

1905

IN RE

\*May 2.

RAILWAY ACT AMENDMENT, 1904.

\*May 15.

IN THE MATTER OF THE JURISDICTION OF  
PARLIAMENT TO PASS SECTION 1 OF 4  
EDW. VII., CH. 31.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

*Constitutional law—Railway company—Negligence—Agreements for exemption from liability—Power of Parliament to prohibit.*

An Act of the Parliament of Canada providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition or declaration issued by the company, or by any insurance or provident association of railway employees; or of rules or by-laws of the company or association; or of privity of interest or relation between the company and association or contribution by the company to funds of the association; or of any benefit, compensation or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association; or of any express or implied acknowledgement, acquittance or release obtained from the association prior to such injury purporting to relieve the company from liability, is *intra vires* of said Parliament. Nesbitt J. dissenting.

SPECIAL CASE referred by the Governor-General-in-Council to the Supreme Court of Canada for hearing and consideration.

The following is the case submitted:—

*Extract from a Report of the Committee of the Honourable the Privy Council approved by His Excellency the Governor-General on 28th December, 1904.*

On a memorandum dated 14th December, 1904, from the Minister of Justice recommending, pursuant to the authority of and as directed by the Act passed in the fourth year of His Majesty's reign, Chapter 31,

\*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

intituled "An Act to amend the Railway Act, 1903," that the question of the competency of the Dominion Parliament to enact the provisions set forth in the first section of said Act be submitted to the Supreme Court of Canada for its determination.

1905  
In re  
RAILWAY  
ACT.  
—

The Committee submit the same for approval.

(Sgd.) JOHN J. MCGEE,  
*Clerk of the Privy Council.*

*Extract from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency the Governor-General, 13th January, 1905.*

On a report dated 9th January, 1905, from the Minister of Justice, submitting that by an order-in-council dated 28th December, 1904, the question of the competency of the Dominion Parliament to enact the provisions set forth in the first section of the Act passed in the fourth year of His Majesty's reign, Chapter 31, intituled "An Act to amend the Railway Act, 1903," was ordered pursuant to the authority and as directed by the said Act to be submitted to the Supreme Court of Canada for its determination.

The Minister states that inasmuch as it is provided by the second section of the said Act that the said Act shall come into force on a day to be named by a proclamation, which event has not yet happened, doubts may arise as to the validity of the said reference and the powers of the Supreme Court of Canada to determine the questions thereby referred.

The Minister accordingly recommends that the question of the competency of the Dominion Parliament to enact the provisions set forth in the first section of the said Act passed in the fourth year of His Majesty's reign, Chapter 31, intituled "An Act to amend the Railway Act, 1903," be referred to the Supreme Court of Canada for hearing and considera-

1905  
In re  
RAILWAY  
ACT.  
—

tion pursuant to the provisions of the Revised Statutes of Canada, Chapter 135, "An Act respecting the Supreme and Exchequer Courts," as amended by 54 and 55 Victoria, Chapter 25, intituled "An Act to amend Chapter 135, of the Revised Statutes of Canada, intituled "An Act respecting the Supreme and Exchequer Courts."

The Committee submit the same for approval.

(Sgd.) JOHN J. MCGEE,  
*Clerk of the Privy Council.*

The Minister of Justice.

The provisions set forth in the first section of the Act referred to in the said Reference, being Chapter VI. of 4 Edward VII., are as follows :—

I. Notwithstanding anything in the Act heretofore passed by Parliament, no railway company within the jurisdiction or legislative power or control of Parliament shall be relieved from liability for damages for personal injury to any workman, employee or servant of such company, nor shall any action or suit by such workman, employee or servant, or, in the event of his death, by his personal representatives, against the company, be barred or defeated by reason of any notice, condition or declaration made or issued by the company, or made or issued by any insurance or provident society or association of railway employees formed, or purporting to be formed, under such Act; or by reason of any rules or by-laws of the company, or rules or by-laws of the society or association; or by reason of the privity of interest or relation established between the company and the society or

