

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Wickham and others v. the New Brunswick and Canada Railway and Land Company and others ; delivered 22nd December, 1865.*

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Present :

LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

THIS is an Appeal from an Order made by the Supreme Court of Judicature of New Brunswick affirming an Order made by one of the Judges of the Supreme Court refusing a motion for an injunction to restrain the Defendants in the suit from selling, and, if allowed to sell, from paying over, the proceeds of the sale of lands of the New Brunswick and Canada Railway and Land Company to certain judgment creditors of the said Company upon whose judgments executions had issued, and in the event of a sale to restrain the Sheriffs from paying over the proceeds of the sale to the Judgment creditors, and to order such proceeds to be paid over to a receiver previously appointed on the application of the Plaintiffs.

The Plaintiffs were the holders of certain mortgage debentures granted by the Company, and claimed under the terms of those debentures to have a right to prevent the sale of the lands under the executions issued by the Defendants the Judgment creditors, or at all events to be entitled to the proceeds of such sale.

There is no doubt upon principle, as well as on the authority of the cases cited in the argument at the Bar, that the right of a Judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff with all the charges and incumbrances, legal and equitable, to which it was subject in the hands of the debtor. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has the right to take. This case, therefore, depends entirely upon the question what, as between the New Brunswick and Canada Railway Company and the debenture holders, was the interest which the Company had in the lands taken in execution by the Judgment creditors. The title of the Company depends upon a private Act of the Imperial Legislature, 21 and 22 Vict., cap. 154, by which the undertaking of the St. Andrew's and Quebec Railroad Company was transferred to them in pursuance of an agreement entered into between the two Companies which is set out in the Schedule to the Act.

Under this agreement the shares of a class of shareholders in the St. Andrew's and Quebec Company called the Class A Company were to be transferred to the Transferee Company, and the Class A Company were to be entitled to receive the quantity of 42,670 acres, in addition to a quantity of 20,630 acres already granted to them. And the Transferee Company were to be entitled to appropriate out of the lands to be granted to them 16,000 acres of land in respect of their Class A shares, and 105,000 acres in respect of their Class B shares.

Both in the agreement and in the Act confirming it a marked distinction appears to be made between the undertaking itself of the St. Andrew's and Quebec Railroad Company and the lands and other property belonging to the Company. In the agreement the Companies mutually agree with each other that the undertaking of the St. Andrew's and Quebec Railroad Company, and the control and management thereof (*i.e.*, of the undertaking), and all the lands, goods, chattels, and present and future property and effects, rights, and expectancies of the St. Andrew's and Quebec Railroad Company shall

be and are hereby transferred to the Transferee Company. And the 3rd section of the Act confirms the agreement in these words: "the transfer by the same agreement of the said undertaking and of the same lands, rights, and expectancies to the Company is hereby confirmed, and the same undertaking, lands, rights, and expectancies shall from and after the passing of this Act be vested in the Company." It will be necessary to bear this distinction in mind in determining what were the rights which were acquired by the Appellants under the terms of the debentures issued by the Company.

The Company, it appears, was by its constitution a Land as well as a Railway Company. Of course it was essential to the carrying out of the objects of this part of their undertaking that they should have the power of dealing freely with the lands belonging to them, and as they were also to be entitled to appropriate a large quantity of these lands to their shareholders, that they should not be restricted in the exercise of this right of appropriation.

The debentures which the Company issued to the Appellants and others seem to have been framed with a special view to these objects.

The one given to Mr. Wickham, one of the Appellants, is printed in the proceedings as a specimen of them all. It is an indenture of mortgage, dated May 29, 1862, made between the Company of the one part, and Mr. Wickham of the other part. It recites the advance by him of 1,000*l.* to the Company on condition that they will repay the same to him on the 1st January, 1867, with interest in the meantime at the rate of 6 per cent. per annum, by equal half-yearly payments on the 1st July and the 1st January in every year. It then proceeds, "Now it is hereby witnessed that for securing the said advance and interest, the said Company hereby grant to the said Henry Wickham Wickham, his executors, administrators, and assigns, the undertaking of the said New Brunswick and Canada Railway and Land Company, and all moneys to arise from the sale of the lands of the said Company for the time being, and all future calls on shareholders of the said Company, and all the tolls and sums of money which shall become due to the said Company, including the provisional guarantee, and also all engines, tenders, passenger and other

cars, and every description of rolling stock, rails, sleepers, goods, and chattels of the said Company whatsoever or wheresoever being, and all the estate, right, title, and interest of the said Company in the same."

