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*Feb. 18, 20.

*Nov. 10.

MARIA KEARNEY, (PLAINTIFF).....APPELLANT;

AND

STEPHEN D. OAKES, AND JOHN PAW, (DEFENDANTS)..... ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Action—Notice of—Contractor to build Government Railway—Government Railway Act, 44 *Vic. ch.* 25, *s.* 109—*Construction of term "employee."*

Sec. 109 of the Government Railway Act of 1881, (44 Vic. ch. 25), provides that "no action shall be brought against any officer, employee or servant of the department, [Railways and Canals], for anything done by virtue of his office, service or employment, except within three months after the act committed, and upon one month's previous notice in writing."

Held, reversing the judgment of the court below, Ritchie C. J. and Gwynne J. dissenting, that a contractor with the Minister of Railways and Canals, as representing the crown, for the construction of a branch of the Intercolonial Railway, is not an "employee" of the department within this section.

Held, per Patterson and Fournier JJ., that the compulsory powers given to the Government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds and a plan or description filed; if these provisions are not complied with, and there is no order-in-council authorizing land to be taken when an order-in-council is necessary, a contractor with the crown who enters upon the land to construct such public work thereon is liable to the owner in trespass for such entry.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment at the trial in favor of the plaintiff.

This was an action for trespass on plaintiff's land. The defendants were contractors with the Dominion

*PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

(1). 20 N.S. Rep. 30.

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Government, represented by the Minister of Railways and Canals, for the construction of a branch of the Intercolonial Railway at Dartmouth, N. S. The plaintiff's land was expropriated by the Government for the purposes of the railway, and an action was brought in the Exchequer Court and damages recovered therein by the plaintiff in respect of such expropriation, and to the present action the defendants pleaded that the plaintiff having admitted the right of the crown to expropriate the land could not now claim that the entry by defendants, which was for the purpose of executing the work for which the expropriation was made, was a wrongful entry. Another defence pleaded was that the defendants, by virtue of their contract, were employees of the Department of Railways and Canals within the meaning of sec. 109 of the Government Railways Act of 1881, and entitled to notice of action which they had never received.

The Supreme Court of Nova Scotia decided the case in favor of the defendants upon this latter ground, reversing the judgment of the Chief Justice at the trial who had awarded the plaintiff $100.00 damages. The plaintiff then brought the present appeal.

Wallace for the appellant referred to Abbott's Law Dictionary under the word "servant" and Bouvier title "employé," to show that defendants were not "employees" under the statute.

Borden for the respondent, cited on the same point *Lowther* v. *Earl of Radnor* (1); *Ellis* v. *Sheffield Gas Co.* (2); *Water Co.* v. *Ware* (3); and contended that as the crown was in possession of the land no action would lie against the defendants who were on the land merely as the servants or agents of the crown, citing *Carr* v. *United States* (4); *The Davis* (5).

(1) 8 East 113.
(2) 2 E. & B. 767.
(3) 16 Wall. 566.
(4) 98 U.S.R. 433.
(5) 10 Wall. 15.

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SIR W. J. RITCHIE C. J.—Sec. 109 of the Government Railways Act is as follows :—

No action shall be brought against any officer, employee or servant of a department for anything done by virtue of his office, service or employment, unless within three months after the act committed and upon one month's previous notice thereof in writing, and the action shall be tried in the county or judicial district where the cause of action arose.

In this case there was no notice of action ; the Government undertook to perform certain work which, as they could not do it personally, they agreed with, that is to say they employed, the defendants for a certain consideration to do it. Whether the agreement was in the nature of a contract in writing or verbal for a fixed sum or otherwise to do certain specified work, can it be said that those who agreed to do the work were not employed to do it? And if so, how can it be said they were not employees of the parties for whom they were to do the work ? Though those who actually did the work may properly be called contractors, as between the Government and themselves, how did that make them the less persons employed to do the work and, therefore, the less employees of the Government ? By what process of reasoning can it be said that the contractors in this case were not employed to do this work, and did not become employees of the crown, or that what they did was not done by virtue of their office, service or employment ? By the terms of their contract what they were employed to do was :

To provide all and every kind of labor, machinery and other plant, articles and things whatsoever necessary for the due execution and completion of all and every the works set out or referred to in the specifications annexed, &c. in the manner required by, and in strict conformity with, the said specifications and drawings relating thereto and the working and detail drawings which may from time to time be furnished, (which said specifications and drawings were thereby declared to be part of the contract) and to the complete satisfaction of the chief engineer for the time being having control over the work.

The said contract gave the chief engineer, with the sanction of the Minister, liberty at any time, before the commencement or during the construction of the works, or any portion thereof, to order any work to be done or to make any changes which he might deem expedient in the grades, width of cuttings and fillings, nature, character or position of the works or any part or parts thereof, or any other thing connected with the works, or connected with such changes, &c., and provided that the contractors should immediately comply with all written requisitions of the engineer in that behalf, but that they should not make any change in, or addition to or omission or deviation from, the works unless directed by the engineer, and should not be entitled to any payment therefor unless first directed in writing by the engineer to make such changes, etc., nor unless the price to be paid for any additional work was previously fixed by the Minister in writing, and the decision of the engineer as to whether such change or deviation increased or diminished the cost of the work and the amount to be paid or deducted therefor, as the case might be, should be final, and the obtaining of his certificate should be a condition precedent to the right of the contractors to be paid therefor. If any such change or alteration should, in the opinion of the engineer, constitute a deduction from the works his decision as to the amount to be deducted on account thereof should be final and binding. The engineer by the said contract was the sole judge of the work and material in respect to both quantity and quality, and his decision in respect to disputes with regard to work or material, or as to the meaning or intention of the contract and the plans, etc., was to be final.

The contract also provided that a competent foreman should be kept on the ground by the contractors during all the working hours to receive the orders of the

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engineer, and should the person so appointed be deemed by the engineer incompetent or conduct himself improperly he might be discharged by the engineer, and another should at once be appointed in his stead. Such foreman should be considered the lawful representative of the contractors and should have full power to carry out all requisitions and instructions of the engineer.

Sec. 12. All machinery and other plant, material and things whatsoever provided by the contractors for the works hereby contracted for, and not rejected under the provisions of the last preceding clause, shall from the time of their being so provided become, and until the final completion of the said works shall be, the property of Her Majesty for the purposes of the said works, and the same shall on no account be taken away or used or disposed of except for the purposes of the said works, without the consent in writing of the engineer.