No agreement with employees to relieve company from liability for personal injury.

association, or the contribution or payment of moneys of the company to the funds of the society or association; or by reason of any benefit, compensation or indemnity which the workman, employee or servant, or his personal representatives, may become entitled to or obtain from such society or association or by membership therein; or by reason of any express or implied acknowledgment, acquittance or release obtained by the company or the society or association prior to the happening of the wrong or injury complained of, or the damage accruing, to the purport or effect of relieving or releasing the company from liability for damages for personal injuries as aforesaid.

1905  
In re  
RAILWAY  
ACT.  
—

The following counsel appeared on the hearing.

*Newcombe K. C.*, Deputy Minister of Justice for the Dominion of Canada.

*C. H. Ritchie K. C.* and *Haughton Lennox* for the Railway Employees.

*Walter Cassels K. C.* for the Grand Trunk Railway Company.

*Newcombe K. C.* is heard. This legislation only applies to railway companies within the jurisdiction or legislative control of Parliament and is authorized by sec. 91, subsec. 29 of The B. N. A. Act, 1867 and sec 92 subsec. 10.

Railway companies of the class mentioned can only be incorporated by Parliament which can also take away the powers so conferred. *Vogel v. Grand Trunk Railway Co* (1).

*Ritchie K. C.* and *Lennox* are heard for the Railway Employees. The validity of legislation similar to this

(1) 10 Ont. App. R. 162 at p. 179.

1905  
In re  
 RAILWAY  
 ACT.  
 —

has been upheld by the courts in *Ferguson v. Grand Trunk Railway Co.* (1); *Grand Trunk Railway Co. v. Miller* (2); *The Queen v. Grenier* (3).

Parliament has the exclusive power to prescribe regulations for the construction, repair and alteration of the railway and for its management, and to dictate the powers and constitution of the company. Per Lord Watson in *Canadian Pacific Railway Co. v. Parish of Notre Dame de Bonsecours* (4).

*Cassells K. C.* is heard for the Grand Trunk Railway Co. This legislation is void as an infringement on property and civil rights in the Province. *Citizens Ins. Co. v. Parsons* (5); *Russell v. The Queen* (6); *Attorney General of Manitoba v. Manitoba License Holders Association* (7).

The Ontario Courts have held The Workmens' Compensation Act applies to Dominion railways, consequently this legislation is within the competence of the local legislature. See *Washington v. Grand Trunk Railway Co.* (8); *Canada Southern Railway Co. v. Jackson* (9).

THE CHIEF JUSTICE.—I am of opinion, as at present advised, that the Act in question is *intra vires* of the Dominion Parliament. I view it as one of public order for the good government of the whole of the Dominion in relation to corporations and undertakings under the control of the federal authority. The case of *Citizens Ins. Co. v. Parsons* (5), relied upon by the railway companies does not, as I read it, help their opposition to the validity of the Act.

(1) Q. R. 20 S. C. 54.

(2) 34 Can. S. C. R. 45.

(3) 30 Can. S. C. R. 42.

(4) [1899] A. C. 367 at p. 372.

(5) 7 App. Cas. 96.

(6) 7 App. Cas. 829.

(7) [1902] A. C. 73.

(8) 24 Ont. App. R. 183.

(9) 17 Can. S. C. R. 316.

I see nothing in it to justify their contention that if the Dominion Parliament had imposed statutory conditions for the whole Dominion upon the federal insurance companies, such statutory conditions would have been *ultra vires*. The exclusive jurisdiction of Parliament over federal railways must include the power to enlarge or restrict their rights and duties in the *administration* of their various roads so as to make them uniform all through the Dominion. It is certainly expedient, not to say more, that upon such railways the relations between the corporation and its employees should be governed by the same rules all over the Dominion, and that the right of an employee of such a company, or of his personal representative in the event of his death, to recover compensation if he is injured or killed in the performance of his duties be not different whether the accident happens in British Columbia for instance, or in Nova Scotia or Quebec, or made dependent upon the locality where he has joined the service of the company. And the federal Parliament alone can pass such a law for the Dominion. These federal corporations are created and these railways are operated in the public interest of the Dominion at large, and whatever the federal Parliament thinks it expedient to decree in relation to their management and administration in that same public interest it must have the power to do.

