1905
*Nov. 15.
1906
*Feb. 21.

THE CITY OF TORONTO (DEFENDANTS) ..... } APPELLANTS;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law — Parliament — Power to legislate — Railways — Railway Act, 1888, *ss.* 187, 188—*Protection of crossings—Party interested—Railway committee.*

Secs. 187 and 188 of The Railway Act, 1888, empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates or otherwise, are *intra vires* of the Parliament of Canada, Idington J. dissenting. (Secs. 186 and 187 of The Railway Act, 1903, confer similar powers on the Board of Railway Commissioners.)

These sections also authorize the committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested."

Held, Idington J. dissenting, that the municipality in which the highway crossed by the railway is situate is a "person interested" under said sections.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiffs.

Sections 187 and 188 of "The Railway Act, 1888," read as follows:

"187. Whenever any portion of a railway is constructed, or authorized or proposed to be constructed

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

upon or along or across any street or other public highway at rail level or otherwise, the company, before constructing or using the same, or, in the case of railways already constructed, within such time as the Railway Committee directs, shall submit a plan and profile of such portion of railway for the approval of the Railway Committee; and the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, authorize or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection—or to carry such street or highway either over or under the said railway by means of a bridge or arch, instead of crossing the same at rail level—or to divert such street or highway either temporarily or permanently—or to execute such other works and take such other measures as under the circumstances of the case appear to the Railway Committee best adapted for removing or diminishing the danger arising from the then position of the railway; and all the provisions of law at any such time applicable to the taking of land by such company, and to its valuation and conveyance to the company, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee under this section.

"188. The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection, between the said company and any person

1905

CITY OF TORONTO v. GRAND TRUNK RY. CO.

interested therein, as appear to the Railway Committee just and reasonable."

In the year 1890 the appellants applied for protection at the crossing of Bloor Street, in the City of Toronto, by the Grand Trunk Railway Company, and also at the crossings of Pape Avenue, Logan Avenue and Jones Avenue, by the said Grand Trunk Railway Company, in the said City of Toronto, and the committee made an order dated the 8th day of January, 1891, directing that the crossing of Bloor Street, by the Grand Trunk Railway Company, and the crossing of Pape Avenue, Logan Avenue, and Jones Avenue, by the Grand Trunk Railway Company, be protected by being provided with gates and watchmen, and that the cost attending the placing and maintenance of the gates and watchmen at the said crossings be borne, one-half by the City of Toronto, and one-half by the Grand Trunk Railway Company of Canada, which said order of the Railway Committee of the Privy Council was made an order of the High Court of Justice for Ontario, on the 4th day of December, 1903.

On the 21st day of April, 1899, the appellants applied to the Railway Committee for an order for the protection of the crossings of the Grand Trunk Railway Company at Dunn Avenue, in the City of Toronto, and on the 9th day of June, 1899, the appellants applied to the Railway Committee for an order for the protection of the crossing of the Grand Trunk Railway Company at Dowling Avenue, in the City of Toronto, and the committee directed that the crossings at Dunn Avenue and Dowling Avenue in the City of Toronto be provided with protection and that watchmen be placed at the said crossings, the wages of the said watchmen to be borne and paid solely by the City of Toronto as appears by an order of the Privy Coun-

cil dated the 11th day of March, 1902, which order was made a rule of the High Court of Justice for Ontario on the 4th day of December, 1903.

In pursuance of the orders of the Railway Committee of the Privy Council the crossings in question have been protected in the manner directed by the said orders and an account has been kept of the expense of the installation and maintenance of the said gates and watchmen by the said respondents who have from time to time demanded payment of the appellants' shares of the same, but so far payment has been refused.

The appellants at the trial contended that the Parliament of Canada had no power to direct or enable the Railway Committee to charge the costs of the works which are part of a railway, though declared to be for the general advantage of Canada, against a municipality, and they further contended that the Railway Committee had not the power to make the orders in question, charging the cost of the work against the appellants under the statute upon which the Railway Committee purported to act.

The appellants further contended that they were not consenting parties to such order and that the orders in question were not made upon their application, but by the Railway Committee in pursuance of its ordinary procedure.

