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CORPORATION OF THE COUNTY OF PONTIAC ..... } APPELLANT;

AND

THE HONORABLE JAMES G. ROSS, RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Municipal Aid to Railway Company—Debentures—Signed by Warden de facto—44 and 45 Vic., ch. 2, sec. 19 P. Q.—Completion of railway line—Evidence of—Onus probandi on defendant.

A municipal corporation, under the authority of a by-law, issued and handed to the Treasurer of the Province of Quebec $50,000 of its debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions in which the Government provincial subsidy was payable under 44 and 45 Vic. ch. 2, sec. 19, viz., "when the road was completed and in good running order to the satisfaction of the Lieutenant-Governor in Council."

The debentures were signed by S. M. who was elected Warden and took and held possession of the office after the former Warden had verbally resigned the position.

In an action brought by the railway company to recover from the Treasurer of the Province the $50,000 debentures after the Government bonus had been paid and in which action the municipal corporation was *mise en cause* as a co-defendant, the Provincial Treasurer pleaded by demurrer only, which was overruled, and the County of Pontiac pleaded general denial and that the debentures were illegally signed.

Held,—1st, affirming the judgment of the court below, that the debentures signed by the Warden *de facto* were perfectly legal.

2nd. That as the Provincial Treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieutenant-Governor in Council, the onus was on the municipal corporation, *mise en cause*, to prove that the Government had not acted in conformity with the statute. Strong J. dissenting.

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*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) affirming the judgment of the Superior Court.

The respondent's action was to recover from the Treasurer of the Province of Quebec $50,000 worth of municipal debentures of the appellant, which, it is alleged, had been deposited with the said Treasurer as trustee both for appellant and a certain railway company known as the Pontiac Pacific Junction Railway Company. The debentures had been granted to the company under a by-law passed the 14th September, 1881, and were to be handed over to the company as the construction of the road progressed in the County of Pontiac, to wit, at the rate of $2,500 per mile, at the completion of every ten miles of road, "and in the manner and subject to the same conditions in which the bonus payable under the Act passed at the last Session of the Legislature of the Province of Quebec (1880-81) is to be paid to the said company":—The company transferred the right to obtain the bonus from the Treasurer to plaintiff, who alleged in his declaration that the said railway company had conformed with the conditions of the by-law and had built within the County of Pontiac more than twenty miles of said railway, which have been completed and "admitted to be in good running order, to the satisfaction of the Lieutenant-Governor in Council."

Appellant's pleas to the action were as follows:—

1. Défense en faits.

2. An exception setting forth that the said debentures are and have always been illegal, null and void, as not having been issued in conformity with the said by-law or the municipal code, and because, amongst other reasons, at the time they were issued and handed to the Treasurer of the Province, Simon McNally, who

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signed them, was not Warden of the County of Pontiac and had no authority to sign them, that W. J. Poupore was then such Warden, and alone had authority or power to sign such debentures, and, although *in fact* McNally appears to have acted, Poupore was the real Warden and in possession of the office as such.

The Provincial Treasurer pleaded to the action by demurrer only, which was overruled.

At the trial it appeared by the minutes of the council that at a special session of the council Warden Poupore refused to sign the debentures and verbally tendered his resignation, "in order to let some other gentleman carry out the behest of the council in signing the debentures," and that at a subsequent special session of the council Warden Poupore's resignation was accepted, and Mayor McNally was elected to sign the debentures, which he did.

The Government Engineer Light was examined as a witness and proved that he had made a report upon the completion of the road, and that he had given a certificate that the road was complete and in good running order, so far as the specifications of the Province would require.

The Government subsidies were paid.

F. Langelier, Q.C., and *McDougall* for appellant.

The appellant was only bound to hand over its debentures when the road or certain sections of it shall have been completed and in good running order to the satisfaction of the Lieutenant-Governor in Council. Plaintiff admits this to be so, as it forms the subject matter of one of the allegations of his declaration.

Now the only legal manner in which such proof could have been adduced, would have been by the production of an Order in Council establishing the "satisfaction of the Lieutenant Governor in Council," but no Order in Council is produced. On the contrary, plain-

tiff relies solely upon the testimony of Mr. Light, engineer acting for the Government of the Province of Quebec, who swears that he gave a certificate to the effect that twenty miles of said road had been completed, &c., &c., after an inspection he made of it. In cross-examination, he admits that a small portion was, at the time, uncompleted, but that should be set off by work of another kind not called for, but which had been performed.

Could the company receive any amount of the bonus (subsidy) from the Government until the Lieutenant-Governor in Council be satisfied? Certainly not, according to the statute. The appellant, being in the same position as the Government in that respect, is not yet bound, and the plaintiff's action is not only unproved, but premature, as it is to be inferred that the non-production of an Order in Council means that no such order exists. *Stadacona Ins. Co.* v. *Trudel* (1); *Pacquet* v. *Gaspard* (2).