1905  


---

*in re*  
 RAILWAY  
 ACT  


---

 The Chief  
 Justice.

GIROUARD J.—If I were unfettered by authority I would feel inclined to declare that the statute before us was *ultra vires* of the Parliament of Canada. But in face of the decisions of the Privy Council I consider that doubt is not even possible, and that we have only one thing to do, that is, to uphold that statute as being incidental to the power which clauses 91 and 92 of the B. N. A. Act give to the Parliament of Canada, to

1905

*In re*  
RAILWAY  
ACT.

Girouard J.

make laws for the creation, regulation and maintenance of interprovincial or international, or even federal railways, within the meaning of the said Act.

DAVIES J.—I confess to having had many doubts upon the proper answer to be given to the question asked as to the validity of this legislation. It is very near the line, and, while, from one point of view, it seems to be *intra vires* of the Dominion Parliament I admit the weight of the arguments to the contrary. On the whole, I have reached the conclusion that the legislation is *intra vires* and valid, and my answer to the question is in the affirmative. If *intra vires* in part it seems to me to be so in all.

I have reached this conclusion because I think the Act is within the enumerated powers specially conferred upon the Dominion Parliament by the 91st section of the British North America Act.

Sub-section 29 of that section extends the exclusive legislative authority of the Parliament of Canada to

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.

The subject matter here in question comes within the express exception of sub-section 10 of section 92, and therefore comes within the 29th enumeration of section 91 of the British North America Act, 1867, and is excluded from provincial powers by the tenth enumeration of section ninety-two.

Exclusive legislative authority on railways, such as are here enumerated, being vested in the Dominion Parliament, that Parliament has, as a consequence, full and paramount power so to legislate upon such matter as fully, properly and effectively to carry out the construction, management and operation of these railways. In so legislating it matters not that they infringe upon the

1905

*In re*  
RAILWAY  
ACT.

Davies J.  
—

powers of legislation with regard to property and civil rights assigned to the provincial legislatures. Such invasion is admittedly necessary to enable the parliament properly and effectively to legislate. The main and controlling question is, therefore, whether the legislation in question can be said to be fairly and reasonably within the plenary and exclusive powers of the Dominion Parliament enabling it effectively to control the construction, management and operation of the classes of railways excepted from sub-section ten of section ninety-two and embraced within sub-section twenty-nine of section ninety-one. I think it may fairly be so held.

The Act substantially prohibits any railway under the jurisdiction of Parliament from making any contract directly or indirectly with its employees so as to limit or relieve the company from liability for personal injuries to these employees in the course of their employment. The provisions necessarily infringe upon subject matters ordinarily within the jurisdiction of the legislatures. But that does not matter provided the legislation can be upheld as being reasonably within the exclusive powers conceded to the Dominion Parliament to provide for the effective and proper operation and management of the roads. I do not think the courts should be astute to discover reasons to annul the legislation of parliament on a subject matter within its exclusive jurisdiction even if, in the exercise of its powers, it does trench upon the subjects generally within the provincial jurisdiction, or if plausible arguments can be urged that, from that one aspect, such legislation is not necessary to control effectively the subject matter of such legislation.

The Grand Trunk Railway Company in its factum upon this appeal contending against the validity of the Act, says :



1905

*In re*  
RAILWAY  
ACT.

Davies J.  
—

The statute in question is far reaching. It would operate to destroy the effect of any notice, condition or declaration made or issued by the company. Such a statute might prove very injurious to the proper maintenance and operation of the railway. It would tend to negligence on the part of employees; and other results of an injurious character to the public service and the safety of the travelling public would necessarily result from such a far-reaching statute.

