, classification and mode of licensing teachers, to appoint examiners of teachers, and to grant and cancel licenses. They were to "hear and determine all appeals from the decision of Trustees." They were to prescribe the duties of Inspectors of Schools, and to apportion all moneys granted by the Legislature for the support of all such schools among the several parishes in proportion to the number of classes of Schools reported to have been efficiently conducted for the preceding year, not exceeding an average of one thousand dollars to each parish in any one County, nor one thousand three hundred dollars to any one parish therein. Then they were to provide for the establishment, regulation and government of School Libraries, and the selection of books to be used therein, but no works of a licentious, vicious, or immoral tendency or hostile to the Christian religion, or works on controversial theology shall be admitted. The other provisions of that section may be passed over. Then as to the Superintendent—he was to have a general supervision and direction of the training and model Schools and the parish Schools, subject to the order of the Board of Education. That is sufficient to state about the Superintendent. Then I go to Clause 6 which relates to the trustees, "Three trustees of Schools shall be annually elected in each town and parish at the time and in the same manner as in other cases; in incorporated Towns, Cities or Counties, the Council shall appoint the Trustees, and the Trustees in office at the time of the passing of this act shall continue to act until others are appointed in their stead." The next sub-division describes their duty.—"It shall be the duty of Trustees to divide their respective parishes into convenient School districts, and from time to time to reconstruct them and define in writing the boundaries of each district and file a description thereof with a Clerk of the Peace, and in incorporated Counties with the Secretary Treasurer and a copy thereof with the Town Clerk." Then it says. "They shall give a licensed teacher authority in working to open a School in a district where the inhabitants have provided a sufficient School House, secured the necessary salary and with their assent agree with such teacher;" so that it does not appear that the establishment of Schools was compulsory on inhabitants anywhere under this act of Parliament, but that where the inhabitants had provided a School House and secured the necessary salary, there the trustees were to give a licensed teacher authority to open a school. Then it says the Trustees "may suspend or displace any teacher for incapacity or any improper or immoral conduct" and so on. Then there are provisions about electing a School Committee which are not very important.

**LORD JUSTICE JAMES.**—They are to be taken with the whole of it.

**MR. BROWN.**—Yes.

**LORD JUSTICE MELLISH.**—Do you contend that the Parish Schools themselves were denominational under this act.

**MR. BROWN.**—Certainly, that is the main point of the case.

**LORD JUSTICE MELLISH.**—How can Parish Schools be denominational? I understood you to say that there was power under this act to give funds to exclusively Roman Catholic Schools, that is to say if the Roman Catholics established a Roman Catholic School under this act a Government subvention could be given to that School.

**MR. BROWN.**—What I meant to convey was this, that under this Act the Board of Education had power to appropriate part of the funds raised by taxation in the province to either a Roman Catholic or a Protestant Episcopal School or a Wesleyan School.

**LORD JUSTICE MELLISH.**—Do you mean those being all the Parish Schools.

**MR. BROWN.**—Certainly.

**LORD JUSTICE MELLISH.**—Do you mean that if the Roman Catholics were a majority in a particular Parish they could erect an exclusively Roman Catholic School?

**MR. BROWN.**—Certainly, and that is precisely what they did.

**LORD JUSTICE MELLISH.**—We must not look at what they did, but what the Act says.

**MR. BROWN.**—I mean that they have not departed from what was authorized by the Act. I apprehend your Lordships will take into account what they did in pursuance of the Act. Well, then, towards the end of Section 6 we find that, "In any Town, Village, or populous district the Trustees may authorize such number of Schools as the wants of the population may require." The next clause but one says, "The trustees shall apportion among the School Districts in their respective parishes any money raised by county or parish assessment for the support and maintenance of the Schools therein in such manner as they shall deem just and equitable."

**LORD JUSTICE MELLISH.**—May there be several Schools in the same parish?

**MR. BROWN.**—Clearly.

**LORD JUSTICE MELLISH.**—Has each School a district of its own, or might the parish say, "We will have one Roman Catholic School, one Episcopal School, and two schools of other denominations in our parish."

**MR. BROWN.**—I should think so.

**SIR M. SMITH.**—One of the clauses of this section is, "It shall be the duty of the Trustees to divide their respective parishes into convenient School Districts."

