

1892 THE NOVA SCOTIA CENTRAL }
 *May 11. RAILWAY COMPANY (PLAIN- } APPELLANTS;
 *Dec. 13. TIFFS)..... }

AND

THE HALIFAX BANKING COM- }
 PANY, FLETCHER B. WADE } RESPONDENTS.
 AND JAMES D. EISENHAUER }
 (DEFENDANTS)

ON APPEAL FROM THE SUPREME COURT OF
 NOVA SCOTIA.

*Mortgage—Railway bonds—Security for advances—Second mortgages—
 Purchase by—Trust.*

W. having agreed to advance money to a railway company for completion of its road an agreement was executed by which, after a recital that W. had so agreed and that a bank had undertaken to discount W.'s notes endorsed by E. to enable W. to procure the money to be advanced, the railway company appointed said bank its attorney irrevocable, in case the company should fail to repay the advances as agreed, to receive the bonds of the company (on which W. held security) from a trust company with which they were deposited and sell the same to the best advantage applying the proceeds as set out in the agreement.

The railway company did not repay W. as agreed and the bank obtained the bonds from the trust company and having threatened to sell the same the company, by its manager, wrote to E. & W. a letter requesting that the sale be not carried out but that the bank should substitute E. & W. as the attorneys irrevocable of the company for such sale, under a provision in the aforesaid agreement, and if that were done the company agreed that E. & W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the repayment of the moneys advanced. E. & W. agreed to this and extended the time for payment of their claim and made further

PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.
 (Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

advances and, as the last mentioned agreement authorized, they re-hypothecated the bonds to the bank on certain terms. 1892

At the expiration of the extended time the railway company again made default in payment and notice was given them by the bank that the bonds would be sold unless the debt was paid on a certain day named; the company then brought an action to have such sale restrained.

Held, affirming the decision of the court below, that the bank and E. & W. were respectively first and second encumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company in respect thereof, and there was no rule of equity forbidding the bank to sell or E. & W. to purchase under that sale.

Held further, that if E. & W. should purchase at such sale they would become absolute holders of the bonds and not liable to be redeemed by the company.

Held also, that the dealing by the bank with the bonds was authorized by the Banking Act.

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APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment of the trial judge who had granted an interim injunction to restrain the Halifax Banking Company from selling the bonds of the appellant company's road.

The facts upon which the judgment of the Supreme Court is founded are fully set out in the reasons for judgment given by Mr. Justice Strong.

Henry Q.C. and *Newcombe* for the appellants.

Borden Q.C. for the respondents, *Eisenhauer* and *Wade* and *Russell Q.C.* for the Halifax Banking Company.

STRONG J.—The facts of this case are not in dispute, and the importance of it consists wholly in the large amounts involved and not in any difficulty in the law applicable to the facts as they appear in the documentary and other evidence.

The appellants are a railway company incorporated by the legislature of Nova Scotia, and are owners of a

1892 line of railway extending from Middleton to Lunenburg in that province.

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Being in want of money for the completion of their line of railway, which was then in course of construction, the appellants, for the purpose of raising loans and advances, and securing the repayment of the same, entered into the agreements and transactions herein-after stated:—

Strong J.

By an agreement between the appellants and the defendant Wade, bearing date the 13th February, 1889, it was agreed, among other things, that the defendant Wade should furnish the appellants with money for the completion of their railway in an amount not to exceed at any one time \$200,000, and with a bank credit or guarantee in any amount necessary for the purchase of rails, rolling stock, etc., not to exceed \$200,000; that the defendant Wade should carry \$130,000 of the said cash advance for six months after 1st January, 1890; that the appellants should pay for the use of said money the ordinary bank rate of interest, and for the said guarantee or credit whatever the regular bank charge therefor should be, and in addition should pay the defendant Wade \$27,500; that if the appellants should require more than \$200,000 the defendant Wade should furnish such further sum, not to exceed \$50,000, upon which the appellants should pay interest at the same rate as on the \$200,000, and in addition to the defendant Wade an amount equal to ten per cent upon the said further sum so to be advanced; that out of the said sum of \$200,000 the amount due to the defendants Wade and Eisenhauer for notes then in the bank to secure previous advances made by the defendants Wade and Eisenhauer should be paid at once, also the amount of a note then outstanding to the defendant Eisenhauer for commissions upon said past advances; that as to said sum of \$27,500 one-third thereof should

