EDWARD OSCAR BICKFORD ..... APPELLANT;

AND

THE GRAND JUNCTION RAILWAY COMPANY ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Railway Company—Delivery of Railway iron—Right of Property and Lien after contract of sale—Power of Company to mortgage their road—Doctrine of ultra vires.*

The Grand Junction Railway Company, a corporate body, having the statutory power to borrow money, issue debentures, bonds, or other securities for the sum so borrowed, to sell, to hypothecate or pledge the lands, tolls, revenues and other property of the Company, and also power to purchase, hold and take any land or other property for the construction, maintenance, accommodation and use of the Railway, and to alienate, sell or dispose of the same, entered into a contract with one Brooks for the construction of their road. When Brooks required the iron necessary for the undertaking, he was unable to purchase it without the assistance of the Company, and he thereupon authorized the officers of the Company to negotiate for its purchase. In consequence, a Mr. Bell, solicitor of the Company, as agent of Brooks, and with the approval, in writing, of the President of the Company, entered into a written agreement, dated Toronto, 9th June, 1874, with the Defendants

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J. J.

(Bickford and Cameron) for the purchase of the iron, which was to be paid for as delivered on the wharf at Belleville by the promissory notes of Brooks, and a credit of six months was to be given from the time of the several deliveries of the iron. By that agreement, also, Brooks agreed to obtain from the Railway Company an irrevocable power of attorney enabling the Bank of Montreal, who advanced to Bickford the money necessary for the purpose of buying the iron, to receive the government and municipal bonuses, and to procure from the Company a mortgage for $200,000 on that portion of their road (44 miles) on which the iron was to be laid—the mortgage to be sufficient in law to create a lien on the 44 miles of railroad, as security for the due payment of the notes of the said Brooks, but not to contain a covenant for payment by the Company. On the 30th of June, 1874, a more formal agreement, under seal, was executed, which did not vary in any material respect the terms of the preceding agreement. On the same day a power of attorney (upon which was endorsed by Brooks a written request to the Company to give the said power of attorney), and a mortgage (upon which also was endorsed by Brooks a request to grant the said mortgage), were executed by the Company under their corporate seal to one Buchanan, then manager of the Bank of Montreal, in Toronto, as a trustee. The Bank of Montreal having made advances to Bickford in the ordinary course of their business dealings to enable him to purchase the iron, it was all consigned to their order by the Bills of Lading, and, when delivered on the wharf at Belleville, was held by the wharfingers subject to the order of the Bank, the whole quantity stipulated for by the contract being so delivered ready for laying on the track as required.

The Bank of Montreal and Bickford caused to be delivered, from time to time to Brooks by the wharfingers at Belleville, all the iron he required to lay on the track, being about 2,000 tons, and about an equal quantity remained on the wharf unused. Brooks having failed to meet his promissory notes for the price of the iron, Bickford recovered judgment at law against him to the amount of $164,852.96. The Bank then sold the iron remaining on the wharf for the purpose of realizing their lien, when Bickford became the purchaser thereof at $33.50 per ton for the rails and $50.50 for track supplies. Bickford was removing the said iron when the Company filed a Bill in Chancery asking for

an injunction to restrain the removal of the iron. A motion to continue the injunction was refused on the 11th October, 1875. The Defendants (Bickford, Cameron and Buchanan) then answered the Bill, and on the 18th January, 1876, by consent, a decree was made referring it to the Master to take the mortgage account, to ascertain and state the amount due to Bickford and Cameron for iron laid or delivered to or for Plaintiff's use on the track, and also the amount due (if anything) in respect of iron delivered at Belleville, but since removed, and to report special circumstances, if requisite.

The Master found due upon the mortgage $46,841.10, the price of iron actually laid on the track, and interest; and that nothing was due in respect of the iron delivered at Belleville but subsequently removed. On appeal to Vice-Chancellor *Proudfoot* the Master's report was affirmed, and on an appeal to the Court of Appeal for Ontario, it was held that the mortgage was *ultra vires*, and the Master's report was affirmed.

*Held:* On appeal (reversing the judgment of the Court of Chancery) that the proviso in the mortgage was in its terms wide enough to sustain the contention of the mortgagee to claim the price of all the iron delivered on the wharf at Belleville, and that the memorandum endorsed by Brooks on the mortgage should not be construed as cutting down the terms of the proviso, but was intended as written evidence of Brooks' consent to the mortgage and to the loss of priority in respect of the mortgage bonds to be delivered to him under the contract.

*Held, also:* (reversing the judgment of the Court of Appeal for Ontario) that the statutory power to borrow money and secure loans, cannot be considered as implying that the Company's powers to mortgage are to be limited to that object; and therefore that the mortgage executed by the Company on a portion of their road in favor of the Trustee Buchanan, being given within the scope of the powers conferred upon the Company to "alienate, sell, or dispose" of lands for the purpose of constructing and working a Railway, was not *ultra vires*.

*Query?* Whether the rights of a corporation to take lands, operating the Railway, taking tolls, &c., are susceptible of alienation by mortgage in this country?

*Held, also:* That under the Pleadings and Decree in the cause, the objection that the mortgage was *ultra vires* was not open to the Company in the Master's office, or on appeal from the Master's Report.

Appeal from a judgment of the Court of Appeal for Ontario, dismissing an appeal brought by the Defendants, Bickford and Buchanan, from an order of *Proudfoot*, V.C., confirming the Master's report in a suit in the Court of Chancery.

The Respondents, on the 25th March, 1872, entered into a contract with Alphonso Brooks for the construction of the Grand Junction Railway from Belleville to Lindsay. He entered on the work, and had, in June, 1874, done grading and other work on the line to the value of $327,000, according to the certificates and estimates of Mr. Shanly, the Company's Engineer.

The contract provided for payment to Brooks at the rate of $19,000 per mile; being $6,000 in Government or municipal aid or cash, $1,000 in paid up stock, and $12,000 in first mortgage bonds of the Company.

In June, 1874, Brooks required the iron for at least part of the road to enable him to proceed with its construction, and being unable to purchase it without the assistance of the Company, he authorized the officers of the Company to negotiate for its purchase, and accordingly Mr. Bell, the Solicitor for the Company, having at the same time written authority from Brooks to act for him, and Mr. Kelso, the President of the Company, came to Toronto, and, on the 7th of June, 1874, entered into the written agreement with the Defendants, Bickford and Cameron, for the purchase of the iron rails and track supplies for the road from Belleville to Hastings, 44 miles, about 4,000 tons.

On the 30th of June, 1874, a formal contract, under seal, between Brooks and the Defendants, Bickford and Cameron, was executed, and the Respondents then executed in pursuance of the terms of the contract, a power of attorney and a mortgage deed, in favor of the

defendant Buchanan, then the Manager of the Bank of Montreal in Toronto, the Defendant Bickford having arranged with the Bank to obtain advances of money from it to enable him to buy the iron to fulfil the said contract, and the said Buchanan being named as the trustee to receive and to hold the said securities under the said contract.

By the first agreement Bickford and Cameron agreed to sell to Brooks the iron rails required for the 44 miles already referred to, which were estimated at about 4,000 tons, and the fish-plates, &c. The price of the rails was fixed at $47.50 per ton, and of the fish-plates, &c., at the rate of 4¼ cents per pound, "all delivered at the wharf at Belleville, free of duties; Brooks to pay wharfage and harbour dues (if any); a credit of six months to be allowed, but the notes of Brooks at three months to be given and to be renewed for three months, interest being added to all such notes at 7 per cent. per annum, to be given from time to time for the iron as delivered." Brooks also agreed to procure and give as collateral security for the notes, an irrevocable power of attorney, authorizing an officer of the Bank of Montreal to receive the Government and municipal bonuses; and to procure from the Company a mortgage for $200,000 on the 44 miles of railway to be executed, to an officer of the bank as collateral security for the notes to be given as the iron was to be delivered. The agreement contained the following stipulation: "The said mortgage from the Company to be sufficient in law to create a lien on the said 44 miles of railroad, as security for the due payment of the notes of the said Brooks, but not to contain a covenant for payment by the Company." The mortgage was to be the first and only first security or charge on the 44 miles.

