*Privy Council Appeal No.* 23 *of* 1935.

George Pardew Lovibond - - - - - - - - *Appellant*

*v.*

Grand Trunk Railway Company of Canada and others - *Respondents*

FROM

## THE COURT OF APPEAL OF ONTARIO.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH MAY, 1936

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*Present at the Hearing:*

LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD MAUGHAM.
SIR GEORGE RANKIN.

[*Delivered by* LORD RUSSELL OF KILLOWEN]

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These are two appeals by special leave.

By his first appeal George Pardew Lovibond seeks to reverse an order (dated the 28th June, 1933) of the Court of Appeal of Ontario which dismissed his appeal from the judgment of Kerwin J. pronounced on the 24th February, 1933, in an action in which he was the plaintiff.

Before stating the terms of that judgment it will be convenient to outline the relevant facts leading up to the issue of the writ, as those facts are set out, or involved in the allegations contained, in the statement of claim.

The Grand Trunk Railway Company of Canada (hereinafter referred to as the Grand Trunk) was incorporated in the year 1852 by special Act of the Legislature of the old Province of Canada. Its issued capital stock consisted (in addition to £12,500,000 4 per cent. Guaranteed Stock) of Preference and Common Stock (hereinafter referred to as the junior stocks) of an aggregate nominal value of £37,073,492. In addition there were issued and outstanding debenture stocks of the Grand Trunk exceeding £31,000,000. By an Act of the Parliament of Canada (viz., the Grand Trunk Railway Acquisition Act, 1919), the Minister of Railways and Canals of Canada was authorised to enter into an agreement with the Grand Trunk for the acquisition by the Government of the junior stocks of the Grand Trunk subject to certain terms and conditions to be embodied in an agreement between the Government of Canada and the Grand Trunk. The agreement was to be submitted for the approval

of a meeting of all the stockholders of the Grand Trunk including holders of the debenture stocks and guaranteed stocks. 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 junior stocks not transferred to the Government or its nominees under the terms of the Act.

The draft of an agreement embodying the terms prescribed by the Act of 1919 was submitted to a meeting of Grand Trunk stockholders on the 19th February, 1920, and was approved by a majority vote of those present, or represented by proxy, at the meeting.

By an Act of the Parliament of Canada (10-11 Geo V. c. 13), assented to on the 11th May, 1920, an agreement dated the 8th March, 1920, executed by the officers of the Grand Trunk and by the said Minister on behalf of the Government of Canada and scheduled to the Act was confirmed and ratified. By that 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, the junior stocks of the Grand Trunk: the value, if any, to the holders thereof was to be determined by a board of three arbitrators subject to a maximum limit of some $64,000,000: new guaranteed stock to the value of the junior stocks as so determined was to be distributed among the holders of the junior stocks upon the transfer to or vesting in the Government or its nominees of the junior stocks; and any shares or any part of the junior stocks 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.

Arbitration proceedings having been held, two of the arbitrators by a majority award found that there was no value to the holders thereof in the junior stocks of the Grand Trunk. The third arbitrator was of opinion that their value was not less than $48,000,000.

On the 18th January, 1923, the appellant's name appeared on the stock register of the Grand Trunk as the registered holder of £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1,100 Common Stock.

By an Order in Council, approved by the Governor-General on the 19th January, 1923, it was declared that the whole of the junior stocks of the Grand Trunk were the property of the Minister of Finance in trust for His Majesty, and it was directed that entries thereof in stock registers and

other books of the Grand Trunk in that behalf should forthwith be made. In pursuance thereof some officer, servant or agent of the Grand Trunk entered on the stock register of the Grand Trunk a transfer of the junior stocks to the Minister of Finance.

Subsequently an amalgamation took place between the Canadian National Railway Company (a company incorporated in the year 1919 by Special Act of the Parliament of Canada 9-10 Geo. V. cap. 13, and hereinafter referred to as the old Canadian National) and the Grand Trunk, as a result of which a company came into existence which also was called the Canadian National Railway Company and which is hereinafter referred to as the new Canadian National. By the amalgamation agreement (dated the 30th January, 1923) it was amongst other things provided that the amount of the capital stock of the new Canadian National should be the equivalent in Canadian money at $\$4{\cdot}86\frac{2}{3}$ to the pound sterling of £37,073,492 the total of the junior stocks 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 to the Minister of Finance in trust for His Majesty; 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 should be surrendered by the Minister of Finance to the new Canadian National for cancellation. By an Order in Council approved by the Governor-General on the 30th January, 1923, this agreement was approved and it was provided that the Minister of Finance should be registered on the books of the new Canadian National as the holder in trust for His Majesty of the said share of its stock, and that upon such registration being made he might surrender to the new Canadian National the junior stocks of the Grand Trunk.