The Chancellor, who presided at the trial, gave judgment as follows:

"The questions of law argued in this case are settled by authority to which I defer and follow:

"1. Whether the sections of the 'Railway Act,' (1888) ch. 29, sections 187, 188, are *ultra vires?*

"2. Whether the city is a party interested, if the Act is not *ultra vires?*

1905

CITY OF TORONTO v. GRAND TRUNK RY. CO.

"3. Whether there was jurisdiction on the part of the Railway Committee of the Privy Council to interfere in this case and direct the apportionment of cost, and as to the different crossings, because of the city making application for different relief.

"These were all expressly or by fair implication involved in the decision of the majority of the Court of Appeal in *Re Canadian Pacific Railway Co. and York*(1), and I just follow that authority in directing the proper orders to be made for collecting what is due by the city.

"The law as settled by the above case was recognized by Burbidge J. *In re Grand Trunk Railway and City of Kingston*(2).

"Costs follow result."

The Court of Appeal affirmed this judgment holding that the case referred to by the Chancellor decided the questions in dispute.

Fullerton K.C. and *Johnston*, for the appellants. A municipality can only be authorized to expend money by the legislature: *Municipality of Pictou* v. *Geldert*(3), and neither Parliament nor the Railway Committee can order protection for a municipal purpose. See *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(4); *Grand Trunk Railway Co.* v. *Therrien*(5).

The municipality is not a "person interested" within the meaning of section 188 of "The Railway Act, 1888," and as to this *In re Canadian Pacific Railway Co. and the County of York*(1), is wrongly decided.

(1) 25 Ont. App. R. 65.
(2) 8 Ex. C.R. 349.
(3) [1893] A.C. 524.
(4) [1899] A.C. 367.
(5) 30 Can. S.C.R. 485.

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

H. S. Osler K.C., for the respondents.

Shepley K.C. for the Dominion of Canada.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

GIROUARD J.—The questions involved in this appeal have been thus summarized by Chancellor Boyd, in the trial court:

(1) Whether the sections of the Railway Act (1888), ch. 29, sections 187, 188 are *intra vires?*

(2) Whether the city is a party interested, if the Act is not *ultra vires?*

(3) Whether there was jurisdiction on the part of the Railway Committee of the Privy Council to interfere in this case and direct the apportionment of costs, and as to the different crossings, because of the city making application for different relief?

The learned Chancellor and the judges of the Court of Appeal unanimously answered the above questions in the affirmative. I entirely agree with them. They refer to a decision in *Re Canadian Pacific Railway Co. and the County of York*(1), followed by Burbidge J. in *Re Grand Trunk Railway Co. and the City of Kingston*(2). Mr. Justice Osler has so correctly expressed my own views on these points of law at pp. 72-73 of the former case that I cannot do better than quote his own language:

On the question whether these provisions of the Railway Act are *ultra vires* of Parliament, in relation to the three municipalities or otherwise, I have little to add to what I said on the general question in *McArthur* v. *The Northern and Pacific Junction Ry. Co.* (3) at pages 124, 125 (1890). As provisions relating to the safety of the public in connection with the management of a great Dominion undertaking they would appear to be eminently germane, if not absolutely necessary, to legislation on such a subject, and cannot be

(1) 25 Ont. App. R. 65. (2) 8 Ex. C.R. 349.
(3) 17 Ont. App. R. 86.

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Girouard J.

held to be invalid merely because in the mode in which Parliament has declared they shall be carried out, they, to some extent, affect property and civil rights. It cannot but be considered reasonable and right that the public, as represented by the municipalities through which the road passes, sharing in the advantages conferred by it and directly benefited by the measure of protection imposed and required, should share also in the cost of maintaining them. Legislation by which such liability may be imposed seems to me not essentially different—regarded as legislation relating to the railway—from that under which the road is created, and the compulsory acquisition of land, and the ascertainment of its price or value, provided for, *e.g.*, the cases of fencing and subtracting benefit derived from increased value of remaining land. It is not, in my opinion, *ultra vires* and, if not, I agree that the court cannot review the decision of the Railway Committee and declare that those whom they have decided to be interested in and liable to contribute to the cost of maintenance are not interested and liable. It was argued that if the county or township could be treated as interested the Railway Committee might as well declare that any other municipality in the Province, even the most distant, might also be so held, but I do not think that questions of *ultra vires* can be tested or decided by unreasonable or extravagant suppositions of that kind. It must be assumed that the Railway Committee will exercise the judicial powers which have been entrusted to it in a just and reasonable manner, and there is no reason to say that even as regards the county it has here acted otherwise. Many of the matters urged on the appeal, relating to the status of municipalities, their powers of taxation, etc., are really mere assertions in various forms of the principal objection, for if the legislation is *intra vires* municipal corporations are in no different position from natural persons, and there is no more difficulty in enforcing compliance with the order of the Railway Committee than in enforcing a judgment obtained against them in an ordinary action.

