ROBERT L. MACILREITH (DEFENDANT) ..... APPELLANT;

AND

GEORGE W. HART AND ANOTHER, EXECUTORS OF R. I. HART (PLAINTIFFS) ..... RESPONDENTS.

1907
*Nov. 26, 27.

1908
*Feb. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Illegal expenditure—Action by ratepayer—Intervention of Attorney-General—Validating Act—Right of appeal.

Prior to the passing of the Act of the Legislature of Nova Scotia, 7 Edw. VII. ch. 61, the City Council of Halifax had no authority to pay the expenses of the mayor in attending a convention of the Union of Canadian Municipalities.

Where a municipal council illegally pays away money of the municipality to one of its officers an action to recover it back may, if the council refuses to allow its name to be used, be brought by a ratepayer suing on behalf of all the ratepayers and need not be in the name of the Attorney-General.

Pending such an action the legislature passed an Act authorizing payment by the council of any sums for principal, interest and costs incurred by the defendant "in the event of judgment being finally recovered by the plaintiff."

Held per FITZPATRICK C.J. and MACLENNAN J., that the meaning of the words quoted was that the action might proceed to a finality, including any competent appeal, and that they did not put an end to the appeal to this court.

Per FITZPATRICK C.J. and MACLENNAN J.—*Quære.* Should not the action have been brought on behalf of all the ratepayers *and inhabitants* of the municipality?

Judgment appealed from (41 N.S. Rep. 351) affirmed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial by which the action was dismissed.

The action was originally brought by Rueben I. Hart, a ratepayer of the City of Halifax, on behalf of all the ratepayers, to recover from the defendant, mayor of the city, a sum of money paid him out of civic funds in reimbursement of his expenses in attending a convention of the Union of Canadian Municipalities at Winnipeg. The plaintiff claimed that such payment was beyond the powers of the city council and, on refusal of the latter to allow its name to be used, that he was entitled to bring the action. On his death the suit was revived by his executors, the present respondents.

The trial judge dismissed the action holding that it could only be brought in the name of the Attorney-General. His judgment was reversed by the full court and judgment entered for the plaintiff. The defendant appealed to the Supreme Court of Canada.

Pending the action an Act was passed by the legislature of the province legalizing such payments for the future and empowering the City Council of Halifax "in the event of judgment being finally recovered by the plaintiff" in this case to pay all or any sums for principal, interest and costs incurred by the defendant. 7 Edw. VII. ch. 61, sec. 17.

Allison for the respondent took the preliminary objection that the above mentioned Act having legalized such expenditure for the future and empowered the city council to pay any sum recovered by the

(1) 41 N.S. Rep. 351.

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plaintiffs nothing but costs was involved in the appeal and the court should not entertain it. He relied on *Moir* v. *Village of Huntingdon*(1); *McKay* v. *Township of Hinchinbrooke*(2); *Fraser* v. *Tupper* (3).

The court directed that the hearing of the appeal should proceed on the merits.

F. H. Bell for the appellant. The payment to the defendant by the city council was not *ultra vires* being made as incidental to, and by virtue of, its general statutory powers. *Attorney-General* v. *North-Eastern Railway Co.*(4); *Attorney-General* v. *Manchester Corporation*(5); *Attorney-General* v. *Mersey Railway Co.*(6).

Even if the payment was illegal the contract to pay having been executed the money cannot be recovered back. Leake on Contracts (5 ed.), p. 553; *Hermann* v. *Charlesworth*(7).

In any case the action could only be brought by the Attorney-General. *Evan* v. *Corporation of Avon* (8); *Attorney-General* v. *DeWinton*(9); *Kilbourne* v. *St. John*(10).

Allison for the respondents. A municipal corporation can only exercise the powers expressly granted to it or powers necessarily incidental thereto or essential to its declared objects and purposes. Dillon on Municipal Corporations (4 ed.), vol. 1, p. 87.

