CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

ALEXANDER S. WALLBRIDGE (PLAINTIFF) ..... APPELLANT; 1889 *Nov. 13, 14.

AND

WILLIAM FARWELL *et al. ès-qual.* (DEFENDANTS) ..... RESPONDENTS. 1890 *June 12.

THE ONTARIO CAR AND FOUNDRY COMPANY (limited) (PLAINTIFF)... APPELLANT;

AND

WILLIAM FARWELL *et al. ès-qual.* (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Railway bonds—Trust conveyance—Construction of—Trustees—43 and 44 Vic. (P.Q.) c. 49—44 and 45 Vic. (P.Q.) c. 43—Privileged claim—Unpaid vendor—Immoveables by destination—Arts. 1973, 1996, 1998, 2009, 2017 *C. C.*

In virtue of the provision of a trust conveyance, granting a first lien, privilege and mortgage upon the railway property, franchise and all addition thereto of the South Eastern Railway Company, and executed under the authority of 43 and 44 Vic. (P.Q.) ch. 49,

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

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and 44 and 45 Vic. (P. Q.) ch. 43, the trustees of the bondholders took possession of the railway. In actions brought against the trustees after they took possession, by the appellants, for the purchase price of certain cars and other rolling stock used for operating the road, and for work done for, and materials delivered to, the company after the execution of the deed of trust, but before the trustees took possession of the railway,—

Held,—1st, affirming the judgments of the court below, that the trustees were not liable.

2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when moveables become immoveable by destination (as was the result with regard to the cars and rolling stock in this case,) and the immoveable to which the moveables are attached is in the possession of a third party or is hypothecated. Art. 2017 C. C.

3. But even considered as moveables such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder, as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendors.

Per Gwynne J.—That the appellants might be entitled to an equitable decree, framed with due regard to the other necessary appropriations of the income in accordance with the provision of the trust indenture, authorizing the payment by the trustees "of all legal claims arising from the operation of the railway including damages caused by accidents and all other charges," but such a decree could not be made in the present action.

Per Strong J.—*Quære:* Whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by courts in this country.

APPEALS from the judgments of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgments of the Superior Court in favour of the appellants.

The action brought by the appellant, A. W. Wallbridge, against the respondents in their quality of trustees of the South Eastern Railway Company, was for work done for, and supplies delivered to, the Railway Company, and the action brought by the appellants,

The Ontario Car Company, was for cars and other rolling stock furnished to the said railway company, after the execution of a trust conveyance to respondents of the railway company's property and franchise as authorized by statute to secure the payment of its bonds, but prior to the trustees taking possession under said trust conveyance.

The material provisions of the statutes 43 and 44 Vic. ch. 49, and 44 and 45 Vic. ch. 43 (P.Q.), in persuance whereof the trust conveyance was executed, and of the trust conveyance itself, are referred to at length in the judgments hereinafter given.

Both appeals were argued together.

Laflamme, Q.C., for appellants, cited and relied on arts. 1973, 2047, 2009, 2082, 2083, 1922, 1802, 1977, 1046, 1966, 1996 and 1987 C. C. ; Sirey, Rep. Gen. (1) ; Sirey (2) ; Aubry & Rau (3) ; Troplong, Antichrèse (4) ; Laurent (5) ; Pothier, Pandectes (6) ; Proudhon (7) ; Beach on Receivers (8) ; *Burnham* v. *Bowen* (9) ; *Fosdich* v. *Schall* (10) ; *Union Trust* v. *Souther* (11) ; *Ralston* v. *Stansfield* (12) ; *Greenshields* v. *Dubeau* (13).

O'Halloran, Q.C., and *Ferguson*, Q.C., for respondents, cited and relied on *Redfield* v. *Wickham* (14) ; *Rhode Island* v. *South Eastern Railway Company* (15) ; *St. Louis* v. *Cleveland* (16) ; *Goodherham* v. *Toronto & Nipissing Railway* (17) ; Coote on Mortgages (18) ; Jones on Railroad Securities (19).

(1) Vo. Constructeur No. 3.
(2) 31, 2, 286.
(3) 4 Vol., p. 719.
(4) No. 425.
(5) 20 Vol., p. 361-363.
(6) 1 Vol., p. 20.
(7) 3 Vol., p. 285, No. 1436.
(8) §§ 367-370.
(9) 111 U. S R. 777.
(10) 99 U. S. R. 235.
(11) 107 U. S. R. 591.
(12) 31 L. C. Jur., p. 1.
(13) 9 Q. L. R. 353.
(14) 31 L. C. Jur. 170.
(15) 31 L. C. Jur. 86.
(16) 125 U. S. R. 659.
(17) 8 Ont. App. R. 685.
(18) P. 400.
(19) Cap. 11, § 357.

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SIR W. J. RITCHIE C.J.—I agree in the judgments prepared by Mr. Justice Taschereau in these cases.

STRONG J.—I concur in the judgment which has been prepared by my brother Taschereau, and I only desire to add a few words to guard against any misconstruction of my acquiescence in that judgment, as it may be invoked as a precedent in future cases, especially in cases arising in the Provinces subject to the English system of law.

The actions in the present case seek to make the trustees personally liable for the debts of the railway company, incurred in the purchase of rolling stock. This, I am clear, cannot be done and, therefore, I agree in dismissing the appeal. I also entirely concur in the view of my brother Taschereau as regards the loss of the vendor's privilege by reason of the cars and rolling stock having become, under the express provision of the law, immoveables by destination.

What I desire to explain, however, is this. In assenting to the judgment of the court dismissing these appeals I do not by any means intend to preclude myself in future, should the question be raised in proper form and in an appropriate case, from considering whether the principle which is now universally recognised in the United States as to the applicability of current earnings to current expenses, incurred either whilst or before railway property comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by our courts. This doctrine is now firmly settled in the United States, where railway mortgages exactly resemble those in use with us, and which do not at all resemble

the securities of debenture holders under the English system of securities for borrowed capital; and the practice referred to is so pregnant with justice, good faith and equity that there may be found strong reasons for applying it here when the question arises. It certainly does not arise in the present case where the defendants are not receivers but trustees, and where it is sought to recover a personal judgment against them, which is entirely inadmissible.

TASCHEREAU J.—By the Quebec Act 43-44., Vic., ch. 49, (1880) the South Eastern Railway Company, being in financial difficulties, was authorized to issue mortgage bonds to a certain amount, and for the purpose of securing the payment of the same and interest thereon, to convey its railway, franchise and all its property, tolls and income to trustees to be named, when required, by the shareholders of the company.

