THE ALBERTA RAILWAY AND IRRIGATION COMPANY (DEFENDANTS) ..... APPELLANTS;

1911

*March 2, 3.
*May 15.

AND

HIS MAJESTY THE KING, *ex rel.* THE ATTORNEY-GENERAL OF ALBERTA (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF ALBERTA.

Irrigation works—Nuisance—Obstruction of highways—Duty to build and maintain bridges—Construction of statute—61 *V. c.* 35, *ss.* 11, 16, 37.

By "The North-West Irrigation Act, 1898" (61 Vict. ch. 35), it is provided, (sec. 11*b*) that irrigation companies should submit their scheme of works to the Commissioner of Public Works of the North-West Territories and obtain from him permission to construct and operate the works across road allowances and surveyed public highways which might be affected by them; that (sec. 16) his approval and permission for construction across the road allowances and highways should be obtained prior to the authorization of the works by the Minister of the Interior of the Dominion, and, (sec. 37), that during the construction and operation of the works, they should "keep open for safe and convenient travel all public highways theretofore publicly travelled as such, when they are crossed by such works" and construct and maintain bridges over the works. The commissioner was the local officer in control of all matters affecting changes in or obstructions to road allowances and public highways vested in the territorial government "including the crossing of such allowances or public highways by irrigation ditches, canals or other works." The commissioner granted permission to the appellants to construct and maintain their works across the road allowances and public highways shewn in their ap-

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

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

plication "subject to the provisions of section 37 of the said North-West Irrigation Act," without imposing other conditions.

Held, reversing the judgment appealed from, (3 Alta. L.R. 70), the Chief Justice and Idington J. dissenting, that the absolute statutory duty in respect of the construction and maintenance of bridges imposed by section 37 of "The North-West Irrigation Act, 1898," relates solely to highways which were publicly travelled as such prior to the construction of the irrigation works, and that, as no further duty was imposed by the commissioner as a condition of the permission for the construction and maintenance of their works, the company was not obliged to erect bridges across their works at the points where they were intersected by road allowances or public highways which became publicly travelled as such after the construction of the works.

Per Davies and Duff JJ.—In construing modern statutes conferring compulsory powers, including powers to interrupt the exercise of public rights, questions as to what conditions, obligations or liabilities are attached to, or arise out of the exercise of such powers, are primarily questions of the meaning of the language used or of the proper inferences respecting the legislative intention touching such conditions, obligations and liabilities to be drawn from a consideration of the subject-matter, the nature of the provisions as a whole, and the character of the objects of the legislation as disclosed thereby.

NOTE—Leave to appeal to the Privy Council was granted, 20th July, 1911.

APPEAL from the judgment of the Supreme Court of Alberta (1), affirming the judgment of Scott J., by which the action was maintained.

The action was brought, on behalf of the Government of the Province of Alberta, to compel the defendants to erect and maintain bridges across their irrigation canal at certain points where it crossed road allowances and highways which had not been publicly travelled as such prior to the construction of their irrigation works. The trial judge entered judgment, *pro formâ,* in favour of the plaintiff and the Supreme Court of Alberta, on an appeal, affirmed the decision. The judgment now appealed from

(1) 3 Alta. L.R. 70.

ordered that the company should erect the bridges or "abate and keep abated the nuisance created through the interruption of public travel by the maintenance and operation of their said irrigation canals across the said road allowances at the points * * * mentioned respectively, so that the said original road allowances respectively, having been adopted and now being used (save as to those portions extending for a short distance on each side of the said points respectively) as highways by the public, may be conveniently travelled by the public."

The questions at issue on the appeal are stated in the judgments now reported.

Ewart, K.C., and *E. F. Haffner,* for the appellants.

S. B. Woods, K.C., for the respondent.

THE CHIEF JUSTICE (dissenting)—I agree in the opinion stated by Mr. Justice Idington.

DAVIES J.—I agree in the opinion stated by Mr. Justice Duff.

IDINGTON J. (dissenting)—This case is within a narrow compass, yet to understand it properly we must bear in mind the governmental and other condition of things in the North-West Territories, before and at the time of the appellants receiving their charter of incorporation, and the concession of water now in question.

These vast and almost uninhabited territories, after being acquired by Canada, in 1870, were legislated for by Parliament and within such legislation

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Idington J.

ruled by officers appointed by the Dominion Government.

Legislative as well as administrative powers were delegated from time to time by Parliament or, within lines it laid down, by the Government to the council or councils which, in time, thereby grew to be representative assemblies, or partly so, concurrently with the powers of the executive council proper.

All the details relative to this development except the one or two features directly bearing on this case may be passed by. In the delegating of these local powers from time to time the legislation therefor was not always as well expressed or the powers as well defined as they might have been. In the rapid changes thus made some confusion was apt to arise, as we will see presently, in the carrying into execution of the legislative and administrative purposes of the parent and delegated powers.

This vast territory was from its acquisition being rapidly settled. To promote that settlement the lands were surveyed from time to time, according to a plan which, speaking generally, divided the land into sections of a mile square and left for the use or creation of future highways, road allowances of a chain in width, between each of these sections, so that each section was surrounded by a road allowance.

It would be as well also to bear in mind that the Canadian Pacific Railway Company was entitled to select each alternate section in the whole stretch of country from east to west and forty-eight miles wide, which were to be free from taxation for a long period.

It was, I may observe, from the earliest period of this rule, as these enactments relative to this company shew, hoped to carve out provinces each with

autonomy like that of the other provinces of Canada, and that municipal institutions should, when settlement required them, be created by each of such provinces.

There had been, as the arid, or periodically arid, character of parts of the country became known, various legislative plans adopted for meeting this obstacle in the way of settlement and improvement.

These plans, saving rights acquired under them, were set aside by the "North-West Irrigation Act, 1898." Section 4 of this Act enacted that there should be deemed to be vested in the Crown

> the property in and the right to the use of all the water at any time in any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water.

