

BETWEEN

1904  
Jan. 11.

HIS MAJESTY THE KING..... } PLAINTIFF ;

AND

THE QUEBEC NORTH SHORE }  
TURNPIKE TRUSTEES..... } DEFENDANTS ;*Debentures—Validity—Ultra vires—Breach of trust—Knowledge of breach  
by Crown's Officers at time debentures issued.*

In an action for the recovery of interest upon certain debentures issued by the defendants and held by the Crown, it was set up by way of defence that the defendants had no authority to issue such debentures ; that the application by the defendants of moneys received from the sale of debentures to the payment of interest on other debentures was a misapplication of the trust fund and a breach of trust ; and that the Crown's advisers knew when the debentures were acquired by it that the proceeds thereof were to be so misapplied.

*Held*, that inasmuch as the defendants had authority to issue and dispose of the debentures in question, their acts in so doing were *intra vires*, and that complicity by the Crown in a breach of trust committed by them could not be relied on as a defence to the action.

INFORMATION by the Attorney-general for Canada seeking to recover certain moneys due to the Crown upon debentures.

The facts of the case are stated in the reasons for judgment.

June 4th and 5th 1903.

The case was heard at Quebec.

*G. F. Shepley*, K. C. appeared for the plaintiff ;

*L. J. Cannon*, K. C., appeared in the interests of the Province of Quebec.

*G. G. Stuart, K.C., E. F. Lafleur, K.C., L. F. Burroughs, and C. E. Dorion*, appeared for the defendants.

Counsel for the plaintiff having discussed at some length the points in issue on his opening of the case, the argument was begun by counsel for the defendants.

*G. G. Stuart, K.C.*, for the defendants, contended that the debentures here sued on by the Crown were beyond the powers of the trustees to issue. The statute 4 Vict. (Can.) c. 17 did not authorize the issue of debentures for such purposes. What was contemplated by that Act was, that in case the trustee became short of funds to pay the interest on debentures thereby authorized to be issued, the Crown might have advanced the trustees moneys to pay such interest, and these advances might have been repaid out of the revenues of the trust and out of the revenues only. Nor does the statute 16 Vict. (Can.), c. 235 authorize the issue of the debentures here sued on. A careful examination of these statutes not only demonstrates that the trustees had no express or implied power to issue the debentures, but the right of the Crown to be paid in preference to other creditors is expressly denied. (He cites 12 Vict. (Can.) c. 115; 14 & 15 Vict. (Can.) c. 132; 14 & 15 Vict. c. 133; C.C.L.C. Art. 1983.) He further contended that under the ninth sect. of 20th Vict. (Can.) c. 125, the trustees could only issue debentures for the purposes of the works; they could not issue debentures for the purpose of paying interest.

Again, the orders in council tendered in evidence show that the Crown was informed of the condition of the trust, and of the illegality contemplated by the trustees in the way of issuing these debentures here sued on. The Crown, therefore, having practically invited that illegality on the part of the trustees is prevented from recovering upon these securities. The real transaction between the trustees and the Crown

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was an advance by the Crown to pay interest; there was no purchase of debentures or bonds in the ordinary sense. (He cites *Belleau v. The Queen* (1). The trustees were a corporation, it is true; but it was a corporation of whom all the officers were persons named by the Crown, and under the orders of the officers of the Crown. The Crown, by the orders in council, invites the trustees to do something *ultra vires*; and then turns round and says nevertheless its claim to be paid on the debentures is as good as other creditors who have taken debentures legally and for the purposes for which they were authorized to be issued. I submit that this cannot be done. (He cites *Bank of Toronto v. Perkins* (2).

Then it is also clear upon the evidence that the transaction between the parties was one of loan, and not a sale of debentures.

*E. F. Lafleur, K.C.*, followed for the defendants :

There was a breach of trust by the trustees to the knowledge of the Crown as a creditor taking a security; and the creditor cannot profit by the illegal transaction. The Crown cannot be said to be in any better position in this matter than a private person. If the transaction is *ultra vires* no privilege is conferred by it.

As to the question of jurisdiction, I submit that this court ought not to entertain the claim. The distinction between this case and the case of *Yule v. The Queen* (3) is that in the latter the liability itself was created by the *British North America Act*, 1867. Now in this case it cannot be contended that any liability on the part of the trustees is created by that Act. The liability, if any, of the trustees does not arise under any "law of Canada"; and that being so, there is

(1) 7 S.C.R. 53.

(2) 8 S.C.R. 603.

(3) 6 Ex. C. R. 103.

want of jurisdiction in this court to take cognizance of the claim.

