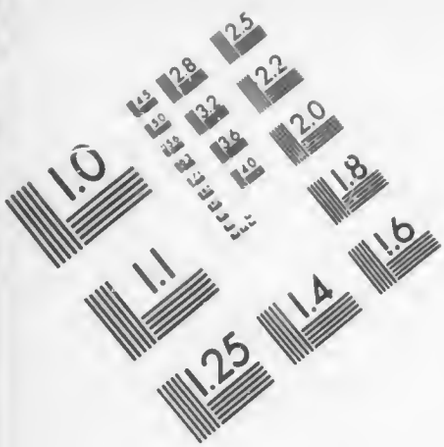

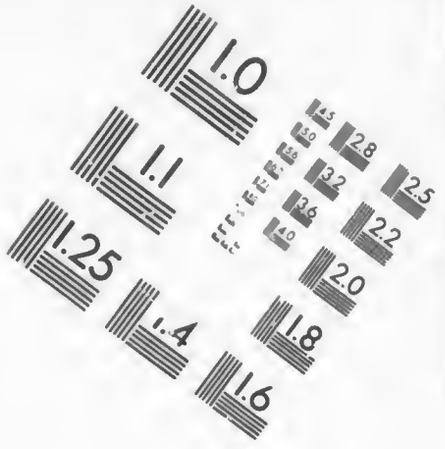

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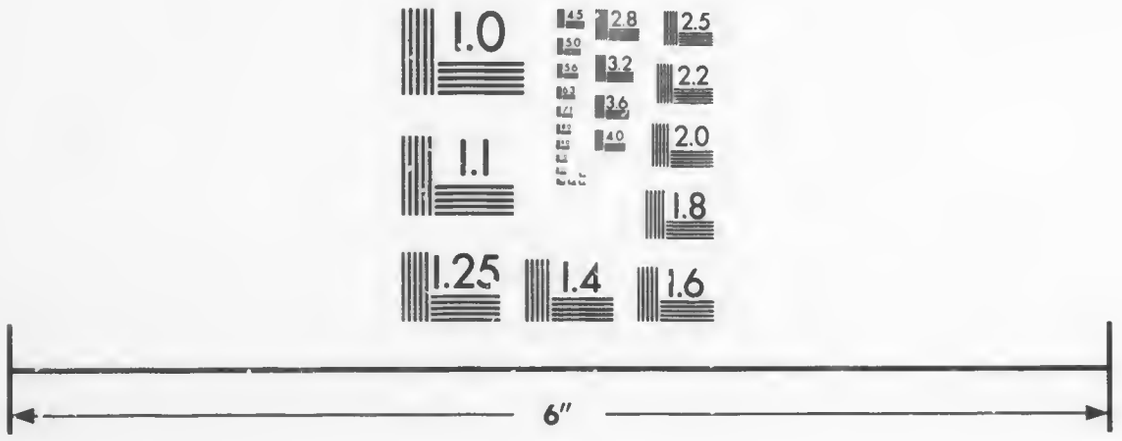

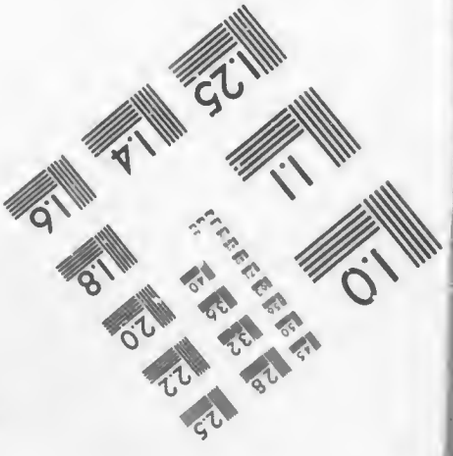

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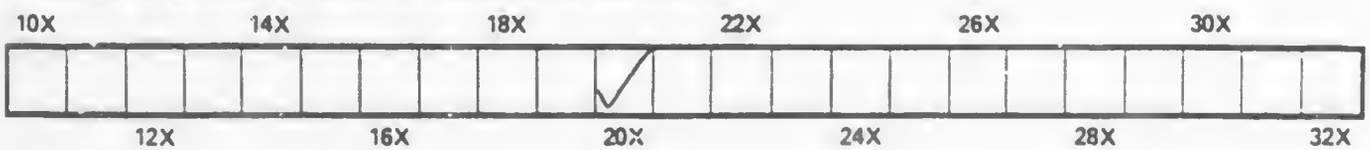

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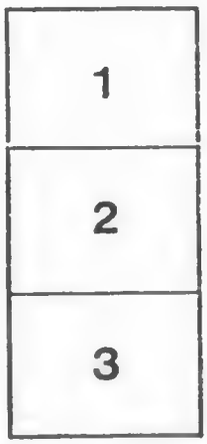

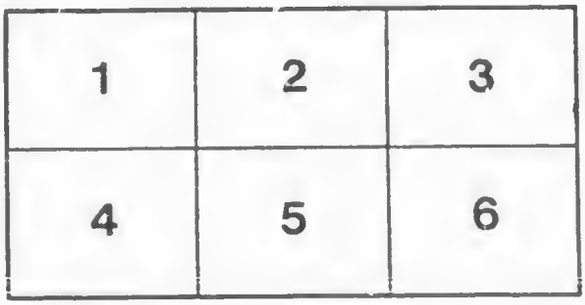

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In Chancery.

REPORT

OF THE

ARGUMENTS AND JUDGMENT

IN

HERRICK

v.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

HEARD 17TH JUNE, 1861, BEFORE THE COURT OF CHANCERY IN UPPER CANADA.

