CAMPBELL-BENNETT LIMITED .....APPELLANT; 1953 *Nov. 10, 11

AND

COMSTOCK MIDWESTERN LIMITED and TRANS MOUNTAIN OIL PIPE LINE COMPANY .....RESPONDENT. 1954 *May 19

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional Law—Mechanics' Lien—Interprovincial and International oil pipe line company incorporated by special act of Parliament—Whether mechanics' lien applies to, or may be enforced against, property of such company—British North America Act, 1867 (30 & 31 Vict. c. 3 Imp. ss. 91 head 29, 92 head 10(a))—The Mechanics' Lien Act, R.S.B.C. 1948, c. 205.

A company incorporated by special Act of the Parliament of Canada for the purpose of transporting oil by means of interprovincial and international pipe lines is a work or undertaking within the exclusive jurisdiction of Parliament. As such it is not subject to a lien under the provisions of a provincial Mechanics Lien Act since the effect of such legislation would permit the sale of the undertaking piecemeal and nullify the purpose for which it was incorporated.

Judgment of Court of Appeal for British Columbia (1953) 8 W.W.R. (N.S.) 683, affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) dismissing an appeal from a judgment of Archibald J., Judge of the County Court of Yale answering in the negative certain questions of law set down for hearing before trial.

W. H. Campbell and *Marcel Joyal* for the appellant.

S. McK Brown for Comstock Midwestern Ltd., respondent.

D. N. Hossie, Q.C. and *W. L. N. Somerville* for Trans Mountain Oil Pipe Line Co., respondent.

W. R. Jackett, Q.C. and *T. Eaton* for Attorney General of Canada.

The judgment of Kerwin and Fauteux JJ. was delivered by:—

KERWIN J.:—This is an appeal by Campbell-Bennett Ltd. from a judgment of the Court of Appeal for British Columbia affirming an order of a judge of the County

*PRESENT: Kerwin, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

(1) (1953) 8 W.W.R. (N.S.) 683; [1953] 3 D.L.R. 594.

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Court of Yale. The latter answered certain questions of law set down for hearing and disposition before the trial of an action in that Court to enforce a mechanics' lien. These questions and the answers thereto are as follows:—

Question (*a*): Can a lien claimed under the Mechanics' Lien Act, Chap. 205, R.S.B.C. 1948 and amending acts exist or be enforced against the property of the Defendant Trans Mountain Oil Pipe Line Company referred to in the Plaint and Summons in this action under the circumstances therein alleged and having regard to the matters raised by Paragraph 29 of the Dispute Note of the Defendant Trans Mountain Oil Pipe Line Company and Paragraph 27 of the Dispute Note of the Defendant Comstock Midwestern Limited.

Answer: No.

Question (*b*): If not, can the Plaintiff proceed to obtain Judgment under Section 35 of the Mechanics' Lien Act or otherwise in these proceedings.

Answer: No.

Question (*c*): Has this Honourable Court jurisdiction to entertain the matters complained of in this action.

Answer: No.

Trans Mountain Oil Pipe Line Co., hereafter called Trans Mountain, is a corporation incorporated by a Special Act of the Parliament of Canada, c. 93 of the Statutes of 1951. By s. 5 it has all the powers, privileges and immunities conferred by, and is subject to all the limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil or any liquid product or by-product thereof which is enacted by Parliament. By s. 6:—

The Company, subject to the provisions of any general legislation relating to pipe lines for the transportation of oil or any liquid product or by-product thereof which is enacted by Parliament, may

(*a*) within or outside Canada construct, purchase, lease, or otherwise acquire, and hold, develop, operate, maintain, control, lease, mortgage, *create liens* upon, sell, convey, or otherwise dispose of and turn to account any and all interprovincial and/or international pipe lines for the transportation of oil including pumping stations, . . .

