Privy Council Appeals Nos. 132 *and* 166 *of* 1919.

The Pacific Coast Coal Mines, Limited, and others - - - *Appellants*

v.

John Arbuthnot and others - - - - - - *Respondents.*

John Arbuthnot and others - - - - - - *Appellants*

v.

The Pacific Coast Coal Mines, Limited, and others - - - *Respondents.*

(*Consolidated Appeals.*)

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER, 1920.

Present at the Hearing:

VISCOUNT CAVE.
LORD MOULTON.
LORD PHILLIMORE.

[*Delivered by* LORD MOULTON.]

The matters for decision in the present appeal arise out of the order made by His Majesty in Council on the 8th August, 1917, on an appeal from the Court of Appeal of British Columbia in an action brought by the Pacific Coast Coal Mines, Ltd., and others against John Arbuthnot and others. Their Lordships by their decision advised the setting aside of the order made by the Court of Appeal in British Columbia and supported in part the judgment of the Judge of first instance in the case. Consequently they made an order restoring with variations the order made by him and giving liberty to apply to the Court of first instance to give effect to their judgment. This was done, and it was referred to the Registrar of the Court to make a report as to the sums due from or to the various parties concerned in the suit. Such report was made by the Registrar on the 24th April, 1918, and came before the Court of first instance for further consideration on the 13th June, 1918, when an order which forms the basis of the present dispute was made by the Court in respect of all the matters before it. Against this order certain of the defendants appealed

to the Court of Appeal of British Columbia, and that Court by an order dated the 1st April, 1919, varied in substantial respects the order of the Court below. From this order, cross-appeals have been brought by the plaintiffs and defendants. These appeals have been consolidated and are now before the Board.

It will be seen therefore that their Lordships are concerned only with the question of what is the effect of the Order in Council of the 8th August, 1917. The rights of the parties were finally determined by that order. It is only the interpretation and proper mode of carrying out that order which is before their Lordships on the present occasion.

But although the rights of the parties have been finally determined by the Order in Council dated the 8th August, 1917, it will be necessary to give a short account of the matters out of which the litigation arose in order that the meaning and effect of that order may be properly understood.

The appellant Company was incorporated under the Provincial Companies Acts on the 21st March, 1908, for the purpose of acquiring and working mining properties and selling the produce. No question now arises about the circumstances under which this promotion took place. It must be taken for the purposes of this appeal that no complaint can be made against any of the defendants in respect thereof in view of the fact that the charges against them relating to the promotion of the defendant Company were formally withdrawn by the plaintiffs at the former hearing before this Board who directed them to pay the costs occasioned by their having put them forward in the litigation.

In the course of time dissensions arose within the Company. Its shares had practically become the property of two groups of shareholders, which may be called respectively the British Columbia group and the New York group, and these dissensions threatened to lead to heavy litigation, which would certainly be very injurious to the future prosperity of the Company as a whole. To avoid this, the two groups came to an agreement, which included among other things an arrangement that the New York group should buy out the British Columbia group so that the latter would cease to have any connection with the Company.

The agreement between the parties was finally adjusted and entered into on the 11th February, 1911. It was not, however, a simple purchase of the shares for money, but was an elaborate agreement by which it was arranged that debentures should be issued by the Company and that the members of the British Columbia group should receive debentures to the par value of their respective shares in return for the surrender of those shares to the Company, and that such shares should be thereupon cancelled (an order of the Court to be obtained if necessary for the purpose), and that a consequential reduction of the appellant Company's capital from $3,000,000 to $2,000,000 should be made. Inasmuch as no mere agreement between private shareholders could effect these purposes, provision was made in the agreement for an application to the Legislature of British Columbia for an Act to

authorise the agreement, the reduction of capital, the surrender of the shares, and the issue of debentures as provided by it. The agreement also contained provisions in respect of other matters which are not material to the questions now before their Lordships.

The Provincial Legislature was then in session at Victoria, and on the 14th February a petition for a private Act as above described was presented, and a Bill was accordingly introduced which became law on the 1st March, 1911. Shortly described, its effect was to validate, ratify and confirm the agreement itself and all its terms and to give to the Company power to carry out its provisions—

> "Subject to the same being adopted by a resolution passed by 75 per cent. of the shareholders of the Company present personally or by proxy at any meeting of the shareholders of the said Company called for that purpose and for the purpose of authorising the issue of the said debentures after the 14th day of February, 1911."

