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*Oct. 30.
*Nov. 22.

THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES (DEFENDANTS) AND ULRIC TESSIER AND OTHERS (ADDED PARTIES) } APPELLANTS;

AND

HIS MAJESTY, THE KING (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Breach of trust—Purchase of debentures out of Common School Fund—Knowledge of misapplication of moneys—Payment of interest—Statutory prohibition—Evasion of statute—Estoppel against the Crown—Action—Adding parties—Practice.

In an action by the Crown against the Quebec North Shore Turnpike Road Trustees to recover interest upon debentures purchased from them by the Government of the late Province of Canada (with trust funds held by them belonging to the Common School Fund), the defendants pleaded that the Crown was estopped from recovery inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust and with the intention of misapplying the proceeds towards payment of interest upon other debentures due by them in violation of a statutory prohibition.

Held, affirming the judgment appealed from (8 Ex. C.R. 390) that, as there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust or misapplication by the advisers of the Crown could not be set up as a defence to the action.

APPEAL from the judgment of the Exchequer Court of Canada (1) maintaining the action with costs. The action was on information by the Attorney-General of Canada, to recover interest due upon debentures pur-

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 8 Ex. C.R. 390.

chased by the Government of the late Province of Canada, under the circumstances stated in the judgments now reported, from the defendants. In the Exchequer Court judgment was rendered in favour of the Crown, on 11th January, 1904 (1), on which an appeal was taken by the defendants to the Supreme Court of Canada. On 13th of May, 1904, when that appeal came on for hearing, the argument of counsel for the appellants was stopped and it was announced by the court that the appeal could not be further proceeded with until the other bondholders were made parties, and, on 16th May, 1904, it was ordered that the judgment then under appeal should be opened and the matter remitted to the court below for the purpose of having all necessary parties represented in the cause, according to the practice of that court, before final judgment should be rendered.

Subsequently, the other appellants, above named, were added (each for the purpose of representing certain classes of the other bondholders interested), and, on the 9th of October, 1905, the judgment now appealed from was rendered, in terms similar to those of the judgment referred to above and in the Exchequer Court report above cited. The said last mentioned judgment proceeded as follows:

"1. This court doth order, adjudge and declare that in any future payment or distribution of interest on the debentures, or any of them, issued by the defendants, His Majesty the King is entitled, in respect of the debentures held by him and mentioned in the information herein, to share in such payment or distribution of interest *pari passû* with other holders of debentures of a like class.

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"2. And this court doth further order, adjudge and declare that with respect to the Montmorency Bridge debentures held by His Majesty the King, His Majesty is also entitled to payment of the arrears of interest for which the defendants have, pending the proceedings herein, 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 the proper taking of the accounts the tolls and revenues of the said bridge have not been sufficient to enable the defendants to make such provision therefrom.

"3. And this court doth further order, adjudge and declare that with reference to the bond for £5,000 mentioned in the information of the Attorney-General of Canada fyled herein, His Majesty the King is entitled to payment thereof when there are funds available for that purpose after provision is made for other prior charges upon the tolls and revenues of the said trust or of the said defendants, the Quebec North Shore Turnpike Road Trustees.

"4. And this court doth further order and adjudge that His Majesty the King do recover his costs of the action to be taxed."

The questions raised upon the present appeal are stated in the judgments now reported.

Stuart K.C., Lafleur K.C. and *C. E. Dorion K.C.* appeared for the several appellants.

Shepley K.C. for the respondent.

GIROUARD J.—I regret I have to dismiss this appeal. I say so intentionally, for I feel that the public who sought for investment in the Quebec Turnpike

Trust debentures had every reason to presume that the interest on the debentures was not to be supplied by the Crown directly or indirectly. I must confess that I have a strong sympathy for the ordinary bondholders who naturally looked upon these debentures as Government securities. But we are not here to administer sympathy or even equity, but the laws of the land. Their expectation is not sufficient to determine the right of the Crown to invest in these debentures the funds of which it was trustee, and to hold and claim under the same. All the statutes which have been quoted at the bar and in the factums, enact that the prohibition to the Crown is limited to the payment of the interest on the said debentures out of the Consolidated Revenue Fund.

In 1841, by 4 Vict. ch. 17, sec. 21, it is provided that the trustees may borrow money

> not to be paid out of or to be chargeable against the general revenue of the province.

In 1851, by 14 & 15 Vict. ch. 132, it is declared

> that no money shall be advanced out of the provincial funds for the purpose of paying the said interest.

During the same session of Parliament, by 14 & 15 Vict. ch. 133, sec. 2, the trustees are authorized to issue certain debentures with this proviso:

> And neither the principal nor interest of the debentures to be issued under this Act shall be guaranteed by the province or payable out of any provincial funds.

In 1853, by 16 Vict, ch. 235, sec. 7, the trustees may again issue debentures

> provided nevertheless that * * * no money shall be advanced out of the provincial funds for the payment of the said interest.

