Privy Council Appeal No. 83 *of* 1913.

The Attorney-General for the Province of Alberta - - - - - - *Appellant,*

v.

The Attorney-General for the Dominion of Canada - - - - - - *Respondent,*

AND

The Canadian Pacific Railway Company - *Intervenants.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND OCTOBER 1914.

Present at the Hearing.

THE LORD CHANCELLOR.
LORD MOULTON.
LORD SUMNER.
SIR CHARLES FITZPATRICK.
SIR JOSHUA WILLIAMS.

Delivered by LORD MOULTON.

The present appeal relates to two questions which were referred by H.R.H. the Governor in Council for the hearing and consideration of the Supreme Court of Canada pursuant to section 60 of the Supreme Court Act. These questions relate to the validity of section 7 of chapter 15 of the Acts of the Legislature of the Province of Alberta of 1912, intituled an Act to amend the Railway Act.

Prior to the passing of the above Act, section 82 of the Alberta Railway Act of 1907 stood in the following form :—

"The Company may take possession of, use or occupy any lands belonging to any other Railway Company, use and enjoy the whole or any portion of the right of way, tracks, terminals, stations, or station grounds of any other Railway

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Company, and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the Railway of any other Railway Company, subject always to the approval of the Lieutenant-Governor in Council first obtained, or to any order or direction which the Lieutenant-Governor in Council may make in regard to the exercise, enjoyment, or restriction of such powers or privileges.

"(2) Such approval may be given upon application and notice, and after hearing the Lieutenant-Governor in Council may make such order, give such directions, and impose such conditions or duties upon either party as to the said Lieutenant-Governor in Council may appear just or desirable having due regard for the public, and all proper interests, and all provisions of the law, at any time applicable to the taking of land and their valuation, and the compensation therefor and appeals from awards thereon shall apply to such lands, and in cases under this section where it becomes necessary for the Company to obtain the approval of the Board of Railway Commissioners for Canada, it shall do so in addition to otherwise complying with this section."

By section 7 of the Amending Act of 1912, the following subsection was added to the section 82 above referred to :—

"(3) The provisions of this section shall extend and apply to the lands of every Railway Company or persons having authority to construct or operate a Railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such land does not unreasonably interfere with the construction and operation of the Railway or Railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority."

The questions referred to the Supreme Court of Canada were as follows :—

"(1) Is section 7 of chapter 15 of the Acts of the Legislature of Alberta of 1912 intituled 'An Act to Amend the Railway Act' *intra vires* of the Provincial Legislature in its application to Railway Companies authorised by the Parliament of Canada to construct or operate railways?

"(2) If the said section be *ultra vires* of the Provincial Legislature in its application to such Dominion Railway Companies, would the section be *intra vires* if amended by striking out the word 'unreasonably'?"

At the hearing before the Supreme Court of Canada it would seem that by consent of Counsel representing the Dominion Government and the Province of Alberta respectively, a third question was submitted to the Court for hearing and consideration. It was hypothetical in form and no answer was given to it by the Supreme Court. Their Lordships do not consider that such question should be regarded as forming part of the questions referred to the Supreme Court by H.R.H. the Governor in Council, or that it is included in the present appeal. No attempt was made to argue it at the hearing, and their Lordships do not propose to take further notice of it.

By section 92, subsection 10, of the British North America Act, 1867, it is enacted as follows:—

"92. In each Province the Legislature may exclusively make Laws in relation to matters coming within the classes of Subjects next hereinafter enumerated, that is to say:—

* * * * *

"10. Local Works and Undertakings other than such as are of the following classes:—

"(*a*) Lines of Steam or other Ships Railways Canals Telegraphs and other Works and Undertakings connecting the Province with any other or others of the Province or extending beyond the limits of the Province.

* * * *

"(*c*) Such works as, although wholly situate within the Province are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of two or more of the Provinces."

By section 91, subsection 29, of the British North America Act, 1867, it is enacted as follows:—

"91. . . . It is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority

of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

* * * * *

"(29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It has never been doubted that these words refer to and include railways such as are mentioned in 92 (10) (*a*) and (*c*) above quoted. Indeed the language seems to point to 92 (10) so expressly that the contention is frequently heard that it is intended to refer to it solely. It is not necessary to decide such point in the present case. It suffices to say that railways such as are described in 92 (10) (*a*) and (*c*) come under the exclusive legislative authority of the Parliament of Canada. The Provincial Legislature therefore has no power to affect by legislation the line or works of such a railway. If authority were required for so plain and evident a conclusion from these statutory provisions, it is to be found in the judgment of their Lordships in the case of *The Canadian Pacific Railway Company* v. *Corporation of the Parish of Notre Dame de Bon Secours*, 1899, A.C. 367, and *Madden* v. *Nelson and Fort Sheppard Railway Company*, 1899, A.C. 626.

The provisions of section 82 of the Alberta Railway Act, 1907, do not in the opinion of their Lordships necessarily clash with these rights of legislation which thus exclusively belong to the Dominion Parliament, for it is possible to give to the words "railway company" the limited meaning of a company owning and operating a railway situated entirely within the Province and to that extent the legislation is *intra vires*. But subsection (3), which was added by the Act of 1912 and the validity of which is under

consideration, expressly extends section 82 so as to make it apply to a Dominion Railway. With this addition the provisions of section 82 of the Railway Act, 1907 of the Legislature of Alberta, constituted unquestionably legislation as to the physical construction and use of the track and buildings of a Dominion Railway, and that of a serious and far-reaching character. Their Lordships have no hesitation therefore in pronouncing that subsection 3 is *ultra vires* of the Alberta Legislature.

