

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James P. Fox and others v. the Government of Newfoundland, from the Supreme Court of Newfoundland; delivered 26th May 1898.*

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Present:

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The Commercial Bank of Newfoundland suspended payment on the 10th December 1894 and on the 7th January 1895 an Act of the Newfoundland Legislature (58 Vict. cap. 3) was passed for its winding-up and liquidation. The Appellants are the trustees appointed for that purpose. By Section 2 of the Act the provisions of Chapter 90 of the Consolidated Statutes of Newfoundland entitled "Of Insolvency" were made applicable to the winding-up of the Bank in the same manner as they applied to individuals and partnerships. Of these Section 34 provided that next after preferential payments provided for in the preceding sections all debts and claims due to the Crown or to the Government or revenues of the Colony should form a prior claim upon the estate and effects of any person declared insolvent. On the 18th October 1895 the Respondents took out a summons against the

Appellants claiming to be paid preferentially out of the assets of the Bank an aggregate sum of \$10,233. 06 being the amount of the sums due by the Bank to the Government upon the accounts set out in the particulars annexed to the summons. These sums were the balances standing in the books of the Bank at the time of its insolvency to the credit of the current accounts which had been opened and were kept in the Bank by and in the names of the chairmen of various Boards of Education in the Colony appointed under the provisions of the local "Education Act 1892." The way in which the money was paid to the Bank and receipt given was stated by a witness who was a clerk in the Treasury Department of the Government to be in accordance with a practice which had existed for many years. Under this practice, at the end of each quarter a list is made up of the amounts to be paid to the Bank on account of the various parties named in the list; the clerk of the Bank comes to the Treasury, and, if the warrants for the quarter have come down, the list is made up and revised and the gross amount paid to the clerk of the Bank in one cheque. The list contains the amounts appropriated or allocated to the several Boards of Education, Church of England, Methodist etc., and also contains salaries and other items not now in question. The Bank receives the moneys for and on behalf of the several parties in whose favour the warrants are drawn and gives a receipt on their behalf. The warrants are drawn in favour of the several Boards of Education. After the payment, the Treasury has no further knowledge or cognisance of the condition of the accounts of the several parties in or with the Bank. By Section 1 of the "Education Act 1892" it is enacted that there shall be annually appropriated for general educational purposes \$8,736. 80 to be apportioned

among the several religious denominations of the Colony according to population to be expended by the several Boards of Education appointed in the several districts provided for in the Act, subject to certain deductions as provided for in other sections. Section 2 enacts that a further sum of \$5,526. 39 shall be annually appropriated and apportioned among the several religious denominations of the Colony, subject to deductions provided for in other sections, and expended, in such manner as the Governor in Council may determine, in furtherance of education in places outside the city of St. John's in any of the districts where there are not means adequate for the support of schools. Other sections of the Act following these and relating to other moneys appropriated for educational purposes make the same distinction between expending by Boards of Education and expending by the Governor in Council. By Section 17 the Governor in Council is to appoint in each of the Church of England districts members of the Church of England one of whom shall be the senior clergyman of that Church actually resident or officiating in the district to form and be a Church of England Board of Education for the district. And the section says that "The said Boards shall manage and expend all moneys hereby appropriated for Church of England general educational purposes in the respective districts." Sections 23 and 28 contain similar provisions for the Roman Catholic and Methodist districts. Section 36 gives power to the Boards to make bye-laws, rules, and regulations, not contrary to the provisions of the Act, for the establishment and management of schools within their respective districts, and for the appropriation of the respective sums of money therein or thereafter to be granted for the districts, and provides that all bye-laws,

rules, and regulations shall be submitted by the Boards to the Governor in Council for approval, and shall be of no effect until such approval has been received. Section 37 provides that there shall be an annual meeting of every Board of Education when the accounts shall be submitted and audited, and the chairman of the Board shall as soon thereafter as possible transmit to the proper superintendent correct returns of all schools under the Board with detailed accounts duly audited according to the forms prescribed in schedules to the Act, and any Board neglecting to transmit the return on or before the first day of September in each year shall, on the representation of the proper superintendent, not receive further payments until such default shall be remedied. Section 71 provides for the appointment of three superintendents who are by Section 72 to have, subject to the Governor in Council, a general supervision and direction of all schools receiving aid from Government, and are to enforce the provisions of the Act and the regulations and decisions of the Governor in Council in reference to the same and to prepare annually a report and detailed accounts of income and expenditure, which shall be laid before the Legislature. In 1893 an Act, 56 Vict. cap. 7, was passed to provide for higher education under which a Board of 23 members called "The Council of Higher Education" is to be appointed by the Governor in Council and a sum of \$4,000 is to be paid to the Council, to be expended by it in prizes, premiums and scholarships. This Council is in the list of the sums to be received by the Bank.

The case was first heard by Mr. Justice Winter who as to six items which are not now in question allowed the claim as preferential and as to the amounts standing to the credit of the Education Boards and the Council of Higher Education

held that it was not preferential. This judgment was ordered by the Supreme Court to be reviewed, and on the matter coming in review before a Full Bench consisting of the Chief Justice and Little and Winter JJ. the former two held that the Government were preferential creditors of the Bank on all the amounts set out in the particulars annexed to the summons, Winter J. dissenting. Judgment was accordingly given for the Government with costs, and the trustees have brought the present appeal.

The several amounts of money specified in the list were in their Lordships' opinion paid by the Treasury to the Bank and received by it as the agent of and on behalf of the several Boards of Education. The Bank did not become a debtor to the Government for those sums or retain them for the Government. The warrants were drawn in favour of the Boards and a receipt given on their behalf, and the Bank became a debtor to them, the money being placed to their account in the books of the Bank. The Government had no longer any control over the money. It was contended by Mr. Asquith, who appeared for the Government before their Lordships, that the Boards of Education were merely distributing agents of the Government, only distributing branches. This appears to be the view of the majority of the learned Judges, as expressed in the reasons they have given for their judgment, and indeed is the only way in which the judgment can be supported. But this view is not consistent with the provisions in the Act. In Sections 1 and 2 a distinction is made between money to be expended by a Board of Education and money to be expended as the Governor in Council may determine. By Section 34 the Boards have power to make bye-laws and rules to be approved by the Governor in Council, but are not bound to do so. By Section 37 their

accounts are to be audited, and returns of all schools with detailed accounts duly audited are to be transmitted to the Superintendent, and these are by Section 72 to be laid before the Legislature. This seems to be for the information of the Government and Legislature, and not in order that any item of expenditure may be disallowed if the Government does not approve of it. The appointment of Boards for each of the three religious denominations, and the constitution of the Board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it, a power which is independent of the Government. And in the form of engagement of a teacher, given in Schedule F of the Act, the chairman agrees on behalf of the Board to pay the salary of the teacher, and if it be not paid the Board may be sued. This is not consistent with a mere agency to distribute the money. According to the language of the Insolvency Act, the question is whether the sums in the list annexed to the summons are debts or claims due to the Crown or to the Government or revenues of the Colony and their Lordships are opinion that they are not. They will therefore humbly advise Her Majesty so to declare and to reverse the judgment of the Supreme Court except so far as it relates to the six items before mentioned and to order the Respondents to pay the costs of the hearing before the Full Bench. The Respondents will also pay the costs of this appeal.

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