THE CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANT;

1922
*Nov. 3, 7.
*Dec. 19.

AND

THE DEPARTMENT OF LANDS AND FORESTS OF THE PROVINCE OF ONTARIO ..... RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railway company—Highway crossing—Cost of construction and maintenance—Seniority—Existing and potential highways.

The Dept. of Lands and Forests, Ont., applied to the Board of Railway Commissioners for orders directing the C.P. Ry. Co. to construct at its own cost an overhead crossing over its right of way at a point in the Township of Eton and a highway crossing in the Township of Aubrey. The board granted both applications and gave leave to the company to appeal to the Supreme Court of Canada. The order for leave stated that the title of the company was obtained under authority of the Provincial Act, 59 Vict. c. XI, and was expressly made subject to the provisions of sec. 2 thereof, namely, "such transfer * * * shall not be deemed * * * to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the land hereby intended to be conveyed." It also stated that when the Act was passed there were existing common and public highways across the lands intended thereby to be conveyed but none at either of the points in question and none laid out in the area covered by the Townships of Eton and Aubrey. Further that by an order in council passed in 1866 in respect to lands on the northerly shores of Lakes Huron and Superior an allowance of five per cent of the acreage should be reserved for roads and the right was reserved to the Crown to lay out roads where necessary.

Held, per Davies C.J. and Duff, Brodeur and Mignault JJ., that the phrase "rights of the public with respect to common and public highways existing at the date hereof" should receive its ordinary grammatical construction, namely, rights of the public in existing highways; and that as there were highways existing on the right of way the rights of the public were only protected in respect thereto. *Canadian Pac. Ry. Co.* v. *Dept. L. and F.* (58 Can. S.C.R. 189) expl.

Per Duff J. The lands transferred being occupied by a railway constructed by the Dominion Government, the transfer of the latter was not one of the kind contemplated by the order in council which primarily related to patents granted under the Ontario Land Acts.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Anglin J. The legislature could not have intended that sec. 2 of 59 Vict., c. XI, would only protect public rights in the scattered trails over the hundreds of miles covered by the right of way in question and must have meant to protect such rights which were *in posse* under the order in council when the Act was passed; but as the order in council only applies to lands on the northerly shores of lakes Huron and Superior, and the townships of Eton and Aubrey are not so situated, there is no reservation of rights in respect to the highways in question on this appeal and the province of Ontario has no right reserved to construct crossings over the railway.

Idington J. did not deal with the merits of the appeal, being of opinion that the order of the board did not present such a stated case as required by law to give this court jurisdiction.

APPEAL from the decision of the Board of Railway Commissioners for Canada that the cost of constructing crossings of the Canadian Pacific line of railway in the Kenora District should be borne by the company.

The order of the board granting leave to appeal from its decision reads as follows:—

Order No. 32294

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Wednesday, the 12th day of April, A.D. 1922.

HON. F. B. CARVELL, K.C., Chief Commissioner.

S. J. McLEAN, Asst. Chief Commissioner.

J. G. RUTHERFORD, C.M.G., Commissioner.

In the matter of the application of the Department of Lands and Forests, Northern Development branch, province of Ontario, hereinafter called the "Applicant," for an order directing the Canadian Pacific Railway Company, hereinafter called the "Railway Company," to provide and construct an overhead crossing, at its own expense, over its right of way on the line between Lots 6 and 7, Concession 1, in the Township of Eton, District of Kenora, Province of Ontario;

And in the matter of the application of the applicant, under section 256 of the Railway Act, 1919, for an order directing the Railway Company to provide a suitable highway crossing where its railway intersects the line between Lots 10 and 11, Concession 6, in the Township of Aubrey,

District of Kenora, Province of Ontario, mileage 73 of the Railway Company's Ignace sub-division, file Nos. 30870 and 28140.