This Act covered all such water in the North-West Territories, except in specified districts, and prohibited the diversion of it, saving by those having prior rights or licenses under this Act.

The water might be used for domestic purposes on the land where found, but its use for irrigation had to be acquired by means of licenses to be issued to individuals or companies from the Department of the Interior.

A comprehensive scheme is laid down in the Act and powers are given the Minister of the Interior for making regulations to carry it out.

The Commissioner of Public Works of the North-West Territories has, in any case, to be memorialized by any one desiring a license to divert and use such water.

The preliminary requirements to be observed by any of such memorialists as apply for a license for diverting, or diverting and carrying, a less quantity

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Idington J.

than twenty-five cubic feet of water per second, are of a simpler nature than those asking concessions respecting that or any greater quantity.

But the party applying for a license for the greater quantity had, in applying, to observe the same preliminary terms and conditions specified for an application for a license for the less quantity and in addition thereto a great deal more.

These several requirements are set forth in sections 11 and 12 of the Act.

I assume the prescribed mode of application set out in these sections was complied with.

Amongst other things these sections required, was an application, under section 11, sub-section (*b*) of the Act, which is as follows:—

(*b*) an application on forms provided by the commissioner, for the right to construct any canal, ditch, reservoir, or other works referred to in the memorial, across any road allowance or surveyed public highway, which may be affected by such works.

The following is the form used by the appellants in making their application, so far as shewn in the case herein:—

Lethbridge, January 31, 1899.

To the Commissioner of Public Works,
Regina, Assa.

Sir,—We beg to inform you that we have made application to the Minister of the Interior, under the provisions of the North-West Irrigation Act, for permission to divert water from the St. Mary River, on the south-east quarter of section 36, township 1, range 25, west of the fourth meridian, for irrigation purposes, and to construct the canals, ditches, reservoirs and other works necessary for the utilization of such water.

We have received the authorization for the construction of the works in question, but would point out that in completing such construction it will be necessary to cross the road allowance, or public highway, and we therefore beg to apply for permission under the North-West Territories and Dominion Lands Act to construct and maintain the canals, ditches and reservoirs across the road allow-

ances or public highways at the places indicated in the accompanying plan, the necessary bridge or bridges at these points being constructed and maintained by us as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act.

Your obedient servant,
THE ALBERTA IRRIGATION COMPANY,
Per C. A. MAGRATH, Superintendent.

The concluding words "as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act" are evidently misplaced. The sentence seems rather long for the clear expression of its purpose. These words at the end, in one way of treating the sentence, are nonsense, and hence mere surplusage.

But giving them a meaning they were evidently intended to bear, as if they had been inserted after the words "point out" near the beginning of the sentence, they are comprehensible.

In any way we may treat them (unless we are to assume there never was a comprehensible application made as required by the Act, and, hence, the whole concessions given by the commissioner void)—Can we read the notice without imputing to the applicant the express tender of an undertaking to construct and maintain the necessary bridge or bridges at the points indicated on the plan?

The only points indicated are the crossings of each road allowance or public highway.

Had there been some selected from these and specially designated, such designation might have excluded the remaining crossings; but as it is, the proffered undertaking can only mean all. No doubt the parties concerned so understood the undertaking to be and acted accordingly.

This is, if possible, still clearer when we turn to

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Idington J.

sub-section (*d*) of the same section 11, which is as follows:—

> (*d*) a plan, in duplicate, on tracing linen, shewing in detail all head-works, dams, flumes, bridges, culverts or other structures to be erected in connection with the proposed undertaking,

and ask its meaning.

We find applicants thereby required to furnish along with the memorial a plan of the bridges to be constructed on the proposed work. And on turning to those filed with this application we find two distinctly different bridge plans.

One is evidently intended to meet the statutory requirement of section 37, to which I will again refer, and the other is a twelve-foot bridge. What is this twelve-foot bridge for? Is its draft or plan not to meet this very requirement of sub-section (*d*) and its construction to fit the proffered undertaking contained in the application? What other meaning can it have?

Are we to discard all these things because the western man in a hurry had not taken time to revise his form and allowed the projector to write his requisition and undertaking on a clearly defective form?

It is a form that refers to some Act which I cannot discover, and which certainly is not the true title of this Act. We must treat the application as designed to meet the requirements of the Act, or as a nullity, for the parties had no power save when acting in conformity with the statute.

If we treat this application as null, what rights can appellants have? They are bound by the statute to apply on a form provided by the commissioner who impliedly must have had the instructions and regula-

tions of the Minister of the Interior for a guide, as the express power is given him by section 51 to prescribe the forms to be used.

I see no insuperable difficulties either in the way of our maintaining the rights of the appellants or the rights of the Crown, when we have regard to the considerations already adverted to and the nature of the business the parties had in hand.

The commissioner could not be endowed by the North-West Council or the Legislative Assembly which defined his duties, with power to deal with such a subject, regardless of the purposes of the Dominion.

The forms were to be provided by the commissioner, but the power in section 51 shews the forms were to be framed by the Minister.

It is true the commissioner was given by the Legislative Assembly in the year preceding the passing of the "Irrigation Act, 1898," power to deal with questions affecting changes in, or obstruction to, roads

> including the crossing of such road allowances or public highways by irrigation ditches,

but this of necessity must be referable to Irrigation Acts which, as already noted, were swept away by this Act of 1898.

It is conceivable, however, that in referring to him by section 16 of this latter Act, the granting of a certificate, regard was had to the local legislation.

Now what did the commissioner do in response to this application? He granted the permission but the certificate thereof shews no reference to the proffered undertaking.

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Idington J.

Surely that must be read as an assent to the application on the terms offered.

It seems rather a strong thing to presume that he intended to reject the terms proffered, which were so very onerous for the applicant, and so directly for the benefit of the public and governments he represented.

To do so would seem like a betrayal of the trust reposed in him.