On the 17th January, 1929, the appellant presented a petition of right seeking a declaration that the junior stocks of the Grand Trunk remained and were still vested in the several persons in whom they were respectively vested immediately before the said Order in Council of the 19th January, 1923, or in the respective legal personal representatives of such of the said persons as were then dead. The claim to this relief was based upon allegations that the various Acts of Parliament, Orders in Council and agreements hereinbefore mentioned were *ultra vires*, illegal and void. The necessary fiat was however refused by the Governor-General in Council; and an application to His Majesty in Council for special leave to appeal from this decision was refused.

Thereafter, viz., on the 27th November, 1931, the appellant took transfers of certain amounts of the various denominations of the junior stocks from (1) one Elizabeth Marion Lovibond and (2) one Henrik Leoffler. On the same

day he presented these transfers with the relevant certificates for entry on the registers of the Grand Trunk in London but was advised that the registers had been closed and that the transfers could not be registered in London. He then, on the 16th December, 1931, caused them to be delivered to the Secretary of the Canadian National (but whether the old company or the new company is not clear) and the Grand Trunk, with the request that the transfers should be entered in the proper stock registers of the Grand Trunk and new certificates issued. On the same day he submitted to the President of the Canadian National (but whether the old company or the new company is not clear) and the Grand Trunk, a demand for rectification of the stock register of the Grand Trunk by restoring his name 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 (but whether the old company or the new company is not clear) should appropriate or acquire £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1,100 Common Stock of the Grand Trunk and transfer and register the same in the books of the Grand Trunk in his name as the holder thereof. Neither the request nor the demand made by him on the 16th December, 1931, was complied with; and accordingly he issued the writ in the present action of the 26th December, 1931. He is the only plaintiff, but he sues " on behalf of himself and on behalf of himself and all others the registered holders on 18th January, 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." The defendants are the Grand Trunk, the Canadian National Railway of Canada and the Attorney-General of Canada.

By his statement of claim he states either in terms or inferentially the facts already narrated, and alleges as to each Act of Parliament, Order in Council and agreement that it is invalid, illegal and void. From paragraph 3 of the statement of claim it would appear that the defendant the Canadian National is the old company, and in paragraph 5 it is stated that the Attorney-General is joined for the purpose of the declarations asked for in sub-paragraphs (*b*), (*e*) and (*f*) of paragraph 32.

Paragraph 32 sets out in detail the relief claimed. It runs thus :—

> " 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 £1,100 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 £1,100 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

"(*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."

A motion for an order staying or dismissing the action on the ground (amongst others) that the plaintiff's claim could only be asserted by petition of right having failed on the ground that that question ought to be left to be decided at the trial, a defence was delivered. Paragraphs 23, 24 and 25 thereof are in the following terms:—

"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."

A reply was delivered by the plaintiff in paragraph 11, of which it was pleaded:—

"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."

An order was subsequently made for the points of law raised by paragraphs 23, 24 and 25 of the defence to be set down for hearing before the trial of the action, and they were set down and argued accordingly before Kerwin J., who on the 24th February, 1933, made an order which so far as material was in the following terms:—

"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."

The learned Judge was of opinion that in order to succeed in any part of his claim the plaintiff must establish that the Crown never obtained title to the junior stocks, and that even though the Crown had ceased to own or be in possession of the property in question the subject could only proceed by petition of right, if his claim depended on establishing the invalidity of the title which the Crown had at one time acquired. For this proposition he relied upon a judgment of this Board in the case of *A.G. for Ontario* v. *McLean Gold Mines Co.* ([1927] A.C. 185). The learned Judge thought that paragraph 24 of the defence merely referred to the machinery by which the plaintiff might have a petition of right disposed of; and he expressed no opinion in regard to paragraph 25.

An appeal by the plaintiff from the order of Kerwin J. to the Court of Appeal of Ontario was on the 28th June, 1933, dismissed with costs.

The Chief Justice of Ontario expressed his views in the following words :—

"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. (*A.G. Ontario* v. *McLean* [1927] A.C. 185.) Therefore this appeal should be dismissed with costs."

The Chief Justice in appeal took the same view. "Here", he said, "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."

