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BOARD OF RAILWAY COMMISSIONERS.

DECEMBER 20TH, 1911.

ST. THOMAS v. GRAND TRUNK RW. CO.

13 Can. Ry. Cas. 134.

Highway—Opening across Railway—Jurisdiction of Board of Railway Commissioners—Public Interest—Protection—Railway Act, ss. 2 (21), 237.

DOM. RW. BD. refused the application of St. Thomas for leave to extend Inkerman street across lands of Grand Trunk Rw. Co., holding that the crossing would be a very dangerous one and would require protection almost at once.

An application heard at St. Thomas, December 13th, 1911, the facts of which are fully set out in the following judgment.

W. B. Doherty, for the applicant.

W. H. Biggar, K.C., for the respondent.

HON. MR. MABEE, CH. COMR.:—The city is asking for leave to carry Inkerman street across the lands of the Grand Trunk Railway Company. The facts are a little out of the ordinary. Inkerman street is not opened up to the right-of-way of the company on the south side; a block of land owned by the railway company, purchased, it is said, for the purpose of building a round house, lies between the nothern terminus of Inkerman street, on that side, and the right-of-way. Under sec. 237, the Board is authorized to give leave to construct a highway across "any railway." The word "railway" is defined by sec. 2, sub-sec. 21, as including "sidings, stations, depots, wharfs . . . property, real or personal, and works connected therewith." There is, therefore, power to authorize the construction of a highway through any land

a railway company might acquire for use in connection with its undertaking; and the Board probably has jurisdiction to compel the company to abandon this property for round house purposes, and permit the city to extend this street through it. Upon looking over the ground, there certainly does seem to be some necessity for opening the street. Some considerable number of residents would be convenienced; but, on the other hand, the crossing would extend over three tracks, and would be a very dangerous one. It would almost at once require protection, and I hesitate to impose this danger upon the public and the company. If at some future time, the necessity for this street extension increases, it may be reconsidered; but, in the meantime, I think the request of the city should be refused.

McLEAN, COMR.:—I question whether the whole scope of the definition of "railway" as it appears in sub-sec. 21 of sec. 2 of the Railway Act, must in every case be read into the word "railway" as it may appear from time to time in various sections of the Railway Act. The definition is an inclusive one, and which phase of it is applicable depends upon the context. It seems to me that the context of sec. 237 shews that there "railway" is concerned with the "railway which the company has authority to construct or operate," which would include therewith the full width of the right-of-way, and not with the "property real or personal and works connected therewith." The question of jurisdiction need not, however, be pursued further, as I concur in the disposition recommended, the governing consideration being public safety.

BOARD OF RAILWAY COMMISSIONERS.

DECEMBER 21ST, 1911.

GRIMSBY BEACH AMUSEMENT CO. v. GRAND TRUNK AND HAMILTON, GRIMSBY AND BEAMSVILLE ELECTRIC Rw. COS.

13 Can. Ry. Cas. 138.

Highway Crossed by Railway—Protection—Watchman in Charge—Apportionment of Expense.

DOM. RW. BD. ordered that a watchman should be employed from 1st May to 1st October for the first year, to see if he would afford proper protection to the public crossing a railway at a public highway. Township to pay 15 per cent. of the cost and the Grand Trunk Rw. Co. 85 per cent.; H. G. & B. Elec. Rw. Co. to pay nothing.

An application heard at Toronto, December 14th, 1911, the facts of which are fully set out in the following judgment.

W. H. Biggar, K.C., for the Grand Trunk Rw. Co.

Messrs. Gibson & Coleman, for the Hamilton, Grimsby and Beamsville Electric Rw. Co.

Wm. Mitchell, for the village of Grimsby.

Messrs. Allen, Beemer, and Smith, for the township of North Grimsby.

ASSISTANT CHIEF COMMISSIONER:—The Grand Trunk Railway crosses a highway which leads to an amusement park known as the "Grimsby Beach" with a double track. The electric railway, known as the Hamilton, Grimsby and Beamsville Electric Railway Company, has a line ending a short distance south of the Grand Trunk Railway, and on the east side of the public road in question.

There were two matters reserved for the Board's consideration. One was, the character of the protection to be installed at the crossing, and the other was, what parties should contribute to the cost of that protection. First, with regard to the character of the protection. I was at first inclined to the view that gates would be necessary where such a large number of people would be apt to cross the railway at one time; or if not gates that two watchmen should be placed at the crossing, one on the north and the other on the south of the Grand Trunk tracks. However, some of my brother Commissioners hold the view that one watchman would be sufficient. I agree that one watchman might be appointed for the first year to see if that would afford sufficient protection. The watchman to be employed only from the first of May to the first of October in each year, because outside of that period, when the amusement park is not in operation, the crossing is little used.

With regard to the question of who should share in the expense of the protection, i.e., the watchman's salary, the Board specially joined the Electric Railway Company as a party to these proceedings in order that that company might be given an opportunity to be heard on this point. My view is that, the Hamilton, Grimsby & Beamsville Electric Railway Company should not be called upon to pay any portion of the cost. This company discharges its passengers some distance south of the Grand Trunk Railway Company's crossing, and when a passenger leaves the Electric Railway Com-

pany's car that company is under no further obligation to him. He need not cross the tracks at all, but if he does and is injured there is no legal obligation on the Electric Railway Company whatsoever. Therefore, any measure which prevents a person or persons from being injured at the Grand Trunk Railway Company's crossing can be of no financial benefit whatever to the Hamilton, Grimsby and Beamsville Electric Railway Company.

Under these circumstances, I do not think that the Hamilton, Grimsby and Beamsville Electric Railway Company should be called upon to pay any portion of the cost. I would put 15 per cent. of the cost on the township, and the balance on the Grand Trunk Railway Company.

MILLS, COMR.:—I concur; but I am not fully satisfied as to the liability of the Electric Railway Company.

MCLEAN, COMR., Jan. 3rd, 1912 (*dissenting in part*):—I concur as to the protection. The Electric Railway, it is true, discharges its passengers south of the Grand Trunk Railway tracks, but these passengers are brought there by the electric railway, with the park as their objective point, and they are the people for whom this protection is especially designed. The electric railway clearly contributes to the danger, and I have, therefore, to dissent as to the proposed distribution of cost. The 85 per cent. of the cost which the Assistant Chief Commissioner would place on the Grand Trunk Railway, should, I think, be equally divided between it and the electric railway.

BOARD OF RAILWAY COMMISSIONERS.

NOVEMBER 6TH, 1911.

WELLAND v. CANADIAN FREIGHT ASSOCIATION.

13 Can. Ry. Cas. 140.

Freight Rate—Unreasonable—Application for Reduction—Discrimination—Fifth Class Rate—Only a Paper Rate—No Competition.

DOM. RW. BD. ordered that the freight rate on binder twine, from Auburn in U. S. A. to points in Canada, less two cents, should be the maximum rate to Welland, the present rate being unreasonable.

An application heard at Toronto, April 28th, 1909, and re-heard at Ottawa, March 15th, 1910.

W. M. German, K.C., for the applicant.

John Pullen, for the respondent.

McLEAN, COMR.:—The original attack on the rates concerned was on the ground that they were discriminatory. I have endeavoured to give full weight to the argument presented by Mr. German at the re-hearing, but am unable to see that the opinion I had already expressed in this matter should be changed.

The proposition contained in the draft order is in effect that the Auburn rate "via Niagara frontier," less two cents per hundred pounds, shall be taken as the maximum on shipments from Welland. This is subject to the qualification that when existing commodity or fifth-class rates from Welland to shorter distance points are less than would be given by the Auburn basis as reduced, the aforesaid rates shall apply as maxima.

I have already expressed my opinion regarding the Auburn rate basis in the following words:—

"It is, however, alleged by the railways that there is no movement of binder twine from Auburn into Canada. The applicants do not controvert this statement. It follows, then, that under existing conditions and notwithstanding the lower rate basis there is no competition. The rate is, in effect, a paper rate and cannot be used as a measure of the reasonableness of rates from Welland to intermediate Canadian points. If a different state of facts arose, it would be pertinent to consider the Auburn rate."

I do not understand that the situation is so changed as to justify a consideration of the Auburn rate. The application as to discrimination failed; the relief proposed is by way of finding that the existing rates are unreasonable per se. Concerning this phase of the matter, I express no opinion. Without derogating from the Board's power to act in the matter of its own initiative and to give such remedy as to it seems proper, it does seem to me that in a case formally launched as this was, and presented by counsel who had the assistance of a skilled traffic expert, the Board should not relieve the applicants from the preliminary burden of establishing that the rates are unreasonable per se.

HON. MR. MABEE, CH. COMR.:—I am of opinion that the rate is unreasonable and the Auburn rate less two cents should be applied as Mr. Hardwell recommends.

MILLS, COMR., agreed with HON. MR. MABEE.

BOARD OF RAILWAY COMMISSIONERS.

OCTOBER 23RD, 1911.

EXPRESS TRAFFIC ASSOCIATION v. CANADIAN MANUFACTURERS ASSOCIATION AND BOARDS OF TRADE OF TORONTO, MONTREAL AND WINNIPEG.

13 Can. Ry. Cas. 169.

Express Rate—Competition with Post Office Parcel Post—C. R. C. No. 2, s. D.—Jurisdiction of Dom. Rw. Board—Discretion of Carriers.

Express companies applied for leave to withdraw and cancel s. D. of the Can. Ry. Classification No. 2, on the ground that shippers of other classes of goods were unjustly discriminated against in favour of shippers under above s. D., and for an order extending s. D. to any weight up to $10 in value. Section D. was framed by the applicants to meet competition of the Post Office parcel post rate. The respondents contended that s. D. should apply to any weight up to $10 in value, although the P. O. Department only competed up to 5 lbs. in weight.

DOM. RW. BD. *held* that by conference between officials of Canadian and American express companies s. D. had been placed upon the international classification applying to traffic between Canada and United States and *vice versa*, and it should not be removed without affirmative evidence that it was not profitable to the express companies.

That there was no undue discrimination because it was not caused by any initiative of the express companies, but if s. D. were removed there might be injury to shippers in Canada by very much lower rate being charged on traffic originating in U. S. A. and coming into Canada in the same cars as used by Canadian shippers.

That the Board has no jurisdiction to order express companies to compete with the P. O. Department, that matter is optional on the part of the express companies.

An application heard at Toronto, October 23rd, 1911, the facts of which are fully set out in the following oral judgment, delivered at the close of the hearing.

F. H. Chrysler, K.C., for the applicants.

J. E. Walsh, for the respondents.

HON. MR. MABEE, CH. COMR.:—There are two applications involved in this hearing. The first is by the express

companies for an order eliminating section D from the classification. During the express inquiry, section D was investigated, and some of the items covered were eliminated, and something was said at the time in answer to the contention of the express companies that it should be taken out of the classification entirely, that the better course would be to leave it in abeyance and hear it in the nature of a second application, if the express companies were so advised. That application has now been heard.

The first ground advanced by Mr. Chrysler is that section D is discriminatory, and he urges that the shippers of the various classes of commodities covered by section D are unduly favoured by the application of those rates. That better rates are given to those shippers than to shippers of other articles of commerce; and that for that reason alone, the section being discriminatory in its nature, it should be taken from the classification.

Now it seems to us that the answer to that is this: the post office authorities put in force special postal rates upon a large quantity of commodities covered by sec. 70, and some of the following sections in the postal regulations. At that time the express rates upon the commodities covered by those postal regulations were higher than the postal rates then introduced by the post office department. Now going back to that time, it was optional with the express companies to meet those reduced postal rates or not, as they chose. If there had been a Railway Commission in existence at that time it would not have had power to require the express companies to carry traffic in competition with the post office department. It was optional with the express companies whether they would meet that competition or not.