I can draw no such inference. Nor do I see the slightest ground for such an implication.

The certificate ends by using the words

> subject, however, to the provisions of section 37 of the said North-West Irrigation Act.

It is urged this impliedly relieved the applicants from the comprehensive words of the undertaking. How can that be so? It but repeats what the statute had imposed and could not be dispensed with by this officer. The applicants and he were both bound by that statutory provision which by its terms pre-supposes a travelled highway. It is the case of mere road allowances he had, and we have, to deal with.

It may be admitted, for argument's sake, a crossing of a road allowance was subject to his judgment, as, for example, at a point where the configuration of the ground was such as to render a highway impossible. That might be a case for his dispensing with a bridge.

He could, for such or other good reason, have dealt with crossings, not covered by section 37, but yet within his power, in a way that might by his manner of selection perhaps have given rise to the application of the maxim *expressio unius est exclusio alterius* relied on, and thereby relieved the applicant in regard to other places within this power. Then

this argument might have had great force if so applied to the necessary crossings under his control.

How that can apply here I cannot understand. I cannot see how any expression relative to something else than that within his power and so being dealt with by him can have any bearing on the matter. It seems to me clear that all that was meant by this reference to section 37 was of abundant caution and does not affect the matter one way or another.

And when we find nothing done to alter the plans submitted for two kinds of bridges the undertaking stands good.

It seems this application and the certificate were printed forms likely in use for another Act, and hence clumsy of expression relative to this, yet these words

> the necessary bridge or bridges at these points being constructed and maintained by us

have a terseness and force that cannot be set aside.

They are the language the statute provides should be supplied by the commissioner for the applicant to use, and we are not idly to assume he departed from the requirement of his own implied demand according to the statute, merely because he did not reiterate same in his assent.

And I find a printed form in the case before us which suggests an evident explanation for the peculiarity of ending this appellants' application seems to wear.

In this form a blank space is left for receiving the name or designation of the party on whom the burden of building bridges and maintaining them was to be cast.

In that blank when used by the appellants (as ap-

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Idington J.

plicants) the word "us" was written in, no doubt by its officer, and it reads in the copy used for this case as if no pause or punctuation ever could have been needed. Hence if this surmise or inference be correct, appellants' neglect to punctuate is entirely to blame for the present misleading shape which the end of their application assumes.

The limited nature of the commissioner's powers relative to these road allowances and public highways, does not seem to me to have conferred any jurisdiction to destroy either a public highway or a road allowance or authorize any one else to do so. His jurisdiction was entirely of a preservative character.

It is evident that the construction of a canal forty-eight feet wide as proposed in the one case, or of sixteen feet wide as proposed in the other of those instances presented for our consideration, of necessity certainly had, unless provided against, this result of destruction and not preservation.

I do not think the commissioner ever supposed he was assenting to such destruction, nor do I see how we can fairly impute such kind of assent to him, in face of the accepted proposal providing for all the necessary bridges over road allowances or public highways.

Nor can his adding from abundant caution the reference to the statutory provision section 37, which is entirely applicable to other cases than road allowances, justify such an inference.

The express language of the application refers to "road allowances or public highways," whilst section 37 clearly refers only to travelled public highways, and deals not with mere road allowances. The application does not restrict its undertaking to build

bridges only at public highways either then existent or by future development to become, before construction, public highways.

Nor should we forget that concessions of this kind given the appellants are to be restricted, and the authority therefor restricted, within what is clearly and explicitly expressed or by implication as clear as if so expressed.

The intrusion involved in the execution of such works without clear authority, upon parts of the Crown domain consecrated as these road allowances were for a specific purpose, would be as illegal as if they had been fenced off by the appellants without clear and explicit authority.

Either such works, including such consequences without express authority from the dominant power, must be held illegal and liable to abatement, or their continuation regardless of the tender of sufficient necessary bridges to overcome the consequences of such intrusion must be held illegal; and abatement must follow, unless the tender thereof which induced the grant be fully implemented.

I might let the matter rest here but perhaps I ought not to pass in silence other points pressed in argument.

The attempt to import section 37 into the application in substitution for the section 11, sub-section (*b*) already referred to as therein, seems without foundation.

The elaborate, and I respectfully submit, irrelevant argument to prove that the term "road allowances" means only public highways, leaves them as distinctly different as ever. Every public highway may be on, or be loosely referred to as a "road allow-

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Idington J.

ance." But every road allowance is not a public highway; yet when it becomes such, will need a bridge over such canals as in question here, and when, and so often as necessity therefor arises, the undertaking is to become from time to time operative.

Let us bear in mind the condition of things already briefly referred to, as existing in the country in question and the claim in argument that this building and maintaining of bridges involves enormous expense.

The more the expense is magnified the less force favourable to the appellants does any argument derived from expense appear to have.

If the section 37 of the statute is the only authority to be observed, and the only means out of the difficulty, there would seem to have been innumerable crossings by way of bridges and approaches to be constructed when the district got settled. And at whose expense? And for whose benefit but those holding lands thus irrigated?

It seems impossible to suppose that Parliament intended to supplement this concession by assuming the burden.

If local taxation is the only source left, the upland landholder deriving no benefit might have to pay thus for the man on the level plain. And until Canadian Pacific Railway lands had become taxable the burden in some districts covered by this legislation would probably fall on a fractional part of a district concerned only with the need for bridges and perhaps having none of the irrigated lands within its jurisdiction.

If the cost of bridge building is borne by the water company then the charge finally falls on those who

are paying for the use of the water and receiving the benefit thereof.

Every improvement helps even those not directly benefited. Yet taxation for others' benefit does not tend to promote settlement, and its incidence does not compensate. The Canadian Pacific Railway construction apparently conferred direct benefit on everyone within the range of the part exempted from taxation, yet common knowledge tells us its repetition of exemption from taxation most unlikely in 1898, for a purely private enterprise like this.