be paid to the defendant Wade out of the first advances made in respect of said sum of \$200,000, one-third on 1st October, 1889, and the balance with the commission aforesaid upon further advances beyond said sum of \$200,000, if any, on 15th December, 1889; that the total amount of all said advances and guarantee including said commission should be secured upon the appellants' entire bond issue and the subsidies granted, or to be granted, to the appellants by the Dominion and Provincial Governments.

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At or shortly before the time of this agreement the appellants, by virtue of the powers granted in their charter, executed bonds amounting in all to \$740,000. These bonds and the interest coupons thereunto attached were payable to bearer and were secured upon the appellants' railway, rolling stock, franchises and other property by a first mortgage executed by the appellants to the Farmer's Loan and Trust Company, of New York, as trustees, and the bonds were placed in the possession of said Farmer's Loan and Trust Company as such trustees.

In order to comply with this agreement the defendant Wade agreed with the defendant Eisenhauer and the defendant, The Halifax Banking Company, that the money required should be advanced by the bank upon promissory notes of the defendants Wade and Eisenhauer, and the appellants, in pursuance of the said agreement, entered into an agreement, or power of attorney under seal, with the defendants, dated 4th July, 1889, whereby, after reciting that the defendant Wade had agreed to furnish to the plaintiff certain funds, to raise which the defendant Eisenhauer had agreed to endorse the promissory notes of the defendant Wade, which the bank had agreed to discount, and that the appellants had agreed to pledge the said bonds to secure the said advances, the appel-

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lants appointed the bank its attorney irrevocable in case the appellants should fail to carry out their said agreement with the defendant Wade, or should fail to pay the said advances at the times and in the manner agreed, to receive the said bonds from the said Farmer's Loan and Trust Company, and dispose of the same to the best advantage, and out of the proceeds pay first the expenses incident to obtaining the said bonds from the said Farmer's Loan and Trust Company, secondly the amount of any paper then held by the bank as security for said advances, thirdly any further advances made by the defendants Wade and Eisenhauer including amounts due them for commission and remuneration, and fourthly the balance to the appellants. And it was also provided by the said power of attorney that in case the defendants Wade and Eisenhauer should require the bank to proceed with the sale of said bonds for the purposes aforesaid, that the bank should then forthwith proceed to sell said bonds, or forthwith substitute the defendants Wade and Eisenhauer as the attorneys irrevocable of the appellants, with as full and ample authority in the premises as was by the said power of attorney granted and conferred upon the bank. Also that the said power of attorney should in no case be revoked without the consent of the defendants Wade and Eisenhauer.

Afterwards, on 12th August, 1889, it was agreed between the appellants and the defendant Wade, that the defendant Wade should advance additional funds for the appellants, and that if required by the defendants Wade and Eisenhauer the appellants should increase their bond issue to an amount not exceeding \$1,000,000 which should be exchanged for the said bonds then already executed and which said new bonds should be delivered as security to the bank for all moneys then or thereafter to be advanced by the

defendants, including the commissions of the defendant Wade.

In accordance with the last mentioned agreement, and at the request of the defendants Wade and Eisenhauer, the previous issue of bonds was re-called, and a new issue of bonds was made by the appellants on or about 1st January, 1890. This new issue comprised 1,000 bonds of \$1,000 each, payable with interest semi-annually at the rate of five per cent within forty years. These bonds, with the coupons for interest attached, were payable to bearer, and were secured and deposited with the Farmer's Loan and Trust Company in like manner as the previous issue of \$740,000 had been.

