Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Grand Trunk Pacific Railway Company v. *The Landowners fronting on Empire Avenue and McKellar or Hardisty Street, Fort William, and others, from the Supreme Court of Canada; delivered the 2nd November* 1911.

PRESENT AT THE HEARING:

LORD ATKINSON.

LORD SHAW.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD SHAW.]

This is an Appeal from a Judgment of the Supreme Court of Canada dated the 15th June 1910. That Judgment dismissed an Appeal from an Order of the Board of Railway Commissioners for Canada, which Order was made on the 6th October 1909.

The facts giving rise to the question before their Lordships may be stated in a word. The Grand Trunk Pacific Railway Company constructed a branch line to the Town of Fort William in the Province of Ontario, and in order to "establish and maintain its terminals and "other works in connection therewith," it entered into an agreement with the Corporation of that Town on the 29th March 1905. By the Agreement the Corporation granted to the Railway Company "free of cost and all liability the right "to build on the level and operate in perpetuity "a double track line of railway on all the streets

" of the municipal corporation coloured red " on a certain plan. Two of those streets were Empire Avenue and McKellar or Hardisty Street. The Railway Company then applied, under Section 159 of the Railway Act of 1906, for approval of the location of its line of railway. On the 6th October 1909 the Board of Railway Commissioners ordered that " subject to the " terms and conditions contained in the said " Agreements, and subject to the condition that " the applicant Company shall do as little " damage as possible, and make full compensation " to all persons interested for all damage by " them sustained by reason of the location " of the said railway along any street in " Fort William, the location, " be and the same " is hereby approved." The true question in this case is whether it was within the powers of the Board of Railway Commissioners to impose the " condition " that the Company should make full compensation to all persons interested for all damage sustained by reason of the location of the railway. On the one hand, the Railway Company maintains that it was *ultra vires* of the Board to impose the condition, and presents the argument that the condition should be deleted and that the Order *quoad ultra* should stand. While, upon the other hand, the Respondents in the Appeal maintain that it was within the power of the Board to make a condition of compensation of the kind in question; but they plead that, if this was not so, then the Order,—never having been, or been intended to, be an unconditional Order,—should fall, if the condition fails.

These Respondents are frontagers—that is to say, owners of properties in the streets named, and it is not difficult to understand how they are, and possibly also how the municipality itself is, seriously affected by the location of the railway

as proposed and sanctioned. It appears, however, that many of the properties in question are neither taken nor injuriously affected in the sense of the English Railway Law as interpreted by *The Hammersmith and City Railway Company* v. *Brand* (L.R. 4, E. and I. Appeals 171), a decision which has been followed in Canada (in re *Devlin* v. *The Hamilton and Lake Erie Railway Company*, 40 Upper Canada Q. B. Rep. 160). It is in no way surprising to find that the Board, giving a sanction for the construction of a railway through the municipality, should make the condition that the compensation to be paid for that privilege should fully equate with the injury done "to all "persons interested"; that is to say, that the compensation should be recoverable in respect not only of the construction of the Railway as settled by Brand's case, but also for all damage sustained in respect of its "location."

The real question, however, is whether, under the 47th Section of the Railway Act of 1906, the Board was vested with a power of widening the scope of the compensation provided for in the statute itself. The language of Section 47 gives power to the Board to direct that its Order shall come into force, *inter alia*, upon the performance "of any terms which the Board may "impose upon any party interested." This language is certainly general and comprehensive; but, in their Lordships' view, it cannot be interpreted as being designed to alter the other and specific provisions of the statute as to the compensation payable by the Railway Company. The particular application now being dealt with falls within the scope of Section 237, which applies to "any application for leave to con- "struct the railway upon, along, or across an "existing highway." By Sub-section (3) of that section it is provided that when the application is of that character "all the provisions of

" law at such time applicable to the taking of " land by the Company, to its valuation and sale " and conveyance to the Company, and to the " compensation therefor, shall apply to the land " exclusive of the highway crossing required " for the proper carrying out of any order " made by the Board." It does not appear to their Lordships that it would be safe to infer from the generality and comprehensiveness of the powers of the Board, and apart from any specific reference to the compensation itself and the parties entitled thereto, that these provisions of Section 237 were liable to be altered, abrogated, or enlarged by the exercise of the Board's administrative power under Section 47.

The reasons above referred to, which might induce administrative action so as to make the compensation properly equate with the injury to all interests, are reasons which might or might not appear sufficient for direct legislative interposition, but as already mentioned, their Lordships, apart from that, cannot interpose by the inference argued for. On the contrary it appears to them that the administrative action taken was beyond the powers of the Board of Railway Commissioners for Canada, under the law as it stood at the date of the Order.

On the other hand, their Lordships are unable to give any countenance to the proposition that an Order thus pronounced, subject to a condition in itself neither unnatural nor unreasonable, but erroneously inferred to be within the Board's powers, should be treated by the method of striking the condition out and leaving the Order as an unconditional Order to stand. Nobody meant that. The point is not advanced by the use of language as to whether this was a condition precedent or was not, the truth of the matter being pretty clear, namely, that had the Board been faced with the situation that it was not within its power to give pro-

tection to all the real interests which, in its opinion, were subject to injury by the location of the railway at the streets mentioned, the Board could have adopted either of two other courses open. These were:—(1) of either declining to sanction the location applied for, or (2) of intimating that they would only sanction the location if steps were taken to make a deviation or detour,—Section 159 (3) providing for the case of sanction of a deviation of not more than one mile. To put the Board, which had these options before it, in the position of having unconditionally approved of the location of the railway along the streets named, and to do so by writing out the condition which appears upon the face of the Order, appear, in their Lordships' judgment, to be neither fair to the Board itself, nor to the municipality, nor to the interests concerned. The Order itself, and not the mere condition, must fall, and the parties will be left to come to a fresh arrangement under a new application and according to the circumstances, legislative and otherwise, at its date.

Their Lordships will humbly advise His Majesty that the Judgment appealed from be reversed, and that the Order of the Board of date 6th October 1909, be rescinded, the decisions as to costs in the Courts below to stand, but there being no Order as to costs in the present Appeal.

In the Privy Council.

THE GRAND TRUNK PACIFIC RAILWAY COMPANY

v.

THE LANDOWNERS FRONTING ON EMPIRE AVENUE AND McKELLAR OR HARDISTY STREET, FORT WILLIAM, AND OTHERS.

DELIVERED BY LORD SHAW.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1911.