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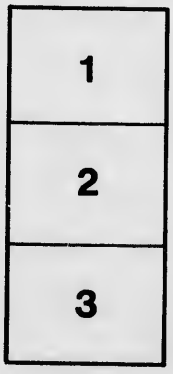

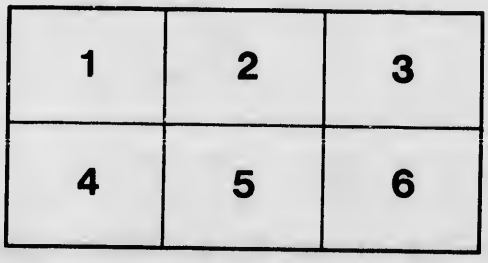

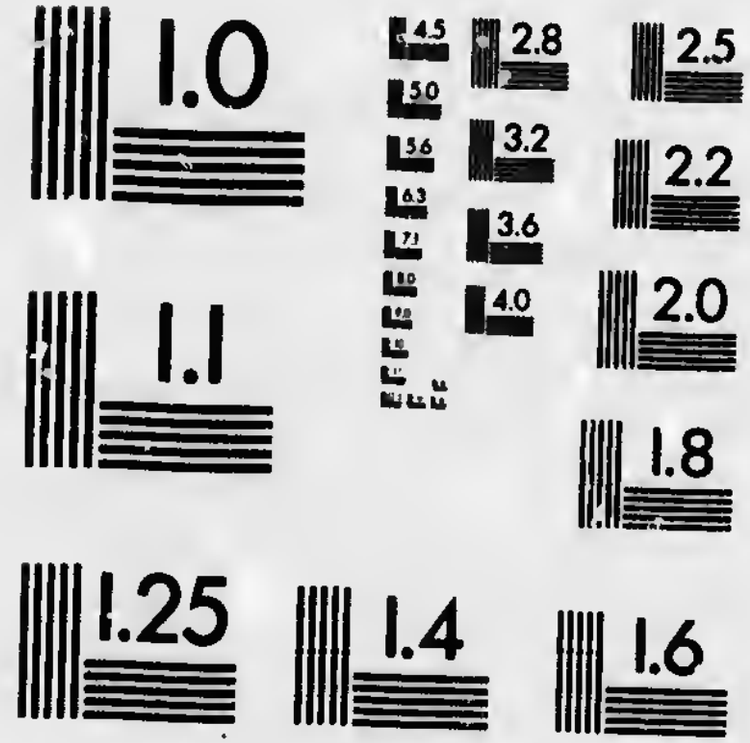

JUDGMENT

OF THE SUPREME COURT OF NEW BRUNSWICK,

Upon the question of the Constitutionality of "The Common Schools Act, 1871," delivered in Hilary Term 1873, in the case of

AUGUSTE RENAUD and others.

The Chief Justice delivered the following, as the Judgment of himself and Justices Allen and Weldon.

We are asked to set aside the Assessment in this case, on the ground that the Legislature had no power or authority to enact the Law under which such Assessment was levied—The Common Schools Act 1871—inasmuch as, it is contended, it contravenes 'The British North America Act, 1867,' and is consequently void and of no effect. We have never doubted that when a Provincial Act and an Imperial Statute are repugnant, so far as such repugnancy extends, but no further, the Provincial Act is void; and this principle has been, since the passing of 'The British North America Act, 1867,' on several occasions enunciated and acted on by this Court; and we should not have thought it necessary now to refer to it, still less to support by authorities the views we have always entertained on this point (without any doubts), were it not that we observe that in the neighbouring Province of Quebec the question has been much discussed, and the Court divided in their opinions on the subject, though the majority arrived at the same conclusion as that which has hitherto governed this Court. We have always thought it a constitutional principle, too clear to be seriously questioned, that the subordinate legislative power of a Colonial Legislature must succumb to the supreme legislative power and control of the Parliament of Great Britain, and therefore have heretofore considered it wholly unnecessary to cite any authority; but as there is a clear statutory recognition, as well as the highest Judicial declaration in support of the accuracy of the view we have acted on, we think it as well now to name them. In the Imperial Act 28th & 29th Vic. cap. 63, sec. 2, it is enacted—"That any "Colonial Law which is, or shall be, in any respect repugnant to the provisions of any Act "of Parliament extending to the Colony to which such Law may relate, or repugnant to "any order or regulation made under authority of such Act of Parliament, or having "in the Colony the force and effect of such Act, shall be read subject to such Act, order, "or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and "remain absolutely void and inoperative." And sec. 3 says—"No Colonial Law shall "be or be deemed to have been void or inoperative on the ground of repugnancy to the "Law of England, unless the same shall be repugnant to the provisions of some such Act "of Parliament, order, or regulation as aforesaid." And this Statute has undergone judicial comment in the case of Phillips *vs.* Eyre, (Law Rep. 6, Q. B., 20,) where Willes, J. in delivering the judgment of the Exch. Ch., in stating the effect of this Statute, after putting forward what has always been considered Law in this Province, viz. that an English statute only binds the Province when it is by the express words of the statute, or by necessary intendment, made clearly applicable to the Province, says—"It was argued "that the Act in question (an Act passed by the Legislature of Jamaica) was contrary to

" the principles of English Law, and therefore void. This," he says, " is a vague expres-
" sion, and must mean either contrary to some positive Law of England, or to some prin-
" ciple of natural justice, the violation of which would induce the Court to decline giving
" effect even to the Law of a Foreign Sovereign State. In the former point of view, it is
" clear that the repugnancy to English Law which avoids a Colonial Act, means repug-
" nancy to an Imperial statute or order made by authority of such statute applicable to
" the Colony by express words or necessary intendment, and that so far as such repug-
" nancy extends, and no further, the Colonial Act is void."

But long prior to the passing of either the 28th & 29th Vic. cap. 63, or 'The British North America Act, 1867,' the Judiciary of England authoritatively declared what the Law was on this subject, in answer to a question propounded to the Judges by the House of Lords.

