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*Mar. 22, 23
*Oct. 30.

THE BOARD OF EDUCATION FOR THE CITY OF WINDSOR..... APPELLANT;

AND

FORD MOTOR COMPANY OF CANADA LIMITED AND THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF WINDSOR ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Assessment and taxation—Schools—Companies—Company designating portion of its assessment in municipality for separate school purposes—Separate Schools Act, R.S.O., 1937, c. 362, s. 66—Notice by company in form B to city clerk—Apportionment of assessment attacked on ground that portion so designated not ascertained to comply with s. 66 (3) as to proportionate limit—Prima facie validity of notice—Onus of proof.*

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

The secretary of respondent company, in accordance with a resolution of its directors, forwarded to the clerk of the City of Windsor a notice in form B, provided for by *The Separate Schools Act*, now R.S.O., 1937, c. 362, s. 66, requiring that 18% of its assessment be entered, rated and assessed for separate school purposes, and the assessor made his assessment accordingly. An appeal by appellant board against the assessment for separate school purposes was allowed by the court of revision, and its decision was sustained by Mahon Co. C.J., who, in a stated case made for purposes of appeal, found that the apportionment for separate school purposes made by the directors of the company (the shares of which company are numerous, widely distributed and extensively traded), though made in good faith, was not based on actual knowledge and was "only a guess or an estimate"; and held that the notice (form B) given by the company should be set aside and declared of no effect, and that all the company's assessments in said city should be assessed, enrolled and rated for public school purposes, as it had not been proved affirmatively that there was compliance with s. 66 (3) of said Act, namely, that the portion (18%) designated for separate school purposes was no greater proportion of the whole of the assessment than the amount of the shares held by Roman Catholics bore to the whole amount of the shares of the company. His judgment was reversed by the Court of Appeal for Ontario, [1938] O.R. 301, on the grounds that the statute ought, if possible, to be interpreted and applied so as to effectuate its manifest intention, viz., to provide for an equitable apportionment; on receiving the notice the assessor is bound to assess and return his roll apportioning the assessment; his roll is *prima facie* valid; the onus of displacing that situation rests on the attacking party and this onus was not discharged. Appeal was brought to this Court.

*Held* (The Chief Justice and Davis J. dissenting): The appeal should be dismissed.

*Per* Rinfret, Crocket and Kerwin JJ.: Having regard to the history of the Act and the change made in 1913 (c. 71) to the present form of s. 66 (3), the legislative intention was to free a company desirous of having part of its assessment apportioned to separate school purposes from the difficulty of ascertaining the precise ratio of the holdings of Roman Catholics. To give effect to that intention it must be held, on proper construction of the statute, that the company's notice stands and is to be followed unless displaced by evidence that the prohibition in s. 66 (3) has been violated. (*Regina Public School District* v. *Gratton Separate School District*, 50 Can. S.C.R. 589, discussed; it forms no authority on the point now in question) (Crocket J. further expressly concurred in the reasons given in the Court of Appeal).

*Per* the Chief Justice (dissenting): Sec. 66 imposes a strict limit upon the proportion which can be designated by the company in its notice, and a prohibition to the company against exceeding that limit. In giving the notice, the company, though not a public body, is exercising a statutory authority bestowed upon it in the public interest and for a public purpose, and is affected by certain obligations which govern a public body invested with powers the execution of which may prejudicially affect the rights and interests of others; it is bound to act within the limits of the power conferred, and conformably

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to the procedure laid down by the statute; it is bound to exercise the power in good faith for the purposes (those contemplated by the statute) for which the power is given; and in putting the power into effect (following the procedure laid down) it is bound to act reasonably (*Westminster* v. *London & N.W. Ry. Co.*, [1905] A.C. 426, at 430). The statute contemplates a notice given, and only given, after the company has ascertained as a fact that the proportion is not greater than that defined by s. 66 (3); unless that condition be fulfilled, the company cannot be said to be exercising the statutory power in conformity with the directions of the statute. Though there was no suggestion of any conscious dereliction from duty or any motive but an honest desire to conform to the directions of the statute, yet the material (as disclosed by the findings in the stated case) on which the notice was given formed no substantial foundation for the conclusion of fact which was the essential condition of a valid notice; therefore in giving the notice the company was not acting reasonably in exercise of the power conferred, and therefore the notice was not a valid exercise of the power. The above view would not preclude the establishment before the court of revision that the conditions under which the notice could validly be given did in fact exist; but there was no such evidence in this case.

*Per* Davis J. (dissenting): The portion of its school rates which a company has a right under the Act to divert from public schools to separate schools is limited to the proportion named in s. 66 (3). Though it may not know all its Roman Catholic shareholders, it can, to the extent that it does ascertain them, exercise that right. But, in the absence of actual knowledge of any amount of shares held by Roman Catholics, an estimate of shares so held does not satisfy the plain conditions imposed by the Act. (*Regina Public School District* v. *Gratton Separate School District*, 50 Can. S.C.R. 589, at 606, cited; also the history of the legislation discussed, in regard to the construction of the statutory provisions now in question). In view of the facts as found according to the stated case, the question of onus of proof was not important; but, in a case where it became of importance, the onus should rest upon the party seeking the benefit of the special statutory provision—on the person claiming exemption as a separatist from the general liability for the support of public schools, to prove those exceptional matters that took him out of the general rule (*Re Ridsdale and Brush*, 22 U.C.Q.B. 122, at 124; *Harling* v. *Mayville*, 21 U.C.C.P. 499, at 511; *Free* v. *McHugh*, 24 U.C.C.P. 13, at 21; also Parts I and II, generally, of the Act now in question and s. 5 of *The Public Schools Act*, R.S.O., 1937, c. 357, referred to; also principles as to onus of proof discussed).

APPEAL by the Board of Education for the City of Windsor from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of His Honour G. F. Mahon, a Judge of the County Court of the County of Essex. The judgment of Mahon Co. C.J. sustained the

(1) [1938] O.R. 301; [1938] 3 D.L.R. 298.

decision of the Court of Revision of the City of Windsor (which had allowed the present appellant's appeal against the apportionment of assessment made in accordance with the notice in Form B hereinafter mentioned) and held that the notice in Form B (provided for by *The Separate Schools Act,* now R.S.O., 1937, c. 362, s. 66) forwarded by the secretary of the Ford Motor Company of Canada Ltd. (in accordance with a resolution of the directors of the company) to the clerk of the City of Windsor, directing that 18% of the assessment of said company within the city of Windsor be entered, rated and assessed for separate school purposes, should be set aside, vacated and declared null and void and of no effect and that all the assessments of said company in said city should be assessed, enrolled and rated for public school purposes.

