Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Royal Bank of Canada and others v. *The King and another, from the Supreme Court of Alberta (P.C. Appeal No.* 61 *of* 1912)*; delivered the* 31*st January* 1913.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD MOULTON.

[DELIVERED BY THE LORD CHANCELLOR.]

This is an Appeal from a Judgment of the Supreme Court of Alberta. It raises questions of much importance, which their Lordships have taken time to consider. The main controversy is as to the validity of a Statute of the Legislature of Alberta passed in 1910, and dealing with the proceeds of sale of certain bonds. These proceeds had been deposited with certain Banks, one of them being the Appellant Bank. The judgment under appeal was given in an action brought by the Government of Alberta against the Royal Bank of Canada, the Alberta and Great Waterways Railway Company, and the Canada West Construction Company, to recover $6,042,083.26, with interest, being the amount of the deposit held by the Appellant Bank. The Court of First Instance and the Court of Appeal of the Province have given judgment for the Government.

It is contended by the Appellants that the Statute in question was not validly enacted. It is said to have been *ultra vires* of the Legislature of the Province as attempting to interfere with property and civil rights outside the Province, and also as trenching on the field of legislation as to banking, which, by Section 91 of the British North America Act, is reserved to the Parliament of Canada. It is further said that inasmuch as the Statute purported to make the deposits part of the General Revenue Fund of the Province, it was inoperative as being an attempt to raise revenue for provincial purposes in a manner not authorised by Section 92 of that Act. In order to determine the points thus raised, it is necessary to examine the transactions to which the legislative action of the Alberta Government was directed.

The Appellant Railway Company was incorporated by an Act of the Legislature of the Province, being Chapter 46 of 1909, for the purpose of constructing and operating a railway, to extend from Edmonton in a north-easterly direction, and to be wholly within the Province. The capital was to be $7,000,000, and the Company was empowered to issue bonds. By another Act of the same Session, being Chapter 16, which received the Royal Assent on the same day, the 25th of February, the Government of Alberta was authorised to guarantee the principal and interest of the bonds to be issued by the Railway Company to the extent of $20,000 a mile up to 350 miles, with a further amount in respect of the cost of terminals. The bonds were to be repayable in fifty years, and were to bear interest at the rate of five per cent. By Section 2 it was provided that the bonds so guaranteed were to be secured by mortgage to be made to trustees, which was

to cover the railway, its rolling stock and equipment, and its revenues, rights and powers. By Section 3 the form and terms of the bonds, mortgage, and guarantees were to be approved by the Lieutenant-Governor in Council. By Section 4, when the guarantees were signed on behalf of the Government, the Province was to be liable for payment of principal and interest, and no person entitled to the bonds was to be under the necessity of inquiry in respect of compliance with the terms of the Act. By Section 5 all moneys realised by sale, pledge, or otherwise of the bonds, were to be paid by the purchaser, subscriber, pledgee, or lender, into a bank or banks approved by the Lieutenant-Governor in Council, to the credit of a special account in the name of the Treasurer of the Province, or such other credit as the Lieutenant-Governor in Council should direct. The balance at the credit of the special account or accounts was to be credited with interest at such times and at such rate as might be agreed on between the Company and the bank holding the same, and such balance was from time to time to be paid out to the Company or its nominee, in monthly payments so far as practicable, as the construction of the lines of railway and the terminals was proceeded with to the satisfaction of the Lieutenant-Governor in Council according to specifications to be fixed by contract between the Government and the Company and in such sums as an engineer appointed by the Lieutenant-Governor in Council should certify as justified, provided that at the option of the Company the moneys so paid into the bank should, instead of being so paid out, be paid to the Company on the completion, as certified by the engineer to the satisfaction of the Lieutenant-Governor in Council, of sections and terminals specified. The balance of the proceeds of the bonds which

might remain after completion of the railway was to be paid over to the Company or its nominees. Section 5 concluded with a provision, which appears to have been inaccurately printed, but which their Lordships interpret as bearing the meaning put on it in an Order in Council subsequently made by the Lieutenant-Governor on 7th October 1909, that the balance at the credit of the special account remaining until paid out as above arranged for, was to be deemed part of the mortgaged premises under the mortgage, and not public monies received by the Province.

