35, 1936

In the Privy Council.

No. 23 of 1935.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

BETWEEN

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - (*Plaintiff*) *Appellant.*

AND

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY GENERAL OF CANADA

(*Defendants*) *Respondents.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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In the Privy Council.

No. 23 of 1935.

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AND

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY GENERAL OF CANADA (*Defendants*) *Respondents.*

RECORD OF PROCEEDINGS.

In the Supreme Court of Ontario.

No. 1.
Writ,
26th December, 1931.

No. 1.

Writ.

No. 4130, A.D. 1931.

IN THE SUPREME COURT OF ONTARIO.

Between

GEORGE PARDEW LOVIBOND, on behalf of himself, and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

GEORGE THE FIFTH by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

In the Supreme Court of Ontario.

No. 1.
Writ, 26th December, 1931.
—*continued.*

To Grand Trunk Railway Company of Canada, Canadian National Railway Company, and the Attorney-General of Canada of the of in the of

We Command You, that within ten days after the service of this Writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in this action, and take notice, that in default of your so doing, the plaintiff may proceed therein and judgment may be given in your absence on the plaintiff's own shewing, and you may be deemed to have admitted the plaintiff's claim and (subject to Rules of Court) will not be entitled to notice of any further proceedings herein.

Witness, The Right Honourable SIR WILLIAM MULOCK, Knight Commander of the Most Distinguished Order of St. Michael and St. George, Chief Justice of Ontario, this 26th day of December in the year of our Lord 1931.

E. HARLEY,
Senior Registrar, S.C.O.

N.B.—This Writ is to be served within 12 calendar months from the date thereof, or, if renewed, within 12 calendar months from the date of such renewal, including the day of such date, and not afterwards.

Appearance may be entered at the Central Office at Osgoode Hall, Toronto.

The Plaintiff's claim, on behalf of himself and all those whom he represents in this action, is for:

(*a*) A declaration that the Grand Trunk Railway Acquisition Act, 1919 (10 Geo. V. Chapter 17) is ultra vires the Parliament of Canada;

(*b*) A declaration that the Act, 10–11 Geo. V. (1920) Chapter 13, being an Act to confirm an agreement dated the 8th day of March, 1920, between His Majesty the King and the Grand Trunk Railway Company of Canada, is ultra vires the Parliament of Canada, and that the resolution of shareholders, dated February 19th, 1920, and the Agreement dated March 8th, 1920, mentioned in that Act, are invalid, void and of no effect;

(*c*) A further declaration that the registered holders of first preference stock, second preference stock, third preference stock, and common stock of the defendant Grand Trunk Railway Company of Canada, of record on January 18th, 1923, their personal representatives or assigns, are entitled to have such stock, or other stock of the same class and value, registered on the books of the defendant Grand Trunk Railway Company of Canada in their respective names as holders thereof, and are entitled to all rights of and incidental to ownership of such stock, and for such orders and declarations as are necessary to establish such rights in the plaintiff, and in all persons whom he represents in this action;

AND the plaintiff also claims, on his own behalf:

(*d*) An order directing the defendants Grand Trunk Railway Company of Canada and Canadian National Railway Company to rectify the stock

Issued from the Central Office, Osgoode Hall, at the City of Toronto, in the County of York,
E. HARLEY.
Senior Registrar, S.C.O.

register of Grand Trunk Railway Company of Canada by restoring the name of the plaintiff as the registered holder of £100 first preference stock, £100 second preference stock, £700 third preference stock, and £1100 common stock of the defendant Grand Trunk Railway Company of Canada of which stock the Plaintiff was the registered owner on 18th January, 1923;

(*e*) Or an order directing the defendants Grand Trunk Railway Company of Canada and Canadian National Railway Company to appropriate or acquire £100 first preference stock, £100 second preference stock, £700 third preference stock, and £1100 common stock of the defendant Grand Trunk Railway Company of Canada, and to transfer and register the same in the books of the defendant Grand Trunk Railway Company of Canada in the name of the plaintiff as the holder thereof;

(*f*) Or, in the alternative, damages in the amount of $9,733.33 for the refusal or failure of the defendants Grand Trunk Railway Company of Canada and Canadian National Railway Company to obtain and register such stock, or cause the same to be obtained and registered in the name of the plaintiff;

(*g*) And damages for the wrongful acts of the defendants Grand Trunk Railway Company of Canada and Canadian National Railway Company in depriving the plaintiff of the rights and privileges of ownership of such shares without lawful authority;

(*h*) And an order directing the defendants Grand Trunk Railway Company of Canada and the Canadian National Railway Company to register the plaintiff, or cause him to be registered, in the books of the defendant Grand Trunk Railway Company of Canada, as the holder of £1,200 of first preference stock, £1,100 of second preference stock, £1,700 of third preference stock, and £1,900 of common stock of the defendant Grand Trunk Railway Company of Canada assigned to the plaintiff by transfers of stock dated the 27th November, 1931, made by Mrs. Elizabeth Marion Lovibond and Captain Henrik Loeffler;

(*i*) Or, in the alternative, damages in the amount of $28,713.33 for the refusal or failure of the defendants Grand Trunk Railway Company of Canada and Canadian National Railway Company to register such stock or cause the same to be registered in the name of the Plaintiff;

(*j*) And damages for the wrongful acts of the defendants Grand Trunk Railway Company of Canada and Canadian National Railway Company in depriving the plaintiff of the rights and privileges of ownership of such stock without lawful authority;

And the plaintiff also claims on behalf of himself and on behalf of himself and all others whom he represents in this action;

(*k*) Such further and other relief as may seem just and equitable to this honourable Court;

(*l*) And the costs of this action.

In the Supreme Court of Ontario.

No. 2. Appearance, 9th January, 1932.

No. 2.

Appearance.

IN THE SUPREME COURT OF ONTARIO.

Between

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY GENERAL OF CANADA - - - - - - - - *Defendants.*

Enter an appearance for Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company, and for the defendant The Attorney-General of Canada.

Dated at Toronto this 9th day of January, 1932.

W. STUART EDWARDS,
Parliament Bldgs., Ottawa,
by his agents,
Messrs. TILLEY JOHNSTON THOMSON & PARMENTER

Address for service—
Messrs. TILLEY JOHNSTON THOMSON & PARMENTER,
80 King Street West, Toronto.

In the Supreme Court of Ontario.

No. 3. Statement of Claim, 4th March, 1932.

No. 3.

Statement of Claim.

IN THE SUPREME COURT OF ONTARIO.

(Writ issued December 26, 1931)

Between

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - *Defendants.*

STATEMENT OF CLAIM.

1. The plaintiff, who resides in Manor Park, in the County of Essex, England, was, on the 18th of January, 1923, the registered holder of First Preference Stock, Second Preference Stock, Third Preference Stock and Common (Ordinary) Stock of the defendant Grand Trunk Railway Company of Canada.

2. The stock of the plaintiff and the stock of those whom he represents in this action, has been transferred illegally on the books of the defendant Company and he and they have been deprived of the rights and privileges of holders of such stock, without their authority or consent, and without compensation of any kind, under cover of certain statutes of the Parliament of Canada hereinafter referred to, which the plaintiff submits are invalid and ultra vires.

3. The defendant, Grand Trunk Railway Company of Canada, (hereinafter referred to as the " Grand Trunk ") is a company incorporated in the year 1852, by special Act of the Legislature of the Province of Canada (16 Vict. Cap. 37). The defendant, Canadian National Railway Company, (hereinafter referred to as the " Canadian National ") is a company incorporated in the year 1919, by special Act of the Parliament of Canada (9–10 George V. Cap. 13).

4. Under certain statutes of Canada, orders-in-council and agreements hereinafter referred to, the Canadian National assumes to be amalgamated with the Grand Trunk and to be liable for all claims, demands, causes of action, obligations, agreements and duties of the Grand Trunk and to stand in the place of and represent the Grand Trunk for all purposes.

In the Supreme Court of Ontario.

No. 3. Statement of Claim, 4th March, 1932—*continued.*

5. The defendant, The Attorney-General of Canada, is joined in this action for the purpose of the declarations asked for in sub-paragraphs (*b*), (*e*) and (*f*) of paragraph 32 of this Statement of Claim.

6. The original undertaking of the Grand Trunk was the construction and operation of a steam railway from the City of Toronto to the City of Montreal, in Canada. This undertaking was completed, and, from time to time thereafter, the railway was extended by main and branch lines, by the acquisition of other railway undertakings, and otherwise, so that in the year 1919 the Grand Trunk owned and operated or controlled, (exclusive of the Grand Trunk Pacific Railway System) 3,692 miles of railway in Canada and 1,666 miles of railway in the United States of America. In 1919 the Grand Trunk was the principal railway system serving the older and more populous parts of the Province of Ontario and uniting that service with important railway services and connections in the United States of America.

7. Under its Act of incorporation and amending Acts, a principal office of the Grand Trunk was located in London, England; meetings of directors and stockholders were held in London and corporate action was taken there; a stock register, upon which transfers of the stock in question in this action were entered, was kept in the London office of the Company and new certificates of stock so transferred were issued from that office. Almost all, if not all, of the capital stock of the Company was held by persons resident in Great Britain.

8. At all times material to this action, the issued capital stock of the Grand Trunk consisted of the following:

4% Guaranteed Stock - - - -	£12,500,000.
First Preference 5% Stock - - -	3,420,000.
Second Preference 5% Stock - - -	2,530,000.
Third Preference 4% Stock - - -	7,168,055.
Common Stock - - - - - -	23,955,437.
Total - - - - - -	£49,573,492.

In addition to such capital stock, there were issued and outstanding debenture stocks of the Grand Trunk amounting to £31,926,125; the holders of these debenture stocks were entitled to certain voting privileges at general meetings of stockholders.

9. From time to time between the years 1916 and 1919 proposals of purchase by the Government of Canada of the Grand Trunk Railway System, and a subsidiary system known as the Grand Trunk Pacific Railway System, were discussed in Parliament and between officials of the Government and the Grand Trunk. In the year 1917, a Royal Commission appointed by the Government of Canada to enquire into railways and transportation in Canada submitted a report, commonly known as the "Drayton-Acworth Report," which recommended that the control, both of the Grand Trunk Pacific Railway System and of the Grand Trunk, be assumed by the people of Canada by acquisition of the entire share capital of the Grand Trunk,

guaranteed, preference and ordinary, such share capital to be surrendered to Trustees in exchange for an annuity based on " a moderate but substantial proportion of $3,600,000., the average sum paid as dividend in the last ten years," this annuity to be increased by 40 or 50 per cent. after the first seven years. Subsequent negotiations for the acquisition of the Grand Trunk stock by the Government of Canada and the organization of the Canadian National Railway System arose out of and were founded upon the recommendations of this report.

10. In 1918 the Government of Canada entered into negotiations with the Directors of the Grand Trunk for the purchase of the railway undertaking. During or about the month of February, 1919, the Government of Canada offered to take over the Grand Trunk and the Grand Trunk Pacific Railway System and acquire all other assets and assume all liabilities and obligations of both companies and to make an annual payment to stockholders of the Grand Trunk of $2,500,000. annually for the first three years, $3,000,000. annually for the succeeding five years and $3,600,000. annually thereafter; these sums to be distributed by the Grand Trunk management among the holders of Four per cent. guaranteed and the First Preference, Second Preference, Third Preference and Common stocks, according to their priorities. This offer was refused by the Directors of the Grand Trunk without being submitted to the stockholders for their consideration.

11. By a statute enacted by the Parliament of Canada known as the Grand Trunk Railway Acquisition Act, 1919 (which the plaintiff submits is ultra vires in whole or in material parts) the Minister of Railways and Canals of Canada was authorized to enter into an agreement with the Grand Trunk for the acquisition by the Government of the entire capital stock of the Grand Trunk, (except the Four per cent. guaranteed stock of the Grand Trunk amounting to £12,500,000) subject to certain terms and conditions to be embodied in an agreement between the Government of Canada and the Grand Trunk, including provision for determination of the value of such stocks by a board of arbitrators, subject to a maximum amount on which the annual dividend at 4% per annum would not exceed $5,000,000.; and provision for transfer or vesting in the Government or its nominees of the preference and common stock upon issue of new guaranteed stock in exchange therefor. The agreement was to be submitted for the approval of a meeting of all stockholders of the Grand Trunk, including holders of debenture stocks and guaranteed stock of the Grand Trunk, whose holdings were not subject to adjudication by the arbitrators as to value. The Act also provided that the Governor-in-Council might make such orders as were deemed requisite to vest in the Government any of the preference or common stock not transferred to the Government or its nominees under the terms of the Act.

12. At the time of the enactment of the statute of 1919, the terms of the proposal embodied therein had not been submitted to the stockholders of the Grand Trunk; no agreement had been made by the Grand Trunk or its stockholders to sell or dispose of its undertaking or of the capital

In the Supreme Court of Ontario.

No. 3. Statement of Claim. 4th March, 1932—*continued.*

stock; the principle of arbitration as to value of the stocks had not been accepted by the stockholders; the name of the Chairman of the Board of Arbitrators had not been submitted to or accepted by the stockholders; the voting arrangements for a general meeting of stockholders proposed in the Act, which were contrary to precedent and equity, had not been agreed to by the stockholders; the provision for dismissing directors and transferring of shares had not been submitted to or accepted by the stockholders.

13. The draft of an agreement embodying the terms prescribed by the statute of 1919 was submitted to a general meeting of stockholders of the Grand Trunk, held in London, on the 19th February, 1920. This meeting included representation of various classes of stockholders whose interests were in conflict, inasmuch as holders of debenture stock and the guaranteed 4% stock were, by the terms of the agreement, assured of payment of the full interest and dividends on their stocks and, if called in or redeemed, the payment of their full face value, whereas holders of the preference and common stocks were not, by the terms of the agreement, assured of any payment whatever for their securities. Although this meeting purported to approve and ratify the draft agreement by a majority vote of those present, or represented by proxy at the meeting, the plaintiff submits that this approval or ratification was illegal, invalid, ineffective and void.

14. By a statute of the Parliament of Canada assented to on the 11th May, 1920, being Chapter 13 of the Statutes of Canada (10–11 Geo. V), (which the plaintiff submits is invalid and ultra vires in whole or in material parts) the Parliament of Canada purported to confirm and ratify the agreement dated the 8th March, 1920, executed by the officers of the Grand Trunk and by the Minister of Railways and Canals of Canada on behalf of the Government of Canada, which is set out as a schedule to the statute. The plaintiff submits that the Grand Trunk had no power or authority to make the agreement and that the whole agreement is, or material parts of it are, ultra vires, illegal, invalid and void.

15. By the agreement, the Grand Trunk undertook and agreed to use its best endeavours to cause the sale and delivery to the Government of Canada and the Government agreed to acquire all the preference and common stocks of the Grand Trunk then issued and outstanding; the value, if any, to the holders thereof of the preference and common stock was to be determined by a board of three arbitrators, of which the Chairman was named in the Statute of 1919, hereinbefore mentioned; the value, if any, so determined was to be subject to a maximum limit of $64,166,666·66; new guaranteed stock, in the form shown in the Fourth Schedule of the agreement, to the value of the preference and common stock, as so determined, was to be distributed among the holders of the preference and common stock in proportions to be determined by the arbitrators, to be issued in exchange for the preference and common stock, upon the transfer to or vesting in the Government, or its nominees, of such stock, and on such new stock an annual dividend of 4% was to be guaranteed by the Government; by clause 13 of the agreement, any shares or any part of the preference

and common stock not transferred to the Government in exchange for the new guaranteed stock, might be declared to be the property of the Minister of Finance in trust for His Majesty, and upon the making of such declaration such stock not so transferred should immediately become the property of His Majesty, and entries thereof in the stock registers and other books in that behalf should be made.

16. Additional arbitrators having been appointed an arbitration was begun, in pursuance of the agreement dated 8th March, 1920, to ascertain the value of the stocks to the holders thereof, as of the month of May, 1920. The arbitration being unfinished within the time mentioned in the agreement, the Government of Canada demanded, as a condition of continuing the financing of the railway and an extension of time for completion of the arbitration, that the Grand Trunk should surrender all control of the management of the railway undertaking by agreeing to make vacant the offices of all directors and to permit the appointment of persons nominated by the Government as directors, who need not reside in England or be qualified by ownership of stock and that the Board of Directors so constituted might exercise and carry on all the powers and business of the company, without reference to or consultation with the shareholders of the Company and not subject in any wise to their vote, direction or control. Thereupon a statute was enacted by the Parliament of Canada, known as as Act Respecting the Grand Trunk Arbitration (being Chapter 9 of the Statutes of Canada, 1921, assented to on 3rd May, 1921) and an agreement was entered into between the Grand Trunk and the Government of Canada on 13th May, 1921, providing, among other things, for such surrender and control of the company's powers and business. The Plaintiff submits that the statute of 1921, above mentioned, is ultra vires the Parliament of Canada in whole or in material parts and that the agreement executed on the 13th May, 1921, above mentioned, is ultra vires the Grand Trunk and that such statute and agreement are otherwise illegal, invalid and void.

17. Thereafter the arbitration proceedings were continued and completed and on or about the 7th day of September, 1921, two of the arbitrators (The Honourable Sir Walter Cassels and the Right Honourable Sir Thomas White) delivered a majority award finding that there was no value to the holders thereof in the preference and common stocks of the Grand Trunk; the remaining arbitrator (the Honourable William Howard Taft) dissented from the award and delivered an opinion that the value of the preference and common stocks of the Grand Trunk, in question in this action, was not less than $48,000,000.

18. An appeal from the award of the arbitrators was taken to the Judicial Committee of the Privy Council solely upon the question of law, whether evidence as to value of the physical assets of the Grand Trunk had been lawfully or illegally excluded by a ruling of the majority of the arbitrators. This appeal from the ruling of the arbitrators was dismissed by judgment delivered on November 10, 1922 without enquiry into the merits of the Award made by the arbitrators.

In the Supreme Court of Ontario.

No. 3. Statement of Claim. 4th March, 1932—*continued.*

19. By an Order-in-Council approved by His Excellency, the Governor-General on the 19th January, 1923, (which the plaintiff submits is not within the authority conferred by the statutes or agreements and is otherwise ultra vires, illegal and void) it was recited that the majority of the arbitrators appointed under the Acquisition Act of 1919 had decided that the preference and common stock had no value and that the Government was now entitled to the whole of the preference and common stock and to the immediate transfer thereof to the Government without the issue to the holders thereof of any of the new guaranteed stock and that " the holders are not entitled to anything "; and that no part of the preference and common stocks had been transferred to the Government nor to any person acting in such behalf or in trust for His Majesty or the Government and that it was accordingly expedient that a declaration should be made under the provisions of Clause 13 of the Agreement vesting the said stocks in His Majesty and thereupon the Order declared that the whole of the preference and common stock of the Grand Trunk was the property of the Minister of Finance in trust for His Majesty and directed that entries thereof in the stock registers and other books of the Grand Trunk in that behalf should forthwith be made.

20. The plaintiff alleges that some officer or servant or agent of the Grand Trunk assumed to enter on the stock register of the Grand Trunk a transfer of the stock owned by the plaintiff and of the stock held by those whom he represents in this action, to the Minister of Finance of Canada, in pursuance of the Order-in-Council of 19th Januuary, 1923, hereinbefore mentioned without the authority or consent of the registered holders thereof and the plaintiff submits that any transfers so made, or however made, are invalid, illegal and void.

21. An Indenture dated 30th January, 1923, between the Canadian National and the Grand Trunk, after reciting that by virtue of an Order-in-Council passed on 19th January, 1923, (being the Order-in-Council mentioned in paragraph 19 of this Statement of Claim) the whole of the voting capital stock of the Grand Trunk, being the First, Second and Third preference stock, and the ordinary or common stock thereof to the aggregate value of £37,073,492 had become the property of the Minister of Finance in trust for His Majesty the King in the right of the Dominion of Canada, and that it was expedient that the Canadian National and the Grand Trunk should be amalgamated so as to form one Company purported to provide (among other things) that the Canadian National and the Grand Trunk thereby agreed to amalgamate and did amalgamate and form one Company as therein mentioned under the name of Canadian National Railway Company; and that the amount of the capital stock of the amalgamated Company should be the equivalent in Canadian money at $4.86 2/3 to the pound sterling of £37,073,492 being the total voting capital of the Grand Trunk, and that the said capital stock should be issued in one share of the face value of $180,424,327.70, as therein mentioned; and that there should be issued to the Minister of Finance, in trust for His

Majesty, by the Amalgamated Company, one share in the capital stock of the Amalgamated Company as therein mentioned, and that upon such issue the shares held by the Minister of Finance (in trust as aforesaid) in the capital stock of the Grand Trunk being or including the stock in question in this action should be surrendered by the Minister of Finance to the Amalgamated Company for cancellation. The plaintiff submits that this agreement dated 30th January, 1923, is invalid, illegal and void.

22. An Order-in-Council passed on 30th January, 1923, (which the plaintiff submits is invalid, illegal, and void) approved the last mentioned agreement, and directed that the Minister of Finance should be registered on the books of the Amalgamated Company as the holder, in trust for His Majesty of the share of stock in the Amalgamated Company issued to him under the provisions of Clause 6 of the said agreement, and upon such registration being made might surrender to the Amalgamated Company pursuant to the provisions of the said Clause 6 the shares in the capital stock of the Grand Trunk in such clause referred to.

23. On or about the 17th January, 1929, the plaintiff caused a Petition of Right in the Exchequer Court of Canada to be delivered to the Secretary of State for submission to the Governor-General-in-Council in accordance with the Petition of Right Act, in order that the Governor-General should grant his fiat that right be done in respect of such Petition. To this petition the plaintiff prays leave to refer in this action. On or about the 10th July, 1929, the Plaintiff was notified that the fiat asked for had been refused by the Governor-General-in-Council.

24. On or about the 25th July, 1930, the Plaintiff caused a petition to be presented to the King's Most Excellent Majesty in Council praying special leave to appeal from the decision of the Governor-General-in-Council of Canada not to grant the fiat applied for and upon this petition the Judicial Committee of the Privy Council advised that such an appeal could not be entertained and leave to appeal was refused.

25. On or about the 27th of November, 1931, there was assigned to the plaintiff by Elizabeth Marion Lovibond £200 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £900 Common Stock of the Grand Trunk and on the same date there was assigned to the plaintiff by Captain Henrik Leoffler £1000 First Preference Stock, £1000 Second Preference Stock and £1000 Third Preference Stock of the Grand Trunk.

26. On the same day the plaintiff caused these transfers, together with the original certificates issued to the assignor in respect of such stock, to be presented at the office of the Canadian National in London for entry on the stock registers of the Grand Trunk formerly maintained in London. Upon this presentation the plaintiff was advised that the registers of the various stocks of the Grand Trunk had been closed and that the transfers could not be registered in London.

27. On December 16, 1931, the plaintiff caused these assignments of stock, duly executed, together with the original certificates representing

In the Supreme Court of Ontario.

No. 3. Statement of Claim. 4th March, 1932—*continued.*

the stock as issued to the assignors to be delivered to the Secretary of the Canadian National and the Grand Trunk with the request that such transfers should be entered in the proper stock registers of the Grand Trunk and new certificates of stock should be issued in exchange for those surrendered for the purpose of such transfer.

28. On the 16th December, 1931, the plaintiff, by his solicitors, submitted to the President of the Canadian National and the Grand Trunk a demand for rectification of the stock register of the Grand Trunk by restoring the name of the plaintiff as the registered holder of the stock of which he was the registered holder on the 18th January, 1923, or in the alternative that the Grand Trunk or the Canadian National should appropriate or acquire £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1100 Common Stock of the Grand Trunk and transfer and register the same in the books of the Grand Trunk in the name of the plaintiff as the holder thereof.

29. The Canadian National and the Grand Trunk have refused or failed to register the transfers as submitted and to issue new certificates of stock in accordance therewith or to rectify the stock register as requested.

30. The Plaintiff submits that during the month of May, 1920, the stock of the Grand Trunk registered on the books of the Company in the name of the plaintiff and in the names of Elizabeth Marion Lovibond and Captain Henrik Leoffler was of substantial pecuniary value to the holders thereof and that other stock of the same class and value was freely offered for sale and sold through the London Stock Exchange.

31. By being deprived of the rights and privileges of ownership of his stock through the illegal transfer herein-before mentioned and through the refusal or failure of the Grand Trunk and the Canadian National to register the transfers of stock as submitted, the Plaintiff has suffered loss and damage for which the Defendants, Grand Trunk and Canadian National are liable to indemnify him.

32. The plaintiff, therefore, claims on behalf of himself and all those whom he represents in this action:

(*a*) a declaration that the transfers, to the Minister of Finance, of the stock of the Grand Trunk registered, on the 18th January, 1923, in the name of the plaintiff and in the names of those whom he represents in this action, are invalid, illegal and void, and an Order directing the defendants Grand Trunk and Canadian National to rectify the stock register of the Grand Trunk in accordance with such declaration; and

(*b*) a declaration that the Grand Trunk Railway Acquisition Act, 1919 (10 George V. Cap. 17) and in particular sections 2, 6, 7, 8, 9 and 10 thereof, are ultra vires the Parliament of Canada; and

(*c*) a declaration that the general meeting of stockholders of the Grand Trunk held in London on 19th February, 1920, was not duly constituted and that the resolution of that meeting purporting

to ratify or approve the agreement of 8th March, 1920 is ultra vires, invalid and void; and

(*d*) a declaration that the agreement dated 8th March, 1920, between the Government of Canada and the Grand Trunk is ultra vires, invalid and void; and

(*e*) a declaration that the Act of 1920 (10–11 George V. Cap 13), being an Act to Confirm the Agreement of 8th March, 1920, and in particular sections 1 and 2 thereof are ultra vires the Parliament of Canada; and

(*f*) a declaration that the Order-in-Council approved by His Excellency the Governor-General on 19th January, 1923, is not within the authority conferred upon His Excellency by the Grand Trunk Acquisition Act, 1919, and is otherwise ultra vires, illegal and void;

And the plaintiff also claims, on his own behalf:

(*g*) an order directing the defendants Grand Trunk and Canadian National to rectify the stock register of the Grand Trunk by restoring the name of the plaintiff as the registered holder of £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1100 Common Stock of the defendant Grand Trunk of which stock the plaintiff was the registered owner on 18th January, 1923; or

(*h*) an order directing the defendants Grand Trunk and Canadian National to appropriate or acquire £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1100 Common Stock of the defendant Grand Trunk and to transfer and register the same in the books of the defendant Grand Trunk in the name of the plaintiff as the holder thereof; or

(*i*) in the alternative, damages in the amount of $9,733.33, for the refusal or failure of the defendants Grand Trunk and Canadian National to obtain and register such stock, or cause the same to be obtained and registered in the name of the plaintiff; and

(*j*) damages in the amount of $4,379.95 for the unlawful acts of the defendants Grand Trunk and Canadian National in registering the invalid transfer referred to in clause (*a*) of this paragraph and in depriving the plaintiff of the rights and privileges of ownership of such stocks without lawful authority; and

(*k*) an order directing the defendants Grand Trunk and Canadian National to register the plaintiff, or cause him to be registered, in the books of the defendant Grand Trunk, as the holder of £1,200 of First Preference Stock, £1,100 of Second Preference Stock, £1,700 of Third Preference Stock and £1,900 of Common Stock of the defendant Grand Trunk assigned to the plaintiff by transfers of stock dated the 27th November, 1931, made by Mrs. Elizabeth Marion Lovibond and Captain Henrik Loeffler; or

In the Supreme Court of Ontario.