Now, these arguments rather tend to confirm my opinion of the validity of the legislation. Whether it would prove injurious or not to the proper maintenance and operation of the railway

is for Parliament and not the court to decide. By passing the Act Parliament has decided. That the Act may affect "the proper maintenance and operation of the road" seems, by the argument, to be admitted, and once that conclusion of fact is reached, the legal result follows, of parliamentary jurisdiction. Any Dominion legislation that, it may reasonably be assumed, will substantially affect the proper maintenance and operation of the railway must, in my opinion, be valid. The fact that it may, from a railway standpoint, be deemed prejudicial and injurious to railway interests and may not promote effective operation and management, by no means settles the question. In deciding such a point parliament must within all proper reasonable limits be supreme.

Human agencies are as essential for the proper management and operation of railways as are mechanical agencies, and, so far they relate to these objects, are necessarily subject to the control of Dominion legislation. The former are, of course, from their complex nature, necessarily more difficult to control and the line, up to which and within which the powers of the Dominion Parliament extend, is difficult to determine and almost impossible to define by any arbitrary rule. But it does seem to me that the hours during which employees may or may not work, the sex, ages

and wages of those who may be employed, the right of employees to combine and form labour unions, the degree and extent to which these unions may be permitted to interfere with the hours, wages and work of the men, the negligence which will give employees a right of action caused by it, the limitations which ought to be put upon that right, alike as to the power of the employee to surrender or contract himself out of the right or the power of the railway company, by notice or rule or otherwise, to limit or entirely abolish it, are all subjects well within the Dominion legislative powers, although they may infringe upon the general powers of the local legislatures. These special matters I have mentioned are a few of the many analogous and cognate subjects arising out of the employment by these great railway corporations of many thousands of men whose duties are to control and manage railways forming a perfect net-work across the Dominion, which subjects must either wholly or partially come within the ambit of the Parliament alone capable of calling these corporations into being and of effectively regulating their operation.

We cannot ignore, in determining what are and what are not fairly within the ambit, the actual existing condition in Canada.

Here are at least three great railway corporations, either already transcontinental or rapidly becoming so. Their operations are of a national character and importance. Their employees number many thousands. The unions of these employees amongst themselves for the better support and protection of their interests and the amalgamation, in some cases, of these unions with the labour unions of the neighbouring republic, add additional strength to the argument for giving a broad and liberal construction to the plenary powers

1905  
In re  
RAILWAY  
ACT.

Davies J.

1905

*In re*  
RAILWAY  
ACT.

Davies J.  
—

of legislation vested in the Dominion Parliament so as to ensure some degree of uniformity in its exercise.

If legislation affecting the contracts entered into by the railways with their employees and the limitations which may be placed upon the companies' liability for damages to their workmen when injured or killed in the course of their employment, are matters for the several provincial legislatures and not for the Dominion Parliament, then, of course, such legislation may be as various and conflicting as there are legislatures to legislate, and it may well result that such various and conflicting legislation would materially affect the management and operation of the roads.

I am, after much reflection, of the opinion that all such legislation must necessarily be within the jurisdiction of the Parliament of Canada which creates the corporations and has plenary and exclusive powers to legislate upon everything relating to their effective management and control.

In the late case of *Madden v. Nelson and Fort Sheppard Railway Co.* (1), the Judicial Committee of the Privy Council held that the provision in The British Columbia Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, should be responsible for cattle injured or killed thereon, was *ultra vires* of the provincial legislature. The Lord Chancellor, in delivering the judgment said :

It would have been impossible to maintain the authority of the Dominion Parliament, if the provincial legislature were to be permitted to enter into such a field of legislation which is wholly withdrawn from them and is, therefore, manifestly *ultra vires* ;

and he goes on to explain the meaning of the Privy Council's judgment in the case of *The Canadian Pacific Railway Co. v. The Parish of Notre Dame de Bonsecours* (2) by saying that, in that case, it was

(1) [1899] A. C. 626.

