

BETWEEN

1908
 Feb. 13.

THE ROYAL TRUST COMPANY, }
 A BODY POLITIC AND CORPORATE, HAVING }
 ITS PRINCIPAL PLACE OF BUSINESS IN THE }
 CITY OF MONTREAL } PLAINTIFF ;

AND

THE ATLANTIC AND LAKE SUPER- }
 RIOR RAILWAY COMPANY, A }
 BODY POLITIC AND CORPORATE, HAVING ITS }
 PRINCIPAL PLACE OF BUSINESS IN THE }
 CITY OF MONTREAL, AND THE CREDITORS }
 OF THE ATLANTIC AND LAKE SUPERIOR }
 RAILWAY COMPANY..... } DEFENDANTS.

Railway—Insolvency—Pleading—Amendment—New issue—Application made too late—Status of creditor as mortgagee of bonds and trustee—Reference to Registrar.

In this case, certain of the defendants, who were creditors of the railway company defendant, asked leave during the progress of the trial to amend their defence by setting up non-compliance by the railway company with certain statutory requirements as to the issue of bonds.

Held, that the amendment asked would result in raising a new issue between the parties, and the application should be refused as having been made too late.

2. By its statement of claim the plaintiff company asked, among other things, that certain mortgage bonds of the defendant company held by them together with a mortgage deed in favour of the plaintiff, as trustee, made by the defendant company to secure certain bonds or debentures, be declared a "first claim and privileged debt" ranking on the property of defendant company's railway.

Held, that judgment should be entered, declaring that said mortgage bonds and trust deed constituted "a claim and privileged debt," but that their rank, amount and priority should be determined by the Registrar of the Court, to whom a general reference was directed to take accounts and ascertain what was due to the several creditors and what the priorities were as between them, and whether there were any prior claims, and, if any, for what amounts respectively.

THIS was a case instituted by a statement of claim, alleging the following facts:—

1. By the Statute of Canada, 56 Victoria, chap. 39, the Defendant, the Atlantic and Lake Superior Railway Company was authorized to issue bonds, debentures, or other securities to the extent of \$25,000 per mile of its railway and branches, and such bonds, debentures or other securities were, in the event of their being issued, to be a first preferential claim and charge upon the company, and the franchise, undertaking tolls and income, rents and revenues, and real and personal property thereof.

2. In pursuance of the power thus given by said statute, the said company did, on or about the 31st day of December, 1894, at the City of Montreal, duly execute a certain indenture or mortgage deed in favour of certain trustees therein named to secure bonds or debentures to the amount of £500,000 sterling, duly issued by the said company defendant; the same as more specifically set up in a copy of the said indenture or Deed of Trust produced herein as Plaintiff's Exhibit No. 1.

3. By the said Indenture or Mortgage Deed, the company defendant created, in favor of the said trustees for the bondholders, a first mortgage upon the whole of its property, assets, rents and revenues, present or future; the whole as appears by the said deed.

4. On the 10th day of June last, the petition of the directors of the said company defendant, for confirmation of a certain scheme of arrangement with its creditors, duly filed in this honourable court, pursuant to the provisions of section 365 of the Railway Act, was granted, and on the 11th day of July instant, the said scheme was duly enrolled in the said Exchequer Court.

5. By the said scheme of arrangement, The Royal Trust Company, the plaintiff herein, was duly appointed trustee for the bondholders of the said company defendant.

6. On the 19th of July instant, at the City of Montreal, by the ministry of John Fair, Notary Public, the said

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the Royal Trust Company, duly presented for payment to the said company defendant, the coupons of the bonds hereinabove mentioned, and more specifically set up in a copy of the demand for payment, and produced herein as Plaintiff's Exhibit No. 2.

7. Upon such demand of payment and protest, the said company refused payment, and declared that it had no funds available for the payment of the said coupons.

8. The said the Royal Trust Company, present plaintiff, is a holder of a first mortgage or preferential claim and charge upon the said company, its franchise, undertaking, tolls and income, rents and revenues, and real and personal property.

9. The said company defendant, the Atlantic and Lake Superior Railway Company, is and has been for a long time past unable to pay its debts as they became and become due, has acknowledged its insolvency and is insolvent within the meaning of the law.

10. The plaintiff claims as follows:—

(a) A declaration that the Mortgage Bonds issued by the Atlantic and Lake Superior Railway Company and the Deed of Trust mentioned in paragraph 2 of the Statement of Claim have created and constituted and constitute a first claim and privileged debt, ranking on the property of the said railway.

(b) An account of what is due to the plaintiff under the foregoing Mortgage Bonds and Trust Deed for principal, interest and costs.

(c) That the said Mortgage may be enforced by foreclosure or sale.

(d) That the Trustees for the Bondholders of the Atlantic and Lake Superior Railway now operating the road by virtue of the Statute of Canada, 1 Edward VII, chapter 48, be allowed to continue operating the said railway as hitherto.

The defendant company appeared and consented to judgment being entered as prayed in the statement of claim. Certain of its creditors, however, filed statements in defence, opposing the judgment as prayed.

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The case now came on for trial before SIR THOMAS W. TAYLOR, acting Judge of the Exchequer Court.

T. Chase Casgrain, K.C., and *J. W. Weldon*, for the plaintiff;

N. K. Laflamme, K.C., and *F. S. Maclellan, K.C.*, for the creditors.

During the progress of the trial, as appears upon the official record, the learned Judge decided certain questions similar to those decided by Mr. Justice Burbidge in the *Baie des Chaleurs* Case (1), adopting the latter's rulings in every instance.

On a motion made at a late stage of the trial by counsel for the creditors to be allowed to amend their statements in defence by setting up that the bonds in the hands of the plaintiff were invalid in as much as they were not issued in compliance with statutory requirements, the learned Judge ruled that the application to amend involved the raising of a new issue between the parties, and was made too late. The learned Judge also refused to declare, in the terms of the prayer of the statement of claim, that the mortgage bonds of the defendant company held by the plaintiff together with a mortgage deed made by the defendant company and held by the plaintiff, as trustee, to secure bonds or debentures, constituted "a first claim and privileged debt"; but directed the matter of such priority to be referred to the Registrar of the Court, to whom a general reference in the cause was made in the same terms as the reference in the *Baie des Chaleurs* Case (2).

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 Judgment.

(1) Reported, *ante*, p. 1.

(2) REPORTER'S NOTE.—See the report of this case on proceedings before the Registrar, *post* p. 42.