*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Central Ontario Railway* v. *The Trusts and Guarantee Company, Limited, from the Court of Appeal for Ontario; delivered the 4th August* 1905.

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Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The only question to be decided on this Appeal is whether a railway which is subject to the legislation of the Dominion can be sold in a suit by the trustees for bondholders to enforce a mortgage on the Railway Company's railway, lands, and franchises. All the learned Judges who have taken part in the decision in the Courts below have decided that it can, and the Appeal is by the Railway Company against their decision.

The Appellant Company was incorporated in the year 1873 by a Statute of the Legislature of Ontario under the name of "The Prince Edward County Railway." By a subsequent Statute of the same Legislature the name of the Company was changed to that of "The Central Ontario Railway," and it was empowered to borrow such sums as might be expedient for completing, maintaining and working the railway and to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property of the Company for the due payment of the said sums and the interest thereon.

In pursuance of this power the Appellant Company made an issue of $2,200,000 in 2,200

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bonds of $1,000 each bearing interest at 6 per cent. per annum. And to secure such issue the Company executed an Indenture of Mortgage dated the 1st April 1882 to the Toronto General Trusts Corporation (the original Plaintiffs in the action) as trustees for the bondholders whereby the Company granted to the mortgagees (*inter alia*) the Company's railway and the lands occupied thereby and all corporate and other franchises held or exercised by the Company, and the tolls, rents, issues, and profits thereof. And it was provided that in case default should be made in payment of the principal of the bonds, the trustees, at the request of 75 per cent. of the bondholders, should immediately elect and declare the principal of all the bonds to be due and payable, and should take proceedings to enforce payment of the principal as speedily as possible instead of operating the railway and conducting the business thereof as previously provided for in case of default being made in payment of interest.

By a Dominion Statute passed in the year 1884 (47 Vict. c. 60) the Central Ontario Railway was declared to be a work for the general advantage of Canada, and thereupon became subject to the legislative authority of the Parliament of Canada.

By a previous Act of the Parliament of Canada (46 Vict. c. 24) it was in Sections 14, 15, and 16, enacted as follows :—

"14. If at any time any railway or any section of any railway "be sold under the provisions of any deed of mortgage thereof, "or at the instance of the holders of any mortgage bonds or "debentures, for the payment of which any charge has been "created thereon, or under any other lawful proceeding, and be "purchased by any person or corporation not having any "corporate powers authorizing the holding and operating "thereof by such purchaser, the purchaser thereof shall trans- "mit to the Minister of Railways and Canals, within ten days "from the date of such purchase, a notice in writing stating "the fact that such purchase has been made, describing the "termini and line of route of the railway purchased and

" specifying the charter under which the same had been con-
" structed and operated, including a copy of any writing
" preliminary to a conveyance of such railway which has been
" made as evidence of such sale; and immediately upon the
" execution of any deed of conveyance of such railway the
" purchaser shall also transmit to the Minister of Railways and
" Canals a duplicate or an authenticated copy of such deed,
" and shall furnish to the Minister, on request, any further
" details or information that he may require.

" 15. Until the purchaser shall have given notice to the
" Minister in manner and form as provided by the last
" preceding section, it shall not be lawful for the purchaser
" to run or operate the railway so purchased, or to take, exact
" or receive any tolls whatever in respect of any traffic carried
" thereon; but after the said conditions have been complied
" with, the purchaser may continue until the end of the
" then next Session of the Parliament of Canada to operate
" such railway and to take and receive such tolls thereon as
" the railway company previously owning and operating the
" same was authorized to take, and shall be subject, in so
" far as they can be made applicable, to the terms and
" conditions of the charter of the said company, until he
" shall have received a letter of license from the Minister
" of Railways and Canals,—which letter the Minister is
" hereby authorized to grant, defining the terms and con-
" ditions on which such railway shall be run by such
" purchaser during the said period.

" 16. It shall be the duty of such purchaser to apply
" to the Parliament of Canada at the next following
" session thereof after the purchase of such railway, for an
" Act of incorporation or other legislative authority, to hold,
" operate and run such railway, and if such application be
" made to the said Parliament and be unsuccessful, it shall
" be in the discretion of the Minister of Railways and
" Canals to extend the license to run such railway until
" the end of the then next following Session of Parliament
" and no longer; and if during such extended period the
" purchaser does not obtain such Act of incorporation or
" other legislative authority, such railway shall be closed
" or otherwise dealt with by the Minister of Railways and
" Canals, as shall be determined by the Railway Committee
" of the Privy Council."

These Sections have been re-enacted in the Dominion Railway Act of 1888 (51 Vict. c. 29), and it is not disputed that they are applicable to the railway of the Appellant Company.

