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UNIVERSITY OF LONDON  
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INSTITUTE OF ADVANCE  
LEGAL STUDIES

29434

In the Privy Council.

No. 21 of 1896.

ON APPEAL FROM HER MAJESTY'S COURT OF  
QUEEN'S BENCH FOR MANITOBA.

Between GREY AND ANOTHER - - - - - Appellants,

AND

THE MANITOBA & NORTH WESTERN RAIL-  
WAY COMPANY OF CANADA - - - Respondents.

**Respondents' Case.**

1. This is an appeal from a Decree of the full Court of Queen's Bench for the Province of Manitoba, pronounced on the 10th day of February 1896. Rec. p. 39.

2. By the Decree in appeal the full Court reversed a Decree pronounced by Mr. Justice Killam on the 17th day of April 1895, in so far as it directs a sale of a part of the Respondent Company's railway other than the personal property, and declared that the mortgage in question in this Action, which embraces only the part of the railway and telegraph directed to be sold, is subject to the payment in priority to it of the working expenses of the Company's entire line of railway and telegraph. Rec. p. 35.

3. The following facts adduced in evidence, and appearing from the exhibits put in at the trial and the relevant Statutes, are material.

4. The Respondent is a railway company originally incorporated in 1880 by an Act of the Province of Manitoba (43 Vic. cap. 35 Man.), as "The Westbourne and North Western Railway Company." 43 Vic. c. 35  
(Man.), 1880.

5. This Act was amended in 1881 by an Act of the Province (44 Vic. cap. 41 Man.) whereby, *inter alia*, the name of the Company was changed to "The Portage Westbourne and North Western Railway Company." 44 Vic. c. 41  
(Man.), 1881.

6. Under these Acts the Railway Company had power to construct and operate a line of railway and electric telegraph from Portage la Prairie in the Province of Manitoba to the northern and western boundary of the Province, and to build and operate specified branch lines within the Province of Manitoba.

RESPONDENTS' CASE.

45 Vic. c. 80  
(Canada),  
1882.

B. N. A. Act,  
s. 92, ss. 10.

7. In the year 1882, by an Act of the Parliament of Canada (45 Vic. cap. 80, Can.), the Respondents' Railway was declared to be a work for the general advantage of Canada, becoming thereby, by sub-section 10 of section 92 of the British North America Act, 1867, a Dominion Railway, subject to the jurisdiction of the Dominion Parliament.

45 Vic. c. 80  
(Canada.)

8. It appears from the Preamble to this Act that the Railway Company had then about completed 35 miles of its road, all within the Province of Manitoba, and that it was the desire of the Company to extend the Railway into the North-West Territories.

9. By Section 3 of this Act the Railway Company was given power and authority to extend its line in a north-westerly direction to a point at or near Prince Albert, in the North-West Territories, on the north branch of the Saskatchewan River, a distance of about 450 miles from Portage la Prairie, and by Section 10 it was authorized to issue bonds for the purpose of raising money for the prosecution of its undertaking, and to secure payment of the same by a mortgage deed.

10. Section 17 of the same Act provided that not less than 50 miles of the Railway should be completed to the satisfaction of the Governor-General-in-Council in each year.

11. This requirement as to annual construction was from time to time varied, but the Railway Company has at all times complied with the demands of Parliament in this respect.

46 Vic. c. 68  
(Canada),  
1883.

12. The foregoing Act was amended in the following year (1883) by 46 Vic., cap. 68, Canada, passed on 25th May 1883, and the name of the Company was changed to "The Manitoba and North-Western Railway Company of Canada."

13. Section 5 of this last-mentioned Act limits and defines the borrowing powers of the Railway Company, and as the mortgage in question purports to be made in pursuance of the powers of mortgaging thereby given, it has an important bearing upon this Appeal.