A long array of decisions has been quoted by the Attorney General for Canada in support of this judgment and, until our recent decision in *Re Railway Act*(1), be reversed, we are bound to hold that, in a case like this, the Dominion Parliament may interfere with property and civil rights and impose obligations upon municipalities as being incidents to the subject matter assigned to its jurisdiction.

An attempt has been made to distinguish cases in

(1) 36 Can. S.C.R. 136.

which a railway is constructed across a pre-existing highway. I fail to conceive how this fact can affect the jurisdiction of the Railway Committee. It may be of importance to apportion and determine the burden of keeping gates. But this has nothing to do with the jurisdiction of the Railway Committee; it is a matter left entirely with the Railway Committee, who may deal with it as in its wisdom it may deem just and in the public interest, without being subject to review by any court of justice.

I would, therefore, dismiss the appeal with costs.

DAVIES J.—The questions to be determined on this appeal are two. First: Had the Parliament of Canada when legislating with respect to railways within its jurisdiction the right to give to the Railway Committee power to apportion amongst parties interested the cost of the carrying out of such protective measures as was by the committee deemed necessary at the crossings of the railway and public highways? Secondly: If so, was the City of Toronto a "person interested" within the meaning of those words in section 188 of the "Railway Act of 1888," with respect to the crossings within the limits as to which an order had been made?

No question as to the reasonableness or justice of the orders impeached was or could be raised provided the Railway Committee had jurisdiction to make them.

It was suggested and argued, however, that the power of Parliament to legislate on the subject matter in dispute might depend upon the priority in existence of the railway or the highway and that while in a case where the railway crossed an existing highway such right might not exist, it might with respect to an ap-

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Davies J.

plication made by a municipality for leave to cross an existing railway by a contemplated highway.

Of course such leave might be given upon conditions which if accepted would be binding upon all parties, but apart from that special point I think the statutory powers conferred upon the Railway Committee to apportion the cost of the works ordered cannot, if *intra vires* at all, be limited or controlled by any question of the priority of the roads crossing each other.

I agree with Meredith J. in *Re Canadian Pacific Railway Co. and the County of York*(1), (from the judgment in which case this is practically an appeal) when he says:

> Complete legislative power admittedly exists somewhere. Nothing turns upon the wisdom or unwisdom, or the reasonableness or unreasonableness of the thing, or whether it is precedented or unprecedented; those are matters for legislative, not judicial, consideration.

The exclusive power to make laws for the construction and efficient operation, management and control, of such railways as have been by the British North America Act, 1867, assigned to the jurisdiction of the Parliament of Canada being vested in that Parliament, the sole question is whether this section 188 is not necessarily incidental and ancillary, or as put by Osler J. in the case above referred to "eminently germane if not absolutely necessary," to give full effect to the ample powers given and intended to be given to the Railway Committee for the safety of the travelling public alike by rail or highway.

Looking at the question in the large and as applicable to the conditions existing in Canada, we find three great transcontinental railways built or being

(1) 25 Ont. A.R. 65, at p. 79.

built across our Dominion connecting one ocean with the other. These roads necessarily cross hundreds of highways where there is little if any traffic. As population increases the traffic grows until a railway crossing of a highway on a level which one year required no special protection, in a few years might require watchmen and gates, and in a few years more either an overhead bridge or an expensive subway.

The increasing traffic demanding these prudent "measures of protection" may be due largely to the operation of the railway, or causes quite foreign to it, or to a combination of both. If Parliament is not justified by the necessity of the case in dealing with this traffic and doing so effectively, what authority can do so?

The power to deal, and to do so effectively, with the special conditions arising from a rapidly increasing traffic at a railway crossing of a highway must necessarily be dealt with by some paramount authority.