They put in certain tariffs intending to meet the competition upon that class of traffic covered by these new postal regulations. They were not bound to do so, nor are they responsible for the result by reason of having done so. It is true that in the result certain shippers of certain commodities got better rates than other shippers of other commodities over the same railway lines from the same express companies, for similar distances. But that is not the fault of the express companies. They had a legal right to meet that competition, and they are not responsible for the result. So that it is not sufficient to say this section should be removed because it works discrimination. The discrimination is not undue, because it was not initiated by the express companies. It is

caused by reason of the rates put in by the postal authorities which the express companies sought to meet. So that we do not think the discrimination that results from the application of section D is such as is struck at by the Railway Act. We, therefore, think that the argument that this section should be taken out because it is discriminatory, must fail.

Now the second objection to its removal is that no evidence has been given by the express companies that it is not remunerative. We are not overlooking the fact that where a competitive rate is put in originally, that is a rate to meet the competition of some other carrier or some other body, that it is not always incumbent upon the carrier, if it desires to take out that competitive rate, to prove that it is not remunerative, but this case is a little bit different from the cases that ordinarily arise, because here the express companies, when they put in this section D, went a good deal farther than the post office authorities did. For instance, the postal department limited the shipment to five pounds. The express companies by the tariffs which they put in offered to carry any weight at these rates. The proper presumption then seems to us to be that these rates were regarded by the express companies as being remunerative. If they had tied themselves down strictly, and limited themselves only to the class of traffic that was carried under the new postal regulations, then it might be that these authorities applied, and the express companies would be entitled to take this tariff out in its entirety without being called upon to shew whether it was remunerative or not.

So that we think, owing to the exceptional circumstances surrounding this case, that this scale should not be removed without affirmative evidence to the effect that it was not profitable to the express companies engaged in carrying that class of traffic.

There is another ground that seems to us to be important, and that is this: At the same time that it was being urged before us last year that section D should be taken out of the Canadian classification, these same express companies were in conference with express officers representing companies in the United States, and agreed to an official classification No. 20, covering international traffic, in which they consented to section D as it stood in the classification that we assented to in March of this year going in, and at the same time covering a great many articles that are not covered by section D in

the Canadian classification. I have run over the list in the international classification hurriedly, and I find that there are some 13 or 14 items, and some of them items of much importance, and under the heads of which one would think a good deal of traffic would move. Take, for instance, plants of all kinds, not including potted plants, roots live, seeds of all kinds, tubers, samples of grain; all of those things in addition to the articles enumerated in the present section D of the Canadian classification are embodied in that international classification, and that voluntarily by the express companies. Now, we should hesitate at taking out of a Canadian classification a long list of articles and commodities that move under an agreed classification with the American carriers between points in the United States and Canada, and between points in the United States, and vice versa. Take, for instance, articles shipped from Boston, carried by the Dominion Express Company to, we will say, Vancouver, in the same cars as the Canadian traffic would be moving from some point originating in Canada, under the agreed scales with the American carriers embodied in classification No. 20; this traffic would move at very much less rates than the same class of traffic over the same line of railway in the same express cars would move from originating points in Canada to Vancouver. Illustrations might be multiplied, but that of itself is sufficient to cause us to pause, even if there were nothing else in the whole case, before we eliminated section D. It is impossible to tell what shippers might be injured by reason of very much lower rates upon traffic originating at American points coming to Canadian common points and carried in the same car. Therefor, we conclude that the section should remain in the classification and should not be eliminated.

Now with reference to the second branch of this case, namely, the application of the Booksellers' Section of the Board of Trade to have the classification that we approved, and which became effective on the 1st of March of this year, varied by increasing the weight that is to be carried under section D from 5 pounds to what it stood under the former section, namely, any weight that the shipper might choose to forward.

Chrysler, K.C.:—Provided that it is not worth more than $10.

HON. MR. MABEE, CH. COMR.:—Yes, limited to $10 in value.

What has already been said with reference to this being a competitive tariff is to a large extent to be applied to the second application. The law permits a carrier to compete in its tolls with another carrier, if it chooses. For instance, supposing the Canadian Pacific Railway was carrying from Toronto to Montreal a certain commodity at a given rate, and supposing the Grand Trunk Railway Company's tariff was considerably higher, and the shipper came to this Board for an order compelling the Grand Trunk Railway Company to carry to Montreal the same commodity at the same rate that the Canadian Pacific Railway Company was carrying it. As I understand the principles of the Railway Act, this Board would have no authority to compel the Grand Trunk Trunk Railway Company to do any such thing. It is, I was about to say, one of the few things that is left to the discretion of the carrier, namely, whether it will or will not meet the rates of its competitors. Now the situation would be the same if the post office authorities had just put in effect these regulations, and an application were now heard by this Board for an order requiring the express companies to compete with these reduced rates on this matter that under these regulations can go through the post office. This Board would have no authority to require the express companies to enter into any such competition. The reason for it is apparent upon its face. If that were the law, some rash tribunal might wreck a carrier by compelling it to enter into competition with some other means of transportation that it was not in any condition to compete with at all. It is open to the post office to carry any sort of matter that is capable of being carried through the mails, and it is open to the post office authorities to make regulations for the carrying of traffic through the mails at any toll, or at any sum that the authorities may choose. It may or may not be carried at a profit. It may be carried at a loss. It may be in the interest of the country as a whole that certain classes of matter should go through the post office at a loss, and it is idle to say that a carrier that is expected to earn dividends and reimburse its stockholders should be compelled to set itself up in competition with any such facility. If an application were being made here to compel the express companies to meet these reduced postal rates, it must fail. What is

in effect asked here is the same thing, namely, that while the express companies have put in a competitive tariff with the postal authorities under which they will compete up to five pounds weight, we are asked to take the five-pound limitation off and make them embark in the carriage of a class of traffic that the postal authorities do not attempt to carry at all. We are alive to the disturbance that this result may have on the business of the book-dealers and others who had the use of this facility. We are alive also to the inconvenience that it may subject them to, that has been spoken of, in the way of tying up separate packages, and the like. But it is a situation that we cannot deal with. The express company is within its right in limiting itself to five pounds. We have no authority to extend it, and in the result the application of the booksellers must fail, and this section D will remain as it was settled, and as it now stands in the classification effective on the 1st of March of this year.

HON. MR. JUSTICE BRITTON. JUNE 1ST, 1912.

BALDWIN v. TOWNSHIP OF WIDDIFIELD.

3 O. W. N. 1348.

Drains — Construction of Road Ditch by Municipality — Flooding Lands—Action for Damages—No Negligence Shewn.

BRITTON, J., dismissed an action by plaintiff for damages arising from alleged flooding of her lands by negligence of defendants in diverting a stream into a ditch of inadequate capacity to carry off the water, on the ground that no negligence had been shewn, but the dismissal was without costs.

Action by plaintiff Eliza, or Elizabeth, Baldwin, owner of part of the S.E. ⅛ of lot 19, concession B. of the township of Widdifield, containing 4 95/100 acres, to recover damages.

Her cause of action, as stated in the statement of claim, was that defendant township, about the year 1899, diverted the water from a certain stream or creek, which ran across another part, than the plaintiff's, of this lot 19, and for the purpose of carrying off the water, so diverted, constructed a ditch running easterly along the old Trout Lake road—which ditch was entirely unfit and inadequate for the purpose intended, and so the water flowed from it over the plaintiff's land to her damage.

Tried at North Bay, without a jury.

G. L. T. Bull, for the plaintiff.

G. H. Kilmer, K.C., for the defendants.

HON. MR. JUSTICE BRITTON:—The facts as I find them, upon the evidence, are that in the year 1900, the husband of the plaintiff, and the then owner of the land in question, was anxious to have the road improved, and to that end presented, or was instrumental in having presented, to the council of Widdifield, a petition for that purpose. The petition was not produced—and we have very little evidence, and that, in the main, from plaintiff's husband—of what was really done by the township. The township did employ Baldwin to do some work upon the road mentioned. He started to work at the southerly end of a culvert across the Trout Lake road —and from that point constructed a road ditch running easterly—some rods and stopping at a point not far from the land of the plaintiff in respect to the flooding of which she complains. This ditch did divert the water that flowed southerly through the culvert—and caused it to flow easterly. The ditch did not extend to, or carry the water to any sufficient outlet—and the water, after leaving the ditch, did, in part at least, flow on plaintiff's land. There was no evidence of the capacity of the ditch—but it was sufficient as far as it was constructed. There was no sufficient evidence to establish the existence of any creek—properly so called—all the water that was diverted was surface water. I find that all the water so diverted would, had the road ditch not been made, have flowed upon lot 19, and would in great part have found its way to the place where plaintiff complains of the flooding. The levels taken by the surveyor, called for the defendants, establishes that. The plaintiff's land is low. One witness spoke of the plaintiff's small acreage as a basin. The evidence for the plaintiff was mainly that of herself—and her husband. They were no doubt sincere—but I cannot accept their evidence against that of others who could see no difference, or no difference worth considering, between the years when water flowed from the higher part of lot 19, and the years since the construction of the road ditch. The whole money expended by the defendants in 1900, was the amount paid to plaintiff's husband, and amounted to only $6.40. The money was not expended under any by-law, but was lawfully expended in the improvement of a road the municipality was bound to maintain. I find the defendants were not guilty of any negligence.

The husband, then owner of the land evidently, at the time the work was done—did not think his land would be damaged by water brought to it from the easterly end of the

ditch constructed by him. From that time until shortly before this action was brought—no complaint was made to the defendants. The land actually generally cultivated by the plaintiff is not more than an acre and one half—and from its situation, it is difficult to determine with any degree of certainty, that there has been any damage caused by anything the defendants have done.

There was evidence that the road ditch for the further benefit of the road should be carried to a sufficient outlet—and that this could be done at comparatively small expense. If the defendants are satisfied of this, I venture to hope that it will be done. At present it may be said that the ditch relieves the higher land of lot 19 from some water that would otherwise flow upon it. That may or may not benefit the higher part of 19. The ditch is certainly of no benefit to plaintiff's land.

Upon the whole case the action must be dismissed—but under all the circumstances it will be without costs. Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JUNE 7TH, 1912.

WOOD v. GRAND VALLEY RW CO. & A. J. PATTISON.

3 O. W. N.

Contract — Agreement to Extend Railway to Town — Breach — Damages—Measure of.

Action for damages for breach of contract. Plaintiffs were merchants and manufacturers of St. George, a town with poor railway facilities. They entered into an agreement with defendant company and defendant Pattison, its president, to subscribe for $10,000 worth of the company's bonds on condition that the company should extend its line into the town. A memorandum embodying the agreement was drawn up and signed, the plaintiffs subscribed and paid for the bonds which were delivered to them, but the proposed extension of the railway was never built. Defendant Pattison disclaimed personal liability on the agreement, claiming he merely acted in his capacity as president of defendant company.

MIDDLETON, J., *held* that the facts shewed that the agreement was intended by all the parties to bind defendant Pattison personally, and the fact that the memorandum of agreement was not executed by him in his personal capacity was of no defence.

That damages should not be assessed as on a failure of consideration, but that difficulty in assessment did not prevent substantial damages being awarded, which, under all the circumstances, should be fixed at $10,000.

Chaplin v. *Hicks*, [1911] 2 K. B. 786, approved.

Judgment for plaintiffs for $10,000 and costs. Any sum realized by plaintiffs in respect of the bonds received under the agreement to be applied in reduction of the judgment.

