1922
February 7.

BETWEEN:

THE CITY SAFE DEPOSIT AND AGENCY CO. LTD..... PLAINTIFF;

AND

THE CENTRAL RAILWAY COMPANY OF CANADA..... DEFENDANT.

In re C. N. Armstrong's Claim.

Railways—Receivership—Fund in the Exchequer Court—Proceedings in the Provincial Court against fund—Concurrent jurisdiction—Comity.

After proceedings had been instituted in the Exchequer Court of Canada by the trustee for the bondholders of the company defendant for the recovery of the amount due on the unpaid bonds of the company a Receiver was appointed and an order made for the sale of the assets. Thereafter moneys representing purchase price of certain property or assets of the company was paid into the court. In order to distribute the fund, creditors of the company were duly notified to file their claims before the Registrar, acting as Referee. Armstrong thereupon filed his claim, which was contested by plaintiff, and after full inquiry was dismissed by the Referee in his report. The report was subsequently confirmed by this court. From this judgment Armstrong appealed to the Supreme Court of Canada, such appeal being afterwards dismissed for want of prosecution. In the meanwhile Armstrong had sued the defendant company in the Superior Court of the Province of Quebec on substantially the same claim, and obtained judgment by default for a large sum and a declaration that the same was privileged as "working expenditure" under the Railway Act. The plaintiffs having applied for the payment out to them of the balance of the fund in the Exchequer Court after satisfying the claims of the privileged creditors, Armstrong opposed the application, filed the judgment in his favour of the Provincial Court, and asked that such balance in the Exchequer Court of Canada be not paid over to the plaintiff as trustee for the bondholders until the said judgment in his favour in the Provincial Court had been satisfied out of the said fund.

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Held: On the facts, that the fund in Court, representing the proceeds of certain assets of the company, was exclusively under the judicial control of this court; and no other court could interfere with it.

2. That even if the Superior Court, of Quebec had concurrent jurisdiction with the Exchequer Court in the matter, the latter being first seized thereof, the former should, by comity of Courts, hold its hand.

Semble: The Central Railway Company of Canada not being a railway or section of a railway wholly within one province, the Exchequer Court of Canada alone has jurisdiction to appoint a receiver thereto, to settle and determine the claims and priority of creditors, in respect of the proceeds of the assets of defendant company so sold and constituting the said fund in Court.

PETITION by claimant C. N. Armstrong for an order that the fund in Court be not paid to the plaintiff, as trustee for the bondholders, until the judgment obtained by him against the said Company before the Superior Court, Province of Quebec, had been satisfied.

Petition heard before the Honourable Mr. Justice Audette at Ottawa, February 7th, 1922.

E. W. Westover, for claimant.

John W. Cook, K.C., for plaintiffs.

The facts are stated below and in the reasons for judgment.

At the instance of the plaintiff herein, trustee for the bondholders, a Receiver was appointed to the defendant Company and an order made for the sale of the assets of the said Company, and a certain sum deposited in court, proceeds of a sale of certain rails. The creditors of the Company were then called by advertisement and the claimant C. N. Armstrong duly filed his claim along with others. A Referee was appointed to enquire into the claims and report to the Court. The claim of the said C. N. Armstrong was contested

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by plaintiff, and after hearing all parties was dismissed by the Referee. Armstrong then appealed from the said report to the Court and his appeal was dismissed. From this decision he appealed to the Supreme Court of Canada and, after several months had elapsed without proceedings being taken therein, said appeal was dismissed for want of prosecution.

Subsequent to the appeal taken from the report of the Referee and to the judgment therein, C. N. Armstrong took an action in the Superior Court for the District of Montreal, Province of Quebec against the Company for substantially the same claim as had been filed before this Court, and been fully gone into as aforesaid. Judgment was obtained in the said Court, by default, for the full amount of his claim, declaring the same to be privileged as "working expenses."

