

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Jamaica Railway Company v. The Attorney General of Jamaica, from the Supreme Court of Judicature of Jamaica, delivered 16th December 1892.

Present :

LORD MACNAGHTEN.

LORD HANNEN.

LORD SHAND.

SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The purpose of this case was to raise certain questions on the accounts of the Jamaica Railway Company for the half-year ending the 30th of June 1890, which seems to have been the first half-year of the Company's existence.

The Government of Jamaica are the holders of a large amount of obligations of the Jamaica Railway Company, known as second mortgage bonds. The action was brought by the Attorney General on behalf of the Government and the other holders of these bonds, complaining of certain items as being improperly charged against income to the prejudice of the second mortgage bondholders. The Supreme Court of Jamaica upheld the contention of the Government, and gave a decree, with costs, against the Company for the sum of 3,975*l.* 6*s.* 6*d.* as "the difference between the amount paid to the second mortgage bondholders as interest for

“ the half-year, which ended on the 30th June
“ 1890, and the amount properly payable.”
From that decree the Company has appealed.

In order to understand the questions between the Government and the Company, it is necessary to explain the position in which the Company stood in relation to the Government, to define the rights of the second mortgage bondholders, and to refer to some special provisions made for the protection of the Government as holders of these bonds.

The Jamaica Railway was a Government line with 65 miles of road. Certain adventurers, who are conveniently described as “ the promoters,” proposed to form a Company for the purpose of acquiring and working the Railway, as it then existed, and also taking over and working as part of the undertaking certain extensions, about 120 miles in length, which the promoters offered to make in connection with the existing line. After a good deal of negotiation, both in the Colony and in this country, an agreement was come to between the representatives of the Government of Jamaica and the promoters, which is embodied in a contract dated the 29th of March 1889 and a supplemental contract dated the 24th of May following. In pursuance of one of the terms of this agreement a Law was passed by the Legislature of Jamaica intituled “ The Jamaica Railway Company’s Law, 1889.” The agreement, as contained in the two contracts, is set forth in a Schedule to the Law. The Law declares (sect. 2) that the agreement is thereby ratified and confirmed; the governor is authorized and required to perform and carry out the conditions thereof according to their purport, and the agreement is made binding on and available to the Company as if the Company had been a party to the same. The Law then proceeds to provide for the incorporation of the

Company and repeats with some amplification of details most of the provisions of the agreement. Within twelve months from the passing of the Law, the sum of 100,000*l.* was to be lodged in the Government Treasury in trust for the Company when formed. Thereupon the subscribers were to be incorporated as the Jamaica Railway Company. The Company was empowered to issue first mortgage bonds, in accordance with the provisions of the agreement (Sect. 47), to be secured by an assignment of all the Company's property. The proceeds of those bonds were to be devoted solely to defraying the cost of extensions and of capital improvements on the line (Law, Sect. 48; Agreement, Sect. 14). The Company was also empowered to issue second mortgage bonds to the extent of 800,000*l.* 100,000*l.* of these bonds were to be issued to the promoters together with a like amount of stock in return for the sum lodged by them to the credit of the Company. On the Company making over to the Government the cash deposit of 100,000*l.* and the balance of the second mortgage bonds, and on the promoters assigning to the Government their second mortgage bonds by way of security for the due performance by them of the terms of the agreement, the Government railway with the rolling stock, stations, stores, and other property belonging to it, was to be transferred to the Company. The balance of the Company's ordinary stock was to be allotted to the promoters in parcels with like amounts of first mortgage bonds in payment for extensions as the work progressed. There was, however, power to issue new stock with the consent of three-fifths of the votes of stockholders present, personally or by proxy at a meeting specially convened for the purpose.

It will be observed that the whole of the first mortgage bonds, the whole of the second mortgage bonds, and the whole of the ordinary stock

were appropriated to special purposes. It must therefore, have been foreseen that on the transfer of the railway the Company would enter upon the business of working the line without any cash in hand. The stores in hand on the day of transfer were to be included in the purchase, but it was provided that stores ordered and not then come to hand should be paid for by the Company (Agreement, Sect. 4).

It will now be convenient to turn to the principal clauses in the agreement and the Law bearing on the rights of the second mortgage bondholders.

The agreement contains the following provision :—

“ 5. The second mortgage bonds shall bear interest at the rate of 4l. per centum per annum conditional on the earnings of the railway being sufficient to earn that sum and if in any year they are not sufficient then at such lower rate as the earnings of such year may enable the Company to pay but there shall be no claim in any year for the unpaid balance in a past year. Such interest shall be a charge on the whole property and earnings of the Company second only to the first mortgage bonds.”