The Company's President gave a written approval of this agreement.

The agreement of the 30th June, 1874, which was a more formal document under seal, did not vary in any material respect the terms of the preceding agreement.

The power of attorney authorized Buchanan to receive the Government and municipal grants, and to this power a copy of the contract was annexed.

Upon this document, Brooks indorsed a request to the Company, in the following terms: "I, Alphonso "Brooks, named within, hereby request the Grand Junc- "tion Railway Company to grant the within power of "attorney to said Buchanan, within named, and I hereby "covenant and agree with the said Company, that the "granting said power or anything contained therein, "shall not in any wise prejudice, affect, or waive, or vary "any contract with the said Company for the construc- "tion of their railway; but the same shall in all respects "continue valid, anything herein contained notwith- "standing." The mortgage, bearing date the same day, was executed by the Company under their corporate seal to Buchanan, by which, after reciting the contract for the purchase of the iron, and an agreement by the Company to execute the instrument as collateral security for the due payment of the notes to be given by Brooks for the price of the iron from time to time as it was delivered, which notes were to be received and held by the Bank of Montreal, the Company assumed to grant all the track and right of way and land taken and used by the Company, in and between the Town of Belleville and the Village of Hastings, with all the rights and privileges appertaining thereto, and the franchise and powers of the railway between Belleville and Hastings, subject to defeasance upon payment of the

promissory notes, which Brooks should give in pursuance of the contract of purchase, not exceeding in all a principal sum of $200,000. The mortgage is expressed to be made in pursuance of the Act respecting short forms of mortgages, and contains a proviso authorizing the mortgagee on default, on one month's notice, to enter upon and lease or sell the lands. It contains an express declaration of intention that it should operate as, and be a lien on, all that section of the Company's railway, to secure collaterally the payment of the notes referred to in the contract; and that in case of default, the mortgagee's sole recourse should be against the property included in the mortgage, and not against the Company for the amount of the consideration; and that it was not intended to give the mortgagee or the vendors any right of action against the Company in respect of the purchase money of the iron. Upon this is indorsed a written request by Brooks, exactly similar in effect to that previously extracted.

The shareholders in the Respondents' Company sanctioned the agreement, and authorized the execution of the mortgage.

The Appellant Bickford then promptly commenced the delivery of the iron on the wharf at Belleville, in pursuance of the contract, and ultimately delivered all that was required to complete the road to Hastings, being the quantity mentioned in the Master's Report. The laying of the iron on the track was needlessly delayed by Brooks, notwithstanding Bickford's urgency, as little or none of the iron had been laid at the beginning of November, 1875, although over 3,000 tons had then been delivered at Belleville, and it was evidently useless to deliver more during that season. Brooks was willing to dispense with the delivery of the remaining

1,000 tons at that time, but the Respondents refused to do so, and Bickford was compelled thereby, at a great and useless extra expense, to deliver the said 1,000 tons.

The Bank of Montreal, having made advances to the Appellant Bickford in the ordinary course of their business dealings with him, to enable him to purchase the said iron, it was all consigned to their order by the bills of lading, and when delivered on the wharf at Belleville was held by the wharfingers subject to the order of the Bank. This arrangement was known to the Respondents and contemplated at the time of the original agreement.

Brooks gave his promissory notes, from time to time, for the price of the iron as delivered on the wharf at Belleville, in pursuance of the contract, and Bickford afterwards, on 8th September, 1875, recovered judgment at law against Brooks on these notes and for the balance then remaining due on the whole purchase money of iron delivered, being the sum of $164,852.96.

The Bank of Montreal and Bickford caused to be delivered to Brooks by the wharfingers at Belleville all the iron he required to lay on the track as fast as he required it, and were ready and willing to deliver the whole of it to him as he required it for that purpose, but he only laid about half the quantity delivered at Belleville, and ironed that part of the road from Belleville to Sterling, 20 miles, when in December, 1874, he stopped work on the road, and has never since done anything upon it.

On 3rd June, 1875, the Respondents cancelled and declared at an end Brooks' contract for building the road.

The Bank of Montreal collected, on account of the Appellant Bickford, the sum of $27,500 from the

Municipal Aid Trustees, and $40,000 from the Government of Ontario under the power of attorney from the Respondents, which moneys have been credited on account of the price of the iron.

In the latter part of June, 1875, Bickford, with the assent of the Company, removed 563 tons of the iron from Belleville, and sold it to the Northern Railway Company.

As no arrangements had been made by the Respondents up to September, 1875, for going on with the work, the Bank of Montreal which had delayed any action up to that time, at the request of the Respondents, advertised for sale by auction at Belleville, on the 20th September, 1875, all the iron then remaining there unlaid, and on that day it was offered for public sale and knocked down to the Appellant Bickford at $33.50 for the rails, and $50.50 for track supplies, that being the full value thereof in June and September, 1875, as subsequently found by the Master. Bickford did not pay this price in money to the Bank, but having sold part of the iron to another Railway Company, he transferred to the Bank the moneys and securities obtained from that Company, and, in October, 1875, he removed 1,165 tons of the iron from Belleville to Port Stanley to carry out the last mentioned sale.

About 495 tons of the iron rails and track supplies delivered on the wharf at Belleville under the contract with Brooks have never been removed and still remain there.

Since the spring of 1875 no work of any kind has been done on the railway, and that part of it on which the iron was laid has never been used for traffic.

The Respondents filed their original Bill in Chancery on 2nd October, 1875, praying for a declaration that a

large quantity of railroad iron (about 4,000 tons) had been delivered under the contract already mentioned, and that the Defendants in that suit were not entitled to remove the same, or that the said Plaintiffs (now Respondents) had acquired, by reason of having given certain securities to the Bank of Montreal, an interest in the iron, and for an injunction to restrain the removal thereof.

An injunction was thereupon obtained *ex parte*, restraining the Defendants therein named from removing the railway iron placed upon the wharves of the Plaintiffs at Belleville, until the 8th October, 1875, and until a motion to continue the injunction should be disposed of.

The motion to continue that injunction was, on the 11th October, 1875, refused.

The Defendants Bickford, Cameron, Buchanan and the Bank of Montreal, then answered the said Bill.

It does not appear that the Defendant Brooks, named as a party in the Bill, was ever served with it, and he never put in any answer, or appeared in any proceeding as a party to the suit.

The Defendants Bickford and the Bank of Montreal and Buchanan having, in January, 1876, caused the lands of the Plaintiffs to be advertised for sale, under the power of sale in the mortgage, the Plaintiffs amended their Bill, and prayed that it might be declared that the securities held by the Bank of Montreal and Buchanan had been fully satisfied, and for an injunction to restrain the sale of the said mortgaged premises, and gave notice of motion for an injunction accordingly.

On the 18th January, 1876, a decree by consent was made, referring it to the Master to take the mortgage account to ascertain and state the amount due for iron

laid or delivered to or for the Plaintiff's use on the track, and also the amount due (if anything) in respect of iron delivered at Belleville, but since removed, and to report special circumstances if requisite; and it ordered payment of the amount found due, within thirty days after the making of the report, and that in default of such payment, the mortgagee should be at liberty to use all or any of his rights and remedies.

On the 9th February, 1876, the Master made his report, finding the amount due on the mortgage security to be $46,841.10 for iron laid or delivered, to or for the Plaintiffs' use, on the track of the railway, and finding nothing due on account of iron delivered at Belleville, but since removed, but reported specially that the Defendant Bickford had delivered on the wharf at Belleville 4,036 tons of rails and 295 tons of track supplies, of which 1,983 tons of rails and 144 tons of track supplies were delivered to Defendant Brooks for the use of Plaintiffs' railway, and 1,592 tons of rails, and 135 tons of track supplies were sold by Bickford to other parties and removed from Belleville, and 450 tons of rails, and ten tons of track supplies still remained on the wharves at Belleville, subject to the order of the Bank of Montreal.