Present:

THE HONORABLE MR. VICE-CHANCELLOR ESTEN, AND THE HONORABLE MR. VICE-CHANCELLOR SPRAGGE.

REPORTED FROM NOTES TAKEN IN COURT BY

RICHARD SNELLING,

STUDENT-AT-LAW.

TORONTO:

ROWSELL & ELLIS, PRINTERS, KING STREET.

1861.

PREFACE.

HERRICK *v.* THE GRAND TRUNK RAILWAY CO.

It is not pretended that the report of the arguments on the hearing of this cause is a full report: it has not been made from short hand notes. No short hand reporter was present; but, as I have been actively engaged in the interest of the Preference Bondholders of the Grand Trunk Railway Company of Canada, ever since they asserted their rights, and have also been acting for Mr. Morrison and others, in the enforcing of those rights, I felt that the preference Bondholders would at least feel an interest in the perusal of a report (however meagre) of the arguments in, and the judgments pronounced upon, a case which so materially affected the great issues now at stake between the Preference Bondholders on the one hand, and the Company, the Judgment Creditors of the company and the other classes interested on the other; hence the following pages.

RICHARD SNELLING.

Toronto, 19th June, 1861.

TORONTO, C. W.,.

MONDAY, 17TH JUNE, 1861.

In Chancery.

HERRICK *v.* THE GRAND TRUNK RAILWAY CO.

This cause came on for hearing on Bill and Answers before the Honorable Mr. Vice-Chancellor ESTEN and the Honorable Mr. Vice-Chancellor SPRAGGE this day.

The Bill was filed by George Herrick (on behalf of himself and all other the shareholders in the Grand Trunk Railway Company of Canada, excepting the defendants hereinafter named who are such shareholders,) against the Grand Trunk Railway Company of Canada.—The Honorable John Ross, Thomas E. Blackwell, Sir Etienne Taché, Thomas E. Campbell, The Honorable James Ferrier, The Honorable Geo. Crawford, James Beatty, Thomas Gibbs Ridout, William Cayley, and The Honorable John Hillyard Cameron.

Mr. *Thomas Galt*, Q. C., and Mr. *Adam Crooks*, appeared as counsel for the plaintiff.

Mr. *Alexander Macdonald* and Mr. *John Bell* (of Belleville) appeared for the Company and the Directors, and Mr. *S. H. Strong* and Mr. *Edward Blake* appeared for Mr. *Cameron*, who was made a party defendant, as being a preference bondholder of the Company.

The plaintiff, Mr. *Herrick*, is a shareholder in the Grand Trunk Railway Company of Canada, and claimed to be entitled to all the powers and privileges of a shareholder, having *twelve* shares in the undertaking, and the object of this suit is best evidenced by referring to the prayer of his bill, which is as follows:

> 1st. That it may be declared by this Honorable Court, that under the circumstances hereinbefore mentioned, the weekly and other earnings of the said road should be applied, after the payment of the ordinary and current expenses of managing, maintaining, and working the said Road, in and towards the purchase and acquisition of such rolling stock, plant,

stores, and other appliances, as may be requisite for the more efficient working of the said Railway, and in and towards the payment and discharge of the floating debt of the said Company, in preference to and before any payment in respect of the preferential bonds aforesaid, or the interest thereon, or any part of the funded debt of the said Company.

2nd. That the Defendants, the Directors of the said Company, may be restrained from any other application or appropriation of the said earnings.

3rd. That (if necessary) for the purposes aforesaid, all proper directions may be given and accounts taken.

4th. That the plaintiff may have such further and other relief in the premises as the nature and circumstances of the case may require, and to this Honorable Court shall seem meet.

Mr. GALT addressed the court, (the pleadings having been read,) on the part of the plaintiff, and commented at considerable length on the provisions of the Act 12 Vic., ch. 29, which is "*An act to provide for affording the guarantee of the Province to the bonds of Railway Companies on certain conditions, and for rendering assistance in the construction of the Halifax and Quebec Railway.*" (This Act will be shortly referred to hereafter as the Guarantee Act of 1849.)

Mr. GALT claimed that this act was largely referred to in all the subsequent acts relating to the Grand Trunk, and argued that it was most important to be considered in reference to the plaintiff's case, urging upon the court that particular attention should be given to its provisions. Referring to the 1st section, he argued that the payment of the interest guaranteed by the Province should be the first charge upon the tolls and profits of the Company, and particular stress was laid upon the circumstance, that by the provisions of this act, the fund out of which the interest on sums guaranteed was to be paid, was out of the "tolls and profits" of the Company, and to secure this a lien was given on the "property" of the Company in the following terms of this section.

"That the Province shall have the first hypothec, mortgage, and lien, upon the road tolls and property of the Company, for *any* sum paid or guaranteed by the Province."

An argument was also raised upon the provisions enacted by section 2 of this act: That the Government provided for itself a security by requiring that railway companies receiving such guarantee should render half-yearly accounts to the Inspector General, attested on oath.

