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*Oct. 23.
*Dec. 13.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

HIS MAJESTY THE KING, EX REL. EDWARD JOHN KEAYS..... } RESPONDENT.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS).. } APPELLANTS;

AND

HIS MAJESTY THE KING, EX REL. T. R. D. BOTTELEY..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Railways—Constitutional law—Legislative jurisdiction—Application of statute—"The Prairie Fires Ordinance"—Con. Ord. N.W.T. (1898) *c.* 87, *s.* 2—*N.W.T. Ord.* 1903, *c.* 25 (1*st sess.*) *and c.* 30 (2*nd sess.*)—*Works controlled by Parliament—Operation of Dominion Railway.*

The provisions of section 2, sub-section (2), of chapter 87, Con. Ord. N.W.T. (1898), as amended by the N.W.T. Ordinances, chapter 25 (1st sess.) and chapter 30 (2nd sess.) of 1903, in so far as they relate to fires caused by the escape of sparks, etc., from railway locomotives, constitute "railway legislation," strictly so-called, and, as such, are beyond the competence of the Legislature of the North-West Territories. *The Canadian Pacific Railway Co.* v. *The Parish of Notre Dame de Bonsecours* ([1899] A.C. 367) and *Madden* v. *The Nelson and Fort Sheppard Railway Co.* ([1899] A.C. 626) referred to.

The judgments appealed from were reversed, Idington J. dissenting.

APPEALS from judgments of the Supreme Court of the North-West Territories, discharging orders *nisi* for writs of certiorari to remove and quash convic-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

tions against the railway company for unlawfully kindling prairie fires, at or near Mortlach and Ernfold, respectively, in the Province of Saskatchewan, contrary to the provisions of "The Prairie Fires Ordinance" as amended.

The principal questions at issue on the appeals were as to the application of the provisions of "The Prairie Fires Ordinance," in respect to kindling fires on prairies and the construction of fire-guards, to railways subject to the control of the Parliament of Canada.

Wallace Nesbitt K.C. and *Beattie* for the appellants.

Ford K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—The subjects of these appeals are judgments of the Supreme Court of the North-West Territories discharging two rules *nisi* for writs of certiorari for the purpose of quashing convictions against the appellant company under section 2 of chapter 87 of the "Consolidated Ordinances" of those Territories as amended in the year 1903. This section so amended enacts as follows:

> 2. Any person who shall either directly or indirectly, personally or through any servant, employee or agent—
>
> (*a*) Kindle a fire and let it run at large on any land not his own property;
>
> * * * *
>
> shall be guilty of an offence and shall on summary conviction thereof be liable to a penalty of not less than $25 and not more than $200 and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by any such fire.

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(2) If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing but such person or his employer shall not be liable to the penalties imposed by this section, if, in the case of stationary engines, the precautions required by section 12 have been complied with and there has been no negligence in any other respect, or in the case of railway or other locomotive engines such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than two hundred or more than four hundred feet therefrom a good and sufficient fire-guard of ploughed land not less than sixteen feet in width kept free from weeds and other inflammable matter and the space between such fire-guard and such line of railway is kept burned or otherwise freed from the danger of spreading fire and there has been no negligence in any other respect.

(3) For the purpose of ploughing any fire-guard as in the next preceding sub-section provided and of freeing from inflammable matter the land between such fire-guard and the line of railway any railway company is hereby authorized to enter upon any uncultivated or unoccupied land without incurring any liability therefor provided that no unnecessary damage shall be done.

An objection in the nature of an objection *in limine* which was raised on behalf of the Crown can be more conveniently dealt with after discussing the substantial question presented by the appeal.

That question is: Was the Legislature of the North-West Territories competent to pass the enactments of sub-section 2 in so far as they relate to fires caused by the escape of sparks from railway locomotives?

It must, I think, be answered in a sense favourable to the contention of the appellant company on the short ground that the enactment of legislation professing to regulate a Dominion railway *quâ* railway was *ultra vires* of a Legislature, whose powers, it is conceded, were not greater than those of the legislature of a province. That such legislation is by

the combined effect of sub-section 29, of section 91, and of sub-section 10, of section 92, of the "British North America Act, 1867," *ultra vires* of a province is, I conceive, not open to dispute. In *The Canadian Pacific Railway Co.* v. *The Parish of Notre Dame de Bonsecours*(1), at pages 372 and 373, Lord Watson, speaking for the Judicial Committee, used these words:

> The British North America Act whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive rights to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so-called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers.