Sec. 66 (3) of said Act provides:

> Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

Mahon Co. C.J. found that the apportionment made by the directors of the company (though they "acted in good faith and with every desire to be fair") "was not based on actual knowledge and was only a guess or an estimate." He held that the onus was upon the company to establish that the portion of its assessment set out in its requisition (Form B) did not bear a greater proportion to the whole of its assessment than the amount of its stock or shares held by Roman Catholics bore to the whole amount of the stock or shares; and that this onus was not discharged.

The Court of Appeal for Ontario (1), on a special case stated by Mahon Co. C.J. for purposes of appeal (pursuant to s. 85 of *The Assessment Act,* R.S.O., 1937, c. 272), answered the questions submitted therein adversely to his holdings, on the grounds that the statute ought, if possible, to be interpreted and applied so as to effectuate its manifest intention, viz., to provide for an equitable apportionment of public and separate school taxes payable by companies having Roman Catholic shareholders who are supporters of separate schools; the assessor is bound to assess and return his roll apportioning the company's assessment

(1) [1938] O.R. 301; [1938] 3 D.L.R. 298.

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on receiving the notice; his roll is *prima facie* valid; the onus of displacing the *prima facie* situation rests on the attacking party and this onus was not discharged in the present case, though practical means of undertaking to do so existed by summoning and cross-examining the company's directors or officers on the hearing before the Court of Revision or before the County Court Judge.

The material facts as found by the County Court Judge are set out in the judgments given in this Court now reported. The appeal to this Court was dismissed with costs, the Chief Justice and Davis J. dissenting.

*I. F. Hellmuth K.C.* and *N. L. Spencer* for the appellant.

*J. B. Aylesworth K.C.* for the respondent Ford Motor Company of Canada Ltd.

*A. Racine K.C.* for the respondent Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor.

THE CHIEF JUSTICE (dissenting)—Mr. Justice Masten states in his judgment:

> The appellants admit that *prima facie* every corporation shall be rated and assessed for the support of public schools and that this is the general or basic rule subject, however, to the provisions of section 65 of the Separate Schools Act.

Section 65 (now s. 66) is in these words:

> 66. (1) A corporation by notice (Form B) to the clerk of any municipality wherein a separate school exists may require the whole or any part of the land of which such corporation is either the owner and occupant, or not being the owner is the tenant, occupant or actual possessor, and the whole or any proportion of the business assessment or other assessments of such corporation made under *The Assessment Act,* to be entered, rated and assessed for the purposes of such separate school.
>
> (2) The assessor shall thereupon enter the corporation as a separate school supporter in the assessment roll in respect of the land and business or other assessments designated in the notice, and the proper entries shall be made in the prescribed column for separate school rates, and so much of the land and business or other assessments so designated shall be assessed accordingly for the purposes of the separate school and not for public school purposes, but all other land and the remainder, if any, of the business or other assessments of the corporation shall be separately entered and assessed for public school purposes.
>
> (3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

(4) A notice given in pursuance of a resolution of the directors shall be sufficient and shall continue in force and be acted upon until it is withdrawn, varied or cancelled by a notice subsequently given pursuant to any resolution of the corporation or of its directors.

(5) Every notice so given shall be kept by the clerk on file in his office and shall at all convenient hours be open to inspection and examination by any person entitled to examine or inspect an assessment roll.

(6) The assessor shall in each year, before the return of the assessment roll, search for and examine all notices which may be so on file and shall follow and conform thereto and to the provisions of this Act.

The appeal came before the Ontario Court of Appeal by way of a stated case and it is convenient to set forth the material facts in the words of the case:

The appeal was heard by the Court of Revision and on the 25th day of November, 1937, the decision of that Court, along with its reasons, was handed down in writing and a certified copy was produced and filed as Exhibit 6. That Court allowed the appeal with the effect that the whole of the assessment of the Ford Company goes to the support of the Public Schools.

The decision of that Court was not unanimous. The minority member, who would have disallowed the appeal, stated "that in his opinion the basis of the appeal should have been established by subsection 4 of section 65 of the Separate Schools Act"; the section 65 mentioned being now section 66 of the Revised Statutes of Ontario, 1937, chapter 362.

It was the opinion of the majority members of the Court, according to the certificate filed (exhibit 6): "That subsection 4 does not invalidate subsection 3 and providing that the letter of the law and the spirit therein is adhered to in accordance with subsection 3, then subsection 4 would have been grounds for confirmation of the assessment. Such was not established by evidence under oath as previously recorded, not only was no effort made by the Corporation to ascertain the number of shares held by Roman Catholics but the Corporation had no knowledge of the proportion of shares held by Roman Catholics."

Against this decision Ford Motor Company of Canada Limited and the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor appealed.

In addition to the aforementioned exhibits filed was exhibit 5, being a certified copy of notice, form 15, under section 33*b* of the then Assessment Act, Revised Statutes, 1927, chapter 238, of the Ford Motor Company, filed in 1936 attached to which was the statutory declaration of the secretary stating that the Ford Company was unable to ascertain which of its shareholders are Roman Catholic and Separate School supporters or the ratio which the number of shares or memberships held by Roman Catholics who are Separate School supporters bore to all the shares issued by the Corporation.

At the commencement of the hearing of the appeal, after the production of the exhibits and their identification by Mrs. Helen Weller of the City Clerk's Department of the City of Windsor, Mr. Aylesworth, counsel for the Ford Motor Company, pointed out that one of the main questions between the parties was as to where the burden rests as to the compliance or non-compliance of the Company with the provisions of the then section 65 (now 66) of the Separate Schools

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Act and that without waiving his position that that onus was on the respondent here to prove affirmatively that less than 18% of the shares were held by Roman Catholics and that that onus was not on the appellant company to prove that there were as many as 18% of its shares held by Roman Catholics, he was willing to bring out the facts on the point. To this Mr. Spencer assented.

Mr. Douglas B. Greig, Secretary of Ford Motor Company of Canada Limited, was then called and gave his evidence, some of the material parts of which were:

The Company was incorporated under the Dominion Companies Act; has 1,658,960 shares of common stock and no preferred shares; that there were shares held by companies; that as of November 28th, 1936, the shares were held in 32 countries; that as of November 27th, 1937, the shares were held in 34 countries; that in Canada and the United States 1,500,000 shares are held; that the company cannot get the shareholders to reply to communications as to religion and school taxes; that the company has difficulty in getting many of its dividend cheques into the hands of those entitled; that they lately had about 100 letters containing dividend cheques returned to them; that there is, on the average, about 20,000 different shareholders; that all the company's shares of stock are not voting shares; that voting shares are not as widely distributed; that, on the average, about 19% of the proxies are returned; that voting shares are held in 16 different countries; that a number of outstanding shares are held in names of brokers; that between September, 1936, and November, 1937, the company's records indicate that the average number of shares held by brokers was 195,000; that the company has transfer agencies in Montreal, Toronto, Detroit and New York; that the number of shares changing ownership, according to records of stock exchanges, exceed by 9,500 monthly the number of shares presented for transfer on the books of the company; that in the year 1937 there were 665,874 shares of stock transferred on the books of the company; that the directors knew that all the stock of the company was not held by shareholders of the Roman Catholic faith and that shares were held by both Roman Catholics and others but did not know and could not ascertain what total percentage of the stock was held by Roman Catholics; that it was a practical impossibility to ascertain definitely what percentage of the shares were held by Roman Catholics and in fact the directors did not inquire from the shareholders as to their religious faith; that the Board consisted of five directors of whom one was a Roman Catholic which director was absent from the meeting adopting the resolution.

