

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Commercial Bank of Canada v. the Great Western Railway Company of Canada, from the Court of Error and Appeal of Upper Canada ; delivered 27th July, 1865.

Present:

LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

THIS is an Appeal from the Judgment of the Court of Error and Appeal in Upper Canada, reversing the Judgment of the Court of Queen's Bench of that province, and ordering a new trial in an action by the Appellants against the Respondents. The action, which was upon the Common Money Counts, was brought to recover the balance alleged to be due to the Appellants for money lent and advanced to the Respondents. The Respondents pleaded that they were not indebted.

The Appellants, the Commercial Bank, were incorporated under an Act of the Colonial Legislature, and have their principal office at the city of Kingston, with a branch office at Hamilton and other branches in Canada.

The Respondents, the Great Western Railway Company, were incorporated under a Statute of Upper Canada, 4 Wm. IV, cap. 29; but the extent of the undertaking and their powers have been since modified and enlarged by several other Acts of the Canadian Legislature.

Under these Acts the Company constructed its main line of railway from the Suspension Bridge on the Niagara River to the town of Windsor, on the Canadian side of the River Detroit. On the oppo-

site bank of this river was the terminus of a railway in the United States, called the Detroit and Milwaukee Railway, which, when completed, was to extend across the State of Michigan in a westerly direction, so as to secure a large portion of the traffic of the Western States of America.

Prior to 1857 the Directors of the Great Western Railway Company had become impressed with the importance of securing the completion of the Detroit and Milwaukee line, with a view to the increase of the traffic upon their own railway. Accordingly a traffic arrangement had been entered into between the two Companies, and the shareholders of the Great Western Railway Company had invested in bonds of the Detroit and Milwaukee Company to the extent of 200,000*l*.

In 1857, the Detroit and Milwaukee Company being in difficulties, and wanting funds to complete their line, they entered into negotiations with the Directors of the Respondents' Company for a loan of 150,000*l*.

The subject of this loan was brought before the shareholders of the Company on the 8th October, 1857, when a resolution was passed "that the Directors be authorized to advance to the Detroit and Milwaukee Railway Company such an amount not exceeding 150,000*l*. sterling as may be necessary to ensure the completion of the railway across Michigan in connection with the Great Western Railway of Canada, such advance being made as a temporary loan and on sufficient security, the expenditure of the same being subject to the control of the Great Western Railway Company."

On the 1st of January 1858, a mortgage deed was executed transferring to Mr. Charles John Brydges, the Managing Director, Mr. Thomas Reynolds, the Financial Director, and Mr. Becher, one of the General Directors of the Respondents' Company, as trustees, all the property, both real and chattel, acquired and to be acquired by the Detroit and Milwaukee Company, so far as they were not affected by previous mortgages, and vesting the entire control of the expenditure of funds to complete the line in the trustees, and also the management of the railway, and the disposal of the net income for assuring the repayment of the money

advanced or to be advanced by the Great Western Railway Company, with interest at the rate of 10 per cent. per annum.

By a resolution of the English Board of the Respondents' Company, the expenditure of funds advanced by them for the works upon the Detroit and Milwaukee line was to be wholly under the direction and control of Mr. Brydges and Mr. Reynolds; and the Respondents having, by agreement with the Detroit and Milwaukee Company, the power to nominate the members of the Board of that Company, and having named (amongst others) Mr. Brydges and Mr. Reynolds, they were respectively elected President and Vice-President of the Detroit and Milwaukee Company.

On the 7th of October 1858, at a meeting of the proprietors of the Great Western Railway Company, a resolution was passed, "that the Directors be authorized to advance to the Detroit and Milwaukee Company a further sum of money not exceeding 100,000*l.* sterling, to be expended by and under the control of the Great Western Railway Board of Directors."

In order to carry out the resolutions for the advance of funds by the Great Western Company to the Detroit and Milwaukee Company, Messrs. Brydges and Reynolds, on the 29th December 1857, entered into an arrangement with the Appellants, the Commercial Bank. The Respondents' Company had, in August 1857, transferred their banking account from the Bank of Upper Canada to the Appellants' Bank, upon an arrangement that the Company was to have an overdrawing credit of 50,000*l.*, to be available when required by the Company for ordinary expenditure of whatever nature, and upon other terms unnecessary to be noticed.

