

Thus it is apparent that the case turns altogether on the construction of the amended and substituted section 16 of section 9 of the Amending Railway Act 46 Vic. chap. 24, as applied to the fact of occupancy by the plaintiffs, or either of them. Although the plaintiffs are a husband and wife, living together, yet the wife appears to have been regarded as the business manager, and the owner of the horses, as well as the occupant of the land.

It appears to me that there is no inconsistency between the first part of the amended clause 16 and sub-sec. 2, as, according to the reporter's note, was intimated by the learned Chief Justice.

The first part of the main section creates and enjoins the duty, and is specifically precise and apt in its language, as it ought to be in a case which interferes with the common law.

In sub-sec. 2, the expression: "The occupant of the land in respect of which such fences," &c., "have not been made or maintained," is only used referentially, that is with reference to the previous specific enactment in the first part of the section, and it must be construed in that way.

It was also urged on the argument that there was an inconsistency between the first paragraph of the main clause, as construed by counsel for plaintiffs, and the last paragraph thereof, wherein the expression "proprietor or tenant" occurs, and the word "occupant" does not occur; and the expression "proprietor or tenant" controlled the word "occupied" in the first part of the section.

I think the argument is fallacious. The apparent repugnancy is capable of a rational explanation.

The two parts of the clause are consistent with each other. A proprietor or tenant would each have a fixed and certain interest in the land to be affected by the omission to put up gates, &c., and each could release and discharge the railway company from the obligation to erect and maintain for a compensation according to his interest in the land. But the occupant, having no right but that of a mere occupant, or what is commonly called a squatter, could have no fixed or certain interest to be permanently affected by the omission, and his release would be valueless. This

construction, I think, strengthens rather than weakens the position of the plaintiffs. The clause, as it stood originally in the "Consolidated Railway Act, 1879," applied to proprietors only, but the same word has been construed by the Courts in England, in dealing with the similar Act there, to include tenants also.

What, then, was the object of the amended and substituted clause 16 in the Act of 1883, 46 Vic.? Was it not to give a remedy to persons like the plaintiffs, who were neither proprietors nor tenants? I am unable to conjecture anything else, or to give any other than an affirmative answer to the former question, or than a negative to the latter.

And this view appears to me to be confirmed by a survey of the situation, and a review of the facts, as regards the Canadian Pacific Railway.

It had been constructed through the settled portion of the country, where the lands were in the hands of proprietors, who were in a position to deal with the company, give the notice required by the Act, if they desired that the company should erect fences, and gates, &c., as provided by the Act, or to release them from the obligation of putting up gates, &c., if they chose to do so.

But the company were then constructing the railway, through forest land of the Crown, where some settlers were going in and occupying lands along or in the neighborhood of the line or route of the railway.

These settlers had no title, except that of mere occupancy, being neither proprietors nor tenants in the legal or ordinary sense of the terms.

At the place in question, and along the route of the railway westward through the Province, or the greater part of it, the lands were not ready or had not been offered for settlement by the Crown Lands Department, and no title but of mere occupancy, coupled with the vague though usually respected right of pre-emption, could be obtained. These settlers required cattle to enable them to get along; the cattle were as liable to be killed by the railway as if their owners were proprietors of the lands, and the killing of them was no less an injury to the owners than it would be if they were proprietors of the lands.

[To be continued.]