Sec. 13. If the engineer shall at any time consider the number of workmen, horses or quantity of machinery or other plant, or the quantity of proper material respectively employed or provided by the contractor on or for the said works, to be insufficient for the advancement thereof towards completion within the limited time, or that the works are, or some part thereof is, not being carried on with true diligence, then in every such case the said engineer may by written notice to the contractors require them to employ or provide such additional workmen, etc., as the engineer may think necessary, and in case the contractors shall not thereupon within three days or such other longer period as may be fixed by any such notice in all respects comply therewith then the engineer may, either on behalf of Her Majesty, or if he see fit may as the agent of and on account of the contractor but in either case at the expense of the contractors, provide and employ such additional workmen, etc., as he may think proper, and may pay such additional workmen such wages and for such additional horses, etc., such prices as he may think proper, and all such wages and prices respectively shall thereupon at once be repaid by the contractors, or the same may be retained and deducted out of any moneys at any time payable to the contractors.

Sec. 28. Her Majesty shall have the right to suspend operations from time to time at any particular point or points or upon the whole of the works, and in the event of such right being exercised so as to cause delay to the contractors, then an extension of time equal to such delay or detention, to be fixed by the Ministers as above provided for, shall

be allowed them to complete the contract, but no such delay shall vitiate or avoid this contract or any part thereof.

Sec. 35. In the event of it becoming advisable in the interests of the public to suspend the work hereby contracted for or any portion thereof, at any time before its completion, and to put an end to this contract, the Minister for the time being shall have full power to stop the work and cancel this contract, on giving due notice to that effect to the contractors.

These provisions clearly show that the whole work was performed under the control and immediate superintendence of the Government and appear to me to bring this case directly within the case of *Newton* v. *Ellis* (1). In that case it was claimed as in this case that the contractor was entitled to notice under 11 & 12 Vic. ch. 63, sec. 139, which is as follows:—

And be it enacted, that no writ or process shall be sued out against or served upon any Superintending Inspector or any officer or person acting in his aid, or under the direction of the general Board of Health, nor against the local Board of Health, or any members thereof or the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the said local board, for anything done or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing shall have been delivered to him, or left at their or his office, or usual place of abode, clearly and explicitly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the last mentioned notice and unless such notice be proved the jury shall find for the defendant; and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere, and the defendant shall be at liberty to plead the general issue, and give this Act and all special matter in evidence thereunder, and any person to whom such notice of action is given as aforesaid may tender amends to the plaintiff, his attorney or agent, at any time within one month after service of such notice.

In fact the present case appears to me to be stronger,

(1) 5 E. & B. 119.

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for here the word "employee" is specifically used which is not the case in the statute referred to.

In *Newton* v. *Ellis* (1), Lord Campbell C. J. says:—

I am of the opinion that the defendant was a "person" acting under the direction of the local board in doing what the declaration complains of. The declaration complains of his wrongfully, negligently and improperly making or digging a hole or cutting, and continuing it without placing a sufficient light, whereby the plaintiff was injured and his carriage broken. The contract shews that the defendant was acting under the direction of the board; he contracted with them to make the well; and in this particular contract there is a stipulation which removes all doubt. We are not bound to lay down any general rule; the contract here requires all to be done to the satisfaction of the surveyor and by his direction; and Mr. Bittleston very properly admits that the surveyor is for this purpose indentified with the board. That is not all; the surveyor has power to interfere; he may dismiss any workman if he is dissatisfied with the way in which the workman performs the works. The defendant was emphatically a person acting under the direction of the board.

Coleridge J.:

There are two things which have been perhaps a little confounded. The question where the work has been done by an independent contractor or by a servant relates only to the liability of the principal. But, so far as regards the effect of a clause such as the one now in question, what the contractor does is done under the direction of the party with whom he contracts for that purpose.

In Ellis v. *Sheffield Gas Co.*, (2). Lord Campbell C. J. says:—

I am clearly of opinion that if the contractor does the thing he is employed to do, the employer is responsible for that thing as if he had done it himself.

He also says:

It would be monstrous if a person causing another to do a thing were exempted from liability for that act merely because there was a contract between him and the person immediately causing the act to be done.

In *Hole* v. *Sitting-Bourne and Sheerness Railway Co.*(3).

(1) 5 E. & B. 122. (2) 2 E. & B. 769.
(3) 6 H. & N. 497.

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Pollock C. B. says :

I am of opinion that the rule must be discharged. The short ground on which my judgment proceeds is, that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which maxim *qui facit per alium facit per se* applies. Where a person is authorized by act of parliament or bound by contract to do particular work he cannot avoid responsibility by contracting with another person to do the work. In *Ellis* v. *The Sheffield Gas Consumers Co.* (1) Lord Campbell said it is " a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that if the contractor does the thing which he is employed to do the employer is responsible for that thing as if he did it himself." Here the contractor was employed to make a bridge, and he did make a bridge, which obstructed the navigation. The case then falls within the principle laid down in *Ellis* v. *The Sheffield Gas Consumers Co.* (1).

Wilde B.:

But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it. The present defendants were authorized to take land for the purpose of their railway, and to build a bridge over the Swale. Instead of erecting the bridge themselves they employed another person to do it. What was done was done under their authority. In the course of executing their order the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a landowner orders a person to erect a building upon his land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form.

How then can there be an employer and not an employee ? I am very clearly of opinion that the contractor in the present case is an employee within the meaning of sec. 109 of the Government Railways Act of 1881, and therefore entitled to the notice provided for by that section, and not having received such notice

(1) 2 E. & B. 767.

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the plaintiff was not entitled to recover. I therefore think that this appeal should be dismissed with costs.

FOURNIER J.—I am in favor of allowing the appeal for the reasons given by Mr. Justice Patterson in his judgment in this case.

TASCHEREAU J.—I am also of opinion that the appeal should be allowed.

GWYNNE J.—This case would appear to be by way of supplementary claim to that in *Kearney* v. *The Queen*, in which the present appellant obtained in this court the sum of $5,131.60 by way of compensation, in lieu of $2,012.00 with interest on $1,512.00 from the 23rd August, 1884, awarded to her by the Exchequer Court for the same land, for entry upon which this action was brought, taken by the Dominion Government for the Dartmouth Branch of the Intercolonial Railway, and which has been constructed upon the land so taken.

A statement of the facts will serve, I think, to show the utter absence of all merit in the plaintiff's claim, which, if she shall succeed, will afford a marked instance of the triumph of the merest technicality against the justice of the case.