From that Report the Defendant Bickford appealed, and the appeal having been heard before Vice-Chancellor Proudfoot, was, on the 15th March, 1876, dismissed for the reasons stated in the judgment of the learned Vice-Chancellor, and which will be hereinafter referred to in the judgment of the Court.

The Defendants Bickford and Buchanan then appealed to the Court of appeal for Ontario.

The Appeal having been argued, the Court of Appeal, by a preliminary judgment, directed it to be re-argued

by one Counsel on each side. The case was re-argued, and on the 15th June, 1876, the Court of Appeal dismissed the appeal, the judgment of the Court being delivered by Mr. Justice *Moss*.

From that Judgment the Defendant Bickford appealed to the Supreme Court.

Mr. *Hector Cameron*, Q.C., for Appellant:

The consent decree in this case was for the purpose of getting a decision of the case made by the Respondents Bill as amended,and that could only be got at after "ascertaining the amount due on the mortgage for iron laid or delivered to or for the Plaintiffs' use on the track, and also the amount due (if anything) in respect of iron *delivered at* Belleville, but since *removed*." The Master, in taking the account of the moneys due to the Apellant under the mortgage, did not charge the Company with the price of the whole amount of iron delivered to the Company pursuant to the contract, giving credit to the Company for the amount realized by the sale mentioned in the pleadings, after default on the part of Brooks and the Company, but charged them only with the quantity actually laid on the track.

On appeal, Vice-Chancellor *Proudfoot* affirmed the report on the construction of the instruments. The Court of Appeal for Ontario held on appeal that the proper construction of the instruments would cover whatever Brooks owed the vendors for iron delivered on the wharf at Belleville, but that the Respondents had no power to pledge their road except for the iron laid down, and for that reason alone declared the report of the Master should be affirmed. The principal point, therefore, to be agreed before the Court is, whether the

mortgage was *ultra vires*, and whether, under the pleadings and proceedings in the cause, it was open to the Respondents to raise on the appeal the contention that the mortgage was *ultra vires.*

The Bill does not in any way impeach the validity of the mortgage, but, on the contrary, affirms it, and by the original Bill claims, that by virtue of having given it, the Company had acquired an interest in the whole of the iron delivered, and a right to prevent the removal of that not laid, while, as amended, it seeks only to raise the question of the amount secured by the mortage and intended so to be, according to the proper construction of the instrument.

The Respondents cannot be allowed at the hearing in appeal to change their attitude and proceed as for the cancellation of an illegal instrument; in other words, they cannot "approbate and reprobate," and a Bill so framed, would have been demurrable. *Cawley* v. *Poole* (1); *Stevens* v. *Guppy* (2); *Rawlings* v. *Lambert* (3).

The rule is that a Bill can only be filed against a mortgagee for the purpose of redeeming the mortgage. *Rogers* v. *Lewis* (4); *Harding* v. *Pingey* (5).

And after decree is pronounced, the accounts are to be taken simply on the footing of what is due under the terms of the mortgage. *Kerby* v. *Kerby* (6); *Pollock* v. *Perry* (7.)

The Bill is not one for relief from a void or illegal transaction on equitable terms, and contains no sufficient submission to such terms as the Court might think fit to impose, without which relief will not be granted.

(1) 1 H. & M., 66; (2) 3 Russ, 185; (3) 1 J. & H., 462; (4) 12 Grant, 259; (5) 10 Jur., N. S., 872; (6) 5 Grant, 587; (7) 5 Grant, 593.

The offer to pay what, if anything, shall appear to be due, upon taking the accounts, is based only on the allegation that the amount secured by a valid mortgage had been paid. See *Parker* v. *Alcock* (1); *Jervis* v. *Berridge* (2); *Athenæum Life Assurance Co.* v. *Pooley* (3); *Re Cork & Youghal R. W. Co.* (4); *Re Durham County Building Society* (5); *Brice* on Ultra Vires (6).

Under the decree, it is not open to the Respondents to contend that the mortgage is *ultra vires*, or that the amount due on it should be reduced to the value of the iron actually laid on the road.

The very fact of taking an account on a mortgage before the Master affirms the validity of the mortgage.

The case of *Penn* v. *Lockwood* (7) relied on by Respondents is not an authority to the contrary, and if it be, it is not supported by principle or the practice of the Court.

In Equity, on taking the account under a mortgage in the Master's office, the amount really advanced under the security was always a matter of proof, and nothing more was done in *Penn* v. *Lockwood* than enquire as to this point.

That was a foreclosure suit, and the mortgagor was Defendant, whereas here the Respondents, the mortgagors, were Plaintiffs, and not only do not question the validity of the mortgage by their Bill or by the consent decree, but actually affirm it.

Corporations should not be allowed to set up their incapacity whenever it is inconvenient for them to carry out their engagements. See *Brice* on Ultra Vires (8), and cases there referred to.

(1) 1 Younge, 361; (2) L. R. 8 Ch., 351; (3) 3 DeG. & J. 294; (4) L. R. 4 Ch., 748; (5) *Wilson's Case*, L. R. 12, Eq., 521; (6) P. 117; (7) 1 Grant, 547; (8) Preface, p. 11.

Nor do the other cases relied upon by the Respondents, in support of their contention that the Company are entitled at any stage to set up the invalidity of the mortgage, apply. All they go to show is, that in appeal, you can urge a new argument, but not a new ground.

The Respondents cannot repudiate their own act, solemnly executed by deed of which they have got the benefit, unless, at any rate, by a substantive proceeding for that purpose, supported by proper allegations and evidence.

*Scott* v. *Colburn* (1); *Anglo-Australian Ass. Co.* v. *British Prov. Ass. Co.* (2); *In re Electric Telegraph Co. of Ireland*; *Troup's case* (3).

The mortgage in question is a valid security, and within the power of the Respondents to make.

Now the Court of Appeal, although they admit the power to mortgage for securing the price of the iron laid down, yet hold the mortgage to be *ultra vires* because it was not made to secure a loan of money under s. 9, ss. 11, of the Railway Act, and was given on a part of the line only, and that even if the Company had power to make such a mortgage as security for a debt, there was no debt of the Company to be secured, Brooks being the debtor and this mortgage being given as collateral security that he would pay.

The validity of the mortgage connot depend on the proper application to the use and benefit of the Company of money or property acquired on the faith of a mortgage given by the Company.

If this Company had power to mortgage to secure the value of iron delivered at Belleville for the use of their

(1) 26 Beav., 276; (2) 3 Giff. 521, 4 DeG. F & J., 341; (3) 29 Beav., 353.

Railway, provided that iron were laid on their track, they cannot be relieved from liability or their mortgage be held void because their contractor failed and neglected to lay it by his own default.

*Re Contract Corporation & Vale Co.* (1).

The following cases show, beyond a doubt, that the power to mortgage specially given by the Railway Act does not exclude the power to mortgage for a purpose within the object of the Company's incorporation.

*Taylor* v. *Chichester & Sandhurst Railway Co.* (2); *Australian S. S. Co.* v. *Mounsey* (3); *Gibbs & West's Case*, *Re International Insurance Co.* (4); *Re Patent File Co.*, *ex parte Birmingham Banking Co.* (5); *Green's* American edition of *Brice*, p. 127, and the American cases there cited; *Allen* v. *Montgomery Railway Co.* (6); *Mobile & Cedar Point R. R.* v. *Salmon* (7); *Riche* v. *Ashbury Railway Carriage Co.* (8); *Shrewsbury & Birmingham Railway Company* v. *North Western Railway Company* (9); 2 *Redfield* on Railways, (10).

The power given by sub-sec. 2 of sec. 9, ch. 66 Con. Stats. of Canada, to a Railway Company to "alienate, sell and dispose of land, for the purposes of their road, clearly includes a power to mortgage. The Respondents wanted the iron for their road, and being practically the buyers of the iron, they had power to give the mortgage to secure the price without express legislative authority. *Brice* on Ultra Vires (11).

