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*May 29, 30;
Oct. 23.
*Oct. 24.

WILLIAM HEWSON (PLAINTIFF) ..... APPELLANT;

AND

THE ONTARIO POWER COMPANY OF NIAGARA FALLS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law—Construction of statute—B.N.A. Act, 1867, *sec.* 92, *sub-sec.* 10(*c*)—*Legislative jurisdiction—Parliament of Canada—Local works and undertakings—Recital in preamble—Enacting clause—General advantage of Canada, etc.—Subject matter of legislation—Presumption as to legislation of Parliament being intra vires—Practice—Motion to refer case for further evidence.*

In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded.

Where the subject matter of legislation by the Parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada or for the advantage of two or more of the provinces.

Semble, per Sedgewick and Davies JJ. (Girouard and Idington JJ. *contra*).—A recital in the preamble to a special private Act, enacted by the Parliament of Canada, is not such a declaration as that contemplated by sub-section 10(*c*) of section 92 of the British North America Act, 1867, in order to bring the subject matter of the legislation within the jurisdiction of Parliament.

A motion made, while the case was standing for judgment, to have the case remitted back to the courts below for the purpose of the adduction of newly-discovered evidence as to the refusal of Parliament to make the above-mentioned declaration was refused with costs.

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

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APPEAL from the judgment of the Court of Appeal for Ontario(1), affirming the decision of Mr. Justice Britton(2), refusing the injunction sought by the plaintiff to restrain the company's proceedings for the expropriation of certain lands required for their works and dismissing the action with costs.

The respondent company was originally incorporated by a special Act, 50 & 51 Vict. ch. 120, under the name of the Canadian Power Company and, by section 29 of that Act, the powers of expropriation mentioned in the "Railway Act" were conferred upon the company. The name of the company was subsequently changed and other powers conferred upon it by the Dominion Statutes, 54 & 55 Vict. ch. 126, 56 Vict. ch. 89, 62 & 63 Vict. ch. 105, 63 & 64 Vict. ch. 113, and 2 Edw. VII. ch. 86. Under the powers so conferred upon them, the company took proceedings for the expropriation of certain lands belonging to the appellant as being necessary for the carrying out of the objects for which they had been incorporated and for the construction of their works in the Village of Chippewa, where they were constructing a canal and hydraulic tunnel. The appellant objected to the expropriation upon the ground that the plan of the respondents' undertaking upon which the expropriation proceedings were founded shewed a substantially different undertaking from that authorized by Parliament; that the undertaking with which the respondents are actually proceeding is in fact a third undertaking, entirely different both from the undertaking shewn upon the plan and from that authorized by Parliament; that the two undertakings last referred to, for either of which the appellant's land would alone be required, are abandoned, or at least cannot be proceeded with for

(1) 8 Ont. L.R. 88. (2) 6 Ont. L.R. 11.

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an indefinite time; and that, in any event, the undertaking is merely local and private, and not within the authority of the Dominion Parliament, and that power of expropriation in connection therewith could be obtained exclusively from the Provincial Legislature.

The case came before Mr. Justice Britton, on a motion by the company for the possession of the lands. The plaintiff had brought his action to restrain the company from proceeding towards the expropriation and notice, on his behalf, had been given for an injunction against the company. By consent of the parties, the motion for possession of the lands was considered as a motion for judgment in the action; a chamber motion for leave to pay the amount of the award was also to be determined. Notice had also been served, pursuant to an order of Mr. Justice Street, upon the Attorneys-General for Canada and for the Province of Ontario, inasmuch as the validity of the Act of 50 & 51 Vict. ch. 120 (D.), and the Acts amending the same were called in question, but neither Attorney-General was represented at the trial.

The preamble to the Act of incorporation recited that it was desirable "for the general advantage of Canada" that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland Rivers, and that the contemplated works "will interfere with the navigation of the Welland River." The Act then proceeded to incorporate the company with, amongst other powers, those already referred to, but without enacting any clause declaratory of the general advantage of Canada or of any two or more of the provinces through the works or undertakings of the company so incorporated. The Act also authorized the company to enter into contracts extending beyond the limits of Canada.

