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 \*April 18.  
 \*June 12.

THOMAS W. O'BRIEN AND H. M. } APPELLANTS;  
 HEMMING (DEFENDANTS)..... }

AND

E. C. ALLEN AND GEORGE M. } RESPONDENTS.  
 ALLEN (PLAINTIFFS)..... }

ON APPEAL FROM THE TERRITORIAL COURT OF THE  
 YUKON TERRITORY.

*Constitutional law—Administration of Yukon—Franchise over Dominion  
 lands—Tolls.*

The Executive Government of the Yukon Territory may lawfully  
 authorise the construction of a toll tramway or waggon road over  
 Dominion lands in the territory, and private persons using such  
 road cannot refuse to pay the tolls exacted under such authority.

APPEAL from a judgment of Mr. Justice Dugas in  
 a Territorial Court of the Yukon in favour of the  
 respondents.

In 1898 the executive government of the territory  
 granted to the defendants the right to construct a toll

\*PRESENT:—Sir Henry Strong C. J. and Taschereau, Gwynne,  
 Sedgewick and King JJ.

tramway or waggon road between certain points, which road when built passed largely through Dominion lands. The respondents, who were engaged in the business of carrying goods through the territory, were required to pay a toll of  $\frac{1}{2}$  cent per pound when using the appellants' tramway, and they brought an action for repayment of the sum so exacted, claiming the right to a free use of the road. Mr. Justice Dugas, before whom the action was tried, held that as the Department of the Interior, which has control over and management of Dominion lands, had not confirmed the franchise to the appellants, the latter had no right to exact tolls for the use of the lands in question. The appeal was from this decision.

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This appeal was taken *ex parte*, the plaintiffs filing no factum, and not being represented by counsel at the hearing.

*Aylesworth Q.C.* and *McGiverin* appeared for the appellants.

The judgment of the court was delivered by :

SEDGEWICK J.—By an instrument dated November 3rd, 1898, the executive government of the Yukon Territory purported to grant to the appellants the privilege of constructing a toll tramway or waggon road, or partly both, from the towns of Dawson and Klondike to the mouth of Bonanza Creek and up to the head of Carmack's Fork, and purporting to fix a tariff of charges for the carriage of passengers and freight. In pursuance of this authority the appellants constructed, either in whole or in part, the tramway, at the expense of over \$45,000, the road for the most part, if not altogether, going through Dominion lands.

On the 12th November, 1898, the respondents, who are publishers and proprietors of the Klondike Nugget,

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at Dawson, and carry on an express and carrying business as well, were engaged in carrying certain freight to Bonanza Creek, and found it necessary to use for that purpose the appellants' tramway, and were required to pay a charge or toll of  $\frac{1}{2}$  a cent per pound on such freight, amounting to the sum of \$1.25 on the whole. On the 18th November they brought this action for repayment of the amount alleged to have been exacted from them, claiming that they were lawfully using the roadway in question, and that the appellants had no right nor authority to levy the said toll or to make any charge against them for the carriage of freight along the trail, and in the alternative that, in any event, such charge or toll was excessive.

The case was tried before Mr. Justice Dugas, in January, 1899, and judgment was given in favour of the respondents, from which judgment this appeal is taken.

We are of opinion that it should be allowed. The Yukon Territory Act (1) gives to the Commissioner in Council the same powers to make ordinances for the government of the territory as were at that time possessed by the Lieutenant Governor and Legislature of the North-west Territories, which powers are set out in c. 22 of 54 & 55 Vict. sec. 6, and are substantially the same as are given to provincial legislatures by sec. 92 of the British North America Act. It has never been doubted that the right of building highways, and of operating them, whether under the direct authority of the Government or by means of individuals, companies or municipalities, is wholly within the purview of the provincial legislatures, and it follows that whether they be free public highways or subject to a toll authorised by legislative enactment, they are

(1) 61 Vict. c. 6 (D).

none the less within the provincial power. In the present case the privilege granted the respondents was a matter purely territorial, and so the learned judge below seems to have held, but he gave judgment as he did because he was of opinion that inasmuch as the lands through which the roadway was built were Dominion lands, and the action of the Commissioner in Council had not been confirmed by the Department of the Interior, which department has under its control the management of Dominion lands, the appellants had no right of entry upon such lands, and that, therefore, the toll exacted was an illegal one. It seems to us that this view is an erroneous one. The question of the ownership of the soil is one with which the respondents have nothing whatever to do. Only the Crown, the owners of the roadway, could raise it, and the appellants being in possession and working their tramway in the same way as an ordinary railway company does, must be deemed to be rightfully in possession as against any one who can claim no title at all. The appeal should, therefore, be allowed with costs, and the action dismissed with costs.

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*Appeal allowed with costs.*

Solicitors for the appellants : *Tabor & Hulme.*

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