The power to mortgage in order to carry out the purposes of the incorporation, will not be taken away by implication. *Maxwell* on Statutes (12); *Angell & Ames* on Corporations (13).

(1) L. R. 8 Eq., 14; (2) L. R. 2, Ex. 356, and 4 H. L., 628; (3) 4 K. & J., 733; (4) L. R., 10 Eq., 312; (5) L. R. 6 Ch., 83; (6) 11 Ala., 437; (7) 15 Ala., 472; (8) L. R. 9 Ex., 264, 292; (9) 6 H. L. Cases, 113; (10) P. 490; (11) P. 111; (12) P. 66; (13) Sec. 191.

The Appellant does not raise any question of franchise in this case, but contends that although this mortgage may be ineffectual to pass the franchise of the Company, it is nevertheless valid to pass the property. The Legislature might, however, recognize a sale or foreclosure of the property under the mortgage and reserve the franchise in favor of the mortgagor. *See* Ontario Act, 38 Vic. c. 47, sec. 7 and 8.

*Green's Brice*, page 125, and American cases cited there.

Appellant also contends that this Company is not now, and never has been, a completed Railway used by the public, but is merely some land acquired by the Company, (with no evidence that any of it has been taken under the compulsory powers of the Act) on which land the iron of the Appellant has been laid under an express agreement, that he should have a lien upon it, until the price of the iron delivered for the use of the Company to be laid on their land, is paid for in full, which agreement the Company now seek to repudiate. The arguments based on the rights of the public do not apply to such a case. *Greenstreet* v. *Paris* (1); *Angell & Ames* on Corporations (2).

The argument against the validity of the mortgage resting on the consequences of a foreclosure, sale or ejectment, would equally apply against the validity of a mortgage expressly authorized on a loan of money under the Railway Act. The question is not, however, what remedy has a mortgagee, but is the mortgage a valid charge on the property of the Company. 2 *Redfield* on Railways (3); *Mississippi and Missouri Railroad Company* v. *Howard* (4); *Madison, &c. Ry.*, v. *Norwich*

(1) 21 Grant, 229; (2) 10 Edit. s. 191; (3) Page 489, et seq., ed., 1873; (4) 7 Wallace, 392.

*Savings Society* (1); *East Boston Freight R. R. Co.* v. *Eastern R. Co.* (2); *Bardstown and L. R. R. Co.* v. *Metcalfe* (3).

The fact that there is no covenant by the Company to pay the money secured by the mortgage cannot render it invalid as a charge on the land, and there is no evidence of any improper reason or intention for the omission of the covenant. *See Benjamin* on Sales (4).

The Appellant also submits that as a matter of law, the Appellant, as vendor, either directly or through the Bank of Montreal, had the right and power to remove any part of the iron unlaid on the track, without rescinding the contract of sale, and was only bound to give credit on the contract price for the value at the time of the removal of the iron so removed. *Benjamin* on Sales (5); *Page* v. *Cowasjee* (6).

As a matter of fact he has sustained a loss of $14.00 per ton on the iron so removed. The question is, who is to bear the loss; the Appellant, who, it is admitted, fully performed his part of the contract, or the Company.

Mr. *J. Bethune*, Q. C., for Respondents:—

The power of attorney and mortgage, given at the request of *Brooks*, carefully provide that they shall not prejudice, alter or affect the contract between the Company and *Brooks*, which show that the Company did not mean to undertake any greater liability to *Bickford* than they were under to *Brooks*, and that they would not be liable to pay more than might be coming to *Brooks*, nor until the terms on which it was

(1) 24 Ind., 457; (2) 13 Allen (Mass.), 422; (3) 4 Metcalfe (Ky.), 199; (4) Am. Ed. p. 678, s. 794; (5) p. 643, 689; (6) L. R. 1 P. C., App. 127.

payable were complied with. Greater regard is to be paid to the intention than to the precise words. *Raymond* v. *Roberts* (1); *Strong* v. *Barnes* (2); *Rogers* v. *Kneeland* (3); *Makepeace* v. *Harvard College* (4); *Morss* v. *Salisbury* (5); *Sawyer* v. *Hammott* (6); *Ford* v. *Beech* (7).

Respondents submit that the contract, the power of attorney and endorsement, as also the mortgage and the endorsement on it, must be read and construed together.

The effect of the transaction was an equitable assignment to *Bickford & Cameron*, or for their benefit of what might become due to *Brooks*, and nothing more. It is not reasonable to suppose that the Company would consent to become liable for iron they were not certain of being laid on their track, or that it was intended that the mortgage would be considered as a security for iron to be in *Bickford's* power to remove. Moreover, the Company, not having power to mortgage the property of the Company, except to secure the payment of moneys borrowed to make or maintain the road, the mortgage in question is and was *ultra vires* and void.

Respondents are entitled at any stage to urge arguments to sustain a judgment in their favour, and their right to contend that the mortgage was *ultra vires*, though no such contention was made in the Master's office, cannot be denied. It is, moreover, a legal question arising on the very face of the instrument. *Fitzmaurice* v. *Bayley* (8); *Withy* v. *Mangles* (9); *Bain* v. *Whitehaven and Furness Junction Ry. Co.* (10); *Misa* v. *Currie* (11).

(1) 2 Aiken (Vt.), 208; (2) 11 Vermont, 224; (3) 13 Wendall, 122; (4) 10 Pickering, 302; (5) 48 N. Y., 644; (6) 15 Maine, 40; (7) 11 Q. B., 869-870; (8) 9 H. L. Cases, 78, and 6 E. & B., 869 and 8 E. & B., 664; (9) 10 Cl. & F., 215; (10) 3 H. L. Cases 1; (11) 10 Ex., 153 and L.R. 1 P. C. App., 559.

The question of *ultra vires* was raised merely in order to reduce the amount due under the mortgage, and not to destroy it altogether; and the Company were therefore entitled to urge that point, though not raised by the pleadings. The case of *Penn* v. *Lockwood* (1), is an authority for such a practice.

Also, by referring to the decree, there seems, as Mr. Justice *Moss* says in his judgment, "to be a special "reason for holding that the point might be taken "under the decree. What was the real controversy 'between the parties? Undoubtedly that of the Com- "pany's liability in respect of the iron delivered at "Belleville, but not placed in the road. The decree con- "tains an express reference to find 'the amount due (if "anything) in respect of iron delivered at Belleville, but "since removed.' *Due* by whom or in what manner? "It must mean upon the security of the mortgage, "because the Company had excluded, by the instrument "itself, any other kind of liability."

Further, the Company, while asserting the invalidity of the mortgage, sought relief from the Court upon the usual conditions imposed in such cases by the Court, of paying for the benefits received by them from the transaction. See *Athenæum Life Assurance Co.* v. *Pooley* (2); *Re Cork and Youghal Ry. W. Co.* (3); these are cases which prove that this condition of relief may be imposed in Chancery.

As to the power of mortgaging its corporate property, Respondent contends that it is not a power incident to a Railway corporation, and can only be conferred upon it by express legislative enactment.

*Commonwealth* v. *Smith* (4); *Hendee* v. *Pinkerton* (5).

(1) 1 Grant, 547; (2) 3 De. G. & J., 294; (3) L. R. 4 Ch., 748; (4) 10 Allen, 455; (5) 14 Allen, 386;

By Con. Stat. Can., cap. 66, sec. 9, sub.-sec. 11, power is given to Railway corporations to borrow such sums of money as may be expedient for completing, maintaining and working the Railway, and to mortgage or pledge the lands, tolls, revenues, and other property of the Company, for the due payment of the said sums and interest thereon.

The Legislature, having expressly given the power to mortgage under certain circumstances, has thereby excluded the right to mortgage under other circumstances.

Where the intention of the Legislature, express or implied, appears to be that a corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void.

*Riche* v. *Ashbury Railway Carriage Company* (1); *Shrewsbury & B.R.W. Co.* v. *North Western Railway Co. & S. U. Ry. & Car. Co.* (2); *South Yorkshire Ry. & R. D. Co.* v. *Northern Ry.* (3).