The principle thus enunciated was applied by the Judicial Committee in the subsequent case of *Madden* v. *Nelson and Fort Sheppard Railway Co.*(2), at page 628.

The real controversy is, therefore, whether or not the legislation in question falls within the category of "railway legislation" strictly so-called. It is argued that as the aim of the ordinance is not the regulation of railways, but the preven-

(1) [1899] A.C. 367.

(2) [1899] A.C. 626.

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tion of prairie fires, it cannot justly be described as "railway legislation." Having regard to the immediate purpose and effect of the enactment it is, I think, not very profitable to dwell upon the ultimate aim of the legislature in passing it. Obviously those parts of it which especially apply to railways—those that is to say with which we are here concerned —were designed with the object of preventing the spread of fire in consequence of the emission of sparks from locomotive engines. But if the legislature has sought to attain this end by passing measures applicable to Dominion railways, which if effective would in substance be "railway legislation," that was plainly, under the authorities referred to, in excess of its powers.

It cannot be disputed that the sub-section in question was intended to and does apply to Dominion railways. The legislative authority of the Legislature of the North-West Territories relating to railways, as such, extended to no railways but street railways and tramways, and having regard to the objects of the ordinance, it is plain that the scope of the term "railways" as used in it cannot be so narrowed as to exclude railways outside those classes.

What then is it that the legislature has enacted respecting Dominion railways?

The section quoted creates an offence which is made up of two elements; the kindling a fire and the letting it run at large on land not the property of the person kindling it. Whether, to constitute the offence, the kindling must be upon such land is immaterial. It is at all events clear that the offence is constituted if it is upon such land that the kindling and the letting the fire run at large both take place. Then the

section proceeds to enact in effect that where a fire is caused by the escape of sparks from a locomotive engine it shall be deemed to be kindled by the person in charge or who should have been in charge of the locomotive; that is to say (where the locomotive is on a railway), by the railway company. The net result of these provisions as they effect a Dominion railway company is, that if by the escape of sparks from a locomotive on its line a fire is caused on land not its own and it allows that fire to run at large upon such land, such a company is guilty of an offence, punishable in the manner prescribed by the ordinance.

But the ordinance proceeds to provide a possible defence for railway companies; and it declares that no railway company shall, although a fire has been caused by such an escape of sparks, be subject to any of the penalties imposed by the section if such company shall shew that the locomotive was supplied with certain specified appliances; that (where the fire has occurred in a "prairie country") the land adjoining the railway line was protected by fire-guards of a prescribed character on both sides of the line at a prescribed distance from it; and that there was no other negligence.

Now it will not, I suppose, be doubted that in the absence of negligence or the breach of some specific duty the fact that a fire is caused by the escape of sparks from a locomotive engine in the course of the normal operation of a railway under the authority of Parliament does not render those responsible for the operation of it liable to legal proceedings as for a wrongful or unlawful act.

They are in such circumstances not so liable because they have done nothing wrongful or unlawful;

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and in the case of a fire so caused occurring upon land which is not their property there can plainly, apart from some special enactment, be no duty incumbent upon them to prevent it running at large. Since there is no Dominion enactment imposing such a duty upon companies operating railways under the legislative control of the Dominion it would appear to follow that legislation by a province professing (in the absence of negligence or the breach of some duty imposed by competent authority) to subject such companies to an obligation to prevent the spread of such fires is, as plainly repugnant to the law of Canada permitting the use of steam locomotives upon such railways, *ultra vires*. And, subject to the effect of the provisions relating to the defences which I have just mentioned, that seems very clearly to be what, on its fair construction, the ordinance in question enacts.