No. 3. Statement of Claim. 4th March, 1932—*continued.*

(*l*) in the alternative, damages in the amount of $28,713.33 for the refusal or failure of the defendants Grand Trunk and Canadian National to register such stock or cause the same to be registered in the name of the plaintiff; and

(*m*) damages in the amount of $12,920.95 for the unlawful acts of the defendants Grand Trunk and Canadian National in registering the invalid transfers referred to in clause (*a*) of this paragraph and in depriving the plaintiff of the rights and privileges of ownership of such stock without lawful authority;

And the plaintiff also claims on behalf of himself, and on behalf of himself and all others whom he represents in this action :

(*n*) such further and other relief as may seem just and equitable to this Honourable Court; and

(*o*) the costs of this action.

33. The plaintiff proposes that this action be tried at the City of Toronto, in the County of York.

Delivered this Fourth day of March, 1932, by Messrs. McRuer, Evan Gray, Mason and Cameron, 372 Bay Street, Toronto, Solicitors for the Plaintiff.

No. 4. Notice of Motion by Defendants to stay or dismiss action.— 19th March, 1932.

No. 4.

Notice of Motion by Defendants to stay or dismiss action.

IN THE SUPREME COURT OF ONTARIO.

between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

TAKE NOTICE that the Court will be moved on behalf of Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company and on behalf of the defendant The Attorney-General of Canada at Osgoode Hall in the City of Toronto on Wednesday the 23rd day of March 1932 at 11.00 o'clock in the forenoon or so soon thereafter as the motion can be

heard for an order staying or dismissing the action on the following amongst other grounds :

(1) Rights of the Crown have been brought into question in the action without the Crown having been made a party thereto;

(2) The claim of the plaintiff is of a nature that can be asserted only by Petition of Right.

(3) The claim being in tort is not one that can be asserted in a class action.

(4) The personal claim asserted by the plaintiff cannot be combined in one action with the claim made on behalf of the class.

(5) The persons professed to be represented by the individual plaintiff are not along with the plaintiff members of one class.

and in the alternative for an order directing the plaintiff to furnish particulars of the allegations contained in the statement of claim and in the event of the action not being stayed or dismissed, for an order extending the time for delivery of the statement of defence herein and for such further or other order as may be proper.

AND TAKE NOTICE that in support of such motion will be read the writ of summons and the statement of claim herein and such further and other material as counsel may advise.

Dated at Toronto this 19th day of March 1932.

TILLEY, JOHNSTON, THOMSON & PARMENTER
80 King Street West, Toronto Agents herein for W, Stuart Edwards, Parliament Buildings, Ottawa, Solicitor for Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company and for the defendant the Attorney-General of Canada.

To Messrs. McRuer, Evan Gray, Mason & Cameron,
372 Bay Street, Toronto,
Solicitors for the plaintiff.

In the Supreme Court of Ontario.

No. 5. Order of Rose C.J. dismissing Defendants' Motion, 19th May, 1932.

No. 5.

Order of Rose C.J., dismissing Defendants' motion.

IN THE SUPREME COURT OF ONTARIO,

The Honourable The Chief Justice of the High Court } Thursday, the Nineteenth day of May, 1932.

between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - *Defendants.*

Upon motion made on the 23rd day of March, 1932 unto this Court on behalf of Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company and on behalf of the defendant the Attorney-General of Canada for an Order staying or dismissing the action or in the alternative for an Order directing the plaintiff to furnish particulars of the allegations contained in the Statement of Claim and in the event of the action not being stayed or dismissed, for an order extending the time for the delivery of the Statements of Defence herein, upon hearing read the writ of summons and the statement of claim herein and upon hearing counsel for all parties and this Court having been pleased to direct that the said motion should stand over for judgment and the same having come on this day for judgment.

2. THIS COURT DOTH ORDER that the time for delivery of the Statements of Defence herein be and the same is hereby extended until one month (excluding long vacation) from the disposition of the pending motion before the Honourable Mr. Justice Magee for leave to appeal or should an appeal be permitted by him, then until one month (excluding long vacation) from the disposition thereof whichever time shall be longer.

3. AND THIS COURT DOTH FURTHER ORDER that save as aforesaid this motion be and the same is hereby dismissed.

4. AND THIS COURT DOTH FURTHER ORDER that the costs of this motion be costs in the cause.

CLARENCE BELL,
Assistant Registrar, S.C.O.

Entered O.B.126, pages 484–5.
July 6, 1932.
H.F.

In the Supreme Court of Ontario.

No. 6. Reasons for Order of Rose C.J., 19th May, 1932.

No. 6.

Reasons for Order of Rose C.J.

This is a motion made on behalf of the defendants for an order staying or dismissing the action, upon the grounds (1) that rights of the Crown have been brought into question without the Crown having been made a party to the action; (2) that the claim of the plaintiff is of a nature that can be asserted only by petition of right; (3) that the plaintiff's personal claim, or part of it, being in tort cannot be asserted in a class action; (4) that the personal claim asserted by the plaintiff cannot be combined in one action with the claim which he makes on behalf of himself and others; and (5) that the persons professed to be represented by the plaintiff are not with him members of one class.

The plaintiff presented a petition of right in which he set forth certain of the claims which he now makes in this action. The petition was left with the Secretary of State for Canada in accordance with sec. 4 of the *Petition of Right Act* (R.S.C. 1927, c. 158), but a fiat was refused. The plaintiff then petitioned His Majesty in Council for leave to appeal from the refusal of His Excellency the Governor-General to grant a fiat, but leave to appeal was refused: *Lovibond* v. *The Governor-General of Canada* (1930). App. Cas. 717. Then this action was commenced. In it the plaintiff on behalf of himself and all others the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assignees, sues the Grand Trunk Railway Company of Canada, The Canadian National Railway Company, and the Attorney-General of Canada, asking on behalf of himself and all those whom he professes to represent in the action (*a*) a declaration that certain transfers to the Minister of Finance of certain shares of stock of the Grand Trunk Railway Company of Canada are illegal and void, and an order directing the defendant railways to rectify the stock register of the Grand Trunk (*b*) a declaration that the *Grand Trunk Railway Acquisition Act*, 1919 (10 Geo. V. c. 17) is *ultra vires* the Parliament of Canada, (*c*) a declaration that a certain meeting of shareholders of the Grand Trunk Railway Company was not duly constituted, and that a resolution passed at that meeting was *ultra vires* and void, (*d*) a declaration that an agreement of the 8th March, 1920, between the Government of Canada and the Grand Trunk is *ultra vires* and void, (*e*) a declaration that an Act of 1920 (10–11 Geo. V. c. 13) confirming the last mentioned agreement is *ultra vires*, and (*f*) a declaration that an order-in-council of the 19th January, 1923, is not within the authority conferred by the Act of 1919 and is otherwise *ultra vires* and void. On his own behalf, he claims an order for the rectification of the stock register of the Grand Trunk Company by restoring his name as the holder of certain specified shares of stock or an order directing the defendant railways to appropriate or acquire shares and to transfer and

In the Supreme Court of Ontario.

No. 6. Reasons for Order of Rose C.J., 19th May, 1932—*continued.*

register the same in the books of the Grand Trunk in the name of the plaintiff as holder, or, alternatively, damages.

The important question raised by the motion is whether the action is one which can be maintained against the Attorney-General of Canada without leave. As in *Attorney-General for Ontario* v. *McLean Gold Mines Limited* (1927) *A.C.* 185, the plaintiff's claim, however it may be viewed, " seeks in substance and reality to avoid the title (to shares of the Grand Trunk Company) acquired by and vested in the Crown ;" and it is contended —and obviously there is much to be said in favour of the contention— that such a claim can be presented only by way of petition of right, and that it ought now to be decided that the action cannot be maintained. Counsel for the plaintiff, however, contends that, as in *Electrical Development Company of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario* (1919), A.C. 687, this question as to the right to maintain the action ought to be left to be decided at the trial; and after much consideration of the arguments and of the relevant authorities, particularly the judgment of the Appellate Division in *Keewatin Power Co., Ltd.* v. *Keewatin Flour Mills Co., Ltd.* (1926) 59 O.L.R. 406, and the cases therein referred to, especially *Dyson* v. *Attorney-General,* (1911) 1 K.B. 410, I have come to the conclusion—not without some misgiving —that the argument of counsel for the plaintiff ought to prevail, and that no opinion as to whether the action will lie ought now to be expressed. It is difficult without discussing the merits of the case to make any adequate statement of the reasoning by which this conclusion has been reached. I restrict myself, therefore, to the statement that my view is that, all things considered, the better practice (in this particular case) is to adopt the course for which counsel for the plaintiff contends. The motion to dismiss the action will be refused.

The claim asserted by the plaintiff on behalf of himself and those whom he professes to represent, for a declaration of the invalidity of the statutes and of the proceedings based upon or purported to be validated by them is, I think, a claim that can be combined in one action with a claim made on behalf of the plaintiff individually for consequential relief; and the plaintiff's individual claim, though in tort, is in reality such a claim for consequential relief. It is my opinion, therefore, that no order requiring the plaintiff to elect as between proceeding with his own claim and proceeding with the claims put forward on behalf of himself and others ought now to be made. That is not to say that I am expressing any opinion as to whether the trial Judge ought to take evidence upon the issues raised by the claim for consequential relief (for instance evidence as to the value at a certain time of the shares of which the plaintiff claims to have been deprived wrongfully) before a decision has been reached upon the main issue in the action. Any such question as to procedure is, of course, a question to be determined by the trial Judge; my decision is merely that upon the material now before the court it cannot be said that the two claims may not be made in the one action.

Upon the remaining question raised by the notice of motion my opinion is that the persons professed to be represented by the individual plaintiff are persons with whom he has such a unity of interest as justifies him in suing on their behalf.

In the Supreme Court of Ontario.

The motion will be refused. The defendants ought to have a reasonable time for the delivery of their statement of defence, say two weeks—or if a longer time is needed the matter can be mentioned to me before the order is issued.

No. 6. Reasons for Order of Rose C.J., 19th May, 1932—*continued.*

The costs of the motion ought to be costs in the cause.

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10 **No. 7.**

No. 7. Notice of Motion by Defendants for leave to appeal from Order of Rose C.J., 23rd May, 1932.

Notice of Motion by Defendants for leave to appeal from Order of Rose C.J.

IN THE SUPREME COURT OF ONTARIO

between

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second, and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - *Plaintiff*

20 and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - *Defendants.*

TAKE NOTICE that by special leave of the Honourable Mr. Justice Magee this day granted a motion will be made on behalf of Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company and on behalf of the defendant the Attorney-General of Canada before the Honourable Mr. Justice Magee in Chambers at Osgoode Hall, Toronto, on
30 Friday the 27th day of May 1932 at the hour of 2.00 o'clock in the afternoon or so soon thereafter as the motion can be heard for an order granting to the applicants leave to appeal from the order of the Honourable the Chief Justice of the High Court pronounced on the 19th day of May 1932 or for such further or other order as may be proper.

AND TAKE NOTICE that in support of such motion will be read the writ of summons and the statement of claim herein, the said order and the

No. 7. Notice of Motion by Defendants for leave to appeal from Order of Rose C.J., 23rd May, 1932—*continued.*

reasons therefore and such further and other material as counsel may advise.

Dated at Toronto this 23rd day of May 1932.

TILLEY, JOHNSTON, THOMSON & PARMENTER,
80 King Street West, Toronto, Agents herein for
W. Stuart Edwards, Parliament Buildings, Ottawa,
Solicitor for the applicants.

To Messrs. McRuer, Evan Gray, Mason & Cameron,
372 Bay Street, Toronto,
Solicitors for the plaintiff.

No. 8. Order of Magee J. A. refusing leave to appeal, 25th June, 1932.

No. 8.

Order of Magee J.A., refusing leave to appeal.

In the Supreme Court of Ontario.

The Honourable Mr. Justice Magee in Chambers } Saturday, the twenty-fifth day of June, 1932.

Between

George Pardew Lovibond, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - - *Plaintiff*

and

Grand Trunk Railway Company of Canada, Canadian National Railway Company and The Attorney-General of Canada - - - - - - - - - *Defendants.*

UPON application made on behalf of the Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company, and on behalf of the defendant The Attorney-General of Canada on the 27th and 28th days of May, 1932, in the presence of counsel for the plaintiff and upon hearing read the Notice of Motion, the Writ of Summons, the Statement of Claim, the Order of the Honourable the Chief Justice of the High Court pronounced on the 19th day of May, 1932, and the reasons therefor, and upon hearing what was alleged by counsel aforesaid

2. IT IS ORDERED that this application be and the same is hereby dismissed.

3. AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

D'ARCY HINDS,
Asst. Rg.

Entered O.B. 127, page 405,
August 9, 1932,
V.C.

No. 9.

In the Supreme Court of Ontario.

Reasons for Order of Magee J.A.

No. 9. Reasons for Order of Magee J. A., 25th June, 1932.

MAGEE J.A.

On this application by the defendants for leave to appeal from the order of Chief Justice Rose refusing their motion to stay or dismiss the action I am unable to say that within the requirements of Rule 493 there are conflicting decisions upon the matter involved or there is good reason to doubt the correctness of the decision on any branch of it. I must therefore refuse the application.

No. 10.

No. 10. Statement of Defence, 26th September, 1932.

Statement of Defence.

IN THE SUPREME COURT OF ONTARIO.

Between

GEORGE PARDEW LOVIBOND, on behalf of himself, and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stock and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

STATEMENT OF DEFENCE.

1. The Defendant, the Canadian National Railway Company (herein referred to as the Canadian National) is a corporation formed by the amalgamation of a company of the same name incorporated in 1919 by special Act of Parliament (9-10 Geo. V. cap. 13) and the Grand Trunk Railway Company of Canada (herein referred to as the Grand Trunk) a Company incorporated in 1852 by special Act of the Legislature of the Province of Canada (16 Vic. cap. 37). The amalgamation was effected by order-in-council dated 23rd January, 1923, under Sections 152 and 153 of the Railway Act and Section 21 of the Canadian National Railway Act of 1919. The result of the amalgamation was that the Canadian National became liable for all obligations of the Grand Trunk and now represents the Grand Trunk for all purposes. The word defendants as used herein means the Attorney-General of Canada and the Canadian National representing itself and its constituent companies, including the Grand Trunk.

In the Supreme Court of Ontario.

No. 10. Statement of Defence, 26th September, 1932—*continued.*

2. The Grand Trunk in 1919 owned, operated or controlled the railway system referred to in paragraph 6 of the Statement of Claim and in addition it owned, operated or controlled the Grand Trunk Pacific Railway system comprising 2,230 miles of railway extending from the City of Winnipeg to the City of Prince Rupert with many branch lines in Western Canada.

3. The Grand Trunk Pacific Railway Company (hereinafter referred to as the Grand Trunk Pacific) was incorporated by special Act of Parliament (3 Edw. VII cap. 122) to construct and operate a railway for the general advantage of Canada from Moncton, in the Province of New Brunswick, to a port to be determined on the Pacific Coast, in British Columbia. At the same session of Parliament, the National Transcontinental Railway Act was passed (3 Edw. VII, cap. 71) authorizing the construction of a national trans-continental railway to be operated as a common railway highway across Canada from ocean to ocean and wholly within Canadian territory. The said Act ratified a certain agreement dated 29th July, 1903, made between His Majesty acting in respect of the Dominion of Canada, and certain persons representing and acting on behalf of the Grand Trunk Pacific, and rendered the same binding on the said Company. By the said agreement, the Grand Trunk Pacific obligated itself to construct the Western division (from Winnipeg to the Pacific Coast) of the National Transcontinental Railway, and further to take a lease of, maintain and operate the Eastern division (from Moncton to Winnipeg) of the said National Transcontinental Railway to be constructed by the Government of Canada.

4. By the agreement aforesaid the Government, for the purpose of aiding the Company in its construction, agreed to guarantee bonds of the Company for an amount equal to 75% of the cost of construction (clause 28). The Grand Trunk Pacific agreed that the Grand Trunk should guarantee the bonds to be issued by it covering the balance of the cost of construction (clause 34), and that the Grand Trunk should acquire the common stock of the said Grand Trunk Pacific. The Grand Trunk was by the National Transcontinental Railway Act (section 7) authorized to guarantee the bonds of the Grand Trunk Pacific and to acquire the said stock. The Grand Trunk acquired the entire capital stock and retained it.

5. The construction of the Eastern division of the National Transcontinental Railway by the Government of Canada and of the Western division by the Grand Trunk Pacific was duly completed but the Grand Trunk Pacific failed to carry out its agreement to lease, maintain and operate the Eastern division and the Government was compelled to operate it and sustained large operating losses as a result.

6. The Grand Trunk Pacific was at all times greatly in need of financial assistance. The Government of Canada guaranteed its outstanding obligations to an amount in excess of $80,000,000., made direct advances of over $30,000,000. and purchased over $30,000,000. of its Mortgage Bonds guaranteed by the Government and $25,000,000. of its bonds and debentures

guaranteed by the Grand Trunk. The Grand Trunk guaranteed its outstanding obligations to an amount in excess of $95,000,000. and made direct advances of over $25, 000,000.

7. The Grand Trunk Pacific was opened for traffic in 1916, from which date its annual deficits constantly increased, being about $1,358,000. in 1916 and over $23,000,000. in 1920. During the same period the Company's business, instead of increasing, decreased. The Company in 1919 and for some time before was hopelessly bankrupt and went into receivership on 7th March, 1919, the Minister of Railways and Canals of Canada being appointed Receiver. The Government alone could take it over.

8. In the year 1919 and long before, the Grand Trunk was insolvent and incapable of meeting its obligations as they matured and operate its railway. It had guaranteed subsidiary obligations other than those of the Grand Trunk Pacific. Large sums were immediately required in 1919 for deferred maintenance of road and equipment; for expensive and urgently needed grade separations ordered by public authorities in Canada and the United States; and for necessary capital expenditures. The Grand Trunk System was at the same time meeting substantial deficits after allowing for operating expenses and fixed charges. The result was that by 1919 a national emergency had arisen affecting the whole of Canada and inviting the immediate attention of the Grand Trunk, the Government and Parliament to provide a solution that would result in the payment of the Grand Trunk obligations, protect, if possible, the interest and dividends payable on senior stocks, secure to the holders of preference and ordinary stocks the value, if any, they had in the undertaking and ensure the continued operation of railways that had received large Government aid.

9. Defendants deny that any proposal of purchase by the Government of Canada of the Grand Trunk and the Grand Trunk Pacific was made between the years 1916 and 1919, or at all. Any discussions regarding the possibility of the Government taking over the Grand Trunk and the Grand Trunk Pacific resulted from the financial embarrassment of those Companies, their officers having both before and after the making of the Drayton-Ackworth Report referred to in paragraph 9 of the Statement of Claim, stated, as the fact was, that the Companies could not carry on. Any sum the Government might have been willing to pay to the preference and ordinary stockholders was merely in relief of their position and not as indicating any value in their stock.

10. The Defendants submit that the statutes, orders-in-council and agreements referred to in paragraphs 11, 13, 14, 15, 16, 19, 21 and 22 of the Statement of Claim are intra vires and valid in all material parts and they refer to said statutes, orders-in-council and agreements for their terms.

11. The agreement of 8th March, 1920 was duly and regularly approved and authorized at the meeting of stockholders held 19th February, 1920. Holders of each class of debenture stock and each class of capital stock attended the meeting, some in person and others by proxy. The stockholders

In the Supreme Court of Ontario.

No. 10. Statement of Defence, 26th September, 1932—*continued.*

approved the agreement by an overwhelming majority, the holders of each class of stock being largely in favour of adopting the agreement. The votes on the preference and ordinary stock were as follows :

First Preference :

Proxies in favour - - - -	£862,604
Votes in person in favour - - -	£ 71,940
Votes against - - - - -	£ 500

Second Preference :

Proxies in favour - - - -	£674,803
Votes in person in favour - - -	£ 81,250
Votes against - - - - -	£ 300

Third Preference :

Proxies in favour - - - -	£1,457,898
Votes in person in favour - - -	£ 210,726
Votes against - - - - -	£ 24,500

Ordinary :

Proxies in favour - - - -	£3,210,756
Votes in person in favour - - -	£ 491,934
Votes against - - - - -	£ 263,335

12. The agreement of 13th May, 1921 was duly and regularly approved and authorized by unanimous vote of the stockholders present or represented by proxy at the meeting held on 3rd May, 1921.

13. Pursuant to the agreement of the 8th March, 1920, the Government duly guaranteed the payment of dividends at 4% per annum on the guaranteed stock of the Grand Trunk amounting to £12,500,000. and interest on the debenture stocks of the Grand Trunk amounting to £31,926,125. as and when payable in accordance with the terms thereof and the guarantee was duly signed and deposited in accordance with the terms of the agreement.

14. Since the acquisition of the Grand Trunk, the Defendant, the Canadian National, has made expenditures on capital account for the improvement and development of the railways of the former Grand Trunk system of a sum exceeding $300,000,000. the moneys so expended having been obtained by the issue of securities of the Canadian National guaranteed by the Government of Canada. In addition many millions of dollars have been expended by the Canadian National on account of the Canadian National Railway System, which expenditures have greatly benefited the Grand Trunk and the Grand Trunk Pacific and the said railways have been operated, improved and developed in conjunction with and as part of the

No. 10.
Statement of Defence, 26th September, 1932—*continued.*

Canadian National Railway System which comprises, in addition to the Grand Trunk and the Grand Trunk Pacific, many other railways, so that the Grand Trunk and the Grand Trunk Pacific have become constituent parts of the Canadian National Railway System and cannot now be separated from it.

15. The Plaintiff was not, prior to 8th March, 1920, the registered holder of any preference stock in the Grand Trunk and held only 200 shares of ordinary stock. At the time he acquired stock he was aware of the legislation and the agreement providing for arbitration and purchased the stock with the object and in the expectation of securing advantage from said arbitration.

16. The preference and ordinary stockholders of the Grand Trunk, including the Plaintiff and the former owners of his stock, took active steps to authorize and bring about the agreements of 8th March, 1920 and 13th May, 1921, or they took no action to prevent the agreements but stood by and permitted them to be entered into in the hope and expectation that benefit would accrue to them under the arbitration and well knowing that the agreements would be acted on, that substantial obligations would be assumed thereunder and that large liabilities would be incurred in financing and operating the railways. They were represented by counsel on said arbitration and on the petition for leave to appeal and on the appeal from the award to His Majesty in His Privy Council and at no time until the result of the arbitration proved disappointing was the agreement repudiated, but on the contrary was enforced. Pursuant to the agreement, contributions were levied on the holders of debenture and guaranteed stocks to the amount of $1,382,931.29 to cover the expenses of the arbitration held for their benefit. The preference and ordinary stockholders, including the Plaintiff, are now estopped by their laches, delay and acquiescence from maintaining this action.

17. Without concurring in the submissions of invalidity therein contained the Defendants admit the allegations in paragraphs 16 to 19 and 21 to 24 inclusive of the Statement of Claim and admit that preference and ordinary shares standing in the names of the Plaintiff and others were transferred to the Minister of Finance in pursuance of the order-in-council of 19th January, 1923.

18. The Defendants admit that documents purporting to be transfers of stock were presented at the office of the Canadian National in London for entry; that they were delivered to the Secretary of the Canadian National; that a demand was made on the President of the Canadian National for rectification of the stock register; and that the Canadian National refused or failed to register the transfers or to issue new certificates or to change the stock register.

19. The location of the principal office of the Grand Trunk, the place for holding meetings of directors and stockholders, the keeping of stock registers and the issuance of certificates of stock transferred were matters

In the Supreme Court of Ontario.

No. 10. Statement of Defence, 26th September, 1932—*continued.*

governed by the legislation affecting the Grand Trunk and were at all times under the control of Parliament.

20. The Defendants deny the allegations in paragraphs 30 and 31 of the Statement of Claim.

21. The persons who were registered holders of preference and ordinary stocks on 18th January, 1923, and their personal representatives or assigns do not constitute a class that may be represented by the Plaintiff for the purposes of this action.

22. The Defendants submit that the holders of one or more classes of stock in the Grand Trunk may not maintain this action or maintain it without making the holders of all classes of stock affected by the legislation and agreement parties of it.

23. The Plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right.

24. The Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.

25. An action by the Plaintiff either personally or in his representative capacity for the declarations referred to in paragraph 5 of the Statement of Claim will not lie even though the Attorney-General of Canada be a party defendant.

26. Save as herein expressly admitted the Defendants deny all allegations contained in the Plaintiff's Statement of Claim.

DELIVERED this 26th day of September, 1932, by Tilley, Johnston, Thomson & Parmenter, 80 King Street West, Toronto, Agents herein for W. Stuart Edwards, Parliament Buildings, Ottawa, Solicitor for said Defendants.

In the Supreme Court of Ontario.

No. 11. Reply and Joinder of Issue, 5th October, 1932.

No. 11.

Reply and Joinder of Issue.

IN THE SUPREME COURT OF ONTARIO.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stock and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - *Plaintiff.*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - *Defendants.*

REPLY AND JOINDER OF ISSUE.

1. Where used in this pleading the expression " Grand Trunk " means the Grand Trunk Railway Company of Canada, and the expression " Canadian National " means the Canadian National Railway Company, and the expression " Grand Trunk Pacific " means the Grand Trunk Pacific Railway Company.

2. In reply to the allegations relating to the Grand Trunk Pacific contained in Paragraphs 2 to 7 inclusive of the Statement of Defence, the Plaintiff submits that these allegations are immaterial and irrelevant to the issues in this action, but, insofar as they purport to set out a narrative of facts leading up to the issues referred to in the pleadings, or to recite facts which are evidence on the question of damages suffered by the Plaintiff, the allegations are not accurate or complete; and in particular the Plaintiff alleges in reply to the said paragraphs in the Statement of Defence that any liability in law of the Grand Trunk for the obligations of the Grand Trunk Pacific is merely an item to be taken into account, if at all, with many others and contra items in determining the value of the Grand Trunk stock or the damages suffered by the Plaintiff; that the sum of $80,000,000. and two sums of $30,000,000. mentioned in the said paragraphs, as advances or guarantees by the Government of Canada to the Grand Trunk Pacific are not obligations of or chargeable against the Grand Trunk; that more than $25,000,000. of moneys belonging to the Grand Trunk was invested in the construction and maintenance of the Grand Trunk Pacific, which has now been taken into possession of the Canadian National without any compensation to the Grand Trunk for the moneys so provided; that a large part of the sum of $95,000,000. mentioned in the said paragraphs as obligations of the Grand Trunk Pacific guaranteed by the Grand Trunk was guaranteed

In the Supreme Court of Ontario.

