Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Redfield, Farwell, and McIntyre, v. *the Corporation of Wickham, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered* 15*th February* 1888.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Respondent Corporation became subscribers for stock in the Richelieu, Drummond, and Arthabaska Counties Railway Company, which was incorporated by the Quebec Act, 32 Vict., c. 56, under an agreement by which the Company undertook to construct their line of railway so that it should pass through the municipality of the township of Wickham. By a provincial Act passed in the year 1872 (36 Vict., c. 51), the undertaking of the Arthabaska Company was amalgamated with that of the South-Eastern Counties Junction Railway Company, and a new Corporation formed, under the name of the South-Eastern Railway Company. The whole real and personal estate of the two Companies was transferred to the new Corporation, subject to the proviso that the rights and remedies of municipalities and other creditors, or of bondholders having mortgage on the real estate of either Company, should remain

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unimpaired, but that liabilities arising from tort, as contradistinguished from the separate debts and obligations contracted by either Company, were to attach only to the assets of the wrong-doing Company, existing at the time when the Act came into operation.

In virtue of the powers conferred upon it by the Act of 1872, the South-Eastern Company issued bonds or debentures hypothecating, (1) the Arthabaska Railway, which formed the northern section of its undertaking, to the amount of $150,000, (2) the Southern Counties Junction Railway, forming the southern section, to the amount of $750,000, and (3), the United Railway (which includes both sections), to the amount of 640,000*l.* sterling. In the year 1880 the whole of the northern section bonds, and the greater part of the southern section and united railway bonds were still outstanding, and the earnings of the Company were insufficient to pay the arrears of interest then due. In these circumstances the Legislature of Quebec passed an Act (43 & 44 Vict., cap. 49), which received Her Majesty's assent on the 24th July 1880, giving effect to the terms of an arrangement between the Company and its bondholders for the issue of new bonds, to carry a first mortgage and charge upon the entire undertaking, in substitution for the outstanding bonds already mentioned.

By that Act the Company was authorized to issue mortgage bonds, at the rate of $12,500 per each mile of railway constructed or to be constructed, up to a limit of two million dollars; and, for securing the due payment thereof with interest, to convey its entire property, including its franchise, to trustees in trust for that purpose. It was made lawful to insert in the trust conveyance stipulations as to who should have the possession and control of the franchise and

other property conveyed; and, in the event of default in payment of the bonds, or of any of the coupons thereto attached, for divesting the Company of all interest, equity of redemption, claim, or title in the said franchise and property, and vesting the same absolutely in the trustees. Section V. empowered the trustees, when and as often as default should be made, to "take possession of and run, operate, maintain, "manage, and control the said railway and other "property conveyed to them as fully and effec- "tually as the Company might do the same." The conveyance, when executed, was (Section 7) declared to be to all intents valid, and to have the effect of creating a first lien, privilege, and mortgage upon the railway and other property thereby conveyed.

In pursuance of the Act of 1880, the Company issued new mortgage bonds; and, on the 12th August 1881, executed a relative conveyance in trust, which contains a covenant entitling the trustees to enter into possession if default shall be made and continue for 90 days; and a further covenant for divesting the Company, in certain events, of all interest, equity of redemption, and claim or title, as in the Act provided. On the 5th October 1883, interest on the mortgage bonds being more than 90 days overdue, the Company, on the requisition of the trustees, and in compliance with the terms of the conveyance, gave them possession; and the trustees have since continued to maintain, work, and manage the railway, on behalf and at the expense of the bondholders, and have received the tolls and other profits of the undertaking. The Appellants are now the acting trustees under the conveyance.

Neither the Arthabaska Company nor the South-Eastern Company (to whom its contract obligations were transferred by the Amalgamation

Act of 1872), carried any part of their lines of railway through the municipality of the township of Wickham. In respect of that breach of agreement, the Respondents, on the 17th July 1880, just seven days before the Act 43 & 44 Vict., cap. 49, became law, brought an action of damages before the Superior Court of Quebec against the South-Eastern Company, in which they obtained a judgement, now final, for the sum of $22,280, on the 29th January 1883. Upon the 6th November 1883 a writ of Fi. fa., *de bonis et terris*, was issued; and, on the 19th of that month, the sheriff seized in execution and proceeded to advertise for sale the whole of the South-Eastern Company's railway, including both sections thereof, together with all the lands of the Company and buildings erected thereon, as well as the rolling stock and other appurtenances of the railway, which are *immeubles* according to the statute law of Quebec.

