THE WARDEN AND COUNCIL OF THE TOWN OF DARTMOUTH. ... } APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

1882
*Nov. 7.
1883
*April 28.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mandamus, Rule nisi for—County School Rates for 1873-78—*Rev. Stat., ch.* 32, *sec.* 52, *N. S.*

A mandamus was applied for at the instance of the sessions for the county of *Halifax*, to compel the warden and council of the town of *Dartmouth* to assess, on the property of the town liable for assessment, the sum of $16,976 for its proportion of county school rates for the years 1873-78, under sec. 52 of the Educational Act, R.S.N.S., ch. 38.

The Supreme Court of *Nova Scotia*, without determining whether the required assessment was possible and was obligatory when the writ was issued, made the rule *nisi* for a mandamus absolute, leaving these questions to be determined on the return of the writ. On appeal to the Supreme Court of Canada, it was

Held (*Strong* and *Gwynne*, JJ., dissenting) that the granting of the writ in this case was in the discretion of the court below, and the exercise of that discretion cannot at present be questioned.

Per *Ritchie*, C. J.: That the town of *Dartmouth* is not, but that the city of *Halifax* is, exempted by ch. 32 R. S. N. S. from contribution to the county school rates.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* making absolute a rule *nisi* for a writ of mandamus against the appellants.

The proceedings in the above matter were commenced by a rule *nisi*, taken out at the instance of the sessions for the county of *Halifax*, for a writ of mandamus to compel the warden and council of the town of *Dartmouth* to forthwith assess upon the property within the said town liable to assessment, the sum of fifteen thousand nine hundred and seventy-six dollars, for

*PRESENT:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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school purposes, and collect the same and pay it over to the treasurer of the county of *Halifax*.

After argument of said rule *nisi*, the Chief Justice, in March, A.D. 1880, delivered the judgment of the court, *James*, J., dissenting.

Subsequently, in the month of April, A.D. 1881, the Chief Justice delivered a further and final judgment of the court, making absolute the rule for mandamus, *James*, J., dissenting.

From this rule the appellants instituted the present appeal.

The facts of the case and the arguments of counsel are fully set forth in 3 *Russell* and *Chesley* Reports (1), and in *Russell* and *Geldert's* Reports (2).

Mr. *Rigby*, Q.C., and Mr. *Thompson*, Q.C., for appellants.

Mr. *Gormully* for respondent.

RITCHIE, C.J.:

This matter came before the Supreme Court of *Nova Scotia* on a rule *nisi* for a mandamus to the town council of *Dartmouth*, at the instance of the sessions for the county of *Halifax*, to compel the town council to assess for school rates on the town $15,976, and to pay the same over to the treasurer for the county of *Halifax*. On 4th April, 1881, the Chief Justice delivered the judgment of the Supreme Court of *Nova Scotia*, making the rule absolute. The sessions claimed to base their proceedings on sections 52 and 54 of chap. 32 rev. stat. of *N. S.*, "Of Public Instruction."

In *Nova Scotia*, outside of the city of *Halifax*, the management of the public instruction of the country is by the instrumentality of commissioners of schools and trustees, and the mode of support is thus provided for by sections 41, 42, 44 and 45:

(1) P. 147. (2) P. 402.

There shall be paid annually from the provincial treasury for common schools throughout the province, the sum of one hundred and seventeen thousand dollars; out of which sum there shall be paid to the city of *Halifax* seven thousand five hundred dollars. After deducting such sum of seven thousand five hundred dollars, the balance shall be distributed between the several counties of the province, according to the grand total number of day's attendance made by all the pupils in the public common schools throughout the province. If in the distribution of the before named annual grants, the result shall exhibit, for any county, a sum less than the provincial grant for the corresponding term of 1872, less the special grant to poor sections, the council of public instruction is authorized to grant to such county such additional sum as may be requisite to make the sum total equal to the provincial grant for the corresponding term of 1872—less the special grant to poor sections—provided always, that when such extra or supplementary aid is given, the decrease in the attendance shall not be more than 10 per cent. of the grand total day's attendance for the county for the corresponding term of 1872. The distribution of the moneys payable under the authority of this chapter, to the respective counties, for common schools, shall be made semi-annually through the inspectors, to the respective teachers and assistants lawfully employed by trustees, according to the number of days the schools have been in session, and the grade of license held.

