

event took place the obligation of the trustees provided for in the trust-disposition took effect, and from the moment it took effect the right of the Crown to this duty attached.

I therefore move your Lordships that the judgment appealed from be affirmed, and that this appeal be dismissed with costs.

LORD WATSON—My Lords, this is a very plain case. I think it quite sufficient to say that I agree with all the Judges in the Courts below that the trust constituted by the fourth purpose of the deed of 1850 was only meant to endure until the seventh purpose came into operation, and that the seventh purpose became operative as soon as the truster's debts were paid off by his son Duke Archibald, who thereupon became the beneficial owner of all the objects of vertu and other articles of which he had previously the liferent use only.

LORD MORRIS and LORD FIELD concurred.

The House affirmed the decision of the First Division, and dismissed the appeal with costs.

Counsel for the Appellant—Sir Horace Davey, Q.C. — Macphail. Agents — Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Sir Charles Russell, A.-G.—The Lord Advocate—Patten MacDougall. Agent—Sir W. H. Melville, Solicitor for England of the Board of Inland Revenue, for Philip J. Hamilton Grierson, Solicitor for Scotland of the Board of Inland Revenue.

Tuesday, November 29.

(Before the Lord Chancellor (Lord Herschell), and Lords Watson, Ashbourne, and Morris.)

MANN AND BEATTIE v. EDINBURGH NORTHERN TRAMWAYS COMPANY.

(*Ante*, vol. xxviii. 828, and 18 R. 1140.)

*Company—Promotion Money—Expenses of Private Act—Fiduciary Relation—Private Advantage—Ratification by Directors—Liability to Account.*

M, the agent, and B, the engineer, of a newly incorporated cable tramways company, of which they had been the chief promoters, arranged on behalf of the company the contract for the construction of its works. By this contract the contractors undertook, besides constructing the works, to pay the expenses incurred by the company in obtaining their Act. M and B at the same time entered into an agreement with the contractors on their own behalf, whereby they bound themselves to relieve the contractors of their liability for the expenses of the Act in

consideration of the payment of a sum of £17,000, the balance of which they were to retain for their own behoof.

Five years afterwards the company called on M and B to account for the sum they had received under their agreement with the contractors. In answer the defenders maintained that the company were barred from challenging the agreement, in respect that everyone interested in the shares of the company knew of and had assented to the agreement, and the company's shares had never been issued to the public.

*Held (aff.)* the decision of the First Division) that the alleged knowledge and assent of those who represented the company had not been proved; but even assuming such knowledge and assent, the agreement was illegal, as it was *ultra vires* of promoters or directors or shareholders to apply the moneys of the company, which were devoted by statute to special purposes, to any purpose which was not sanctioned by the provisions of the Act of incorporation.

This case is reported *ante*, vol. xxviii. p. 828, and 18 R. 1140.

Messrs Mann and Beattie appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, in the year 1884, on the 7th of August, an Act was obtained called the Edinburgh Northern Tramways Act, which authorised the making of certain tramways in the city of Edinburgh. That Act was promoted by Messrs Mann and Beattie, who were respectively law-agent and engineer, and it was no doubt promoted also by certain other persons named in the Act who had agreed to a limited amount to guarantee the expenses which were necessarily incurred for the purpose of obtaining the Act, and they had also, some of them, taken part in raising the deposit required in order that the Act might be obtained.

The Edinburgh Northern Tramways Company having obtained the Act for the purpose of establishing cable tramways in Edinburgh sought to obtain a contract with another company in order that the tramways might be made and the necessary works constructed. They ultimately entered into an agreement of the 24th of October 1884 with the Cable Corporation, who for a certain sum of money were, as provided in that Act, to construct the tramways, and to pay all the expenses of and incidental to obtaining the Act, which by section 78 of the Act it was provided should be paid by the Tramways Company. That was the agreement, so far as it appeared, between the Tramways Company and the Cable Corporation. The sum of £93,000 was not all of it to be paid in cash, but it was to be paid partly in cash and partly in shares. I need not trouble your Lordships with the particulars of the payments to be made, because nothing turns upon it.

