

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of F. D. Grey and another v. The Manitoba and North-Western Railway Company of Canada, from the Court of Queen's Bench for Manitoba ; delivered 6th March 1897.

Present :

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
LORD DAVEY.

[*Delivered by Lord Hobhouse.*]

The Appellants, who were Plaintiffs below, contend that they are entitled to a decree for sale of a section of the Defendants' line of railway and telegraph. This has been refused by the Court of Queen's Bench in Manitoba, whose decree is under appeal ; and the questions before this Board are : first whether the Court was right in such refusal ; and secondly if it was, whether the Plaintiffs are or are not entitled to other relief in this suit.

The line in question was commenced under powers conferred by the Manitoba Legislature within that province. In the year 1882 it became a Dominion Railway subject to the exclusive jurisdiction of the Dominion Parliament ; and Acts of Parliament have been passed for the extension of the line into the North-West Territory beyond the limits of Manitoba. In

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the years 1882 1883 and 1885 the Company obtained powers to issue mortgage bonds upon the whole or part of their line, not exceeding 20,000 $\frac{1}{2}$ per mile according to the state of their works. In pursuance of those powers the Company issued bonds which in the year 1885 were cancelled and were replaced by fresh issues now in existence.

The instrument on which the Plaintiffs found their claim is a mortgage dated the 16th April 1886. At that time the Company had power under an Act of 1883 to secure their bonds by mortgage of the whole or any part of their property assets and revenues, subject to the condition that their revenue should be pledged in the first instance to the payment of the working expenses of the railway. They had then constructed 130 miles and had placed 50 more under contract. That length of 180 miles is called the first Division or portion of the railway, and has been at work for some years. The bonds were a series of 5,400, each of the nominal value of 100 $\frac{1}{2}$; equal to a charge of 3,000 $\frac{1}{2}$ per mile of the first Division. They bear on their face that they are secured by the mortgage in question.

By that mortgage the Company grant to the Plaintiffs: first, the first Division of the line, with all rights and properties used for the construction maintenance and operation of that Division; secondly, the plant specified in a schedule, and all other plant then or thereafter acquired for the purpose of constructing or working the first Division; thirdly, the revenues of the first Division, subject to (among other things) the working expenses " of the said railway " and telegraph; " and fourthly, incorporeal rights connected with the first Division. A number of special provisions are contained in 19 articles, of which only three need be referred to now.

By article 2, if default is made in payment of interest for three months, power is given to the mortgagees (called the trustees) to enter upon the mortgaged property to operate and to conduct the business of the first Division. After deducting the expenses of operating that Division, and other deductions there specified, the trustees are to apply the money in payment of the bonds.

By article 3, if the default continues for 12 months, power is given to the trustees, either with or without entry, to sell the mortgaged property, and after deducting the expenses incurred by the trustees in operating and maintaining the "said railway and premises," and other deductions, to apply the residue in payment of the bonds.

By article 18 the Company covenant to pay the interest of the bonds, and for that purpose to apply the net earnings and income derived from the mortgaged Division.

By an Act of Parliament passed on the 2nd June 1886 it is enacted that as soon as the prior bonds have been surrendered and cancelled, the bonds secured by the mortgage of the 16th April shall be ratified and confirmed, and shall be the first lien and charge on the first Division of the railway as provided by the said mortgage deed.

By another Act of Parliament passed in the year 1893 it is enacted that securities issued by the Company, among which the bonds and mortgage are specified as affecting the first Division, shall remain the first preferential claims and charges upon the respective portions of the Company's undertaking or property affected or charged as security for payment in each case, and according to the tenor and effect of any by-law, or of any deed of mortgage, conveyance, or assurance, in each case.

The Company have not been able to meet their obligations, and in June 1893 a Mr. Allan and others, judgment creditors of the Company, filed a bill praying for the appointment of a Receiver. On the 8th June 1893 Allan was appointed Receiver of the undertaking and assets of the Company until the hearing, and he was ordered to provide for the working expenses of the Railway and other outgoings and repairs. That order was substantially continued at the hearing of the cause on the 13th July 1893.