(1) 19 Can. S.C.R. 363.
(2) 24 Can. S.C.R. 55.
(3) Cout. Dig. 104.
(4) [1906] 1 Ch. 310.
(5) [1906] 1 Ch. 643.
(6) [1906] 1 Ch. 811; [1907] 1 Ch. 81.
(7) [1905] 2 K.B. 123, at p. 131.
(8) 29 Beav. 144.
(9) [1906] 2 Ch. 106.
(10) 59 N.Y. 21.

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The payment to the respondent in this case was not incidental nor essential to the objects and purposes of the corporation and was *ultra vires*. *Waters* v. *Bonvouloir*(1).

The Attorney-General was not a necessary party to the action. See *Attorney-General* v. *Wilson*(2); *Patterson* v. *Bowes*(3); *Armstrong* v. *Church Society* (4); *Prestney* v. *Mayor, etc., of Colchester*(5).

THE CHIEF JUSTICE agreed with Maclennan J.

DAVIES J.—This action was brought by the respondent, Hart, as one of the residents and ratepayers of the City of Halifax, on behalf of himself and the other ratepayers, praying for a declaration that a certain payment of $231, made to the defendant, appellant, when mayor of the said city, out of the funds of the city, might be declared illegal and void and re-paid by him into such funds.

The defendant contested the suit upon several grounds.

First: That the payment was not *ultra vires* of the corporation, but within their powers;

Secondly: That, even if *ultra vires,* the payment was made for work which the defendant had been requested by the council to do and constituted a completed contract so that neither the city nor any one else on its behalf could recover it back, and

Thirdly: That the transaction impeached was complained of as being an improper and illegal diversion

(1) 172 Mass. 286.
(2) 1 Cr. & Ph. 1.
(3) 4 Gr. 170.
(4) 13 Gr. 552.
(5) 21 Ch.D. 111.

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of the city funds and that the only person who could take the proceedings for the recovery of the money was the Attorney-General, with or without a relator.

We were all of the opinion, after hearing the argument, that the trial judge and the majority of the court of appeal were right in holding the payments complained of to have been *ultra vires* of the corporation, and, having been so, could have been recovered back in a suit by the City of Halifax corporation.

The city having, however, refused to allow its name to be so used, the main question argued before us remained:—Could, in such a case, a ratepayer and resident, suing as the plaintiff has done here and making the city a defendant in his suit, successfully claim the declaration he prayed for, or must such a suit be brought in the name of the Attorney-General.

The trial judge, holding that the Attorney-General was a necessary party, dismissed the action, and the court of appeal in Nova Scotia unanimously reversed that decision and held that the action, as brought, could be maintained.

We think it is not open to doubt that granting the payment impeached to have been *ultra vires,* and made to an officer of the corporation such as the mayor, the action could have been maintained in the corporate name of the city against him for its money, and that, in such case, the Attorney-General need not have been a party. The fact that it was money and not other property of the city that was in question could not make any difference in the right of the city corporation to sue, and I did not understand Mr. Bell, in his very able argument at bar, to contend that it did.

The sole point, therefore, that remains for con-

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sideration is whether, in a case where the municipal authorities refuse to allow the corporation name to be used to test the legality of the payment of municipal funds proposed to be made or already made, or the legality of the appropriation of other property of the municipality made or to be made, questions which seem to me to stand practically on the same footing, the action to test the question must be brought in the name of the Attorney-General, with or without relators, and cannot be brought in that of the resident ratepayers who are members of the corporation.

Many years ago, that important question was decided in Ontario in the case of *Paterson* v. *Bowes*(1), in favour of the right of the ratepayers to sue in the circumstances suggested. That case has been consistently followed in that province ever since and may now be considered as the settled rule of law and practice there.

The decision of the Supreme Court of Nova Scotia in the case now under review, reversing that of the trial judge, follows on the same line, while in Prince Edward Island, Hodgson M.R., in *Tanton* v. *The City of Charlottetown*(2), after a lengthy review of the English cases, holds that the Attorney-General must be a party plaintiff.