By section 4 of the said act, it was enacted that in any such deed of conveyance, the company and the trustees might stipulate as to who should have the possession, management and control of the said railway, receive the tolls and income thereof, and dispose of them, as well before as after default in the payment of said mortgage bonds or of the interest thereof, with power also to stipulate how, in case of such default, the company might be divested of all interest, equity of redemption, claim or title to the said railway franchise, and other property so conveyed, and how the same might become vested absolutely in the said trustees in satisfaction of the said bonds.

By section 5, the said trustees were empowered, upon default in the payment of the bonds, or of any interest coupons, to take possession of and run operate, manage and control the said railway as fully and effectually as the company might do the same.

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Section 7 enacts that the said conveyance shall be to all intents, valid, and create a first lien, privilege and mortgage upon the said railway.

Section 10 enacts that neither the present proprietors of the said road, nor those contemplated under the said act, shall have the power to close or cease running the said road.

On the 12th August, 1881, mortgage bonds having been issued by the company, a deed of trust was executed by which the said railway was conveyed by the company to the present respondents as trustees, for the purpose of securing the payment of the said bonds, as contemplated by the said act. It was stipulated in the said deed that the company should remain in full possession of the said railway, as if the deed had not been passed, until ninety days after default of payment of said bonds or interest thereon, after which ninety days the said trustees were empowered to enter into possession. The deed then provides that in case of default of payment, during six months, the trustees may become full owners of the road, after certain notices and lapse of time therein specified.

This deed was registered in March, 1884.

Under the terms of this deed the company continued in possession of the railway, until the 5th October, 1883. when, interest on the said mortgage bonds being overdue for more than 90 days, upon the request of the said trustees, the company gave them up the possession and control of the railway, voluntarily and in good faith, as alleged in the appellant's declaration.

These trustees, are the respondents in this court, defendants in the Superior Court. They are sued by the appellant for work done for and materials delivered to the company, from the 9th of May, 1882, to September 20th, 1883, that is to say after the execution of the deed of trust aforesaid, but

before they, the trustees, came in possession on the 5th October, 1883.

They pleaded to this action, that they are not liable for the appellant's claim, and that there is no privity of contract between them and the appellant. They also pleaded *res judicata*, but abandoned their contentions on that point at the hearing before us.

The Superior Court gave judgment for the appellant on the ground, "that the deed of trust to the respondents constituted a pledge of this railway, with the statutory power, against the common law rules concerning pledges, to leave the pledge in the hands of the pledger, as long as the interest on the bonds was paid as accrued, that as in law the pledger is bound to the preservation of the thing pledged, under Article 1973, Civil Code, the respondents, as such pledgees, were bound to satisfy the appellant's claim, which is for work and materials necessary for the working of the said railway."

The Court of Appeal reversed that judgment and dismissed the appellant's action upon the ground that the work done and the materials sold which he claims in his action were not furnished or done to or for the respondents, but to and for the company, to whom alone he had given credit.

The appellant now appeals from this last judgment.

Since the judgment of the Superior Court was given in this case, the Privy Council has, in a case of *Redfield* v. *Wickham* (1) given an authoritative opinion on the construction of the Quebec Statute of 1880, under which the respondents are now in possession of this railway. The only observation of their lordships, however, which can have any bearing on this present case is the following:

Their lordships do not doubt that the effect of the trust conveyance

(1) 13 App. Cas. 467.

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of 12th of August, 1881, followed by possession in terms of the deed' was to vest the property of the railway and its appurtenances in the appellants and to reduce the interest of the South Eastern Company to a bare right of redemption.

The appellants there were the trustees, respondents in the present case.

These remarks of their lordships, however, have perhaps, no direct application here, because, clearly, their lordships thereby refer solely to the conveyance to the trustees when followed by their possession, whilst the appellant's claim is for goods sold to the company when the company was still in possession, before the trustees exercised their right to take possession.

This raises the question, not determined by the Privy Council, as to the nature and legal character of the possession by the company after the deed of trust of 1881 till the 5th October, 1883? A question which, of course, I need consider here only as its solution may affect the present case.

Now, conceding with the Superior court for the sake of argument, that the deed of 1881, as long as the company retained possession, constituted a pledge, (which, of course, implies that the company also remained proprietor,) it is evident that this pledge was not for the benefit and in the interest of the company's creditors generally, but only and exclusively for the benefit and in the interest of the mortgage bondholders. The appellant contends however, and the Superior Court gave countenance to that contention, that, as under article 1973, the debtor is obliged to repay to the creditor the necessary expenses incurred by him, the creditor, in the preservation of the thing pledged, the respondents are here liable towards him, the appellant, because such was the nature of the materials sold and the work done by him for the company. I cannot adopt

this view of the case. It is true, in fact, and admitted in the record, that the work done and materials sold by the appellant were necessary for the working of the railway; but, assuming there was a contract of pledge, the company being allowed, exceptionally by the statute, to remain in possession of the thing pledged, though, at common law, the pledgee must have the possession, it follows that article 1973, can have no application whatever to the appellant's claim. In the first place, it is not the creditor here who has incurred expenses for the preservation of the thing pledged by his debtor and still belonging to his debtor, but it is the debtor who, according to this theory, allowed to remain in possession of the thing pledged, has incurred the expenses for the preservation of his own property. In the second place, if these expenses were recoverable at all against the trustees, it is the company, and the company alone, who could recover them. I cannot see on what principle the appellant, a third party, can have an action against the trustees on that contract of pledge, if such contract there ever existed before the trustees' possession. The appellant contracted with the company and the company alone. To the company alone he gave credit. He sued the company and obtained judgment for these very same advances he now claims from the trustees. This fact, it is true, is not by itself a bar to his present action, but is as full and complete evidence as can be had that his dealings were with the company. There is no *lien de droit*: there was no privity of contract between the appellant and the trustees, and I cannot see that any legal liability ever was created in his favour against the trustees by this contract of pledge, if it ever existed, for the sum now claimed.

Then this article 1973, C. C., upon which this argument is based, seems to me the very enactment that proves its unsoundness. This article says that

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the pledger is always responsible for the expenses incurred for the preservation of the thing pledged, even when the thing pledged is in the pledgee's possession. By what reasoning can it be contended that when, as here, by exception, the pledger retains possession, these expenses will then fall, not on the pledger, but on the pledgee? I cannot see it. I take this article to lead to the very opposite conclusion, and, when applied to this case, to clearly throw on the company alone all the expenses now claimed from the trustees.