Action tried at Brantford on the 28th of May, 1912.

Shepley, K.C., and Harley, for the plaintiff.

Smoke, for the defendant company.

Holman, K.C., for Pattison.

HON. MR. JUSTICE MIDDLETON:—The plaintiffs are a number of merchants and manufacturers carrying on business at St. George, a town situated about half way between Brantford and Galt. At the time of the occurrences giving rise to this action, and down to the present time, the village of St. George is somewhat unfavourably located from the standpoint of the manufacturer. The Grand Trunk Railway has a station named St. George, but it is between one and two miles from the village, and no accommodation is afforded to industries by any spur line or industrial siding or switches. The Grand Valley Railway, running from Brantford to Galt, follows a semi-circular route along the valley of the Grand River, passing some six miles south of St. George. A branch line runs northward at Blue Lake, some two miles, terminating four miles south of the village.

In 1906 Mr. Pattison was the president of the Grand Valley Railway, its largest individual stockholder, and very much interested in the success of the undertaking. He conceived the idea that a continuation of the road from Blue Lake to St. George would not only be of great advantage to the industries of that village but that the interests of his road would be substantially advanced, as a very considerable amount of freight might be diverted from the Grand Trunk by affording convenient access to the different industries, and the freight could then be carried to Galt, where transhipping arrangements might be made with the Canadian Pacific Railway.

With this in view, he visited St. George and convened a public meeting of those most likely to be interested in the proposed arrangement; and, after explaining what was proposed, he solicited financial assistance, to take the shape of the purchase of bonds that would be issued by the railway to aid in the construction of the four miles necessary for this new undertaking.

Like all promoters, Mr. Pattison was sanguine, and he seems to have imparted some of his enthusiasm to the plaintiffs. The Grand Valley Railway Company was well-known; its financial position was not regarded as satisfactory; and,

before parting with their money, the plaintiffs insisted on Mr. Pattison shewing his faith in the company under his control by himself undertaking to be responsible for the carrying out of the promises he was ready to make on its behalf.

There is a conflict of evidence as to Mr. Pattison's attitude. His recollection is that he was to undertake nothing save in his representative capacity; but I think his recollection is at fault and that it was his intention, as well as the intention of the plaintiffs, that he should be personally bound.

Upon the faith of Mr. Pattison's personal guarantee, the plaintiffs agreed to purchase bonds of the road to the extent of ten thousand dollars. These bonds were not regarded as being of any great value, and were not sought as an investment. What the plaintiffs desired, and what Mr. Pattison promised —both in his own name and in the name of the railway—was the construction of the line which would give them a means of handling freight independently of the Grand Trunk; the accommodation afforded by that company being, as already said, regarded as quite inadequate and unsatisfactory.

Mr. Pattison undertook to reduce the arrangement to writing, and he prepared a short memorandum—produced at the trial—under date of the 6th of June. This stated that the subscription of Mr. ———— for ———— bonds is received subject to the establishment of freight connection with the C. P. R. at Galt, and is to be cancelled if freight connection and satisfactory tariff rates are not arranged. This memorandum was signed by the Grand Valley Railway Company and was to be delivered to each individual subscriber whose subscription would form part of the $10,000.

When this document was submitted as embodying the arrangement made, it was at once repudiated. Mr. Pattison's attitude then was: "If you do not like the draft that I propose, prepare one to suit yourselves." Mr. Wood was selected as the draftsman, and prepared a document. This was afterwards read over by all concerned, was deemed to be satisfactory and was executed by Mr. Pattison, who signs thus: "The Grand Valley Railway Company, A. J. Pattison, president."

Upon the faith of this document (dated June 29th, 1906), individual subscriptions for bonds—some of which bear an earlier date, but were until then held in escrow—

were handed over, and new subscriptions were made for an amount necessary to cover the shortage, so that the total would reach the required $10,000. A joint note was executed by the subscribers and discounted; the proceeds went to the credit of the railway; and the bonds were allotted and distributed. Some of the signatories to this note ultimately proved unable to pay. The plaintiffs paid the whole note, and between them became entitled to the whole $10,000 of bonds.

The company readily assimilated the $10,000 but did not make any serious endeavour to construct the four miles of road: merely grading a short distance.

At one stage of the trial some difficulty was suggested by reason of the bonds having been transferred by the Northern Securities Limited; but Mr. Pattison made it quite plain that the bonds were the bonds of the railway company, although held by the Northern Securities Limited, a concern of which he was also president.

Upon the pleadings the company disputed all liability for the transaction; but when it was made to appear that the money had gone to the company, and when Mr. Pattison stated that all he had done was done with the sanction, not only of the entire directorate, but with the sanction and approval of all the shareholders of the company, Mr. Smoke admitted that the company was not in a position to repudiate the transaction.

The question of difficulty is whether on the agreement of the 29th June Mr. Pattison assumed any personal liability.

In the first place, much reliance is placed upon the fact that Mr. Pattison did not sign this document individually; he signed it merely as president of the railway.

I quite agree with Mr. Shepley that the addition of the word "President" would not derogate from Mr. Pattison's personal liability if the signature had been simply "A. J. Pattison, President;" but I cannot follow him when he contends that the signature in question is Mr. Pattison's signature. I think it was intended to be the signature of the railway, by Pattison, its President.

Nevertheless, I think that by the terms of the agreement, Mr. Pattison was intended to be personally bound, and the absence of his signature is not fatal. The writing was intended to embody in a permanent record the terms of an agreement already made. It does not itself constitute the agreement; and, as I understand the transaction, the agree-

ment was one which it was quite competent for the parties to make without any written instrument.

Yet, I think it important to investigate the terms of the written agreement, because, no doubt, all concerned regarded it as embodying the agreement which had already been made. Looking, then, at the agreement for the purpose of ascertaining Mr. Pattison's liability, and for this purpose disregarding all other evidence, I think I find conclusive proof of his personal liability.

"Mr. A. J. Pattison, President of the Grand Valley Railway Company, hereby undertakes and agrees, on his own behalf and on behalf of the Grand Valley Railway Company, that he will make or cause to be made, a through traffic arrangement with the C. P. R., making direct connection with the C. P. R. at Galt, in terms of the Railway Act of Canada, in such a way that current competitive freight rates will apply continuously from St. George," &c.

The addition to Mr. Pattison's name of his description, "President of the Grand Valley Railway Company," does not, as already said, detract from his individual liability. Then the agreement proceeds:

"It is further agreed that the extension of the Grand Valley Railway to St. George," &c., "will be proceeded with at once."

And this is followed by a proviso:

"Provided always that the terms, conditions and covenants of this agreement shall be binding upon the heirs, executors, and assigns of the said Pattison and the said Grand Valley Railway Company."

I am inclined to think that the draftsman of this agreement at first intended it to be an agreement entirely between Pattison and the plaintiffs, and that it was an afterthought which induced him to add "and the said Grand Valley Railway Company." If this is so, then the words "It is further agreed" must be translated "It is agreed between Pattison and the subscribers for bonds."

Upon the argument it was pointed out that the document was on its face, defective, in that while "parties" are spoken of, there are no parties. But, viewed not as an agreement, but merely as a record of the agreement, I think it goes far to corroborate the plaintiffs' version of what the real agreement was.

Therefore, both on the document and on the oral evidence, I find this issue in favour of the plaintiffs.

Mr. Pattison, some time after the making of this agreement, appears to have sold his interest in the railroad to a third party, who undertook to assume and carry out the contracts entered into. Some dispute has arisen between Pattison and his vendee, and the vendee now refuses to carry out the bargain. Mr. Pattison relies upon this as a moral justification for his position, thinking that the contract was one which ran with the office of president.

I cannot agree with him in this. His railroad received the ten thousand dollars, and in selling out he no doubt obtained a correspondingly increased price; so that if he is now called on to make good his undertaking he ought not to complain.

At the trial it was agreed that the question of damages should be dealt with upon a reference, if I should be of opinion that the plaintiffs were entitled to recover. Subsequently both counsel have spoken to me and have agreed that I should myself assess the damages upon the evidence before me.

The plaintiff's counsel contended that I should give judgment for recovery of the ten thousand dollars, upon the theory that there had been a failure of consideration; the plaintiffs undertaking to return the worthless bonds of the railway company. No case was cited that appears to me to justify the granting of this relief.

I do not think the consideration can be said to have failed; for two reasons. In the first place the plaintiffs have the bonds, and although the bonds may not be of great value, they, undoubtedly, formed part of the consideration. In the second place, I find no case in which money has been ordered to be refunded, as upon failure of consideration, where the failure is a non-performance of a promise. The ten thousand dollars was given by the plaintiffs for the bonds of the railway and for the promise of the railway and of Pattison to secure the construction of the road. This promise has not been performed, and the only remedy is damages for its breach.

Particulars were given of the damages which the plaintiffs thought they were entitled to recover, upon an entirely erroneous theory. The true principle is found in the case of *Chaplin* v. *Hicks*, [1911] 2 K. B. 786, where the Court of Appeal entirely repudiated the idea that substantial dam-

ages should not be awarded where there is difficulty in the assessment. I need not here quote what is there set forth at length.

In this case the plaintiffs expected to receive great benefit if they could secure the construction of the railway and competition between the Grand Trunk and the Canadian Pacific. In addition, they expected great convenience in the carrying on of this business by the ready access to a railway by which incoming and outgoing freight could be handled. They expected additional profit by the increased prosperity of the municipality in which they were interested. All these considerations were present to the minds of both parties at the time of the making of the agreement.

There were many elements of uncertainty. These could not be eliminated. If all that was hoped for came to pass, the advantage to the plaintiffs would far exceed the ten thousand dollars paid. The price was not given for a thing certain, but was given for the chance of obtaining the great advantage hoped for. If I were to attempt to assess damages on the basis of the plaintiffs receiving all that they contemplated, then the damages would be many times the price paid. But endeavouring to assess in the light of all the uncertainties and contingencies pointed out by counsel, and which were no doubt equally present to the minds of both parties at the time the agreement was made, I think I shall not go far wrong if I place the damages at the same sum as that which Pattison and his railway induced the plaintiffs to give for this chance.

The plaintiffs profess to regard the bonds as of no value; and, while I am not allowing this to influence me in the assessment of damages, I think it is fair that any value there may be in them should go in ease of Pattison if he is called upon to pay; and if the plaintiffs assent, I shall direct that upon payment of the judgment the bonds shall be delivered to Pattison or whom he may appoint, and that any money which may be received on account of the bonds in an action brought by other bondholders and now pending, for the realization of the total issue, $450,000, shall be credited upon the judgment.

The judgment will, therefore, be for ten thousand dollars and costs, subject to the provision above indicated.

HON MR. JUSTICE MIDDLETON. JUNE 8TH, 1912.

FREEMAN v. BANK OF MONTREAL.

3 O. W. N.

Banks and Banking—Deposits and Withdrawals by Infant—Bank Act, s. 95—Action to Recover Money Withdrawn when a Minor.

Action by plaintiff to recover $1,300, being a portion of a sum of $1,800 deposited by plaintiff in defendant's bank and withdrawn by him during his infancy. The action was not brought until 18 months after plaintiff came of age, but he claimed that his mother had led him to believe he was a year younger than he actually was. The action was based on plaintiff's interpretation of the Bank Act, s. 95, which provides that "the bank may . . . receive deposits from any person whomsoever . . . whether such person is qualified by law to enter into ordinary contracts or not, and from time to time repay any or all of the principal thereof. . . . If the person making any such deposit could not, under the law of the province where the deposit is made, deposit and withdraw money in or from the bank without this section, the total amount to be received from such person on deposit shall not at any time exceed the sum of five hundred dollars."