The power which the local legislature possesses of legislating with respect to property and civil rights would be manifestly inefficient and limited. The subject is not one admitting of dual legislation.

The only power capable of dealing fully and effectively with such a condition is that of the Parliament of Canada.

That in dealing with it property and civil rights are effected is a matter of course, but all interested parties may be dealt with and all interests affected legislated for. It seems to me in the very nature of things this must be so or the legislation would fail to fulfil its object, the public safety.

But it is said all this can be accomplished at the expense of the railway, and without assigning any

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Davies J.

portion of that expense to the municipality. Just so. It can be so. But Parliament having authority over the premises has chosen to say, we think a more equitable plan will be to invest a competent tribunal with the power of apportioning between the railway and interested parties the share of the cost of the protective measures each should bear.

The only question then remaining would be whether the municipality was a "person interested" within the meaning of these words in the section.

In the first place by R.S.C. ch. 1, sec. 7, sub-sec. 22, the word "person" includes any body corporate and politic so that if Parliament had power to do so it has declared municipalities interested as being within the classes liable to contribute to the expenses of the protective measures ordered.

By the "Consolidated Municipal Act of Ontario, 1892," ch. 44, sec. 3, the inhabitants of every city, etc., are declared to continue as a body corporate.

While there may be some doubt as to the complete title of the municipality to the soil or freehold of and in the public roads and streets within its bounds, there is none that such roads and streets are vested in it and under its jurisdiction and that it is the virtual owner of the public roads and streets within its bounds and liable to keep them in repair.

The practical interest, therefore, of the municipality in the road, and in the manner in which the Railway Committee deals with it whether by deflecting it or carrying it under or over the railway or merely causing gates to be placed across it with watchmen, seems to be indisputable. The municipality in this respect represents its entire population.

If its title is only in the surface and another person owns the soil below the surface that may be a

good reason for insisting that the varied titles and interests affected should be considered by the tribunal. But that is all.

Once you reach the point that the subject matter is one for Parliament to deal with, then it is for Parliament exclusively. There cannot be two conflicting tribunals legislating at the same time upon such a vital subject as the public safety at railway crossings. If for Parliament exclusively the legislation may cover all the ground necessary to make it effective and may in order to do so extend to branches eminently germane and ancillary even if not absolutely essential in the sense in which the appellant contends this legislation is not. And so it may not only affect and embrace interests other than those of the railway, but may do so in such a way as to compel them to contribute to carry out what is deemed necessary and adequate protection to the public under the circumstances in each case, the tribunal vested with the power of so determining being unfettered in the exercise of its judgment within its statutory powers and not liable to supervision or control by the courts.

The City of Toronto in its corporate capacity represents all of the inhabitants of the municipality in which the railway crossing is situate at which the protection works were ordered. As such it properly applied to have these protection works carried out. I do not think the mere fact of its application necessarily involved it in liability to pay any part of the cost of these works. But being the virtual and actual owner of substantial interests in the street or highway at and on both sides of the railway crossing and which interests were directly affected by the works asked for and ordered and at the same time the corporate representative of the residents and people directly interested

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Davies J.

in these works, I am of opinion that it is a municipality or "person interested" within the meaning of the section of the "Railway Act" under discussion and amenable for the purposes of the order made by the Railway Committee to its jurisdiction.

I am not able to appreciate the argument that because the municipality is one with powers and rights defined and limited by the provincial legislature it can therefore escape the responsibility which attaches to it as a person or municipality interested under the Act.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The respondents sued in this action to recover moneys spent in guarding their railway crossings of streets in the City of Toronto, alleging as the basis of such right of action certain orders made by the Railway Committee of the Privy Council, directing said appellants to repay to said respondents moneys spent by them in guarding such crossings.

The courts below following the result of a similar case, which is reported in 25 Ont. A.R. 65, gave judgment for these claims, and from that this appeal is taken by the said city.

The respondents' railway was built after the streets crossed had, except in the cases of two of the crossings now in question, been in use for some years.

These two exceptions are crossings of Dunn Avenue and Dowling Avenue effected by virtue of the passing of a by-law of the Village of Parkdale, now forming part of Toronto, assented to by the Great Western Railway Company, who were predecessors in title of the respondents, in respect of that part of their

road crossing the two streets thus opened across the railway tracks.

