

IN THE MATTER OF

THE ATLANTIC AND LAKE SUPERIOR RAIL-
WAY COMPANY'S SCHEME OF ARRANGE-
MENT;

1908
Oct. 5

AND

THE NORTH EASTERN BANKING COMPANY,
Limited, a corporation incorporated under the laws of
Great Britain, and having its registered office at
Newcastle-on-Tyne, England..... PETITIONER.

*Scheme of Arrangement—Confirmation—Creditor applying to file claim long
after date of order of confirmation—Laches—Refusal of application by
Registrar—Appeal to Judge—Practice.*

A Scheme of Arrangement between a Railway Company and its creditors had been confirmed by order of Court after the company had complied with all the requirements of the statute and the rules of court made thereunder, and after notice given to all parties interested. Furthermore, as the confirmation had been opposed, enrolment of the Scheme and the order of confirmation was not made until the expiry of thirty days after the date of the order confirming the Scheme, and after notice of the said order had been published in compliance with Rule 60 of the Rules and Orders regulating the practice of the court. Following upon that new proceedings were taken, and an order obtained, on behalf of the company, for the sale of the railway, and it was sold thereunder. More than fifteen months after the Scheme was confirmed, by a judgment of the court, although the fact of such confirmation had become known to him some four months before he applied, a creditor of the railway applied for an extension of time for appealing from the judgment confirming the Scheme.

The Registrar in Chambers, in view of the facts above stated, refused the creditor's application.

Held, on appeal from the decision of the Registrar, that the application was properly refused.

THIS was a motion by way of appeal from a decision of the Registrar in Chambers refusing an application for an extension of time for appealing from a judgment of the Court confirming a Scheme of Arrangement.

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The decision of the Registrar (L. A. AUDETTE, K.C.,) was as follows.

THE REGISTRAR :

This is an application on behalf of the North Eastern Banking Company, Limited, bearer of one hundred bonds of £100 each of the Atlantic and Lake Superior Railway Company and a creditor of the said railway company to the amount of £10,000, for an extension of time to appeal to the Supreme Court of Canada from the judgment of this court bearing date the 10th day of June, A.D. 1907, confirming the Scheme of Arrangement herein between the Atlantic and Lake Superior Railway Company and the holders of £500,000 four per cent. first mortgage sterling bonds issued by the company, upon the grounds that the said North Eastern Banking Company only became aware of the said Scheme of Arrangement and of its confirmation in the middle of the month of October, 1907, and was thus unable to deposit its bonds in the hands of the Royal Trust Company, and get in exchange therefor certificates of participation, as provided by the said Scheme.

Under *The Exchequer Court Act* any party who is dissatisfied with any judgment of this Court is given thirty days from the day on which judgment has been pronounced to appeal to the Supreme Court of Canada.

The present application is made fifteen months and sixteen days after the pronouncing of the judgment from which the petitioner wishes to appeal, although it became aware of the same about four months after the delivery of such judgment.

Now the present case is materially different from an ordinary case wherein there is one plaintiff and one defendant. Indeed, it is a matter where a railway, a public utility, is involved, and where, besides the parties

to the case, there are a number of creditors who have been called and where a number of them appeared and contested the proceedings; and further where judgment was duly given after considering the objections of the several parties interested who have so appeared.

The proceedings taken herein for the purpose of arriving at a Scheme of Arrangement were so taken under sections 285, and following, of *The Railway Act* 1903, 3 Edw. VII, chap. 58 (now re-enacted in *The Railway Act*, chap. 37 R.S. 1906, secs. 365 and following). General Rules and Orders were under the provisions of section 289 (now sec. 368) duly made by the Exchequer Court regulating the practice and procedure of the court under the several sections of the Act dealing with Schemes of Arrangement.

Now the Scheme of Arrangement in question herein has duly confirmed after compliance with all the requirements of the statute and the Rules of Court made thereunder, and after ample notice had been given to all parties interested, as will appear by the affidavit of Mr. J. deGalindez filed herein on this application. And further, as the confirmation had been opposed, the enrolment of the same was only made thirty days after the pronouncement of the judgment confirming the same, and notices of the said judgment have been given in compliance with the following rule of practice of the court which reads as follows:—

“ 19. If the order for confirming a scheme is not opposed, the Scheme and such order may be enrolled forthwith. If the order is opposed notice of the order shall, at least once in every week which shall elapse between the pronouncing of such order and the expiration of thirty days from the pronouncing thereof, be inserted in the *Canada Gazette* and such two newspapers as shall have been appointed by the Judge for the insertion of advertisements under the 14th rule hereof. And such scheme and order shall not be

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enrolled until the expiration of thirty days from the day of the order having been pronounced, nor until the *Canada Gazette* and the newspapers containing such notices are produced to the Registrar.”