On the fourth day of May 1840, the Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the Judges (with the exception of Lord Denman and Lord Abinger, who did not attend the meeting of Judges) upon the questions of Law propounded to them, respecting The Clergy Reserves' (Canada) Act. In answer to the question lastly propounded, (question 3), which is as follows :—" Whether the Legislative Council and Assembly of the Province of Upper Canada, having, in an Act 'To provide for the sale of the Clergy Reserves, and for the distribution of the proceeds thereof,' enacted that it should be lawful for the Governor, by and with the advice of the Executive Council, to sell, alienate and convey in fee simple, all or any of the said Clergy Reserves; and having further enacted in the same Act, that the proceeds of past sales of such Reserves which have been or may be invested under the authority of the Act of the Imperial Parliament, passed in the seventh and eighth years of the Reign of His late Majesty King George the Fourth, intituled 'An Act to authorize the sale of part of the Clergy Reserves in the Provinces of Upper and Lower Canada,' shall be subject to such orders and directions as the Governor in Council shall make and establish, for investing in any securities within the Province of Upper Canada, the amount now funded in England, together with the proceeds hereafter to be received from the sales of all or any of the said Reserves, or any part thereof, did, in making such enactments, or either of them, exceed their lawful authority;" His Lordship said—" In answer to the question lastly propounded, we all agree
" in the opinion, that the Legislative Council and Assembly of the Province of Upper
" Canada have exceeded their authority in passing the Act 'To provide for the sale of the
" Clergy Reserves, and for the distribution of the proceeds thereof,' in respect of both the
" enactments specified in your Lordships' question. As to the enactment, that it should be
" lawful for the Governor, by and with the advice of the Executive Council, to sell, alien-
" ate and convey in fee simple, all or any of the Clergy Reserves; we have, in answer to
" the second question, already stated our opinion to be such, as that it is inconsistent with
" any such power in the Colonial Legislature; and as to the enactment 'that the proceeds
" of all past sales of such Reserves, which have been or may be invested under the authority
" of the Act of the Imperial Parliament, passed in the 7th & 8th George 4th, for autho-
" rizing the sale of part of the Clergy Reserves in the Provinces of Upper and Lower
" Canada, shall be subject to such orders and directions as the Governor in Council shall
" make and establish for investing in any securities within the Province of Upper Canada
" the amount now funded in England, together with the proceeds hereafter to be received
" from the sales of all or any of the said Reserves;' we think such enactment is, in its terms,
" inconsistent with and contradictory to the provisions of the statute of the Imperial Par-
" liament, 7th and 8th George 4th, and therefore void, there being no express authority

" reserved by that Act to the Colonial Legislature to repeal the provisions of such latter " Statute."

Assuming, then, that it is not only the right, but the bounden duty of this Court to deal with questions of this nature when legitimately presented for its consideration, we must endeavour to ascertain whether there is such a repugnancy in this case as will constrain us to declare " The Common Schools Act 1871," void, in part or in whole.

By the 93rd section of ' The British North America Act, 1867,' it is enacted, that— " In each Province the Legislature may exclusively make Laws in relation to Education, " subject and according to the following provisions :—

" (1) Nothing in any such Law shall prejudicially affect any right or privilege with " respect to Denominational schools, which any class of persons have by law in the Province " at the Union.

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

" (3) Where, in any Province, a system of Separate or Dissentient Schools exists by " law at the Union, or is thereafter established by the Legislature of the Province, an " Appeal shall lie to the Governor General in Council, from any act or decision of any Pro- " vincial 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."

It is now contended, that the rights and privileges of the Roman Catholic inhabitants of this Province, as a class of persons, have been prejudically affected by The Common Schools Act 1871, contrary to the provisions of sub-section (1) of section 93 of ' The British North America Act.' We have now to determine whether any class of persons had, by law in this Province, any right or privilege with respect to Denominational schools at the Union, which are prejudically affected by The Common Schools Act of 1871. This renders it necessary that we should, with accuracy and precision, ascertain exactly what the state of the law was with reference to Denominational schools, and the rights of classes of persons in respect thereto, at the Union. At that time, what may fairly and legitimately be called the Common School system of the Province, was carried on under an Act passed in the 21st Vic. cap. 9, intituled " An Act relating to Parish Schools." There were, no doubt, at the same time in existence, in addition to the schools established under the Parish School Act, schools of an unquestionably denominational character, belonging to, and under the immediate government and control of particular Denominations, and in which, there can be no doubt, or it may reasonably be inferred, the peculiar doctrines and tenets of the Denominations to which they respectively belonged were exclusively taught, and therefore had, what may rightly be esteemed, all the characteristics of Denominational schools, pure and simple. We do not here refer to Collegiate Institutions, which it has been strongly, and with great force urged, were not within the contemplation of the

Imperial Parliament, or intended to be affected by 'The British North America Act, 1867;' but we refer to such schools as the Wesleyan Academy, Sackville, as incorporated by the 12th Vic. cap. 65, amended by 19th Vic. cap. 65, a Corporation entirely distinct in Law, as we presume also, in fact, from the College which the Trustees of that Academy are authorized to found and establish under the 21st Vic. cap. 57; an Institution entirely under the control of the Wesleyan denomination, and in which, or in any department thereof, or in any religious services held upon the said premises, it is enacted that no person shall teach, maintain, promulgate or enforce any religious doctrine or practice contrary to what is contained in certain Notes on the New Testament, commonly reputed to be the Notes of the Rev. John Wesley, A. M., and in the first four volumes of Sermons, commonly reputed to have been written and published by him. The Varley School, endowed by the late Mark Varley, who bequeathed certain property "To the Trustees of the Wesleyan Methodist Church of the City of Saint John, for the establishment and maintenance of a day school," which devise was confirmed by the 13th Vic. cap. 2, and the property vested in certain persons, viz., the Trustees of said Wesleyan Methodist Church in the City of Saint John, in connection with the British Conference, upon the Trusts, &c., in said Will. The Madras School, which by its Charter is to be conducted according to the system called the Madras system, as improved by Dr. Bell, and in use and practice in the British National Education Society, incorporated and established in England; which National Society established in 1811, was incorporated in 1817, for promoting the education of the poor in the principles of the Established Church throughout England and Wales; the schools established by such Society being purely denominational, in which the children are to be instructed in the Holy Scriptures, and in the Liturgy and Catechism of the Established Church, and, "with respect to such instruction the schools are to be subject to the superintendence of the Parochial Clergyman, and the Masters and Mistresses are to be Members of the Church of England." And the Baptist Academy or Seminary—the Roman Catholic School established in the City of Saint John—the Free School in Portland, under the Board of Commissioners of the Roman Catholic School in Saint John—the Roman Catholic School in Fredericton—the Roman Catholic School in Saint Stephen—the Roman Catholic School in Saint Andrews,—all of which are recognized by name by the Legislature in various Acts, anterior to the 21st Vic. cap. 9, and received specific annual grants from the Public Provincial Funds, outside the Parish School Act.

In the year 1857, and subsequently thereto, the money intended for educational purposes has been annually granted in a lump sum, viz., so much "to provide for certain educational purposes," not specifying any particular school or purpose, as had been theretofore customary. But the Estimates of the Public Expenditure which appear in the Public Journals, shew that appropriations of a similar character have been since annually made. Thus in the year 1867, but before the 1st day of July (the day of the Union), it will be seen by the Journals of the House of Assembly, page 45, that in addition to the amount authorized by Law, the following schools, among others, received special grants, viz:—The Madras School; the Wesleyan Academy; the Baptist Seminary; the Roman Catholic School, Fredericton; the Presbyterian School, St. Stephen; the Roman Catholic School, St. John; the Varley School, St. John; the Roman Catholic School, Milltown; the Roman Catholic School, St. Andrews, male and female; the Roman Catholic Schools, Carleton, Woodstock, Portland, and Bathurst; the Presbyterian School, Chatham; Roman Catholic School, Newcastle; and the Sackville Academy; and in the Journals for 1871, the year the Common School Law passed, are to be found special appropriations for the above Schools; so that it is obvious there were in existence at the time of the Union, and have

