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UNIVERSITY OF LONDON  
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INSTITUTE OF ADVANCED  
LEGAL STUDIES

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# In the Privy Council.

No. 21 of 1896.

## On Appeal from Her Majesty's Court of Queen's Bench in Equity for Manitoba.

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BETWEEN

FRANCIS DOUGLAS GREY and SIR JOHN ROBERT  
HERON MAXWELL - - - - - *Appellants,*

AND

THE MANITOBA AND NORTH WESTERN RAILWAY  
COMPANY OF CANADA - - - - - *Respondents.*

APPELLANTS' CASE.

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### CASE FOR THE APPELLANTS.

1. This is an Appeal from a Judgment of the full Court of the Court of Queen's Bench in Equity for Manitoba, pronounced on the 10th February, 1896, whereby the said full Court varied the order made by Mr. Justice Killam on the 17th day of April, 1895, in a suit brought by the Appellants against the Respondents in the Court of Queen's Bench in Equity for Manitoba.

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2. The Respondents are a Railway Company, incorporated under various Acts of the Legislature of Manitoba in the Dominion of Canada, and of the Parliament of Canada, having their head office at Portage la Prairie, in the province of Manitoba, and they are the owners of and operate a line of railway running from Portage la Prairie to Yorkton, in the North-West Territories, a distance of 223 miles, together with two branches, known as the Shell River branch and the Saskatchewan and Western branch, the latter of which is leased from the Saskatchewan and Western Railway Company.

Evidence of Baker. Record, p. 31.

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3. The Appellants are the Mortgagees of the first 180 miles, or the first division of the Respondent Company's railway and telegraph, extending from Portage la Prairie aforesaid to Langenburg in the North-West Territories, and of the revenues tolls and profits arising therefrom, in trust for the holders of bonds to the amount of £540,000, issued by the Respondent Company, and secured on the said first division.

4. The questions to be determined on this Appeal are as follows, namely :

- (i) Whether the Appellants as mortgagees are entitled to have a sale of the whole of the first division of the Respondent Company's railway and telegraph.

- (ii) Whether if the Appellants are not entitled to have a sale of the whole of the first division they are entitled to have a sale of that portion of the first division (being about 170½ miles) which is wholly situated within the Province of Manitoba.
- (iii) Whether the mortgage of the first division of the Respondent Company's railway and telegraph to the Appellants is subject to the payment in priority of the working expenses of the entire line of railway worked and owned by the Respondents (inclusive of the first division) and of all rates, taxes, assessments and other government charges charged thereon, or only of the working expenses of the said first division and the rates taxes, assessments and other government charges charged thereon.

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5. The Respondent Company was originally incorporated by a Special Act of the Legislature of Manitoba of 1880 (43 Vic. c. 35) under the name of The Westbourne and North Western Railway Company, and power was given to them to construct a railway from a point on the Canadian Pacific Railway between Poplar Point and the western boundary of the province of Manitoba to the northern or western boundary of the said province.

6. By a Special Act of the Parliament of Canada of 1882 (45 Vic. c. 80, section 1) the Respondent Company's railway (the name of which had been changed to the Portage Westbourne and North Western Railway Company) was declared to be a work for the general advantage of Canada, and (section 3) the Respondent Company was authorised to extend their railway in a north-westerly direction to a point near Prince Albert on the north branch of the Saskatchewan River, in the North West Territories. This Act also contained a section (section 10) authorising the Directors of the Respondent Company under certain conditions to issue bonds secured upon all or any part of the property of the Company.

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7. By a special Act of the Parliament of Canada of 1883 (46 Vic., c. 68) (section 1) the name of the Respondent Company was changed to the Manitoba and North Western Railway Company of Canada, and (section 5) power was also given to the directors of the Respondent Company to issue bonds upon like conditions substantially to those contained in section 10 of the Special Act of 1882.