Upon the application of the Railway Company, and upon consideration of the submissions made on behalf of the Railway Company and the applicant; and upon its appearing that the Railway Company's railway through the townships in question was constructed in the year 1883, and that the right of way on which the said railway was constructed was conveyed to the Railway Company by Letters Patent issued under authority of the Dominion of Canada, dated 29th March, 1904, having been previously conveyed to the Dominion of Canada by an order in council made by the Lieutenant-Governor in Council of Ontario, dated 3rd June, A.D. 1897, and issued under the authority of the statute of the province, 59 Victoria, chapter XI;

And upon its appearing that at the time of the passing of the said statute, 59 Victoria, chapter XI, there were existing common and public highways across the lands intended to be conveyed by that Act, but no such highway was in fact located at either of the points now in question, nor were any highways laid out in the area covered by the townships of Eton and Aubrey which were then unsurveyed;

And upon its appearing that the Railway Company's title was, under the terms of the said order in council dated June 3, 1897, made expressly subject to the conditions and limitations contained in section 2 of the said provincial Act, which section provides—

> "Such transfer shall be deemed to be subject to any agreement, lease, or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order in council making the transfer, and the order in council shall not be deemed to have conveyed, or to convey, the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the land hereby intended to be conveyed"—

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And upon its appearing that, under the terms of the order in council, made on the recommendation of the Commissioner of Crown Lands, dated August 6, 1866, it was provided that in respect of lands on the northerly shores of lakes Huron and Superior, an allowance of five per cent of the acreage be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary;

And upon its appearing that the townships of Eton and Aubrey are situated upwards of 200 miles westerly of Fort William;

And whereas the time within which an appeal herein from this Board to the Supreme Court of Canada might be made, was extended until the 18th day of April instant;

And whereas, in the opinion of the Board, a question of law arises as to the effect of the above statute and orders in council—

It is ordered that leave be, and it is hereby, granted the Railway Company to appeal to the Supreme Court of Canada upon the following question of law, namely;

"Whether, upon the facts stated by the Board, the title of the Railway Company is subject to a prior right reserved in the Crown to construct and maintain public crossings over the Railway Company's right of way, as applied for by the applicant herein."

(Signed) F. B. CARVELL,

Chief Commissioner,

Board of Railway Commissioners for Canada.

The reasons for the decision of the board were prepared by Mr. McLean, Assistant Chief Commissioner, and were concurred in by Commissioner Rutherford. He held that the order in council of 1866 is still in force, that the points in question on the railway are on the northerly shores of Lakes Huron and Superior, and that public rights in crossings on highways laid out under authority of the order in council are preserved by sec. 2 of 59 Vict., c. XI.

Tilley K.C. for the appellant.

F. E. Titus for the respondent.

THE CHIEF JUSTICE.—This case comes before us by way of appeal, granted by the Board of Railway Commissioners, from two orders of the board authorizing the construction of highways across the railway in the Township of Aubrey and Eton and ordering that the construction and maintenance should be borne by the railway company.

The facts stated by the board were that,—

Upon its appearing that the railway company's railway through the townships in question was constructed in the year 1883, and that the right of way on which the said railway was constructed was conveyed to the railway company by letters patent issued under the authority of the Dominion of Canada, dated 29th March, 1904, having been previously conveyed to the Dominion of Canada by an Order in Council made by the Lieutenant Governor in Council of Ontario, dated 3rd June, A.D. 1897, and issued under the authority of the statute of the province, 59 Victoria, chapter XI;

And upon its appearing that at the time of the passing of the said statute, 59 Victoria, chapter XI, there were existing common and public highways across the lands intended to be conveyed by that Act, but no such highway was in fact located at either of the points now in question, nor were any highways laid out in the area covered by the townships of Eton and Aubrey which were then unsurveyed;

And upon its appearing that the railway company's title was, under the terms of the said Order in Council, dated 3rd June, 1897, made expressly subject to the conditions and limitations contained in section 2 of the said provincial Act, which section provides—

"Such transfer shall be deemed to be subject to any agreement, lease, or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the Order in Council making the transfer, and the Order in Council shall not be deemed to have conveyed, or to convey, the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the land hereby intended to be conveyed"—

And upon its appearing that under the terms of the Order in Council made on the recommendation of the Commissioner of Crown Lands, dated August 6, 1866, it was provided that in respect of lands on the northerly shores of Lakes Huron and Superior, an allowance of five per cent of the acreage be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary;

It is ordered that leave be, and it is hereby granted, the railway company to appeal to the Supreme Court of Canada, upon the following question of law, namely:

"Whether upon the facts stated by the Board, the title of the railway company is subject to a prior right reserved in the Crown to construct and maintain public crossings over the railway company's right of way, as applied for by the applicant herein."