Trans Mountain constructed, purchased or acquired an interprovincial pipe line. The general legislation referred to is the *Pipe Lines Act*, R.S.C. 1952, c. 211. Under s. 10 thereof a company, such as Trans Mountain, shall not

without the leave of the Board of Transport Commissioners for Canada, sell, convey or lease to any person its company pipe line in whole or in part, while s. 3 thereof enacts:—

> 3. Except as in this Act otherwise provided ,
>
> (*a*) This Act shall be construed as incorporate with a Special Act, and
>
> (*b*) where the provisions of this Act and a Special Act relate to the same subject-matter, the provisions of the Special Act shall, in so far as is necessary to give effect to the Special Act, be taken to override the provisions of this Act.

The effect of the words "subject to the provisions of any general legislation relating to pipe lines" in s. 6 of Trans Mountain's Special Act is to require Trans Mountain, in accordance with s. 10 of the *Pipe Lines Act,* to obtain the consent of the Board before selling, conveying or otherwise disposing of its interprovincial pipe line.

As alleged in the plaint in the County Court, Trans Mountain is the owner of a pipe line from Acheson, Alberta, to Burnaby, British Columbia, and the owner of all the real property, lands, tenements and hereditaments of any tenure, and any and all easements, rights, privileges or interests in land owned or held by Trans Mountain and comprised in the right-of-way or road of the said oil pipe line or enjoyed therewith. Comstock Midwestern Limited (to which I shall hereafter refer as Comstock) entered into an agreement in writing, dated January 21, 1952, with Trans Mountain to construct and complete certain sections of the latter's oil pipe line. Clause 12(*b*) of the General Conditions attached to this agreement provides for final payment and will be referred to later.

By an agreement in writing dated February 28, 1952, between Comstock and Campbell-Bennett Ltd. the latter agreed to undertake, on behalf of the former, the clearing, grubbing and grading of the construction right-of-way for certain portions of the pipe line. By clause 12 of this agreement:—

> 12. Progress payments and final payment at the unit prices set forth in Clause 1 hereof for grading, clearing and grubbing of construction right-of-way as provided for herein shall be made in compliance with the terms, conditions and times set forth in paragraph 12 appearing on pages 6 and 7 of the said specifications.

i.e. clause 12 of the General Conditions attached to the contract between Trans Mountain and Comstock.

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Under the agreement of February 28, 1952, certain work has been done by Campbell-Bennett for which it has not been paid by Comstock and part of this work was done in the County of Yale in British Columbia. By reason of the work done and services performed, Campbell-Bennett claims to be entitled to a lien under the *Mechanics' Lien Act*, R.S.B.C. 1948, c. 205, upon and against the oil pipe line in the County of Yale and real property, land tenements, hereditaments, rights, privileges, and interests in land as described. A claim for lien was filed and this action commenced to enforce it. The British Columbia Act is similar to many others dealing with mechanics' liens and, if the action were prosecuted to a conclusion, the result would be a judgment for the amount found to be owing by Comstock to Campbell-Bennett Ltd. and an order for the sale of the pipe line within the limits of the County of Yale.

Several arguments were advanced which we were told had not been made to the Courts below. The first of these,—that the main purpose of the *Mechanics' Lien Act* is to secure payment of an amount owing on a lien,—fails because the security to which Mr. Campbell referred is obtained under all the provisions of the Act, including those authorizing the sale of lands if a claim be not paid by the creditor. These are as important as the sections providing for the determination of, and judgment for, the amount of the claim.

The second is based upon the words "create liens" in s. 6(*a*) of the Act incorporating Trans Mountain. These are permissive words and have no reference to liens under the British Columbia Mechanics' Liens Act which are created by operation of law and not by action of Trans Mountain.