By an act passed by the legislature of the Province of Nova Scotia, upon the 19th day of April, 1883, 46 Vic. ch. 33, the municipality of the Town of Dartmouth was empowered to enter into an agreement with the Government of Canada represented by the Minister of Railways of Canada, or with the Government of Nova Scotia represented by the Commissioner of Works and Mines for the province of Nova Scotia for the time being, for the payment to such Government of a sum not exceeding $4,000.00, for a period not exceeding twenty years, or in the alternative a sum not

exceeding two thousand dollars per annum for a period not exceeding forty years, in the event of the Intercolonial Railway or a line of railway connected therewith being extended into the Town of Dartmouth to a point to be determined in such manner as should be approved by the town council. With the view apparently of giving effect to this act of the legislature of Nova Scotia, the Parliament of Canada by the act 46 Vic. ch. 2, passed on the 25th May, 1883, granted a sum of

> $110,000 for a branch of the Intercolonial Railway to Dartmouth, provided the Municipality of Dartmouth undertake the payment to the Government of the amount of $4,000 per annum for twenty years, or so much of that amount as may be required in addition to the net revenue to pay four per centum per annum on the sum expended.

It appears that on or about the 12th of June, 1883, an agreement in accordance with the provisions of the above statute, 46 Vic. ch. 2, in relation to the grant of the $110,000 was entered into between the Government of Canada and the Corporation of Dartmouth. Thereupon the Minister of Railways, thinking himself to be justified in proceeding to have a survey made for the purpose of determining the route of the proposed branch railway, and of acquiring the right of way, proceeded to act under the provisions of the Dominion acts, 31 Vic. ch. 12, 35 Vic. ch. 24, 37 Vic. ch. 15, and 44 Vic. ch. 25, certain sections of which acts appeared to him to afford ample authority for every thing done or authorized to be done by him in the circumstances as they then existed.

By the 10th sec. of 31 Vic. ch. 12, among the works there enumerated as placed under the control and management of the Minister of Public Works, are :

> The railways and rolling stock thereon, and also the works acquired or to be acquired, constructed or to be constructed, repaired or improved at the expense of Canada.

By the 22nd section the Minister is empowered to authorise :

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The engineer, agents, servants, and workmen employed by or under him to enter into and upon any ground to whomsoever belonging and to survey and take levels of the same, and to make such borings and sink such trial pits as he deems to be necessary for any purpose relative to the works under his management.

Then by the 24th section it is enacted that :

The Minister may at all times acquire and take possession for and in the name of Her Majesty of any land or real estate, etc., the appropriation of which is in his judgment necessary for the use, construction and maintenance of any public work, etc., and he may for such purpose contract, and agree with all persons possessed of or interested in such land, real property, etc., and all such contracts and agreements shall be valid to all intents and purposes whatever.

By the 26th section it is enacted that:

The compensation agreed on between the parties or awarded in the manner hereinafter set forth, shall be paid for such land, real property, etc., to the owners within six months after the amount of such compensation has been agreed on or awarded.

By the 27th section it is enacted that:

When any such owner refuses or fails to agree for conveying his estate or interest in any land, real property, etc., the Minister may tender the reasonable value in his estimation of the same with notice that the question will be submitted to the arbitrators hereinafter mentioned, and in every case the Minister may, three days after such agreement or tender and notice, authorise possession to be taken of such land, real property, etc., so agreed or tendered for.

By the 34th section :

If any person or body corporate has any claim for property taken or for alleged direct or consequential damage to property arising from the construction or connected with the execution of any public work undertaken, commenced or performed at the expense of the Dominion, etc., such person or body corporate may give notice in writing of such claim to the said Minister, etc., who may, within thirty days after such notice, tender what he considers a just satisfaction for the same with notice that the said claim will be submitted to the decision of the arbitrators acting under this Act, unless the sum so tendered is accepted, etc.

2. But before any claim under this or any other section of this Act shall be arbitrated upon the claimant shall give security to the satisfaction of the arbitrators or any one of them for the payment of the costs and expenses incurred by the arbitration, in the event of the

award being against such claimant or of its not exceeding the sum tendered as aforesaid.

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By the 35th clause the Minister may refer any of the clauses aforesaid either to one or any greater number of arbitrators as he may see fit, subject, however, in the case of a reference to one arbitrator or to a less number than the full board to an appeal to the full board which is provided for by section 44.

By the statute 35 Vic. ch. 24, passed on the 14th June, 1872, the above 10th section of 31 Vic. ch. 12 is amended and extended, for it is enacted thereby that every work of the nature of any of those mentioned in the 10th section of 31 Vic. ch. 12:

Acquired or to be acquired, constructed or to be constructed, extended, enlarged, repaired or improved at the expense of the Dominion of Canada, or for the acquisition, construction, requiring, extending, enlarging or improving of which any public money has been or shall be hereafter voted and appropriated by Parliament, and every work required for any such purpose, is and shall be a public work, under the control and management of the Minister of Public Works, and all the provisions of the said Act, and of any Act amending it, do and shall apply to every such work as aforesaid, and all the powers, privileges and duties thereby vested or assigned to the Minister of Public Works may be exercised by the said Minister in relation to any and every such work, subject always to the exceptions made in the said tenth section of the said Act, etc. Provided that this Act shall not apply to any work for which money has been appropriated as a subsidy only.

By 37 Vic. ch. 15, passed on the 26th May, 1874, it was enacted that from and after the 1st day of June, 1874:

The Intercolonial Railway shall be a public work vested in Her Mujesty, and under the control and management of the Minister of Public Works, etc.

And further that the powers of the commissioners appointed under the act 31 Vic. ch. 13, respecting the construction of the Intercolonial Railway thereby transferred to the Minister of Public Works, should—

as respects the said Intercolonial Railway and works be in addition

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to any powers the said Minister may as such have with respect to the same as a public work, under 31 Vic. ch. 12, and the Minister may in any case relating to the said railway and works exercise any powers given him by either of the said Acts, and applicable to such case.

Gwynne J.

Then by 42 Vic. ch. 7, 1879, the Public Works Department was divided into two departments, namely, the Department of Railways and Canals, presided over and managed by an officer designated "Minister of Railways and Canals," and the Department of Public Works, presided over and managed by an officer designated "Minister of Public Works," and it was thereby enacted that the Minister of Railways and Canals should have the management, charge and direction of all railways, and works and property appertaining or incident thereto, which were, or immediately before the coming of the act into force might be, under the management and direction of the Department of Public Works, and to the same extent and under the same provisions, subject to those of the act, and that the Minister of Railways and the officer acting under him should, as respects the works under his charge and direction, have all the powers and duties which at the time of the act coming into force should be vested in the Department of Public Works as formerly constituted, and that the Minister of Railways and the officers acting under him as to such works as should be under his charge should be deemed to be successors in office of the former Minister of Public Works and the officers acting under him or his department. This act, in pursuance of a provision in that behalf in the act, came into force by proclamation upon the 30th May, 1879.