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The Chief Justice

The admitted fact found by the board that at the time of the passing of the statute of the province, 59 Vict., c. XI, *there were common and public highways existing across the lands intended to be conveyed by that Act,* appears to me to be the controlling factor in determining the true meaning and intent of the statute and order in council under which the railway company obtained its title.

That title was, under the terms of the order in council, dated 3rd June, 1897, made expressly subject to the conditions and limitations contained in sec. 2 of the provincial Act which provided, *inter alia,* that the

> Order in Council making the transfer shall not be deemed to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the land hereby intended to be conveyed.

It is admitted that there were such highways then existing and in my opinion the language of the section cannot be construed as applicable to the highways now in question and which are only now sought to be opened and provided.

Reference was made at the argument to the case, known as the "Kirkpatrick Case," before this court (1) *Canadian Pac. Ry. Co.* v. *Dept. of P.W. of Ontario,* where it was held that in view of the finding of fact by the board in that case, that *there were no highways in the district when the railway company acquired title,* the condition of sec. 2 of the Act must be construed as meaning

> the rights of the public existing at the date hereof in common and public highways,

and as including rights in highways to be laid out under the reservation for roads by the order in council of 1866. As these potential highways existed before the crossing (asked for), the company being the junior occupant was properly charged with the expense.

Under the facts stated in that case and on which the decision of the court was based, namely, *that there were no highways in the district when the railway acquired title,* the decision of the court seemed to be the only one that

(1) 58 Can. S.C.R. 189

could be given. I may be pardoned for quoting a paragraph from my own judgment in that case:

> I confess that if I had to answer the question submitted to us without regard to the findings on the questions of fact of the Railway Board, I should hesitate a good deal before answering in the affirmative * * * If there were no public highways laid out at the date the statute was passed, it would be without meaning or effect unless it (the statute) was held to apply to potential highways which might be opened from time to time under the reservation of the five per cent area provided for in the order in council of 1866. If there are two meanings which may be given to the language of a public statute one of which would render the statute meaningless and ineffective for the purposes it was meant to cover and the other which would give effect to the statute, I take it the latter must be adopted.

In the case now before us it appears that the court in the *Kirkpatrick Case* (1) was misled as to the determining factor whether or not there were any existing highways when the statute was passed.

It is now stated that there were such existing highways and in my judgment the language of section 2 cannot apply to potential and non-existing highways such as we now have to deal with in this case and the language of the section must be given its plain and natural meaning and confined to then existing common and public highways and as not having in view, or being applicable to, non-existing highways.

I would allow the appeal, with costs.

IDINGTON J. (dissenting).—This is an appeal from the Board of Railway Commissioners for Canada upon what is alleged to be a stated case pursuant to the provisions of the Railway Act in that regard.

Counsel for appellant in his argument herein suggested that some of us, if not all, in the case of *Canadian Pac. Ry. Co.* v. *Department of Public Works of Ontario* (1), had misapprehended the facts.

I suggested that that furnished a good reason for going back to the board and having their case properly stated inasmuch as it did not appear to me to be so.

I suggested the same to counsel for the respondent.

My suggestion met with no response.

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I found then that the so-called stated case in the previous submission, above cited, was in substance identical in its terms with that now submitted herein, save in the difference in township and district in which the respective highways in question were situated.

Indeed this case as submitted would seem to have been copied from the other.

What are the facts as found by the board?

Are we to travel through the judgment of the board to find same, as argument of counsel seemed to indicate was intended?

I most respectfully submit not, in face of the dispute relative thereto and the suggestion of a misapprehension of same when similarly stated in a case of much less complicated character.

And if we turn to the order which stated the case and should contain a concise statement of the relevant facts giving rise to the application of the question of law supposed to be raised by the case, are we to speculate at large, as it were, upon what may be the question of law arising, and are we to assume as a matter of fact that the order in council of 1866, before confederation in fact, related to those lands now in question?

I need not enlarge, for any one looking at the map must be puzzled as to that. It is either relevant or it is not. Yet it is a question of fact which might well affect the dubious language of the Act and the grant made thereunder.

I may point out that the cases such as *Bischop* v. *Toler* (1), and *In re County Council of Cardigan* (2), shew, as do many others to be found in Boulton's Law and Practice of a Stated Case, how far this case as stated falls below what is required.

I must therefore hold it should be dismissed for that reason alone.