In connection with the third argument, Mr. Campbell relied upon clause 12(*b*) of the General Conditions of the contract between Trans Mountain and Comstock which by virtue of the agreement between Comstock and Campbell-Bennett Ltd. is applicable to that contract. This clause 12(*b*) reads as follows:—

> *b. Final Payment:* When each Section of the line has been completed, with the exception of Final Testing, payment will be made within ten (10) days in an amount, which together with previous payments, will equal 90 per cent of the SUPERVISOR'S estimate of the total amount due the CONTRACTOR. Immediately following the Final Testing and

the Final Acceptance of each Section, the SUPERVISOR and the SUPERINTENDENT shall agree on a final certified estimate. When this final estimate has been accepted by the AGENT and the time for filing liens of any kind or character in connection with such work has expired, as provided by the laws of the Dominion of Canada and/or the Province or Provinces in which work has been performed, the AGENT shall pay to the CONTRACTOR within ten (10) days, the remaining amount due:

PROVIDED, however, the AGENT may at option and at any time after the expiration of thirty days next after the final completion of the work to be performed hereunder, make final payment to the CONTRACTOR prior to the expiration of the said lien period which shall in no way relieve the CONTRACTOR and/or the Bond furnished by the CONTRACTOR, from liability shown and for which a lien could attach to said work or structures, to pipe or equipment, or any portion of any thereunder, during the whole of said lien period, but on the contrary, CONTRACTOR and/or said Bond shall be and remain liable during the whole of said lien period.

The words "the time for filing liens of any kind or character in connection with such work has expired, as provided by the laws of the Dominion of Canada and/or the Province or Provinces in which work has been performed" do not constitute an undertaking that Trans Mountain will be bound by the provisions of the British Columbia *Mechanics' Lien Act*. So far as it is concerned, the clause is merely an enabling one.

There remains for consideration that part of Question (*a*) asking whether the lien claimed under the British Columbia *Mechanics' Lien Act* exists, or can be enforced, against the oil pipe line of Trans Mountain within the County of Yale, having regard to the matters raised by paragraph 29 of the dispute note of Trans Mountain and paragraph 27 of the dispute note of Comstock, which paragraphs are in substance the same. It is clear that the work or undertaking of Trans Mountain is a work or undertaking "connecting the Province with any other or others of the Provinces" and therefore within the exclusive authority of Parliament by virtue of s. 91, head 29, of the *British North America Act, 1867*, when read in conjunction with s. 92, head 10A,—just as much as the work or undertaking of the Telephone Company in *Corporation of the City of Toronto* v. *Bell Telephone Company* (1). It is true that this is not a case like *Madden* v. *Nelson and Fort Sheppard Railway Co.* (2), because, there, a provincial enactment specifically imposed a liability upon railway companies declared to be for the

(1) [1905] A.C. 52. (2) [1899] A.C. 626.

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general advantage of Canada. Here, the British Columbia Mechanics' Lien Act is a law of general application and no work or undertaking under Parliament's jurisdiction is singled out. On the other hand, the present case is distinguishable from *Canadian Pacific Railway Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1); "Where", according to the *Nelson* case at p. 628, "it was decided that although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as it then existed—that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance." The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result.

We are not called upon to deal with other circumstances that might arise in connection with such a work or undertaking and therefore nothing is said about them. Confining ourselves to the exact question before us, assistance is obtained in coming to the above conclusion from a consideration of such decisions as *Redfield* v. *Corporation of Wickham* (2); *Central Ontario Railway* v. *Trusts and Guarantee Company* (3); *Crawford* v. *Tilden* (4); *Johnson and Carey Co.* v. *Canadian Northern Ry. Co.* (5).

The *Redfield* case decided that ss. 14 and 15 of the then current Railway Act of Canada "do not suggest that according to the policy of Canadian law a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors or encumbrancers but they clearly show that the Dominion Parliament has recognized the rule that a railway or a section of a railway may as an integer be taken in execution and sale like other immeubles in ordinary course of law." Provisions analagous to ss. 14 and 15 are found in s. 152 of the present *Railway Act,* R.S.C. 1952, c. 234. These provisions deal with the sale of a railway or any section thereof under the powers contained in a

(1) [1899] A.C. 367.
(2) (1888) 13 App. Cas. 467.
(3) [1905] A.C. 576.
(4) (1907) 14 O.L.R. 572.
(5) (1918) 44 O.L.R. 533.

deed or mortgage, and provide for an application by a purchaser to the Minister of Railways and Parliamentary sanction for the purchaser to operate the railway. By s. 30 of the *Pipe Lines Act* certain sections of the *Railway Act* apply to companies authorized by Special Act to construct or operate pipe lines for the transportation of oil or gas but s. 152 of the *Railway Act* is not one of them.