Then we have section 52 which gives rise to the controversy in this case. It is as follows:—

52. The clerk of the peace in each county, except as hereinafter provided in relation to the city of *Halifax*, shall add to the sum annually voted for general county purposes at the general sessions, a sum sufficient, after deducting costs of collection and probable loss, to yield an amount equal to thirty cents for every inhabitant of the county, according to the last census preceding the issue of the county rate-roll; and the sum so added shall form and be a portion of the county rates. One-half the sum thus raised shall be paid semi-annually by the county treasurer, upon the order of the Board or boards of school commissioners for the county.

And sec. 53 provides:—

53. One-half of the amount provided to be raised annually, as aforesaid, shall, at the close of each half year, be apportioned to the trustees of schools conducted in accordance with this chapter, to be applied to the payment of teachers' salaries; and each school shall be entitled to participate therein, according to the average number

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of pupils in attendance and not the length of time in operation, but shall receive no allowance for being in session more than the prescribed number of days in any one half year.

And section 54 provides, when a majority of ratepayers of any section determine that an extra sum over and above the sum provided by the province and county is required, how same shall be raised.

The regulations with respect to public instruction in the city of *Halifax* are quite distinct from and independent of the rest of the province. Section 84 provides :—

The City of *Halifax* shall be one school section, and there shall continue to be thirteen commissioners of schools for such city, appointed (seven by the Governor in Council, and six by the City council) under the provisions of sec. 1 of chapter 9, of the Acts of 1868, as modified by chapter 27 of the Acts of 1869, and the thirteen commissioners thus appointed shall constitute a board of school commissioners for the city of *Halifax*, and such board shall be a body corporate, and may exercise all the powers and perform all the duties of trustees of public schools in and for the city.

Section 85 provides how vacancies shall be filled.

Section 86 prescribes the duties of the board of commissioners :

86. The board of commissioners shall take all necessary steps to provide sufficient school accommodation, and shall furnish annually to the superintendent of education a report of their proceedings under this chapter; also, returns of all schools subject to their control, and a statement of the appropriation of all moneys received and expended by them under the provisions of this chapter.

Section 87 provides that the board of commissioners may aid any city school, provided it be a freeschool :

87. The board of commissioners are authorized to co-operate with the governing body of any city school, on such terms as the board shall seem right and proper, so that the benefit of such schools may be as general as circumstances will permit, and the board may make such allowance to any such school out of the funds under their control as shall be deemed just and equitable, but no public funds shall be granted by them in support of any school, unless the same be a free school.

Section 88 provides for the assessment of the sum required by the commissioners for school purposes:

88. On request of the board of commissioners specifying the amount required in addition to the sums provided from the provincial treasury, for the yearly support and maintenance of the schools under their charge, the city council shall be authorized and are hereby required to add a sum sufficient, after deducting costs of collection and probable loss, to yield the amount so specified by the board, to the general assessment of the city, to be levied and collected from the inhabitants thereof, and from property lying within the county, the owners whereof reside in the city; and, on the payment of the required fee, the city assessors shall furnish to the trustees of *Dartmouth*, or other school section, and the clerk of the peace for the county shall furnish to the city assessors, the information necessary in order to give effect to this provision. Any person who may have been assessed, both in the city and in *Dartmouth*, or any of the school sections in the county, in respect of such property, shall be entitled to receive back the amount paid by him either in the city or in *Dartmouth*, or other school sections, as the case may be, in accordance with the foregoing construction of the law. The sum so assessed shall be paid quarterly by the city treasurer to the board, upon the written order of the chairman or vice-chairman. Provided, however, that the commissioners shall not have power to assess the city for any greater sum than sixty thousand dollars in any one year, without the consent of the Governor in Council, given at the request of such commissioners.

Section 89 defines the objects to be provided for out of assessment:

89. The objects to be provided for by the board of commissioners out of the sum so assessed shall be the salaries of teachers and assistants, and of the secretary of the board, the leasing of lands and buildings for school purposes, the repairing and improving of grounds and buildings, the cleaning, fuel and insurance of school houses, the purchase of prescribed school books, the interest payable on debentures issued by the board, and all other expenses required in the due execution of the different powers and trusts vested in the board by this chapter.