Mr. GALT then referred to the 14 & 15 Vic., ch. 73, (1851,) "*An Act to make provision for the construction of a main Trunk line of Railway, throughout the whole length of the Province.*" By this Statute the Provincial guarantee was extended to *principal*. By the last act it went to interest only, and the 22nd section of this act (14 & 15 Vic.) was particularly referred to and relied upon. It is as follows:

> XXII. And be it enacted, That the said guarantee may, as regards those Companies whose Railways will form part of the said Main Trunk Line, and upon such conditions as the Governor in Council shall think fit, be extended to the payment of the principal of the sum guaranteed as well as to the payment of the interest thereon, provided the bonds guaranteed are made payable at periods previously approved by the Governor in Council, or in his discretion Provincial debentures for the amount to be guaranteed, or any part thereof, may be delivered to the Company in exchange for their bonds for like sums, and the principal and interest whereof shall be made payable at like periods, or at such others as may be agreed upon; and for the principal and interest of such bonds the Province shall have the same priority of hypothec, mortgage, and lien, upon the Railway tolls and property of the Company, as by the said Act is given for sums paid or guaranteed by the Province, and subject to the same provisions, and the said guarantee may be given either at once for the whole sum to be raised by the Company, or from time to time, and by portions as the same shall be required for carrying on the

works, according to the terms and conditions which shall have been made in that behalf: Provided always, that it shall be lawful for the Governor in Council, if he shall deem it expedient, and consistent with the interests of the Province, and the due maintenance of the public credit, to grant the same advantages, or any of them, to the "Ontario, Simcoe and Huron Railroad Union Company," as he may, under this section, grant to Companies whose Railways form part of the said Main Trunk Line of Railway: And provided also that one of the conditions on which the benefit of this section shall be granted to any Company shall be that no by-law of such Company imposing tolls or affecting others than the Company, shall have force or effect until approved by the Governor in Council; and that no such by-law shall remain in force for more than three years from the passing thereof, so that such by-laws may be subject to the periodical revisions by the said Governor in Council; and that the Company shall consent to such amendments (if any) of the Act, incorporating it, as may be requisite to give full effect to this proviso.

Mr. GALT contended, that the only difference between this and the former act was that the Provincial guarantee was extended to principal as well as interest, and that everything else remained the same.

His Honor Mr. V. C. ESTEN.—Of course the mortgage or lien extended to the principal.

Mr. GALT.—Yes my lord, of course; and the only question now is as to the "profits" of the railway, and on this question I would refer your lordship to the 24th section of the same act, which is as follows:—

XXIV. And be it enacted, That the word "Railway" in this Act, shall include all viaducts, bridges, station-houses, depots, and other works, machinery, engines, vessels, carriages, and things of every kind which may be necessary or convenient to the making or using of any Railway.

His Honor Mr. V. C. Esten.—I should like you to read the 19 & 20th sections.

Mr. Galt read those sections, which are as follows:

XIX. And be it enacted that any Company having received such approval as aforesaid shall be empowered, if the length of their Railway exceeds one hundred miles, to divide the same into sections of not less that fifty miles each, and being, as nearly as the total length of the Railway and other circumstances will admit, of seventy-five miles each, and each of such sections may after such division shall have been approved by the Governor, be considered for all the purposes of the said Act, and of this Act as a distinct Railway; and when the requirements of the said Act and of this Act are complied with, as regards any such section, the guarantee of the Province may be given for the sum required to complete such section, which sum shall not be applied to any other purpose; and the Company shall keep and render separate accounts of receipt and expenditure for each such section, and if any receipt or expenditure be common to two or more sections, the same shall be fairly apportioned among them in such accounts to the satisfaction of the said Board.

XX. And be it enacted, That the said guarantee shall not be given with regard to any Railway or Section until the said Board shall have reported to the Governor in Council that the land for the whole Railway or Section has been acquired and paid for; that a part of the work thereon has been completed to their satisfaction, and that the fair cost of the part so completed, including the fair cost of the land and of all materials then procured by and the property of the Company (and not merely the sum the Company may have actually expended upon the same) would not be less than the cost of the part remaining to be done, according to an estimate made upon tenders received and

approved by the Company and by the said Board as fair and reasonable, in which case the guarantee of the Province may be granted for the sum necessary to complete such remaining part of the work according to such estimate; and generally, it shall be the duty of the said Board to obtain and report to the Governor all such information and to do all such things as may be necessary to ensure the faithful execution of the said Act and of this Act, and any duty assigned to the Commissioners of Public Works by the said Act shall hereafter be performed by the said Board.

Mr. GALT then referred to 18 Vic., ch. 74, (1855,) "*An Act, for granting additional aid by loan to the Grand Trunk Railway Company of Canada;*" and read sections 2 & 3, as follows:

II. The sums advanced as a Loan under this Act shall be a first charge, hypothec, and lien, in favour of the Crown on behalf of the Provincial Government, and upon the whole amalgamated Grand Trunk Railway of Canada, and upon all the Railway, works and property forming part thereof or now belonging or hereafter to belong to the said Company, and shall be payable at a period not exceeding twenty years from the passing of this Act, the interest thereon at six per cent. per annum being payable by the said Company to the Crown for this Province, half-yearly, at such times as the Governor in Council shall appoint; Provided that nothing in this section contained shall prejudice the security of the seminary of Montreal and of the British American Land Company upon the former St. Lawrence and Atlantic road, or to any creditor for the price of lands sold to the said Company, or to the Grand Trunk Company having a privilege of *bailleur de fonds*.

III. The said charge, hypothec, and lien in favour of the Crown, shall have the same preference and privilege, and shall be subject

to the same incidents as to redemption and otherwiso as the charge, hypothec, and lien in favour of the Crown for claims arising out of the Provincial Guarantee, or advances in place of the Provincial Guarantee under any former Act or Acts authorising such Guarantee or advance.