On the 20th February, 1911, pending the passing of the Act, a notice was given for a meeting of the shareholders for the above purpose on the 1st March at 3.30 p.m. The Act had actually passed by the hour specified by the notice, and their Lordships on the previous occasion held that this issue of the notice in anticipation of the passing of the Statute was competent to the directors. The meeting was held, and something like 98 per cent. of the shareholders were present either personally or by proxy. It unanimously adopted a resolution such as is provided for by the Act. But their Lordships held that the contents of the notice sent were utterly insufficient, and that there was an absence in it of most material information which should have been given to all the shareholders before they were asked to sanction such important modifications of the powers and constitution of the Company, and that therefore the notice was bad. It followed, therefore, that the adoption of the agreement by the meeting was of no effect. It was not procured in accordance with the condition imposed by the Legislature. The agreement itself and all proceedings thereunder remained therefore *ultra vires* and incapable of ratification by the Company. It was in order to obtain a declaration to this effect, and consequent relief, that the action was brought by certain of the shareholders of the Company. The decision of the Judge of first instance was in favour of the plaintiffs, but this was reversed by the Court of Appeal, and was to a great extent restored by the Order of the 8th August, 1917.

In accordance with the said judgment their Lordships set aside the order of the Court of Appeal of British Columbia and restored the order of the Court of first instance of the 7th January, 1916, with certain modifications. The parts of the order so modified which are material to the questions now before their Lordships are as follows :—

> "1. This Court doth declare that the alleged agreement dated the 11th day of February, 1911, made between John Arbuthnot, James M. Savage, John C. McGavin, and the Vancouver Island Timber Company, Ltd., of the

first part, and John P. Hartman and Charles Cook Michener of the second part, and the Pacific Coast Coal Mines, Ltd. (Non-Personal Liability), of the third part, and Ephraim Hodgson and David Scott Spencer of the fourth part, and Samuel Henry Reynolds of the fifth part, was never adopted by nor is the same binding upon the plaintiff Company, and that the same and all proceedings taken to give it effect was and were as against the plaintiff Company illegal, void, and *ultra vires* of the plaintiff Company, and particularly that the debenture issue, the Trust Deed and the attempted cancellation of shares and reduction of capital based thereon were so likewise illegal, void, and *ultra vires* of and against the plaintiff Company, and that the said Trust Deed and debentures secured thereby issued or held respectively by the defendants John Arbuthnot, James M. Savage, John C. McGavin, William J. Moran, Samuel H. Reynolds, Henry G. S. Heisterman, Evelyn O. I. Rant, Vancouver Island Timber Company, Ltd., the British American Trust Company, Ltd., and Henry E. Young, should be by them respectively delivered up to be cancelled, and doth order and decree the same accordingly ;

" 2. And this Court doth further declare that all monies paid on account of the said Trust Deed or debentures whether for principal, interest, or trustees' and inspectors' fees, or otherwise shall be repaid to the plaintiff Company by the defendants John Arbuthnot, James M. Savage, the British American Trust Company, Ltd., John C. McGavin, William J. Moran, Samuel H. Reynolds, Henry G. S. Heisterman, Evelyn O. I. Rant, and Henry E. Young respectively in so far as the said sum or sums have been respectively received by the said defendants, and if necessary that there be a reference to the Registrar of this Court to ascertain the dealings with said debentures and report thereon, and doth order and decree the same accordingly ;

" 3. And this Court doth further declare that in the event of said defendants being unable for any reason whatever to deliver up to the plaintiff Company for cancellation such Trust Deed or any of the said debentures or if for any reason any of the said debentures are not so delivered up, then and in that event or events, the said defendants John Arbuthnot, James M. Savage, C. C. Michener, William J. Moran, Luther D. Wishard, and Charles O. Kimball, jointly and severally indemnify the plaintiff Company against same to its satisfaction, and in the event of the plaintiff Company unreasonably withholding approval thereof, then, subject to the approval of a Judge of this Court for and in respect of the amount of any such debentures, and of said Trust Deed, and doth order and decree the same accordingly ;