These two crossings seem to have been the result of a bargain whereby the railway company got rid of a liability to maintain several farm crossings.

These railways were built before the "British North America Act," 1867, was passed, and some thirty to forty years before the "Railway Act" we have to consider was passed.

No provision was made, so far as appears from the cases before us, at the time when any of these crossings, which are all level crossings, were constructed, looking beyond the immediate necessities of construction either as to future reconstruction or maintenance.

No provision was made in any of them, or likely ever thought of, for the future guarding of these crossings, for the purpose of protecting the travelling public on either highway or railroad.

As travel on both increased, and trains became multiplied and by reason of double tracking and increased rate of speed, doubly dangerous, some of these railway crossings, from time to time, became scenes of sad accidents which stirred the appellant's council to ask the Railway Committee of the Privy Council for some remedy for such a state of things.

This resulted in the said committee directing, by orders of 8th January, 1891, that gates and watchmen be provided within two months, and thereafter maintained by the respondents and the Canadian Pacific Railway companies respectively, as the case might require, at four of the crossings in question here. Then the order continued as follows:

> Where two railway companies use the same crossing each railway company to contribute one-third, and the municipality or municipalities interested, the other third of the said cost.

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Idington J.

Where one railway company only uses the crossing, the railway company to contribute one-half and the municipality or municipalities interested, the other half of the said cost.

Thenceforward nothing more seems to have been done, until the appellants again applied to the Railway Committee, on the 4th December, 1903, in regard to the above-named Dowling Avenue and Dunn Avenue crossings and the following order was made by said committee on 11th March, 1902:

The said committee, on the 21st day of December, 1900, heard counsel for the railway company and the said corporation respectively, and having duly considered the evidence submitted, hereby orders and directs, subject to the sanction of the Governor in Council, that the said railway company shall provide and keep day and night watchman at the said crossings, the wages of said watchman to be borne and paid by the Corporation of the City of Toronto.

It is upon these orders that respondents sue for the expenses of keeping such watchmen.

I do not think, as argued for respondents, that the applications by the appellants were, or that any one of them was, of such a character as to bind them to abide by any such orders as those so made.

All the municipal authorities did was to present to the power that possibly had the remedying of such a grievance as existed the facts relative to a public evil, from which some of the inhabitants of the city and others suffered.

It is said, however, that these orders were such as the committee, independently of any submission, had power to make by virtue of the following sections of the "Railway Act":

187. Whenever any portion of a railway is constructed, or authorized or proposed to be constructed upon or along or across any street or other public highway at rail level or otherwise, the company, before constructing or using the same, or in the case of railways already constructed, within such time as the Railway Committee directs,

shall submit a plan and profile of such portion of railway for the approval of the Railway Committee; and the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, authorize or require the company to which such railway belongs within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection,—*or to carry such street or highway either over or under the said railway by means of a bridge or arch instead of crossing the same at rail level,—or to divert such street or highway either temporarily or permanently,—or to execute such other works and take such other measures as under the circumstances of the case appear to the Railway Committee best adapted for removing or diminishing the danger arising from the then position of the railway;* and all the provisions of law at any such time applicable to the taking of land by such company, and to its valuation and conveyance to the company, and to the compensation thereof, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee under this section.

188. The Railway Committee may make such orders and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection, between the said company and any person interested therein, as appears to the Railway Committee just and reasonable.

I express no opinion upon the proper interpretation to be given to these sections 187 and 188, in the adjustment of the relations between a railway company and a municipality, arising out of the construction or reconstruction of a railway at its intersection with a highway.

But everything necessarily incidental to the execution of the powers of Parliament in relation to the building or reconstruction of a railway I assume is provided for, and all that might be raised in such case is thus out of the question before us.

All that concerns us here is whether these sections authorize orders such as sued upon; and if so, whether or not the Dominion Parliament had power to so enact.

The use of the words "persons interested" in section 188, is what the respondents rest their case upon.

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Idington J.

The word "person" by virtue of the "Interpretation Act" can undoubtedly include a subject corporate and politic to whom the context can lawfully apply.

But does the word "person" necessarily cover the cases of taxation for expenses of watchmen?

