The Legal News.

Vol. VIII. OCTOBER 10, 1885. No. 41.

In the case of *The Queen* v. *The Bank of Nova Scotia*, an appeal from Prince Edward Island, the Supreme Court of Canada has given a decision in the same sense as that rendered by the Court of Queen's Bench at Montreal in *The Queen & Exchange Bank of Canada*, M.L.R., 1 Q.B. 302, the privilege of the Crown as simple contract creditor being maintained. The Bank of Prince Edward Island became insolvent, and a winding-up order was made on the 19th of June, 1882. At the time of its insolvency the Bank was indebted to Her Majesty in the sum of $93,-494.20, being part of the public moneys of Canada, which had been deposited by several departments of the Government to the credit of the Receiver-General. It appears that the first claim filed by the Minister of Finance at the request of the respondents, liquidators of the Bank of Prince Edward Island, did not specially notify the liquidators that Her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of $65,426.95. On that day the respondents were notified that Her Majesty intended to insist upon her prerogative right to be paid in full. At this time the liquidators had in their hands a sum sufficient to pay the Crown claim in full. The following objection to Her Majesty's claim was allowed by the Supreme Court of Prince Edward Island—"That Her Majesty the Queen, represented by the Minister of Finance and the Receiver-General, has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to Her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company." On appeal to the Supreme Court of Canada, it was held, reversing the judgment of the Court below, that the right of the Crown, claiming as a simple contract creditor, to priority over other creditors of equal degree cannot be disputed; that this prerogative privilege belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of a provincial corporation in a provincial court; that the crown can enforce this prerogative right in proceedings in insolvency under 47 Vict., ch. 23; and, lastly, that the Crown, by its acceptance of two dividends, had not waived its right to be preferred to other simple contract creditors. It will be remembered that the decision in the Exchange Bank case was based upon the civil law of the Province of Quebec, C C.P. 611.

The cases under the English Vaccination Acts do not appear in the law reports, but it is well known from police statistics that numerous prosecutions have had to be resorted to before compliance with the law was secured. The victory of science over ignorance and prejudice has been gained inch by inch; in fact, it is not yet complete. The opposition to vaccination is of two sorts: first, there is the dread of the unknown, entertained by the ignorant, like a child's terror at being left in the dark; secondly, there is the more obstinate opponent of the order of mind now aptly expressed by the term "crank;" such an individual, for example, as will go round chuckling over one supposed case of trouble arising from vaccination, while at the same time he shuts his eyes to the certain fact that thousands have been swept away by failing to be vaccinated. It is not long since a case occurred in England, *Reg.* v. *Morby* (5 Leg. News, p. 241), in which a parent of this class was prosecuted for manslaughter, because he had refused to call a doctor to his son who was ill of smallpox and died without any medical attendance. Even in times when no epidemic is prevalent it is often a disagreeable task to enforce the law, because it involves sending the head of a family, who is otherwise a good citizen, to prison, and leaving his children without the means of support. The remedy now adopted in Montreal, of requiring all employees and their families to be vaccinated, is one which must prevail in every city where the manufacturing interest predominates. Employers hold the key to the position, for there is no

teacher so convincing as the pocket, and if all the employed and their employers are vaccinated, there will not be much trouble in dealing with the unemployed.

COUR SUPÉRIEURE.

MONTRÉAL, 4 juin 1884.

Coram LORANGER, J.

ROULEAU v. LALONDE.

Plaidoyer—Motion—Illégalités prima facie.

JUGÉ:—*Que lorsqu'une question a été soulevée par un plaidoyer au mérite, le défendeur ne peut, par motion, demander le renvoi de l'action pour les mêmes raisons mentionnées en son plaidoyer, quand même l'action serait illégale à sa face même.*

Le demandeur poursuit le défendeur pour la pénalité de $200 accordée à toute personne qui en poursuivra la demande, par l'Acte des élections fédérales, contre les électeurs qui commettent des actes considérés frauduleux par cette loi.