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8. The Respondent Company acting under the powers conferred on them by the said Acts of 1882 and 1883 issued certain bonds secured by two deeds, dated respectively the 1st of December, 1883, and the 15th of May, 1884, but in the year 1886 it was decided to cancel these bonds, and the deeds securing the same, and to issue bonds to the total amount of £540,000, to be secured by a mortgage upon the first 180 miles, or the first division of the respondent Company's railway and telegraph, and also by a mortgage upon certain land grants in the Dominion of Canada, which is not material for the purposes of the decision of this appeal.

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9. At the time the issue of such bonds was decided upon the Respondent Company had constructed 130 miles of their railway (namely) from Portage la Prairie, to the town of Solsgrith, in the province of Manitoba, and was in course

Recitals in Mortgage deed of 16th April, 1886. Record, p. p. 66 & 67.

Deed of additional security. Record, p. 85.

Evidence of Baker. Record, p. 81.

of constructing a further consecutive 50 miles, it being intended and declared by the Respondent Company that such 130 miles and 50 miles should form the first division of their railway.

10 10. The respondent Company accordingly, on or about the 16th of April, 1886, duly and lawfully issued 1st division 1st mortgage bonds of £100 each to the total amount of £540,000, repayable on the 1st of December, 1933, and bearing interest at the rate of 5 per cent. per annum until the 1st of December, 1890, and 6 per cent. per annum from such date until the 1st of December, 1933, such interest being payable half-yearly on the 1st of June and the 1st of December in each year. A form of such bonds is recited in the deed of mortgage and trust of the 16th of April, 1886, hereinafter mentioned which is set out in full in the Record.

Mortgage Deed of 16th April, 1886. Record, p. 65.

20 11. All these bonds were secured by the said deed of mortgage and trust dated the 16th of April, 1886 (hereinafter referred to as the said trust deed) which was made between the Respondent Company of the 1st part the Honorable George Granville Campbell, commonly called Lord George Campbell, Henry William Cobb, and the Appellant Francis Douglas Grey, of the 2nd part, and the Appellants of the 3rd part, whereby the parties thereto of the 2nd part and the Respondent Company granted and conveyed to the Appellants thereafter called the Trustees their heirs and assigns as joint-tenants the 1st division of the Respondent Company's railway and telegraph in the words and figures following, that is to say; "All and "singular the first division or portion of the railway and electric telegraph of "the Company extending from the point of junction with the Canadian Pacific "Railway at Portage la Prairie in the province of Manitoba to a point "distant 180 miles therefrom measured along the track of the said railway "as the same is now located and constructed or in course of construction or as "the same may hereafter be changed located and constructed together with all "and singular rights of way road beds depot grounds and lands used for the "purpose of construction or running of the said first division or portion "of the said railway and telegraph and all tracks bridges viaducts "culverts fences depots stations station houses engine houses car "houses freight houses wood houses machine shops and all other shops "and all other structures and buildings whatsoever now held and acquired or "hereafter to be in anywise held or acquired by the Company its successors "or assigns for use in the construction maintenance and operation of and for "use in connection with the running of such first division or portion of the said "railway and telegraph or of any part thereof now owned by it or hereafter "constructed or in anywise acquired, excepting however from such grant "bargain and sale the municipal bonuses and the land other than aforesaid "granted or to be granted by way of bonus or gift to the Company by the "Government or by any corporation" and after a conveyance of certain rolling stock and equipment, the recital of which is not material for the purpose of the decision of this case, the said conveyance proceeds as follows: "And also all "revenues freights tolls income rents issues profits and sums of money "arising or to arise from the use of the said first division or portion of the said "railway or telegraph or of the property hereby conveyed or any part thereof "subject nevertheless to the working expenses of the said railway and telegraph "and to all rates taxes and assessments and other Government charges. And

Record, p. 65.

Record, p. 71.

Record, p. 72.

“ also all rights privileges powers immunities and exemptions and all corporate  
 “ and other franchises now owned held and enjoyed by the Company or here-  
 “ after to be held and enjoyed or conferred upon it its successors or assigns in  
 “ any way connected with or relating to the said division or portion of the said  
 “ railway or telegraph constructed and to be constructed and the reversion and  
 “ reversions remainder and remainders thereof.”

