THE CORPORATION OF THE CITY OF TORONTO (*Defendant*) ..... } APPELLANT;

1954

*May 25, 26

*Oct. 5

AND

CANADA PERMANENT MORTGAGE CORPORATION (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporations—Contracts—Debenture Issue—Validity of variation in terms thereof by letter under corporate seal—The City of Toronto Debt Consolidation Act, 1889 (Ont.) c. 74—An Act respecting the City of Toronto, 1910 (Ont.) c. 135—The Municipal Act, R.S.O. 1950, c. 243, s. 334.

By a by-law passed under the authority of the Toronto Debt Consolidation Act, 1889 (Ont.) c. 74 as amended, it was provided that the mayor and city treasurer be empowered to raise money by way of loan upon the security of debentures. The debentures were to bear date July 1, 1909, and be payable July 1, 1948, either in currency or sterling in Canada, Great Britain or elsewhere and to have attached coupons for the payment of interest at 4% per annum payable half-yearly at the place where the debentures were made payable. The taking of the debentures as a temporary or permanent investment of the appellant's sinking fund was authorized by the by-law. Debentures were subsequently prepared in compliance with the terms of the by-law payable in sterling at London both as to principal and interest. By 1910 (Ont.) c. 135 the by-law and the debentures were validated and confirmed. On Dec. 31, 1909 the debentures were taken in at par as a temporary investment of the appellant's sinking fund and in 1911 sold at a discount to a broker although the city paid par to the sinking fund. The broker requested that the place of payment be made New York instead of London

and the city treasurer under authority of the appellant's Treasury Board, of which the mayor was a member, by letters dated Nov. 18 and Dec. 9, 1911, written under the appellant's seal, advised payment would be made in New York at the par of exchange (9½%). In 1936 the respondent purchased the debentures from another broker. The interest coupons from July, 1936 to January, 1940 were paid the respondent at London in pounds sterling and at New York in U.S. dollars at the par rate of $4.86⅔ but from that date the appellant refused to pay the interest coupons, and on maturity the principal, other than in accordance with the terms appearing on the face of the debentures.

Held: The appellant was authorized to pay the principal and interest of the debentures only in accordance with the terms appearing thereon.

Per: Kerwin C.J.: The debentures were issued when they were taken as an investment of sinking fund monies. Once issued they could not be re-issued with or without the changes purporting to have been made by the City Treasurer or Treasury Board. *Re Perth Electric Tramways* [1906] 2 Ch. 216.

Per: Rand J.: The issued documents could not be modified by letter as the City Treasurer under the seal of the Corporation purported to do.

Per: Kellock, Locke and Fauteux JJ.: Whatever authority the mayor and treasurer may have had to amend the terms of the debentures ceased when the bonds were taken into the sinking fund.

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing the respondent's appeal from the judgment of LeBel J. (2) dismissing the action.

J. J. Robinette, Q.C. for the appellant.

C. F. H. Carson, Q.C., R. N. Starr, Q.C. and *Allan Findlay* for the respondents.

THE CHIEF JUSTICE:—The substantial point for determination in this appeal is whether the respondent, as holders of debentures of the appellant, the City of Toronto, for £500 each, is entitled to have them redeemed at the rate of exchange ($4.86⅔) prevailing in 1909, or, as the city contends, at the rate of exchange ($4.02) in July, 1948, when the principal of the debentures fell due. The answer to that question will determine the matters in dispute between the parties as to the rate of exchange to be applied to the interest coupons which were payable (and have been paid) half-yearly from January 1, 1941 to January 1, 1948, inclusive.

(1) [1953] O.R. 966; [1953] 4 D.L.R. 816.

(2) [1953] O.R. 81; [1953] 1 D.L. 836.

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Kerwin C.J.