**MR. BROWN.**—As I understand it the effect of it is this, they are to divide their parishes into convenient School Districts, the parishes being very large in this Province, and they may have one School or several in a District. Lower down we find the words "In any Town, Village or populous District the trustees may authorize such number of schools as the wants of the population may require." Then come the clauses about the trustees "apportioning among the districts in their respective parishes any money raised by county or parish assessment for the support and maintenance of the schools therein in such manner as they shall deem just and equitable. Any parish or district adopting the principle of assessment and the sum required for the teacher being assessed and paid, shall, for every year such assessment is so made and paid, receive from the Province Treasurer 10 per cent. over the allowance to schools of the same class in parishes or districts not so assessed, to be apportioned and paid the teachers therein." Then comes a clause relating to school committees. "The inhabitants of the school district being ratepayers, shall, at the meeting called by the trustees as aforesaid, elect by a majority of votes three persons."

**LORD JUSTICE MELLISH.**—This must be the district apportioned to each particular school.

**MR. BROWN.**—I think so. "The inhabitants of the school district being ratepayers shall at the meeting called by the trustees as aforesaid elect by a majority of votes three persons, who shall constitute a school committee for that district and shall continue in office for one year or until others are elected in their stead. The school committee shall have the immediate charge of the school house, with the furniture, apparatus and grounds. They shall, when necessary, call meetings of the inhabitants of the district for the purpose of providing a school house, books, maps, apparatus, school furniture, and fuel, and for the support and comfort of the scholars."

**LORD JUSTICE MELLISH.**—They say "school house;" that rather looks as if there were not to be two schools in one district.

**MR. BROWN.**—They are to have "the immediate control of any library provided by the district, and may appoint a librarian, secretary and treasurer."

**SIR R. V. COLLIER.**—It would not suit the Roman Catholics to let a committee of Protestants have control over the library because there might be books in it which were in the Index Expurgatorius.

**MR. BROWN.**—Your Lordship will see how it worked. Then they might "admit so many free scholars and also children at reduced rates, being the children of poor, and indigent parents, as they deem prudent and just, and they may apply the amount so received to the support of the school."

Now I come to the clauses relating to the teachers which are very important. The heading is "Duties and Qualifications of Teachers," and section 8 is, "The teachers, male and female, shall be divided into three classes qualified as follows: Male teachers of the first class to teach spelling, reading, writing, arithmetic, English Grammar, Geography," and so on. There is nothing about religious instruction in that, nor is

there in regard to the definition of the qualification of teachers of the second class, or of the third class, but a little lower down there is this, "Every teacher shall take diligent care" Your Lordships will find this very important, because it is a clause upon which my client in this case very much relies. "Every teacher shall take diligent care and exert his best endeavors to impress upon the minds of the children committed to his care the principles of christianity, morality, justice, and a sacred regard to truth and honesty, love of their country, loyalty, humanity, and a universal benevolence, sobriety, industry, and frugality, chastity, moderation and temperance, order and cleanliness, and all other virtues, which are the ornaments of human society, but no pupil shall be required to read or study in or from any religious book or join any act of devotion objected to by his parents or guardians, and the Board of Education shall by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in Parish Schools, and the Bible when read in the Parish Schools by Roman Catholic children, shall if required by their parents or guardians be the Douay Version without note or comment." This, of course, in extremely important as bearing on the question under discussion. We find here that "no pupil is required to read or study in or from any religious book if the parents or guardians objected to it." Of course, if they did not object to it he might be so required. Then "The Board of Education shall by regulation" this is compulsory, "secure to all children whose parents or guardians do not object to it, the reading of the Bible in Parish Schools—and the Bible when read in Parish Schools by Roman Catholic children shall, if required by their parents or guardians be the the Douay version without note or comment."

**LORD JUSTICE MELLISH.**—I suppose, though they do not say so, they mean that Protestant children should not be made to read the Douay Version.

**MR. BROWN.**—If not objected to.

**LORD JUSTICE JAMES.**—I should have thought if I had wanted terms to express schools which are not denominational, I should have chosen such terms as are in that clause.

**MR. BROWN.**—That is the argument adopted by the Court below, but it is my duty to submit that that is not so, when the Act comes to be looked at as a whole.

**MR. M. SMITH.**—Surely this is a Parish School in which there may be all denominations, those who do not read the Bible at all, and those who read the Bible in its entirety, and those who read only the Douay Version.

**MR. BROWN.**—In certain parts of the Province the Roman Catholics form the majority, in other districts the Protestants form the majority, and in other districts there is about an equal mixture. The result of that state of things is that in the Roman Catholic parts, practically, the schools were taught by Roman Catholic Teachers and the Douay Version of the Bible read to the children; the acts of devotion were Roman Catholic acts of devotion; and Roman Catholic Catechisms were used. That is, where Roman Catholics constitute a great majority of the people.