Now, upon the organization of the Department of Railways and Canals under this act, it cannot, I think, be doubted that the Intercolonial Railway and all works thereafter to be constructed by public money of

the Dominion must be regarded as being public works under the control, direction and management of the Minister of Railways, and that, unless there be some express provision in some subsequent act of Parliament, plainly and in unequivocal terms enacting to the contrary, upon the perfection of the arrangement between the Government of Canada and the Corporation of Dartmouth, as provided in 46 Vic. ch. 2, the Minister of Railways became invested with all the powers contained in 31 Vic. ch. 12, and which were necessary for the purpose of determining the site by survey and of acquiring the right of way for the construction of the Dartmouth branch of the Intercolonial Railway as a public work of the Dominion of Canada without any powers or authorities whatever additional to those contained in 51 Vic. ch. 12.

Upon the 21st of March, 1881, The Government Railway Act, 44 Vic. ch. 25, was passed. That act increases rather than diminishes the powers vested in the Minister by 31 Vic. ch. 12, 35 Vic. ch. 24 and 37 Vic. ch. 15.

The 1st, 2nd, 3rd and 5th sub-sections of sec. 5 of 44 Vic. ch. 25 correspond with sec. 22 of 31 Vic. ch. 12. By this 5th section and sub-sections it is enacted that:

The Minister shall have full power and authority by himself, his engineers, superintendent, agents, workmen and servants—

1. To explore and survey the country through which it is proposed to construct any Government railway ;

2. And for that purpose to enter into and upon any public lands or the lands of any corporation or person whatsoever ;

3. To make surveys, examinations or other arrangements on such lands necessary for fixing the site of the railway, and to set out and ascertain such parts of the land as shall be necessary and proper for the railway ;

5. To enter upon and take possession of any lands, real estate, streams, waters and water-courses, the appropriation of which is in his judgment necessary for the use, construction, maintenance or repair of the railway.

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Then the 15th sub-section of this section 5 made provision for the Minister contracting with the owners for the land required, corresponding with the provisions of sec. 27 of 31 Vic. ch. 121, and the 17th sub-section made this aditional provision that the Minister should have full power—

At any time to change the location of the line of railway in any particular part for the purpose of lessening a curve, reducing a gradient or otherwise benefiting such line of railway or for any other purpose of public advantage; and all and every the provisions of this act shall refer as fully to the part of such railway, so at any time changed or proposed to be changed, as to the original line.

Then the 10th section of 44 Vic. ch. 25 enacted that:

Where no proper deed or conveyance to the crown is made and executed by the person having the power to make such deed or conveyance, or where a person interested in such lands is incapable of making such deed or conveyance, or where for any other reason the Minister shall deem it advisable so to do, a plan and description of such lands, signed by the Minister, his deputy or secretary, or by the superintendent, or by an engineer of the department, or by a land surveyor duly licensed and sworn in and for the province in which the lands are situate, shall be deposited of record in the office of registry of deeds for the county or registration division in which the lands are situate, and such lands by such deposit shall thereupon become and remain vested in the crown ;

2. In case of any omission, mis-statement or erroneous description in such plan or description, a corrected plan and description may be deposited with like effect ;

3. Such plan and description may be deposited at any time either before entry upon the lands or within twelve months thereafter.

Section 11 made binding all contracts at the price agreed upon for lands which might be purchased for the railway

before the setting out and ascertaining of the lands required if they should be set out and ascertained within a year from the date of the contract even although land may, in the meantime, have become the property of a third party.

Then sec. 15 of 44 Vic. ch. 25 made provision for tender of compensation, and arbitration if tender should

be refused, corresponding with sec. 27 of 31 Vic. ch. 12, and sections 27, 28, 30 and 31 of 44 Vic., all relating to arbitration, correspond severally and respectively with sections 34, 35, 37 and 38 of 31 Vic. ch. 12.

Acting under the powers vested in the Minister by the several sections of the acts above referred to the Minister, after the agreement of the 12th June, 1883, between the municipality of Dartmouth and the Dominion Government, as contemplated by the above extract from the Dominion Statute 46 Vic. ch. 2, had been entered into, proceeded to have a survey made for determining the route of the proposed railway, and had it staked out upon the ground in the usual manner for designating the line of the railway by stakes planted in the ground showing the centre line of the railway. The plaintiff was then approached by persons acting under the authority of the Minister with the view of making a contract with her for the purchase of the portion of her land required for the railway. She appears to have, at first, expressed herself as willing to take $200, and afterwards to have demanded $1,000, and finally to have refused to enter into any arrangement without the approbation of her solicitor who appears to have advised her to agree to nothing but to insist upon such compensation as should be awarded to her under the statutes in that behalf. Upon the 3rd of April, 1884, the Minister had a tender made to her and a notice served upon her in accordance with the provisions of section 27 of 31 Vic. ch. 12, and of section 15 of 44 Vic. ch. 25. In this notice the land mentioned as taken was described as embracing a width of twenty feet throughout the plaintiff's lot on each side of the centre line of the railway " as shown on the plan filed in the office of the Chief Engineer at Moncton." At this time the engineer was, however, making a slight alteration in the width of the land proposed to be taken; no

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alteration was made in the centre line as staked upon the ground, but only in the width of the land taken on either side of such centre line. This location of the railway appears to have been finally completed before the 9th of April, 1884, by a plan and description of the land as taken which were filed in the office of the registrar of deeds for the county of Halifax, in pursuance of the provisions of sec. 10 of 44 Vic. ch. 25, on the 13th of August, 1884, wherein the land as taken upon the 9th of April, 1884, is described as follows :—

Now, it is hereby declared and made known that the said lands are described as follows, that is to say : Beginning at a point where the centre line of the Dartmouth Branch Railway intersects the northern boundary line of the lot belonging to the said Maria Kearney, thence southerly following the several courses of the said centre line a distance of one hundred and forty-eight feet, embracing a width of twenty feet on the eastern and fifteen feet on the western side of the said centre line, thence southerly a further distance of two hundred and fifty feet along the said centre line embracing a width of twenty feet on each side of the same, thence southerly a further distance of five hundred feet along the said centre line, embracing a width of thirty feet on the eastern and twenty-five feet on the western side of the same ; thence southerly a further distance along the said centre line of two hundred and forty-one feet more or less, or to the southern boundary line of the said lot, embracing a width of twenty-five feet on each side of the said centre line, the whole containing an acre and twenty-six hundredths of an acre, more or less, being land and land covered with water as shown on annexed plan colored red.