I have so far considered the deed of 1881, as creating till the 5th of October, 1883, a contract of pledge with the possession and title in the pledger.

I have done so, however, only argumentatively. I cannot see in the deed, as long as the company remained in possession, a contract of pledge. Possession by the pledgee is such an essential feature of that contract that there cannot, in my opinion, exist, any such thing as a contract of pledge with the pledge in the pledger's hands.

Now, if the deed of trust of 1881, as argued in the alternative by the appellant, is to be considered as an actual sale, one by which the title to this railway became vested immediately in the trustees with equity of redemption, even before default of payment of the interest on the mortgage bonds, and before they exercised their right to take possession of it, is the appellant's action maintainable? In that case, the respondents are the vendees, allowing their vendor to remain in possession. The vendor in possession incurs expenses for the preservation of the thing sold, say, expenses absolutely necessary, and of which the vendees must eventually benefit. He incurs these expenses, and contracts for them in his own name with third parties. He himself may, perhaps, then, under certain

circumstances, have an action against his vendee for the re-imbursement of the monies so expended for his benefit, though, as a general rule, till delivery, the property is at the vendor's risks and charges as a depositary, but would this give to those who have contracted with him, the vendor, in his name, for these expenses, a right of action against the vendee personally, for the payment thereof? I should say, clearly not; and, to apply this to the present case, supposing that the company might maintain an action against the trustees for the expenses necessarily incurred on the road after the deed of 1881, and before the 5th October, 1883, yet I cannot see that this would give to the appellant, a third party, the right to claim from the trustees the advances he made to the company, or in other words, the right to be paid by any one else than by the party he dealt with. Whether in such a case the appellant would have under art. 1031, C. C., the right to exercise the company's action against the trustees is a question which does not arise. He claims to act here in his own name and to exercise his own personal right of action. And for the same reason, I may as well immediately remark, the appellant's attempt to have his action considered as one *de in rem verso* (1), cannot help him. The action *de in rem verso* would, under the facts disclosed in the present case, be an action by and in the name of the company against the trustees. The doctrine upon which such an action rests cannot be invoked by the appellant to create a *lien de droit* between him and the trustees.

To follow Mr. Laflamme's able argument for the appellant, I have so far considered the deed of trust of 1881, before the respondents came into possession, either as creating a pledge or as an actual and complete sale of this railway, and I have said why, in my opinion, admitting it to be either one or the other, the ap-

(1) *Vide* 20 Laurent, No. 334.

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pellant has no action against the trustees. I need hardly remark the contradiction between these two grounds of reasoning. If a pledge, the railway company remained the owners. If, a sale, the trustees became owners. Was that deed, however, anything else than a mortgage or hypothec of of this railway, as long as the company remained in possession, within of course the sense and meaning that these words have in the Province of Quebec, where the hypothec is a kind of pledge in which the pledger retains both ownership and possession of the thing pledged, in contradistinction to the contract of pledge, *pignus*, where the pledgee is put in possession, the title remaining in the pledger. It seems to me impossible to see in that deed, as interpreted in the light of the statute of 1880, anything else than a hypothecation of this railway in favour of the bondholders, not precisely the hypothecation of article 2016, C. C., but with the exceptional right, given by the statute, of the mortgagee to enter into possession, in default of payment, after the exercise of which right the contract between the parties became one of *nantissement*, with, of course, *droit de rétention*, till paid, joined to the hypothec. The term "sold" is used in the deed, it is true. But the statute of 1880 authorizes only to *convey* as security. *Transporter*, says the French version. Then a deed called a sale may be nothing else but a contract of pledge : *Ross* v. *Thompson* (1) ; *Farmer* v. *Bell* (2) ; *Canada Paper Company* v. *Cary* (3).

Now what is a hypothec, or rather its origin at common law ?

Troplong (4) answers :

L'on en vint donc par la suite à établir qu'une simple convention

(1) 10 Q. L. R., 308.
(2) 6 Q. L. R. 1.
(3) 4 Q. L. R. 323.
(4) Hypothèque No. 7.

suffirait pour que le débiteur engageât son fonds, sans en abandonner la possession, à condition toutefois de devoir en être dessaisi, en cas de non paiement au temps fixé par le contrat. Ce fut un établissement que le droit prétorien emprunta à la civilisation grecque. Aussi le terme dont on se sert pour exprimer cette convention est-il purement grec.

This is, in my opinion, precisely the nature of the contract that has taken place between the parties here. The company were to remain in possession as long as they satisfied, as accrued, their liabilities to the bondholders. They might never have lost the possession, and have continued to work the railway themselves, the railway, however, by the authority of this statute, all the time remaining vested in the bondholders, or in the trustees for them, till the complete satisfaction of their bonds, in 1901, as security therefor. I must confess that I can see nothing else in this deed, before the trustees took possession, than a hypothecation of the railway, which hypothecation took the character of an antichresis, when the trustees took possession, or, to use the English law terms of their Lordships of the Privy Council, in the *Redfield case* (1)—a conveyance by a debtor to his creditor, coupled with possession, with right of redemption, in security of a debt (2).

New, as before remarked, it is for a debt contracted by the company, before default, and during the possession of the company, for the company, that the appellant now sues the trustees. That the mortgagee is personally liable for the debts created by the mortgagor in possession upon the property mortgaged could not be contended for. Yet the appellant goes that far, when he argues that the company, during the interval between the deed of trust of 1881 and the 5th October, 1883, were the agents or mandataries or *negotiorum gestor* of the trustees.

(1) 13 App. Cas. 467.

(2) See also Laurent, 28 Vol. Nos. 480, 543.

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A word now, as to the question of privilege, upon which the appellant at the hearing strenuously relied. Admitting, for the sake of argument, that he had a privilege on the railway for his claim, under arts. 1996 and 2009, C. C., as being for work done in the common interest of the creditors, I cannot see how this can support his action. 1st There is no question here of preference or priority amongst creditors. 2nd. The privileged creditor has no personal action against the *tiers détenteur* of an immoveable affected by a privilege, but only a real action. 3rd. The privilege given for the expenses incurred in the common interest of the creditors cannot be exercised against a subsequent purchaser, or pledgee in possession, if it has not been registered.

