Supreme Court of Canada

Dartmouth *v.* The Queen (1886) 14 SCR 45

Date: 1886-05-17

The Warden and Council of the Town of Dartmouth, (Defendants)

Appellants

And

The Queen, on the Relation of the Municipality of the County of Halifax (Plaintiff)

Respondent

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

1886: Feb. 22, 23; 1886: May 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Rates and assessments—Municipality of County of Halifax—School rates in—Liability of Town of Dartmouth to contribute to—Assessing present ratepayers for rates of previous year—Mandamus—Jurisdiction to order writ of.

*Held*, Ritchie C. J. dissenting, that the Town of Dartmouth is not liable to contribute to the assessment for the support of schools in the municipality of the County of Halifax.

*Held*, also, that if so liable a writ of mandamus could not issue to enforce the payment of such contribution as the amount of the same would be uncertain and difficult to be ascertained.

*Held*, also that the ratepayers of 1886 could not be assessed for school rates leviable in previous years.

*Held*, per Ritchie C.J. dissenting, that only the City of Halifax is exempt from such contribution, and the Town of Dartmouth is liable.

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Appeal from a decision of the Supreme Court of Nova Scotia quashing a return to a writ of mandamus and ordering a preremptory writ of mandamus to issue.

This case has been three times before the court: First on an appeal from the decision of the Supreme Court of Nova Scotia making absolute a rule nisi for a mandamus, in which the majority of this court held that the issue of the writ was in the discretion of the court below. That is reported in 9 Can. S. C. R. 509. It next came before this court on a preliminary objection that a demurrer would not lie to the return to a writ of mandamus. That case is not reported in this court but will be found in the Nova Scotia Reports[[1]](#footnote-2) and Cassels's Dig.[[2]](#footnote-3). The Supreme Court of Canada overruled the preliminary objection and decided that the case must be heard on the merits.

There are two appeals in the present case before this court, in the one case a mandamus having issued to collect from the town of Dartmouth its proportion of the school rates of the County of Halifax for the years 1875 to 1878 inclusive, and the other to collect the rates from 1879 to 1883 inclusive. The two appeals are substantially the same, the first coming before the court on demurrer to the writ of mandamus and the other on a rule to quash the writ.

The facts of these appeals, and the several statutes on which the claim is set up on the one side and resisted on the other are fully set out in the judgment of the Chief Justice in the former report[[3]](#footnote-4), and in the present judgments.

*Henry Q.C.* and *Graham Q.C.* for the appellants referred to the various Nova Scotia statutes bearing on the case and cited the following cases. *The Queen*

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v. *Read[[4]](#footnote-5)*; *Rex* v. *Justices of Flintshire[[5]](#footnote-6)*; and *Newton* v. *Young[[6]](#footnote-7)*.

*Sedgwick Q.C.* and *Gormully* for the respondents cited the following: *The Queen* v. *Mayor of Maidenhead[[7]](#footnote-8)*; *The Queen* v. *Churchwardens of All Saints, Wigan[[8]](#footnote-9)*; and *Worthing ton* v. *Hulton[[9]](#footnote-10)*.

Sir W. J. RITCHIE C.J.—I may say in this case, that I have taken a great deal of pains to investigate this matter, and have come to the conclusion that the town of Dartmouth is liable to be assessed and that the city of Halifax is exempt.

I heard nothing on the argument which has altered my mind in this respect, and I think nothing has been shown in the return to the writ of mandamus which could do so.

I think the appeal should be dismissed.

STRONG J.—I concur in the judgment prepared by Mr. Justice Gwynne.

FOURNIER J.—I regret that I have not been able to come to the conclusion arrived at by the Chief Justice. I agree with Mr. Justice Gwynne, that the town was liable for this claim.

HENRY J.—This is an appeal from a judgment of the Supreme Court of Nova Scotia quashing the appellant's return to a writ of mandamus and awarding the issue of a peremptory writ of mandamus.

Two questions suggest themselves for consideration:

1st. Whether the Town of Dartmouth is or is not liable to the county assessment for the support of the schools in the County of Halifax outside of the City of Halifax; and

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2nd. If so liable, will a writ of mandamus lie to enjoin the appellants to levy, collect, and pay over the same to the Treasurer of the Municipality of the County of Halifax.

I will deal with each in its order:—

The mandamus nisi is to enjoin the Council of the Town of Dartmouth to levy rates for the years 1874, 5, 6, 7 and 8.

When Dartmouth was incorporated the schools in Nova Scotia were supported:—

1st. By a legislative grant.

2nd. By a county rate sufficient to yield a sum equal to 80 cents a head of the inhabitants to be collected each year with the county rates; and

3rd. A special rate to be imposed by the majority of the ratepayers in each school section.

The statute was passed in 1866 and specially exempts the City of Halifax from its operation as regards the imposition of county or sectional rates in regard to the schools therein, and this provision was made in the act, the act for its incorporation having been passed many years before.

The 2nd section of that act provides that:—

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 of the sum thus raised shall be paid semiannually by the County Treasurer upon the order of the Board of School Commissioners for the county. One half 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 act, and the Act hereby amended, to be applied to the payment of teachers salaries. And each school shall be entitled to participate therein according to the average number of pupils in attendance and the length of time in operation but shall receive no

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allowance for being in session more than the prescribed number of days in any one half-year.

By the 19th section the City of Halifax is made one school section and under Commissioners and the city was required to provide all monies required for its schools in addition to the annual grant provided by the legislature.