MIDDLETON, J., *held* that upon general principles of equity it would be unconscionable to allow the plaintiff to recover in such a case, and that s. 48 of the Bills of Exchange Act, providing that "where a bill is drawn or endorsed by an infant . . . the drawing or endorsement entitles the holder to receive payment of the bill . . . " afforded defendant a complete defence.

That there is no "law of the province" which prevents an infant from depositing money in and withdrawing it from a bank, even assuming that the expression "law of the province" is not to be confined to an express statutory provision.

That in any case plaintiff was precluded from recovery by his laches.

Review of authorities. Action dismissed with costs.

Action tried at Napanee on the 3rd June, 1912, brought by one John W. Freeman, to recover from the defendant bank the sum of $1,300, being a portion of a sum of $1,800 deposited by the plaintiff to his credit in the bank at its branch at Desoronto and withdrawn by him from the bank during his infancy.

The sum of $1,020.42 was deposited on 8th September, 1905. This sum was the share of the plaintiff in the estate of his deceased grandfather. His father, John Freeman, was executor of the estate, and upon realization paid this money to plaintiff, who thereupon deposited it in the bank to his own credit. The sum of $774.76 was deposited in the bank on 15th September, 1905, and was the amount of money standing to plaintiff's credit in the Post Office Savings Bank and withdrawn by him from that bank in the name of John Freeman. This amount represented $100, the proceeds of the sale of certain sheep given to plaintiff by his

grandfather, with whom he at one time resided, and moneys saved by plaintiff from wages paid to him by his father.

The plaintiff's father was at one time supposed to be a successful business man. He carried on business first as a grocer in Desoronto and later as an hotel-keeper. The plaintiff entered his father's employment when about twelve years of age, and assisted first in the grocery business and afterwards as bar-tender. He lived at home, was charged nothing for his board or lodging, and received wages, a substantial portion of which went into the Post Office Savings Bank and then into defendants' bank.

The hotel premises were, at that time, under mortgage to one John McCullough. In April, 1906, an agreement was come to between plaintiff and his father by which plaintiff agreed to lend his father $1,800, to be paid on account of the mortgage upon the hotel; and, on 20th April, 1906, plaintiff signed a cheque in favour of McCullough for this amount. This cheque was afterwards deposited to the credit of McCullough in defendant bank, and in due course was paid out upon McCullough's cheque.

The father continued to carry on the hotel business until shortly before 22nd August, 1910, when he left Ontario on account of domestic and financial trouble. Almost immediately after his departure the plaintiff consulted his present solicitor, who, on 22nd August, 1910, wrote a letter to the bank demanding payment of $1,300 and interest, upon the theory that the receipt of the $1,800 from a minor was a breach of the Bank Act, and that the payment to the minor of anything over $500 was void against plaintiff, who, by reason of his minority, claimed to avoid the contract. Without waiting for a reply the writ in this action was issued on 23rd August.

Plaintiff was born on 23rd December, 1887, and so came of age on 23rd December, 1908; more than a year and a half before the bringing of this action. He claimed that he understood, until recently, that he was born on 23rd December, 1888, and so would not be of age until 23rd December, 1909, a little over six months before the bringing of the action. He did not say that his conduct with reference to the bank, and his attempt to repudiate were in any way influenced by this misunderstanding; but he did rely upon his mistake as an answer to the suggestion that his laches should be treated as precluding him from now repudiating what he did in his minority.

About the time the father left Ontario, the mortgage upon the property was foreclosed, and the whereabouts of the father was not for some time ascertained. It was admitted that he was now absolutely worthless.

W. G. Wilson, for the plaintiff.

A. G. Northrup, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—In Grant's treatise on the law relating to bankers, 6th ed. (1910), p. 31, it is said: "The relations between a bank and an infant customer have not yet been the subject of judicial decision, and involve questions of great nicety."

After the examination of some authorities, he concludes thus: "It is therefore submitted that the law is that if an infant draws a cheque in his own favour, and receives the money, the banker could clearly not be called upon to pay the infant the money a second time. As regards cheques in favour of third parties, the true relation seems to be based on the principle that an infant may do by an agent any act that he can legally do himself."

In Sir John R. Paget's article on bankers, in Halsbury's Laws of England, vol. I., 587, it is stated:

"A current account may be opened with an infant, so long as it is not allowed to be overdrawn; for an infant may be a creditor. A cheque drawn by an infant entitles the holder to receive payment, and so constitutes a discharge. An infant cannot claim again money paid out to him or others upon his cheques."

These expressions of opinion are based upon such statements as that of Pearson, J., in *Burnaby* v. *Equitable Reversionary Interest Society*, 28 C. D. 424, where he says:

"The disability of infancy goes no farther than is necessary for the protection of the infant."

And that of Lord Mansfield in *Earl of Buckingham* v. *Drury*, 2 Eden:

"Infancy never authorizes fraud . . . If he receives rents he cannot demand them again when of age."

And that of James, L.J., in *Re Brocklebank*, 6 C. D. 358:

"Cannot an infant give a receipt for wages or salary due to him in respect of his personal liability?"

These statements, it is true, are *dicta;* but they are *dicta* of great weight, and are quite in accord with the general principles governing infants.

In *Overton* v. *Bannister*, 3 Hare 503, an infant nineteen years of age had executed a release. This was held to be a good discharge to the trustee for the sum actually paid, but not to be a bar to a suit to recover a further sum alleged to be due.

In *Valentini* v. *Canali*, 24 Q. B. D. 166, Lord Coleridge, C.J., with whose judgment Bower, J., concurred, in dismissing an action brought by an infant to recover monies paid by way of rent for a furnished house which he had used and occupied, stated that the infant's claim "would involve a violation of natural justice. When an infant has paid for something, and has consumed or used it, it is contrary to natural justice that he should recover back money which he has paid."

It is clear that when the bank became indebted to the infant Freeman, with respect to his deposit, the mere fact of his infancy would have been no answer to an action brought by him to recover the money. As put by James, L.J., in the case already referred to, 6 C. D., at p. 360, "A man cannot be allowed to escape from the payment of a debt because the person to whom it is due happens to be an infant. He cannot be permitted to say, 'I will cheat my creditor because he is an infant.'"

It is a mere accident that by the Rules of Practice, in an action for the recovery of a debt due to an infant, the judgment would require the money to be paid into Court for his benefit. That provision does not in any way alter the effect of the contract to repay implied upon the making of the deposit.

The contract was one beneficial to the infant. He was the custodian of his own money, and the agreement merely made the bank a temporary custodian of his funds during his will. The bank's obligation was to hand back the money to its customer or pay it to his order. Nothing in this was detrimental in any way to the interest of the infant.

But, apart from this, I think that the provisions of the Bill of Exchange Act afford a complete defence, although this operation of the section may not have been foreseen by the draftsman of the Act. Section 47 provides that "capacity to incur liability as a party to a bill is co-extensive with capacity to contract." But sec. 4 provides that "where a bill is drawn or endorsed by an infant . . . the drawing or endorsement entitles the holder to receive payment of the bill. . . ."

This provision applies to a cheque (sec. 165): and, substituting the word "cheque" for "bill," the effect is: "A cheque drawn by an infant entitles the holder to receive payment thereof." If McCullough was entitled to receive payment, then the payment must operate to discharge the bank.

The plaintiff's counsel based his argument to a great extent upon the provisions of sec. 95 of the Bank Act; and I have postponed its consideration because it can better be dealt with in the light of the law relating to infants' contracts. That section provides that the "bank may . . . receive deposits from any person whomsoever . . . whether such person is qualified by law to enter into ordinary contracts or not, and from time to time repay any or all of the principal thereof . . . If the person making any such deposit could not under the law of the province where the deposit is made deposit and withdraw money in or from the bank without this section, the total amount to be received from such person on deposit shall not at any time exceed the sum of five hundred dollars."

So far as I know, no case has arisen under this section. The plaintiff's counsel assumes that the effect of it is to make not only the receipt from, but the repayment to an infant, of any sum exceeding $500, unlawful; and from this he argues that because $1,800 was received unlawfully and $500 only could be paid lawfully, he is now entitled to demand payment of $1,300, the disability having ceased.

In the first place it is to be observed that there is no restriction upon repayment. The restriction is upon the amount of deposit; and if, as a matter of policy, the Legislature requires an infant's account to be kept under $500; and the bank, in ignorance of the fact that the depositor was an infant, receives a sum exceeding this limitation, it then becomes its duty to immediately repay the excess to the infant on learning of his minority. I cannot find in this section any sanction for the theory upon which the action is brought.

But, as said, I do not think that there is any "law of the province" which prevents an infant from depositing money in and withdrawing it from the bank, even assuming that the expression "law of the province" is not to be confined to an express statutory provision.

If an infant cannot deposit money in and withdraw it from a bank, possibly he would be unable to deposit his money with an inn-keeper for safe keeping, or, if he did de-

posit it, according to the plaintiff's theory, the only safe course for the inn-keeper would be to wait till suit and then to pay the money into Court.

Upon another ground I think the plaintiff fails. The action is not brought until more than a year and a half after the infant attained his majority. The money withdrawn from the bank was used by him for his father's benefit, and applied in reduction of the mortgage on the father's hotel. Before making any claim he waited until the mortgage on the hotel had been foreclosed and the father had absconded. If he intended to repudiate what he had done during his minority, I think that under the circumstances he ought to have acted with greater promptness.

In answer to this the plaintiff suggests that he had been misled by his mother as to the actual date of his birth, and that he was a year younger than it now turns out that he is.

I do not think that this affords him any excuse. His competency depends upon his age, not upon what he thinks his age is. If the bank has misled him it might be estopped. The fact that his mother misled him—if, indeed, she did—is quite immaterial.

I find as a fact that the bank acted throughout honestly, without any knowledge of the plaintiff's infancy, and that there is nothing in his appearance to indicate infancy or to provoke enquiry. If it had not been for the fact that the mother's statement was not contradicted, I would have thought from the plaintiff's appearance that he was older than the mother states. I do not at all credit his half-hearted statement that he was coerced into making the loan to his father. I think the true situation was that at that time he had confidence in the business in which he was his father's right-hand-man, and thought that the interest of his father and himself was identical.

The action will be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. JUNE 6TH, 1912.

RICKLEY v. STRATTON.

3 O. W. N. 1341.

Medicine and Surgery — Malpractice — Evidence — Negligence—Damages—Costs.

Action by infant suing by his father as next friend and by his father against defendant, a medical practitioner, for damages for alleged malpractice in the setting of a broken leg. The child's leg was broken on December 12th, 1911, and set by the defendant on the following day in a proper manner. He attended to it properly up to December 22nd and left it then in splints with specific instructions as to treatment and care, and as his office was a considerable distance from the plaintiff's home, instructed them to call him by telephone if needed. He did not call again until January 7th and in the interim the fracture had in some manner been displaced and the bones wrongly united.

MIDDLETON, J., *held* that under the circumstances this absence from the case did not of itself constitute malpractice.

Action dismissed with costs, damages fixed at $50 to father and $150 to infant in case of plaintiff's recovery on appeal, and set-off of costs to be allowed.

Action tried at Napanee on the 3rd June, 1912.

Plaintiff, Benjamin Rickley, an infant some eight years of age, by his father as his next friend, and the father, sued defendant, a medical practitioner, for malpractice in the treatment of a broken leg.