Upon plaintiff moving before this Court, for an order that the balance of the fund in Court be paid to them as trustee for the bondholders, after the payment of the privileged claims, Armstrong filed the present petition before this Court asking that the fund in court be not paid to the said plaintiff unless and until the judgment obtained against the Company by default in the Province of Quebec as aforesaid, was first satisfied. Armstrong also took out a seizure by garnishment after judgment in the Superior Court, aforesaid which was served upon the Registrar of this Court ordering him to declare what moneys were in his hands or under his control belonging to the defendant, etc. To the said judgment and siezure the plaintiff filed an opposition, and obtained an order thereon from a Judge of the said Superior Court staying execution which opposition became a plea to the action.

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AUDETTE, J. now (this 7th February, 1922) delivered judgment.

I do not think this is a matter in which I should reserve judgment for further consideration. I feel that I have all the facts before me, and I can dispose of it this morning.

Dealing first with the petition of Mr. Armstrong claiming to be collocated, under the judgment of the Superior Court of Quebec, District of Montreal, I may say that the present fund—realized from the proceeds of the sale of the rails—is entirely under the judicial control of the Exchequer Court of Canada, and no other court has any right or will be permitted to interfere with it. A Receiver having been appointed by this Court to the defendant Company, all of the assets of the said defendant Company—the Central Railway Company of Canada—and more especially the proceeds of the rails—became vested in the Receiver and out of the control of the said Company, pursuant to the judgment appointing the Receiver. Moreover, the defendant Company being a railway not only within one province and not having a special section thereof alone in any one province, it would seem the Exchequer Court of Canada alone has jurisdiction in the matter. Mr. Armstrong has not suffered and is not aggrieved. When these proceeds were realized, all the creditors of the defendant company were called, and claimant Armstrong, as well as the other creditors, filed his claim which was duly enquired into upon evidence adduced, and finally it was disposed of under judgment of this Court. There was then an appeal taken from the same to the Supreme Court of Canada, which appeal was afterwards abandoned after a certain time and dismissed by the latter Court; so that he is not in the position

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of a creditor appealing to the indulgence of the Court to be heard after delays. He has been heard. He chose to go to another court that had concurrent jurisdiction and present to it the same claim and obtained judgment by default upon it and he now claims priority thereunder,—a real travesty of justice. It is a well established jurisprudence that whenever any fund of an insolvent defendant is under the control of a competent court, no other court should interfere with it.

This is the principle that has found its way into the Winding up Act, under sec. 22 R.S.C. ch. 144,—and we have had in this Court, in the past, in respect of railway matters a number of those applications made, and that jurisprudence has always been observed by all the courts of the Dominion. I might cite some recent cases upon the point which came to my knowledge quite casually in the course of my reading a day or two ago. *Re Fairweather* (1); *Stewart* v. *LePage* (2); *Brewster* v. *Canadian Iron Co.* (3); *Baxter* v. *Central Railway Company* (4). The text books on Receivers are also unanimous in consecrating the same principle upon that question.

However, that may be, I have no hesitation in coming to the conclusion to dismiss, with costs, the application of claimant C. N. Armstrong, his rights having been already considered and disposed of by the Court. The application savours of the nature that can be qualified as vexatious, impertinent and irrelevent.

Coming now to the motion made on behalf of the plaintiff, subject to the undertaking by its counsel at the opening this morning—that the trustee will take care of those amounts allotted in the Referee's

(1) 21 O.W.N. 150;
(2) 53 S.C.R. 337;
(3) 7 O.W.N. 128;
(4) 22 O.R. 217.

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report in the passing of the Receiver's account, that is, will take care of the amount mentioned in the columns that allot a certain amount to the bondholders, another to the Receiver himself, and another to the Ottawa Navigation Company,—I see no reason why the balance of the fund available in court should not be paid to the plaintiff, saving and excepting however, the sum I think of $1,500 which should be kept in court to cover any costs that might be thrown upon the Receiver as defendant in the case now pending in Montreal between the trustee and the Ottawa Valley Railway and the Receiver. The whole with costs.

Judgment accordingly.