

Privy Council Appeal No. 71 of 1914.

The Eastern Trust Company - - - *Appellants,*

v.

McKenzie Mann and Company, Limited - *Respondents.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 27TH APRIL 1915.

Present at the Hearing.

THE LORD CHANCELLOR.

SIR GEORGE FARWELL.

LORD ATKINSON.

SIR ARTHUR CHANNELL.

LORD PARMOOR.

[*Delivered by* SIR GEORGE FARWELL.]

This is an appeal from a judgment of the Supreme Court of Canada (Duff, J., dissenting), which reversed the unanimous judgment of the Supreme Court of Nova Scotia, dated the 5th July 1913, varying the report dated 15th January 1912, of the referee appointed by the Court in this action. The action is a partnership action between James Irvine, since deceased, as plaintiff, and Robert G. Hervey and others as defendants, and a decree was made therein by Graham, J., on March 13th, 1905, whereby the partnership was dissolved and certain accounts and inquiries were directed to be taken

by a referee appointed by the Court. The respondents, Mackenzie and Mann, were made parties to the action under the following circumstances. In June 1903 the Hervey Trust and Guarantee Company, as agent for the partners Irvine and R. G. Hervey, controlled all the capital, stock, and bonds of the Nova Scotia Southern Railway Company, which had been formed by the partners, who were unable to complete its construction, and arrangements had been made whereby the railway was to be completed by the Halifax and South-Western Railway Company, and Government subsidies were to be paid to that company in respect of the Nova Scotia line, which would form part of the said Halifax and South-Western Railway when completed; and on the 13th June 1903 an agreement was entered into between the trust company, as agents for the two partners of the one part, and the respondents Mackenzie and Mann (therein and hereinafter called the contractors) of the other part, whereby the partners agreed to sell and the contractors agreed to buy all the stock and bonds of the said Nova Scotia Railway Company for 275,000 dollars, of which 75,000 dollars was to be paid in fully paid capital stock of the said Halifax Company at par on an event which has happened and the balance, 200,000 dollars, as follows:—5,000 dollars on execution and the balance, 195,000 dollars, from time to time to the extent of 50 per cent. of the amounts paid by Government on account of loans or subsidies in respect of the said Nova Scotia line as and when such amounts are paid until the whole 195,000 dollars is paid.

“ Provided that if the 50 per cent. be not sufficient
“ to pay the 195,000 dollars in full, the balance shall be
“ paid when the said loans and subsidies have been all
“ received by the said company.”

There is a further proviso which will be more conveniently dealt with later.

The sum payable by the contractors would form part of the assets of the partnership of which the court had undertaken the administration, and would be primarily applicable in discharging the debts of the firm, including their indebtedness to the Nova Scotia Company, and inasmuch as the contractors owned all the stock and shares of that company, the discharge of the company's debts would enure for their benefit by increasing the value of the company's assets, and consequently of its stocks, shares, and securities. The substantial question in the case is the amount payable under the contract by the contractors.

On 29th January 1904 a receiver was appointed of such assets, and an injunction was granted restraining the defendants Hervey and the Hervey Trust Company from receiving from the contractors or the provincial treasurer of the Province all or any part of the 195,000 dollars.

When this appeal was opened before their Lordships it was treated as common ground that (as appears from the report of the referee at page 126 of the Record) by September 27th, 1907, the total subsidy then paid by Government was 397,080.90 dollars :—

“One half of this, 198,540.45, a sum sufficient to pay
“ more than the amount called for under the contract of
“ June 13th, 1902.”

This subsidy was paid on mileage. The inquiry with regard to this matter is given in the order of 24th November 1908 (page 66 of Record) :—

“What balance remains due and owing in respect of
“ the consideration moneys payable under the said contract
“ dated June 13th, 1902, to the parties entitled under the”

“ said agreement, or the persons, if any, who succeeded to their rights thereunder.”

The case has throughout proceeded on the footing of ascertaining the exact amount due, but towards the end of his reply before their Lordships, counsel for the respondents took the point that nothing was due, because, according to his argument, the 195,000 dollars fell short by about 30,000 dollars, and that the inquiry should be answered accordingly. It may be questioned whether such an argument is now open to the respondents, but whether it is so or not, their Lordships are of opinion that it is untenable; the 5,000 dollars was undoubtedly payable and paid on the execution of the contract, and the balance from time to time to the extent of 50 per cent. of the amounts was payable and paid by Government on account of loans or subsidies. There is nothing to lend colour to the suggestion that the contractors are not bound to pay until the whole accounts have been settled up, and show no balance, even of a dollar, owing. The proviso points to the payment of the balance out of subsidies paid in respect of the residue over and above the 50 per cent., not to the payment of the entirety of the 50 per cent. of the subsidies, as a condition precedent to a demand for payment of so much as has been paid, and an account of the amount of such payments.