(2) [1899] A. C. 367.

decided that, although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction, would be beyond the jurisdiction of the provincial legislatures, the railway company were not exempted from the municipal state of the law as it then existed—that all landowners, including the railway company—should clean out their ditches so as to prevent a nuisance.

1905  
*In re*  
 RAILWAY  
 ACT.  
 ———  
 Davies J.  
 ———

These decisions throw much light upon the view which the Judicial Committee of the Privy Council take as to the necessity of excluding the provinces from interfering by legislation in a matter wholly withdrawn from them and, inferentially, show how broad should be the construction placed upon the powers of the Dominion in a matter exclusively relegated to it to legislate upon.

For these reasons, I answer the questions as to the validity of the Act in question in the affirmative.

NESBITT J.—That the Dominion Parliament has the exclusive jurisdiction to legislate in respect to the incorporation, organization, operation and management of certain railways is not open to dispute, and the sole question presented for our consideration here is whether the Act in question is not an infringement of the provincial jurisdiction as being legislation upon civil rights and not purporting to be upon a subject incident to or ancillary to “railway legislation.” It is to be observed that the Act is one claimed to be promoted by a section of the employees of the railway and aimed at the redress of a contract grievance or supposed destruction of civil remedy and as such it is frankly supported by the factum filed on behalf of the promoter acting for such employees.

It is also to be observed that although it is headed “An Act to amend the Railway Act of 1903,” it stands quite apart from the “Act to amend the Railway Act, 1903,” to be found in the very next chapter of the same statutes, and which latter Act deals with what might

1905

*In re*  
RAILWAY  
ACT.

Nesbitt J.  
-----

well be described as "railway legislation." I merely draw attention to this as lending some colour to the argument that the Act in question was only passed to interfere with contract rights and has no real relation to the operation or management of "railways." The Act itself, we were told on argument, was passed because the Dominion Parliament had incorporated an insurance company and compelled the Grand Trunk Railway Company to contribute a certain sum yearly to the funds of the company which company had been empowered to make by-laws and that one of the by-laws, No. 15, made provision that any member of the society or his representatives became disqualified from maintaining an action against the railway company for injuries arising from accident. This has been held to be a contract authorized by the employee who took advantage of the benefits of the company's contribution, etc., and to preclude recovery for negligence. The Act in question apparently goes much further than legislation upon such a subject as was said to be aimed at and, as I read it, provides that no railway company shall be relieved from liability for damages for personal injury to any workman, employee or servant of such company, by reason of any notice, condition or declaration made or issued by the company, or by reason of any rule or by-laws of the company, or by any express or implied acknowledgment, acquittance or release obtained by the company \* \* \* prior to the happening of the wrong or injury complained of, or the damage accruing to the purport or effect of relieving or releasing the company from liability for damages for personal injuries as aforesaid.

Such legislation would, it seems to me, enable an employee to recover notwithstanding his express breach of duties prescribed although the provincial

law regulating the rights of the parties was to the contrary and I am unable to conceive that such legislation can be said to be in any way incidental to the operation or management of railways or to be in any sense "railway legislation." Since railways were operated no such provisions so far as I know can be found in any country under the guise of legislation regulating the operation or management of railways, and I cannot believe would be granted by any Parliament as part of a legislative railway policy.