Record, p. 72.

12. It was also by the said trust deed of the 16th of April, 1886, agreed  
 and declared that the trustees, and the survivors, and survivor of them, and  
 their successors in the Trust should hold all the premises thereby conveyed, real  
 as well as personal, in trust, nevertheless, to and for the uses and purposes, and  
 with the powers and authority, and upon the conditions thereafter mentioned  
 and set forth in the words following, that is to say :

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“ Article 1. Until default shall be made by the Company in the payment  
 “ of the principal or interest of the said bonds hereby secured or some one or  
 “ more of them or until default shall be made by the Company in respect of  
 “ something herein required to be done or kept by it the Company shall be  
 “ suffered and permitted to possess manage and enjoy the said first division or  
 “ portion of the said railway and telegraph expressed to be conveyed hereby  
 “ together with the equipments and appurtenances thereof and the franchises  
 “ appertaining thereto and to take and use the rents incomes profits tolls and  
 “ issues thereof in the same manner and with the same effect as if this deed  
 “ had not been made but subject or to be subject nevertheless to the lien of  
 “ these presents.”

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Record, p. 73.

“ Article 2. In case default shall be made in payment of any interest to  
 “ accrue on any of the aforesaid bonds to be issued by the Company when such  
 “ interest shall become payable according to the tenor of such bond or the  
 “ terms of any coupon thereto annexed and such default shall continue for the  
 “ period of three months or in case default shall be made in  
 “ the observance or performance of any other matter or thing in  
 “ these presents mentioned and agreed or required to be observed  
 “ and performed by the Company and such default shall continue  
 “ for the period of three months then and from thenceforth and in  
 “ either of such cases it shall be lawful for the trustees personally or by their  
 “ attorneys or agents to enter into and upon all and singular the said first  
 “ division or portion of the said railway and telegraph and the premises hereby  
 “ conveyed or intended so to be (acquired or constructed and to be acquired or  
 “ constructed) or any part thereof and from thenceforth to have hold possess and  
 “ use the said railway and premises and each and every part and parcel thereof  
 “ then subject to the lien of these presents with full power to operate and  
 “ conduct the business of the said first division or portion of the said railway  
 “ and telegraph by their superintendents managers and servants attorneys or  
 “ agents either in conjunction with the persons or companies operating and  
 “ conducting the other portions of the said railway or otherwise and to make  
 “ from time to time all repairs and replacements and such useful alterations  
 “ additions and improvements thereto as may seem to them judicious and to  
 “ collect and receive all tolls fares freights incomes rents issues and profits  
 “ of the same and of every part thereof and after deducting the expenses of

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10 " operating the said division or portion of the said railway and telegraph and Record p. 73.  
 " conducting the business thereof and of all the said repairs replacements  
 " alterations additions and improvements and all payments which may be  
 " made or may be due for taxes assessments charges or liens prior to the  
 " lien of these presents upon the said premises or any part thereof as well as  
 " just compensation for their own services and for the services of such  
 " attorneys and counsel and all other agents and persons as shall have been  
 " by them employed the trustees shall apply the money arising from such  
 " collections and receipts as aforesaid to the payment of interest on the said  
 " bonds in the order in which such interest shall have become and shall  
 " become due rateably to the persons entitled to such interest and if after  
 " paying in full the interest which shall have accrued on the said bonds a  
 " surplus of the moneys arising as aforesaid shall remain and the principal  
 " of said bonds shall not be due and such surplus or any part thereof shall  
 " not be required in the judgment of the trustees for the protection of the  
 " property or to provide for the instalment of interest next thereafter to fall  
 " due the same shall be paid over to the Company but in case the principal of  
 " said bonds or any of them shall have become due the surplus arising as  
 " aforesaid shall be reserved to be applied to the payment of said bonds upon  
 20 " a sale of the said railway and premises as hereinafter provided.