" 11. And this Court doth further declare that the defendants John Arbuthnot, James M. Savage, John C. McGavin, William J. Moran, Samuel H. Reynolds, Henry G. S. Heisterman, Evelyn O. I. Rant, and the British American Trust Company, Ltd., each of them be and they are hereby restrained from in anywise dealing with the said Trust Deed or the said debentures or any of them, other than by the delivery of same to the plaintiff Company for cancellation, and doth order and decree the same accordingly ;

" 15. And this Court doth further declare that in the event of any of the monies paid by the plaintiff Company on account of the said Trust Deed or debentures, whether for principal, interest, or trustees' and inspectors' fees or otherwise, not being repaid to the plaintiff Company, then and in that event judgment may be entered against the said defendants John Arbuthnot, James M. Savage, C. C. Michener, Samuel H. Reynolds, William J. Moran, Charles O. Kimball, and Luther D. Wishard, jointly and severally ;

" Let all further directions and considerations, including subsequent costs and the question of interest on the amounts paid on account of said debentures or damages in lieu thereof, be reserved until after the Registrar has reported."

Before proceeding to deal with the effect of this order it is necessary to give some account of the proceedings of the Company

subsequent to the General Meeting held in accordance with the notice of the 20th February, 1911.

On the day after the abortive meeting of the shareholders on the 1st March, 1911, above referred to, a directors' meeting was held and at that meeting the directors belonging to the British Columbia party, viz., the respondents Arbuthnot, Savage and Moran and the said S. H. Reynolds (since deceased) resigned office as directors. At a meeting on the following day their resignations were accepted and four directors belonging to the New York section were appointed in their place. The new Board of Directors proceeded to carry out the provisions of the resolution passed at the meeting of the shareholders. They affixed the seal of the Company to the agreement, issued the debentures, and made all payments thereunder. It appears from the papers in the original appeal that the defendant John P. Hartman (who had taken an active part in bringing about the arrangement) was one of the directors so appointed on the 4th March, and that he, Michener, Wishard and Robertson (who was a nominee of Michener and qualified by him) were appointed an executive committee with the power to exercise any and all of the powers of the Board of Directors. Wishard became President of the Company and Kimball Vice-President.

The order of the Judge of first instance purporting to carry into effect the order of His Majesty in Council of the 8th August, 1917, is dated the 13th June, 1918. As to much of the relief decreed there is no dispute, but the order of the Judge of first instance was varied in certain respects on appeal to the Court of Appeal in British Columbia, and it is from the order of the latter Court that the present appeal and cross-appeal are brought. These raise only four points for decision and these of a simple character. Hence it will be more convenient to deal clause by clause with the Order of the 7th January, 1916, as modified by the Order in Council and the specific relief decreed thereunder by the Court of Appeal in British Columbia, taking in order the objections raised by the parties in respect to such relief and dealing with them as they arise.

Turning then to Clause 1 of the Order, their Lordships find that after declaring that the agreement, its adoption, and the subsequent action thereon were *ultra vires* of the plaintiff Company and were therefore void it gives the specific relief that the Trust Deed and the debentures secured thereby issued to the various defendants should be by them respectively delivered up to be cancelled. These debentures were made out to bearer, and the obvious object of the relief is to secure the Company from the danger of having claims made upon them in future under these invalid documents.

Clause 3 of the Order must be looked upon as supplementary to Clause I and as completing the relief intended to be given thereby. It provides for the case where there is a failure to deliver up some of the debentures. In such case it directs that certain of the defendants (viz., those who were directors at the date of the passing of the Act) should be jointly and severally

liable to indemnify the Company against claims upon such outstanding debentures.

There is, and could be, no appeal against the relief given by Clause 1 inasmuch as it follows precisely the former Order of this Board, and, moreover, it is evident that the Company is entitled to have these invalid debentures delivered up and cancelled in order to prevent claims not legally sustainable being made against the Company in future upon them. The effect of Clause 3 is obviously to render the parties there named liable to indemnify the Company against any failure to obtain the relief given under Clause 1 by reason of the defendants therein named not delivering up the debentures. But here a serious difficulty arises. It happens that 115 of the debentures formerly held by the defendant McGavin had been sold to one Henry Wyndham Jefferson, who brought an action upon them against the plaintiff Company while this litigation was going on and recovered judgment for his full claim against the plaintiff Company by reason that at the date when he so recovered judgment the appeal to their Lordships which led to the Order of the 8th August, 1917, had not come on for hearing and the action of the plaintiff Company against the present defendants stood dismissed by the Court of Appeal in British Columbia. The plaintiff Company brought no appeal from the judgment so obtained by Jefferson and it still stands. A further difficulty arises in respect of these debentures. In the action thus brought by Jefferson in which he succeeded the Company made the defendants named in Clause 3 third parties, and claimed an indemnity from them substantially on the same grounds as in the present action, and in that action the defendants who had thus been made third parties obtained judgment against the Company on this claim with costs, and such judgment still stands.