On the 7th of October two Orders in Council were made by the Lieutenant-Governor. The first of these, after reciting the Incorporating Act and the Guarantee Act above referred to, approved forms of mortgage and a guarantee, authorised the proper officials to execute them, and designated the Standard Trusts Company as the trustee under the mortgage deed. This order, also, pending the preparation of engraved bonds, authorised the guarantee of a single printed bond without coupons for the entire sum to be covered by the bonds, $7,400,000 to be exchanged for the engraved bonds in due course. By the second of these orders, after reciting that the Company had elected to receive the money on completion of sections and of terminals on a progress basis, certain banks, including the Appellant Bank, were designated as the banks into which the proceeds of the bonds were to be paid in accordance with the Guarantee Act. By an Order made on the 9th of November the list of banks was varied, but the Appellant Bank remained included, and the deposit out of the proceeds of the bonds of $6,000,000, being the principal included in the amount sued for, was assigned to it. This Order recited that it was the understanding of the Government that

on the proper interpretation of the last-mentioned Act the monies in question, when paid into the banks, not being public monies received by the Province, could only be withdrawn on the terms stated in the Act. The second Order of the 7th of October had approved the terms of the preliminary bond in a form which made the principal and interest payable in London at the counting house of Messrs. Morgan, Grenfell, & Co. The terms of the bond provided that it should be secured by a mortgage from the Railway Company to the Standard Trusts Company and for the guarantee of principal and interest by the Province. The bond was to be registered in the books of the Company in London, and transfers were to be made in these books.

Shortly after the making of the two Orders in Council of 7th of October arrangements were made in London with Messrs. Morgan, Grenfell, & Co., for the raising of the money authorised to be borrowed. To enable the transaction to be carried out, the Railway Company on the 28th of October, entered into a formal contract with the Provincial Government for the construction of at least 350 miles of the line. The contract recited the right of the Company to issue bonds in proportion to mileage and terminals and the authority of the Government to guarantee principal and interest to the extent of $20,000 a mile and further sums in respect of terminals, and provided, in accordance with the Guarantee Act, that the proceeds arising from the bonds so issued should be paid into the banks approved by the Lieutenant-Governor in Council to the credit of the Treasurer of the Province in a special account, and that such proceeds should from time to time be paid out to the Railway Company on engineers' certificates. The balance of the proceeds after completion of the railway and

terminals was to be paid over to the Railway Company.

By a deed of the same date made between the Railway Company, the Provincial Government, and the Standard Trusts Company, a company incorporated under the law of Manitoba, and having its head office outside the Province, the Railway Company mortgaged its property to the Trusts Company to secure the bonds for the sum of $7,400.000, and interest at 5 per cent. repayable on the 1st of January 1959, and the Government guaranteed payment of principal and interest. The security expressly included not only the railway and its rolling stock and equipment, but all real and personal property then or thereafter held or acquired for the purposes of the railway. Later on, on the 22nd of November, the Railway Company entered into a contract with the Appellant Construction Company, which had been incorporated under Dominion Statutes and had its head office outside the Province, for the construction of the railway, and the Railway Company agreed to pay to the Construction Company the net proceeds of the bond issue, an agreement which was afterwards supplemented by a formal assignment of the 8th of March 1910.