It appears that at the same time as that agreement was entered into, that agree-

ment being negotiated by Messrs Mann and Beattie, another agreement was entered into between the corporation, and Messrs Mann and Beattie of course negotiated also by themselves. It bore date the 25th of October, the following day, but it is admitted, and there can be no doubt of the fact, that these two agreements were under negotiation at the same time, Messrs Mann and Beattie acting on behalf of the company and on behalf of themselves, in effecting these two agreements. This second agreement provided, that whereas by the agreement of 24th October the Cable Corporation were to bear and pay the expenses of obtaining the Tramways Act, in lieu of their so paying the expenses they were to pay to Messrs Mann and Beattie £17,000, and Messrs Mann and Beattie were then to see to the payment of the expenses. My Lords, I have said that they were to pay £17,000, but the whole of it was not to be paid in cash—£5000 was to be paid in cash, and a portion of it to be paid in debentures by the Cable Corporation. I have not lost sight of that fact, but it is immaterial in the view which I take of this case, and I shall speak hereafter of this as a sum of £17,000, although I am quite alive to the fact that it was not all cash payment.

Now, what was the real nature of this agreement? It is obvious that in estimating the £93,000 which was to be paid by the Tramways Company to the Cable Corporation, £17,000 of it was estimated as paid for the amount of these expenses, because this whole agreement was under negotiation at the same time. In reality, therefore, the Tramways Company would pay £93,000 less £17,000 for the works which were to be done in constructing the tramway, and they were to pay (because that is what it amounts to although it is carried out by this machinery) the balance for the purpose of discharging the expenses, and that balance was not merely to go to the discharge of the expenses so far as expenses had been incurred, but if there was a surplus over those expenses after they had been paid without exhausting the £17,000, that surplus was to be kept by Messrs Mann and Beattie. The real effect of the transaction therefore was this—that one is to treat £76,000 as paid for works, and £17,000 (or whatever the payment really represented, as I said, I will call it £17,000) as paid in effect to Messrs Mann and Beattie in order that out of it they might pay the expenses incurred in obtaining the Act, and keep the residue for themselves.

Now, my Lords, the question is, whether that transaction can stand as against the company. There is no contest raised as to the right of Messrs Mann and Beattie to retain all that is necessary for the purpose of discharging every expense authorised to be discharged under section 78 of the Act. The only question is, whether they are bound to account and show how much they have so expended, or whether they can keep the residue, however great it may be beyond those expenses, for their own benefit.

My Lords, the Lord Ordinary has found that the second agreement was not com-

municated at the time when it was made to the directors of the company. He has arrived at that conclusion of fact after seeing and hearing the witnesses. It would need a very strong case indeed to induce your Lordships to depart in any way from his finding. I see not the slightest ground for doing so, and therefore it must be taken that this was an agreement to which no reference was made in the agreement which was submitted to the company, and that it was entered into therefore, there being no communication of it, behind the backs of the company and of those who represented them, the directors.

Now, my Lords, that was the state of things at the time when this agreement was made. It is said that afterwards the agreement became known to the company. I cannot see any evidence that it became known to the company until, at the earliest, February 1886. But even then, when the agreement undoubtedly was brought under the notice of the directors, all that appears is that certain pleadings were brought to their notice—certain proceedings in an action which was then pending were discussed, and throughout I see again no evidence to justify your Lordships in departing from the further finding of the Lord Ordinary, that after the agreement was brought to the knowledge of the directors, though they knew of it, they never either approved or adopted it.

Now, my Lords, upon these findings in relation to the facts which I have stated to your Lordships, it seems to me impossible that any but one conclusion can follow, namely, that Messrs Mann and Beattie cannot retain for their own benefit any surplus after the payment of the expenses.

It has been said that there are now no shareholders in the company who have not become aware of this agreement, and therefore the company cannot be in a position to insist that its terms shall not be carried out. My Lords, I am not satisfied that that is established. The subcontractors who purchased from the Assets Realisation Company, and received a large number of the shares in this company, it is said, had notice of the agreement of 25th of October 1884, but that they had notice of that agreement, of its contents, and of the circumstances connected with it, which prevent its validity against the company, appears to me to be very far from proved, and therefore I am not satisfied at all that that fact is established on the part of the appellants. But, my Lords, even if it were, it does not seem to me to be material in this case. I think the fact has been lost sight of really in the appellants' argument that this is a company created by Act of Parliament which has no right to spend a penny of its money except in the manner provided by the Act of Parliament. The Act of Parliament provides that the capital is to be raised for the purpose of being expended in making a cable tramway. The only other expenditure authorised by the statute is the expenditure authorised by section 78, and I am unable to find here any authority,

however much the directors may have agreed to and ratified it and approved of it, which enables this company to spend any of its assets except for those purposes.

