

EXCHEQUER COURT OF CANADA

BETWEEN:—

THE MINISTER OF RAILWAYS AND
CANALS FOR THE DOMINION OF
CANADA } PLAINTIFF;

v.

THE HEREFORD RAILWAY COMPANY. DEFENDANT.

IN RE

STEPHEN N. BOND AND JAMES
MACKINNON, IN THEIR QUALITY OF
TRUSTEES FOR THE BONDHOLDERS OF THE
DEFENDANT COMPANY (CLAIMANT)... } RESPONDENT.

AND

THE MINISTER OF RAILWAYS AND
CANALS (CONTESTING CLAIM)..... } APPELLANT.

*Railways—Incorporation under Special Act—Bondholders—Subsidies—
Priority—Vested Rights—Railway Act, 1919—Retrospective
Effect*

The railway company had been incorporated under the provisions of ch. 93 of the Dominion Acts of 1887. Under certain provisions of that Act the company was empowered to issue bonds secured by a mortgage deed upon the property, assets, rents and revenues of the com-

- (1) (1817) 1 B. & Ald. 94.
- (2) (1827) 6 B. & C. 430.
- (3) (1824) 1 Car. & P. 538.
- (4) (1800) 1 East 643 (Note).
- (5) 1928 A.C. 340; 1927 S.C.R. 583.

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pany. These bonds were to be a "first preferential claim" upon the property of the company. Bonds were issued in the year 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 such subsidies, and for an order authorizing the sale of the railway. The railway was sold under order of Court, and the Minister of Railways claimed to be entitled to receive the purchase money paid for the railway on account of the subsidies that had been granted to the company. By section 3 of the Railway Act of 1919 it was provided that where any railway was incorporated under a special Act, and where the provisions of the Act of 1919 and of any such special Act related to the same subject matter, the provisions of the special Act should be taken to override the provisions of the Railway Act.

Held, that the lien conferred in favour of the Crown by section 160 of the Railway Act of 1919 could not be given priority over the claim of the bondholders, the same having become a vested right prior to the statute of 1919.

2. The general rule as to the retroactive effect of statutes affecting prior vested rights discussed.

An appeal from the report of the Registrar Acting as Referee.

The facts leading up to the reference are as follows: The defendant company was sold under a judgment of this court, rendered in an action brought by the Minister of Railways and Canals, under the provisions of sections 26 et seq. of the Exchequer Court Act. The proceeds of such sale were deposited in court, and creditors of the railway and claimants to such money or any part thereof, were notified through the newspapers to file their claims. In answer to said notice, a number of municipal and school corporations filed claims for taxes due, but the only two claims which were contested, and which it is necessary to refer to here are the claims of the Trustees of the bondholders under the Deed of Trust, and that of the Minister of Railways and Canals, to the whole amount paid into court. The nature and amount of these claims are fully explained in the Report of the Referee, the material parts of which are given below:—

THE REGISTRAR, under the order of reference, reported [February 28, 1928] as follows:—

“ PART III

“ DISPOSITION OF CONFLICTING CLAIMS OF THE MINISTER OF RAILWAYS AND CANALS, AND TRUSTEES FOR THE BONDHOLDERS TO THE MONEYS DEPOSITED IN COURT AS REPRESENTING THE PURCHASE MONEYS ON THE SALE OF THE RAILWAY.

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In this connection the Undersigned had to consider the following:—

CLAIMS

- A. The claim of the Trustees of the Bondholders of the Hereford Railway under the Trust Deed of October 24, A.D. 1890. The amount so claimed is the amount of the proceeds of sale, namely, \$46,378. (Reference Exhibit No. 14.)
- B. The claim of the Minister of Railways and Canals to the payment of the proceeds of sale of the Hereford Railway to the Canadian Pacific Railway Company, namely, the same amount as that claimed by the Trustees of the Bondholders in the above item \$46,378. (Reference Exhibit No. 15.)

CONTESTANTS

- C. A contestation of the claim of the Minister of Railways and Canals by the Trustees of the Bondholders. (Reference Exhibit No. 16.)
- D. A contestation by the Minister of Railways and Canals of the claim of the Trustees of the Bondholders. (Reference Exhibit No. 17.)