been over since in this Province, apart from Schools established under the Parish School Act, denominational Schools, recognized by the Legislature and aided from the public Revenues. But as it is not contended that the Common School Law prejudicially affects any right or privilege with respect to these Schools, which any class of persons had by Law at the Union, it will be necessary to examine minutely and critically the Parish School Act of 1858, under which it is contended 'Rights and Privileges' existed which it is alleged have been so affected. By that Act, the Governor in Council, with a Superintendent appointed by the Governor and Council, constituted the Board of Education; the Province was to be divided into Districts by the Governor and Council, who were to appoint an Inspector for each District; and to the Board of Education was confided the power of making Regulations for the organization, government and discipline of the Parish Schools, and for the examination, classification, and mode of licensing teachers; to appoint examiners of teachers; to grant and cancel licenses, and to hear and determine all appeals from the decision of Trustees; to prescribe the duties of Inspectors of Schools; to apportion all moneys granted by the Legislature for the support of such schools, among the several Parishes, in proportion, &c.; and to provide for the establishment, regulation and government of School Libraries, and the selection of Books to be used; but no Books of a licentious, vicious, or immoral tendency, or hostile to the Christian Religion, or Works on Controversial Theology, were to be admitted. To the Superintendent was confided, subject to the order of the Board, the general supervision and direction of the Inspectors, and the enforcement and the giving effect to all the regulations made by the Board; he was to collect information on Education, hold meetings in different parts of the Province, to which he was to invite the attendance of the Inspectors, teachers, and inhabitants; to address such meetings on the subject of Education, using all legitimate means to excite an interest therein; to cause Trustees, School Committees, and Teachers, to be furnished with copies of the Regulations of the Board of Education, &c.; to adopt measures to promote the establishment of School Libraries; to provide plans for the construction of School Houses, &c.; with power to sue for Books, &c., purchased for the use of Parish Schools, and for all moneys due on sale thereof; and he was required annually to prepare a Report upon the condition of the Schools and School Libraries, with information upon the system and state of Education generally; the amount expended in promoting it; with suggestions, accompanied with a return of moneys received for the sale of Books, &c., to be laid before the Legislature within ten days after the opening thereof. Provision was then made that three Trustees of Schools should be annually elected in each Town or Parish, at the time and in the same manner as other Town and Parish Officers; who should be subject to the same pains and penalties for neglect or refusal to act, or the non-performance of their duties, as other Town and Parish Officers; and when any Town or Parish failed to elect, the Sessions should appoint as in other cases. In incorporated Towns, Cities, or Counties, the Council were to appoint the Trustees. The duties of the Trustees were pointed out: they were to divide Parishes into convenient School Districts; to give any licensed teacher authority in writing to open a school in a District where the inhabitants had provided a school-house and secured salary, and with their assent to agree with such teacher; to suspend or displace teachers for incapacity, &c. They were required immediately after ratifying the engagement of a teacher, and annually thereafter, to call a meeting of the rate-payers of the District, for the purpose of electing a School Committee of three persons; they were to accompany the Inspector in examination of schools; they were at least once a year to examine all schools; to authorize such number of schools in any Town, &c., as the wants of the inhabitants might require; and if they deemed it necessary, authorize the employment of an Assistant Licensed Teacher in any

large school; to apportion among School Districts any money raised by County or Parish Assessment for support, &c. of schools. The election of a School Committee by the rate-payers was then provided for, and their duties pointed out, viz., to have charge of school-house furniture, &c.; to call meetings of inhabitants for providing school-house, books, &c.; to have control of any Library, and appointment of a Librarian, &c.; to receive and appropriate all money raised in the District for providing a Library, &c.; to admit free scholars, and children at reduced rates, being children of poor and indigent parents, &c.

The duties and qualifications of Teachers are minutely detailed in section 8. That section is as follows :—

"8. 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, history, book-keeping, geometry, mensuration, land-surveying, "navigation, and algebra; of the second class—spelling, reading, writing, arithmetic, "English grammar, geography, history and book-keeping; of the third class—spelling, "reading, writing, and arithmetic.

"Every teacher of the first and second class, shall be qualified and enjoined to impart "to his pupils a knowledge of the geography, history and resources of the Province of "New Brunswick, and of the adjoining North American Colonies.

"Female teachers of the first class to teach spelling, reading, writing, arithmetic, Eng-"lish grammar, geography, history, and common needlework; of the second class—spell-"ing, reading, writing, arithmetic, English grammar, geography, and common needlework; "of the third class—spelling, reading, writing, arithmetic, and common needlework.

"Every teacher shall keep a daily register of the scholars, which shall be open for "inspection at all times; a visitor's Book, and enter therein the visits of the Inspectors, "Trustees, and School Committee, respectively; maintain proper order and discipline, and "carry out the regulations made for his guidance.

"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, moder-"ation and temperance, order and cleanliness, and all other virtues which are the orna-"ments of human society; but no pupil 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 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 Douay version, without note or comment."

Provision is then made for Provincial assistance for support of Superior Schools and Libraries; and the subsequent sections of the Act provide for assessment whenever the majority of rate-payers in any County, Parish, District or Municipality determine to provide for the support of Schools therein by assessment, with a provision that any District School supported by assessment shall be free to all the children residing therein. As these latter sections do not touch the questions we are discussing, it is unnecessary to refer to them more particularly. This Act was amended by the Act 26th Vic. cap. 7, which, however, merely gives to the Board of Education authority to order a re-division of Districts improperly divided, and to limit the number of teachers, &c. This, then, was the state of the Law relating to Parish or Common Schools at the time of the passing of "The

British North America Act 1867" and continued so until repealed by 'The Common Schools Act 1871'; and because it is alleged that rights and privileges secured by or enjoyed under this Act have been prejudicially affected by The Common Schools Act, it is contended that the latter Act is void.

The Parish School Act clearly contemplated the establishment throughout the Province of Public Common Schools for the benefit of the inhabitants of the Province generally; and it cannot, we think, be disputed, that the governing bodies under that Act were not in any one respect or particular, 'denominational.' The Board of Education was the Governor and Council, with a Superintendent appointed by them. The Trustees were elected or appointed as the case might be, as *other* Parish officers, and they were put in other respects on precisely the same footing as other Parish officers; and the School Committee was elected by the rate-payers; and in nothing pertaining to the organization, regulation or government of the schools, had any class of persons or denomination whatever, as such, the slightest voice or right of interference. The Board of Education, on behalf of the inhabitants of the Province at large, being responsible for the general working of the system, and the Trustees and School Committees having the management and direction of certain matters, under the Board of Education, in the particular localities for which they were respectively elected, but (without reference) so far as can be gathered from the statute, in any or either case to class or creed.