DUFF J.—This appeal raises a question touching the construction of certain words of an Act of the Legislature of

(1) 59 J.P. 807; 73 L.T. 402. (2) [1890] 54 J.P. 792.

Ontario, c. 11, 59 Vict. I think it will be convenient to set out the statute in full. It is in these words:—

Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The Lieutenant Governor in Council may in his discretion transfer to the Dominion of Canada any lands heretofore taken and occupied by the Canadian Pacific Railway for the road-bed, stations, station grounds, and other purposes of the said railway and included in the plans of the railway deposited by the company in the office of the Minister of Railways and Canals, the same being so transferred to enable the Government of Canada to fulfil its obligations to the said company in that behalf with respect to the railway. The lands so transferable shall be the lands lying between the terminus of the Canada Central Railway near Nipissing known as Calendar Station, and the western boundary of the province of Ontario, near Rat Portage and between the junction at Sudbury on the main line of the Canadian Pacific Railway for the Algoma Branch and the River Saint Mary.

2. Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the Order in Council making the transfer, and the Order in Council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

3. Such transfer by Order in Council shall be as binding on the province of Ontario as if the same were specified and set forth in the Act of this legislature.

Subsequently by order in council (under this statute) of the 3rd June, 1897, the land occupied by the C.P.R. for road beds, stations and station grounds and other railway purposes between Fort William and Cross Lake were vested in the "Government of the Dominion of Canada" subject to certain conditions not material and

subject to conditions and limitations specified in section 2 of the (Act of 1896.)

The point in dispute arises in this way. By an order in council of the 6th August, 1866, certain provisions were made in respect of a survey of "lands on the northerly shore of Lakes Huron and Superior" and for the establishment of roads in that part of the country. And it was provided for that purpose that

an allowance of 5 per cent of the acreage of lands be reserved for the roads, as is done in Lower Canada, and that a clause be inserted in the

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letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

It is stated in the case submitted that at the time of the passing of the Act of 1896, there were existing highways; but it is now contended by the province that the effect of the statute is to reserve to the Crown in right of the province the right

> to construct and maintain public crossings over the railway company's right of way

in conformity with the spirit of the order in council of August, 1866. Whether this right is reserved or not is the question to be decided on this appeal.

On behalf of the province it is argued that the statute preserves not only the rights of the public in existing highways but that it reserves a right to the Crown to lay out and construct highways over the lands granted.

The more natural construction of the section appears to be that which treats the words

> existing at the date hereof within the limits of the lands hereby intended to be conveyed

as an adjectival phrase qualifying highways and the words

> within the limits of the lands hereby intended to be conveyed

as an adverbial element qualifying "existing." This appears to be the grammatical construction of the language.

I can see no reason for departing from the grammatical and ordinary sense of these words. I do not forget Lord Macnaghten's language in *Vacher & Sons* v. *London Society of Compositors* (1) at p. 118, where he says that in the absence of a preamble as a rule there are only two cases in which it is permissible to depart from the ordinary and natural sense of the words in an enactment; those two cases being, 1st, where the words taken in their natural sense lead to some absurdity, and 2nd, where there is some other clause in the body of the enactment inconsistent with or repugnant to the clause in question construing in the ordinary sense the language in which it is expressed.

(1) [1913] A.C. 107.

I am unable to discover any absurdity or repugnancy arising from reading the words according to their natural sense nor indeed can I, without straining the language to a degree for which there appears to be no justification, find anything in the statute which reserves to the provincial government the right which is now claimed.

Read as they stand, without any kind of distortion, the words seem quite apt to reserve the rights of the public in respect of existing common and public highways, the rights of the public (that is to say the rights of His Majesty's liege subjects) to use such highways for what may be called highway purposes, rights not vested in the Crown as proprietor but generally under the guardianship of the Crown as *parens patriæ*. As applied to highways existing at the time, that is to say, at the critical time, the date of the passing of the Act, the language seems to be clear, precise and apt.