The necessity of the Attorney-General being a party to *any action* against corporations which involve only public rights or interests, or for the protection, in any way, of public interests, as such, and as distinct from cases where there is a distinct private injury arising from the act complained of, is admitted.

What is contended by the respondent is that where the act complained of is *ultra vires* of the corporation,

(1) 4 Gr. 170.

(2) 1 East. L.R. 282.

and works a distinct private injury separable from the wrong to the public, the private individual or individuals may, in cases where the user of the name of the corporation is refused, sue for his own protection in his own name without the Attorney-General.

In the case of *Boyce* v. *Paddington Borough Council*(1), Buckley J. held that a plaintiff can sue without joining the Attorney-General, in two cases, (*a*) where an interference with a public right involves interference with some private right of the plaintiff, and (*b*) where no private right of the plaintiff is interfered with but he, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

Does the principle involved in the second proposition of Buckley J., and on which it necessarily rests, apply to the facts of this case?

Assuming, as we have already decided and on which assumption alone the question arises, that there has been an interference with a public right by the misappropriation of the moneys of the municipality to purposes outside of its powers, can it fairly be said that the plaintiffs have suffered damage peculiar to themselves *quâ* ratepayers.

The public right, interference with which justifies the intervention of the Attorney-General is, I take it, the application of moneys devoted by the terms of the incorporation Act of the municipality to certain specified purposes, to purposes other and different from these, in other words, to purposes *ultra vires* of the municipality.

The peculiar damage sustained by the ratepayers as the result of such misappropriation, arises out of

(1) [1903] 1 Ch. 109.

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the increased rates which they will have to pay by reason of the misappropriation of the moneys of the corporation. It matters not whether the damage be great or small, unless indeed the whole transaction was so trivial that the court would refuse to interfere on that ground. But the broad contention is put forward that even where personal misappropriation of the corporate funds by the officers of the municipality is shewn, coupled with the refusal by the controlling officials of the use of the corporate name to enable the wrong to be rectified, the ratepayers are helpless unless and until they can get the Attorney-General to intervene; and that any special damage which the plaintiffs individually or as a special class will sustain cannot and does not give them a right to sue.

The misappropriation here complained of is only $270. If it was $2,700, it should not make any difference in the determination of the right of the injured class to sue for their own protection. As ratepayers, they seem to me to have suffered special and peculiar damage to themselves distinct from the public damage which the Attorney-General has the sole right to represent, and, as a result of such special and peculiar damage, have a right to sue in their own name, in equity, to have the wrong rectified or proposed wrong enjoined, where their trustee, (the municipality), refuses to allow the corporate name to be used for the purpose.

I quite concede, alike on principle as on authority, that where the general right of His Majesty's subjects alone is involved, and with respect to any interference with that right, the Attorney-General is the only and proper person, with or without relators, to sue. The relator only came in for the purpose of costs. *At-*

torney-General v. *Logan*(1). The Attorney-General comes in as the officer of the King, who, as *parens patriæ,* by his proper officer, files his information to see that right is done to his subjects who are incompetent to act for themselves. But it does not seem reasonable or consistent with principle to apply the rule to cases where persons or a class, being members of municipal corporations, complain of the action of officials, having control for the time being of the corporation, diverting or appropriating its money or property for purposes *ultra vires* of the corporation so as to work a special injury to such persons or class of persons and refusing to allow the corporation name to be used to test the legality of the action complained of.

In the latest case I have been able to find, *The Attorney-General, (on the relation of the Spalding Union Rural District Council)*, and *The Spalding Union Rural District Council* v. *Garner*(2), where the beneficial right of pasturage along a certain road was in question, Channell J. held, that this right was vested in the *Parish Council* and not in the *Rural District Council* and that

> the Attorney-General could only interfere to protect the rights of the community in general and not the rights of a limited portion thereof, especially when that limited portion could have brought the action alone, and that, therefore, the Attorney-General had no right to bring the action.

The learned judge reviews many of the decided cases and admits that he had reached his conclusion "not without considerable doubt."