What then is the effect of these last mentioned provisions? Obviously a company having failed to prevent such a fire, occurring in a prairie country, from running at large could not under those provisions escape the penalty imposed by satisfying the tribunal of the faultlessness of its equipment or even by going further and satisfying the tribunal of the entire absence of all negligence in the operation of its line; it must, in order to avail itself of the defence afforded by the ordinance, having shewn these things, still shew, in addition, that it had maintained fire-guards of the character described.

In effect, that is to say, the failure to maintain such fire-guards coupled with the failure to do something which the legislature was incompetent to require it to do is made (in the case of a fire arising without blame on the part of the company from the lawful use of equipments sanctioned by law) to consti-

tute on its part a punishable offence. I own that such an enactment appears very plainly to me to be an enactment prescribing the maintenance of such fire-guards as adjuncts to Dominion railway lines as a condition of the lawful operation of them in the localities to which it applies; and, therefore, to be an enactment professing to regulate the working (if not the construction) of such lines; and, consequently, to be within Lord Watson's words "railway legislation strictly so-called" as used by him in the passage I have quoted.

The provision relating to appliances for locomotives is, I think, affected by the same vice; and an examination of the provision relating to "other negligence" is, I think, unnecessary. The ordinance authorizes a single defence comprising three elements. It is impossible to eliminate from that defence the requirements relating to fire-guards or to the equipment of locomotives without wholly altering the character of the defence and substituting for that authorized by the legislature one which the legislature has not authorized. That is in effect to substitute for the enactment which the legislature has passed something to which it has not given its sanction and to give effect to this latter as the law of the land—not, I think, a course which a court of law can legitimately take.

These considerations would seem also to meet the objection mentioned at the outset. In substance it was argued that, eliminating as *ultra vires* the provisions of the ordinance prescribing regulations upon the subjects of locomotives and fire-guards, the remains of the enactment (that is of sub-section 2), are sufficient to support the conviction. In the view I have just expressed this objection must obviously fail. Another possible objection not taken before us or in

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the court below, ought perhaps to be noticed. The conviction, being a conviction under the leading enactment of section 2, does not, it might be argued, at all depend upon sub-section 2 for its validity; and cannot, therefore, be invalidated as a result of the conclusion that the provisions of that sub-section relating to railways are inoperative. Since, however, there is an entire absence of the particularity required by law from both the information and the conviction, *Smith* v. *Moody* (1), we must, I think, before giving effect to such an objection, look at the proceedings to ascertain whether there was before the magistrate any charge or any evidence of an offence of which the appellants could be legally convicted. He could not legally convict them of an offence or legally try them upon a charge under an *ultra vires* enactment; and, the proceedings shew plainly, that not only there was no evidence of an offence other than an offence under sub-section 2, but, that, otherwise than under it, no charge was, in point of fact, either tried or preferred.

IDINGTON J. (dissenting).—These are two appeals from the judgments of the Supreme Court of the North-West Territories, dismissing motions to make absolute rules *nisi* for writs of certiorari for the purpose of quashing convictions of the appellants for breaches of the Prairie Fires Ordinance of the said Territories as amended by the addition of sub-section 2, in the first session of 1903, and sub-section 3, in the second session of the same year, and of which the material parts are set out below.

By section 39 of the "Supreme Court Act," we are given jurisdiction to hear an appeal from the

(1) (1903) 1 K.B. 56.

judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari*, etc. * * * not arising out of a criminal charge.

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I assume, for the reasons hereafter appearing as incident to the main argument, the nature of these regulations is such that they are not an invasion of the field of criminal law.

The writ of certiorari issues, unless when applied for by the Crown, only in the discretion of the court. If the writ has been refused in the exercise of the judicial discretion of the court section 45 of the same Act denies the right of appeal.

If we assume that the judgment was not an exercise of judicial discretion, though it might be said of necessity to be such, and then proceed to consider the appeal, we are confined to ascertaining whether or not on the law and facts the magistrate had jurisdiction to convict. If *ultra vires* legislation has been found side by side with that *intra vires* and the latter suffice to maintain, on the facts, jurisdiction, we cannot because erroneous views were put before the magistrates, or the court below needlessly gave a wrong reason, quash the conviction. This is not the possible case of a magistrate failing to weigh the evidence because of his sole reliance on an *ultra vires* provision.