J. L. Whiting, K.C., and J. E. Madden, for the plaintiffs.

W. S. Herrington, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—At the trial this case narrowed itself very much, and the question which calls for decision is in very narrow compass.

The child was injured on the 12th December, 1911. The doctor was called in upon the same day, and, after ascertaining the nature and extent of the injury, proceeded to treat the child in a way that is characterized by the witnesses on both sides as being exceedingly skillful; to use the words of one of the witnesses, it was "a good example of up-to-date surgery." The leg, after being straightened, was duly fastened to splints, a weight was attached, and the patient was then left till the morning, when it was intended to set the broken limb. On the morning of the 13th, it was found that the bone was almost exactly in place, and the setting was accomplished without difficulty. The patient was made

comfortable and was left to the care of the mother. The defendant called several times and examined the limb, doing all that was necessary; and, up to a date as to which there is some uncertainty—but which I fix as the 22nd of December—there is no room for any adverse comment upon his treatment or conduct, and, apparently, the child was on the high way to recovery. This would be some ten days after the fracture.

I quite accept the doctor's statement as to the course adopted by him in the treatment of the child; and, speaking generally, I much prefer his evidence to the evidence of the parents.

On that day it appears that he had an idea that the bandaging of the leg or the weight attached had been tampered with, probably with the view of easing the pain which the child necessarily suffered, incident to the healing of the broken limb; and he then very fully and carefully warned the mother, in whose care the child was, of the danger of deformity resulting from any interference with the bandaging and other appliances.

The plaintiffs lived a considerable distance from Napanee, the residence of the defendant, and travelling at this time was difficult, owing to the poor condition of the roads. The plaintiffs were poor people, and could only afford to pay very small remuneration. Up to this time the defendant had only received five dollars on account of his services, and later on five dollars more in full of his charges, and he looked upon the case as practically a charity case; though this can make no difference in his liability.

There was a telephone in the village, to which the father and mother and other members of the family had easy access; and the defendant came to the conclusion that the leg was so well bandaged in the splints and that the mother so thoroughly understood the necessity for leaving it quite undisturbed, that further visits were not necessary. He consequently gave instructions that if anything went wrong he was to be called from Napanee by telephone, and he stated that there was no necessity for frequent visits.

There is a good deal of confusion upon the evidence as to what took place next. The defendant has no detailed record of the case to aid his memory. The mother is most positive in her statements, but I do not think she can be relied upon. She fixes the date of the next visit as being the 31st December, and says that upon that day the doctor stated

that he would come in about a week and remove the splints. The doctor has no recollection of this visit, and places his next visit as being on the 7th of January. The mother says that on the 5th January, a Friday, the doctor came and removed the splints and that the limb was then found to be crooked and in bad shape, that the doctor made light of the condition of the limb and declared it was all right and would be a useful limb and that the shortening was very trifling.

The doctor denies this visit entirely.

It is common ground that on the 6th of January, Saturday, the father called upon the doctor and told him that the limb was not straight, and that the mother was much dissatisfied with its condition. The doctor suggested that if the bone had united improperly the leg might have to be again broken. The doctor then called on the 7th, the occasion which he says was his first visit after the 22nd of December. The leg was then, undoubtedly, in a most unsatisfactory condition. The broken bone, the parts of which had been placed end to end, had slipped, the lower section had crossed over the upper section and had united at the point of crossing. The two portions of the bone were at an angle of 135 degrees.

The mother refused to allow the bones to be severed, and the doctor tried to reduce the angle by a proper splint, but failed, as the adhesion was too firm. He advised an operation in the hospital; and there is a good deal of dispute as to the attitude of the different parties; but nothing turns upon this, as in the end the child was taken to the Kingston Hospital and was there operated upon very skillfully by Dr. Anglin. The bone was separated where the improper union had formed, the broken ends were successfully united, and after some weeks the child was returned to its mother with the leg in an entirely satisfactory condition.

Save in respect to one matter, everything that has been suggested against Dr. Stratton is entirely without foundation; and, although the child is not now in a satisfactory condition, the doctor is in no way to blame for anything that took place after the child was taken to the hospital and placed in charge of the doctors there.

Doctor Anglin was a witness at the trial, and had not seen the child from the time it was discharged from the hospital early in April, until the day of the trial. At the trial he examined the child and found that owing to the failure of the mother to obey his instructions and prevent the child

standing upon the injured limb, most of the benefit of the operation had been lost and the leg is now almost as crooked as before the operation at the hospital.

There is no doubt that on the 7th of January the leg was in very bad shape and that the condition of the bones then resulted in a shortening of over two inches. The question is as to the cause of this condition and the responsibility for it. On the 22nd of December, the healng had, undoubtedly reached a critical stage. The bone would not then have knit by the formation of any new bony structure, or, at most, the bony structure would have been of a very fragile nature; at the same time, the bone would have then united by the formation of callous or cartilaginous material, and, unless displaced by some mis-adventure, there was no reason why the healing should not satisfactorily progress.

At the hearing it was suggested that the mother must, herself, have loosened the splints or taken off the weight at some time between the 22nd December and the 7th January. She denies this. The husband denies it also, although he was not present more than a small portion of the time; and the child also denies it. Although I have grave suspicion, I do not think that in the face of these denials I can find in favour of this contention, more particularly as Dr. Anglin stated that the child was exceedingly restless and that the displacement of the bone may have been occasioned by this, quite apart from any improper conduct on the part of the mother.

One thing is clear; that, between the 22nd December and the 7th January, and probably almost immediately after the 22nd, the bone somehow became displaced and remained displaced sufficiently long to become firmly fixed by the 7th January.

The negligence which is now suggested—though this I think was not present to the mind of the parties when the action was brought—is that the doctor ought to have realized the necessity of inspecting the limb every four or five days so that he might see if displacement had taken place, either by the restlessness of the patient or by the carelessness or worse of the mother, so that the bone might be restored to its proper position before an adhesion had taken place or it had become so firmly fixed as to necessitate a serious operation.

Upon this point there is a conflict of evidence. Some of the medical men thought that under the circumstances the

defendant had done all that he was called upon to do; that, having explained the danger to the mother, he was justified in relying upon her communicating with him if any displacement took place. Dr. Anglin said that the danger was a real danger and that Dr. Stratton "took a chance." Further than this, he declined to go. Others went farther, and said that, having undertaken the case, the doctor was not justified in taking a chance which might result so seriously to the child.

After considering the matter as carefully as I can, I do not think that the defendant was guilty of any actionable negligence, and in my view, the action fails.

Had I come to the opposite conclusion, the damages to be awarded would have been a comparatively small sum; as there is no possible liability of the doctor save for the failure to attend the patient between the 22nd December and the 7th January, which resulted in the improper union of the bone. This necessitated the operation in the Kingston Hospital. In Kingston, the child was treated as a free patient, and the items inserted in the bill with respect to hospital charges, Dr. Anglin's bill, and nursing, are fictitious. Dr. Wilson's bill is unpaid, and I am satisfied that it was prepared for the purpose of the litigation.

The whole financial loss to the father would be covered by a small sum, and I would assess his damages at fifty dollars. The infant plaintiff would be entitled to something, because of the pain and suffering incident to the operation at Kingston. I would assess these damages at $150; and I would, in that event, refuse to interfere with the operation of the rule as to setting off costs; because the claim made is, I think, unfair and exaggerated.

As it is, I dismiss the action with costs.

HON. MR. JUSTICE KELLY. JUNE 7TH, 1912.

RE BOEHMER, BOEHMER v. BOEHMER.

3 O. W. N.

Will—Construction—Advancement of Child—Deduction in Share.

Application by Norman Boehmer, a son of the testator, for construction of will of August Boehmer. Paragraphs 7 and 20 of the will were as follows:—

"7. Whatever moneys or stocks I have given or advanced to any of my children during my lifetime, whether charged in my family book or not, and any further amounts for which I shall hold notes against any of my children or which I shall have charged against any of my children in my family book, shall be deducted from their respective shares in my estate.

"20. My son Norman has received from me the sum of $2,207, and he has received from my son George $575, therefore I direct my executors to pay to my son George $575 and interest at five per cent. from April 26, 1904, and to deduct from the share of my son Norman in my estate $2,782, but without interest."

At the date of the death of the testator Norman had been advanced more than the $2,782 as mentioned in paragraph 20.

KELLY, J., *held* that the two paragraphs were not necessarily inconsistent, and that there should be deducted from Norman's share $2,782 and such further sum as he had been advanced prior to the testator's death.

Costs to all parties out of estate, to executors as between solicitor and client.

An application for the construction of the will of August Boehmer.

J. A. Schellen, for applicant, Norman Boehmer, and his infant children.

E. P. Clement, K.C., for the executors and the other adult beneficiaries, and for Emma Boehmer, an infant.

HON. MR. JUSTICE KELLY:—The first question submitted was, whether the executors, in fixing the amount of Norman Boehmer's indebtedness to the estate, should be guided by the "family book" in their possession, or by paragraph 20 of the will, which directed the $2,782 therein mentioned to be deducted from Norman Boehmer's share.

It is contended on behalf of the applicant that in arriving at the amount to be deducted from Norman's share of his father's estate, the terms of paragraph 7 should be disregarded and that only $2,782, mentioned in paragraph 20, should be deducted, notwithstanding that at the date of the will the "family book" shews that more than that sum (including $575 received from his brother George) had been

advanced prior to the making of the will, and that the will provided for a charge against each child's share of any further amounts which the testator might charge in the "family book" against such child.

These paragraphs are as follows:

"7. Whatever moneys or stocks I have given or advanced to any of my children during my lifetime, whether charged in my family book or not, and any further amounts for which I shall hold notes against any of my children or which I shall have charged against any of my children in my family book, shall be deducted from their respective shares in my estate.

"20. My son Norman has received from me the sum of $2,207, and he has received from my son George $575, therefore, I direct my executors to pay to my son George $575 and interest at 5 per cent. from April 26th, 1904, and to deduct from the share of my son Norman in my estate $2,782, but without interest."

The evident intention of the testator to be drawn from the whole of the will was to treat all his children as nearly as possible alike, and to have them benefit equally in his estate, regard being had to advances made to them during his lifetime.

An illustration of this is shewn in paragraph 8 of the will, where he directed that each of his unmarried children should, on his or her marriage, receive the same amount of cash ($500) and the same "wedding outfit of bedding, clothes," &c., which each of the children then married had received at the time of his or her marriage.

On this view of the intention, the question arises, are paragraphs 7 and 20 inconsistent to the extent that paragraph 20 excludes the application of paragraph 7 to the bequest made to Norman.

If this question can be answered in the affirmative, I would feel bound to hold that paragraph 20 should prevail: *Sims* v. *Doughty*, 5 Ves. 243; *Constantine* v. *Constantine*, 6 Ves. 100.

My view, however, is that this is not a case of an inconsistency, with a direction in one clause and a different one in another. I think the two clauses can be read together, the meaning to be taken from them when so read being that, so far as Norman is concerned, whatever moneys or stocks testator had given or advanced to him during testator's lifetime and any further amounts for which testator would hold

notes against Norman, or which he should charge against Norman in the "family book" would be deducted from Norman's share; and that whatever these deductions amounted to would include the $2,782, or, in other words, that the $2,782 is part of the total to be deducted.

Paragraph 20 does not say that the $2,207 therein mentioned is the only amount Norman has received, or that $2,782 is the only amount that is to be deducted. The direction that the $2,782 is to be charged "without interest" was made, to my mind, to exclude the possibility of Norman being charged with the interest on the $575 which that paragraph directed the estate to pay to George, and does not shew an intention to limit the charges against Norman's share to the $2,782.

