1917
February 23.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

THE CITY SAFE DEPOSIT & AGENCY COMPANY, LIMITED,

PETITIONER;

AND

CENTRAL RAILWAY COMPANY.

Exchequer Court Act—Sections 26 and 27—Railway Act, section 142—Receiver, appointment of; Jurisdiction—Incidental proceedings:—

Held, that by section 26 of the *Exchequer Court Act* the Court is given jurisdiction to appoint a Receiver, as an incidental proceeding in an action, as an interim preservation of property, pending final disposition of the action for the sale or foreclosure, *but* that *it does not* confer a direct right of action limited merely to the appointment of a Receiver.

THIS is a Petition by the trustees to the bondholders of the Company praying *solely* for the appointment of a Receiver to the Central Railway Company, and without asking for the sale or foreclosure. The company was insolvent and had filed its Scheme of Arrangement as provided for by the Act, some time previous. The application was first heard on the 12th of January, 1917.

J. W. Cook, K.C., for petitioner.

W. D. Hogg, K.C., for the company.

On application of Mr. Hogg and after argument the matter was postponed to 23rd January.

Mr. Cook then stated he made his application through the trustees under the provisions of sections 26 and 27 of the *Exchequer Court Act* and section

142 of the *Railway Act* and that he considered the petitioners the only and proper persons to apply and by law the only ones having the right to apply. irrespective of anything in deeds. He read from sec. 142 of the *Railway Act*. He also filed various trust deeds and read portions and stated that he based his application entirely on the admitted insolvency of the company.

Mr. Hogg argued that the Court had no jurisdiction to appoint a Receiver on this application and argued at length that moreover the petitioner had not complied with the provision of the trust deed as to steps to be taken before they could make this application. This part of the argument need not be given here as the judgment turns on the question of jurisdiction alone.

On the 29th January, 1917, the court ordered further argument and called counsels' attention to the following two points among others.

1. Has the Exchequer Court any jurisdiction other than that conferred by section 26?

2. Under section 26, is not the right confined to a first mortgage?

On February 9th, 1917, there was a re-hearing and a further hearing.

A. W. Atwater, K.C., *J. W. Cook*, K.C., for petitioner.

W. D. Hogg, K.C., for the company.

Several points were argued at this hearing, but only the substance of the argument as to jurisdiction will be reported here as that alone is considered in the judgment.

Mr. Atwater, K.C., argued *inter alia* that the court's jurisdiction under section 26, of the

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Argument of Counsel.

Exchequer Court Act was not confined solely to the case of the first mortgage (reads the section, etc.) and drew particular attention to sub-section 3 and submitted that this gave the court the fullest and most complete power to do all conservatory acts which it, in its discretion might think necessary, to conserve the rights of the different creditors, in any case where application is made for sale or foreclosure.

That foreclosure proceedings are not necessarily precedent to the application for a receivership. The true construction of the first two lines of sub-section 3 are disclosed when it says: "The Exchequer Court in any of the cases in this secton mentioned. . ." That means that in any of the cases, whether the applications made should be for sale or for foreclosure, the applications may be made for any of the conservatory measures indicated by sub-section 3. As I understand the English authorities, in a mortgage action the Courts have always taken it as being within their powers to appoint a receiver where they saw a necessity for it either before or after the inception of proceedings by way of foreclosure.

If the circumstances disclosed to the Court justify proceedings by way of foreclosure, then the Court may apply all the conservatory remedies necessary to protect the interest of the creditor. "I think your "Lordship must conclude that this is a proper ap- "plication and one which is contemplated by the Act, "that a receiver should be appointed even if actual "proceedings by way of foreclosure have not already "been taken. I might cite at once to your Lordship "certain authorities that your Lordship may desire

"to refer to. I refer your Lordship, to 21 Halsbury "Nos. 464-6 and 27 Encyclopaedia pp. 1627-8."

In 21 Halsbury, section 464, it will be found that where there has been a breach of the mortgagor's obligations, or when, without such actual breach, the security is in jeopardy, the mortgagee can obtain the appointment of a Receiver by the Court. Appointment of a Receiver is made either as a step in an action brought to enforce the security, or in an action having the appointment of a Receiver as its sole object. Then, there is the case of *Taylor v. Emerson.*[1] In 24 Halsbury, section 630, page 343, there is the following citation:

"In the case of companies carrying on undertak- "ings of a public nature, mortgagees and holders of "debenture stock may, in certain circumstances ap- "ply to two justices for the appointment of a re- "ceiver without commencing an action."

I refer also to a case which, I think, bears out the view I am endeavouring to express. That is the case of the *Central Ontario Railway v. The Trusts and Guarantee Company,* reported in Law Reports.[2] The point in discussion was as to whether a creditor, even a mortgage creditor had the right to sell the railway because it was contended that in the public interest the railway should not be sold. The Privy Council eventually determined that it could be, but all the Courts, including the Judicial Committee of the Privy Council, conceded the right of a creditor to a receivership. It was argued on behalf of the railway, as a matter of fact, that that was the ultimate remedy, that they had a right to the receivership.