No. 11. Reply and Joinder of Issue, 5th October, 1932—*continued.*

in respect of interest only, as a contingent charge upon income of the Grand Trunk, not accumulating; that the Grand Trunk Pacific was justified in law in refusing to lease, maintain and operate the Eastern Division of the Transcontinental Railway and was, in fact, released by the Government of Canada from any obligation it might have had to do so; that when the Grand Trunk Pacific failed, by reason of circumstances and conditions for which the Government of Canada was in large part responsible, the Grand Trunk was entitled to be relieved of responsibility for the obligations of the Grand Trunk Pacific; and the Plaintiff says that the Grand Trunk Pacific was an enterprise of the Government of Canada, in the field of construction, ownership and operation of a railway system, in association with a private company and that, having entered into the enterprise in the manner of a private owner or contractor, the Government of Canada, throughout the Grand Trunk Pacific transactions and in subsequent negotiations for acquisition of the Grand Trunk stood in the position of a private railway owner and operator, subject to the law relating to private property and civil rights.

3. In reply to the allegations in Paragraph 8 of the Statement of Defence, the Plaintiff says that the Grand Trunk was not insolvent in the year 1919 or at any time prior to that date and had not failed to meet its obligations or ceased to operate its railway; the Plaintiff further says that if, in 1919, the Grand Trunk encountered difficulty in providing for future obligations as they matured or needed to obtain new capital for maintenance, equipment and development of the railroad, this was a condition which faced all railway enterprise in Canada at the conclusion of the Great War of 1914–1918, and was the result of unfavourable conditions unnecessarily imposed by the Government of Canada during the war period, especially the refusal of the Government of Canada to allow reasonable increases in railway rates to meet the increased costs of operation due to higher wages and rising costs of materials; that this condition was a temporary one which in normal course would, or could, have been adjusted without expropriation or confiscation of the stock of the Plaintiff and those whom he represents in this action; the Plaintiff further submits that if by reason of the failure of the Grand Trunk to make satisfactory arrangements with the Government of Canada respecting the affairs of the Company the Grand Trunk had become unable to provide for payment of its obligations as they matured, and if, as alleged in the Statement of Defence, the Grand Trunk had become insolvent, or a Receiver of its property had been appointed by the Court, a re-organization of the Company and the continued operation of the railroad might have been achieved, which would not have deprived the Plaintiff and those whom he represents in this action of ownership of their stock in the Grand Trunk or have extinguished the value of such stock; and the Plaintiff says that the conditions alleged in the statement of Defence do not justify the legislation or orders-in-council in question in this action which confiscated the stock of the Plaintiff and those whom he represents in this action without compensation. The Plaintiff denies that the facts alleged in the said paragraph or the situation which existed with

regard to the finances of the Grand Trunk constituted a national emergency so as to confer upon the Parliament of Canada extraordinary legislative authority and says that however advantageous to the Government of Canada and to security owners having prior claims on the Grand Trunk the solution referred to in Paragraph 8 of the Statement of Defence may have been, the legislation by which the Parliament of Canada undertook to effect that solution was ultra vires and invalid.

4. In reply to the allegations of the Defendants in Paragraph 9 of the Statement of Defence, the Plaintiff says that on or about the 7th day of March, 1918, the Government of Canada proposed to the Board of Directors of the Grand Trunk to purchase and take over the Grand Trunk and the Grand Trunk Pacific and to acquire all their assets and to relieve the Grand Trunk from its liabilities in respect of the Grand Trunk Pacific and from its obligations to operate the National Transcontinental, and to assume other liabilities and obligations of both companies and to pay therefor an annual sum to the Grand Trunk of Two and a half Million Dollars for each of the first three years, Three Million Dollars for each of the succeeding five years, and Three Million Six Hundred Thousand Dollars in each of the years thereafter, these sums to be distributed by Grand Trunk management as they might determine among the holders of the Four per cent. guaranteed and other stocks, the acquisition of the assets of the Grand Trunk to be carried out by long term lease, renewable perpetually with rental corresponding to the annual payments above mentioned. The Plaintiff denies that the sum which the Government of Canada was willing to pay was merely for the relief of the position of stockholders of the Grand Trunk and says that this offer was made for the advantage of the Government of Canada, which at that time owned or controlled and operated a group of disconnected railway systems, known as the Canadian Government Railways, including the Canadian Northern Railway System, the Grand Trunk Pacific, the National Transcontinental Railway, the Intercolonial Railway System and other local lines; the operation of these Canadian Government Railways was very unprofitable and expensive to the Government of Canada and the purpose of the offer to purchase the Grand Trunk was to secure by amalgamation of the Canadian Government Railways with the Grand Trunk system the co-ordinated transcontinental railway system recommended by the Drayton-Acworth Report, to the advantage and profit of the Government of Canada; the Plaintiff submits that the purchase price named in the offer was the estimate of the Government of Canada of the value of the Grand Trunk to the offeror at the time it was made; and the Plaintiff says that in making the said offer and in entering into the alleged agreement of 8th March, 1920, the Government of Canada, through its Ministers, assumed to act as private owners and operators of a railway system intending to acquire additional properties by purchase.

5. The Plaintiff denies the allegations in Paragraph 11 of the Statement of Defence and says that the meeting of stockholders therein referred to was irregular and its proceedings invalid and of no effect and the Plaintiff

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No. 11. Reply and Joinder of Issue, 5th October, 1932—*continued.*

says that if the votes cast personally, or by proxy, in favour of the agreement, as alleged in the Statement of Defence, are correctly recorded (which the Plaintiff does not admit but denies) the Plaintiff says that of a total outstanding First Preference Stock of £3,420,000 only £934,544 voted in favour of the agreement, and of a total outstanding of Second Preference Stock of £2,530,000 only £756,053 voted in favour of the agreement, and of a total outstanding Third Preference Stock of £7,168,055 only £1,668,624 voted in favour of the agreement, and of total outstanding Common Stock of £23,955,437 only £3,702,690 voted in favour of the agreement and the Plaintiff says that he did not consent to or concur in the proceedings of the meeting and he did not vote for approval of the agreement or authorize any person to represent him in the arbitration which followed or acquiesce in any proceedings taken under or pursuant to the agreement.

6. In reply to the allegations in Paragraph 12 of the Statement of Defence the Plaintiff says that the agreement of 13th May, 1921, was illegal and ultra vires the Grand Trunk and was of such a character that it could not be duly and regularly authorized and approved by any meeting or vote of stockholders.

7. In reply to the allegations in Paragraph 14 of the Statement of Defence the Plaintiff says that the expenditures of the Canadian National therein referred to were made upon lines and properties other than those of the Grand Trunk and were made subsequent to the illegal taking of the stock of the Plaintiff and those whom he represents in this action and were made without their authority or consent and at the sole risk of the Defendants and the Plaintiff says that the Grand Trunk Railway System is still severable from the other systems of the Canadian National but that what shall be decided or agreed in regard to such expenditures and in regard to the severance of the Grand Trunk Railway System from other parts of the Canadian National is not material in or relevant to this action, but will be, and can be practically and effectively dealt with, after the rights and privileges of ownership of the stock of the Grand Trunk have been restored to the Plaintiff and to those whom he represents in this action.

8. The Plaintiff denies the allegations in Paragraph 15 of the Statement of Defence and says that at the time of the illegal taking of the stock of the Plaintiff he was the owner of the stock listed in the Statement of Claim and entitled to all the rights and privileges of ownership and that no action of the Plaintiff could confer on the Parliament of Canada authority to enact the legislation in question in this action.

9. The Plaintiff denies the allegations in Paragraph 16 of the Statement of Defence and says that at the meeting of stockholders held in London on 19th February, 1920, in the presence of the official representative of the Government of Canada, many and strong protests were made against coercion of the Grand Trunk by the Government of Canada into accepting the proposed agreement of 8th March, 1920 and a resolution of protest against the unfair treatment of the Grand Trunk and the oppressive terms of the proposed agreement was unanimously adopted at the said meeting

and the Plaintiff says that any votes cast in favour of approval of the said agreement were so cast because of representations made to the stockholders that no practical alternative was available to the Grand Trunk. The Plaintiff denies that he or they whom he represents in this action were represented by counsel on the arbitration or that he or they concurred in or accepted any proceedings under the alleged agreement. And the Plaintiff says that if he and those whom he represents in this action took no other action than the protest herein referred to against the proceedings under the alleged agreement of 8th March, 1920, until after the arbitration had been held, it was because they expected that reasonable compensation would be paid to all stockholders for the surrender of their stock and because, upon the true interpretation of Section 13 of the alleged agreement dated 8th March, 1920, the transfer of the preference and common stocks of the Grand Trunk to the Minister of Finance was only to be made upon the issue to the holders thereof of new guaranteed stock which would be an obligation of the Government of Canada in exchange for the Grand Trunk stock held by them; and the Plaintiff says that forthwith after the illegal taking of the stock of the Grand Trunk, he or those whom he represents in this action made protests to the Government of Canada against such illegal taking and promptly and without any unreasonable delay submitted to the Government and Parliament of Canada petitions and memorials praying relief from such illegal acts and thereafter with all due diligence prosecuted their claim for relief by petition to the Governor-General-in-Council and by the proceedings referred to in Paragraph 23 of the Statement of Claim and by the proceedings in this action and the Plaintiff and those whom he represents in this action have not been guilty of laches, delay or acquiescence, as alleged in the Statement of Defence, and the Plaintiff says that laches, delay and acquiescence would not confer upon the Parliament of Canada authority to enact the legislation in question in this action nor estop the Plaintiff from seeking his remedy at law in this action.

10. In answer to the submission in Paragraph 21 of the Statement of Defence the Plaintiff submits that those whom he represents in this action are of one class and competent to maintain this action in that their right to relief arises out of the same transaction or occurrence or series of transactions or occurrences in which common questions of law and fact arise.

11. The Plaintiff denies the allegation in Paragraph 23 of the Statement of Defence and says that the stock, ownership whereof is in question in this action, is now held by the Canadian National and not by the Crown.

12. The Plaintiff denies that the Exchequer Court has exclusive original jurisdiction to determine the matters in question in this action and asserts the jurisdiction of this Court to hear and determine the same and the Plaintiff says that unless this action is admitted to be tried in His Majesty's Courts of civil jurisdiction in the Province the Plaintiff and those whom he represents in this action will thereby be deprived of any right to have the validity of legislation of the Parliament of Canada judicially determined and of any remedy at law for a grievous wrong which the

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Plaintiff and those whom he represents in this action have suffered by reason of the illegal acts of the Defendants the Grand Trunk and the Canadian National.

13. Save as herein expressly admitted the Plaintiff denies all allegations contained in the Defendants' Statement of Defence.

14. The Plaintiff joins issue on the Defendants' Statement of Defence.

DELIVERED at Toronto this Fifth day of October, 1932, by Messrs. McRuer, Evan Gray, Mason & Cameron, 372 Bay Street, Toronto, Solicitors for the Plaintiff.

No. 12. Notice of Motion for leave to set down points of law for hearing, 13th October, 1932.

No. 12.

Notice of motion for leave to set down points of law for hearing.

In the Supreme Court of Ontario.

Between :

George Pardew Lovibond, on behalf of himself, and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stock and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - *Plaintiff*

and

Grand Trunk Railway Company of Canada, Canadian National Railway Company, and The Attorney-General of Canada - - - - - - - - - *Defendants.*

TAKE NOTICE that a motion will be made on behalf of the defendants Canadian National Railway Company and The Attorney-General of Canada before the presiding Judge in chambers at Osgoode Hall in the City of Toronto on Tuesday the 18th day of October 1932 at 11.00 o'clock in the forenoon or so soon thereafter as the motion can be heard for leave to set down for hearing before the trial the points of law raised by paragraphs 23 and 24* of the statement of defence and staying the trial, the taking of evidence on Commission and extending the time for production of documents until the points of law have been determined or if leave to set down be refused for an order directing the plaintiff to deliver within a time to be fixed particulars of allegations in his Reply as follows—as to paragraph 2, particulars of the respect in which the allegations in paragraphs 2 to 7 of the Statement of Defence are inaccurate or incomplete; the facts affording

* *Sic*

In the Supreme Court of Ontario.

No. 12. Notice of Motion for leave to set down points of law for hearing, 13th October, 1932. —*continued.*

justification in law for refusing to lease, maintain and operate the Eastern Division of the Transcontinental Railway; the facts constituting a release by the Government of Canada of the Grand Trunk Pacific from its obligations; the circumstances and conditions that were the reason for the failure of the Grand Trunk Pacific and the facts rendering the Grand Trunk Pacific an enterprize of the Government of Canada; as to paragraph 3, particulars of the unfavourable conditions unnecessarily imposed by the Government of Canada and of the refusal of the Government of Canada to allow reasonable increase of railway rates; and as to paragraph 5, particulars in which the meeting of stockholders referred to in paragraph 11 of the Defence was irregular and its proceedings were invalid; and further directing that the evidence of Harry William Harding, European Secretary and Treasurer of the Canadian National Railway Company in London and such other witnesses in England as may be called by the defendants or either of them be taken before F. A. C. Redden and C. V. Booth, of Redden & Booth, 17 Victoria Street, London, S.W.1, England, as Commissioners or either of them and that if necessary a commission do issue for that purpose and also directing the Plaintiff to attend before said F. A. C. Redden or C. V. Booth at London to be examined for Discovery herein before the taking of such evidence and staying the trial of the action until the return of the Commission, and for such further or other order as may be proper.

AND FURTHER TAKE NOTICE that should the presiding Judge in Chambers be of opinion that the application as to alternative relief if it proceeds should be dealt with by the Master in Chambers the application will be made before the Master.

AND FURTHER TAKE NOTICE that in support of said application will be read the pleadings herein and the affidavit of C. F. H. Carson filed (copy of which is served herewith) and such other material as counsel may advise.

DATED at Toronto this 13th day of October, 1932.

TILLEY, JOHNSTON, THOMSON & PARMENTER,
80 King Street West, Toronto, Agents herein for W. Stuart Edwards, Esquire, K.C., Parliament Buildings, Ottawa, Ontario, Solicitor for the applicants.

To: Messrs. McRuer, Evan Gray, Mason & Cameron,
372 Bay Street, Toronto.
Solicitors for the Plaintiff.

In the Supreme Court of Ontario.

No. 13.

Order of Rose C.J. granting leave to set down points of law for hearing.

No. 13. Order of Rose C.J. granting leave to set down points of law for hearing, 14th January, 1933.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE THE CHIEF JUSTICE OF THE HIGH COURT IN CHAMBERS: } Saturday the 14th day of January 1933.

Between:

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns, - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - *Defendants.*

1. UPON the application of the defendants Canadian National Railway Company and The Attorney-General of Canada and upon reading the pleadings herein and the affidavit of Cyril Frederick Harshaw Carson and the affidavit of Francis Andrew Brewin filed and the exhibits therein referred to and upon hearing counsel for said defendants and for the plaintiff and judgment upon the said application having been reserved until this day.

2. IT IS ORDERED that the said defendants be and they are hereby granted leave to set down for hearing before the trial of the action the points of law raised by paragraphs 23, 24 and 25 of the statement of defence herein respectively as follows:

> 23. The plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right.
>
> 24. The Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.
>
> 25. An action by the plaintiff either personally or in his representative capacity for the declarations referred to in paragraph 5 of the Statement of Claim will not lie even though the Attorney-General of Canada be a party defendant.

3. AND IT IS FURTHER ORDERED that the trial of the action and other proceedings therein including production of documents, examinations for discovery and the taking of evidence on commission but not including applications for orders for security for costs now pending or

hereafter to be launched be and the same are hereby stayed until after the final determination of said points of law.

4. AND IT IS FURTHER ORDERED that the costs of this motion be reserved to be disposed of by the judge presiding at the hearing of said points of law.

"D'ARCY HINDS,"
Ass. R.

Entered O.B. 131 page 181
January 25th, 1933
H.F.

No. 13. Order of Rose C.J. granting leave to set down points of law for hearing, 14th January, 1933 —*continued.*

No. 14.

Reasons for Order of Rose C.J.

No. 14. Reasons for Order of Rose C.J., 14th January, 1933.

This is a motion made on behalf of the defendants for leave under Rule 122 to set down for hearing certain points of law raised by the Statement of Defence.

After the Statement of Claim had been delivered, but before the defendants had pleaded, a motion was made for an order under Rule 124 to stay or dismiss the action. Upon that motion one of the points that the defendants now desire to have set down for hearing, viz., the point that as the plaintiff's claim impugns the title of the Crown to certain shares of the capital stock of the Grand Trunk Railway Company of Canada it can be asserted only by petition of right, was discussed by counsel; but, thinking that the action had not then reached the stage at which the points raised could conveniently be discussed, I dismissed the motion ((1932) 41 O.W.N. 188). In doing so I used, unfortunately, words which went rather beyond what really had to be decided. I gave it as my opinion that the case ought to proceed to trial and that the points raised ought to be disposed of by the trial Judge. Leave to appeal from my order was refused by Magee, J.A., who in a short written judgment said that he was unable to say that within the requirements of Rule 493 there were conflicting decisions upon the matter involved or that there was good reason to doubt the correctness of the decision proposed to be appealed against or any branch of it. But, of course, neither Mr. Justice Magee upon the motion for leave to appeal nor I upon the motion to dismiss the action had any intention of prejudging a motion that might be made at this stage of the proceedings for an order under Rule 122; all that was under consideration was the motion made under Rule 124 and all that fell to be decided was whether, regard being had to the opinion expressed by the Judicial Committee of the Privy Council in *Electrical Development Company of Ontario* v. *The Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario,* (1910) A.C. 687, that particular motion ought to be granted or refused. Therefore, I am bound to consider the present application without regard to what was said in the course of the opinion reported in 41 O.W.N.

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No. 14. Reasons for Order of Rose C.J., 14th January, 1933 —*continued.*

The statement of defence and the reply have done much to define the issues : so that, while it has become apparent that if the case is to proceed to trial some particulars of certain of the plaintiff's allegations will have to be given, it is possible to forecast with a certain degree of accuracy the result that would follow upon a decision wholly or partly favourable to the defendants upon one or another of the points that the defendants desire to set down for hearing, and it is also possible to form an opinion as to whether those points can be disposed of before evidence is taken, and as to the balance of convenience.

The plaintiff sues upon his own behalf and on behalf of himself and all others the registered holders on January 18, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada. In his statement of claim he alleges (para. 2) that his shares and the shares of those whom he represents in the action have illegally been transferred on the books of the Grand Trunk under cover of certain statutes of the Parliament of Canada which he submits are *ultra vires*. Then he goes on to set out the manner of incorporation of the companies respectively and the fact of the amalgamation of the two companies, as a result of which amalgamation the Canadian National company professes to be liable for all the obligations of the Grand Trunk Company and " to stand in the place of and represent the Grand Trunk for all purposes." He states the number of miles of railway owned or operated by the Grand Trunk before the amalgamation; he gives particulars as to the location of the Grand Trunk Company's principal office, as to the keeping of the stock-registers, as to the amount of stock of various classes outstanding at the material times, and as to certain negotiations which he says took place with the Canadian Government looking to the acquisition of the stock by the Government. He says that in 1918 the Government entered into negotiations with the directors for the acquisition of the undertaking of the Grand Trunk Company, and that a certain offer (of which he gives particulars) was made and was rejected by the directors. In para. 11 he states some of the provisions of the Grand Trunk Acquisition Act, 1919 (which Act he submits was *ultra vires* in whole or in material parts). Among the provisions referred to is one authorizing the Governor-in-Council to make such orders as may be deemed requisite to vest in the Government any of the preference or common stock not transferred to the Government or its nominees pursuant to other provisions of the Act. He says (para. 12) that at the time of the passing of the Act the shareholders of Grand Trunk company had not approved the scheme set up by the Act, and (para. 13) that a pretended ratification of a draft agreement by a general meeting of shareholders held on February 19, 1920, was, for reasons which he states, ineffective and void. He recites (para. 14) the statute of 1920 (10-11 Geo.V., c. 13) which purports to ratify the agreement; and he submits that this Act also is *ultra vires*. He goes on (para. 15) to refer to some of the terms of the agreement, and amongst them the provision in Clause 13 that any shares of the preference or common stock not transferred to the Government might be declared to be the property of the Minister of Finance

in trust for His Majesty and should upon the making of the declaration become the property of His Majesty, and that the requisite entries should be made in the stock-registers and other books. Then (para. 18) he refers to the arbitration proceedings, the failure to complete the arbitration within the time limited, and the passing of the statute of 1921 (submitted to be *ultra vires*), providing for the surrender to the Government of the control of the company's powers and business; and (para. 17) to the continuation of the arbitration proceedings, the award by the majority of the arbitrators that the preference and common stocks were without value to the holders, and (para. 18) to the unsuccessful appeal to the Judicial Committee of the Privy Council upon the ground of the improper exclusion of evidence. In para. 19 an order-in-council passed on January 19, 1923, which declared that the whole of the preference and common stock was the property of the Minister of Finance in trust for His Majesty, and ordered the requisite entries to be made in the company's books, is recited and is submitted to have been "*ultra vires*, illegal and void." In para. 20 he says that the transfers were recorded pursuant to the order-in-council and submits that they are void. In para. 21 he describes an indenture of January 30, 1923, made between the Canadian National and Grand Trunk companies, providing for their amalgamation under the name of Canadian National Railway Company and for the issue to the Minister of Finance in trust for His Majesty of the whole of the capital stock of the amalgamated company (in one share) and for the Minister's surrendering for cancellation the shares of the stock of the Grand Trunk Company held by him. In para. 22 an order-in-council of January 30, 1923, approving the amalgamation agreement and directing the entry on the books of the amalgamated company of the name of the Minister as the holder of the share of that company's stock, is recited and is submitted to be illegal and void. Then follow references to a petition-of-right that was by the Plaintiff in 1929 presented for a fiat, the refusal of the fiat, and an unsuccessful petition for leave to appeal to the Judicial Committee. Then are set forth demands made by the plaintiff in 1931 for the registration of certain transfers to him of shares of the capital stock of the Grand Trunk company, and the refusal of the defendant railways to record the transfers and to rectify the books of the Grand Trunk company; and it is asserted (paras. 30 and 31) that during the month of May, 1920, the shares which in 1931 were transferred to the plaintiff were of substantial value to the holders, and that "by being deprived of the rights and privileges of ownership of his stock through the illegal transfer . . . and through the refusal or failure of the Grand Trunk and the Canadian National to register the transfers of stock as submitted" the plaintiff has suffered loss and damage for which the defendant railways are liable to indemnify him. The plaintiff claims for himself and all those upon whose behalf he brings the action (*a*) a declaration that the transfer of the shares of the Grand Trunk company's stock to the Minister are "invalid, illegal and void," and an order directing the defendant railway companies to rectify the Grand Trunk company's stock register; (*b*) a declaration that the Act of 1919 is *ultra vires*; (*c*) a declaration

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—continued.

that the meeting of the shareholders of the Grand Trunk Company held on February 19, 1920, was not duly constituted, and that the resolution of that meeting purporting to approve the agreement of March 8, 1920, is void; (*d*) a declaration that the agreement itself is void; (*e*) a declaration that the Act of 1920 purporting to confirm the agreement is *ultra vires* and void; and (*f*) a declaration that the order-in-council of January 19, 1923, whereby it was declared that the shares were the property of the Minister of Finance in trust for His Majesty, was not within the power conferred upon His Excellency by the Act of 1919 and "is otherwise *ultra vires*, illegal and void." In para. 5 of the statement of claim it is stated that the Attorney-General is made a party for the purpose of the declarations "(*b*)," "(*e*)" and "(*f*)"—*i.e.* the declarations that the statutes and the order-in-council are ultra vires. The plaintiff claims on his own behalf orders for the rectification of the Grand Trunk company's stock-register, and other relief incidental to the claim based upon the refusal by the company of his demand for registration, and alternatively damages in stated amounts for the refusal of the defendant railways to register him as a shareholder and for registering the transfer to the Minister of Finance and without lawful authority depriving the plaintiff of the rights and privileges of ownership. And for himself and those on whose behalf he sues he claims further and other relief as may seem just and equitable and the costs of the action.

The statement of defence refers again to the statutes incorporating the defendant companies and to the order-in-council by which the amalgamation was effected and asserts (para. 1) that "the result of the amalgamation was that the Canadian National became liable for all obligations of the Grand Trunk and now represents the Grand Trunk for all purposes" It alleges (para. 2) that in 1919 the Grand Trunk owned the lines of railway referred to in the statement of claim and also owned, operated or controlled the Grand Trunk Pacific Railway system. It refers (para. 3) to the incorporation by statute (3 Edw. VII. c. 122) of the Grand Trunk Pacific Company, and the passing of the National Transcontinental Railway Act (3 Edw. VII, c. 71), ratifying an agreement of July 29, 1903, made between His Majesty acting in respect of the Dominion of Canada and certain persons representing the Grand Trunk Pacific company, by which agreement the company obligated itself to construct the western section and to take a lease of and maintain and operate the eastern section of the National Transcontinental railway. Then (para. 4) it refers to the provisions of the last-mentioned agreement for the guaranteeing by the Government of bonds of the Grand Trunk Pacific company as an aid to the company in the construction work; for the guarantee by the Grand Trunk Company of other bonds of the Grand Trunk Pacific Company; and for the acquisition by the Grand Trunk of the common stock of the Grand Trunk Pacific; and it alleges that the Grand Trunk acquired that stock and retained it. In para 5. it alleges that the Grand Trunk Pacific failed to lease, maintain and operate the eastern section of the National Trans-continental Railway, and that the

Government was compelled to operate it and sustained a loss; and in para. 6 that the Grand Trunk Pacific was at all times greatly in need of financial assistance; that the Government rendered certain stated assistance, including a purchase of bonds and debentures guaranteed by the Grand Trunk company; and that the Grand Trunk company guaranteed outstanding obligations of over 95 million dollars and made direct advances of over 30 millions. In para. 7 it is alleged that from the opening in 1916 the annual deficit of the Grand Trunk Pacific Company constantly increased; that the company was in 1919 hopelessly bankrupt and went into receivership, the Minister of Railways and Canals being appointed Receiver; that the Government alone could take it over. In para. 8 it is alleged that in 1919 the Grand Trunk Company was insolvent, incapable of meeting its obligations as they matured and of operating its railway, and in urgent need of money for certain purposes specified; and it is asserted that a national emergency had arisen which invited the immediate attention of Parliament. In para. 9 is a denial of the plaintiff's allegations as to governmental proposals of purchase; in para. 10 an assertion of the validity of the statutes and orders-in-council attacked; in para. 11 an assertion of the regularity of the ratification of the agreement of March 8, 1920, by the Grand Trunk shareholders (particulars of the vote being given); and in para. 12 an assertion that the agreement of May 13, 1921 also was duly ratified. Then follow paragraphs dealing with expenditures made by the Canadian National Company for the improvement and development of the railways of the former Grand Trunk system; allegations that the plaintiff acquired his shares with knowledge of the legislation and in the expectation of securing advantage from the arbitration; and allegations that for reasons stated the preference and ordinary stockholders of the Grand Trunk, including the plaintiff, are estopped by laches, delay and acquiescence from maintaining this action. Para. 17 is important; it contains an admission of the allegations of fact (but not of the submissions of invalidity) in paras. 16 to 19 and 21 to 24 inclusive, of the statement of claim—i.e. the paragraphs dealing with the surrender to the Government of the control of the Grand Trunk company's business, the award, the appeal, the declaration by the order-in-council of January 19, 1923, that the Grand Trunk Stock was the property of the Minister of Finance in trust for His Majesty, the provision (by the indenture of January 30, 1923) for the surrender of this stock for cancellation, and for the issue of the stock of the Canadian National company to the Minister in trust for His Majesty, the order-in-council approving the last mentioned indenture, the presentation by the plaintiff of his petition-of-right, and the unsuccessful application for leave to appeal from the refusal of a fiat, para. 18 admits the Plaintiff's demand for the registration of the transfers of shares, and the refusal of registration. Paras. 23, 24 and 25 raise the points of law which the defendants desire to have set down for hearing. They are in these words :—

> " 23. The plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right."