Under these circumstances the Judge of first instance by his order of the 13th June, 1918, directed that the defendant McGavin should pay the amount of the judgment, including costs, and that if he failed to do so before a date named the plaintiffs might enter judgment for the amount against the defendants named in the third clause. The Court of Appeal struck out this part of the Order, and directed only that the defendants named in the 3rd clause should indemnify the plaintiffs against the judgment obtained by Jefferson. Against this decision of the Court of Appeal both parties appealed to the Board, the plaintiffs contending that the Order of the Judge directing the defendants named in Clause 3 to pay the amount of the judgment should be restored, and the defendants claiming that the direction as to indemnity given by the Court of Appeal should be omitted. In their Lordships' opinion the contention of the defendants is right. There are questions arising out of the neglect of the Company to appeal against the Jefferson judgment, and out of the order made in the action in favour of third parties, which the defendants are entitled to have decided in a proceeding properly raised under the original order of indemnity, and these questions should not be decided against them at the present stage. Their Lordships think, therefore, that the direction of the Court of

Appeal as to indemnity should be struck out, but there should be liberty to the plaintiffs to apply to enforce the declaration as to indemnity contained in the third clause so far as regards the Jefferson judgment.

The other points raised on this appeal relate to the relief granted by Clauses 2 and 15 of the Order of the 7th January, 1916, as modified by the Order in Council. They relate chiefly to the relief granted in respect of the monies paid by the Company on the coupons of the debentures that had matured prior to September, 1914, the date at which the Company wholly ceased to pay on them. This raises a very serious question of law which their Lordships will presently deal with. But before doing so it will be convenient to dispose of a question of fact raised as to the coupons, amounting to $36,090, which fell due on the September, 1912. These coupons, to the amount of $36,000, were met by an allied company, the Canadian Securities Corporation, who purported to purchase them at their face value and charged the plaintiff Company in account with the sums so paid, the balance of $90 being paid by the plaintiff Company. On taking the account under Clause 2 the Judge included the above sum of $36,000 as having been in effect paid by the plaintiff Company, but this decision was reversed by the Court of Appeal. The plaintiffs have appealed on this point. Their Lordships are of opinion that although the evidence leaves a considerable amount of obscurity as to the transactions with regard to this coupon. it is substantially established that it was in fact paid by the Company by being included in a promissory note on which they are liable, and that accordingly no distinction should be drawn between this coupon and those paid in cash by the Company. On this point, therefore, they think the plaintiffs' appeal should be allowed.

Their Lordships now turn to the main questions in dispute in the case, namely, the proper interpretation of the relief directed by Clauses 2 and 15 of the order of the 7th January, 1916.

Taking first Clause 2, they find that the language is quite plain and definite. It simply directs that monies received from the Company :—

> " On account of the said Trust Deed or debentures, whether for principal or interest, or trustees' and inspectors' fees or otherwise, shall be repaid by [here naming certain of the defendants] in so far as the said sum or sums have been respectively received by the said defendants."

The defendants there named are the Trust Company and those to whom the debentures were originally issued either directly or through the Vancouver Island Timber Co., Ltd., who received them purely as trustees for four of the other defendants named and who handed them over to their *cestuis que trustent* without ever having had any beneficial interest in them. So clear is the language that no dispute would, their Lordships think, have arisen upon the meaning and effect of this clause had it not been that in the Order of the 7th January, 1916, there was a reservation of the question of interest, and on further consideration the Judge of first instance charged the whole of the repayments directed under

this clause with 5 per cent. interest from the date of the original payment by the Company. The Court of Appeal in British Columbia has disallowed this interest and their Lordships have to consider which view is the correct one.