The intention of the Legislature seems to have been that a mortgage might be given to secure a debt due by the Company, and for satisfaction of which the shareholders might be compelled to pay the amounts they had subscribed; that such a mortgage should be given upon the whole property of the road as a going concern.

The mortgage in question was given upon a portion of the road only, and was not given to secure repayment of moneys borrowed by the Company.

Even if the Company had power to make such a mortgage as security for a debt, there was no debt of the Company to be secured. The mortgage in question

(1) L.R. 7, H. L., 653; (2) 6 H. L. Cases, 113; (3) 9 Ex., 84.

was simply given as collateral security for the payment by Brooks to Bickford of any liability of the former under his contract with the latter, and was therefore beyond the power of the Company, and invalid.

There was no liability of the Company for satisfaction of which the shareholders might have been compelled to pay the amounts they had subscribed. On the contrary, the mortgage in question contains an express declaration of intention that it should operate as, and be a lien upon, the section of Railway covered thereby to secure collaterally the payment of the notes referred to in the contract, and that in case of default the sole recourse of the mortgagee should be against the property included in the mortgage, and not against the Company.

If the money had actually gone into the road, the mortgage would come within the meaning of sec. 9, sub.-sec. 11, but if the mortgage is for money or iron, as in this case, which has not gone to build the road, it should be declared void. The American cases cited by the Appellant's counsel cannot apply, as each State has its own legislation. The following cases show that a different policy is adopted in the various States. *The Bridgeport City* v. *The Empire Stone Dressing Company* (1). *The Bank of Genesee* v. *The Patchins Bank* (2).

As to the rights of the mortgagees the Respondent refers to the following cases: *Galt* v. *The Erie & Niagara Railway Company* (3); *Peto* v. *The Welland Railway Company* (4); *The Corporation of the County of Welland* v. *The Buffalo & Lake Erie Railway Company* (5); and also to the Common Pleas case of *Galt* v. *The Erie and Niagara Railway Company* (6).

(1) 30 Barbour N. Y. R., 421; (2) 3 Kernan N. Y. R., 309; (3) 14 Grant, 499; (4) 9 Grant, 455; (5) 31 U. C. Q. B., 539; (6) 19 U. C. C. P., 357.

In concluding, Respondent submits that the moment the case was referred to the Master on a consent decree, he is not confined to the facts in the Bill. The case of *Kerby* v. *Kerby* (7) supports this view. Whether the objection that the mortgage was *ultra vires*, not having been raised in the Master's office, could be taken on appeal, is, in fact, a point of practice decided by the Court of Appeal, and this Court is generally supposed not to reverse the finding of the Court of Appeal on a question of procedure and practice, and should not declare the matter not to be properly before the Master.

Mr. *Cameron*, Q. C., in reply:—

This is not merely a question of practice in the Master's office, but one of pleading and legal principle.

It is said the effect of endorsement was to limit the Company's liability to what they might owe Brooks. If so construed, it would actually destroy the value of the mortgage, whilst, in fact, the consideration was for the iron Appellant would deliver at Belleville for the use of the Company. Bickford never guaranteed that the iron would be laid on the track.

JUNE 4th, 1878.

The Court ordered a re-hearing on the following points:—

1st. As to the effect of the provision in the agreement between Brooks and Bickford that the vendors should retain their lien and ownership of the iron until laid on the track.

(1) 5 Grant, 587.

2nd. Supposing the mortgage valid, what was its effect upon the property of a Railway never a going concern ?

Mr. *Hector Cameron*, Q.C. :—

The contract was an executory contract. When the iron was delivered on the wharf at Belleville, it became an executed contract on the part of the vendor, and when vendee gave his notes it was an executed contract on the part of the vendee. The Bank, however, had a perfect right to retain the *jus disponendi*, and, as stated in *Benjamin* on Sales, sec. 794, the Bank had a special property analagous to that of a pawnee, and when the purchaser was and continued in default the Bank had a perfect right to sell the property. See *Ogg* v. *Shuter* (1).

It was never intended the property should pass to Brooks, so that it might be seized for Brooks' debt. It was, moreover, at the Company's express demand that all the iron was delivered ; and the moment a loss was incurred by Brooks' default, the Company became liable, under their mortgage, for the damages suffered, that is the difference between the contract price and the market value on a re-sale (2).

As to the effect of the mortgage, when the Legislature gives the right to a Company to mortgage for a special purpose, there is no reason why their land and property should not pass. Our Courts and Legislature have sanctioned the entire foreclosure of a railway under a mortgage. In any case this mortgage is certainly valid as to lands not compulsorily taken, and there is no

(1) L. R. 1 C. P. Div., 47; (2) *Benjamin* on Sales, secs. 382, 399 & 794.

evidence that any lands were so taken. *Brice* on Ultra Vires, (1).

Mr. *Bethune*, Q.C. :—

The property never passed, and the intention was to always give to the Bank an independent ownership which cannot be said to have ever been transferred to Brooks. See *Benjamin* on Sales (2) ; *Hilliard* on Sales (3) ; *Parson* on Promissory Notes, (4) ; *Stevens* v. *Wilkinson* (5).

Brooks' notes were given for property which never passed, and the Company cannot be said to have ever intended to become responsible for damages. This is clearly shown by the words of the proviso.

As to the second point, the clear intention of the Legislature was that a company might execute a mortgage for the purpose of completing, working *and* maintaining, not *or* maintaining the railway.

The mortgage only seems incident to the mere issuing of the debentures. If you can treat this mortgage as a mortgage of so much land, the result would be that the road would be stopped by getting a specific mortgage on one part of the road. The object of the charter was to have a perpetual running road, and the power of mortgaging is only given by Statute in a modified way, for there is no power of winding up given to the Company.

Mr. *Cameron*, Q C., in reply :—

How the mortgage may be enforced is not in dispute

(1) p. 110. (Edition 1877.) 2 DeG. & J., 453; (2) Secs. 210, 319, 320, 353, 399 ; (3) 404; (4) Vol. 1 p. 206 ; (5) 2 B. & Ad., 320.

here. If the power of mortgaging were not given, no Railroad Company in Canada could ever build a railway. There are many reasons why Railroad Companies in this country should be given the power to mortgage what in England it would be illegal to mortgage. In this country railways are often built by the aid of large tracts of land, and surely the power to mortgage them must have been intended to be given by the Legislature.

JANUARY 28th, 1878.

STRONG, J., delivered the Judgment of the Court.

The judgment of the learned Vice-Chancellor, on the appeal from the Master's Report, proceeded upon the ground that the liability of the Railway Company under their mortgage was to be subject to the state of the accounts between Brooks and the Company, and that they were not to be liable to the Bank to any greater amount than that in which they should be found indebted to Brooks under the contract of the 25th of March, 1872. This restriction of the mortgage to a mere subrogation to the rights of Brooks against the Company was, in the opinion of the Vice-Chancellor, the proper construction of the agreement, power of attorney, mortgage and memorandum endorsed, all read together. We are unable to concur in this view, and, we think, the true answer to it has been given by the learned Chief Justice of the Court of Appeal in his judgment. The memorandum endorsed is not to be construed as cutting down the terms of the proviso in the mortgage deed, by the stipulation that the contract was not to be varied, but was intended to conserve written evidence of

Brooks' consent to the mortgage and to the loss of priority in respect of the mortgage bonds to be delivered to him under the contract, which the mortgage would, of course, have taken precedence of.

All the surrounding circumstances point to this as the natural construction, and it is no strain upon the words of the memorandum itself so to interpret it. This reading makes the memorandum consistent with the sealed agreement; the restrictive interpretation adopted by the Vice-Chancellor would give rise to a conflict of meaning between the memorandum and the agreement, both executed on the same day. It is needless to dwell further on this point, for we entirely adopt the reasoning of the learned Chief Justice on this part of the case.