There were other facts brought out from Mr. Greig's evidence, but, I think the material facts are above recited. His evidence did show that directors in making the apportionment they did, acted in good faith and with every desire to be fair; they reasoned from a number of angles and made assessment comparisons and population comparisons, it is true many, if not most of them, after the notice, Form B, had been filed with the City Clerk; and that the directors, in adopting the resolution believed, from such information as was available to them, that the apportionment made to Separate Schools by the resolution was a percentage of the Company's local assessment no greater than the percentage of its shares held by Roman Catholics. However, I found that the division they made was not based on actual knowledge and was only a guess or an estimate.

None of the parties proved what proportion of the stock or shares of the Company was held by Roman Catholics.

With the greatest respect, I find myself unable to concur in the application that has been made of this statute by the Court of Appeal for Ontario. My views can be stated very briefly.

I am unable to escape the conclusion that section 66 imposes a strict limit upon the proportion of its land and business or other assessments which can be designated by the ratepayer-corporation in its notice for assessment for the purposes of the separate school in the municipality. Subsection 3 appears to me to impose a prohibition directed to the corporation against designating for such purposes a proportion of its land, business or other assessments greater than the proportion which the stock or shares held by Roman Catholics bears to the whole amount of its stock or shares.

The ratepayer corporation is not a public body, but in giving the notice authorized by section 66, it is exercising a statutory authority bestowed upon it in the public interest and for a public purpose. In exercising such authority it is affected by certain obligations which govern a public body invested with powers the execution of which may prejudicially affect the rights and interests of others. It is bound to act within the limits of the power conferred, and conformably to the procedure laid down by the statute. It is bound to exercise the power in good faith for the purposes for which the power is given, that is to say, for the purposes contemplated by the statute; and, in putting the power into effect (following the procedure laid down), it is bound to act reasonably. (*Westminster* v. *London & N.W. Ry. Co.* (1)).

With great respect, I think this statute contemplates a notice given, and only given, after the ratepayer corporation has ascertained as a fact that the proportion of its assessment directed to be applied for separate school purposes is not greater than the proportion defined by subsection 3. Unless that condition be fulfilled, the corporation cannot, in my opinion, be said to be exercising the statutory power in conformity with the directions of the statute.

Now, nobody suggests that in this case there has been on the part of those acting for the ratepayer corporation

(1) [1905] A.C. 426, at 430.

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any conscious dereliction from duty, or any motive but an honest desire to conform to the directions of the statute; but, having considered with the greatest care the material before them as disclosed by the findings of the learned judge, I am constrained to the view that they had not before them any substantial foundation for the conclusion of fact which was the essential condition of a valid notice —in the absence of which, that is to say, the notice could not be given conformably to the tenor of the statute.

It follows, I think, that in giving the notice the corporation was not acting reasonably in exercise of the power conferred; and that the notice was, therefore, not a valid exercise of their power. The learned judge considered that the persons acting for the Ford Company proceeded upon a guess or an estimate. There is much elasticity in the employment of the word "estimate," but it is very clear to me that, as I have already implied, they had not before them anything that could lead them beyond the region of supposition.

No abstract criterion can be laid down for weighing the probative force of facts. It is sufficient that in this case there was no solid basis for a conclusion that the statutory condition of a valid notice was, in fact, fulfilled.

The view I have expressed would not preclude the Corporation ratepayer, or, I think, the Separate School Board, from establishing before the Court of Revision that the conditions under which the notice could validly be given did in fact exist; but there was no such evidence in this case.

Question No. 3 ought, therefore, to be answered in the affirmative and that answer disposes of the controversy.

The appeal should be allowed and the judgment of Judge Mahon restored.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—On July 27th, 1937, the directors of the respondent company, Ford Motor Company of Canada, Limited, passed a resolution instructing its secretary to forward to the Clerk of the City of Windsor a notice requiring that eighteen per centum of the Company's land and business or other assessments in Windsor be entered,

rated and assessed for Roman Catholic Separate School purposes. A notice to that effect, in the prescribed form, was sent to and received by the City Clerk, and the assessor entered the Company as a separate school supporter in the municipal assessment roll with respect to the designated percentage of the Company's assessments and as a public school supporter with respect to eighty-two per centum of its assessments.

It is common ground that in the absence of such notice the Company would have been properly entered as a public school supporter only. The notice was given and the entries made in accordance with section 65 of *The Separate Schools Act*, R.S.O., 1927, chapter 328, as enacted by section 57 of *The Statute Law Amendment Act, 1937*. As the determination of this appeal depends primarily upon the construction of section 65, its provisions are reproduced forthwith:—

65. (1) A corporation by notice, Form B, to the clerk of any municipality wherein a separate school exists may require the whole or any part of the land of which such corporation is either the owner and occupant, or not being the owner is the tenant, occupant or actual possessor, and the whole or any proportion of the business assessment or other assessments of such corporation made under *The Assessment Act*, to be entered, rated and assessed for the purposes of such separate school.

(2) The assessor shall thereupon enter the corporation as a separate school supporter in the assessment roll in respect of the land and business or other assessments designated in the notice, and the proper entries shall be made in the prescribed column for separate school rates, and so much of the land and business or other assessments so designated shall be assessed accordingly for the purposes of the separate school and not for public school purposes, but all other land and the remainder, if any, of the business or other assessments of the corporation shall be separately entered and assessed for public school purposes.

(3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

(4) A notice given in pursuance of a resolution of the directors shall be sufficient and shall continue in force and be acted upon until it is withdrawn, varied or cancelled by a notice subsequently given pursuant to any resolution of the corporation or of its directors.

(5) Every notice so given shall be kept by the clerk on file in his office and shall at all convenient hours be open to inspection and examination by any person entitled to examine or inspect an assessment roll.

(6) The assessor shall in each year, before the return of the assessment roll, search for and examine all notices which may be so on file and shall follow and conform thereto and to the provisions of this Act.

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FORM B

(*Section 65*)

Notice by Corporation as to Application of School Tax.

To the Clerk of (describing the municipality).