**LORD JUSTICE JAMES.**—In the case of a School Board School in England if all the inhabitants belonged to the Church of England nobody would interfere if the School was conducted in religious matters in accordance with the teaching of the Church of England; but it would be a very difficult matter if, as is generally the case, the inhabitants were church people and dissenters of various denominations.

**LORD JUSTICE MELLISH.**—They mention "the principles of christianity," that must mean those principles which are common to all christians.

**MR. BROWN.**—With regard to the Douay Version—the reason why it is directed to be the Douay Bible without note or comment is this—Your Lordships may remember that there are a great many notes in the Douay Bible of a highly controversial character and that is why those notes are to be left out. Our view of the Act of Parliament is this—which is the view I have to submit to Your Lordships, that this Act of Parliament had regard, of course, to the state of religious belief among the inhabitants of the Province at the time at which it was passed; that it was designed by this Act of Parliament and that such was the practical operation of it, that in districts where the whole or the great majority of the inhabitants were Roman Catholics that the Schools should be Roman Catholic Schools; that is to say in this sense that the Teachers and the teachings should be Roman Catholic.

**LORD JUSTICE MELLISH.**—How is it secured by that? Because if the Parish changed and instead of there being a majority of Roman Catholics, the Protestants became the majority they must elect a different body of Trustees and change everything.

**MR. BROWN.**—I quite agree that the intention of the Act was that. If, for example, there should be a district which should be vacated by the Roman Catholics and taken possession of by the Protestants it is impossible to deny that such was the intention of the Act of Parliament, the Provincial Legislature having a view to the variety of opinions that prevailed.

**LORD JUSTICE JAMES.**—A majority might make it a denominational School because the majority having the control might elect and govern according to their views.

**SIR M. SMITH.**—Supposing that one class of children read the Bible in its entirety and another class read the Douay Version, should you call that a denominational School?

**MR. BROWN.**—No, I should call that a mixed School. I submit the intention of the Act is this, that where you get a mixed population you should have mixed religious teach-

ing, or if the parents object to it probably none, but that where you get a Roman Catholic population you should have Roman Catholic teaching, and where you have a Protestant population you shall have a Protestant teaching. The Act of Parliament must be supposed to have had reference to the state of religious opinion in the Province.

SIR M. SMITH.—Is there any part of the County where they are all Roman Catholics?

MR. BROWN.—My learned friend Mr. Duff can tell your Lordships about that better than I can.

MR. DUFF.—Yes, a very large part.

MR. BROWN.—There are a great many settlers who are almost all Roman Catholics.

SIR R. COLLIER.—Still if a Protestant child came they could not shut him out.

MR. BROWN. The probability is the parents would not send him.

LORD JUSTICE MELLISH.—He would have as much right to be taught the Christian religion as any child of Roman Catholic parents.

SIR M. SMITH.—They are bound to read the Bible to all those children whose parents do not object to it.

LORD JUSTICE JAMES.—And to read the Protestant Bible.

MR. BROWN.—The Bible is not regarded as a Sectarian book.

SIR R. P. COLLIER.—Yes, it is in the Index Expurgatorius.

LORD JUSTICE MELLISH.—“The Bible” means the English Bible, therefore it does say the Board of Education shall secure the reading of the Bible, that is the English Version.

MR. BROWN.—If a Protestant child went to a Roman Catholic School he would be enabled to have the Protestant Version read to him.

LORD JUSTICE JAMES.—This is as clearly an anti-denominational school as can be.

MR. BROWN. I am obliged to admit it is a Parish School, but the consequence by no means follows that it is not a denominational School in a part of the Province where the inhabitants are of one denomination. I would test it in this way, will your Lordships ask yourselves, considering that the terms used are popular, and that “denominational” has only grown into use lately? I believe I can remember the first time it was used.

LORD JUSTICE JAMES.—Would you call the Irish Schools denominational Schools? They are, as it seems to me, exactly the same as these Schools. They must have been taken from the model of the Irish Schools, and they are not denominational.

LORD JUSTICE MELLISH.—Except that they have a Patron. The Parish Priest is the Patron and the Patron has a good deal to do with them.

MR. BROWN.—If your Lordships were to go into one of those districts where there was a school with a Roman Catholic teacher, and the Douay Bible and Roman Catholic books of devotion, and Catechisms used every day, and ask any inhabitant there what sort of a School it was he would say it was a Roman Catholic School.

LORD JUSTICE JAMES.—They try to abuse the Act of Parliament by making it a denominational School.

MR. BROWN.—I apprehend that is not so. That would be an answer to my argument if it was so.