They are further of opinion that it would not become *intra vires* if the word "unreasonably" were struck out of the section. It would still be legislation as to the physical track and works of the Dominion Railway, and as such would be beyond the competence of the Provincial Legislature. These are matters as to which the exclusive right to legislate has been accorded to the Parliament of the Dominion so that the Provincial Legislatures have no power of legislation as to them and this holds good whether or not the legislation is such as might be considered by juries or judges to be reasonable.

It was no doubt due to the almost self-evident character of these propositions that at the hearing of the appeal before their Lordships but little attempt was made to support the validity of subsection (3) in its entirety. To judge by the reasons given by the learned Judges of the Supreme Court in their judgments it would seem that much the same course was adopted in the argument before the Supreme Court. The true aim of the discussion seemed rather to obtain the opinion of the Court and of their Lordships upon hypothetical variations of the section which would have the effect of limiting its application. Indeed, in the hearing before their

Lordships, Counsel for the Appellants practically confined their arguments to the single case of a Provincial Railway crossing the track of a Dominion Railway. Their Lordships are of opinion that great care should be exercised in permitting questions thus referred to the Supreme Court to be varied, more especially when those questions come up on appeal for decision by their Lordships. It may no doubt happen that the questions relate to matters which are in their nature severable, so that the answers given may cast light upon the effect of the deletion or alteration of parts of the provisions the validity of which is being considered. But their Lordships do not desire to give any countenance to the view that Counsel may vary the questions by hypothetical limitations not to be found in the provisions themselves or in the questions that relate to them.

In the present instance, however, the case chosen by Counsel for the Appellants as the subject of their arguments has no doubt strong claims for separate consideration, inasmuch as it is doubtless the case which was mainly present to the mind of the Provincial Legislature when considering subsection (3). It has reference to the circumstances under which the exclusive power of Parliament to legislate as to Dominion Railways appears to operate most harshly on the freedom of action of the Province. It was urged with great force that if the Provinces have no power to authorise their railways to cross the tracks of Dominion Railways they might theoretically be placed in a position of great difficulty. Regarded in the abstract it might be possible for a tract of country situated in a province to be surrounded by Dominion Railways in such a way that unless

crossing were permitted a Provincial Railway situated within that tract would be completely isolated and cut off from access to other portions of the Province. But the difficulty is essentially administrative, and not one that could be cured by any decision as to constitutional rights. It is scarcely too much to say that it would not be practicable to frame the actual claim of the Province in the present case in such a way that it could be a constitutional right possessed by a Province. Even their own Counsel admitted that the Province could not give to one of their railways the right to cross a Dominion Railway at any place or in any specific way chosen by them. They admitted that the place and manner must be subject to the approval of the Railway Board, a body created by a Dominion Statute in the year 1903, whose powers depend on a Dominion Railway Act. How could a constitutional right be measured or defined by the views or decisions of such a body—one which did not exist when the constitution was created?

It is therefore not in abstract constitutional rights but in administrative provisions that the remedy must be sought for the inconveniences which in the abstract might flow from the fact that the exclusive power of legislating as to Dominion Railways is vested in Parliament. And in this respect the present form of the Dominion Railway legislation indicates and in their Lordships opinion provides an effective remedy. By section 8 of the Dominion Railway Act Parliament treats in a special manner the crossing of Dominion Railways by Provincial Railways. These portions of the Provincial Railways are made subject to the clauses of the Dominion Railway legislation, which deal also with the crossings of two Dominion Railways so that the Provincial

Railways are in such matters treated administratively in precisely the same way as Dominion Railways themselves. The Parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion Railway as to which the Dominion Parliament has exclusive rights of legislation, and moreover, as the Provincial Railways are there by permission and not of right, they can fairly be put under terms and regulations. But section 8 of the Railway Act of the Dominion and the clauses which are by it made binding on any Provincial Railway crossing a Dominion Railway appear to their Lordships to indicate that it is part of the functions of the Railway Board to permit and to regulate such crossings. They are left unfettered as to whether they will permit such crossings to be at any particular spot or to be carried out in any particular way, and this jurisdiction is essential to them as guardians of those powers of construction and operation of Dominion Railways which are necessary for their existence and efficiency. But these powers of permitting crossings by Provincial Railways under suitable circumstances and with proper precautions have not been given to them idly and for no purpose. They bring with them the duty of using those powers for the benefit of the public whenever an occasion arises where they can be wisely used.

By these provisions the Dominion legislation has in their Lordships' opinion given to Provincial Railways desiring to cross a Dominion Railway all the *locus standi* that they need for making an application to the Railway Board for permission to do so. The Railway Board is bound to exercise these powers given to it just as much as all other powers given to it so as

to advance the best interests of the public. In this way the legitimate claims of Provincial Railways to obtain facilities for crossing Dominion Railways are in fact met as fully as is practicable and this without risking the chaos of overlapping legislative powers.

Their Lordships are therefore of opinion that both the questions submitted to the Supreme Court of Canada should be answered in the negative and that the decision appealed from was correct. They will accordingly humbly advise His Majesty that this Appeal should be dismissed, but without costs.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA

v.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.

JUDGMENT BY LORD MOULTON.

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