Judgments of the Lords of the Judicial Committee of the Privy Council on the Appeals of Bourgoin and another v. *La Compagnie du Chemin de Fer de Montréal, Ottawa, and Occidental and Ross, from the Court of Queen's Bench, for the Province of Quebec, delivered on the* 14*th February* 1880, *and on the* 26*th February* 1880.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

The only question which has been fully argued upon the four appeals consolidated in this record is whether the judgment of the Court of Queen's Bench rendered in the first suit, No. 693, was right in annulling and setting aside the award of the 28th of July 1876 upon either of the grounds stated in it. As to one of those grounds which proceeds upon the assumption that the lump sum of $35,013, awarded to the Appellants, included the whole value of the land, and not merely the value of their interest as lessees, it is not necessary to say anything, because that objection has not been pressed.

The question, therefore, is reduced to this: can the judgment be supported on the other ground taken? Their Lordships confined the argument, in the first instance, to that question, because they thought that if the award was found to be invalid on the face of it, that finding

would go far to dispose of all or most of the questions which have been litigated between the parties. They will, therefore, for the present, confine their attention to the first of the suits and the final judgment therein, nor will they go into the facts further than is required in order to elucidate the single point to be now determined. The Appellants are four persons holding a quarry, as lessees, under a Mrs. Smith. They are sometimes described as working together in two partnerships of two each, as "Bourgoin et Fils" and "Bourgoin et La Montague," but for all practical purposes they may be treated as the four joint lessees of the quarry. The Respondents, who were the Plaintiffs in the suit, are a Railway Company, styled on the record "The "Montreal, Ottawa, and Western Railway Com-"pany." This Company was incorporated originally under another title, viz., "The Montreal "Northern Colonization Railway Company," by an Act of the Legislature of the Province of Quebec (32 Vict., c. 55), and was governed by that and a subsequent statute of the same Legislature, 34 Vict., c. 23. It was, therefore, in its inception a provincial railway. In 1873, however the Parliament of Canada, by Act 36 Vict., c. 82, declared this railway to be a federal enterprise, and by a subsequent statute (38 Vict., c. 68) changed the name of the Company to that which it bears on this record. Hence, when the proceedings which resulted in the award in question were commenced, the railway had become a federal railway, and the Respondent Company was subject to and governed by the provisions of the Canadian statute known as "The Railway Act, 1868."

It appears that, in one or other of the above two states of existence, this Company had proceeded in the usual way to ascertain the compensation payable to the lessor, Mrs. Smith, in

respect of her freehold interest in the land to be expropriated. The Appellants intervened, and sought to have the sum payable to them for compensation in respect of their interest as lessees ascertained by the same proceeding. The Company declined to accede to this, and having settled the amount of compensation payable to Mrs. Smith, took possession of the quarry. The Appellants upon that instituted certain proceedings, in order to compel the Company to ascertain the compensation due to them; those proceedings were ultimately successful, and thereupon the Company gave the notice of the 22nd of February 1875, which was the foundation of the proceedings that resulted in the award. Their Lordships think it right here to observe that, in their opinion, there is nothing exceptional in that notice, nothing which supports the suggestion that its terms were varied by reason of the Company having previously, and perhaps wrongfully, taken possession of the quarry. It appears to them to be the usual notice contemplated by "the Railway Act of 1868." The words which have been so much relied on as authorizing the arbitrators to settle all questions between the parties have been taken *verbatim et literatim* from the 10th subsection of the 9th Section of that Statute. After the service of the notice, arbitrators were appointed and the award in question was made, and the only two documents besides the notice which seem to be in any way material for the decision of the question now to be determined are, the award itself, which is at page 12, and the claim of the Appellants, which is at page 20 of the record.

The material passage in the award, upon which the whole question turns, is that whereby the arbitrators, after stating that they had proceeded

to assess the compensation to be paid by the Company to the Appellants for the piece of land described, and for all the damages resulting from the taking possession of the same, and had visited the said piece of land, and estimated with care and established the value of it, and the amount of the said damages, proceeded to award—

"The sum of $35,013, *plus* $100 per month from this date, payable on the first of each month, until the said Company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land, and constructed a culvert to protect the said watercourse, as being the amount of compensation to be paid by the said Montreal Northern Colonization Railway Company, now called 'the Montreal, Ottawa, and Western Railway Company,' to the said 'Bourgoin et Fils' and Bourgoin and La Montague for the said piece of land, and for all the damages resulting from the possession of the same."