Let us consider the effect of the statute under the alternative construction proposed. The right claimed is, as already mentioned, the right to construct and maintain public crossings over the railway company's right of way. Now the rights reserved to the Crown by the order in council cited above obviously become operative only when a title has passed from the Crown to a grantee. Strictly the right reserved to the Crown is a right to lay out highways over the lands granted and to assume such part of those lands as may be necessary without compensation up to 5 per cent of their area. It may be conceded that these rights reserved to the Crown are rights which do not depend upon the terms of the patent but in all cases to which the order in council applies they exist by virtue of the order in council itself whatever the terms of the instrument of grant may be; and I think it would not be an exaggerated or non-natural construction of the phrase used in the second section of the statute of 1896 ("rights of the public") to read it as comprehending these rights of the Crown exercisable in respect of lands granted for the purpose of providing highways. The language is not very apt for such a purpose it is true, but I think that would not be an inadmissable construction. But it is a very different

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matter to treat this order in council as giving rise to rights in the "public" in the sense above mentioned (all His Majesty's subjects) in land still ungranted and still vested in the Crown.

The whole allodial title in such a case is in the Crown and, except as regards highways established by law, that title is burdened by no "rights of the public" in any accurate sense of the term in relation to highways. As a famous American judge recently said that "such words as 'right' are a constant solicitation to fallacy." *Jackman* v. *Rosenbaum* (1), at page 8 per Holmes J. It is the duty of public officials charged with the administration of Crown lands to act according to law; and the "public" using the term as denoting the body of citizens in whom reposes what Mr. Dicey calls the "political sovereignty" of the province, has perhaps in some loose sense a "right" to have this duty observed. But even here "public" has not the same meaning as it has when one speaks of the "rights of the public" in a highway.

There is no good reason I apprehend for ascribing to the phrase "rights of the public" used in this statute any such vague indefinite import; "rights of the public" as applied to such a subject as highways means according to the ordinary signification of the words rights of a class known to the law and capable of legal protection at least in some proceeding by the Crown *ad vindicatam publicam*. I can see no reason why they should not be given effect to according to that meaning.

Again the lands conveyed by the statute were already in occupation for the purposes of the railway already constructed by the Dominion Government under the authority of statute in execution of the undertaking given by the Dominion in the British Columbia terms of union. Under the Expropriation Act the proper Dominion officials had authority in so far as the Dominion Parliament could grant such authority, to enter upon the Crown lands of the province for the purpose of constructing public works, the procedure for doing so being laid down in the Act. The Lake Superior section of the railway was built almost wholly through the Crown lands of the province with the

(1) 67 L. ed. (U.S.R.) 7.

knowledge of everybody in Canada and it must be assumed, after the lapse of forty years, that the Government proceeded either in conformity with the procedure laid down by statute or that it did so with the consent of the provincial government. That the Dominion had authority to enter upon and take provincial lands for this purpose seems to be the necessary result of the decision of the Privy Council in *Attorney General of British Columbia* v. *Canadian Pac. Ry. Co.* (1). Whatever may be thought as to the general scope of the principle laid down in that case it is conclusive upon this point at least, that the Dominion in execution of the agreement with British Columbia in relation to the construction of the Canadian Pac. Ry. had authority to enter upon and take the Crown lands of a province for the purpose of constructing the railway agreed upon. One has no difficulty in understanding the desire of the company to have a conveyance from Ontario in order to set at rest any possible question as to the regularity of its title but for the purpose of the present question it must be taken that the lands were lawfully in the occupation of the railway for railway purposes; and in such circumstances authority to construct and maintain a highway over the railway could only be given by the Dominion Parliament. *Attorney General of Alberta* v. *Attorney General for Canada* (2).

I can find nothing in the order in council which makes it applicable to such a case. It is an order in council primarily applying to lands granted to a subject by letters patent. It is not an instrument framed in contemplation of the transfer of lands to a Government department or other public authority for the purpose of constructing a government railway or other public work. Nor can I see anything in the statute of 1896 pointing to an intention to reserve to the Provincial Government a right to construct and maintain works which could only be exercised under authority given by the Dominion Parliament.

The previous decision presents no difficulty. It proceeded upon a misapprehension of fact.

The question should be answered in the negative.

(1) [1906] A.C. 204. (2) [1915] A.C. 363.

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Anglin J.

ANGLIN J.—By leave of the Board of Railway Commissioners, given under section 52 (3) of the Railway Act, 1919, the Canadian Pacific Railway Company appeals to this court on the following question of law:—

> Whether, upon the facts stated by the Board, the title of the railway company is subject to a prior right reserved in the Crown to construct and maintain public crossings over the railway company's right of way, as applied for by the applicant herein.