Mr. GALT contended that as the said charge, hypothec, and lien in favour of the Crown, shall have the same preference and privilege, and shall be subject to the same incidents as to redemption and otherwise as the charge, hypothec, and lien in favour of the Crown for claims arising out of the Provincial guarantee, and that such payments were to be paid out of the profits. "Now," said Mr. Galt, "what are profits?" On this point I refer your lordships to the case of "Corry v. The Londonderry and Enniskillen Railway Company," reported in 7 Jur. N. S. 508. In this case it was held that debts incurred by a railway company for rails, stations, and the like, and which if there had been funds would have been paid at the time they were incurred, form a first charge upon the profits of the company; and that guaranteed preference shareholders are entitled to be paid arrears of dividends, without interest, in priority to those shareholders over whom they have a preference."

The judgment as rendered in this suit by *Sir J. Romilly*, M. R., was commented upon at length by Mr. Galt. The learned Master of the Rolls said: "This suit is instituted to determine what constitutes the profits of this company, and how they ought to be applied. The railway in its inception was not successful to the extent contemplated by its promoters, and the consequence has been that various acts of parliament have been passed enabling the company to obtain more money by the issue of fresh shares. * * * The first question is what constitutes profits, and whether the defendants are entitled to pay any, and what debts out of the profits before they divide them among the shareholders. It is clear that all the debts of the company are first payable, other than those which may be called funded debts. For instance, the defendants have raised money by mortgage,

under the powers contained in their Acts for the purpose of completing their line. This does not consitute such a debt as that it can be paid off out of the profits before the profits are divided. But on the other hand, any debts which have been incurred, and which are due from the directors or the company, either for steam engines, for rails, for completing stations, or the like, which ought to have been paid at the time, had the defendants possessed the necessary funds, these are so many deductions from the profits, which are not ascertained till the whole are paid. Something was urged in argument as to the propriety of these debts having been incurred. With that I have nothing to do in this suit. It is not instituted to make the directors the trustees of the railway company, liable to their *cestuis que* trust for the due performance and execution of the trusts confided to them. All the debts incurred by the directors, which would be allowed in a suit for taking the account as between them and their *cestuis que* trust, are debts to be paid before the profits can be ascertained, and before any thing ought to be applied in payment of the interest or dividend."

His Honor Mr. V. C. Esten.—Do you contend that this case intends to refer to all debts incurred in the past, and to be incurred in the future, for working the road, and for the purchase and payment of rolling stock, &c.?

Mr. Galt.—Yes, my lord, most unquestionably, that is our contention.

His Honor Mr. V. C. Esten.—A bond to *complete* the undertaking—would it be a *debt* referred to in this judgment?

Mr. Galt.—No, I suppose not my lord. I refer your lordship to section 3, of the act of 1856, 19 & 20 Vic., ch. 111, and particularly, my lord, to 20 Vic., ch. 11, section 4, which I will now read to your lordships:—

> IV. On condition and provided that the said Company by means of the Preferential Bonds mentioned in the Act of 1856, chapter one hundred and eleven (for granting additional aid to the said Company,) or by means of any other loans effected or to be effected

for such purposes, complete their Railway from Riviere-du-Loup to Stratford, and thence by St. Mary's direct to Sarnia, including the Victoria Bridge, and the other works, undertakings and engagements mentioned in the said Act of 1856, and supply the said Railway with sufficient plant, rolling stock and appliances to work the same efficiently, within the limits of time named in the said Act of 1856, or within such extension thereof as is hereinafter stated, and so long as they maintain and work the same regularly, the Province foregoes all interest on its claim against the Company, until the earnings and profits of the Company, including those of the Atlantic and St. Lawrence Railroad Company, shall be sufficient to defray the following charges:—1. All expenses of managing, working and maintaining the works and plant of the Company:—2. The rent of the Atlantic and St. Lawrence Railway, and all interest on the bonds of the Company exclusive of those held by the Province:—3. A dividend of six per cent. on the paid up share capital of the Company, in each year in which the surplus earnings shall admit of the same: And then in each year in which there shall be a surplus over the above-named charges, such surplus shall be applied to the payment of the interest on the Province Loan accruing in such year: The bonds and share capital herein mentioned shall be held to include and consist of all loans and paid up capital which the Company have raised or may hereafter raise *bonâ fide* under the authority of any Act of the Provincial Legislature passed or to be passed, for any purpose authorized by any such Act.

Your lordships will remark, continued Mr GALT, that the Province foregoes all interest on its claim against the company until the "earnings and profits" of the company shall be sufficient to do certain things; and, 1st. *All* expenses of managing, working, and maintaining the works and plant of the company are to be paid.

His Honor Mr. V. C. ESTEN.—All expenses must be previously deducted before the Government postponed its lien; it seems to imply that unless the Government made this concession, they were entitled to receive interest, but they forego the interest; the Government, as I understand it, Mr. Galt, *concede nothing*.

Mr. GALT.—But, my lords, let me refer your lordships to 22 Vic., ch. 53, secs. 4 & 5.

> IV. It shall be lawful for the Directors of the Grand Trunk Railway Company of Canada, to increase the Capital Stock of the said Company, by such sum not exceeding the sum of Two Hundred and Fifty Thousand Pounds sterling, as may be requisite for constructing the bridge and works hereby authorised, or for enabling them to carry this Act into effect; and such increase may be made either by subscriptions for new stock by the then Shareholders of the Company, or by the admission of new subscribers, or in both ways; and the shares of such additional Stock shall be each of the same amount as the shares of the other Stock of the said Company, and all the provisions of the Act incorporating the said Company shall apply to such additional shares, and to the subscribers therefor or holders thereof, in so far as may not be inconsistent with the express provisions of this Act; or it shall be lawful for the said Directors to raise the said sum partly by such increase of the Capital Stock of the Company as aforesaid, and partly by loan, and for that purpose to issue Debentures of the said Company, to which all the provisions of the Act incorporating the said Company shall apply as to the Debentures issued under the authority thereof: And it shall be lawful for the Directors of any other Railway Company, on behalf thereof, to subscribe for and hold shares of such additional Stock as aforesaid of the Grand Trunk Railway Company of Canada, and to authorise any person or persons to vote upon such Stock at meetings of the Shareholders of such last-