On the 3rd July 1894 the Plaintiffs filed the bill in the present case, praying as follows:—

“ 1. That the Defendants may be ordered to discover what personal property is now embraced in or included in the security referred to in this Bill namely the Indenture of sixteenth April 1886.

“ 2. That all the property described in and included under the said Indenture may be sold under the direction of this Honourable Court and that the Plaintiffs may have liberty to bid at such sale.

“ 3. That a Receiver may be appointed of the revenues tolls and profits of the first Division of the said railway and that the same may be applied in payment of the amount secured by the bonds hereinbefore referred to.

“ 4. That the Plaintiffs may have such further and other relief as to your Lordships shall seem meet and as shall not interfere with the possession of the Receiver in the suit herein-before referred to of Allan v. The Manitoba and North-Western Railway Company.

It seems that by some interlocutory order a Receiver was appointed.

At the hearing before Mr. Justice Killam it was shown that of the 180 miles of the first Division $9\frac{1}{2}$ miles lay in the North-West Territory; and the questions were whether a sale should be ordered either of the whole Division or so much thereof as lies within the limits of Manitoba, and whether there should be a Receiver of the revenues of the first Division, and if so upon what terms. That learned Judge held that nothing less than the entirety of the Division

was saleable; and the soundness of that opinion, which was shared by the Court of Appeal, has hardly been disputed at this bar. He further held that, though the Manitoba Court could not conduct a sale outside the province, it could properly, especially as the Plaintiffs are trustees, take notice that they had a valid power of sale extending to the whole first Division, and give orders for their protection and assistance. He felt no difficulty about continuing the Receiver.

By his decree dated 17th April 1895 he continued the Receiver, and ordered him to apply the revenues received in accordance with the terms of the mortgage except so far as it directs payment of moneys to the Plaintiffs, which moneys were to be paid into Court. He directed an enquiry as to the personal property included in the mortgage, and ordered that all necessary enquiries be made, accounts taken, costs taxed, and proceedings had, for redemption or sale. He made the usual mortgage decree for payment and redemption; and then went on to give directions "in the event of a sale." He declined for the present to decide whether the Company was entitled to charge the working expenses of the line against the revenues of the first division.

The wording of this decree is very peculiar. Apparently it is intended to avoid the difficulty arising from part of the land being beyond the jurisdiction of the Court, by not ordering a sale in terms but leaving it to take effect under the power. It has however been treated in the subsequent stages of the litigation as being substantially a decree for a judicial sale; and it is not easy to treat it otherwise. The Company appealed from it on this ground. They also appealed on the ground that a Receiver ought not to be appointed, or if appointed, should at

least receive nothing till after payment of the working expenses of the whole line.

The Court of Appeal held that the first Division is a section of the railway which by the law of Canada is capable of sale; but that it must be sold in its entirety, and that the Manitoba Court could not do that for want of jurisdiction in the North-West Territory. They further held that it was right to continue the Receiver of the revenues of the Division, but that he must take subject to the working expenses of the entire line.

By their decree dated the 10th February 1896 they reversed the decree below so far as it directs a sale of any portion of the Defendants' property other than the personal property. They then made an order respecting the charge of working expenses, the terms of which are open to some exception as being capable of an extension wider than was meant. But they need not be minutely discussed now, because the Company do not ask anything more, or allow that the decree gives them anything more, than the right to deduct the working expenses of the railway from its receipts before handing anything over to the Receiver of the revenues of the Division.

To dispose of this point at once, their Lordships are of opinion that as long as the line is worked as a whole, the terms of the mortgage make it clear that the revenues of the first Division are subject, along with the other revenues, to the working expenses of the whole line. Different considerations would arise if the mortgagees were to enter and operate under Article 2 of the mortgage, or to sell under Article 3; parts of the deed which did not enter into discussion before the Court of Appeal. But the appointment of a Receiver of

the revenues does not disturb the entirety of the management, and it leaves the entire revenue subject to the entire charge. Therefore with an alteration, which perhaps is only verbal, for the purpose of avoiding the construction objected to by the Plaintiffs and disclaimed by the Company, their Lordships assent to the order relating to the Receiver.