The judgment of the court below is right (though some reasons may or may not be erroneous) if the magistrates had jurisdiction to try the charge. The case of *The Colonial Bank of Australasia* v. *Willan* (1), has long been the ruling case upon the subject. Assuming the law to be as expressed at pages 442 *et seq.* thereof, or even going so far as in the Ontario cases cited to us, to look at the evidence to find if any in support of the conviction, we are confined here to very narrow ground.

(1) L.R. 5 P.C. 417.

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If we can conclude as a matter of law that a railway company incorporated by the Dominion Parliament, pursuant to the powers about to be referred to, is entirely free from liability to submit to anything a local legislature by its enactments may prohibit, and fix a penalty for breach of, then the objection to the magistrate's jurisdiction, involved in these motions, may be arguable.

The real questions the appellants desire us to solve may not be involved in this proposition, but they can only be solved in the appellants' favour on this appeal, in case we can so determine.

I propose therefore to consider the case from that fundamental point of view. The ordinances in question are as follows, and the information is laid, and conviction is, under the original section 2, though argument was addressed to us as to the amendments only:

2. Any person who shall either directly or indirectly, personally or through any servant, employee or agent—(a) kindle a fire and let it run at large on any land not his own property; * * * shall, be guilty of an offence and shall on summary conviction thereof be liable to a penalty of not less than $25 and not more than $200 and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by such fire.

(2) If a fire shall be caused by the escape of sparks or any other matter from an engine or other thing it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing but such person or his employee shall not be liable to the penalties imposed by this section if in the case of stationary engines the precautions required by section 12 have been complied with and there has been no negligence in any other respect, or in the case of railway or other locomotive engines such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than two hundred nor more than four hundred feet therefrom a good

and sufficient fire-guard of ploughed land not less than sixteen feet in width kept free from weeds and other inflammable matter and the space between such fire-guards and such line of railway is kept burned or otherwise freed from the danger of spreading fire and there has been no negligence in any other respect.

(3) For the purpose of ploughing any fire-guard as in the next preceding sub-section provided and of freeing from inflammable matter the land between such fire-guard and the line of railway any railway company is hereby authorized to enter upon any uncultivated or unoccupied land without incurring any liability therefor provided that no unnecessary damage shall be done.

The first question raised by these enactments is as to the power of a local legislature to impose such penalties as are provided for by section 2 as it originally stood.

This power, if it exist, rests upon section 92, sub-section 15, of the "British North America Act, 1867," operating within the scope of sub-section 16.

If anything in physical conditions confined to or peculiar to a province constitutes any matter, one of a local nature, within the meaning of this sub-section 16, then the danger from prairie fires, (so destructive and so little understood elsewhere in Canada, than in the prairie provinces), surely is one of and needs the application of some legal provisions of a local character, to provide and protect against such dangers.

This was not in itself questioned in argument. It was argued, however, in general terms that this legislation was *ultra vires*. In section 2 as it stood originally there would seem to have been, unless (for the present at all events assumed not to be), trenching upon criminal jurisdiction, an unassailable enactment; and the amending sub-sections 2 and 3, if properly applied and limited to such acts and parties as would be amenable to provincial legislation seem equally unassailable.

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It was contended, however, that the appellants were, by reason of their incorporation, within the exclusive powers of the Dominion, by virtue of sub-section (*a*) of sub-section 10, of section 92, and section 91, sub-section 29, of the said Act to build and run a line of railway propelled by steam power, freed from any obligation to observe any legislation, on the part of the local legislature, upon the subject of prairie fires.

Is this broad proposition tenable? If not how far is such a railway company free from anything a local legislature can enact?

It cannot disregard any of the license laws of a province, or by-laws of a municipality created by, and so empowered by, a province to pass such by-laws. At least none of such companies have tried to do so, as yet.

Can it disregard, so as to endanger the existence of towns or of great cities, the ordinary fire limits by-laws thereof, prohibiting the erection, within such limits, of buildings, of forbidden inflammable materials?

Can it refuse to submit to the inspection by municipal or provincial authorities, acting within the meaning of mere municipal regulations in that regard, of the chimneys in its buildings?