*G. F. Shepley K. C.* for the plaintiff: I submit that if the trustees had statutory power to create the charge the Crown is here seeking to enforce, no question of illegality could arise. Was the issue of debentures creating a charge upon the tolls *ultra vires* of these trustees? My contention is that, under the provisions of the various Acts cited by counsel for the defendants, there was undoubted authority conferred upon the trustees to issue debentures creating a charge upon the tolls. (He cites *Brice on Ultra Vires*. (1) But it is argued for the defendants that the transaction between the parties was *ultra vires* not because there was no competent legislative authority on the part of the trustees to enter into the transaction but because, to the knowledge of the Crown's officers, the trustees intended to misapply the trust funds. That position, I submit, is an untenable one.

As to the effect upon our claim here of any knowledge which the officers of the Crown at the time had of a possible breach of trust arising from the act of the trustees in creating this charge on the tolls, I submit that such a matter cannot enter into the consideration of the court in dealing with the case. It is the validity of the debentures in themselves that we are concerned with here. The crucial question here is: Was there power on the part of the trustees, under the statutes referred to, to create the charge in favour of the Crown? If that is decided in the affirmative, as I submit, it must be, all considerations of illegality and breach of trust fall to the ground. Upon the material before the court it is clear that the trustees had competent authority to enter into the transaction charging the tolls, and beyond that there can be no enquiry here:

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(1) 3rd ed. p. 50.

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THE JUDGE OF THE EXCHEQUER COURT now (January 11, 1904) delivered judgment.

The information is filed to obtain relief:—(1) In respect of certain debentures, amounting in all to fourteen thousand five hundred pounds and interest thereon since the year 1859, issued by the defendants and now held by the Government of Canada for the Governments of the Provinces of Ontario and Quebec, as part of what is known as the Common School Fund ; and (2), also in respect of a certain bond bearing date of the 30th of December, 1861, whereby the defendants became bound to Her late Majesty, in the right of Her Province of Canada, for the payment of the sum of five thousand pounds with interest payable out of the first moneys which might come into their hands applicable to the purpose of such payment, within ten years from the date of the said bond.

With reference to this bond there is, I think, no present difference or controversy between the parties. There is not now, and there never has been, in the defendants' hands any moneys that could be applied to the payment of either the principal or interest thereof, and the contingency that there will ever be any funds available for that purpose is but a remote one. If ever in the future there should, after providing for all charges upon the tolls and revenues of the trust, be anything that could lawfully be applied to the payment of the interest or principal due upon this bond the amount should be paid to the Crown ; and I understand that both parties are agreed that it should be so declared in the judgment to be entered in this case.

Of the debentures amounting to fourteen thousand five hundred pounds now forming, as mentioned, part of the Common School Fund, debentures to the amount of three thousand pounds were acquired by the Govern-

ment of the late Province of Canada under the authority of an order in council of the 3rd of February, 1855; which, so far as relates to the questions in issue here, was in these terms :—

“ On the petition of the trustees of the Quebec Turnpike Roads, representing that owing to the decreased revenue derived from tolls, and their want of means to meet the interest due on their Debentures, which became payable on the 1st of January ult., and other demands, they require the sum of three thousand pounds currency, which they pray may be advanced from the public funds to enable them to carry on the Trust.

The Hon. Inspector-General submits that the Receiver General be authorized to invest temporarily the sum of three thousand pounds of the Common School Investment Fund, in the debentures of the Quebec Turnpike Trust, such debentures being of the usual transferable character, bearing interest at the rate of six per cent. per annum, and to be retired by the trustees so soon as the increased tolls shall enable them to do so.”

The report of the Inspector-General having been referred to the Attorney-General before the order in council was passed, the latter advised that the Government had not at their disposal any funds out of which they would be authorized by law to make the advances prayed for by the petitioners; but that it was competent to the Government to come to the relief of the petitioners by investing any moneys, at the disposal of the Government, in the debentures that the petitioners were authorized to issue, leaving with them the responsibility as to the objects to which such moneys might be by them applied.

The balance of the debentures mentioned, amounting to eleven thousand five hundred pounds, were

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acquired under the authority of an order in council of the late Province of Canada, dated September 1st, 1857, which omitting the formal parts, was in the terms following:—

“ On the application of John Porter, Esq. Secretary to the Quebec North Shore Turnpike Trust for aid to enable the Trust to meet the interest on its debentures and exhibiting a statement of account, shewing that the Trust will, for the future, be able to provide for all its arrangements.

“ The Committee find that, by Ordinance 4 and 5 Vic. Cap. 72, the Governor is authorized to appropriate moneys from the public chest, to meet any deficiency of interest, to be replaced whenever the Trust should be in funds, and this authority was exercised by order in council of 3rd February, 1855, directing an investment in the debentures of the Trust, to the extent of £3,000, on account of the Common School Fund. They, therefore, recommend that the Receiver-General be authorized to invest, from time to time, in the debentures of the Trust a sum not exceeding in the whole £11,500, as sales of lands shall be effected, and payment made to the credit of the Common School Fund.”

As a matter of fact the Committee were in error with respect to the Ordinance cited giving the authority mentioned, as also with respect to any such authority having been exercised by the order in council of the 3rd of February, 1855.