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Therefore, according to the old maxim *expressio unius exclusio est alterius,* the Crown had a perfect right to invest in and hold the debentures of the Turnpike Trust out of the funds of which it was trustee, for instance, the Common School Fund, even for the purpose of providing for the payment of interest on its debentures past or future.

The appeal should be dismissed, but, under the circumstances, without costs.

DAVIES J.—I am of opinion that this appeal should be dismissed and only desire to add a few words to the reasons given for his judgment by Burbidge J. I feel that I need not add anything to what that learned judge has said upon the point of the want of authority in the late Province of Canada to invest Common School Fund moneys in the appellants' debentures.

On the other point argued before us, that the issue of debentures for the purpose of raising money to pay interest on other debentures was *ultra vires* of the appellants and a breach of trust and that the Crown being a party to that breach of trust could not assert a valid title to the debentures the learned judge was of the opinion that, assuming the responsible advisers of the Crown to have had knowledge or means of knowledge of such an intended diversion by the appellants of the proceeds of the debentures, this could not affect the Crown's title because the issue of the debentures was clearly *intra vires* and such a breach of trust as that suggested could not be imputed to the Crown.

The appellants' argument before us substantially was that the transaction was really and truly an advance of moneys from the public chest to the trustees

for the payment of overdue interest on debentures previously issued; that the original ordinance of 4 & 5 Vict. ch. 72 of the then Province of Canada authorized such advances, and that the order in council of 1st September, 1857, under which the moneys now in question were paid, when read in connection with the applications made to the Government by and on behalf of the trustees, sufficiently shewed these facts. The order in council referred to is no doubt, so far as its introductory statements are concerned, couched in ambiguous terms which, if accepted as literally true and not qualified by the operative part of the order in council or otherwise explained, are calculated to mislead.

But an examination of the statutes and the previous order in council recited in that of September, 1857, shews that the statements in the latter relied on by the appellants were based upon several misconceptions and were altogether inaccurate. The ordinance to which it refers incorrectly as 4 & 5 Vict. ch. 72, was no doubt intended to be 4 & 5 Vict. ch. 17, sec. 27, and the provisions of sections 26 and 27 of that ordinance were, I think, clearly aplicable only to debentures issued under it and not to debentures authorized and issued under subsequent Acts. At the date of the order in council in question the Act of 12 Vict. ch. 15, and the two Acts, that of 14 & 15 Vict. ch. 132, and that of 16 Vict. ch. 235, had all been passed and are those under which the debentures now in question were issued. All of these Acts contained express prohibitions against paying interest on the debentures out of the public funds.

The order in question further assumed that what was done by the order of 3rd February, 1855, was an

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exercise of this supposed statutory authority to advance moneys out of the public funds to pay overdue interest which it plainly was not. The operative part of the order, however, authorizes the investment from time to time in the debentures of the trust of a sum not exceeding £11,500 out of the Common School Fund as the sales of the lands of that fund permitted.

The only possible conclusions to be drawn, therefore, from a study of these later statutes and documents is that the statutes under which the debentures in question were issued contained express prohibitions against the advance by the Government of moneys from the public funds towards the payment of overdue interest on the debentures authorized by them to be issued involving an entire change in public policy from that sanctioned by sections 26 and 27 of the earlier ordinance, 4 & 5 Vict. ch. 177, and that the order in council of 1857 authorizing the purchase of the debentures in question expressly limited the moneys to be paid for their purchase to those of the Common School Fund which the Crown held in trust merely. It is true these debentures were not amongst those which were expressly authorized as investments for these trust funds nor were they expressly prohibited. But even assuming the investments to have been unauthorized by the statutes creating the trust I cannot see how the appellants can for that reason successfully contend that they, as trustees of the turnpike trusts who issued the debentures, can repudiate liability on the debentures. The want of authority on the part of the Crown to invest in the particular manner it did cannot be a defence to an action on the debenture itself. At the utmost it would be a breach of trust for which the Crown might, in the event of the

loss of the money, be held liable by its *cestui que trust* the beneficiaries of the Common School Fund.

I do not think the inference drawn by the appellants from such documentary evidence as is forthcoming with respect to the application of the moneys received for the debentures in question an unfair one, but it is only an inference or suggestion. There is no direct evidence on the point. I agree, however, with the judgment appealed from that, accepting the suggestion or inference, it cannot be imputed to the Crown that it was a party to such breach of trust.

I do not see any evidence which justifies the assumption of the appellants that the transaction was not really and *bonâ fide* an investment of trust funds in the debentures of the turnpike trust.

As I have said all the Acts passed subsequently to that ordinance of 4 & 5 Vict. ch. 17, and under which the debentures in question were issued, contained express provisions prohibiting any advances from the public funds for the payment of overdue interest, and the Government of the day was advised by its Attorney-General at the very time the investment was made of the existence of these express prohibitions. The order in council of September, 1857, authorizing the investment of £11,500 in appellants' debentures expressly stated that the moneys to be advanced were those belonging to the Common School Fund and were to be made from time to time

> as sales of land shall be effected and payment made to the credit of the Common School Fund.