The objection that promissory notes, secured by the mortgage, were only to be given by Brooks and Bickford, under the agreement, as the iron was delivered into Brooks' possession, to be laid on the railway, and not when the iron was delivered at Belleville, is also, in our opinion, correctly answered by the judgment delivered in the Court of Appeal. The first informal memorandum of agreement, that of the 9th of June, 1874, made between Brooks and Bickford and Cameron, makes it clear that what was then intended was that the notes should be given on the delivery on the wharf at Belleville, for it contains these words "all delivered on the wharf at Belleville free "of duties, the said Brooks to pay wharfage and harbour "dues (if any), a credit of six months to be allowed, but "the notes of the said Brooks at three months to be given "and to be renewed for three months, interest being "added to all such notes, at 7 per cent per annum, to be "given from time to time as delivered." This was the agreement of which the contract under seal of the

30th June was intended to be a more formal expression. The argument in support of this contention, founded on the provision that the mortgage was to stand as a security only for the balance uncovered by the bonuses, and Government grant, which were not payable until the iron was laid, is, as the Chief Justice demonstrates, sufficiently refuted by the terms of the agreement "and all moneys received from such bonuses and aid "to be credited on the amount secured by said "mortgage." We are at a loss to see that Brooks' covenant with Bickford to proceed with diligence in laying the track has any bearing on the point. This objection, therefore, also fails; it was indeed but faintly pressed in argument here.

The objection that the mortgage ought not to be considered as a security for the iron removed by Bickford, appeared at first more serious than either of those before alluded to. The agreement for the sale of the iron was, of course, a mere executory agreement, not amounting to a bargain and sale of specific chattels, but so soon as the iron was deposited on the wharf it became appropriated to the purposes of the agreement, and, if no contrary intention had been expressed in the contract, the property would have passed to Brooks, the vendors retaining merely a lien until the time arrived for laying the iron on the railway, and it was delivered to Brooks for that purpose.

The contract, however, did control the passing of the property, for it contains this stipulation in favor of the vendors:—"The said vendors to hold their lien "and *ownership* on the iron until laid down on the "track, when the several grants and bonuses are "payable." In the face of this provision no property passed, unless the word "*ownership*" is to be read

otherwise than in its primary meaning, a construction there is no ground for. The law on this subject is clear. On an agreement for the sale of chattels ascertained at the time of the contract, or afterwards specifically appropriated to the purposes of the contract, the property ordinarily passes at the time of sale or as soon as the appropriation takes place, but this is only a presumption of intention, which may be controlled by the express provision of the parties. In the present case the parties have clearly expressed their intention, that the property should not pass to the vendee, until it was delivered to him to be laid upon the railway. The case of *Page* v *Cowasjee* (1), referred to in the judgment of the Court of Appeal, is therefore inapplicable. It was argued that the removal of the iron constituted a failure of the consideration of the notes *pro tanto* which could have been set up in defence to an action on the notes, and that if the whole price had been paid, a proportion could have been recovered back in an action for money had and received. The case, however, being that it was too late to set up the failure of consideration, as judgment had been recovered whilst the money had not been paid, a Court of Equity would, it was suggested, restrain execution on the judgment, in order to obviate the needless circuity of first paying the money, and then suing for its recovery; in other words, it would be inequitable to enforce execution under such circumstances.

We are of opinion, however, that this contention is not entitled to prevail, inasmuch as the consideration for the promissory notes was the vendors' covenant contained in the sealed contract of the 30th June, 1874, as distinguished from the performance of that covenant,

(1) L. R. 1 P. C. App., 127.

and, as this covenant was partly performed by the delivery at Belleville, that is, performed as far as the vendors could perform it, there was not such an entire failure of consideration as would have entitled Brooks, if the money had been actually paid, to recover back, in an action for money had and received, an amount equal to the proportion of the price paid for the iron removed. The recovery of that money would not have left the parties *in statu quo*, and therefore the purchasers' remedy would be a cross action on the agreement. The rights of the parties would be therefore properly adjusted, in taking the mortgage account, by charging the full amount of the promissory notes against the mortgagor, and then, under the general direction to make just allowances, deducting the reduced value of the iron at the time of its removal.

The question which next arises relates to the jurisdiction of the Master, to whom the reference was made by the decree, to entertain the question of the validity of the mortgage. In point of fact, at least as far as we can see on the face of the record, that point was not raised before the Master, but this can make no difference, for it was quite competent to the Court below to consider any objection which could have been set up in the Master's office. It has been objected that this is a point of practice on which this Court, as an appellate jurisdiction, should not disturb the decision of the Court below; but, without conceding that this objection has any force, it must be remembered that the decision appealed from is not that of the Court of Chancery, which is the Court whose practice is in question, but of the Court of Appeal, before which the point was discussed for the first time. However, we do not consider that any authority would warrant us in declining to

review the judgment of the Court below on this head, for the single reason that it is not confined to a mere question of discretion, or even a pure point of practice, but involves the decision of a very substantial question —one going to the very merits of the cause—the proper construction and effect of the terms of compromise which the parties had agreed to and had embodied in the decree. The general practice of the Court of Chancery of Ontario, according in this respect with that which prevailed in England before the abolition there of the office of Master, is, that a question such as this, the invalidity of a mortgage deed, should be raised by the pleadings and adjudicated on by the Court at the hearing of the cause. We can find no exception to this cardinal rule of equity procedure save in some few respects, where the general orders of the Court of Chancery in Ontario have authorized the Master to deal with matters of account which formerly required special directions in the decree, and which have no relation to the present case. If the doctrine of the Court of Appeal were to prevail, it is hard to suppose any case in which the Master, under a reference to take the account in a mortgage suit, might not assume the jurisdiction to decide on the validity of the mortgage deed. If the mortgagors are to be at liberty to say in the Master's office, there is nothing due on this mortgage deed, because it was beyond the powers of the Respondents as a corporation to make it, why should they not also be heard to say, there is nothing due because the deed was obtained by fraud? Unless some arbitrary line is to be drawn, the right of the Master, under such a reference, to enquire into the validity of the deed would, according to the doctrine of the Court below, be co-extensive with that of the Court at the hearing, em-

bracing every case in which a mortgage might be impeached upon a ground which would have entitled the mortgagor to have had it wholly set aside by decree or to have had the mortgagee's bill for foreclosure dismissed. We know of no authority for any such delegation of the functions of the Court to the Master. The case of *Penn* v. *Lockwood* (1) has been relied upon as an authority for such a mode of procedure, but we are unable to see that it has any application. That was a case, in which, under a former practice of the Court of Chancery in Upper Canada, the Defendant, having made default in answering the Bill in a foreclosure suit, a decree was issued on præcipe, as of course, from the Registrar's office without any judicial intervention. The terms of the decree were those appropriate to a foreclosure suit directing the Master to take the usual accounts. This was at a time long anterior to the repeal of the usury laws. On proceeding with the account in the Master's office it appeared that the mortgage had been given to secure a loan of money, but that it covered an amount in excess of the money actually advanced and legal interest, whereupon the Master reported the actual loan with interest at six per cent. alone, as the amount due, disallowing to the mortgagee the illegal interest. This was the only course the Master could have pursued; strictly confining himself to the account, he enquired into the consideration for the mortgage, and finding that the amount secured on its face comprised usurious interest, he disallowed it; if he had proceeded otherwise and taken the amount secured as the true mortgage debt, he would have unjustly charged the mortgagor with money which was not recoverable. If the principle which the Court of Appeal have applied

(1) 1 Grant, 547.

in this case had been acted on in *Penn* v. *Lockwood*, the Master would have found that the mortgage being illegal nothing was due, for it was only in suits for redemption, where the mortgagor asked the aid of the Court, that the payment of principal and legal interest was imposed as a conditional term of relief; in forclosure suits the Court, if usury were proved, dismissed the Bill. The practice of imposing such terms in redemption suits was an exception to the well established general rule that the measure of a party's equities is the same in all cases without regard to his position on the record as Plaintiff or Defendant. *Hanson* v. *Keating* (1); *Gibson* v. *Goldsmid* (2). Had the Master in *Penn* v. *Lockwood* gone to the extent which the Court below have gone in the present case, he must have found that the mortgage was wholly void, and have reported that nothing was due in respect of it. Therefore, for the reason alone that the principle on which the Court of Appeal proceeded was at variance with the established practice, and that no authority has been cited in support of the decision but the case of *Penn* v. *Lockwood*, which is distinguishable on the ground that the Master was there dealing with the account, and so within the limits of his jurisdiction, we should be prepared to reverse the order under appeal.

