

THE MINISTER OF RAILWAYS AND  
CANALS (PLAINTIFF)

1929

\*May 13.  
\*June 13.

AND

THE HEREFORD RAILWAY COM-  
PANY (DEFENDANT)

AND

THE MINISTER OF RAILWAYS }  
AND CANALS (CLAIMANT)..... } APPELLANT;

AND

STEPHAN N. BOND AND JAMES MAC- }  
KINNON (CONTESTING CLAIMANTS).. } RESPONDENTS.

## ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Railway—Incorporation under special Act—Bondholders—Subsidies—Sale  
of the railway—Proceeds of the sale—Priority*

The Hereford Railway Company had been incorporated under the provisions of c. 93 of the Dominion Acts of 1887 and of c. 81 of the Dominion Acts of 1888. Under certain provisions of those Acts the company was empowered to issue bonds secured by a mortgage deed upon the property, assets, rents and revenues of the company. These bonds were to be a "first preferential claim" upon the property of the company. Bonds were issued in 1890 and a mortgage deed was duly executed between the company and the trustees of the bondholders. Subsequently, subsidies were granted from time to time by the Dominion Government to the company. On the company failing to operate its road, the Minister of Railways took the necessary steps under section 160 of the *Railway Act* of 1919 to create a first lien or mortgage upon the railway and its equipment in favour of the Crown for the amount of these subsidies, and for an order authorizing the sale of the railway. The railway was sold under order of court to the Canadian Pacific Railway Company on the condition that the latter would continue the operation of a portion of the original railway line, and the proceeds of the sale were paid into court in accordance with the judgment. The registrar of the Exchequer Court of Canada, acting as referee, under order of the court, in determining the respective ranks and privilege of the creditors, reported that, after the payment of three small claims, the balance of the proceeds of the sale should be paid to the trustee for the bondholders. The Minister of Railways appealed to the Exchequer Court of Canada on the ground that he was entitled to that money; but the report of the referee was upheld by that court.

*Held, per Anglin C.J.C. and Mignault and Smith JJ., without hearing counsel for the respondents, and affirming the judgment of the Exchequer Court of Canada ([1928] Ex. C.R. 223), that the balance of*

\*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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the proceeds of the sale has been rightly ordered to be paid to the trustees for the bondholders. The subsidies granted to the railway company were upon condition that the railway should be continuously operated. The fulfilment of that condition to the extent deemed necessary by the Minister of Railways having been secured by the terms of the sale, and no part of the purchase money being required for that purpose, and there being no claim for enforcement of the lien for the amount of the subsidies, the Minister of Railways had no right to claim the balance of the purchase money.

Newcombe J., on the other hand (with whom Rinfret J. concurred), while unwilling to conclude a question adversely to a party who had not been heard, said that he would be surprised to find that any subsidized Dominion railway, including the defendant company, which "cannot, by reason of the condition of such railway or of its equipment, be safely and efficiently operated," is not subject to the statutory provisions, and may not, when these have been complied with, \* \* \* be sold to satisfy the first lien or mortgage which the statute creates, and which is, by its express direction, due and payable to His Majesty; and, moreover, if the statute applied, that he was not convinced that the Exchequer Court had authority to regulate the exercise of the Minister's powers as to the application and disposition of the proceeds.

APPEAL from the judgment of the Exchequer Court of Canada (1) affirming a report of the registrar of that court acting as referee.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

*W. Lazure K.C.* for the appellant.

*F. S. Rugg K.C.* for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Mignault and Smith JJ.) was delivered by

SMITH J.—The defendant railway company was incorporated by Dominion statutes of 1887 and 1888, and was authorized to construct a railway in the counties of Comp-ton and Wolfe from the international boundary at Hereford to Lime Ridge, a distance of 48 miles. The railway was built with the aid of subsidies from the Dominion, amounting to \$170,560, and from the province, amounting to \$84,226.36. One of the conditions of the grant of the Dominion subsidies was that the railroad should be continuously and faithfully operated and kept in good working and running order.

