Privy Council Appeal No. 100 of 1919.

The Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa - - - - - *Appellants*

v.

The Quebec Bank and others - - - - - *Respondents*

and

The Attorney-General for the Province of Ontario - - - *Intervener*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD OCTOBER, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
MR. JUSTICE DUFF.

[*Delivered by* LORD DUNEDIN.]

The present case is what it is to be hoped is the last chapter of the history of the unfortunate disagreement between the Board of the Roman Catholic Schools and the Educational Authority of the City of Ottawa. This matter has already been before this Board in the two cases of *Trustees of the Roman Catholic Separate Schools for the City of Ottawa* v. *Mackell* [1917] A.C. 62 and *Trustees of the Roman Catholic Separate Schools for the City of Ottawa* v. *Ottawa Corporation* [1917] A.C. 76. It is unnecessary to state on this occasion the system under which the Catholic schools are maintained, as that is set out at length in those judgments. It is sufficient to say that it was decided in the former case that a regulation of the Education Authority prescribing the use of English in the schools was not *ultra vires* as infringing the provision of subsection 1 of section 93 of the

British North America Act; while in the latter it was held that an Act of the Legislature of Ontario appointing a Commission to take over the schools and supersede the Board was *ultra vires* as infringing the said provision.

The Commission was in occupation of the schools theretofore managed by the appellants from the 26th July, 1915, till November following, when, upon the above second-mentioned judgment being pronounced, they gave up possession to the appellants. During the régime of the Commission the schools were carried on by them. In order to meet the expenses of the schools the Commission besides levying a half year's rate took a sum of $97,000 odd standing at the credit of the appellants on an account in their name with the Quebec Bank. They also incurred a liability of $71,000 odd to the Bank of Ottawa.

These actions were raised by the appellants against the Quebec Bank, the Bank of Ottawa and certain individual members of the Commission. There was claimed against the Quebec Bank the said sum of $97,000 odd, against the Bank of Ottawa a sum of $37,000 odd which had been transferred to it out of the $97,000 and kept as a sinking fund to meet certain debentures issued by the Board, and against the Commissioners the sum of $84,000 odd, being the produce of the half year's rate above referred to. These actions were consolidated. Pending these actions the Legislature of Ontario passed the statute of 7 Geo. V cap. 50, which is as follows :—

> " Whereas pursuant to an Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa passed in the fifth year of the reign of His Majesty, King George Fifth, chapter 45, the Minister of Education with the approval of the Lieutenant-Governor in Council on the 20th day of July, 1915, appointed a Commission consisting of Denis Murphy, now deceased, Thomas D'Arcy McGee and Arthur Charbonneau herein referred to as 'the Commissioners' to conduct and manage the Roman Catholic Separate Schools of the City of Ottawa, which said act has been declared to be *ultra vires;* and whereas the Board of Trustees of the said Separate Schools prior to the appointment of the said Commission, had neglected and failed to open, keep open, maintain and conduct the said schools according to law and to provide qualified teachers therefor, had threatened at various times to close the said schools and had neglected and refused to discharge and perform the duties imposed upon it by law to the loss and damage of the supporters of the said schools and to the serious prejudice of the children entitled to attend the same; and whereas by reason of the neglect and default of the Board as aforesaid it was necessary to provide special means for the education of the children entitled to attend the said schools until the Board should be willing to perform its lawful duties in respect to said schools, and the Commissioners were appointed for that purpose; and whereas the Commissioners entered into possession of the school premises and property on the 26th day of July, 1915, and therafter maintained and conducted the said schools continuously until the said Act was declared to be *ultra vires*, during the whole of which time the said Board was unwilling to conduct the said schools according to law; and whereas the Commissioners in carrying on said schools and meeting obligations of the Board disbursed $68,873.43 which at the date of their appointment stood to the credit of the Board in the Quebec Bank of Ottawa, the further sum of $84,156.04 received out of Court pursuant to