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" 24. The Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.

" 25. An action by the plaintiff either personally or in his representative capacity for the declarations referred to in paragraph 5 of the Statement of Claim will not lie even though the Attorney-General of Canada be a party defendant."

In his reply the plaintiff denies or qualifies some of the allegations made by the defendants (in paras. 2 to 7, inclusive, of the statement of defence) with reference to the financing of the Grand Trunk Pacific Railway and the obligations assumed by the Grand Trunk; he says that the Grand Trunk Pacific company was justified in refusing to take a lease of and operate the eastern section of the National Transcontinental Railway, and was in fact released by the Government from any obligation in that regard; and he says that in the transactions under discussion the Government was in the position of a private owner and operator and subject to the law relating to private property and civil rights. In para. 3 he denies the insolvency in 1919 of the Grand Trunk company and casts upon " unfavourable conditions unnecessarily imposed by the Government " the blame for the company's financial embarrassments; and he says that the conditions alleged in the statement of defence did not constitute a national emergency or justify the legislation and orders-in-council attacked in the action. In reply to para. 9 of the defence there are (para. 4) statements as to the proposals alleged to have been made by the Government (the details of which are not of importance in connection with the present motion). In para. 5 are particulars as to the voting at the meeting at which the shareholders are by the defendants alleged to have ratified the agreement of March 8, 1920, and a denial of the plaintiff's acquiescence in the proceedings taken under the agreement. In para. 6 the plaintiff alleges that the agreement of May 13, 1921, was *ultra vires* of the company and could not be authorized by any meeting. In para. 7 he denies that the expenditures said by the defendants to have been made by the Canadian National Company upon properties of the Grand Trunk company were so made or are properly chargeable against him and those whom he represents, and he says that the Grand Trunk system is still severable from the other systems of the Canadian National Railways. In para. 9 he submits reasons why it should not be found that he and those whom he represents are estopped from maintaining the action. In para. 11 he denies the allegations of para. 23 of the statement of defence, and calls attention to the fact that the shares of the Grand Trunk stock are now held by the Canadian National company and not by the Crown. In para. 12 he denies the exclusive jurisdiction of the Exchequer Court and says that unless this action is admitted to be tried in the provincial court he and those whom he represents will be deprived of any right to have the validity of the legislation judicially determined and of any remedy at law for a grievous wrong suffered by reason of the illegal acts of the defendant railway companies.

It is reasonably plain, if not upon the foregoing imperfect epitome of the pleadings then upon the pleadings themselves, that if all the issues raised are tried the trial will be very long and very expensive. For instance

it is obvious that upon the issue as to the regularity and effect of the votes taken at the meetings (held in England) of the shareholders of the Grand Trunk Company and upon the issue as to estoppel, laches and acquiescence, there must be a good deal of evidence and that much of it will have to be taken upon commission; and that the plea of estoppel, with the reply to it, opens up a wide field. But the greatest occasion for the expenditure of time and money is perhaps presented by the conflicting allegations as to the financial condition in which the Grand Trunk Company found itself at the material times. The plaintiff says that his shares and the shares of those whom he represents were of value, indeed he names the sum which he claims as damages for being deprived of his individual holdings. The defendants on the other hand say that the company was insolvent and that the shares were worthless. Counsel for the plaintiff suggests that this particular issue need not necessarily be tried until after the right to damages has been established; but the suggestion does not seem to be a practical one; for one of the defendants' contentions is that the legislation in question can be supported as an exercise of the power possessed by Parliament (discussed in *Toronto Electric Commissioners* v. *Snider* (1905) A.C. 396) in special and exceptional conditions of emergency; and, even if the financial position of the Grand Trunk Company at the relevant times were not gone into by the plaintiff as part of his case, it would necessarily have to be described by the defendants' witnesses called in support of the defendants' case based upon the allegations of the existence of a national emergency. Perhaps it is unlikely that the enquiry would be as extensive as was the enquiry that the arbitrators were compelled to make when they were endeavouring to ascertain " the value, if any, to the holders thereof, of the preference and common stock of the company "—the arbitrators sat and heard evidence and argument for over eighty days: (1923) A.C. at p. 157—but certainly the volume of evidence would be considerable and much time and energy would be consumed in the preparation of the case. These considerations lead to the conclusion that if the points of law raised by the defence in paragraphs 23, 24 and 25 are not obviously frivolous, and if a decision upon one or another of them favourable to the defendants might remove the necessity of going into such questions as have been mentioned, and if the points of law can really be determined satisfactorily without the taking of evidence, the order asked for ought to be made. Such orders ought of course to be made cautiously, for, as is mentioned by Kennedy, L.J., in *Codling* v. *John Mowlem & Co. Ltd.* (1914) 3 K.B. 1056, there are few cases which do not depend upon the facts. But in some cases the power given by the Rule has been exercised advantageously, and the present seems to me to be one of the cases in which it ought to be exercised if there is reasonable certainty of the existence of the conditions that I have mentioned. Therefore, I proceed to consider one by one the paragraphs in which the points of law that the defendants desire to have argued are raised.

Para. 23 Mr. Evan Gray refers to Clode on Petition of Right, pp. 104 et seq. and argues that the question raised by this paragraph cannot be determined until it is known whether the possession of the shares by the

In the Supreme Court of Ontario.

No. 14.
Reasons for Order of Rose C.J., 14th January, 1933
—*continued.*

Minister of Finance in trust for His Majesty was wrongful from the beginning, and that the question as to the quality of the Minister's possession cannot be settled until the question as to the validity of the statutes and orders-in-council has been determined. He says that he hopes by evidence to establish the fact that the case is of the class dealt with in Clode on p. 105 rather than of the class to which *Attorney-General for Ontario* v. *McLean Gold Mines Limited*, (1927) A.C. 185 belongs. But Mr. Tilley's contention, as I understand it—and this seems to be what is asserted in para. 23—is that whether the Minister's possession in trust for His Majesty was or was not acquired wrongfully and whether the shares are or are not now held in trust for His Majesty, the rule applied in the *McLean Gold Mines* case is applicable here; and the question as to whether this contention is or is not sound is, I think, a question that the court can decide without the assistance of witnesses. The Parties in their pleadings agree that the shares came into the possession of the Minister in the manner stated in para. 19 of the Statement of Claim, that they were surrendered to the Canadian National Company for cancellation as has been mentioned, and that the stock of the Canadian National Company was issued to the Minister in trust for His Majesty. If it follows from those agreed facts that this action is not maintainable the court can so determine without hearing more, and a considerable expenditure of energy and money will have been averted by the determination; whereas if the Court, after the point raised has been argued, comes to the conclusion that no decision as to the competence of the court to try the action can be reached until the quality of the Ministers original possession of the shares is known, no judgment will be pronounced under Rule 123, but the proper directions will be given. It is not correct to say that the leave provided for by Rule 122 may be given only when it is made to appear to the Judge to whom the application is made that the determination of the point raised will necessarily enable the Court to pronounce a judgment under Rule 123.

Then Mr. Evan Gray contends that a determination of the point raised could have no effect upon the plaintiff's claim against the defendant railway companies for damages. To that contention the same answer can be made; the point is taken upon behalf of all three defendants; if it is well taken by one but not by the others the court will so determine. I think that leave ought to be given to set this point down for hearing.

Paragraph 24. The point raised by this paragraph depends largely upon the construction of a statute. There does not seem to be any difficulty in the way of determining it in the manner suggested.

Paragraph 25. This point, I think, is one that can be determined without the taking of evidence. The determination of it favourably to the defendants' contention might not have any great effect upon the plaintiff's claim against the defendant companies for damages; but obviously something is to be gained by an early determination in the one sense or the other, and I can think of no injustice that can be done to the plaintiff by setting the point down with the others.

Leave will be given to set the three points down for argument, and further proceedings in the action will be stayed pending the final determination. The costs of the motion will be in the discretion of the Judge hearing the argument.

In the notice of motion defendants ask in the alternative for an order for particulars and for an order for a commission to take evidence in England. Of course, this alternative request need not be considered at this time.

No. 15.

Order of Sedgwick J. extending time for leave to appeal.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE MR. JUSTICE SEDGWICK in Chambers. { Saturday, the twenty-first day of January, 1933.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

UPON the application of the plaintiff in the presence of counsel for the defendants upon reading the pleadings herein, the Order of the Honourable the Chief Justice of the High Court dated the 14th day of January, 1933, and upon hearing what was alleged by counsel aforesaid

2. IT IS ORDERED that the time for making an application for leave to appeal to the Court of Appeal from the said Order of the Chief Justice of the High Court dated the 14th day of January, 1933, be and it is hereby extended to the 31st day of January 1933.

3. AND IT IS FURTHER ORDERED that the costs of this application be costs to the defendants in the appeal from the said Order, and that if an application for leave to appeal is not made, that the costs of this application be costs to the defendants in any event of the cause.

" D'ARCY HINDS,"
Asst. Registrar.

" Entered O.B. 130 page 443,
January 26, 1933.
" H.F."

In the Supreme Court of Ontario.

No. 16. Notice of Motion for determination of points of law. 26th January, 1933.

No. 16.

Notice of Motion for determination of points of law.

IN THE SUPREME COURT OF ONTARIO.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - *Defendants.*

TAKE NOTICE that pursuant to the order of the Honourable the Chief Justice of the High Court dated the 14th day of January 1933, the points of law raised by paragraphs 23, 24 and 25 of the statement of defence herein will be set down for hearing before the Judge presiding in Court at Osgoode Hall, Toronto, on Thursday the 2nd day of February 1933 at 11.00 o'clock in the forenoon or so soon thereafter as counsel can be heard.

DATED at Toronto this 26th day of January 1933.

TILLEY, JOHNSTON, THOMSON & PARMENTER,
80 King Street West, Toronto, Agents herein for W. Stuart Edwards, K.C., Ottawa, Ontario, Solicitor for the defendants, Canadian National Railway Company and The Attorney-General of Canada.

To Messrs. MCRUER, EVAN GRAY, MASON & CAMERON,
372, Bay Street, Toronto,
Solicitors for the plaintiff.

In the Supreme Court of Ontario.

No. 17. Notice of Motion for leave to appeal from Order of Rose C.J., 26th January, 1933.

No. 17.

Notice of Motion for leave to appeal from Order of Rose C.J.

IN THE SUPREME COURT OF ONTARIO.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself, and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

TAKE NOTICE that an application will be made before the presiding Judge in Chambers at Osgoode Hall on Tuesday the 31st day of January, 1933, at the hour of 11 o'clock in the forenoon or so soon thereafter as counsel may be heard for an Order granting leave to appeal from the Order of the Honourable the Chief Justice of the High Court dated the 14th day of January, 1933, setting down for hearing before the trial of the action points of law raised by paragraphs 23, 24 and 25 of the Statement of Defence, and for such further or other Order as may be proper.

AND TAKE NOTICE that in support of the said application will be read the pleadings and proceedings in this action, the said Order of the Honourable the Chief Justice of the High Court dated the 14th day of January, 1933, the affidavits and exhibits referred to in the said Order, the Order of the Honourable Mr. Justice Sedgwick in Chambers dated the 21st day of January, 1933, extending the time where this application for leave to appeal may be made, and such other and further material as counsel may advise, and the reasons for the said Order of the Honourable the Chief Justice.

Dated at Toronto this 26th day of January, 1933.

McRUER, EVAN GRAY, MASON & CAMERON,
372 Bay Street, Toronto, Solicitors for the Plaintiff.

To : TILLEY, JOHNSTON, THOMSON & PARMENTER,
80 King Street West, Toronto, Agents for
W. Stuart Edwards, Parliament Buildings,
Ottawa, Solicitor for the Defendants.

In the Supreme Court of Ontario.

No. 18. Notice of Countermand, 31st January, 1933.

No. 18.

Notice of Countermand.

IN THE SUPREME COURT OF ONTARIO.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

TAKE NOTICE that the plaintiff hereby countermands the Notice of Motion served and set down herein for leave to appeal from the Order of Chief Justice Rose dated the 14th day of January, 1933.

DATED at Toronto this 31st day of January, 1933.

McRUER, EVAN GRAY, MASON & CAMERON,
372 Bay Street, Toronto, Solicitors for the Plaintiff.

To : TILLEY, JOHNSTON, THOMSON & PARMENTER,
80 King Street West, Toronto, Agents for
W. Stuart Edwards, Parliament Buildings,
Ottawa, Solicitor for the Defendants.

No. 19. Order of Kerwin J. dismissing action on Defendants' points of law, 24th February, 1933.

No. 19.

Order of Kerwin J. dismissing action on Defendants' points of law.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE MR. JUSTICE KERWIN — Friday the 24th day of February, 1933.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

1. UPON motion made unto this Court on Thursday the 2nd day of February 1933 pursuant to leave granted by the order of the Honourable

In the Supreme Court of Ontario.

No. 19. Order of Kerwin J. dismissing action on Defendants' points of law, 24th February, 1933—*continued.*

the Chief Justice of the High Court herein dated the 14th day of January 1933 by counsel on behalf of the defendants Canadian National Railway Company and The Attorney-General of Canada for determination of the points of law raised by paragraphs 23, 24 and 25 of the statement of defence herein and upon hearing read the pleadings, the said order of the Honourable the Chief Justice of the High Court and the reasons therefor and upon hearing counsel for the said defendants and for the plaintiff and judgment upon the motion having been reserved until this day and this Court having directed that the motion be turned into a motion for judgment.

2. THIS COURT DOTH DECLARE that the plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right as alleged in paragraph 23 of the statement of defence herein AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

3. AND THIS COURT DOTH FURTHER DECLARE that the Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action as alleged in paragraph 24 of the statement of defence herein AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

4. AND THIS COURT DOTH NOT SEE FIT by reason of the declarations aforesaid to make any declaration with respect to paragraph 25 of the statement of defence herein.

5. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE THAT this action be and the same is hereby dismissed with costs to be paid by the plaintiff to the said defendants forthwith after taxation thereof including the costs of the motion referred to in the said order of the Honourable the Chief Justice of the High Court dated the 14th day of January 1933.

Judgment signed this 8th day of March, 1933.

" D'ARCY HINDS,"
Registrar S.C.O.

Entered J.B. 52 pages 578–9.
March 8, 1933.
" H.F."

No. 20.

No. 20. Reasons for Judgment of Kerwin J. 24th February, 1933.

Reasons for Judgment of Kerwin J.

By paragraphs 23, 24 and 25 of the Statement of Defence filed in this action the defendants, in accordance with Rule 122, raised certain points of law and by order of the Chief Justice of the High Court, they were set down for hearing before the trial.

The nature of the action and the issues are, if I may say so, succinctly and clearly set out in the reasons for judgment of the Chief Justice on the motion before him for leave to set down for hearing the questions of law and in his reasons for judgment on a prior motion made by the defendants to dismiss the action. I, therefore, refrain from referring to them in detail.

In the Supreme Court of Ontario.

No. 20. Reasons for Judgment of Kerwin J. 24th February, 1933 —*continued.*

Paragraphs 23, 24 and 25 of the defence are as follows :

" 23. The Plaintiffs claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right.

" 24. The Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.

" 25. An action by the Plaintiff either personally or in his representative capacity for the declarations referred to in paragraph 5 of the Statement of Claim will not lie even though the Attorney-General of Canada be a party defendant."

A perusal of the pleadings satisfies me that in order to succeed in any part of his claim the plaintiff must obtain a declaration that the relevant Acts passed by the Parliament of Canada are ultra vires and that the Crown never obtained title to the shares of stock of the Grand Trunk Railway Company of Canada held by the plaintiff and those whom he represents. This is made clear by a reference to paragraphs 2 and 11 of the statement of claim which are as follows :

" 2. The stock of the plaintiff and the stock of those whom he represents in this action, has been transferred illegally on the books of the defendant Company and he and they have been deprived of the rights and privileges of holders of such stock, without their authority or consent, and without compensation of any kind, under cover of certain statutes of the Parliament of Canada hereinafter referred to, which the plaintiff submits are invalid and ultra vires.

" 11. By a statute enacted by the Parliament of Canada known as the Grand Trunk Railway Acquisition Act, 1919 (which the plaintiff submits is ultra vires in whole or in material parts) the Minister of Railways and Canals of Canada was authorized to enter into an agreement with the Grand Trunk for the acquisition by the Government of the entire capital stock of the Grand Trunk (except the Four per cent. guaranteed stock of the Grand Trunk amounting to £12,500,000) subject to certain terms and conditions to be embodied in an agreement between the Government of Canada and the Grand Trunk, including provision for determination of the value of such stocks by a board of arbitrators, subject to a maximum amount on which the annual dividend at 4% per annum would not exceed $5,000,000; and provision for transfer or vesting in the Government or its nominees of the preference and common stock upon issue of new guaranteed stock in exchange therefor. The agreement was to be submitted for the approval of a meeting of all stockholders of the Grand Trunk, including holders of debenture stocks and guaranteed stock of the Grand Trunk, whose holdings were not subject to adjudication by the arbitrators as to value. The Act also provided that the Governor-in-Council might make such orders as were deemed requisite to vest in the Government any of

the preference or common stock not transferred to the Government or its nominees under the terms of the Act."

The ensuing paragraphs allege certain facts and contain references to other Acts of Parliament and an Order-in-Council and the arbitration proceedings. For the purpose of this motion it must be assumed that all of these Acts and the Order-in-Council are ultra vires as claimed, and on this assumption a finding would be made that the Crown never acquired title to the shares referred to and thus the title of the Crown to them would be brought in question.

Mr. Evan Gray cites Clode on Petition of Right at Page 104 et seq. as setting out the law to be that a subject is not driven to a petition of right (1) where the Crown is not in possession of the property in question, (2) if the original possession of the Crown were unlawful. Mr. Evan Gray further argues that the petition of right was never applicable to a claim to recover, or with reference to, shares of stock, but I cannot see that any different principle would be applicable.

So far as the statements in Clode are concerned, I think they must be taken to be incorrect in view of the decision in *Attorney-General for Ontario* v. *McLean Gold Mines* (1927) A.C. 185. In that action certain mining claims in Ontario granted by the Crown were forfeited under the Mining Tax Act and were granted to another person. In the action defects were alleged in the forfeiture proceedings and a declaration was claimed that the plaintiffs were the true owners of the claims and that the forfeiture certificates were void and an order was asked that the plaintiffs be substituted as owners in the register of titles. If the forfeiture proceedings were defective then the Crown had acquired no title after the first grant and, as pointed out at page 190, " However the plaintiffs' claim may be viewed it seeks in substance and in reality to void the title acquired by and vested in the Crown as the result of the impugned forfeiture."

I am unable to distinguish that case from the one at Bar. *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (1920) *A.C.* 358 and *Dyson* v. *Attorney-General* (1911) 1 K.B. 410 cited by Mr. Evan Gray were referred to in the McLean case and distinguished. In the McLean case, as in this, the question is not as to the propriety of joining the Attorney-General but as to the very right of the plaintiff himself to bring the action.

This disposes of the point of law raised by paragraph 23 of the Statement of Claim.

The reference in paragraph 24 to the Exchequer Court of Canada is merely to the machinery by which, if the plaintiff is driven to a petition of right, he may have the matter disposed of in that kind of a proceeding.

I refrain from expressing any opinion as to paragraph 25 because, for the reasons given, I am of opinion that this action will not lie at the suit of the plaintiff. His claims for the declarations referred to in (*a*), (*c*), and (*d*) of his prayer; for the orders mentioned in (*g*), (*h*), and (*k*), and for damages in (*i*), (*j*), (*l*), and (*m*) are merely for consequential relief.

I, therefore, declare that the plaintiff's claim cannot be maintained and judgment will go dismissing the action with costs. The costs of the motion of January 14, 1933, will be paid by the plaintiff.

In the Supreme Court of Ontario.

No. 21. Notice of appeal to Court of Appeal, 10th March, 1933.

No. 21.

Notice of appeal to Court of Appeal.

IN THE SUPREME COURT OF ONTARIO.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923 of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

TAKE NOTICE that the plaintiff appeals to the Court of Appeal of Ontario from the judgment pronounced by the Honourable Mr. Justice Kerwin on Friday, the 24th day of February 1933, whereby this action was dismissed upon the determination of points of law raised by paragraphs 23, 24 and 25 of the Statement of Defence by leave of the Honourable the Chief Justice of the High Court dated the 14th day of January, 1933, upon the following amongst other grounds :

1. That the said judgment is contrary to law;

2. That the learned Judge erred in holding that this action cannot be maintained in the Supreme Court of Ontario;

3. That the learned Judge erred in holding that the plaintiff's claim impugned the title of the Crown to the preference and ordinary stocks of the Grand Trunk Railway Company of Canada in such a manner that it cannot be maintained by action in the Supreme Court of Ontario but only by petition of right;

4. That the learned Judge erred in holding that Petition of Right was a proper remedy for the relief claimed in this action;

5. That the learned Judge erred in deciding that the Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action;

6. That the learned Judge should have decided, with respect to Paragraph 25 of the Statement of Defence, that this action is properly framed and that the Attorney-General of Canada is properly joined as defendant;

7. And, in the alternative, the plaintiff submits that the questions in issue upon the application of the defendants are such as cannot be properly, justly and conveniently determined upon a motion under Rule 122; and

8. That the learned Judge should have made an order requiring the points of law raised by paragraphs 23, 24 and 25 to be determined at the trial of this action.

In the Supreme Court of Ontario.

No. 21. Notice of appeal to Court of Appeal, 10th March, 1933—*continued.*

AND TAKE NOTICE that upon the said appeal the appellant will ask for an order directing the said points of law raised by paragraphs 23, 24 and 25 of the Statement of Defence to be determined at the trial of this action.

DATED at Toronto this 10th day of March, 1933.

McRUER, EVAN GRAY, MASON & CAMERON,
Solicitors for the Plaintiff.

To: Messrs. TILLEY, JOHNSON, THOMSON & PARMENTER,
Agents for W. Stuart Edwards, Esquire,
Solicitors for the Defendants.

No. 22.

Plaintiff's Memorandum on appeal under Rule 495.

No. 22. Plaintiff's Memorandum on appeal under Rule 495, 3rd May, 1933.

IN THE SUPREME COURT OF ONTARIO.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - *Plaintiff* (*Appellant*)

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - *Defendants* (*Respondents*).

STATEMENT ON BEHALF OF THE APPELLANT—RULE 495.

1. This is an appeal from the judgment of Mr. Justice Kerwin dismissing the plaintiff's action, with costs, on the ground that the plaintiff can only proceed by Petition of Right and that the Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.

2. The motion came before Mr. Justice Kerwin, pursuant to an order of the Chief Justice of the High Court, dated 14th January, 1933, directing that points of law raised by paragraphs 23, 24 and 25 of the Statement of Defence should be set down for argument, pursuant to Rule Number 122, and all other proceedings stayed pending the determination of these questions. The plaintiff opposed the making of the order and still objects that such procedure is irregular. In conjunction with this appeal, the

In the Supreme Court of Ontario.

No. 22. Plaintiff's Memorandum on appeal under Rule 495, 3rd May, 1933—*continued.*

plaintiff will submit that it is still open to this Court to (and the Court should) set aside the order of the Chief Justice of the High Court and refer the questions raised by the defendants to the trial judge for determination in the usual course, as suggested in English Yearly Practice, 1933, at page 391. The English Court of Appeal followed this practice in the case of *Western Steamships* v. *Amaral*, 1914 3 K.B. 55 and our own Court of Appeal in *Bank of Ottawa* v. *Roxborough* 18 O.L.R. 511.

SUBSTANCE OF PLAINTIFF'S CLAIM.

3. This is an action by the plaintiff (who resides in England) on behalf of himself and all other holders of preference and common stock of the Grand Trunk Railway Company of Canada, for a declaration that the stock which, on the 18th of January, 1923, stood in their names on the stock register of the Grand Trunk Railway Company of Canada, is still owned by them and that changes in the stock register, made without their authority or consent, are illegal and void.

4. For relief the plaintiff asks an order directing the defendant companies to rectify the stock register of the Grand Trunk Railway Company of Canada in accordance with such declarations, or, in the alternative, for an order that the defendant companies pay damages to the plaintiff.

5. The defendants admit that the entries in the stock register of the defendant company of which the plaintiff complains, were made by them, but plead that in so doing they acted under the authority, and in pursuance of certain Acts, of the Parliament of Canada, which are their sufficient authority. Upon this the plaintiff submits that the alleged authority is invalid, because the statutes and orders-in-council relied upon are ultra vires the Parliament of Canada and there the principal issue is joined.

6. The cause of action arises out of the relationship of the plaintiff to the Grand Trunk Railway Company of Canada, as a stockholder, in a joint stock company. The Canadian National Railway Company is made a party defendant because this corporation assumes to stand as successor to the Grand Trunk Railway Company of Canada, and, as such, to be liable for all the obligations and rights of action against the Grand Trunk Company.

7. The Attorney-General of Canada is joined as defendant in the action for the purpose of the declaration as to the validity of the statutes of the Parliament of Canada referred to above. *Dyson* v. *Attorney-General* 1911 1 K.B. 410. *Smith* v. *Attorney-General* 52 O.L.R. 469.

8. The form of the action in this Court is one well-established by authority and precedent, of which the following are noteworthy:

McMurrich v. *The Bondhead Harbour Company*, 9 U.C.Q.B., page 333;

In re Ottos Kopje Diamond Mine 1893, 1 Chancery Division 618, especially at page 625;

Taylor v. *Midland Railway Company*, 1862, 8 House of Lords Cases, page 751;

Sloman v. *Bank of England*, 1845, 14 Simons Reports, page 475, especially at pages 486 and 487.

9. In support of the judgment of Mr. Justice Kerwin, the only authority heretofore adduced by the Defendants is the decision of the Judicial Committee of the Privy Council, in the case of *Attorney-General* v. *McLean Gold Mines*, 1927 A.C. 185. By paragraph 23 of the Statement of Defence the proposition of the defendants is stated to be:

> "The plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action, but only by Petition of Right."

10. The plaintiff submits that the judgment in the McLean Gold Mines case does not justify the proposition of the defendants as above written. The plaintiff's claim is not a question of the Crown's title to shares, but is accurately and fully stated above. No claim is made against the Crown, as such, nor is any order asked for or relief claimed over against the Crown. The Crown is not now in possession or enjoyment of the shares in question in the action, nor does it appear from the pleadings that the Crown claims any present right, title or interest therein. In such case, Petition of Right is not a proper or appropriate remedy. *Esquimalt and Nanaimo* v. *Wilson*, 1920 A.C. 358.