For the purpose of the proposed expenditure on the Detroit and Milwaukee line, it was arranged that a separate account for the Great Western Railway should be opened at the Branch Commercial Bank at Hamilton, so that the expenditure might be kept distinct from the ordinary cash transactions of the Great Western Railway; that the account should be headed and known as "the Detroit and Milwaukee Account, Great Western Railway:" that

the Bank should make advances from time to time on this account, and that such advances should be covered monthly by sterling bills on the Great Western Railway Company, London, and that the available traffic receipts of the Detroit and Milwaukee line should also be applied in reduction of these advances.

This account was accordingly opened on the 30th December 1857, and operations upon it continued down to the 30th December 1859.

In the course of the transactions the following letter was written by Messrs. Brydges and Reynolds to Mr. Park, the Manager of the Bank at Hamilton, dated 16th December 1858 :—

“With reference to the conversation which took place yesterday between you and Mr. Campbell and Mr. Reynolds, upon the subject of the Detroit and Milwaukee Railway Company’s account with the Commercial Bank, we beg leave to state that the Great Western Company holds itself liable to the Commercial Bank for all overdraft on the Detroit and Milwaukee Company’s account with the said Bank. This is quite understood by us, but as you expressed a wish to have it placed on record, we now do so by means of this letter.”

At the close of this account a balance was alleged to be due to the Bank, amounting to upwards of 945,000 dollars, upon which the action was brought.

At the trial it was agreed that if the Plaintiffs were entitled to a verdict, the amount for which it should be entered should be ascertained by reference, and an endorsement to that effect was made upon the Record, which will be the subject of future consideration.

At the conclusion of the Plaintiff’s case, the Counsel for the Defendants applied for a nonsuit, upon various objections to the action in point of law, and leave was reserved to move the Court to enter a nonsuit. The Defendants then called witnesses, and after a discussion between the learned Judge and the Counsel on both sides as to the questions of fact to be submitted to the jury, the following questions were put to them and answered as follows :—

1. To which Company was credit given by the

Bank—to the Great Western or to the Detroit and Milwaukee; or was credit given upon the responsibility of Messrs. Brydges and Walker?

Answer.—To the Great Western.

2. Had Messrs. Reynolds and Brydges authority from the Great Western Company to make financial arrangements for the Detroit and Milwaukee Company on account of the Great Western Company to the extent of 250,000*l.*, agreed to be loaned by the Great Western Company to the Detroit and Milwaukee Company, and was the account of the Commercial Bank opened and conducted by them in pursuance of such authority?

Answer.—They had the authority, and the account was opened and conducted by them in pursuance of that authority.

3. Had the Commercial Bank notice at any time, while the account was going on, that Messrs. Brydges and Reynolds had exceeded their authority, or that more than the two loans, amounting to 250,000*l.* had been expended?

Answer.—The Bank had no notice that Messrs. Brydges and Reynolds exceeded their authority.

4. Suppose the original credit was given by the Bank to the Great Western Company, on the opening of the account was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th December, 1858, was given, either to the extent of the second loan of 100,000*l.* sterling, or otherwise, or was the account continued on after that period, in the same manner as before by the parties?

Answer.—There was no limitation, and the account was continued in the same manner as before the letter of the 16th December 1858, was given.

5. Did the Great Western Company, by its dealings with the Detroit and Milwaukee Railway Company, reap the benefit of the expenditure made by the Commercial Bank on the Detroit and Milwaukee account?

Answer.—They did.

The verdict was accordingly entered for the Plaintiffs, subject to a reference as to the amount in the following terms, indorsed by the learned Judge on the record:—

“It is agreed by the Counsel for the parties in this case that the amount for which a verdict shall

be entered, if the Plaintiffs shall be entitled to a verdict, shall be ascertained by a Referee or Referees to be chosen by the parties respectively in term or otherwise ; and if the parties cannot agree upon a person or persons for that purpose, then it is agreed between the parties that I shall nominate the Referee as upon a compulsory reference. The Referee to have power, at the request of either party, to report upon the different classes of the account, such as amounts paid upon coupons, upon cheques, upon promissory notes, or otherwise, and to draw up a statement of facts for the opinion of the Court."