The schools established under this Act, were then, Public Parish or District Schools, not belonging to or under the control of any particular denomination; neither had any class of persons nor any one denomination—whether Protestant or Catholic—any rights or privileges in the government or control of the schools, that did not belong to every other class or denomination, in fact, to every other inhabitant of the Parish or District; neither had any one class of persons or denomination, nor any individual, any right or privilege to have any peculiar religious doctrines or tenets exclusively taught, or taught at all in any such school. What is there then in this Act to make a school established under it a denominational school, or to give it a denominational character? A good deal has been said as to the intention of the Imperial Parliament in using the words "Denominational schools," in sub-section (1). There seems to be no difficulty in giving a legal construction or definition to these words, if they are read in their ordinary sense. It is a well-established canon of construction, that an Act is to be construed according to the ordinary and grammatical sense of its language, if precise and unambiguous; and it is likewise a rule established by the highest appellate authority, that the language of a statute taken in its plain, ordinary sense—and not its policy or supposed intention—is the safer guide in construing its enactments. See Philpott *vs.* St. George's Hospital, (6 H. Lords Cases, 338; 3 Jur. N. S. 1269.) And in the great Sussex Peerage Case, (11 C. & F. 86: 8 Jur. 793), the Judges declared the law to be, that if the words of the Act are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense; that the words themselves do in such case best declare the intention of the Legislature.

The 5th paragraph of section 8, of the Parish School Act, has been very strongly relied on, as establishing a right in respect to denominational schools. Under that paragraph, the teacher is most certainly enjoined to take diligent care, and exert his best endeavours to impress on the minds of the children committed to his care, *the principles of christianity, morality, &c. &c.* As we think it cannot be denied that the Schools under this Act were to be Public Parish Schools, for the benefit of all the inhabitants of the Parish or District in which they might be established, and the pupils attending the schools would necessarily,

in a vast majority of cases throughout the Province, be children of parents belonging to different denominations; can it be supposed, with any reason, that the Legislature could have intended that the teacher, who might possibly himself belong to a persuasion differing from all his pupils, should impress on the minds of his pupils the principles of christianity, by instructing each one in the peculiar doctrines of the denomination of its parents? Still less, do we think it could have been intended, that the principles of christianity to be impressed, should be those of a denomination to which any of the pupils did not belong, simply because they might happen to be those of a denomination to which the teacher, or even a large majority of his pupils, may have belonged. It seems to us, that in view of the entire scope, object, and policy of the Act, that the duty imposed on the teacher by the 5th paragraph of section 8, was a duty outside of the Educational teaching of the school, (which is specifically provided for in paragraphs 1 & 2), to be performed as opportunities occurred, by precept and example, rather than by any direct or continuous system of dogmatic teaching; that the principles of christianity, honesty, &c., to be impressed, were to be principles of general applicability, interfering with the peculiar religious views of none;—doctrines, precepts, and practices, which all christian people hold in common, rather than the dogmatic teachings or tenets of a particular denomination or sect. This view would seem to be strongly confirmed by the last clause of the 4th paragraph, because, while under the first clause of that paragraph, the duty referred to is to be discharged by the teacher in respect to all the children committed to his care, without any exception in favor of any class or creed; the provision in the last clause is—"but no pupil 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," leaving the duty still on the teacher "to im- "press on the minds of the children committed to his care, the general principles of "christianity, morality, justice, a sacred regard for truth and honesty, &c. &c.;" and the paragraph ends by providing that 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 Parish Schools by Roman Catholic children, "shall, if required by their parents or guardians, be the Douay version, *without note or* "*comment.*" This paragraph, so far from making the schools denominational, or giving any rights or privileges in respect to a denominational school, appears to us to be directly opposed to the idea of denominational teaching in the schools. Does not the very last clause, (that most relied on at the argument), permitting the use of the Douay version, by the addition of the words "without note or comment," shew, that with the Bible read from that version, no denominational views of any kind shall be put forward; and is not the whole in this view entirely consistent with the exclusion from the School Library, and from use, of all works on controversial theology? But it has been said, that under the Parish School Act, schools were in fact established in certain localities where all, or a large majority of the rate-payers, happened to belong to one particular persuasion, in which the catechisms of particular Churches were taught, prayers peculiar to a particular religious body were used, and books inculcating the doctrines, views and practices of a particular denomination were used as Class Books; and that these schools were therefore denominational, and consequently the class of persons belonging to any such denomination, had a legal right or privilege with respect to denominational schools. Assuming what is alleged to have been the case,—though on the point we have no information before us of which we can take judicial notice,—surely it is begging the whole question. How can the mere fact, that in exceptional cases, certain schools under the Parish School Act, drawing Provincial aid, may have been made for the time being, with or without the knowledge or sanction of the Board of Education, denominational; by reason of the

teacher instructing the children exclusively in doctrines of a particular denomination, or using the prayers or books, or daily teaching the catechism peculiar to such denomination, confer any legal right or privilege on any class of persons with respect to denominational schools, or give the denomination whose tenets may have been so taught in any such schools, rights or privileges other than those possessed by all and every the humblest inhabitant of the Parish in which such school existed, free and independent of all denominational connection?

It is not by what the Board of Education, Superintendent, Inspectors or Trustees may have done or allowed to be done under the Act, nor is it from the mode in which the principles of Christianity may have been actually practically taught in one or a hundred schools which may have drawn public money under the Parish School Act, that the question in a legal view must be determined; we must look to the Law as it was at the time of the Union, and by that, and that alone, be governed. Where then do we find any legal exclusive right or privilege conferred on any denomination to any school established or that might be established under that Act; or any right or privilege conferred on any class of persons to deal with such a school as belonging to such persons as a class or denomination; or as being under their control as such; or that as a class they had any right to have taught therein, the peculiar doctrines of their denomination? The assumption that the character or status of the school could be legally altered or affected, or rights gained by reason of the religious opinions or feelings of the inhabitants of a District, or a majority of them, because in such a case Trustees and a School Committee might perchance be elected from a particular denomination, and so that then the school might be made denominational, is in our opinion entirely erroneous. To the Board of Education is entrusted the controlling, governing power. By those rules and regulations, made and ordained within the letter and spirit of the Act, must all acts under them be controlled and governed, wholly independent of the religious opinions of the electors of the District, or of the Trustees elected by them. It appears to us, then, that in passing the Parish School Act, the Legislature contemplated a general system of Education for the benefit of all the inhabitants of the Province, without reference to class or creed; that such schools were to be organized, regulated and governed by public bodies, not owing their existence to, or being in any way under the control of any class or denomination; that the Act made no provision for any schools established thereunder being denominational, and did not provide that any sect or denomination whatever, as such, was in any such schools to have control or precedence, nor in any way give or recognize any right in any class of persons to have in the schools established thereunder, the doctrines, precepts or tenets of their denomination taught as part of the system of instruction, or to have such schools in any other respect denominational in their character. That with reference to religion, the Act simply recognized the duty of impressing on the minds of the pupils the general principles of christianity, honesty, &c., common alike to all christians; and simply required to be secured by regulation the reading of the Bible as the inspired Word of God, accepted by all christians as the basis of their faith, securing always to the Roman Catholics the use, when read by Roman Catholic children, if required by their parents, the version recognized by their Church, but without note or comment; but at the same time, with the greatest apparent caution and scrupulous care, lest the religious principles of any should be interfered with, providing that even with respect to the inculcating the principles of christianity, morality, &c., as indicated, no pupil should 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 so, even with respect to the reading of the Bible, it is to be secured only to those children whose parents and guardians do not object. If, then, the establishment of denominational schools,

or the teaching of denominational doctrines, was not recognized or provided for by the Act, and the Roman Catholics had therefore no legal rights, as a class, to claim any control over, or to insist that the doctrines of their Church should be taught in all or any schools under the Parish School Act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that as a class of persons they have been prejudicially affected in any legal right or privilege with respect to "Denominational schools," construing those words in their ordinary meaning, because, under 'The Common Schools Act 1871', it is provided that the schools shall be non-sectarian?