The objection taken to the award is now confined to that portion of the passage just quoted, which includes and follows the word "plus," and relates to what the arbitrators seem to have considered as wholly or in part the compensation due to the Appellants in respect of that portion of their claim which was comprehended in the words of its 4th head, and claimed damages for the watercourse diverted by the Company, and for pumping and work to be done at the rate of $600 per annum for eight years (which they treated as the probable duration of their lease), and amounting to a gross sum of $4,800. Their Lordships, after full consideration of this case, and of the learned arguments upon it, have come to the conclusion that, in respect of the passage in question, the award is bad upon the face of it. The case of the Appellants was very ingeniously put, particularly by Mr. Fullarton. His argument was to this effect. He said that the arbitrators probably conceived that, if they gave the full sum claimed on the assumption that the interruption of the drainage would last for the

whole duration of lease, fixed at eight years, they might be doing great injustice to the Company; that by virtue of the 6th Sub-section of the 7th Section of "the Railway Act 1868," which is in these words:—

"To construct, maintain, and work the railway across, along, or upon any stream of water, watercourse, canal, highway, or railway which it intersects or touches; but the stream, watercourse, highway, canal, or railway so intersected or touched shall be restored by the Company to its former state, or to such a state as not to impair its usefulness."

The Company was, to the knowledge of the arbitrators, under a statutory obligation to restore the watercourse; that they assumed that the Company would perform that statutory obligation as soon as possible; and accordingly assessed the damages in the manner complained of in ease and for the supposed benefit of the Company; and further, that it was competent to them so to do.

The motives of the arbitrators, whatever they may have been, cannot validate their act if that were *ultra vires*. And the first observation which their Lordships have to make is that, as they read the statute, it was not competent to the arbitrators to impose the payment of a rent or periodical sum at all. The word "rent," no doubt, occurs in several of the sub-sections of Section 9; but their Lordships think that the use of that word is always to be explained by a reference to the provisions contained in the Sub-sections 3, 4, and 8, and that in every case, except those in which the parties expropriated fall within the description of "corporations or per-"sons who cannot in common course of law sell "or alienate the lands set out and ascertained," it is the duty of the arbitrators to fix as compensation, such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same under the 27th Sub-section, or into Court under the 34th Sub-section, of the 9th Section of the Act, in order to

entitle the Company to possession under the 27th, or to a confirmation of title under the 34th and 35th Sub-sections. It appears, moreover, to their Lordships, that even if a rentcharge could be given by way of compensation in circumstances like these to the expropriated parties, it has not been done in this case; that the monthly sum awarded is not, in any sense of the term, a rent; that it is more in the nature of an assessment of damages payable *in futuro*, and does not in any point of view fall within the provisions of the Act.

A further objection to this part of the award is, that it makes the monthly payment contingent on the completion and erection of certain works, and thus introduces an element of uncertainty which would of itself be a fatal objection to the award. That it is open to the objection of uncertainty is shown by the observations which have been quoted from the judgment of Mr. Justice Tessier, who decided in favour of the Appellants. The learned Judge, p. 403, line 20, assumes that if the culvert is not constructed the annual sum will continue to be payable, not only to the Appellants and their assigns, but to the reversioner, Mrs. Smith. The learned Counsel for the Appellants repudiated that construction; but the fact that it was put by the learned Judge upon the document goes to prove that there is some degree of uncertainty in the award. Again, the duration of the Appellant's interest is uncertain, in that they held their lease with the power of renewing it so long as any stone remained to be worked. They might thus prolong the time during which the monthly sum would be payable, by omitting to work the stone, although no doubt the Company would have the power to put an end to their liability by doing the works prescribed.

Lastly, there seems to their Lordship to be a fatal objection to the award in the direction to the Company to restore the watercourse in a particular manner, and that by the construction of a culvert. They conceive that it was not within the functions of the arbitrators to prescribe how the Company was to relieve itself from the statutory obligation imposed upon it by the 6th Sub-section of the 7th Section, or to cast upon them the construction of a culvert which possibly might not be necessary.