It is then declared that if the Company fails in paying the said principal or interest moneys on the days specified for payment, Mr. Wickham may, upon giving three months' notice to the Company, enter upon the receipt of the said proceeds of sales, tolls, calls, and sums of money which may thereafter become due to the said Company in any manner from or in respect of the said undertaking, and upon the absolute possession of the said engines, tenders, cars, rolling stock, rails, sleepers, goods, and chattels of the said Company before mentioned, and the said road and the entire charge, control, and working thereof, and reimburse himself thereout the sums due upon his security and his expenses. And the debenture closes with a proviso in these terms: "Provided also, that nothing herein contained shall be held to limit the power of sale or appropriation by the said Company of any of the lands of the said Company, nor constitute a charge upon the same."

It was contended on the part of the Appellants that these debentures transferred to the mortgagees all the property of the Company without any exception; for that the undertaking itself being granted, the lands which are a portion of the undertaking must necessarily pass under that word. On the other side, the case of *Doe dem. Myatt v. The St. Helen's and Runcorn Gap Railway Company* (2. Q. B. 364) was cited to show that the mortgage by a Railway Company of their undertaking did not give the mortgagee any title to land so as to enable him to maintain ejectment. That case did not determine that the conveyance of an undertaking by a Railway Company would in no case carry the land; but, as was said by Mr. Justice Coleridge, "The word is ambiguous and may be construed as meaning the speculation generally, or possibly it might be taken to include the land itself."

Having, then, no certain and settled meaning, when this word is used in any conveyance of property by a Company, it must be construed according to the obvious intention of those who employ it.

As a guide to its meaning in the debentures in

question, reference may again be made to the agreement and the Act, transferring the undertaking to the New Brunswick and Canada Company, and to the manner in which the undertaking and the lands are in expression (at least) distinguished from each other. Turning from them to the debenture it will appear that this distinction is not only preserved but strengthened. For as if to show in the clearest manner that the word "undertaking" was not intended to include the lands belonging to the Company, it is immediately followed by a grant of all monies to arise from the sales of such lands. Now if it was intended to comprehend the lands themselves in the mortgage debentures, or if the word "undertaking" would *ex vi termini* contain them, the debenture holders would not only have been entitled to, but would have had the complete control over the proceeds of the sales of lands, as the Company could not have sold without their consent, and it would, therefore, have been quite unnecessary to provide specifically for their having the monies to arise from the sales. It ought, perhaps, also to be noticed that even when provision is made for the default of the Company by non-payment of the principal or interest secured by the debentures, the right of entry which is given to the debenture holders is not upon the lands themselves, but only upon the receipt of proceeds of sales. But if any doubt exists upon these terms of the debenture the proviso must entirely remove it. It has been already observed that the Company is a Land Company, whose very object is to deal with and dispose of lands, and that it has a right to appropriate portions of these lands to its shareholders. With these operations, any interest in or charge upon the lands would materially interfere. The words of the debenture are so sweeping and general that it might well be supposed they would give the mortgagees the right to every description of property belonging to the Company. Therefore, to prevent any misconception, the proviso in express and clear terms says to the mortgagees, what has been previously granted to you shall not limit the power of sale or appropriation by the Company of any of the lands of the Company, nor constitute a charge upon the same. In this view the proviso is not inconsistent with but merely explanatory of what has gone before; but, according to the Appel-

lands, the meaning of the proviso is, that although all the lands are granted to the debenture-holders, yet in every instance in which the Company wishes to exercise its power of sale or of appropriation the charge upon the particular lands is to be withdrawn, but to remain upon the unsold and unappropriated residue. It is not, however, usual to treat the actual right to lands as a mere charge upon them; and as the power of sale and appropriation extends to any and all of the lands of the Company, it does seem unreasonable, upon the Appellant's construction, that all the lands should be given to the mortgagees as a part of their security, and a power left in the Company immediately to take them all away again. It seems clear to their Lordships that the lands not being in terms granted by the mortgage debentures, the proviso makes the intention of the parties perfectly clear that no general expression used in the grant was intended to comprehend them, and therefore that the debenture-holders are not entitled to interfere with the sale of the lands under the execution issued by the Judgment creditors.

But the debenture-holders insist that if they cannot stop the sale of the lands, they are entitled, under the terms of their debentures, to all the moneys arising from such sale. It is quite clear, however, that the sales contemplated by the grant are those which are to be made by the Company in the course of their regular operations. It was contended on the part of the Appellants, that the sale under the execution would be virtually a sale by the Company, as the title of the Judgment creditors is derived from them. But that is not so. The Judgment creditors take what belonged to the Company, but do not take under them; and a sale by the Sheriff under an execution is a sale by the law, and not by the Company.

It is clear, upon the whole case, that the lands of the Company did not pass to the mortgagees under the debentures, nor are they entitled to the proceeds of the forced sales.

Their Lordships will therefore recommend to Her Majesty that the Decree appealed from be affirmed, and the Appeal be dismissed with costs.

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