Necessarily at almost every step in railway legislation property and civil rights must be involved, such as expropriating lands, contracts for carriage of goods, regulating the tolls to be charged and the terms of carriage. Duties must be prescribed, but the remedies for breach of such duties it seems to me are within the jurisdiction of the provincial legislatures. No doubt if parliament saw fit to enact as part of the operating policy of the railway that workman should only work certain hours; that men of certain age only should be employed; that no women or young boys or girls should be so employed; that workmen should not go on strike; it could do so as an incident of railway operation but this legislation does not appear to me to fall within the doctrine of operation or management but rather within legislation as to contracts as, for instance, if Parliament prescribed that if a passenger was injured on the railway he should give notice within twelve hours or no action would lie, which would be, in my opinion, outside its jurisdiction. I think Parliament can say the railway shall do so and so and, upon failure, any person injured by such failure shall have an action, but there, it seems to me, its jurisdiction ends, and the doctrine of civil rights leaves the railway subject to the jurisdiction of the Provincial Legislatures as to the remedies and defences respectively.

1905

*In re*  
RAILWAY  
ACT.Nesbitt J.  
—

1905

*In re*  
RAILWAY  
ACT.

Nesbitt J.  
—

Mr. Lennox, the promoter, argued that the legislation was necessary because the insurance society was incorporated by the Parliament of Canada, but it seems to me that a foreign corporation of which the employees became members or policy holders under similar recited conditions would have been the same. The remedy given otherwise by law the employee was held to have contracted himself out of, not because it was a Dominion corporation, but for the reasons I have indicated, and the legislation in question, therefore, is admittedly to get rid of the effect of what has been held to be a contract, and is not to prescribe certain rules to govern in the employment of operatives in the management of the railway viewed in which aspect it might well be "railway legislation," and *intra vires*. In Ontario the 10th sect. of R.S.O., 1897, ch. 160, would seem to regulate the defence. In Quebec in case of death, art. 1056 of the Civil Code would indicate that the workman could receive compensation for the injury prior to his death and so allow him to contract for a release for any injury from which death might result, which would bar action by his representative. This statute if *intra vires* would appear to override any provincial law. I am not deciding that rule 15 of the Grand Trunk Provident Association is a binding contract, but this legislation, as I read it, embraces any acquittance obtained by the company prior to the accident and, therefore, seems to me a matter purely affecting civil rights and not legislation falling within the subject of "railways" as relating to the incorporation, organization, operation or management of them. I have been constrained to this view by what I conceive to be the real purport of *The Queen Insurance Co. v. Parsons* (1); *Hodge v. The Queen* (2); *Russell v. The*

(1) 7 App. Cas. 96.

(2) 9 App. Cas. 117 at p. 130.

*Queen* (1); *McArthur v. Northern & Pacific Junction Railway Co.* (2); *Clegg v. Grand Trunk Railway Co.* (3); *Canada Southern Railway Co. v. Jackson* (4); *The Canadian Pacific Railway Co. v. Parish of Notre Dame de Bonsecours* (5); *Union Colliery Co. v. Bryden* (6); *Cunningham v. Tomey Homma* (7); *City of Toronto v. Bell Telephone* (8). Also, the recent ten hour labour case from New York, decided by the Supreme Court of the United States, where the majority held that the law was really a labour law and unconstitutional and not a health law and constitutional as a police provision.

1905  
In re  
RAILWAY  
ACT.  
Nesbitt J.

The statute under consideration seems plainly one seeking to disguise purely civil rights' legislation under the false garb of railway policy and deprives one party to a contract of its rights under the form of legislating on the subject of "railways" when such contract rights are neither incidental nor ancillary to such subject, unless the mere fact of one of the contracting parties being a railway necessarily creates jurisdiction.

I would adopt the well known rule in the United States where the courts have been so often called upon to decide between the nicely shaded lines of state and federal authority and where the character of legislation is none the less manifest because of the general terms in which it is expressed.

I would answer that the Act in question was not one the Parliament of Canada was competent to pass.

(1) 7 App. Cas. 829.

(2) 17 Ont. App. R. 86.

(3) 10 O. R. 708 at page 714.

(4) 17 Can. S. C. R. 316.

(5) [1899] A. C. 367.

(6) [1899] A. C. 580 at p. 587.

(7) [1903] A. C. 151.

(8) [1905] A. C. 52.