46 Vic. c. 68,  
s. 5 (Canada),  
1883.

14. The material portions of this Section are as follows:—

"The Directors of the Company . . . . are hereby authorized  
"to issue bonds under the seal of the Company . . . . and the  
"Directors shall have power to issue and sell or pledge all or any of  
"the said Bonds at the best price and upon the best terms and  
"conditions, which at the time they may be able to obtain, for the  
"purpose of raising money for the prosecution of the said undertaking,  
"and the said bonds hereby authorized to be issued shall, without  
"registration or formal conveyance, constitute a first mortgage or  
"privilege upon the said undertaking and upon the said Railway  
"constructed and to be thereafter constructed, and upon the property  
"of the Company acquired or which may be thereafter acquired

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“(excepting therefrom municipal bonuses), and upon its tolls and revenues derived from operating the said Railway, after deduction from such tolls and revenues of (all) working expenses, and upon the franchises of the Company, save and except as is hereinafter provided for; and each holder of the said bonds shall be deemed to be a mortgagee upon the said securities *pro rata* with the other bondholders, and shall have priority as such . . . . . but notwithstanding anything in this Act contained, the Company may secure the bonds to be issued by them by mortgage deed creating such mortgages, liens and encumbrances upon the whole or any part of such property, assets and revenues of the Company, present or future, or both, as shall be described in the said deed; but such revenues shall be pledged in the first instance to the payment of the working expenses of the Railway; and by the said deed the Company may grant to the holders of such bonds, or to the trustee or trustees named in such deed, all and every the powers and remedies granted in this Act in respect of the said bonds, and all other powers and remedies not inconsistent with this Act, or may restrict the bondholders in the exercise of any power, privileges or remedy granted by this Act, as the case may be; and all such powers, rights and remedies as shall be so contained in such mortgage deed shall be valid, binding and available to the bondholders in manner and form as therein provided.”

15. On the 1st of December 1883, the Respondents executed a Deed of Mortgage upon the railway of the Company extending from Portage la Prairie to Prince Albert in the North-west Territories, an estimated distance of 430 miles as the same was then located or constructed or in course of construction, together with the properties, revenues, franchises, &c., therein set out, to Lord George Campbell, Henry William Cobb and Francis Douglas Grey, as Trustees for Bondholders, to secure payment of the Bonds of the Respondents then intended to be issued, at the rate of £4,100 per mile of railway actually constructed and made ready for operation. Rec. p. 66.

16. By Indenture dated the 15th day of May 1884, and made between the Respondents and the Trustees above named, it was agreed that the Bonds of the Company should be issued at the rate of £3,000 per mile of railway, and not at the rate of £4,100 as contemplated in the Mortgage of December 1883. Rec. p. 67.

17. The Railway Company thereupon issued 3,280 Bonds of £100 each, £328,000 in all, entitled to the benefits of the security of the Indentures of December 1883 and May 1884, payment of which was further secured by the transfer under Deeds of the 1st of March 1884, 15th of May 1884, and 10th of July 1884, from the Respondents to the above-named Trustees for the Bondholders, of certain lands of the Dominion of Canada granted or agreed to be granted by way of subsidy to the Railway Company, Rec. p. 67.

18. The Railway Company having found that the proceeds of the Bonds Rec. p. 67.

so issued were not sufficient, issued Second Mortgage Bonds to the amount of \$5,400 per mile for the purpose of raising money for the construction of the railway.

48-49Vic.c.86.  
(Canada)  
1885.

19. Doubts having arisen as to the validity of these Second Mortgage Bonds, the Act 48-49 Victoria cap. 86, (1884-5) was passed by the Parliament of Canada, which, after reciting the facts relative to the issue of Bonds set out in the preceding paragraphs hereof, declared that the Bonds of the Respondents issued to the amount of \$14,600 (£3,000) per mile were the First Mortgage Bonds of the Company; and the same Act legalized and confirmed the Second Mortgage Bonds.

Rec. pp. 67.68.

20. In the early part of the year 1886 an arrangement was effected whereby the foregoing First Mortgage Bonds were to be surrendered and cancelled, and to be replaced by a new issue of Bonds for £540,000, being at the prescribed rate of £3,000 per mile of 180 miles of the main line, of which 130 miles had already been constructed and the remaining 50 were then in course of construction.

Rec. p. 68.

21. In pursuance of this arrangement, as appears from the recitals to the Mortgage Deed in question herein, the First Mortgage Bonds, amounting to £328,000 previously issued, were surrendered and cancelled, the Trustees for the holders thereof were released, and the Company relieved from all covenants and obligations contained in the Indentures of the 1st of December 1883 and the 15th of May 1884.