an Order of the Appellate Division of the Supreme Court of Ontario, dated the 3rd day of April, 1916, and the further sum of $71,944.08 received from other sources, all of which sums of money were by law applicable to the maintenance and conduct of the said schools ; and the Commissioners in the maintenance, conduct and management of the said schools, also incurred a liability to the Bank of Ottawa for $71,891.16 and interest thereon which still remains unpaid ; and whereas the Board has commenced actions against the Quebec Bank, the Bank of Ottawa and the Commissioners to recover the moneys so disbursed as aforesaid and has refused to assume the said liability to the Bank of Ottawa and it is desirable to declare the rights of the parties ;

" Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

" 1. It is declared that the Commissioners disbursed the monies and incurred the liability herein recited for payments and expenditures which were necessary to maintain and carry on the said schools and which should have been made by the Board in the proper conduct and management of the said schools but for its wrongful neglect and default as aforesaid.

" 2. It is further declared that the said payments and expenditures shall be deemed for all purposes to have been made by the Commissioners for and on behalf and at the request of the Board and that the Commissioners are entitled to indemnity from the Board in respect thereof.

" 3. It is further declared that the said liability of $71,891.16 and interest thereon to the Bank of Ottawa, subject to the rights of third parties, if any, is a debt of the Board to the said Bank and that the Bank is entitled to set off the same against any other monies of the Board in its hands.

" 4. In default of payment of the said liability by the Board the same may be paid to the Bank out of the Consolidated Revenue Fund of the Province and thereafter the said sum with proper interest thereon shall be a debt to His Majesty and may be recovered from the Board in any action brought for that purpose.

" 5. This Act may be pleaded as a defence to any action now pending or that may hereafter be brought by the Board against any person or Corporation in respect of any of the monies received and disbursed by the Commission as aforesaid.

" 6. The Order in Council made on the 26th day of August, 1915, which is set out in the Schedule herewith, is confirmed and declared to be and to have been from the said date, legal, valid and binding, and the Commissioners shall be indemnified by the Province from and against all liability for indebtedness incurred by them or damages recovered against them by reason of any of said payments and expenditures by them as aforesaid or in consequence of anything done or suffered by them or any of them while acting as such Commissioners.

" SCHEDULE.

" Copy of an Order in Council approved by His Honour the Lieutenant-Governor, the 26th day of August, A.D. 1915.

" The Committee of Council have had under consideration the report of the Honourable G. H. Ferguson, Acting Minister of Education, dated 19th August, 1915, wherein he states that in view of the pending litigation in which the Roman Catholic Separate School Board for the City of Ottawa is Plaintiff and the Quebec Bank a party Defendant, the Quebec Bank has declined to pay to the Ottawa Separate School Commission the monies heretofore, now or hereafter standing to the credit of the said Board in the said Bank without a bond of indemnity from the Province in that behalf, and that there is urgent need of the monies in question for the purpose of the Commission and of the separate schools under their control and management, and it is advisable to comply with the request of the Bank. The

Minister, therefore, recommends that he be authorized and empowered as Acting Minister of Education on behalf of the Province to execute and deliver with the seal of the Department of Education to the Quebec Bank a bond indemnifying and saving harmless the Bank from all loss, costs or damage the Bank may at any time suffer or sustain on account of or by reason of the payment or transfer at any time and from time to time by the said Bank to the Ottawa Separate School Commission of any monies heretofore, now or hereafter standing to the credit of the Roman Catholic Separate School Board for the City of Ottawa in the books of the said Bank or that otherwise but for the appointment of the said Commission would be the property of or payable to the said Board, or of any loans, advances, overdrafts or credits at any time or from time to time that may be made or given by the Bank to the Commission, or of anything otherwise lawfully relating to the premises, the bond to be in such penal sum and in such form and to contain such provisions as may be satisfactory to the said Bank and to the Counsel for the Department of Education.