Take notice that (*here insert the name of the corporation so as to sufficiently and reasonably designate it*) pursuant to a resolution in that behalf of the directors requires that hereafter and until this notice is either withdrawn or varied the whole or so much of the assessment for land and business or other assessments of the corporation within (*giving the name of the municipality*) as is hereinafter designated, shall be entered, rated and assessed for separate school purposes, namely, one-fifth (*or as the case may be*) of the land and business or other assessments.

Given on behalf of the said company this (*here insert date*).

R.S., Secretary of the Company.

In accordance with section 32 of *The Assessment Act* then in force (R.S.O., 1927, chapter 238), the Board of Education for the City of Windsor complained to the Court of Revision that the Company was wrongfully placed upon the roll as a Roman Catholic School supporter. By a majority, the Court of Revision considered that it was not established by evidence under oath that eighteen per centum was not a greater proportion of the whole of the Company's assessments than the proportion of stock or shares in the Company held by Roman Catholics bore to the whole amount of such stock or shares; and

not only was no effort made by the corporation to ascertain the number of shares held by Roman Catholics but the corporation has no knowledge of the proportion of shares held by Roman Catholics.

They therefore held that the whole of the Company's assessments should be entered and assessed for public school purposes.

The Company and the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor appealed to the County Judge and upon the latter's affirmance of the decision of the Court of Revision took a further appeal to the Court of Appeal for Ontario on a stated case. The Court of Appeal reversed the order of the County Judge and the Board of Education now appeals to this Court.

The County Judge reported and found as follows:—

At the commencement of the hearing of the appeal, after the production of the exhibits and their identification by Mrs. Helen Weller of the City Clerk's Department of the City of Windsor, Mr. Aylesworth, counsel for the Ford Motor Company, pointed out that one of the main questions between the parties was as to where the burden rests

as to the compliance or non-compliance of the company with the provisions of the then section 65 (now 66) of the Separate Schools Act and that without waiving his position that that onus was on the respondent here to prove affirmatively that less than 18 per cent. of the shareholders were Roman Catholics and that that onus was not on the appellant company to prove that there were as many as 18 per cent. of its shareholders Roman Catholic, he was willing to bring out the facts on the point. To this Mr. Spencer assented.

Mr. Douglas B. Grieg, secretary of the Ford Motor Company of Canada, Limited, was then called and gave his evidence, some of the material parts of which were:

The Company was incorporated under the Dominion Companies Act; has 1,658,960 shares of common stock and no preferred shares; that there were shares held by companies; that as of November 28th, 1936, the shares were held in 32 countries; that as of November 27th, 1937, the shares were held in 34 countries; that in Canada and the United States, 1,500,000 shares are held; that the company cannot get the shareholders to comply with requests as to school taxes; that the company has difficulty in getting many of its dividend cheques into the hands of those entitled; that they lately had about 100 letters containing dividend cheques returned to them; that there is, on the average, about 20,000 different shareholders; that all the company's shares of stock are not voting shares; that voting shares are not as widely distributed; that, on the average, about 19 per cent. of proxies are returned; that voting shares are held in 16 different countries; that a number of outstanding shares are held in names of brokers; that between September, 1936, and November, 1936, the company's records indicate that the average number of shares held by brokers was 195,000; that the company has transfer agencies in Montreal, Toronto, Detroit and New York; that the number of shares changing ownership, according to records of stock exchanges, exceed by 9,500 to 10,000 monthly the number of shares presented for transfer on the books of the company; that in the year 1937 there were 665,874 shares of stock transferred on the books of the company; that the directors knew that all the stock of the company was not held by shareholders of the Roman Catholic faith and that shares were held by both Roman Catholics and others but did not know and could not know what percentage of the stock was held by Roman Catholics.

There were other facts brought out from Mr. Greig's evidence, but, I think the material facts are above recited. His evidence did show the directors, in making the apportionment they did, acted in good faith and with every desire to be fair. They reasoned from a number of angles and made assessment comparisons and population comparisons, it is true many, if not most of them, after the notice, Form B, had been filed with the city clerk. However, I must find and do find that the division they made was not based on actual knowledge and was only a guess or an estimate.

## The questions asked in the stated case are as follows:—

1. Upon the facts above set out and upon the true construction of the Statutes as applied to the facts, was I right in holding that upon an appeal by a ratepayer affected by the Notice "B" given by the Corporation and the assessment, rating and enrolment made thereunder, the onus is upon the Corporation to establish the fact that the share or proportion of its land, business or other assessments as set out in its

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requisition (Form B) does not bear a greater proportion to the whole of its assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares.

2. Upon the facts above set out and upon the true construction of the Statutes as applied to the facts, was I right in holding that upon an appeal by a ratepayer affected by the Notice "B" given by the Corporation and the assessment, rating and enrolment made thereunder, the onus is not upon the ratepayer attacking the assessment to establish affirmatively the fact that the share or proportion of the Corporation's land, business or other assessments as set out in its requisition (Form B) bears a greater proportion to the whole of its assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares.

3. Upon the facts above set out and upon the true construction of the Statutes as applied to the facts so stated, was I right in holding that the appeals of Ford Motor Company of Canada, Limited, and of the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, should be dismissed, the decision of the Court of Revision sustained and the Notice, Form B, delivered by Ford Motor Company of Canada, Limited, set aside, vacated and declared null and void and of no effect and that all the assessments of the Company in the City of Windsor be assessed, enrolled and rated for Public School purposes, unless it was affirmatively proved before me that the share or proportion of the Corporation's land, business or other assessment as set out in its requisition (Form B) did not bear a greater proportion to the whole of its assessment than the amount of the stock or shares held by Roman Catholics bore to the whole amount of the stock or shares.

Two points should, I think, be here emphasized. The first is that, while in the present instance the assessor fulfilled the obligation cast upon him by subsection 2 of section 65 of *The Separate Schools Act,* the problem would be the same if he had disregarded his plain duty and had failed to assess in accordance with the notice sent by the Company. In either case the question of substance must be whether a party objecting to the notice is obliged to show affirmatively that the proportion of the holdings of Roman Catholics in shares or stock of the Company was less than eighteen per centum. The second point is that the hearing of the appeal from the Court of Revision by the County Judge is in the nature of a new trial, as subsection 2 of section 78 of the present *Assessment Act,* R.S.O., 1937, chapter 272, provides:—

> The hearing of the said appeal by the county judge shall, where questions of fact are involved, be in the nature of a new trial, and either party may adduce further evidence in addition to that heard before the court of revision subject to any order as to costs or adjournment which the judge may consider just.