It appears to me that there may fall within the range of such a comprehensive section as 187 many cases of "persons interested" whereby an operative effect may be given to that phrase "any person interested" in section 188, without extending the meaning so far as to cover the meaning presented here for our acceptance. Is it not enough to say that full effect may be given to every word of these sections without making them cover pretensions for which *primâ facie* there is no foundation?

May not full and proper effect be given to the use here of the words "person interested" by its restriction to what is incidental to the cases of building or reconstruction? In either such case an effect is given to it. Individuals and corporations (municipal or otherwise) owning adjacent or adjoining property may need, in regard to building or reconstruction, to be so dealt with in the cases of arches, subways or diversions as to require the exercise of the power of directing costs to be shared according as their respective properties may be benefited. And in that class of cases effect would be given the words. Even the future hiring of watchmen might become a feature of the adjustment of the proprietary rights of such parties, one necessarily invading the other for purposes of construction.

That might give effect to every line and every letter of sections 187 and 188, but yet fall far short of supporting the pretensions needed to support these orders.

Let us analyze section 187 and its several relations to section 188, and see if it clearly expresses anything more than these possible incidents of construction.

The company crossing

shall submit a plan and profile, etc., and the Railway Committee if it appears to it expedient or necessary for the public safety may from time to time * * * require the company to which such railway belongs to protect such street or highway by a watchman and gates or other protection.

This is the first alternative for the protection of the street. In directing it the committee are pointed to the company alone, as the parties to supply watchmen and gates or other protection. It is a separate subject matter and is kept apart and dealt with as entirely different from what follows.

In that the section is only dealing with a crossing "at rail level or otherwise." The word "otherwise" might possibly cover a departure from exact level by grade up or down, yet be within the same general meaning of a level crossing which may need a watchman.

There is nothing in this which indicates a duty on the part of any one else than the railway company, but rather the reverse.

There are following this subject matter others of an entirely different nature, and three other alternatives, one to carry the highway over or under the railway; another to divert the highway; and a third to execute *such other works* and take *such other measures* as appear to the committee best adapted

for removing or diminishing the danger arising from the then position of the railway.

Then we come to section 188 and the committee is empowered

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Idington J.

to give such directions respecting *such works* and the execution thereof, and the apportionment of the *costs thereof* and of any *such* measures of protection.

What work? Surely not a gate. Clearly, I would say, some of the *works* contemplated by the three other alternatives. And what "measures of protection?" *"Any* such" must surely be of the same class as has immediately before these words been specified; that is in the last of the three alternatives, or possibly each or any of all three.

Obviously the phrase does not grammatically relate to any measures of protection other than "such" as are *"works"* and the execution thereof.

Excluding, as I suggest, gates from "such works" as being of too trifling a nature to so designate, and as a subject apart from manifestly important works contemplated in the latter part of the section, this would be clearly so.

It is not necessary to go so far as to hold that this analysis makes it absolutely impossible to apply the words "any such measures of protection" solely to the preceding "such other works and," etc., and "such other measures as under the circumstances of the case," etc., "appear," etc., and exclude the possibility of them relating to all that had gone before. It would, however, violate no canon of construction to adopt the restricted interpretation of these words, "any such measures of protection" in the way I suggest. And if that be done there is an end of the respondents' case.

I am concerned, however, only to shew this, that privileges given by statute to private corporations must be restricted to what is clearly expressed, and that the remarkable concessions given by these orders, especially the last one, do not rest upon any such

clear expression in this statute as the legal principle I invoke requires.

It is well we should clearly apprehend what is implied in the maintenance of this last order. To begin with; the statute contemplates only an "apportionment of the costs," but this order directs the whole to be ultimately borne by the municipality. It takes out of the hands of the municipality the police business of protecting travellers on the streets, transfers that to a railway company, and orders the municipality to recoup the railway company thus substituted in control. In the case of this particular order no gates or works of any kind are in question.

The crossings in question in this order are the result of a compact between the Village of Parkdale and others concerned and the railway company.

This compact relieved the Great Western Railway Company of other burthensome crossings, and it does not seem as if ordinary good faith had been kept in thus shifting the consequent burthen upon the city.