From the language of paragraph 7 it is evident that the testator contemplated the possibility of his making further advances to one or other of his children after the making of his will, and as it is unlikely that he knew what such further advances would be, it is not reasonable to suppose that he intended to limit the deductions to be made against Norman to the amount mentioned in paragraph 20 while there was the possibility of further advances being made to him. This is not in keeping with the general spirit and intention of the will.

While I have come to the conclusion on consideration of the language and general intention of the will that paragraph 7 is to apply to Norman's share in the same manner as to the shares of the other children, certain circumstances in connection with the will confirm the view I have taken. Evidence was tendered of the intention expressed by the testator after the will, tending to shew that he intended to benefit Norman to a greater extent than the other members of his family. This evidence, however, is not admissible. In Jarman on Wills (5th ed), p. 384, it is stated that parol evidence of the actual intention of the testator being inadmissible for the purpose of controlling or influencing the construction of the written will, the language of the will must be interpreted according to its ordinary acceptance or with as near an approach to it as the context of the instrument and the state of the circumstances will admit of.

The "family book" shewed that in April, 1904, the amount to be chargeable against Norman was $2,207, and

that between that time and the making of the will further advances were made to him and charged in the book. It appears that in April, 1904, testator made a will which contained in exact words the provisions of paragraphs 7 and 20 of the present will. The circumstances that the amount chargeable in 1904 against Norman, as shewn by the "family book," corresponded with the amount of the deduction to be made from his share by the terms of the earlier will, and that the paragraph referring to it had been copied into the new will, helps to confirm the view which I have expressed, but which I have arrived at altogether apart from that circumstance.

The answer to the first question submitted being that the executor ought to be guided by and to act on paragraph 7 and not paragraph 20, no further answer is necessary to the second question.

The costs of all parties will be out of the estate; those of the executors to be as between solicitor and client.

HON. MR. JUSTICE LATCHFORD. JUNE 6TH, 1912.

ROBINSON v. GRAND TRUNK RW. CO.

3 O. W. N. 1345; O. L. R. .

Negligence—Railway—Injury to Person in Charge of Live Stock while being Carried at Half Fare—Liability of Railway.

Action for damages sustained by plaintiff by reason of defendants' negligence while plaintiff was a passenger on defendants' railway. Plaintiff was in charge of a horse being shipped from Milverton, Ont., to South River, Ont., the rules of defendants requiring a man in charge. Defendants admitted negligence, but claimed they were absolved from liability by the terms of a special contract with the consignor on a form approved by the Dominion Railway Commission, providing as follows:—

"In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever."

The contract was signed by defendants' agent and the consignor, but not by the plaintiff, and it was handed folded to him with a note endorsed on the margin: "Pass man in charge at half fare." He did not open it nor read it, and no fare was asked for nor paid by him. Half fare, however, was charged the consignee in the account rendered for the carriage of the horse and paid by him.

LATCHFORD, J., *held* that plaintiff's rights were not extinguished by the contract between defendants and another, from which plaintiff derived no benefit, and of the terms of which he had neither notice nor knowledge.

Judgment for plaintiff for $3,000 and costs.

Goldstein v. *Canadian Pacific Rw. Co.*, 23 O. L. R. 536, 18 O. W. R. 977, specially referred to.

W. L. Haight, for the plaintiff.

D. L. McCarthy, K.C., and D'Arcy Ttate, K.C., for the defendants.

HON. MR. JUSTICE LATCHFORD:—That the defendants caused injury to the plaintiff by their negligence was formally admitted at the trial, where the damages which the plaintiff thus sustained were fixed by a jury at $3,000.

It is, however, contended on behalf of the defendants, that they are relieved from liability by the terms of a contract made between them and one Dr. Parker, who shipped a horse in charge of the plaintiff from Milverton, in the county of Perth, to South River, in the district of Parry Sound. Dr. Parker had purchased the horse for his friend, Dr. McCombe, of South River, and at the latter's request the plaintiff proceeded to Milverton to bring up the horse; the rules of the defendants requiring that live stock shipped more than a hundred miles should have a man in charge.

The plaintiff accompanied Dr. Parker to the railway station, and was present when the shipping bill and special contract upon which the defendants rely was signed by the agent and by Dr. Parker, who, thereupon, at the instance of the agent, handed it folded to the plaintiff. In the margin of the contract is written: "Pass man in charge at half fare." The plaintiff did not open or read the contract. Its purport was not made known to him by anyone, nor was he required by the agent (as the form directs) to write his name upon it. He paid no fare, and was asked for none. Half fare for him was, however, charged in the bill rendered to Dr. McCombe at South River for the carriage of the horse, and both charges were paid by Dr. McCombe. During the transit a rear-end collision negligently occurred at Burk's Falls, and the plaintiff sustained serious injury.

The contract under which the horse was carried was before the Board of Railway Commissioners of Canada for approval, on the 17th October, 1904, upon the application of the three great railway systems of the Dominion and of the Pere Marquette Railroad Company. An order was thereupon made which, after referring to the matter as one of great importance, "requiring that much circumspection should be exercised in examining into the forms which the Board hereafter has to approve, and also into the question of limitation of liability on the part of the carriers," empowered and authorized the applicants to use the forms

submitted "until the Board shall hereafter otherwise order and determine."

The form signed by Dr. Parker is identical with that then temporarily authorized by the Railway Commissioners; and, though nearly eight years have elapsed, no further or other order has been made in a matter so seriously affecting the relations between the principal railways of the country and the shippers of live stock. The important provision is as follows:

"In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then, as to every person so travelling on such a pass or reduced fare, the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever."

In view of the decisions of *Bicknell* v. *Grand Trunk Rw. Co.* (1899), 26 A. R. 431, and *Sutherland* v. *Grand Trunk Rw. Co.* (1909), 18 O. L. R. 139, it cannot be doubted that the contract was binding upon Dr. Parker. That point, however, is not involved in the present case. Here the question is this: Is the plaintiff bound by a contract made between the shipper and the carrier to which the plaintiff was not a party and of the terms of which he had no knowledge? I have been referred to no case which decides this affirmatively.

In *Goldstein* v. *Canadian Pacific Rw. Co.*, and in *Robinson* v. *Canadian Pacific Rw. Co.* (1911), 23 O. L. R. 536, the carriers appear to have recognized their liability for negligence causing damage to persons accompanying live stock under a contract identical with that made between Dr. Parker and the defendants. The contract bore the same "Note" as here; and in both cases, as here, the men accompanying the stock were not required to sign or endorse the contract. Unlike the present case, the relation of master and servant—if that is at all material—existed between the shippers and the men accompanying the stock. The question before the Court for decision was the right of the carrier to recover from the shippers the amounts paid by the railway company to Robinson, who was injured, and to the

personal representatives of Goldstein, who was killed. Garrow, J., in his judgment (p. 540), says:

"No trial having taken place, it is now quite impossible accurately to ascertain what the defendants feared or exactly why they settled; the only really material fact appearing so far as the third parties (the shippers) are concerned being that before doing so the defendants took the precautions of obtaining from them the undertaking not to dispute the liability of the defendants to the plaintiffs or the amounts at which it was proposed to settle."

The learned Judge then proceeds to say that the question before the Court was merely the right of the railway to indemnity for the amounts so paid; and, applying the rule that generally the right to indemnity, unless expressly contracted for, must be based upon a previous request, express or implied, to do the act in respect of which indemnity is claimed, the learned Judge held that in the circumstances there was no express covenant or contract of indemnity and that it would be impossible in law to imply one. The case against the third parties was, therefore, dismissed.

In my opinion, I am not bound by the opinions expressed by Meredith, J., in his judgment (pp. 542 and 543) as to the right or absence of right on the part of those injured by the carriers, arising out of the contract made between the shippers and the railway company. These opinions are, I think, mere dicta, not necessary to the determination of the question of indemnity which was before the Court.

I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of the terms of which he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide.

I direct that judgment be entered for the plaintiff for three thousand dollars and costs. There may be a stay of thirty days.

HON. MR. JUSTICE KELLY. JUNE 7TH, 1912.

RE COUTTS & LEBOEUF.

3 O. W. N.

Vendor and Purchaser—Title—Will—Wrong Description of Lands—Valid Title Passed under Will.

Application under Vendor and Purchasers Act to determine whether certain lands passed under a devise made by one Alexander Coutts, deceased. The testator had devised "the north half of the south half of lot 11 in the fifth concession of the township of Tilbury East," whereas the only land he owned not disposed of by other devises was the north half of the north half of the said lot 11.

KELLY, J., *held* that the latter parcel passed under the devise, and the vendor could make a valid title.

Re Harkin, 7 O. W. R. 840;
Re Clement, 22 O. L. R. 121; and
Smith v. *Smith*, 22 O. L. R. 127, followed.

An application under the Vendors and Purchasers Act.

Jane Coutts, claiming to be devisee under the will of her husband, Alexander Coutts, of the north half of the north half of lot 11 in the 5th concession of the township of Tilbury East, in the county of Kent, agreed in February, 1910, to sell these lands to Eugene Leboeuf; the purchaser objected to the title on the ground that the property was not devised or disposed of by Alexander Coutts and did not pass by his will, and that he died intestate as to it, and that therefore the vendor had no power to sell it.

Alexander Coutts made his will on 17th April, 1875, and died August 14th, 1881. His wife, Jane Coutts, was appointed the executrix, and probate of the will was issued to her.

The first paragraph of the will was:

"I give, devise and bequeath all my lands and tenements, goods and chattels as follows:" Then, after devising to his son the south half of the north half of lot 11 in the 5th concession of Tilbury East, containing 50 acres more or less, and other lands, he devised to his wife, Jane Coutts, the vendor, for the benefit of his family, several parcels, including "the north half of the south half of lot No. 11 in the 5th concession, containing 50 acres more or less," and he did "also enjoin her to sell any portion or parcel of the lands willed to her at any time she may see fit or judicious."

At the time the will was made, and also at the time of his death, testator was the owner of the north half of lot 11 in the 5th concession of Tilbury East, but was not then

and never was the owner of or interested in the south half of that lot.

Walker, K.C., for the vendor.

Clark, for the purchaser.

HON. MR. JUSTICE KELLY:—The will shews an intention on the part of the testator to dispose of all his lands and tenements, etc. Not owning the south half of the lot, but owning the north half of it, and having devised the south half of the north half to his son, if in the devise to Jane Coutts he had used the word "north" instead of "south" the description in the will would then, as stated in *Re Harkin*, 7 O. W. R. 850, at p. 841, "fit his exact ownership and all his lands will pass by his will as the intention is therein expressed."

I am of opinion that the will operates so as to pass to the vendor, Jane Coutts (for the benefit of testator's family and subject to the power of sale as therein expressed), the north half of the north half of Lot 11 in the 5th Concession of the Township of Tilbury East. I refer to *Re Harkin*, 7 O. W. R. 840; *Re Clement*, 22 O. L. R. 121, and *Smith* v. *Smith*, 22 O. L. R. 127, where many of the earlier cases are considered.

MASTER IN CHAMBERS. JUNE 8TH, 1912.

POWELL REES v. ANGLO CAN. MORTGAGE CO.

3 O. W. N.

Discovery—Examination of Officer of Company—Not Authorized to do Business in Province—Name on Charter and Prospectus—Order Granted.

Motion by plaintiffs under C. R. 903 for examination of one Reynolds as an officer of defendant corporation in aid of execution.

MASTER IN CHAMBERS *held* that although defendant company was not authorised to do business in the province, yet as Reynolds' name appeared in the charter and prospectus as one of the provisional directors, he could be examined.