It is right now to notice shortly certain authorities which have been invoked in the course of the arguments at the bar. The Chief Justice referred to four cases reported in the 12th Queen's Bench Reports, Upper Canada, as supporting his judgment, whereas the learned Counsel for the Appellants has treated them as authorities in his favour. If those decisions are opposed to the decision of the Court of Queen's Bench of Quebec in this case, that would only show that there is a conflict of authority between the highest Courts of the two provinces, and that it is for their Lordships to decide between them. But their Lordships think that in truth there is no conflict at all, and that the cases in question do go to support the judgment of the Chief Justice in this case. It is to be observed that in all four cases the award was set aside. There is, therefore, no affirmative decision that a clause of this kind in an award is good. The only passage in the judgments in question which seems to their Lordships capable of being treated as in favour of the Appellants is that at page 114 of the volume, in the case of the Great Western Company *v.* Baby. Chief Justice Robinson there says :—

"The second and third objections seem also to have been satisfactorily answered. It is not the devisees who are moving against the award, on the ground that some things are directed in their favour which cannot be enforced against the Company ;

it is the Company who are complaining of the extravagance of the award. If they choose to object against the making and maintaining the tank spoken of, and to keeping open the Ferry street, and can successfully resist both or either of them, that would only show that, so far as the amount of the award can have been influenced by assuming that those things were to be done, the devisees may have reason to complain that they have been deluded by promises of advantages which cannot be secured to them, and that the sum awarded as the value of their property should therefore have been larger, as they cannot reckon upon enjoying these benefits, which the arbitrators may have taken into account as considerations in their favour, tending to diminish the sum to be awarded."

He goes on to say,—

"Besides, these are not things which the arbitrators have taken upon themselves to direct. They seem rather to have inserted them as being things understood between the parties, and which they had therefore taken into consideration in estimating the damages."

Then, at page 121, after saying that the award must be annulled upon another ground, he says,—

"But, to avoid occasion for question upon any future award, we would suggest that it should be clearly expressed, in the first place, that the sum awarded is given for the value of the lands and tenements or private privileges proposed so be purchased, or for the amount of damages which the claimant is entitled to receive in consequence of the intended railroad in and upon his lands (as the case may be), and that the award should either be silent in regard to any other matter on which the statute gives no authority to the arbitrators to give a direction, or that, if the estimate has been influenced by anything which the Company has engaged to do in order to lessen the inconvenience, it should be plainly expressed that the Company have undertaken to do it, and the particular thing should be so defined as to leave no uncertainty, and no room for future litigation as to what is to be done or allowed by the Company, and at what particular part in their work and in what manner it is to be done."

Therefore this judgment proceeded upon the fact that the Company had agreed and offered to do certain things, not that the arbitrators had imposed upon this Company the obligation to do them, and it points out that the award would be more correctly drawn if it had taken no notice at all of the works in question, or had stated that the Company had voluntarily undertaken to perform them. It gives no countenance to the doc-

trine that it is competent to arbitrators to impose such an obligation as of their own authority.

Again, the case cited from Sirey's Collection seems to be distinguishable from the present in the manner in which Chief Justice Dorion has pointed out. There a gross sum was awarded, but that gross sum was made reducible if the Company should do something which, as in that Canadian case, they had undertaken to do. The case is certainly distinguishable from the present, both because the compensation awarded was one sum payable at once, and because the Company had undertaken to do the works in question. Several other French decisions have been cited by Mr. Justice Tessier in support of his view of this award, but it appears to their Lordships impossible to reconcile the broad principle which he seems to deduce from them, viz., that objections of this kind can only be taken by the person expropriated, and not by the body that expropriates, with the Railway Act of 1868 and its provisions. Their Lordships think that this case ought to be decided upon Canadian legislation and upon Canadian jurisprudence. For that reason they do not notice the case from the Isle of Man, which was cited by Mr. Benjamin.

The only remaining question to be considered is one which was suggested in the course of the argument, viz., whether the objectionable part of the award is severable from that which awards to the Appellant the sum of $35,013, so that the Appellants may recover that, waiving their right to the rest of the compensation awarded. The point was never taken in the Canadian Courts, no offer of waiver was made there, and it may be questionable whether that point can now, for the first time, be raised here. Assuming, however, that it is open to the Appellants, their Lordships are of opinion that the award is not severable in

the manner suggested, the compensation improperly awarded being combined as it is with that which was properly awarded, and both declared to be "le montant de la compensation à être "payée, pour le dit morceau de terre, et pour "tous les dommages résultant de la possession "d'icelui." And if they were severed a question might arise, as Mr. Benjamin has argued, whether the award would not be defective in that it failed to deal fully with one of the questions submitted to the arbitrators, viz., the amount of compensation due to the Appellants under the fourth head of their claim.