But it is contended in this case, that the words "Denominational schools" were not used by the Legislature, and should not be construed by us, in their ordinary grammatical sense and meaning, but should have a much broader interpretation. While freely admitting that though the general rule is, that every word must be understood according to its legal meaning, in construing an ordinary, as opposed to, a penal enactment, where the context shews that the Legislature has used it in a popular or more enlarged sense, Courts will so construe the language used; we are at a loss to discover anything in "The British North America Act, 1867," indicating a legislative intention of using the words otherwise than in their ordinary meaning. It is clear enough that the reference in sub-section 2 to separate and dissentient schools in Ontario and Quebec, is especially to schools of Protestants and Catholics; and it is, perhaps, equally clear that sub-section 3 applies only to schools of a like character existing in any of the four Provinces. But we are at a loss to understand why sub-sections 2 & 3 should be held to control or in any way limit or affect a previous distinct enactment, couched in plain and unambigious language, and which, by quite as clear and unequivocal terms, has relation to all classes of persons or denominations, and to all the Provinces of the Dominion; or why, because separate and dissentient schools, as between Protestants and Roman Catholics, not only in Ontario and Quebec, but in any Province in which they may exist at the Union, or be thereafter established, are provided for and protected, therefore we must necessarily infer therefrom, that in using the term "Denominational schools" in sub-section 1, the Legislature intended to legislate only as between Roman Catholics and Protestants, and then also as to schools not necessarily denominational in the ordinary acceptation of the term. We think that the term "denomination" or "denominational" as generally used, is in its popular sense more frequently applied to the different denominations of Protestants, than to the Church of Rome; and that the most reasonable inference is, that sub-section 1 was intended to mean just what it expresses, viz. that "any" that is, every "class of persons" having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants, or Roman Catholics, should be protected in such rights. If it had been intended that the clause was to be limited in its application to Roman Catholics and Protestants, only as dissentient one from the other, and apply to schools other than those usually understood as denominational schools, is it not fair to presume that the Legislature would have used some expression in the sub-section itself indicating such a particular sense, especially as we have seen there were at the Union, in this Province at any rate, strictly denominational schools, both Protestant and Roman Catholic, to which such a clause would be applicable; and for the very reason also, that when dealing with schools as between Protestant and Roman Catholic in sub-sections 2 & 3, the language clearly confines it to those bodies respectively?

But assuming that the term "Denominational Schools" is not to be construed in what has been called its narrow signification, perhaps the most favorable position to assume would be, to read the sub-section 1 as meaning substantially that nothing in any such law shall prejudicially affect any right or privilege which any class of persons, as a denomina-

tion, had by law with respect to schools in the Province at the Union. Let us endeavour to ascertain whether in such a case we would be justified in pronouncing the Common Schools Act 1871, *ultra vires*, and therefore void.

Except in the matter of compulsory taxation, there is no very great difference in principle, that we can discover, between the Parish School Act of 1858 and the Common Schools Act of 1871. The general government, superintendence and control of the schools, are, under both laws, vested in a Board of Education almost similarly composed, the only difference being, that to the Governor and Council and Superintendent, is added the President of the University, under the latter Act; in fact, the power to make Regulations for the organization, government and discipline of the Schools, appointment of Examiners of Teachers, and the power of granting or cancelling licenses, and of making such Regulations as may be necessary to carry into effect the Act, and generally to provide for any exigencies that may arise under its operations, are precisely the same in both;—(See sec. 4, paragraphs 3 to 10, of the Parish School Act, and sec. 6, sub-sections 4 to 8, of the Common Schools Act): and the details are to be carried out by a Superintendent, Inspectors and Trustees, alike substantially under both Acts; and the duties and powers of these officers do not in principle substantially differ. But there are, of course, differences. Those relied on are, that the Common Schools Act has no enactment similar to section 8 of the Parish School Act; that the Parish School Act had no enactment similar to section 58, sub-section 12, of the Common Schools Act; and this section, it is alleged, prohibits the granting Provincial aid to any but Schools under the Common Schools Act; and that by the 60th section of the Common Schools Act, all schools conducted under its provisions shall be non-sectarian—a provision not to be found in the Parish School Act; and it is contended, that the omission in the one case, and the express enactment in the other, prejudicially affect the rights and privileges which the Roman Catholics, as a class of persons and a denomination, had in the schools established or which might have been established under the Parish School Act; in other words, that the rights and privileges which they had under the one, the omission and the enactments referred to, prevented their claiming or obtaining under the other.

With reference to the omission: The Parish School Act no doubt declares that the Board of Education shall secure to all children whose parents do not object, the reading of the Bible, and that when read by Roman Catholic children, if required by their parents, it shall be in the Douay version, without note or comment. Here, we have expressly directed to be secured to all children, what many persons no doubt consider a great right and privilege; and Roman Catholic parents have a great right secured to them, viz., to have, if they require it, a particular version of the Bible read. As to the reason why a similar provision, securing these important rights in which Protestants and Catholics were both interested, was excluded from the Common Schools Act, it is not our business to inquire; what we have to determine is, does this omission make the Law void, if in other respects unobjectionable? We think not. If this was a right or privilege which existed at the Union, the Legislature certainly have not protected it by any express enactment. But is the right taken away? May it not still exist, provided always, it is a right which legitimately comes under sub-section 1, section 93? Because that section declares that nothing in any such Law shall prejudicially affect any such right; and in such case, reading the Common School Law by the light of this section, would it not be the duty of the Board of Education under the Common Schools Act, instead of making Regulation 21, declaring as follows:—that "It shall be the privilege of every Teacher to open and "close the daily exercises of the school by reading a portion of Scripture (out of the "Common or Douay version, as he may prefer), and by offering the Lord's Prayer—any

" other Prayer may be used, by permission of the Board of Trustees; but no teacher " may compel any pupil to be present at those exercises, against the wishes of his parents " or guardian, expressed in writing, to the Board of Trustees;" to secure by Regulation, just what the Board of Education were bound to secure under the Parish School Act of 1858; that is, to make just such a Regulation as the Parish School Act required to be made? We have seen they have precisely the same, and only the same powers to make Regulations, as the Board had under the Parish School Act. By this simple means, the rights of all the children and their parents in the Province—as well Protestant as Roman Catholic—which existed at the Union, would be preserved, and all just cause of complaint on this head removed. Why the Board of Education should have departed from the principle and policy of the Parish School Act, and taken from the parents of all the children of the country—Protestant and Roman Catholic alike—the great boon and privilege of insisting on the Bible being read in schools, as they have done, and should have conferred on the teacher, not only the privilege of reading the Bible or not as he likes, but out of the Common or Douay version—not as the children or their parents may choose, but as the teacher may prefer, though he cannot compel the attendance of the pupils,—is not for us to attempt to explain; we simply point out the fact. But if the right secured by the Parish School Act is protected by 'The British North America Act, 1867,' we fail to see, because the Board of Education may not have made such a Regulation as they ought in such case to have made, or have made a Regulation they ought not to have made, that the action of the Board, or its non-action, can render the Act of the Legislature inoperative.