named Company, appointing one such person for every hundred shares held by such other Company, and one for any broken number of shares so held less than a hundred; and it shall also be lawful for the Directors of such other Company to lend money to the Grand Trunk Railway Company of Canada, or to guarantee the payment of the principal or interest or both of any Debentures to be issued under this Act by such last-mentioned Company, and to construct any Branch Railway or other work which may be necessary for conveniently connecting the Railway of such other Company with the said bridge, or for enabling such other Company fully to avail itself of the provisions of this Act, and to increase the Capital Stock of such other Company by such sum as may be necessary to defray the cost of any such work, or to pay any sum which shall become payable by such Company under the provisions of this Act, and such increase may be made either by subscription for new Stock by the then Shareholders of such Company, or by admission of new subscribers, or in both ways, or it shall be lawful for the Directors of such Company to raise such sum partly by such additional Stock and partly by loan, and for that purpose to issue Debentures of such Company; and to all such Branch Railways and other works to be constructed under this Section by any Company other than the Grand Trunk Railway Company of Canada, and to all shares of the additional Stock of such Company authorized by this Section, and to the subscribers for and holders thereof, and to all Debentures to be issued by such Company, and other the things to be done by or on behalf of the said Company under this Section, the provisions of the Act incorporating such Company, as amended by any subsequent Act, shall apply in so far as they may not be inconsistent with this Act.

V. The Guarantee of this Province shall not be extended to any Loan or Debenture to

be raised or issued under the authority of this Act or in respect of the said bridge or any work to be constructed under this Act; and neither the privilege and prior claim of Her Majesty on behalf of this Province by reason of the Guarantee of the Province granted or to be granted to the Grand Trunk Railway Company of Canada, or to any other Railway Company, or any general hypothec or mortgage given by the said Grand Trunk Railway Company of Canada or by any other Railway Company, before the passing of this Act, shall extend to the said bridge, or to any work constructed solely under the authority of this Act, or to the tolls and profits to be derived therefrom, but the same, and the shares held by any other Company in the Stock of the Company constructing the said bridge, may be separately hypothecated, mortgaged or pledged, and the claim of Her Majesty on behalf of this Province and any such general hypothec or mortgage as aforesaid, shall rank after any special hypothec, mortgage or pledge to be given upon the said bridge or works or any of them, for securing any sum of money raised or borrowed for the purpose of constructing the said bridge or any such work as aforesaid.

Mr. GALT—I refer your lordship with confidence to these sections. The Company may issue any amount of bonds it pleases. I contend that the Province has not transferred any right to the preference bondholders, and all the Province has done in the matter of preference bonds, is just this:—The Province has said,—"when there is any thing to pay us, you, preference bondholders, shall have it." But, my lords, when reference is made to that Act to which I have referred your lordships, as to the order of appropriation of the earnings—when regard is had to the deductions made by the Legislature—I say it was intended by the Legislature, by those deductions for expenses of managing, working, and maintaining to provide for the creditors of the Company. And if this were not so, all I can say is, my lords, that the Legislature have appropriated the earnings of the Company for all time to

come, and have left no fund whatever for the payment of creditors. I refer your Lordships to the case of *Russell* v. *The East Anglian Railway Company*, reported in 6 Railway Cases, 541. Mr. GALT proceeded to comment thereupon.

His Honor Mr V. C. SPRAGGE—Mr. Galt, do you understand that floating debt means every unsecured debt?

Mr. GALT—Yes, my lord: I presume it is so.

His Honor Mr. V. C. ESTEN—Mr. Galt, as I understand your argument, there are three classes of debt which you contend should be paid *before* the interest is paid on the preference bonds.

1st. The debts for constructing the line, which were incurred before the act authorising the issue of the preference bonds had passed.

2nd. The expenses of managing, working, and maintaining, in arrear, and also incurred before the said act had passed: and

3rd. Similar debts incurred, and to be incurred, since the said act has passed.

Mr. GALT—That is our contention, my lord.

His Honor Mr. V. C. SPRAGGE—What are the costs of construction? when the rails are down? or when the road commences running?

Mr. GALT—I cannot say my lord what may be said to be the costs of construction; nor does it much matter, as the debts for construction are almost all paid. I suppose if a bridge break down, the company would be bound to repair it, and the costs for doing so would be a proper charge to be paid as expenses of managing, working, and maintaining.

His Honor Mr. V. C. ESTEN.—I really don't know what the legislature may have meant to say—I do know what it has said.

Mr. ADAM CROOKS next addressed the court on the part of the plaintiff, and called the attention of their lordships particularly to the frame of the suit. He referred to 23 *Beavan*, 212, & *Drewry's Equity Pleader* 57, and contended that the bill was properly framed, and that the plaintiff *qua* a shareholder, had a right to the relief sought by the bill. Mr.

Crooks referred to the case already cited *Corry* v. *The Londonderry and Enniskillen Railway Company*, and directed the attention of their lordships to the consideration that the Grand Trunk preference bondholders' rights were in the nature of a lien on the "profits" of the railway, and argued that there was no difference between preference bondholders and preference shareholders. That a railway mortgage was in the nature of a Welsh mortgage. That while the dry right to have a Receiver remained to the bondholder or mortgagee, yet he could neither sell nor foreclose. Mr. Crooks also remarked on the circumstance that no sinking fund was provided for the payment of the principal of these preference bonds.