Whether any notice was served upon the plaintiff showing this trifling variation from the land as described in the notice served upon her on the 3rd of April does not appear. Most probably the slight variation was deemed to be quite immaterial as it seems to have been, for the plaintiff in any arbitration must have recovered compensation for the land actually taken however erroneously it had been described in the notice served upon her on the 3rd of April; and if she had found any difficulty upon that point she herself could have taken the initiative under the 34th section of 31

Vic. ch. 12, or the 27th section of 44 Vic. ch. 25, to have compensation awarded to her for the land actually taken, to shew which the Department of Railways must have produced their locating plan. Upon the 9th of April the Department of Railways telegraphed to Mr. Compton, an official arbitrator residing at Halifax, directing him to take the evidence in the plaintiffs case for submission to the full board ; this telegram was supplemented by a written authority to Mr. Compton from the department, signed by the secretary, and dated the 17th of April, 1884, as follows :

Sir,—With reference to the claim of Mrs. Widow Kearney, in the matter of the expropriation of certain land for the purposes of the Dartmouth Branch Railway, you are hereby instructed to take the evidence in the case, and submit the same to the full board of arbitrators for award upon the claim under the powers conferred by the act 31 Vic. ch. 12. I write this in confirmation of telegram sent you on the 9th instant.

In the meantime Mr. Compton, acting upon the authority of the telegram of the 9th of April, had given notice to the plaintiff's solicitor, and also to a gentlemen acting as counsel for the Dominion Government, that he would hold his court at the 17th of April to take the evidence. On that day the plaintiff and her solicitor and the counsel acting for the Dominion Government attended, and the court was opened by Mr. Compton. A surety was then offered by and on behalf of the plaintiff to sign with her the necessary bond as required by the 34th section of 31 Vic. ch. 12, and the 27th section of 44 Vic. ch. 25 ; the surety tendered not having been approved the case was adjourned to the following day, when plaintiff's solicitor attended and produced and tendered a bond duly executed in his presence by the plaintiff and a surety, and bearing date the 17th day of April, 1884. This bond was approved and accepted and was subject to the condition following :

Whereas Maria Kearney of Dartmouth, N. S., hath preferred a

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certain claim against the Civil Government of Canada for a certain piece or parcel of land lying and being in the town of Dartmouth, in the county of Halifax, and Province of Nova Scotia, taken by the Government of Canada for the purposes of the Dartmouth Branch of the Intercolonial Railway. Whereas the claimant cannot agree with the Honorable Minister of Public Works of Canada, (acting in the capacity of representative of Our Sovereign Lady Victoria), with regard to the said claim, the same has been referred to the full board of official arbitrators of Canada, appointed under and by virtue of the act of the legislature of Canada, 31 Vic. ch. 12.

And whereas by the said act it is expressly required that before any claim shall be arbitrated upon the claimant shall give security to Her Majesty to the satisfaction of the arbitrators, or any one of them, for the payment of the costs and expenses incurred by Her Majesty in the arbitration in the event of the costs on such arbitration, or any part thereof, being awarded against the said claimant, or of the award not exceeding the sum tendered by the said Minister to the said claimant.

The plaintiff's solicitor having then stated that he was not ready with his witnesses, and having applied to the official arbitrator for an adjournment, the case sat adjourned "until such time as the arbitrator can conveniently resume it." In point of fact it never was resumed by the official arbitrators, nor was any reason suggested why it was not. The plaintiff and her solicitor perhaps thought, as is generally found to be the case, that a much larger sum is usually awarded after the work is completed than would be awarded, or than may be asked, if the arbitration should take place before the work is commenced. However, nothing further was done in the arbitration until after the 31st October, 1887, when, in pursuance of the provisions of the Dominion Statute, 50 & 51 Vic. ch. 16, the case was transferred to the Exchequer Court for adjudication by the judge of that court to whom was submitted all the evidence taken in the present action, and the result has been that, upon appeal to this court from the judgment of the learned judge of the Exchequer, the plaintiff has succeeded in recovering for the land the sum of $4,000 together with interest thereon from

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the 23rd of August, 1884, as already stated, for land for which she had expressed herself, in April, 1884, as willing to take $1000.

In the meantime the Department of Railways by the Minister of Railways, upon the 22nd of July, 1884, entered into a contract with the defendants for the construction of the railway, and after having, upon the 23rd day of August, 1884, caused a plan and a description of the land taken from the plaintiff to be duly registered in the registry office of the county of Halifax, authorized and directed the defendants afterwards, and on or about the 18th day of September, to enter upon the land of the plaintiff so taken and to do the several acts which they did, and for which this action was commenced upon the 30th of September, 1884.

It is unnecessary to set out the pleadings which display no small amount of prolixity and irrelevancy, for the whole substance of the case is that the action for an alleged wrongful entry upon the plaintiff's land, and for doing such acts as were done by the defendants between the 15th and 30th September in constructing the railway,—to which action the defendants plead, first in justification, that the Minister of Railways had authority to enter upon and take the plaintiff's land for the construction of the Dartmouth branch of the Intercolonial Railway, and to do and to authorize to be done the acts complained of, and that the defendants, by the direction and command of, and as the agents and servants of, the Minister entered upon the land and there did the thing complained of; and secondly, that the defendants did what they did as the servants and employees of the Department of Railways, and that no notice in writing of this action was ever given to them as required by the 109th sec. of 44 Vic. ch. 25.

The case proceeded at the trial upon the contention, in which the learned Chief Justice of Nova Scotia who

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tried the case concurred, that as it appeared that an order in council authorising the construction of the Dartmouth branch was not made until the 12th December, 1884, none of the acts authorized by the Minister prior to that date were legal, and he rendered a verdict for the plaintiff for $100. Upon appeal from that judgment the Supreme Court of Nova Scotia reversed it and ordered judgment to be entered for the defendants upon the ground that they were entitled to have had, but had not, notice of action. From this judgment the present appeal is taken.

The Minister of Railways certainly appears to have received the impression or formed the opinion that in November, 1884, an order in council was necessary, but in this opinion or impression I think he was mistaken. Both he and his advisers seem to me to have lost sight altogether of 35 Vic. ch. 24 and 46 Vic. ch. 2, and also to have misconceived the object and the effect of the 6th sec. of 44 Vic. ch. 25.