Riddell J.A. also relied on the *McLean* case, but as it seems to their Lordships he attributed to it a wider scope than the two Chief Justices appear to have done. They both treated the *McLean* case as justifying them in holding that proceedings by petition of right were the only proceedings available when the relief sought involved the putting an end to an existing title of the Crown. The Chief Justice of Ontario treats the junior stocks as standing in the name of the Minister: "the stock in question", he says, "has been transferred to the Minister of Finance." The Chief Justice in appeal speaks of the "extinguishment" of the Crown's title. Riddell J.A. goes further, for he said:—"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": and, making the assumption in the

plaintiff's favour that the Crown had transferred the stock to a third person, he held that upon the authority of the *McLean* case no proceedings except by petition of right were open to the plaintiff.

Middleton J.A. seems to have taken the same view, as did also Masten J.A.

The plaintiff has now appealed to His Majesty in Council; and in the argument addressed to their Lordships' Board has contended (1) that the *McLean* case has no application to his action, since it is merely an action which seeks to enforce the rights of stockholders against the Grand Trunk for breach of duty in removing the names of the stockholders from the stock register without their authority or consent: (2) that the fact that the authority for the removal was the Crown's authority (viz. the Order in Council of the 19th January, 1923) does not debar the Courts from inquiring into and adjudicating upon the validity of that authority; (3) that a subject is entitled to sue to recover property not in the ownership or possession of the Crown notwithstanding that the defendant's title is derived from or through the Crown: (4) that if the *McLean* case decided that whenever a subject's claim to property depended upon or involved the establishment of the invalidity of a title which was formerly but was no longer vested in the Crown, the claim could only be the subject of petition of right, then the decision was erroneous and should not be followed: but (5) that in the case described the subject's claim could be asserted by action provided that (as in the present case) no claim was made to relief against the Crown, and no order was sought against the Crown or the Crown's servants.

Their Lordships have had their attention called to certain authority in favour of the third and fifth of the above contentions. Thus in Clode on Petition of Right (pp. 104 and 105) after the statement that so long as property wrongfully seized is detained by the Crown the subject's remedy is by petition it is stated, citing Staunford's Prerogative:—

> "It may be, however, that after the wrongful seizure the Crown grants the land over by letters patent to another; in such a case there seems to be no necessity for the party grieved to bring his petition against the Crown, since he can recover possession of the land from the king's patentee as a trespasser by the appropriate common law remedy; 'and the reason of this is because that when his highness seizeth by his absolute power contrary to the order of his laws, although I have no remedy against him for it, but by petition for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is mine assize revived, for now the patentee entereth by his own wrong and intrusion and not by any title that the king giveth him, for the king had never title ne possession to give in that case. And this appeareth in M. 4, Ed. IV., f. 21 & 25, and M. 24, Ed. III., f. 64, and Travers 34 & 35. Like law is it if I have a rent-charge out of certain land, and the tenant of the land enfeoffeth the king by deed enrolled; now during the king's possession I must sue by peticion,

but if his highness enfeoffe a stranger I may distrain for my rent upon a stranger; and so it is in the cases before, where a man may have his "traverse" or "monstrans de droit:" if the lands be once out of the king's hands the party then may have his remedy that the common law giveth him, for in all these cases a peticion did lye only for the dignity of his person and not for the right that he had to the possession of the thing'. *Staunford's Prerog. Chap. xxii, fol. 74b, 75a.*"

Again at p. 107 occurs the following passage :—

"There is, however, another fact which should be noticed in connection with this branch of the subject. We have seen that where the king's wrongful title is by matter 'in pais', if he grant over his interest, the party grieved is not put to his petition, but can recover at common law against this patentee; this does not seem to be the case 'when the king's title accrues to him by a judicial record, or as Gascoigne (9 H. 4) says by judgment of record; there although the king grants all his estate over, yet the party grieved was put to his petition, and should have "scire facias" against the patentee, as in case of attainder recovery, etc.' . . ."

In support of Staunford's opinion the learned author refers (among other authorities) to the case of the *Warden and Commonalty of Sadlers* (4 Co. 54*b*).

In Chitty on the Prerogatives of the Crown (at p. 342-343) the same passage from Staunford is cited.