There is, however, the further objection that the terms of the decree in the present case, read and considered in connection with the proceedings in the cause, and with what had taken place between the parties excluded any such power in the Master.

At the date of the consent decree, the Respondents had amended their Bill, and given notice of motion for

(1) 4 Hare, 1; (2) 5 DeG. McN. & G., 757.

an injunction to restrain the sale under the power in the mortgage, upon the ground that having regard to the fact that a portion of the iron had, as already mentioned, been removed and sold by Bickford, the mortgage was a satisfied security. Whilst this motion was pending the parties agreed to terms of compromise, which the decree in question was intended to carry out. The first clause of the decree directs the Master to ascertain and state the amount due on the mortgage security in the Bill mentioned, and to find the amount due for iron laid or delivered to or for the Plaintiffs' use on the track, and also the amount due (if anything) in respect of iron delivered at Belleville, but since removed, and to report special circumstances if requisite. The object obviously being to get a decision, under this consent decree, of the case made by the last amendment to the Bill—namely, that the Appellants were not entitled to recover for the iron removed, the only point remaining in dispute, a decision which, as involving matter of account, could be more conveniently arrived at on an appeal from the Master than on a motion for the injunction. If, therefore, the general rule of practice had warranted the setting up of the defence of illegality in the Master's office for the first time, we should have thought that this decree, having regard to its peculiar wording and to the circumstances under which it was made, ought to be construed as excluding any enquiries but those specifically mentioned in it.

We have also to differ from the learned Judges of the Court below in the opinion which they formed as to the validity of the mortgage. The objection to it, which has been sustained by the Court of Appeal, is that it was beyond the powers of the Railway Company to create such a security. It cannot be success-

fully contended, in the face of many decisions to the contrary, both in England and America, of Courts of the highest authority, that a statutory corporation is incapable of mortgaging its property, unless its incapacity to do so is either expressly declared, or is to be gathered by implication from the terms of the Act of Incorporation. In other words, no enabling power is requisite to confer the authority to mortgage, but *primâ facie* every corporation must be taken to possess it. *Ashbury Carriage Co.* v. *Riche* (1); *Re Patent File Company* (2); *Scott* v. *Colbourn* (3); *McCormack* v. *Perry* (4); *Pennock* v. *Coe* (5); *Dunham* v. *Railway* (6); *Galveston Railway Co.* v. *Cowdry* (7); *Australian Steamship Co.* v. *Mounsay* (8). If its rights in this respect are limited, it must be by force of some disability imposed by the instrument creating it, whether that instrument be a Statute or a Royal Charter; and such a disability may be deduced either from the object of the corporation being limited to certain specific objects, or from its property being subject to charges or trusts in favor of the public with which a mortgage would be inconsistent. The deed of charge in question in the present case, purports to give, in security for the payment of iron to be used in the construction of the Respondent's railway, all the lands of the Company, as well as its franchises and powers. The Act of Incorporation, which creates the Company and authorizes the construction of the railway, neither confers upon nor takes away from the Company the power to mortgage its lands or other property. It incorporates with it, however, the

(1) L. R. 7 H. L., 653; (2) L. R. 6 Ch., 83; (3) 5 Jur., N.S., 183; (4) 7 Exch., 355; (5) 23 How., 128; (6) 1 Wall., 267; (7) 11 Wall., 474; (8) 4 K. & J., 733.

provisions of the General Railway Act (1), including that contained in section 9 sub-section 11 of that Act which authorizes the Company to borrow money, issue debentures, and to mortgage the lands, tolls, revenues and other property of the Company for the payment of such loans and debentures, and also that contained in section 9 sub-section 2, giving the Company authority to "alienate, sell and dispose of lands acquired for the "construction, maintenance and accommodation of the "Railway." The power to borrow money and secure the loans cannot, we think, be considered as implying that the Company's powers to mortgage are to be limited to that object, but it indicates that, in the view of the Legislature, borrowing money was not so obviously within the necessary general powers of the Company as to be considered as conferred without express words. Another reason for not attributing any such effect to the express power to mortgage just referred to is this: at the date of the passing of the original Railway Act, from which the clause in question in the Consolidated Act has been taken, the usury laws were in force, and this section gives authority to borrow at the rate of eight per cent. interest. Again, it is not merely a power to mortgage to secure loans which is created by the section in question, but it authorizes the borrowing on debentures which are to be secured by mortgage. Further, it empowers the Company to "hypothecate, mortgage, and pledge" not merely its lands, but also its tolls, revenues and other property; thus giving enlarged powers as to the property which may be subjected to the mortgage. It seems to us, therefore, out of the question to say that this sub-section can either be

(1) Con. Stat. of Canada, cap. 66.

construed so as to exclude the general power of the Company incidental to its existence as a corporation to deal with its property by way of mortgage, or, that it can have any restrictive influence on the express powers conferred by sub-section 2 of section 9 of the same Act.

The next enquiry must be, if this mortgage was within the scope of the powers conferred upon the Company to construct and work a railway. In other words, was it given for a purpose tending to effect the objects for which the Company was called into existence? The iron rails, for the price of which the mortgage in question was actually given, were indispensable to enable the Company to carry out its undertaking. This iron the Company might, if they had so chosen, have purchased directly from the vendors. It was found more convenient, however, to make a contract for the construction of the railway, by which the contractor undertook to furnish the iron. There was nothing, however, in the circumstance that the construction and completion of the line of railway had been made the subject of contract, which took away from the Company the power which they originally possessed of purchasing iron, and, if they thought fit, of securing the payment of the price upon any property which, in other respects, they were free to give as security. Then, on what principle could it be suggested that having this power of purchasing iron directly and giving security for the price, the Company were disabled from mortgaging their property as a collateral security in aid of their contractor. This, it must be borne in mind, does not concern the powers of the directors merely, but it is a question of the powers of the corporation itself in its dealings with strangers. The

answer to the enquiry before made seems included in this statement of the powers of the Company. They have power under the general law of corporations to mortgage for any purpose in furtherance of the object of incorporation ; the object of the incorporation being the construction of a railway for which iron rails were absolutely requisite, they had power to give a mortgage to secure the price of rails, and they have done no more than that in the present case. That they have given the mortgage as sureties for the contractor, and not as the direct purchasers of the iron, can make no difference ; indirectly, they having given it to secure the price of the rails, and the secondary liability, to which they have subjected their property, is as much in furtherance of their undertaking as if no contractor had been interposed between them and the Appellants ; in short, the Company were, in effect, the sub-purchasers from Brooks of the iron which the latter had purchased from the Appellants, and in order to obtain the property instead of paying money, they gave the mortgage to secure the original price.

Had the mortgage been given for any object foreign to or inconsistent with the purposes of of the incorporation, then, no doubt, it would have been *ultra vires* of the Company. A familiar instance of a Railway Company exceeding the limits of its undertaking, is afforded by a well known case, in which such a corporation added to its legitimate business that of a line of steamships. Had this mortgage been given in aid or furtherance of any similarly unauthorized enterprise, it would, of course, have been *ultra vires*, but it is manifest that such was not the case here, and that the sole object of the corporation was to attain the end for which it had been created.