It cannot, I apprehend, admit of a doubt that the 6th sec. of 44 Vic. ch. 25 did not effect a repeal of 35 Vic. ch. 24; neither can it be doubted that if this 6th section had never been enacted the Minister would have had complete authority to construct the Dartmouth branch as a public work of the Dominion of Canada under the powers vested in him by 35 Vic. ch. 24, in connection with 46 Vic. ch. 2, and that for such purposes all the provisions of 44 Vic. ch. 25, as well as 31 Vic. ch. 12, would apply in maintenance and support of the acts of the Minister Now, the object and effect of the 6th sec. of 44 Vic ch. 25, seems to me to be this: It authorises the Minister of Railways, without any order in council or any other authority whatever, to construct a branch line of the Intercolonial Railway, provided such branch should not exceed one mile, and it makes applicable to the construction of such a branch all the provisions

applicable to the acquiring the necessary land and to the complete construction of the work. Now if the Dartmouth branch railway had not exceeded one mile in length the Minister could have constructed it upon his own responsibility without the assistance of any previous appropriation by Parliament for the purpose such as was granted by 46 Vic. ch. 2 ; and if a sum of money had been appropriated for such a branch by a Parliamentary grant the Minister would have that appropriation as an additional authority under the powers vested in him by 35 Vic. ch. 24, as justifying him in all his acts for the purpose of constructing such a branch. But the section 6 further provides that the Minister may, by and with the authority of the Governor in council, and without any other authority, construct a branch railway not exceeding six miles in length, and this authority may be exercised without any previous appropriation of any sum by Parliament for such a branch. This is a power given to the Governor in council *ex mero motu*, to construct a branch in connection with a Government railway without any previous appropriation for the purpose or any other Parliamentary sanction whatever. But the vesting such a special authority in the Governor in council does not detract one iota from the authority vested in the Minister by 35 Vic. ch. 24, when an appropriation is made by an act of Parliament for the construction of a branch line between two places whether they be or be not more than six miles apart from each other. The 46 Vic. ch. 2 shows that the Dartmouth branch of the Intercolonial Railway was a line known to Parliament. It required no order in council to bring it into existence.

By 44 Vic. ch. 25, it is enacted that all the provisions of that act shall apply to all railways vested in Her Majesty, and that are under the control and management of the Minister of Railways. The word "rail-

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way" as used in the act is declared to mean every railway and property connected therewith under the management of the department.

By 37 Vic. ch. 15 the Intercolonial Railway, with all property thereunto appertaining, is expressly declared to be a public work vested in Her Majesty and under the control and management of the Minister.

By 35 Vic. ch. 24 every railway for the construction of which any public money shall be appropriated by parliament is declared to be a railway and public work under the control and management of the Minister.

Upon the passing, therefore, of 46th Vic. ch. 2 the Branch of the Intercolonial Railway to Dartmouth became a railway vested in Her Majesty and under the control and management of the Minister, to which all the sections of 44 Vic. ch. 25, relative to the acquiring title to lands for the purposes of the railway, as well as all the like sections of 31 Vic. ch. 12, are made applicable wholly apart from and independently of anything in the 6th section of 44 Vic. ch. 25. I am of opinion, therefore, that for the protection and justification of the Minister, in doing and authorising to be done every thing that was necessary for the construction of the Dartmouth Branch Railway, an order in council under the said 6th section was not necessary; and that upon registration in August, 1884, of the plan and description of the plaintiff's land, which was required for that purpose, that land became vested in Her Majesty for the use of the Dominion Government under section 10 of 44 Vic. ch. 25, and the plaintiff's rights were converted into a claim for compensation, the proceedings to obtain which it was quite competent for the plaintiff herself to have initiated under the 27th section of the act, which she might have done at any time and no doubt would have done if

she or her advisers had not formed the opinion, in which they have been justified by the result, that it would be to her advantage to delay proceedings towards arbitration until after the work should be completed. I am of opinion, therefore, that it clearly appeared that the acts of the defendants under the authority of the Minister were justified, and that for this reason the verdict should have been for the defendants. But I am also of opinion that the defendants were entitled to notice of action. If the Minister was authorised in causing the acts complained of to be done, the defendants were justified as acting by his command and as his servants. If the Minister was not justified he was himself equally responsible as the defendants for the acts of the defendants, and he would have been entitled to notice of action, and as the defendants acted under the authority of the Department of Railways and the Minister and employed by them to do what they did, as they would be justified as the servants and employees of the department if the Minister had been justified, so are they equally the servants and employees of the department and the Minister if the Minister was not justified and equally with him entitled to notice. He who does a thing by the command and authority of another, and employed by such other, is surely, as regards the act authorized, both in law and common sense, rightly described as the servant and employee of the person employing him.

I am of opinion, therefore, for the above reasons, that the appeal should be dismissed with costs.

PATTERSON J.—The plaintiff brought this action on the 30th September, 1884, charging the defendants with trespassing on her lands, and claiming $8,000 damages.

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The pleadings, which do not err on the side of needless brevity, need not be noticed in detail.

The defendants, by indenture dated the 22nd day of July, 1884, entered into a contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals of Canada, to construct a railway of five or six miles, being a branch of the Intercolonial Railway, the work to be completed to a named point on or before the 15th September, 1884, or if extended the whole contemplated distance then to be completed on or before the 1st November, 1884.

This branch railway was a work which the Minister of Railways and Canals was authorized by the 6th section of the Government Railways Act, 1881, to construct, but only by and with the authority of the Governor in Council. The order in council was essential whenever such a branch railway exceeded one mile in length.

An order in council was passed, but not until the 12th December, 1884, which was after the contract time for the completion of the whole work and after the commencement of this action.

The entry upon the lands of the plaintiff of which she complains was made in September, 1884.

The action was tried in 1886, before the Chief Justice of Nova Scotia, who gave judgment for the plaintiff with $100 damages.

The defendants moved against that judgment, and it was reversed by a majority of the court on the ground that the defendants were entitled, under section 109 of the statute of 1881, (44 Vic. ch. 25), to a notice of action which had not been given. Two of he learned judges of the court held that opinion, the learned Chief Justice dissenting.

Section 109 is thus expressed :

No action shall be brought against any officer, employee or servant

of the Department for anything done by virtue of his office, service or employment unless within three months after the act committed, and upon one month's previous notice thereof in writing, and the action shall be tried in the county or judicial district where the cause of action arose.

The question was whether these contractors were employees of the Department of Railways and Canals within the intention of the enactment.

The dispute is over the word "employee" which has of late years found a place in our popular vocabulary, and has now been adopted in Dominion legislation.

In the absence of any definition in the interpretation clause of the statute we have to find what the word means.

Several dictionaries have been quoted from in the judgments delivered in the court below. In those of them within my reach I do not find the word "employee," but I find the French term "employé," in the masculine form, inserted as a word that retains in English speech its French meaning of one who is employed.

That is doubtless the term intended by the legislature.

In fact we find the two expressions used convertibly, as *e. g.* in section 112 "any officer or servant of, or any person employed by the department," and in section 121 "any officer or servant of, or person in the employ of the department," obviously denoting the same persons described in sections 64, 74, 82, 106 and 109, as officer, servant or employee of the department.