30 " Article 3. In case default shall be made in the payment of interest on Record p. 73.  
 " the said bonds or any of them as aforesaid and shall continue as aforesaid for  
 " the period of twelve months thereafter or in case default shall be made in the  
 " payment of the principal of the said bonds or any of them or any part thereof  
 " it shall be lawful for the trustees after such entry as aforesaid or after other  
 " entry or without entry personally or by their attorneys or agents to sell and  
 " dispose of the said first division or portion of the said railway and telegraph  
 " and of all and singular the property rights and franchises hereinbefore  
 " expressed to be conveyed and which shall be then subject to the lien of  
 40 " these presents either separately or in conjunction with the owner or owners  
 " for the time being of the remaining portions of the said line at public auction  
 " in the City of Winnipeg in the Province of Manitoba or elsewhere in North  
 " America or Europe and at such time as the trustees shall appoint having  
 " first given notice of the time and place of such sale by advertisement  
 " published not less than three times a week for six successive weeks in one or  
 " more daily newspapers in the City of Winnipeg and in one or more  
 " daily newspapers in the City of London England and the City of  
 " Toronto and after such notice it shall be lawful for the trustees to make  
 " such sale or to adjourn such sale from time to time in their discretion  
 " and if so adjourning to make the same without further notice of the time  
 " and place to which the same shall be so adjourned and if the premises shall  
 " not be sold by public sale as aforesaid to sell the same by private contract  
 " with power to the trustees to make any such sale as aforesaid subject to such  
 " conditions as the trustees think fit and to vary any contract for sale and to  
 " buy in at any public sale and to fix any reserve price and to rescind any  
 " contract for sale and to resell without being answerable for any loss occasioned  
 " thereby and to make and deliver to the purchaser or purchasers of the said

Record p. 74.

" railway and premises or any part thereof good and sufficient deed or deeds  
 " in the law for the same in fee simple which sale made as aforesaid shall be  
 " a perpetual bar both in law and equity against the Company and its assigns  
 " and all other persons claiming the said premises or any part or parcel thereof  
 " by from through or under the Company or its assigns and the title of the  
 " purchaser shall not be impeachable upon the ground that no case had arisen  
 " to authorise the sale or that the power was otherwise improperly or  
 " irregularly exercised and after deducting from the proceeds of such sale just  
 " allowances for all expenses thereof including attorneys' and counsels' fees and  
 " all other expenses advances or liabilities which may have been made or incurred  
 " by the trustees in operating or maintaining the said railway and premises  
 " or in managing the business thereof and all payments by them made for taxes  
 " or assessments and for charges and liens prior to the lien of these presents  
 " on the said premises or any part thereof as well as a reasonable compensation  
 " for their own services in addition to the amount of £100 per annum for each  
 " Trustee hereinafter mentioned it shall be lawful for the Trustees and it  
 " shall be their duty to apply the residue of the moneys arising from such sale  
 " to the payment of the principal and accrued and unpaid interest on all the  
 " said bonds which shall then be outstanding whether the same shall or shall  
 " not have arrived at maturity without discrimination or preference as between  
 " principal and accrued and unpaid interest or as between the holders of said  
 " bonds or of any coupons issued therewith but equally and rateably to all such  
 " bond and coupon holders and if after the payment and satisfaction of said  
 " bonds principal and interest a surplus of the said proceeds shall remain to  
 " pay such surplus to the Company or its assigns and it is hereby declared and  
 " agreed that the receipt of the Trustees shall be a sufficient discharge to the  
 " purchaser or purchasers at such sale for his or their purchase money and that  
 " after payment of such purchase money and having such receipt such  
 " purchaser or purchasers shall not be obliged to inquire into the application of  
 " such purchase money upon or for the trusts and purposes of these presents,  
 " or be in any manner whatsoever answerable for any loss misapplication or  
 " non-application of such purchase money or of any part thereof and if any of  
 " the premises herein comprised shall after the power of sale hereinafter  
 " contained shall have arisen remain unsold it shall be lawful for the Trustees  
 " to hold the premises and exercise all the powers and authorities in the  
 " preceding article contained or to let the premises for such term and in such  
 " manner as shall in their or his discretion seem fit and they shall reserve the  
 " net monies rents and profits to arise thereby to be applied to the payment of  
 " the said bonds upon a sale of the said railway and premises."