The proper construction of section 65 of *The Separate Schools Act* cannot be reached without an investigation

of its history. For many years the *Separate Schools Act* in force from time to time in Ontario contained a section empowering a company to give notice to the clerk of the municipality wherein a separate school existed, requiring any part of its assessable property to be rated and assessed for the purposes of the separate school. In this section was included a proviso (as, for instance, in section 54 of *The Separate Schools Act* as enacted by 4 Edward VII, chapter 24, section 6) that the share so rated "shall bear the same ratio and proportion to the whole of the assessment" as the amount or proportion of the shares or stock of the Company as are held and possessed by persons who are Roman Catholics bears to the whole amount of such shares or stock. In 1913, however, by 3-4 George V, chapter 71, section 66, the statutory provision was recast. What was formerly the proviso appeared (as it now does), as subsection 3,—but with this important difference: Instead of the requirement that the share of the assessment should bear the *same* ratio and proportion to the whole of the assessment as the amount or proportion of the shares held by Roman Catholics bore to the whole amount of such shares, it was provided that it *shall not bear a greater proportion.*

Mr. Hellmuth, for the appellant, argued that prior to 1913 it would have been incumbent upon the Company to ascertain the exact proportion, and that as soon as it was shown before the Court of Revision or County Judge that that had not been done, the Company would be assessed for public school purposes; the new Act, he submitted, merely authorized the Company to find the limits of the ratio but gave it no further or greater power. That is, he contended, the Company must be able to show that, in selecting the proportion to be assessed for separate school purposes, it has not adopted a greater proportion than the holdings of Roman Catholics bear to the whole amount of the Company's stock or shares. As an aid towards the establishment of these propositions he relied upon *Regina Public School District* v. *Gratton Separate School District* (1).

In connection with that case, it should be noted at the outset that two members of this Court were in favour of allowing the appeal because of their views as to the

(1) (1915) 50 Can. S.C.R. 589

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proper construction of sections 93 and 93 (*a*) of the Saskatchewan *School Assessment Act,* while two others adopted a directly contrary construction. In the result, the appeal was allowed, but that was because the fifth member, Mr. Justice Idington, without expressing any opinion upon the question of construction, concluded that the legislation was *ultra vires* the Saskatchewan legislature. In any event, the statutory provisions and the facts before the Court in that case were so different from what we have to consider on this appeal that no assistance may be gained from a review of the opinions expressed as to the construction of the statute. There, a number of companies had not given, under the permissive section 93 of the Saskatchewan *School Assessment Act,* notices requiring a portion of their school taxes to be applied for separate school purposes. Section 93 contained a proviso that the share to be assessed for separate school purposes should bear the same proportion to the whole property of the company assessable within the school district as the proportion of the shares of the company held by Protestants or Roman Catholics respectively bore to the whole amount of the shares of the company,— in effect the same as the proviso in the earlier Ontario statutes. Under section 93 (*a*), which had been enacted later than section 93, the separate school trustees notified these companies that unless and until they gave notice under section 93 the school taxes payable by them would be divided according to a set formula. The mooted question was as to the efficacy of the separate school trustees' notices upon the proper construction of the two sections.

In the case at bar, although no obligation was imposed upon the respondent company, it did give a notice. As found by the County Judge, the directors acted in good faith, knowing "that shares were held by both Roman Catholics and others" although "not what percentage of the stock was held by Roman Catholics." Under these circumstances, if the question had arisen under the statute as it stood prior to the 1913 amendment, no effect could have been given to the notice because it was shown that the share of the Company's assessments to be rated for separate school purposes did not bear the same ratio to the whole of the assessments as the proportion of the shares held by Roman Catholics bore to the whole amount

of such shares. I attach no importance to the fact that the new legislation appears, not as a proviso, but as a separate subsection, but the enactment was altered and it is only from a consideration of the language used that we are justified in gauging the intention of the legislature. That intention was to free a company desirous of having part of its assessment apportioned to separate school purposes from the difficulty of ascertaining the precise ratio of the holdings of Roman Catholics in its capital stock. To adopt the construction of the statute suggested on behalf of the appellant would be to require the Company to do the very same thing, although, it is true, it might then direct that a less proportion of its assessments be rated for such purposes. To give effect to the legislative intention, the proper construction of the statute requires us to hold that the Company's notice stands and is to be followed unless displaced by evidence that the prohibition in subsection 3 has been violated. As pointed out by Masten, J.A., if the fact be as the appellant contends, the means existed whereby it might be proved.

The appeal should be dismissed with costs.

CROCKET J.—As I fully concur in the reasons for the unanimous judgment of the Ontario Court of Appeal (Middleton, Masten and Fisher, JJ.A.), as given by Masten, J.A., as well as in those of my brother Kerwin here, I would dismiss this appeal with costs.

DAVIS J. (dissenting)—I am of the same opinion as my Lord, the Chief Justice. The fact that the case is one of general importance leads me to state fully the reasons which move me to the same conclusion.

The appeal raises nothing but a question of law. The facts found by the County Judge are not subject to any right of appeal; we are entirely bound by those facts. The only question open for determination upon the stated case under *The Assessment Act* is the question of pure law: whether the County Judge as a matter of law upon the facts as he found them, reached a proper conclusion.

The point in issue in the case is a very simple one, turning on the interpretation and application of the words of sec. 66 of *The Separate Schools Act,* R.S.O., 1937, ch. 362. For convenience I shall refer throughout to the pro-

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visions in the present revised statutes of Ontario (1937) because there has been no change in the relevant provisions in force at the dates material in this case. Under said sec. 66 a corporation may require the whole or any part of its land, business or other assessments in any municipality in which a separate school exists, to be rated and assessed for the purposes of separate schools rather than for the purposes of public schools, but "unless all the stock or shares" in the corporation "are held by Roman Catholics," the share or portion of said land, business or other assessments to be so rated and assessed "shall not bear a greater proportion" to the whole of such assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares of the corporation.

The respondent Ford Motor Company of Canada Limited, in July, 1937, sought to have 18 per cent. of its land, business and other assessments in the City of Windsor rated and assessed for separate school purposes under and by virtue of the statutory provision above mentioned, by delivering to the clerk of the municipality a notice (Form B) as provided by subsection (1); the assessor thereupon, in accordance with subsection (2), entered the company as a separate school supporter in the assessment roll in respect of 18 per cent. of its land, business and other assessments designated in the notice. The Board of Education for the City of Windsor complained of this assessment (by virtue of sec. 31 of *The Assessment Act*, R.S.O., 1937, ch. 272) and raised the question by way of appeal to the Court of Revision, of the right of the company to divert this portion of its school rates from the public schools to the separate schools. The Court of Revision by a majority agreed with the Board of Education's contention that the company had not brought itself within the statute, and accordingly set aside the assessment in respect of separate schools. On an appeal being taken by the company and by the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor (by separate notices of appeal, to which I shall later refer) to the County Judge, he, by force of subsec. (2) of sec. 78 of *The Assessment Act*, was entitled to deal and did deal with the appeals as "in the nature of a new trial" and all parties were entitled

to adduce further evidence in addition to that heard before the Court of Revision. Sec. 83 of *The Assessment Act* provides that the decision and judgment of the County Judge "shall be final and conclusive in every case adjudicated upon," except that in the case of the assessment of a telephone company an appeal shall lie from such decision and judgment to the Ontario Municipal Board. Sec. 85, however, gives a right of appeal to the Court of Appeal from the judgment of the County Judge "on a question of law or the construction of a statute." Subsection (2) of sec. 85 provides that any party desiring so to appeal to the Court of Appeal shall, on the hearing of the appeal by the Judge, request the Judge to make a note of any such question of law or construction and to state the same in the form of a special case for the Court of Appeal. That was the procedure adopted in this case.