Sections 90 and 91 give the board power to borrow money for sites and buildings, and to issue debentures.

Section 98 provides for payment over by city treasurer of all moneys assessed to board, as follows:

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98. All moneys assessed on the city of *Halifax* for educational purposes, and in the hands of the city treasurer, shall be paid over by him to the commissioners of schools for the city of *Halifax* at the time and in the manner hereinbefore provided.

And section 100 provides as follows:—

100. The provisions of this chapter, except as hereinafter specified, shall apply to the city of *Halifax*, provided that the pupils of any ward shall be entitled to school privileges in any other ward.

The contention on behalf of the town of *Dartmouth* is, that that town is exempt from the tax of 30 cents a head, and that, if liable, *Halifax* is not exempt but equally liable, and if so, the amount *Dartmouth* would be entitled to receive would be more than she would have to contribute.

With the justice or injustice, policy or impolicy, of exempting or making *Dartmouth* liable, we have nothing to do. These are considerations with which the Legislature alone has to deal. All we have to do is to ascertain and determine the true construction and meaning of the Acts which have been passed by the Legislature of *Nova Scotia* in reference to this matter.

On the 22nd March, 1880, Chief Justice *Young* delivered the judgment of the Supreme Court, affirming the liability of *Dartmouth* to contribute a sum equal to 30 cents a head, and, after giving a decided opinion on this point, with a view to the Legislature dealing with the matter and reconciling what the court seemed to consider the apparent contradiction in the Act fixing this liability on the town of *Dartmouth*, and the Act providing that the sum to be voted for the estimates, including ordinary and extraordinary expenses, should not exceed in any year the sum of $15,000, the court suspended, in the meantime, its final determination on the rule.

Mr. Justice *James*, who dissented from this judgment and put forward very strongly the injustice and wrong

that would be inflicted on *Dartmouth*, if the burthen of the 30 cents a head was imposed on that town and *Halifax* was exempt therefrom, after referring to matters unquestionably for legislative rather than judicial considerations, says:

I shall now briefly consider the question whether the town of *Dartmouth* is liable in law for the amount claimed, or any part of it, which is, in fact, the main point in this case. This question has been so fully discussed by the learned Chief Justice in an opinion which, so far as it defines the natural construction of the statutes, I entirely concur, that not many words will be necessary from me on that point. There can be no doubt that the framers of the *Dartmouth* Act of incorporation intended and expected that their town would be exmpted, as the city was supposed to be. There are several features of the Act which indicate that that was their intention. But was that the intention of the Legislature, as expressed in the Act of incorporation? In considering the question, I think I am bound to require that any language that would exempt one locality from the payment of a tax imposed upon the whole of the rest of the Province, with at most but one exception, should be clear and explicit; but I find no clear and explicit words in the statute to this effect. On the contrary, I find, in sections 36 and 37, language which appears to me totally inconsistent with such contention, keeping in mind that the schools at each section are to be supported from these sources, viz:—the provincial grant, the county assessment and the local assessment. I observe that section 36 is as follows:—After the passing of this Act the town shall be set off as a separate school section and the town shall have the expenditure of all school rates raised within its limits for the schools of the town, as also of all Government and school grants for such a town, which grants shall be paid to the town.

He then proceeds:

Here we find the three sources of educational income clearly, as I consider, specified in detail, viz:—1. Local assessment; 2. Government grants; 3. School grants. And the two latter grants are to be "paid to the town." Now we know, of course, that the second of these—the Government grant—means the grant out of the provincial treasury. But what is the third—the school grant—if not the share allotted to the town out of the county assessment? I can conceive of no other meaning for the words, and therefore the town is to receive and expend its proportion of the county assessment. It is not contended that the town is to receive a proportion of this fund without contributing to it. That would be taxing the poorer districts of the

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county to assist the richer. And I am sure the people of *Dartmouth* have no such desire, and would never ask such a thing, and their counsel have raised no such contention at the argument. All they ask and all their counsel have contended for is, that if the city of *Halifax* is exempt, *Dartmouth* should also be exempt, and this they are in all justice and equity bound to insist upon, not only in their own behalf, but in behalf of the rest of the county, who, like themselves, are unjustly taxed to subserve the interests of the city of *Halifax*. It is clearly the interest of *Dartmouth* that neither should be exempt.