His Honor Mr. V. C. Esten.—I suppose it was intended that the company should start free and clear of debt, and that the interest being regularly paid little trouble would ensue. It is remarkable, however, and somewhat important that a sinking fund was not provided for.

His Honour V. C. Spragge.—The bonds are payable on a day certain.

Mr. Crooks—Yes, my lord, in 20 years. I refer your lordships to *Crawford* v. *North Eastern* 4 *K. & J.*, 23 *Jur.* 1093.

Mr. Alexander McDonald next addressed their lordships. He said he appeared for the directors and the company. The company he considered were *quasi* trustees of the earnings of the road, and they desired to dispense those earnings strictly in accordance with the acts of Parliament. He said that trustees were entitled to come to this court for advice and relief when threatened by actions. The company being trustees for the distribution of the earnings of the road, the question is—where are they to begin? There is no difficulty when a starting point has been obtained, but the difficulty is to arrive at a correct starting point, and hence the desirability of a decision of this court upon the subject. The Directors of the company (said Mr. McDonald) have a plan which they were prepared to act upon. Mr. McDonald argued that this bill was sustainable, and it would have been equally so if filed by the company or the Directors, as it has been by a share-

holder. As to the preference bondholder who is a party, Mr. McDonald contended that the decree to be pronounced in this suit would certainly bind him. If the decree should be that the defendant Cameron is to be paid, then he (Mr. Cameron) would, no doubt, be strenuous in his contention to support such a decree; but if on the other hand, the decree should be that the debts of the company must be first paid, then, without doubt, Mr. Cameron will be bound.

His Honor Mr. V. C. ESTEN.—Mr. Cameron is a holder of preference bonds resident in this country—can he represent those in England? Cannot a bondholder resident here, have views and wishes, which those resident in England may not agree in?

Mr. McDONALD.—I think not, my Lord. If the principle of representation is applicable, the other parties resident in England must be bound by any decree made against Mr. Cameron.

His Honor Mr. V. C. ESTEN.—This court will not make a decree which can be upset next week.

Mr. McDONALD.—The company, and its Directors, desire that the decision to be pronounced in this suit should be final. Mr. McDONALD then referred to the act of 1857, 20 Vic., ch. 11, and reading section 4, he contended that the true construction of that section was that all the earnings of the company should go to pay debts in the first instance.

His Honor Mr. V. C. ESTEN.—As I have before observed, Mr. McDonald, *the Legislature supposed, and we may take it intended, that the road started clear of all debt*, and if this had been a fact, the construction of this act, 20 Vic., ch. 11, sec. 4, is easy enough, and there being no sinking fund provided, it seems to me as if the preference bonds were in fact perpetual annuities.

Mr. McDONALD.—But again, my lords, I do not know that I need trouble your lordships with further reference to those acts which have been so frequently mentioned in the course of this argument. I think we get over all difficulty by referring to an act which was passed last session, and I beg your lordships to refer to the same.

Mr. STRONG.—If that act is referred to, I must consider

whether I can retain my brief. My learned friend must not take me by surprise. I have not seen the act, it is not yet printed, and it was understood that that subject should not be referred to.

The COURT.—The Acts of last session are printed, and are in court. We had better see the Act, Mr. McDonald, and hear what you have to say upon it.

Mr. McDONALD read from an act passed last session, "*An Act to explain and amend the railway clauses Consolidation Act.*" The 8th section he relied upon, which is as follows:

> VIII. The interest of the purchase money or rent, of any real property acquired or leased by any railway company, and necessary to the efficient working of such railway and the price or purchase money of any real property or thing without which the railway could not be efficiently worked, shall be considered to be part of the expenses of working such railway, and shall be paid as such out of the earnings of the railway."

His Honor Mr. V. C. ESTEN.—Is that a declaratory act, and does it apply?

Mr. McDONALD.—I think I shall be able to shew your lordships that it does apply; and I refer your lordships to the case, *Wilson v. Whatley*, 1 *T. & H.* 436, a decision of Mr. V. C. PAGE WOOD, which I think carries the application to the present case completely.

The COURT.—What definition do you give to the word "thing."

Mr. McDONALD.—The case I have cited gives the definition, and I contend upon the authority of that case that a "locomotive" is a thing within the meaning of the act.

Mr. GALT objected to any reference being made to this statute. He considered that it did not apply, and he did not wish that it should be made any part of *his* case.

Mr. McDONALD concluded his argument by a general reference to the position of the Company and Directors in this litigation, and reviewed the points which, as he submitted, established the views he had taken of the case.

Mr. S. H. STRONG.—I appear, my lords, for the Hon.