The decision of the board being final on questions of fact which it has determined (s. 52, s.s. 6 and 10 (*a*)) and the submission being "upon the facts stated by the board" we look to the order granting leave for the facts upon which we are to proceed. *Inter alia* it is therein stated that the right of way of the appellant consists of property conveyed to it by Dominion letters patent (1904) which had been previously conveyed to the Dominion by order in council of the Lieutenant-Governor of Ontario (27th of May, 1897—a date probably erroneously given instead of the 3rd of June, 1897) issued under the authority of the statute of the province, 59 Vict., c. XI (assented to on the 7th of April, 1896), and that

> the railway company's title was * * * made expressly subject to the conditions and limitations contained in section 2 of the said provincial Act.

Although the Dominion letters patent of 1904 now before us omit the clause, found in the letters patent of other lands granted in 1906 (which were before the court in the *Kirkpatrick Township Case* (1) at page 194), making the title thereby conferred on the railway company expressly subject to

> the limitations and conditions and the reservations set forth in the Order in Council of the Lieutenant Governor of our said province of Ontario, dated, etc.,

in my opinion the facts stated by the board preclude the contention addressed to us that the appellant obtained by the grant of 1904 rights authority to confer which is vested in the Dominion for railway purposes and which are paramount to and override any conditions, limitations or reservations that accompanied the transfer of the provincial

(1) 58 Can. S.C.R. 189.

title to the Dominion as prescribed by section 2 of the provincial statute. Upon "the facts stated by the Board," which constitute the hypothesis upon which the question of law is submitted to us, what we are asked to determine is whether the statutory declaration that any transfer made under the authority of the 59 Vict., c. XI,

> shall not be deemed * * * to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof

reserved to the Crown the

> right to construct and maintain public crossings over the railway company's right of way, as applied for by the applicant herein,

—nothing else and nothing more.

Upon the statement of fact made by the board in the submission of the *Township of Kirkpatrick Case* (1), that

> no highway was laid out across the said railway before title to its right of way was acquired,

this court there determined that the words,

> rights of the public in common and public highways existing at the date hereof,

in section 2 of the Act, 59 Vict., c. XI,

> must be construed as meaning "the rights of the public existing at the date hereof in common and public highways" and as including rights in highways to be laid out under the reservation

of 5 per cent for roads made in the survey of the township pursuant to the policy established by an ante-confederation order in council of 1866 of the late province of Canada made under the authority of C.S.C., c. 22, s. 7.

We are now confronted with the statement of fact, made in the board's order granting leave to appeal,

> that at the time of the passing of the statute, 59 Vict., c. XI, there were existing common and public highways across the lands intended to be conveyed by that Act.

This new statement of fact, no doubt, takes away the ground on which the judgment of the majority of this court proceeded in the *Township of Kirkpatrick Case* (1) and I agree that the court is not bound to regard the construc-

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tion there put upon the language of the reservation made in section 2 of the 59 Vict., c. XI (O.) as at all conclusive in the case now presented.

But with respect for the views of my colleagues who are of a contrary opinion, I remain unconvinced that in providing for the transfer to the Canadian Pacific Railway Company of a right of way over provincial Crown lands from Calendar to the Manitoba boundary, a distance of many hundreds of miles, the only public rights of crossing which the legislature and Government of Ontario intended to protect were in respect of the few scattered trails which the railway then intersected and that they meant to forego, so far as they might effect the railway right of way, whatever rights it had been provided should be reserved for the construction of public highways by the order in council of 1866. Merely to avoid repetition, on this aspect of the matter I refer to what I said in the *Township of Kirkpatrick Case* (1). In the whole area of the townships of Eton and Aubrey with which we are now dealing, and through which the railway runs for 123 miles, the fact, as now stated by the board, is that no highways were laid out at the date of enactment of 59 Vict., c. 11.

These townships were surveyed after the passing of that statute. The fact that in them a reservation of 5 per cent for highways has been made is therefore in itself of no significance. If the territory included in them should be regarded as part of the "lands on the northerly shore of Lakes (*sic.*) Huron and Superior" dealt with by the order in council of 1866 (as the township of Kirkpatrick was admitted to be in the former case (1) at pp. 191 and 195) the same "rights of the public" which prevailed there must, I think, have been respected here. I should perhaps add that a reservation by the Crown of the rights of the public in regard to highways actually existing would scarcely seem to have been necessary, whereas in regard to highways not located, but for the sites of which there was provision in the 5 per cent reservation directed to be made in surveys, such a reservation would be eminently proper and reasonable.