Another objection was also taken by the respondent's counsel, which may possibly have been taken in the Supreme Court of Canada, although the only reference to anything of the sort occurs in Duff, J.'s dissenting judgment, where he says:—

“ If it had been shown that the plaintiff in the action or the receiver was aware that such payments were being

“ made to Hervey, then it is conceivable that a case of
 “ estoppel might have been made out. But there is no
 “ suggestion of anything of the kind.”

The argument offered to their Lordships is that Hervey, in contempt of court, got payment of some of the subsidy money to himself, and that a motion to commit him was made, which failed by reason of his disappearance from the colony. It appears to their Lordships that it is sufficient to state the point to show its want of substance.

The real point, however, argued and dealt with in the courts below is as follows. The contract of 13 June 1902 contained the following proviso referred to above:—

“ It is part of this contract that the Government of
 “ Nova Scotia have the right to be satisfied that all claims
 “ for moneys due and owing by the said Nova Scotia
 “ Southern Railway Company, Ltd., and its contractors
 “ in the province of Nova Scotia for labour and supplies
 “ furnished in connection with the construction of the
 “ said Nova Scotia Southern Railway Company's road,
 “ heretofore constructed, have been paid or satisfied, and
 “ the amounts of such claims may be paid out of the con-
 “ sideration moneys hereinbefore mentioned, and all sums
 “ paid in liquidation of such claims shall be considered
 “ payments on account of the said sum of 195,000 dollars.”

The object of this proviso is to enable the Government of Nova Scotia, in whose jurisdiction labour had been done by working men, and materials supplied and used, on that portion of the railway that had been made in the province, to compel payment therefor by the Nova Scotia Railway and its contractors: the persons to be paid are the labourers for their labour and the tradesmen for their goods: the persons who were bound to pay, and whose default was to be cured by government intervention, were the railway company and the contractors. There

is no such provision with regard to any other work or material.

The contract is framed in accordance with the subsidy contract between the Nova Scotia Government and the Halifax and S.W.R. Co., in whom the undertaking of the Nova Scotia Company was vested (Act I., 3 of 1903, Acts of Nova Scotia), confirmed by C.1 of the Acts of Nova Scotia, 1902, set out at p. 237 of the record, which makes special provision for payment of all labour in the construction of the work or materials therefor, and in case of default in paying the men or in paying for materials on or before the 20th day of the month for all works performed or materials delivered before the first of that month, the Governor in Council has power to retain all money due to the company and to apply it in paying the men their wages, or in paying for materials, and charge it as if paid to the company on account of the subsidy. The Government undertook no personal liability for such payment, but took power to ascertain the sums due and the persons to whom they were due.

In June 1903 the Government, under the statutory powers given under C. 26, 1903. Nova Scotia appointed a Commissioner—

“ to inquire into and report to the Governor in Council
 “ what claims for wages of the workmen employed in and
 “ for materials supplied for the construction or unfinished
 “ construction of the Nova Scotia Southern Railway are
 “ due and unpaid by any person, firm, or corporation, and
 “ the particulars and amounts of such claims respectively,
 “ and also all other claims against the company, construc-
 “ tion company, or contractors engaged in the building of
 “ the said railway, the nature and particulars of the said
 “ claims, and the respective amounts thereof.”

The Commissioner duly made his report, and the Government acted thereon, and made large

payments to persons reported as entitled to payments out of the subsidy. The greater part of these payments reached the persons entitled thereto, and no objection is now raised in respect thereof. But before all the payments on account of the subsidy had been made, viz., on 13th July 1903, this action was commenced, and a receiver was appointed by the court of the assets of the plaintiff's business, and an injunction was granted until the final determination of the action restraining the defendants, R. G. Hervey, and the Hervey Trust from receiving from the Canadian Bank, or the contractors, or the Provincial Treasurer of Nova Scotia or otherwise, and the said bank and the contractors were restrained from paying to the said defendants or to any persons other than the receiver (*inter alia*), all or any part of the said 195,000 dollars. The Provincial Treasurer was dismissed from the action on the ground that the court had no jurisdiction over him, and the Government, with full notice of the order, proceeded to distribute the subsidy without any regard to it. With regard to payments actually made by the Government under the statutory powers above referred to, the action of the executive may be justifiable; but even so, the question whether any particular sums mentioned in the contract were or were not properly described as for labour and supplies is a question of construction, and therefore of law for the courts. Their Lordships are unable to agree with the view of the Supreme Court as to the powers of the Government and to the presumption that ought to be drawn as to the nature of the payments made.