Again, in section 37, I find that for the two adjoining districts, included in the town for school purposes by this section, the council shall be paid the proportion of Government school grants payable in such districts, and to impose and levy the county school assessment and all school assessments in such districts, and collect the same in the same manner as if such districts formed part of the town. I find nothing in the Act to counteract these explicit statements. I can only say that if the framers of the Act intended, as I have no doubt they did, to exempt the town from the county assessments, they have made a most unfortunate use of the English language. I hope the town will no longer persist in an expensive and hopeless contention in the courts of law to escape this assessment, which the city and *Dartmouth* ought both to be willing to bear, but look to the Legislature to remedy in another way the severe taxation inflicted on them by the law, and which they are quite unable to bear.

He then says:

It is indispensable, in my view of the law and facts, that I should decide, so far as I am able, upon the arguments presented to us, whether the city of *Halifax* is exempt or not.

While I think he has very clearly established his first proposition as to the liability of *Dartmouth*, I think he has failed to show that *Halifax* is not exempt.

If the effect of a law exempting *Halifax* has all the obnoxious characteristics which Mr. Justice *James* attributes to such an enactment, viz., injustice and inconsistency, and being unfair, partial and oppressive, and violating the first principles of natural justice and perpetrating a moral wrong, these are considerations most proper to be brought to the notice of the Legislature, and would, we may readily assume, be duly dealt

with by the Legislature; but it is just possible that that body might have discovered good reason for coming to the conclusion that, without being open to any of those grave imputations, it was quite compatible with sound policy and honest and just legislation that, while *Dartmouth* was not, *Halifax* should be exempt, as is to be inferred was the view of the rest of the court. The brother judges of Mr. Justice *James* agreed with the Chief Justice, that suspending their final decision on the rule *nisi* for a mandamus was, under the circumstances, the course which met the necessity of the case, and Mr. Justice *James* adds:

The matter will doubtless now be brought before the Legislature by one or other of the parties concerned, and it will then be judged on the principles of right and justice. Our duty is to expound the law. If the law is unjust we cannot alter it; but those who make the laws have not only the power, but it is their solemn duty to amend them, if they are unjust or inequitable, as I am satisfied the law on this question now is, if the construction which has heretofore been put upon it is correct.

The matter came again before the court on the 4th of April, 1881. The Chief Justice delivered the judgment of the court as follows:

The controversy in this case has been twice before us, and judgments pronounced as they are reported in 3 *Russell & Chesley*, 187, and 1 *Russell & Geldert*, 402.

The demand by the sessions, and now by the municipality of *Halifax*, is for the accumulated amounts of school rates for five years, being in all the sum of $15,976, as set out in the rule *nisi* for a *mandamus* granted 1st February, 1879.

Upon full enquiry the court declared that, in their opinion, the law was entirely with the sessions, and that the town of *Dartmouth* was liable for this large sum. But in consideration of the delay and of an Act passed in 1877 at the instance of the defendants without reference to this liability, having given a decided opinion on the main question, and desiring that the Legislature should have an opportunity to deal with it, we suspended in the meantime our final determination on the rule.

The counsel for the plaintiffs have now informed us that no legis-

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lative action has been had in the matter, and they apply for a final judgment. The objections to this form of proceeding were argued at large, and I need not repeat the cases and authorities cited in our last judgment.

There is here a right we have determined, and these are parties applying who have a real interest in the subject-matter and are acting *bonâ fide*.

Whether the required assessment is possible and was obligatory when the writ issued, are questions which may arise on the return.

As the matter stands, we have no choice, and, in pursuance of our views, we make the rule absolute with costs.

This, as has been intimated, will be appealed from. If not, it is to be understood that the word "forthwith" in the mandatory clause is used in the qualified sense in the treatise by *Tapping* 328.

Mr. Justice *James* remained of the same opinion which is reported in 1 *Russell & Geldert*, 417, and thought the rule *nisi* for a writ of *mandamus* should be discharged. The rule *nisi* for a *mandamus* was made absolute, and from this the present appeal.