Can it refuse to conform to the public health requirements demanded by pressing need, to prevent the spread of disease merely because these requirements have been enacted, as they usually are, by local legislatures or some local body constituted by a local legislature for the purpose?

In a word, can it, in the negligent doing of the work of building and running or both, befoul the streams, pollute the air, endanger life and property

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and destroy everything in its path, regardless of all those local regulations that bind every person and every other corporate body in a province?

Is it a sufficient plea, in answer to such acts and breaches of local regulations, that it has had conferred upon it by the Dominion the corporate power to build a line of railway?

Could an individual, so empowered, so escape? It is quite competent for the Dominion Parliament to confer upon a single individual the power of building any such railways as in question. What greater rights than any one else could he have, apart from those he might be specifically endowed with, for that purpose? What exemptions from the common burthens can his property, when he has thus acquired it, have, or he from the duties of citizenship, incidental to such ownership, unless such exceptions are expressly given or are necessarily incidental to the due exercise of the powers given him?

If a person or corporation so authorized to construct and run a railway can do none of these several, locally forbidden, things, how can he or it rightfully kindle fire by means of improperly running an engine that is built and run, quite regardless of any care in structure or handling, to provide against such escape of fire, and kindling of fire, as must inevitably follow its use in such a way?

If he or it run a road in such a manner surely the power the Dominion has conferred has been exceeded.

Can it be said, in the absence of any regulation of the Dominion, express or implied, that one so far exceeding the express powers given and so acting has, in some implied way, the high authority of the Dominion Parliament to sanction such acts?

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In the absence of such sanction how can it be said that such conduct, when carried on within a province, is entirely beyond its legislative control? That without legislative sanction of any sort, such a person or such a corporation, merely by reason of a limited authority given, can run riot and do that which no one else can do is rather a broad proposition.

It seems to me, all to resolve itself into a question of the right of the local legislature to enact laws, tending to protect property against the dangers of a local nature, arising from that negligence which the Dominion Parliament never sanctioned nor intended to sanction nor legislated as to.

Can it be said that because the Dominion has entirely omitted (and I think its delegation of power in that regard until acted on leaves it omitted) any provision in the way of regulating such a mode of exercise of power, it has conferred a right to indulge in unqualified recklessness? Or can it be said that though it has not done so, yet there never can be any legislative effort made elsewhere to prevent such wrong?

Must it be taken that the right of action each sufferer may or must as a legal result have for the damages sustained be the only legal remedy against such a state of things?

I think not, and that unquestionably the acts of a local legislature properly providing due and reasonable means for the preservation of property, in the province, from fire, are within the scope of sub-section 16, and in the absence of any legislation by the Dominion Parliament, are enforceable to punish offenders, personal or corporate, that may by his or its, *unauthorized acts,* endanger such property.

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The negligent setting of fire on the part of a railway run by Dominion authority and *letting it run at large,* which is the gist of the offence, would be in excess of its power and thus unlawful and has not any colour of Dominion sanction.

The accused in order to meet these charges had only to come into court and say that what was done, and is charged, was done by virtue of this high authority, and acting within it, and prove such fact and claim discharge.

Do the recognized exceptions of the ordinance attempt to prevent that? To my mind clearly not.

The issues raised were much and needlessly obscured by confusing the validity of the legislation itself which may be *intra vires* as to almost every line of it properly applied; with the persons or corporations to which it might be applicable in given circumstances, and the different ways in which they might come within its range so far as to render them respectively amenable to the several provisions.

I think section 2 as it originally stood is quite wide enough, when due regard is had to the word "indirectly" (and so reading it as necessarily including negligently), to cover such an offence as is charged against the appellants herein.

The word "indirectly" can indeed hardly have any meaning here unless so read.

It comes then, thus looked at, to a question of the onus of proof at the trial. Can we say that such onus is by any general principle of law made to rest upon him who accuses a railway company of a breach of law to shew that it was beyond all peradventure of excuse or justification, and anticipate the defence possibly existing under the same or another Act, or

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must not the matter stand as in all other cases that where men *primâ facie* are made to appear, to have offended against law, they must plead and prove such justification or excuse as law and fact may give.