Besides, under our law, if the county, *mise en cause*, or the defendant had not filed an appearance when sued, and let the case go by default, the plaintiff could not have obtained judgment without proving by production of the Order in Council, that the portions of the road involved in the action had been duly completed, &c., to the satisfaction of the Lieutenant-Governor. But the Court below rules that, having appeared and filed a defence in which all the matters set forth in the plaintiff's claim are expressly denied, appellant by such fact is placed in a worse position than if it had made default. Appellant respectfully urges that the holding is erroneous and subversive of our notions of procedure and evidence.

Art. 144 of the Code of Procedure relied on by the

(1) 6 Q.L.R. 31.

(2) Stuarts L.C.R. 100, see footnote.

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Court of Queen's Bench will hardly bear the interpretation put upon it. It simply requires an express denial of the facts, and in this instance appellant could assuredly not make a stronger denegation than by alleging that "all and every, &c., the facts, matters and things set forth in the declaration are false," which naturally includes the allegation that the road was complete "to the satisfaction, &c., &c." Would the denegation be any stronger by singling out some special fact set up, and stating that such fact "is specially and expressly false?" Appellant believes not, and maintains that its general denial is the proper and sufficient pleading, and that special averments are only required in affirmative pleadings.

One of the learned judges (Mr. Justice Cross) states, however, in his reasons or notes, that this point is a new issue, and was raised in appeal only.

The learned judge is manifestly in error here, as a reference to Mr. Justice Caron's remarks and judgment in the court of original jurisdiction will show that the point was there raised, and passed upon by the tribunal. The plaintiff, at the hearing in the Superior Court, could have applied for a re-opening of the case, in order to produce the Order in Council, but did not do so, and argued that the case was proved without it. So that he cannot now complain that this is a new issue.

We also contend that the bonds are worthless and never could or should legally issue. W. J. Poupore was, on the 14th Septemper, 1881, Warden of Pontiac. By the Municipal Code, Wardens are elected annually, to wit, in March of each year (1).

His signature is subscribed to the by-law of the 14th September, 1881. The bonds purport to have been signed and delivered on or about the 13th February, 1882.

(1) See Mun. Code L. C. Art. 248.

Therefore, it would be an unmistakeable fact to any one reading the by-law that W. J. Poupore would still be Warden on the 13th February, 1882, and the only legally qualified functionary who could validly sign bonds, unless in the meantime the office of Warden had become vacant by death, resignation or other valid cause, and a successor appointed.

In the present instance Poupore did not resign. It was held that there is evidence of Poupore's resignation as Warden, but we claim that he did not resign and that it is not shown in the record. The only presumable reason the courts below could have for reaching the conclusion that Poupore had relinquished the office would appear because of what purports to be the minutes of two special sessions of the County Council of Pontiac, at the first of which, held on the 18th January, 1882, Poupore is stated to have said that "he would rather resign than sign the debentures," but at which he did not actually resign, and this is not sufficient Art. 126, Mun. Code C. L.; *Pattison* v. *Corporation of Bryson* (1); *Paris* v. *Couture* (2), etc.

But respondent meets appellant's argument by a special answer, affirming that McNally was at all events the *de facto* officer and agent of the Corporation, appellant, and that his act, that of signing the bonds, would make them binding upon the county.

But such pretensions can hardly avail against the fact that there was no vacancy in the Wardenship, and that there could be but one Warden, to wit, W. J. Poupore. How could McNally be a *de facto* officer at a period when there existed a real, a *de jure* officer? Poupore's refusal to sign the bonds, if that were in issue, would not give a right to appoint McNally. He, Poupore, could be compelled by action to sign such bonds, or under art. 251 he could regularly be removed

(1) 9 L. N. 169. (2) 10 Q. L. R. 1.

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from office, and somebody else legally appointed to sign them.

If there was no vacancy there could be no valid election, and all the proceedings surrounding McNally's pretended appointment are bad.

Grant on the Law of Corporations (1); Dillon's Municipal Corporations (2).

Irvine Q.C. and *D. Ross* Q.C. for respondent.

The proceedings of the council show that Poupore, who had been the warden, voluntarily resigned his office, and that his resignation was accepted, and that a regularly convened meeting for the purpose of electing his successor having been called, McNally was duly elected in his place, and took and held possession of the office without any objection, until the expiration of the term, when he was re-elected and has been Warden ever since.

Even if there were any technical defect in the election of McNally, he being in the possession of the office of Warden, and recognized as such by the council, his acts in that capacity would bind the corporation towards third parties.