Substantially the only contention between the parties on the whole Reference was as to whether the proceeds of the sale of the railway to the Canadian Pacific Railway Company, amounting to the sum of Forty-six Thousand Three Hundred and Seventy-eight Dollars (\$46,378), should be directed to be paid to the Trustees of the Bondholders or should go to the Minister of Railways and Canals as representing the Crown in the right of the Dominion of Canada, after satisfying the claims for Working Expenditure.

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In order to have a clear understanding of the position of the parties on the Reference it is necessary to summarize the history of the Hereford Railway Company and its dealings with the Dominion Government, its bondholders, and the Maine Central Railroad Company.

The Hereford Branch Railway Company was incorporated under the provisions of Chapter 93 of the Dominion Acts of 1887. By an amending Dominion Act (being Chapter 81 of the Dominion Acts of 1888), the name of the Company was changed to "The Hereford Railway Company" (section 1). The road was constructed with the aid of Dominion and Provincial subsidies. Under the provisions of sections 11, 12, and 13 of The Incorporating Act of 1887 the Company was empowered to issue bonds secured by a mortgage deed upon the "property, assets, rent and revenues of the Company, present or future or both, as shall be described in the said deed." By the amending Act of 1888 above referred to, the amount of the bond issue was limited to Fifteen Thousand Dollars (\$15,000) per mile (section 8 of Chapter 81 of the Dominion Acts of 1888.)

Bonds to the amount of eight hundred thousand dollars (\$800,000) were issued by the Company bearing date the 1st day of October, A.D. 1889. These bonds were exchanged under the authority of the Dominion Acts, 53 Vict., Chapter 72, for an issue of bonds for the same amount bearing date the 1st day of May, A.D. 1890. The bonds issued on the 1st October, A.D. 1889, were duly cancelled, and the new issue delivered to the holders of the prior issue of bonds. These bonds by their express terms constituted a mortgage and privilege upon the property of the railway and its assets, rents and revenues; and contained a reference to the Dominion Acts, 50-51 Vict., Chapter 93 (1888) which ranked them as a first preferential claim upon the Company and its property, save as to the working expenses of the railway.

By the Dominion Act, 53 Vict., Chapter 73, the Company was empowered to lease its railway, franchises, etc., to the Maine Central Railroad Company, and a lease was passed between the parties on the 28th day of August, A.D. 1890, for the term of 999 years. (Exhibit A on the Reference.) By this lease the Maine Central Railroad Com-

pany undertook, *inter alia*, to guarantee and endorse the bonds issued by the Hereford Railway Company, and also to become bound by the provisions of a mortgage deed subsequently to be executed by the Hereford Railway Company and the Trustees of the Bondholders. Under this lease the Maine Central Railroad Company operated the railway until the 1st day of November, A.D. 1925.

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On the 24th day of October, A.D. 1890, the mortgage deed referred to was duly executed between the Hereford Railway Company and the Trustees of the Bondholders in notarial form (Exhibit A at the trial). By the terms of the Trust Deed the Maine Central Railroad Company was obliged to become the guarantor of the principal and interest of the bonds issued by the Hereford Railway Company and to endorse the said bonds. The Trust Deed recites on page 3 that the Maine Central Railroad Company "has been made subject to this mortgage deed and to the conditions thereof." The Trust Deed purports to 'mortgage and hypothecate' the railway, with its building plant and appurtenances and assets, to secure the payment of the said bonds, and the mortgage is made subject only in priority to the working expenses of the railway.