In pursuance of this agreement of the 13th February, 1889, the defendants Wade and Eisenhauer, from time to time, advanced on the appellants' account large sums of money.

The appellants did not pay the advances or commissions as agreed, and about the month of May, 1890, the defendants Wade and Eisenhauer paid to the bank \$100,000 or thereabout on account of the said indebtedness to the bank. The bank then also, at the request of the defendants Wade and Eisenhauer, and under the provisions of the power of attorney of the 4th July, 1889, procured the said 1,000 bonds from the said Farmer's Loan and Trust Company, and have since held the same.

The statement so far is taken from the appellants' statement of claim.

On the 13th of May, 1890, the appellants being then indebted to the defendants Wade and Eisenhauer in a very large amount for money paid by them to the bank, and in respect of their liability to the bank for advances made to the appellants' company, and they having threatened to sell the bonds under a substi-

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tution as attorneys in pursuance of the power given to the bank so to constitute them, contained in the instrument of the 4th July, 1889, a further agreement was entered into in the form of a letter written by Mr. George W. Bedford, the general manager of the company, to Messrs. Eisenhauer and Wade.

This agreement was as follows :

HALIFAX, N. S., May 13th, 1890.

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James Eisenhauer, Esq., and F. B. Wade

DEAR SIR,—On behalf of the Nova Scotia Central Railway Company, and as their duly authorized agent or attorney, I have to request that you will not carry out the purchase of the bonds of said railway as this day contemplated, but that instead you will, if possible, arrange to have the Halifax Banking Company substitute you for them as the attorneys irrevocable of the railway company for the sale of the bonds, and in case you do so the said railway company agrees as follows :

1. That you shall have the sole and absolute right to sell said bonds at such price, upon such terms, and subject to such conditions as you, in your judgment, may deem best in the interest of all concerned.

2. That out of the proceeds of the sale of said bonds, after deducting all expenses incurred in connection therewith, you shall first deduct,

(a) All sums advanced or hereafter to be advanced by you or either of you on account of said railway, and all commissions due or to grow due in connection therewith.

(b) A reasonable commission or charge for carrying said loan after the 1st of January, 1890, and for the extra trouble, labour, etc., etc., occasioned thereby, and by the circumstances arising out of the same, and for making said sale.

(c) You shall deduct and pay to F. B. Wade a sum as an equivalent for his services and efforts in connection with the enterprise, which sum up to the 1st January, 1889, has been agreed upon as \$20,090, in addition to his charge for legal services and expenses ; his services from that time to the present not being yet determined.

3. That you have the power to hypothecate said bonds pending a sale, and that in order to carry the present loan you are at liberty to pay to any bank, and charge to commission account against the railway, a bonus not to exceed \$1,000 per month until bonds sold.

4. That during the continuance of this arrangement and until the bonds are sold and the money paid, the railway to remain under its present management.

5. That in case the earnings of the road are not sufficient to pay the operating expenses during said time, the railway company will pay the deficit promptly, in order that the credit of the company may be maintained.

6. That in case the local government makes payment of any subsidy upon representations or promises of yours or either of you as to the final completion of the road, the company will, to your satisfaction, secure the performance of said representations or promises.

7. That the company will execute and deliver to you any documents or papers necessary to carry this proposal and agreement into effect.

8. These things being performed out of the balance of funds in your hands from the sale of the bonds, you are to pay C. O. Stearns the sum of \$70,000, and the balance pay over to G. S. Hutchinson, or the railway company.

9. That you shall have power to settle the Vickers suit upon the best terms possible, if you find it necessary, in order to facilitate the sale of the bonds.

10. The company will agree to put a siding in at Morgan's, if the new road opened from there to Kaizer's or Bare's corner.

Yours truly,

(Sgd.) GEO. W. BEDFORD,
Nova Scotia Central Railway Co.