If the right and privilege falls under section 93, and if there is no power to compel the Board of Education to make such a Regulation, or the Legislature should have inserted a clause in the Common Schools Act, requiring them to do it, is not this just a case where sub-section 4, of section 93 of 'The British North America Act, 1867', applies? viz:—" In case 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, " then as far only as the circumstances of the case may require; the Parliament of " Canada may make remedial laws for the due execution of the provisions of this section." In this connection we may refer also to the 20th Regulation, which, it has been contended, prejudically affects the rights and privileges which the Roman Catholics had under the Parish School Act. This Regulation declares that " symbols or emblems distinctive of any " national or other society, political party, or religious organization, shall not be exhibited " or employed in the school room, either in its general arrangement or exercises, or on the " person of any teacher or pupil." It may be, that the Board of Education have disregarded the general policy of the Common Schools Act, and interfered with the rights of teachers, parents, and children, in excluding from the schools alike teachers and pupils, who may exhibit on their persons, in dress or ornament, symbols or emblems distinctive of ayn national or other society, political party, or religious organization: for, however clear the right of the Board of Education may be to make regulations necessary for the good government and discipline of the schools; to make arbitrary, restrictive regulations, as to the dress or personal adornment of the teachers and pupils, or which are calculated, unnecessarily to interfere with their feelings, national, social, or religious, in matters not calculated to give any just cause of offence to others, or to interfere with good order in the schools, is quite another question. And while it is by no means clear to us, that any power exists in the Board of Education, under the Common Schools Act, by regulation, to deprive teachers, parents, and children, of their right of access to the Free Schools of the country, to the support of which they, and all others, are forced to contribute, unless they submit to such regulations; and though the assumption of such a power of practical

expulsion by the Board of Education, raises a question involving important and delicate rights,—rights which, in this land of civil and religious freedom, few may be willing to see infringed—or at any rate, raising discussions which must be unpleasant to those engaged in them, and calculated to result in consequences which can scarcely fail to produce acrimonious feelings, and in the end be injurious to the cause of Free Education, which we must presume the Regulation objected to was intended to further; all we can say is, as the case stands, the Regulations are not before us in such a way that we can deal with them, and therefore we are not called upon to express any decided opinion as to their validity, because the constitutionality of the Act cannot, in our opinion, be affected by any regulation made under it, there being nothing unconstitutional in the Act itself, that we can discover.

The second objection is easily answered. The provision in sec. 58, sub-sec. 12, of The Common Schools Act, declaring that no public funds shall be granted, would seem to apply to the schools particularly referred to in the preceding part of that section, and not to all schools. But, if it was intended to apply generally to all schools, as Mr. Duff's argument assumes, what does it amount to? It cannot take from the Legislature the right to make such grants. Thus, we see in the Estimates of the year 1872, grants were recommended by the Lieutenant Governor, and no doubt made, for all the denominational schools before specifically referred to, (see Journals of House of Assembly, page 124); and if such a clause was *ultra vires*, and we declared it void—*cui bono?* It would not affect the other parts of the Act, and what would practically be attained? The Legislature could, whether the clause stands or is declared void, do just as it pleases about granting or withholding the public funds.

But it is contended that the 60th section, declaring "that all schools conducted under "the provisions of this Act shall be non-sectarian," prejudicially affects the rights and privileges which the Roman Catholics, as a class, had in the Parish Schools at the time of the Union. It cannot be denied that to the Provincial Legislatures is confided the exclusive right of making laws in relation to Education; and that they, and they only, have the right to establish a general system of Education, applicable to the whole Province, and all classes and denominations, provided always they have due regard to the rights and privileges protected by section 93 of The British North America Act, 1867.'

Now, what in this case, is the right or privilege claimed to have been prejudicially affected? Is it a legal right or privilege that could have been put forward and enforced by the Roman Catholics, as a class, under all circumstances and in every Parish or Common School; or is it a legal right confined to the Roman Catholics as a body; or does it belong equally to all and every of the other denominations of christians in this Province, and capable by them of enforcement; or, on the contrary, was it not the mere possible chance of having religious denominational teaching in certain schools, dependent entirely on accidental circumstances; as, on what might happen to be the religious views of the majority in a Parish, and then on the accidental result of the election of Trustees and School Committee, and on the views of the parties so elected, as to religious denominational teaching, and their willingness to permit it in the schools, (admitting that the Trustees or Committee had any discretion in the matter, which perhaps is more than doubtful); was it not also dependent on the Board of Education, who had the general controlling power? If, dependent on circumstances such as these, how can it be considered such a legal right as could have been contemplated by the Imperial Parliament in passing the 93rd section of 'The British North America Act, 1867'? Where is there any thing that can, with any propriety be termed a legal right? Surely the Legislature must have intended to deal with legal rights and privileges. How is it to be defined—how enforced?

It by no means follows as a necessary legal consequence, that because a majority of the inhabitants of a Parish or School District may belong to a particular persuasion, they would necessarily vote for Trustees favourable to denominational teaching, nor could they be compelled by any legal process so to vote; nor does it follow that Trustees when elected even by a majority of one denomination, would necessarily prove favourable to denominational teaching; and by what legal process could they be constrained to assent to its introduction in the schools? And again, suppose up to this point all were favourable, might not the whole scheme be ignored by the Board of Education; and how then could any class of persons, as such, no matter to what denomination they may belong, claim of right to control or direct the acts or doings of any of these parties; or how could Electors, Trustees, School Committees, or the Board of Education, be compelled to make any school in any sense denominational, or in other words, to confer on any such class, denominational rights? Surely the rights contemplated, must have been legal rights: in other words, rights secured by law, or which they had under the law at the time of the Union. If any such existed they must have been capable of being clearly and legally defined, and there must have existed legal means for their enforcement, or legal remedies for their infringement; for it is a clear maxim of law, that *ubi jus ibi remedium*. It was said long ago in a celebrated case, that if a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is aggrieved in the exercise and enjoyment of it; and that it was indeed a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. What possible legal means could any denomination have invoked under the old Parish School Act, to compel any one school to be made denominational, or to require and insist that in any one school, denominational tenets, doctrines, precepts or practices, should be taught or used? But then it was repeatedly urged upon us, that under the Parish School Act, circumstances might and very often did concur, where schools might, and in numerous cases did, become denominational; but that by reason of section 60 of the Common Schools Act, such was not now possible. The answer is simply this: The inability of a class of persons to have under the Common Schools Act, that which possibly they might under certain exceptional and accidental circumstances have had under the Parish School Act of 1858, but which they had no right to insist on having, is a damage not occasioned by any thing which the law esteems an injury,—a kind of damage termed in law, *damnum absque injuria*, and for which there is no remedy. And so, in this case, as there was no legal right to have denominational schools or denominational teaching, there is no injury in legal contemplation committed, by the Legislature dealing with the question in such a manner as to prevent the possibility arising, and consequently no right to have the action of the Legislature abrogated. It may be a very great hardship, that a large class of persons should be forced to contribute to the support of schools to which they are conscientiously opposed, or be shut out from what they have hitherto under certain circumstances enjoyed, and be without remedy; but by any such considerations, Courts of Justice ought not to be influenced: hard cases, it has been repeatedly said, are apt to make bad law; and it has also been justly remarked, that if there is a general hardship affecting a general class of cases or persons, it is a consideration for the Legislature, not for a Court of Justice

FISHER, J.

