Privy Council Appeal No. 45 of 1925.

The Trustee of the Property of Andrew Motherwell of Canada, Limited, in Bankruptcy - - - - - *Appellant*

v.

Alexander F. Zimmerman and another - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1925.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
LORD SHAW.
LORD CARSON.
LORD BLANESBURGH.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, affirming a judgment of Mr. Justice Mowat of the 27th May, 1922. That judgment was in favour of the plaintiffs, the present respondents, in an action for payment or foreclosure under a mortgage dated 7th December, 1920, to secure $25,000 and interest. The defence was that the mortgage was invalidly created. The appellant is the trustee of the property of the company.

The mortgage was made by Andrew Motherwell of Canada, Limited, a private company incorporated under Dominion law, and having only a few shareholders, in favour of the respondents as mortgagees. In October, 1920, the Company was in financial straits, its bankers being insistent on an immediate reduction of an advance of $125,000. The president of the company, Andrew Motherwell, Jr., entered into negotiations with the respondents for

loans of money to relieve the pressure and satisfy the bank. The respondents agreed to make advances up to $50,000, if they were secured by a first mortgage on the company's real estate and should also receive a transfer from Andrew Motherwell, Jr., out of his shares in the company's capital stock of fully paid ordinary shares of a face value equal to the amount advanced by way of loan to the company.

The directors of the company had general authority to borrow money on behalf of the company and to give security for it. This general authority was conferred by a by-law designated as By-law No. 2, which was duly passed in June, 1919. By the law of Canada the directors of a company, if authorised by by-law, sanctioned by a vote of not less than two-thirds in value of the subscribed stock of the company represented at a general meeting duly called for considering the by-law, may from time to time :—

> "Borrow money upon the credit of the company;
>
> Limit or increase the amount to be borrowed;
>
> Issue bonds, debentures, debenture stock or other securities of the company, and pledge or sell the same for such sums and at such prices as may be deemed expedient;
>
> "Hypothecate, mortgage, or pledge the real or personal property of the company, or both, to secure any such bonds, debentures, debenture stock or other securities and any money borrowed for the purposes of the company."

A by-law to this effect was passed on the 30th June, 1919, as stated. In addition to this general authority, a special by-law, designated as No. 6, is said to have been passed by the directors on 4th November, 1920, and to have been sanctioned by the shareholders present at this special meeting called to consider that by-law on the 7th December, 1920. It authorised borrowing on a first mortgage security on the company's lands and also authorised the transfer of paid-up shares to the extent to be mentioned presently from Mr. Motherwell, Jr., to the respondents. As to this second by-law, questions of validity are raised in this action, but these questions do not appear to arise in reference to the general power conferred by the earlier by-law of 1919.

Their Lordships think that two separate questions must be considered—(1) Was it *ultra vires* of the company to grant the mortgage in question taken *per se*, on the ground that it was beyond its legal powers to do so? (2) Was it beyond the authority of the directors to make use in the way they did of such powers as they possessed to enter into the particular transaction impeached in these proceedings? As to the first of these questions, their Lordships do not entertain doubt, and indeed no serious controversy has been raised. It was plainly within the power of the company to make the mortgage assuming that by a duly passed by-law it was authorised to do so. As to the particular form of the transaction, other questions arise.

What happened was this: By-law No. 6 was passed at a meeting of directors on the 4th November, 1920, which was attended