The County Judge found, as was in fact admitted, that all the shares of the company were not held by Roman Catholics. That being so, the question of fact then was whether or not 18 per cent. was a greater proportion of the whole of the company's assessments than the amount of the shares of the company held by Roman Catholics bore to the whole amount of the shares of the company. The right of a company under the statute to divert a portion of its school rates from public schools to separate schools (where all the shares are not held by Roman Catholics) is limited, as I have said, to a proportion "not greater than" the amount of the shares of the company held by Roman Catholics bears to the whole amount of the shares of the company. Prior to the amendment made in 1913 (3-4 Geo. V, 1913, ch. 71, sec. 66 (3)) the words were "shall bear the same ratio and proportion" (see 4 Edw. VII, 1904, ch. 24, sec. 6). The amendment permitted any part of a company's taxes to be diverted to separate schools so long as it "shall not bear a greater proportion." It is a simple mathematical calculation to determine the maximum statutory percentage once two amounts are ascertained—the amount of the shares in the company held by Roman Catholics and the total amount of the shares of the company. It became unnecessary however, under the amendment, that the exact ratio and proportion be ascertained, or if ascertained be diverted. To whatever extent the company ascertained the amount

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of shares held by Roman Catholics, to that extent the amendment gave the power to divert. The taxes that may be diverted must not bear "a greater proportion"; they may be less, but they cannot be greater. But one cannot determine any proportion at all until he ascertains, first, the total amount of the shares of the company, and second, some amount of those shares that is held by Roman Catholics.

In this case the parties gave all the evidence they could to the County Judge and he found as a fact that no one knew what amount of shares was held by Roman Catholics. The evidence of the Secretary of the Company, accepted by the County Judge, was that the directors "did not enquire from the shareholders as to their religious faith." The County Judge expressly found as a fact "that the division they (i.e., the directors) made was not based on actual knowledge and was only a guess or an estimate" and he sustained the decision of the Court of Revision.

The Company and the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, by way of a stated case on a question of law or construction of statute, appealed to the Court of Appeal. The two appeals are said to have been heard together in the Court of Appeal, as they had been before the County Judge. I cannot see any reason for both the company and the Separate School Board appealing separately, but that only goes to the question of costs. The Court of Appeal took a different view of the matter from that taken by the Court of Revision and by the County Judge, and allowed the appeals. From that judgment, to which I shall presently refer, the Board of Education appealed to this Court.

Upon the facts as found by the County Judge (and there was not a suggestion that if an appeal had lain on matters of fact as well as on matters of law the findings of fact could have been in any way impeached), I confess that I cannot see any really arguable point of law. If the company does not ascertain any number of shares held by Roman Catholics, how can the Court say that 18% is "not greater than" the maximum proportion allowed by the statute?

Much of the argument was directed to the question of onus and the first two questions in the case stated by the

County Judge at the request of the respondents are directed to the question of onus. But all the available facts were frankly given to the tribunal of fact (i.e., the County Judge), and the facts have been found and there is no right of appeal thereon. If no evidence had been tendered to the County Judge on the hearing before him, or if the evidence had been so evenly balanced that the County Judge could come to no conclusion on the facts, the onus or burden of proof might have operated as a determining factor of the whole case; *Robins* v. *National Trust Co.* (1). But that was not the case here. The learned County Judge was not upon the whole evidence judicially satisfied that 18 per cent. was not a greater proportion than that permitted by the statute. It is quite unnecessary for the Court to answer the first two questions submitted in the stated case. The third question is the substance of the matter, i.e., Was the County Judge right in holding that the appeals of the company and of the Roman Catholic Separate Schools Trustees should be dismissed, the decision of the Court of Revision sustained and the notice, form B, delivered by the company, set aside, unless it was affirmatively proved that the percentage of the company's assessments (i.e., 18 per cent.) set out in the requisition (Form B) did not bear a greater proportion to the whole of its assessments than the amount of the shares held by Roman Catholics bears to the whole amount of the shares of the company? Agreeing as I do with the conclusion of the learned County Judge upon the facts as he found them, I would answer the third question in the affirmative.

But there was so much said during the argument on the question of onus that it may be desirable to say that in any case where onus becomes of importance the problem of deciding upon whom the onus rests depends upon the nature and circumstances of the particular question involved. There is no single principle or rule which will afford a test in all cases for ascertaining the incidence of the burden. A statement of general application appears to be that the burden of proof lies upon the party who substantially asserts the affirmative; but even this statement as a working rule presents its own difficulties in

(1) [1927] A.C. 515, at 520.

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particular cases because, when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment may be taken as true unless disproved by that party. And yet this statement again cannot be said to furnish a satisfactory general working rule. The article on Evidence in the Hailsham edition of Halsbury's Laws of England (Vol. XIII) which was under the editorship of Lord Roche, has left untouched the carefully guarded statement in the article on Evidence, in the first edition, which was under the joint editorship of Mr. Hume-Williams and Mr. Phipson. The law was there stated as at October, 1910, and the unchanged statement to which I have reference, in the edition of 1934, is paragraph 615 (2) at page 545, as follows:

> (2) Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter.
>
> The principle of this exception has frequently been recognized, both by the Legislature and in decided cases. On the other hand, its validity has been several times challenged by high authorities, and having regard to this conflict of opinion, the following statement of the point is, perhaps, the one which is the least open to objection:—"In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."

I cannot appreciate the argument that when a company has been given a statutory right to divert taxes from one purpose to another provided the division "shall not bear a greater proportion" than that stipulated in the statute, and the company puts in an arbitrary figure without any actual knowledge of the facts, it falls upon those adversely affected to establish the two essential facts that are necessary in order that the simple mathematical calculation can be made to determine the maximum stipulated statutory proportion beyond which the taxes are not to be diverted, i.e., first, the total amount of the stock or shares of the company, and secondly, the amount of the stock or shares held by Roman Catholics. If that is so, it would only be necessary for any company to put in any arbitrary figure it liked and then to say to any person prejudicially affected and complaining that the division of taxes occasioned by such arbitrary figure must stand until the person who complains is able to prove affirmatively against the company (which itself has the information in its own

keeping, if any one has) that the arbitrary percentage is in fact greater than the proportion fixed and permitted by the statute.