At the trial, Mr. Justice Britton held that the preamble shewed, by implication, the intention of Parliament to give power to deal with matters subject to the exclusive jurisdiction of the Dominion of Canada and, in connection therewith, to expropriate private property in the Province of Ontario; that this amounted to a Parliamentary declaration that the formation of the company for the purposes mentioned was for "the general advantage of Canada"(1). On appeal to the Court of Appeal for Ontario, this decision was affirmed(2), and, in delivering the judgment of that court, Mr. Justice Maclennan said:

"We are of opinion that this judgment should be affirmed.

"The first objection to the power of expropriation claimed by the defendants is that the work authorized by the company's Acts of incorporation is a purely provincial work and therefore *ultra vires* of the Dominion Parliament.

"It is not necessary that we should say that we agree with all the reasons given by the learned judge for his opinion that this objection is not well founded. It is sufficient to say that the matter is made quite clear by the preamble of the Act, and the power granted to the company by section two, 50 & 51 Vict. ch. 120 (D.), to contract with any bridge company having a bridge across the Niagara River to carry wires *across*, and to connect with wires of any electric light company or other company *in* the United States.

"The preamble recites that it is desirable for the general advantage of Canada that a company should be incorporated for certain purposes; that certain persons have prayed for incorporation of such a company, and that it is expedient to grant their prayer. And then follow the enacting clauses. We think that recital is clearly a declaration by Parliament that the work which is thereby authorized is a work for the general advantage of Canada within section ninety-two, sub-section 10(*c*), of the B.N.A. Act. We also think the power granted by section two of the company's Act above mentioned makes the work authorized a work, or undertaking, extending beyond the limits of the province, within section ninety-two, sub-section 10(*a*). The work is therefore one excluded from the jurisdiction of the legislature of the province.

"It was also objected that the work being constructed by the company is not such as authorized by its Act, because the terminus selected is not that prescribed.

(1) 6 Ont. L.R. 11. (2) 8 Ont. L.R. 88.

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"The canal which is authorized is to extend from some point on the Welland River at or near its conjunction with the Niagara River to a point or points on the west bank of the Niagara River about or south of the Whirlpool. The point selected for the southern terminus is near the falls, which is said to be two and one-half miles south of the Whirlpool, and it is argued that the point so selected is therefore not *about or south* of the Whirlpool. We cannot say that these words restrict the company to the selection of a point about or near the Whirlpool, or that a point two and one-half miles south of it is not within the language used. So to hold, would be to construe the words as if they had been about *and* south.

"It is further contended that the company is seeking to expropriate a greater width of land than is authorized by the Dominion Railway Act.

"We think this objection also fails. By section twenty-nine of the company's Act, certain sections of the Dominion Railway Act(1), are made applicable to the company, and among others section eight, prescribing the breadth of the land which may be taken without the consent of the owner. That section declares that where the railway is raised more that five feet higher, or cut more that five feet deeper, than the surface of the line, the land taken shall not exceed one hundred yards in breadth. It is sworn that the depth of the company's canal where it passes through the land in question is more than five feet, the average depth being seventeen and one-half feet, as appears upon the plan and profile filed and approved by the Deputy Minister of Railways and Canals. The width claimed by the company from the plaintiff is one hundred yards, and we think the company is within its rights in making that claim.

"We think there is clearly nothing in the objection that the work has been abandoned, for, by the Act 63 & 64 Vict. ch. 113(D.), the time for the completion of the company's works was extended for six years from the passing of that Act, that is, from the 7th July, 1900."

The Court of Appeal for Ontario affirmed the judgment of Mr. Justice Britton refusing the injunction sought by the plaintiff's action and dismissing the action with costs. The plaintiff asserts the present appeal.

The questions at issue upon the appeal are sufficiently clear from the foregoing statement and the references made in the judgments now reported.

(1) R.S.C. ch. 109.

Lafleur K.C. and *H. S. Osler K.C.* for the appellant.

Walter Cassels K.C. and *F. W. Hill* for the respondents.

While the case was standing for judgment a motion was made on behalf of the appellant to have the consideration of the appeal discharged and the case remitted back to the Court of Appeal or to the trial court in order that newly discovered evidence might be adduced tending to shew that the Parliament of Canada had, on several occasions, refused to incorporate in the Acts respecting the company any clause or clauses enacting a declaration that the works and undertaking of the company were for the "general advantage of Canada or for the advantage of two or more of the provinces."