by Mr. Motherwell, Jr., and Dr. McWilliam, two of the three directors then constituting the Board. Two directors formed a quorum. On the 10th November, 1920, notice was given of a meeting of shareholders to "ratify, confirm or otherwise a by-law to borrow $50,000 for the purpose of reducing the liability of the company to the Canadian Bank of Commerce and as security therefor authority to execute a first mortgage upon the real estate and plant of the company." The meeting of the shareholders was to be held on the 7th December, 1920. At the directors' meeting of the 4th November, 1920, the directors were advised by cable received from Andrew Motherwell, Sr., in Scotland, that he and four other shareholders objected to the by-law, and that Mr. Omand, representing Andrew Motherwell, Sr., would be in Hamilton, Ontario, that evening to discuss the matter with the president. The meeting was adjourned to the following day, and at the adjourned meeting it was decided, if agreeable to the shareholders, to adjourn the special meeting called for the 7th December until the arrival of Andrew Motherwell, Sr., in Canada, unless his objection were withdrawn in the meantime. At the meeting on the 7th December, the president suggested delaying the consideration of By-law No. 6, but later, during the meeting, having communicated with Mr. Omand by telephone, he informed the shareholders that Mr. Motherwell, Sr., had withdrawn his objections, and by unanimous vote of the shareholders present the by-law was thereupon sanctioned and the officers of the company were authorised to execute a mortgage for the present advance of $25,000. The notice to the shareholders of the 7th December, 1920, referred to the proposal to ratify the by-law for the borrowing of $50,000, but made no reference to the other transaction under which Andrew Motherwell, Jr., was to transfer to the respondents one fully paid-up share for every $100 advanced, that all money advanced by the respondents should be paid through him into the treasury of the company, and that for this consideration the company should issue for every $100 so paid in one fully paid-up share of the unissued capital of the company. These matters were both included in the proposed by-law. It appears, however, from the minutes of the meeting of the 7th December, that the by-law was brought before the meeting. Mr. Motherwell, Sr., seems to have known of it, and their Lordships think that it must be inferred from the evidence that he either withdrew his objections, or instructed his agent, Mr. Omand, not to insist on them, for he took no steps to interfere with the by-law. No other shareholder, either then or thereafter, took any objection to it, and the proper proportion of the shareholders voted to make any resolution passed at the meeting valid. Minutes of the meeting of directors held on the 4th November, which disclosed the whole of the transaction, were read and confirmed, and the directions therein were approved and adopted together with the By-law No. 6 as a special authority. Authority was also granted to the officers of the company to execute the mortgage in question, and all deeds, conveyances, etc., necessary to carry

out and effectuate the security granted to the respondents for such advances as by them were to be made according to the exigency of the by-law of the company, and the directors were authorised to do all things necessary to give effect to this.

It is contended for the appellant that insufficient notice was given to the shareholders of the proposal to couple the mortgage, by way of conveyance, to the respondents with the transfer to the respondents of fully paid-up shares in the company to the extent of one share for every $100 paid by Andrew Motherwell, Jr., into the treasury of the company. Their Lordships will assume, for the purpose of the question before them, that the notice was insufficient as failing to give full information. But they are unable to take the view that this insufficiency avoided the legal effect as a conveyance of the mortgage granted. For the granting of that mortgage there was authority given to the directors by the old By-law No. 2. The conveyance made by it might conceivably have been set aside on the ground of non-disclosure of the rest of the transaction. On this question it is not necessary to express an opinion. The mortgage part of the transaction may have been severable. But even if it was not, the setting aside of it could only be justified by way of rescission, and such rescission would only be directed on the equitable condition of repayment of the $25,000 advanced. But the appellant declines to make any offer of repayment, and rescission therefore cannot be directed, even if there be ground for it. The transaction is, moreover, one which the shareholders have not sought to impeach, and as it is a transaction which they could ratify, the attempt at impeachment in these proceedings is not one which commends itself. The shares, the allotment of which is attacked, are worthless, and if they have been actually issued, which is not clear, no injury appears to have been suffered by the appellant.

The two Courts which heard the case in Ontario appear to have taken this view, and their Lordships agree with them. Their Lordships will humbly advise the Sovereign that the appeal should be dismissed with costs.

In the Privy Council.

THE TRUSTEE OF THE PROPERTY OF ANDREW MOTHERWELL, OF CANADA, LIMITED, IN BANKRUPTCY

v.

ALEXANDER F. ZIMMERMAN AND ANOTHER.

DELIVERED BY VISCOUNT HALDANE.

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