

mortgagee would not in this case have been required to make the mortgagor a party: see *Kinnaird v. Trollope*, 39 Ch. D. 636, 642.

Declaration will be that the purchaser's objection is invalid.

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MABEE, J.

OCTOBER 4TH, 1906.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. CITY OF TORONTO.

*Railway—Protection of Public at Highway Crossings—Gates and Watchmen — Liability of Municipality — Orders of Railway Committee of Privy Council and Board of Railway Commissioners—Acquiescence.*

Action to recover from defendants \$4,677.11, being the proportion that it was alleged defendants were liable to pay towards the maintenance of gates, etc., of certain city streets crossed by plaintiffs' line of railway.

Angus MacMurchy, for plaintiffs.

J. S. Fullerton, K.C., for defendants.

MABEE, J.:—The liability arises under orders of the Railway Committee of the Privy Council, dated 8th January, 1891, and 16th December, 1893, both of which were made rules of Court on 28th February, 1895. Plaintiffs provided the gates and watchmen as ordered, and rendered defendants from time to time proper accounts of the expenses connected with their compliance with these orders, and defendants paid their share each year, pursuant to the orders, down to 31st December, 1901, since which date they have paid nothing, although accounts were regularly rendered.

Defendants plead that the streets in question were highways prior to the construction of plaintiffs' line of railway; that the Railway Committee had no authority or jurisdiction to order or direct defendants to pay any portion of the cost of protecting such crossings; and that these orders are not binding upon defendants. It is also pleaded that the clause or clauses of the Railway Act purporting to give the Committee power to make orders such as those in question, are