It seems to me abundantly clear that the city of *Halifax* is neither to contribute to nor participate in the fund to be raised under section 52; that no meaning whatsoever can be attached to the words in that section, "except as hereinafter provided in relation to the city of *Halifax*," or to the words in section 100 "the provisions of this chapter, except as hereinafter specified, shall apply to the city of *Halifax*," unless they mean that section 52 is not to apply to the city of *Halifax*; nor with section 98, which clearly indicates that all monies assessed in the city of *Halifax* for educational purposes are to be paid over by the city treasurer to the commissioners of schools for the city of *Halifax*, to be appropriated by them, not for the support of schools outside of the city of *Halifax*, but to the yearly support and maintenance of the schools under their charge.

To hold that the city of *Halifax* is not exempt would, in my opinion, be flying in the face of the express words of the statute and the necessary inference which arises

therefrom, and from the scope and apparent policy in relation to the city of *Halifax* and the province generally, and still more so against the well known rule that when ever it is sought to impose a rate, the burthen lies on those seeking to enforce it, to show that the words used by the Legislature are clear and unambiguous in order to charge the subject; and that taxing acts must be construed strictly. Supposing we could look on the effect of the exemption of *Halifax* in the light so strongly represented by Mr. Justice *James*, the wording and whole frame of this statute too plainly show that the Legislature intended to exempt the city of *Halifax*. Where the words are perfectly clear, we ought not, as said by *Brett*, L. J., in *Rabbits* v. *Cox* (1), "to construe a plain enactment so as to make it suit our views of what is just and right," and more especially so with a view to the imposition of a burthen. In *Ingram* v. *Drinkwater* (1), in the judgment of the court it is said:

> The cases of *Reg.* v. *Neville* and *Colebrooke* v. *Tickell* show clearly that when it is sought to impose a rate the burden lies on those seeking to enforce it, to show that the words used by the Legislature are clear and unambiguous in order to charge the subject.

In the present case, instead of any such words being in the statute, there are, on the contrary, clear and unambiguous words exempting the city of *Halifax*.

Then, as to the exemption of *Dartmouth*. After what has been said in the court below, it is scarcely necessary to add more. By the Act incorporating the town of *Dartmouth*, sec 36 provides:

> After the passing of this Act the town shall be set off into a separate school section, and the town shall have the expenditure of all school rates raised within its limits for the schools of the town, as also of all Government and school grants for such schools, which grants shall be paid to the town.
>
> Sec. 37. For all school purposes the district lying between the

(1) 3 Q. B. D. 314, affirmed 3 App. Cases 473.

(2) 32 L. T. N. S. 746.

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northern boundary of the town and the lands of the British Government, and the district lying between the southern boundary of the town and *Herbert's* brook shall form part of the "town of *Dartmouth*," and the town shall be entitled to receive and be paid the proportion of the Government school grants payable in respect of such districts, and to impose and levy the county school assessments and all school taxes on such districts, and collect the same, in the same manner as if such districts formed part of such town.

It would seem, from the express words of these sections, that though the jurisdiction in reference to the support and regulation of the public schools was transferred to the town council, the mode of supporting the schools has not changed. The funds were to come from the same sources, viz., the Government grant, the share of the county schools assessments which they are "to impose and levy," and the school taxes in districts named. Had there been any intention that this should he changed the expenditure of school grants and imposition and levying of the county school assessments would not have been provided for, and if the exemption had been contemplated would the legislature not have provided for such exemption by express words, as was done in the case of *Halifax*? *Dartmouth* having been liable to this assessment before and up to the time of its incorporation, I can find nothing in the Act of incorporation relieving it from the burthen, but, on other hand, express words and necessary implication, to my mind, clearly establish the contrary, and, therefore, we must follow the general rule of construction, that so far as is possible effect must be given to every word of a statute. If we exempt *Dartmouth* we must not only depart from the plain words of the statute, but we must eliminate language from it as pointed out by Mr. Justice *James*, too clear to be misunderstood, and even then we can find no words from which any express intention to exempt is indicated, but are left simply to an inference to be drawn from

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the fact of the school limits of *Dartmouth* having been extended to take in certain portions outside of the limits of the town for school purposes, and on the strength of this repeal the law as it originally stood.