The Town of Dartmouth was incorporated in 1873, and the provision for the support of its schools appears to me substantially the same as previously made for the City of Halifax.

By the 27th section of the act of incorporation it is provided that the Council of the Town shall have jurisdiction over the support and regulation of the public schools, the appointment of teachers and the regulating and collection of assessments.

By section 28 the council is to vote, assess, collect, receive, appropriate, and pay all monies required, amongst other things, for its schools; and to have all the powers relating thereto previously vested in the sessions, grand jury school meeting and town meeting. By the 36th section the town was made a separate school section and was to have for its schools the expenditure of all school rates raised within its limits. The 37th section connected with the town for school purposes two adjoining school districts, and it was provided that the proportion of the legislative grant to which they would be entitled should be paid to the town, and the town should have the right 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 the town.

By the 41st section the council was declared to have the regulating and ordering of all monies to be paid out of funds in the hands of its treasurer.

Here then is provided the whole system for the support

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and management of the schools of the town. It is clear that in the provision for schools no part of the funds is stated to be derived from any participation of the county school funds raised by the rate of 30 cents a head. The provision as to the latter requires the county treasurer to pay semi-annually one half of the funds raised by the assessment of thirty cents, upon the order of the school commissioners, to be applied and appropriated by them. By the act of incorporation the town ceased to be within the jurisdiction of any board of school commissioners; and the council of the town, although exercising the same functions as school commissioners, are not known as or termed such; and besides, after payment on the order of the school commissioners by the county treasurer, the same section provides that at the close of each half year the moneys were to be apportioned by the school commissioners to the trustees of schools conducted in accordance with that act, and the act by it amended, to be applied to the payment of teachers' salaries. Now, by the act of incorporation a different system for schools in the town is provided, and the schools there cannot be said to be conducted according to the school act as applicable to counties and therefore are not within the category referred to as entitled to participate. As a matter of fact the town did not so participate. It has otherwise paid for and sustained its schools, and this, to my mind, was the intention of the legislature when enacting the incorporation of the town. The town has supported its own schools without asking for any participation in the county assessment, and it is now sought to make it contribute to the support of schools outside. If it assessed, collected and paid to the county treasurer the assessment of thirty cents a head justice would require that its proper proportion should be paid back in aid of its schools. According to the

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provisions I have quoted from the school act the town could not participate for, amongst others, the reason that its schools are provided to be sustained in a manner not in accordance with that act, and that consideration is evidence that no such rate was intended to be levied on the inhabitants of the town.

Further the 28th section before referred to provides that the council should vote, assess, collect, receive, appropriate and pay all monies required for its schools. The only outside aid provided was its share of the legislative grant. Beyond its share of such grant it was required, as in the case of the City of Halifax, to support its own schools, and by the 36th section it was made a separate school section and to have for its schools the expenditure of all school rates raised within its limits; and the 47th section gave the regulating and ordering of all monies to be paid by its Treasurer to the council of the town. If the council was to vote, assess, collect and appropriate all monies required for its school it could not participate in the funds raised by any county assessment, and the act having made it, not a school district but a separate school section to support its own schools, and as such, to have the expenditure of all school rates raised within its limits, why should the matter of the assessment of thirty cents be at all applicable to the town? The provisions of the incorporation act in regard to schools are essentially different from those in the general school act. And the former substantially repeals the provisions of the latter as to the town.

Had the town been incorporated when the general school act was framed and passed I have not the slightest doubt but in the section providing for the county assessment Dartmouth would have been excepted as well as Halifax. It is true that the fourth series of the revised statutes was in force during the

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years for which it is claimed that the town was liable; and it might have been exempted like the City of Halifax; but if under the original school act the town was liable but under the terms of its incorporation act it would not be liable under the provision for county assessment, though that provision was continued in the fourth series (which may be construed as a re-enactment merely of the original act and not intended as a repeal of any of the provisions of the incorporation act) the latter act being a local act would not be assumed to be affected by a revision of the general and public statutes; but if any doubt existed on that point it would be at once removed by reference to a provision in the 4th series providing for its publication, which enacted that nothing therein contained should affect local acts. I am, in consideration of the legislation on the subject in question, of the opinion that the town was and is wholly exempt from the operation of the section of the school act which provides for county assessment, and that when the legislature by the provisions of its act of incorporation imposed upon it the whole burden for the support of its schools beyond the legislative grant it was so intended. It has been contended that the words:

As also of all Government and school grants for such schools which grants shall be paid to the town—

following as they do the provision that:

The town shall have the expenditure of all school rates raised within its limits for the schools of the town—

control and effect the operation of the provision preceding them. I am, however, at a loss to discover that they have any effect except to extend the operation of the provision so as to include the expenditure of the Government grants. It is claimed that the words "and school grants" are to be construed as intended to apply to the funds raised by county assessments. In my opinion it would be torturing language

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to do so. The difference between "grants" and "rates" or "assessments" is too well understood and appreciated for any one to assume that the Legislature should so misapply the word "grants," and particularly in the same section which gives to the council of the town the exclusive right of expenditure "of all "school rates raised within its limits." Unless it plainly and irresistibly appeared to be so we cannot think that the Legislature would so stultify itself. Besides, it being patent from the whole of the school act that the only "grants" mentioned were Government grants, I am brought to the conclusion that the word "and" between the words "Government" and "school grants" was unintentionally inserted and that the provision should be read "as also of all Government school grants." If, however, it be read even as including the county assessment of 30 cents, the previous provision is not thereby limited but on the contrary extended. The whole provision was made to confer upon the council the right of expenditure, and if the rate be raised, either as a county assessment or otherwise, within the limits of the town, the council had its expenditure and it was not therefore to go into the general school fund of the county to be applied under the provisions of the act. Reading the act of incorporation with the school act it is not difficult to reach the conclusion that it was fully the intention of the Legislature to apply to Dartmouth the same system for the support of its schools as was then in force with respect to the City of Halifax, and it appears to me difficult to resist that conclusion. I am therefore of opinion that Dartmouth is in no way liable to the municipality of the County of Halifax, and that our judgment should be accordingly.