Au mérite de cette action, le défendeur plaide, entr'autres choses, que cette action en est une qui tombe sous le chapitre 43 de 27-28 Vict., exigeant que toutes les actions *qui tam* fussent précédées d'un affidavit. Et que le demandeur a, dans cette cause, fait émaner le bref sans produire cet affidavit; que, par conséquent, le bref ayant été illégalement émané, l'action doit être renvoyée.

Subséquemment, le defendeur fit une motion par laquelle il demande, pour les mêmes raisons déjà mentionnées dans le susdit plaidoyer, que vû que le bref est nul à sa face même l'action du demandeur soit renvoyée.

Voici le jugement renvoyant la motion:

" La Cour, après avoir entendu les parties sur la motion du défendeur demandant le débouté de l'action, avoir examiné la procédure et délibéré:

" Attendu que le défendeur a soulevé par voie de contestation régulière le point invoqué dans la présente motion et que le litige est engagé sur cette contestation;

" La Cour, sans adjuger sur le mérite même de la question, renvoie la motion du défendeur, avec dépens, etc."

Geoffrion, Rinfret & Dorion, avocats du demandeur.

Ouimet, Cornellier & Lajoie, avocats du défendeur. (J. J. B.)

QUEEN'S BENCH DIVISION.

TORONTO, Feb. 9, 1885.

Before WILSON, C.J., ARMOUR, J., O'CONNOR, J.

CONWAY v. CANADIAN PACIFIC RAILWAY CO.

Railways and Railway Companies, 42 Vict., ch. 9, 46 Vict., ch. 24 (D)—Liability to fence.

HELD, O'CONNOR, J., dissenting, *that under the Consolidated Railway Act* 1879, *42 Vict., ch. 9 (D), as amended by 46 Vict., ch. 24 (D), the railway company are not bound to fence except as against a "proprietor or tenant" in occupation, and that the company are not liable to a mere squatter for the killing of his horses without other negligence than their omission to fence as against him.*

The meaning of the terms "Proprietor," "Tenant," and "Occupant," considered.

The plaintiffs claim compensation from the defendants for two horses, the female plaintiff's property, which were killed by a construction train of the defendants on their railway in the township of Ferris, on the 22nd of June 1884. The claim was made upon the ground that the plaintiffs were the occupants of the east half of lot 29, in the 14th concession of that township, that the defendants were bound to fence the line of their road as against her, according to the 46 Vict., ch. 24, sec. 9 (D), and its sub-sections, which repealed and amended 42 Vict., ch. 9, sec. 16 (D), and its sub-sections, and that the company had not put up such fence.

The question was, whether the female plaintiff was an occupant of the land in question within the meaning of the Act.

The case was tried at the Fall Assizes, at Pembroke, by Cameron, C.J., without a jury.

It appeared that the defendants, while constructing their road in that locality, put up some shanties for the accommodation of their men, and for their own purposes, and one of these shanties was used as a boarding house, the one which the plaintiffs claimed. The person who first kept the boarding house gave it up, and the plaintiffs went into it, and kept the boarding house about March, 1883, up to about November of that year. The female plaintiff said she went on the land, in June 1882, and her house, she said, was on the east end of the lot between lots 28 and

29, and they improved a little on the north side, and about an acre on the south side near the railway track, and that they cultivated what they could in 1883, she expecting then it was to be the defendants' land; that they went in there first as tenants of James Worthington, the manager of the construction work for the defendants; that the first three months they paid $4.00 a month, and after that $6 a month rent; that they paid him rent up to September, 1883, and two months later rent was paid to Salisbury, the pay master of the defendants; that they had since paid no rent to anybody, the rent being deducted by the defendants from her board bill for boarding the men; that she afterwards heard from the assessor that Mr. Worthington gave up his claim to the land, and that she paid taxes on it, and she applied in May, 1884, to the Crown land agent in Mattawa for it; that a part of the house occupied by her was not built by the company, and that she paid the man $8 for that part, which she used as a kitchen; that she continued in that house, which was on the concession road, till the last of June, 1884, and until after the horses were killed; that she then went into the house upon lot 27, where the station was built, and bought an acre of it; that she was not located for it, but for lot 26; that she made the affidavit of 9th September, 1884, for the purpose of applying for the east half of lot 29; that it was a mistake in the affidavit that she was located for lot 27; it should have been for lot 26; that she was living on an acre she had of lot 27; that she was located for 26 in the spring of 1884, and applied for it before her horses were killed.