This being their Lordships' view, they think that the decision of the Court of Queen's Bench, which annulled and set aside the award as invalid on the face of it, is correct. They have come to that conclusion with considerable regret, because they feel that the Appellants were entitled to a fair compensation for the expropriation of their quarry, and that now, after a vast amount of expensive litigation, they are as far as ever from receiving that compensation. Their Lordships do not say that the fault is wholly that of the Company or wholly that of the Appellants; but the lamentable result remains, and they can only express their hope that in some way or another means will be found to give the Appellants a fair compensation for the expropriation of their quarry, and for the damages which they have sustained thereby. Their Lordships, however, can but decide this question on its legal merits, and they feel that it is of great importance that arbitrators, with the large power given to them by "the Railway Act, 1868," should be kept within the limits of their authority.

The conclusion to which their Lordships have come seems to dispose, not only of the first appeal, but of most of the other questions raised on the record.

Mr. Doutre then intimated that, after consultation, the Counsel for the Appellants had come to the conclusion that even if the award were pronounced to be bad, that could affect only two of the appeals, and that they were desirous to argue the two other appeals. After some discussion their Lordships assented to the adoption of this course. Those appeals were accordingly argued, and on the 26th day of February their Lordships* delivered the following judgment upon them :—

The judgment of their Lordships, which was delivered on the 14th instant, and ruled that the award of the 28th of July 1876 was bad on the face of it, disposed, except as to costs, of the Appeals numbered 13 and 144 respectively, and of all the questions on this record between the Appellants and the Respondent Company.

It seemed, moreover, to leave to the Appellants no substantial interest, other than costs, in the rest of the litigation. Their Counsel, however, expressed a desire to argue the remaining appeals (Nos. 117 and 141), and satisfied their Lordships that they were entitled to do so. Those appeals have accordingly been heard, and their Lordships have now to give judgment upon them. In order to see clearly what are the quessions raised by them, it is necessary to refer shortly to some of the proceedings in the two actions numbered respectively in the Superior Court 693 and 1,213.

In the latter of these, which was brought by the Appellants against the Company in December 1874 in order to recover the amount due on the award, the Respondent, the Attorney General intervened in the month of February 1878. The cause was heard on the 18th of April 1878 by Mr. Justice Mackay in the Superior Court

* Sir Robert P. Collier was not present.

against both the Company, the Defendants, and the Attorney General as intervenor, and the judgment of that Court dismissed the intervention, and condemned the Company to pay to the Appellants the amount due on the award. From this judgment the Company and the Attorney General appealed separately. The Court of Queen's Bench reversed the judgment of the Superior Court against the Company, and the appeal of the Appellants against so much of their judgment (No. 144) has already been disposed of. The appeal of the Attorney General was also allowed, and the judgment of the Superior Court reversed as against him, but on the ground that the intervention, though legally competent, was unnecessary, without costs. Hence the Appeal No. 117.

Again, the Superior Court, by its judgment in Suit No. 693, wherein the Company sued to set aside the award, dismissed that suit with costs. The Company appealed against that judgment, and has succeeded both in the Court of Queen's Bench and here in getting it reversed. The date, however, of the judgment of the Superior Court was the 30th of April 1877; the appeal against it was not lodged until the 5th of October following, and intermediately, *i.e.*, on the 22nd May in that year, the Appellants issued a writ of execution for their costs, under which the Sheriff seized certain lands, rolling stock, and other property as belonging to the Company. On the 17th January 1878, the Attorney General filed an "opposition à fin de distraire," by which he claimed the whole of the property seized as the property of the Queen for the use of the Province of Quebec. The Appellants filed their contestation, and on the 31st May 1878 Mr. Justice Johnson pronounced the judgment of the Superior Court, which upheld the opposition; declared that all the lands seized were the property of Her Majesty for the use of the Province

of Quebec; that accordingly the seizure of the lands, immoveables, and accessories in question was null, void, and illegal, and granted main levée thereof to the opposant, with costs against the contestants, the present Appellants. That judgment was, on appeal, confirmed by the Court of Queen's Bench, and hence the Appeal No. 141.