The debentures were issued pursuant to By-law 5338 of the City, which had been passed in accordance and with the authority conferred upon it by Ontario statute c. 74 of 1889, as amended by c. 89 of 1895. That statute authorized the city to pass by-laws to provide for the issue of debentures to be known as City of Toronto General Consolidated Loan Debentures "and the said debentures may be payable at any place in Canada, Great Britain, the United States of America, or elsewhere, and may be in sterling money of Great Britain, or currency of Canada or the United States of America, and such debentures shall be in sums of not less than $100 currency or £20 sterling".

The by-law was passed July 16, 1909, and, after providing that the Mayor and Treasurer might raise money by way of loan upon the security of the debentures, enacted that the Mayor and Treasurer might cause any numbers of debentures to be made as required. The debentures were to bear date July 1, 1909, and to be payable July 1, 1948, either in currency or sterling in Canada, Great Britain, or elsewhere, with coupons attached for the payment of interest at the rate half-yearly of 4% per annum. The debentures were printed bearing date July 1, 1909, and payable July 1, 1948, and by them:—

> The Corporation of the City of Toronto promises to pay to the bearer at Lloyds Bank Limited, London E.C., England, the sum of Five Hundred Pounds sterling on the 1st day of July, A.D. 1948, and the half-yearly coupons thereto attached as the same shall severally become due.

The interest coupons were payable in sterling.

By c. 135 of the Ontario Statutes of 1910, by-law 5338 "and all debentures issued, or to be issued thereunder, and all assessments made or to be made, and all rates levied, or to be levied, for payment thereof, are validated and confirmed, and the said Corporation is declared to have had power to pass, issue and levy the same". At all relevant times the Municipal Act in force in Ontario was c. 19 of the statutes of 1903. We need not concern ourselves with s-s. (1) of s. 420 of that Act which authorized the Council to invest monies at the credit of the sinking fund account in local improvement debentures of the municipality, or in any other debentures of the municipality which might be approved by the Lieutenant-Governor-in-Council,

because the special statute of 1910 confirming by-law 5338 is sufficient authority for the taking of the debentures, issued under the by-law, as a temporary investment of the sinking fund, in view of Clause VI of the by-law:—

> The said Mayor and Treasurer may cause the said debentures, or a sufficient amount thereof, to be sold or hypothecated, or may authorize the said debentures, or any portion thereof, to be purchased or taken as and for a temporary or permanent investment of the sinking fund of the City of Toronto, and the proceeds thereof, after providing for the discount (if any) and the expenses of the negotiation and sale thereof, shall be applied for the purposes above specified and for no other purpose.

On December 31, 1909, a meeting of the Treasury Board was held, at which the Treasurer submitted a statement of debentures which he recommended be taken for temporary investment of sinking fund monies, and included in that statement were the debentures issued under by-law 5338. The debentures being dated July 1, 1909, the first payment of interest was due January 1, 1910. By Clause V of the by-law, during thirty-nine years, the currency of the debentures, the sum of $10,000 was to be raised annually for the payment of interest and the sum of $3,461 was to be raised annually for the purpose of forming a sinking fund for the payment of the principal. The debentures remained as a temporary investment of the City's sinking fund until 1911, when they were sold through brokers.

The important question is whether the debentures were issued in December, 1909, when they were taken as a temporary investment of sinking fund monies, or whether they were issued only when the sale through the brokers occurred in 1911. In my opinion they were issued in December, 1909. If they were not issued then, there was no debt on the part of the City and there would have been no power to levy a rate to provide for the interest and for the sinking fund to retire the principal: *Bogart* v. *Township of King* (1). Once issued they could not be re-issued with or without the changes purporting to have been made by the City Treasurer or Treasury Board: in *re Perth Electric Tramways* (2); and this notwithstanding the facts

(1) (1901) 1 O.L.R. 496. (2) [1906] 2 Ch. 216.

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that the debentures were taken into the City's sinking fund at par and, while they were sold to the brokers in 1911 at a discount, the City paid par to the sinking fund.