By Dominion statute of 1890, the railway company was authorized to lease the railroad and its franchises to the Maine Central Railway Company, with which company's railroad in Maine the defendant's railway made connection at Hereford. A lease was accordingly made for 999 years, under which defendant's railroad was operated until 1st November, 1925.

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Under authority of Dominion statutes of 1887 and 1889, bonds of the defendant company were issued to the amount of \$800,000, and were constituted a mortgage and privilege on the property of the railway and its assets, rents and revenues, save as to working expenses. Pursuant to the terms of the lease, the lessee guaranteed and endorsed these bonds. Having, up to the end of 1923, operated the railroad at a loss of \$1,639,359.63, and having become proprietor of the large majority of the shares of the lessor company, the lessee brought about an agreement between the two companies for cancellation of the lease, as provided by an indenture dated 8th September, 1925, without obtaining statutory authority for such cancellation. The rolling stock and all equipment were then removed to the United States, and operation of the railway ceased.

The municipalities petitioned the Minister of Railways and Canals for redress under s. 160 of the *Railway Act*, which is as follows:

160. Whenever it is made to appear to the Minister that any railway owned by a company incorporated by the Parliament of Canada, the construction of which has been aided by a subsidy from the Government of Canada, cannot by reason of the condition of such railway or of its equipment be safely and efficiently operated, the Minister may apply to the Board for an order that the said railway, or its equipment, or both, shall be put in a safe and efficient condition, which order the Board is hereby authorized to make after such notice to the president or manager of the company and the trustee of the bondholders, if any, as to the Board seems reasonable, and the Board may, by order, direct what repairs, improvements or additions shall be made to the said railway, or equipment, or both, and within what times the same shall be undertaken and completed respectively.

2. If the company fails to comply with such order of the Board, the Governor in Council may, upon the recommendation of the Minister, approve of such order, and direct that a copy of such order and of the order of the Governor in Council approving thereof, certified by the secretary of the Board and clerk of the Privy Council respectively, shall be filed by the Minister in the office of the registrar of deeds of each county through which such railway runs, and upon such order being so filed there shall, *ipso facto*, be created a first lien or mortgage upon the said railway

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and its equipment in favour of His Majesty for the amount of the said subsidy, which shall immediately thereupon become due and payable to His Majesty.

3. Such lien may be enforced by His Majesty in the same manner and by the like proceedings as any other lien upon property may be enforced by His Majesty in the Exchequer Court of Canada.

4. The said court may order such railway and its equipment to be sold to satisfy such lien, and pending such lien may appoint a receiver to manage and operate such railway.

5. Any money realized from such sale may, with the consent of the purchaser, be applied by the Minister under the direction of the chief engineer of Government railways towards the repair and improvement of such railway and equipment so far as the same may be deemed necessary by the Minister, and any moneys so realized, and not in the opinion of the Minister required for such repairs and improvements, may be paid to the company owning the railway at the time of the sale, or to the trustee for the holders of any outstanding bonds or other securities secured by mortgage or otherwise upon such railway.

All the proceedings provided for by sub-s. 1 were taken, and the defendant railway company having failed to comply with the order of the Board, the proceedings set out in the first part of paragraph 2 were taken for acquiring a first lien or mortgage on behalf of His Majesty for the amount of the subsidy.

The Minister then commenced this action, and filed a statement of claim by which, after recital of facts, he claims and demands that the sale of the railway be ordered and decreed by the court on the express condition that the purchaser thereof be required to provide rolling stock, and other accessories necessary to operate said railway, in compliance with the order of the Board of Railway Commissioners. Judgment was given, ordering the sale, and tenders were called for. The tender of the Canadian Pacific Railway Company was accepted, and by the judgment of the court of 25th May, 1927, the railroad and other assets of the defendant company were sold to the Canadian Pacific Railway Company for \$46,378, upon the terms and conditions of the tender as follows:

1. That the Canadian Pacific Railway Company shall not be required to operate and shall not undertake to operate at any time those portions of the railway between Cookshire and Lime Ridge and between Malvina and the international boundary, but shall be at liberty to take up the rails and fastenings on the said portions of the railway and dispose of the same, or dispose of the whole of the said portions of the railway, or any part thereof, as it may see fit.