The lease of the railway to the Maine Central Railroad was cancelled by the parties thereto by indenture dated the 11th day of September, A.D. 1925. (Exhibit B on the Reference). No legislative authority was obtained by the parties to the lease for its cancellation, although as has been seen the Dominion Parliament authorized the lease to be made in the first instance. By the instrument cancelling the lease it is provided that such cancellation is subject "to whatever rights the bondholders of the Hereford Railway Company may have in virtue of said lease." It is also provided that "this indenture shall not be construed to enlarge, abridge, or affect the obligation of the said Maine Central Railroad Company as guarantor of the mortgage bonds of the said the Hereford Railway Company now outstanding." So that as a matter of fact the bondholders are in no way prejudiced by the cancellation of the lease. Their rights against the Maine Central Railroad Company as guarantor of the bonds, are not impaired. By the said indenture it was also provided that the Maine Central Railroad Company would "assume and pay the interest

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on the first mortgage bonds of the Hereford Railway Company at present outstanding as the same may become due." Such interest to be paid from the 1st day of November, A.D. 1925, until the maturity of the said bonds. By the cancellation of the lease also the Maine Central Railway Company undertook to buy all the shares of the capital stock of the Hereford Railway Company at Sixty Dollars (\$60) a share. Mr. Rugg stated, and his statement was not disputed by Mr. Lazure on behalf of the Crown, that the bonds are being retired by the Maine Central Railroad Company from time to time as they are presented through the banks. Mr. Rugg also stated that of the eight hundred thousand Dollars (\$800,000) of bonds issued there was only Twenty-five Thousand Dollars (\$25,000) represented originally in the books of the Company, and the whereabouts of the other Seven Hundred and Seventy-five Thousand Dollars (\$775,000) of bonds are not known. (See pp. 19 and 20 of the proceedings on the Reference.)

Some time after the cancellation of the lease, namely, on the 1st day of November, A.D. 1925, as mentioned above, the Maine Central Railroad Company abandoned the operation of the railway. 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 Railways Act, 1919, to enforce the lien for the subsidies paid, in the Exchequer Court of Canada.

In his argument before the Undersigned in support of the claim of the Crown to receive the amount of the purchase money of the railway, paid into court by the Canadian Pacific Railway Company, Mr. Lazure contended that section 160 of the Railway Act, 1919, should be read as having a retrospective operation, so that it would give a remedy to the Crown in the case of these subsidies paid to the Hereford Railway Company although such subsidies were granted and paid to the Company before the Railway Act of 1919 came into operation. As a matter of fact the provisions of section 160 of the Railway Act of 1919 were first enacted in the year 1911. (See 1-2 Geo. V, Chapter 22, section 13.) But of course on that date also the Crown could not maintain its claim unless a retroactive effect was given to the statute of 1911.

Accepting it as an axiom of construction that statutes are not to be taken as having a retroactive operation unless express words are used for the purpose or unless there is an implication of retroactivity necessarily arising from the language used (Craies Statute Law, 3rd Ed., p. 329), and finding, as I do, that there are no such express words in the enactment, I am of the opinion that in such a case as the present there is no implication of retroactivity inhering in the language of section 160 of the Railway Act of 1919 (R.S.C., 1927, c. 170). By the provisions of that section where a railway company has been subsidized by the Dominion Government, and can be shown not to operate the railway safely or efficiently, the Minister of Railways and Canals may apply to the Board of Railway Commissioners for an order to put the railway or its equipment, or both, in a safe and efficient condition. If the Company fails to comply with an order of the Board obtained in pursuance of this section the Minister of Railways and Canals may, after certain formalities required by the Act have been satisfied, obtain 'a first lien or mortgage' upon the railway and its equipment for the amount of the subsidy granted by the Dominion Government, and such lien may be 'enforced by His Majesty in the same manner and by

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the like proceedings as any other lien upon property may be enforced by His Majesty in the Exchequer Court of Canada.'

Now the effect of the retrospective operation of this section, which counsel for the Minister asks the court to recognize, would be to displace a prior 'first preferential claim' upon the property of the railway which had been granted to the bondholders of the Company by the provisions of the 13th section of Chapter 93 of the Dominion Acts of 1887, that is to say, the Act incorporating the defendant railway company.

To give effect to the contention of the counsel for the Crown would simply amount to removing or taking away a vested right, and there is always a presumption against such being done where there are no express words to be found in the statute for the purpose. (See Craies 3rd Ed., pp. 109 and 112.)