[1] (1843), 4 Dr. & War. 117.
[2] [1905] A. C. 576.

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The point I am endeavouring to make in this matter is only that a receivership has always been recognized as the legitimate and proper remedy. It has never been questioned, and the Privy Council has treated the right to a receivership as being an inherent right, as the only remedy that the creditor could exercise if there was no remedy by sale. There was never any question in any of the courts, either here or in Great Britain, as to the rights of a creditor, particularly of a mortgage creditor to have a Receiver appointed of the property that was pledged to him in order that he might manage it for his beneficial interest.

Mr. Hogg: What we say is that under the first mortgage deed they have not put themselves in a position to apply for a receivership. They must come within the requirements of the deeds.

In the first place, they have not placed themselves in that position by a proper resolution and, secondly, there has been no notice given to the company up to this moment declaring the principal due upon the mortgage of 1914.

Mr. Hogg denied the right to a receivership under the circumstances.

The facts are stated in the reasons for judgment.

Reasons for Judgment.

CASSELS, J., now (February 23rd, 1917) delivered judgment, as follows:—

The Petition in this case was filed asking for the appointment of a Receiver for the railway. The prayer of the petition, is as follows:

"Wherefore your Petitioner humbly prays that "by judgment to be rendered on the present ap- "plication, the said F. Stuart Williamson be ap-

"pointed as Receiver for the said Central Railway "Company of Canada, and that he be authorized "to take possession of the said railway and of all "the railway stock, equipment and other acces- "sories thereof, the whole under the direction of "this Honourable Court, the said Williamson be- "ing authorized generally to do all that is necessary "for the proper working, maintenance and ad- "ministration of the railway, with power in the "name of the company to institute or defend any "suit or action on its behalf; the whole according "to law."

The petition alleges that two deeds of trust were executed, one bearing date the 17th July, 1911, the other on the 5th May, 1914. The allegation in the petition, is as follows:

"18. The company respondent has practically "ceased to do business: the interest on its issued "bonds is long in arrears; all construction work has "long since been abandoned, and the only tangible "assets consist of some ties and rails lying in the "open at McAlpine; shares of stock in certain sub- "sidiary companies, which are of little or no value; "certain wharf properties at Carillon and Ottawa "and a small steamer known as 'The Empress', the "title to which your petitioner believes is in reality "vested in one of the subsidiary companies afore- "said. The value of the whole of the said assets to "the best of your petitioner's knowledge and belief "does not exceed the sum of $100,000, against which "are claims, according to the statement of the re- "spondent itself, aggregating over $2,000,000."

In other words, according to the allegation in the petition the assets, if realized in full, would net to

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the creditors about five cents on the dollar, from which would have to be deducted all costs connected with the realization of these assets.

On the application for Receiver, the case was fully argued in all of its aspects, and various points were raised on behalf of the defendants against the right of the petitioner to a Receiver. While I have considered all the questions raised, and the authorities cited, as I have come to the conclusion that I have no jurisdiction to grant the application, I think it better not to pronounce upon any of these questions, until such time if ever when the various points have to be passed upon.

The petition is confined merely to an application for the appointment of a Receiver. No other relief is asked, as a sale or foreclosure.

The jurisdiction of the Court is purely statutory. It is given by section 26 of the *Exchequer Court Act*. The court has jurisdiction to order and decree a sale in the manner indicated by sub-section (a), 1, 2 and 3, for foreclosure as indicated by sub-section (d).

Sub-section 3 of section 26 provides, as follows:

"The Exchequer Court, in any of the cases in "this section mentioned, shall have all the powers "for the appointment of a receiver either before or "after default, the interim preservation of the pro- "perty, etc."

I think it quite clear that the power to appoint the Receiver is intended for the interim preservation, pending the final disposition of the action for the sale or for foreclosure. It is what might be called an auxiliary or ancillary process with the object of preserving the property, pending the final de-

termination of the action; but, I do not think it ever was intended to confer a direct right of action limited merely to the appointment of a Receiver.

There have been several cases in the Exchequer Court where the sale of a railway has been ordered and a Receiver appointed. In every case, as far as I have ascertained there was always an action commenced by a statement of claim praying for the sale of the railway, and no case is there on the records of the Court, where the relief sought is confined merely to the appointment of a Receiver. The statute which I have referred to contemplates the appointment of somebody having powers greater than were given to the appointee commonly known as a Receiver. It applies to a Manager,—and there are also provisions authorizing the Receiver or Manager, under the direction of the Court, if necessary, to complete the railway. These provisions are in excess of the ordinary provisions which provided for the appointment of a Receiver alone.

In the earlier cases a Receiver appointed to a railway, could not interfere in any way with the management of the road. He simply received any surplus earnings there might be after payment of the working expenses. The courts were unwilling to take the management of the railway out of the hands of those entrusted to manage it under their acts of incorporation.