It may be said these things have nothing to do with the interpretation of the statute. I agree; nothing of statutes and contracts must be construed in such a manner as to lead to absurdity.

But these things constitute the conditions and surrounding circumstances that so evidently must have been present to the minds of those who asked in no doubtful terms for a concession, but were granted it in terms alleged to be ambiguous.

Again it is said some bridges have been built by the Alberta Government. What does that amount to? It is said to have been done under protest. But whether so or not the circumstances are not at all of the same character as of a man who has made a grant being met by his own acts thereafter as interpretative of his intention relative to an ambiguous term of the grant.

The province was created after all these happenings now in question, and it may well be that somebody had blundered. We have only too much apparent in this case of how errors may occur in transacting government business in a country where conditions relative thereto are rapidly changing.

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Idington J.

The great effort in argument seemed to be addressed to the proposition that section 37 must govern all that was ever conceivably within the range of the commissioner's business vision, or powers in law, to impose.

What can such a proposition lead to? When we reflect that this Act was equally applicable to the possibly common case of the farmer or farmers in need of water for irrigation purposes, applying for a license therefor.

The grant prayed for in such case may involve the crossing (by means, for example, of a pipe or ditch of a capacity to carry only what a pipe of three inches or three feet in diameter might carry) of one or more road allowances not yet become travelled highways.

Who is to determine the question of the right to cross such road allowances and the terms upon which the leave is to be given? And by what procedure is such a determination to be reached?

At each step in the proceedings up to the officer who finally grants the permission to cross such road allowance, the man and the officer in each such case are identical with those who had to be consulted to certify and to do all leading to the granting and to grant such permission as was given to the appellants.

Yet we have two or three things urged upon us herein as if undoubted law, that if acted upon would lead to extraordinary results in the operating of this Act in this connection.

One is thus stated in the appellants' factum:—

> The "necessary" bridges were, of course, those which were rendered necessary by the statute under which the application was made. And that the Commissioner of Public Works so understood, is shewn by the language in which he couches his permission:—"sub-

ject, however, to the provisions of section 37 of the said North-West Irrigation Act."

It would have been quite irregular for the commissioner to impose any condition not warranted by the Act. He did not do it. And it may fairly be assumed that the company did not voluntarily assume any such liability.

The contention means, if it means anything, that the only thing the commissioner could do in the case of the farmers requiring permission for a pipe of a capacity of three inches or three feet in diameter across a road allowance or travelled highway, was to require they should build a bridge as provided for in section 37, or put the Public Works Department or other public authority to the expense of providing for all time a culvert for the sole benefit of such grantees.

It first assumes that an officer empowered to act on behalf of the Crown, can never stipulate for anything conditional to his consent unless his power has been expressly clothed with a provision enabling the public to be so protected. And in the next place it assumes that a grant obtained by virtue of such condition is perfectly good. In other words, the grantee can repudiate, and by his repudiation acquire something he never could have got but by breach of faith.

I cannot accept such a doctrine as law. Such a grant has been obtained either by fraud or mistake, if the officer had no right to stipulate; and work constructed thereunder must be liable to abatement.

It is further to be observed that said section 16 of the Act requiring a certificate as stated above, contains all the legislation of the Dominion relative to the commissioner's power or duties in connection with the subject now in question. Certainly there is thus afforded the amplest scope for him so far as that legislation is concerned. And when we have regard

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Idington J.

to the power conferred by the above-mentioned enactment of the assembly, how can it be said he had no power to impose any conditions or stipulate for anything the public weal required at his hands in the discharge of his duty.

How can it be said he was confined to observing or to the stipulating for the observance by others of section 37 in the Act? He had no power relative thereto. He could not dispense with its operations for an instant. It bound him and it bound the promoters, and still binds appellants. And to assume as a mere matter of course he was doing so, seems either idle, or that we are to assume he was an idle and useless functionary.

If he had no power beyond the limits of this section 37, which is plain and expresses a purpose that becomes operative under certain conditions and not otherwise, why should there be a reference to him at all?

Again, it seems as if the man or company demanding a right of way across a road allowance dedicated to the public use when the district had not yet become so settled as to have any need for a bridge, must as an initial step have imposed by the commissioner upon him or it, the burden of needlessly constructing a bridge such as section 37 specified, or nothing.

It is unnecessary in this view to consider the question of want of authority, or semblance thereof, respecting the subsidiary undertaking secondly in question herein.

Any questions as to the mandatory form of the judgment directing building of bridges where no authority may exist for the constructing of the works necessitating same, can be met by modification there-

of, if the respondent be so advised as to ask herein for same.

It is competent for the respondent to waive the extreme right he may have to relief, and accept in any conditional form found advisable, a judgment within and subject to such conditions.

I would allow such amendment in this regard by way of variation as the respondent may desire and be advised.

Meantime I would dismiss the appeal with costs.

DUFF J.—The appellants, the Irrigation Company, have established irrigation works in Alberta under the authority of the "Irrigation Act of 1898." Their works include canals or open ditches which intersect roads now used for public travel at different places, and the controversy that has given rise to the action is upon the question whether the appellants are or are not under an obligation to provide bridges for the accommodation of the traffic at these places.

The appellants do not dispute that they were and are obliged to make provision for the passing over their works of the traffic upon highways which had actually been in use for public travel before those works were constructed across them. They admit that section 37 of the Act imposes that duty; but they deny that any duty is incumbent upon them to provide for traffic upon highways that were not so used until after the construction of the works — in which category the roads in respect of which this controversy arises are admitted to be. It is disputed by the appellants that, at the time of the construction of these works, these roads were, in law, public highways. I do not think it necessary to decide that point, and

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Duff J.

for the purposes of this case I shall assume in favour of the Crown that they were.