The right of the Attorney-General alone to interfere in cases where incorporated companies, by their officials, attempt to misuse their statutory powers or

(1) [1891] 2 Q.B. 100. (2) 23 Times L.R. 563.

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divert or misappropriate the company's funds, irrespective of special damage to the complainant, is neither raised nor questioned here, nor do I seek to cast any shadow of doubt upon such right.

Chief Justice Dillon, in his book, (4 ed.) on Municipal Corporations, so often cited as authority, in discussing the question now under review, concludes strongly in favour of the right of ratepayers, without joining the Attorney-General, to maintain such actions as the present; sections 914 to 922. By pertinent and cogent reasoning, which is satisfactory to me at any rate, he establishes the distinction which should prevail, that

> where the duty about to be violated or the action sought to be enjoined is public in its nature and affects all the inhabitants alike, one not suffering any special injury cannot, in his own name, or by uniting with others, maintain a bill, but that, in the case of a ratepayer sustaining special damage, he may bring his action for relief.

In *Crampton* v. *Zabriskie*(1), in 1879, the Supreme Court of the United States added the weighty sanction of their authority to the conclusions which Mr. Dillon had reached and upheld

> the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay.

I do not propose to review the great array of authorities more or less applicable which were cited to us by learned counsel in their able arguments. The case of *Watson* v. *The Mayor, etc., of Hythe*(2), was relied upon by the appellant for the proposition that, for the purposes and practice we are discussing, muni-

(1) 101 U.S.R. 601.

(2) 22 Times L.R. 245.

cipal and commercial corporations stood on different footings. The case is very meagrely reported and the decision is that of a single judge. In maintaining the objection to the maintenance of the action, he laid stress upon the fact that the wrong complained of was one by a public body and *not causing damage to an individual* and that such wrong could only be restrained by action of the Attorney-General. In substance (he says), the plaintiffs were seeking to restrain not the council, but the corporation from exercising its public functions in a manner which was not pleasing to the plaintiff.

The ratio of his decision appears to have been the absence of special damage to the individual suing and the substitution by the plaintiff of his displeasure for his damage. Nor does it clearly appear from the report of that case that the act complained of was *ultra vires*.

The case of *Evan* v. *The Corporation of Avon*(1) was much replied upon by the appellants. I do not think that when properly examined it can be said to be an authority for their contentions. In the first place, the plaintiff there sued by himself without the Attorney-General, and not even on behalf of the rest of the burgesses or of the inhabitants. Yet the bill was not dismissed upon these grounds but because the *corporation* was absolutely entitled to the property claimed, and the plaintiff had failed to shew a title in the freemen under the reservation comprised in the second section of the Municipal Corporations Act of 1835. There was no question there of payments of the corporation funds for purposes beyond their powers. The prayer of the bill was to restrain the corporation

(1) 29 Beav. 144.

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from selling the market property and other property remaining in them and for an account of such property as they had sold, and the holding of the M.R. was, that the corporation admittedly not being within "The Municipal Corporations Act,"

had full power to dispose of all its property like any private individual,

and that no private trust was sufficiently alleged on the face of the bill to support it. When read together with the subsequent case of *Prestney* v. *The Mayor and Corporation of Colchester & The Attorney-General*(1), I do not think it can be held to be an authority for the appellants' contentions in this suit.

On the whole and admitting that there is some conflict of authority, I conclude that the balance alike of authority and reason, to say nothing of convenience, are in favour of such an action as the present being maintainable.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—I agree with Mr. Justice Graham that there is no English authority that conflicts with the law as upheld in *Paterson* v. *Bowes*(2), which followed *Bromley* v. *Smith*(3), and has been in turn followed by a stream of cases for fifty years in Ontario, that a ratepayer has a right of action where moneys have been, as here, unlawfully taken, or diverted from the municipal treasury to which his taxes go and that the Attorney-General is not a necessary party.

As against these authorities we have three recent

(1) 21 Ch.D. 111.

(2) 4 Gr. 170.

(3) 1 Slm. 8.

cases in New Brunswick and Prince Edward Island, all within the last twenty years.