11. The McLean case is clearly distinguishable from the issue in the present case, and the Plaintiff will hereinafter show that the judgment in the McLean case does not decide that a Petition of Right is necessary or appropriate to the relief claimed herein.

NARRATIVE.

12. Under the Rule by which this appeal is argued (Rule 122), the Defendants are taken, for the purpose of the argument, to admit the pleadings of the Plaintiff as true in fact. *Bank of Ottawa* v. *Roxborough* 18 O.L.R. 516.

13. The facts, upon which the claim of the plaintiff rests, are the story of the acquisition by the Government of Canada of the undertaking known as the Grand Trunk Railway Company of Canada, which now forms part of the Canadian National Railway System. Negotiations between the directors of the Grand Trunk and the Government of Canada, begun in 1918, culminated in an agreement between the Company and the Minister of Railways, intended to provide for the acquisition by the Government of the entire capital stock of the Grand Trunk, subject to certain terms and conditions. These terms included provision for determination of the value of such stocks by a board of arbitrators, subject to a maximum amount, and provision for transfer or vesting in the Government or its nominees of the preference and common stock upon issue of new stock guaranteed by the Government of Canada in exchange therefor in the amount of the arbitrators' award. By the agreement, the Company undertook to use its best endeavours to secure the transfer to the Government, or its nominees of all the oustanding stock of the Company in exchange for the new stock to be issued to the Grand Trunk stockholders.

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No. 22. Plaintiff's Memorandum on appeal under Rule 495, 3rd May, 1933— *continued.*

14. The draft agreement was submitted to a general meeting of Stockholders of the Grand Trunk, held in London on the 19th February, 1920, and declared approved upon a majority vote of those represented. The regularity and sufficiency of this meeting is one of the questions of fact and law in issue upon the pleadings. Legislation of the Parliament of Canada, which the plaintiff submits is ultra vires in material parts, purported to authorize, and after its execution, to confirm, the agreement.

15. The arbitration referred to in the agreement was held during the years 1920 and 1921. Two of the arbitrators (the Honourable Sir Walter Cassells, Chairman, and the Right Honourable Sir Thomas White, nominee of the Government of Canada) delivered a majority award, finding that there was no value to the holders thereof in the preference and common stocks of the Grand Trunk, notwithstanding the fact that for many years prior to that time these shares, or some of them, had had substantial pecuniary value to the holders thereof and were freely traded in upon the London Stock Exchange at certain prices. The remaining arbitrator (the Honourable William Howard Taft, nominee of the Grand Trunk Railway Company) dissented from the award, and delivered an opinion that the value of the preference and common stock of the Grand Trunk, in question in this action, was not less than $48,000,000.

16. By an order-in-council dated 19th January, 1923, which the plaintiff submits is not within the authority conferred by the statutes or agreement, and is otherwise ultra vires, illegal and void, it was recited that the majority of the arbitrators appointed under the Acquisition Act of 1919 had decided that the preference and common stock had no value and that the Government was now entitled to the whole of the preference and common stock and to the immediate transfer thereof to the Government, without the issue to the holders thereof of any of the new guaranteed stock referred to in the Agreement, and that " the holders are not entitled to anything " ; further, that no part of the preference and common stocks had been transferred to the Government and that it was accordingly expedient that a declaration should be made, under the provisions of Clause 13 of the Agreement, vesting the said stocks in His Majesty, and thereupon, the order declared that the whole of the preference and common stock of the Grand Trunk was the property of the Minister of Finance in trust for His Majesty and directed that entries thereof be made in the stock registers and other books of the Grand Trunk Railway Company.

17. A few days later, an agreement of amalgamation between the Canadian National Railway Company and the Grand Trunk Railway Company was made, dated 30th January, 1923, confirmed by an order-in-council passed on the same date, by which the two railway enterprises were amalgamated and the shares of the Grand Trunk Railway Company were transferred or assigned to the Canadian National Railway Company in exchange for stock of the latter company, equivalent in par value to the par value of the Grand Trunk stock so transferred.

18. This transaction, if valid (which the plaintiff denies), had the double effect of making the amalgamated company liable for all the

obligations of the Grand Trunk Railway Company, and of passing the ownership of the shares of the Grand Trunk Railway Company from the Government of Canada to the Canadian National Railway Company.

19. Almost all, if not all, of the capital stock of the Company was held by persons resident in Great Britain. These stockholders, through their representatives, protested to the Government of Canada against what they believed to be unfair, oppressive and illegal action, amounting to confiscation of their shares without compensation. For some years they endeavoured to obtain redress from the Government and Parliament of Canada, or compensation for their property, and when these efforts had failed, they undertook to assert by action in Canada their legal rights of ownership of the shares in question.

20. In 1929, the stockholders, represented by the plaintiff, caused a petition of right to be addressed to his Excellency the Governor-General-in-Council, asking for hearing in the Exchequer Court of Canada, of their cause of action, but the petitioners were notified, on or about the 10th day of July, 1929, that the fiat necessary for the prosecution of the petition had been refused.

21. Thereupon the plaintiff caused a petition to be presented to the King's Most Excellent Majesty-in-Council praying special leave to appeal from the decision of the Governor-General-in-Council of Canada not to grant the fiat applied for, and upon this petition the Judicial Committee of the Privy Council advised that such an appeal could not be entertained and leave to appeal was refused.

22. Thereafter, the plaintiff, having first laid a basis for his action by presentation to the Company of a demand for rectification of the stock registers of the Grand Trunk and the registration of certain stock transfers in his own name, began this action, by writ dated the 26th December, 1931, claiming the relief set out in Paragraph 32 of the Statement of Claim.

23. When the statement of claim had been delivered, the defendants moved to have the action dismissed on the grounds now in question in this motion, or some of them. The Chief Justice of the High Court refused this application, giving reasons therefor.

24. Application was made to the Honourable Mr. Justice Magee in Chambers for leave to appeal from the order of the Chief Justice of the High Court, dated the 19th May, 1932, but this leave to appeal was refused with reasons.

25. Thereafter, the statement of defence was delivered, the reply and joinder of issue filed, and then the further application was made by the defendants to the Chief Justice of the High Court, referred to at the beginning of this memorandum. The judgment thereon is now the subject-matter of the present appeal.

Reasons for Appeal.

26. In practical effect, the judgment of Mr. Justice Kerwin, if maintained, will prevent the plaintiff from having judicially determined his legal rights and status as a stockholder in the Grand Trunk Company under the

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No. 22. Plaintiff's Memorandum on appeal under Rule 495, 3rd May, 1933— *continued.*

Dominion legislation in question in this action. The defendant, the Attorney-General of Canada, who now submits that the rights here in issue can only be determined upon a petition of right, represents the executive branch of government, which has already refused the fiat necessary to permit a petition of right to be prosecuted. In result therefore, the judgment of this Court, enables the Executive to prevent the judicial determination of the plaintiff's claim. It is admitted that the plaintiff has been deprived of property rights, without compensation, and he is seeking the judicial determination of his rights at law. The plaintiff submits that upon this motion, the right of access of the individual to the Court in such circumstances is in issue, and that this Court ought not to adopt any rule which excludes the plaintiff from this privilege.

27. The plea of the defendants, which the judgment appealed from allows, is not a plea in legal justification of the defendants' acts or claims. It is not an answer to the plaintiff's claim on its merits. It offers the plaintiff no alternative remedy. It is a plea which endeavours to deny the plaintiff any judicial remedy. As such, it requires the strictest scrutiny of the Court before it is accepted as an answer to the plaintiff's claim.

28. The rule stated in paragraph 23 of the Statement of Defence cannot be maintained by authority in the form therein stated. The rule intended to be invoked is the general rule, founded on the King's prerogative since feudal times, that the King cannot be sued in his own court. To this general rule, the procedure by petition of right is an exception. There are other exceptions to the general rule, found in actions against the Attorney-General as defendant, representing the Crown for the purpose of such actions.

General terms used in the reasons for judgment in the McLean case have been removed from their context and misapplied by the defendants' pleadings. The procedure by petition of right, as an exception to the general rule of prohibition is really an enabling procedure, allowing a form of proceeding where an action could not otherwise be maintained. But before considering the appropriateness of procedure by petition of right the previous question must be determined, namely:—whether the cause of action is barred by the general rule that actions against the Crown cannot be maintained in this Court. On this question the plaintiff submits that his claim does not come under the prohibition of the general rule and that, therefore, it is not necessary for him to invoke the procedure by petition of right.

The McLean Gold Mines case was excluded by the main rule, that is to say, it was held to be an action against the Crown, claiming relief against the Crown, and therefore not maintainable, except by petition of right; and it was held to be a proper subject for petition of right. The plaintiff's claim in this action is not against the Crown, nor is any relief asked for against the Crown; therefore, this right of action is not denied by the rule as to actions or proceedings against the Crown. Consequently, the plaintiff is not put to his petition, or limited to that remedy for his relief.

29. A petition of right is only appropriate to a claim or action against the Crown in which restitution of any incorporeal rights, or a return of

lands or chattels, or payment of money or damages in respect of a contract with the Crown is sought. (*See* Petition of Right Act, R.S.C., cap. 34, Section 2 (*a*).) The essential part of the proceedings upon the petition of right is the claim against the Crown; the rights of third parties are merely incidental to this claim. (*See* section 7 of the Act.) *Esquimalt and Nanaimo Railway* v. *Wilson*, 1920 A.C., page 358, especially at page 364. In the present case, the rights claimed against the private defendants are the main cause of action and no relief whatever is sought from the Crown. (*See* page 2 of this memorandum) in such a case, procedure by petition of right is not appropriate.

30. The rule that the Crown cannot be sued in an action is a rule of formality only. In character and application it is comparable to the rule embodied in our Statute of Limitation of actions, which bars an action to enforce a legal right, but does not extinguish that right. The essence of the rule as to proceedings against the Crown is respect for the dignity of the Crown against whom certain rights, otherwise exigible, can be exercised only by his leave. The rule does not extinguish the right which an individual may have against other private individuals, if those rights can be exercised or relief secured by direct action which does not violate the rule of the Crown's Prerogative.

Eastern Trust Company v. *Mackenzie*, 1915 Appeal Cases, 759;
Hodge v. *Attorney-General* 1839 3 Y. & C. 342;
Staunford: Prerogatives, Chap. 22, Folio 74 B;
Chitty: Prerogatives, page 342;
Clode: Petition of Right, page 105.

The plaintiff in this case, having a right of action against private parties (namely, a right of action for rectification of a share register, or damages) which does not implead the Crown, is not barred by the rule as to actions against the Crown from prosecuting his action against such private defendants.

31. For the purpose of this motion and appeal, it must be assumed that the legislation in question may be ultra vires. This is clear from the reasons for judgment of Mr. Justice Kerwin, but also because a particular point of law, elected under Rule 122, from various points at issue in the action, can only be an answer to the plaintiff's claim, if it is a valid defence to the whole action, whatever may be the result of the other questions in issue. In the present case, therefore, the plea of the defendants is only good if it is a valid answer to the plaintiff's claim when the legislation in question is found to be ultra vires.

32. Assuming the legislation in question ultra vires for this purpose, it becomes clear that a petition of right is not an appropriate proceeding for the relief claimed for the following reasons:

(*a*) An ultra vires statute is null and void; no right can be acquired under it and no authority is conferred by it. Any act done upon its assumed authority is an unauthorized act, and, in so far as it prejudices the rights of others, is a wrongful act. An act of an officer or minister of the Crown,

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done pursuant to an ultra vires statute, is not an act of the Crown. This is merely an application of the well known principle, "The King can do no wrong." As the Crown can not be guilty of tort, so the Crown cannot commit an ultra vires act. Consequently, any proceeding which seeks relief against an ultra vires act ought not to be by petition of right, but, may be by action against the person or officer committing the unauthorized act.

Tobin v. *The Queen*, 1864, 16 C.B.N.S., page 310;
Feather v. *The Queen*, 1865, 6 B. & S. 257, especially at 296;
Chitty's Prerogatives of the Crown, at page 340;
Norton v. *Shelby*, 118 United States Report, 425.

(*b*) When the Imperial Parliament established in Canada a federal constitution, in the form of the British North America Act, 1867, the prerogatives of the Crown in Canada were necessarily affected by that statute. Supreme legislative authority in Canada was divided into three parts, namely: That of the Imperial Parliament; that of the Parliament of Canada; and that of the Provincial Legislatures. Similarly, the executive authority of the Crown was divided into three branches, namely: that of the Crown in right of the Imperial Parliament; the Crown in right of the Dominion Parliament; and the Crown in right of the Provincial Legislatures. Since the preservation of this constitution requires the determination from time to time of the respective fields of authority, legislative and executive, under the constitution, by the judicial branch of government, it must be assumed that the prerogatives of the Crown were affected, if necessary, to the degree required to provide for judicial determination of these questions of the relative fields of authority.

Consequently, the royal prerogative of immunity from proceedings at law is qualified by the British North America Act, 1867, to the degree that the constitutional authority of acts of the respective legislatures and executive branches of government may be judicially determined, without derogation from the King's dignity. Requirement of a fiat from the authority impugned, as a condition precedent to trial of the issue, would destroy the effectiveness of the constitution itself.

Bonanza Creek Mining Company, 1916 A.C. 566; at 579–80;
Musgrave v. *Pulido*, 1875, A.C. 102;
Electrical Development Company v. *Attorney-General for Ontario*, 1919, A.C. 687.

(*c*) It is a necessary corollary of a fixed and written constitution that the Court shall determine the validity of any acts of the executive or legislature, under that constitution for the purpose of preserving it.

"The Federalist," LXXVIII; referred to in Bourinot; Canadian Constitution, page 149; *Marbury* v. *Madison* (In the Supreme Court of the United States), 1803, Cr. 137; Kent's Commentaries Chapter 20, Vol. 1, pages 450–454.

(*d*) Under decisions of the English Courts, a wide jurisdiction has been maintained to entertain actions calling in question acts of the executive

representing the Crown, or even rights of the Crown itself by way of action against the Attorney-General as defendant representing the Crown. In these cases it has been held that the plaintiff is not bound to proceed by petition of right and that petition of right is not the appropriate remedy for the relief claimed. See particularly the following references :

Dyson v. *Attorney-General*, 1911, 1 K.B. Division 410;
Hodge v. *Attorney-General*, 1839, 3 Y. & C. 342;
Attorney-General v. *Hallett*, 1846, 15 M. & W. 97.

If such actions are maintainable in England without violating the royal prerogative under a constitution in which the Imperial Parliament has sovereign and unlimited authority and the Executive Government is vested in His Majesty personally, surely the scope for the judicial determination of questions of ultra vires, in relation to legislative and executive authority in Canada must be even wider than that allowed under procedure in the English Courts. The principle that the King could not be sued in his own Court, or, in certain cases, only by Petition of Right, was developed at a time in English jurisprudence when there was no thought of a written constitution or limited legislative authority. In modern circumstances and in Canadian jurisprudence that principle must give way to the degree necessary to preserve the Constitution. A principle developed in and appropriate to feudal times cannot be used to shelter the acts of a subordinate legislature, or an official assuming to represent the Crown, from judicial determination of the true rights of the King under his Constitution.

33. Although it has been decided that a petition of right was necessary in the case of *McLean Gold Mines* v. *Attorney-General* (1927, A.C. page 185), that case is distinguished from the present issue in the following manner :—

(*a*) In the McLean case direct action was sought against the Crown as a defendant, represented by the Attorney-General of Ontario and the Minister of Mines. In the present case, the Crown is not a party defendant to the action, the Attorney-General being joined for a limited and special purpose only.

(*b*) In the McLean case the question concerned title to lands registered in the Register of Land Titles; the action was brought to set aside a certificate of forfeiture for non-payment of taxes on the ground that the proceedings of such forfeiture were invalid. Although the claim alleged that the forfeiture was void, the legal position was that the title shown by the Registry Office was good until it had been proved bad. The present case is distinguished, in that the main issue is the question of the validity of Acts of Parliament on constitutional grounds, as distinguished from regular or irregular proceedings in applying the terms of a statute. These two issues have no similarity in principle.

(*c*) In the McLean case, the plaintiff required to set aside the title of the Crown acquired by forfeiture of the mining claims, before he had any status to maintain an action against the private defendants. In the present case, the right of the plaintiff to maintain an action against the private defendants arises by virtue of their relationship or privity, quite independent of any question of crown title or of rights transmitted by the Crown.

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No. 22. Plaintiff's Memorandum on appeal under Rule 495, 3rd May, 1933— *continued.*

(*d*) The question of title to land in the Register of Land Titles is a matter of quasi-judicial record. Under the precedents and authorities, questions of title, in such cases, are distinguished from cases in which the right or title is not a matter of judicial record, or the finding of an office. In the first case, the title or claim is good until it is proved to be bad; in the second case, the title or claim to title may be ab initio wrongful. The authorities distinguish these two classes by holding that petition of right is necessary to relief in the first case, even when the lands or property have been alienated by the Crown and are held by a private person; but in the second class of case, petition of right is not necessary and direct action may be maintained against the transferees from the Crown by direct action.

See Clode on Petition of Right, page 107;
Attorney-General v. *Hallett* (*supra*).

(*e*) The McLean case concerned a Crown grant of Crown Lands. A special body of jurisprudence relating to Crown grants has been developed by the decisions, affected in many cases by statutory provisions, of which decisions much is not applicable to rights and claims of a different character. It is submitted that the question of rights and privileges of stockholders in a joint stock company is distinguishable from matters of title to land or possession of chattels, in that it rests upon a privilege or relationship in the nature of status, rather than upon any questions of possession or title to physical property. Even the terminology of proceedings by petition of right is inappropriate to shares in a joint stock company. The old writ of "amoveas manus," granted upon a successful petition of right, would not be appropriate to the present action. There is no case on record in which petition of right has been employed to recover possession of shares of stock in an incorporated company. The courts ought not to maintain the new precedent, which the judgment of Mr. Justice Kerwin would establish.

34. Even if a petition of right was necessary to the plaintiff's claim, when property in the shares in question was vested in or claimed by the Crown (which the plaintiff does not admit), that procedure is no longer necessary when the Crown has alienated its property or claim and these are now vested in or claimed by a corporation entitled to be sued.

Chitty's Prerogatives at pages 342 and 343;
Clode on Petition of Right, page 102;
Esquimalt Case, 1920 A.C. 358;
Attorney-General v. *Hallett*, 15 M. & W., page 97;
Staunford's Prerogatives, Ch. 22, Fol. 74 (*a*) and 75 (*b*).

35. The Exchequer Court of Canada has no jurisdiction to entertain the issues in question in this action. Determination of validity of acts of Parliament, or the Legislatures, is vested, by the British North America Act, in the provincial courts of civil jurisdiction exclusively. (See Sections 101, 129 and sub-sections 13 and 14 of Section 92 of the British North America Act, 1867. See also *Consolidated Distilleries* v. *Consolidated Exporters*, 1930 S.C.R., page 535.) The Dominion Courts Act (R.S.O.,

Chapter 87) gives original jurisdiction in such matters to the Supreme Court of Canada, upon reference by a judge of this Court, but does not confer such authority upon the Exchequer Court of Canada; nor would a provincial act be effective which purported to do so. The jurisdiction of the Exchequer Court of England is not to be compared with that of the Exchequer Court of Canada, limited as the latter is by the provisions of the British North America Act. The plaintiff submits that the question of validity of the statutes referred to in this action and consequential relief based thereon is a matter for the exclusive jurisdiction of this Court, and not competent to the Exchequer Court of Canada.

36. Upon this appeal the plaintiff submits, with respect, that the Court should set aside the order of Mr. Justice Kerwin and declare :

(*a*) That this action is properly framed and need not be brought by petition of right;

(*b*) That this Court has jurisdiction to entertain the action and that the Exchequer Court of Canada has not;

(*c*) That the Attorney-General is properly made defendant for the purposes of the declarations asked in paragraph 32 of the Statement of Claim.

37. In the alternative, if the Court should consider that the questions in issue on this motion are very grave and difficult, that they require not only mature consideration by this Court at the trial of the action, but that they require proper record of evidence showing material and relevant facts, and that the plaintiff is entitled to examinations for discovery and production of documents before the trial of the action, or the determination of the questions, then, in such case, the plaintiff respectively submits that the points of law raised by the Statement of Defence now in question should be referred to the Judge at the trial of the action for determination.

38. As to costs of this appeal, the plaintiff submits that if the plaintiff's appeal is allowed, the costs dealt with by the order appealed from, and the costs of this appeal should be payable to the plaintiff by the defendants forthwith.

Dated at Toronto this Third day of May, 1933.

V. EVAN GRAY,
F. A. BREWIN,
Counsel for the Plaintiff.

In the Supreme Court of Ontario.

No. 23. Defendants' Memorandum on appeal under Rule 495, 6th May, 1933.

No. 23.

Defendants' Memorandum on appeal under Rule 495.

LOVIBOND *v.* GRAND TRUNK RAILWAY COMPANY OF CANADA *et al.*

DEFENDANTS' MEMORANDUM FILED PURSUANT TO RULE 495.

The Defendants, the Attorney-General of Canada and the Canadian National Railway Company representing itself and its constituent companies, including the Grand Trunk Railway Company of Canada, intend to argue on the appeal that on the issues raised by paragraphs 23, 24 and 25 of the Statement of Defence, the action should be dismissed and intend to cite the cases mentioned in the proceedings below. 10

Toronto, May 6, 1933.

TILLEY, JOHNSTON, THOMSON & PARMENTER,
Agents for W. Stuart Edwards, Parliament Buildings, Ottawa, Solicitors for said Defendants.

In the Court of Appeal of Ontario.

No. 24. Formal Judgment, 28th June, 1933.

No. 24.

Formal Judgment.

IN THE COURT OF APPEAL OF ONTARIO.

THE HONOURABLE THE CHIEF JUSTICE OF ONTARIO
THE HONOURABLE THE CHIEF JUSTICE IN APPEAL
THE HONOURABLE MR. JUSTICE RIDDELL
THE HONOURABLE MR. JUSTICE MIDDLETON
THE HONOURABLE MR. JUSTICE MASTEN

} Wednesday the 28th day of June, 1933. 20

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself, and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stock and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - *Plaintiff*

and 30

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

1. Upon motion made unto this court on the 30th and 31st days of May and on the 1st day of June 1933 by counsel on behalf of the plaintiff by way of appeal from the judgment pronounced by the Honourable Mr. Justice Kerwin on the 24th day of February 1933 herein in the presence of counsel for the defendants Canadian National Railway Company and

No. 24. Formal Judgment, 28th June, 1933—*continued.*

The Attorney-General of Canada and upon hearing read the pleadings, the order of the Honourable the Chief Justice of the High Court dated the 14th day of January 1933 and the reasons therefor, and the said judgment of the Honourable Mr. Justice Kerwin and the reasons therefor and upon hearing what was alleged by counsel aforesaid and judgment upon the motion having been reserved until this day.

2. THIS COURT DOTH ORDER that the said appeal be and the same is hereby dismissed with costs to be paid by the plaintiff to the said defendants forthwith after taxation thereof.

" D'ARCY HINDS,"
Registrar S.C.O.

Entered O.B. 135 Page 11.
July 4, 1933.
V.C.

No. 25. Reasons for Judgment. (*a*) Mulock C.J.O.

No. 25.

Reasons for Judgment.

(*a*) MULOCK, C.J.O.—This is an appeal from the judgment of Kerwin, J. dismissing the action on the ground that it impugned the title of the Crown to certain stock of the Grand Trunk Railway Company of Canada.

In the statement of claim the plaintiff alleges that on the 18th of January, 1923, he was a registered holder of first preference stock, second preference stock, third preference stock and common (ordinary) stock of The Grand Trunk Railway Company of Canada; that by a Statute of Canada the Minister of Railways was authorised to enter into an agreement with the Grand Trunk Railway Company for the acquisition by the Government of Canada of the entire capital stock of The Grand Trunk Railway (except certain guaranteed stock) subject to the provision for transferring and vesting the same in the Government of Canada; that a draft of said agreement embodying the terms prescribed by said Statute was submitted to a general meeting of stockholders of The Grand Trunk Railway Company, and that the meeting purported to approve and ratify the same; that by a statute of the Parliament of Canada assented to on the 11th of May, 1920, Parliament purported to confirm and ratify the agreement which was dated the 8th day of March, 1920, and executed by the officers of The Grand Trunk Railway Company and by the Minister of Railways and Canals of Canada on behalf of the Government of Canada; that by said agreement the Government of Canada agreed to acquire all the preference and common stock of The Grand Trunk Railway Company, the value thereof to be determined by arbitration; that the value thereof represented by new guaranteed stock should be distributed among the holders of the said preference and common stock in exchange therefor upon the transfer and vesting of the same in the Government; that clause 13 of the agreement provided that any shares of said preference or common stock not transferred to the Government in such exchange might be declared to be the property

In the Court of Appeal of Ontario.

No. 25. Reasons for Judgment. (*a*) Mulock C.J.O. —*continued.*

of the Minister of Finance in trust for His Majesty; that upon such declaration all the stock not transferred should immediately become the property of His Majesty; that an award made by a majority of the arbitrators determined that there was no value in such preference and common stocks; and that by an Order-in-Council of the Government of Canada of the 19th of May, 1923, in pursuance of clause 13 of said agreement, it was declared that the whole of the said preference and common stock was the property of the Minister of Finance in trust for His Majesty and that some officer of said Grand Trunk Railway Company assumed to enter on the stock register of The Grand Trunk Railway Company a transfer of the stock owned by the plaintiff and of those whom he represents to the Minister of Finance (the Order-in-Council declaring this stock to be the property of the Minister of Finance in trust for His Majesty).

In clause 32 of the statement of claim the plaintiff asks for a declaration that the transfers to the Minister of Finance of the stock of The Grand Trunk Railway Company registered in the name of the plaintiff and in the names of those whom he represents in this action, are invalid, illegal and void and that the stock register of the said Grand Trunk Railway Company should be rectified accordingly.

It thus appears from the statement of claim that the stock in question has been transferred to the Minister of Finance in trust for His Majesty represented by the Government of Canada; that the plaintiff contends that such transfer is illegal and should be so declared. The plaintiff is not entitled to impugn the title of the Crown in this stock by action but only by petition of right. (*Attorney-General of Ontario* v. *McLean*, 1927, 1 A.C. 185.)

Therefore this appeal should be dismissed with costs.

(*b*) Latchford C.J.A.

(*b*) LATCHFORD, C.J.A.—Notwithstanding the time devoted to the argument of this appeal, it appears to me that the matter is quite simple. The claim of the plaintiff is in substance and fact asserted against His Majesty, represented herein by the Attorney-General of Canada, and only by petition of right can such a claim be maintained.

" However the plaintiffs' claim may be viewed," said Anglin, C. J., in delivering the opinion of the Judicial Committee of the Privy Council in *Attorney-General for Ontario* v. *McLean Gold Mines* (1927) A.C. 185, " it seeks in substance and reality to avoid the title acquired by and vested in the Crown—The real matter in issue is the Crown's title."