The determination of both these appeals mainly depends on the effect to be given to the transaction between the Company and the Government of Quebec which is embodied in the Notarial Act or Deed of the 16th of November 1875, and in Act 39 Vict., c. 2, of the Legislature of Quebec. The parties to the Deed are stated to be Her Majesty the Queen, represented by the Secretary of the Province of Quebec, "acting as well for "and on behalf of Her Majesty as for and on "behalf of the Province of Quebec, party hereto "of the first part, herein-after called 'the Go-"'vernment,' and the Montreal, Ottawa, and "Western Railway Company, described as a "body politic and corporate, duly incorporated "by statutes of the Province of Quebec and of "the Dominion of Canada, &c., party hereto of "the second part, herein-after called 'the Com-"pany.'" The deed, after reciting the nature of the enterprise and the commencement of the work, and that the Company was then unable to proceed further with the construction of the railway by reason of certain bonds not being negotiated; and that the Government was willing to assume and complete the construction of the said railway upon such terms and conditions, and in such manner and within such time as the Government might deem expedient, and for that purpose to acquire from the said Company all its rights and assets, and to take upon itself the legitimate liabilities of the Company, and to repay the disbursements of the Company in manner and form and to the extent therein-after

described; and that in consideration thereof the Company had agreed to transfer and convey such rights and assets to the Government also upon the conditions therein-after expressed—proceeds to state, in different clauses, the covenants and agreements into which the parties had entered before the notary. The material clauses are the 1st, 2nd, 4th, 7th, 8th, and 9th.

By the 1st, the Company granted, sold, and conveyed to the Government all its right, title, and interest in the uncompleted railway, with all lands acquired or bonded for right of way, stations, and other purposes, all bridges, piers, abutments, forms, and other things expressly mentioned, stating their intention to be "to divest the Com-"pany of all the property of the said corporation, "and of all and every part and parcel of the said "incomplete railway, and of everything apper-"taining thereto or necessary or useful or ac-"quired for the construction thereof, now in the "possession of the Company, or to which it is "entitled as fully and completely to all intents "and purposes as the same are now held by the "Company, and to vest the same in the Govern-"ment."

By the 2nd, the Company transferred to the Government all its right, title, and interest in and to the balance of the subscription of stock in the said Company by the Corporation of the city of Montreal, and the several subscriptions of stock in the said Company of various other corporations, together with all the rights, claims, and demands of the said Company upon the said City of Montreal for the said balance of subscriptions, and upon the said other corporations for their said subscriptions of stock and bonus.

By the 4th, the Government, in consideration of the above sales and transfers, agreed to pay to certain trustees for the Company, upon the confirmation of the deed, the sum of $57,149. 95 currency, being the amount of the then paid up

capital of the Company; and also to pay immediately all such disbursements and liabilities as had been adjusted between the Government and the Company; and it was further agreed that if any further legitimate liabilities should be established to the satisfaction of the Government to be justly and legally due by the Company, the same should also be assumed and paid by the Government.

By the 7th, it was provided that, until it should please the Government to receive possession of the property aud premises thereby transferred, the Company should hold and administer the same for and on behalf of the Government, and in such manner as should be directed by it, and should, in all respects, carry out the instructions of the Government in respect of the said railway; and in respect of every matter and thing connected therewith, until the transfer and delivery thereof to the Government and its complete assumption and possession thereof had been perfected; and that, so soon as such transfer and delivery should have been so perfected the Company should dissolve itself, and should cease to act in any way, the Government thereupon indicating some person to accept transfers of the shares of the Company held by the individual shareholders therein.

By the 8th, the Company undertook to assist the Government, in any manner that might be required, in procuring the passage of any act by the Dominion or the Provincial Parliament that the Government might deem expedient to have passed in the interest of the enterprise, and to furnish aid and assistance in other matters.

And, by the 9th, it was provided that the deed should have no force or effect after the termination of the next Session of the Legislature of the Province of Quebec, unless confirmed by the said Legislature at the next Session thereof, nor

until such confirmation; but that it should be submitted for such confirmation to the next Session of the said Legislature, and, immediately upon such confirmation, should have full force and effect according to its terms.