"The Committee concur in the recommendation of the Minister and advise that the same be acted on.

"Certified,

"J. LONSDALE CAPREOL,

"Clerk, Executive Council."

The Attorney-General for Ontario was allowed to intervene as a defendant. The consolidated cases were tried by Clute, J., who pronounced judgment in favour of the appellants but under deduction so far as the Commissioners were concerned of whatever sums they could show they had properly expended on the conduct of the schools while under their charge. The Appellate Court of Ontario unanimously overruled this judgment and dismissed the actions. Appeal has now been taken to this Board.

The claim against the Quebec Bank would be obviously good at common law. The Bank was the debtor of the appellants, and it would be no defence to say that they had paid the money to a Commission whose authority was based on an Act of the Provincial Legislature which had been declared to be *ultra vires*. The real defence to the action lies in the later statute quoted above. It is equally clear that this statute by its terms provides a complete defence. The only real question is therefore whether that statute also is *ultra vires*. It can only so be held if it contravenes the exception to subsection 1 of section 93 of the British North America Act, or in other words if it prejudicially affects a right or privilege of the appellants. For indubitably in other respects it is a measure dealing with civil rights and as such within the domain of the Provincial Legislature.

It was frankly admitted by the learned Counsel for the appellants that the money spent and the liability incurred was spent and incurred in the carrying on of the schools in a proper manner: that is to say was not in any way expended on purposes other than the carrying on of the schools. The appellants cannot say that the money if they had had it would not have been spent on the same purposes; all that they can say is that they would have had the control and spending of it. The right which has got to be prejudicially affected is the right to maintain separate schools under the Education Acts. Now it was pointed out by

the Lord Chancellor in deciding the *Ottawa Corporation* case that there might be cases where a right might be affected without being prejudicially affected. It will at once be apparent what a contrast there is between the legislation which was the subject of that decision and that in the present case. There the right of the appellants to conduct their schools was taken away for an indefinite period. Their restoration did not depend on themselves but could only be given them by others. They are now restored—that legislation having been held to be *ultra vires*—but their extrusion from management is a matter of past history which no legislation can obliterate. Nor does the present legislation seek to do so. It is possible to criticise the words used, but the gist of the statute is unmistakable. All it does is to declare that the payments made while the schools were being carried on by others than the appellants are good payments against the funds which were only raised and only available for the conduct of the said schools. If the contention of the appellants were given effect to —for they argued that the deduction allowed by Clute, J., was unwarranted—the result would be that the schools would have been carried on by funds provided gratuitously by the Banks or by the individual Commissioners, the appellants would be in the possession of funds which had been destined for the carrying on of the schools in the past, and which as they could not now be so applied, would form a gratuitous bonus in their hands. Their Lordships therefore agree with the unanimous judgment of the Supreme Court that the statute is not *ultra vires* and that the actions fall to be dismissed. They fail to see that the right of the appellants has been in any way prejudicially affected by the statute. The only way in which they were prejudicially affected was by the action of the former statute, which extruded them from the management of the schools. Had they been left in management they would necessarily have spent this very money for the same purposes. It cannot be said to create a prejudice to affirm that the money was rightly spent for the purposes for which it was destined. The same ratio applies to a liability incurred by others for an equally proper purpose.

It may be as well to say a word as to the position of the $37,000 held by the Bank of Ottawa. On the appellants paying the debt incurred to the Bank of Ottawa of $71,000 odd, the said sum of $37,000 will of course be made available to the appellants for the purpose for which it was set aside, viz., the provision of a sinking fund for certain debentures.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeals.

The appellants will pay the respondents' costs. The Attorney-General of Ontario will bear his own costs.

In the Privy Council.

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF OTTAWA

v.

THE QUEBEC BANK AND OTHERS

and

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO (Intervener).

[DELIVERED BY LORD DUNEDIN.]

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