

*Privy Council Appeal No. 118 of 1916.*

**Mackenzie, Mann, and Co. (Limited), and Others - Appellants,**

v.

**The Eastern Trust Company - - - Respondents,**

FROM

**THE SUPREME COURT OF NOVA SCOTIA.**

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER, 1916.**

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*Present at the Hearing :*

THE LORD CHANCELLOR (LORD BUCKMASTER).  
VISCOUNT HALDANE.  
LORD DUNEDIN.  
LORD PARKER OF WADDINGTON.  
SIR ARTHUR CHANNELL.

[*Delivered by* THE LORD CHANCELLOR.]

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In this case their Lordships think that they are bound to give effect to the arrangement that was made on the previous hearing, and they realise that the Order in Council of the 29th April, 1915, that was then drawn up, did not carry into effect that arrangement. It is therefore necessary that the Order should be varied, and their Lordships propose to vary it in the terms hereinafter referred to. If there be anything to be said on these terms afterwards their Lordships will hear either party in the matter, but their Lordships think that the following variation of the Order ought to be made.

There ought to be a declaration that the account (a) directed by paragraph 8 of the decree dated the 13th March, 1905, be proceeded with as far as may be necessary to ascertain whether there may be any, and what, balance due from the partnership to the Nova Scotia Southern Railway Company in respect of the profits on rails referred to in paragraph 6 of that decree after allowing for moneys paid out of these profits in aid of the project or undertaking of the company, but nothing contained in this declaration is to prejudice any set-off or cross-claim or any application which may be made for

further accounts on further consideration of the action in the Court below. The decree dated the 14th March, 1916, ought to be affirmed, except in so far as it may be affected, if at all, in consequence of this declaration, and if and in so far as so affected it ought to be varied accordingly. There will of course be liberty to apply to the Court below. This declaration is not to affect payments made or to be made by any person under paragraph 3 of the decree, dated the 14th March, 1916, to the receiver, and it necessarily follows that the distribution of the assets by the receiver, ordered by paragraphs 4 and 5 of the decree, must be stayed until after the account (a) has been taken.

In regard to the costs, their Lordships are of opinion that the costs of the whole of the hearing up to the appeal to this Board ought to be paid as they were directed to be paid by the Court through which the proceedings have passed, because it was the duty of the appellants, if they desired to have this order varied, to have taken the point at the earliest possible moment and not to have proceeded to challenge the effect of the Order in Council of the 29th April, 1915 through the Court below when the referee was perfectly right in the view he took of that Order. The costs of this appeal are costs as to which their Lordships think it not desirable that any order should be made. Each party, therefore, will bear their own costs. And their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council.

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MACKENZIE, MANN, AND CO. (LTD.),  
AND OTHERS

vs.

THE EASTERN TRUST COMPANY.

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DELIVERED BY  
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