At the close of the evidence the learned Chief Justice found that the plaintiff entered into possession of a small portion of lot No. 29 in the statement of the plaintiff's claim mentioned, not exceeding two acres, under one James Worthington, who was a contractor for building the railway; that the land in question was part of the ungranted land of the Crown; that the greater part of the land in the neighborhood was in a state of nature; that the plaintiff paid rent to Worthington for the house up to November, 1883, and since that time the plaintiff had made application to the Crown Lands Department to be allowed to purchase the lot, and that the Department had not as yet given any intimation to her as to whether she would be allowed to buy or not.

He also found that one Rangier was in possession of a small part of the lot, that George Quirt was in possession of part of the said lot, and claimed the right to become the purchaser of the same: and that since this action commenced, he and the plaintiff Catherine Conway had agreed to hold, she the east half and Quirt the west half of the lot; that the defendants were not guilty of any negligence, other than the omission to fence their railway over the said lot of land. He found the value of the horses killed by the defendant's train to be $300, for which amount they were entitled to recover, if under the circumstances, the plaintiffs, or either of them were or was such occupants of the land that the defendants were bound to fence their railway across lot No. 29, in the pleadings mentioned; and he found that the plaintiffs were not such occupants; and that the defendants were not bound to fence their railway across the said lot; and he dismissed the plaintiff's action, with costs.

The shorthand reporter at the trial noted that his lordship said at the time of giving judgment that he was by no means free from doubt that he put a proper construction on the clause: that the first part of the section 46 Vic., ch. 24, sec. 9, required the railway company to fence where any part of the land was occupied, no matter how small a part, while the latter part of sub-section 2 only gave the right of occupation to the land in respect of which the fencing must be done; and the occupant of an acre was not the occupant of a whole lot, but only of a part of it; and that he thought it better to decide as he did, so that the matter might be settled by a review of his judgment.

November 29, 1884. *Osler, Q.C.*, and *M. J. Gorman*, moved to set aside the judgment, and enter it for the plaintiff, contending that the plaintiffs, being occupants of lot 29 in the 14th concession of Ferris, crossed by the defendants' railway, the defendants were bound by sec. 9, sub-sections 1, 2, 3, of 46 Vic. chap. 24, to fence where their line crossed this lot; and that, having neglected to do this, and the plain-

tiff's horses having, in consquence, got on the track and been killed, the defendants were liable, apart altogether from any question of negligence.

H. Cameron, Q. C., and *W. R. White*, contra. Plaintiffs being only trespassers, never having been located or obtained a license of occupation from the Crown, were not the legal occupants, as contemplated by the statute, and cannot compel the company to fence, and hence cannot recover. Before the amendment made by the section referred to, defendants would not be liable to the plaintiffs: see *Kilmer* v. *Great Western R. W. Co.*, 35 U.C.R. 595; *Wilson* v. *Northern R. W. Co.*, 28 U. C. R. 276; *Douglas* v. *Grand Trunk R. W. Co.*, 5 A. R. 585. The legislature could never have intended to compel the railway to fence against mere trespassers, for this would apply to any person living on any land whether belonging to the Crown or not. There would be no limit to the liability in such case. An occupant is a person who holds the title, or has the permission of the Crown to occupy it: see Wharton's Lexicon as to the meaning of occupancy.

February 9, 1885. WILSON, C. J. — The perusal of the evidence satisfies me that until November, 1883, the plaintiff had no right of occupation of any part of lot No. 29, but of the house which she rented from Mr. Worthington, and that she claimed nothing more at that time than as tenant to Worthington. She may have used part of the small cleared parts about the house and railway ground, but not as of right, and, as she said, she would have continued to pay rent after November, 1883, till she owned the land, if she had been asked for it; but she was not asked for it; because the work had gone further east than lot 29, and the men were not boarded upon that lot after that time. They were then boarded on lot 27.