The special act of 1910 validated the by-laws and debentures, but not something done by officials of the municipality without statutory authority. Similarly, the matter is not affected by the general provisions of s. 334 of the present Municipal Act (1950) R.S.O., c. 243:—

> Where the interest for one year or more on the debentures issued under a by-law and the principal of any debenture which has matured has been paid by the corporation, the by-law and the debentures issued under it shall be valid and binding upon the corporation.

By-law 5338, and the debentures issued under it, are valid and binding upon the Corporation, but they, including the interest coupons, were to be paid in accordance with the terms of the documents (printed and issued pursuant to the by-law) at whatever the pound was worth upon the respective due dates.

The appeal should be allowed and the judgment at the trial restored with costs throughout.

RAND J.:—The by-law authorized the mayor and the city treasurer to "raise by way of loan on the security of the debentures hereinafter mentioned" a sum of money not exceeding $250,000. The debentures were to be issued "either in currency or in sterling money, payable in gold coin for not less than $100 currency or £20 sterling each"; they were to be "sealed with the seal of the said Corporation and be signed by the mayor and treasurer" and were to be payable either "in Canada, Great Britain, or elsewhere".

Under this authority the instruments dated July 9, 1909, were prepared payable in sterling at London. Evidently the market in London at that time was not favourable to such financing because in November, 1911 an offer was made by G. A. Stimson & Co., acting for a principal in the United States, to the city, to purchase £46,800 out of the total issue of £51,369 12s., 3d. The offer apparently requested the place of payment to be New York instead of London. Under date of November 18, 1911 the treasurer of the city, R. T. Coady, wrote to Stimson & Co. "with

reference to the following debentures which you purchased from the City of Toronto", the description of which included £46,800 mentioned. The letter concluded:—

> In compliance with your request and in order to suit the convenience of your client, this Corporation will make payment of principal and interest either at the Canadian Bank of Commerce, New York City or the Bank of Toronto at Toronto (your clients to decide which bank), instead of at London, England. Payment will be made at the par of exchange (9½%).

On November 13 Coady, in a letter to the Treasury Board of the city, had recommended the sale of the debentures on two conditions:—

> (*a*) That they should be held in Canada with interest and principal payable "here or in New York", as arranged with the City Treasurer;
>
> (*b*) And that they be sold on the distinct understanding that they would not be negotiated in Great Britain in order that they might in no way conflict with a contemplated loan to be made in London early the next year, 1912.

A further letter dated December 9, 1911 from Coady to Stimson & Co., after a reference to the "debentures purchased" by that company in the sum of £46,800, the last paragraph of the letter of November 18, slightly modified, was repeated:—

> In order to suit the convenience of your client, this Corporation will make payment of the principal and interest of these debentures at the Canadian Bank of Commerce, New York City, instead of at London, England. Payment will be made at the par of exchange (9½%).

It was signed by Coady, described as "City Treasurer, Keeper of Civic Seal". The letter of November 18 was authorized by the Treasury Board of the city of which the mayor was a member at a meeting at which he was present. Both letters to Stimson & Co. were impressed with the corporate seal but neither was signed by the mayor.

Apparently on May 19, 1936 the respondents purchased £20,000 worth of the debentures, and in the letter from the brokers of that date confirming the purchase the amount payable is calculated on the exchange rate of $4.86\frac{2}{3}$ at the price of $107.40, and the securities are said to be "payable Canada, New York and London". On June 1, 1936 the respondents were furnished with a copy of the letter of November 18, 1911 and their cheque for the price of the debentures is by memorandum on the letter of confirmation said to have been issued on the same day.