LORD JUSTICE MELLISH.—There are no express words which say they may teach any denominational religion they please.

SIR J. W. COLVILLE.—Your argument would be against the repeal of the Act. It could not make those Schools denominational, the legal constitution of which was that they were not denominational.

MR. BROWN.—I do not say it would.

LORD JUSTICE MELLISH.—You say this Act could never be altered by the Local Legislature.

MR. BROWN.—It is enough for me to say that as I construe the Imperial Act of the Union they were prohibited from taking away the right of a religious majority or a religious totality, in any particular district, to have their own books of devotion and their own Bible, read and taught in that school.

LORD JUSTICE MELLISH.—As I collect from reading the papers there actually were in New Brunswick Roman Catholic Schools established by private Acts of Parliament which are not interfered with by this Act at all.

MR. BROWN.—Not quite so. All that appears is (and that only appears in a passage on the judgment of one of the learned Judges) that it would seem there were some private Roman Catholic Schools not established by Act of Parliament but alluded to in the judgment.

LORD JUSTICE JAMES.—Moving endowments.

MR. BROWN.—Probably, but private schools to all intents and purposes those Roman Catholic Schools were, as also were certain Wesleyan and Baptist Schools.

LORD JUSTICE MELLISH.—Your argument really goes to repeal the substance of the 93rd section which says, “The Legislature may exclusively make laws in relation to education.” You say they cannot.

MR. BROWN.—I do not go that length, but I say they fall under the restriction put upon their powers by sub-section 1.

Lord Justice Mellish.—There is an Act relating to Parish Schools which made every parish school in New Brunswick a non-denominational school. You say they had a system by which a majority of any denomination in a Parish could establish a school for their own denomination.

Mr. Brown.—I admit as a fact that there are some districts in which the inhabitants were mixed and the teaching was that of a mixed character.

Lord Justice Mellish.—But then a Roman Catholic majority would have the power of making a Roman Catholic School. I do not see how you could make any difference between the places where they had not a majority at the time of the passage of the Act and where they might get one hereafter.

Mr. Brown.—You have taken away from the totality of the Roman Catholic or Protestant inhabitants of the districts the power to establish schools in which their own religious tenets are taught. They cannot establish such Schools under the new Act.

Mr. M. Smith.—Nor under this Parish Act.

Mr. Brown.—If there was an immigration of Protestants into a Roman Catholic parish and a subsequent change in the religious views of the majority, that change would affect the character of the school.

Lord Justice Mellish.—The teacher is bound to give instruction in the principles of Christianity.

Mr. Brown.—Yes.

Lord Justice Mellish.—And undenominationally.

Mr. Brown.—I submit that is not so.

Lord Justice James.—Do you think it is worth while going on with that? These words are as clear as they can be. I cannot conceive that any words could more clearly convey the determination that these schools should not be denominational. That seems to be the plain meaning of those words, as plain as anything can be expressed in the English language.

Mr. Brown. Is it possible to put that construction upon them, having regard to the way in which this Act was worked?

Lord Justice James.—I do not think we can look at that. We have a plain Act of Parliament to construe, and we have nothing to do with the mode in which it is worked.

Mr. Brown.—The Legislature in passing this Act of Union may be supposed to have had regard to the state of religious teaching at the time, and the wishes of the majority.

Lord Justice James.—They knew what the law was.

Mr. Brown.—They must be taken to have had knowledge of the state of things disclosed by the affidavit, from which it distinctly appears that in a great number of districts in this Province, Roman Catholic teachers were elected, they had the Roman Catholic Catechisms in the schools, they used Roman Catholic books of devotion, and they read the Bible also. That state of things is distinctly prohibited by the new Act, which says in terms that the schools are to be non-sectarian.

Lord Justice James.—The first Act said so.

Mr. Brown.—Of course your Lordship does not allege that there are any such terms to be found in the first Act. All that can be said is what your Lordship has called attention to in section 8, about reading the Douay version without note or comment, the object of which I have endeavored to point out. The fact is the notes to the Douay version were distinctly notes of controversial theology.

Sir Montague Smith.—Supposing there are children who do not read the Bible at all, others who read it in its entirety, and others who read it in the Douay version, how can you say that is a Denominational School?

Mr. Brown.—I do not know that that would be a Denominational School. It would be difficult to say that was so, but I am obliged of course, to put it in this way, that they were only Denominational Schools where the majority of the inhabitants of a district were Protestants or Roman Catholics or belonged to some particular sect.