The Crown rests upon two distinct grounds: 1st, that as a condition of the permission (necessary under the statute) to cross the highways in question, the appellants were required to enter into (and did so) an obligation to construct such bridges as should be necessitated by their works; and 2ndly, that the right derived from the statute of constructing their works over a given highway was in every case burdened with a co-relative duty to make provision for the passage of public traffic over the parts of the highway affected by the exercise of the right whenever such provision should be reasonably demanded by the requirements of that traffic.

The second of these contentions may be conveniently considered first. The learned judges of the full court of Alberta have unanimously upheld this contention, basing their view mainly upon the authority of a series of decisions of which the latest is *Hertfordshire County Council* v. *Great Eastern Railway Co.* (1).

I do not think it necessary to discuss these decisions in detail. As I read them they are not inconsistent with what I take to be a settled principle in the construction of modern statutes conferring compulsory powers, including powers to interrupt the exercise of public rights; namely, that the question of what conditions, obligations or liabilities are attached to or arise out of the exercise of such powers is primarily a question of the meaning of the language used or of the proper inferences respecting the legislative intention touching such conditions, liabilities and ob-

(1) [1909] 2 K.B. 403.

ligations to be drawn from a consideration of the subject-matter, the nature of the provisions as a whole and the character of the objects of the legislation as disclosed thereby.

The statute in question was a re-enactment of a statute passed in 1894, with some changes not without a bearing on the construction of the Act. The parent enactment made provision for the construction of irrigation works under the authority of the Governor-General in Council according to plans to be approved by the Minister of the Interior. In 1897, a representative "Legislative Assembly" was for the first time constituted for the North-West Territories. The legislative authority vested in the assembly was subject to the control of the Dominion Parliament; but, broadly speaking, extend to the same subjects as those assigned to the provincial legislatures and an executive was established responsible to the assembly. When in the following year, 1898, the "Irrigation Act" was re-enacted, its provisions were changed to suit the altered circumstances. The memorial praying for authority to execute irrigation works and the plans of such works were to be filed at Regina in the office of the Commissioner of Public Works—a member of the executive of the territories; the documents were to be examined by the engineer-in-chief of the territories, and the approval of the chief engineer was one of the conditions which the Act required to be observed before the execution of the works could be authorized by the Minister of the Interior.

The changes touching the matter of the interference with highways are important and significant.

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Duff J.

The Act of 1894 contained (section 31) a provision in these words:—

> Any person or company constructing any works under the provisions of this Act shall during such construction keep open for safe and convenient travel all public highways theretofore publicly travelled as such, when they are crossed by such works, and shall, before water is diverted into, conveyed or stored by any such works extending into or crossing any such highway, construct, to the satisfaction of the Minister, a substantial bridge, not less than fourteen feet in breadth, with proper and sufficient approaches thereto, over such works; and every such bridge and the approaches thereto shall be always thereafter maintained by such person or company.

There was a further provision requiring the information forwarded to the Minister to contain a description of bridges at highways and farm crossings, but otherwise no express mention of the subject of highways. The Act of 1898 reproduced the first mentioned section as section 37; but it further required as a condition of a grant of authority by the Minister that the consent of the territorial Commissioner of Public Works to the construction of any work across any road allowance or surveyed public highway that might be affected by such works, should first be obtained. It is to be observed that road allowances became vested in the territorial executive and assembly before 1898; and that the phrase "surveyed public highways" refers to highways transferred under the authority of statute to the territorial government by the Government of Canada.

The duty of dealing with obstructions to road allowances and public highways vested in the territorial government was specifically placed upon the Commissioner of Public Works by an ordinance of 1897 (No. 17); and the same ordinance provided for the appointment of a deputy-commissioner, who should also be chief engineer.

I do not think that, in view of these provisions, an intention can be imputed to Parliament to impose an absolute obligation such as that which it is now sought to fasten upon the company in respect of highways and road allowances to which section 37 does not apply; the general effect of the provisions of the Act seems rather to be that Parliament has left in the hands of the territorial authorities the protection of the interests of the public in such highways and road allowances; and consequently, to ascertain the obligations of the irrigation company in this respect, we must look to what passed between the company and the territorial commissioner at the time the permission to construct across highways was granted. The respondent relies upon the words of the company's application. It will be convenient to set out in full this application and the formal certificate of permission to cross road allowances issued by the Commissioner of Public Works of the territories; and they are as follows:—

Lethbridge, January 31, 1899.

To the Commissioner of Public Works,
Regina, Assa.

SIR,—We beg to inform you that we have made application to the Minister of the Interior, under the provisions of the North-West Irrigation Act, for permission to divert water from the St. Mary River on the south-east quarter of section 36, township 1, range 25, west of the fourth meridian, for irrigation purposes, and to construct the canals, ditches, reservoirs and other works necessary for the utilization of such water.

We have received the authorization for the construction of the works in question, but would point out that in completing such construction it will be necessary to cross the road allowance, or public highway, at the points indicated on the general plan herewith, and we therefore beg to apply for permission under the North-West Territories and Dominion Lands Act to construct and maintain the canals, ditches and reservoirs across the road allowances or public highways at the places indicated in the accompany-

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Duff J.

ing plan, the necessary bridge or bridges at these points being constructed and maintained by us as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act.

Your obedient servant,
THE ALBERTA IRRIGATION COMPANY,
Per C. A. MAGRATH, Superintendent.

Canada,
North-West Territories,
Department of Public Works,
Regina, March 15, 1899.

This is to certify that the Alberta Irrigation Company, having been authorized under the provisions of the "North-West Irrigation Act" to divert water from the St. Mary River on the south-east quarter of section 36, township 1, range 25, west of the fourth meridian, and to construct the necessary canals, ditches, reservoirs, and other works for the utilization of such water for irrigation purposes, is hereby granted permission, under the provisions of "The Public Works Ordinance" relating to road allowances and public highways, to construct and maintain the canals, ditches, reservoirs or other works forming part of such authorized system, across the road allowances or public highways at the point or points shewn by the plans filed by the said The Alberta Irrigation Company in the Irrigation Office, subject, however, to the provisions of section 37 (31 struck out) of the said North-West Irrigation Act.