The Appellants then filed their opposition *afin de distraire*, their main ground of objection being that Article 553 of the Procedure Code only authorizes the seizure of immoveable property of the judgement debtor, which is in the possession of such debtor, whereas the railway seized was neither the property, nor in the possession of the South-Eastern Company, Their Lordships do not doubt that the effect of the trust conveyance of 12th August 1881, followed by possession in terms of the deed, was to vest the property of the railway and its appurtenances in the Appellants, and to reduce the interest of the South-Eastern Company to a bare right of redemption. In these circumstances, whatever might be his rights against the interest remaining in the Company, the property of the railway could not be attached by any judgement creditor of the Company who was affected by the provisions of 43 & 44 Vict.,

chap. 49. But Section XI. of that Act expressly provides that nothing therein contained shall in any manner affect suits then pending in any court of law; and the Respondents are within the exception, because the action in which their decree was obtained was actually in dependence at the time of its passing. It was argued for the Appellants that the exception is limited to suits during their dependence, and does not apply to proceedings taken in execution of a judgement after the suit is at an end. That construction of the clause would deprive it of all meaning. None of the provisions of the Act could by possibility affect the conduct of a suit instituted against the South-Eastern Company, although they are calculated to impair the Plaintiff's recourse against its property after he has obtained a decree. According to the provisions of the Civil Code (Art. 2034), a judgement ordering payment of a specific sum of money carries a hypothec upon the real as well as upon the moveable estate of the debtor; so that, apart from the provisions of the Act of 1880, the Respondents' judgement against the South-Eastern Company made the principal sum decreed, with interest and costs of suit, a charge upon the railway, enforceable in terms of law.

In the course of the argument, the Appellants maintained that the sheriff's seizure ought to be annulled, and proceedings stayed, on the ground that the railway, assuming it to be the property and in the possession of the Company, was not liable to attachment for judgement debts of the Company. That plea does not appear to have been taken, or discussed, in either of the Courts below; but, seeing that it involves considerations of public interest, and is sufficiently raised by the proceedings submitted to them, their Lordships conceive that they are bound to dispose of it.

The Appellants relied upon the authority of "Gardner *v.* London, Chatham, and Dover Rail-"way Company" (2, Ch. Ap., 201), and "*In re* "Bishops Waltham Railway Company" (2, Ch. Ap., 382). These cases, which were decided by Earl Cairns (then Lord Justice) and Lord Justice Turner, establish conclusively that, in England, the undertaking of a Railway Company, duly sanctioned by the Legislature, is a going concern, which cannot be broken up or annihilated by the mortgagees or other creditors of the Company. The rule thus settled appears to rest upon these considerations,—that, inasmuch as Parliament has made no provision for the transfer of its statutory powers, privileges, duties, and obligations from a railway corporation to any other person, whether individual or corporate, it would be contrary to the policy of the Legislature, as disclosed in the general Railway Statutes, and in the special Acts incorporating Railway Companies, to permit creditors of any class to issue execution which would have the effect of destroying the undertaking or of preventing its completion.

A different result was arrived at by the Court of Queen's Bench for Lower Canada in "The "Corporation of the County of Drummond *v.* "The South-Eastern Railway Company" (24, L. C. Jurist, 276). In that case the Corporation, who were the holders of a bond issued to them by the Richelieu, Drummond, and Arthabaska Railway Company, before the amalgamation, obtained judgement against the South-Eastern Company, and proceeded to take in execution, with a view to sell, a section of their railway. The Judge of the Superior Court quashed the proceedings, on the ground that the railway of a Company incorporated by statute could not be seized in execution of a judgement, or sold at a sheriff's sale; but his decision was reversed by a