Here, as in the McLean case, the plaintiff cannot succeed until he extinguishes the title of the Crown, and that can be done only under proceedings by petition of right.

I therefore think the appeal should be dismissed with costs.

(*c*) Riddell J.A.

(*c*) RIDDELL, J.A.—This appeal by the plaintiff from the judgment of Mr. Justice Kerwin was argued at great length and with much attention to detail; but it became evident at an early stage that the decision must rest upon the interpretation to be put upon the most recent decision in the Judicial Committee in an Ontario case of a cognate character, and also

that the facts relevant were few, simple and not in dispute—the whole question being matter of law.

The plaintiff sues for himself and others in the like situation, but, of course, his position is not strengthened by his suing for others as well as for himself.

He was a shareholder in the old Grand Trunk Railway Company of Canada, the undertaking of which got into such a position that it was thought by His Majesty's Ministers in Canada that steps should be taken in the public interest: Parliament by The Grand Trunk Acquisition Act, 1919, authorized the Minister of Railways and Canals to enter into an agreement with the said Company for the acquisition of its entire stock (with certain exceptions, not of importance here.) An agreement having been arrived at, Parliament by the Act of 1920, 10–11 Geo. V., cap. 13, purported to confirm it. Both these Statutes, the plaintiff claims are *ultra vires* and invalid. The agreement provided for a Board of three Arbitrators to determine " the value, if any, to the holders thereof, of the preference and common stock " (the plaintiff is alleged to have been a holder of such kinds of stock): then, when this value was so determined, the Grand Trunk was to issue new stock, " new guaranteed stock," which was to " be issued in exchange for the preference and common stock upon the transfer to or vesting in the Government, or its nominees, of such . . . stock "; and it was added " Should any shares or any part of the preference or common stock not be transferred to the Government, the Governor-in-Council may declare such shares or any such part of the preference and common stock to be the property of the Minister of Finance in trust for His Majesty, and upon the making of such declaration the shares or part thereof not so transferred shall immediately become the property of His Majesty, and proper entries thereof in the stock registers and other books in that behalf shall be made. . . ."

The Arbitration was held and resulted in a (majority) decision that there was no value to the holders thereof of the preference and common stock. An appeal from this award (on matters of law only) was dismissed by the Privy Council.

Thereupon, the stock not having been transferred to the Government or its nominees, an Order-in-Council was passed, January 19th, 1923, which *inter alia* declared that the whole of such stock was the property of the Minister of Finance in trust for His Majesty, and directed entries to be made accordingly—that is claimed by the plaintiff to be *ultra vires* and null, as also the entries made in accordance with the direction.

It was arranged that the Grand Trunk and Canadian National Railways should amalgamate under the name of Canadian National Railway Company, that stock in the Amalgamated Company should be issued to the Minister of Finance in trust for His Majesty, and that the stock held by the Minister of the Grand Trunk should be surrendered to the Amalgamated Company for cancellation; this was approved by an Order-in-Council, January 30th, 1923,—all these proceedings, the plaintiff claims are null and void.

In the Court of Appeal of Ontario.

No. 25. Reasons for Judgment. (c) Riddell J.A.—*continued.*

At this time, the plaintiff was the registered holder of preference and common stock of the Grand Trunk; and on or about November 27, 1931, transfers of both kinds of stock were made to him by previously registered holders of the same. He tendered the transfers for entry on the stock registers of the Grand Trunk, but, of course, the transfers were not entered.

He claims a declaration that the transfers of the stock in the Grand Trunk to the Minister of Finance are " invalid, illegal and void "; that the Act of 1919 and particularly secs. 2, 6, 7, 8, 9 and 10 are " *ultra vires* the Parliament of Canada "; that the Agreement of March 8, 1920 between the Government of Canada and the Grand Trunk is " *ultra vires*, invalid and void "; that the Act of 1920 and particularly secs. 1 and 2 are " *ultra vires* the Parliament of Canada," and that the Order-in-Council of January, 1923, " is not within the authority conferred upon His Excellency by the Grand Trunk Acquisition Act, 1919, and is otherwise *ultra vires*, illegal and void."

In addition to the above claims which he makes on behalf of the class, he asks for himself an order directing the Grand Trunk and Canadian National to rectify the G.T.R. stock register by the entry of his name; an order to the Railway Companies to appropriate or procure stock of which he claims to be the owner and register it in his name; in the alternative, damages.

The defendants, the Grand Trunk, Canadian National and the Attorney-General of Canada plead at length; but the only pleas we need consider here are as follows :—

> " 23. The Plaintiff's claim impugns the title acquired by the " Crown to the preference and ordinary stocks of the Grand Trunk " and cannot be maintained by action but only by petition of right.
>
> " 24. The Exchequer Court of Canada has exclusive original " jurisdiction to determine the matters in question in this action.
>
> " 25. An action by the Plaintiff either personally or in his " representative capacity for the declarations referred to in para- " graph 5 of the Statement of Claim will not lie even though the " Attorney-General of Canada be a party defendant."

On a motion of the defendants to set down for hearing before the trial of the points of law raised by paragraphs 23, 24 and 25 of the statement of defence under Rule 122, the learned Chief Justice of the High Court on January 14th, 1933, ordered that this should be done. The matter came on for hearing before Mr. Justice Kerwin; and February 24th, that learned Judge gave a judgment, entered as follows :

> " 2. THIS COURT DOTH DECLARE that the plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right as alleged in paragraph 23 of the statement of defence herein and DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

3. AND THIS COURT DOTH FURTHER DECLARE that the Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action as alleged in paragraph 24 of the statement of defence herein AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

4. AND THIS COURT DOTH NOT SEE FIT by reason of the declarations aforesaid to make any declaration with respect to paragraph 25 of the Statement of Defence herein.

5. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that this action be and the same is hereby dismissed with costs to be paid by the plaintiff to the said defendants forthwith after taxation thereof including the costs of the motion referred to in the said order of the Honourable The Chief Justice of the High Court dated the 14th day of January, 1933."

Notice of Appeal was given from this judgment; while there is no notice of Appeal from the original order of the Chief Justice, in the reasons for this Appeal appears the following :—

" 7. And, in the alternative, the plaintiff submits that the questions in issue upon the application of the defendants are such as cannot be properly, justly and conveniently determined upon a motion under Rule 122; and

8. That the learned Judge should have made an order requiring the points of law raised by paragraphs 23, 24 and 25 to be determined at the trial of this action.

AND TAKE NOTICE that upon the said appeal the appellant will ask for an order directing the said points of law raised by paragraphs 23, 24 and 25 of the Statement of Defence to be determined at the trial of this action."

This I pass over for the time, and will return to it later.

The nature of this proceeding has received some attention in England which has a Rule corresponding to our Rule 122. In *Dyson* v. *Attorney-General* (1911) 1 K.B. 410, at page 414, Cozens-Hardy, M.R., says that " Order XXV, r. 4 (in wording the same as our R. 122) was not intended to take the place of a demurrer "; and, p. 408, Fletcher Moulton, L.J., says : " They (*i.e.*, the Courts) have laid down again and again that this process is not intended to take the place of the old demurrer . . . " But this is largely a matter of terminology, as Farwell, L.J., at p. 424, says that on such an application, " we must treat the allegations as true."

I do not think it necessary or advisable to go into the general law of Petition of Right, the older decisions or decisions in other parts of the British world, finding in the latest decision of the Privy Council in an Ontario case on the law of this Province, which I conceive to be a rule of decision as to the jurisdiction of the Supreme Court of Ontario. I do not enquire if this decision is in accordance with previous decisions of the Privy Council—that body is not bound by its own decisions, *Tooth* v. *Power*

In the Court of Appeal of Ontario.

No. 25. Reasons for Judgment. (c) Riddell J.A.—*continued.*

(1891) A.C. 284; *Read* v. *Bishop of Lincoln* (1892) A.C. 284. Nor do I consider if the decision is in accordance with the decisions in our own Courts —the Privy Council is not bound by our view of our own law; in *Campbell* v. *Hogg* (1930) 3 D.L.R. 673, the long settled practice in our Province and decisions on the point were disregarded, as was pointed out in *Re Johnston* (1932) O.R. 385. The Privy Council then having given the decision in *Attorney-General of Ontario* v. *McLean Gold Mines, Limited* (1927) A.C. 185, " Unless and until the Judicial Committee change the opinion . . . or new legislation is passed, we are bound to accept this as the law of the Province of Ontario "; *Re Johnson* (1932) O.R. 385, at p. 389.

The facts in the case just mentioned were as follows: The plaintiffs were the owners of certain lands; from their omission to pay taxes thereon, the Crown forfeited these lands, and later granted them to another; the plaintiffs contending that the Crown had no right to forfeit the lands brought their action. The trial Judge, Mr. Justice Lennox, held that the Court had no jurisdiction, but that proceedings should have been taken by Petition of Right; the Appellate Division, following what had long been supposed to be the law, reversed this decision; 58 O.L.R. 65; the Privy Council in turn reversed the judgment of the Appellate Division and reinstated the judgment of Mr. Justice Lennox, (1927) A.C. 185.

It is, I think, abundantly manifest that the status of the plaintiff in the present case depends upon the validity in law of the assertion by the Crown of ownership of the stock, just as in McLean case it depended upon the validity in law of the assertion by the Crown of ownership of the lands claimed. If the Crown ever owned the stock, the plaintiff has no standing to assert in any Court that he has any rights by reason of his ownership thereof.

To compare the McLean case with the present, divested of rhetoric and unimportant circumstances, it seems to me that the cases are practically identical. In each case (1) the plaintiff was the owner of certain property; (2) he was called upon to do something in respect of that property; (3) he omitted to do so; (4) thereupon and for that reason the Crown exercised what the Administration claimed the right to do and purported to make that property, the property of the Crown; (5) The Crown transferred the property to a third person. (This last is on the hypothesis that the stock was actually in law transferred by the Crown; were it considered that no effective transfer has been made by and from the Crown, the case would be *a fortiori* against the plaintiff)—in favour of the plaintiff's claim I shall consider the transfer made.

Applying now the *ratio decidendi* of the McLean case, pp. 189, 190, with the necessary changes in terminology—if the judgment in this case merely set aside the transfer of the Crown to the C.N.R. (if made), the result would be to leave the title to the stock vested in the Crown. Indeed, it is essential to the plaintiff's status to seek relief against the defendant Company that he should re-establish his interest in the shares by avoiding the forfeiture of that interest under the provisions of the Act of 1920. Until

that has been done the plaintiff cannot be regarded as having any interest which would enable him to impeach the title of the defendant company. However the plaintiff's claim may be viewed, it seeks in substance and reality to avoid the title acquired by and vested in the Crown as the result of the impugned forfeiture. The real matter in issue is the Crown's title and the consequent right to grant the stock in question to the defendant Company. Indeed, the chief, if not the sole ground of the attack is the absence of title in the grantor—the Crown. The plaintiff's claim rests on the assertion that His Majesty could not effectively grant or dispose of that property because he lacked title thereto, owing to the invalidity of the forfeiture on which that title depended. In this case, the plaintiff, in order to recover the stock he seeks, must first set aside the forfeiture, which, if valid, extinguished his ownership and vested the title in the Crown.

I am wholly unable to find any circumstance to take this case away from the *ratio decidendi* of the McLean case; and would hold that the Supreme Court of Ontario has no jurisdiction in the premises.

This is the substance of the appeal; but the plaintiff asks to have this considered as an Appeal from the Order of the Chief Justice under Rule 122. It is pointed out that in England there is "no appeal as of right from the decision of the Judge at Chambers in the case of such an order as this," per Fletcher-Moulton, L.J., in *Dyson* v. *Attorney-General* (1911) 1 K.B. 410 at p. 419; in Ontario an Appeal from such an order can be taken only by leave, R. 493; and leave has not been obtained. But in England the Court of Appeal heard argument against the original order on the appeal against the adjudication. *Western Steamship Company Limited* v. *Amaral Sutherland & Co., Limited* (1914) 1 K.B. 55; but as appears by the Report in 30 T.L.R. 492, this was by leave. Assuming, without deciding, that this course is open to us and we should entertain the appeal, I do not think we should set aside the order under Rule 122. We might have the exceedingly unfortunate spectacle witnessed in the McLean Case of the parties going to the Privy Council without any regard to the rights and deciding only the jurisdiction of the Court to try the merits. As is said by Cozens-Hardy, M.R. at p. 417 of (1911) 1 K.B., "I can conceive many cases in which such a declaratory judgment may be highly convenient"; and I think this is one of them.

The doubt I expressed on the argument as to the power of Mr. Justice Kerwin to dismiss the action under Rule 123, is met by the provisions of Rule 205.

But I think that it should not have been declared that the Exchequer Court has exclusive jurisdiction; this is not necessary for the determination of this action and its dismissal on the ground of want of jurisdiction—the real question for decision being only "Has the Supreme Court of Ontario jurisdiction?" not "What Court has jurisdiction?"

With this amendment, I think the appeal should be dismissed with costs.

In the Court of Appeal of Ontario.

No. 25. Reasons for Judgment. (*d*) Middleton J.A.

(*d*) MIDDLETON, J.A.—The sole question presented upon this appeal is the right of the plaintiff to maintain this action in this court.

If the Crown is a necessary party to the proceedings, the plaintiff cannot maintain this action and must proceed by petition of right. If this is his only remedy, we are not concerned with the difficulties in his path.

The decision of the Privy Council in *Attorney-General for Ontario* v. *McLean* (1927) A.C. 185 is directly in point. I adopt the language of the late lamented Chief Justice of Canada in that case. It is obvious that it is vital to the success of the plaintiff that he should obtain a particular declaration and order set forth in the prayer to his statement of claim. It is essential to the plaintiff's status that he should establish his interest and the interest of those whom he represents in the shares of the Railway Company. Until that has been done he cannot succeed. The real matter in issue is the Crown's right and title to the stock in the Railway Company and what is being alleged is the invalidity of the proceedings upon which the Crown's title depends. The one essential thing that is in controversy is the title of the Crown. That being so, on the authority of that decision this action will not lie.

It is suggested that this is in conflict with the decision of the Privy Council in the earlier case of *Esquimalt & Nanaimo Ry. Co.* v. *Wilson* (1920) A.C. 358. A perusal of the two reports will show, as might be expected, that there is no kind of conflict between the two cases.

The appeal should, in my view, be dismissed with costs.

(*e*) Masten, J.A.

(*e*) MASTEN, J.A.—The plaintiff sues on behalf of himself and all others, the registered holders on January 18th, 1923, of 1st, 2nd and 3rd preference stocks and ordinary common stock of the Grand Trunk Rwy. Co. of Canada, their personal representatives or assigns.

The defendants are the Grand Trunk Company of Canada, Canadian National Rwy. Company and the Attorney-General of Canada.

By his statement of claim, the plaintiff alleges that he was and still is, the owner of certain shares of stock in the Grand Trunk Rwy. Company of Canada. He then sets forth in historical detail various statutes of the Parliament of Canada and various agreements and Orders in Council through which, as he alleges, he has been illegally deprived of his shares and claims relief as follows :

> " 32. The plaintiff, therefore, claims on behalf of himself and all those whom he represents in this action :
>
> (*a*) a declaration that the transfers to the Minister of Finance, of the stock of the Grand Trunk registered on the 18th January 1923, in the name of the plaintiff and in the names of those whom he represents in this action, are invalid, illegal and void, and an Order directing the defendants Grand Trunk and Canadian National to rectify the stock register of the Grand Trunk in accordance with such declaration; and (*b*) a declaration that the Grand Trunk Railway Acquisition Act, 1919 (10 Geo. V. Cap. 17) and in particular

sections 2, 6, 7, 8, 9 and 10 thereof, are ultra vires the Parliament of Canada; and

(*c*) a declaration that the general meeting of stockholders of the Grand Trunk held in London on 19th February, 1920, was not duly constituted and that the resolution of that meeting purporting to ratify or approve the agreement of 8th March, 1920, is ultra vires, invalid and void; and

(*d*) a declaration that the agreement dated 8th March, 1920, between the Government of Canada and the Grand Trunk is ultra vires, invalid and void; and

(*e*) a declaration that the Act of 1920 (10-11 George V. Cap. 13), being an Act to confirm the Agreement of 8th March, 1920, and in particular sections 1 and 2 thereof, are ultra vires the Parliament of Canada; and

(*f*) a declaration that the Order-in-Council approved by His Excellency the Governor-General on 19th January, 1923, is not within the authority conferred upon His Excellency by the Grand Trunk Acquisition Act, 1919, and is otherwise ultra vires, illegal and void.

(*g*) "And the plaintiff also claims, on his own behalf:

An order directing the defendants Grand Trunk and Canadian National to rectify the stock register of the Grand Trunk by restoring the name of the plaintiff as the registered holder of £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1100 Common Stock of the defendant Grand Trunk of which stock the plaintiff was the registered owner on 18th January, 1923; or

(*h*) an order directing the defendants Grand Trunk and Canadian National to appropriate or acquire £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1100 Common Stock of the defendant Grand Trunk and to transfer and register the same in the books of the defendant Grand Trunk in the name of the plaintiff as the holder thereof; or

(*i*) in the alternative, damages in the amount of $9,733·33, for the refusal or failure of the defendants Grand Trunk and Canadian National to obtain and register such stock, or cause the same to be obtained and registered in the name of the plaintiff; and

(*j*) damages in the amount of $4,379·95, for the unlawful acts of the defendants Grand Trunk and Canadian National in registering the invalid transfer referred to in clause (*a*) of this paragraph and in depriving the plaintiff of the rights and privileges of ownership of such stocks without lawful authority; and

(*k*) an order directing the defendants Grand Trunk and Canadian National to register the plaintiff, or cause him to be registered, in the books of the defendant Grand Trunk, as the holder of £1200. of First Preference Stock, £1100 of Second

In the Court of Appeal of Ontario.

No. 25. Reasons for Judgment. (e) Masten J.A.—*continued.*

Preference Stock, £1700 of Third Preference Stock and £1900 of Common Stock of the defendant Grand Trunk assigned to the plaintiff by transfers of stock dated the 27th November, 1931, made by Mrs. Elizabeth Marion Lovibond and Captain Henrik Leoffler; or

(*l*) in the alternative damages in the amount of $28,713·33 for the refusal or failure of the defendants Grand Trunk and Canadian National to register such stock or cause the same to be registered in the name of the plaintiff; and

(*m*) damages in the amount of $12,920·95 for the unlawful acts of the defendants Grand Trunk and Canadian National in registering the invalid transfers referred to in clause (*a*) of this paragraph and in depriving the plaintiff of the rights and privileges of ownership of such stock without lawful authority."

The defendants, at paragraphs 23, 24 and 25 of the statement of defence, make the following allegations:

"23. The Plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right.

24. The Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.

25. An action by the Plaintiff either personally or in his representative capacity for the declarations referred to in paragraph 5 of the Statement of Claim will not lie even though the Attorney-General of Canada be a party defendant.

In his reply at paragraph 11, the plaintiff alleges:

"The Plaintiff denies the allegation in paragraph 23 of the Statement of Defence and says that the stock, ownership whereof is in question in this action, is now held by the Canadian National and not by the Crown."

These appear to me to be the portions of the pleadings which come in question on this present appeal.

By an order dated the 14th January, 1933, the Chief Justice of the High Court granted to the defendants leave to set down for hearing before the trial of the action the points of law raised by paragraphs 23, 24 and 25 of the statement of defence, and directed that the trial of the action and other proceedings therein, including the production of documents, examinations for discovery and the taking of evidence upon commission, be stayed until after the final determination of the said points of law. The order of the Chief Justice of the High Court was made in pursuance of the provisions of Rule 122 of the Consolidated Rules which read as follows: "Either party shall be entitled to raise by his pleading any point of law, and by consent of the parties, or by leave of a judge, the same may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial." This Rule corresponds substantially to Rule 2 of Order 25 of the English Rules.

Pursuant to the above order, and in accordance with the practice of the Court, the defendants brought in Weekly Court an application for the determination of these questions, and that application came on for hearing before Kerwin J. who, on the 24th February, 1933, made an order as follows:

"2. THIS COURT DOTH DECLARE that the plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right as alleged in paragraph 23 of the Statement of Defence herein and DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

"3. AND THIS COURT DOTH FURTHER DECLARE that the Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action as alleged in paragraph 24 of the Statement of Defence herein and DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

"4. AND THIS COURT DOTH NOT SEE FIT by reason of the declarations aforesaid to make any declaration with respect to paragraph 25 of the statement of defence herein.

"5. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE THAT this action be and the same is hereby dismissed with costs to be paid by the plaintiff to the said defendants forthwith after taxation thereof including the costs of the motion referred to in the said order of the Honourable the Chief Justice of the High Court dated the 14th day of January, 1933."

The plaintiff now appeals to this Court from the judgment of Kerwin J. dismissing the action.

If certain principles of law and practice are borne in mind, the solution of the question raised on this appeal appears to me to present little difficulty.

It is clear that on a motion brought under Rule 122, the Court can determine whether or not it has jurisdiction to entertain this action.

In the present appeal, the question to be determined is the jurisdiction of the Supreme Court of Ontario to maintain an action where the plaintiff, in order to found his status as a plaintiff, must establish the invalidity of the statutes of the Parliament of Canada amalgamating the Grand Trunk and the Canadian National Railways as well as the Orders in Council passed under the authority of those statutes cancelling the shares claimed by the plaintiff, and vesting the title to the Grand Trunk undertaking in the Crown. If those Acts are valid, the plaintiff has no status.

Defendants' argument is that the question whether the plaintiff has now any title to the Grand Trunk shares as claimed, or a status to claim damages for cancellation involves a declaration of the invalidity of the title which the Crown assumed to acquire under the above-mentioned statutes and Orders-in-Council, and the defendants therefore claim that

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Reasons for Judgment.
(e) Masten J.A.—*continued.*

this Court has no jurisdiction to entertain such an action which must be asserted by petition of right or in the Exchequer Court of Canada.

The first point which clearly emerges is that the Court has power under Rule 122 to determine the question so raised by the defendants as to whether it possesses jurisdiction to entertain this action. I refer in that connection to the case of *The Companhie de Mocambique et al* v. *The British South Africa Company*, 1893 *A.C.* 602. There the plaintiff brought an action in the Supreme Court of England claiming, among other things, a declaration of its title to land in South Africa and damages or an injunction for trespass by the defendant on such land. The House of Lords, on an application, similar to that now before this Court, dismissed the action so far as it related to the above claims on the ground that the Supreme Court of Judicature had no jurisdiction to entertain an action for such a declaration as was asked or to grant a judgment for damages for trespass to land situate abroad.

While the defendants claim that the plaintiff must establish its status as the holder of the securities in question by attacking the title of the Crown, the plaintiff argues that for the disposition of this present application his status must be taken to be admitted, and invokes the well-recognized rule that on the hearing of an application under Rule 122 on an objection by way of a point of law raised on the pleadings, the party raising the objection admits, for the purpose of the argument, the facts alleged by the opposite party, and declares that those facts are not sufficient to afford the ground of relief for which in this case the plaintiff contends. The plaintiff seeks to apply that rule to the pleadings here in question by claiming that the defendants admit for the purposes of this application the allegation by the plaintiff in his pleadings that the statutes and Orders in question are " invalid, illegal and void," and consequently that the shares claimed by the plaintiff must be taken to remain for the purposes of this argument in full force and virtue. Thus, the plaintiff alleges that for all purposes of this application the status of the plaintiff as the holder of the shares claimed by him is established.

The answer to the argument of the plaintiff seems to me to be plain. What the rule of practice prescribes is that the *facts* shall be deemed to be admitted; but whether the statutes and Orders in question are " invalid, illegal and void " is not a question of fact but of law, and is not admitted. This is to say, the point which the plaintiff must establish against the Crown in destruction of its title in order to acquire his status, is not admitted, and it is something which, as against the Crown, this Court has no jurisdiction to determine.

As to the Rule regarding what is deemed to be admitted on the argument of a point of law, I refer to Stephen on Pleading, 6th edit. at page 133; Bullen & Leake Precedents, 3rd edit. at page 820; Archibald's Q.B. Practice, 11th edit. page 913, note *g*.

In the foregoing observations I assume that the principle laid down by the Judicial Committee of the Privy Council in *Attorney-General for Ontario* v. *McLean Gold Mines*, 1927, A.C. 185, applies. Adapting the

words of that judgment to the circumstances of this case, it may be said that "it is essential to the plaintiff's status to seek relief against the defendants that he should re-establish his interest in the securities in question by avoiding the cancellation of these securities under the Statutes and orders in council in the statement of claim mentioned. Until that has been done, the plaintiff cannot be regarded as holding any interest which would enable him to maintain this action.

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No. 25. Reasons for Judgment. (e) Masten J.A.—*continued.*

"However the plaintiff's claim may be viewed, it seeks in substance and reality to avoid the title acquired by and vested in the Crown as the result of the impugned legislation." The real matter in issue is the Crown's title and its consequent right to deal as it has done, with the securities claimed by the plaintiff.

It seems to me that the principle of the McLean case governs this appeal completely and is the rule that must be applied by this Court. Whether it is or is not consistent with previous decisions is immaterial, but I entirely agree with Mr. Tilley's argument that it is not inconsistent with the Esquimalt case, 1920, A.C. 358.

Subject to the variation suggested by my brother Riddell, the appeal should be dismissed with costs.

In the Supreme Court of Ontario.

No. 26. Notice of Motion to admit appeal, 26th May, 1934.

No. 26.

Notice of Motion to admit appeal.

IN THE SUPREME COURT OF ONTARIO.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - (*Plaintiff*) *Applicant*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - (*Defendants*) *Respondents.*

TAKE NOTICE that by special leave of the Honourable Mr. Justice Middleton this day granted, an application will be made on behalf of the Plaintiff before the Honourable Mr. Justice Middleton, in Chambers, at Osgoode Hall, Toronto, on Wednesday, the 30th day of May, 1934, at the hour of 10.00 o'clock in the forenoon or as soon thereafter as the motion can be heard for an Order to admit the appeal of the Plaintiff from the Order of the Court of Appeal herein, dated the 28th day of June, 1933, to His

In the Supreme Court of Ontario.

No. 26. Notice of Motion to admit appeal, 26th May, 1934—*continued.*

Majesty in his Privy Council and to approve and allow the security for such appeal or for such further or other order as may be proper;

AND TAKE NOTICE that in support of such application will be read the Writ of Summons and the pleadings the said Order of the Court of Appeal, the judgment pronounced by the Honourable Mr. Justice Kerwin on the 24th day of February, 1933, the Order of the Honourable the Chief Justice of the High Court, dated the 14th day of January, 1933, the Affidavit of John Frederick Woods, filed, dated the 26th day of May, 1934, and such further and other material as Counsel may advise.

DATED at Toronto this 26th day of May, 1934.

V. EVAN GRAY,
Sterling Tower,
372 Bay Street, Toronto.
Solicitor for the Applicant.

To : Messrs. TILLEY, THOMSON & PARMENTER,
Agent for W. Stuart Edwards, K.C., Parliament Buildings, Ottawa, Solicitors for the Respondent.

No. 27. Affidavit of J. W. Woods, in support of Motion to admit appeal, 26th May, 1934.