While in my opinion, as already expressed, the question of onus does not arise in this case, if you had a case where onus became of importance it would, in my view, rest upon the party seeking the benefit of the special statutory provision. Even before the days of Confederation, the same sort of problem with which we have to deal here arose in Upper Canada with respect to school assessments of individuals. The principal school legislation of the province of Ontario may be traced from the form in which it appeared in the Consolidated Statutes of Upper Canada, 1859, ch. 64, through various consolidations. In 1862, in the case of *Ridsdale and Brush* (1), the Court of Queen's Bench, composed of McLean, C.J., Burns and Hagarty, JJ., delivered judgment in which Burns, J., speaking for the Court, at p. 124 said:

> We take it to be perfectly plain, from reading the Common School Act, chapter 64 of the Consol. Stats. of U.C., chapter 65, providing for separate schools, and chapter 55, the Assessment Act, that the Legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favour.

Gwynne, J., in *Harling* v. *Mayville* (2), approved the language of Burns, J., in the *Ridsdale* case (1) and said, at p. 511:

> I think that the party claiming exemption from the general rule of *prima facie* liability to common school rates should show that the trustees of his separate school have taken the steps pointed out by the law to procure for the separatists the desired exemption.

The language of Burns, J., in the *Ridsdale* case (1) was again referred to by Chief Justice Hagarty (he had been a member of the Court in that case) in *Free* v. *McHugh* (3). The effect of the judgments in those cases is that it lies on the person claiming exemption as a separatist from the general liability for the support of public schools to prove those exceptional matters that take him out of the general rule. I can see nothing inconsistent with that long established view of exemption from public school

(1) (1862) 22 U.C. Q.B. 122. (2) (1871) 21 U.C. C.P. 499.
(3) (1874) 24 U.C. C.P. 13, at 21.

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rates in the statement of Lord Haldane in the *Tiny* case (1), that "the separate school was only a special form of common school."

School legislation in Ontario has from earliest times, and continues so down to this date, provided under certain circumstances for Protestant as well as for Roman Catholic separate schools. Part I, being the first fifteen sections of *The Separate Schools Act,* R.S.O., 1937, ch. 362, provides the conditions on which one or more separate schools for Protestants and one or more separate schools for coloured people may be established in any township, city, town or village in the province. Part II provides for separate schools for Roman Catholics. The public schools are governed by *The Public Schools Act,* R.S.O., 1937, ch. 357. By sec. 5,

> All schools established under this Act shall be free public schools, and every person between the ages of five and twenty-one years, except persons whose parents or guardians are separate school supporters, and except persons who, by reason of mental or physical defect, are unable to profit by instruction in the public schools, shall have the right to attend some such school in the urban municipality or rural school section in which he resides.

Counsel for the respondents pressed upon us another argument, quite independent of the question of onus. They said that the proportion or percentage in this case was "a reasonable probability" made in good faith by the directors as a fair estimate, and that the statute should be so interpreted by the Court, as in fact it was by the Court of Appeal, to allow any such reasonable probability to stand as a satisfactory compliance with the statute, upon the ground that the manifest intention of the statute was to provide for an equitable apportionment of public and separate school taxes payable by companies having Roman Catholic shareholders. But the language of the statute itself is perfectly plain and the Court cannot relieve itself of its duty to apply it. There is nothing in the language that suggests a place for either an estimate or a guess. Sir Louis Davies (then Davies, J.) in this Court in *Regina Public School District* v. *Gratton Separate School District* (2), in discussing a Saskatchewan

(1) *Roman Catholic Separate School Trustees for Tiny et al.* v. *The King,* [1928] A.C. 363, at 387.
(2) (1915) 50 Can. S.C.R. 589.

statute allowing an apportionment between public and separate schools somewhat similar to the statute before us (except that the share to be assessed for separate school purposes should bear "the same ratio and proportion" to the whole property of the company as the proportion of the shares of the company held by the Protestants and Roman Catholics respectively bore to the whole of the shares of the company) said, at p. 606:

> Now it is manifest that a company desirous of exercising the permission given by section 93 must before exercising it have ascertained with certainty the religious persuasions or beliefs or connections of its various shareholders. In no other way could the statutory division the company was authorized to require of its assessable taxes be made and the grossest injustice might be done to one or other of the respective schools, public or separate, if in the absence of such knowledge any company should attempt to exercise its privilege.

The statutory provision with which we have to deal was first enacted in its present language in 1913 (3-4 Geo. V, ch. 71, sec. 66), when the words "not greater than" were substituted for the words "the same ratio and proportion," which had appeared in the enactment as first introduced in Ontario in 1886 by 49 Vict., ch. 46, sec. 53. It is not without significance, I think, that in 1936, then sec. 65 of *The Separate Schools Act,* R.S.O., 1927, ch. 328 (the same as present sec. 66), was repealed by the Ontario Legislature by *The School Law Amendment Act, 1936,* being 1 Edw. VIII, ch. 55, sec. 42, and there was passed by the Legislature *An Act to amend The Assessment Act,* being 1 Edw. VIII, ch. 4, which added to *The Assessment Act* entirely new sections, 33*a*, 33*b*, 33*c*, 33*d*, 33*e* and 33*f*, relating to the distribution of assessments of corporations for public and separate school purposes. These statutory changes—that is, the repeal of old sec. 65 of *The Separate Schools Act* and the enactment of the new provisions—were both assented to on April 9th, 1936. The new provisions expressly dealt with the case, such as the one before us in this appeal, of

> * * * a corporation, which, by reason of the large number of its shareholders or members and the wide distribution in point of residence of such shareholders or members, is unable to ascertain which of its shareholders or members are Roman Catholics and separate school supporters or the ratio which the number of the shares or memberships held by Roman Catholics who are separate school supporters bears to all the shares issued by or memberships of the corporation, * * * [sec. 33*b* (1)].

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Provision was made for the division of school taxes between the public schools and separate schools

> in the same ratio as the total assessments of all the rateable property in such municipality or school section assessed according to the last revised assessment roll to persons who being individuals are public school supporters bear to the total assessments of all the rateable property in such municipality or school section assessed according to the said assessment roll to persons who being individuals are Roman Catholics and separate school supporters; and taxation for public school purposes and separate school purposes against the said lands, business and income of the corporation shall be imposed and levied accordingly; * * * [sec. 33*b* (3)].