The plaintiff, before the horses were killed, had been located for lot 26. She continued to live on the east half of 29 till after the horses were killed, that is, till about the last of June, 1884, and then she moved to lot 27, still keeping possession of the east half of 29, by having some of her goods and crops upon that lot.

In May, 1884, she wrote to the Crown Land agent applying for the east half of 29. On the 9th of September, 1884, she made an affidavit, in which Dranley and Halliday joined, that she was head of the family, and had no son, but seven daughters, and that the land she applied to be located for was wholly unoccupied and unimproved.

That affidavit was not correct in several particulars.

1. She was not properly head of the family, for her husband was living.

2. She had a son.

3. The land was not wholly unoccupied, for there were several of the company's men still occupying shanties upon the lot; and at that time she had been located for No. 26, and lived upon No. 27.

It appears she never paid taxes upon the east half of 29 until the 27th of September, 1884, according to the receipt, although the receipt was not given till the 6th of October.

Mr. Gorman, the plaintiff's solicitor, wrote to the plaintiff, and Mr. Dranley received it for her about the end of September, in which he stated that neither the plaintiff nor Dranley could recover against the company for their horses which had been killed, unless it could be proved that they had some title to the lot; and the plaintiff said the letter stated by payment of taxes or something of that kind.

Then it appears that Halliday, the collector, claimed from Quirt $15, being the sum said to be payable for the whole lot No. 29, who refused to pay that sum; but he paid about two months before the trial, in October, $11.08, and, as well as I can make out, after the letter came from Mr. Gorman about proving title in Mrs. Conway by the payment of taxes, or something of that kind, Halliday told Quirt to the effect he would let his share of the taxes stand at the $11.08, and he would get the rest of the $15 from the plaintiff, and she then paid him $3.90, making in all $14.98 for the taxes for 1884.

It is also quite clear that after the receipt of Mr. Gorman's letter, Quirt was sent for on the 6th of October, about nine days before the trial, by the plaintiff, and by those assisting and advising her in this action, to appear before Mr. Shannon, the magistrate; and Quirt went to the place appointed, the plain-

tiff's house, and the result of what was then done was that Quirt was induced to give up to the plaintiff all claim to the east half of lot 29, the land in question, and to confine his claim to the west half only of the lot.

The whole country there is unfenced and a common, as the plaintiff said.

Now the question is, was the plaintiff an occupant of the east half of lot 29 at the time her horses were killed on the 2nd June, 1884? The statute now in force and applicable to this case is the 46 Vic. ch. 24, sec. 9, repealing and amending the 42 Vic. ch. 9, sec. 16, subsecs. 2 and 3.

It is not necessary to refer to the earlier Act further than to notice that it applied to "the proprietors of lands adjoining the railway," whereas the latter Act is more largely expressed. It was passed 25th May, 1883, and it is:

Section 16. "Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied.

2. Or, within three months, after such construction hereafter.

3. Or, before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon.

4. (And in the last case after the company has been so required in writing by the occupant thereof).

5. Fences shall be erected and maintained over such section or lot of land on each side of the railway, of the height and strength of an ordinary division fence.

6. With openings, or gates, or bars, or sliding or hurdle gates with proper fastenings therein, at farm crossings of the railway.

7. And also cattle-guards at all highway crossings, suitable and sufficient.

8. To prevent cattle and animals from getting on the railway.

9. But this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

Sub-section 2. "If after the expiry of such delay, such fences, &c., are not duly made, and until they are so made, and afterwards, if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines to the cattle, horses, or other animals of the occupant of the land in respect of which such fences, &c., have not been made or maintained as the case may be, in conformity herewith."

In reading these enactments, the parts of section 16 which I have numbered, the parts to be considered in this case are Nos. 1, 5, 6, 7, 8, 9.

The part numbered 1 applies, because the railway was already constructed on this lot at the passing of the Act on the 25th of May, 1883, as the plaintiff said the company commenced running trains past this lot in the fall of 1882, and it is for that reason the parts numbered 2, 3, 4, do not apply.