In the *Central Ontario Railway* case Lord Davey pointed out at page 582 that the Courts of Upper Canada had previously decided that the vendee under a sale in pursuance of a bond mortgage could not exercise the franchise by working and operating a railway, and their Lordships saw no reason to doubt the correctness of the law thus laid down. In the case before them, however, their Lordships held that the same result should follow as in *Redfield* because of the provisions of ss. 14, 15 and 16 of the *Railway Act*. The two Ontario cases referred to decide that a lien under the Ontario Mechanics' and Wage Earners' Act could not exist or be enforced against the property of the railway companies there in question.

The absence of any provision such as s. 152 of the present *Railway Act* therefore leaves the matter that it must be taken that the British Columbia Mechanics' Lien Act does not even purport to apply to the oil pipe line of Trans Mountain in the County of Yale. If it does, it is to that extent ultra vires. Mr. Campbell agreed that if he failed in his contentions as to Question (*a*), it was unnecessary to consider Question (*b*) and (*c*). For the above reasons the appeal should be dismissed with costs but no order should be made as to the costs of the Attorney General of Canada.

The judgment of Rand, Kellock, Locke and Cartwright JJ. was delivered by:—

RAND J.:—The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the "powers, privileges and immunities conferred by" and, except as to provisions contained in the statute which conflicted with them, was made subject to all the "limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil" enacted by Parliament. Within that framework, it was empowered to construct or

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otherwise acquire, operate and maintain interprovincial and international pipe lines with all their appurtenances and accessories for the transportation of oil.

The *Pipe Lines Act*, R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tolls therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the *Railway Act*. By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tolls or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.

Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens? The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy: *Winner* v. *S.M.T. (Eastern) Limited* (1), affirmed, with a modification not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realiez the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.

In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to

(1) [1951] S.C.R. 887.

be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there could be no such destruction by means of any mode of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purposes of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the *Railway Act*, R.S.C. (1952) c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the *Pipe Lines Act* is a sale by the company, not one arising under the provisions of law and in a proceeding *in invitum*. The general principle was stated by Sir Hugh M. Cairns, L.J. in *Gardner* v. *London, Chatham and Dover Railway* (1):—

> When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred.

In the same judgment and speaking of the effect of an authorized mortgage of the "undertaking" he said:—

> The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees—by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed.

To the same effect, in the case of execution, are *Peto* v. *Welland Railway Company* (2), and *King* v. *Alford* (3),

(1) (1867) L.R. 2 Ch. 201 at 212. (2) (1862) 9 G.R. 455.
(3) (1884) 9 O.R. 643.

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(an engine house and turntable of a railway) which followed *Breeze* v. *The Midland Railway Company* (1), (a station house).

These considerations, *a fortiori,* become controlling when the question arises as between Provincial and Dominion jurisdictions. The mutilation by a province of a federal undertaking is obviously not to be tolerated in our scheme of federalism, and this from the beginning has been the view taken of provincial legislation of the nature of that before us.

In *Johnson & Carey Co.* v. *Canadian Northern Railway Co.* (2), which followed *Crawford* v. *Tilden* (3), as a binding decision, a lien claimed by a sub-contractor against a portion of the defendant's railway, under Dominion jurisdiction, was denied. The governing case had gone before both the Divisional Court and the Court of Appeal, and in both the judgment was unanimous. In *Larsen* v. *Nelson & Fort Sheppard Railway* (4), a similar ruling was made. In *Western Canada Hardware Co. Ltd.* v. *Farrelly Bros. Ltd.* (5), the Appellate Division of the Supreme Court of Alberta, speaking through Stuart J.A., found against the application of *The Mechanics' Lien Act* to an irrigation ditch constructed under the authority of Dominion legislation.