Rec. p. 65.

22. On the 16th day of April 1886 the principal Indenture in question herein was entered into between the Railway Company of the first part, the Trustees for the holders of Bonds of the first issue of £328,000, of the second part, and the Appellants (who are hereinafter referred to as "the Trustees") of the third part, and by this Instrument the Railway Company, for the purpose of securing the £540,000 of Bonds then about to be issued, mortgaged to the Trustees the First Division or portion of the railway and electric telegraph of the Company, extending from Portage la Prairie to a point distant 180 miles, as therein particularly described; excepting, however, from such grant 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 also by way of grant and not of exception all the locomotives . . . the particulars of which are contained in the second schedule to the mortgage, and all other, if any, the rolling stock . . . then held or thereafter to be held or acquired by the Company, its successors or assigns; and also all revenues, income, and profits, arising from the use of the said Division, subject nevertheless to the working expenses of the said railway and telegraph, and all rates, taxes and assessments, and other Government charges; and also all rights, privileges, powers, immunities and exemptions, and all corporate and other franchises then owned, held and enjoyed by the Company or thereafter to be held or 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

Rec. p. 71.

or telegraph constructed and to be constructed, and the reversion and reversions, remainder and remainders thereof.

23. The portion of the railway described in this mortgage, referred to throughout as the First Division, extends from Portage la Prairie 180 miles to Langenburg, a station in the North-West Territories 9½ miles west of the western boundary of the Province of Manitoba. Rec. p. 31.

24. The Trustees for the old £328,000 issue of Bonds joined in the mortgage for the purpose of confirmation, and to convey the legal estate to the Appellants. Rec. p. 65.

25. The trusts, uses and purposes upon which the property described in the mortgage deed is held by the Trustees, and the powers and authorities purporting to be conferred upon them by the deed, are set forth in 18 articles contained in the mortgage.

26. By Article 1 the Company is entitled to possess, manage and enjoy the First Division or portion of the said railway and telegraph together with the equipment and appurtenances, and to take and use the rents, incomes, &c., until default shall be made in payment of the principal and interest of the bonds in question. Rec. p. 72.

27. Article 2 provides in effect that if default shall be made in payment of any interest to accrue on any of the bonds, and such default shall continue for three months, it shall be lawful for the Trustees to enter upon the First Division, with full power to operate and conduct the business of the same, and to collect the tolls, &c., thereof, and after deducting the expense of operating the said Division to apply the money arising from such receipts in payment of the interest on the bonds. Rec. p. 73.

28. Article 3 provides in effect, that in case default shall be made in the payment of interest on the bonds or any of them, and shall continue for 12 months thereafter, or in case default shall be made in payment of the principal, it shall be lawful for the Trustees to sell the First Division and the property, rights and franchises expressed to be conveyed by the mortgage, and which shall be then subject to the lien of the same, either separately or in conjunction with the owner or owners for the time being of the remaining portions of the said line. Rec. p. 73.

29. Provision is also made by the same article for the disposition of the moneys received from such sale.

30. By Article 18 the Company covenants with the Trustees to pay the interest and principal of the said bonds, and for that purpose in each and every year to use and apply the net earnings and income to be from time to time derived from this Division. Rec. p. 82.

31. This is the mortgage in question in this suit, under which the Appellants invoke the assistance of the Court to obtain a sale of the First Rec. p. 65.

Division of 180 miles of the Respondents' railway, and the other relief prayed in the Bill of Complaint.

48-49 Vic.  
c. 60, (Can.)  
1884-5.  
Rec. p. 87.

32. Under an Act of the Parliament of Canada, 48 and 49 Vic., cap. 60 (1884-5), Dominion lands were granted to the Company to the extent of 6,400 acres per mile for the whole distance from Portage la Prairie to the crossing of the south branch of the Saskatchewan river, 20 miles from Prince Albert, equal to about 430 miles of railway; subject only to the payment by the Company of the cost of survey of the lands, and incidental expenses, at the rate of 10 cents per mile in cash upon the issue of patents therefor.

Rec. p. 87.