The effect of the parts so numbered 1, 5, 6, 7, 8, is, that in the case of any railway constructed at the passing of the Act, on any section or lot of land, any part of which land is occupied, the company shall, within three months after the passing of the Act, fence over such section or lot on each side of the railway, with openings, &c., at farm crossings of the railway, and with cattle guards at all the highway crossings sufficient to prevent animals from getting on the railway.

Number 9 does not apply here, because no compensation of any kind has been given by the company, and besides it only applies when compensation is given for the dispensation of gates or bars, and has no relation to fences.

It is important, however, in this case, because it may enable us to some extent to place a better construction on the word occupied in number 1 of section 16, and the term occupant in sub-section 2, than if number 9 were not there. Number 9 then provides that the clause relating to gates or bars "shall not be interpreted to the profit of," that is, shall not apply to or be available for, any proprietor or tenant of any such section or lot, in case the proprietor has accepted compensation for dispensing with gates or bars.

The meaning of the statute is, that no one,

not even the proprietor or tenant, can claim to have the railway fenced off as against him, unless his land is occupied, and he or some one for him is the occupant of it.

The terms proprietor and tenant do, *ex vi termini*, mean a person having at least a defined and vested estate. I do not say the estate should be a strictly legal estate, or what before the Judicature Act would have been a trust estate, as valid in effect as a legal estate.

A person claiming the land as his own as against the legal owner, by any act of wrong as by a disseisin, dispossession or the like, might, I think, be considered a proprietor under this Act. That term is used plainly in opposition to the term tenant. There is no difficulty in determining the meaning of proprietor. It is, in my opinion, used to express the full ownership of the land by legal title, or by claim of title. If a person, in a contract for sale of land described himself as proprietor, that would be understood to mean that he was the owner of the property: *Rossiter* v. *Miller*, 5 Ch. D., 648; 3 App. Cas. 1124.

There is more difficulty about the word tenant. It means some lesser estate or interest than the actual ownership, and it means something more than mere occupancy.

A mere occupier of land is, by express enactment of the Assessment Act, R. S. O., ch. 180, sec. 6, sub-sec. 2, made liable for taxes when the occupation is not exempted by sub-sec. 1. See also sub-sec. 7. But that is because an occupant by wrong derives as much benefit by the property as one by title, and the municipality cannot be required to investigate the title of every one who is in occupation of land, whether it is by right or wrong, and it is just that the occupant, although without title, should be subject to the burdens of the municipality in like manner as those who hold by title.

So a person who has bought or agreed to buy Crown Lands, or who is located for land as a free grant, is subject to taxation for such land, although no license of occupation, location ticket, certificate of sale, or receipt for money paid on a sale, has issued; and although no payment has been made on the land; or although part of the purchase-money is overdue and unpaid; although such person is not in occupation of the land, and although he has not a very secure title, and perhaps no title at all without a license of occupation under the R. S. O. ch. 23, sec. 15; and yet the interest of a person having a claim under the Assessment Act, section 126, may be sold under the R. S. O., ch. 23, sec. 18, although no license of occupation has been issued.

I am of opinion that if a license of occupation has issued to the locatee or purchaser of Crown land under ch. 23, sec. 15, such person may properly be considered to be a tenant under 46 Vic. ch. 24, sec. 9, if in actual occupation of the land, because such person may maintain actions against any wrongdoer as effectually as he could do under a patent from the Crown, and he may assign his interest in the land; and I am also of opinion that a person who has no license of occupation, &c., but who has a claim and right of occupation of his lot under section 126 above referred to, if in occupation of his land, may also be considered to be a tenant of the land under the 46 Vic. ch. 24.

In this case the plaintiff has no license of occupation, or any kind of other right or title to the land. She made application for the land, but whether she will be allowed to purchase it or not, if she desire to purchase it, or whether it will or will not be allotted or assigned to her under "The Free Grants and Homesteads Act," R. S. O., ch. 24, if she desire to get it as a free grant, has yet to be determined. It is very probable she may not be located for it, and it is quite certain she ought not to be, for she was, before the time her horses were killed, and at the time she made her affidavit to be located for this land, already located for lot No. 26, and her application for this land was in direct violation of section 7 of the Free Grants Act.