In the following term the Defendants moved the Court of Queen's Bench for a nonsuit upon the leave reserved for that purpose, and also for a new trial for misdirection and want of direction on the part of the learned Judge before whom the cause was tried, and for the reception of improper evidence. This latter ground, however, was abandoned by the Counsel for the Appellants in the course of the argument upon the present Appeal.

In considering the grounds upon which it was insisted that there should be either a nonsuit or a new trial ordered, it will be convenient to confine attention to those points which have been relied upon in the argument before their Lordships.

These, as to the nonsuit, were said to be the 4th and 5th points in the rule *nisi* for setting aside the verdict and entering a nonsuit, viz. :—

4th. That Messrs. Brydges and Reynolds could not bind the Defendants at all, even though under the formality of a seal, as they had no power to borrow money on behalf of the Defendants for the present purpose, the Plaintiffs being aware that it was for the Detroit and Milwaukee Railway Company that the money was required.

5th. The Act allowing the Defendants to lend to the Detroit and Milwaukee Railway Company does not authorize a borrowing, and contemplates having the funds in hand before lending, and so the borrowing was *ultra vires*, and the Plaintiffs being aiders in the illegal object of the borrowing cannot recover against the Defendants.

Leaving aside for the present the question of how the funds were obtained by means of which the first advance of 150,000*l.* was made to the Detroit and Milwaukee Railway Company, there can be no doubt

that this advance being for a purpose foreign to the objects of the incorporation, would be *ultra vires* and not in itself binding upon the shareholders of the Respondents' Company. But with respect to this loan all objection is removed by the Act of the Canadian Legislature, 22 Vict., cap. 116, by the 11th section of which it is provided that the loan of "seven hundred and fifty thousand dollars (150,000*l.*) already made by the said Company to the Detroit and Milwaukee Railway Company, is thereby declared to be lawful."

So with respect to the advance of the 100,000*l.* to the Detroit and Milwaukee Railway Company, which was made after the passing of the Canadian Act just mentioned, that advance is not objectionable on the mere ground that it was made for purposes foreign to the undertaking of the Great Western Railway Company, because by the same 11th section of the 22 Vict., cap. 116, it is enacted that "the Great Western Railway Company shall have full power and authority to use its funds by way of loan or otherwise in providing proper connections and in promoting its traffic with railways in the United States of North America, provided that no such expenditure shall be incurred unless sanctioned by a vote to that end of two thirds of the shareholders voting in person, or by proxy, at a general meeting of the shareholders specially called for that purpose." It is not disputed that the proper authority was obtained from the shareholders before this advance was made. But it is said that with respect to the advance of the 150,000*l.*, the Act only renders the loan itself lawful, but does not legalize the borrowing by which it was made. And as to the 100,000*l.* that the Act merely gives power and authority to the Company to use its own funds in providing connection with or in promoting the traffic of foreign railways; but gives them no power of borrowing for these purposes.

If the Company had no borrowing powers, or none which could be employed upon such advances as those in question, it might be necessary to consider whether a distinction might not be taken between the loan of 150,000*l.* which, having been already made, was expressly sanctioned by the Legislature, with (as it might be contended) all its circumstances, and

the statutable power of applying the Company's funds in future, the terms of which would require to be strictly pursued.

But when the question upon the borrowing powers of the Company comes to be considered, there will be found to be no necessity for making a distinction between the two advances.