33. A tract of 2,752,000 acres of land was reserved by the Dominion Government from which the Company might select its land.

Rec. p. 87.

34. By reason of having constructed 130 miles, the Company became entitled to select out of this tract lands to the extent of 832,000 acres; and on completion of 50 miles more, the balance of the first division, was to become entitled to select 320,000 additional acres, making a total of 1,152,000 acres to which the Company would be entitled in respect of the first 180 miles, out of which it had disposed of about 74,000 acres.

35. Patents were not issued by the Crown to the Company in respect of these lands, but the Company created land warrants each of which entitled the bearer to select and receive a Crown Patent for 160 acres of land from the land grant reserved for the Company by the Government of Canada, which had not been previously sold by the Company or selected by any holder of a like certificate.

Rec. p. 87.

36. Land Warrants created by the Company in respect of 320,000 acres, which the Company was entitled to acquire in respect of the first 50 miles constructed, had been transferred as additional security to the Trustees for the holders of Bonds of the first issue of £328,000.

48 Vic. c. 42,  
(Man.) 1885.  
Rec. p. 88.  
53 Vic. c. 27,  
(Man.) 1890.  
49 Vic. c. 49,  
(Man.) 1886.  
56 Vic. c. 21,  
(Man.) 1893.

37. Under the Railway Aid Act of the Legislative Assembly of Manitoba, passed on the 2nd day of May, 1885 (Manitoba Act 48, Vic. cap. 42) an aid of \$673,786.67 was granted by way of loan to the Company in respect of that portion of the main line comprising a section of 90 miles between Minnedosa (a station 78½ miles west of Portage la Prairie) and the Western boundary of the Province of Manitoba, and to secure such loan land warrants representing 675,040 acres were transferred to the Provincial Treasurer of the Province to the extent of one acre for every dollar of such aid, as prescribed by the Act, the proceeds of the sale of which were to be applied on the interest upon the Debentures issued by the Province in payment of such aid and in redeeming them at maturity.

Rec. p. 86.

38. On the 16th of April, 1886, by Indenture hereinafter referred to as "the Deed of additional security," and made between the Railway Company of the first part, the Trustees for the Bonds of the old issue of £328,000 of the second part, and the Appellants, the Trustees for the present Bonds, of the third

part, the lands granted to the Company by the Government of Canada in respect of the 180 miles to the extent of 1,078,000 acres (being 1,152,000 acres less the lands sold not exceeding 74,000 acres) together with all land warrants for the said lands that had been issued and had not been sold and disposed of, but subject to the repayment of 10 cents per acre to the Government of Canada, and to the repayment of the aid granted by the Government of the Province of Manitoba (erroneously referred to in the deed as \$686,000) were granted to the Trustees as additional or further security for the payment of the bonds then to be issued. Rec. p. 89.

39. The net proceeds derived from the sales of these lands and land warrants, after payment of the expenses connected with the acquisition, survey, management and sale thereof, and subject to the discharge of the prior liens and charges thereon, were to be applied in meeting payment of the interest upon the bonds in the event of the net earnings derived from the first division being insufficient to meet such interest, and surplus amounts were to be applied in redeeming bonds drawn for redemption. Rec. p. 91.

40. Bonds amounting to £540,000, being at the rate of £3,000 per mile of the 180 miles of the first division, were issued by the Company, as contemplated and provided for by the mortgage and deed of additional security of 16th April 1886. Rec. p. 68.

41. Before the end of 1886 the Company had constructed the additional 50 miles of the first division, making in all 180 miles of main line from Portage la Prairie in Manitoba to Langenburg in the North West Territories, being the first division mentioned in the mortgage, and had also built a branch line from Binscarth (a station on the first division,  $154\frac{2}{10}$  miles west of Portage la Prairie) to Russell, known as "The Shell River Branch,"  $11\frac{1}{2}$  miles in length. Rec. p. 113.

42. The Company issued bonds upon this branch of its undertaking to the extent of £34,500. Rec. p. 113.

43. Payment of these bonds is secured by a mortgage of this branch, which is in the same form as the mortgage of 16th April 1886, upon the first division, and which is dated the 17th day of February 1887, and is made by the Company to the appellants as Trustees for the holders of this issue of bonds. All these bonds are now outstanding, and are in default. No interest thereon has ever been paid. Rec. p. 113.