Costs reserved until examination.

After the motion reported in 21 O. W. R. 271, 3 O. W. N. 844, the plaintiffs signed judgment on default of appearance. They afterwards made a motion for examination of Mr. Reynolds, under Rule 903. He filed an affidavit to the same

effect as on the previous motion, and was cross-examined. The motion was then argued.

M. C. Cameron, for the plaintiffs.

John MacGregor, contra.

CARTWRIGHT, K.C., MASTER:—The facts are the same as when the judgment was signed. The defendant company has never been authorized to do business in this province, because sufficient stock has not been subscribed and paid. But a charter was issued by the Lieut.-Governor on 29th November, 1910. In it Mr. Reynolds is the first named of six elected provisional directors; and the head office of the company was fixed at Toronto. It was also proved that in the prospectus issued by the company in England, and filed with the Provincial Secretary here, Reynolds is named, as first of the Canadian directors, and is also called president—also the head offices are stated to be at 77 Victoria street, Toronto. These facts seem sufficient to support an order for the examination of Mr. Reynolds, if plaintiffs still think it will be of any service to them. If they elect to proceed costs will be reserved. If they take the other course the motion will be dismissed without costs.

HON. MR. JUSTICE RIDDELL. JUNE 10TH, 1912.

SUTHERLAND v. SUTHERLAND.

3 O. W. N.

Assessment and Taxes — Tax Sale — Action to Set Aside — Irregularities.

Action to set aside tax sale of certain lands of plaintiff made to defendant. The action was brought within two years of the date of the tax deed but not of the date of the auction sale. The property, worth some $1,000, had been sold for $38.78, the exact amount of the taxes due, and the advertisement required by 4 Edw. VII. c. 23, s. 143 (1), had only been published once instead of thirteen times as required by the statute.

RIDDELL, J., *held* that the irregularities in connection with the sale were sufficient to avoid it and that the sale had not been conducted "fairly and openly" within the meaning of sec. 172 of the Assessment Act.

That the phrase "two years from the time of sale" in sec. 173 of the Assessment Act means two years from the date of the tax deed, not from the date of the auction sale.

Donovan v. *Hogan*, 15 A. R. 432, followed.

Sale set aside, purchaser protected, no costs.

The plaintiff was the owner of about an acre of land in the township of West Zorra, upon which was a brick dwelling house and another building worth in all about $800 or $1,000.

October 27th, 1909, the treasurer of the county of Oxford sold this for taxes for the sum of $38.78 (the exact amount due) to John Sutherland, brother of the plaintiff—he died in January, 1911, and the deed was made to his son Robert John Sutherland, one of the defendants.

December 4th, 1911, the plaintiff brought her action to set aside the sale.

P. McDonald, for the plaintiff.

S. G. McKay, K.C., and J. G. Wallace, K.C., for defendants.

HON. MR. JUSTICE RIDDELL:—Full credence is to be given to the witnesses called for the defence—this in the case of Consolidated Rules applies to what he swore to after the trial of the case was resumed—I found it necessary to postpone the further hearing of the case by reason of his condition. All the notices that were sworn to have been sent to the plaintiff, including those by her agent Wadland, I find she received, notwithstanding her denial.

But with all this, the proceedings bristled with irregularities and such as on the authorities, well known, rendered the sale voidable.

I mention in particular only one—the Assessment Act, 4 Edw. VII., ch. 23, sec. 143, sub-sec. 1, requires an advertisement "once a week for four weeks in the Ontario Gazette, and in some newspaper published within the county once a week, for thirteen weeks . . ." of the list of lands, etc. Then sub-sec. 3 provides that instead of this advertising "the treasurer may have the advertisement published in the Ontario Gazette as hereinbefore provided, and then publish in at least two newspapers published as in sub-sec. 1 provided, a notice announcing that the list of lands for sale for arrears of taxes has been prepared, and that copies thereof may be had in his office and that the list is being published in the Ontario Gazette . . ."

This provision was simply to save the expense of publishing a long list of lands in the local papers; and it cannot in my opinion be considered that it did more than this. But the

interpretation put upon this section by the county is that a single publication is sufficient—and accordingly the publication required by sub-sec. 3 appeared only once in the local papers instead of for thirteen weeks, as I think the statute requires.

The defendants, however, rely upon sec. 173.

Hall v. *Farquharson* (1888), 15 A. R. 457, is relied upon by the plaintiff as shewing that the purchaser cannot claim the statutory protection because as it is argued the sale was not "openly and fairly conducted."

That decision it is contended on the other hand was in a different state of the law—the statute there referred to is R. S. O. 1877, ch. 180; sec. 155 of that Act is much the same as sec. 172 of the statute of 4 Edw. VII.: sec. 156, however, is different from sec. 173 of the present Act and reads thus:—

"Whenever lands are sold for arrears of taxes and the treasurer has given a deed for the same such deed shall be to all intents and purposes valid and binding except as against the Crown, if the same has not been questioned before some Court of competent jurisdiction by some person interested in the land so sold within two years from the time of sale." There is here no validation of the sale—for that sec. 155 had at that time to be applied to and that required the sale to have been "openly and fairly conducted." Moreover in *Hall* v. *Farquharson* it was considered only sec. 155 was or could be relied upon—the two years' time had not run. See p. 467.

This state of the law continued down through R. S. O. (1887), ch. 193, secs. 188, 189; 55 Vict. ch. 48, secs. 188, 189; R. S. O. 1907, ch. 224, secs. 208, 209, but the new Act, 4 Edw. VII, while not substantially changing the earlier section by sec. 172, made a great change in the latter by sec. 173. "Wherever land is sold for taxes and a tax deed thereof has been executed the sale and the tax deeds shall be valid and binding to all intents and purposes except as against the Crown unless questioned before some Court of competent jurisdiction within two years from the time of sale." In the present state of the law there is no need of calling in the aid of sec. 172 to validate a sale—if the sale has been two years before the issue of the writ, that is enough when a tax deed has been executed.

But it has been authoritatively decided in *Donovan* v. *Hogan* (1888), 15 A. R. 432 that "two years from the time

of sale" means "two years from the time of making the tax deed," not from the time of the auction sale of the land. While the legislature has in the Act of 1904, inserted the words "the sale" in the first part of the section, and it may be contended that this must mean the auction sale—and that the word "sale" at the end of sec. 173 must be read as meaning the same thing, I do not think it open to a Judge of first instance to question the applicability of a decision on the word by the Court of Appeal on mere inference except of the strongest kind. If a change is to be made, it should be made by the Appellate Court. Section 173 then does not here avail the defendants, and they must rely upon sec. 172. That only protects "provided the sale was openly and fairly conducted"—these words are considered in *Donovan* v. *Hogan*, and Patterson, J.A., says, p. 446: "I have a strong feeling that something more must be required than easy-going uninquiring honesty on the part of the official who sells . . . what is aimed at is that these sales shall be conducted as ordinary business transactions are where property is sold by auction with a view to obtain its fair market value . . . Fairness is required on the part of the vendee as well as the vendor."

Here there was no local advertisement, but a bill posted at the court-house and a single insertion in two papers of the skeleton advertisement authorized by the Act; there were only three or four attending the sale, and but one bid for the property, and that the exact amount of the charge against the property—this bid was made by the brother of the plaintiff who had been anxious to get the property although it is true it was not proved that the county officials were aware of that fact. It is true too, that the agent of the owner was at the sale, but he was not in funds. But can it be said that this sale was "conducted as ordinary business transactions are where property is sold by auction with a view to obtain its fair market value?"

I think the defence fails and sale should be declared invalid—it is not a case for costs—the defendant Sutherland will have, of course, the benefit of the provision of 4 Edw. VII. ch. 23, sec. 176; the amount of damages to be assessed to him for purchase money, interest, improvements, etc., under this section and the value of the land, etc., will be determined by the Master (unless the parties agree) the costs of reference, etc., and F. D. reserved..

I do not find fraud or evil practice by the purchaser. Section 176 (3) (c) nor does either of the other exceptions exist. It is to be hoped that aunt and nephew will be able to settle their dispute without further litigation.

BOARD OF RAILWAY COMMISSIONERS.

FEBRUARY 9TH, 1912.

CANADIAN FRATERNAL ASSOCIATION v. CANADIAN PASSENGER ASSOCIATION.

13 Can. Cr. Cas. 178.

Railway Board—Jurisdiction—Passengers—Discrimination in Carrying—Excursion Fares—7 & 8 Edw. VII. c. 61, s. 9—Railway Act, s. 317.

DOM. RW. BD. *held* that the 25 cents charged for issuing railway certificates, entitling persons attending meetings to return home without payment of a return fare, is a charge or toll made in connection with transportation of passengers and is covered by the tariff filed by the respondents, and as such may be lawfully collected.

That the Board has no jurisdiction to compel railway companies to issue excursion rates nor to fix the number of persons entitled to the benefits thereof. Such matters are within the disrcetion of the railway companies.

An application heard at Toronto, February 9th, 1912, the facts of which are fully set out in the head-note and the following judgment, delivered at the close of the hearing.

Lyman Lee, for the applicant.

W. H. Biggar, K.C., Angus MacMurchy, K.C., and W. P. Torrance, for the respondent.

HON. MR. MABEE, CH. COMR.:—The contention of the applicants here is of a two-fold character. The first claim is that this 25-cent charge for viseing these certificates is not a toll within sec. 9 of 7-8 Edw. VII., ch. 61. The section referred to was drawn with the idea of covering every conceivable charge that a railway company, or any person on behalf of, or under the authority, or with the consent of the railway company could make in connection with the movement of traffic. Bearing that in mind, it has got to be construed liberally.

This 25 cent charge is made, we think, by the railway company in connection with the transportation of passengers.

It is unfortunate that the clause in the tariff that has been referred to was worded as it is. It was not necessary to use the word "fee" and it was not necessary to set out in that clause that this charge was to be made with a view of defraying expenses. It does not say distinctly that it is intended to raise a fund to defray the expenses of the special agent, but to defray expenses generally I should think would be the interpretation of those words. There is no more necessity of putting words "to defray expenses" in this document than there would be to put those words in any special freight or passenger tariff or any standard freight or passenger tariff that a carrier might file. Everybody knows that the law authorises railway companies and carriers to levy tolls with the view first of defraying expenses; and then if, as sometimes happens, there is anything left over, it goes to those whose money has been put into the enterprise. Probably if the word "fee" in the expression I have referred to had not been in this tariff it might not have been open to, and probably would not have invited the attack that has been made upon it. We come to the conclusion that this 25 cent charge is a toll or charge made in connection with the transportation of passengers. That is the first thing we find.

Secondly, we find, possibly not without some hesitation, and admitting that the matter is arguable, that that 25 cent charge is covered by this tariff, although in the unfortunate form to which I have adverted, and that the railway company is within its right in making the charge.

I can understand how some of these delegates who attend these conventions may feel about the payment of this 25 cent charge. But before we interfere, this fact must be remembered, certainly carrying passengers for a cent and a half a mile is carrying them for a pretty low charge. This is a concession made by the railway companies to people travelling in large numbers. The railway companies have discretion in connection with reducing fares. The law does not give this Board any jurisdiction over railway companies to compel them to issue excursion rates. If this were an application to compel the railway companies to carry bodies of people of 300 or more at one-way fares, we would have no jurisdiction to compel the railway companies to put in any such tariffs.

Now in effect this is an application to compel the railway companies to take 25 cents off the tariff that they have filed. The tariff is a one-way fare plus 25 cents; and in effect the request is that the railway company be compelled to carry at a one-way fare and cut off the 25 cents. The law does not give us jurisdiction to do anything of the kind.