As regards the question of sale, the decisions, both English and Transatlantic, which bear on the jurisdiction of Courts of Justice to deal with foreign land, have been very carefully discussed in the Courts below. It is hardly necessary to go into that discussion again here. The thing asked for by the bill is a judicial sale of land partly within and partly out of the jurisdiction, as an entire thing, and with specific directions by the Court. It is impossible to do that; the decree of the Court below does not do it directly, and it has been hardly more than suggested at the bar that there is any principle or authority to justify it. The two reasons urged for supporting the decree of the First Court are of a different nature.

One is that the Plaintiffs are trustees and are entitled to the aid of the Court in administering their trusts. But this is not a suit for the administration of the trusts; it certainly could not be made so unless the beneficiaries were represented separately from the trustees. The Plaintiffs sue as mortgagees to enforce their mortgage; and the fact that they are trustees cannot give them any larger rights against their mortgagors, or any larger jurisdiction to the Court, than if they were sole owners.

The other reason is that, inasmuch as the Company is subject to Manitoba jurisdiction, it may be ordered to effect that sale which the Court cannot effect. But the Company have not contracted to sell, nor have they the power

to do so; nor did the bill or the decree of the First Court contemplate such a thing. The Company, purporting to act in pursuance of statutory powers, have granted a mortgage containing a power of sale for the security of their creditors, and that mortgage has been recognized by statute. How far each portion of the mortgage is actually supported by statute, appears to be a question still in dispute; for Mr. Robinson on behalf of the Company disputes the validity of the power of sale which they purported to confer; and as their Lordships were for the reason to be presently stated unwilling to hear his argument, they decide nothing about it. Supposing it to bind the Company, it is quite a different thing from an undertaking by them to effect the sale themselves.

The result is that their Lordships concur with the view taken by the Court of Appeal on the question of sale. But then it is contended that if the particular form of relief asked for by the Bill cannot be granted, it is still open to the Court to grant substantial relief by way of affirming and construing the deed of mortgage, and so enabling the mortgagees to resort to their remedies in an effectual way. The Company, it is said, resist an entry. They are now denying that there is any power to sell. They raise questions with reference to working expenses which are calculated to damage the chances of a sale. Let us at all events have such questions as these cleared up by declarations of the Court before we attempt to enter or to carry our property into the market.

In the course that the litigation has taken the Courts below have not dealt with these questions; but it may be assumed for the present purpose that under proper circumstances a suit might be framed and sustained for the now suggested relief. The Respondents make the preliminary

objection that this is not such a suit, and that it can only be converted into such a suit by amendments, which ought not now to be allowed. To determine this matter it is necessary to examine with some care the course of proceedings in the lower Courts.

It has been mentioned that in the year 1893 Mr. Allan was appointed to be Receiver of the undertaking assets and property of the Company. The consequence was that the Plaintiffs could not take steps to enforce their mortgage except at the peril of committing a contempt of Court. In November 1893 they presented a petition for leave to take proceedings. In that petition they stated the non-payment of interest, and that they had demanded possession of the first Division which the Company had refused. They prayed as follows :—

“ 1. That leave may be granted to them to take such proceedings in this Honourable Court as they may be advised for enforcing their rights to enter upon possession of the said first Division or 180 miles of railway and the other property conveyed to them under the said Indenture and to obtain possession thereof.

“ 2. That leave may be granted to your Petitioners to take such proceedings in this Honourable Court as they may be advised for the appointment of a manager and receiver or for such other redress as they may be advised and also for a foreclosure of the mortgaged premises.

“ 3. That leave may be granted to your Petitioners to take such proceedings in this Honourable Court as they may be advised to enforce the execution by the Defendant Company of a deed of further assurance of the said fifty miles to the said Trustees upon the trusts mentioned in the said Indenture.