No. 27.

Affidavit of J. W. Woods in support of motion to admit appeal.

IN THE SUPREME COURT OF ONTARIO.

Between :

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - *Defendants.*

I, JOHN FREDERICK WOODS, of the City of Toronto in the County of York, Barrister and Solicitor, make oath and say :

1. I am associated with V. EVAN GRAY, K.C., Solicitor for the Plaintiff herein, as junior counsel, and as such have knowledge of the facts hereinafter deposed to.

2. Hereto annexed is a true copy of the Judgment of the Court of Appeal herein, dated June 28, 1933.

In the Supreme Court of Ontario.

No. 27
Affidavit of J. W. Woods, in support of Motion to admit appeal, 26th May, 1934—
continued.

3. The costs of the action adjudged to be paid by the Plaintiff to the Defendants, pursuant to the said Judgment, amounting to One thousand, six hundred and ninety-nine dollars and thirty cents ($1,699.30) have been paid in full, and hereto annexed is a copy of a receipt from the Solicitors for the Defendants, acknowledging receipt of payment of the balance of the taxed costs herein.

4. The Plaintiff has paid into Court, in this action, the sum of Two thousand dollars ($2,000) as security for the costs of an appeal from the judgment of the Court of Appeal herein to the Judicial Committee of the Privy Council, and hereto annexed is a receipt for such payment into Court.

5. The matter in controversy herein exceeds the sum or value of Four thousand dollars ($4,000) and I am advised and believe that the Plaintiff is entitled under the provisions of the Privy Council Appeals Act (R.S.O. 1927, Chap. 86) to appeal to His Majesty in his Privy Council.

Sworn before me at the City of Toronto, in the County of York, this 26th day of May, 1934.

"JOHN F. WOODS."

"GERARD BEAUDOIN,"
A Commissioner &c.

No. 28.

No. 28.
Order of Middleton J.A. admitting appeal and approving security.
2nd June, 1934.

Order of Middleton, J.A., admitting appeal and approving security.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE MR. JUSTICE MIDDLETON IN CHAMBERS } Saturday, the 2nd day of June, 1934.

Between

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY GENERAL OF CANADA - - - - - - - - - *Defendants.*

1. Upon the application of Counsel for the Plaintiff, made on the 30th day of May, 1934, in the presence of Counsel for the Canadian National Railway Company sued herein under the names Grand Trunk

In the Supreme Court of Ontario.

No. 28. Order of Middleton J.A. admitting appeal and approving security. 2nd June, 1934—*continued.*

Railway Company of Canada and Canadian National Railway Company and for the Defendant the Attorney-General of Canada, upon hearing read the order of the Court of Appeal for Ontario, pronounced herein on the 28th day of June, 1933, and the reasons therefor, the writ of summons and the pleadings, the judgment pronounced by the Honourable Mr. Justice Kerwin on the 24th day of February, 1933, the order of the Honourable the Chief Justice of the High Court, dated the 14th day of January, 1933, and the affidavit of JOHN FREDERICK WOODS, filed and the exhibits therein referred to and it appearing that the Plaintiff has, under the provisions of the Privy Council Appeals Act (R.S.O. 1927, Chap. 86) a right of appeal to His Majesty in His Privy Council, and upon hearing what was alleged by Counsel aforesaid, and judgment upon the application having been reserved until this day.

2. IT IS ORDERED that an appeal by the Plaintiff to His Majesty in His Privy Council from the said order of the Court of Appeal for Ontario be and the same is hereby admitted.

3. AND IT IS FURTHER ORDERED that the sum of Two Thousand dollars ($2,000) paid into Court as appears by Exhibit " C " to the said affidavit of John Frederick Woods be and the same is hereby approved as good and sufficient security that the Plaintiff will effectually prosecute his appeal to His Majesty in His Privy Council from the said order of the Court of Appeal for Ontario, and will pay such costs and damages as may be awarded in case the said order is confirmed or in part confirmed.

4. AND IT IS FURTHER ORDERED that the costs of the said application shall be costs in the said appeal.

" D'ARCY HINDS,"
Registrar, S.C.O.

Entered O.B. 141, page 550.
July 6th, 1934.
V.C.

No. 29. Reasons for Judgment of Middleton J.A.

No. 29.

Reasons for Judgment of Middleton J.A.

Motion for allowance of security upon appeal to the Privy Council. The security is by $2,000 cash deposit. Mr. Carson objects that there is not in this case an appeal as of right. I do not agree with him. The action is conceded to be, *inter alia*, for a money demand far exceeding $4,000. An Order was obtained by the Defendants directing a question of law to be argued before the trial of issues of fact. Upon the argument of this question of law the action was dismissed. An appeal from this is now sought and, in my opinion, as of right because the action has been as effectually disposed of by the judgment which has been pronounced as

No. 29. Reasons for Judgment of Middleton J.A.—*continued.*

if it had been tried and all the issues both in law and fact had been disposed of. In effect there has been a successful demurrer to the plaintiff's claim.

The unreported judgment of the late Mr. Justice MacLaren in the Hydro Electric case is relied upon as justifying a refusal of the allowance of the security. There the motion was an interlocutory motion and the position, although it might have been fatal to the action, was in effect an interlocutory decision and the appeal will only lie by special leave. The case is, I think, distinguishable.

The security will be allowed. Costs in the appeal.

No. 30.

No. 30. Order of Masten J.A., granting leave to appeal from Order of Middleton J.A., 29th June, 1934.

Order of Masten J.A., granting leave to appeal from Order of Middleton J.A.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE MR. JUSTICE MASTEN IN CHAMBERS — Friday, the 29th day of June, 1934.

Between

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY GENERAL OF CANADA - - - - - - - - - *Defendants.*

1. Upon the application made on the 13th day of June, 1934, by counsel for the Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company and for the Defendant, The Attorney-General of Canada, hereinafter referred to as the applicants, in the presence of counsel for the Plaintiff and upon reading the order of the Court of Appeal for Ontario pronounced herein on the 28th day of June, 1933, and the reasons therefor, the writ of summons and the pleadings, the judgment pronounced by the Honourable Mr. Justice Kerwin on the 24th day of February, 1933, the order of the Honourable the Chief Justice of the High Court made on the 14th day of January, 1933, the affidavit of John Frederick Woods filed and the exhibits therein referred to, the order of the Honourable Mr. Justice Middleton made on the 2nd day of June, 1934, herein, and the reasons therefor, and upon hearing what was alleged by

In the Supreme Court of Ontario.

No. 30. Order of Masten J.A., granting leave to appeal from Order of Middleton J.A., 29th June, 1934 —*continued.*

counsel aforesaid and judgment upon the application having been reserved until this day.

2. IT IS ORDERED that the applicants be and they are hereby granted leave to appeal from the said order of the Honourable Mr. Justice Middleton to the Court of Appeal for Ontario.

3. AND IT IS FURTHER ORDERED that the costs of this application be reserved to be disposed of by the Court of Appeal for Ontario on the hearing of such appeal.

"D'ARCY HINDS"
Registrar, S.C.O.

Entered O.B. 141 page 540 & 1
July 5, 1934.
"V.C."

No. 31. Reasons for Judgment of Masten J.A.

No. 31.

Reasons for Judgment of Masten J.A.

This is a motion for leave to appeal to the full Court from the order of Middleton, J.A., admitting the appeal under Section 10 of the Privy Council Appeals Act, R.S.O. cap. 86.

The defendants ask leave to appeal to the full Court from the order of Middleton, J.A., on the ground that the matter in controversy does not exceed the sum or value of $4000·00 as required by Section 1 of the Act, and consequently that no direct appeal from the judgment of the Court of Appeal exists as a matter of right. The applicant contends that the sole question arising on the appeal proposed by the plaintiff is the jurisdiction of this Court to entertain this action and that the consideration of all questions as to damages are postponed till after the final determination of the question of the Court's jurisdiction.

The history of the proceedings in the action so far as they are relevant to this motion is as follows:—

By an order dated 14th January, 1933, Rose, C.J. directed that paragraphs 23, 24 and 25 of the statement of defence be set down for hearing on points of law and that the trial of the action and certain other proceedings therein be stayed until after the final determination of the said points of law.

Paragraphs 23, 24 and 25 above referred to read as follows:—

> "23. The plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stock of the Grand Trunk and cannot be maintained by action but only by petition of right.
>
> "24. The Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.
>
> "25. An action by the plaintiff either personally or in his representative capacity for the declarations referred to in paragraph 5 of the Statement of Claim will not lie even though the Attorney-General of Canada be a party defendant."

On that application the question raised was elaborately argued by counsel and was dealt with by the Chief Justice with equal elaboration. I quote from his judgment :—

" Perhaps it is unlikely that the enquiry would be as extensive as was the enquiry that the arbitrators were compelled to make when they were endeavouring to ascertain ' the value, if any, to the holders thereof, of the preference and common stock of the company '—' the arbitrators sat and heard evidence and argument for over eighty days; ' (1923) A.C. at p. 157—but certainly the volume of evidence would be considerable and much time and energy would be consumed in the preparation of the case. These considerations lead to the conclusion that if the points of law raised by the defence in paragraphs 23, 24 and 25 are not obviously frivolous, and if a decision upon one or another of them favourable to the defendants might remove the necessity of going into such questions as have been mentioned, and if the points of law can really be determined satisfactorily without the taking of evidence, the order asked for ought to be made. Such order ought of course to be made cautiously, for, as is mentioned by Kennedy, L.J. in Codling v. John Mowlem & Co., Ltd. (1914) 3 K.B. 1056, there are few cases which do not depend upon the facts. But in some cases the power given by the Rule has been exercised advantageously, and the present seems to me to be one of the cases in which it ought to be exercised if there is reasonable certainty of the existence of the conditions that I have mentioned. Therefore I proceed to consider one by one the paragraphs in which the points of law that the defendants desire to have argued are raised."

After considering each of the paragraphs separately he directs the three points to be set down for preliminary argument and stays further proceedings in the action pending the final determination of the application so directed.

The three points were set down for argument and came on to be heard in Weekly Court before Kerwin, J. His order is dated the 24th February, 1933. As something turns on the terms of that order I quote in full the relevant portions.

" UPON motion made unto this Court on Thursday the 2nd day of February, 1933, pursuant to leave granted by the order of the Honourable the Chief Justice of the High Court herein dated the 14th day of January, 1933 by counsel on behalf of the defendants Canadian National Railway Company and The Attorney-General of Canada for determination of the points of law raised by paragraphs 23, 24 and 25 of the statement of defence herein and upon hearing read the pleadings, the said order of the Honourable the Chief Justice of the High Court and the reasons therefor and upon hearing counsel for the said defendants and for the plaintiff and judgment upon the motion having been reserved until this day and this

In the Supreme Court of Ontario.

No. 31. Reasons for Judgment of Masten J.A.—*continued.*

Court having directed that the motion be turned into a motion for judgment.

2. THIS COURT DOTH DECLARE that the plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right as alleged in paragraph 23 of the statement of defence herein AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

3. AND THIS COURT DOTH FURTHER DECLARE that the Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action as alleged in paragraph 24 of the statement of defence herein AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

4. AND THIS COURT DOTH NOT SEE FIT by reason of the declarations aforesaid to make any declaration with respect to paragraph 25 of the statement of defence herein.

5. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE THAT this action be and the same is hereby dismissed with costs to be paid by the plaintiff to the said defendants forthwith after taxation thereof including the costs of the Chief Justice of the High Court dated the 14th day of January 1933."

His reasons for judgment after discussion of the arguments raised conclude as follows :—

" So far as the statements in Clode are concerned, I think they must be taken to be incorrect in view of the decision in *Attorney-General for Ontario* v. *McLean Gold Mines* (1927) A.C. 185. In that action certain mining claims in Ontario granted by the Crown were forfeited under the Mining Tax Act and were granted to another person. In the action defects were alleged in the forfeiture proceedings and a declaration was claimed that the plaintiffs were the true owners of the claims and that the forfeiture certificates were void and an order was asked that the plaintiffs be substituted as owners in the register of titles. If the forfeiture proceedings were defective then the Crown had acquired no title after the first grant and, as pointed out at page 190, ' However the plaintiff's claim may be viewed it seeks in substance and in reality to void the title acquired by and vested in the Crown as the result of the impugned forfeiture.'

" I am unable to distinguish that case from the one at Bar. *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (1920) A.C. 358 and *Dyson* v. *Attorney-General* (1911), 1 K.B. 410 cited by Mr. Evan Gray were referred to in the McLean case and distinguished. In the McLean case, as in this, the question is not as to the propriety of joining the Attorney-General but as to the very right of the plaintiff himself to bring the action.

" This disposes of the point of law raised by paragraph 23 of the statement of claim.

" The reference in paragraph 24 to the Exchequer Court of Canada is merely to the machinery by which, if the plaintiff is driven to a petition of right, he may have the matter disposed of in that kind of a proceeding.

" I refrain from expressing any opinion as to paragraph 25 because, for the reasons given, I am of opinion that this action will not lie at the suit of the plaintiff. His claims for the declarations referred to in (*a*), (*c*) and (*d*) of his prayer; for the orders mentioned in (*g*), (*h*) and (*k*), and for damages in (*i*), (*j*) and (*m*) are merely for consequential relief.

" I, therefore, declare that the plaintiff's claims cannot be maintained and judgment will go dismissing the action with costs. The costs of the motion of January 14th, 1933, will be paid by the plaintiff."

The only question considered and adjudicated related to the jurisdiction of the Supreme Court to entertain this action, in other words, " the very right of the plaintiff himself to maintain this action."

No note of any application to turn the application into a motion for judgment on the merits appears in the Registrar's Book, nor so far as I have been able to find in the note book of my brother Kerwin.

In my view of the order of Rose, C.J., staying all proceeding in the action " until after the final determination of said points of law," I think Kerwin, J. had no power to turn the application pending before him into a motion for final judgment. The " said points of law " had not been finally determined. The order of Kerwin, J. was subject to appeal and was actually appealed. Indeed the question is not yet finally determined for the Privy Council may grant leave to appeal.

The order of Kerwin, J. was appealed to the Court of Appeal and was affirmed with a minor variation which is not relevant to this application. The reasons of the Court are reported in 1933 O.R. 727,749, and relate soley to the lack of jurisdiction in this Court, because the plaintiff's claim is to avoid the title acquired by and vested in the Crown.

I would have thought that a more apt wording of the order of Kerwin, J. would have been somewhat as follows, " this Court being of opinion that it has no jurisdiction to entertain the plaintiff's claim all further proceedings in this action are forever stayed."

However the form of words employed can make no difference. For the purpose of this motion the only point is what is the question to be considered by the Privy Council on the plaintiff's proposed appeal. That

In the Supreme Court of Ontario.

No. 31. Reasons for Judgment of Masten J.A.—*continued.*

question is necessarily the same as that which was considered before Kerwin, J. and in the Court of Appeal, viz. the jurisdiction of the Supreme Court. The dismissal of the action by Kerwin, J. was founded solely on the ground of lack of jurisdiction. The question of damages has never been considered and if the plaintiff were granted a fiat and proceeded by petition of right the order of Kerwin, J. dismissing this action could not be set up as res adjudicata for the Exchequer Court would for that purpose inquire what was the real issue determined in the present action.

If I ascribed the same meaning and effect to the terms of the order of Kerwin, J. as was taken by my brother Middleton I would reach his conclusion that an appeal to the Privy Council exists as of right under Chapter 86 of the Revised Statutes of Ontario, but for the reasons above stated I think that the question of jurisdiction is by the order of Rose, C.J. segregated for preliminary consideration as a question of law. It was the only question considered by Kerwin, J. and by the Court of Appeal and is the only question that can be considered on the proposed appeal to the Privy Council. Also it involves no " controversy as to a pecuniary amount or of a pecuniary nature."

I need scarcely say that in view of the great familiarity of my brother Middleton with this phase of practice I express the above opinion with the greatest diffidence but having given it my best consideration I cannot do otherwise than act on the view at which I have arrived.

If I am right in that view then I think the practice is governed by such cases as *City of Toronto* v. *Toronto Electric Light Co.* (1906) 11 O.L.R. 310; *Canadian Pacific Ry. Co.* v. *City of Toronto* (1909) 19 O.L.R. 663; *McBride* v. *Ontario Jockey Club* (1925) 58 O.L.R. 267; *Boland* v. *Canadian National Railway Co.* (1925) 58 O.L.R. 225, and that the application to admit the appeal *should have been refused.*

I would therefore grant leave to appeal from the order of Middleton, J.A. to the full Court. Costs of this motion to be dealt with by the full Court on the hearing of the appeal.

No. 32.

Order of Masten J.A., staying proceedings.

In the Supreme Court of Ontario.

No. 32. Order of MastenJ.A., staying proceedings, 19th July, 1934.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE MR. JUSTICE MASTEN IN CHAMBERS } Thursday, the 19th day of July, 1934.

Between

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - *Defendants.*

1. Upon the application by counsel for the Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company and for the Defendant, The Attorney-General of Canada, in the presence of counsel for the Plaintiff and upon reading the order of the Honourable Mr. Justice Masten made on the 29th day of June, 1934, and the material therein referred to and upon hearing what was alleged by counsel aforesaid.

2. IT IS ORDERED that all and any proceedings that might be taken under, pursuant to or as a result of the order of the Honourable Mr. Justice Middleton made herein on the 2nd day of June, 1934, including the issue of any certificate by the Registrar of this Court with respect to the appeal admitted by the said order of the Honourable Mr. Justice Middleton and all other proceedings herein including the making or delivery of any exemplification or certified copy of the material on record in this Court in this action, but not including the proceedings by way of appeal from the said order of the Honourable Mr. Justice Middleton, be and the same are hereby stayed pending the final disposition of the appeal from the said order of the Honourable Mr. Justice Middleton.

3. AND IT IS FURTHER ORDERED that the costs of this application be costs in the said appeal from the order of the Honourable Mr. Justice Middleton.

" D'ARCY HINDS,"
Registrar, S.C.O.

Entered O.B. 141 pages 599 & 600.
July 20, 1934.
" V.C."

In the Court of Appeal of Ontario.

No. 33. Formal Judgment, 1st November, 1934.

No. 33.

Formal Judgment.

IN THE COURT OF APPEAL OF ONTARIO.

THE RIGHT HONOURABLE THE CHIEF JUSTICE OF ONTARIO
THE HONOURABLE MR. JUSTICE RIDDELL
THE HONOURABLE MR. JUSTICE FISHER
THE HONOURABLE MR. JUSTICE DAVIS
THE HONOURABLE MR. JUSTICE MACDONNELL

Thursday, the 1st day of November, 1934.

Between

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - - - - - - *Plaintiff*

and

GRAND TRUNK RAILWAY COMPANY OF CANADA CANADIAN NATIONAL RAILWAY COMPANY and THE ATTORNEY-GENERAL OF CANADA - - - - - - - - - *Defendants.*

1. Upon motion made unto this Court on the 24th and 25th days of September 1934, by counsel on behalf of the Canadian National Railway Company sued herein under the names Grand Trunk Railway Company of Canada and Canadian National Railway Company and the defendant, The Attorney-General of Canada, hereinafter referred to as the appellants by way of appeal from the order of the Honourable Mr. Justice Middleton dated the 2nd day of June, 1934, herein, in the presence of counsel for the plaintiff, upon hearing read the writ of summons and the pleadings, the order of the Honourable the Chief Justice of the High Court dated the 14th day of January, 1933, the judgment pronounced by the Honourable Mr. Justice Kerwin on the 24th day of February, 1933, the memoranda on appeal herein dated respectively the 3rd and 6th days of May, 1933, the order of the Court of Appeal for Ontario dated the 28th day of June, 1933 and the reasons therefor, the affidavit of John Frederick Woods filed and the exhibits therein referred to, the said order of the Honourable Mr. Justice Middleton and the reasons therefor and the order of the Honourable Mr. Justice Masten dated the 29th day of June 1934, and the reasons therefor and the order of the Honourable Mr. Justice Masten dated the 19th day of July, 1934 and upon hearing what was alleged by counsel aforesaid, and judgment upon the motion having been reserved until this day.

2. THIS COURT DOTH ORDER that the said appeal be and the same is hereby allowed and that the said order of the Honourable Mr. Justice Middleton be and the same is hereby vacated and set aside.

In the Court of Appeal of Ontario.

No. 33. Formal Judgment, 1st November, 1934—*continued.*

3. AND THIS COURT DOTH FURTHER ORDER that the plaintiff do pay to the appellants their costs of the said Appeal, and their costs of the motion made before the Honourable Mr. Justice Middleton of 30th day of May 1934, and of the motions made before the Honourable Mr. Justice Masten on the 13th day of June 1934, and on the 19th day of July 1934, forthwith after taxation thereof.

10 "D'ARCY HINDS"
Registrar, S.C.O.

No. 34.

No. 34. Reasons for Judgment. (*a*) Mulock C.J.O.

Reasons for Judgment.

(*a*) MULOCK, C.J.O.:—This is an appeal from the order of Middleton J.A., admitting an appeal by the plaintiff to His Majesty in His Privy Council from an order of the Court of Appeal, and approving the security.

In the statement of claim the plaintiff alleges that he was the owner of certain preference and common stock of the Grand Trunk Railway Company; that the same had been illegally transferred to the Government of Canada
20 in the books of the defendant Company under cover of certain statutes of the Parliament of Canada which he submits are invalid, and presses for a declaration that the transfers of said stock are illegal and void and for an order directing a rectification of the stock register in accordance with such declaration. He also asks for a declaration that certain acts of the Parliament of Canada, being 10 & 11 Geo. V. chap. 13, being an Act confirming an agreement under which the said Government acquired the said stock, was ultra vires of the Parliament of Canada, and he asks in the alternative, for damages (exceeding $4,000·00).

The defendants by paragraphs 23, 24 and 25 of their statement of
30 defence deny the invalidity of the said Act and of said agreement and allege that the plaintiff's claims impugn the title of the Crown in the said stock and cannot be maintained by action but only by petition of right; that the Exchequer Court of Canada has exclusive jurisdiction to determine the matters in question in this action and that the plaintiff is not entitled to maintain the same.

On application by the defendants by an order in Chambers dated the 14th January, 1933, leave was granted to the defendants to set down for hearing before the trial of the action the points of law raised by said paragraphs 23, 24 and 25 of the statement of defence, and it was directed
40 "that the trial of the action and other proceedings herein, including production of documents, examination for discovery and taking of evidence on examination but not including application for orders for security for costs now pending or hereafter to be launched be and the same

In the Court of Appeal of Ontario.

No. 34. Reasons for Judgment. (*a*) Mulock C.J.O.—*continued.*

are hereby stayed until after the final determination of the said points of law."

The matters referred to by the said order of the 14th January, 1933, came on to be heard by Kerwin J. and after directing that the motion before him be turned into a motion for judgment, made the following order; "This Court doth declare that the plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right as alleged in paragraph 23 of the statement of defence herein and doth order and adjudge the same accordingly."

"This Court doth further declare that the Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action as alleged in paragraph 24 of the statement of defence herein and doth order and adjudge the same accordingly."

"And this Court doth not see fit by reason of the declarations aforesaid to make any declaration with respect to paragraph 25 of the statement of defence herein."

"And this Court doth further order and adjudge that this action be and the same is hereby dismissed with costs. . . ." The plaintiff appealed to this Court from the order of Kerwin J., and by an order of the 28th June, 1933, the appeal was dismissed with costs ; Thereupon the plaintiff made an application before Middleton J.A. for approval of security that he would effectively prosecute an appeal to the Privy Council, and by order dated the 23rd June, 1934, it was ordered that an appeal by the plaintiff to His Majesty's Privy Council from the order of the Court of Appeal, dismissing the appeal from the order of Kerwin J., be admitted and the sum of $2000 paid into Court was approved as good and sufficient security that the plaintiff would effectively prosecute such appeal. From this order of Middleton J.A. the defendants appeal and their contention is that the matter in controversy is not within the provisions of sec. 1 of the Privy Council Appeals Act, chap. 86 of the Revised Statutes of Ontario. That section reads as follows : "Where the matter in controversy in any case exceeds the sum or value of $4000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature, affecting future rights of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council and except as aforesaid no appeal shall lie to His Majesty in His Privy Council."

The question in controversy is one of fact. Controversy implies dispute. Until the defendants dispute the claim there is no controversy; thus controversy is not synonymous with cause of action, and what is in controversy can only be discovered from the subsequent proceedings; the pleadings and the evidence.

In *Toronto* v. *Toronto Electric Light Company*, 11 O.L.R. at page 313, Osler J., said : "The whole matter in controversy *at the trial* was whether the Electric Light Company had forfeited its rights. . . . This was the only claim made, the only contention put forward at the trial. . . ." In

the present case the plaintiff made a claim against the Crown for certain stocks. The defendants in addition to challenging the validity of the claim contend that this Court had no jurisdiction to entertain it. The plaintiff took issue with that contention and this Court, holding that it had no jurisdiction, dismissed the action and the plaintiff now desires to appeal from such dismissal.

At this stage the matter in controversy is whether this Court has jurisdiction to entertain the plaintiff's claim. That question has for the time being superseded any matter in controversy respecting the merits of the action. They have not yet been dealt with by the Court below, and the case as regards them is not yet ripe for appeal to the Privy Council. The first question to be determined is that of jurisdiction; it does not involve any pecuniary amount, and therefore an appeal as of right in respect thereof is not within the provisions of section 1 of the Act.

For these reasons I think that the appeal sought by the plaintiff is not competent.

I agree with my brother Macdonnell that the order of Middleton J.A., is appealable, and am of opinion that it should be set aside with costs.

(*b*) Riddell J.A.

(*b*) RIDDELL, J.A.—This matter was argued at considerable length with a copious citation of authorities, Ontario and English in many Courts and the Judicial Committee. I think the decision can well be put on very simple grounds, but that it may be understood, it would seem necessary to state the facts a little at length. The plaintiff sues on behalf of himself and all others, the holders of certain Stocks and Bonds of the Grand Trunk Railway of Canada; the defendants are the said Grand Trunk Railway, the Canadian National Railway Company (which may be considered its successor) and the Attorney-General of Canada. It is claimed that the stock, etc., of the plaintiff and those he represents of the Grand Trunk was illegally transferred without compensation; a long statement is made of alleged unlawful meetings and acts, and it is claimed that the plaintiff and those he represents have been financially damaged. The prayer is in essence to have the stock, etc., replaced or in the alternative for damages to a large amount. The defendants, *inter alia*, plead validating legislation and that the Court has no jurisdiction to try the case.

At the trial before Mr. Justice Kerwin, that learned Judge considered himself bound by the judgment of Courts of authority to hold and did hold that the Court had no jurisdiction and dismissed the action on this ground alone; on appeal to this Court, we sustained this decision, considering ourselves bound by the recent decision of the Judicial Committee. The plaintiff desiring to appeal to His Majesty in Council, obtained an Order in Chambers from Mr. Justice Middleton admitting the proposed appeal under sec. 10 of The Privy Council Appeals Act, R.S.O. 1927, cap. 86. Leave to appeal to the Full Court, from this Court, was given by Mr. Justice Masten; on the matter coming before us, objection was taken to our power to entertain the appeal and this question and the merits of the appeal were fully argued. In the appeal, it is abundantly plain that the only question

In the Court of Appeal of Ontario.