Under the arrangements with Messrs. Morgan, Grenfell, & Co., the preliminary bond for $7,400,000 already referred to was taken up by them. A letter of the 11th of October 1909 from the Deputy Provincial Treasurer of the Province to Messrs. J. P. Morgan & Co., of New York shows the method adopted by the Government in carrying out the transaction. The preliminary bond was to be handed to Messrs. J. P. Morgan & Co. as agents for the Government. That firm was to transfer to or hold this bond for Messrs Morgan, Grenfell, & Co., the immediate takers up of the bond issue in London. The purchase money was to be deposited to the credit of the Provincial

Treasurer in the Edmonton branches of the designated banks. These arrangements were carried out in this fashion. As the proceeds of the bond issue in London came over to New York the money which was to be applied and secured in accordance with the Statutes, Orders in Council, and contracts already referred to, was paid in instalments in New York, the part with which the Appellant Bank is concerned being received by its house in New York, and credited to the Provincial Treasurer to the Railway Special Account. The Bank had its head offices in Montreal and was incorporated under Dominion law. The account at Edmonton in Alberta was opened there in accordance with the arrangements already referred to. No money in specie was sent to the branch office which the Bank possessed there, but the General Manager in Montreal arranged for the proper credit of the Special Account. It is plain that all these transactions were carried out for the purposes and on the faith of the Statutes, Orders in Council, contracts, and mortgage deed referred to, and were effected for the purpose of providing for the construction of the railway with the security and guarantees which had been given. It is not in dispute that the Government at this period meant the Appellants to understand that it would adhere strictly to the terms of its guarantee.

The Construction Company commenced the works preliminary to the construction of the line. No part of the sum at the credit of the special account was paid out for this purpose, but the Bank made advances, and the Construction Company assigned to the Bank as security its interest in the proceeds of the bond issue.

The second chapter of the history of the events which resulted in the appeal before their Lord-

ships opened in March 1910. There appears to have been public uneasiness about the action of the Government in entering into the arrangements above described, and, in the event, a Royal Commission of inquiry was appointed. While it was sitting there was a change of Government. The new administration introduced and passed two Statutes, and on the validity of the first of these the question to be decided in the appeal turns. This Statute, which became law on the 16th of December 1910, after setting out in its preamble that the Railway Company had made default in payment of interest on the bonds and in the construction of the line, and then ratifying and confirming the guarantee by the Province of the bonds, enacted that the whole of the proceeds of sale of the bonds, and all interest thereon, including such part of the proceeds of sale as was then standing in the banks in the name of the Treasurer of the Province or otherwise, and comprising, *inter alia*, the $6,000,000 and accrued interest in the Appellant Bank, should form part of the general revenue fund of the Province free from all claim of the Railway Company or their assigns, and should be paid over to the Treasurer without deduction. It was also provided that notwithstanding the form of the bonds and guarantee the Province should as between itself and the Railway Company be primarily liable on the bonds and should indemnify the Company against claims under them. By another Statute passed at the same time any person or corporation claiming to have suffered loss or damage in consequence of the passing of the Act just referred to might submit a claim to the Government to be reported on to the Legislature.

On the day of the passing of these Acts a notice was served on behalf of the Treasurer of the Province on the Appellant Bank claiming

payment of $6,042,83·026 and interest, and a cheque was presented to and refused by the Bank. A claim against the Bank as from this date for interest at the rate of 5 per cent. was then made. The action out of which the appeal arises was immediately launched, claiming, on behalf of the Crown and the Provincial Treasurer, the sum above mentioned from the Appellant Bank, and the Railway Company and the Construction Company were subsequently joined as Defendants. The main defence pleaded was the invalidity of the first of the two Statutes of 1910, and the Bank also claimed a lien for advances to the Construction Company. The case was tried before Stuart, J., who held that the proceeds of the bonds were within the Province, and that the matter was one of a local nature in the Province. He therefore decided that it fell within Class 16 of Section 92 of the British North America Act, and not within Section 91, and that accordingly, the Statute having been validly passed, there should be judgment for the Plaintiffs. The Appellants appealed to the Court of Appeal which unanimously dismissed the appeal. The Chief Justice held that the Statute was probably authorised by Classes 10 and 16 of Section 92, and certainly by Class 13, relating to property and civil rights. He also decided against the Appellants on the further points they made that the Act trenched on the subject of Banking Legislation in Section 91, and that it was invalid as being confiscatory and not an authorised way of raising a provincial revenue. Beck, J., Scott, J., and Simmons, J., decided against the appeal on substantially the same grounds, though the two latter learned Judges differed from the rest of the Court on a minor question as to interest.