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The first, and in my opinion, the determining question is whether the letters of November 18 and December 9 were valid as modifications of the documents. What the mayor and treasurer were authorized to do was to borrow money upon the security of "debentures". Now that term for the purposes here is well known; although somewhat elastic in meaning, in municipal financing it is, ordinarily, as here, a promise under seal to pay the bearer a principal sum and interest at certain times, and is an instrument transferable on the markets by delivery. Obviously the letter could not be made a constituent part of the documents themselves; only by alterations in their language itself could such a change be made. It is elementary as well as basic that a negotiable instrument must be and remain unaffected by any agreement *dehors* itself. The letter at most would be a collateral undertaking which by its nature could be effective not otherwise than as an ordinary contract between the immediate parties to it. The debenture is itself a self-contained obligation, in the hands of third persons enforceable according to its terms; and that the authority to issue a security of that nature and in that form includes authority to modify its terms in relation to subsequent holders by means of letters scattered among bond houses is, in my opinion, a contradiction in terms. The result of any such dealing is exemplified here by the cashing of interest coupons in London when sterling was at a premium, and now that the pound is at a discount, by claiming payment in New York. That is beyond what the by-law contemplated as the issue of debentures.

On the surface this appears to be a harsh result, but the slightest appreciation of the nature of municipal action and of authority conferred on municipal officers shows it to be inevitable. The power to incur debts binding the citizens and their property within a subordinate administration of government must be found in the legislation conferring it. That legislation is published at large. If the specification of the authority is ignored, then the victims must suffer the consequences they have brought down upon themselves. That persons engaged in large scale investments could, to any extent, act upon such a loose

and irregular mode of civic financing as that exhibited here is something over which the veil of charity had best be drawn.

The Court of Appeal viewed the confirming legislation, 10 Edw. VII, c. 35, s. 6 as supplying any deficiency of authority and assumed the certificates and the debentures declared to be legally issued to include the letters of the treasurer. If this had been intended, the confirmation would have used the clearest language to make that extraordinary fact evident. It is not the usual meaning of the words to embrace what are in effect circular letters spread around bond markets, especially when they are written after the legislation is enacted. Nor is s. 334 of the Municipal Act any more effective to bring that result about; the same objection applies and it strengthens the view that no such slipshod mode of issuing securities was contemplated. To treat the operation of these statutory provisions as converting the sterling obligation into one of United States dollars would work a virtual fraud on any purchaser who bought the debentures on the security of the pound.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

The judgment of Kellock and Fauteux JJ. was delivered by:—

KELLOCK J.:—The material parts of by-law 5338 passed on the 16th of July, 1909, by the appellant are as follows:

I

It shall be lawful for the Mayor of the City of Toronto and the City Treasurer to raise by way of loan, upon the security of the debentures hereinafter mentioned from any person or persons, body or bodies corporate, who may be willing to advance the same upon the credit of such debentures, a sum of money not exceeding in the whole the sum of $250,000.00, and to cause the same to be paid into the hands of the Treasurer of the said City, for the purposes and with the objects above recited.

II

It shall be lawful for the said Mayor and Treasurer to cause any number of debentures to be made for such sums of money as may be required for the purposes aforesaid, either in currency or sterling money, payable in gold coin, for not less than one hundred dollars currency, or twenty pounds sterling each, and not exceeding in the whole the said sum at $250,000.00, and that the said debentures shall be sealed with the seal of the said Corporation, and be signed by the Mayor and the Treasurer.

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III

The said debentures shall bear date the first day of July, 1909, and shall be made payable on the first day of July, 1948, either in currency or sterling, in Canada, Great Britain, or elsewhere, and shall have attached to them coupons for the payment of interest.

IV

The said debentures shall bear interest at the rate of four per cent per annum from the date thereof, which interest shall be payable half-yearly, on the first days of the months of January and July in each year, at the place where the said deventures are made payable.

VI

The said Mayor and Treasurer may cause the said debentures, or a sufficient amount thereof, to be sold or hypothecated, or may authorize the said debentures, or any portion thereof, to be purchased or taken as and for a temporary or permanent investment of the sinking fund of the City of Toronto, and the proceeds thereof, after providing for the discount (if any) and the expenses of the negotiation and sale thereof, shall be applied for the purposes above specified and for no other purpose.

Paragraph *V* provides that during the thirty-nine years of the currency of the debentures, the sum of $13,461 should be raised annually to provide for the interest and sinking fund by a special rate "from the year 1910 to the year 1948", both years inclusive.