It is extraordinary that (as appears from the statement of Counsel) there were no borrowing powers conferred upon the Respondents' Company by the original Act of Incorporation; but these powers are only to be found in a subsequent Act for increasing the capital stock of the Company, and in a section expressed in a declaratory form. This section is the 16th of the Canadian Act of the 16th Vict., cap. 99, by which it is declared and enacted that "the Company have had and shall have power and authority to borrow money from time to time for making, completing, maintaining, and working the said railroad, as they might or may think advisable, and to pledge the lands, tolls, revenues, and other property of the Company for the due payment thereof, and might and may make the bonds or debentures issued by them for securing the repayment of any sums so borrowed or to be borrowed convertible into stock of the said Company, on the terms and conditions expressed or to be expressed in such bonds and debentures or in the bye-laws of the Company." It was said by the Counsel for the Respondents that this section gave them power to borrow only on bonds and debentures; and from the language of the section it may fairly be argued that the Legislature supposed that all the borrowings of the Company would be upon securities of this description. But it is not said that they shall not have power to borrow *except* upon "bonds or debentures issued by them for securing the repayment of the sums so borrowed." If, therefore, money were borrowed by the Company for the legitimate purposes of the undertaking, it would be no answer to the lender seeking to recover his money to say that he had no bond or debenture as a security for his loan. The 11th section of the Act of the 22nd Vict., cap. 116, makes it lawful to apply the funds of the Company to promote the traffic of other railways. The money lent for this

purpose is just as legitimately employed as if it were spent in "maintaining and working" their own line; and if they have a right to borrow for the one purpose they have equally a right to borrow for the other. And although the first loan of 150,000*l.* to the Detroit and Milwaukee Company was originally unlawful, yet when it was made lawful by the 22nd Vict., cap. 116, it was in the same predicament as if it had been so from the first, and consequently no sound distinction can be made between the borrowing from the Bank in respect of this loan and the borrowing for the advance of the 100,000*l.*

There seems to be no ground, therefore, for holding that a nonsuit ought to have been entered.

The rule for a new trial for misdirection or want of direction presents much more difficulty.

The questions to be submitted to the Jury were, with two exceptions, acquiesced in by the Counsel on both sides.

It is unnecessary to consider these questions in detail. The Court of Queen's Bench held that there was no misdirection or want of direction involved in any of them. And although the Judges in the Court of Error and Appeal did not enter into an examination of the mode in which the case went to the jury, they must have been of opinion that there was nothing in the form of the questions which amounted to misdirection. In this opinion their Lordships concur, and are satisfied that, as far as the direction went, the facts to be tried were substantially left to the jury.

But the Court of Error and Appeal proceeding upon a ground which (as the Chancellor of Upper Canada said) "was not presented to the Court below, nor prominently discussed before them," reversed the Judgment of the Court of Queen's Bench, and directed a new trial. This ground was that "there was neither previous sanction nor knowledge from time to time, nor subsequent ratification by the shareholders, or even the Directors of the Railway Company, of the dealings between Messrs. Reynolds and Brydges and the Commercial Bank in respect of the Detroit and Milwaukee Railway account beyond the sum of 250,000*l.*, and therefore that the Company were not liable beyond that amount. And the Court of Error thought that the extent of

the Company's liability, upon the evidence furnished, should have been declared by the Court, and that in this view there ought to be a new trial."

It certainly appears that the opinion of the Judge as to the liability of the Company beyond the 250,000*l.* was not in any way expressed upon the trial. The point was incidentally noticed in the third and fourth questions submitted to the jury, the third being, "Had the Commercial Bank notice at any time while the account was going on, that Messrs. Brydges had exceeded their authority, or that more than the two loans, amounting to 250,000*l.* sterling, had been expended?" And the fourth, "Suppose the original credit was given to the Bank by the Great Western Company on the opening of the account, was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th December, 1858, was given, either to the extent of the second loan of 100,000*l.* sterling, or otherwise? or was the account continued on after that period in the same manner as before by the parties?" But the learned Judge gave no intimation of his opinion upon the question as to the extent of the Company's liability, which was an essential element in the determination of the amount which the Bank was entitled to recover in the action.

The point was raised, though not so distinctly as it might have been, upon the motion for a new trial; for in the rule one of the objections to the Judge's charge was "in his not directing that the expenditure of money by the Defendants on the Detroit and Milwaukee Railway was a matter beyond the scope and power of the Defendants, except to an extent authorized by a vote of the shareholders, and so illegal." And the question seems to have been discussed, though, as the Chancellor says, "not prominently discussed," before the Court of Error and Appeal."