“ 4. And that leave may be given to them to take such other proceedings as they may be advised for enforcing their rights in the premises.

“ 5. And that the reasonable costs of your Petitioners incurred on this petition may be allowed and paid to them.”

The Record does not show the whole of the proceedings on that petition; but the ultimate order made by the Appellate Court was, so far as material, as follows :—

“ 2. This Court doth further order that the Petitioners be at liberty to file a bill in this Court praying that the premises

“ comprised in the security referred to in the said petition
“ being the mortgage bearing date the 16th day of April
“ A.D. 1886 may be sold and that a receiver of the revenues
“ tolls and profits may be appointed thereof.

“ 3. And this Court doth further order that the Petitioners
“ be at liberty if they so desire to take proceedings for the sale
“ of the said premises or any part thereof under or in pursuance
“ of any power which they may have under the said security.”

Why the order did not give leave to prosecute the remedy by entry, or generally any remedies to which the Plaintiffs might be entitled under the mortgage, is not explained in the Record. It is suggested that the Court considered the power of entry to be invalid ; but it can hardly have been intended to make a final decision on such a point in the course of hearing a preliminary application for leave to sue, and not to allow it to be tried, if the Plaintiffs desired it, in the regular course of litigation.

The important consideration however for the present purpose is that the Plaintiffs accepted the order and framed their bill in accordance with it. The bill does indeed contain allegations that the Plaintiffs demanded, and that the Company refused, possession of the first Division ; and that the Company deny the validity of the bonds, and of the mortgage, especially of the power to sell ; and that owing to the antagonistic position of the Company a sale can only be made effectually under the direction of the Court. But the Company, while asserting that any entry by the Plaintiffs would be illegal, deny that any demand for it had been made, and they deny that the right to sell has ever been discussed, or that they have adopted any antagonistic position as alleged by the Plaintiffs. No evidence was given on these points ; the bill was not amended ; and the specific relief prayed by it was, as before stated, confined to a judicial sale and the appointment of a Receiver.

It is under these circumstances that their Lordships are asked to treat the case as if the Plaintiffs had proved a case of obstruction and

difficulties raised by the Company, either in derogation of their contract, or showing such discrepancies in the construction of the contract as would entitle the mortgagees to come to the Court for a declaration of its true meaning before they take action to enforce it. The questions now raised ought to have been raised on the pleadings and evidence so that they might be properly thrashed out in the Courts below. As the matter stands they have not been touched by the Courts below. When Mr. Robinson proposed to argue that the power of sale is invalid their Lordships were unwilling to hear him. They must equally refuse to hear (or at least to determine, for they have partially heard) discussions relating to the position of the Plaintiffs in the event of an entry, or of the purchaser in the event of a sale. They confine themselves to deciding the issues which the Courts below were invited by the Plaintiffs to decide, viz., whether there can be a judicial sale, and what it is that the receiver of the revenues of the division is entitled to receive. Finding that the Court of Appeal of Manitoba is right in its decisions, and that no alteration is requisite except the correction of an ambiguity in its decree, they will humbly advise Her Majesty to dismiss the appeal; and the Appellants must pay the costs.

The mode in which their Lordships think that the decree appealed from should be varied is by discharging paragraph 2 and substituting the following order:—

“ Continue the receiver till further order.
 “ Declare that according to the true construction
 “ of the mortgage of the 16th April 1886 the
 “ revenues, freights, tolls, income, rents, issues,
 “ profits and sums of money thereby mortgaged
 “ were so mortgaged subject along with the other
 “ revenues of the Company’s undertaking to the

“ working expenses of the Defendant Company’s
“ entire line of railway and telegraph which in
“ the ordinary course of conducting such line
“ would fall upon them. Declare that the Receiver
“ is, and since his appointment has been, Receiver
“ of the net earnings which by Article 18 of the
“ said mortgage the Company covenanted to
“ apply to the payment of the bond debts thereby
“ secured. Order the Receiver to pay such net
“ earnings into Court to abide the further order
“ of the Court or a Judge thereof.”