Acting under the authority of this by-law, bonds were duly executed under the corporate seal providing for payment in pounds sterling "at Lloyd's Bank Limited, London E.C., England" on the 1st day of July, 1948, with half-yearly coupons for interest in the appropriate amounts. The bonds not having been sold, they were, in the following December, "taken for temporary investment of sinking fund moneys" by the appellant corporation and the proceeds applied to the purposes for which the by-law had been passed.

On November 13, 1911, at a meeting of "the Treasury Board" of the municipality, the treasurer reported that he had received an offer from a firm of brokers on behalf of American clients "to purchase" the bonds at £96.5.0 per £100 and interest from July 1, 1911, and he recommended acceptance subject to the following conditions:

1. That the Debentures will be held in this Country with interest and principal payable here or in New York, as arranged with the City Treasurer.
2. That the Debentures be sold on the distinct understanding that they will not be negotiated in Great Britain, in order that they may in no wise conflict with our forthcoming large loan in London, early next year.

The board approved of this recommendation and the bonds were sold accordingly. On November 18, the treasurer wrote the brokers, the letter containing the following paragraph:

> In compliance with your request and in order to suit the convenience of your client, this Corporation will make payment of principal and interest either at The Canadian Bank of Commerce, New York City, or the Bank of Toronto at Toronto (your clients to decide which Bank), instead of at London, England. Payment will be made at the par of exchange (9½%).

The treasurer signed under the corporate seal of the municipality.

On December 9, 1911, the treasurer, again under the seal of the corporation, wrote in acknowledgment of a letter dated the previous day, stating that

> In order to suit the convenience of your client, this Corporation will make payment of the principal and interest of these Debentures at the Canadian Bank of Commerce, New York City, instead of at London, England. Payment will be made at the par of exchange (9½%).

It is common ground that the last sentence means payment on the basis of $4.86\frac{2}{3}$ to the pound sterling.

The bonds thus disposed of were registered in the name of the Receiver General of Canada in trust for the purchaser, a life insurance company. On January 31, 1934, this registration was cancelled, the bonds again becoming bearer bonds. It is not known through how many hands they may have passed, but eventually, on May 19, 1936, they were purchased by the respondent from another firm of brokers.

At the time of this purchase, the respondent had some knowledge of a letter having been written by the City Treasurer with relation to payment of the bonds and, on June 1, 1936, at the request of the respondent, the Deputy City Treasurer sent it a copy of the letter of November 18, 1911. No mention appears to have been made of the subsequent letter. On maturity, the respondent claimed payment in American funds on the basis of a conversion rate for sterling of $4.86\frac{2}{3}$.

The main contention for the respondent is that the bonds, as originally printed and executed, were amended by the two letters above referred to, and that by reason of the provisions of 10 Edward VII, c. 135, s. 6, and R.S.O.

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1937, c. 266, s. 335 and related sections, which validated the "debentures", the appellant was bound to redeem the bonds in accordance with the second letter.

It is also contended for the respondent that by reason of the appellant having paid interest for a number of years in accordance with the terms of the letter of December, the appellant was estopped from now taking any other position.

On behalf of the appellant a number of contentions were put forward, with all of which, in the view which I have formed, it is not necessary to deal. The appellant contends that there was no authority conferred upon either the mayor or the treasurer or both acting together to bind the city by either of the letters relied upon by the respondent and that there is nothing in the terms of the by-law or of the debentures which confers upon the respondents the right of action which it asserts. The appellant further contends, in any event, that by reason of the bonds having been taken into the sinking fund and the proceeds applied to the purposes for which the by-law was passed, any authority on the part of the mayor and the treasurer to amend the terms of the debentures, assuming there ever was any such authority, ceased at that time. In my opinion this contention is sound.