The confirmation required by this last clause of the deed was given by the Act 39 Vict. c. 2, which was passed by the Legislature of Quebec on the 24th December 1875. That Statute not only, by its 8th Section, confirmed in the fullest manner the transfer and assignment of the 2nd November 1875, it did a great deal more : it combined the enterprise of the Montreal, Ottawa, and Western Railway Company with that of another Company called the North Shore Railway Company, which had made a similar transfer in favour of the Government of Quebec; it gave to the railway to be completed the new name of "The Quebec, Montreal, Ottawa, and Occidental "Railway"; it declared that railway to be a public work belonging to the province of Quebec held to and for the public uses of the province, and provided for the mode of its construction; it vested the construction and management of that railway in certain Commissioners with ample and defined powers; by Section 11 it made the provisions of the Quebec Railway Act 1869, so far as they were applicable to the undertaking and not inconsistent with the provisions of that Act, applicable to the said railway, and empowered the Commissioners, in cases where proceedings had been commenced by the Montreal, Ottawa, and Western Railway for the expropriation and acquisition of lands for the purposes of that railway and had not been completed, to continue such proceedings under the provisions of the Quebec Railway Act, but with the consent of the proprietor of such lands, or to discontinue such proceedings, and commence proceedings *de novo* under the said Quebec Railway Act; and by

Section 24 it reunited lands which had been granted to the Montreal, Ottawa, and Western Railway Company, to the public lands of the Province. Sections 43, 44, 45, and 46 have even a more direct bearing upon the questions raised by the two appeals now under consideration. Section 43 in order "to avoid all doubts," enacts that the Quebec, Montreal, and Occidental Railway is thereby invested with all the rights, powers, immunities, franchises, privileges, or assets granted by the Legislature of the Province of Quebec to the Montreal Northern Colonization Railway Company, and, so far as that Legislature could do, with all the rights, powers, immunities, franchises, privileges, and assets granted by the Parliament of the Dominion of Canada to the Montreal, Ottawa, and Western Railway Company. Section 44 takes away the power of the last-mentioned Company to appoint Directors, and abolishes the Directorate contemplated by the former Statutes. Section 45 transfers to the Commissioners the rights of the individual shareholders in the Montreal, Ottawa, and Western Railway Company, providing that their paid-up stock shall be refunded to them; and, Section 46 authorizes the Commissioners, with the consent of the Lieutenant Governor in Council, to apply to the Parliament of Canada for any legislation which may be deemed necessary for the purposes of the Act.

The combined effect, therefore, of the deed and of this Statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing Company, to the Quebec Government, and, through it, to a Company with a new title and a different organization; to dissolve the old federal Company, and to substitute for it one which was to be governed by, and subject to, provincial legislation.

It is contended on the part of the Appellants that this transaction was invalid, and altogether inoperative to affect the obligations of the Company. They insist that, by the general law and by reason of the special legislation which governed it, the Company was incompetent thus to dissolve itself, to abandon its undertaking, and to transfer that, and its own property, liabilities, powers, and rights to another body, without the sanction of an Act of a competent Legislature; and, further, that the Legislature of Quebec was incompetent to give such sanction. This contention appears to their Lordships to be well founded.

That such a transfer, except under the authority of an Act of Parliament, would in this country be held to be *ultra vires* of a Railway Company, appears from the judgment of Lord Cairns *in re* Gardner *v.* London, Dover, and Chatham Railway Company, 2 Chancery Appeals, 201 and 212. That it is equally repugnant to the law of the Province of Quebec, so far as that is to be gathered from the Civil Code, is shown by the 369th Article of that Code. But the strongest ground in favour of the Appellants' contention is to be found in the special legislation touching this Railway Company. The history of the Company and of its conversion from a provincial into a federal Railway Company has been stated in the judgment already delivered. By Section 1 of the Canadian Statute 36 Vict, c. 82, which effected that conversion, the railway was declared to be a work for the general advantage of Canada. By the 5th Section of the same Statute, it was enacted that the continuations of the line thereby authorized should be deemed to be railways or a railway to be constructed under the authority of a special Act passed by the Parliament of Canada, and that the Company should be deemed to be a Company incorporated for the construction and working of such railways

and railway, according to the true intent and meaning of "The Railway Act, 1868" (the Dominion Statute). By the 6th Section, Parts 1st and 2nd of "The Railway Act, 1868" (which comprise all the general and material provisions of that Statute), were made applicable to the whole line of the railway, whether within or beyond the enterprise originally contemplated; and it was enacted that no part of "The Quebec Railway Act, 1869," should apply to the said railway, or any part thereof, or to the said Company. And by the 7th Section it was provided that the two Acts of the Quebec Legislature (32 Vict. c. 35, and 34 Vict c. 28), by which the Company had been incorporated and previously governed, should be read and construed and have effect as if the changes of expression therein mentioned (the effect of which would be to make them speak as Acts of the Canadian Parliament) had been made in them; that so read and construed and taking effect, they should be deemed to be special Acts according to the true intent and meaning of "The Railway Act, 1868," and that no part of "The Quebec Railway Act, 1869,' should be incorporated with the said special Acts, or either of them, or form part thereof, or be construed therewith as forming one Act.