A writ of *mandamus* is a prerogative writ and not a writ of right, and the granting of it is, in that sense, discretionary. The exercise of this discretion cannot be questioned, but the grant of a peremptory *mandamus* is a decision upon a right, declaring what is and what is not lawful to be done, and such decision is subject to review

See *Reg.* v. *All Saints* (1).

The general rule upon which the court acts in making the rule absolute and granting the writ is, that if the affidavits raise questions of disputed facts it will grant the writ in order that those questions may be tried, or if there be questions of law which ought to be put in a more solemn train for inquiry, a similar course will be pursued; but if the arguments on both sides disclose that there is no dispute as to the facts, and the court has no doubt in point of law, it will not make the rule absolute. Wherever there is a fair doubt, either upon matter of fact or of law, the court will make the rule absolute in order that it may be fairly discussed on the return.

This is not a *mandamus* peremptory. If the town of *Dartmouth* think they can show any good and sufficient cause why the whole of the amount now claimed should not be levied, it will be quite open to them to return any such matter of law or fact, or both, as they may be advised will sustain such a contention, and have the same discussed and settled on the return.

I am of opinion that the present appeal should be dismissed.

STRONG, J.:

I am of opinion that a *mandamus* should not have been granted before the recovery of a judgment by the

(1) 1 App. Cases 611.

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county, and that on this ground the writ should have been refused; and consequently this appeal ought to be allowed.

FOURNIER, J.:

I concur in the opinion that the appeal should be dismissed on the ground that the parties will be able to urge their objections on the merits. I express no opinion as to whether *Dartmouth* is exempt from the operation of the School Act.

HENRY, J.:

I have arrived at the conclusion that the mandamus is not peremptory, but merely in the nature of a rule *nisi*, calling upon the parties to show cause why a peremptory mandamus should not issue. I am inclined to the opinion that *Dartmouth* was not exempt from the operation of the School Act in the same way as the city of *Halifax* was, but that matter has not yet been fully decided by the court below, and I therefore give no positive opinion upon the point. I think, under the circumstances, the appeal should be dismissed.

GWYNNE, J.:

The appeal in this case must, in my opinion, be allowed with costs. Assuming the contention upon the part of the authorities of the county of *Halifax*, upon whose behalf the rule to show cause why a writ of mandamus should not issue was applied for, to be correct—namely, that the Act incorporating the town of *Dartmouth* does not relieve the ratepayers of that municipality from payment of the county rate for school purposes imposed by sec. 52 of ch. 32 of 4th series of revised statutes, then the liability remains imposed and is enforceable under the provisions of the latter Act, unless the Act incorporating the town makes some other provision for imposing and levying

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the rate. If the above chapter 32 is the only Act governing the imposition and levying the rate, then it is apparent that the town of *Dartmouth*, in its corporate capacity, has nothing to do with the matter. The Act itself determines the amount of the rate by a mode of calculation which the clerk of the peace is required to make, and to enter the amount so determined on the county roll, which is every year placed in the hands of collectors authorized and required to collect the rate as part of the county rate payable by the respective ratepayers of each year; but the contention is, that although the chapter 32, since the incorporation of the town, still remains in force and affects the ratepayers therein, casting upon them still the obligation to pay county school rate, as imposed by section 52, which rate the clerk of the peace is still authorized and required to calculate and determine, instead of his adding it to the county roll to be collected as part of the county rate, as it was before the Act of incorporation, he must now communicate the amount of the rate, (as required to be paid by the ratepayers of *Dartmouth*), to the Warden and council of the town, who, as is further contended, are bound under ss. 28 and 42 of their Act, to vote, assess and collect the rate from the ratepayers of the town and to pay it over to the treasurer of the county of *Halifax*.