We have had applications from different sources, one in particular from Montreal a year or two ago, to compel the railway companies to issue excursion tickets to some ice festival or ice palace or something they were having down there. We had also one from Sherbrooke in connection with a snowshoe association. The railway companies came to the conclusion that issuing excursion fares for meetings of that kind was not in the interest of the country. It was advertising that the country was cold, that the people engaged in the luxuries of ice palaces and the like, and they did not think that was good for immigration purposes. They said, We will not issue return tickets or excursion fares to demonstrations of that sort. We were asked to intervene and we held that we had no jurisdiction to intervene.

A railway company issues tickets to 300 people or more and we are asked to say that 300 is too many, that it ought to be cut down to 250 or 200. The answer is that the statute does not give us any authority to do anything of the kind. The railway companies have the right, if they like, to apply the regular return trip fare to any number of persons travelling from the same place to the same place, or as these people do, to these gatherings.

The application we think must fail upon both heads; first with reference to the 25 cent charge; and second with reference to the contention that 300 is too many.

I think it would be advisable for the railway companies to revise this unfortunately worded clause and set forth more clearly what evidently the intention was when the tariff was filed.

McLean, Comr. (*dissenting in part*):—In regard to the tariff, I have indicated already the view I take in the matter. I differ slightly from what the Chief Commissioner has said. I cannot quite see that the tariff as worded falls within the definition of a toll contained in section 9 of chapter 61 of 7 & 8 Edw. VII. I think it is legitimate to assume that when the association saw fit, acting for the company, to put in the words "defray expenses," put in small capitals and

in connection with the question of validation, they were indicating that that was a special expense of validation. I cannot see that that fits into what is covered by the scope of tolls.

PRIVY COUNCIL.

NOVEMBER 2ND, 1911.

GRAND TRUNK PACIFIC RW. CO. v. FORT WILLIAM LAND-OWNERS AND FORT WILLIAM LAND INVESTMENT CO. ET AL.

[1912] A. C. 224; 13 Can. Ry. Cas. 187.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Board of Railway Commissioners—Jurisdiction—Municipal Streets—Railway upon or along Highway—Leave to Construct—Approval of Location—Condition Imposed—Payment of Damages to Abutting Land-owners—Construction of R. S. C. (1906), c. 37, ss. 47, 155, 159, 235, 237.

Having obtained the consent of the municipality to use certain public streets for that purpose, the G. T. Pac. Rw. Co. applied to the Railway Board for leave to construct and approval of the location of the line upon and along the highways in question. None of the lands abutting on these highways were to be appropriated for the purposes of the railway, nor were the rights or facilities of access thereto to be interfered with except in so far as might result from inconvenience caused by the construction and operation of the railway.

DOM. RW. BD., in granting the application, made an order that the railway "make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street."

SUPREME COURT OF CANADA (43 S. C. R. 412; 11 Can. Ry. Cas. 271), sustained above order, Davies and Duff, JJ., dissenting.

PRIVY COUNCIL reversed above judgments, holding that under s. 237 (3) of R. S. C. (1906), c. 37, the power to award damages was in respect of construction, and s. 47 did not on its true construction extend that power to meet the case of location.

That as the condition failed there had been no approval of the location.

An Appeal by special leave from a judgment of the Supreme Court of Canada, June 15th, 1910.

The Board of Railway Commissioners on October 6th, 1909, in pursuance of powers vested in them by the Railway Act, R. S. C., 1906, ch. 37, ordered that the appellant company might construct its line of railway along certain streets through the city of Fort William notwithstanding the strong objections thereto of the respondents that it would be injurious to their properties which abutted on the said streets. The order was made subject to the express condition

stated in their Lordships' judgment and the above head-note.

The appellant company appealed to the Supreme Court for a declaration that to impose the condition was beyond the jurisdiction of the Board, and that the order of the Board should be upheld as unconditional.

The Supreme Court held that the condition was within the jurisdiction of the Court to impose.

Section 47 of the Railway Act relates to the conditions which the Board may impose and is as follows:—

"The Board may direct in any order that such order or any portion or provision thereof, shall come into force, at a future time, or upon the happening of any contingency, event or condition in such order specified, or upon the performance to the satisfaction of the Board, or person named by it, of any terms which the Board may impose upon any party interested, and the Board may direct that the whole or any portion of such order, shall have force for a limited time, or until the happening of a specified event."

July 25th, 1911. Sir R. Finlay, K.C., Atkin, K.C., and G. F. Spence, for the appellants contended that the Board had no power to impose the condition in question, that it was separable from the rest of the order and ought to be separated. The terms of sec. 47 are so general that the section must be read in connection with the specific provisions of the Act relating to compensation. It should be read together with secs. 235 and 237, and the power to order compensation is limited to the matters specifically referred to in these sections, and could not be arbitrarily extended so as to include compensation not specifically authorized by statute. There was no power to extend compensation from cases arising in consequence of the construction of a railway to those arising from its location. In regard to the imposition of a condition improperly, see *Rex* v. *Dodds*, [1905] 2 K. B. 41. It was contended that the condition should be struck out as *ultra vires* and that the appellants were entitled to treat the order as valid and to act upon it as if no such condition were imposed.

J. S. Ewart, K.C., for the respondents the Fort William Land Investment Company, contended that sec. 47 on its true construction authorized the Board to impose the condition contained in its order; otherwise it had implied authority to frame its order as it thought right. The Board in considering whether a proper location should or should not be approved must in the proper exercise of its discre-

tion take into account all the circumstances, including the effect on the owners of abutting lands, and must judicially determine whether it should impose any and what conditions on which its approval should be granted. Approval is refused except subject to conditions expressed.

There is no jurisdiction to reverse that order, and still less to uphold it, while striking out the condition which was a vital part thereof. The matter was entirely within the discretion of the Board, and if the terms on which it was exercised are disapproved, the order, which was inseparable from the condition, should be rescinded.

Atkin, K.C., replied.

The appeal to the Judicial Committee of the Privy Council was heard by LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

Their Lordships' judgment was delivered by

LORD SHAW OF DUNFERMLINE:—This is an appeal from a judgment of the Supreme Court of Canada dated June 15th, 1910. That judgment dismissed an appeal from an order of the Board of Railway Commissioners for Canada, which order was made on October 6th, 1909.

The facts giving rise to the question before their Lordships may be stated in a word. The Grand Trunk Pacific Railway Company constructed a branch line to the town of Fort William, in the Province of Ontario, and in order to "establish and maintain its terminals and other works in connection therewith" it entered into an agreement with the corporation of that town on March 29th, 1905. By the agreement the corporation granted to the railway company "free of cost and all liability the right to build on the level and operate in perpetuity a double track line of railway on all the streets of the municipal corporation coloured red" on a certain plan. Two of those streets were Empire avenue and McKellar or Hardisty street. The railway company then applied under sec. 159 of the Railway Act of 1906, for approval of the location of its line of railway.

On October 6th, 1909, the Board of Railway Commissioners ordered that "subject to the terms and conditions contained in the said agreements, and subject to the condition that the applicant shall do as little damage as possible and make full compensation to all persons interested for

all damage by them sustained by reason of the location of the said railway along any street in" Fort William, the location "be and the same is hereby approved." The true question in this case is whether it was within the powers of the Board of Railway Commissioners to impose the "condition" that the company should make full compensation to all persons interested for all damages sustained by reason of the location of the railway. On the one hand the railway company maintains that it was *ultra vires* of the Board to impose the condition, and presents the argument that the condition should be deleted and that the order *quoad ultra* should stand. While, upon the other hand, the respondents in the appeal maintain that it was within the power of the Board to make a condition of compensation of the kind in question; but they plead that if this was not so, then the order—never having been, or been intended to be, an unconditional order —should fall, if the condition fails.

These respondents are frontagers, that is to say, owners of properties in the streets named, and it is not difficult to understand how they are, and possibly also how the municipality itself is, seriously affected by the location of the railway as proposed and sanctioned. It appears, however, that many of the properties in question are neither taken nor injuriously affected in the sense of the English railway law as interpreted by *The Hammersmith and City Rw. Co.* v. *Brand* (1869), L. R. 4 H. L. 171, a decision which has been followed in Canada in *Re Devlin and Hamilton & Lake Erie Rw. Co.* (1876), 40 U. C. R. 160. It is in no way surprising to find that the Board, giving a sanction for the construction of a railway through the municipality, should make the condition that the compensation to be paid for that privilege should fully equate with the injury done "to all persons interested;" that is to say, that the compensation should be recoverable in respect not only of the construction of the railway as settled by *Brand's Case* (1869), L. R. 4 H. L. 171, but also for all damage sustained in respect of its "location."

The real question, however, is whether, under the 47th section of the Railway Act of 1906, the Board was vested with a power of widening the scope of the compensation provided for in the statute itself. The language of s. 47 gives power to the Board to direct that its order shall come into force, *inter alia*, upon the performance "of any terms which the Board may impose upon any party interested." This

language is certainly general and comprehensive; but, in their Lordships' view, it cannot be interpreted as being designed to alter the other and specific provisions of the statute as to the compensation payable by the railway company. The particular application now being dealt with falls within the scope of sec. 237, which applies to "any application for leave to construct the railway upon, along, or across an existing highway." By sub-sec. 3 of that section it is provided that when the application is of that character "all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land exclusive of the highway crossing required for the proper carrying out of any order made by the Board." It does not appear to their Lordships that it would be safe to infer from the generality and comprehensiveness of the powers of the Board, and apart from any specific reference to the compensation itself and the parties entitled thereto, that these provisions of sec. 237 were liable to be altered, abrogated, or enlarged by the exercise of the Board's administrative power under sec. 47.

The reasons above referred to, which might induce administrative action so as to make the compensation properly equate with the injury to all interests, are reasons which might or might not appear sufficient for direct legislative interposition, but, as already mentioned, their Lordships, apart from that, cannot interpose by the inference argued for. On the contrary it appears to them that the administrative action taken was beyond the powers of the Board of Railway Commissioners for Canada, under the law as it stood at the date of the order.

On the other hand, their Lordships are unable to give any countenance to the proposition that an order was pronounced, subject to a condition in itself neither unnatural nor unreasonable, but erroneously inferred to be within the Board's powers, should be treated by the method of striking the condition out and leaving the order as an unconditional order to stand. Nobody meant that. The point is not advanced by the use of language as to whether this was a condition precedent or was not, the truth of the matter is pretty clear, namely, that had the Board been faced with the situation that it was not within its power to give protection to all the real interests which, in its opinion, were subject to injury by the location of the railway at the streets mentioned, the Board

could have adopted either of two other courses open. These were: (1) of either declining to sanction the location applied for, or (2) of intimating that they would only sanction the location if steps were taken to make a deviation or detour, sec. 159 (3) providing for the case of sanction of a deviation of not more than one mile. To put the Board, which had these options before it, in the position of having unconditionally approved of the location of the railway along the streets named, and to do so by writing out the condition which appears upon the face of the order, appear in their Lordships' judgment, to be neither fair to the Board itself, nor to the municipality, nor to the streets concerned. The order itself, and not the mere condition, must fall, and the parties will be left to come to a fresh arrangement under a new application and according to the circumstances, legislative and otherwise at this date.

Their Lordships will humbly advise His Majesty that the judgment appealed from be reversed, and that the order of the Board dated October 6th, 1909, be rescinded, the decisions as to costs in the courts below to stand, but there being no order as to costs in the present appeal.

Batten, Proffitt & Scott, solicitors for appellants.

Blake & Redden, solicitors for the respondents.