Glyn Osler appeared for the appellant in support of the motion.

F. W. Hill, contra, was not called upon for any argument.

THE CHIEF JUSTICE.—The appellant, evidently not expecting a judgment in his favour on his appeal as submitted for consideration in May last, moved the court yesterday for an order

referring the case back to the Court of Appeal or to the High Court of Justice to take further evidence as to the refusal of the Parliament of the Dominion of Canada to declare the undertaking and works of the respondent company to be works for the general advantage of Canada.

This motion must be dismissed with costs.

Assuming that the evidence tendered could be legally received, and that the appellant was able to

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prove the fact that Parliament has refused to specifically declare that the works in question were for the general advantage of Canada, the fact would remain that it has, in fact, repeatedly assumed legislative jurisdiction over them. Now, all presumption being in favour of the constitutionality of such legislation, it must be assumed that, if they have refused to enact a special clause that would unquestionably have given it jurisdiction, and yet continued to exercise that jurisdiction by repeatedly amending the original Act, it was because such a special clause was deemed unnecessary by Parliament itself, either because in the preamble of the Act the motive that induced Parliament to pass it being that the Act was for the general advantage of Canada is an admission amounting to a declaration that it was so, or, because such a declaration was unnecessary, as the Act was one to authorize an interference with the navigation of the Welland River, or because the works were to extend beyond the limits of the province. So that, assuming that the facts alleged in the affidavits filed with the motion are true, they could not in any way affect the result of the appeal.

The motion is dismissed with costs.

DAVIES J.—I concur in the judgment dismissing the motion to refer the appeal back in order that some further evidence might be taken on the ground that the evidence proposed to be given is, in my opinion, clearly inadmissible. My reasons for the judgment on the merits are quite outside of and not affected by the evidence sought to be introduced even if admissible.

GIROUARD and IDINGTON JJ. concurred.

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The following are the opinions of their Lordships on the merits.

THE CHIEF JUSTICE.—I would unhesitatingly dismiss this appeal.

The first ground upon which the appellant attempted to support his case is that the Dominion Act incorporating the company respondent, 50 & 51 Vict. ch. 120, is *ultra vires* and unconstitutional.

Now, upon him was the burden of establishing the soundness of that contention; the presumption in law always is that the Dominion Parliament does not exceed its powers. The ground upon which he bases his argument on this part of his case is that the Dominion Parliament has not declared this company and its undertaking to be for the general advantage of Canada. But assuming, without deciding, that it has not done so as required by the British North America Act, 1867, it is evident, on the face of the Act of incorporation, that such a declaration was quite unnecessary to give to the federal legislative authority exclusive control over the company.

The preamble of the Act alleges that the company's contemplated works "will interfere with the navigation of the Welland River." Now, that was acted upon by Parliament, the petition for incorporation granted, the works authorized, permission granted to interfere under certain conditions with the navigation of the said river, which is proved to be a navigable one, and, by section 32 of the Act, the provisions of the Act respecting certain works over navigable rivers (R.S.C. ch. 92) were extended to the company. Now that the federal Parliament has the exclusive right to so legislate needs no demonstration. The fact that the company may not yet in fact have interfered with the

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navigation of that river cannot affect the constitutionality of the Act. It had and has yet the power to do so.

Moreover, by the Act 56 Vict. ch. 89 (D.), amending the company's charter, the words "or any other wires or cables which the company may lay across the said river," were added to section 2 thereof, making it clear that the company has the right to lay cables across the boundary line into the United States and to do business therein. *Vide Canadian Pacific Railway Co.* v. *The Western Union Telegraph Co.*(1). Such a company, with works extending beyond the limits of the province, is not a company with provincial objects. It may, if it pleases, do business only in the United States, not at all in Ontario. And the Ontario legislature could not have given the powers that the federal Parliament has granted them.

The other grounds taken by the appellant are frivolous; I am inclined to say as frivolous. The judgments of the two courts below amply demonstrate it.