Lord Justice Mellish.—Must not a Denominational School, within the meaning of the first sub-section of the 93rd section, be a school which is to be always denominational? Would a school, which may be denominational one year and belong to a particular sect, and then the next year to another sect according to the majority of the inhabitants in its favor, be a Denominational School, which any particular class have by law?

Mr. Brown.—Your Lordship has represented the case in a very strong light, undoubtedly. I cannot say they were denominational in perpetuity. I am compelled by the necessity of the facts to admit they might cease to be so; but still they would be so as long as the majority of the inhabitants of a district continue in the same faith, as they do for generations in these parts.

Lord Justice Mellish.—Is there anything more to be said upon that, because if not, there seems to be an end of it?

Mr. Brown.—I do not know whether some light is not thrown on the construction of the first article by the second article in section 93 of the Imperial Act: "All the powers, privileges and duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic subjects shall be, and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec." This second article applies to the Pro-

vinces of Upper and Lower Canada, as they were formerly called, and the Separate Schools here mentioned for the Queen's Roman Catholic subjects were schools established by Act of Parliament in Upper Canada, and in like manner the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec were also schools established by Act of Parliament in Lower Canada. They were established by Act of Parliament in like manner as these schools in New Brunswick, of course with this distinction that there was express provisions in the Acts of Parliament relating to the Province of Canada, for the establishment of these separate and dissentient schools. The Act of Upper Canada was in the consolidated statutes of Upper Canada, chapter 65.

Lord Justice James. How does that throw any light upon your argument? In those Provinces there were Denominational Schools which had privileges secured to them by law.

Mr. Brown.—I use it as showing that Article 2 is intended to apply to the separate and dissentient Schools of Upper and Lower Canada, established by Act of Parliament; that it consequently does not apply to the schools of New Brunswick or Nova Scotia; and, therefore, that Article 1, probably by inference, was intended to apply to the Parliamentary Schools in Nova Scotia, there being no others than those I have mentioned; that is to say, these Parish Schools which, in Protestant districts were Protestant Schools, and in Catholic districts were Catholic Schools. So far as Nova Scotia is concerned I have been unable to discover that there were any schools established there beyond Common Schools.

Lord Justice Mellish.—Article 1 would clearly apply to a case of this sort—if the law at that time allowed Roman Catholics to establish with their own money exclusively Catholic Schools, it would not be lawful for the Legislature to pass a law saying, "We object to the Roman Catholic Religion so much that there shall be no Roman Catholic Schools in this Province."

Mr. Brown.—That is probably so, but it is not very likely that the Legislature can be supposed to have had that case before them. There were some private Roman Catholic Schools and some private Presbyterian Schools in New Brunswick.

What I was a going to say was, that it is more probable, both by the words and the reason of the case, that Article 1 contemplated schools of a public character than mere private schools. It would be almost without example in modern times for the Legislature to interfere with mere private schools of any Body.

Sir M. Smith.—They interfere with endowed schools.

Lord Justice Mellish.—No doubt they do in this country.

Mr. Brown. It would be a very extraordinary thing here if the Legislature were to interfere with the Roman Catholic College, at Oxott, or the Dissenters School, at Mill Hill. There was a School called the Madras School, which had a charter from the Crown, and that was confirmed by a private Act of New Brunswick, which I have in this Book; but it does not appear that that Act did more than confirm the charter of this Madras School. Nothing appears to have been done by Act of Provincial Parliament, excepting the grant of the charter.

Lord Justice James. It is all by law, whether by chapter or otherwise.

Mr. Brown. I submit it can hardly be supposed those were the Schools wholly and solely referred to in this section.

Lord Justice Mellish.—The second clause enacts that all the powers, privileges and so on which the Roman Catholics have in Upper Canada, (which is a Protestant country) shall apply to the Protestant Schools in Lower Canada. That section does not prevent the Legislature of Upper Canada taking away those privileges. That is already done by the first section.

Mr. Brown.—I think the third Article probably provided for that—"where in any Province a system of separate or dissentient schools exist by law at the Union, or is thereafter established by the Legislature of the Province. An appeal shall be to the Governor General in Council."

Lord Justice Mellish.—That gives an appeal to the Legislature, but still the first section applies to those very schools for the purpose of providing that their privileges shall not be taken away.

Mr. Brown.—As I understand Article 2, it was intended to put a limit on the powers of the Provincial Legislature to make new enactments because it says this—"In each Province the Legislature may exclusively make laws in relation to education; subject and according to the following provisions, one of which is 'All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic subjects shall be, and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.' That is apparently intended to be operative in the future.

Lord Justice James.—Do you really think it worth while to pursue this topic any further?