(Sgd.) J. H. ROSS,
Commissioner of Public Works.

It is argued that there is to be found in these two documents read together an undertaking on the part of the company to construct and maintain such bridges as might from time to time become necessary to furnish proper accommodation for public travel upon the highways crossed by the company's works. I do not think this is the natural construction of these documents. The company appears to me to be proposing to construct and maintain a bridge or bridges at such places as shall be nominated by the commissioner, or, in other words, to be submitting itself to such conditions as in this respect the commissioner may think fit to impose; and, in granting the

application, the commissioner restricts himself to requiring a compliance with section 37. To my mind, it is not easily conceivable (if the view of the commissioner had been that the company was entering into the large undertaking now attributed to it) that he would have refrained from noticing the undertaking in the document in which his permission is expressed. Moreover, any doubt arising upon the meaning of these documents as touching this point, when read by themselves, would appear to be settled in favour of the company by the subsequent conduct of the parties. Paragraphs 14 and 15 of the statement of defence shew that bridges were built and have been maintained by the governments of the North-West Territories and Province of Alberta, upon road allowances intersected by the company's canals, since the granting of this permission; and until very recently no claim has been made upon the company by any of the governments concerned in respect of the cost of constructing or maintaining these bridges. That, in the absence of some other explanation—and none is forthcoming — seems to shew conclusively that the territorial Commissioner of Public Works did not understand the company to have entered into any such obligation as would support the claim made in this action.

I think the action fails.

ANGLIN J.—This action comes before us in the form of a special case upon pleadings and admissions settled between the parties. The question in controversy is whether the appellants are or are not obliged to erect bridges at points where their canals or irrigation ditches intersect road allowances or surveyed

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Anglin J.

public highways which have become publicly travelled roads only since the construction of the works.

The appellants constructed their works under the authority of the "North-West Irrigation Act, 1898," 61 Vict. ch. 35, (D.), to the provisions of which the powers conferred on them were made subject by section 16 of their original Act of incorporation, 56 Vict. ch. 69, (D.).

A study of the "North-West Irrigation Act, 1898," has satisfied me that Parliament therein provided fully and exhaustively for the crossing by irrigation ditches of all highways and road allowances, and for the protection of public interests therein. Whether, as argued by Mr. Woods, the "public highways theretofore publicly travelled as such" dealt with in section 37 are confined to old trails still in use, jurisdiction over which had not been transferred to the Legislature of the North-West Territories, but was still vested in the Dominion Department of the Interior, or whether, as contended by Mr. Ewart, they also include road allowances and surveyed highways which are in actual use for public travel at the time of construction and over which the local legislature had been given jurisdiction and control (60 & 61 Vict. ch. 28 (D.), secs. 18 and 19; 55 & 56 Vict. ch. 15 (D.), sec. 6), it is incontrovertible that, by the words "any road allowance or surveyed public highway," clause (*b*) of section 11 is made applicable to all highways and allowances for roads which irrigation ditches may cross and which are not covered by section 37. It would therefore seem to be not only unnecessary, but inadmissible to seek for implied obligations on the part of licensees operating under the statute in regard to the crossing of highways or

road allowances other or greater than those imposed by its provisions. By section 37, Parliament has imposed upon the licensees an absolute obligation in regard to every public highway publicly travelled as such before the construction of their works to provide against interruption of safe and convenient travel after, as well as during construction. The existing conditions of travel with which this section deals involve the necessity of some such provision as it makes for bridging. But in the case of a highway which, although surveyed, was not actually in public use before the works were constructed, and in the case of a mere road allowance shewn upon a plan of survey—whether it should be regarded as a highway in law or merely as a reservation which might, at a later period, become a highway — the necessity for bridging and the kind of bridge which might be requisite would obviously depend upon the nature of the surrounding country, the likelihood of the surveyed highway or road allowance coming into public use, the character of the traffic for which provision might be necessary, and other considerations upon which it would be eminently proper that a responsible and well informed local official should exercise his judgment.

These surveyed highways and road allowances having been placed under the control of the local legislature, that body by the "Public Works Ordinance of 1897" (No. 17, secs. 3 and 8) provided for the appointment of a Commissioner of Public Works for the North-West Territories who should be a member of the executive council, and it empowered him to

deal with all questions affecting changes in or obstruction to any road allowance or public highway which has been vested in the North-West Government for public use, including the crossing of

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Anglin J.

such allowances or public highways by irrigation ditches, canals or other works.

It is to this responsible officer that, under clause (*b*) of section 11 of the "Irrigation Act," the petitioner for a license must present his application

> for the right to construct any canal, ditch, reservoir or other works * * * across any road allowance or surveyed public highway;

and it is his permission to so construct such works which must be certified to the Dominion Minister of the Interior before he may be asked to authorize the construction of the works (section 16). As to existing travelled highways, section 37 makes provision for the protection of public interests; as to surveyed highways and road allowances not publicly travelled before the construction of the works, those interests are protected by the powers vested in the local Commissioner of Public Works, whose permission to carry the works across such highways and road allowances the applicant for a license must obtain before he can procure the Minister's authorization to proceed with construction. It follows that to the discretion of this member of the local government is entrusted the duty of making such provision as may be requisite and adequate for the protection of the rights of the public in regard to surveyed highways and road allowances not actually travelled as public highways before his permit is obtained. It is his duty to

> deal with all questions affecting changes in or obstructions to

such highways or road allowances, including the crossing of them by these irrigation ditches. To his judgment Parliament has committed the determination of the circumstances in which permission to cross should be granted or withheld; to his discretion it has entrusted the duty of fixing the terms and con-

ditions upon which such permission shall be given. When application is made to him for a permit, he must decide what obligations, present and future, the applicant should assume for the protection of public interests, present and future, in the then untravelled highways or road allowances the crossing of which he is asked to sanction.