The word as used in the statute means, in my opinion, "servant" and nothing more. It is, perhaps, inserted to save the feelings of those servants who do not like to be called servants, or by way of concession to the tendency of the day to understand the word servant as expressive only of service of a lower or quasi menial grade.

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Section 120 illustrates this. It provides for the "punishment of every person wilfully obstructing any officer or employee in the execution of his duty," obviously including under the term "employee," persons who might be called servants without fear of resentment on their part—switchmen for example—and proving that words "employee or servant" are used to denote one class and not two classes of retainers.

Thus the statute is its own interpreter. The "employee or servant of the department" is not a contractor like these defendants who agree with Her Majesty to provide materials and labor, and to execute such works as the construction of a branch railway. There is not often occasion to speak of contractors in the Railway Act, but the term does occur once or twice. In section 104 the contractor is called "contractor" in provisions relating to his contract, and section 99 provides for attesting on oath accounts sent in by "any contractor, or person in the employ of the department," distinguishing between contractor and employee.

Then we have section 121 giving to the informer a moiety of pecuniary penalties imposed by the act, "unless he be an officer or servant of, or person in the employ of, the department," where the persons in the employ, or employees, must mean those regularly employed about the railway. A better definition, and one which effectually excludes contractors, is supplied by sections 112 and 113, viz: persons employed at regular wages. Section 112 makes a misdemeanor of the wilful contravention of any rule, order or regulation of the department by "any officer or servant of, or any person employed by, the department," if injury ensues to property or person; while, if the contravention does not cause injury, then, by section 113, "the officer, servant or other person guilty thereof shall

thereby incur a penalty not exceeding the amount of thirty days' pay," etc.

It is, to my mind, manifest from the light thrown by the statute itself upon the sense in which the word "employee" is used that the view of the learned Chief Justice in the court below is correct, and that the protection of section 109 is not intended to extend to persons in the position of the present defendants.

I should have arrived at the same conclusion if section 109 had been the only place in the statute where the expression in debate was found. It would, in my judgment, be impossible on the one hand to extend the meaning of the term "employee," so as to include contractors, even if they were nominally contractors with the department in place of being contractors with the Queen, and on the other hand to narrow the force of the term so as to exclude the liability of the employer for injuries caused by the negligence of the employed. It is now familiar law that a person employing a contractor is not usually liable for injuries caused by his negligence. The cases on the subject will be found collected, and discussed in a pleasant style, in Shirley's Leading Cases, (1), under *Reedie* v. *London and N. Y. Railway Company* (2.) And see Evans on Principal and Agent (3).

I have no idea that the ordinary rule on the subject is to be reversed when Government railways are concerned, but that would, as I apprehend, be the result of the judgment now in review. If the contractor is an employee or servant then the master is liable for injuries caused by his negligence or want of skill.

I do not think we derive assistance in finding the force of the terms "employee or servant," as used in our section 109, from the decisions under section 139

(1) 3 ed. pp. 291 *et seq.* (2) 4 Ex. 244.
(3) 2 ed. pp. 590 *et seq.*

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of the English Public Health Act, 1848, or section 106 of the Metropolis Management Amendment Act, 25 & 26 Vic. ch. 102. The former act requires notice of action before process is sued out against any superintending inspector, or any officer or person acting in his aid or under the direction of the General Board of Health, or against the Local Board of Health or any member thereof, or the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the Local Board of Health. A person who agreed to sink wells under a contract with a local board which contained provisions found in most contracts of the kind, and found in the contract of the present defendant with Her Majesty, that the work should be done to the satisfaction of the surveyor of the board who had power to require the contractor to reject and remove materials, &c., and to discharge foremen or workmen with whom the surveyor might be dissatisfied, was held in *Newton* v. *Ellis* (1) to be a person acting under the direction of the board, and therefore entitled to notice of action. That decision was followed by others, both under the Public Health Act, 1848, and under the Metropolis Management Amendment Act, section 106 of which is essentially the same as section 139 of the earlier act, but includes " contractor " among the persons enumerated as entitled to notice. (See *Davis* v. *Curling* (2), *Hardwick* v. *Moss* (3), *Poulsum* v. *Thirst* (4), *Wilson* v. *Mayor of Halifax* (5), *Whatman* v. *Pearson*) (6).

These enactments differ so materially from our section 109, which extends its protection only to " any officer, employee or servant of the department," as to leave them without influence on the controversy ex-

(1) 5 E. & B. 115.
(2) 8 Q. B. 286.
(3) 7 H. & N. 136.
(4) L. R. 2 C. P. 449.
(5) L. R. 3 Ex. 114.
(6) L. R. 3 C. P. 422.

cept as they tend to show that my understanding of the effect of section 109 correctly interprets the intention of the legislature ; because, with the two English statutes before them, one of which was held by force of the words " acting under the direction of the board," to include a contractor under the ordinary form of contract, and in the other of which the contractor was expressly named, notwithstanding the presence of the words " acting under their or any of their directions," the legislature has not adopted the same or, in my judgment, any equivalent phraseology. We must, as it seems to me, interpret our statute by itself, and, for the reasons I have endeavored to explain, I am unable to hold that this defendant is, within the meaning of section 109, an officer, employee or servant of the department.

It has been contended that the acts of the defendants were legally authorised. That contention was unsuccessfully advanced at the trial before the learned Chief Justice, and was dealt with in the judgment then delivered by him. Before the court *in banc* the judgments turned altogether on the objection to the want of notice of action, and no opinion is reported to have been expressed on the other grounds of defence.

The points have been ingeniously argued before us by Mr. Borden for the defendants, but without creating in my mind any doubt of the soundness of the judgment which decided them against his clients

The fundamental difficulty in his way is the absence of legal authority to enter on the lands of the plaintiff in September, 1884.

One answer, suggested rather than seriously argued, is that an order in council was passed after action commenced which professed to ratify what had been done.

No authority has been produced which supports the contention. The order in council, which under the

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Government Railway Act 1881, section 6, might have been issued to authorise the construction of this branch railway, would have taken the place of an act of Parliament. The Governor in Council would have, in making such an order, been exercising a power vested in him by the legislature.

The order made in December, 1884, could operate only from its date. It was not like the ratification of something done in the name or professedly on behalf of another. It is too plain to require elaborate demonstration thatt he act which can be effectually ratified so as to affect the rights of a stranger must be one which the person who ratifies it could himself have lawfully done. The prior mandate to which the ratification is equivalent must be a mandate that could lawfully have been issued.