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Record, p. 76.

13. It was also by the said trust deed of the 16th of April, 1886, agreed  
 and declared (Article 5) that in case default should be made in the payment of  
 any half-yearly instalment of interest on any of the said bonds when interest  
 should become payable according to the tenor of the said bonds or of any coupon  
 thereto annexed, and such instalment of interest should remain unpaid and in  
 arrear for a period of twelve months after the same should have become  
 payable as aforesaid and been demanded then and from thenceforth, the

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principal sum of each and every of the bonds thereby secured should at the option of the trustees become and be immediately due and payable notwithstanding the time limited in the said bonds for the payment thereof might not then have elapsed (Article 6), that the trustees should also have power if and when they should be in possession of the said division or portion of the said railway and telegraph or previous to a sale thereof by them out of the assets in their hands for the time being, to expend such a sum or sums of money upon the residue of the Company's line, or to enter into such Agreement in relation to the working thereof as might in their or his discretion be necessary or advisable in order to promote the traffic and to increase the revenues and income of the division or portion of the said railway and telegraph comprised in the security and for the purpose of ascertaining the proportion of the revenues and income derived from the through traffic of the said entire line and telegraph which is referable to (and the proportion of the general expenses of the said entire line and telegraph which ought to be borne by) the division or portion thereof comprised in the security to submit the same to arbitration and to arrange with the Company or other the person or persons interested therein a proper system of division by which such proportion might be ascertained. (Article 15), that the office of the Clydesdale Bank Limited, 30 Lombard Street, London, should be the place of payment of the interest coupons and the principal of the said bonds unless and until a change in the place of payment thereof should be made, of which due notice should be given by advertisement as therein mentioned and the respondent Company further thereby (Article 18) covenanted and agreed to and with the trustees and their successors in the trust created thereby, that the Company would duly pay and discharge the interest and principal of the said bonds in accordance with the tenor thereof and would for that purpose in each and every year ensuing the date thereof, faithfully use and apply the net earnings and income to be from time to time derived from the said division or portion of the said railway and telegraph, or from any part thereof, after discharging its obligations upon or with respect to prior liens thereon, or so much of such net earnings and income as might be necessary for that purpose to the payment of the same as and when the same should become due, until all the said bonds should be fully paid and satisfied.

14. Shortly after the said trust deed of the 16th of April 1886 was executed a further Special Act, (49 Vic. c. 75) relating to the Respondent Company was passed by the Parliament of Canada, section 4 whereof is as follows, (namely):

“ And whereas the Company has in pursuance of its powers in that behalf heretofore made and issued certain first mortgage bonds secured by a mortgage bearing date the 1st day of December 1883 on the whole of its line of railways, which mortgage was duly deposited in the office of the Secretary of State, so soon as all such bonds so issued have been surrendered and cancelled the bonds secured by a mortgage on the first division of the railway, being 180 miles thereof, commencing at Portage la Prairie, which mortgage, bearing date the 16th day of April 1886, has been duly executed and is deposited in the office of the Secretary of State, shall be hereby ratified and confirmed, and such

Record, p. 76.

Record, p. 77.

Record, p. 81.

Record, p. 82.

“ bonds to the amount of £3,000 sterling per mile of railway, shall thereupon  
“ be the first lien and charge on such first division of the railway comprising  
“ 180 miles as aforesaid, as provided by the said mortgage deed.”

Evidence of  
Baker.  
Record, p.p. 31.  
et seq.

15. The Respondent Company, has, since the execution of the said trust deed of the 16th of April, 1886, completed the additional 50 miles of railroad to Langenburg, in the North West Territories, making with the 130 miles completed on the 16th of April, 1886, the first division of the Respondent Company's railway, the whole of which is operated and worked by the Respondent Company.

Admission of  
facts by Respon-  
dents,  
Record, p. 29.