Sections 55 and 57 of the Law are in the following terms :—

“ 55. The interest of the second mortgage bonds issued by the Company under the provisions of this Law at the rate mentioned in the said agreement shall be paid out of the profits of each half-year before any dividend is paid on the stock of the Company but if in any year ending on such day as may be agreed on between the Governor and the Company or if no such day is agreed on then on the 31st December there are no profits available for the payment of the full amount of interest on the said bonds for such half-year no part of the deficiency shall be made good out of the profits of any subsequent half-year or out of any other funds of the Company.

“ 57. At the end of any year in which the full interest shall not have been paid to the second mortgage bondholders it shall be lawful for any second mortgage bondholder suing on behalf of himself and the other second mortgage bondholders to bring an action in the Supreme Court against the Company and if in such action it be made to appear that on a proper account being taken of the transactions and earnings of the Company a larger net profit was earned by the Company after paying all prior charges properly payable thereout than was divided by the Company among the second mortgage bond-

holders the Plaintiff shall be entitled to judgment against the Company for the amount of the difference between the amount paid (if any) as interest for such half-year and the amount properly payable provided that it shall not be lawful for the Company to make any payment in satisfaction or part satisfaction of any such judgment that would in the year in which the same is made or in any subsequent year prevent the Company from paying the full interest payable on the second mortgage bonds for that year.

Besides these clauses there are several provisions, some for the protection of the second mortgage bondholders generally, and some for the special protection of the Government, which ought not to be overlooked. It was provided (Agreement, sect. 15) that the cost of new buildings or works, or of any increase in the amount of rolling stock that might be deemed necessary for the development of traffic, should not be paid out of the earnings of the Company. There were to be five directors, one of whom was to be nominated by the Government (Law, sects. 87, 88). No contract for goods or stores in excess of 100% was to be binding on the Company except with the concurrence of the Government Director, subject to an appeal to the Governor in Privy Council (Law, sect. 82). Nothing beyond travelling expenses was to be paid to the directors for their services that would prevent the interest on the second mortgage bonds being paid in full (Agreement, sect. 30). There was to be an official audit of the Company's books and accounts at such intervals as the Governor might fix, so long as the Government might continue to hold any second mortgage bonds. In case of any penalty recovered against the Company being paid out of the Company's assets so as to diminish "the amount that would otherwise be payable during that year to the second mortgage bondholders," the stockholders were to be jointly and severally liable to make good the deficiency so caused (Law, sect. 159).

As regards the nature and extent of the charge created in favour of the second mortgage bond-

holders, it may be observed that the second mortgage bonds are described as "a charge on the undertaking" in the Agreement, sect. 1. The interest on these bonds is declared to be "a charge on the whole property and earnings of the Company second only to the first mortgage bonds" (Agreement, sect. 5). The Law, sect. 56, declares that these bonds, "with the interest payable thereon, shall be a charge on all the property of the Company assigned to trustees for the first mortgage bondholders to the same extent as but second only to the first mortgage bonds." The language varies, but the meaning is the same.

The transfer of the Jamaica Railway to the Company seems to have been completed on the 1st of January 1890. The second mortgage bonds issued to the Government, as part of the consideration for the purchase, bear that date. The bonds are in the form of an acknowledgment of indebtedness, with a promise to pay the principal sum mentioned in the bond "with interest thereon at a rate not exceeding 4 per cent. per annum conditional upon the earnings of the railway being sufficient to earn that sum, and if in any year they are not sufficient then at such lower rate as the earnings of such year may enable the Company to pay," such interest, as the same is earned, being payable on the first days of July and January in each and every year after the date of the bond. The bond then states, among other provisions of the Law, the provisions contained in Sections 55, 56, 57, and 159. It concludes with the following statement, "All provisions of whatsoever nature affecting second mortgage bonds, or the right of the holders thereof not mentioned herein but contained in the said Law, or in the agreement incorporated therein, shall be deemed to be, and hereby are declared to be, applicable to and part of this bond. This bond shall not

“ be or become valid or obligatory to bind the
 “ Company unless it bears the certificate of
 “ the Treasurer of the Colony of Jamaica that it
 “ has been issued by the Company in accordance
 “ with the terms of the Jamaica Railway Com-
 “ pany’s Law, 1889.” Endorsed is a certificate
 signed by the Treasurer of the Colony to the
 effect that “ the within bond has been issued by
 “ the Jamaica Railway Company in accordance
 “ with the terms of the agreement of the 29th day
 “ of March 1889 and of the Jamaica Railway
 “ Company’s Law, 1889.”