In *Bourgoin* v. *La Compagnie de Montréal du Chemin de Fer* (6), the Judicial Committee held that Quebec, even with the consent of the company, could not bring about the dissolution of the undertaking of a railway which had been declared a work for the general advantage of Canada. In *Attorney General for Alberta* v. *The Attorney General for Canada and the Canadian Pacific Railway Company* (7), Alberta was held incompetent to appropriate in any manner any part of the physical property of a Dominion railway for any purpose even though no interference with the construction or operation of the railway should result. In the case before us we have such a measure by which a physical appropriation is authorized that would completely nullify the object of the legislation of Parliament.

(1) (1879) 26 Gr. 225.
(2) (1918) 44 O.L.R. 533.
(3) (1907) 14 O.L.R. 572.
(4) (1895) 4 B.C.R. 151.
(5) (1922) 3 W.W.R. 1017.
(6) (1880) 5 App. Cas. 381.
(7) [1915] A.C. 363.

This wide concurrence of opinion, followed in the courts below, is, if I may say so, the necessary conclusion from the matters that have been accepted as pertinent to the question raised.

The appeal must therefore be dismissed with costs, but there will be no costs to the Attorney General of Canada.

ESTEY J.:—The respondent Trans Mountain Oil Pipe Line Company (hereinafter referred to as Trans Mountain) was incorporated by special act of the Parliament of Canada (S. of C. 1950-51, c. 93). In the exercise of its powers it entered into a contract for the construction of a pipe line through portions of the provinces of Alberta and British Columbia, by which, when completed, it would convey oil from a point near Edmonton, Alberta, to a point near Vancouver, British Columbia.

The respondent Trans Mountain entered into a contract with the respondent Comstock Midwestern Limited (hereinafter referred to as Comstock) under which the latter agreed to construct certain sections of this pipe line.

The respondent Comstock, in turn, entered into a subcontract with appellant Campbell-Bennett Ltd. for the clearing, grubbing and grading of construction right-of-way for sections of this line in the counties of Yale, Westminster and Cariboo in British Columbia. When the appellant was not paid it filed a mechanics' lien against the pipe line of Trans Mountain and in order to enforce the lien commenced actions, one in each of the counties named. We are here concerned only with that in the county of Yale.

Before the trial the following points of law were submitted to the learned county court judge: (See ante p. 208)

The learned county court judge answered "No" to each of these and his answers were affirmed in the Court of Appeal.

Section 5 of the act of incorporation of Trans Mountain Oil Pipe Line Company provides:

> The Company shall have all the powers, privileges and immunities conferred by, and be subject to all the limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil or any liquid product or by-product thereof which is enacted by Parliament.

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Under s. 6 the company may acquire real property and may

> construct, purchase, lease, or otherwise acquire, and hold, develop, operate, maintain, control, lease, mortgage, create liens upon, sell, convey, or otherwise dispose of and turn to account any and all interprovincial and/or international pipe lines, . . .

Then s. 7 of the same act embodies s. 63 of the *Companies Act* (R.S.C. 1952, c. 53), under which Trans Mountain is empowered to borrow upon the credit of the company and to issue debentures or other securities, and, in particular, power to mortgage, hypothecate, charge or pledge all or any of its real and personal property.

Parliament, in 1949, had enacted the *Pipe Lines Act* (R.S.C. 1952, c. 211). Section 3(*a*) of that enactment provides: "this Act shall be construed as incorporate with a Special Act" and the definition of "Special Act" includes the statute incorporating the respondent Trans Mountain.

Section 4 of the *Pipe Lines Act* provides that the Board of Transport Commissioners for Canada "shall exercise and enjoy the same jurisdiction, powers and authority in matters under this Act as are vested in the Board by the *Railway Act*." Then, by s. 30, ss. 207 to 246, 248 and 251 of the *Railway Act* are incorporated into the *Pipe Lines Act* "in so far as they are reasonably applicable and not inconsistent with this Act." Under s. 11 of the *Pipe Lines Act* it is provided that Trans Mountain shall not begin the construction of a section or part of a pipe line without obtaining leave of the Board of Transport Commissioners, and s. 10(*a*) provides that Trans Mountain shall not, without leave of the Board, "sell, convey or lease to any person its company pipe line, in whole or in part."