There remains the further enquiry: Was this mortgage inconsistent with any statutory destination of the property of the Company subject to the mortgage? In this connection it must be borne in mind that the single question before the Court is that concerning the validity of the mortgage, and that it is premature to discuss the nature and extent of the remedies to which the Appellant may be entitled. We have only to recall the terms of the decree under which this contention has arisen, and which consist of a reference to ascertain the amount due, to be satisfied that the question of the Appellant's right to any particular remedy has been excluded by the decree, which expressly concedes the right to sell, if the money found due should not be paid within thirty days from the date of the Report. That the Appellant may have threatened and actually intended to offer for sale the franchises of the Railway Company is therefore immaterial in the consideration of this appeal; in short, it is not under the judicial notice of the Court. I apprehend the Respondents will not be precluded from enforcing any remedy which they may have ever possessed to restrain any illegal act, which the Appellant may purpose to commit under color of availing himself of his legal remedies to realize the money secured by his mortgage. But the question of what these remedies may consist is wholly beside the present controversy.

If the mortgage comprises any property which the Company were free to give in security, it can make no difference that it also includes other subjects, which were so impressed with a charge or trust in favour of the public, that it was beyond the power of the Company to deal with them.

The Court below have determined that this deed was

wholly void, but if it creates a good charge on any single parcel of land which it purports to affect, this cannot be the correct conclusion. The charge is on all the lands of the Company situate in the town of Belleville, and Villages of Sterling and Hastings, and in the several townships designated, and on the franchise and powers of the Railway between the town of Belleville and the Village of Hastings. Then are all the lands of a Railway Company so dedicated to public uses, or so impressed with a public trust that it is *ultra vires* of the Company to deal with them by way of mortgage? On the answer to this must depend the correctness of the decision appealed from. Assuming for the present purpose that the principles enunciated by the English Court of Chancery in the case of *Gardener* v. *The London, Chatham & Dover Railway Company* (1) are applicable to the permanent way, station houses, and station grounds actually required for the use and purposes of the Railway, it surely cannot be said that a Railway corporation, constituted as the Respondents' Company is, may not legally acquire and hold other lands, which it requires for no such uses. All practical experience demonstrates that a company of this kind, at the completion of its works, usually finds itself to have acquired property in land not required for the purposes of its working, lands which it may have been compelled to acquire as part of other property which it could not dispense with, or which, though purchased or taken as necessary for the use of the railway, have, in the event, been found to be superfluous. Is the Company, then, to be prohibited from dealing with such lands, the retention of which, in their hands, as so much unproductive stock, can subserve no possible purpose of public

(1) L. R. 2 Ch., 201.

utility? The answer to this enquiry in the negative would be obvious on general principles, even if a specific enactment did not afford it. But we have this answer embodied in the written text of the law itself, for by section 9 sub-section 2 of the General Railway Act (1), express power is conferred upon the Company to alienate, sell and dispose of lands which they may have acquired for the construction, maintenance, accommodation and use of the railway. This right of alienation includes lands acquired in the exercise of compulsory powers as well as those obtained by conventional purchase. That the words "alienate, sell or dispose" include a power to mortgage as well as that of absolute disposition, requires no demonstration.

Mr. Justice Ritchie has suggested how important a power of mortgaging surplus lands is in this country, for a reason which would have no existence in England. The practice has prevailed, in all the Provinces, of making large statutory grants of wild lands from the public domain in aid of the construction of railways. Were Railway Companies disabled from mortgaging, the use of such grants would be greatly diminished. The power of mortgaging lands so granted, has been expressly recognized as one of the ordinary powers of a Railway Company by the Supreme Court of the United States. *Tucker* v. *Furgusson* (2); *Farnsworth* v. *Minnesota and Pacific Railway Co.* (3).

For these reasons it is impossible to maintain the order of the Court of Appeal in the absence of evidence establishing the fact that the Company had no lands other than those required for the permanent way and

(1) Con. Stat. of Canada, cap. 66; (2) 22 Wall., 572; (3) 2 Otto., 49.

station grounds, and otherwise for the efficient working of the railway. The mortgage cannot be pronounced wholly void on the ground now under consideration, unless this is shown. It lay upon the Respondents, who seek to avoid the mortgage, to prove this, but there is not the slightest evidence of it.

Therefore, conceding for the present that the mortgage, if confined to the franchise, and to the railway and its adjuncts, would have been void as being a charge on subjects *extra commercium*, it does not follow that it may not be a good charge on other lands over which the Company had power of free disposition, and for that reason alone the order of the Court below should be reversed.

It is proper, however, to guard against the supposition that we express any opinion as to whether, if this mortgage had been confined to the railway itself and its franchises, it would have been wholly void and inoperative. Speaking for myself alone, and without expressing any decisive opinion, I think there was much force in the argument that a Court of Equity would give effect to such an instrument, at least to the extent of treating it as a good equitable charge upon the net earnings of the railway, a view which would have been quite sufficient to have sustained this appeal.

Further, the use of the word "franchise" seems to have led to some confusion in considering the rights of mortgagees of railways in this country. Strictly, the expression is not accurate as applied to a corporation constituted by Act of Parliament; it should be confined to corporations created by Royal grant or charter, the word "franchise" meaning a privilege granted by the Crown in the exercise of the Royal prerogative (1). It has,

(1) *Chitty* on Prerogatives of the Crown, pp. 118, 119.

however, been sometimes applied to statutory corporations in a more extended signification than even analogy warrants, as meaning not only the right conferred on a number of individual persons to constitute a corporate body, but also as importing powers in derogation of private rights of property conferred on such a body by Statute.

The right to be a corporation is not, of course, susceptible of alienation by mortgage or otherwise, but it is not easy to find any conclusive reasons why other powers, such as those of taking lands, operating the railway, taking tolls, and exercising the other rights and powers usually conferred on railway companies, should not be susceptible of transfer, the transferees being, of course, subject to all trusts and burdens in favor of the public which the original Company was liable to. Very high American authority, including that of the Supreme Court of the United States (1), points to one solution of this difficult question, whilst English decisions maintain the opposite view ; and it was contended by Mr. Cameron, in his very able argument on behalf of the Appellant at this bar, that the circumstances of this country and the conditions under which railways are constructed here, warranted the adoption of the American in preference to the English doctrine, as being more favorable to the rights of the holders of bonds and debentures issued for borrowed capital. We express no opinion on this point, other grounds suffice to decide this appeal, but it was thought right to notice the argument and to say that we still consider it an open question which this Court may yet be called upon to decide

(1) *Hall* v. *Sullivan*, 21 Law Reporter, 138. Judgment of *Curtis* J., in U. S. Circuit Court ; *Wilmington Railway Co.* v. *Reed*, 13 Wall., 268.

without any prejudice from the present determination.

The same may also be said of the point much pressed by Mr. Cameron, that a mortgagee of a railway which has been abandoned and become an abortive undertaking before its construction has been completed, and which remains nothing more than so much land, may be entitled to very different remedies from those to which the holder of such a security may be restricted upon a completed line—a going concern—such as Lord *Cairns* in his judgment in *Gardener* v. *The London, Chatham & Dover Railway Company* (1) likens to "a fruit-bearing tree," a simile very inapplicable to land in this country, originally designed for a railway which has been abandoned. When such a case is presented for decision, it will, in my opinion, deserve attentive consideration.

The judgment of the Court being to reverse the order of the Court below, the minutes of the order to be drawn up on this appeal will be as follows:

REVERSE the order of the Court of Appeal of the 15th day of June, 1876, and also that of the Court of Chancery of Ontario, of the 15th day of March, 1876.

REFER it back to the Master of the Court of Chancery to review and alter his report by finding the amount due on the mortgage security in the pleadings mentioned to be the balance remaining due for principal and interest for the price of all the iron delivered on the wharf at Belleville by the said defendant Bickford, for the defendant Brooks, which said price was found by the said Master in his report, to be the sum of $219,830, after

(1) L. R. 2 Ch. 201.

deducting from the said sum the value of the iron mentioned in the said report of the Master, as having been removed from Belleville by the said defendant Bickford, at the rate already found by the said Master, and specified in his Report, with liberty to the Master to report any special circumstances material to the question of damages.

ORDER that the Respondents pay to the Appellant his costs of this appeal, and also the costs in the Court of Appeal, as well as those of the motion by way of appeal from the Master's Report in the Court of Chancery.

Attorney for Appellant :—*Hector Cameron.*

Attorneys for Respondents :—*Bethune, Osler & Moss.*