On the 1st of January 1890, when the Com-
 pany took over the railway, the stores in hand
 were of the value of 589*l.* 2*s.* It does not
 appear whether on that day there were any
 stores ordered which had not come to hand.
 Nor is there anything to show whether the
 stores in hand were or were not an adequate
 supply for the requirements of the railway as it
 then existed.

The accounts rendered by the Company for the
 half-year ending the 30th of June 1890 showed a
 profit of 9,934*l.* 15*s.* 1*d.*, and no more, or about
 6,000*l.* less than the half-yearly interest payable
 on the second mortgage bonds.

On the 24th of January 1891 the Government
 instituted this action, claiming an account of the
 net profits of the Company for the half-year
 ending the 30th of June 1890, and payment of so
 much as should be found divisible among the
 second mortgage bondholders.

Besides an item of small amount, which is not
 in question on this appeal, the statement of claim
 challenged two items in the half-year’s accounts.
 A sum of 969*l.* 7*s.* 1*d.* was charged for engrossing
 and printing the mortgage bonds of the Company.
 This charge was objected to altogether. The
 other item to which exception was taken was a
 charge in respect of stores. The stores in hand
 at the beginning of the half-year were, as already

stated, of the value of 589*l.* 2*s.* In the course of the half-year the Company purchased stores of the value of 7,283*l.* 19*s.* 1*d.*, and paid for them out of the earnings of the half-year. They had on hand at the end of the half-year stores of the value of 3,595*l.* 1*s.* 5*d.* They deducted from their gross earnings the whole amount expended in the purchase of stores during the half-year, whereas the Government contended that only the value of the stores actually used or consumed during the half-year ought to have been charged against the gross earnings, and that the sum of 3,005*l.* 19*s.* 5*d.*, being the difference between the value of the stores in hand on the 30th of June 1890 and the value of the stores in hand on the 1st of January, ought to have been treated as part of the profits available for payment of interest on the second mortgage bonds.

In their defence the Company maintained the propriety of the half-year's accounts. They did not take exception to the scope of the action.

On the application of the Plaintiff the Supreme Court dealt with the questions between the parties as issues of law arising on the pleadings. Upon the trial of those issues the Court held that the two sums of 3,005*l.* 19*s.* 5*d.* and 969*l.* 7*s.* 1*d.* were not sums properly payable out of the gross earnings of the Company for the half-year which ended on the 30th of June 1890 in priority to the full interest of 4 per cent. payable on the second mortgage bonds. The decree which gave effect to the decision of the Court, and which was dated the 2nd of November 1891, was prefaced by a statement to the effect that it appeared that "no question is raised between the parties on the ground that the accounts in this action appertain to a half-year and not to a full year."

It will be observed that the action was brought upon the footing that there was to be a rest at the end of every half-year. That seems to have

been at the time the view of both parties, and it was accepted by the Court. The learned Chief Justice observes that "the second mortgage bondholders are entitled to interest only if, in any particular half-year, the Company makes a profit, *i.e.*, a net profit sufficient to pay the interest in whole or in part. If there are no profits earned by the Company in any particular half-year, the bondholders lose all claim for interest for that half-year."

In the course of the opening the Counsel for the parties were invited to consider whether the view upon which the suit was framed, and upon which the Supreme Court proceeded, could be supported. The point was fully argued. The Solicitor General, on behalf of the Government, contended that, according to the express terms of the Law the bonds were half-yearly income bonds carrying interest for the half-year at the rate of 4 per cent. per annum contingent on the profits of the half-year. He admitted that, by the terms of the agreement, the second mortgage bonds were to be yearly bonds. But he insisted that the language of Sections 55 and 57 of the Law showed clearly that a change had been made when the matter was under the consideration of the Legislature. The thing was done clumsily, no doubt; the draft was not thoroughly revised; the language was not happy, but the meaning was plain. That was the view presented to their Lordships. Whether it be right or wrong it certainly credits the managers of the Company and the officials of the Government with singularly short memories. The Law is passed in June 1889. The bonds are issued in January 1890. The operative part of the bonds repeats the very language of the agreement in the clause which it is said the Law has amended. And the Government certify that the bonds are in accordance with the Law.