It was necessary that the public should be protected. It undoubtedly would be within the power of Parliament to enact anything binding the railway, to take such steps as would furnish such protection. That was done by these orders in directing the erection of gates and the keeping of watchmen at the crossings.

But when that was done the imposition of the expenses thereof, upon the municipality, was something unnecessary and in the last analysis is but an assertion of the power of taxation not for the general public benefit, but in one of its most offensive forms, purely for the amelioration of the finances of the railway company.

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Idington J.

In the carrying on of any business there comes with increased business increased burthens in the way of discharging duties to others. It is in the way of carrying on a highly dangerous business, such as that of the respondents', natural that the increase renders the carrying of it on more and more dangerous and demands greater care and more expensive machinery to avert these necessary dangers.

In every other dangerous business the burthen of protecting the neighbour is cast upon those carrying on the business, and not upon the neighbour. Why should railway companies be exempted from this general rule?

The municipality even if it owned the adjacent property, as it probably does not, would by following this general rule be protected but not burthened.

But when we reflect that the municipality, in the exercise of its jurisdiction over this adjacent soil, is, amongst other things, only serving the purpose of enabling the customers of this railway company to reach its stations, to do business with it, we see less reason to create or impose upon the municipality a new duty in this regard.

By statute the municipality has a duty to keep in repair the road, and see that its physical condition is such that it can be travelled over.

No one ever dreamt of this statutory obligation extending to the extraneous dangers such as steam whistles in factories alongside of it, or the result of a train lawfully crossing it or running along it.

No one has ever had the temerity to invoke the law to give a remedy for losses caused by the exercise of such powers as those enjoyed by the railway or others.

The negligence, if any has ever been found to exist,

leading to accidents, has been that of the railway company, and not of the municipality.

I entirely dissent from the proposition put forth in argument that the fee simple of the land over which a highway has been established necessarily becomes vested in the municipality.

Indeed, except where the municipality has expressly acquired the fee simple, which it may or may not according to the facts of each case, as incidental to the execution of its powers for opening, assuming, or in any way acquiring, a road for public use, and the cases, if any, covered by section 601 of "The Municipal Act," I think the fee simple is not vested in the municipality.

I am unable to see how, even if it were, it could as in this case, as urged, aid respondents' position. See Mr. Biggar's valuable Municipal Manual, pp. 818 and 819, for references that settle presumptions of, and kind of, ownership of highways such as may exist in a municipality.

Again the appellant being a municipal corporation possesses only such powers as the "Municipal Act of Ontario" has given and is subject to such liabilities as that Act expressly or impliedly imposes.

There is no power that I can conceive of in the Dominion Parliament to *directly* add to or take away from the powers of the municipality.

Indirectly Dominion legislation, as for example, making the omission to observe a duty already existent a crime, may so operate on municipal or other corporations as apparently to conflict with this statement. On consideration there is clearly only apparent conflict.

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Idington J.

The cases of *Valin* v. *Langlois*(1) and *Attorney-General* v. *Flint*(2), at first blush suggest an analogous case under the "British North America Act, 1867," conflicting with this proposition—clearly distinguishable, however, I say.

But the courts are for the administration of justice generally, and that ought to include dealing with what flows from legislation within the proper competence of the Dominion Parliament. And in the latter case I cite the then Mr. Justice, now Sir Henry Strong, was careful to say that the court might not be compellable to act though it could if Parliament chose to authorize it.

Can it be said that the protection of the public in relation to the running of a railway rendered it necessary or reasonably necessary to make such orders as those now in question? Necessity may in any case warrant Parliament going far to execute its powers.

But I cannot find such necessity, either reasonable or unreasonable, for the part of the order requiring the municipality to refund the railway company expenses incurred in the course of its business.

Public convenience or expediency in themselves, without necessity, cannot justify Parliament stretching its supposed authority.

And clearly, where it would as here be quite competent for the legislature to so reduce or abolish the taxing power of any municipality that in no way could Parliament reach them pecuniarily, it is difficult to support a proposal for Parliament to direct levying of rates on such a body.

The province has always paid part of the municipal expenses and might if its revenue sufficed go a step further and pay all.

(1) 5 App. Cas. 115. (2) 16 Can. S.C.R. 707.