16. Interest on the said bonds was paid by the Respondent Company down to, and including the 1st of December, 1892, but the interest which fell due upon the 1st of June, 1893, and subsequent dates down to the present time, has not been paid, and the Respondent Company has consequently made default in the payment of the same, within the meaning of the said trust deed of the 16th of April, 1886, and the principal of the bonds has accordingly become payable according to Article 5 thereof.

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Bill of com-  
plaint. Clause 19.  
Record, p. 12.

17. After the lapse of three months from the first of the said defaults on the 1st of June, 1893, the appellants demanded of the Respondent Company delivery of possession of the said first division and premises conveyed to them in accordance with the terms of the said trust deed of the 16th of April, 1886, but the Respondent Company refused to deliver possession.

Bill of com-  
plaint. Clause 21.  
Record, p. 12.

18. The Respondent Company further denied the right of the Appellants to make a sale of the said first division, and in consequence of such denial, and of the antagonistic position taken up by the Respondent Company, and of other matters appearing in the Bill, the Appellants were compelled to take legal proceedings on behalf of the bond holders for whom they are trustees to enforce their security and execute their trusts and powers.

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19. The Court of Queen's Bench in Equity for Manitoba has the same equitable jurisdiction over persons within its personal jurisdiction with respect to land situated without its territorial jurisdiction, as is exercised by the Chancery Division of the High Court of Justice in England, and can by the exercise of such personal jurisdiction enforce a sale of and the execution of trusts affecting land situated without its territorial jurisdiction in the same manner as the said Chancery Division.

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20. The Appellants contend that the first division of the Respondent Company's railway is a section of a railway capable of being sold under the laws with respect to railways in force in the Dominion of Canada, and is a section within the meaning of Section 278 of the Dominion of Canada Railway Act (51 Vic., c. 9) and that it is competent for the Court of Queen's Bench in Equity for Manitoba as a Court of Equity to decree a sale of the first division in accordance with the terms of the trust deed of the 16th of April, 1886, notwithstanding the fact that 9½ miles of such first division are situated outside the Province of Manitoba.

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21. The Respondent Company adduced no evidence to show that a sale of the said first division would be contrary to the law in force in the North-West Territories, and the Appellants therefore also contend that in the absence of any such evidence the Court in Manitoba should have decreed a sale of the



said first division, relying on the Court in the North-West Territories to carry out and give effect to such a decree as a matter of comity if and so far as it might be necessary so to do.

22. In the alternative the Appellants contend that if it is not competent for the Court in Manitoba to decree a sale of the whole of the said first division the 170½ miles, or thereabouts, of the same which are wholly situated within the province of Manitoba are a section of a railway capable of being sold, and that it is competent for the Court in Manitoba to decree a sale of the same.

10 23. The Appellants further contend that upon the true construction of the special Acts of 1882, 1883 and 1886 relating to the Respondent Company, and of the trust deed of the 16th of April, 1885, the mortgage to them of the first division of the railway is only subject to the payment in priority of the working expenses of such division, and all taxes, rates, assessments and other Government charges charged thereon, and that the said first division can and ought to be sold free from any liability to maintain the other portions of the Respondent Company's railway.

20 24. On the 8th of June, 1893, a suit was commenced in the Court of Queen's Bench in Equity for Manitoba by Andrew Allan and others against the Respondent Company, praying for the appointment of a receiver of the revenues, rents, issues and profits of the Respondent Company, and for other relief, and by an order dated the 8th June, 1893, H. Montague Allan, one of the Plaintiffs in the said suit, was appointed receiver of the entire undertaking and assets of the Respondent Company until the hearing or other final disposition of the case. Answer, Clause 18. Record, p. 17.

25. By an Order of the Master, dated the 21st of July, 1893, the Appellants were made parties to the suit of Allan v. The Manitoba and North-Western Railway Company.