These provisions, taken in connection with, and read by the light of those of the Imperial Statute, "the British North-American Act, 1867," which are contained in Section 91, and Sub-section 10 *c* of Section 92, establish, to their Lordship's satisfaction, that the transaction between the Company and the Government of Quebec could not be validated to all intents and purposes by an act of the provincial Legislature, but that an Act of the Parliament of Canada was essential in order to give it full force and effect. This proposition was, finally, hardly disputed by the learned

Counsel for the Respondent, but they relied upon the 8th clause of the deed, and the 46th Section of the Quebec Act, as showing that recourse to the Parliament of Canada for its sanction was within the contemplation of the parties, and contended that, before that sanction was obtained, the transaction was valid for some purposes, and gave certain inchoate rights which were capable of being asserted. In support of their argument they cited The Great Western Railway Company *v.* The Birmingham and Oxford Junction Railway, 2 Phill. 597, and what was said by Lord Cottenham in that case. It is to be observed, however, that Lord Cottenham, when ruling that the contract, which could not be fully carried out without Parliamentary sanction, was not, in the absence of such sanction, to be treated as a nullity, and that some of its provisions might nevertheless be binding, was dealing with the rights of the parties to the contract *inter se.* Here the public, and the creditors of the Company, in which category the Appellants fell since the questions raised by these two appeals must be considered as if the award were valid, were no parties to the transaction, and could not be affected by it until it was fully validated by an Act of the Parliament of Canada, to obtain which no attempt seems ever to have been made. In their Lordship's opinion, therefore, the transaction, considered as a whole, was of no force or validity as against the rights of the Appellants when the decisions of the Canadian Courts upon the intervention and the opposition were passed.

This being their Lordships' conclusion, they proceed to consider how it affects the two appeals, and first that which relates to the Attorney General's intervention. Now, if it be admitted, for the sake of argument, though their Lordships must not be taken to affirm the proposition, that

the Attorney General had such an inchoate right under the transaction as would have justified his intervention had there been reason to suppose that the expiring Company would fail to make a substantial defence to the action No. 1,213, it is to be observed that that was not the actual state of things. The action itself was not commenced until December 1876, and the defences of the Company were filed on the 30th of that month. The transaction between the Company and the Quebec Government was completed, so far as it was ever completed, in December 1875. It is, therefore, obvious that, in the first instance, the Quebec Government intended to defend the action, in the name of the Company, under the provisions of the 7th Clause of the deed. All objections which the Company could take to the award, and in particular the one which has proved fatal to it, were taken in their defences. The intervention of the Attorney General was not until 1878, and the reasons filed by him on the 17th of September in that year are sufficient to show that the object of the intervention was to raise objections to the validity of the award, founded upon the attempted transfer of 1875, which could not have been taken in the name of the Company. Those reasons, the contestation of them, and the other pleadings show that the new issues raised between the parties were the validity of the transfer as against the Appellants, the right of the Commissioners under the Quebec Act to continue or discontinue the proceedings in the expropriation, the abandonment of the railway, and its transformation into a new railway, to be constructed under different conditions. This intervention was only necessary for the trial of these fresh and additional issues; and was, as the Court of Queen's Bench itself has found, wholly unnecessary for the trial of the

original issues. Upon the trial of the action in the Supreme Court, Mr. Justice Mackay expressly found "que les faits allegués dans la dite "intervention, savoir le transport des droits et "actions de la dite Defenderesse au Gouverne-"ment de la dite Province de Québec, n'a pas "été prouvé avoir lieu légalement," a finding in accordance with the conclusion to which their Lordships have come touching the transaction of 1875, and one which would justify the dismissal of the intervention, even if the learned Judge had taken a view different from that which he did take of the validity of the award. The Attorney General had failed to show any grounds for inflicting upon the Appellants the costs of unnecessary and expensive proceedings. In these circumstances, their Lordships are of opinion that the Court of Queen's Bench ought to have dismissed the appeal of the Attorney General, and to have affirmed the judgment of the Superior Court, in so far as it related to the intervention, with costs.