The respondent Trans Mountain does not dispute that, though incorporated by a special act of Parliament, it is ordinarily subject to provincial laws of general application. It does contend, however, that it is not subject to the provisions of the provincial *Mechanics' Lien Act* because, when enforced, it would mean the sale of at least a portion of its pipe line and would, therefore, substantially impair, if not destroy, its powers and capacities to transport oil from near Edmonton to a point near Vancouver and, therefore, to prevent the attainment of the end for which it was incorporated.

Parliament, no doubt because a pipe line, constructed as here in question, is a means of transportation, made its operation subject to certain provisions of the *Railway Act* and to the jurisdiction of the Board of Transport Commissioners. It is, therefore, of some significance that railways, on the basis that they provide an essential public service, have been held not to be subject to mechanics' liens. The principle underlying these decisions appears to be that to permit the enforcement of such a lien would tend to destroy a public service and, therefore, as a matter of policy, such property ought not to be subject to a mechanic's lien. *King* v. *Alford et al.* (1); *Larsen* v. *Nelson & Fort Sheppard Railway* (2).

That a province cannot, by legislation, impose requirements upon a Dominion corporation that would substantially impair its powers or capacities to accomplish the purpose for which it was incorporated under Dominion legislation is well established. *John Deere Plow Co., Ltd.* v. *Wharton* (3); *Great West Saddlery Co. Ltd.* v. *The King* (4). In the latter case, in referring to Dominion corporations, it is stated that

> they cannot be interfered with by any Provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law.

Provincial legislation requiring the Bell Telephone Company of Canada to obtain the consent of the municipality before erecting its poles and attaching its wires thereto was held ultra vires.

> It would seem to follow that the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada." *Toronto Corporation* v. *Bell Telephone Company of Canada,* (5).

An ordinance of the Northwest Territories imposed liability upon one in charge of a locomotive for damages from a fire caused thereby, unless it was equipped with certain appliances and the railway company maintained a

(1) (1885) 9 O.R. 643.
(2) (1895) 4 B.C.R. 151.
(3) [1915] A.C. 330.
(4) [1921] 2 A.C. 91.
(5) [1905] A.C. 52 at 57.

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specified fire guard. This legislation was held not applicable to railways subject to the legislative jurisdiction of Parliament. *C.P.R.* v. *The King* (1).

A province cannot impose upon such railways the obligation to construct fences. *Madden* v. *Nelson and Fort Sheppard Railway* (2). Nor can a province require a Dominion company to obtain a licence before offering its shares for sale. *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3).

On the other hand, a province may require that a Dominion company shall maintain ditches constructed under authority of Parliament in a manner that will not injure adjoining property. *C.P.R.* v. *Bonsecours* (4). The Security Frauds Prevention Act of Alberta (S. of A. 1930, c. 8) required that any person or corporation, before offering corporate shares for sale, must obtain a provincial licence. Such legislation was held intra vires the province. *Lymburn* v. *Mayland* (5).

The Judicial Committee has recently discussed this subject in *Attorney General for Ontario et al.* v. *Israel Winner et al.*, a decision dated February 22, 1954, and as yet unreported. There an individual operated a bus line from Boston, Massachusetts, through various states and the Province of New Brunswick, to Glace Bay, Nova Scotia. His bus service was held to be included within the phrase "works and undertakings" in s. 92(10)(*a*) of the *B.N.A. Act* and, therefore, subject to the legislative jurisdiction of Parliament (s. 92(29)). Lord Porter, delivering the reasons of the Judicial Committee, stated that provincial "legislation will be invalid if a dominion company is sterilised in all its functions and activities or its status and essential capacities are impaired in a substantial degree." Again he stated:

> It must be remembered that it is the undertaking not the roads which come within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with the prerogative of the Dominion.