It is not, therefore, in my opinion, open to any doubt that the moneys intended to be invested and which were actually paid were those of the Common School Fund held by the Government in trust only.

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Whatever claim the beneficiaries of the trust might have against its trustee for an improper investment of the funds in case there was a loss from the investment such an impropriety or wrongful act could afford no possible ground for a repudiation by the debtor of his debenture debt.

The statutory prohibition against the use of the public funds for the purpose of paying overdue interest and the express language of the order in council directing the advance from time to time out of the Common School Funds as they became available through the sales of land, constitute a sufficient answer to the assumption appellants ask us to make.

I think, therefore, the appeal should be dismissed.

IDINGTON J.—The Crown in the years 1855 and 1857 bought, from the appellants, debentures which they admittedly had power to issue and sell.

It is now set up as an answer to the claim of the Crown to enforce the payment of interest upon these debentures that the sales thereof were in truth made in violation of an express statutory prohibition against their raising money to pay interest, and bought by the Crown either with actual notice of this violation of the statute or with the intention of actually aiding in the evasion of the statute.

I do not see evidence to support any such contention.

It is contended that the frame of the applications to the Crown for advances coupled with the words of the orders in council prove this.

The first application to the Crown was in the nature of an appeal to the generosity of the Crown for an advance which would undoubtedly if given as asked have practically resulted in a total loss thereof.

It was not at first an application to the Crown to buy from appellants their debentures. The result of a full consideration of the application was that the Crown expressly refused to have anything to do with the payment of interest. The Attorney-General to whom the matter was referred, after an order in council had been passed, but before anything done under it, clearly advised that there could be no such dealing as a purchase of debentures issued to pay or raise money to pay interest. At the same time it was quite manifest that money was needed for other purposes than the payment of interest.

It appears by the application for the first advance that three thousand pounds was needed for interest. It also by the same application appears that £5,959 "for interest and other charges" was urgently needed.

What the Crown practically said in answer to this and after hearing the opinion of the Attorney-General was this: "We cannot entertain your application so far as it relates to interest, but as you evidently need in all £6,000 you must, as to interest, provide for that, but as to the other three thousand pounds we will buy from you, of your debentures that have become of less than par value to your contractors and others you owe, to the amount of three thousand pounds. This will relieve the financial situation by legal methods and thereby attain part of the results sought for." Such I infer quite clearly was the position taken by the Crown.

How can such a dealing be attacked as a violation of any statute or in any way vitiate the Crown's title to the debentures?

The order in council was not at all limited to interest, but the other charges were also within its very words and purpose.

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No doubt it may be said that it would have been better to have avoided expressly the very shadow of the appearance of evil by rescinding the order and adopting another, limited to the execution of the secondly named and only purpose in hand, after the opinion of the Attorney-General was received.

That is, alike with the question of the propriety of using the Common School trust funds for so precarious an investment, a mere matter for criticism that in no way goes to the root of the matter now in hand, in such a way as to entitle the appellant to succeed. Both criticisms we have nothing to do with here.

The second purchase of similar debentures would seem to have originated in an application which is now lost. The orders in council under which the lot of debentures secondly in question herein were issued authorized the Receiver-General

> to invest from time to time in the debentures of the Trust, a sum not exceeding in the whole $11,500 as sales of land shall be effected and payment made to the credit of the Common School Fund.

The recitals in this order contain such a grossly mistaken statement of the first transaction and the basis on which it rests that I can attach no importance to its statements.

Its first recital might be read as if another application for aid to pay interest had as in the first instance been made to the Crown.

Assuming it so I cannot after what had transpired only about two years before infer that improper methods were resorted to.

The recital, coupled with the wording of the order looking to the future rather than the then immediate needs and purposes, may also be read as shew-

ing that such a balance sheet had been exhibited, that the appellants' debentures could be looked to as a safe investment of the funds referred to.

The utmost that can be said is that the wording of the recital is of doubtful import or the production of a hand that wrote the gross misconceptions of the facts that follows it in the next few sentences.

Then are we at this distance of time to impute to the Crown, even if permissible, the doing of what was improper? Are we when two very obvious courses, one clearly right and the other wrong, were open to the officers of the Crown to conclude that they selected the wrong course? Are we to suppose that they invested in prohibited debentures when the probabilities are that these free from taint of any such prohibition were available and just as serviceable for the purposes in hand?

I will not, on the slender basis of these recitals, so full and so very obviously full of error that one is surprised to find such errors in such a place, draw the conclusion it is necessary to draw in order that this appeal can have any support.

I would not under the like circumstances in the case of a private individual whose witnesses and papers and means of explanation as well as possibly he himself had all passed away, draw such conclusions.

I think the appeal should be dismissed with costs.

MACLENNAN J. concurred for the reasons stated by Davies J.

DUFF J. concurred for the reasons stated by Idington J.

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Appeal dismissed with costs.

Solicitors for the appellants: *Caron, Pentland, Stuart & Brodie.*

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