In case, however, I should be wrong in my conclusion in that respect it is desirable to discuss the other point

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in the case—that in case Dartmouth should be liable as contended for should a peremptory mandamus be adjudged.

It is a high prerogative writ and one of the first principles in regard to it is that it is only allowed when the complaining party has no other remedy, nor is it allowed where issues are necessary to be tried to ascertain the sum really due, if any. If Dartmouth is liable to the county assessment it will not be contended that it is not, as a result, entitled to a distributive share of the funds so raised. By no evidence is it shown, nor is it I presume now capable of being shown, what in each of the years in question that share would have amounted to. The schools in the county have been sustained, as also those in the town, independently of the funds now claimed from Dartmouth. What then is the destination of the money if assessed upon and collected in Dartmouth and paid over to the county treasurer? It cannot be appropriated under the school act, for the object no longer exists and the time for doing so has elapsed. The county school commissioners could not now appropriate it under the terms of the school act. Its legal disposition was required to be made semi-annually for the payment of the teachers employed and serving each year and that could not now be done for their services have been paid for already. Under such, and other circumstances not necessary to be stated, why should a peremptory mandamus be allowed to enforce the assessment for and collection of monies for purposes and objects no longer necessary? Had the municipality of the county been shown to have advanced and paid out under the provisions of the school act the monies now sought to be recovered the case would stand on a different footing, but it is quite clear that such was not done. Dartmouth received nothing during those years from

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the county fund and it is not shown that the municipality of the county was called upon to pay or did pay one penny more on account of the default of Dartmouth to contribute its share of the funds to be raised by county assessments. Why then should Dartmouth pay the county anything?

There are, therefore, many nice legal and equitable questions to be adjudicated upon and decided, and if the liability of Dartmouth to the county was established the former would be liable only for the difference between the amount of its liability and the amount it would be entitled to as its distributive share of the funds. Such an adjustment could only be fairly made after a thorough investigation requiring much evidence, documentary and otherwise, and until such was made it would, under the circumstances, be unjust and oppressive to oblige Dartmouth to pay by assessment the whole amount and to trust to future proceedings to obtain its distributive share from the county. Courts never allow a peremptory mandamus to be issued where the interests of the parties are not provided for, and for the reasons given and many others that might be stated I think we would perpetrate a gross wrong to Dartmouth, under the circumstances, if we allowed the writ in this case. I am therefore of opinion that on all points our judgment should be to refuse it.

GWYNNE J.—The question in this case arises upon a demurrer to a return to a mandamus nisi addressed to the municipality of the Town of Dartmouth commanding them, unless they should shew good cause to the contrary, to assess and levy upon and from their ratepayers and to pay over to the treasurer of the municipality of the County of Halifax the sum of $15,976.00, being the aggregate of several sums said to have been apportioned upon the inhabitants of the town by the

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clerk of the peace of the County of Halifax in the years 1874, 5, 6, 7 and 1878 respectively, calculated at the rate of thirty cents for every inhabitant of the town, and for which several sums, as is said, the ratepayers of the Town of Dartmouth were in those several years respectively liable according to law to have been assessed to assist in the support of common schools in the County of Halifax, and which several sums so annually apportioned it was the duty, as is said, of the municipality of the town to have assessed upon, and levied from, the ratepayers of the town in each of those years and to have paid over to the treasurer of the County of Halifax when collected, but that they neglected so to do. The points to be determined are two, namely:—

1st. Whether the ratepayers of the municipality of the Town of Dartmouth were, or their property was, liable to contribute to the support of the common schools of the County of Halifax outside of the Town of Dartmouth, during the above years, the 30 cents per head of the inhabitants which is mentioned in the 52nd section of chap. 32 of the 4th series of the revised Statutes of Nova Scotia as is claimed, and

2nd. Apart from the question whether such ratepayers were or not liable to have been rated and assessed in each of the above years for the above purpose, as claimed, whether in view of the matters pleaded in the return to the mandamus nisi, or of any of those matters, a peremptory mandamus should be now granted commanding the municipality to assess their present ratepayers and to levy from them the above sum of $15,976.00 dollars and to pay the same to the treasurer of the County of Halifax.

On the 30th day of April, 1873, when the act incorporating the Town of Dartmouth was passed the provision made for the support of common schools in

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the Province of Nova Scotia consisted of three funds:—

1st. A Provincial or Government grant.