The corporation of Pontiac have no interest in urging this objection now. They themselves placed these bonds in the hands of the treasurer to be handed to the company on the fulfilment of the conditions imposed by the by-law. These conditions have been complied with and the company are entitled to have them. If they are null by reason of any irregularity it will be time enough for the county corporation to urge it when they are called upon to pay them.

It was urged at the hearing before the Court of Appeals that there was no evidence of an Order of the Lieutenant-Governor in Council accepting the road.

(1) P. 213, Ed. 1850. (2) P. 293, sec. 276.

This pretension was overruled by the court, on the ground that the fact of the adoption of such Order in Council was not specially put in issue. (Art. 144, C. C.P.) Moreover, there is ample evidence that the road is completed, and it was for the appellant to prove that the Government had not complied with the statute.

STRONG J.—I am of opinion that the debentures were perfectly valid, even assuming that they were signed by a warden who was merely such *de facto*, and had not a strictly legal right to the office, and consequently that the peremptory exemption pleaded by the *mise en cause* was ill-founded and therefore properly dismissed.

Upon the other point in the case I think the appellants' contention must be sustained, and that the appeal must be allowed.

The debentures were, according to the express provisions of the by-law, under which they were issued, to be deposited in the hands of the Provincial Treasurer, who was to hold them as trustee for the appellants and for the railway company, and was to hand the same to the company as the work of construction of the railway should progress within the limits of the appellants' county "in the manner and subject to the same conditions in which the bonus payable under the act passed at the last session of the legislature of the Province of Quebec was to be paid to the said company."

By the Provincial Statute of Quebec, 44 and 45 Vic., ch. 2, sec. 19, the Government bonus was only to be paid when certain sections of the railway had been completed, and were in good running order to the satisfaction of the Lieutenant Governor in Council.

The respondent in his declaration has distinctly alleged a compliance with the terms of the condition

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upon which alone the principal defendant in the action, the Provincial Treasurer, who held the bonds upon the trusts mentioned could have been warranted in handing them over to the railway company or its cessionaries, namely, the completion of the prescribed section of the railway to the satisfaction of the Lieutenant Governor in Council. The allegation in the declaration is in these words : " That the said Pacific Junction Railway have conformed with the condition of the said by-law, and have built within the said county of Pontiac more than twenty miles of the said railway which has been completed and admitted to be in good running order to the satisfaction of the Lieutenant Governor in Council."

The appellants having pleaded the general issue (*defense au fonds en fait*) have thereby put every material allegation to be found in the action in issue and this allegation of completion to the Lieutenant Governor's satisfaction amongst others.

It was therefore incumbent on the respondent to prove his allegations and amongst others this allegation of the performance of a condition which was an essential preliminary of his right to demand the delivery of the debentures.

I am unable to assent to the respondent's contention that it was for the appellants to prove that the approval of the Lieutenant Governor in Council never was in fact obtained. The burden of proof in this, as in all cases where it is expressly stipulated that liability to payment for work done under a contract, is not to arise until a third person has expressed approval of the works, as in the common cases of architects and engineers' certificates under railway construction or building contracts, was on the person claiming to be entitled to payment, and I can see no difference in this respect between this case and those referred to. It is true

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that the direct relief sought by the action is against the treasurer, but inasmuch as the latter is a mere trustee, depositor or shareholder, and as the parties substantially interested are the appellants, there is no reason why the ordinary rules as to the burden of proof should not apply in their favour. Further, I cannot agree that any admission by the treasurer should prejudice or in any way affect the appellants who have been properly put in cause as the parties really interested.

Mr. Justice Cross as appears from the judgment delivered by him in the Court of Appeals, seems to have considered that this point of the defect in the respondent's case arising from the absence of proof that the Lieutenant Governor in Council had expressed satisfaction with the work, had not been taken in the court of first instance, but from the judgment of Mr. Justice Caron, before whom the cause was originally heard, it is apparent that this was a misapprehension for the latter learned judge expressly mentions this point as having been insisted upon before him.

It is therefore reduced to a single question, does this record contain evidence that the Lieutenant Governor in Council had (in the words of the statute which were referentially introduced into the by-law) expressed his satisfaction that the portion of the railway in the County of Pontiac had been completed and that the same was in good running order ?