On these debentures no interest has been paid to the Crown since 1859. Other debenture holders have in respect of debentures, of which the Crown holds a part, been paid interest to date in some cases, and in other cases some twenty odd years more interest, than the Crown has received. On the hearing Mr. Shepley, for the Crown, limited the relief sought in the

proceeding in respect of these debentures to a declaration :—(1) That the Crown was entitled to share *pari passu*, with other holders of debentures of the same class, in any future payments or distribution of interest ; (2) In respect to a sum invested in certain debentures issued under 20th Vict. c. 125, s. 8, for the purpose of repairing the Montmorency bridge or building a new one, that the Crown is not only entitled to share *pari passu* with other holders of such debentures in future payments or distributions of interest, but to immediate payment of certain arrears of interest for which the defendants have, pending the present proceeding, made provision ; the tolls and revenues applicable to the payment of interest on these debentures having been sufficient to enable the defendants to pay interest to other holders in full to date.

To the relief to which the Crown thus limits its demand in respect to these debentures the defendants object :—

First, that the government of the late Province of Canada had no authority to invest any part of the Common School Fund in the debentures in question. By the second section of the Act 12th Victoria, chapter 200, it was provided that the capital of the said Fund should from time to time be invested in the debentures of any public company in the province, incorporated by an Act of its Legislature, for the construction of works of a public nature, and which company should have subscribed their whole capital stock, paid up one half of such stock and completed one half of such work or works, or in the public debentures of the Province, for the purpose of creating an annual income ; and it may, I think, be conceded that the debentures issued by the defendants were not within the terms of that provision.

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But making that concession, it is clear that neither the defendants nor the other holders of like debentures were in any way prejudiced by the government of the late Province of Canada investing a portion of the Common School Fund in such debentures without having express statutory authority therefor. That was a matter between the Government and the Legislature. No doubt the fact of such an investment having been made was brought to the attention of the Legislature in connection with the public accounts, although it may not have been asked to ratify by an Act of the Legislature what had been done. But whether that was so or not the absence of such statutory authority does not, it seems to me, afford a good reason for refusing the relief that the Crown now asks for.

Then in the second place, it is objected that the defendants had, with one exception to be noted, no authority to issue debentures to pay interest on other debentures; that the application by the defendants of moneys received from the sale of debentures to the payment of interest on other debentures was a misapplication of trust funds, and a breach of trust; and that the Crown's advisers knew when the debentures were acquired by it that the proceeds thereof were to be so misapplied. Now, assuming this to be true—and it would appear to be true—it does not follow that the Crown is not entitled to the relief which it seeks.

The defendants had authority to issue and dispose of the debentures in question. Their acts in so doing were *intra vires*, and the relief sought could only be refused on the ground that the Crown was a party to the breach of trust, and that is something that cannot, I think, be imputed to the Crown; and therefore it is not necessary to consider whether such an objection

ought to prevail against a person seeking like relief under like circumstances.

By the 9th section of the Act of the late Province of Canada 20th Victoria, chapter 125, assented to on the 10th of June, 1857, the defendants were empowered to issue debentures to pay, among other things, the interest that would be due on July 1st of that year on debentures theretofore issued by the defendants, and it was provided that the debentures so to be issued should have no preference over other debentures issued by them, nor should the issue thereof affect or impair any privilege or preference attached to any former debentures. Of this issue of debentures the Crown holds a portion; and it was suggested at the hearing that there should be some declaration as to the position these debentures occupied with reference to other debentures issued by the defendants under other authority. But that it seems to me would not be proper as all the parties interested are not before the court, or represented in respect of their rights by the defendants. I do not see how with propriety more can be said with respect to these debentures than is said in respect to other debentures in question here, namely, that the Crown is entitled to share *pari passu* with other holders of such debentures in any future payment or distribution of interest.

Then with reference to the Montmorency bridge debentures, the Crown is, I think, entitled to the arrears of interest for the payment of which the defendants have made provision, unless it should appear that such provision has been made out of funds not applicable to the payment of such interest, and that on a proper taking of the accounts the tolls and revenues of the bridge have not been sufficient to enable the defendants to make such provision therefrom.

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There will be judgment for the Crown, and a declaration :—

1. That it is entitled in any future payment or distribution of interest on the debentures mentioned herein to share *pari passu* with other holders of debentures of the like class ;

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2. That with respect to the Montmorency bridge debentures held by the Crown, the Crown is also entitled to payment of the arrears of interest for which the defendants have, pending these proceedings, made provision, unless it should appear that such provision has been made out of funds not applicable to the payment of such interest, and that on a proper taking of the accounts the tolls and revenues of the bridge have not been sufficient to enable the defendants to make such provision therefrom.

3. With reference to the bond for 5,000 pounds, that the Crown is entitled to payment when there are funds available for that purpose after providing for other prior charges upon the tolls and revenues of the trust.

*Judgment accordingly.*

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitors for the defendant: *Caron, Pentland & Stuart.*

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