2. That the Canadian Pacific Railway Company will within three months from the completion of the purchase commence the operation of the portion of the railway between Cookshire and Malvina with at least

three mixed trains a week each way, but its obligations to continue the operation of such portion shall be subject to the law governing railways subject to the jurisdiction of the Parliament of Canada.

3. That the purchase price shall be paid to the registrar of the Exchequer Court of Canada upon the passing of title to the property upon the terms aforesaid.

The sale and transfer were carried out and the money paid into court in pursuance of this judgment upon the terms stated.

By an order of the court, it was referred to the registrar to enquire and report on all claims to the proceeds of the sale, and to determine the respective ranks and privileges of the creditors. The referee reported that three small claims should be first paid, and that the balance should be paid to the trustees for the bondholders. The Minister of Railways appealed from this report in so far as it directs the balance to be paid to the trustees for the bondholders, on the ground that he is entitled to have such balance paid out to him. This appeal was dismissed by judgment of the 18th October, 1928, and the Minister appeals to this court.

It has been argued that, as s. 160 of the *Railway Act* was first enacted in 1911, many years after the incorporation of the defendant railway company and the building of the railway, and after the bondholders had acquired vested rights under statutory authority, it should not be held to have any retroactive effect, and should be deemed to have reference only to railways subsequently built. It is also argued that this results from the proper construction of the wording of the Act.

It is not, however, necessary to deal here with that question. There was judgment for sale of the railroad under s. 160, and no appeal was taken from that judgment. The sole question, therefore, that need now be dealt with is as to the disposition of the balance of the proceeds of the sale now in court.

I am in accord with the learned referee in the disposition he has made of that balance, for the reasons fully and clearly stated by him.

The subsidies granted to defendant railway company were, as stated, upon condition that the railway should be continuously and faithfully operated and kept in good working and running order. Section 160 provides that, on proceedings taken under that section and default to comply

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with the order made by the Board of Railway Commissioners for the safe and efficient operation of the railway, there shall be created a first lien and mortgage upon the railway and its equipment for the amount of the subsidy, which may be enforced in the Exchequer Court. If proceedings were taken merely to enforce this lien and recover back the subsidies, the property covered by the lien would be sold with clear title, unencumbered by onerous conditions and undertakings to be assumed by the purchaser, and the amount of the subsidies would be first paid out of the proceeds of sale and the balance would go to the owner or its bondholders. The subsidies having been thus paid back, there would remain no further obligation to anyone to equip or operate the railway. This is not what the Minister asked to have done in the present case. He made no request in the statement of claim for enforcement of a first lien for the subsidies. What he asked for and what he and the municipalities evidently desired was such a sale as would bring about the fulfilment of the condition continuously and faithfully to operate the railway and keep it in good working and running order. That condition once fulfilled at the instance of the Minister by resort to the property of the defendant company, there would be no right to recover the subsidies, as s. 160 does not empower the Minister to recover the subsidies and also enforce performance of the conditions. The defendant company's railroad and assets were sold subject to and charged with the obligation of fulfilling the conditions on which the subsidies were granted to the extent to which the Minister judged it desirable to exact the fulfilment of these conditions. The fulfilment of these conditions to the extent deemed necessary by the Minister having been secured by the terms of the sale, and no part of the purchase money being required for that purpose, and there being no claim for enforcement of the lien for the amount of the subsidies, the balance of purchase money in question should, as found by the learned Referee, be paid, as directed by sub-s. 5 of the section, to the owners or the trustees for the bondholders. There can be no object in first handing it to the Minister, to be by him passed on to the trustees for the bondholders.

The appeal is therefore dismissed with costs.

NEWCOMBE J. (Rinfret J. concurring).—The facts are not in dispute, but it is well to have in mind the following particulars:

The Hereford Railway Company, declared to be a work for the general advantage of Canada, was incorporated by Dominion Acts of 1887, ch. 93, and 1888, c. 81, and constructed the railway in question, with the aid of Dominion and provincial subsidies. The Dominion subsidy agreements, which are statutory, as therein recited, are dated 31st March, 1888, and 3rd August, 1889. As stated in the recitals, the railway was to be constructed

according to descriptions and specifications and upon conditions to be approved by the Governor in Council, upon a report of the Minister of Railways and Canals, specified in an agreement to be made by the company with the Government,

and, in consideration of the subsidy to be paid, the company covenanted and agreed:

6. That the company will upon and after completion of the said line of railways and works appertaining thereto, truly and faithfully keep the same and the rolling stock required therefor, in good, efficient working and running order, and shall continuously and faithfully operate the same.