The only evidence adduced in any way bearing on this question of the Lieutenant Governor's approval, is the report of Mr. Light, the government engineer and his deposition confirmatory of what is there stated, and the fact that the Government bonus was paid over to the railway company. It is manifest that the engineer's approval cannot be substituted for that of the Lieutenant Governor in Council, to do this would be to alter the contract of the parties. As regards the fact that

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the Government bonus was paid over, it does not appear that this payment was made in pursuance of any order in council or other formal act of the Lieutenant Governor in Council. The essential fact that the railway had been completed and was in running order to the satisfaction of the Lieutenant Governor should, in order to comply with the terms of the contract, have been proved in some other way than by mere presumption or inference. What the appellants contracted for was a formal expression of satisfaction, for this is indicated by the requirement that it was to be by the Lieutenant Governor in Council, and the proper way of establishing this would have been by showing that it was embodied in some order or declaration in council or other appropriate act of state. To imply an approval of the Lieutenant Governor in Council from other facts and circumstances is not sufficient, inasmuch as the contract requires an express and formal executive act for which no equivalent can be substituted without imposing upon the appellants terms which they never agreed to. Had there been any actual approval in council it would have been susceptible of the easiest kind of proof by merely putting in a copy of the order certified by the clerk of the Executive Council, and in the absence of such proof it is therefore reasonable to infer that the sanction of the Lieutenant Governor was never obtained. It has been suggested that this is a mere formal and technical objection, but I cannot regard it as such ; the appellants are only insisting on the fulfilment of the terms for which they stipulated as a condition of the grant made by them in aid of the railway, and experience has shown that public bodies such as the appellants cannot be too careful in guarding the interests of their constituents by clauses such as that contained in this by-law, and in exacting a strict compliance with

the conditions on which they grant pecuniary aid to railways.

Therefore, concurring in the opinion expressed by Mr. Justice Tessier in the Court of Queen's Bench, my judgment must be for allowing this appeal.

The judgment of the majority of the court was delivered by

TASCHEREAU J.:—As to the second plea that the debentures were illegal, we are unanimously of opinion that it is altogether unfounded in law. The proceedings of the council show that Poupore, who had been the Warden, voluntarily resigned his office, and that his resignation was accepted, and that a regularly convened meeting for the purpose of electing his successor having been called, McNally was duly elected in his place, and took and held possession of the office without any objection, until the expiration of the term, when he was re-elected and has been Warden ever since. The debentures signed by the warden *de facto* are perfectly legal, and the two judgments of the courts below declaring them to be so are unassailable.

The appellant, at the hearing, strongly urged the objection that the respondent, not having proved that by an Order in Council this road had been admitted to be in good running order, the action should on that ground alone be dismissed, on the general issue.

I do not see anything in this contention. First, the statute does not mention an Order in Council. The fact that the Government bonus has been paid is, it seems to me, sufficient evidence that the road must have been completed to the satisfaction of the Lieutenant-Governor in Council. That bonus was payable only when the road was so completed, and we must assume, in the absence of any evidence to the contrary,

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that the Government acted in conformity with the statute.

Secondly, it is in evidence that at a meeting of the municipal council held on the 8th September, 1886, they passed a resolution containing in effect the following :—

"Whereas, this Council has always considered and still considers the said pretended debentures to be worthless, illegal, null, void, and in no way binding upon this corporation, and that they should be quashed and annulled by the courts, the Warden be and he is immediately authorised to retain counsel and to instruct them to take such steps as may be necessary to have said pretended debentures set aside and declared null; that the Treasurer of this Province be requested by the Warden not to hand over to the said company any portion of the said pretended debentures until their legality shall have been decided upon by the courts.

Now, this resolution, which was served on the Provincial Treasurer, contains an implied admission by the appellant that the only objection against the transfer of these debentures by the Provincial Treasurer to the company was the illegality of the said debentures, and that the road must then have been completed to the satisfaction of the Lieutenant-Goveenor in Council.

Thirdly.—On this record itself, the Provincial Treasurer, a co-defendant with the appellant, has unequivocally admitted that the road had been completed to the satisfaction of the Lieutenant-Governor in Council, by the fact that his only plea to the respondents' action was a demurrer, which has been overruled. So that judgment must now necessarily go against him, ordering him to deliver over the said debentures to the respondent.

I do not lose sight of the fact that this is an admission

by another party to the case on a separate issue, but the corporation here is not in the position of an ordinary co-defendant, but only a *mise en cause*. No condemnation whatever can go against the said corporation. They, as *mise en cause*, could have been admitted to prove that the admissions of the Provincial Treasurer had been erroneously or fraudulently given, and that it was not true that this railway had been completed to the satisfaction of the Lieutenant-Governor in Council. With these admissions of the only real defendant on the record, on them, the *mise en cause*, laid the burden of proving their contentions. It is wrong for the corporation to say that if they had not appeared and pleaded to the action the plaintiff would have had to prove the completion of the road to the satisfaction of the Lieutenant-Governor in Council. If the Corporation had not appeared and pleaded to the action, judgment on the merits would have gone against the Treasurer immediately on the overruling of his demurrer.

Appeal dismissed with costs.

Solicitor for appellants: *J. M. McDougall.*

Solicitor for respondent: *David Ross.*