It is true that art. 2084, as does art. 2107 of the French Code, exempts such a privilege from the necessity of registration, but this must be read as applying merely to the respective rights of the creditors amongst themselves, when a distribution of the price of sale of the property takes place. It has no application to subsequent purchasers or pledgees of the property, whose titles are registered. Art. 2056 (1)

4thly. The trustees for the bondholders have, by the act of 1880, confirmed in this respect by the act of 1881, 44-45 Vic. c. 43, the first lien and privilege on this railway, with the *droit de rétention*, till all arrears due on these bonds are paid. Consequently, the plaintiff, if he has this privilege attached to expenses made in the interest of the mass of the creditors, which, undoubtedly, under art. 1996, would include those incurred for the preservation of this railway, cannot have the bene-

(1) See also arts. 2015 & 3030 C. C.; Pont 2 Vol. 1123; Aubry & Rau 3 Vol. § 269; Massé 5 Vol. 806; Rolland de Villargues, Privilège No. 334; Persil, Régime hypoth. 2107; Dalloz, Priv. & ch. 1, sec. 4; Boileux, 7 Vol. pp. 557, 558; Troplong Priv. & Hyp. 265, 273, 922; and Zachariæ Par. 269.

fit of his privilege, before disinteresting the bondholders. Being vested by the statute and the deed with the *droit de rétention*, as a first lien and privilege, the bondholders, and the trustees for them, cannot be deprived of it till they are entirely paid (1). This question does not directly arise in this case, however, as the appellant's action is merely a personal action against the trustees. I have noticed it solely in answer to the appellant's contention as to the rank of his privilege under the code. It is clear, to my mind, that the statute of 1880, has given to the bondholders a privilege which carries priority to the appellant's claim, whatever rank his privilege would have had under the code, and, consequently, if the appellant was at all entitled to invoke his right of privilege in support of his action, he could not do so without having, as a condition precedent, paid all the bondholders (2). It has been argued for the appellant that the statute merely says that the conveyance shall be "a first charge," and that this does not mean *the* first charge. But to my mind there is no ground whatever for that distinction. A first charge must mean second to none.

Some of my remarks in the next case may apply to this one.

I would dismiss the appeal.

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TASCHEREAU J.—In this case, the same trustees are sued by the Ontario Car Company, for cars sold, on credit, to the South Eastern Railway Company, to the amount of over $45,000, after the deed of trust of 1881, and before the 5th October, 1883, that is to say, as in the preceeding case, before the trustees were put into

(1) Compare arts. 1967, 1969, 2001 C.C. (2) See 28 Laurent Nos. 500, 540

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possession of the railway. Here also, as in the previous case, the Superior Court gave judgment for the plaintiffs, now appellants, and the Court of Appeal reversed that judgment. I need not repeat here my reasoning in the previous case, which applies almost entirely to this one. The two however are not precisely identical. Here, the Car Company's action prays as follows :—

That the transfer and delivery of the said cars by the said company to the defendants and their predecessors be declared fraudulent, null and void, and be set aside. That the indenture of mortgage of the 12th of August, 1881, the resolution of the shareholders authorizing the same, and the foreclosure and taking possession thereunder upon the 5th of October, 1883, be also declared fraudulent, null and without effect, and be set aside so far as respect the said cars. That the said South Eastern Railway Company be impleaded to hear said transfer, indenture, resolution and foreclosure set aside and hear the final judgment thereon. That the trustees, defendants, be adjudged and condemned to pay and satisfy the plaintiffs the sum of $45,556.97, damages for the use and detention of said cars, from the 5th October, 1883, to this date, with interest.

That the defendants be ordered not to use, and be enjoined and prevented from holding or using, said cars or any of them, as long as said plaintiffs shall not be paid therefor the sum of $45,556.97 with interest, and be condemned to surrender and deliver the said cars within fifteen days from the final judgment to be pronounced in the case in as good order and condition as when taken by the said trustees, to a guardian to be named by said court, and that the same be sold in satisfaction of the plaintiffs' claim, and in default of so doing and failing to deliver the same that they be adjudged and condemned to pay jointly and severally the said sum of $45,556.97.

By these conclusions, the car company do not ask for a direct personal condemnation against the trustees. Neither do they claim the cars themselves, they merely claim a *jus ad rem* on them, and that they be sold, *en justice*, in satisfaction of their claim. It is only on the failure by the trustees to deliver up these cars so that they be so sold, that the car company ask, that they, the trustees, be condemned to pay the plaintiffs' claim.

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And I cannot see that it would have been possible, in any case, upon these conclusions, to condemn the trustees to pay the amount claimed, without option, as the Superior Court has done.

This action, I notice, was instituted in December, 1886, over 3 years after the trustees entered into possession of the railway. The argument of counsel at bar had led me to understand that the car company based their action on a claim to a right of privilege, as unpaid vendors. There is not a word of it, however in their declaration. The only grounds of their conclusions are that the deed of trust of 1881, and the delivery of possession in 1883, were fraudulent, null and void, and strange to say, though the general issue was pleaded, only one witness was examined by the plaintiffs, and that one, merely as to the necessity of these cars for the working of the railway. An admission covering certain facts is to be found in the record, but there is nothing in it that can be connected in any way whatever, that I can see, with the plaintiffs' allegations of fraud. The insolvency of the railway company, in 1883, when they bought these cars, is admitted, but I fail to see that the trustees, authorized by Act of Parliament to take possession of the railway, and everything connected with it, including these very cars, as security towards the bondholders, can be said to have participated in a fraud, when they did the very thing the statute was passed to authorize. If a fraud at all, all I can say is, that it was a fraud authorized by statute, and a statute enacted precisely because the railway company was insolvent. It is not even proved that when they entered into possession on the 5th October, 1883, the trustees were at all aware of the car company's claim against the railway company.

Upon the general issue alone the plaintiffs' action

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it seems to me, fails. But were it otherwise on that first plea, and taking it for granted that it may be gathered from the general allegations of their declaration that their claim is based on their privilege as unpaid vendors, on the defendants' exception, by which they plead the privilege and mortgage given by the statute on this railway and all its rolling stock in favor of the mortgage bondholders, the result must be the same.

It is clear that by the deed of trust of 1881, as I said in the previous case, the railway and everything connected with it became a security towards the bondholders with a first lien, privilege or mortgage on everything thereby conveyed, either moveable or immoveable, comprising all cars, locomotives, tenders, etc., etc., then owned by the company, or that might from time to time thereafter be acquired by the company. Now the very cars upon which the plaintiffs claim a right became, by operation of the statute, at the very moment they came into the railway company's possession, and whether they are to be considered as moveable or immoveable property, affected and charged as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendor. And even if it might be contended that this privilege and lien did not so attach immediately at the moment the railway company bought these cars and added them to their rolling stock, it seems to me unquestionable that, when on the 5th of October, 1883, the trustees got possession of them with the railway, as pledgees by antichresis, as additional security to their statutory mortgage, their *droit de rétention* became a first charge and lien, with priority over every other creditor, even the unpaid vendor, and that consequently the trustees cannot be dispossessed,

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except upon payment of all accrued interests on these bonds. Article 2001 C. C.