Now, my Lords, that this is the law has been established and recognised for a long series of years. In the case of *The Caledonian and Dumbartonshire Railway Company v. The Magistrates of Helensburgh*, 2 Macq., it was sought to enforce an agreement made with the promoters of the company, and to secure a declaration of its validity as against the company. Of course as regards the facts, to that extent that case differs from the present inasmuch as there the agreement sought to be enforced was one made with the promoters, but the reasoning of the learned Lord Chancellor, and the grounds upon which he bases his judgment, are strongly applicable to the proposition which I have just laid down. The Lord Chancellor says—"When such a body apply for an Act of incorporation, what they ask for of the Legislature is not an Act incorporating and giving powers to those only who are applying, not necessarily even incorporating and giving powers to any of them, but an Act incorporating all persons who may be willing to subscribe the specified sums, and so to become shareholders in the company. If the Legislature accedes to such an application, the Act when passed becomes the charter of the company, prescribing its duties and declaring its rights, and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the Act, and liable to no obligations beyond those which are there indicated. If this be not the true principle, the Legislature must be making itself ancillary to serious injury. When a capitalist, believing in the probable success of any particular project sanctioned by the Legislature, is satisfied with the terms of incorporation embodied in the Act, he reasonably advances his money on the faith of those terms, and if the project turns out a failure he has no right to complain. The speculation was one as to the prudence of which he had the means of judging, and no injustice is done to him if in the result he sustains a loss. But surely the case is very different if behind the terms of incorporation expressed in the Act, there are others of which the public have no notice, but which are to be held equally binding on the shareholders as if they had formed part of the charter of incorporation." The learned Lord Chancellor then goes on to lay it down that the only modes in which a company can apply its funds are those prescribed by its Act of incorporation, which is its charter. And in the case of the *Earl of Shrewsbury v. The North Staffordshire Railway Company* that is very distinctly indicated as the ground of the judgment in the very instructive judgment of Vice-Chancellor Kindersley, who points out that where the expenditure of money is for a purpose unauthorised by the Act it is *ultra vires*, and there is no power in the company validly to make that payment. If that be so, my

Lords, no approval of those who may happen to be directors at the time when the company is formed, or of those who may happen at that time to be all the shareholders in the company, can possibly give it validity, because it is something which the company itself cannot do, and which it cannot be authorised to do either by its then directors or by its then shareholders.

Now, my Lords, in the present case the 78th section, as I have said, has sanctioned expenses, costs, and charges coming within the definition of that section. But the payment of any money whatsoever to Messrs Mann and Beattie not necessary for the discharge of those obligations is a payment out of the assets of the company—that is in effect the money of the company (because in spite of the machinery by which this was effected, that is what it comes to), which the company have no right to apply in the manner in which they do apply it if Messrs Mann and Beattie keep anything beyond the sum necessary to discharge those expenses.

My Lords, I can see nothing that has been done by this company or its directors which in the slightest degree bars the company from now coming to maintain that beyond the sum necessary to discharge the obligations prescribed in the 78th section there can be no right in Messrs Mann and Beattie to retain any of the moneys which they claim under the agreement of the 25th of October 1884.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON—My Lords, this case appears to me to be equally plain in fact and in law. The effect of the separate agreement of the 25th of October was, in my opinion, the same as if it had been embodied in the contract of the 24th of October 1884. In substance it was an arrangement that the appellants should receive £17,000 out of the moneys of the Tramways Company, and out of that they were to pay the costs and charges sanctioned by section 78 of the Act of incorporation, and to keep the balance, if any, to themselves. So far as regarded the balance, that agreement was plainly illegal and void. It would be intolerable that persons employed by a company to make a contract on its behalf should be able either directly or indirectly to secure a pecuniary advantage to themselves for which they have given no consideration, at the company's expense.