Under authority of the Dominion statutes above mentioned, the company issued bonds dated 1st May, 1890, payable in forty years, secured by mortgage of 24th October, 1890.

Section 160 of the *Railway Act* was enacted by c. 22, s. 13, of 1911, as s. 369A, and was introduced into the *Consolidated Railway Act*, c. 69 of 1919, as s. 160.

The railway ceased to be maintained or operated on 1st November, 1925, and so remained in a state of inactivity until after the proceedings which led to the sale under the above section 160.

The respondents admit in their factum:

That the appellant has carried out the procedure set forth in article 160 and that subsidies had been received by the Hereford Railway Company to the extent of \$170,560.

The Minister proceeded in the Exchequer Court to enforce the lien, which, assuming the application of the statute, he admittedly possessed, and the court exercised the jurisdiction which it had to order the sale of the railway "to satisfy such lien." Lest there should be any error as to the footing upon which the proceedings were understood, considered and dealt with in the Exchequer Court, I introduce the following extract from the registrar's report.

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Referring to the date, 1st November, 1925, when operation of the railway was abandoned, the report proceeds:

In order that the operation of the railway should be continued the Minister of Railways and Canals petitioned the Board of Railway Commissioners for an order directing the Hereford Railway Company to operate the railway with the necessary equipment. On the 1st day of April, A.D. 1926, an order of the Board of Railway Commissioners was issued and served upon the Hereford Railway Company. The railway company having failed to comply with the said order the Minister took the necessary steps under paragraph 2 of section 160 of the *Railway Act* to create a first lien or mortgage upon the railway and its equipment in favour of His Majesty for the amount of the subsidies granted from time to time by the Dominion Government to the Hereford Railway Company, and for an order authorizing the sale of the said railway. The amount of the Dominion subsidies totals one hundred and seventy thousand five hundred and sixty dollars (\$170,560) according to the claim of the Minister of Railways and Canals filed before the undersigned on the reference as exhibit 15. Thereafter proceedings were taken by the Minister of Railways and Canals on behalf of His Majesty under the provisions of subsection 2 of section 160 of the *Railway Act* 1919, to enforce the lien for the subsidies paid in the Exchequer Court of Canada.

Follows a discussion, extending to three printed pages of the record, intended to demonstrate that section 160 should not be applied retrospectively, or, as it is said, so as to affect vested rights; from which the conclusion seems to be drawn that the statute does not apply in this case. Nevertheless, it is directed that the proceeds of the sale realized under the statute shall be paid to the bondholders, because, as is said, it is unnecessary for the Minister to exercise the powers conferred upon him by subsection 2 of s. 160 and it is suggested that a spirit of equity should control.

The case was heard upon appeal in this court, and, after hearing the appellant's counsel, a majority of the court was so fully satisfied with the result below that it was considered unnecessary to hear counsel for the respondents.

For my own part, I would not conclude a question adversely to a party who has not been heard, but perhaps I may be permitted to say with propriety that I would be surprised to find that any subsidized Dominion railway, including the defendant company, which

cannot, by reason of the condition of such railway or of its equipment, be safely and efficiently operated,

is not subject to the statutory provisions, and may not, when these have been complied with, as they admittedly have been in this case, and after notice to the president or manager of the company and the trustee of the bondholders, which is also for present purposes admitted, be sold



to satisfy the first lien or mortgage which the statute creates, and which is by its express direction due and payable to His Majesty. Moreover, if the statute applies, I am not convinced that the Exchequer Court has authority to regulate the exercise of the Minister's powers as to the application and disposition of the proceeds.

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*Appeal dismissed with costs.*

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Solicitors for the appellant: *Wilfrid Lazure.*

Solicitors for the respondents: *Frederick S. Rugg.*

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