The Act itself makes no express declaration that such was the intent of the legislature, but it is argued that this intention is the fair and proper inference to be implied from what the Act does say. There is, in my judgment, much force in the contention, that on the contrary, the effect of the Act incorporating the town is to exempt the ratepayers therein from all liability under sec. 52 of ch. 32, above referred to. Sec. 27 of the Act places the public schools under the jurisdiction of the corporation. Sec. 28 imposes upon the council

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the burthen, among others, of voting, assessing, collecting, receiving, appropriating and paying whatever monies are required for school rates. This section would seem to impose upon the corporation the whole burthen of themselves assessing and raising all monies required for school purposes, and to invest the council with the discretionary power of themselves determining what sums should be necessary and required to be levied from the ratepayers for school purposes, and of appropriating such sums in such manner as to them in their discretion should seem fit. It certainly seems questionable whether the 28th section is open to the construction that the legislature, by the language there used, intended to impose upon the council the duty of assessing and collecting a sum conclusively determined by the clerk of the peace of the county of *Halifax*, under sec. 52 of ch. 32, which the council could have no power of altering, and whether it contemplated the council going through the form of voting and assessing that sum under the provisions of the 28th and 42nd secs. of their Act of incorportion, in order to collect the rate and to hand it over to the county treasurer. The Act says nothing as to the clerk of the peace of the county communicating to the warden and council of *Dartmouth* the amount required by the county authorities from the ratepayers of *Dartmouth* for county school purposes; nor is there any provision in the Act requiring the town council to pay over any sum for such purpose to the county treasurer. The omission to insert provision for that purpose does certainly seem strange, if, as is contended, the intention of the legislature, in so far as this particular rate is concerned, was merely to make an alteration in the manner in which the amount, when determined by the clerk of the peace of the county, should be levied within the limits of the town. Then, again, by the

37th section, it is enacted specially that the town shall impose upon and levy from an outlying district specified in the Act outside the limits of the town, and for school purposes, placed under the jurisdiction of the town, the amount of county school assessment on such district which, before the Act of incorporation, was imposed and levied under sec. 52 of ch. 32, and paid to the county treasurer; and it is asked, with much apparent force, what would be the meaning of this section if a county school rate be still payable to the county treasurer under ch. 32, sec. 52, by the ratepayers of the town, who have imposed upon them the whole burthen of maintaining the schools in that outlying district, and who, in consideration of such burthen, are empowered to impose upon and levy from the ratepayers of such district the county school assessment, by section 52, formerly payable by such ratepayers to the county treasurer?

Then again, section 36 makes the town a separate school section, and to it is given the expenditure for the schools of the town of all school rates raised within its limits.

I must say that there is, as it appears to me, much force in the argument that the true effect of the Act of incorporation, according to a sound construction, is to exempt the ratepayers of the town from all liability to pay the amount formerly imposed by sec. 52 of ch. 32; but in the view which I take, it is unnecessary to determine that point for the purpose of the present appeal, for whatever may be the correct construction of the Act upon this point, the Act makes no difference as to the persons liable, if any be, to pay the rate, namely, the ratepayers of the town, in each year. They are the proper persons to pay the expense of providing public instruction in each year for the children of the inhabitants, and sec. 42 clearly shows the intention of

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the Legislature to have been that all rates required for each year shall be imposed and levied within the year. Nothing can be clearer than the 42nd section upon this point. The propriety and justice of making the ratepayers of each year the sole persons liable to contribute to the expenses attending public instruction in that year, except in so far as such expense is provided for by public grant, is apparent; while, on the contrary, nothing could be more unjust than to compel the ratepayers of 1882, who may be totally different persons from those, for example, of 1874, to pay the school rates of 1874, the benefit of which was wholly enjoyed by the children of the ratepayers of that year. It would be contrary to the principle which governs courts of justice in ordering the issue of writs of mandamus, if this court should sustain the order made, in the circumstances of the present case, whether the ratepayers of the town of *Dartmouth* are or are not, by the Act of incorporation, relieved from the liability which had been imposed by sec. 52 of ch. 32. That point will arise if the liability should be sought to be enforced within the year in which it is claimed to have accrued. At present I, express no decided opinion upon the point, but for the reasons stated, this appeal must, I think, be allowed. The Supreme Court Act, sec. 23, gives an appeal in this case, at its present stage, and no object can be served in calling upon the appellants to raise, by a return to the writ of *mandamus*, a point which it is competent for the court to decide now and which, in my judgment, it ought in the exercise of a sound discretion to decide by refusing to sanction the issuing of the writ for the single reason above stated.

Appeal dismissed with costs.

Solicitors for appellants: *Foster & Foster.*

Solicitors for respondent: *J. N. & F. Ritchie.*