30 26. The Appellants accordingly on the 1st of November, 1893, presented a petition to the Court praying that leave might be granted to them to take proceedings for enforcing their rights to enter and take possession of the said first division of the Respondent Company's railway, for the appointment of a manager and receiver, and for a foreclosure of the premises mortgaged to them, and for other relief. This petition was heard before the Full Court on the 9th of June, 1894, and leave was then given to the Appellants to take proceedings for the appointment of a receiver of the revenues, tolls, and profits of the first division of the Respondent Company's railway, and for a sale of the property comprised in their security. Answer, Clause 21. Record, p. 20.

40 27. On the 3rd of July, 1894, in accordance with the leave granted to them by the Full Court, the Appellants filed their bill of complaint against the Respondent Company in the suit now on appeal in the Court of Queen's Bench in Equity for Manitoba, and thereby after stating the facts substantially as set forth above prayed (among other things) that all the property described in and included under the said trust deed of the 16th of April, 1886, might be sold under the direction of the Court, and that the Appellants might have leave to bid at such sale, that a receiver might be appointed of the revenues, tolls, and profits of the first division of the Respon- Record, p. 3.

dent Company's railway, and that the same might be applied in payment of the amount secured by the bonds, and that they might have such further and other relief as to the Court should seem meet, and as should not interfere with the possession of the receiver in the suit of Allan v. The Manitoba and North Western Railway Company.

28. On the 3rd of July, 1894, notice of motion for the 11th of July, 1894, was made and filed in the said Court on behalf of the appellants for an order appointing a receiver of the revenues, tolls, and profits of the said first division. Affidavits were filed in support of and in opposition to the said motion.

29. On the 18th of July, 1894, the said motion was heard before Mr. Justice Dubuc, and on the 23rd of July, 1894, judgment was given on the motion appointing a receiver of the revenues, tolls, and profits of the 1st division of 180 miles of the Respondent Company's railway, such receiver to apply the said revenues, tolls, and profits in accordance with the terms of the trust deed of the 16th of April, 1886, except in so far as such trust deed directed payment of any of such moneys to the appellants, such moneys (if any) to be paid into Court to the credit of the cause.

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Record, p.p. 14.  
et seq.

30. On the 3rd of August, 1894, the respondent Company filed its answer to the appellants bill of complaint, and thereby in effect denied the right of the appellants to have a receiver appointed or a sale decreed of the said first division of the railway, and alleged that the mortgage to the Appellants of the said first division was subject to the payment in priority of the working expenses of the entire railway and telegraph operated by the Respondent Company and of all taxes, rates, and assessments and other Government charges charged thereon. The answer further submitted that H. Montagu Allen, the receiver appointed as above mentioned in the suit of Allan v. The Manitoba and North Western Railway Company, the bondholders for whom the Appellants are trustees and certain alleged holders of bonds secured upon another branch of the respondent Company's railway known as the Shell River branch ought all to have been made parties to the suit.

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Record, p. 16.

Record, p.p. 26-7.

Record, p. 30.

31. On the 5th of January, 1895, the Appellants joined issue with the Respondent Company on its answer.

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Record, p. 30.

32. On the 1st of February, 1895, the trial of the suit was held before Mr. Justice Killam. Oral evidence was adduced on behalf of the Respondent Company, but the Appellants did not adduce any such evidence.

Record, p. 35.

33. On the 17th of April, 1895, Mr. Justice Killam pronounced judgment on the trial of the suit, and thereby continued the appointment of the receiver of the first division of the railway, and directed that all necessary enquiries should be made accounts taken, costs taxed, and proceedings had for redemption or sale of the property comprised in the said trust deed of the 16th of April, 1886, and gave the Appellants their costs of the suit. A print of the judgment and the reasons for the same are set out in full in the record.

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Record, p. 35.

Record, p. 42.

Record, p. 39.

34. On the 14th of June, 1895, the Respondent Company gave notice to the Appellants that they had set down the suit for argument before the full Court

by way of appeal from the judgment of Mr. Justice Killam on the grounds set out in the præcipe setting down the said appeal. Record, p. 37

35. On the 12th of July, 1895, the judgment of Mr. Justice Killam was reheard by way of appeal before the full Court of the Court of Queen's Bench in Equity for Manitoba consisting of Chief Justice Taylor, Mr. Justice Bain, and Mr. Justice Dubuc.