majority of the Queen's Bench, who (Tessier, J., *dissentiente*) allowed the sale to proceed. Apparently, the Court did not in that case require to consider whether a judicial sale could have been permitted of such part of the railway property as would necessarily have had the effect of breaking up the undertaking, or of resolving it into its original elements. Mr. Justice Cross said (24, L. C. Jurist, 289) :—"I can see no "serious cause to apprehend that a change of "proprietorship would interfere with the obli- "gations which the road owes to the public, and "which the general laws affecting railroads "impose on whomsoever holds it. Should it "pass into the hands of individual proprietors, it "is nevertheless to a great extent subject to the "general laws enacted for the government, "control, and inspection of railways."

These observations strongly suggest that the legislation which the Court of Lower Canada had to consider, in that case, differs in material respects from legislation upon the same matters in this country. The learned Judge was speaking, in the year 1879, with reference to provincial statutes, which it is now unnecessary to examine, because the undertaking of the South-Eastern Company had become a Dominion railway, before the Respondent's writ of Fi.-fa was issued. Section 92 (10 c.) of "The British North America Act, 1867," excludes the authority of provincial Legislatures in regard to local works and undertakings which are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada. On the 25th of May an Act was passed by the Dominion Parliament (46 Vict., cap. 24), further to amend "The Consolidated Railway Act, 1879," and to declare certain lines of railway to be works for the general advantage of Canada; and the

enumeration of these lines in Section 6 includes the whole system of the South-Eastern Company, which is connected with the Grand Trunk Railway. Section 14 of the same Act provides that "if at any time any railway or any section "of a railway be sold under the provisions of "any deed of mortgage thereof, or at the in- "stance 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 cor- "porate powers authorizing the holding and "operating thereof," the purchaser must, within ten days from the date of his purchase, transmit to the Minister of Railway and Canals an intimation of the fact, describing the termini and line of route of the railway, and specifying the charter under which it had been constructed and operated. Section 15 provides that, until such intimation has been made and all information furnished which the Minister may require, it shall not be lawful for the purchaser to operate the railway; but that he may thereafter continue, until the end of the then next session of the Parliament of Canada, to work the railway and to take tolls, upon the terms and conditions of the previous owner's charter, unless these are varied by a letter of license, which the Minister is authorized to grant. Section 15 makes it the duty of the purchaser to apply to Parliament, during the next session after the purchase, for an Act of Incorporation or other legislative authority to hold, operate, and run the railway. If the application proves unsuccessful, it is in the discretion of the Minister to extend his license until the end of the next following session of Parliament, and no longer. Should the pur-

chaser, during the extended period, fail to obtain an Act of Incorporation or other legislative authority, then the railway must 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.

Comment upon these enactments would be superfluous. They do not suggest that, according to the policy of Canadian law, a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgement creditors or incumbrancers; but they clearly show that the Dominion Parliament has recognized the rule that a railway or a section of a railway may, as an integer, be taken in execution and sold, like other *immeubles*, in ordinary course of law. They justify the statement of Chief Justice Dorion, in the present case, that "it is now well settled by the jurisprudence pre-"vailing in this country, and recognized by the "Act 46 Vict., cap. 49, that a railway can be "seized and sold for the debts of the Company "who owns such a railway."

For these reasons, their Lordships have come to the conclusion that their judgement must be for the Respondents. They are not affected by the Act of 1880, and must, therefore, be placed in no worse, and at the same time, in no better position than they would have occupied if the Act had never passed. On the one hand, the railway taken in execution by the Respondents must, for all the purposes of these proceedings, be deemed to be still the property and in the possession of the South-Eastern Railway Company; and, on the other hand, the Appellants, as representing the present holders of mortgage bonds, must be taken as standing in the shoes of the bondholders whose debts were unpaid at the passing of the Act. The Appellants will

be entitled, in the present proceedings, to the benefit of all rights and preferences which were attached to these mortgage debts during their subsistence.

Their Lordships will accordingly humbly advise Her Majesty to affirm the orders appealed from, and to dismiss the appeal. The costs of this appeal must be borne by the Appellants.