I concur in the judgment of my brethren, as to the constitutionality of The Common Schools Act 1871; but as there are some sentiments in it in which I do not agree, I have thought in a matter of so much delicacy and importance, it was better to read the judgment that I had written, than attempt to qualify opinions which my brethren had so fully considered.

The right to impose this Assessment is objected to on the ground that it includes a sum for the support of schools under the authority of the Act relating to Common Schools, 34 Vic. cap. 21, which it is contended is unconstitutional; that the Legislature have no power to pass it, because it contravenes the exception in the Act of Union.

By the 93rd section of 'The British North America Act, 1867,' it is declared—"That in and for each Province, the Legislature may exclusively make laws in relation to Education, subject and according to the following provision :—

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

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

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

"(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."

The exclusive power of legislating upon the subject of Education, is thus conferred upon the Legislature of each Province, subject to the reservation of the rights of any class of persons with respect to Denominational Schools.

Every one acquainted with the history of the Provinces which comprised Canada, before the Union, knows the reason for the insertion of some of the provisions of this section. It was found to be the only mode of solving a question that had caused serious difficulty with the Government and Legislature of that Province.

Paragraphs two and three were constructed to soothe and settle these difficulties, and at present only apply to that Province, now consisting of Ontario and Quebec, where schools were in operation at the Union, answering the description given them in these paragraphs.

Whether the fourth paragraph applies to any other law than such as is referred to in the third paragraph, it is not necessary to consider, as the constitutionality of the School Act depends entirely upon the meaning of the first paragraph.

The simple question for solution is, does The Common Schools Act 1871, prejudicially affect any right or privilege with respect to Denominational schools, which any class of persons had by law in the Province at the time of the Union? It is not merely a right or privilege. A denominational right or privilege, of itself, if any such existed, would not alone make The Common Schools Act unconstitutional. It must be a right or privilege with respect to a denominational school, which a class of persons had by law at the Union, which is prejudicially affected by this Act, to render it unconstitutional.

It appears to me, that the first inquiry is—What is a denominational school? In my opinion, it is a school under the exclusive government of some one denomination of christians, and where the tenets of that denomination are taught. But assume that a school

answering either of these requisites is a denominational school, and this is the lowest ground upon which it can be put, and then examine the laws in force at the time of the Union, to ascertain if any such school then existed by law, and if the right of any class of persons therein has been prejudicially affected by The Common Schools Act.

There were denominational schools in existence at the Union, such as the Varley School in Saint John, the Sackville Academy, the Madras School, and the like, but they are not touched by The Common Schools Act 1871; they remain in the enjoyment of all the rights they had at the Union.

The Act 20 Vic. cap. 9, intituled "An Act relating to Parish Schools," with some unimportant amendments not affecting the present question, was in force at the Union. As it has been superseded by The Common Schools Act 1871, which is objected to, we must refer to its provisions to ascertain whether it authorized any denominational school; for if it did not, then the Act under consideration has not in any of its provisions prejudicially affected any right or privilege any class of persons enjoyed at the Union.

The very title of the Act proclaims its unsectarian character as fully, to my mind, as the positive enactment in the Act of 1871, that the schools conducted under its provisions should be non-sectarian—a useless provision in an Act which alone provided for the establishment of such schools.

Parish Schools, that is, schools in and for every Parish in the Province, according to the political division of the Province into Counties, Towns, and Parishes, distributed and sustained by public aid according to the population and extent of each Parish,—the number and classes of the schools must, in the very nature of things, be other than denominational.

I will now refer to the provisions of the Act, and see if there is any authority for the establishment of a denominational school under it, or any countenance in the Act for such a school.

The Governor in Council appoints the Superintendent of Schools, who, with the Governor and three members of the Executive Council, constitute the Board of Education. The inspection of the schools is done altogether by political agency. The Governor in Council is authorized to divide the Province into four Districts, and appoint one Inspector for each District.

The Board of Education, a purely political body, make rules and regulations for the organization and government of the schools, and such other regulations as may be deemed necessary to carry the Act into effect. There was no restriction whatever upon the power of the Board in this respect. The Board regulates the mode of licensing, examining, classifying, and paying the teachers, and prescribes the duties of the Inspectors.

The Superintendent, a political officer, has the general direction and supervision of the schools, subject to the order of the Board.

Each Parish was to be divided into School Districts by three Trustees annually elected by the rate-payers, at the same time and in the same manner as other Town or Parish officers were elected, and subject to the same penalties and disabilities, with the same provision for appointing them, in case of failure in the election. They employ the Teachers, and may dismiss them, subject to an appeal to the Board of Education. They are to examine the schools, and apportion the money raised by assessment, when so raised, amongst the different schools.

Each school was under the immediate supervision of a School Committee elected annually by the rate-payers of the District. They were empowered to admit free scholars, and children of poor parents at a reduced rate.

The law also provided for a Superior School in each Parish, thus also supplying the means for higher education.

The Teachers, both male and female, were divided into three classes, with an appropriate allowance to each class from the Provincial Treasury, and with duties, as to the subjects taught, prescribed in the Act for each class.

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 any thing of a denominational character is referred to in any way; and it shews how jealous 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 School, the wants of higher education were provided. The whole machinery of the Act is designed to make the schools common to the child 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 contribution or tuition fee. It contains provision for voluntary assessment in the District, Parish or County where the rate-payers 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 object. Neither class, creed, nor colour, affect or influence the one more than the other. The only qualification for the electors of any officer is that they are to be rate-payers 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 authorizes; 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 on controversial theology; while it left the inhabitants free to elect their local agents, who should employ the 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.

What sort of denominational school would that be, where the master would not be aided in his dogmatic teaching by the writings of men of his own faith? When a denominational school is established, how strictly this is provided for. Take any one of the Acts on our Statute Book, and examine its provisions. I will refer to the Act incorporating the Trustees of the Wesleyan Academy at Mount Allison, Sackville, (12 Vic. cap. 65); the 11th section is as follows:—

"No person shall teach, maintain, promulgate or enforce any religious doctrine or practice in the said Academy, or any department thereof, or in any religious service held upon the said premises, contrary to what is contained in certain Notes of the New

Testament, commonly reported to be the Notes of the said Rev. John Wesley, A. M., and in the first four Volumes of Sermons, commonly reported to have been written and published by him."

Take the Charter of the Madras School, or any other Act, and the same strict provision for dogmatic teaching is made. I pass by the Colleges, which were referred to by the Counsel on the argument on this rule, as not material to the inquiry, if they are within the category contended for.

I can hardly imagine any stronger illustration of the principle that pervades the whole Act relating to Parish Schools, than the language of the eighth paragraph of the fourth section, which thus restrains the large legislative power of the Board of Education. It is as follows :—

"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."