JOHN HILLYARD CAMERON, who is made a party defendant in the interest of the preference bondholders. My learned friend, Mr. Blake, is with me in the same interest. I need not recapitulate the various statutes which have been so frequently, in the course of this argument, brought before the attention of your lordships. My learned friend, Mr. Galt, has exhausted all that I need say on the question of extracts from the statutes. To my mind, my lords, the question is one of construction—the construction of the 5th section of the act 22 Vic., ch. 52. I take the practical question for your lordships' consideration to be, whether the directors have a right to pay any debts other than mere current expenses—working expenses. These, I submit, must be met and paid: and what are working expenses? They are easily described. I understand working expenses to comprise wages to employees, wood and oil, necessary to work the line, repairs of rolling stock, and the maintainance of the permanent way. And how can it be otherwise, the acts clearly provide how the Company are to pay their debts, and indicate the fund to be employed for that purpose. The Company by their acts have power to raise capital by *contribution* and *by loan*, and reading the acts by the light of an ordinary commercial understanding, the interpretation is clear. Take the case of a partnership, which I submit is a proper illustration. Suppose that the profits thereof are mortgaged, profits to be hereafter made, can the mortgagors, the partners, use the capital of the partnership for purposes foreign to their trade? Certainly not; the capital cannot be so used. And now refer to 20 Vic., ch. 11, sec. 4, and the force of my illustration is apparent

Mr. STRONG went on to observe that the *share* capital was limited, but that there was no restriction to the *loan* capital; and the section last referred to, went to shew, clearly, how the income of the Railway was to be applied, after deducting working expenses. Mr. STRONG then ably illustrated the case of the preference bondholders in the view of "convenience," and reviewed the case of *Russell v. East Anglian Railway*, shewing in what manner that case was inapplicable. He also reviewed the case of *Corry v. The Londonderry and Ennis-*

killen Railway Company, and pointed out to the court that *that* case was as to the distribution of profits as *between shareholders*, while this case was as *between creditors*. And here again he referred, by way of illustration, to the case of a partnership—arguing that as to a division of profits between shareholders,(i. e. partners,) the case of *Corry v. Londonderry* was sustainable, but urging the great and grave distinction between *that* and *this* case.

Mr. STRONG also urged, in a very forcible argument, that the Act of 1858, (22 Vic., ch. 52,) superseded the Act of 1857, (20 Vic., ch. 11.) That in the act of 1858 there were not any conditions. That the order of application of earnings after payment of working expenses was clear, and that the first payment thereafter was to be made by payment of interest to the preference bondholders. That this Act gave them a title even as against judgment creditors, and that the lien of the Province absolutely vested in them.

Mr. STRONG briefly referred to the frame of this suit, and as to defendants by representation, referring to *Calvert on Parties*, 41.

Mr. EDWARD BLAKE followed on the part of Mr. CAMERON in the interest of the preference bondholders.

Mr. BLAKE proceeded as follows :—The lien of the Crown, or that of the preference bondholders, or both, extending to everything owned by the Company, the execution creditors would be restrained from levying, at the instance of these parties, and therefore the damage alleged by the bill would not arise in fact.

The lien of the bondholders was practicably a first lien, not on the profits, but on the road and effects of the company : and the bondholders were entitled independently of the Act of 1858, to a Receiver of the profits, on default of payment of interest or principal.

The clear intention of the Legislature was, that the Company should construct and equip the road by means of the borrowing powers conferred under the various acts, and there was no intention that the Company should go into debt to contractors or others for construction, except by means of these borrowing powers.

The result of the plaintiff's contention would be to give the Company power to postpone all holders of securities by the simple expedient of going into debt, and the bondholders would be better off if they had nothing to look to save the Company's promise to pay.

The words of the Act of 1858 were clear, and it was manifest that under them the bondholders were entitled to all the earnings except what were applicable to the expenses of management and maintenance.

This was really a suit between the execution creditors and the bondholders, and the former were necessary parties to the litigation, as were also the other classes of creditors.

If the act of last session applied, it was clearly fatal to this bill; as it was prospective, and did not assist the present execution creditors, while it indicated that the pre-existing law was in favor of the bondholders.

Corry's case was not an authority, the plaintiff being a shareholder, and the question being as to the application between shareholders of the profits.

The proper course for the company, was to exercise its borrowing powers, and thus to pay the construction debts. It was no excuse to say that these powers could not be exercised. The answer to that was, that the liabilities should not have been incurred until the means to pay had been provided by the exercise of these powers, which were the only means to which the creditors could look for relief.

Mr. ADAM CROOKS now interposed, and begged their lordships to refer to *Linley on Partnership*, pp. 419, 777, 778.

Mr. THOMAS GALT rose to reply, but inasmuch as both Mr. STRONG and Mr. BLAKE had not referred to the Railway Clauses Consolidation Amendment Act,

The COURT stated that they should like to hear Mr. STRONG'S and Mr. BLAKE'S views upon the 8th clause, cited by Mr. MCDONALD.

Mr. STRONG said, that he considered the Act a general Act—that the Act was prospective, and did not apply to personal property—and as to the interpretation to be given to the word "thing," the words of the act were, "real pro-

perty or thing," and the adjective must apply to "thing" as well as "property," and the act should read "real property or real thing."

Mr. BLAKE followed, corroborating this opinion.

Mr. GALT continued his reply, and said he did not rely at all upon the statute referred to by Mr. McDonald, and passed last session.

His Honor Mr. V. C. ESTEN.—I do not think that statute will bear the interpretation Mr. McDonald seeks to give it.

His Honor Mr. V. C. SPRAGGE.—That Act is a general Act; it does not refer to the Grand Trunk Railway.

Mr. GALT, continued.—My learned friends Mr. STRONG and Mr. BLAKE may think that it was quite an easy thing for the Company to borrow money, and that it was only necessary to announce the fact that money was required, and it could be at once procured, but he (Mr. Galt) could assure them that they were pretty well mistaken; it was one thing to have the power to borrow, and another to get the money.

Mr. GALT said that if the arguments of Mr. STRONG and Mr. BLAKE prevailed and were conceded, four millions sterling of ordinary bonds would be cut out, and he was sure the Legislature never intended that.

Mr. GALT, in continuation, reviewed the case as it had been presented, and thereafter their lordships requested the gentlemen engaged in the case to remain for about a quarter of an hour, and that they thought the court could then give judgment.