None of this authority seems to have been cited to, or considered by, the Board in the *McLean* case (*supra*) and their Lordships would not, as at present advised, desire to say that it was the intention of the Board in that case to depart from this authority: more particularly since the judgment may well be open to the construction that the decision was in fact based upon a view that part of the relief claimed, viz., the cancellation of the certificates of forfeiture involved the taking away of something from the Crown: for it is to be observed that success by the plaintiffs would have deprived the Crown in that case of the benefit of certain reservations in the Crown's favour made on the occasion of the grants which the plaintiffs were seeking to avoid. Further the Crown would have been deprived of its right or chance of forfeiting the lands against its new grantee. But however this may be, in the view which their Lordships take of the real nature of the plaintiff's principal claim in the present case as disclosed in his statement of claim, it is unnecessary to pronounce a final opinion upon the question whether the decision in the *McLean* case necessarily involves the proposition that the mere fact that a subject's claim to property (which though formerly is no longer in the ownership or possession of the Crown), necessitates attacking the validity of a title formerly claimed to be in the Crown, prevents that claim from being asserted otherwise than by petition of right.

Their Lordships feel no doubt that the main object of the relief which the plaintiff claims is the recovery for himself and the other former holders of the junior stocks of the stocks which were formerly standing in their names, but which

were subsequently put into the name of the Minister of Finance and held by him in trust for the Crown. So far as the allegations in the statement of claim are concerned, the junior stocks are still in the Minister's name, and the orders claimed in para. 32 (*a*), (*g*), (*h*), (*k*) could only be granted by taking stock away from the Crown's trustee. Such relief can only be obtained by the subject on petition of right. Even if the allegation made in para. 11 of the reply be treated as incorporated in the statement of claim, the position remains in their Lordships' opinion the same. The Canadian National (whether the old or the new) has no beneficial interest in the stock; if it did get it, it was only received for the purpose of terminating its existence. The only person who, if the stock still exists and the plaintiff's claim succeeds, would be deprived of the stock and any beneficial interest therein, would be the Crown. Their Lordships are accordingly of opinion that the orders of Kerwin J. and the Court of Appeal were right in so far as they operated to prevent the plaintiff from seeking by action to obtain the orders on the Grand Trunk and the Canadian National claimed by para. 32 (*a*), (*g*), (*h*) and (*k*) of the statement of claim.

The order of Kerwin J. however goes much further in its operation; it dismisses the action. Now the action also seeks relief by way of damages against the defendant companies, founded upon some alleged breach of duty in removing the name of the plaintiff from the stock registers.

To an action of that nature the person whose name has been substituted on the registers for that of the plaintiff need not, indeed ought not, be joined as a defendant. The claim is not for rectification of the stock register; i.e., the relief sought is not the substitution of the plaintiff on the register as owner of stock in the place of some other person; to proceedings which seek to enforce such a claim as that, that other person would be a necessary party. The claim is merely one in the nature of a claim for damages; and to an action to enforce such a claim, he is not a proper party. *Cottam* v. *Eastern Counties Railway Company* (1 J. & H. 243) may be referred to as an instance of a rectification claim; and *Barton* v. *London and North-Western Railway Company* (38 C.D. 144) may be referred to as a case in which no rectification was claimed, but in which the relief sought and obtained was in the nature of damages against the railway company.

Their Lordships see no ground upon which this claim by the plaintiff for damages, for what it may be worth, can be prevented from proceeding against the defendant companies, notwithstanding that the plaintiff's title to any relief may ultimately turn out to depend upon the invalidity of the impeached Acts of Parliament and Orders in Council. There is nothing in this fact which prevents the plaintiff from asserting by action his claim against a fellow subject for damages. Their Lordships are of opinion that in this respect the action must be allowed to proceed.

There remains for consideration that part of the relief claimed which seeks to obtain declarations. These are sought as foundations upon which to base the claims to have the names of the old holders of the junior stocks restored as such to the register of the Grand Trunk : in other words they are ancillary to the claims which can only be the subject of a petition of right. The action cannot be allowed to proceed in regard to them; and as the Attorney General is only sued for the purpose of the declarations asked for in para. 32 (*b*), (*e*) and (*f*) of the statement of claim, the action should no longer proceed against him as a party. If the action proceeds to trial on the question of damages, and if it becomes necessary to determine the validity of any legislation of the Parliament of Canada, the presence and assistance of the Attorney General for Canada and the Attorney General of Ontario can be obtained at a later stage under the Ontario Judicature Act (1927 R.S.O. c. 88) sct. 32.

In the view which their Lordships take, it is unnecessary for them to express any opinion in regard to the questions raised in paras. 24 and 25 of the defence.