Their Lordships are not concerned with the merits of the political controversy which gave

rise to the Statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the Legislature of the Province to pass the Act of 1910. They agree with the contention of the Respondents that in a case such as this it was in the power of that Legislature subsequently to repeal any Act which it had passed. If this were the only question which arose the Appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the Province the balance standing at the special accounts in the banks, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. Elaborately as the case was argued in the judgments of the learned Judges in the Courts below, their Lordships are not satisfied that what appears to them to be the fundamental question at issue has been adequately considered.

It is a well established principle of the English Common Law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the Defendant to the use of the Plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed. It applies, as was pointed out by Brett, L.J., in *Wilson* v. *Church* (13 Ch. D. 1, at p. 49) when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers as being held to his use. *Wilson* v. *Church*, which was affirmed in the House of

Lords under the name of *The National Bolivian Navigation Company* v. *Wilson* (5 Ap. Cas. 176), is an excellent illustration of the principle. A loan had been raised to make a foreign railway, on a prospectus which set out a concession by the foreign Government in virtue of which the bondholders were to have the benefit of certain Customs duties. The foreign Government, finding that the railway had not been made, revoked the concession. The trustees, to whom the money had been paid to be expended on the gradual construction of the railway, contended that it was not apparent that they could not with certain variations substantially carry out the scheme. It was held that, while the Government had a right to revoke the concession which could not be questioned, the effect of its so doing was to materially vary the prospects and terms of security of the bondholders, and that the question whether the scheme had become so abortive that the consideration for the advances had failed, must be determined, not merely by a survey of physical or financial considerations, but by reference to the conditions originally stipulated for. The bondholders were declared to be entitled to recover their money.

The present case appears to their Lordships to fall within the broad principle on which the judgments in that case proceeded. The lenders in London remitted their money to New York to be applied in carrying out the particular scheme which was established by the Statutes of 1909 and the Orders in Council, and by the contracts and mortgage of that year. The money claimed in the action was paid to the Appellant Bank as one of those designated to act in carrying out the scheme. The Bank received the money at its branch in New York, and its General Manager then gave instructions from the head office in Montreal to the manager of one of its local

branches, that at Edmonton in the Province of Alberta, for the opening of the credit for the special account. The local manager was told that he was to act on instructions from the head office, which retained control. It appears to their Lordships that the special account was opened solely for the purposes of the scheme, and that when the action of the Government in 1910 altered its conditions, the lenders in London were entitled to claim from the Bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the Province, and the Legislature of the Province could not legislate validly in derogation of that right. These circumstances distinguish the case from that of *The King* v. *Lovitt* (1912 A.C. 212) where the point decided was in reality quite a different one.

In the opinion of their Lordships the effect of the Statute of 1910, if validly enacted, would have been to preclude the Bank from fulfilling its legal obligation to return their money to the bondholders whose right to this return was a civil right which had arisen, and remained enforceable outside the Province. The Statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the Province nor directed solely to matters of merely local or private nature within it.

Other questions have, as already stated, been raised in this Appeal as to whether the Statute of 1910 infringed the provisions of Section 91 of the British North America Act, by attempting to deal with a question relating to banking, and by trenching on the field already occupied by the Dominion Banking Act. It was also contended that the appropriation of the deposits to the

General Revenue Fund of the Province was outside the powers assigned to the Provincial Legislature for raising a revenue for provincial purposes. The conclusion already arrived at makes it unnecessary for their Lordships to enter on the consideration of these questions, and of other points which were made during the arguments of Counsel.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed, and the action dismissed. The Respondents must pay the costs here and in the Courts below.

In the Privy Council.

THE ROYAL BANK OF CANADA AND OTHERS

v.

THE KING AND ANOTHER.

DELIVERED BY THE LORD CHANCELLOR.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.