The appeal is unanimously dismissed with costs, as was, by the Ontario Court of Appeal, the appeal from Mr. Justice Britton's judgment dismissing the appellant's action.

SEDGEWICK J.—I agree that the appeal should be dismissed with costs for the reasons stated by my brother Davies.

GIROUARD J.—I am of the opinion that the appeal should be dismissed for the reasons given by Mr. Justice Maclennan in the Court of Appeal.

(1) 17 Can. S.C.R. 151.

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DAVIES J.—The chief contention on the part of the appellant was that the charter of the respondent was null and void as not being within the legislative jurisdiction of the Parliament of Canada and as being a purely local work and undertaking which the Legislature of Ontario could alone authorize.

The Court of Appeal for Ontario held the charter of the respondents to be *intra vires* of the Dominion Parliament on two grounds: First, that the general recital in the incorporating Act

> that it was desirable for the general advantage of Canada that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland Rivers

was a sufficient declaration within sec. 92, sub-sec. 10 (*c*) of the British North America Act, 1867, and: Secondly, that the power given by section 2 of the company's charter to connect its wires with the wires of any electric or other company in the United States, made the work one extending beyond the limits of the province and so within sec. 92, sub-sec. 10 (*a*).

As at present advised I do not think the general declaration in the preamble of this private Act such a declaration as that contemplated by sub-sec. 10 (*c*) of section 92 of the British North America Act, 1867. In my present view of that section I should be inclined to think that with respect to a work or undertaking of a purely provincial kind solely within the jurisdiction of the provincial legislature, and with respect to which Parliament was assuming jurisdiction on the sole ground that the undertaking was for the general advantage of Canada or of two or more of the provinces, the declaration intended was an enacting declaration to the effect required by the Imperial Act. Such a declaration is not, I think, one which might be spelled out of the charter granted or inferred merely

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from its terms or deduced from recitals of the promoters in the preamble, but one substantially enacted by Parliament. It is not necessary for me, however, to decide the point now, as I hold the charter valid on other grounds and wish to leave the point open.

The jurisdiction of the legislature of Ontario is limited to the incorporation of companies with provincial objects only, and such legislature could not confer on a company incorporated by them such extensive powers as are conferred on this respondent company.

It is true that the location of the works where the "electric power is to be generated is near Niagara Falls and solely within the province." But the undertaking of the company is not simply to generate power, but to supply such power

> to manufacturers, corporations and persons for use in manufacturing or any other business or purpose.

Now the subject matter of the charter is obviously not merely a local one. On the contrary it is obviously one which contemplates extension over large areas. I do not find in the Act any words importing or implying a limitation upon these powers as to area. I should read the second section of the Act as giving powers to extend if found necessary or desirable to any part of Canada which was found practicable. The objects of the company as defined by the Act contemplated, in my opinion, possible extension beyond the limits of one province, and it is therefore just as much within the express exception of the British North America Act, 1867, as a telegraph or telephone company with like powers of extension. *City of Toronto* v. *Bell Telephone Company of Canada*(1).

Suppose a similar charter granted to a company

(1) [1905] A.C. 52, at p. 57.

to erect its works on the Ontario side of the Chaudière Falls, at Ottawa, would not the argument that the language of the charter permitted the company to extend its wires for half a mile across the bridge into Hull, in the Province of Quebec, be almost irresistible. Where are the words limiting or preventing such extension to be found? There are clearly no such words while, on the contrary, the general words used fully permit of the extension from one province to another.

It is not necessary in an Act of the Parliament of Canada expressly to enact that the company created shall have power to extend its undertaking from the place where its chief works are authorized to be constructed into any other part of Canada. The Parliament of Canada is speaking and, unless there are words of limitation introduced, or the subject matter is obviously of a local or private nature, the language of the statute will be read as applicable to Canada, and not simply to the province in which, such as in this case, the generating works are authorized to be constructed. On the other hand, a provincial charter will be construed as having a provincial limitation, and the legislature will not be presumed to assume jurisdiction beyond the limits of the province.

The preamble recites the object of the promoters to be

> the promoting manufacturing industries and inducing the establishment of manufactories *in Canada.*

The second section, as I read it, not only gives them general and unlimited powers of supplying electric power to parts of Canada beyond the province where their generating works are to be situate, but expressly authorizes them

> to connect with the wires of any company in the United States.