In the opinion of their Lordships, although the language used is not happily chosen, there is no variance in effect between the terms of the agreement and the provisions of the Law. The expression "for such half-year," which occurs in Section 55 and Section 57, and which alone creates any difficulty, must mean "for each half of the year for which the interest is to be calculated," or in other words, "for each half of the year ending on the 31st of December." All that Section 55 says is that "if . . . there are no profits available for the payment of the full amount of interest on the said bonds for such half-year," that is, "if there are not profits available for the payment of the full amount of interest on the said bonds for each half of the year ending on the 31st of December," then the deficiency is not to be made good afterwards. Section 57 says that "at the end of any year in which the full interest shall not have been paid," an action may be brought and an account is to be taken—that is, of course, an account for the full year—and then judgment is to be given for the amount of the difference between "the amount paid, if any, as interest for such half-year," or in other words, "the aggregate of the sums paid as interest for each half of the year ending the 31st of December" and the amount "properly payable."

If this be the correct view it follows that the decree cannot be supported. The action was in a great measure misconceived. But in their Lordships' opinion it would not be right, considering the footing upon which the litigation has been conducted, and the statement or admission contained in the decree as to the period of accounting, to dismiss the action at this stage of the proceedings. The proper course will be to discharge the decree of the 2nd of November 1891, and in lieu thereof to order that an

account be taken of the transactions and earnings of the Jamaica Railway Company for the year ending the 31st of December 1890, with a direction that in taking such account no charge is to be made in respect of the cost of engrossing and printing the mortgage bonds of the Company. There can be no justification or pretence for such a charge as against the second mortgage bondholders. The effect of admitting it would be to make mortgagees pay the costs of their mortgagors.

The question as to the expenditure on stores is a more difficult one. The result must depend on the circumstances of the case which have not as yet been fully brought before the Court. In reference to this matter their Lordships do not see their way to introduce any special direction into the decree. But it may be useful to call attention to some general considerations which must be kept in view, and which may help the parties to come to a settlement without further litigation.

On the one hand it was contended that every penny expended out of income during the period of accounting must be brought into the account and charged against the income of that period, and that at all events as the directors of the Company were placed in the management of the Company's affairs the Court ought not to interfere with their discretion when they were acting *bonâ fide*. The argument on behalf of the Government was that the second mortgage bondholders are entitled to receive in or towards payment of interest due to them every penny of profit made during the period of accounting, in whatever shape or form the profits may be found at the end of the period, and whatever may be the consequences to the Company.

Their Lordships are not able to accept either view without some qualification. When the

Law directs that an account is to be taken it would be absurd to suppose that the Court is to be bound by what the Company—the accounting party—has actually done. That is the very thing which the Law intends to be reviewed. Nor is every item of expenditure necessarily to be debited wholly against the income of the period in which it occurs. It may be fair and proper to spread some items over a longer time—a case contemplated and provided for in Table A, Section 80, of the first schedule to the Companies Act, 1862. The Company is bound to conduct its business fairly and to make up its accounts fairly, with a due regard to the obligations which it has undertaken towards the bondholders. That is the measure of the duty in this respect cast upon the directors. It would perhaps not be easy to define it more precisely.

On the other hand, the contention put forward on behalf of the Government is too narrow. They would have the account taken as if there was to be a periodical stoppage of the business and a recurring winding-up. But the charge in favour of the bondholders is a charge upon the undertaking. To use Lord Cairns' well-known expression: "The undertaking is made over as a going concern, . . . as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and pay the debt." The fruit is to be gathered in its season. If when the time arrives to gather the ripe fruit you strip the tree bare of everything on it, the expectations of the coming year may perhaps be disappointed. For anything that appears, the stores in hand may have been exceptionally reduced when the Company took over the business. It may be necessary in the interest of all concerned, including the bondholders, to keep a larger stock on hand. If so, why should not the stock be kept up out of income? There is nothing in

the Law to compel the Company to divide everything in the shape of profits as on a winding-up. The Law speaks of what the earnings of the year "may enable the Company to pay"—of "profits available for the payment" of interest—of "the amount properly payable." The agreement clearly contemplated that the Company might have to pay out of income for stores ordered but not come to hand when they took over the Railway. There is a prohibition against paying out of earnings for any increase of rolling stock. There is no such prohibition in reference to the supply of stores requisite to be kept in hand. As regards an undue increase in the amount of stores, the Government took care to protect themselves in a different way. They stipulated that no purchase of stores in excess of 100% should be valid without the concurrence of the Government Director or the Governor in Privy Council.

In the result, therefore, their Lordships will humbly advise Her Majesty that judgment should be pronounced in accordance with the view they have expressed.

Each party will bear their own costs of the litigation up to the present time, including the costs of the Appeal.