The authority of Mr. Bedford to bind the company by this letter is impeached by the statement of claim, but in the argument at the bar of this court that point was not raised or insisted upon, and the learned counsel for the appellants, in answer to an inquiry from the court, distinctly stated that on behalf of the railway company they waived all question as to Mr. Bedford's authority in this respect.

This new agreement of the 13th of May, 1890, was accepted and adopted by the respondents Wade and Eisenhauer, and on the faith and security of it they not only extended the time for payment, but also made further advances.

In pursuance of the power so to do, contained in the 3rd clause of the letter or agreement of the 13th of May, 1890, the respondents Wade and Eisenhauer re-hy-

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pothecatcd the bonds to the bank by an instrument dated the 15th of May, 1890, which is as follows:—

This agreement made this 15th day of May, A.D. 1890, between James D. Eisenhauer, of Lunenburg, merchant, and Fletcher B. Wade, of Bridgewater, barrister-at-law, both in the county of Lunenburg, of the first part; and the Halifax Banking Company, of the second part.

Witnesseth:—Whereas, the said James D. Eisenhauer and Fletcher B. Wade are indebted to the said Halifax Banking Company in the sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, for advances made to James D. Eisenhauer and Fletcher B. Wade, on account of Nova Scotia Central Railway construction and equipment.

And whereas, the said Fletcher B. Wade has given the promissory note of him, the said Fletcher B. Wade, in favour of James D. Eisenhauer, or order, for the sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, payable on demand with interest at the rate of seven per centum to the said James D. Eisenhauer, and the said James D. Eisenhauer has endorsed the said promissory note to the said Halifax Banking Company, and the said James D. Eisenhauer and Fletcher B. Wade, attorneys of the said Nova Scotia Central Railway Company, have hypothecated the first mortgage bonds of the said Nova Scotia Central Railway Company to said Halifax Banking Company as collateral security for the payment of the said sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, the said James D. Eisenhauer and Fletcher B. Wade having, under a certain agreement or power of attorney, required the said Halifax Banking Company to proceed with the sale of the said bonds for the purposes mentioned in said agreement or power of attorney, and the said Halifax Banking Company under said agreement or power of attorney have substituted said James D. Eisenhauer and Fletcher B. Wade as attorneys irrevocable of the said Nova Scotia Central Railway Company, with as full and ample power and authority in the premises as have been granted and conferred upon the Halifax Banking Company.

It is hereby agreed by and between the same James D. Eisenhauer and Fletcher B. Wade, parties of the first part, and the Halifax Banking Company, parties of the second part, that the said James D. Eisenhauer and Fletcher B. Wade shall pay in addition to the sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, and interest thereon after the rate of seven per centum per annum, or upon such portion of the same as may be due and remaining and unpaid to the Halifax Banking Company, a commission of one thousand (\$1,000) dollars per month on said sum

of three hundred and forty-five thousand, six hundred and eighty-three dollars and fifty-eight cents, or any part thereof, and any part or fraction of a month during which said sum or any part thereof shall remain unpaid shall be considered and taken to be one whole month. And the said Halifax Banking Company, the party of the second part, doth hereby agree to allow the said James D. Eisenhauer and Fletcher B. Wade the period or time not exceeding six months from the date of these presents for the payment of the said three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, together with interest thereon at the rate of seven per centum per annum and the commission aforesaid; and it is hereby expressly agreed between the said James D. Eisenhauer and Fletcher B. Wade, the parties of the first part, and the said Halifax Banking Company, the party of the second part, that the giving of the aforesaid time, or the agreement to give or extend said time for the payment of the aforesaid sum or any part thereof, shall not in any way release or discharge the endorser, said James D. Eisenhauer, on the aforesaid note made by Fletcher B. Wade in favour of said James D. Eisenhauer, or order, and endorsed by said James D. Eisenhauer to said Halifax Banking Company, nor shall it discharge or release any security or securities which the said Halifax Banking Company have, or which they may have, for the payment of the said sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, with interest thereon at the rate of seven per centum per annum and commission aforesaid, or any portion thereof.

