Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney-General for the Dominion of Canada v. The Standard Trust Company of New York, from the Supreme Court of Canada; delivered the 23rd May 1911.

PRESENT AT THE HEARING:

VISCOUNT HALDANE.
LORD MACNAGHTEN.
LORD MERSEY.
LORD ROBSON.

[DELIVERED BY VISCOUNT HALDANE.]

In this Appeal the question which has to be decided is whether the Appellant, the Attorney-General for the Dominion of Canada, can successfully object to a claim by the Respondents to be admitted as creditors of the South Shore Railway Company for a sum of 348,000 dollars. The material facts of the case are these:—

In the year 1893 a railway, extending from St. Lambert, opposite Montreal to Sorel, a distance of about forty-five miles, had been built, and belonged to the Montreal and Sorel Railway Company. Bonds for 100*l.* each had been issued by the Company to the extent of about 1,500. The Company had become bankrupt and the railway was not being worked. On the 1st of March in that year Messrs. Tourville, Leduc, Fortier, and Beauchemin, agreed to form themselves into a Syndicate for the purpose of acquiring the railway and of completing and equipping it and putting it into good condition. They bought up 1,453 of the bonds at a price

amounting to about 34,000*l*. They also bought up a judgment against the Company for a substantial sum, and they spent a good amount of their own money in improving the railway. Under an Act of the Quebec Legislature, assented to on the 8th of January 1894, a Company known as the South Shore Railway Company was incorporated, with power to construct and acquire railways in the locality of the Montreal and Sorel Railway. This Act and the incorporation under it of the South Shore Company were procured by the four members of the Syndicate. The whole of the shares in the Company in reality belonged to them, and there were no independent shareholders. Each of them subscribed for 75,000 dollars of the Company's stock. Along with three other persons, nominees whom they had qualified, they were elected directors, and Mr. Tourville was elected president. On the 16th of January a meeting of the shareholders was held, at which the the directors were authorised to enter into agreements with railway companies and with other persons in accordance with the provisions of the Act. On the 1st of June 1894, the Montreal and Sorel Railway was sold by the Sheriff of Montreal under a judgment obtained by the Collector of Taxes, and it was bought, at a nominal price of 1,600 dollars, by Mr. Tourville, a member of the Syndicate, and the President of the South Shore Company. On the 4th of June, at a meeting of the directors, Mr. Tourville, on the narration that the real value of the railways was represented by the bonds of the Montreal and Sorel Company acquired by the members of the Syndicate and by them transferred in part to the South Shore Company in payment for the stock they had subscribed for, agreed to transfer the railway to the South Shore Company at a purchase price to be settled at a

later period. The deed of sale to the Company from the sheriff was executed on the 7th of July. On the 8th of October 1895 the directors and their nominees, the only persons interested in the Company, fixed the sale price at 648,000 dollars, and took credit in their own favour for the 300,000 dollars subscribed by the members of the Syndicate and paid in bonds as already stated. This price has not been shown to be excessive, although it amounted to much more than the Syndicate had actually spent in acquiring and improving the railway. The indebtedness of the Company, after taking credit for the 300,000 dollars of subscription money, thus amounted to 348,000 dollars, and this sum was allocated as an indebtedness of 87,000 dollars to each of the four members of the Syndicate, with interest at six per cent. A formal agreement to this effect between the members of the Syndicate and the South Shore Company was executed on the 2nd of December 1895. These debts were subsequently transferred to the Respondents.

In 1902 the South Shore Railway Company was amalgamated with the Quebec Southern Railway Company. In 1904, the Companies having become insolvent and having failed to work the railways, the Minister of Railways and Canals for the Dominion of Canada instituted proceedings in the Exchequer Court of Canada, under the provisions of the Canadian Statute 3 Edward VII., cap. 21, against the amalgamated Companies for a sale. Under the provisions of this and a subsequent Statute passed for the purpose, a sale was ordered on the 11th of September 1905, and the railways were sold for 1,051,000 dollars. By a subsequent order it was referred to the Referee of the Court to investigate the claims of the creditors of the Companies. The Respondents put in a claim on the basis above indicated. The Attorney-

General of the Dominion, as an unsecured creditor of the Amalgamated Railway Companies, intervened and contested this claim, as did also the Bank of St. Hyacinthe.

