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*March 18.
*April 5.

THE COUNTY OF CARLETON.....APPELLANTS;

AND

THE CITY OF OTTAWA AND OTHERS.RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Railway crossing—Contribution to cost—Party interested—Municipality—Distance from work.

A municipality may be a "party interested" in works for the protection of a railway crossing over a highway though such works are neither within or immediately adjoining its bounds and the Board of Railway Commissioners has jurisdiction to order it to pay a portion of the cost of such work.

APPEAL by leave of a judge in chambers as to the jurisdiction of the Board of Railway Commissioners to order the County of Carleton to contribute to the cost of a viaduct or overhead roadway over four railway crossings on Wellington Street in the City of Ottawa.

The County of Carleton originally joined with the City of Ottawa in applying to the Board for an order for this work. Subsequently the Village of Hintonburgh, in which the proposed viaduct would be situated was incorporated with the city, and the work, which had been within a few feet of the county boundary was then distant from it nearly a mile. The county, therefore, withdrew from the joint application and it was proceeded with by the city alone. The

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

Board, however, held that the county was still a "party interested" and in granting the application ordered it to pay a portion of the cost. The county appealed to the Supreme Court of Canada challenging the jurisdiction of the Board to make such order.

R. V. Sinclair K.C. and *D. H. McLean* for the appellants.

McVeity for the respondents the City of Ottawa.

Ewart K.C. for the Grand Trunk Railway Co.

W. L. Scott for the Canadian Pacific Railway Co.

The CHIEF JUSTICE and DUFF and ANGLIN JJ. concurred in the judgment of Mr. Justice Davies.

DAVIES J.—The question on which leave to appeal was given in this case, from an order of the Board of Railway Commissioners directing the municipality of the County of Carleton to pay a proportion of the cost of certain protective works ordered at the crossing of the Richmond Road and the Canada Atlantic and other railways, was limited to the jurisdiction of the Board to make the order it did as against the municipality of the County of Carleton.

The ground upon which the jurisdiction was challenged was that, while the crossing in question was, at the time the application was made to the Board for such protective works, within a few hundred feet of the municipal boundary, subsequently, before the case came on for hearing and at the time the order was made, the area within which the crossing existed had

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been legally withdrawn for about a mile from the municipal boundary and the intervening territory brought within the City of Ottawa and, so, the proposed protective works were neither within the municipal bounds of the county or immediately adjoining them.

It was contended on behalf of the municipality that it could not be held to be an "interested party" within the meaning of the "Railway Act" with respect to protective works ordered by the Board at highway crossings which were not within the boundaries of the municipality, and the more so in a case such as the one before us where, it was contended, the highway was not vested in the municipality, but in a toll company.

All questions as to sections 186 and 187 of the "Railway Act of 1903" being *intra vires* of the Parliament of Canada have been set at rest by the decision of this court in the case of *The City of Toronto* v. *The Grand Trunk Railway Co.*(1), and that of *Toronto Corporation* v. *The Canadian Pacific Railway Co.*(2), decided on appeal from the Court of Appeal for Ontario by the Judicial Committee of the Privy Council.

The powers of the Board of Railway Commissioners to order municipalities to pay a proportion of the cost of protective works ordered to be built at highway and railway crossings on railways within the jurisdiction of the Dominion Parliament so far as these crossings were within the municipal bounds or immediately adjoining them were, by these two cases, finally settled against the municipality.

In the latter case, decided by the Judicial Committee of the Privy Council, two of the crossings there in question were over a railway, the southern boundary

(1) 37 Can. S.C.R. 232. (2) [1908] A.C. 54.

of which was the northern boundary of the City of Toronto and so outside of but immediately adjoining the city boundaries.

The question raised in the case before us was whether a municipality was liable if the crossings where the works were ordered was beyond its bounds and not immediately adjoining them.

I am unable to discern any substantial reason for limiting the jurisdiction of the Board of Railway Commissioners in the manner suggested.

If that Board has jurisdiction to order a municipality to pay a proportion of the cost of any work ordered by it to be done at a railway and highway crossing in cases where that work is beyond the bounds of the municipality, even though adjoining it, I fail to see why its jurisdiction should cease if the crossing happened not to adjoin, but to be a short distance beyond the municipal bounds.

The municipality was not an "interested party" within the provisions of the "Railway Act" and so liable to pay a share of the cost of the work at a railway and highway crossing simply because the crossing was within its bounds or "immediately adjoining" them, or because the municipality owned the highway crossing the railway or being crossed by it, but because the works ordered were, in the words of the statute, for the "protection, safety and convenience of the public" and such

> as, under the circumstances, appeared to the Board best adapted to remove or diminish the danger or obstruction arising or likely to arise therefrom,

and because the Board found the inhabitants of the municipality specially interested in these protective works.

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What Parliament was conferring on the Board were powers for the "protection, safety and convenience of the public" at the crossings, alike that portion of the public being carried by the railway and that portion using the highway.