Mr. Brown.—Your Lordship sees the great importance of the case. It isn't my duty to represent my own views here. As well as I can I have represented the views of my client.

Lord Justice James.—It seems to be a thing as plain as possible—a Parish School under the control of a Board, open to all sects, there, being a denominational school; it is an absolute contradiction in terms. You might as well introduce the word "not" after the word "shall" in an Act of Parliament, and make a clause read "shall not" when the Legislature said "shall."

Mr. Brown.—If the case is to turn upon that particular point I do not think I can add anything material. The case is undoubtedly as Lord Justice Mellish has stated and I am compelled from the necessity of this to admit that what is a Roman Catholic School this year may become a Protestant School the next. It is unavoidable from the Act of Parliament. Still what I do submit is that what the Legislature had in contemplation was the state of things existing and the privileges enjoyed by either Protestants or Roman Catholics at the time of the Act of Union. The state of things is shown to be such that in Roman Catholic districts the teaching was exclusively Roman Catholic and in Protestant district, no doubt, it was the same. If a person in the district was asked what sort of a school this was, whether or not it was a denominational school he would have said "undoubtedly it is a Roman Catholic School" and the same observation would be made with regard to Protestant Schools.

If your Lordships think that it is no use my going into the other parts of the case I would ask you to hear what Mr. Duff, who argued this case in the Court below, will say with reference to the first article.

Mr. Duff.—The inhabitants of this district have felt so much aggrieved that they desire me to present the case before your Lordships. They have attempted to obtain redress through the Dominion Parliament and have been refused until they first obtained your Lordships' judgement in the matter: therefore it is that under a great many difficulties we have felt constrained to bring the case to your Lordships' notice. I shall have only a few words to say. Of course it is a very important question as regards the interests of a large portion of Her Majesty's subjects in the province of New Brunswick, and they feel themselves very much aggrieved. It is a question that involves the construction of their constitution. We have now as they have in the United States a written constitution and would like if it had been possible to have had the assistance of some of the legal minds in the United States to govern us in the construction of this Act, such men as Mr. Justice Story or Mr. Kent.

Lord Justice James.—I think you may assume that we can construe a statute.

Mr. Duff. It will be fair, at all events, to refer very shortly to the laws in force in different Provinces at the time of the Union. I think on reference to these it will be found that all the laws on the subject of education in Ontario, Quebec, and New Brunswick have a two fold object; the one was secular education: the other was religious instruction combined with that secular education. That was particularly the case with regard to Lower Canada where the rights of the Protestant minority were secured by what are called dissentient Schools. The rights of the Roman Catholic minority in Upper Canada were secured by what are termed Separate Schools. The rights of these two classes of christians, the Roman Catholics and Protestants, were secured as we say in New Brunswick by the 8th section of the Act.

Lord Justice Mellish.—How were the Catholic Schools in Upper Canada and the Protestant Schools in Quebec managed?

Mr. Duff.—By an assessment.

Lord Justice Mellish.—By an assessment on people of a different denomination.

Mr. Duff.—No, on themselves separately. That is by the 15th.

Lord Justice Mellish.—Were there any schools clearly denominational schools, Roman Catholic or Protestant in any one of the four Provinces which were supported by taxes on all the Queen's subjects without reference to their religion.

Mr. Duff. No, I think not, unless your Lordships hold that it was so in New Brunswick. I am coming to that presently.

Lord Justice Mellish.—That is considered a very great grievance as a rule.

Mr. Duff.—Section 58 of the consolidated statutes of Lower Canada contains this provision.

Lord Justice James.—The foundation of the whole case is whether there are denominational schools, and the question is whether it is capable of anything like a reasonable argument that a school open to all the children in the district, in which all children are to be equally taught and which is under the control of ratepayers, whether it is possible to contend that that is a denominational school. It is a public school as distinctly as it can be.

Mr. Duff.—I want about to ask your Lordship's attention to the laws of Ontario.

Lord Justice James.—I could easily understand there were denominational Schools whose privileges required to be preserved; but in New Brunswick the schools were public schools, established by public moneys, moneys raised partly by assessment and partly by the estate, into which it was expressly provided that all children should be admissible.

Sir M. Smith.—Section 24 of the Parish Schools Act is, "any district school supported by assessment shall be free to all the children residing therein."



Mr. Duff.—Under a previous section the majority of the inhabitants of that district must consent before they are liable to that.

Sir M. Smith.—When they do consent every child in the district may enter the school.

Mr. Duff.—What I was about to submit to your Lordships was that in view of the state of the law of the different Provinces at the time of the Union, the Imperial Legislature must have contemplated a state of circumstances such as existed in the Province of New Brunswick.