It seems to me the *primâ facie* case was made when the company's servant in the course of his employment dropped the coal or hot cinders that kindled the fire which was neglected and that by neglect was let run at large on land not the company's own; and it then devolved on the company to excuse or justify.

And I am of opinion that, whilst it may be optional for a Dominion railway company to avail itself of the exculpatory part of the amending sub-sections and the powers given thereby, there is nothing in them commanding this Dominion railway company or any other railway company to rely for its justification or exculpation on these sub-sections or any of them.

To imply otherwise, as to these sub-sections, is to read into them what is not expressed and what would not be imputed to them if used by a sovereign legislature whose powers were unlimited upon trial of a charge laid thereunder for breach thereof.

Try to frame an indictment on such a supposed Act, and charge that the accused had run an engine without a smoke stack equipped as mentioned; and another count that the company had not constructed fire-guards yet had run engines on its road; and another count combining both such offences.

Could such an indictment escape being quashed as to every count?

Or try an indictment thereon for setting a fire by means of so running an engine without a proper smoke stack and without fire-guard and without other negligence.

The combination would be fatal.

Assuming an indictment on such a statute, maintainable by alleging the substance of the offence, and accompanying that with an allegation of such a specific act of negligence as the defective smoke stack or want of fire-guard how could it be claimed that in the absence of offence in regard to defective smoke stacks or want of fire-guard, the accusation of some other offence, for some form of negligence, other than and in the absence of either of these, would not lie? Thus we are brought back face to face with and cannot escape the broad question of negligence.

That negligence which I find within section 2 remains also within sub-section 2 as well, when, as here and thus, the moot questions are eliminated.

A by-law may be attacked by impeaching a conviction thereunder, but because some of its provisions are *ultra vires* that would not render the whole void, or conviction bad, if a severable part applicable to the offence could be upheld.

Revenue laws have been found impracticable of uniform application, when sometimes some persons or things and not others, come within their respective range, as the cases of *Thomson* v. *Advocate General* (1842) (1); *Blackwood* v. *The Queen* (1882) (2), and others cited in Hardcastle's chapter on "Territorial effect of Statutes," illustrate.

In English law we cannot easily find many apt illustrations arising from the need of differentiating in this way so as to apply distributively the words of a statute to meet varying conditions of person or things or places.

(1) 12 Cl. & F. 1. (2) 8 App. Cas. 82.

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Sutherland on Statutory Construction (2 ed.), in chapter 9, on "Statutes void in part" is replete with that class, of American cases, forming partial illustrations and some strikingly in point as at pages 584 *et seq.*

English law when extended to a colony and superseding some local law of the colony no doubt would raise the same sort of question which also must continually arise under the "British North America Act, 1867," as interpreted in the case of *The Attorney-General of Ontario* v. *The Attorney-General for Canada.* (1)

What may be *intra vires* to-day may in its application to or range of objects, be found in whole or in part inoperative to-morrow.

I therefore think even if we assume, without deciding, the smoke stack provision, as an enactment, (though merely a superfluous substitution for, and mere repetition of the common law) to be void, and the fire-guard provision to be also void, and thus discarded, that their elimination of law or fact, from the case only renders the case of negligence the clearer.

There are many operations of Dominion companies, either a steam railway, or banking, or shipping, or ferry, or interurban and interprovincial, company, as well as use of a smoke stack or engine, by the first, that may render the wrongful setting of fire and its spread a subject for local legislation.

In either of the ways I have suggested the ordinance should be read, and treated, unless I can say as I cannot, that there was no evidence of negligence and hence no jurisdiction, the appeal should fail. The "Ernfold" case is, I assume, so entirely within this

(1) [1896] A.C. 348.

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view of negligence that the court below is unanimous, though, in the way Mr. Justice Wetmore puts it, needlessly resting the onus on the requirements of the ordinance as to smoke stack. The common law required independently of this ordinance an engine of the sort in question to have, as matter of reasonable care,

> suitable smoke stack netting and ash pan netting in good repair and in proper place.

I hardly see how unauthorized enactments can change the common law so as to entitle a railway company to dispense with a proper smoke stack, etc. The onus rested upon the company to meet the *primâ facie* case of negligence.