2nd. A rate or assessment called the county school rate or assessment which consisted of a rate calculated on the basis of 30 cents for every inhabitant of the respective counties and collected together with the ordinary general county rates, except in the City of Halifax which was a distinct municipality in itself for which special provision was made, and

3rd. A special rate which the majority of the ratepayers in each school section present at a regularly called school meeting were authorised to impose upon the ratepayers of their section. This rate in default of payment was also collected together with the general county rates and the assessment was returned to the general sessions of the county in which the school section in which the special rate was imposed was situate. The statute then in existence in relation to the Provincial or Government grant was 28 Vic. ch. 29, entituled "an Act for the better encouragement of education" and passed on the 2nd of May, 1866, by which act the sum of $6807.00 per annum was granted to the District of the City of Halifax, $3929.00 to the District of Halifax West, $1263.00 to the District of Halifax Shore and $1279.00 to the Rural District of Halifax.

The statute then in existence in relation to the county school rate was 29 Vic. ch. 30, entituled "An "Act to amend the Act for the better encouragement "of education," and passed on the 7th day of May, 1866. By the 2nd section of that act it was enacted as follows:—

2nd. 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

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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, and one-half of 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.

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 act and the act hereby amended to be applied to the payment of teachers' salaries; and each school shall be entitled to participate therein according to the average number of pupils in attendance and 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.

The provision in relation to the special school section rate was contained in the third section of this act but it is unnecessary to set out at large the provisions of this section.

The provision in respect of the City of Halifax was contained in the 19th section and, in short substance, was that the city was as one school section placed under the jurisdiction of a board of commisioners appointed by the Governor in Council, composed of twelve persons, two being residents of each ward in the city; and upon the council of the city was imposed the burden of providing all monies necessary for the support of the schools in addition to the amount provided by the provincial grant. Now, on the 30th of April, 1873, the act 36 Vic. ch. 17 was passed, by which a portion of the County of Halifax was incorporated as the Municipality of the Town of Dartmouth, and the question now is, whether the provisions of that act do not, in equally clear language as is used in the above act 29 Vic., ch. 30 in relation to the City of Halifax, exempt the ratepayers of the Town of Dartmouth from all liability to contribute to the support of common schools in the County of Halifax outside of the town.

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The first section of the above act of incorporation defines the limits of the town.

By the 27th section it is enacted that the council of the town, consisting of a warden and six councillors as provided in a previous section, shall have jurisdiction over all the property of the town and over the support and regulation of the public schools and the appointment of teachers, and also over the support of the poor, and regulating and collecting the assessments, and making all contracts relative to matters under their control.

By the 28th section it was enacted that they should vote, assess, collect, receive, appropriate and pay whatever monies should be required for county assessments, poor, school and other rates and assessments, and should have within the town all the powers relating thereto vested in the sessions, grand jury, school meeting and town meeting, and should have and exercise within the town all the powers and authority which within the district previous to the passing of the act were exercised by the sessions, grand jury or town or school meeting or trustees of schools and public property.

By the 36th section it was enacted that the town should constitute a separate school section and that it should have for the schools of the town the expenditure of all school rates raised within its limits.

By the 37th section it was enacted that for all school purposes the district lying between the 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, should form part of the Town of Dartmouth, and that the town should 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

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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. By the 41st section it was enacted that the council should have the regulating and ordering of all monies to be paid out of funds in the hands of the treasurer of the town, and by the 35th section that the school house and all property real and personal which, at the time of the passing of the act, should be public property or should have been held in trust for the Town of Dartmouth should, on the passing of the act, vest in and become the property of the town.

Now the language of this act, as it appears to me, in the plainest possible terms detaches the Town of Dartmouth wholly from the County of Halifax for school purposes and from the control of the boards of school commissioners for the county, and exempts the ratepayers of the town from all liability to contribute the thirty cents for every inhabitant of the town, constituting the county school rate, or any part thereof to the treasurer of the county. The school property situate in the town is transferred to, and made part of, the property of the town, over which absolute jurisdiction and control is given to the town council. To the town council is also given absolute jurisdiction over the support and regulation of the public schools and the appointment of teachers and the assessment and collection and expenditure for the schools of the town of all school rates raised within its limits, comprehending therefore the expenditure of the thirty cents for every inhabitant of the town, if that be a rate which after the passing of the act of incorporation of the town remained imposed upon the ratepayers; all these rates so collected, in the absence of any express provision to the contrary, must naturally be payable into the hands of the treasurer of the town, out of whose

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hands no monies can be paid without the authority of the town council, who, having absolute jurisdiction over the support and regulation of public schools and the appointment of teachers are also invested with all the authority, powers and duties which, in relation to that portion of the County of Halifax which is constituted the town of Dartmouth, were, previously to the passing of the act incorporating the town, vested in the boards of school commissioners for the county and the trustees of the public schools of the county. For all school purposes the districts mentioned in the act which abut on the northern and southern limits of the town as defined in the act are made part of the town corporation, which is declared to 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 in the same manner as if such districts formed part of such town. Can any language be plainer than this? It is not that the town hall receive and be paid the proportion of the Government school grants and of the county school assessments payable in respect of such districts, but with the same sentence in which it is said that the town council shall receive and be paid the proportion of the government school grants payable in respect of such districts is coupled the provision that they shall also receive the county school assessment, that is to say, they shall receive the thirty cents for every inhabitant of the districts.

Now, that the Government school grants are received by the town for the support of the schools of the town there can be no doubt; upon what principle then can this other fund, which by the same sentence the town council are authorized to receive, be received by them for a different purpose without express

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language clearly defining such different purpose? But instead of such language the section says that the town is entitled to impose and levy this county school assessment (consisting of thirty cents per head for every inhabitant of the districts) and all school taxes in such districts, in the same manner as if the districts were for all purposes, as for school purposes they are, by the act made to form part of the town; that is to say, as it appears to me, that they shall impose and collect these taxes for the support of the schools of the town, and in their character of a board of school commissioners for, and trustees of the common schools of the town, having absolute jurisdiction over the support and management of those schools, and that they shall collect them by the hands of their own collectors, and receive them into the hands of their own treasurer, and be accountable to no one in respect of them but their own constituency, as a separate municipality.