(1) 58 Can. S.C.R. 196-7.

But in the present case the applicability of the order in council of 1866 to the territory included in the townships of Eton and Aubrey is in issue. It is not affirmed in the order granting leave to appeal. On the contrary, while the order in council is recited in that order and is also included as one of the documents in the case, the recital of it is immediately followed by the statement that

> the townships of Eton and Aubrey are situated upwards of 200 miles westerly of Fort William.

An Ontario departmental map put in with the case shews that the District of Rainy River, in the province of Ontario and part of the State of Minnesota, lies between those townships and Lake Superior. The eastern boundary of the townships of Aubrey and Eton will, if produced southerly, extend through the District of Rainy River into the State of Minnesota and will never reach Lake Superior, but will pass many miles west of its extreme western end.

Notwithstanding these facts the learned Assistant Chief Commissioner in his reasons for judgment held that the territory comprised in these townships fell within the description "lands on the northerly shore of Lake Huron and Superior." I was for some time disposed to think that we should accept that finding as "final" under s. 52 (10*a*) of the Railway Act, because the recital of the order in council of 1866 in the board's order granting leave to appeal would seem to imply its relevancy. On further consideration, however, in view of the omission from the board's order of the explicit finding on that point contained in the learned commissioner's opinion, of the specific statement that the two townships are situated 200 miles west of Fort William, and of the fact that the question to be determined by us is whether there has been a reservation of rights to the Crown covering the points at which the applicant has applied for the construction of public crossings, I now regard the applicability of the order in council of 1866 to these localities as one of the matters involved in the question submitted, no other reservation of rights than that made by such order in council having been suggested.

With very great respect, I am of the opinion that the territory comprised in the townships of Aubrey and Eton

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cannot be regarded as "lands on the northerly shore of Lake Huron and Superior," and that the order in council of 1866 therefore does not apply to it. No other reservation of right in regard to highways in that territory, before the 7th April, 1896, having been preferred, it follows that upon the case as now presented it must be held that no

> right reserved in the Crown to construct and maintain public crossings over the (appellant) railway company's right of way, as applied for by the applicant,

has been shown: and if no such right, of course no such "prior right."

I would for these reasons answer the question submitted in the negative and would therefore allow the appeal.

BRODEUR J.—This is an appeal from the Board of Railway Commissioners on a question of law under the provisions of the "Railway Act."

The question which the board has given leave to submit reads as follows:

> Whether upon the facts stated by the Board the title of the company is subject to the prior right reserved in the Crown to construct and maintain public crossings over the company's right of way, as applied for by the applicant herein.

In order to fully understand the bearing of this question it is necessary to state briefly what are the facts and the circumstances which have given rise to the present appeal.

In 1866, an order in council was passed by the government of the day directing that out of the lands on the northerly shore of Lakes Huron and Superior an allowance of five per cent of the acreage of lands be reserved for roads and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

In 1883, the Canadian Pacific Railway was built in the northwestern part of Ontario under Dominion legislation. At that time the townships of Eton and Aubrey, in which the crossings in issue in this case are situated, were not proclaimed; and it was only in 1896 and 1897 that they were surveyed in accordance with the provisions of the order in

council of 1866. No road allowances were laid on the survey plans, but in the grants of lands subsequently made five per cent was reserved for roads.

As it was contended by some that the Dominion Parliament could not authorize the taking of provincial Crown lands for the construction of a Dominion Railway (*Attorney General of British Columbia* v. *Canadian Pacific Ry. Co.* (1), it was suggested that legislation should be passed by the province of Ontario for the purpose of setting this contention at rest; and, in 1896, the legislature of this province authorized the transfer of the lands occupied by the Canadian Pacific Railway on the condition that the grant should not

affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof.

In 1897 the Ontario Government vested in the Dominion of Canada the lands occupied by the Canadian Pacific Railway from Fort William to the western boundary of Ontario, which included the rights of way through the two townships above mentioned. This grant of the Ontario Government was made on the condition above quoted of the statute of 1896.