The decision of the Board as to whether a municipality was or was not a party interested was made by the statute binding and conclusive. It is a question of fact to be determined under all the circumstances of each case. The circumstance of a crossing where protective works were ordered being within or without the municipality might be or not be, under all the special circumstances of the case, most material to the decision of the fact whether or not the municipality was an interested party, but it was not, in itself, conclusive. Such a crossing might be within the boundaries of the municipality and yet its inhabitants be very slightly interested in the protective works ordered, or it might be just beyond the precincts of the municipality and yet so situated that a large number of the inhabitants of the municipality were vitally interested in the protective works ordered. In each case the question of fact and the amount of the municipality's contribution were to be determined by the Board.

The municipality represented its inhabitants; the works to be ordered were works for the "protection, safety and convenience" of such inhabitants as part of the public; and the degree and extent to which the municipality was to share the expense of the protective works determined on as necessary was to be decided by the Board. In all cases it was necessarily a question of fact to be decided in the light of all the circumstances and not necessarily dependent upon the arbi-

trary fact of the protective works being within or immediately adjoining the municipality.

Though not within the express terms of the decision of the Judicial Committee in the case above cited, of *Toronto Corporation* v. *The Canadian Pacific Railway Co.*(1), this case is within the reasoning on which that judgment and also the judgment of this court in the *City of Toronto* v. *The Grand Trunk Railway Co.*(2) above cited, were founded.

The following extract from the judgment of the Judicial Committee, as delivered by Lord Collins, shews, in part, the reasoning by which their lordships reached the conclusions they did:

> In the present case it seems quite clear to their lordships that if, to use the language above quoted, "the field were clear," the sections impugned do no more than provide reasonable means for safeguarding, in the common interest, the public and the railway which is committed to the exclusive jurisdiction of the legislature which enacted them, and were, therefore, *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and, in the view of their lordships, there is nothing *ultra vires* in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reasonable that those who derived special advantage from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provisions are alike reasonable and *intra vires* of the Dominion Legislature, and, on the principles above cited, must prevail, even if there is legislation *intra vires* of the provincial legislature dealing with the same subject-matter and in some sense inconsistent.

I think, therefore, the limitations upon the jurisdiction of the Board of Railway Commissioners sought

(1) [1908] A.C. 54. (2) 37 Can. S.C.R. 232.

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to be put by the County of Carleton in this case are not maintainable and that the appeal must be dismissed with costs.

Idington J.

IDINGTON J.—I think this appeal should be dismissed with costs.

The power of the commission as to directing a municipal corporation to aid in protecting a railway company has been, ever since *The City of Toronto* v. *The Grand Trunk Railway Co.*(1), was decided here, dependent entirely upon the finding of the commission as to whether or not any of the inhabitants of such municipality were interested.

The majority of the court in that case held, as beyond doubt, that, if the inhabitants were interested, the corporation must be held so.

I had supposed, until then, that though the inhabitants had been incorporated, they and the corporation were not, in law, convertible terms, and that the latter could only represent the former so far as its legislative creator had determined it might.

I had also supposed that "municipal institutions" in a province, having as a subject matter been assigned by the "British North America Act, 1867," to the legislature of the province, exclusively to make laws in relation to matters coming within such a subject so assigned, it was not competent for the Dominion Parliament either to add to such power as the creating legislature had seen fit to confer or, above all, to use these institutions for the purpose of levying taxes upon the inhabitants so incorporated when given no

(1) 37 Can. S.C.R. 232.

such power, merely to subserve the execution of any of the powers conferred on the Dominion.

I had supposed any such corporation, in respect of its property, whether of roads or aught else, might, as any other property owner, become, of necessity, subject in relation to such property to the will of Parliament lawfully empowering or directing railway construction and suggested a line might well be drawn for exercising the jurisdiction now in question to cover this property relation, as within the manifest interest of the corporation.

The opinions given by the other members of the court left us no room for doubt that the line should not be so drawn or any line drawn save where Parliament saw fit to draw it.

The "British North America Act, 1867," and the "Railway Act" so interpreted left the matter wholly to the commissioners to find and say what municipal corporations were "interested" within such meaning as was thus assigned in the latter Act.

This case was upheld by the Judicial Committee of the Privy Council, and, later, *The Toronto Corporation* v. *The Canadian Pacific Railway Co.* (1), not only carried quite logically (if I may be permitted to say so) the doctrine further than the former case; but also lays down so wide a principle of action to be applied that it is hard to see what appellants can have hoped to gain by thus flying in the face of judicial authority when armed only with nothing new but only such arguments as had proved of no weight in the highest courts of law entitled to pass upon the matter.

(1) [1908] A.C. 54.

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Appeal dismissed with costs.

Solicitor for the appellants: *D. H. McLean.*

Solicitor for the respondent The City of Ottawa: *Taylor McVeity.*

Solictor for the respondent The G. T. Ry. Co.: *W. H. Biggar.*

Solicitor for the respondent, The C. P. Ry. Co.: *E. W. Beatty.*