Now, against the above apparently plain construction of express provisions in the statute it is argued that under the 28th section of the act the town of Dartmouth had as clear a right of exemption from liability to the county rate for general purposes, as to which they had not claimed exemption, as of exemption from liability for the county school rate of 30 cents per head, as to which they do claim exemption; and so it was argued that they were liable for both. But the answer to this argument is very simple, namely, that the two rates are very different and are treated as being so in the act, and that the exemption from liability to pay over the school rate to the county treasurer is not claimed solely in virtue of the provisions of section 28 of the act, but in virtue also of the provisions of sections 36 and 37 which give to the Town Council, in the exercise of their absolute jurisdiction over the support and regulation of the public schools of the town vested

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in them by the 27th section, the expenditure for the schools of the town of all school rates raised within the limits of the town. But while the act thus gives to the town council absolute jurisdiction and control over all school rates raised within the town, it provides equally clearly (by sections 28 and 42) that the town shall contribute to the sum required for county rates for general purposes, the expenditure of which is not given to the town but is left with the county authorities just as it was before the incorporation of the town; and for this reason the contribution of the town to the sum required for general purposes of the county, when levied, becomes payable to the county treasurer; although, inasmuch as the powers of the general sessions as affecting county assessments are vested in the town council, the latter very probably have the right of defining what the town's share or contribution to the county rate for general purposes shall be; but with this we are not concerned. For the present purposes it is sufficient to say that it is quite a fallacy to hold that of two funds, one of which, when collected, is appropriated to purposes of the county as distinct from the town, and the other to the purposes of the town as distinct from the county, because the former is properly payable into the county treasury therefore the latter must be also.

Moreover, it is to be observed that the act 29 Vic. ch. 30, which imposed the rate of 30 cents for every inhabitant of the county, provides that the rate shall be paid when collected into the hands of the county treasurer and that one half of the sum thus raised shall be paid by him semi-annually upon the order of the board or boards of school commissioners for the county, and that the one half shall semi-annually be apportioned to the trustees of schools conducted in accordance with the act, to be applied to the payment of teachers' salaries. But as the town council have

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absolute jurisdiction over the support and management of the common schools of the town and the appointment of teachers, whose salaries therefore they must agree upon and provide, and as they are thus put in the place of a board of school commissioners and trustees of the schools of the town, they could not claim to be nor be recognized as being a board of school commissioners for the county so as to entitle them to demand and receive from the county treasurer, for the schools of the town, any part of the county school rate come to his hands for the support of the common schools of the county, nor can the schools of the town which are conducted by authority of the act of incorporation of the town under the exclusive regulation of the town council as the board of school commissioners for, and as trustees of, the schools of the town, be said to be schools conducted in accordance with the act which regulates the management of the common schools of the county so as to warrant the payment of any portion of the rate received by the county treasurer for support of the schools of the county to the teachers of the common schools of the town who, being appointed by the town council with whom they contract for their services, must look alone to the town council who appoint them for their pay. But it is contended, and this is the chief argument upon which the right of the municipalty of the County of Halifax to the peremptory mandamus asked for is rested, that all these express provisions for the support and regulation of the schools of the town under the control, conduct and management of the town council, as board of school commissioners and trustees of the common schools of the town, and notably the provision that the town council shall have, for the schools of the town, the expenditure of all school rates raised within its limits, are over ruled by a sentence in the 36th section of the act, the consideration

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of which I have purposely postponed until now for the purpose of first drawing attention to those clauses of the act which, as is contended, are over ruled by the language of the sentence relied upon, and of thus pointing out with greater force what appears to me to be the fallacy of the argument, which is, that a liability by implication is created, which subjects the town council of Dartmouth to the burthen of collecting within the limits of the town the thirty cents for every inhabitant of the town for the purpose of paying over the rate when collected to the county treasurer to be distributed under the provisions of the general act among the schools of the county, and that the only interest which the town council of the town of Dartmouth have in that rate is to receive for the schools of the town a proportion of the whole amount constituted of the thirty cents for every inhabitant of the county, including the inhabitants of the town of Dartmouth, such proportion being calculated, as in the case of the schools of the county outside of the town, upon the average attendance of the pupils at the schools. The sentence relied upon comes immediately after that part of section 36, which says that:—

The town shall have the expenditure of all school rates raised within its limits, for the schools of the town, as follows: as also of all Government and school grants for such schools, which grants shall be paid to the town.