36. On the 10th of February, 1896, the full Court pronounced judgment. Chief Justice Taylor and Mr. Justice Bain were of opinion that the 180 miles, or first division of the Respondent Company's Railway, was a section within the meaning of section 278 of the Dominion of Canada Railway Act, 1888, but that the Court had no jurisdiction to decree a sale of that portion of the first division of the Respondent Company's railway situated outside the province of Manitoba, and that the Appellants were not entitled to have a sale decreed of all or any part of the said first division, in so far as the same consisted of real property. They were also of opinion that the mortgage to the Appellants of the said first division was subject to the payment in priority to such mortgage of the working expenses of the entire railway, but they did not see fit to declare the rights of any parties in respect of such priorities after any sale of the said first division, and they directed that there should be no costs up to the hearing of the Appeal, but that the Respondent Company should have their costs of the Appeal. Save as aforesaid they affirmed the judgment of Mr. Justice Killam. Mr. Justice Dubuc concurred. A print of the judgment and of the reasons of Chief Justice Taylor and Mr. Justice Bain for the judgment are set out in full in the record. Record, p. 39.  
Record, p.p. 52.  
et seq.

37. On the 11th of March, by an order made by Mr. Justice Killam leave was given to the Appellants to appeal from the first three paragraphs of the Order of the 10th of February, 1896, to Her Majesty in Council and by an order of the 26th of March 1896 it was by consent ordered that the said Appeal to Her Majesty in Council should be admitted, and that the Appellants should be at liberty to prosecute the same. Record, p. 41.  
Record, p. 41.

38. The Appellants humbly submit that the judgment of the full Court of the Court of Queens Bench in Equity for Manitoba should be reversed for the following amongst other Record, p. 39.

## REASONS.

1. Because the 180 miles of railway forming the first division of the Respondent Company's railway is, under the laws in force in the Dominion of Canada, capable of being sold by the Court in Manitoba at the instance of the Appellants as mortgagees in trust.
2. Because the fact that  $9\frac{1}{2}$  miles of such 180 miles is without the province of Manitoba is no bar to the right of the Appellants in the circumstances above set forth to have a sale decreed by the Court of Queen's Bench in Equity for Manitoba, inasmuch as there is a contract between the

Appellants and the Respondent Company, both of whom are subject to the jurisdiction of the said Court, and the said Court by acting as a Court of Equity on the persons or corporations within its jurisdiction can enforce a sale of the whole of the said first division.

3. Because even if the Court in Manitoba has no power to decree a sale of the whole 180 miles of the said first division, the said Court has power to decree a sale of the 170½ miles or thereabouts of the same, situated wholly within its territorial jurisdiction, and the 170½ miles are under the circumstances of this case a section proper to be sold. 10
4. Because upon the true construction of the trust deed of 16th of April, 1886, and of the Special Acts relating to the Respondent Company's railway, and particularly upon the true construction of section 4 of the Special Act of 1886, the mortgage to the Appellants is only subject to a prior charge of the working expenses of the first division of the Respondent Company's railway, and of all rates, taxes, assessments, and to the Government charges charged thereon.
5. Because if the said first division is ordered to be sold by the Court, any other construction than the above of the said trust deed and Special Acts would be to render the said first division practically unsaleable, burdened with the upkeep of the other portions of the Respondent Company's railway, and of any extensions of the same under the present powers of the Respondent Company. 20

EDWARD BLAKE.

EDWARD CLARKE. 30

A. E. BALFOUR.



**In the Privy Council.**

*On Appeal from Her Majesty's Court of  
Queen's Bench in Equity for Manitoba.*

BETWEEN

FRANCIS DOUGLAS GREY and SIR  
JOHN ROBERT HERON MAXWELL,  
*Appellants,*

AND

THE MANITOBA AND NORTH-  
WESTERN RAILWAY COMPANY  
OF CANADA - - *Respondents.*

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Case for the Appellants.

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*Appellants' Solicitors.*