I am of opinion, therefore, the plaintiff cannot be considered to be within the terms of the 46 Vic., c. 24, s. 9, under the term occupant in that section, and she certainly neither was nor is a proprietor or tenant of the land.

The defendants had the right under the 42 Vic., ch. 9, sec. 7, sub-sec. 3, with the consent of the Governor-in-Council, "to take and appropriate for the use of their railway and works so much of the wild lands of the Crown lying on the route of the railway as have not been granted or sold, and as may be necessary

for such railway." And the R.S.O., ch. 165, sec. 9, sub-sec. 3, is in the like terms, excepting that the consent of the Lieutenant-Governor-in-Council is required. And I think it may be assumed here that such consent has been given to the company. Now, the defendants did take and appropriate the part of this lot north and south of their railway before the plaintiff was in possession, and they have shanties on it also, and some of their workmen are in possession of them, and that possession had not, at the time when the horses were killed, been in any way abandoned; and the defendants were quite as much in possession of the land, if not more so, than the plaintiff was.

I am of opinion, also, the plaintiff was not in fact, an occupant of the land at all at the time when, &c. She had rented the house she occupied from the contractor of the road, and paid him rent for it; and she never, by any act further than by writing a letter in May, 1884, to the Crown Lands Agent, applying to be located for the land, had extended her possession or occupation before the time when, &c., beyond the possession which she had during the time of her paying rent for the house she was put in possession of. And her conduct, aided by Dranley, who thought to strengthen his own claim against the company by strengthening her right, under which she claims, by the payment of $3.90, the balance of taxes claimed from but not paid by Quirt, and the affidavit made by the two before the Crown Lands Agent in September, and the agreement got from Quirt, all just a few days before the trial, showed a scheme to make out a title to the land to which she had no kind of right.

I cannot say I regret the conclusion I have come to, for although the plaintiff has sustained a serious loss by the destruction of her horses, it was very much her own fault in turning them loose as she did, when the horses would be almost certain to roam in the small clearing made by the cutting of the railway line, and for the erection of the shanties required for the workmen, and for the defendants' other purposes; and it would be a great and useless expense, to force the company to fence both sides of the railway along the lots which were occupied, while gaps are left all along the unoccupied lots, through which cattle and horses could always escape on to the line, so long as the occupiers had no side fences to keep their animals from wandering on to the adjacent lots, and getting on to the railway through the gaps.

Upon the whole I am of opinion the motion must be dismissed, with costs.

O'CONNOR, J. The plaintiffs as occupants of the east part of lot 29 in the 14th concession of the township of Ferris, in the district of Nipissing, brought this action to recover the value of two horses killed on the railway of the defendants by a locomotive and train of the defendants passing thereon.

The railway at that place was not fenced off from the adjoining lands. The horses were killed on the 2nd June, 1884. The railway had been constructed across this lot 29 in the early part of 1883.

The only question for decision is, whether the plaintiffs were "occupants" or rather, perhaps, whether the female plaintiff was "occupant" of any part of said lot 29, within the meaning of the 16th section of the Dominion Act 46 Vic. ch. 24.

Section 16, Consolidated Railway Act, 1879, required the railway company, within six months after any lands had been taken for the use of any railway, if required by the proprietors of the adjoining lands, to erect fences with gates, &c., at farm crossings of the road, for the use of the proprietors of the land adjoining the railway, &c.

This clause is repealed and amended, and one substituted for it, by the 9th section of the 46th Vic. ch. 24, above mentioned, which enacts:—

Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied, or within three months after such construction hereafter ..... fences shall be erected and maintained over such section or lot of land on each side of the railway, of the height and strength ... with openings or gates ... at farm crossings ... sufficient to prevent cattle and animals from getting on the railway...., but this is not to apply to any proprietor or tenant who shall have accepted compensation for dispensing with the erection of such gates or bars.

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 tbe 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.]