And it is also hereby agreed by the said James D. Eisenhauer and Fletcher B. Wade that they shall not in any way interfere with the possession of the said bonds by the said Halifax Banking Company, nor shall the said Halifax Banking Company be required to deliver said bonds into the possession of any person or persons whatsoever, until the whole amount due by said James D. Eisenhauer and Fletcher B. Wade is paid to the said Halifax Banking Company, and the said James D. Eisenhauer and Fletcher B. Wade do hereby covenant and agree with the said Halifax Banking Company that they, the said James D. Eisenhauer and Fletcher B. Wade, have full power and authority to hypothecate and deliver the first mortgage bonds of the Nova Scotia Central Railway Company to the said Halifax Banking Company.

In witness whereof the said James D. Eisenhauer and Fletcher B. Wade have hereunto set their hands and affixed their seals, and the Halifax Banking Company has executed these presents by Robie Uniacke, President, and Wilson L. Pitcaithly, cashier of said Halifax Banking Company, subscribing their names to these presents and affixing thereto the corporate seal of said bank at Halifax.

(Sgd.) JAMES D. EISENHAUER [L.S.]

(Sgd.) FLETCHER B. WADE [L.S.]

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A large sum of money being due to the bank for advances, which were secured to them by the hypothecation of the bonds already mentioned by the respondents, Eisenhauer and Wade, under the agreement of the 13th of May, 1890, amounting to \$319,213.84, the bank, on the 17th of December, 1890, gave a written notice to the railway company that they would at once proceed to sell the bonds unless before the 29th December, 1890, the amount of their debt should be paid. At this time there was due to Wade and Eisenhauer a large sum for advances which they had made and money which they had paid to the bank in reduction of the debt of the latter, in respect of which sum of money Wade and Eisenhauer were entitled to a charge upon the bonds, subordinate in point of priority to the lien or charge of the bank.

On the 29th day of December, 1890, the appellants brought the present action, claiming that the sale of the bonds by the Halifax Banking Company should be restrained.

An interlocutory injunction having been granted was dismissed by the Supreme Court of Nova Scotia sitting *en banc*; subsequently the cause was heard before Mr. Justice Ritchie, who dismissed the action, and on appeal to the Supreme Court this judgment was affirmed.

From this latter decision the appeal now in judgment has been brought.

The view taken by the Supreme Court was that the Halifax Banking Company and the respondents Eisenhauer and Wade were in the relative positions of first and second encumbrancers, the respondents being to all intents and purposes mortgagees, and this being so, that there was no rule or doctrine of equity which forbade the Banking Company from selling and the respondents Wade and Eisenhauer from purchasing

under that sale. The contention of the appellants was that the respondents Eisenhauer and Wade were under a disability to purchase because they were by the original power of attorney of the 4th of July, 1889, made trustees for the appellants in case they should themselves sell the bonds.

It is, I think, very clear that there is no foundation, equitable or otherwise, for the action

However informal some of the documents constituting the security may be we must look at the substance of the several transactions, and doing this we cannot fail to see that the respondents Wade and Eisenhauer, having ample authority so to do under the express power conferred upon them by the 3rd clause of the agreement contained in the letter of the 13th May, 1890, pledged or hypothecated the bonds in question by the instrument of the 15th of May, 1890, with the Banking Company to secure the debt for which the latter proposed to sell. In my opinion Wade and Eisenhauer are, as I have said, to be regarded as successive mortgagees or encumbrancers. In respect of the \$100,000 and upwards which they had actually paid in cash to the bank they had no security but these bonds. In respect of their security for this debt it is true they were subordinated in point of priority to the bank, but subject to that they had an effectual charge upon the bonds. There could, therefore, be nothing to interfere with the right of the Banking Company to sell for the realization of the debt, nor with the right of Wade and Eisenhauer to purchase.