44. By the Act of 1886, 49 Vic. cap. 75 (Canada), the first division bonds secured by the mortgage of the 16th April 1886, were ratified and confirmed, and by the Act of 1887, 50 and 51 Vic. cap. 79 (Canada), the Shell River Branch Bonds, secured by the mortgage of the 17th February 1887, were also ratified and confirmed. 49 Vic. c. 75,  
(Can.) 1886.  
50-51 Vic.,  
c. 79, (Can.)  
1887.

45. The Saskatchewan and Western Railway Company constructed a line of railway extending from Minnedosa, a station on the first division ( $78\frac{5}{10}$  Rec. p. 81.

miles west of Portage la Prairie) to the town of Rapid City, in the Province of Manitoba, a distance of 15½ miles. This Company issued bonds upon its undertaking to the extent of £37,200, payment of which is secured by a mortgage of its railway, which also follows in form the mortgage of the 16th of April 1886, upon the first division of the Respondent's railway, and is dated the 28th day of May 1887, and made to the appellants as Trustees for the holders of this issue of bonds. All these bonds are now outstanding and are in default. No interest thereon has ever been paid.

Rec. p. 94.

46. On the 28th of May 1887, the Saskatchewan and Western Railway Company, and the appellants as Trustees for its bondholders, leased the line of that Company to the Manitoba and North Western Railway Company for the term of 99 years. The lease is made in consideration of a rental to be composed of a sum equal to the interest upon the £37,200 of bonds, and other sums.

Rec. p. 17.

47. In June 1893, Andrew Allan and others, judgment creditors of the respondent Company for a large amount, filed a Bill in the Court of Queen's Bench in Equity in the Province of Manitoba, praying, amongst other things, that a Receiver should be appointed.

Rec. p. 17.

48. On the 8th day of June 1893, an order was made in the said cause whereby H. Montague Allan of the City of Montreal, one of these judgment creditors, was appointed Receiver of the undertaking and assets of the Company until the hearing, or other final disposition of the cause.

Rec. p. 18.

49. On the 13th of July 1893, a decree was pronounced in the cause continuing the appointment of Mr. Allan as such Receiver, and directing that out of the moneys to be received by him as such Receiver "he should provide " for the working expenses of the Railway and other outgoings in respect of the " undertaking and management and collection of its assets, including any " repairs necessary to keep the said Railway in running order, and should pay " the balances to be certified to be due from him into Court to the credit of the " cause."

Rec. p. 35.  
45 Vic. c. 80,  
(Can.) 1882.  
50-51 Vic., c. 79  
(Can.) 1887.  
49 Vic. c. 59,  
(Man.) 1886.

50. The Railway at this time consisted of a main line of 223 miles extending from Portage la Prairie to Yorkton in the North-west Territories, destined to be extended under its existing charter 250 miles further to Prince Albert; the Shell River Branch of 11½ miles running northerly from Binscarth on the Company's main line, which branch may be extended under the Extension Charter to the northern or western boundary of the Province of Manitoba at a point north of the main line; and the Saskatchewan and Western Branch from Minnedosa to Rapid City, a distance of 15½ miles, all of which was operated by the Company as one Railway.

Rec. p. 20.

51. On the 1st day of November 1893, the Appellants presented a petition to the Court of Queen's Bench in Equity, alleging default under the mortgage in question for the period of three months, and prayed:

Rec. p. 25.

(a.) That leave might be granted to them to take proceedings in



the said Court for enforcing their rights to enter into possession of the First Division of the Railway and the other property conveyed to them by the mortgage.

(b.) That leave might be granted to them to take proceedings for the appointment of a manager or receiver, and also for a foreclosure of the mortgaged premises.

52. On the 31st of January 1894, an order was made by Mr. Justice Bain dismissing this petition with costs, upon the grounds that the Court had already appointed a Receiver against whom no personal misconduct was alleged, and that the only relief the Court could give mortgagees of a railway was equitable execution of the earnings of the undertaking that remained after its reasonable running expenses had been provided for.