The Counsel for the Appellants object to the Judgment of the Court of Error and Appeal, ordering a new trial upon the ground that the Company are liable to the Bank in respect of their dealings beyond the 250,000*l.*, as the Bank had no notice of any excess of authority, supposing any to have taken place; and also that the extent of the Com-

pany's liability can be determined in the reference of the amount of the verdict agreed to at the trial, without sending the parties before another jury.

If the question as to the dealings beyond the 250,000*l.* had arisen between the shareholders and the Directors of the Respondents' Company, there would be very little difficulty in deciding that the shareholders were not liable. The objects to which the moneys were applied would not have been a legitimate application of the funds of the Company without the Act of the 22nd Vict., cap. 116, and that Act expressly provides that no such expenditure shall be incurred unless sanctioned by a vote to that end of two-thirds of the shareholders voting in person or by proxy at a general meeting of the shareholders specially called for that purpose. If the conditions of the statutable power are not complied with, it is not lawfully exercised. But it is said that the Bank is in a different position from the shareholders of the Company; that according to the case of the *Royal British Bank v. Turquand* (6 E. and B. 327), the Bank had a right to presume that there had been a resolution of the shareholders authorizing the borrowing beyond the amount of the 250,000*l.*, and the jury at the trial expressly found that "the Bank had no notice that Messrs. Brydges and Reynolds exceeded their authority."

It must be observed however, that the Bank had the fullest information that the account which was opened on behalf of the Great Western Company was for the purpose of their making advances for the Detroit and Milwaukee Railway. They must have known that the Company could not apply its funds in aid of another Company without the authority of the Legislature. They must, therefore, upon the opening of the account, have been directed at once to the source of this extraordinary power, and must have learnt the conditions under which it was to be exercised. The words of the Act are negative and prohibitory: "No such expenditure shall be incurred unless by a vote to that end of two-thirds of the shareholders." The case differs in this respect from the *Royal British Bank v. Turquand*, for there the clause of the Deed of Settlement was an empowering clause, enabling the Directors to borrow on bond such sums as should from time to time, by a general resolution of the Company be

authorized to be borrowed ; and this very distinction was taken by Chief Justice Jervis in that case, for after observing that parties dealing with the Bank were not bound to do more than to read the Statute and the Deed of Settlement, he adds, "and the party here, on reading the Deed of Settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions."

The right of the Bank to claim in respect of the dealings beyond the 250,000*l.* was clearly a question which ought to have been decided as a guide to the referee in ascertaining the amount of the claim, and as there was a miscarriage in this respect on the part of the Judge, there must necessarily be a new trial, unless, under the terms of the reference as to the amount of the verdict, the question can be raised for the decision of the Court.

Upon this point, however, their Lordships, with every desire to save the parties the expense of another trial, are compelled to come to a conclusion adverse to the view presented by the Appellants. The reference, which is evidently framed upon the provisions of the Canadian Common Law Procedure Act, is to ascertain the amount for which a nominal verdict for the Plaintiffs ought ultimately to be entered. The duty of the Referee under this reference would be to call for vouchers and proof of the different items contained in the particulars of demand. The reference provides that the Referee is to have power to report upon the different classes of the account, such as amounts paid upon coupons, upon cheques, upon promissory notes, or otherwise, and to draw up a statement of facts upon each for the opinion of the Court. There is nothing in this language which enables the Referee to say, "I will not look at the account beyond a certain date, because I think there was no liability of the Railway Company after that date ;" and any report upon the limit to the liability which he could make, would not be "upon classes of the account, such as amounts paid upon coupons, &c.," but it would be a statement as to the provisions of the Act empowering the loan to the foreign railway, the Resolutions of the shareholders of the Respondent's Company, and the facts which would prove knowledge, or want of knowledge, on the part of the Bank of the excess of authority. This consideration will be sufficient to show that the

extent of the liability of the Respondents was not intended to be within the province of the Referee, and that it is not comprehended in the terms of the reference. A new trial seems to be the inevitable result of the omission to decide this question, and their Lordships will therefore recommend to Her Majesty to affirm the Judgment of the Court of Error and Appeal, and to dismiss the Appeal with costs.

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