The law must be the same in all these three provinces, as well as in Nova Scotia.

It would seem as if expediency, as well as what seems in principle good law, should drive us to follow the law as maintained in Ontario, and in this case in Nova Scotia.

I see no possible legal defence in the way of justification for the appellant and the argument in his favour, derived from the alleged rule that moneys paid *ultrà vires* cannot be recovered, is not applicable to one standing, as he did, in relation to the depleted fund.

The appeal should be dismissed with costs.

MACLENNAN J.—I agree with the judgment that the payment in question to the appellant, MacIlreith, was one which the defendant corporation could not legally make; and that, in that respect, it stands on a different footing from the payment to the defendant Doane.

I am also of opinion that the judgment is right on the question raised upon the form of the action.

I confess I feel no difficulty whatever upon that question. It is a mere question of proper parties to a suit in a court of equity. That question, in the very form in which it arises here, was fully discussed and reasoned out in Ontario, in the case of *Paterson* v. *Bowes*(1), by two of the ablest equity judges of that province; and I am unable to see any flaw in their reasoning.

(1) 4 Gr. 170.

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The right of the inhabitants to compel the city corporation, that is the city council, as a body, to do its duty, rests on this:—That the corporation is a trustee for the inhabitants.

That was declared in the same case of *Bowes* v. *City of Toronto*(1), by L.J. Knight Bruce, in these words:—

> The (city) council was, in effect and substance, a body of trustees for the inhabitants of Toronto.

The only difference between that case, in its initial stage, when the question of pleading was decided, and the present, is that in that case the plaintiff sued on behalf of himself and all the other inhabitants, and not, as here, the other ratepayers.

The city corporation is composed of all the inhabitants and not merely of the ratepayers, and I think the better form of action would be on behalf of both the inhabitants and ratepayers; but I think it good enough in its present form, as on behalf of the ratepayers, for, whether inhabitants or not, all the ratepayers are also *cestuis que trustent* of the city corporation.

As between the ratepayers and other inhabitants, the former have the greater interest in the recovery of money of the corporation, which has been misapplied, for they must pay an equivalent sum again, unless it is recovered, while the other inhabitants are free from that obligation.

It was said that as the statement of claim now stands the inhabitants who are not ratepayers, and who have an important interest, ought to be but are not before the court. But I think they are before the

(1) 11 Moo. P.C. 463, at p. 524.

court sufficiently, being represented by the city corporation, and will be bound by the judgment, whatever it may be. But, if that were doubtful, it would be proper to allow an amendment by alleging that the plaintiff sued on behalf both of the ratepayers and inhabitants(1).

It was also urged that, while the plaintiff might have been a ratepayer in 1905, when the money in question was misapplied, he might have ceased to be so in 1906, when he brought his action. But it is distinctly alleged in the statement of claim, and expressly admitted in the statement of defence, that the plaintiff was a resident ratepayer when the money was misapplied and continued so to be at the time of pleading.

I am unable to see any good reason why, on a mere question of parties, and of the form of action, there should be any distinction whatever between business corporations and those numerous bodies, small and great, other than charitable, which we have in all the provinces of Canada, and which are authorized to act as corporations.

I express no opinion on the question whether the Attorney-General of the province could, having regard to decided cases, or could not, have sued in this case, with or without a relator.

At the opening of the argument, it was objected by the respondents' counsel that the statute of Nova Scotia, ch. 61, sec. 17, (1906), had put an end to the appeal, and the argument proceeded subject to that objection.

I do not think there is anything whatever in the objection.

(1) R.S.C. [1906] ch. 139, secs. 54, 55.

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The authority given by the statute to the city council is only in the event of judgment being finally recovered by the plaintiff. I think that language contemplates that the action might proceed to a finality, including any competent appeal or appeals, which the parties or either of them might be advised to resort to.

I think the appeal should be dismissed.

DUFF J. concurred with DAVIES J.

Appeal dismissed with costs.

Solicitor for the appellant: *F. H. Bell.*

Solicitor for the respondents: *Edmund P. Allison.*