Their Lordships are of opinion that the persons directed to make the repayments are charged solely as recipients and in no other character. The peculiarity of this case is that the parties directly guilty of the *ultra vires* acts complained of are substantially the persons bringing the action and seeking to profit by the relief granted. The insufficiency of the notice to the shareholders of the meeting on the 1st of March rendered that meeting and the resolution passed at it of no legal effect. But had it rested there it would have been merely a nullity. It was the putting that resolution into force and acting upon it that constituted the *ultra vires* acts of the Company and all these were done by the directors who belonged to the New York section. The directors, Arbuthnot, Savage, Reynolds and Moran, resigned at the meeting of the Board held on the 2nd March, 1911, and their places were taken by directors belonging to the other party. It was these latter who affixed the seal of the Company to the agreement, who issued the debentures and made all the payments on the coupons. Looking at it from the point of view of their legal duty they ought to have taken no action upon the resolution of the meeting until after they had issued a proper notice to the shareholders and held a meeting capable of passing a valid resolution. Seeing the consensus of opinion as to the desirability of the agreement which existed among both the groups that were the principal holders of the shares, it is quite possible that the agreement would have been approved of at such meeting and no question of *ultra vires* could have arisen.

Now it is to be observed that no relief is directed against the persons actually participating in these *ultra vires* acts excepting those who actually received money from the Company under the debentures. Take, for example, the defendant John P. Hartman. The papers of the original case show that he took an active part in the arrangement of the agreement and in the acts of the Company on and after the 2nd of March, 1911, that is to say, in the sealing of the agreement by the Company, the issue of the debentures and the payment of the coupons. He was before the Court as a defendant in the action and yet no specific relief except in the matter of costs was directed against him. The consideration of these things, coupled with the language of Clause 2, leads their Lordships to the opinion that the defendants there mentioned are treated merely as recipients of money received by them from the Company without any legal claim to it existing by reason of the invalidity of the original resolution and of all subsequent steps taken in virtue of it, and that the relief is purely a repayment to the Company of monies so received as being money had and received by them to the use of the Company which, therefore, they must repay. The receipt of the monies must be taken to have been without any actual knowledge that the payments were *ultra vires* and in that sense the monies were

received innocently. It must be remembered that though fraud was charged in the action it was not proved, and there is no finding in the original Order in Council which fastens any charge of impropriety on the persons receiving the payments in respect of their so receiving them.

Under all these circumstances their Lordships are of opinion that the decision of the Court of Appeal of British Columbia discharging the direction of the Judge of first instance as to interest being chargeable on these repayments was correct. There is no doubt that the Courts have power to direct that monies received from a Company under a claim which is invalid by reason that the claim was *ultra vires* should be repaid with interest, but there is no fixed rule that such should be the case. The directors of the Company have been guilty of great delay in impeaching the validity of the debentures and of continuing to act under what they must be taken to have known to be an invalid resolution. Those who were actually guilty of the issue of the debentures and maintaining their credit by payment of the coupons are not made liable under the order, and their Lordships are of opinion that it would be unfair to require the recipients under Clause 2 to do anything other than repay the money actually received as they would have been ordered to do in a common law action. On the question of interest, therefore, the plaintiffs' appeal fails.

There remains the consideration of Clause 15. The monies it refers to are described in exactly the same language as is used in Clause 2, except that in Clause 2 they are specifically restricted to those that have been received respectively by the persons therein named, and it would be contrary to the sound principles of construction to hold that the words had any other or different meaning in this clause to that which they have in the earlier one. With regard to such monies the relief directed by Clause 15 is that the defendants therein named should jointly and severally be liable to make up to the Company any failure in the performance of Clause 2, and as their Lordships have already interpreted the relief directed by Clause 2, there is no need further to discuss Clause 15. It suffices to say that if and so far as the Company do not obtain the repayments directed by Clause 2, they can recover the deficiency in the manner directed by Clause 15.

But there is no such restriction in Clause 15, therefore with regard to the further question raised by the defendants' cross-appeal on Clause 15, namely, that the liability imposed by the clause is limited to the monies ordered to be repaid under the second clause, their Lordships agree with the construction put upon the clause by both Courts in British Columbia and hold that this part of the cross-appeal is unfounded.

Their Lordships are therefore of opinion that the judgment of the Court of Appeal of British Columbia should be varied in respect of the sum of $36,000 paid under coupon No. 3 of the debentures and the specific order as to the Jefferson judgment in the manner above directed, and that as both appeals have partly succeeded and partly failed, there should be no order as to costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C

1921.