The case put forward by the Attorney-General, the present Appellant, and by the Bank, was that the proceedings of the members of the Syndicate as directors of the South Shore Company, authorising the purchase of the Montreal and Sorel Railway and the transfer of bonds in payment for the stock subscribed for by the Syndicate, was *ultra vires* and a breach of duty. It was said that Mr. Tourville and his associates in the Syndicate were promoters of the South Shore Company and occupied a fiduciary position towards it, and that the resolution of the directors fixing the price of the railway at 648,000 dollars was not binding and that the price was unfair. The Respondents' answer was that the price was not in excess of the real value, and that the Attorney-General and the Bank had no title to object.

The Referee, after hearing evidence and argument, by his final Report, dated the 25th of May 1908, dismissed the case of the Attorney-General and the Bank and allowed the claim of the Respondents. The Attorney-General and the Bank both moved to vary this Report, but the Exchequer Court, by order dated the 31st of October 1908, dismissed the motions. From this order the Attorney-General and the Bank both appealed to the Supreme Court of Canada, which, by a judgment dated the 15th of February 1910, dismissed the Appeals, Idington, J., dissenting. The Attorney-General alone now appeals to the Privy Council.

The Appellant contends, on the footing of being an unsecured creditor of the Quebec Southern Railway Company as amalgamated, that the fund arising from the sale directed by

the Exchequer Court ought not to be diminished by admitting the claim of the Respondents. He alleges that the price of 648,000 dollars paid in 1894 to the Syndicate for the railway was excessive, that the transaction was *ultra vires*, and that, apart from this, the members of the Syndicate, being also directors, were in a fiduciary position towards the South Shore Company, such that the transaction cannot stand. In the view of the case taken by their Lordships, it is not necessary to enter into the question whether the price of 648,000 dollars was excessive. The Referee, after hearing evidence, decided that it was not, and this finding of fact is not dissented from by any of the Judges in the Courts below, except Idington, J. But whatever may have been the character of this transaction, it was approved, with full knowledge of the facts, by all of those who owned, or were beneficially interested in, the stock of the Company at the time. It, therefore, does not matter, for the purposes of a case such as the present, that these persons were also promoters and vendors. If the transaction had been *ultra vires* in the sense of being outside the legal capacity of the Company, and accordingly not its act, the case would have been different. But, although this has been suggested, their Lordships can find no foundation for the argument. Under the provisions of the Statute of the Quebec Legislature incorporating it, the Company had power to purchase the Montreal and Sorel Railway, and was authorised to take payment for the amount subscribed for its stock in bonds of any railway company. The transaction was actually carried out in this form, and was on the face of it within the powers conferred by the Statute on the Company. If, therefore, what the directors did is to be impeached, it must be on the ground, not of its having been *ultra vires* of the Company,

but of its having been a breach of duty by the directors. Now, although the capital of the Company was 1,000,000 dollars, the only stock issued was to the amount of 300,000 dollars, and this was taken up and owned by the members of the Syndicate and no one else. They and they alone were interested in the capital of the Company. This is not a case of winding up, but even if it were, it would make no difference. In proceedings of the character of the present the title of a liquidator as representing creditors cannot be higher than the title of the Company against whom the creditors claim. In this case the interests of the Company and of the Syndicate were identical. The only persons beneficially interested in the Company were the four members of the Syndicate. The law gave them the complete control of its action. Under that control the Company gave effect to the policy of the only persons who had any beneficial interest in its capital. The case is not one in which the apparent procedure can be said to have been unreal, or to have been a cloak under which a conspiracy to defraud was concealed. Under these circumstances, their Lordships are of opinion that the Company, notwithstanding that no general meeting, apart from the meeting of directors, appears to have been held for the purpose, was completely bound by the transactions sought to be impeached, and that the Appellant, who has certainly no title higher than that of the Company against the assets of which he claims, is bound likewise.

In the course of the argument for the Appellant the well-known case of *Erlanger* v. *The New Sombrero Phosphate Company* (3 A.C. 1218) was much relied on, as showing that the action of the directors could not stand. It is sufficient to observe that, for the reasons given in the House of Lords in *Salomon* v. *Salomon* (1897 A.C. 22),

the doctrine of the former case has no application to circumstances such as those of the present case, where every one interested in the capital of the Company has, with full knowledge, concurred in the act impeached. Their Lordships will humbly advise His Majesty that the Appeal should be dismissed.

The costs must be paid by the Appellant.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

v.

THE STANDARD TRUST COMPANY OF NEW YORK.

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