The fact that under the first power of attorney, that of 4th July, 1889, they were to sell for the benefit of and as trustees for the railway company, in case the bank should decline to sell, cannot possibly make any difference between the present case and that of successive mortgagees.

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In the first place the sale which it is sought to restrain was not a sale by the respondents Eisenhauer and Wade under the power of attorney, but by the Banking Company under the hypothecation of the 15th of May, 1890, executed by Eisenhauer and Wade in pursuance of the 3rd clause of the new agreement of the 13th of May, 1890.

Next it is clear, upon the authorities referred to in the judgment of the Supreme Court, that if property is substantially mortgaged, charged or hypothecated to secure a debt it makes no difference that the mortgagee, chargee, or hypothecary creditor may be called a trustee. Being a creditor he has the rights of one just as much as if his security was created by a mortgage deed expressed in the most regular and conventional form. *Kirkwood v. Thompson* (1); *Locking v. Parker* (2) are conclusive authorities to this effect.

The case then just resolves itself into one of a sale by a first mortgagee or pledgee and a purchase by a second mortgagee or pledgee.

The appellants do not merely insist that the second mortgagees, Eisenhauer and Wade, having purchased are liable to be redeemed and are not the absolute purchasers, but further that the sale was absolutely void and liable to be set aside on the ground that the relationship of Eisenhauer and Wade to the appellants was such that they were disabled from purchasing. As I have before shown, and as the courts below have held, this last position is wholly untenable.

The first contention, however, is equally so. Eisenhauer and Wade, having purchased, are entitled to hold the bonds absolutely and are not liable to be redeemed in turn by the railway company. The authorities upon this head are decisive. The cases of

(1) 2 H. & M. 392; 2 DeG. J. & S. 613. (2) 8 Ch. App. 30; Re Alison, 11 Ch. D. 284.

Kirkwood v. Thompson (1) and *Shaw v. Bunny* (2) 1892
 are conclusive of the question. Of course any surplus of the purchase money which would remain after paying off the bank would, in this view, belong to the railway company. The court below are, therefore, in all respects right upon these points.

It was further said that the transaction was *ultra vires* of the Banking Company. A sufficient answer to this is, however, given by Mr. Justice Ritchie in his judgment at the hearing, an answer which I adopt.

It was also made a point by the statement of claim, though it was not argued before this court, that the railway company had no power to borrow and that, therefore, the securities were wholly void. The plain answer to this is that they were authorized by statute to make a mortgage, and issue the bonds in question secured by it, for the very purpose of raising a fund of borrowed capital in order that they might be enabled to complete the construction of the line of railway.

No fraud or want of good faith is proved.

As regards want of authority in Mr. Bedford to enter into the agreement of the 13th May, 1890, of which the appellants got the benefit, all objection on that score was, as I have said, expressly waived by the learned counsel for the appellants upon the argument at the bar of this court.

The appeal must be dismissed, but the judgment to be drawn up must be prefaced with a recital of the waiver by counsel of all objections to the authority of Mr. Bedford to bind the railway company by the agreement of the 13th of May, 1890.

The dismissal must, of course, be with costs.

TASCHEREAU J.—I would dismiss this appeal. The appellants' whole contention seems to be that Eisen-

(1) 2 H. & M. 392.

(2) 33 Peav. 494.

1892 hauer and Wade were in the position of trustees and
 THE NOVA could not become purchasers under the sale by the bank.
 SCOTIA But they were not mere trustees. Their position is
 CENTRAL more analogous to that of a second mortgagee. The
 RAILWAY whole purpose of the transaction was not to create any
 COMPANY trust for the benefit of the railway company but to
 v. secure, in the first place, the advances made by the
 THE bank to Wade, and by Wade to the railway company,
 HALIFAX and in the second place, after this claim was satisfied,
 BANKING to secure the amounts over and above this amount
 COMPANY. due to Wade and Eisenhauer and to Wade personally.
 — The original power of attorney of 4th July, 1889,
 Taschereau expresses that the bonds are to be held by the Trust
 J. Company "in trust to secure the Halifax Banking
 — Company and the said James D. Eisenhauer and
 Fletcher B. Wade the payment of the amount of their
 respective advances." This purpose colours the whole
 transaction and distinguishes it clearly from the case
 of a trust for the benefit of the railway company. In
 effect there is no fiduciary relation between Eisenhauer
 and Wade and the appellant railway company, nor
 between the respondent Banking Company and the
 appellant railway company, and the principle that a
 trustee for sale cannot purchase the subject matter of
 the trust for his own advantage has no application in
 this case.