Their Lordships have now to consider Appeal No. 144, which arises out of the "opposition à "fin de distraire." That opposition to the execution could not succeed as to such of the lands seized as had belonged to the Company, unless it were established that the property in those lands had been changed by the attempted transfer of 1875. Their Lordships are of opinion that there was no such change of property. The transaction, viewed as a whole, and as one single contract, could not, for the reasons above stated, operate as a valid transfer of the lands of the Company to the Government of Quebec. Their Lordships feel bound to dissent from two propositions, on one of which the judgment of Mr. Justice Johnson, and on the other of which the judgment of Chief Justice Dorion, in part proceeds. Mr. Justice

Johnson ruled that the contestants ought, if they questioned the validity of the transaction of 1875, to have concluded that it should be set aside or declared null, and that, by reason of their failure to do so, they must be taken to be bound by it. Chief Justice Dorion expressed an opinion that it was only at the instance of the Government of Canada (the Dominion), or of an individual who could show that he had a special interest distinct from that of the public, that the transfer could be set aside. These reasons are somewhat contradictory, and their Lordships cannot think that either affords a good ground for the judgment impeached. If the transaction, not having the sanction of the Parliament of Canada, were *ultra vires* of the Company and the Government and Legislature of Quebec, it was of no legal force or validity against the Appellants, and might be so treated by them whether it were formally set aside or not. The other ground on which the judgment proceeds, and which has been chiefly insisted upon here, is more plausible. It is that the Company had power, under the second Subsection of the 7th Section of "The Railway Act, 1868," to "alienate, sell, and dispose of its lands;" that the transaction of 1875, even if invalid as a whole, is severable, and that the Company must be taken to have sold by it their land to the Government of Quebec in the exercise of that power. Their Lordships cannot accede to this argument. It appears to them that the contract is not severable in the manner suggested. It is a contract whereby, for the same consideration, everything which it purported to pass was intended to pass. Suppose what was suggested by Chief Justice Dorion were really to happen, that the Dominion Government were to take steps to set aside the transaction, could the Government of Quebec be heard to say, "True,

" the transaction will not stand as a transfer of " the railway, or of the rights, powers, liabilities, " and duties of the Company, but it may enure " as a sale of the lands acquired in order to the " construction of the railway, or part of them, in " the exercise of the power in question." Would not the answer be, " There is no trace of such a " contract, or of an intention to make it ?"

By the evidence taken on this proceeding, it appeared that a considerable part of the lands, rolling stock, and other property seized, had never belonged to the Company, but had been purchased by the Commissioners since 1875.

In respect of that property, the Attorney General was entitled to succeed in his opposition. He should, however, have been held to have failed as to the lands, &c. which had belonged to the Company. And in their Lordships opinion, the proper order to be made was one which would have upheld the seizure as to this latter part of the property in question, whilst it granted main levée as to the rest, leaving each party to pay their own costs. Since the execution must now altogether fail by reason of the award having been set aside, it will not be necessary to draw up a formal order to the above effect.

The order which their Lordships will humbly recommend Her Majesty to make on the four consolidated appeals will be to the following effect, viz., to dismiss the appeals numbered respectively 13 and 144, and to allow those numbered respectively 117 and 141; to affirm the judgment of the Court of Queen's Bench (Record 180) in the suit No. 693, wherein the Company was Plaintiff, and the Appellants and others were Defendants; to reverse so much of the judgment of the Court of Queen's Bench (Record 286) in the action 1213, wherein the Appellants were Plaintiffs, and the Company were Defendants, and the Attorney General

intervenor, as relates to the intervention of the Attorney General, and in lieu thereof to affirm so much of the judgment of the Superior Court in the same suit as relates to such intervention, with the costs of the appeal to the Queen's Bench; but to affirm in all other respects the last-mentioned judgment of the Court of Queen's Bench; to reverse the judgment of the Court of Queen's Bench in the matter of the opposition "à fin de distraire," and to declare that in lieu thereof, an order should have been made reversing the judgment of the Superior Court in such matter, and declaring that the opposition should have been allowed as to so much only of the property seized as had been purchased by the Commissioners since 1875, and disallowed as to the rest, and that each party should bear their own costs in both Courts, but that by reason of the failure of the execution in consequence of the setting aside of the award, it had become unnecessary to draw up any such order.

Their Lordships are of opinion that, under the circumstances, no order should be made as to the costs of these consolidated appeals.

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