Section 420, s-s. (1) of the Consolidated Municipal Act, 3 Edward VII, c. 19, authorizes the council to invest moneys "at the credit of the sinking fund account" in certain securities, including "local improvement debentures of the municipality" or "in any other debentures of the municipality which may be approved of by the Lieutenant-Governor in Council". By s-s. (2) the Council is authorized to "regulate, by by-law, the manner in which such investments shall be made". S-s. (3) reads as follows:

> It shall not be necessary that any local improvement or other debentures of the municipality referred to in this section shall have been disposed of by the council, but the council may apply the sinking fund to an amount equal to the amount of such debentures towards the purposes to which the proceeds of such debentures would properly be applicable, and the council shall thereupon hold the debentures as an investment on account of the sinking fund, and may deal with the same accordingly.

No order of the Lieutenant-Governor in Council was produced authorizing the placing of the debentures in the sinking fund, but paragraph VI of the by-law authorized the mayor and treasurer to cause the debentures to be "taken as and for a temporary or permanent investment of the sinking fund", and to apply the proceeds for the purposes of the by-law. The by-law, including this provision, was validated by s. 6 of 10 Edward VII, c. 135, passed on the 19th of March, 1910.

Accordingly, assuming the mayor and treasurer would otherwise have been authorized to "amend" the bonds in the terms of either of the letters here in question, I think it clear that any such authority ceased upon the bonds being placed in the sinking fund. The special rate for the first year had been levied and the proceeds presumably paid into the sinking fund, as well as the first year's interest. The sale in 1911 could only have been a sale of the bonds as they existed at that time and the terms contained in the letters were merely terms of the contract of sale. It is not contended that these terms are enforceable against the city unless supported by the by-law here in question. In this view they, of course, are not.

I would allow the appeal with costs here and below.

LOCKE J.:—The debentures in question were issued by the Corporation of the City of Toronto under the powers vested in it by c. 74 of the Statutes of Ontario for 1889, as amended by c. 89 of the Statutes of 1895. They were dated July 1, 1909, and, when delivered, obligated the Corporation to pay the face amount of each of them in pounds sterling at Lloyd's Bank Limited, London, England, on the 1st day of July, 1948, and interest at four per centum per annum, payable half yearly.

By s. 420 of the Consolidated Municipal Act (c. 19, S.O. 1903), a municipality was empowered to purchase its own local improvement debentures and any other of its own debentures which might be approved of by the Lieutenant-Governor in Council, as an investment for the purpose of its sinking fund. By-law No. 5538 which authorized the issue of these debentures was passed on July 16, 1909, and authorized the Mayor and the Treasurer to cause the said debentures to be sold or hypothecated or purchased or

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taken as a temporary or permanent investment of the sinking fund of the City. After they had been issued, they were purchased for the purposes of the sinking fund at par and delivered in the month of December, 1909.

No question arises as to the validity of the by-law which was validated and confirmed by c. 135 of the Statutes of 1910.

From the time of their delivery as authorized, these debentures were binding obligations of the Corporation in accordance with their tenor. In this respect, the liability was the same as if they had been purchased by some third party.

Whatever may be said in support of the contention that by the terms of the by-law the Mayor and Treasurer were empowered to cause the debentures to be issued payable either in sterling or Canadian or American currency, or in all of these mediums of exchange, and to determine the place of payment, those powers were, in my opinion, exhausted when the debentures were actually issued and delivered by the Corporation in the year 1909, and the change in their terms, said to have been made by the letters addressed to Stimson and Company of November 18, 1911, and December 9, 1911, signed by the City Treasurer under the seal of the Corporation, was wholly unauthorized and not binding upon the appellant. While the terms of the letter of November 18 were shown to have been approved by a resolution of the Treasury Board, a body set up by the Council to advise the Treasurer in regard to sinking fund matters, it is not contended that that body was vested with power to alter the terms of debentures of the respondent corporation and there is nothing in the evidence to suggest that it possessed any such power.

In view of my conclusion upon this aspect of the matter, it is unnecessary for me to deal with the other questions which were so fully argued before us.

I would allow this appeal and direct that the action be dismissed with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *W. G. Angus.*

Solicitors for the respondent: *Sinclair, Goodenough, Higginbottom & Brocklesby.*