To give the plaintiffs a right of preference over the trustees, or to deny to the trustees the *droit de rétention* on these cars, would clearly be setting the statute at naught. Under article 1543 civil code, (article 5811 Revised statutes) the right of an unpaid vendor to demand the *rescission* of the sale of moveable things can only be exercised while the things sold remain in the possession of the buyer. The railway company here were the buyers, not the trustees. The contention that they, the company, acted merely as agent or *negotiorum gestor* for the trustees is untenable. I have referred to this point in the previous case. The railway company was then the owner in possession with a statutory mortgage on the property in favor of the bondholders. When the statute gives to the trustees a lien or mortgage on the railway, it clearly implies that the trustees were not, at first, to be owners. One does not require a lien or mortgage on his own property for the payment of his claims. Then the statute and the deed provide when and under what circumstances the trustees might become later absolutely owners of the railway. This also implies that they were not yet owners, and still further, there was no price of sale, so there was no sale ; *pretium* is a requisite of this contract, as much as *res et consensus*. The fact that trustees for the bondholders, benefited by the sale of these cars to the railway company does not help the plaintiffs. A hypothecary creditor always benefits from the improvements made and expenses incurred by his debtor on the property hypothecated.

As to the unpaid vendor's right of revendication, under article 1998, civil code, it clearly cannot be claimed by the plaintiffs. 1st, because they had given delay to the railway company for the payment

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of these cars. 2nd, because those cars are now in the hands of a third party. 3rd, because they are too late. Articles 1998, 1999, civil code, and cases cited in de Bellefeuille's code under these articles; *Rhode Island* v. *South Eastern* (1). I need not dwell on this any longer however, as the action here is not one of revendication.

But further are these cars now moveable property? It is a well established jurisprudence that the rolling stock of a railway is immoveable property and part of the freehold. The appellants argue, however, that the *immobilisation* of a moveable does not operate against its unpaid vendor. Admitting this to be so, and the weight of authorities now seems to incline that way, the rule applies only between the vendor and the vendee as long as the vendee is in possession of the thing sold, but does not operate against a third party who comes into possession of an immoveable to which are attached moveable things, which by law are immoveable *par destination*, nor against a mortgaged creditor. I think that the point is now not open to discussion. I refer to the cases of Chrétien (2), and Camus (3), in that sense. So that, putting aside the general rule that "*les meubles n'ont pas de suite* (4)," on this other consideration, I do not see how the action can be supported. The immobilisation takes effect against an unpaid vendor in favor of the mortgaged creditor, even if the buyer is still in possession. Marcadé (5), says :—

La seconde question est de savoir si la résolution de la vente mobiliére, qui est impossible quand le meuble vendu est passé dans les mains d'un tiers de bonne foi qui l'a acheté ou reçu en gage, est également impossible quand ce meuble est devenu immeuble par destination et qu'il se trouve soumis au droit d'un créancier hypothécaire de l'acheteur.

(1) 31 L. C. J. 86.
(2) S. V., 36-2-347.
(3) S. V. 40-1-412.
(4) Laurent 29 Vol., No. 478; Bourjon, 1 Vol. No. 145.
(5) Vol. 6, p. 301.

Mr. Troplong (addit. au No. 465) et plusieurs arrêts décident que la résolution peut encore avoir lieu. L'acheteur disent-ils en substance, n'a pas pu transférer plus de droits qu'il n'en avait lui-même ; or la transformation du meuble en immeuble par destination ne met pas cet acheteur à l'abri de l'action du vendeur, la preuve en est dans l'article 593, puisque la loi, après avoir prohibé en principe, dans l'article 592, la saisie exécution des meubles immobilisés par destination, la permet dans cet article 593, au vendeur non payé. Cette doctrine nous parait inexacte, et nous pensons, avec Mr. Duvergier (1439) et des arrêts postérieurs à ceux indiqués ci-dessus, que l'action résolutoire n'est pas admissible ici.

Il est très vrai que du vendeur à l'acheteur l'immobilisation dont il s'agit ne nuit en rien au droit de ce vendeur, mais il en est autrement entre le vendeur et le tiers qui acquiert un droit sur le meuble vendu, et il est faux de dire que le tiers ne puisse pas avoir plus de droits que n'en aurait l'acheteur. Mr. Troplong reconnait que, vu l'effet de la possession de bonne foi sur les choses mobilières, celui à qui le meuble aurait été revendu par mon acheteur serait à l'abri de mon action en résolution, tandis que mon acheteur, lui, s'il avait encore le meuble, ne pourrait pas s'en garantir.

Le tiers peut donc avoir plus de droits que l'acheteur, et c'est tout simple, puisque c'est un effet de la bonne foi de ce tiers, bonne foi dont l'acheteur qui ne paye pas ne saurait argumenter. Si celui à qui le meuble a été revendu est à l'abri de l'action résolutoire, s'il en est de même du créancier dont ce meuble est devenu le gage mobilier, pourquoi en serait-il autrement de celui dont il est devenu, par son immobilisation, le gage hypothécaire ?

Le droit de ce dernier n'est pas moins favorable, et c'est avec raison que la jurisprudence se fixe dans ce sens !

See in the same sense, Pont (1) ; Aubry & Rau (2) also say :

Il importe peu, quant aux immeubles par destination, que les objets réputés tels aient déjà existé en cet état au moment de l'établissement de l'hypothèque, ou que le propriétaire de l'immeuble hypothéqué ne les y ait attachés que plus tard. On doit en conclure que le vendeur d'objets mobiliers, par exemple de machines incorporées par l'acheteur à l'immeuble hypothéqué, ne peut exercer ni l'action résolutoire ni le privilége établi, par le No. 4 de l'art. 2102 au détriment des créanciers hypothécaires de ce dernier, qu'ils soient antérieurs ou postérieurs à la vente.

See also Zachariæ (3) and Dalloz (4).

(1) 1 Vol. No. 154.
(2) Vol, 3, p. 409.
(3) 5 Vol. P. 143, note 27.
(4) 87-1-394.

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According to these authors, these cars are now immoveable property, as forming part of the railway, and the trustees' mortgage and privilege on the railway extends to them, even if they, the trustees, were not vested with the possession.