It was further held, on the admission of the parties, that no injunction could be granted against the Crown, and further that no other

party to the action was bound by the injunction or the appointment of a receiver.

This decision raises a question of great importance. Duff, J., in his dissenting judgment, puts the first point very clearly :

“ the parties were declaring that certain payments made by
 “ the Government were to be deducted from the considera-
 “ tion moneys. These were such payments as the Govern-
 “ ment should be satisfied were due and owing in respect of
 “ of claims for ‘labour and supplies. The deduction could
 “ ‘ only be made if two conditions were satisfied : (1) that
 “ ‘ the claim was for labour and supplies ; and (2) that the
 “ ‘ Government was satisfied that it was due and owing.’ ”

In the present case the Government have not only made payments which by no latitude of construction can come within the words “labour and supplies,” but have also paid a large sum to R. G. Hervey, who was directly restrained by the court from receiving it. If it was the case of a private individual, he would be clearly liable to make good the wrongful payment and to purge his contempt. In the case of the Crown there is no ground for Idington, J.’s, proposition that the Government may fairly say that they were given such power by the Legislature over the subject matter and that the courts have no ground for interfering, at all, directly or indirectly, with the exercise of such a discretion. There is nothing on which to found the existence of the alleged discretion or to support a decision which pronounces the Executive Government free to dispose of money the right to which is *sub judice inter partes* and held *in medio* by the order of the court.

The second point taken by Idington, J., is equally untenable and even more important. The non-existence of any right to bring the Crown into court, such as exists in England

by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Attorney-General v. Dyson* (1911, 1 K.B., 410) and in *Attorney-General v. Burghes* (1912, 1 Ch., 173). It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver and to obtain from the court an order on the receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.

The duty of the Crown in such a case is well stated by Lord Abinger in *Deare v. Attorney-General* (1 Y. & C. Exch. at page 208). After pointing out that the Crown always appears (in England) by the Attorney-General in a court of justice—especially in a Court of Equity—where the interest of the Crown is

concerned, even perhaps in a bill for discovery, he goes on to say :

“ It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice where any real point of difficulty that requires judicial decision has occurred.”

Further, their Lordships are unable to agree with the Supreme Court of Canada in their opinion of the injunction. Apart from the Crown, the court had clear jurisdiction over all the parties to the action to restrain them from doing any of the acts complained of ; its order and injunction operates *in personam*, and compels the party forbidden to do any act, whether the receipt of money or the like, to refrain from doing it, whoever the other party may be, and whatever his rights may ultimately prove to be. The existence of such a jurisdiction has been part of the equitable jurisdiction of our courts for centuries, and is necessary in a case like the present for the safe preservation of the subject matter of the action until the rights of the parties can be finally determined. It is a misconception to speak of the order and injunction of the court in such a case as this as only permissive ; it was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged, and although it could not bind the Government not to pay or make the Government responsible for that obedience to the law which the court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by the Government. Their Lordships are unable to agree with the decision of the Supreme Court which gives the Executive power to override the judgment of the court.

Their Lordships, with all respect, differ entirely from the statements in Idington, J.'s, judgment, that an injunction under which the hand giving may be innocent, and the hand receiving guilty, would be an anomaly not in accord with the policy of the law which developed the power of injunction. Such an injunction is, on the contrary, in accordance with ordinary practice and well-settled principles, and their Lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made. An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts; it is clear that if a claimant to an inalienable Government pension succeeded in persuading the court in this country that he had a *prima facie* claim to it, and obtained an interim injunction, the true owner of the pension could be committed for contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order.

Their Lordships agree with the decision of the Supreme Court of Nova Scotia, and will humbly advise His Majesty to allow this appeal, discharge the order of the Supreme Court of Canada, and restore that of the Supreme Court of Nova Scotia, of the 5th July, 1913.

But in remitting the report as directed by the last-mentioned order there should be a direction to the referee that in taking the accounts all amounts paid by the Government of Nova Scotia to the creditors of the Nova Scotia Southern Railway Company ought to be set off against the amount payable by the respondents.

The respondents must pay all the costs in the Courts below and of this appeal.

In the Privy Council.

THE EASTERN TRUST COMPANY

2.

MCKENZIE MANN AND COMPANY,
LIMITED.

DELIVERED BY SIR GEORGE FARWELL.

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