Their Lordships retired for fifteen minutes, and returning into court, His Honor Mr. V. C. ESTEN gave judgment.

JUDGMENT.

His Honor Mr. V. C. ESTEN said, after the best consideration we have been able, in so short a time, to give to this case, we have come to the conclusion that the plaintiff's bill must be dismissed. It appears to us that the situation of the Peferenee Bondholders is clear—their position and their rights have been well defined by the Acts. His Lordship then referred to and quoted from 12 Vic., ch. 29,

which gave the Crown the lien for interest—18 Vic., ch. 174, which extended that lien to principal as well as interest—19 & 20 Vic., ch. 111, which authorized the issue of the Preference Bonds. Now, this last act, said his Lordship, authorized this Company to issue Preferential Bonds to the extent of two millions of pounds sterling. The holders of such bonds to have priority of claim therefor *over* the present first lien of the Province. As Bondholders merely, they have no lien, but by this enactment their lien (for they get the lien which the Government already possessed) attaches to the whole property of the Company, *present* and *future*, for Principal as well as Interest.

The rights of the Preference Bondholders thus created are not impaired by any subsequent enactments, and in my view the Act 22 Vic, ch. 52, rather confirms those rights.

Now the object of this suit is to restrain the Directors from paying the interest now due and unpaid on the Preference Bonds. Apart from the Acts of Parliament, this Court has no power to interfere. This Court must decide the questions which are raised upon these pleadings, according to the several Acts of Parliament which bear upon the subject; and if we refer to those Acts, as we have done, we find it clearly expressed, THAT THE PREFERENCE BONDHOLDERS ARE IN THE POSITION OF PREFERRED CREDITORS, HAVING A LIEN UPON THE ROAD AND ALL THE WORKS AND PROPERTY OF THE RAILWAY. Then again, on looking at those parts of the Acts which have been cited as describing the order of distribution of the earnings of the road, we do not find that in those Acts the rights of the Bondholders are in any wise impaired. There is no doubt in my mind but that the Bondholders can institute a suit to restrain the Directors from applying the earnings of the road in any other way than in the order appointed by the Acts. This case is to be distinguished from *Corry v. Londonderry and Enniskillen Railway Company*.

We cannot say how the past debts, due and unpaid, are to be met; but it is quite clear to me that a person having a lien is not obliged to submit to payments of past debts which the Directors have neglected to pay; and I consider that the

Preference Bondholders of the Grand Trunk Railway Company are in that position.

From the best consideration we have been able to give to the case, we have concluded that the Bill must be dismissed, and with costs.

His Honor Mr. V. C. SPRAGGE regretted that he had not been able to give this case more consideration before rendering judgment. There were two branches in the case. (His Lordship then read the prayer of the Bill.) He was of opinion that it would be a breach of trust to apply the earnings in any way unauthorised by the Acts. He was in doubt as to the expenses of maintaining and working, and whether the preference bondholders were entitled to any thing more than the "profits." He thought that the statutes 12, 19, 20, & 22 Vic., should be read in *pari materia*. His lordship, however, desired to reserve his opinion on these points, as he had not sufficiently considered the effect of the numerous statutes which had been referred to, and he desired to look more fully into the case of *Corry* v. *Londonderry*, &c., at any rate his leaning was in favour of the decision come to by his learned brother ESTEN, and he should agree *pro-forma*, that the bill be dismissed.

His Honor Mr. V. C. SPRAGGE considered that the suit was not properly constituted.

NOTE.

Since the foregoing was in press, Mr. Galt waited upon me and handed me the following, as the Judgment of the Court, which he said had been drawn up by Mr. Crooks, Junior Counsel for the plaintiff, and agreed to by the Court. This course was taken, inasmuch as it was the expressed intention of the counsel for the plaintiff to take the case to the Court of Appeal at once. The case will not however be heard in appeal before the fall. I have concluded to print the judgment as handed to me by Mr. Galt, referring at the same time to my own record, as above given.

R. S.

HERRICK *v.* GRAND TRUNK RAILWAY.

JUDGMENT OF THE COURT, AS DRAWN UP BY PLAINTIFF'S COUNSEL.

On the 17th June, 1861, the case was argued by Council for all parties, before their Lordships, Mr. V. C. ESTEN, and Mr. V. C. SPRAGGE, when their Lordships delivered their judgments *viva voce*, and to the effect following:

Mr. V. C. ESTEN thought that the plaintiff's Bill should be dismissed, inasmuch as the preferential bondholders had a preferential lien, over the property of the company under 19 and 20 Vic., ch. 111, and that the rights thus created had not been impaired by the subsequent enactments; that it was therefore the duty of the Directors to apply the surplus earnings of the road in and towards payment of the interest due upon the preferential bonds. His Lordship distinguished the present case from that of *Corry* v. *the Londonderry & Enniskillen Railway Company*, 7 *Jur. N. S.* 508, which was cited in argument, viewing that case as one in which creditors' rights were not in question, but only those of shareholders *inter se*. His Lordship doubted how far the rights of absent parties could be bound by the present parties to the bill.

Mr. V. C. SPRAGGE was inclined to think that the rights of the Preferential Bondholders were statutory only, and that taking the place of the Government Loan, the interest on these Bonds was only payable out of profits, as provided for by Stat. 12 Vic., ch. 29, and that therefore the principal established by Corry's case would require the payment of debts incurred for the maintenance and working of the Railway before that of the interest on the Preferential Bonds, but with the view of enabling the parties to obtain the benefit of a judgment from the Court of Appeal, he would concur *pro forma* with the opinion pronounced by Mr. V. C. ESTEN.