A case of *Detouche* c. *Neustadt* (1), in the Cour de Cassation is in point.

See also *Philion* v. *Bisson* (2), and article 2017, civil code.

But if they are moveables, the plaintiffs are not in a better position.

Le droit de résolution et le privilége supposent que l'acheteur est encore en possession de la chose (3).

The Colebrook Rolling Mills v. *Oliver* (4), *Thibaudeau* v. *Mills* (5).

See also Laurent (6); Bédarride, Achats et Ventes (7).

Article 1996, civil code, relating to disbursements incurred for the preservation of the property has been cited by the appellants, but it hardly applies to the facts of this case. But should it apply, the statute here again intervenes, and sets at rest all possible controversy as to the relative rank of the claim for these expenses, or that of the unpaid vendor's and that of the trustees, by enacting that the trustees shall be first.

Another point upon which there can be no doubt, is that when the vendor has given credit, the pledgee's claim has priority over the vendor's (8).

And again :—

La résolution de la vente mobilière à la poursuite du vendeur non payé ne peut avoir lieu contre un tiers à qui le meuble a passé de bonne foi en gage (9).

Article 417 civil code, which enacts that the pro-

(1) S. V. 68, 1. 9.
(2) 23 L. C. J. 32.
(3) 29 Laurent, No. 471.
(4) 5 Q. L. R. 72.
(5) M. L. R. 1, Q. B. 326.
(6) 29 Vol. No. 526, Nos.470,487.
(7) Nos. 327, 328.
(8) See 1 Pont, No. 152, art. 2000, C.C.
(9) S. V. 38, 2, 97, *Moss* v. *St. Jean*, 15 R. L. 353.

prietor must re-imburse to the possessor the necessary expenses incurred on the property, was also invoked by the plaintiffs and is referred to by the Superior Court, but it has no application. The expenses here were made by the railway company as owners in full possession and for themselves. The plaintiffs sold these cars to the railway company, and, on that sale, they have no personal action against the trustees. This article, if it applied at all, would give an action to the railway company against the trustees, but cannot give one to the car company.

Articles 1043 and 1046 civil code, were also relied upon by the Superior Court. This last article enacts that he whose business has been well managed by a *negotiorum gestor* is bound, 1st, to fulfil the obligations that the *negotiorum gestor* has contracted in his (the person whose business has been well managed) name, 2dy., to indemnify him for all the personal liabilities which he has assumed, and 3dly., to reimburse him all necessary or useful expenses. In the Wallbridge case, the Superior Court treated the railway company pending their possession after the deed of trust, as the *negotiorum gestor* of and acting for the trustees. This, in that case, under article 1046, would have given an action to the railway company against the trustees, but not to the plaintiff. The railway company did not contract with the plaintiff Wallbridge in the trustees' name, and it is not pretended that they did. Then the railway company were not *negotiorum gestor* at all for Wallbridge, as I said in that case. In the present case, the Superior Court, another judge presiding, held that it is the Ontario Car Company that was the *negotiorum gestor* for the trustees. I cannot adopt that view of the facts. I cannot see how the Ontario Car Company, by the simple fact of selling cars to the railway company acting for itself became the *negotiorum gestor* of

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the trustees. By this line of reasoning the bondholders, instead of a security on this railway, would have been liable to all the expenses even before getting the control and revenue.

As to the plea of *res judicata*. It appears on this record that, in previous actions, the present plaintiffs attempted seizure *en revendication* of these very same cars, and that by judgments, which are now *chose jugée*, these seizures were quashed on the ground that these cars were now immoveable property, as forming part of the rolling stock of this railway.

Le vendeur qui a succombé sur la demande en revendication d'objets mobiliers, est-il ensuite recevable à former une demande en résolution de la vente des mêmes objets ? Non, suivant la Cour de Cassation, (1).

The annotator however brings strong arguments against that decision, and I do not determine this question of *res judicata*. I would hesitate, however, to say that it is not *res judicata* between the parties that these cars now form part of the freehold. The seizures were quashed on that only ground.

L'autorité de la chose jugée s'attache aux motifs d'un jugement quand ils ont été sanctionnés par le dispositif (2).

It might perhaps have been contended that the plaintiffs' action was nothing else but the action *Pauliana*, to set aside the deed of August, 1881, as made in fraud of creditors. Articles 1039 and 1040, however, would have been in their way, apart from the statute of 1880, passed for the very purpose of authorizing that deed. That is probably why they have not attempted to support their action, as one of that character.

I would dismiss the appeal.

Since I wrote down these reasons for my conclusion it has been suggested by my colleagues that, as the

(1) S. V. 37-1-42.
(2) S. V. 76-1-448 — 81-2-145 ; Bonnier, 2 Vol. 459 ; Demolombe, 7 Vol. des oblig. pár. 291 ; S. V. 39, 1, 119 ; Dalloz, 88-2-210.

deed puts upon the trustees the obligation to pay the running expenses of the road, they are liable for the appellants' claim. But I cannot adopt this conclusion.

I. I read the deed as stipulating that the trustees, after they come into possession, shall be bound to pay the expenses of the road incurred during their possession, but cannot see that they covenanted to pay the expenses incurred or expended by the company itself during the possession by the company.

2. Such a construction of the deed would put on the trustees all the debts incurred by the company, even those incurred prior to the deed of trust.

3. If this was the true construction, the statute of 1881 would have been altogether unnecessary, and I take that statute as a legislative interpretation that the bondholders' lien has priority over all other creditors whatever.

4. By this construction, the enactment which gives to the mortgage bond holders a first lien on the road and all its appurtenances is set at nought.

5. This construction has not been thought of, even by the appellants and is inconsistent with their declaration and particularly with their conclusions, as, were it to prevail, it would necessarily entail a direct condemnation against the trustees for the amount claimed, with execution, of course, against the railway itself and all its appurtenances, a condemnation which in this case would clearly be *ultra petita*.

6. Even if that was the true construction of the deed, the appellants' action should fail for want of privity of contract: as it is clear that a covenant between the company and the trustees that the trustees should pay the expenses incurred by the company would not give to the appellants a right of action against the trustees.