These new provisions were obviously intended to meet just such a case as that now before us where, by reason of the large number of shareholders and the wide distribution in point of residence, a company is unable to ascertain, or cannot conveniently ascertain, which of its shareholders are Roman Catholics. But all these new statutory provisions were entirely repealed, on March 25th, 1937, at the next session of the Legislature by *The Assessment Amendment Repeal Act, 1937,* being 1 Geo. VI, ch. 9, and on the same day there was re-enacted, by *The Statute Law Amendment Act, 1937,* 1 Geo. VI, ch. 72, sec. 57, old sec. 65 of *The Separate Schools Act* (the same as sec. 66 in the Revised Statutes of 1937) which had been repealed the year before and which section specifically provides that

> 65. (3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

The fact that the Legislature obviously dealt with just such a difficulty as has occurred in this case, and then immediately repealed the new provisions and restored the old, leaves no room in my opinion for the construction put upon the section by the Court of Appeal that we will best effectuate the intention of the Legislature by construing the words so as to imply that in the absence of actual knowledge of any amount of shares held by Roman Catholics in the company, a fair estimate is sufficient.

The general rule undoubtedly is that where an Act of Parliament has been repealed it is, as to all matters completed and ended at the time of its repeal, as though it had never existed as a governing law with respect to these

subject-matters (*per* Bramwell, L.J., in *Attorney-General* v. *Lamplough* (1)). But if a present statute is doubtful or ambiguous, it is to be interpreted so as to fulfill the intention of the Legislature and to attain the object for which it was passed, and in that connection Lord Blackburn in *Bradlaugh* v. *Clarke* (2) said:

It is upon this principle that it is held, as I think it has always been held, that where a statute was passed for the purpose of repealing and, in part, re-enacting former statutes, all the statutes *in pari materiâ* are to be considered, in order to see what it was that the Legislature intended to enact in lieu of the repealed enactments. It may appear from the language used that the Legislature intended to enact something quite different from the previous law, and where that is the case effect must be given to the intention. But when the words used are such as may either mean that former enactments shall be re-enacted, or that they shall be altered, it is a question for the Court which was the intention.

In the *Lamplough* case (3), Bramwell, L.J., said at p. 227:

Then it is argued that you cannot look at the repealed portion of the Act of Parliament to see what is the meaning of what remains of the Act. I know that is not the argument of the Solicitor-General, but that opinion has been expressed. I, however, dissent from it.

Brett, L.J., in the same case, said at p. 231:

The judgments of the majority in the Exchequer Division lay down that the moment an Act of Parliament is partly repealed we cannot look at the repealed part for any purpose, but that the repealed part must be regarded as if it had never been enacted. I cannot help thinking that that part of the judgments is not sustainable, for what we have to consider is not what was the construction of the first statute, but what is the effect of the repealing statute? We cannot tell what is the effect of the latter without looking at the meaning of the statute which it has repealed. We must treat it as we treat all statutes for the purpose of construing them; we must look at the facts which were existing at the time the Act passed to see what was its meaning.

Lord Justice Knight Bruce said in *Ex parte Copeland* (4):

Although it has been repealed, still, upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former Act. Lord Mansfield, in the case of *The King* v. *Loxdale* (5), thus lays down the rule: "Where there are different statutes *in pari materiâ*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other."

(1) (1878) 3 Ex. D. 214, at 228.
(2) (1883) 8 App. Cas. (H.L.) 354, at 373.
(3) (1878) 3 Ex. D. 214.
(4) (1852) 2 De G. M. & G. 914. at 920.
(5) (1758) 1 Burr. 445, at 447.

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Fletcher Moulton, L.J., in *Macmillan & Co.* v. *Dent* (1), said:

> In interpreting an Act of Parliament you are entitled, and in many cases bound, to look at the state of the law at the date of the passing of the Act—not only the common law, but the law as it then stood under previous statutes—in order properly to interpret the statute in question. These may be considered to form part of the surrounding circumstances under which the Legislature passed it, and in the case of a statute, just as in the case of every other document, you are entitled to look at the surrounding circumstances at the date of its coming into existence, though the extent to which you are allowed to use them in the construction of the document is a wholly different question.

While regard may be had to a repealed statute *in pari materiâ* where difficulties of construction arise, I do not think it is necessary to invoke this rule or to rely on the repealed statute to construe the present section, which is neither doubtful nor ambiguous. The conditions which the Legislature has thought fit to impose are plainly set forth and it is not within the province of any tribunal to relax these conditions. It is not for those seeking to take advantage of the special privilege of a statute to say that they have given something just as satisfactory and reasonable as the exact conditions imposed by the statute; they must clearly satisfy the conditions.

Although the case was argued before us by the respondents as if an estimate had been carefully arrived at by the directors before the statutory notice (Form B) was given to the clerk of the municipality, it is to be noted that the County Judge does not put it that way in his findings. He says:

> They (i.e., the directors) reasoned from a number of angles and made assessment comparisons and population comparisons,

but

> it is true many, if not most of them, after the notice, Form B, had been filed with the City Clerk.

The Court of Appeal took the view that it is impossible in most cases for companies to state the exact percentage of their shareholders who are Roman Catholics and that if it is a *sine qua non* under the provisions of the statute that they should so state, then the present legislation is wholly ineffective to accomplish the purpose intended by the legislation, which purpose that Court took to be to provide for an equitable apportionment of the taxes pay-

(1) [1907] 1 Ch. 107, at 120.

able by companies where some of their shareholders are supporters of public schools and others of their shareholders are supporters of separate schools. The Court of Appeal therefore thought it was its duty to give such an interpretation of the statute as would render it effective to accomplish that purpose. But Mr. Hellmuth pointed out that there was not the injustice that had been suggested in an adherence to the language of the statute because any company that wished to could ascertain, so far as it was convenient to do so, who, if any, were Roman Catholic shareholders in the company and the amount of shares held by them. The company might not be able to exhaust the entire list of its shareholders if the company had a very large number of shareholders scattered all over the world, but supposing it ascertained that 20 per cent. or 30 per cent. of the amount of the shares of the company was held by Roman Catholics, the company could divert its school taxes to separate schools up to the ascertained percentage and it could not then be denied that that proportion was "not greater than" the percentage stipulated by the statute. As the statute has stood since 1913 (except for the one year it was repealed) the percentage is not required to bear "the same ratio and proportion" as in the earlier statutory provisions; the result is that a company, though it may not know all its Roman Catholic shareholders, can, to the extent that it ascertains them, take full advantage of the present statutory provision.

In my opinion, the County Judge was right in his conclusion and I would therefore answer the third question submitted in the stated case in the affirmative, and would allow the appeal, with costs against the respondents in this Court and in the Court of Appeal.

*Appeal dismissed with costs.*

Solicitor for the appellant: *Norman L. Spencer.*

Solicitors for the respondent Ford Motor Company of Canada Ltd.: *Bartlet, Aylesworth & Braid.*

Solicitor for the respondent The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor: *Armand Racine.*