Now, apart from the improbability of the Legislature imposing on the town and its ratepayers such a burthen as is contended for by the municipality of the County of Halifax, not in express terms but as arising by implication merely, it is to be observed that (coupled as the sentence is with the previous part by the words "as also of") what is intended to be given by the latter part of the clause is the expenditure for the schools of the town of something additional to what by the previous part is given for the same purpose. I have already shown that what

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is given by the previous part is the expenditure for the schools of the town of all school rates raised within the limits of the town; the ratepayers of the town can, therefore, be no longer liable to have levied upon them a rate raised within the limits of the town, not for the schools of the town, but as a contribution to the county school rate, to be received by the county treasurer for the support of the common schools of the county, and to be distributed by the board of school commissioners for the county and the trustees of the common schools of the county. The words "school grants," therefore, in the 35th section, can by no possibility be construed as meaning that proportion of the county school rate calculated according to the average attendance of pupils and which would have come to the schools of that portion of the county set apart for the town if the town had never been incorporated; and it is wholly upon the assumption that this is what the words "school grants" as used in the section do mean that the liability by implication which is contended for is rested. The inference and conclusion which in fact do follow from what is expressly said in the section is directly the reverse of what is contended for, namely, that as the town council are beyond all doubt given the control and expenditure of all school rates of every description raised within the limits of the town, they cannot claim (as in point of fact they do not claim and never have claimed) any right to receive for the support of the schools of the town any part of the county school rate coming into the hands of the treasurer of the county, nor can the town or its ratepayers be made liable to contribute to that fund, and this is the construction which, as I think I have shewn, is consistently supported by the other provisions of the act which withdraw the town schools from all supervision and control of the board of school commissioners for the county and places them wholly under the

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town council as the board of school commissioners for the town. It is impossible, therefore, to give to the words "school grants" as used in the 36 th section the meaning contended for. Moreover the term "grant" is a very inappropriate term to apply to a portion of a rate levied upon several ratepayers for the purpose of distribution in varying proportions among the several contributors. Nowhere is the term so applied. The appropriate designation "school rates" is given in the 36th section to cover the whole of that portion of "school rates" which is raised within the limits of the town. In the 37th section what the town is given in respect of the outlying districts which are made part of the town for school purposes is—the proportion of the Government school grants payable in respect of such districts and the county school assessment. Here also the appropriate designation is given—nowhere is that rate or a part of it spoken of as a "grant" to the parties upon whom the rate is levied. It is asked however: What then can have been intended by the use of the words "school grants" in the 36th section of the act? To answer that question accurately I am not concerned; it is sufficient if it be, as I think it is, plain beyond all question that they could not have been used to mean a portion of the county school rate in the hands of the county school treasurer as is contended for, for no part of any school rate raised within the limits of the town can be applied as a contribution to that fund, the town itself having the expenditure of all school rates raised within its limits I do not think that we are bound to find a precisely accurate and grammatical construction for every minute word used in an act of Parliament. It is sufficient if we can arrive at a proper construction of the act from its general provisions and from what is therein expressed with sufficient certainty. But to my mind the use of the words in the section can receive an explanation

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in perfect consistency with the construction I have given to the act, by regarding the words as intended to be used, as I must say I have little doubt is the fact, in precisely the same sense as it is clear they are used in the 37th section—the only difference being the inversion of the order in which the "Government school grants" and "the county school rate or assessment" are spoken of in these sections, and the inadvertent misuse and insertion of the very minute word "and" where it ought not to be. Thus the 36th section will read that the town shall have the expenditure of all school rates raised within its limits, for the schools of of the town, and also of all Government school grants for such schools—and the 37th that the town shall be entitled to receive and be paid the proportion of "the Government school grants" and to impose and levy on all the districts named the county school assessments, and collect the same in the same manner as if such districts formed part of -such town. In this manner, the words "school grants" being in both cases coupled with the word "Government" receive their appropriate designation, namely, "Government school grants." Another argument has been used founded on the fact that the provision which exempts the city of Halifax from contribution to] this county school rate is found in ch. 32 of the 4th series of the Consolidated statutes, and the question is asked: If it had been intended that the Town of Dartmouth and its ratepayers should be in like manner exempt why does not a provision to that effect appear in this same 32nd chapter? The answer is, however, very plain and is: Because the 4th series is but a consolidation of the public general statutes, and as to this particular act the provisions which appear in the 32nd ch. of the 4th series are taken *verbatim* from 29 Vic. ch. 30, the statute in force on the subject when the act by which Dartmouth was incorporated was passed. The City of

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Halifax was incorporated as a separate municipality in 1864 before the passing of the Public General Statute 29 Vic. ch. 30, which authorized the levying of the rate of 30 cents for every inhabitant of the county which is the county school rate. The Public General Statute 28 Vic. ch. 29, passed in 1865, first made the city a separate school section and gave to it for the support of the city schools a large sum by way of Government grant and conferred upon the city council the power, and imposed upon them the burthen, of levying by assessment on the ratepayers of the city all further monies necessary for the support of city schools. When, then, the county school rate of 30 cents per head was first constituted by the Public General Statute 29 Vic. ch. 30, which was a statute in amendment of 28 Vic. ch. 29, it was natural that the provisions in this latter act as to the city of Halifax supporting its own schools should be continued and if required amended in 29 Vic. ch. 30, and this was what was done, and when the 4th series of the Public General Statutes came to be published as a consolidation of those statutes the provisions as to the city of Halifax retained their original place in the Public General Statutes so consolidated. But the portion of the county of Halifax which in 1873 was incorporated as the Town of Dartmouth having been ever since 1866 subject to the county school assessment under the provisions of 29 Vic. ch. 30 as part of the county it was natural that, in the act incorporating the town as a separate municipality and as a separate school section, should be inserted provisions imposing on the town corporation the like burthen of supporting their own schools and exempting the ratepayers of the town from further contribution to the support of the schools of the county outside of the limits of the town, in like manner as appears in the public statutes in relation to the city of Halifax. The act incorporating the town of