53. On the 14th of February 1894, an order was made by Mr. Justice Bain dismissing a petition of the Trustees to set aside an order adding them as parties to the above mentioned suit. The learned Judge held that that mortgage to the Trustees of the tolls and earnings was subject to the charge of the working expenses of the entire Railway.

54. On the 9th of June 1894, upon appeal both these orders were set aside, but upon grounds which did not affect Mr. Justice Bain's opinion upon the working expenses question. 10 Manitoba  
L. R., pp. 106  
and 123.

55. The Trustees on the 3rd day of July 1894, filed their Bill of Complaint in this suit. Rec. p. 3.

56. By their Bill the Appellants prayed among other things that all the property described in the mortgage of the 16th of April 1886, might be sold under the direction of the Court, and that a Receiver might be appointed of the revenue, tolls and profits of the First Division, and that the same might be applied in payment of the amount secured by the bonds. Rec. p. 13.a.

57. The Company duly filed its answer in the said cause. Rec. p. 14.

58. On the 23rd of July 1894, an order was made directing the appointment of a Receiver of the revenue, tolls and profits of the First Division, and Mr. A. M. Nanton was subsequently appointed Receiver.

59. The cause came on for trial before the Honorable Mr. Justice Killam on the 1st day of February 1895. His Lordship reserved judgment and on the 17th day of April, 1895, pronounced a decree as follows:— Rec. p. 42.

(a.) That the Receiver, Mr. Nanton, previously appointed therein of the revenue, tolls and profits of the First Division should be continued. Rec. p. 35.

(b) That all necessary enquiries should be made, accounts taken, costs taxed and proceedings had for redemption or sale, and that for these purposes the cause should be referred to the Master.

(c) That the Company forthwith after the making of the Master's

report should pay to the plaintiffs what might be found due to them for principal money, interests and costs.

60. From this decree the Company appealed to the full Court of Queen's Bench for the Province, which Court on the 10th day of February 1896, reversed the decree of the Honorable Mr. Justice Killam in so far as it directed a sale of any portion of the defendants' railway other than the personal property, and declared that the mortgage in question was subject to the payment of the working expenses of the Company's entire railway and telegraph, and the appointment of the Receiver was varied accordingly.

61. From this decree the trustees for the First Division bondholders bring this appeal.

62. The Company submits that the decree of the full Court in so far as it refuses a sale of the First Division and declares that the appellant's mortgage is subject to the working expenses of the entire railway, is right and should be affirmed for the following among other

#### REASONS.

(1) Because it has been well settled for many years in the Canadian Courts in accordance with the principles of English Law enunciated and applied in *Gardner v. London, Dover & Chatham Railway, L.R., 2 Chy. p. 201*, that, apart from Statute, upon considerations of public policy, a bondholder, mortgagee, or incumbrancer of a Railway cannot enforce his charge by a sale or foreclosure of the railway undertaking.

(2) Because the Statutes above referred to do not confer any right to disintegrate the Railway by selling the First Division.

(3) Because these Statutes do not enable the Company to create a mortgage of its undertaking and franchises, whatever may be the effect of the bonds authorised by such Statutes or the rights of the holders thereof.

(4) Because the Court of Queen's Bench in Manitoba has no jurisdiction to direct a sale of that portion of the First Division not within the Province of Manitoba, and in any event the remaining portion of the First Division within the Province does not constitute an *integer*, a sale of which may be decreed.

(5) Because if the Trustees have any lien or charge upon any portion of the revenues, tolls and profits of the First Division, it is only on any surplus after payment by the Company of the working expenses of the entire railway and telegraph, and of all rates, taxes and assessments and other Government charges.

C. ROBINSON,

C. SWINFEN EADY.



In the Privy Council.

No. 21 of 1896.

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ON APPEAL FROM HER MAJESTY'S  
COURT OF QUEEN'S BENCH FOR  
MANITOBA.

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GREY AND ANOTHER.

v.

THE MANITOBA AND NORTH  
WESTERN RAILWAY COMPANY OF  
CANADA.

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**Case**

*OF THE RESPONDENTS.*

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BOMPAS, BISCHOFF, DODGSON, COXE & BOMPAS,

4, GREAT WINCHESTER STREET, E.C.

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