GWYNNE J.—This is an action instituted in the name of the Nova Scotia Central Railway Company as plaintiffs who in their statement of claim pray for an injunction to restrain the defendants Wade and Eisenhauer from purchasing from the defendants the Halifax Banking Company certain bonds issued by the plaintiff company and pledged to the bank for advances made to the company by the bank and Wade and Eisenhauer respectively, upon the allegation that Wade and Eisenhauer to whom

the bank contemplated selling the bonds had, by divers transactions between them and the company since the first advances for which the bonds were pledged as security, become trustees of the said bonds for the sale thereof for the plaintiffs and could not therefore become purchasers thereof, or in the alternative that an account may be taken of what is due by the plaintiffs to the defendants and each of them in respect of which the defendants or any of them are entitled to hold the said bonds as security, and that it may be adjudged and declared that the plaintiffs are entitled to redeem the new bonds upon payment of the amount so found due. And that the proposed sale may be restrained and stayed, &c. The whole merits of the case were entered into upon the motion for the injunction upon the affidavits of one Bedford who deposed as general manager of the plaintiff company, and one Stearn who deposed as president of the company who says nothing in addition to what is stated in Bedford's affidavit in support of the motion, and upon the affidavits of the defendants Wade and Eisenhauer and one Pitcaithly who deposes as cashier of the bank in answer to the motion. The motion for the injunction having been refused the case went down to trial, upon substantially the same evidence as that contained in the affidavits on the motion for injunction, when a verdict and judgment were rendered for the defendants which has been sustained by the Supreme Court of Nova Scotia. From that judgment the present appeal is taken and the sole question appears to be whether such relationship of trustees for sale as prevented Wade and Eisenhauer becoming purchasers of the bonds which in point of fact were sold by the bank existed between them and the plaintiffs. Apart from this question it must, I think, be conceded that there is no merit whatever in the case to justify an avoidance of the sale in the interest of the plaintiffs.

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By the deed of the 4th July, 1889, the Halifax Banking Company were made mortgagees of the bonds of the railway company therein mentioned upon trust and as attorneys irrevocable of the railway company, in the event of the latter failing to pay the Banking Company by the 1st January, 1890, and Eisenhauer and Wade their respective advances made by Eisenhauer and Wade through the Banking Company to the railway company upon the discounted paper of Eisenhauer and Wade, to sell the bonds and from the proceeds thereof to pay themselves and to retire any of the said paper of Eisenhauer and Wade then held by the said Banking Company, and then upon trust to pay the said Eisenhauer and Wade any further advances that might have been made by them over and above the amount discounted by the Banking Company and any sums remaining due to them for commissions for making such advances, and upon the further trust to pay any balance remaining from the sale of the bonds to the railway company. By the deed it was agreed and provided that the Banking Company should not be compelled to act in the premises any further than they were willing, from time to time, to do, but that in case they should be required by Eisenhauer and Wade to proceed with the sale of the said bonds for the purpose aforesaid, they should, thereupon, either proceed forthwith to sell the same, in which case they should be entitled to be placed in funds and guaranteed for expenses, or they should forthwith substitute said Eisenhauer and Wade as attorneys irrevocable of them the said railway company, with as full and ample power and authority in the premises as were by the said deed granted and conferred upon the said Banking company. The railway company having made default in the payments by them to be made to the Banking Company, the latter was proceeding to sell the bonds