To illustrate, further, turn to the plenary powers of Parliament in relation to banks and banking; navigation and shipping; beacons, buoys and light houses; and we can, without difficulty, find as good, if not better, reasons for protecting, in one case by police protection, the banking institutions or, in the others, the travelling public by directing a guarding of the harbour, so as to make it safe for ingress and egress of vessels, and in giving facilities for landing passengers and freight; and by keeping the lights burning to shew the way to the traveller or passing ship.

Would it be competent for Parliament to cast the burthen of these expenses, or any of them in any one of those several cases, upon the municipality most concerned?

It seems to me as if there would be no greater stretch of authority in doing so than we have now under consideration, whenever we go in any one of them, beyond the boundary line of reasonable necessity.

Such I conceive the way in which we must approach the consideration of such a question, when, if ever, it becomes necessary to determine as I do not presume to do the limits in this regard of the power of Parliament.

What I am concerned with here is to point out the probably grave consequence of raising such extreme pretensions of power, and the improbability that such an issue was ever intended to be raised, or is raised by the words of the sections I have quoted.

I think when we get thus to the very root and essence of the matter we are impelled to say Parliament can never have intended, and ought not to be held to have intended, by any such enactment as section 188 of the "Railway Act," to have conferred on a

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Idington J.

body constituted for other purposes than imposing local taxation, or enacting police protection, the power to do so, in a case quite unnecessary for the full execution of the powers conferred by the "British North America Act."

Would Parliament ever have ventured, by virtue of the powers it is given by that Act, to have enacted by express words that each municipality through which a railway runs, and therein crosses streets or roads of the municipality, should protect and pay for the protection of the crossings by an annual rate sufficient for the purpose?

If it could do this, why not enact that the railway should be free from taxation?

We have had a case presented to this court (I refer to the cases of the *Municipality of North Cypress* v. *Canadian Pacific Railway Co.*(1)), which raised the issue in a different form. That such a question as raised in the last mentioned cases should be thought arguable shews how far beyond Parliament the power of exempting from taxation is generally held to be in the older provinces, that did not get their powers from the Dominion.

The converse power to impose a tax is just as far and none the less because indirect.

Conceding to the full that the proprietary rights and all other powers or rights of a municipality must bend before the proper execution of the will of Parliament within its powers, does not uphold the pretension to add to the taxing power of the municipality beyond what the legislature has defined or may define. The possession or the right of the municipality may be invaded, but its limits of the power of taxation cannot be increased by Parliament.

(1) 35 Can. S.C.R. 550.

Public convenience or protection would, if any basis to rest upon, which I deny, enable the extension of such powers as here asserted to the erection of railway stations and their lighting and policing as within the power.

The provisions in the statutes that preceded that now under consideration are, on this point of the relation of the municipal and railway authorities, instructive, both as to the condition of things at the time of confederation, and to see how before that time railway corporations, including respondents, were supposed to be the servants of the public, but since then their growth in wealth has been accompanied apparently (if we contrast these orders with penalizing power on same subject formerly in power of municipality) by a progressive and aggressive attitude compared with that of the ancient times. See 14 & 15 Vict. ch. 51, secs. 12 and 13; "The Consolidated Statutes of Canada," 22 Vict. ch. 66, secs. 12 and 141; 31 Vict. ch. 68, secs. 10, 36 and 37; 42 Vict. ch. 9, secs. 15, 48 and 49; 47 Vict. ch. 11, secs. 3 and 10; 49 Vict. ch. 109, secs. 12 and 48, 183 to 186.

We should not lose sight of these former times, as the standard of thought prevailing when the "British North America Act" was passed, and in the light of which we ought to interpret that legislation, which though in form the work of the Imperial Parliament, was but the reflection of what Canadians desired. That habit of thought must be considered if correct interpretation is to be had.

I am of the opinion that the municipal corporation is not a "person interested" in the sense necessary to support these orders for repayment to the company of the expenses indicated.

And if none of the interpretations I have suggested

1906

CITY OF TORONTO v. GRAND TRUNK RY. CO.

Idington J.

in regard to these words be tenable I am, for the reasons already indicated, of opinion that (in the sense required to uphold these orders) they are *ultra vires* of Parliament.

I think the appeal should be allowed and the action be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. C. Chisholm.*

Solicitor for the respondents: *W. H. Biggar.*