Lord Justice James.—What the Legislature provided was that if there was any legal right secured by law to any class of religious denominations, the local majority was not to deprive that class of it; that the local majority was not to be at liberty to take away any actual legal right secured to any denomination.

Mr. Duff.—Yes but perhaps I may submit to your Lordships that the language of this first sub-section is capable of being applied to a right—such as this—a right to call into existence Schools exclusively of any particular Denomination, under particular circumstances or rather conditions of time and place. The right would exist even if those schools themselves did not exist. Your Lordships will observe that the language is different from the other sub-section. It is not a system of Separate Schools; it is not a system of Denominational Schools; but it is a right in respect of Denominational Schools. I would respectfully submit to your Lordships that that right might exist, capable of being called into existence under local circumstances or otherwise, and in point of fact it was from time to time called into existence as shown by the affidavit of the priest, M. Cornier. We do not of course pretend to say that merely because in certain districts schools were established belonging peculiarly to the Roman Catholic denomination where their doctrines were taught, their Bible read and their Acts of devotion practised, therefore that you gave them a right, but if they could call these schools into existence by virtue of any law in force, that, I respectfully submit was a right in respect of a denominational school.

Lord Justice James.—That is to say, that if a school might fall into the hands of persons entirely Roman Catholic or entirely Protestants there would be Roman Catholic electors and Protestant electors, and a Roman Catholic Master or a Protestant Master appointed. The school might be so worked as to give it a denominational character it is thought, but to say that because it has assumed that character it is therefore a denominational school, any injury to which would be unconstitutional, is monstrous.

Mr. Duff.—I refer your Lordships to the 8th section in the Act 21st Victoria, at page 30, of the book containing the Acts. "Every teacher shall take diligent care, and exert his best endeavours to impress upon the minds of the children committed to his care the principles of Christianity morality and justice, and a sacred regard to truth and honesty, love of their country, loyalty humanity, and a universal benevolence sobriety, industry and frugality chastity and moderation and temperance order and cleanliness and all other virtues which are the ornaments of human society, but no pupils shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians; and the Board of Education shall, by Regulation secure to all children whose parents or guardians do not object to it, the teaching of the Bible in parish schools—and the Bible when read in parish schools by Roman Catholic children, shall if required by their parents or guardians, be the Douay version, without note or comment."

There we have the Bible secured; we have the Roman Catholic Bible secured to Roman Catholic children. This section authorises acts of devotion to be practised. It authorises religious books being used. Well, if in a locality entirely Roman Catholic they appoint a Roman Catholic teacher and Roman Catholic Trustees, they have their Douay Bible, they practice their acts of devotion and they use religious books, all under this section, all authorised by this law.

Lord Justice Mellish.—Is there any section in the Act about prayers in the school.

Mr. Duff.—Not that I recollect. It appears that a school so constituted would be legally constituted under this Act. The right to constitute such a school is a right secured to them by Law in respect of a denominational school.

Lord Justice James.—It is a right to the ratepayers of a district to establish a school; but it is not a right to a denomination. It is a right to the rate payers to whatever denomination they belong, but because the rate payers may belong to one denomination by an overwhelming majority, that does not make the school denominational.

Mr. Duff.—The 93rd section would seem to secure some such rights as this, because Lower the other rights, the rights of the system of separate schools in Upper and Canada were secured by the other sections.

Lord Justice Mellish.—I do not agree with you there because I can find nothing in the first section which prevented the legislature of Upper Canada repealing the peculiar laws by which the Roman Catholic schools in Upper Canada were established. The section says: "All the powers privileges and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be, and the same are hereby extended to

the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec." There is nothing that prevents the Legislature in Upper Canada repealing all the powers, privileges and duties conferred on separate schools for the Queen's subjects in Upper Canada, except the first section.

Mr. Duff.—The third sub-section has some reference to it. "Where in any Province a system of separate or dissentient schools exist by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall be to the Governor General in Council from an Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects, in relation to education.

Lord Justice Mellish.—If you are right that the Parish Schools in New Brunswick were Denominational Schools, that would be a system of dissentient separate schools in New Brunswick, and the third subjection would apply to it.

Mr. Duff.—That is not my contention.

Lord Justice James.—Do you really go so far as to say that the Act establishing modern schools has never been repealed? Was there any Act that could not be repealed by the Legislature?

Mr. Duff.—If they simply repealed the Act, and went no further, we should not be injured.

Lord Justice James.—If they simply repealed the Act it is as *tabula rasa*: therefore, there would be no legal privilege interfered with.