It appears to the Undersigned that there is nothing in the language of section 160 of the Act of 1919 to justify the presumption that the Parliament of Canada intended to give the language used a retroactive effect. Whatever may be thought of the spirit of equity that infuses this legislation considered in relation to those who might have become the holders of the bonds of the Hereford Railway Company at a period subsequent to the year 1911, it is reasonably clear that no retroactive effect should be given to the legislation so as to deprive purchasers of bonds prior to 1911 of their vested right to preference under the Special Act of 1887 incorporating the Hereford Railway Company.

The rule against retroactivity by forced construction can hardly be better put than it was by Lord Selborne in the case of *Main v. Stark* (1).

Their Lordships of course do not say that there might not be something in the context of an Act of Parliament, or to be collected from its language which might give to words *prima facie* prospective a larger operation; but they ought not to receive a larger operation unless you find some reason for giving it. . . . That operation, would in the first place be contrary to general principles. Even if there were not on the face of the Act something affirming those principles, words not requiring a retrospective operation, so as to effect an existing status prejudicially, ought not to be so construed.

I repeat that I can find nothing in the language of section 160 upon which to successfully found the contention

(1) (1890) 15 A.C. 384, at p. 387 and 388.

that it should be given a retrospective operation so as to cut out the vested rights of the bondholders and previous legislation of the Dominion Parliament.

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A construction of section 160 that would confine it in its operation to matters arising subsequent to it becoming law, receives much support from the further principle of statutory construction that all the parts or sections of a statute should be read together so that no part should be segregated from its context or any pertinent section of the statute be disregarded, in order to place a forced meaning on any particular provisions of the statute. This is the principle known as construction *ex visceribus actus*. In the *Lincoln College* case (1), Sir Edward Coke says:

The office of a good expositor of an Act of Parliament is to make construction on all the parts together, and not of one part only by itself. And in his Institutes, 1 Inst. 381 b. Coke says:

It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers . . . and this exposition is *ex visceribus actus*.

Following the principle in the rule last mentioned and turning to section 3 of the Act of 1919 we find cogent reason for excluding any implication of retrospective operation of the provisions of section 160. Section 3 reads as follows:

3. Except as in this Act otherwise provided (a) this Act shall be construed as incorporate with the Special Act; and (b) where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act, shall, in so far as is necessary to give effect to such special Act, be taken to override the provisions of this Act. R.S., c. 37, s. 3.

What could be more explicit of the intention of the Legislature to keep alive vested rights, such as those of the bondholders of the Hereford Railway Company, under section 12 of the Special Act of 1887, than the language used in section 3? In the first place Parliament declares that the General Act of 1919 shall be construed as "incorporate with the Special Act" and secondly, where the provisions of the General Act and of any Special Act "relate to the same subject-matter" the provisions of the Special Act in order to make it effective shall be taken to "over-ride the provisions" of the General Act. The subject-matter dealt with by the pertinent sections of the Special Act and the Railway Act of 1919 is undoubtedly one and the same, namely, priority of rank as a creditor or claimant.

(1) (1595) 3 Co. Rep. at 59 b.

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Clearly there is no advantage to be gained by discussing further the doctrine of implied retroactivity or retrospective operation of section 160 as regards the year 1911 or the year 1919. Confining himself now to a consideration of the effect of the provisions of section 160 of the Railway Act of 1919 as to disposing of the amount of the purchase money paid into Court by the Canadian Pacific Railway Company, the Undersigned feels it desirable to quote the concluding portion of subsection 2 as follows:

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. Any moneys 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. 1911, c. 22, s. 13 Am.

It is not necessary to say anything about the appointment of a Receiver, because that was rendered unnecessary by the manner in which the proceedings have been conducted before the court, the parties having entirely concurred in the view that it was not necessary to appoint a Receiver.