Parliament has thus made a rigid provision (section 37), where conditions permitted of that being done; and an elastic and adaptable provision where the conditions rendered rigidity unsuitable and undesirable. But in these two provisions the whole subject of the crossing by irrigation works of highways and road allowances, whatever their character, and of the protection of public interests in the matter of travel is, in my opinion, exhaustively dealt with. I therefore conclude that the appellants, who were, of course, obliged to comply with the provisions of section 37, would have been required, in regard to surveyed highways and road allowances to which section 37 does not apply, to submit to and carry out such terms for the protection of the public interest therein as the Commissioner of Public Works when granting them permission to carry their works across such highways and road allowances might have seen fit to impose.

At some points where road allowances which were to be crossed would, owing to physical difficulties, be unlikely to become travelled roads (par. 16 of the statement of defence, which is admitted) it might be manifestly unnecessary and unfair to exact the construction of bridges; at others the settlement of the adjacent territory might depend entirely upon the success of the irrigation undertaking and it might

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Anglin J.

well be deemed only reasonable that the owners of lands thus rendered arable should by municipal taxation, or that the state, which would be greatly benefitted, should, out of public revenues, provide such bridges as might become necessary for public travel. In fact the public advantage from the appellants' works as a whole might be so great and their construction so costly, and yet so desirable, that it might well be deemed fair and proper entirely to relieve the company undertaking them from the burden of providing crossing facilities for public travel. All these matters Parliament no doubt intended that the commissioner should consider when dealing with applications for permission to cross highways.

That the protection of public interests in highways or road allowances yet untravelled should be confided to the care and judgment of the member of the local government presiding over its Department of Public Works is not only not surprising, but seems to be a natural sequence of the transfer of jurisdiction and control over them to the local legislature, and of the action of that body in making it the duty of that member of the local executive to

> deal with all questions affecting changes in or obstruction to any road allowance or public highway * * * including the crossing of such road allowances or public highways by irrigation ditches, canals or other works.

It is contended that the cutting through highways which the crossing of them by irrigation canals entails is, in reality, a "closing up" of such highways and that power to authorize the closing up of roads is reserved to the Lieutenant-Governor in Council. 60 & 61 Vict. ch. 28, sec. 20 (D.). But the "closing up" which is thus provided for is what occurs where the right of public travel over land reserved

as a road allowance or a surveyed highway is entirely taken away and such land is, or may be devoted exclusively to other purposes, whether a substituted or diverted road is or is not provided (see 61 Vict. ch. 32, sec. 5 (D.). The interruption of public travel occasioned by the cutting of an irrigation canal or ditch through it is rather "a change in or obstruction to the road allowance or highway" which gives rise to "questions"—*e.g.* what provision will be suitable in the changed circumstances to overcome the obstruction? The public right of way over the part of the road or allowance crossed by the canal is not wholly destroyed or taken away, as it is in the case of the "closing up" of a road: it is merely obstructed or interfered with, and must in the future be exercised in a different manner and by the aid of artificial means. The manner in which it should be exercised and upon whom the burden of providing the necessary means should fall are *inter alia* "questions" with which the legislature has made it the duty of the commissioner to "deal;" and Parliament has placed persons seeking to exercise rights conferred by the "North-West Irrigation Act"—including corporate bodies created by itself for that purpose, such as the defendants — under the control of the local commissioner in regard to the crossing of surveyed highways and road allowances not theretofore publicly travelled by making his permission to carry the works across them a pre-requisite to obtaining from the Minister of the Interior the necessary authority to construct such works.

That it was the deliberate policy of Parliament to place in the hands of a local official the power and the responsibilty of determining what provisions for the

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Anglin J.

protection of public interests should be made in connection with the construction of works which the "Irrigation Act" empowers the minister to authorize is further indicated by the clause (section 16) requiring examination and approval of applicants' memorials and of their plans of projected works by the chief engineer and surveyor of the local Department of Public Works as a further preliminary to the grant by the minister of authority to construct such works.

The controlling powers of the commissioner must be exercised at the time his permission to cross highways and road allowances is applied for. As I read it that is what the statute provides; and it is only reasonable that it should be so. It must be of the utmost importance to a company undertaking the construction of irrigation works involving an investment of a large amount of capital that it should know what obligations to the public it is obliged to assume. This does not necessarily mean that the commissioner must immediately determine and specify with precision what bridges the company shall build. But he must define the obligations to which it will be subject —both present and future. He may require it to undertake to provide bridges, either merely at stated points, or, as will frequently be necessary, immediately, or within defined periods, at specified points, and in the future at such other points as he may in his discretion from time to time determine. The company, with this knowledge of the obligations which it must assume, if construction goes on, will be in a position to decide whether it can safely proceed with its project. As I construe the provisions of the "Irrigation Act," the terms or conditions imposed by the Commissioner of Public Works when granting his

permit for the crossing of highways and road allowances shewn on the plans of the works filed with him, as required by section 11, are (subject always to the provisions of section 37) the only terms and conditions to which in this matter the rights of the company subsequently obtaining authorization to construct such works from the minister under section 16 are subject. When the commissioner has granted his permit, except as to the enforcement of such terms as it contains or as may have been imposed by him as a condition of its being granted, he is functus. The statute contains no other provision under which such obligations may be created; and, in my opinion, it is equally conclusive against the existence of the suggested common law duty on the part of the company to build bridges over its canals which the commissioner has not, when granting his permit, required it, or reserved the right to require it, to construct.

The permit of the commissioner for the crossing shewn on the appellants' original plan imposed no condition except the observance by the company of the provisions of section 37. It was suggested in argument that the commissioner may have assumed that under section 37 the company would, whenever travel should require it, be bound to erect bridges at all points where its works cross road allowances or surveyed highways. This is scarcely conceivable; and were it the fact no obligation on the part of the company in respect of highways not within section 37 would ensue.