It has now become necessary to open highways in these townships and the Railway Board has decided that the right of way of the railway company being subject to the rights of the public with respect to the common and public highways existing means that the condition covers not only existing highways, but potential highways.

This question is not a new one; it came before us in 1918 in a case concerning the construction of a crossing in the township of Kirkpatrick (1). In this *Kirkpatrick Township Case* (1) the majority of the court came to the conclusion, on the construction of facts stated by the board, that there were no highways in the district when the railway company acquired title and that the rights of the public included rights in potential highways to be laid out under the reservation for roads by the order in council of 1866.

In the facts now submitted to us, it is formally stated that there were highways existing in the district.

(1) [1906] A.C. 204. (1) 58 Can. S.C.R. 189.

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I did not then concur in the view expressed by the majority of the court. It seemed to me impossible that it could be suggested that from the District of Nipissing to the western boundary line of Ontario there were not highways existing when the law of 1896 was passed; and I quoted different Ontario statutes which, according to my mind, would controvert this suggestion. I was of the view that the statute of 1896 had to be construed according to the ordinary grammatical rule *ad proximum antecedens fiat relatio* and the words

> rights of the public with respect to common and public highways existing at the date hereof

mean not rights then existing with respect to highways, but rights of the public with respect to highways then existing. The participle "existing" qualifies not the substantive "rights" but the substantive "highways," because it is nearer the latter than the former. My construction of the facts submitted to us and of the statute did not prevail and I was, with my brother Mignault, in the minority.

With the facts which are now submitted to us by the board, it is evident that the legislature of Ontario did not intend to refer in its legislation of 1896 to potential highways, but to the highways built and established at the time it was passed.

For these reasons the appeal should be allowed with costs and we should answer negatively the question submitted to us; and we should state that the title of the railway company is not subject to the prior right reserved in the Crown to construct and maintain a public crossing over the railway company's right of way.

MIGNAULT J.—In the case of *The Canadian Pacific Ry. Co.* v. *Department of Public Works of Ontario* (1), referred to in the judgment appealed from as "The Kirkpatrick Case," I expressed the opinion that the question of seniority should be decided in favour of the railway company. My brother Brodeur was of the same view, but the majority of the court decided otherwise, holding that the highway and not the railway company was senior. In that

(1) 58 Can. S.C.R. 189.

case, the statement of facts on which the judgment of the court was based declared expressly that

no highway was laid out across the said railway before title to its right of way was acquired under the said Order in Council.

Here the case submitted by the Railway Board states that

at the time of the passing of the said statute, 59 Victoria (Ontario), chapter XI, there were existing common and public highways across the lands intended to be conveyed by that Act, but no such highway was in fact located at either of the points now in question, nor were any highways laid out in the area covered by the townships of Eton and Aubrey which were then unsurveyed.

The Ontario statute here referred to authorized the Lieutenant Governor in Council of Ontario to transfer to the Dominion of Canada certain lands occupied by the Canadian Pacific Railway between Calender Station, at the eastern extremity of Lake Nipissing, and the western boundary of Ontario, and in the former case I said that I could not assume that there were no highways in this large tract of land covering several hundred miles. It now turns out that there were highways across the lands intended to be conveyed by the Act, and the case stated for the opinion of this court expressly so declares.

I think this difference of statement of fact sufficiently differentiates this case from the previous one and leaves me free to decide (as I think it should be decided) the question of seniority in favour of the company without it being necessary to repeat what I said in the former case. I feel all the less hesitation in distinguishing the two cases because the portion of railway over which it is proposed to carry the highways in question was originally built by the Dominion of Canada under the authority of the Dominion statute, 37 Vict., c. 14. For the purpose of this work Parliament could and did authorize the Dominion Government to take provincial Crown lands; *Attorney General for British Columbia* v. *Canadian Pacific Ry. Co.* (1). And the grant of this portion of the railway, to wit the portion between Fort William and Manitoba, made by the Dominion to the appellant on the 29th March, 1904, under the

(1) [1906] A.C. 204.

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authority of the Dominion statute, 44 Vict., c. 1, is in no wise based upon the Ontario statute above referred to, and contains no restrictions whatever in respect of highways.

I would allow the appeal with costs and answer the question submitted in the negative.

Appeal allowed with costs.

Solicitor for the appellant: *W. N. Tilley.*

Solicitor for the respondent: *F. E. Titus.*