I have searched diligently through the various text-books and authorities, and I can find no case in which a Receiver has been appointed, except for the purpose of obtaining ancillary or auxiliary relief in the suit which has been instituted. I will deal

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later with the case cited by Mr. Atwater for the contrary proposition. In *Kerr on Receivers,*[1] it is stated: "Except in certain statutory cases, and in "cases of lunacy, the Court has no jurisdiction to "appoint a receiver unless an action is pending."

And the case cited of *Salter v. Salter*[2] a decision of the court of Appeal in England is strong authority for that proposition. Reference may also be made to Daniel's Chancery Practice,[3] where there is a collection of authorities.

In the American courts the law is equally clear. In *Smith on Receivers,*[4] a valuable American authority, it is stated, as follows: "It is a pre-"requisite that there shall be at the time of making "application a suit actually pending." And at page 35, section 13, of the same author, similar language is used.

In *"High on the Law of Receivers"*[5] referred to by the respondent's counsel, it is stated, as follows:

"Suit must be actually pending; allegations must "be specific. Ordinarily, unless perhaps in the case "of infants or lunatics, a suit must be actually "pending to justify a Court of equity in appoint-"ing a receiver. And since the Court is without "jurisdiction to appoint a receiver before the bill "is filed, the fact that the bill is subsequently filed "and that the receiver gives bond does not impart "any validity to the order. And the suit which "must be actually pending must be one in which the

[1] 6th ed. by F. C. Watmough, (1912), p. 147, ch. 5.
[2] [1896] P. 291.
[3] 5th ed., vol. 2, p. 1502.
[4] (1897), p. 26, sec. 9.
[5] 4th ed., p. 24, sec. 17.

"main relief sought is independent of the receiver-"ship."

Cook on Corporations.[1]

"In regard to the procedure in appointing a re-"ceiver a Court of Equity, as already stated, has "no power to appoint a receiver except in a pend-"ing suit."

My construction of section 26 of the *Exchequer Court Act*, would lead me without the aid of these English and American authorities to the same conclusion. It seems to me an absurdity that the court should undertake through their officers the management and control of a railway for all time, or at all events for such a time as would elapse before the payment of the bonded debts of the company.

I am referred by Mr. Atwater for a contrary view to the Laws of England,[2] which state as follows:

"Where there has been a breach of the mort-"gagor's obligations, or where, without such "actual breach, the security is in jeopardy, the "mortgagee can obtain the appointment of a re-"ceiver by the Court. The appointment is made "with a view to preserve the property if it is in "danger, or by intercepting the income, to provide "a fund for payment of the mortgage; and it is "made either as a step in an action brought to en-"force the security, or in an action having the ap-"pointment of a receiver as its sole object."

For this proposition the only case cited is that of *Taylor v. Emerson.*[3] An analysis of that case does not bear out the broad proposition as stated. In that case the only remedy which the plaintiff could

[1] 7th ed., p. 335, sec. 863.
[2] Earl of Halsbury, Vol. 21, p. 261, sec. 464.
[3] (1843), 4 Dr. & War., 117.

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be entitled to under the decisions of the Lord Chancellor, was the appointment of a receiver unless in fact another remedy was applied, namely, the removal of the trustee and substitution of a new trustee. In that case the plaintiffs filed their bill alleging that Porter the trustee appointed under the deeds referred to had not executed the same or gone into possession of the lands conveyed to him. They prayed that Emerson, who was the debtor, and who had conveyed the properties, might be ordered to convey to the plaintiffs or to a trustee for their use the said lands, and for a receiver. The plaintiffs in that case pressed that they were entitled as mortgagees. The Lord Chancellor in his written reasons for judgment points out, that this claim is not well founded. He held that on proper construction of the documents, the first trust to which the rents were to be applied was to pay the head rent,—the next was the premium on the policy of insurance. He says at page 123:

> "I think, therefore that the parties did not in-
> "tend that the amount of this debt should be
> "raised by a sale of the leaseholds; all that the
> "plaintiffs are entitled to is, that the trustee,
> "Porter, should enter into possession,"

or failing the trustee so entering and performing the duties cast upon him as a trustee,

> "the Receiver already appointed should be con-
> "tinued."

And he proceeds:

> "I shall direct the trusts of the deed to be car-
> "ried into execution, under the direction of the
> "court, and declare that the parties are not to be

"considered as mortgagees, or entitled to a sale."

The plaintiffs' only remedy in that case was to have the trustee Porter called upon to perform his duties. The only right which in any event the plaintiff was entitled to was that this trustee should receive the annual rents, pay the head rent, next the premiums, and then the balance of the rents to the plaintiff until his debt was wiped out. So while it is stated that a Receiver was appointed, in fact the Receiver merely took the place of the trustee to carry out the duties of the receipt of the rents and proper application thereof. I do not think this case has any application to the case in question.

I am of opinion that this present application should be refused. As I have stated, I think it wiser not to prejudice any of the parties in any future proceedings, by any views of mine unnecessary to the determination of the case. I think that under the circumstances of this case each party should bear their own costs.

The application is refused without costs to either party.

Judgment accordingly.

Solicitors for petitioners: *Cook & Magee.*

Solicitors for company: *Hogg & Hogg.*