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Dartmouth being a local act its provisions could not appear in chapter 32 of the 4th series of the consolidated Statutes, those statutes being only the Public General Statutes, but in an act passed on the same day as the act incorporating the town was passed, and which is the act which provides for the publication of the 4th series of the Consolidated Statutes and prescribes the time and manner at and in which that series should come into operation, it is enacted that nothing therein contained should affect local or private acts, so that, as I stated at the outset, the only question is, whether the provisions of the act incorporating the Town as a separate municipality and school section are or not as effectual for exempting the ratepayers of the town in all time thereafter from liability to contribution to the county school rate coming to the hands of the county treasurer for the support of the schools of the county, that is to say schools outside the limits of the town, as the provisions of the Public Statutes relating to the City of Halifax and which exempt the ratepayers of that city from a like burthen. And in my opinion, for the reasons above given, the provisions of the act incorporating the town are abundantly sufficient to exempt and do exempt the ratepayers of the town from all liability to contribute to the support of any schools outside the limits of the town, and they are not therefore liable to be rated for the sum now demanded or any part thereof.

Now, as to the 2nd question: The town council, in their return to the mandamus nisi, besides insisting upon their absolute exemption from liability to contribute to the county school rate for the support of the schools of the county, raise two objections to the issuing of the peremptory mandamus: 1st. They rely upon an act of the Legislature passed in 1877, whereby it was enacted that in no year should a sum in excess

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of $15,000 for all ordinary and extraordinary expenses be levied upon the ratepayers of the town; and 2nd. They say that the rate payers of the town are now quite different persons from those who were ratepayers of the years 1874, 5, 6, 7 and 8, upon whom the burden, if any, was imposed of providing a fund to pay for the education of the children of the ratepayers of those years, and they insist upon the injustice of calling upon the present ratepayers for what the ratepayers of the above years should alone have paid.

In consideration of these points insuperable objections to our granting this exceptional process present themselves; for assuming the liability of the ratepayers of the town in the above years, and the rate when collected to have been payable to the county school fund in the hands of the county treasurer, under the provisions of ch. 32 of the 4th series of the revised statutes, it was leviable and payable for a special purpose occurring only in those years respectively, namely, the support of common schools and the payment of teachers' salaries in those years, in which special purpose, according to the contention of the applicants for the mandamus, the schools of the town were equally interested with those of the county. But all those schools have been supported and all their teachers paid in those years; in the town, at the sole expense of the town, without any assistance whatever from the county, and in the county at the sole expense of the county. The purpose then for which the levy on the ratepayers of the town, if authorized, was authorized, was satisfied in each year without any contribution by the town to the county school fund. The levy, therefore, if now made, assuming it to have been leviable by authority of the county upon the rate payers of the town, cannot be required for the purpose of being applied to the purpose for which it was originally established and the town

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would have been entitled to receive a share of the whole fund in proportion to the attendance of pupils at their schools; so that in no event could the county receive the whole amount demanded. But as the monies, if levied now, could not be applied to the purpose to which, if leviable in the above years respectively, they were applicable, for what purpose can they be now recovered? To no purpose, as it appears to me, could they when levied be now applied unless it be to reimburse the county for such amount, if any, as they may have been compelled to pay, in each of the above years, in support of their own schools in excess of what would have fallen upon them if the town had contributed the amounts now claimed to have been the proportions which in each of the above years they should have contributed to the common fund. But as the town schools, according to the contention of the county, would have been entitled to share in the fund in proportion to the attendance of pupils at their schools; a proportion which has never been ascertained and probably cannot now be, and if ascertainable, the fund cannot now be applied to the purpose for which it was established; the amount if any there be which the county could claim by way of re-imbursement never has been, and probably cannot now be, ascertained. Certain however it is that they are not entitled as they claim to be, to demand and recover now the whole of the rate which they say the town should have contributed in each year to the fund, deducting nothing for the amount the town schools would have been entitled to receive from the fund in each year. Moreover there is nothing to show that the county incurred and paid any greater sum in the support of their schools, or that those schools received in the above years, from general county funds, a greater sum, or that they were entitled to receive in proportion to

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the attendance of pupils at their schools any greater sum, than the county school fund, as actually received by the county treasurer in those years, was sufficient to pay. We have no means now of knowing what amount of the common fund if the town had contributed to it in those years would have been applicable to distribution among the county schools and for their support and how much for distribution among the town schools if distributed under ch. 32 of the 4th series, and the town having received nothing in those years from the fund, we are furnished with no information, and we cannot tell whether the amount received by the county schools in those years from the fund actually received by the county treasurer as the common school fund of those years was greater or less, and if less how much less, than would have been the share of those schools respectively if the contribution of the town had been added to the fund and the share which the town schools would have been entitled to receive in proportion to the average attendance of pupils had been drawn from it also. What sum, therefore, if any there be, which the county should now receive by way of reimbursement is unknown and can only be ascertained in an action properly framed and adequate to establish the amount to be due, if anything be due, as a debt from the town to the county. It is, however, clear that the amount, if any, which the county could establish a right to recover would not be the amount of the whole of the town's proportion of contribution to the fund in each year assuming the town to have been liable to contribute at all to it. If the county can establish a claim against the town, as for a debt, by way of reimbursement or otherwise, it is by action and not by mandamus that they should proceed. If entitled to recover in such an action the town may be able by the issue of debentures or otherwise to pay the debt without violating the provisions of the act of 1877.