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Mr. Lafleur felt himself obliged to contend that the local legislature could grant similar powers of connection, and I was disposed at the argument to agree with him. But a closer examination of the clauses of the British North America Act, 1867, has led me to entertain very grave doubts that this is so. It seems clear to me that the legislature could not grant a local company power to connect its wires with those of a local company in any of the other provinces. If it could each company would cease to be one of a "local or private nature" and become interprovincial and general. How then could the legislature grant power to connect the wires of the company it was creating with those of the companies of a foreign country. The local or private company on such connection taking place would at once cease to be "local or private" within the British North America Act, 1867, and become international.

It was argued that the province has as much right to confer powers beyond its jurisdiction upon the corporations it calls into existence as the Dominion Parliament has beyond Canada. In a certain sense that may be true. But there is a difference and a rational one too. Provincial charters are defined by the British North America Act, 1867, as matters of a local or a private nature not "connecting the province with any other or others of the provinces," and "not extending beyond the limits of the province." Dominion charters are not controlled by any such statutory limitations, and while the exercise of the powers they confer upon a company of connecting at the international boundary line with the works of a foreign company may be subject to the municipal law of that country and permitted and controlled by the comity of nations, there is no statutory prohibition in the Bri-

tish North America Act preventing the granting of the power by the Canadian Parliament to a company it incorporates to connect with a company of the United States at the boundary line.

It is not necessary, however, for me to decide whether a grant by the legislature of the province to a company created by it to connect its wires with those of a foreign corporation, at the frontier, would be necessarily beyond its powers or would invalidate the charter altogether or simply in part. That question was not argued excepting incidentally because the validity of a provincial charter was not an issue on this appeal. Whether there exists a concurrent jurisdiction in the Dominion and the province to confer such a power I am not called upon now to decide. I do hold the power to exist in the Dominion Parliament; and that, because of its exercise with respect to this special corporation and also because of the general extent of the powers granted, the Act of incorporation here in question is legal and valid.

With respect to the point raised as to whether or not the work under construction is within the Act, I concur with the Court of Appeal.

Mr. Justice Sedgewick desires me to say that he concurs with the foregoing reasons.

IDINGTON J.—There is undoubted authority for saying that an Act may extend in its operative force and effect beyond the preamble's statement of fact or purpose inducing the enactment. And it is said that where the preamble is found more extensive than the enacting part it is inefficacious to control the effect of the latter.

The preamble has, however, always been a guide to the interpretation of the enacting clauses following

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it. And the Interpretation Act, by secs. 3 and 4 and sub-sec. 56 of sec. 7, formally declares the relation of the preamble to the clauses following and in the latter section says, that

> the preamble of every Act shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act.

It seems to me that these considerations and declarations cannot be given full force and effect to, in the interpretation of the incorporating Act that created the respondent company, unless we read the preamble thereof as meaning that which begins by saying,

> whereas it is desirable for the general advantage of Canada that a company should be incorporated, etc.

to be a declaration of the mind of the Parliament of Canada and its purpose in making the enactment. What more can sub-section (*c*) of sub-section 10 of section 92 of the British North America Act, 1867, require to give it vitality here?

Is this recital anything else than a declaration of the Parliament of Canada? Its very essence is of that nature.

Its being by law declared to be a part of the Act, to manifest its purpose, seems to render it impossible to hold it anything else than, or as falling short of, what the creative power of the sub-section (*c*) requires as a condition preliminary to its exercise.

That condition being thus duly complied with, the Parliament of Canada had undoubtedly the power to incorporate, and incidentally thereto to confer on this company so incorporated the right to expropriate the land in question.

I do not wish, especially as this suffices for disposing of the appeal, to express or to be held as impliedly

expressing an opinion on some of the interesting questions of great constitutional importance that have been considered in the courts below.

I must add, however, that I see no difficulty in the company's way by reason of its mode of procedure or alleged expiration of its powers, and on these points I agree with the reasons given in the judgment of Mr. Justice Maclennan.

I think, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Alexander Fraser.*

Solicitor for the respondents: *F. W. Hill.*