I confess, however, that the want of knowledge of the localities and points referred to in the evidence in this "Ernfold" case renders it to me less clear than it evidently was to those in the court below. I would not, however, interfere as apart from the reason given, resting upon ordinance instead of common law, as to negligence, there seems in substance no ground of complaint.

There seems, at first blush, by reason of the way the matter has been treated, more in the "Mortlach" case, to reduce that case to a question of the right to impose upon a Dominion railway company the duty of making fire-guards. But, on the evidence the appellants' servants for twenty minutes or half an hour saw the smoke yet failed to move, until the fire kindled in a neglected spot of dry grass on the right of way had spread for half a mile, on other than the company's land and the terror stricken people had gathered to extinguish it.

Assuming it optional with the company to disregard the provisions for fire-guards, the doing so ren-

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dered it all the more incumbent upon it to have the section men on the watch, for the setting of fire which sometimes, it is said, is inevitable with the most carefully constructed and managed engine.

I cannot assent to the suggestion that when fire escapes in such a case and kindles the grass on the company's own ground and spreads therefrom through neglect it cannot be made amenable, in the absence of Dominion legislation, to local legislation, for such neglect.

No attack is made upon the form of conviction, in either case, in the grounds taken by the rule *nisi*, or in argument, and no argument was made on the facts that would enable me to say that the evident negligence was not in either case sufficient in itself, if negligence ever can be the basis of local prohibition in relation to anything a Dominion corporation can do. That it could be so seemed strenuously denied. Indeed that is to my mind the sole issue here.

I am inclined to hold the opinion that some cases have shewn an undesirable tendency on the part of superior courts, in discharging their duty of keeping, by virtue of the writ of certiorari, magistrates within their jurisdiction, to act as an appellate court.

We ought not, I conceive, to encourage such a tendency.

We ought only to entertain an appeal of this kind upon the plainest error of the court below, indeed a something clearly indicating usurpation of authority by the magistrate, upheld by the superior court of a province.

There are or can be brought about, with a little patience, much ampler means of effectively and authoritatively defining the constitutional limitations

of provincial legislative authority than generally lies within the scope afforded for quashing a conviction upon the return of a writ of certiorari. The issue attempted to be raised by the denial of any power of legislative prohibition, by a local legislature, on the subject of negligence that might include what a Dominion company may be guilty of, is far more important than it seems at first sight.

The fire-guard provision, treated as optional, may be of a beneficent nature, especially in view of section 298 of "The Railway Act," and not objectionable as an attempt at widening the powers of a Dominion corporation to acquire real estate. Possibly, though repudiated in this argument, Dominion companies may have the right, in common with others, to avail themselves of local regulations to even pull down neighbouring buildings to protect their own from spread of fire.

I refrain from expressing any unnecessary opinions upon these or other points of law presented for solution, further than that which appears in my dissent from the broad proposition I have set forth above and combatted throughout.

I call attention to *The Canada Southern Railway Company* v. *Jackson*(1), in which this court upheld the "Workmen's Compensation Act" of Ontario as binding upon Dominion railway companies as well as other parties in respect of acts of negligence, for which they had not been theretofore liable.

I have assumed that the exercise of the penalizing power that is given the provinces by the "British North America Act, 1867," is applicable, in proper cases, to negligence, and that it is no greater stretch

(1) 17 Can. S.C.R. 316.

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of authority to apply it to companies deriving their corporate existence from the Dominion Parliament, than to apply the civil remedy acted upon in that case.

The exercise of any such power must not exceed any of the recognized limitations, such as criminal law, or come in conflict with the Dominion legislation properly and authoritatively enacted.

The Bonsecours Case(1) also lends countenance to this way of looking at the matter.

The Madden Case(2), when the legislation there in question is examined closely, has nothing I can see to do with the matter. It was an attempt to conflict with Dominion legislation and enforce fence building where impliedly, if not expressly, this latter had freed the company from so doing.

The appeals should be dismissed with costs.

Appeals allowed with costs.

Solicitor for the appellants: *J. A. Allan.*

Solicitor for the respondent: *Frank Ford.*

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(1) (1899) A.C. 367.

(2) [1899] A.C. 626.