Then there was no suggestion and no evidence offered to show that the Minister intended, with the consent of the purchaser, to apply the proceeds of the sale towards the repair and equipment of the railway; indeed by reason of the understanding between the Minister of Railways and Canals and the Canadian Pacific Railway Company, the purchaser of the railway in question, it has become unnecessary for the Minister to so apply the moneys realized from the sale. This is established by the terms of the tender for the purchase of the railway submitted by the Canadian Pacific Railway Company on the 2nd day of May, A.D. 1927, and appearing of record herein. By the terms of the tender the Canadian Pacific Railway Company stipulated that it should not be required to operate at any time those portions of the railway between Cookshire and Lime Ridge and between Malvina and the international boundary, but should be at liberty to take up the rails and fastenings of the said portions of the railway and dispose of the same, or any part thereof, as to it may seem

fit. Then it was further stipulated in the Tender that the Canadian Pacific Railway Company would, within three months from the completion of the purchase, commence the operation of the portion of the railway between Cookshire Malvina with at least three mixed trains a week each way, subject to the law governing railways and subject to the jurisdiction of the Parliament of Canada. Furthermore the said terms of the Tender are embodied in the Deed of Sale to the Canadian Pacific Railway Company executed by the Registrar of this Honourable Court on the 6th day of August, A.D. 1927. A duly authenticated copy of such Deed now remains on the files of this court.

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By the arrangement so appearing in the Tender of the Canadian Pacific Railway Company and embodied in the Deed of Sale, the Minister is relieved of the necessity of applying the purchase moneys towards the repair and improvement of the railway and its equipment as mentioned in subsection 2 of section 160 of the Railway Act of 1919. That being so, the Minister is also relieved of paying the money "to the Company owning the railway at the time of the sale, as provided in the said subsection 2." So that in the last analysis it must be found that the duty cast upon the Minister in the circumstances of this case by the provisions of the said subsection is to pay the said purchase moneys "to the Trustee for the holders of any outstanding bonds or other securities secured by mortgage or otherwise upon such railway."

THEREFORE the Undersigned, for the reasons above stated, is of opinion that the claimant, the Minister of Railways and Canals has failed to establish his claim to the proceeds of the sale of the Hereford Railway, and that such claim should stand dismissed, and the claim of the Trustees of the Bondholders to such proceeds allowed, and the balance thereof remaining after the payment of the other claims set out in Part IV of this Report be paid over to the said Trustees upon the production by them of bonds in equal amount to the balance of the moneys so remaining in court."

A consent was filed to the payment out of those claims which were not contested, and the Minister of Railways and Canals appealed from this report by way of motion to vary the same in conformity with his claim as filed, and the Trustees moved to affirm the Report, and for a judg-

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ment that the balance of the money in Court be paid them, for the bondholders. These two motions were heard before the Honourable Mr. Justice Audette at Ottawa, on the 20th April, 1923.

Mr. Wilfrid Lazure, K.C., for plaintiff.

Mr. Rugg, K.C., for Trustees for the bondholders.

AUDETTE J., now (October 18, 1928), delivered judgment.

This matter comes now before this court, upon a motion on behalf of the trustees for the bondholders to confirm the Referee's Report, and upon a motion by way of appeal by the plaintiff from the said Report in respect of the collocation of the moneys to the bondholders.

By an Order of this court of the 30th December, 1927, the matter of the disposition of the proceeds realized from the sale by the defendant's railway was referred to the Registrar of this Court for inquiry and report, and more especially, 1. to investigate, inquire and report upon all claims herein to the proceeds of the sale of the railway; to hear evidence in respect thereof and any contestation of such claim.

2. And to determine the respective ranks and privileges of the creditors. The Referee filed his report on the 28th February, 1928.

There seemed to be no reason in this case that the moneys should go back to the Crown to be paid to the purchasers of the railway for the repairs and improvement of the same. There is no occasion to pay back to the purchasers, the Canadian Pacific Railway Company, any part of their purchase money, as so prosperous and efficient a corporation is obviously in a position to satisfactorily operate the railway and to improve it when occasion arises, as undertaken by them by the conditions and terms of sale. The moneys should go to the bondholders.

I have heard both parties on the issue in question upon their argument submitted in writing, and after due deliberation I have come to the conclusion to grant with costs the bondholders' motion for judgment pursuant to the Report, and to dismiss with costs the plaintiff's motion by way of appeal, and to order and adjudge that all moneys be paid to the claimants accordingly.

Judgment accordingly.