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GWYNNE J.—The decision in these cases must depend upon the construction to be put upon the terms and provisions of the trust indenture by way of mortgage, executed by the South Eastern Railway Company, under the authority of the Quebec Statutes, 43 and 44 Vic., ch. 49, and 44 and 45, Vic., ch. 43. By the former of these acts the company was authorized to issue certain bonds and, for the purpose of securing the payment of the same and interest thereon, to convey the railway, franchise and all property, rights and interests owned, possessed or enjoyed by it, and the tolls, income, profits, improvements and renewals thereof, and additions thereto, to trustees in trust for that purpose, and it was enacted that the trustees to whom such conveyance should be made should be designated by the shareholders at a meeting of the shareholders authorizing the issue of said bonds, and that the said conveyance should be made in such form as the shareholders at such meeting should direct, and that the company and the said trustees might therein, among other things, stipulate as to who should have possession, management and control of the said franchise and other property therein conveyed, and receive the tolls and income thereof, and how the same should be applied and disposed of, while such bonds should be outstanding, as well before as after default should be made in the payment thereof, or of any of the coupons thereto attached, and might make such other provisions therein, not contrary to law, as might be considered necessary or convenient for the purposes of such trust: and the trustees were by the act authorized, upon default being made in payment of the said bonds or coupons, to take possession of and run, operate, maintain, manage and control the said railway and other property conveyed to them as fully and effectually as the company might do the same;

and it was further enacted that the said conveyance should be to all intents valid and should create a first lien privilege and mortgage upon the said railway and other property thereby conveyed: and it was expressly declared that neither the said company, who were the proprietors of the road at the time of the passing of the said act, nor those contemplated to become proprietors under the act, namely the trustees, and, eventually, the bondholders, should have power to close or cease running any part of the said road. Under the authority of these acts the trust indenture therein referred to was executed by the company to certain trustees therein named, whereby, after recital of the issue of the bonds, authorised by the act, the company granted, bargained and sold to the trustees, the railway of the company as the same was then located and constructed, and as the same might thereafter be located and constructed, and all branches thereafter to be built, and all the lands, &c,, &c., then owned or that thereafter might be acquired by the company for the uses of the railway, together with the franchises of the company, and all rights secured to the company by its charter, and also all cars, locomotives, tenders, wood, ties, steel and iron rails, tools, machinery, supplies, and personal property of every description then owned by the company, or that might from time to time thereafter be acquired by the company for the purpose of operating and maintaining the said railway and transacting the business thereof, and also all the right, title and interest of the company in two certain railways, called the Newport and Richford railways and the Lake Champlain and St. Lawrence Junction railway, to have and to hold to the trustees upon the trusts thereinafter specified and, among such trusts, upon trust, that until default should be made in the payment of the said bonds, or

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of some portion of the interest thereon, and such default should continue for the space of 90 days, the company should be entitled to retain possession of all of the railway property, rights and interests thereby conveyed and to run, operate and manage the same, and to take and receive all and singular the tolls, receipts, income and profits of the same and the business thereof for their own use, benefit and advantage, in all respects as fully and absolutely as if the indenture had not been made; but that upon such default happening then the trustees should be entitled, and have the right, to take and receive immediate possession of the said railway, and all the property, rights, and interests by the said indenture conveyed, and to run, operate, and manage the same, and to take and receive all and singular the tolls, receipts, income and profits of the same and the business thereof, as fully and absolutely as the company might otherwise do, and use, pay out, and disburse said tolls, receipts, income and profits in the payment and settlement of all expenses of running, operating, managing, and maintaining the said railway and other property, rights and interests thereby conveyed, including all rents due for the use of any and all railways and property leased to the company, as specified in the leases thereof, or agreements in respect thereto, and all expenses and liabilities incurred by the trustees their successors and assigns in that behalf, and a reasonable compensation to them for their services: and also all expenses of renewing, repairing, and increasing the said railway and other property for the purpose of keeping the same in good condition for the transaction of the business thereof; and all taxes and assessments on said property thereby conveyed, and all legal claims thereon arising from the operating of said railway, including damages caused by accidents, and all other

charges, and the balance of said tolls, receipts, income and profits, after paying or providing for the payment of all and singular the expenses and payments aforesaid, to use, pay out and disburse semi-annually to the owners and holders of the bonds aforesaid, and the residue, after paying all such bonds to the company.

Now in the month of November, 1883, the plaintiff, Wallbridge recovered a judgment in the Superior Court of the Province of Quebec, against the South Eastern Railway Company for the sum of $7970.00 and interest for lumber and ties supplied to the company, for the necessary use and working of the railway, between the months of August, 1881, and September, 1883, and the plaintiffs, the Ontario Car and Foundry Company, in the month of July, 1884, recovered three several judgments against the railway company for the sum in the whole of $45,556.97, exclusive of interest for,—1. 200 railway platform cars delivered to the railway company in the month of February, 1883, for the necessary use and working of the railway. 2. for 50 coal cars delivered to the company in the month of May, 1883, for the like necessary use and working of the railway, and,—3. for 20 cattle cars delivered to the company in the month of July, 1883, for the like necessary use and working of the railway. On the 5th October, 1883, the trustees under the said trust indenture took possession of the railway and of all the above material and plant so as aforesaid supplied for the necessary use of the railway; and made use thereof under the provisions of the said act 43 and 44 Vict. ch. 49, and of the said trust indenture, in operating and working the said railway which, by the act, they were under the obligation to continue to run and operate, and the question is whether, for the purpose of obtaining satisfaction of the said judgments which still remain wholly unsatisfied, the parties who

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supplied the materials and plant above described, and which was all necessary for the working of the railway, have any remedy against the trustees personally, or against the receipts, income, and profits coming to their hands from the working of the railway and the use of the said material and plant.

That the bondholders, in whose interest and for whose benefit the trustees are operating, as they are by the act obliged to keep the railway in operation, have obtained the benefit of the plant and material in question there can be no doubt; and as deriving the benefit, it is not unreasonable that some provision for such a case should have been made in the trust indenture; it would certainly, I think, be but just and equitable that there should be, and the only question appears to me to be whether there has been. If the material and plant had not been provided by the company, the trustees, I apprehend there can be no doubt, would have taken possession much sooner than they did, and, upon taking possession, in order to operate the railway as they were obliged by the statute to do, in the interest of the bondholders, must needs have supplied themselves with the material and plant; and, in that case they must have been personally responsible, to whomsoever should supply it, for the price thereof: but the material and plant in question having been delivered to the railway company before the trustees took possession, although the latter, as trustees of the bondholders, derive all the benefit and could not continue to operate the railway without such material and plant they, cannot, I agree in thinking, be made personally responsible. It was argued, that the true construction of the trust indenture is that the company's possession of the railway, after the execution of the indenture prior to the railway being taken possession of by the trustees, was as agents merely of the

trustees, in whom the property was vested by the trust indenture, and that, therefore, the trustees should be held to be liable for material and plant, necessary to keep the railway in operation, provided for the benefit of the trustees by their duly authorised agents; but this contention cannot be entertained in face of the express provision in the trust indenture that until default the company should be at liberty to retain their possession of the railway, &c., &c., &c., for their own use, benefit, and advantage, as fully and absolutely as if the indenture had never been made. The statute, however, enacts that it is whatever the "conveyance," that is, the trust indenture, provides for, that shall become a first lien privilege and mortgage upon the railway and other property thereby conveyed. Now, the trust indenture in express terms provides for many things as being payable out of the income and receipts from the railway before anything shall be paid to the bondholders.