It has been urged that the sixth paragraph of section 8, countenanced denominational teaching. I think no one can read that section, and fail to discern that it enacts the very contrary. The words of the paragraph are :—

"Every teacher shall take diligent care, and exert his best endeavours to impress on 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, moderation and temperance, order and cleanliness, and all other virtues which are the ornaments of human society."

Surely it cannot be disputed that this can be done without any denominational teaching, or, in the language of the statute, without entering upon controversial theology.

There are certain great fundamental principles of christianity, common to all, that may be enforced, without trenching upon debatable ground. Take the Sermon on the Mount, or any of the lessons of the Great Teacher himself, for example.

To avoid any abuse of this duty or privilege of the teacher in the Parish Schools, the Legislature proceeds further to enact—"but no pupil 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." Here is a positive enactment against denominational teaching.

Knowing it to be possible for a designing teacher, under color of the authority to impress upon the minds of the children the principles of christianity, and all other virtues, stealthily to teach doctrines of a denominational or sectarian character, and to protect the child from the influence of such teaching, the parents are empowered to interfere and withdraw the child from any such teaching, or from joining in any act of devotion having such a tendency.

The paragraph then proceeds thus—"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."

What is there denominational in thus inculcating the principles of christianity, and all other virtues which are the ornaments of human society? What better mode could be adopted than by reading portions of the Bible? It certainly is not a denominational Book. It is the common standard of faith and practice to all christians. To it they all appeal. Where are such ennobling thoughts as in the Bible? It is said to be an historical fact, that when the question of reading the Bible in the Common Schools of one of the Cities on this Continent was debated, the Jews voted for it, on the ground that it was

well adapted to the instruction of children, because of the sublime principles of morality it contained.

Though the Bible is regarded as the great charter of our salvation, as the revelation of the will of God to man, eminent Divines in one branch of the Church Catholic object that some words, some expressions, some sentences, are incorrectly rendered in our ordinary English version, and recognize another version as being a more correct interpretation of such words, expressions, and sentences.

The Legislature, with the same object of preventing any denominational right, enacts—"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; the very words "without note or comment," of themselves, are significant proofs of the intention of the Legislature.

Assuming that the Bible is a denominational book, and I cannot think any one will seriously contend that it is, and that this provision created a right—a denominational right if you please—that will not help the *ultra vires* argument, because if it were so, it is a right or privilege which a class of persons had by law at the Union, to have the Bible read in a Parish School, not in a Denominational School, and that is not a right secured by 'The British North America Act, 1867,' even if it existed.

I have endeavoured to ascertain the true construction of the Act relating to Parish Schools, as the only Act affecting the question; I include the amendments, which are not important. Every other Act which confers upon any denomination a right or privilege with respect to Denominational Schools, is left unrepealed, so that no right or privilege enjoyed by any class of persons under any such Act is prejudicially or in any way affected by the Act under consideration.

I will now refer very briefly to the 34th Vic. cap. 21, intituled "An Act relating to Common Schools." It is substantially the same as the Act of 1858, relating to Parish Schools.

The Board of Education is the same, with the addition of the President of the University. It has the same large powers.

The duties of the Superintendent are the same.

The number of Inspectors is increased, with smaller Districts for each, but with duties very similar to what they discharged under the old law.

The Trustees are appointed in the same manner as under the old law, and discharge much the same duties, including the duties of the School Committee.

The Teachers are classified and paid as in the old law. Superior Schools are provided for, and Libraries, upon the same principle. The only real difference that I can discover, arises from the different modes of supporting the school.

Under the Act of 1871, the portion of the support furnished by the inhabitants is raised by assessment; and in the machinery and provision necessary for working this out, and the different modes of paying and supporting the schools, that it involves, is the only difference. In other respects, this Act provides for the attainment of the same object by the same means.

It is said that there is no provision requiring the reading of the Bible in the schools. The Board of Education may by Regulation provide for it, as in the Act relating to Parish Schools. If it were otherwise, it would not help the *ultra vires* argument, unless the schools could be shewn to be denominational.

Upon the argument, it was contended that some of the Regulations interfered with the rights of a class of persons. I confess I was unable to discover the bearing of that argument upon the question. How, if the Law were good, a bad Regulation—if such there

was—would affect it? Assuming that this contention is correct, and that it prejudicially affects the right that a class of persons had at the Union, such a right, if it existed, is not saved by 'The British North America Act, 1867;' because it would be a right or privilege with respect to a Parish School, and not to a denominational school.

I cannot discover that the Regulations have any thing to do with the question of the power of the Legislature to pass the Act, or can form any guide in the interpretation of it. It appears to me that under either of the Acts of 1858 or 1871, it was competent for the Board of Education to make any of the Regulations referred to; whether they exercised their powers wisely or unwisely, under the Act of 1871, is another question.

The propriety of the Regulations objected to is a question of public policy, upon which I am not called upon to express an opinion. I may, as an individual, entertain a very strong opinion as to its policy As a Judge, all I feel called upon to do is to consider its legality, and for myself, on that point, I entertain no doubt.

I am therefore of opinion that the Rule should be discharged.

WETMORE, J.

While fully concurring in the opinion of my learned Brethren as to the constitutionality of 'The Common Schools Act 1871,' I do not wish to be understood as expressing a participation in any doubt whatever as to the Regulations of the Board of Education.

I think the only question properly before the Court is, as to the Act itself, and not as to the Regulations. We are only called upon to decide whether or no, the Schools Act, or any part of it, is *ultra vires;* and upon the decision, the Assessments, to set which aside the application is made, are to be affected.

If the Act itself is not *ultra vires*, I do not see how the promulgation of any Regulation, even supposing it to be one which the Schools Act would not warrant, or to be in violation of the provision of Section 93, sub-section 1, of 'The British North America Act, 1867,' can affect the case, any more than Assessors acting in violation of the law under which an Assessment is imposed, would affect the law authorizing the Assessment. In such case, if the Assessment is imposed in a manner not warranted by law, parties aggrieved would have their remedy for obtaining relief; and so, with reference to a Regulation sought to be established by the Board of Education If that body should exceed the power given by law in such case, the Regulation would not have the support of law to uphold it, and therefore could not be maintained; but the law, nevertheless, would remain in full force and authority.

The application to this Court is simply to set aside an Assessment in consequence of the invalidity of the Law; it does not touch the Regulations; and though they have been referred to by Counsel in the argument, it does not seem to me they are before us in such a way as to call for a decision, or the expression of an opinion upon any one of them. Indeed, I do not see that a most positive and direct expression by the Court, as to the legality or illegality of any of the Regulations, would in the slightest degree affect the constitutionality or unconstitutionality of the Law; and I therefore purposely abstain from expressing my opinion upon any one of the Regulations. Should a question arise respecting the Regulations, or should a decision upon them be necessary for any other matters before the Court, then, of course, I would be required to express my opinion; until it does arise, I decline doing so: to use an expression of Cockburn, C. J. in Rimini *vs.* Van Praagh, (L. Rep. 8 Q. B. 4,) "It will be time enough to do so, when the necessity arises."

Rule for a *Certiorari* discharged.