The question raised by the second appeal is a short one, but it has revealed considerable divergence of judicial opinion. It is whether the appellant was entitled as of right to appeal to His Majesty in Council from the order of the Court of Appeal of Ontario dated the 28th June, 1933; and the answer depends upon whether this appeal is covered by the words " where the matter in controversy in any case exceeds the sum or value of 4,000 dollars " within the meaning of section 1 of the Privy Council Appeals Act of Ontario (R.S.O. 1927, c. 86). On the one hand it is said that the question for consideration on the appeal is a question of procedure or jurisdiction, and that there is no controversy of a pecuniary nature. On the other hand the contention is that the true test is what is at stake on the appeal, that what is at stake is the plaintiff's right to continue proceedings in which he is claiming damages far in excess of 4,000 dollars, and that accordingly that this is a case (whether that word means " cause " or " instance ") in which the matter in controversy exceeds the sum or value of 4,000 dollars. The question is now of interest in this litigation only as regards costs, owing to the fact that special leave to appeal was granted. Their Lordships however are of opinion that the contention of the appellants is correct, and that the plaintiff was entitled as of right to appeal to His Majesty in Council. The order of the Court of Appeal dismissed his action and as a result his claim to damages was just as effectively put an end to as if his action had been dismissed after a full trial on the merits. In either case it appears to their Lordships that for the purposes of an appeal there is a matter in controversy which exceeds the sum or value of 4,000 dollars.

The order of the Court of Appeal of Ontario dated the 1st November, 1934, should accordingly be discharged. The effect of this will be to restore the order of Middleton J. of the 2nd June, 1934, under which the costs of the application before him were made costs in the appeal to His Majesty in Council.

In the result their Lordships are of opinion that the first appeal should be allowed and the order of Kerwin J. varied by striking out the paragraphs therein numbered 2, 3, 4 and 5, and by substituting for those paragraphs an order staying the action as against the Attorney General of Canada wholly, and as against the other defendants in so far as it seeks to have the stock register of the Grand Trunk rectified or to have Grand Trunk stock registered in the name of the plaintiff, and in particular in so far as it claims the relief sought in sub-paragraphs (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) and (*k*) of para. 32 of the statement of claim. The second appeal should also be allowed, and the order of the 1st November, 1934, discharged.

Their Lordships will humbly advise His Majesty accordingly.

As regards costs, the plaintiff must be ordered to pay the costs of the Attorney-General (1) of the action, (2) of the motion before Kerwin J. which resulted in the order of the 24th February, 1933 (including the costs of the motion referred to in an order of the Chief Justice of the High Court dated the 14th January, 1933), (3) of the appeal therefrom to the Court of Appeal, and (4) of the appeal to His Majesty in Council, the costs of the Attorney-General in each case being taken to be one-half of the aggregate costs of the three defendants. If the plaintiff has in fact paid the costs which he was ordered to pay by the order of Kerwin J., by the order of the Court of Appeal of the 28th June, 1933, and by the order of the Court of Appeal of the 1st November, 1934, he is to be at liberty to deduct the amount of one-half of the costs so paid from the costs ordered to be paid by him to the Attorney-General as aforesaid. As to the costs of the other defendants of the matters aforesaid numbered (2) (3) and (4), it must be remembered on the one hand that the plaintiff has been partially successful on the first appeal and wholly successful on the second appeal, but on the other hand that the plaintiff has been unsuccessful in regard to the matters to which almost the whole of the time occupied by the hearing of the appeals must be attributed. The plaintiff has failed in regard to the main object of his action, which can now only proceed for the purpose, for whatever it may be worth, of seeking to recover damages against the Grand Trunk and the old Canadian National. In these circumstances their Lordships think that justice will be done if the plaintiff be ordered to pay to the defendants other than the Attorney-General one-half of their costs of the matters above mentioned and numbered (2) (3) and (4), the costs of those

defendants in each case being taken to be one-half of the aggregate costs of the three defendants. The plaintiff will accordingly pay to the defendants other than the Attorney-General one-quarter of those aggregate costs. If the plaintiff has in fact paid the costs which he was ordered to pay by the order of Kerwin J., by the order of the Court of Appeal of the 28th June, 1933, and by the order of the Court of Appeal of the 1st November, 1934, he is to be at liberty to deduct the amount of one-half of the costs so paid from the costs now ordered to be paid by him to the defendants other than the Attorney-General. Save as aforesaid their Lordships think that no order should be made either for payment of costs or for the return of costs already paid.

(35214—3A) Wt. 8136—2 120 6/36 P. St. G. 333

In the Privy Council.

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GEORGE PARDEW LOVIBOND

*v.*

GRAND TRUNK RAILWAY COMPANY OF CANADA AND OTHERS

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