Mr. Duff.—We should not then be supporting schools of other denominations. They deprive us of the right.

Sir M. Smith.—The right is gone by the repeal of the Act.

Lord Justice James.—It seems idle to say they cannot repeal the Act.

Mr. Duff.—Well, my Lords, that is all I have to say.

[The Council Chamber is cleared and their Lordships deliberate. After a short time, Counsel and parties are re-admitted]

## JUDGMENT.

Lord Justice James.—Their Lordships have been unable to entertain any doubt whatever upon this question. The point is a very short point and depends upon the construction of a very few words in the Act constituting the Dominion of Canada. The question above to which we desired Counsel to confine themselves as lying at the root of the whole thing is whether the Schools which existed in New Brunswick under the Public Schools Act which existed there before the new Act, were Denominational Schools or not.

I think the Council would find it impossible to express their view on the subject in any better or more forcible language than that which is found in the judgment of Mr. Justice Fisher, which is probably the more valuable upon these points because as far as their Lordships are able to gather, Mr. Justice Fisher personally expressed some doubt as to the policy of the regulations under the new system. Mr. Justice Fisher's language after giving some other description of the old School Act is:—"It provided for a School library in each district by a money grant in aid of the amount raised in the locality for that purpose, and placed the selection of books under the control of the Board of Education, but expressly excluded works of a licentious, vicious or immoral tendency or hostile to the Christian religion or works on controversial theology. This is the only part of the law in which anything of a denominational character is referred to in any way, and it shows how zealous the Legislature was in guarding the law and in preserving the Schools from any denominational or sectarian tendency. Provision was made for the education of the children of the whole people, in schools of every grade and by teachers of both sexes, and by the Superior Schools the wants of higher education were provided. The whole machinery of the Act is designed to make the schools common to the children of every man irrespective of his religious opinions. The Act recognizes the agreement of the inhabitants of any locality with a teacher, licensed by the Board of Education, when they have provided a sufficient school house and secured the necessary salary raised by voluntary contributions or tuition fees. It contains provisions for voluntary assessment in the District, Parish or County where the ratepayers determine to adopt that mode of supporting the schools, and in such case the schools are declared to be free to the children of all the inhabitants. The system is prescribed by the Board of Education; the localities take an active part in the establishment and government of the schools subject to the general control of the Government. The local agency is exercised, and the local officers appointed in the same manner as for the Government and support of the poor, the highways or any other local or parochial objects, neither class, creed nor color affect or influence one more than the other. The only qualification for the electors of any Officer is that they are to be ratepayers upon

real or personal property or income. No class or creed had under the Act any peculiar right, either in the General Government of the whole Province, or in any Parish or School. Now when all this machinery for working the Act relating to parish schools had been made, is it not a striking proof of the determination of the Legislature to avoid the very thing which it is contended the Act authorises by restricting the power of the Board of Education to make rules and regulations in this respect, and expressly excluding from the School Libraries Works hostile to the Christian religion or Works of Controversial Theology, while it left the inhabitants free to elect their local agents, who shall employ their Teachers and look after the Schools. To secure to every man, and the child of every man, a just equality with regard to his religious faith, it enacted in effect that the great leading principles of Christianity should be inculcated in the Schools, but there should not be in the library a book upon Controversial Theology, or in other words, with denominational teaching.

Their Lordships agree entirely with that view, and with that mode of expressing the law by Mr. Justice Fisher.

It has been contended on the part of the appellant that *de facto* they became Denominational Schools in this way — that is to say, that whereas the whole machinery was left local that the ratepayers had the power of appointing the master, and the ratepayers had the power of appointing the trustees of the school, but where the whole inhabitants of a district or the great majority of a district belonged to the Roman Catholic faith, or belonged to a Protestant sect, then they could so work the school practically as to give it a denominational character or a denominational line — that is to say, if all the children were Roman Catholics, Roman Catholic teaching would be found in that school; but that that might be the accidental result of the mode of working the Act under the old system, is not to give a legal right to that denomination, which was the right alone which was intended to be protected by the Federation Act of the Dominion of Canada. It is an accident which might have happened to-day, and might have been reversed to-morrow, by a change of the inhabitants of the district or a change in their views, and that is not a thing to which it is possible to give the colour of a legal right.

Their Lordships are therefore of opinion that there is nothing in the ground taken by the appellant, or anything unconstitutional in the Act of New Brunswick; and therefore their Lordships will recommend to Her Majesty that the appeal be dismissed and dismissed with costs.

[From the short hand notes of Messrs. Walsh & Son, 3 Little George Street, Westminster.]

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