It was argued that the Minister of Railways and Canals had power to enter or authorise the defendants to enter upon this land without an order in council by virtue of certain powers given to the Minister of Public Works by 31 Vic. ch. 12, and which it is said have been transmitted to the Department of Railways and Canals. Works constructed at the expense of Canada are, by section 10, vested in Her Majesty. The Minister is empowered, by section 24, to acquire and take possession of in the name of Her Majesty any land necessary in his judgment for the construction or maintenance of any public work, and if the owner refuses or fails to agree for conveying the land the Minister may, by section 27, tender the reasonable value in his estimation, with a notice to arbitrate, and may after three days authorise possession to be taken.

Without stopping to discuss the question whether these provisions are now applicable to railways which are the subject of separate legislation, we notice that the minor premiss in each syllogism is not proved. It is

not proved that this land was the property of Her Majesty under section 10. There was, in 1883, included in the estimates an item of $110,000 for a branch of the Intercolonial Railway to Dartmouth, but the grant was contingent on action to be taken by the municipality of Dartmouth. I do not know that such action was taken, and it is clear enough that the plaintiff's land had not been bought from her at the expense of Canada, or from any other source, when she brought this action. If there was any right of entry under the Public Works Act it must have been under section 27. But here the minor premiss is that there was a public work for which the land was wanted, and we are brought back to the absence of the order in council by which alone the Dartmouth branch became known to the law, but months had to elapse before such an order existed.

An argument has been pressed for the defendants founded on steps that were taken towards arbitration, and another is rested on the filing of a plan and description. Let us note together the facts touching these two matters.

A notice to arbitrate was given to the plaintiff on the 4th of April, 1884. These dates are material. It described the land proposed to be taken, and for which $150 was offered, as running all across the plaintiff's lot at the uniform distance of twenty feet on each side of a line marked on a plan filed in the office of the Chief Engineer at Moncton as the centre line of the railway. There were either one or two meetings of the arbitrators. The plaintiff attended, and she executed the bond required by the statute. The last meeting was on the 18th of April, when the arbitration was adjourned, and it was never resumed.

It is provided by the Government Railways Act, 1881, section 10, that

> Lands taken for the use of Government railways shall be laid off by

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metes and bounds; and where no proper deed or conveyance thereof to the crown is made and executed by the person having the power to make such deed or conveyance, or where a person interested in such lands is incapable of making such deed or conveyance, or where for any other reason the Minister shall deem it advisable so to do, a plan and description of such lands signed by the Minister, his Deputy or Secretary, or by the Superintendent or by an Engineer of the Department, or by a land surveyor duly licensed and sworn in and for the province in which the lands are situate, shall be deposited of record in the office of the registry of deeds for the country or registration division in which the lands are situate, and such lands by such deposit shall thereupon become and remain vested in the crown.

No part of the plaintiff's land was laid off by metes and bounds. There were stakes planted by the engineers, but they were merely to show the centre line of the railway.

The plan referred to in the notice to arbitrate was never deposited of record in the office of the registry of deeds, but another plan with a different description was prepared, omitting part of the land covered by the first description and including some land which the first description did not include. That plan was deposited in the registry office on the 13th of August, 1884, and the entry on the land was in September. It is admitted that the second description included the *locus in quo*.

It is argued that the effect of the deposit of the plan was, under section 10, to vest the lands in the crown, making the entry lawful and confirming the right of the plaintiff to her claim for compensation. I am inclined to think that that would be so if the section had been fully complied with, but I have not examined the statute closely enough to speak more decidedly on the point. It seems clear, however, that the plan and description must be of territory laid off by metes and bounds. It is upon "such lands" that the statutory conveyance operates, and the essential work on the ground is here wanting.

The point made respecting the attempt at arbitration is that the plaintiff is estopped by her conduct from disputing the right of the crown to enter.

I confess my inability to perceive any particular in which the doctrine of estoppel has any application to the facts, but the change from the plot of land respecting which the tender was made and the arbitration initiated, to the different, or partly different, plot to which the dispute now relates, puts all question of the arbitration out of sight.

In a case very recently decided by the Court of Appeal, *in re Uxbridge and Rickmansworth Railway Co.* (1), there are some observations made by Lord Justice Cotton which are not inapplicable to one or two phases of the case before us. The private act of the Railway Company there required the subscription of a certain amount of capital before the company was authorised to exercise its compulsory powers ; in our case the order in council was necessary.

The capital there had not been subscribed, as here the order in council was not passed.

Nevertheless treaties had gone on with landowners not unlike what occurred with the present plaintiff.

The direct question to which the observations of the Lord Justice were addressed was whether or not the compulsory powers of the company had been exercised. Incidentally he had to touch upon the effect of the failure in the preliminary requisite of the subscription of capital, a question similar to that respecting the obligation of a railway company to file plans and surveys before exercising any statutory powers, on which the decision to a great extent turned in *Corporation of Parkdale* v. *West*, (2). The report of the Uxbridge Railway case is very long. The observations to which I refer are the following, and will be found at p. 563 ;

(1) 43 Ch. D. 536. (2) 12 App. Cas. 602.

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Then has there been an exercise of the compulsory powers? In my opinion there has not. It is very true the power to give notice to treat is included in that group of sections, in the Lands Clauses Act, headed "and with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows:" Then there follows a direction that the promoters of the undertaking shall give a notice to treat in respect of the lands they require to take. But although the direction to give notice to treat is included within that group of clauses, there may never be any step taken as regards the exercise of compulsory powers: because if the company have not got their capital subscribed they cannot exercise any compulsory powers, and the notice to treat, as was the case in one instance here, may be merely a step taken towards an agreement with the landowner, in order to ascertain whether he is willing to make the contract with the railway company, the company saying: 'I want the land; will you sell it to us?' In my opinion it cannot be said that that alone is an exercise of compulsory powers. We are not deciding this for the first time, because it was decided in 1870, in *Guest* v. *Poole and Bournemouth Railway Company* (1), that notice to treat was not an exercise of compulsory powers. It was said that that was not necessary to the decision of the case—that the actual decision was only that the company could not give the notice; but all the judges (and they were judges of considerable authority), in their judgments say that giving the notice was not an exercise of compulsory powers. And in the events which have happened here service of the notice to treat is shown not to have been an exercise of the compulsory powers. It is very true it is a step towards the exercise of the compulsory powers; that is to say, the compulsory powers as regards the purchase of land cannot be exercised until the notice to treat has been given; but they cannot be exercised unless the capital has been subscribed. Subscribing the capital is not an exercise of the compulsory powers, although it is a necessary step towards the exercise of those powers; and in the same way a notice to treat is not an exercise of the compulsory powers, though it is a step that must be taken before the compulsory powers can be exercised and put in force.

I am of opinion that the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for appellant: *T. J. Wallace.*

Solicitor for respondents: *Wallace Graham.*

(1) L. R. 5 C. P. 553.