But, for the respondent, it is urged that in their application for the commissioner's permit the appellants undertook to build bridges at every point where their canals or ditches should cross road allowances

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Anglin J.

or public highways. The appellants' letter on which this contention is based followed a form prescribed by the Minister of the Interior. It reads as follows:

LETHBRIDGE, January 31, 1899.

To the Commissioner of Public Works,
Regina, Assa.

SIR,—We beg to inform you that we have made application to the Minister of the Interior, under the provisions of the North-West Irrigation Act, for permission to divert water from the St. Mary River on the south-east quarter of section 36, Township 1, Range 25, west of the Fourth meridian for irrigation purposes, and to construct the canals, ditches, reservoirs and other works necessary for the utilization of such water.

We have received the authorization for the construction of the works in question, but would point out that in completing such construction it will be necessary, to cross the road allowance or public highway, at the points indicated on the general plan herewith, and we therefore beg to apply for permission under the North-West Territories and Dominion Lands Act to construct and maintain the canals, ditches and reservoirs across the road allowances or public highways at the places indicated in the accompanying plan, the necessary bridge or bridges at these points being constructed and maintained by us as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act.

Your obedient servant,

THE ALBERTA IRRIGATION COMPANY,
per C. A. Magrath, Superintendent.

The reference at the conclusion of this document to sub-section (*b*) of section 11 presents some difficulty. As it stands it is meaningless. Counsel for the appellants suggested that this clause of the statute is referred to by mistake and that the reference should have been to section 37. Counsel for the respondent would transpose this concluding phrase and place it at the beginning of the letter.

The bridges prescribed by section 37 are to be of a uniform width of 14 feet. The fact that the bridge plan filed by the company shews designs for bridges of 12 feet in width as well as of 14 feet makes it reason-

ably clear that the company contemplated at least the possibility of its being required to build other bridges than those for which section 37 provides. Although the form used is certainly full of mistakes, I do not think the reference in it to sub-section (*b*) of section 11 was inserted in mistake for a reference to section 37.

Neither can I yield to the suggestion of Mr. Woods. As introductory to the letter the phrase in question would be ungrammatical and inaccurate. It would find its proper place in the second paragraph of the letter between the word "and" and the word "we." If it may not be inserted at this point it must be rejected as entirely meaningless and unintelligible. But with it or without it, and wherever it is placed, the letter has the same meaning and effect.

The words

> the *necessary* bridge or bridges at these points being constructed and maintained by us

may have reference either only to bridges prescribed by section 37, or to those bridges and, in addition, to such bridges at other points of crossing as the commissioner should deem it necessary to require as a condition of granting the permit sought. In view of the fact already alluded to that a design for bridges 12 feet wide is shewn on the bridge plan filed by the company with the commissioner, and of the scope of the powers and duties of the commissioner, as I understand them, in regard to granting his permission to carry irrigation canals or ditches across highways or road allowances, I think the latter is the proper construction. The allegation in the 16th paragraph of the statement of defence (which is admitted) that it was unlikely that some of the road allowances to be

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Anglin J.

crossed by the company's canals would ever become public roads and the fact that the Government of the North-West Territories has at different times constructed bridges at points where the company's canals crossed highways then in use but which had not been publicly travelled prior to the construction of the works (par. 14, statement of defence) precludes the contention that the company in its letter of application undertook to construct a bridge at every point where its filed plan shewed that any of its canals or ditches cross a highway or road allowance. Moreover, if that were the intention, the word "necessary" before the words "bridge or bridges" in the letter, would be superfluous. I read this letter of the company as an undertaking on its part to construct, in addition to the bridges imperatively prescribed by section 37, bridges at other points where its plans shewed that highways or road allowances were to be crossed if the commissioner should deem them necessary and should direct their construction, either when granting his permit or subsequently, pursuant to a reservation of his right to so direct, contained in or made when his permit was granted. The permit actually granted to the appellants limited their obligation in regard to bridges to a compliance with section 37: they were relieved from any duty to construct other bridges presumably either because the commissioner thought other bridges would not be necessary, or because, having regard to all the circumstances, he concluded that any other bridges which might become necessary should be built at the public expense.

During argument the suggestion was made that the company might have carried its canals through tunnels under the highways which they cross, and

that having chosen a method of "crossing" unnecessarily involving interruption of public travel they must be taken to have done so subject to the burden of providing such means as their action has rendered necessary for the restoration of this public right. No such case is made upon the pleadings. The plans filed by the company and approved by the chief engineer and surveyor shew an open canal. No provision is made for tunnels or culverts under highways. The plans filed make express reference to necessary bridges. The permit granted by the commissioner is to carry the canals "across" not "under" road allowances and highways. Crossing by open canals or ditches appears to be expressly sanctioned; "crossing" by means of tunnels or culverts, assuming its practicability of which there is no evidence, would probably be unauthorized and illegal.

With regard to the crossing in township No. 6, it was urged that the appellants had not obtained a permit for it from the commissioner. No such permit is produced and the admission is made that the exhibits filed included

> all the material documents that have ever come into existence.

There is, however, in evidence a certificate from the chief engineer of the Department of Public Works of the North-West Territories given under section 16 of the "North-West Irrigation Act, 1908," that permission had been granted to the appellants by the commissioner to construct their works across this road allowance or highway in township No. 6. If necessary, a verbal permission from the commissioner might be presumed as the foundation of this certificate. The statute does not require it to be in writ-

1911

ALBERTA RAILWAY AND IRRIGATION CO. v. THE KING.

Anglin J.

ing. But a sufficient answer to this ground of claim appears to be that no such issue is raised on the pleadings settled by the parties.

For these reasons, I am, with great respect, of the opinion, that the defendants are not under any obligation to construct bridges across their canals at the points in question. Their appeal should be allowed with costs in this court and in the court *en banc,* and this action should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Griesbach & O'Connor.*
Solicitor for the respondent: *Charles R. Mitchell.*