We must therefore necessarily arrive at the conclusion that the Scheme was duly confirmed after all the requirements of the law had been complied with.

Following the enrolment of the Scheme in the manner provided both by the statute and the rules of court, an action was taken in this court for the sale of the railway and for the determination of the rights of the several creditors upon the proceeds of the sale thereof.

By the several judgments delivered in that action the railway was ordered to be sold and the rights of the creditors—including the rights of the bondholders under such scheme—were determined, and finally the railway was duly sold in the course of September, 1908, and a conveyance of the same duly executed to the purchasers.

Without going into the merits of the Scheme of Arrangement itself—an enquiry which cannot now be pursued under the circumstances—it may be well to say that no error of judgment which would amount to a miscarriage of justice, or fraud has been either alleged or shown. Indeed the Scheme is not attacked as bad or vitiated by any irregularities, but only as unfair because the petitioner having failed to comply with the provisions thereof through the want of being aware of the same in time, is not to-day in a position to exchange its bonds for certificates of participation. It is its misfortune not to have complied with its terms, and that is all. A cautious holder of such bonds would have kept himself *au fait* with the doings of the company. The majority of the bondholders could not have done more than they did, as they scrupulously complied with the law. The interest of the majority as provided by the Scheme must prevail.

The parties attacking the Scheme to-day are seeking to come within its provisions and share with the other bondholders, who complied with the judgments of the court, the benefits which may be derived from the Scheme itself.

Then, were leave to appeal given now it could only be given on terms, that is, upon the usual condition precedent to pay all costs incurred up to date both in this case and in the case wherein the sale of the railway was ordered. And from a cursory investigation it appears that the costs which would have to be paid under such circumstances would be perhaps over and above the amount the petitioner would ultimately be entitled to recover.

There is here nothing shown why, *ex debito justitiæ*, this application should be granted, and moreover were it granted the very party who is making the application would not benefit by it, as the costs it would have to pay would likely exceed the amount it would ultimately recover. This, however is not said, and is not to be taken as being the basic ground upon which reliance is placed in arriving at the final conclusion upon the present application.

Considering that the Scheme of Arrangement has come before the court in a regular manner, and has been duly enrolled in conformity with the provisions of the statute and the rules of court made thereunder, and considering it has thus acquired a quasi-statutory effect under the provisions of sub-section 4 of section 287, where it is said that after the enrolment of the Scheme its provisions "shall have the like effect as if they had been enacted by Parliament", and considering further the negligence of the petitioner in making its application over fifteen months after the pronouncement of the judgment, when the same came to its knowledge four months after its

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pronouncement, the application cannot be favourably entertained.

A number of authorities have been cited pro and con. Perhaps, however, the most important one cited by the petitioner namely the case of *In re Irish and North Western Railway*, (1) should not be cast aside without some explanation. That case must obviously be distinguished from the present one, inasmuch as the Exchequer Court has made general rules and orders in the manner above mentioned, and in that the enrolment of the Sheme has been duly made in compliance therewith, while in the case cited such general rules had not been made, and question had arisen as to whether the enrolment was perfect without such rules, considering that such rules existed in England.

Moreover, if the present application were granted after such a long lapse of time and after such very material steps taken in the interval, there would be no finality in the judgments delivered by the courts of this country. It is for such purpose that the legislature has placed upon the statute book a limitation of time for appeals.

Under the circumstances the application will be dismissed with costs.

October 12th, 1908.

The petitioner having appealed to the Judge in Chambers from this decision, the appeal was dismissed with costs.

Appeal dismissed.

Solicitors for the Petitioners: *Campbell, Meredith, McPherson & Hague.*

Solicitors for the Atlantic and Lake Superior Railway Company: *McGibbon, Casgrain, Mitchell & Surveyer.*

(1) Ir. R., 3 Eq. 190.