This action was commenced on the 24th April 1902 in the High Court for Ontario by

the Toronto General Trusts Corporation on behalf of themselves, and also on behalf of the bondholders against the Appellant Company, to enforce the security created by the Indenture of Mortgage of the 1st April 1882, and by the Statement of Claim the Plaintiffs claimed (amongst other things) that in accordance with the provisions of the mortgage, the railway and property thereinbefore described, might be sold at the direction of the Court. It was formally admitted in the course of the proceedings that the principal and interest on the bonds were unpaid and in arrear at the date of the commencement of the action. But the Defendants by their amended defence submitted that there was no jurisdiction in the Court to decree a sale of the Defendants' railway, and undertaking to answer the mortgage in question. The Toronto Trusts Corporation ceased to be trustees of the mortgage during the pendency of the suit, and the Trusts and Guarantee Company Limited, were substituted for them, and are the present Respondents.

In the well-known case of *Gardner* v. *London, Chatham, and Dover Railway Company*, L.R. 2 Ch. 201, it was held by the Court of Appeal in England that the holder of a mortgage debenture granted by a railway company in the form given in the Schedule to the Companies Clauses Consolidation Act of 1845 was entitled only to a receiver of the profits or fruits of the undertaking, and was not entitled to have the railway or the lands or any part of the capital property of the Company sold for the payment of his debt. It will be remembered that the security given by such a mortgage bond is on the undertaking and (in certain cases) all future calls on shareholders and on all the tolls and sums of money arising by virtue of the

Company's Act. The reason for so holding was thus stated by Lord Cairns (at p. 212) :—

"When Parliament acting for the public interest authorizes "the construction and maintenance of a railway both as a "highway for the public and as a road on which the Company "may themselves become carriers of passengers and goods, it "confers powers and imposes duties and responsibilities of the "largest and most important kind, and it confers and imposes "them upon the company which Parliament has before it, and "upon no other body of persons. These powers must be "executed and these duties discharged by the company. "They cannot be delegated or transferred."

It appears, however, from an early date to have been the practice in Canada to include the lands and other capital property of a railway company in a mortgage which the company was authorized to execute. And it was contended that where the Legislature authorized the railway and lands to be made the subject of security, it by implication authorized the exercise of the ordinary remedies of a mortgagee of lands. The contrary, however, was decided by the Courts of Upper Canada and Ontario in a case decided in the year 1862, and in subsequent cases which are quoted by the learned Chancellor and the Judges of the Court of Appeal, and the reason given was the same as that stated by Lord Cairns, viz., that the vendee could not exercise the franchise by working and operating the railway. The Quebec Courts, on the other hand, took a different view under similar circumstances, and held that the railway might be sold as an entirety, but not broken up or sold piecemeal.

Their Lordships see no occasion to doubt the correctness of the law thus laid down by the Courts of Ontario, and it may be assumed to be still applicable to a railway company the powers of which are regulated exclusively by the law of the Province. But as regards companies to which the Dominion legislation is applicable, a different complexion is put on the matter by the

enactments which have been quoted. It is true that Section 14 does not of itself confer upon the Courts a power of sale of the railway, but it does provide a statutory means by which the railway may be operated under the licence and with the authority of the Minister of Railways in event of a sale being made at the instance of mortgagees. To quote language attributed to Lord Watson, "the Legislature has made provision " for the transfer of the undertaking."

It can scarcely be doubted that the parties to the mortgage now under consideration contemplated and intended that the mortgagees should have and enjoy means for the recovery of their principal money other than, and different from, the appointment of a receiver of the profits of the undertaking. The trustees are expressly directed to take proceedings to enforce payment of the principal as speedily as possible, instead of merely operating the railway for the benefit of the mortgagees as was provided in case of default being made in payment of interest. The proceedings referred to can only be such as may be taken in the ordinary course of law for recovery of money secured by mortgage including a judicial sale of the mortgaged property. It is true that at the date of the mortgage legal effect could not have been given by the Courts of Ontario to the intention of the parties thus expressed. But the railway having now become subject to the legislation of Canada, and that legislation having provided means by which the transfer of the undertaking may be effected without prejudice to public interests, the difficulty which prevented the Courts from giving to mortgagees of the railway and lands of a railway company the ordinary legal remedies of a mortgagee has now been removed, and the Court is now able to carry into effect the intention of the parties as expressed in the instrument of

mortgage. Their Lordships adopt the language of the learned Chancellor in summing up the reasons for his Judgment :—

"In brief, the Legislature permits a mortgage of the lands of "the Company. The right of such a mortgagee is to enforce "his security by a sale of the land. There is now no "countervailing right on the part of the public based upon the "policy of the Legislature to prevent a sale being had, for upon "and after the sale the road will still run its course and serve "the public as and when in the hands of the original "corporation."

The facts in the case of *Redfield* v. *Corporation of Wickham* (13 A.C. 467) were somewhat different from those in the present case, but the views on the construction and effect of the statute expressed by Lord Watson in delivering the Judgment of this Board coincide with those which their Lordships have endeavoured to express.

Their Lordships, therefore, agree with the Judgment of the Court of Appeal and with the reasons for it given by the learned Judges and will humbly advise His Majesty that the Appeal should be dismissed. The Appellant will pay the costs of it.