But the appellants allege on record that the terms of the agreement "were known to and approved by the pursuers' company." The Lord Ordinary has found "that it is not proved that the agreement between Cable Corporation and the defenders was brought to the knowledge of the directors until long after it was concluded and partly implemented," and that "when brought to the knowledge of the directors, it was never approved or adopted." The learned counsel referred your Lordships to some

portions of the evidence for the purpose of showing that the conclusions of fact at which the Lord Ordinary arrived were not well founded, with the result, I believe, of satisfying your Lordships that those findings which were adopted in the Inner House are substantially accurate.

My Lords, it is clear that the terms of the agreement of the 25th of October must have come to the knowledge of the directors in February 1886 when they were submitted to and considered by them, but there is no indication to be found in the minutes, and, I assume, no reliable evidence adduced orally, to show that at that time or after that date they were adopted by the directors. But I desire to say that in that state of facts I entirely concur in the law as laid down by the Lord Chancellor.

In the case of *Preston v. The Liverpool, Manchester, &c., Railway Company*, in 5th House of Lords Cases, p. 601, the same law as explained by the Lord Chancellor in *The Caledonian and Dumbartonshire Railway Company v. The Magistrates of Helensburgh* was given effect to. No doubt these cases applied to promoters who had endeavoured to bind the company by a contract made before its incorporation, but the ratio of the judgments applies with equal force to contracts or agreements made by the directors of a company after incorporation, and not only to directors but I apprehend to corporators. In my opinion they establish the doctrine that it is beyond the power either of promoters or of directors or of shareholders to apply the moneys of the company which are devoted by statute to special purposes to any purpose which is not sanctioned by the provisions of the Act of incorporation. So that even assuming that the appellants had been able to prove the facts contended for by them, in which they have failed, their case would have been in my opinion no better.

LORD ASHBOURNE—My Lords, I entirely concur in the judgment announced by my noble and learned friend the Lord Chancellor and my noble and learned friend who has just spoken. The contention of the appellants is fraught with peril to the shareholders, present and future, of all companies. The appellants insist on the validity of an agreement under which they were to receive £17,000 for the costs, charges, expenses, and payments therein referred to. This sum was to be given as a bulk sum, not subject to review, account, or audit. It is hardly disputed that after paying all proper outgoings a substantial sum would or might remain over for the personal profit of the appellants. I myself believe, after listening to the argument and reading the documents in evidence, that a very substantial sum would be available for the personal profit of the appellants. But the appellants' case does not turn on more or less. They must contend that whether the whole or only a small part of the £17,000 might be for their own profit, when once knowledge

was brought home to those who chanced at the moment to represent the company it cannot be impugned. On the fact of knowledge I am deeply impressed by and concur in the clear judgment of Lord Trayner, and I am not satisfied that knowledge is shown at the time of the agreement, or probably for a very considerable time afterwards; but slender as is the evidence of knowledge, I see still less evidence of acquiescence. Assuming, however, knowledge, where was the authority to warrant the directors or the company in sanctioning this great payment? It was not covered by the terms of section 78, and we have been referred to no other authority. There is nothing else in the facts to justify it or to prevent its being *ultra vires*, whilst there are powerful and persuasive arguments to be gathered from the evidence, oral and documentary, to make the whole transaction most questionable.

LORD MORRIS—My Lords, I concur in the judgment pronounced, and in the reasons which have been given for it. In my opinion the question in the case is not so much the fiduciary character of the appellants and their consequent liability to account, nor whether the respondents' company knew of, approved, or ratified the agreement of the 25th of October, but rather as to its power to ratify such an agreement. I have not heard any convincing argument to establish that the company itself would not be acting *ultra vires* in ratifying such an agreement. I apprehend that the company itself could not have entered into such an agreement when it was clearly one which authorised the appellants to charge the company, and to get payment out of its funds for £17,000 in the name of expenses, but which really included promotion money or other bonus or other expenses extra those incurred in obtaining the Act, and if the company could not make such an agreement I fail to understand how the company could ratify it when made by their trustees, the appellants.

Their Lordships dismissed the appeal, with costs.

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Counsel for the Appellants—Sir John Rigby, S.G.—H. Johnston. Agent—A. W. Rixon, for A. & G. V. Mann, S.S.C.