in the month of May, 1890, when to prevent that sale the railway company, through their manager, made a proposition to Messrs. Eisenhauer and Wade which was accepted by them whereby, amongst other things, it was agreed that Messrs. Eisenhauer and Wade should arrange with the Banking Company to substitute them for the bank as the attorneys irrevocable of the railway company for the sale of the bonds at such price, upon such terms and upon such conditions as in their judgment they might deem best in the interest of all concerned, with power to the said Messrs. Eisenhauer and Wade to hypothecate the said bonds until sold, and that in order to carry the then existing loan they should be at liberty to pay any bank a bonus not to exceed \$1,000 per month until the bonds should be sold and to charge such sum to the railway company. In pursuance of this agreement and to give effect thereto, Messrs. Eisenhauer and Wade negotiated with the Halifax Banking Company to obtain from them time to endeavour to effect sale of the bonds. The bank agreed with them that upon their paying \$100,000 to the bank on account of the debt then due the bank, amounting then to \$445,683.48, and giving their promissory note for the balance with interest thereon at 7 per cent and also paying the bank a commission of \$1,000 per month so long as such balance should remain unpaid, and hypothecating the bonds to the bank as security for the payment of such balance and interest thereon and said commission they would give to the said Messrs. Eisenhauer and Wade six months time to pay such balance, during which period Messrs. Eisenhauer and Wade should have power to sell the bonds for that purpose, and that the Banking Company would constitute them, the said Eisenhauer and Wade, attorneys irrevocable of the said railway company under the powers in that behalf vested in the

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bank by the deed of July, 1889. Accordingly Messrs. Eisenhauer and Wade paid the bank the said sum of \$100,000 and the terms of the above agreement were perfected by two deeds bearing date the 15th of May, 1890, executed by and between Messrs. Eisenhauer and Wade and the bank with, as there can be no doubt whatever, the full knowledge and approbation of and for the benefit of the railway company. Now the effect of this arrangement was to deprive the bank of all power to sell the bonds so hypothecated with them for the said period of six months at the expiration of which time, in case default should be made in fulfilment of the terms of the said agreement, their power to sell the bonds to the extent that they had such power under the deed of July, 1889, would revive and be in full force. During the six months it appears by the evidence that Messrs. Eisenhauer and Wade did their utmost to procure a sale of the bonds beneficial to the Railway Company in which, however, they failed, not from any default of their own but, I think that it may be fairly said, by reason of their endeavour to meet the views of the company and the impracticability of dealing with the company. The six months, however, expired without a sale having been made and thereupon the right of the bank as mortgagee and pledgee of the bonds accrued, which right the bank gave to the railway company and to Messrs. Eisenhauer and Wade notice they intended to exercise. Messrs. Eisenhauer and Wade thereupon endeavoured to procure the railway company and the persons composing the company to make a payment on account which might be satisfactory to the bank and to endeavour to get further time for sale of the bonds. This the railway company and the persons composing the company refused to do and there was no alternative left but for the bank to sell the bonds.

Under the circumstances above detailed Messrs. Eisenhauer and Wade were not in any sense trustees or attorneys of the railway company to effect the sale contemplated by the bank. That sale was conducted by the bank in their own right and in this sale there was nothing, in my opinion, to prevent Messrs. Eisenhauer and Wade becoming purchasers in their own right and there is nothing in the evidence offered by the plaintiffs to displace the evidence of the defendants that the sale was as good a sale as could have been made and in fact that a better price was given by Messrs. Eisenhauer and Wade than could have been got from any other persons. The plaintiffs have been repeatedly offered the bonds if they would pay the amount paid for them; this they have always declined to do. The judgment, therefore, of the court below must, in my opinion, be sustained and this appeal dismissed with costs.

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PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Drysdale, Newcombe & McInnes.*

Solicitors for respondent Halifax Banking Company:
Russell & Ross.

Solicitors for respondents Wade and Eisenhauer:
*Borden, Ritchie, Parker
 & Chisholm.*