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This court, in my opinion, has no jurisdiction to compel, by the prerogative writ of mandamus, the levying of an amount in one year in excess of what the law permits to be levied in one year; nor in a case within its jurisdiction should it by such a summary and exceptional process order this large sum now claimed to be levied on the present ratepayers, which sum is not required for the purpose of being, and which in the nature of things cannot be, applied to the purposes for which in each of the above years the rate was authorized to be levied, and which can only be wanted and recovered for the purpose of re-imbursing the county for some advance made by it to supply the place of the monies not contributed by the town in the respective years named to the county school rate, the amount of which advance, if any was ever in fact made, being unknown. In such a case it would, in my opinion, be the duty of the court to abstain from enforcing a doubtful demand by this exceptional prerogative process and it should leave the county to establish their right to recover by an action brought for the purpose of determining their right and ascertaining the amount if right there be.

The court must be satisfied that there is a legal duty imposed upon the defendants to comply with all that is commanded by the writ. \* \* \* It is quite settled that if any part of what is commanded by a peremptory mandamus goes beyond the legal obligation the whole must be set aside.

This is the language of Lord Campbell C.J. in *Regina* v. *Caledonian Railway[[10]](#footnote-11)*.

Bailey J. in *Rex* v. *Lincolns Inn*[[11]](#footnote-12) says

The right to the thing demanded and an obligation to do it must concur.

As to the point of levying upon the present ratepayers what should have been levied if at all upon the several ratepayers of the years 1874–5–6–7–and–8. Lord Abinger says in *Woods* v. *Reid*[[12]](#footnote-13)

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The general inconvenience of retrospective rates has been long known and recognized in the courts of law on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors had the full benefit.

I can conceive no case to which this language is more applicable than to an attempt to levy on the ratepayers of 1886 sums of money which were only required in 1874, 5, 6, 7, and 8 to support the schools where the children of the ratepayers of those years were educated and which sums were wanted for no other purpose. If any persons suffered by the educational power of the schools having been impaired in those years it must have been the ratepayers of those years; and if the school fund of those years, without any contribution from the ratepapers of the town, was sufficient to maintain the schools for the school going population of the county in those years no damage would seem to have been suffered by anyone to warrant the levying now, retrospectively, of rates on the ratepayers of the town[[13]](#footnote-14). And in *The County of Frontenac* v. *The City of Kingston[[14]](#footnote-15)*, where the county sued the city in debt for monies which it was alleged the city should have levied on their ratepayers in previous years as their contribution to the jury fund, Wilson J. at pp. 595–6 says:—

If this were a motion for a mandamus on the city to levy a rate to satisfy the claims now sued for, the argument that the claims were of that nature and standing that they could not be lawfully levied from the present ratepayers would be a conclusive answer,

\* \* \* \* \* \*

for the debt claimed would not be the debt of those who are now the ratepayers any more than the baker's or butcher's bill against the former occupant of a house is the debt of the present occupant.

I am of opinion, therefore, that the defendants here are entitled to judgment upon both grounds urged, namely, that the court has no jurisdiction to order a rate to be

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levied which it would not be lawful to levy as being in excess of what is permitted to be levied in any one year by the statute of 1877 and also because of the retrospective character of the rate sought to be levied and the impossibility of applying it to the purposes for which if levied in the years 1874–5–6–7--and–8, it would have been applied in those years, namely, the support of the schools of those years. As, however, the question of the liability of the ratepayers of the town in these years to contribute at all to the county school fund has been raised, and as it is important to all the parties interested that this point should be finally determined as a guide for the action of the town in future years, and as it is competent for us to decide it upon the present proceedings, I think we ought to do so; and being of opinion for the reasons already given that the ratepayers of the town were not in the above years, and are not, liable to contribute to the common school fund for the support of the schools of the county and that therefore the county has no right to recover the amount demanded or any part thereof by action or otherwise I think we ought to rest our judgment upon this ground and allow the appeal and order judgment to be entered for the defendants on the demurrer. The judgment in the other case will be the same in substance but in form it will be to allow the appeal and to order the rule nisi for quashing the mandamus to be made absolute.

Appeal allowed with costs.

Solicitor for Appellants: B. Russell.

Solicitor for Respondents: J. N. &. T. Ritchie.

1. 5 Russ. 8 Geld. 311. [↑](#footnote-ref-2)
2. P. 285. [↑](#footnote-ref-3)
3. 9 Can. S. C. R. 509. [↑](#footnote-ref-4)
4. 13 Q. B. 524. [↑](#footnote-ref-5)
5. 5 B. & Al. 761. [↑](#footnote-ref-6)
6. 1 B. & P. (N. R.) 187. [↑](#footnote-ref-7)
7. 9 Q. B. D. 494. [↑](#footnote-ref-8)
8. 1 App. Cas. 611. [↑](#footnote-ref-9)
9. L. R. 1 Q. B. 63. [↑](#footnote-ref-10)
10. 16 Q. B. 30. [↑](#footnote-ref-11)
11. 4 B. & C. 859. [↑](#footnote-ref-12)
12. 2 M. & W. 784. [↑](#footnote-ref-13)
13. *Regina* v. *Bead* 13 Q.B. 524; *Rex* v. *Bradford* 12 East 556; *Rex* v. *Lancashire* 12 East 366; *Johnson* v. *School Trustees* 30 U. C. R. 264. [↑](#footnote-ref-14)
14. 30 U. C. R. 584. [↑](#footnote-ref-15)