No. 34. Reasons for Judgment. (*b*) Riddell J.A.—*continued.*

to be decided is whether our Court has jurisdiction to try the merits at all; but with that we have now nothing whatever to do. Nor have we any concern with the Common Law or other powers of the Privy Council; all we can have in consideration is the interpretation of the Act, R.S.O. 1927, cap. 86, " The Privy Council Appeals Act." The important parts of that Act are secs. 1 and 10, which read :—

> " 1. Where the matter in controversy in any case exceeds the sum or value of $4,000 as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council; and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council.
>
> " 10. A judge of the Supreme Court shall have authority to approve of and allow the security to be given by a party who intends to appeal to His Majesty in His Privy Council, whether the application for such allowance be made during the sittings of the Court, or at any other time."

An objection to the right to appeal to his Court from the Order of Mr. Justice Middleton, I do not discuss; I shall take it that *quacunque* via, this right exists.

What, then, is the meaning of the words " Where the matter in controversy in any case exceeds in amount, &c." Does the word " Case " mean " the matter to be argued in the Judicial Committee or is it equivalent to " instance " and the connotation equivalent to what the meaning would be if the Statute read " Whenever the matter in controversy exceeds, &c."

The decided cases seem to throw no light upon the subject the only discussion of the word " Case " being that of Lord Esher, M.R., in *Hanfstaengl* v. *American Tobacco Company*, 1895, 1 K.B., at p. 352; and that is not helpful.

I have no manner of doubt that what the Statute means is that an appeal shall lie to His Majesty in Council, whenever the amount in controversy in litigation in the Supreme Court exceeds the sum or value of $4,000.

That such an amount is here in controversy is beyond question, although no reference to the amount need be made before the Judicial Committee.

I think therefore, that the appeal must be dismissed and with costs.

(*c*) Fisher J.A.

(*c*) FISHER, J.A.—I agree with the reasoning and conclusions of my brother Macdonnell but would like to add this to the argument as to the amount involved in this appeal. My brother Macdonnell has dealt with the question of the allowance of the appeal by the Privy Council pointing out that in that case the plaintiff would not be awarded the amount he is claiming or, indeed, any amount, his only right would be to go back and have his action tried. It might also be pointed out that if the Privy Council

dismisses the appeal that decision would be a decision that no sum is involved in so far as this Court and this action are concerned. Therefore, whatever the fate of the appeal to the Privy Council, there in fact no sum at present involved. The Legislature has seen fit to make the sum involved the criterion of an appeal as of right. There being no sum involved here, the plaintiff must, if he wishes to appeal, obtain leave to do so from the Privy Council who alone can decide the right of appeal where no monetary amount is involved.

I would allow the appeal with costs.

(*d*) Davis J.A.

(*d*) DAVIS, J.A.—This action having been dismissed with costs by the trial Judge and an appeal therefrom having been dismissed with costs by this Court, the plaintiff launched a further appeal to the Judicial Committee of the Privy Council and applied to my brother Middleton for an order under The Privy Council Appeals Act, R.S.O. 1927, Chap. 86 to approve the security and allow the appeal. The usual order made " where the matter in controversy in any case exceeds the sum or value of $4,000 " (sec. 1) was made by my brother. From that order the defendants seek to appeal to this Court, and objection is taken that no right of appeal from such order lies to this Court.

I think the objection is well taken. It is a fundamental principle that the right of an appeal must be found in some statute; there is no such thing as an inherent right of appeal. Now by sec. 2 of the Act " the court appealed from " (in this case the Court of Appeal for Ontario) is the court to which statutory jurisdiction is given to approve the security and allow the appeal to proceed, if the conditions of the case fall within sec. 1. In most cases it has been a very simple matter to deal with, almost a matter of routine, and sec. 10 of the Act has provided that " a Judge of the Supreme Court shall have authority to approve of and allow the security . . . whether the application for such allowance be made during the sittings of the Court or at any other time." It is a substitutionary measure for the convenience of litigants in perfecting their appeals, and creates a co-ordinate jurisdiction. No appeal from the single Judge to the full Court is provided for. A motion to the Judicial Committee to quash the order will apparently be entertained. *Davis* v. *Shaughnessy*, 1932 A.C. 106. And if objection be taken before the single Judge that the application involves any intricate question of interpretation of the Statute with respect to the particular matter in controversy in the case, the single Judge will undoubtedly refer the application to be heard by the full Court. This course was not in this case suggested or requested, and the full Court was sitting at the time.

In my view where the exercise of a special statutory jurisdiction is vested in a body and then the same jurisdiction is given alternatively to any one of that body, the jurisdiction is co-ordinate and in the absence of any express provision to the contrary no appeal lies from the order made by any one of the larger body that would not lie from an order made by the larger body itself, of which he is a member.

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No. 34. Reasons for Judgment. (*d*) Davis J.A.—*continued.*

It is urged upon us that an appeal lies either by virtue of the provisions of the Judicature Act, sec. 25, and the Rules of Practice made under that Act, or by virtue of the Judges' Orders Enforcement Act. I do not think resort can be had to either of these statutes where, as here, there is created a special statutory jurisdiction that does not come into play until after the case has been finally disposed of in the Courts of this province. It is to be observed that when the Privy Council Appeals Act deals with stay of execution of judgments of our own Courts (sec. 3) the provisions are expressly made " subject to the Rules of Court."

In my view no right of appeal from the order of my brother Middleton exists, and the appeal must be dismissed with costs, including the costs of the order of my brother Masten who gave leave to appeal.

(*e*) Macdonnell J.A.

(*e*) MACDONNELL, J.A.—The main issue in this appeal is whether or not an appeal lies as of right to His Majesty in Council in a matter where an action involving a sum in excess of $4,000 has been brought in the Supreme Court of Ontario but has been dismissed on the sole ground that the said Court has no jurisdiction to try it.

In the case at bar the plaintiff brought an action in the Supreme Court of Ontario alleging illegal transfer of certain stock and asking by way of redress certain declarations and orders, and damages amounting to some $50,000. The defendants answered with the plea, among others, that the action came within the exclusive jurisdiction of the Exchequer Court of Canada and could not be tried in the said Supreme Court. This the plaintiff denied. To save much trouble and expense, therefore, the Chief Justice of the High Court made, in accordance with the rules, an order that this question of jurisdiction, among other points of law, should be determined and that, pending final determination, the action should be stayed. The points of law, upon motion made by the defendants, came on for determination before Mr. Justice Kerwin, who held that the defendants' contention was right. That learned Judge then directed that the motion be turned into a motion for judgment, and by judgment dated February 24th, 1933, dismissed the action. Subsequently this judgment was confirmed by the Court of Appeal.

Wishing to appeal from this decision to His Majesty in Council, the plaintiff applied under sec. 10 of The Privy Council Appeals Act, R.S.O. 1927, chap. 86, to Mr. Justice Middleton in Chambers, who made an order admitting the appeal. The defendants then obtained from Mr. Justice Masten leave to appeal from this order to the Court of Appeal.

The plaintiff now contends that since his claim involves, *inter alia*, damages amounting to some $50,000 he is entitled by virtue of section 1 of The Privy Council Appeals Act to appeal as of right to His Majesty in Council. The defendants on the other hand contend that the sole point to be argued before His Majesty in Council is the question whether or not the said Supreme Court was right in denying its jurisdiction, that this question is not capable of being given any monetary value and that therefore no appeal lies.

Section 1 of The Privy Council Appeals Act reads as follows :—

" 1. Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council; and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

The determination of the issue depends largely, it is clear, upon what answer is given to the next question. Does the " matter in controversy " mean the matter in controversy in the original litigation or does it mean the matter in controversy in the appeal ? The section reads " The matter in controversy in any case; " and it might be supposed that the question would be decided by determining the meaning of the word " case". Unfortunately, however, the only logical meaning to be given that word. in the light of the history of the section, seems to be of no assistance,

If the words " in any case " are to be interpreted as meaning " in any original litigation", the plaintiff in the present action is clearly entitled to appeal, for in his original action he claimed, *inter alia*, damages much in excess of $4,000. If the words are to be interpreted as meaning " in any appeal", the plaintiff again is clearly not entitled to appeal, for the matter in controversy in the appeal will be merely the question of jurisdiction and such a question has been decided (*Toronto* v. *Toronto Electric Light Company*, 11 O.L.R. 310; *C.P.R.* v. *Toronto*, 19 O.L.R. 563; *McBride* v. *Ontario Jockey Club*, 58 O.L.R. 267) to have no monetary value. But, as was suggested in the course of the argument " case " probably means simply " instance", and the section might as well read " Whenever the matter in controversy exceeds," &c.; and if that is so, the original question will have to be answered without help from the expression " in any case".

" Case " obviously has a great many meanings—cause or suit, condition, situation, instance, event, &c.—so many, in fact, that no assistance in determining its meaning in the section under consideration is obtained from either the dictionary or the reported decisions (cases). The only light upon its meaning comes, probably, from an examination of the history of the section.

This legislation is not the first of its kind in this Province. In 1794 a Court of Appeal was established in Upper Canada by 34 Geo. 111, cap. 2. And various provisions of that Act have been brought down through succeeding statutes until now they are found, with some modification in wording, in the present Act. Several sections of the present Act are, in fact, simply the modern counterpart of the original Act. Presumably, then, the word " case " in the present Act has the same meaning as " case " in the original Act. It may be of assistance, therefore, to consider the meaning of the word in that Act.

Sections 33, 35 and 36 of 34 Geo. 111 cap.— read as follows :—

" XXXIII. And be it further enacted, That the Governor, Lieutenant-Governor, or person administering the Government of

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(e) Macdonnell J.A.—
continued.

this Province, or the Chief Justice of the Province, together with any two or more members of the Executive Council of the Province, shall compose a Court of Appeal, for hearing and determining all appeals from such judgments or sentences as may lawfully be brought before them."

" XXXV. And be it further enacted, That an appeal shall lie to the Court of the Governor and Executive Council, from all judgments given in the said Court of King's Bench, in all cases where the matter in controversy shall exceed the sum of one hundred pounds, or shall relate to the taking of any annual or other rent, customary or other duty, fee, or any other such like demand, of a general and public nature, affecting future rights, of what value or amount soever the same may be, upon proper security being given by the appellant that he will effectually prosecute his appeal, and answer the condemnation, and also pay such costs and damages as shall be awarded in case the judgment or sentence appealed from shall be affirmed, and that upon the perfecting such security, execution shall be stayed in the original cause."

" XXXVI. And be it further enacted by the authority aforesaid, That the judgment of the said Court of Appeal shall be final, in all cases where the matter in controversy shall not exceed the sum or value of five hundred pounds, sterling, but in cases exceeding that amount . . . an appeal may lie to His Majesty, in His Privy Council, upon proper security being given by the appellant that he will effectually prosecute his appeal, and answer the condemnation, and also pay such costs and damages as shall be awarded by His Majesty, in His Privy Council, in case the judgment of the said Court of Governor and Executive Council, or Court of Appeals, shall be affirmed; and upon the perfecting of such security, execution of the said judgment shall be stayed, until the final determination of such appeal to the King in Council."

In section 35 " Cases " are definitely distinguished from " the original cause," and the distinction can hardly be treated as anything but intentional. (The same distinction appears in the present Act, " case " being used in Section 1 and " original cause " in section 3). It seems impossible, therefore to give " case " the meaning of " original litigation." Indeed, if the Legislature had intended that meaning, it would have been easy to use exact and appropriate words.

It seems equally impossible, however, to give the word the meaning of " appeal." For section 35 does not read " an appeal shall lie . . . from all judgments given in the said Court of King's Bench where the matter in controversy shall exceed," &c. but " from all judgments . . . in all cases where the matter in controversy shall exceed " &c. ; and section 36 does not read " The judgment of the said Court of Appeal shall be final when the matter in controversy shall not exceed " but " shall be final in all cases where the matter in controversy shall not exceed." Again, if the Legislature

had intended the meaning " appeal," it would have been easy to say " an appeal shall lie . . . where the matter in controversy in the appeal shall exceed " &c.

Unsatisfactory as it may seem, the only logical meaning to be given the word " cases " in the original Act is that of " instances." The expression " in any case," found in the present act, is clearly the equivalent of the old expression " in all cases." Consequently the meaning to be given the word " case " in the present Act would seem to be " instance." The section must therefore be read as meaning " Whenever the matter in controversy exceeds," &c.; and it remains to determine whether the matter in controversy is the one in the original litigation or the one in the appeal.

In 1859 the expression " in all cases " was changed to " in a case "; in 1877 the section read " In a case where the matter in controversy exceeds " &c.; and again in 1897 it was changed to read, as it does now, " Where the matter in controversy in any case exceeds," &c. But these changes of wording and position can hardly be supposed to have been due to any intention to make a change in the meaning; it is inconceivable that, if any such intention had existed, the Legislature would have neglected to make everything clear by saying " in the appeal " or " in the original cause."

To Section 36 quoted above, a parallel section is found in the Statutes of Lower Canada, 34 Geo. 111, cap. 6, sec. 30 (*a*) which reads as follows :—

> " Be it enacted, that the judgment of the Court of Appeals of that province shall be final in all cases where the matter in dispute shall not exceed the sum or value of £500, sterling; but in cases exceeding that sum or value . . . an appeal shall lie to His Majesty in His Privy Council," etc.

This section was considered by their Lordships in the Privy Council in *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 181. Nothing was said as to the meaning of the word " cases "; for the reasons given above, it probably means " instances." But " matter in dispute " was definitely determined to mean the matter in dispute in the appeal. Their Lordships said :—

> " In determining the question of the value of the matter in dispute upon which the right to appeal depends, their Lordships consider the correct course to adopt is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal. If their liability upon the judgment is of an amount sufficient to entitle them to appeal, they cannot be deprived of their right because the matter in dispute happens not to be of equal value to both parties; and, therefore, if the judgment had been in their favour, their adversary might possibly have had no power to question it by an appeal . . . and it is the immediate effect of the judgment which must be regarded, as the right to appeal arises as soon as it is pronounced."

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This decision has been regularly followed in our practice. Where A. has brought an action against B. for $10,000 and has recovered a judgment for $3,000, it has been generally recognised that A. is entitled to appeal, because the matter in controversy in the appeal exceeds the sum of $4,000, being the $7,000 he claims beyond what he has been awarded, whereas B. is not entitled to appeal because the matter in controversy, so far as he is concerned, is only $3,000. If this were not the practice, the unreasonable result would follow that a person might secure as of right an appeal to His Majesty in Council in every litigation, however unimportant, by simply inserting in his claim some item, however fictitious, amounting to over $4,000.

On behalf of the Plaintiff, however, it is contended that, even under this practice, an appeal lies in the case at bar. According to this very practice, if an action brought by A. for upwards of $4,000 is tried and dismissed, A. is entitled to appeal, for the matter in controversy is a sum in excess of $4,000. In the case at Bar, then, the action having been brought for, *inter alia*, damages amounting to some $50,000, and having been dismissed, an appeal lies. And this appears to have been the view of Mr. Justice Middleton, for in admitting the appeal he said:—

> " An appeal . . . is now sought and, in my opinion, as of right because the action has been as effectually disposed of by the judgment which has been pronounced as if it had been tried and all the issues both in law and fact had been disposed of."

With great respect, I am unable to agree with this view. The rights of the plaintiff have not been tried; the issues have not been disposed of. The plaintiff is still entitled to bring his action in the proper Court; if and when he does so, he cannot be met with any plea that anything has been determined or disposed of except the question of law as to whether or not he is entitled to have this action tried in a particular Court. If he were to be allowed to appeal and were successful in his appeal, he would not be granted by His Majesty in Council $50,000 or any other amount; the decision would simply be that the Supreme Court of Ontario has jurisdiction to try this action and that the plaintiff is entitled to proceed in that Court. In other words, His Majesty in Council would not decide the fate of the $50,000, or any other amount, but only an incidental point of practice and procedure.

In my opinion therefore this is not an instance where the plaintiff is entitled to an appeal as of right under sec. 1 of The Privy Council Appeals Act. It is an instance where application should be made to His Majesty in Council for leave to appeal.

Nor is this a narrow interpretation of The Privy Council Appeals Act. This Act is not final in determining what appeals may be had. No provision is made in it for the Courts of this Province to exercise any discretion as to whether or not the appeal should be had. Disputes over injunctions or franchises, indirectly involving perhaps millions of dollars, are not within

its ambit. In all such cases leave to appeal must be obtained direct from His Majesty in Council. All that this Act does is to provide that in a certain limited number of cases an appeal may be had without that leave. To find the plaintiff in the present instance not within the provisions of the Act is not to deprive him of any natural right nor to prevent his having his cause heard; it is merely to require him to take the proper procedure.

All this, however, does not dispose of the matter. It is contended that, whether or not this is an instance where an appeal lies as of right, the fact is that Mr. Justice Middleton, acting under section 10 of The Privy Council Appeals Act, did by his order admit the appeal to His Majesty in Council, and that from this order there is no appeal to this Court, by leave or otherwise. With this contention, however, I am unable to agree.

Section 10 of The Privy Council Appeals Act, reads as follows :—

> " A judge of the Supreme Court shall have authority to approve of and allow the security to be given by a party who intends to appeal to His Majesty in His Privy Council, whether the application for such allowance be made during the sittings of the Court, or at any other time."

It is clear that in acting under this section Mr. Justice Middleton was acting either as *persona designata* or in his judicial capacity. There is no third alternative. If he were acting as *persona designata*, an appeal might lie under The Judges Orders Enforcement Act, R.S.O. 1927, chap. 111. But in my opinion a Judge acting under this section is not *persona designata ;* he is not given authority as an individual selected because of his training as a suitable or convenient person; he is one of a class, possessing the rights and powers belonging to his office. Mr. Justice Middleton, then, was not acting as *persona designata* but in his judicial capacity. That being the case, an appeal to this Court lies by virtue of sections 24 and 25 (1) (*b*) of The Judicature Act R.S.O. 1927, chap. 88, which provide as follows :—

> " 24. There shall be no appeal to a Divisional Court from any interlocutory order whether made in Court or chambers save by leave as provided in the Rules.
>
> " 25 (1) Subject to sections 23 and 24 and to the Rules regulating the terms and conditions on which appeals may be brought, an appeal shall lie to a Divisional Court from. . . .
>
> " (*b*) any judgment, order or decision of a Judge in Chambers in regard to a matter of practice or procedure which affects the ultimate rights of any party and subject to the Rules from any other judgment, order or decision of a Judge in Chambers in regard to a matter of practice or procedure."

If the order appealed from is to be treated as interlocutory, the defendants come within the provisions of section 24, for they have obtained leave in accordance with the Rules from Mr. Justice Masten. If it is to be

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treated not as interlocutory but as finally disposing of rights, then they come within the provisions of section 25.

It is said that the provisions of sec. 25 do not apply to this case because of the peculiar relationship of section 2 and section 10 of The Privy Council Appeals Act. Section 2 of that Act reads as follows :—

> " No such appeal shall be allowed until the appellant has given security in $2,000, to the satisfaction of the court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed."

It is said that the result of these two sections is to vest jurisdiction first in a body and then, alternatively, in some one member of that body, that the jurisdiction given by the one section is co-ordinate with that given by the other, and that therefore no appeal lies. But in my opinion these two sections should not be so read. The court appealed from in this instance is the Court of Appeal; the person admitting the appeal is a Judge of the Supreme Court. It is true that Mr. Justice Middleton is a Judge of the Court of Appeal; but when making the order in question he was acting not in such a capacity but in his capacity as *ex officio* a Judge of the Supreme Court. An appeal should therefore lie from his decision to a Divisional Court as in the case of other decisions of a single Judge.

Nor does the jurisdiction appear to be co-ordinate. All that section 10 does is to provide an easy method of arranging security in clear cases, avoiding the trouble and delay of applying to the full Court. Cases involving difficulty should be determined by the Court appealed from; if they happen to be brought under section 10 before a single Judge, an appeal to a Divisional Court should lie.

In my opinion no peculiar sanctity is to be given to the provisions of The Privy Council Appeals Act or to orders made under them. In enacting those provisions the Legislature has done nothing more than say what procedure is to be adopted in certain cases; and the members of the Court in making orders have no exceptional power or authority but are governed in the usual way by other statutes and the Rules.

The appeal, must, therefore, be allowed.

In the Privy Council.

No. 35. Order in Council granting special leave to appeal to His Majesty in Council, 29th March, 1935.

No. 35.

Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE.

The 29th day of March, 1935.

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT.
LORD MOTTISTONE.
MR. SECRETARY THOMAS.
MR. J. A. LYONS.
SIR GEORGE CLAUS RANKIN.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 22nd day of March 1935 in the words following viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of George Pardew Lovibond in the matter of an Appeal from the Court of Appeal of Ontario between the Petitioner Appellant on behalf of himself and on behalf of himself and all others the registered holders on January 18th 1923 of First, Second and Third Preference Stocks and of Common Stock of the Grand Trunk Railway of Canada their personal representatives or assigns and the Grand Trunk Railway Company of Canada the Canadian National Railway Company and the Attorney-General of Canada Respondents setting forth amongst other matters that the Petitioner is desirous of obtaining special leave to appeal from an Order of the Court of Appeal made on the 1st November 1934 : that the effect of the Order in question was to decide that an Appeal by the Petitioner to Your Majesty in Council did not lie against an Order of the Court of Appeal dated the 28th June 1933 affirming an Order of the High Court Division of the Supreme Court of Ontario dated the 24th February 1933 whereby the Petitioner's Action was dismissed on a preliminary point of law : that the Petitioner also desires if and so far as necessary to obtain special leave to appeal from the last mentioned Order of the Court of Appeal dated the 28th June 1933 although he contends that he is entitled to appeal therefrom as of right : that the Petitioner's claim against the Respondents is fully set out in the Statement of Claim and the substance of it is set out in the Petition : that the Petitioner claims in this Action on behalf of himself and the Stockholders he represents the following relief : (*a*) A declaration that the transfers to the Minister of Finance of the Stock of the

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Grand Trunk registered on the 18th January 1923 in the names of the Petitioner and the other Stockholders are invalid, and rectification of the Register accordingly; (*b*) (*c*) (*d*) (*e*) and (*f*) declarations that the Grand Trunk Railway Acquisition Act, 1919, the resolution of the general meeting of Stockholders held on the 19th February 1920 purporting to approve the Transfer Agreement, the Transfer Agreement dated 8th March 1920 the Act of 1920 (10–11 Geo. V c. 13) confirming the Agreement, and the Order in Council dated 19th of January 1923 are and each of them is *ultra vires* and void: that the Petitioner also claimed the further relief on his own behalf: (*g*) (*h*) and (*i*) An Order directing the Grand Trunk and Canadian National to rectify the Register of the Grand Trunk by restoring therein his name as holder of the Stocks in respect of which he was registered on the 18th January 1923 or to appropriate or acquire and register in his name a similar amount of such Stocks, or to pay him damages in the amount of 9,733·33 Dollars for failure to do so; (*j*) damages in the amount of 4,379·95 Dollars for the unlawful acts of the Grand Trunk and Canadian National in depriving the Petitioner of his rights and privileges of ownership of such Stocks without lawful authority; (*k*) and (*l*) an Order directing the Grand Trunk and Canadian National to rectify the register of the Grand Trunk by entering therein the name of the Petitioner as holder of the Preference and Common Stock assigned to him or to pay him damages in the amount of 28,713·33 Dollars for failure to do so; (*m*) damages in the amount of 12,920·95 Dollars for the unlawful acts of the Grand Trunk and Canadian National in depriving the Petitioner of his rights and privileges of ownership of such Stocks without lawful authority: that on the 23rd March 1932 the Respondents moved before Rose, C.J., that the Action be stayed or dismissed on the grounds (*inter alia*) that the claim of the Petitioner was of a nature that could only be asserted by Petition of Right: that by Order of Rose, C. J., dated the 19th May 1932 this application was dismissed on the ground that the question as to the right to maintain the Action ought to be left to be decided at the trial: that an application for leave to appeal against this Order was dismissed by Order dated the 25th June 1932: that on the 2nd February 1933 points of law raised by the defence were argued in the High Court Division of the Supreme Court: that by Order dated the 24th February 1933 Kerwin, J., having directed that the motion before him for determination of these points of law should be turned into a motion for judgment declared:—(1) that the Petitioner's claim impugned the title acquired by the Crown to the Preference and Ordinary Stocks of the Grand Trunk and cannot be maintained by Action but only by Petition of Right as alleged in the defence, and ordered and adjudged the same accordingly; (2) that the Exchequer Court has exclusive original jurisdiction to determine the matters in question in the Action as alleged in the

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defence, and ordered and adjudged the same accordingly; (3) that the Court did not see fit by reason of the previous declarations to make any declaration with respect to paragraph 25 of the defence; (4) that the Action should be and was dismissed with costs: that on the 30th and 31st May and the 1st June 1933 an Appeal from the Order of Kerwin, J., was heard by the Court of Appeal: that by Order of the Court of Appeal dated the 28th June 1933 the Petitioner's Appeal was dismissed: that the Petitioner was desirous of appealing to Your Majesty in Council from the Order of the Court of Appeal dated the 28th June 1933 as he submits he is entitled to do as of right by virtue of the provisions of the Privy Council Appeals Act of Ontario, R.S.O. 1927, c. 86: that the Petitioner applied to Middleton, J. A., in Chambers to have his Appeal to Your Majesty in Council admitted and his security for the costs of the Appeal in the sum of 2,000 Dollars approved: that by Order of Middleton, J. A., dated the 2nd June 1934 it was ordered that the Appeal should be admitted and that the sum of 2,000 Dollars paid into Court by the Petitioner be approved as sufficient: that by Order of Masten, J. A., at Chambers dated the 29th June 1934 the Respondents were granted leave to appeal to the Court of Appeal: that by a further Order of Masten, J. A., at Chambers dated the 19th July 1934 all or any proceedings which might be taken for the prosecution of the Petitioner's Appeal were stayed pending the final disposition of the Respondent's Appeal from that Order: that the Appeal was heard by the Court of Appeal and by Order dated the 1st November 1934 it was ordered that the Appeal should be allowed and the Order dated the 2nd June 1934 set aside: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from (1) the Order of the Court of Appeal dated the 1st November 1934 and (2) if and so far as necessary the Order of the Court of Appeal dated the 28th June 1933 or for such further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeals against the Orders of the Court of Appeal of Ontario dated the 28th day of June 1933 and the 1st day of November 1934 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"And Their Lordships do further report that the said Appeals should be consolidated and be heard together on one Printed Case on each side:

"And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the

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Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeals."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Lieutenant-Governor of the Province of Ontario for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

In the Privy Council.

No. 23 of 1935.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

BETWEEN

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - (*Plaintiff*) *Appellant*

AND

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY GENERAL OF CANADA

(*Defendants*) *Respondents*

RECORD OF PROCEEDINGS.

LAWRENCE JONES & Co.,
Lloyd's Building,
Leadenhall Street, E.C.3.
For the Appellant.

CHARLES RUSSELL & Co.,
37, Norfolk Street, W.C. 2.
For the Respondents.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C.4.