In that case it was held that the restrictions upon the nature of the bus business Winner carried on in New Brunswick were ultra vires that province. The principle under-

(1) (1908) 39 Can. S.C.R. 476.
(2) [1899] A.C. 626.
(3) [1929] A.C. 260.
(4) [1899] A.C. 367.
(5) [1932] A.C. 149.

lying that case would seem to constitute an effective bar to the appellant's contentions. The mechanics' lien, when enforced, would substantially destroy the purpose for which Trans Mountain was incorporated by the Dominion.

The provisions of the *Mechanics' Lien Act* give a lien against the respondent's pipe line in favour of the appellant, a sub-contractor, as well as in favour of the labourer for his wages and those who furnish material. The Act provides certain safeguards by which a company in the position of Trans Mountain may, by withholding certain payments, in part at least protect itself. The fact remains, however, that the enforcement of a mechanics' lien would mean that at least a portion of the pipe line would be sold and thereby the powers and capacities of Trans Mountain to perform the service for which it was incorporated would be substantially impaired, if not destroyed.

The company, under s. 6 of its act of incorporation, was empowered to create liens upon its pipe lines. That provision, however, contemplates a contractual obligation which is quite different from a statutory lien, created in favour of those who supply labour or material, with all of its attendant consequences.

The contract between Trans Mountain and Comstock contained a provision (which, in effect, was carried into Comstock's contract with appellant) designed to protect Trans Mountain against a mechanics' lien, so far as contractual obligations could do so. It does not affect the nature and character, nor the ultimate effect of the legislation.

Appellant contends that the *Mechanics' Lien Act* became a part of, or was embodied in the contracts made between the parties hereto in a manner that made the position comparable to that under the *Workmen's Compensation Act,* in referring to which the Privy Council stated:

> The right conferred arises under s. 8, and is the result of a statutory condition of the contract of employment made with a workman resident in the province, for his personal benefit and for that of members of his family dependent on him. . . . This right arises, not out of tort, but out of the workman's statutory contract, . . ." *Workmen's Compensation Board* v. *Canadian Pacific Railway Company,* (1).

It is important to observe an essential difference between the workmen's compensation legislation and that of the mechanics' lien. The former not only creates a contractual

(1) [1920] A.C. 184.

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term of the contract of employment, but creates a benefit for the employees and their dependents and, in order to provide for that benefit, imposes a tax upon the employers. The *Mechanics' Lien Act* in question is quite different. It merely provides for a lien which the workmen and material men may enforce against the property, but which right ceases to exist unless the lien is registered within the time required by the statute. It is a right created by the statute and, while it arises out of the fact of employment or the furnishing of material, it is not made a provision of the contract of employment or of that under which the material is purchased.

The appellant submits that the cleaning, grubbing and grading of the construction right-of-way is but incidental to the work and undertaking of Trans Mountain and comparable to the preparation of land for the construction of dwelling houses, reservoirs and warehouses. The essential difference, however, is that the lien, if effective, here attaches to the pipe line and its enforcement would, as already stated, substantially destroy the purpose for which the company was incorporated.

It was further contended that the omission of any provision in the act of incorporation to the effect that a mechanics' lien should not attach indicates that it was contemplated these liens would attach. On the contrary, such an omission would indicate no more than that Parliament intended to leave such a question to be determined under the relevant provisions of the *B.N.A. Act* with respect to the competency of a province to enact legislation in relation to Dominion companies.

The answers as given by the learned trial judge and affirmed in the Court of Appeal should also be affirmed in this Court. The appeal should, therefore, be dismissed with costs, except that there will be no costs to the Attorney General of Canada.

Appeal dismissed with costs. No costs to the Attorney General of Canada.

Solicitor for the appellant: *W. H. Campbell.*

Solicitor for respondent, Comstock Midwestern Ltd.: *L. St. M. DuMoulin.*

Solicitors for respondent Trans Mountain Oil Pipe Co.: *D. G. Marshall.*