The trustees, on behalf of the bondholders, are by the statute bound to keep the railway in operation, consequently all claims and expenses incurred by the trustees in their operating the railway became a first charge upon the income and receipts coming to their hands, as a necessary incident upon the obligation imposed upon them to keep the railway in operation, without any express declaration in relation to such claims and expenses. However, the trust indenture apparently, *ex majori cautelâ*, does declare the trust purposes towards which the trustees shall apply the income and receipts coming to their hands, namely:—

1st. in payment of all expenses of running, operating, managing and maintaining the railway and other property vested in them by the trust indenture, including all rents due for the use of any railway leased to the company.

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2nd. In paying reasonable compensation to themselves for their services.

3rd. In payment of all expenses of renewing, repairing and increasing the railway and other property for the purpose of keeping the same in good condition for the transaction of business.

Now, these trust purposes so declared, seem to cover and include everything having relation to expenses and claims arising from the operating of the railway by the trustees. But the trust indenture provides further, that the trustees, out of the income coming to their hands from the railway, shall pay:

4th. "All taxes and assessments, and all legal claims on the property thereby conveyed, arising from the operating of the railway, including damages caused by accidents and all other charges."

All charges and claims of the nature comprised under this last head, which should arise or accrue during the period that the trustees should be operating the railway, had already been provided for in express terms; the question, therefore, appears to me to be resolved simply into this; is this provision to be construed also as wholly and solely relating to claims and charges arising while the railway is being operated by the trustees? To my mind, there appears to be a difficulty in so construing it, for, as already observed, the previous provisions in express terms provided for the application of the income by the trustees towards the payment of every one of the items enumerated under this 4th head, if they occurred while the railway was in the possession of and operated by the trustees; the implication, therefore, would seem to be that what is here provided for cannot be limited, at least, to matters occurring wholly during the period that the railway is so operated. Sufficient provision had already been made for the payment of all taxes accrued during the

possession of the railway by the trustees, as expenses necessarily incident to their running, operating, managing and maintaining the railway and other property in good working order and condition. Now, assuming taxes to have accrued due and payable before the trustees took possession, which still remained unpaid after they had taken possession, they surely would be justified under this provision of the trust indenture in paying out of the income coming to their hands all taxes which were over due before they took possession. Taxes, it may be said, stand on a peculiar footing—granted—but in this sentence in which this provision as to taxes is made, the other charges mentioned are connected by the copulative "and all legal claims," &c., &c., &c. Is there, then any reason why the trustees should not in like manner, under the language of this provision, be justified in paying and, if justified, liable to be compelled to pay, out of the income coming to their hands "all legal claims arising from the operating of the railway, including damages caused by accidents and all other charges," which had occurred in connection with the operating of the railway prior to their taking possession and which then still remained unpaid? As, for example, supposing that while the railway was worked by the company the wages and stipend of those engaged in working it had not been paid in full but that a portion had been suffered to fall into arrear, would not the trustees upon their taking possession and finding such wages and stipend to be in arrear, be justified under this provision in the deed, in paying such arrears by degrees out of the income and receipts coming to their hands? Again, supposing that an accident had occurred on the railway a day, a week or a month or more before the trustees took possession, which accident had caused damages to individuals the amount

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of which had not yet been ascertained, or that it had been ascertained but not yet paid, when the trustees took possession, would not the trustees be justified, under this provision in the trust indenture, in applying, and if justified, could they not be compelled to apply, some portion of the monies coming to their hands towards payment of such damages? And if they would be so justified and could be compelled so to do why should they not be equally justified in paying, and be equally liable to be compelled to pay, all other charges which, like those in the present case, are for the direct improvement and beneficial increase in the value of the property vested in the trustees, and absolutely necessary for the operating of the railway by them on their taking possession, although such charges accrued due and payable three months or more or it might be only a week or a day before the trustees should take possession?

The peculiar language of the trust indenture in defining the trust purposes to which the trustees are authorized, and directed to apply the income and receipts coming to their hands, present a great difficulty, as it appears to me, in limiting the authority and direction to matters accruing wholly while the railway is in the possession of the trustees, and being worked by them, but if the plaintiffs be entitled to relief in virtue of the provision of the trust indenture, under consideration, it would be by an equitable decree framed with due regard to the other necessary appropriations of the income, in accordance with the provisions of the trust indenture, a decree which could not be made in the present actions, which are not framed for that purpose, but are framed solely for the purpose of obtaining judgment against the trustees personally, which, as I have already said, I concur in thinking that the facts

and law do not warrant. I must concur, therefore, in dismissing the appeals.

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PATTERSON J.—I concur in dismissing these appeals on the grounds stated by my brother Taschereau. I also agree with the views expressed by my brother Gwynne whose opinion I have read, so far as they affect the present actions in which the trustees personally are charged.

Patterson J.

I am not prepared to express an opinion as to the trustees being justified, and being compellable in any other form of action to provide for claims such as those of these plaintiffs. By the terms of the mortgage deed, they are to hand over from time to time to the company all surplus income not required for the payment of the overdue bonds and coupons. Such surplus moneys, if any such should be forthcoming, would form a fund to which these plaintiffs could have recourse. But to construe the trusts as including among the specified charges debts incurred before the trustees took possession of the road, thus giving those debts priority over the bonds and coupons, would seem to be in effect abandoning the limit of $12,000 a mile or $2,000,000 in all, affixed by the statute to the borrowing powers accorded to the company, and so far impairing the security offered to purchasers of the bonds.

I should, therefore, require to consider maturely the suggestion that the income in the hands of the trustees was chargeable with debts of this class in any form of action, before venturing an opinion upon it.

Appeals dismissed with costs.

Solicitors for appellants: *Laflamme, Madore & Cross.*

Solicitor for respondent: *Jas. O'Halloran.*