

1906
 * March 30.
 * April 6.

THE JAMES BAY RAILWAY
 COMPANY..... } APPELLANT;

AND

THE GRAND TRUNK RAILWAY
 COMPANY OF CANADA..... } RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Appeal to Supreme Court.

The Board of Railway Commissioners granted an application of the James Bay Railway Co. for leave to carry their line under the track of the G. T. Ry. Co. but, at the request of the latter, imposed the condition that the masonry work of such under crossing should be sufficient to allow of the construction of an additional track on the line of the G. T. Ry. Co. No evidence was given that the latter company intended to lay an additional track in the near future or at any time. The James Bay Co., by leave of a judge, appealed to Supreme Court of Canada from the part of the order imposing such terms contending that the same was beyond the jurisdiction of the Board.

Held, that the Board had jurisdiction to impose said terms.

Held, per Sedgewick, Davies and MacLennan JJ., that the question before the court was rather one of law than of jurisdiction and should have come up on appeal by leave of the Board or been carried before the Governor General in Council.

A PPEAL by leave of a judge from an order of the Board of Railway Commissioners for Canada granting an application of the appellants for a crossing under the Grand Trunk line and directing that the substructure be made sufficient to support a second line if thereafter laid.

*PRESENT:—Sedgewick, Girouard, Davies, Idington and MacLennan JJ.

The order of the Board was as follows:—

“In the matter of

“The application of the James Bay Railway Company, hereinafter called the ‘applicant company,’ under section 177 of the ‘Railway Act, 1903,’ to the Board for an Order authorizing an undercrossing of the tracks of the Midland Division of the Grand Trunk Railway Company of Canada, at a point near Beaverton, Ontario, in Lot 13, Concession 7, Township of Thorah, County of Ontario, as shewn on plan on file with the Board under reference No. 16908, file No. 1455;

“Counsel having been heard, for the applicant company and the Grand Trunk Railway Company, and upon the evidence adduced, and the report of the Chief Engineer of the Board—

“It is ordered

“That the applicant company be, and it is hereby authorized to construct and carry its proposed line of railway under the track of the Grand Trunk Railway by means of an under-crossing, at the point shewn on said plan on file with the Board under reference No. 16908, file No. 1455, said under-crossing and drainage facilities in connection therewith to be constructed in accordance with plans to be submitted by the applicant company to and approved of by the Chief Engineer of the Board.

“That, for the purpose of such crossing, the Grand Trunk Railway Company of Canada shall, at the expense of the James Bay Railway Company, raise the tracks of the former mentioned company at the point of crossing aforesaid, and for such distance on each side thereof as shall be considered by the Chief Engineer of the Board necessary to provide a proper grade, to such a height (not exceeding two feet) over

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the present level of said tracks as the Chief Engineer of the Board shall require; and upon completion of the work of so raising such tracks and restoring the roadway to as good a condition as that in which it now is, the James Bay Railway Company shall pay to the Grand Trunk Railway Company the whole cost of such work.

“That the masonry work of the said undercrossing shall be sufficient to allow of the construction of an additional track on the line of the Grand Trunk Railway Company, the superstructure of such additional track to be supplied by the Grand Trunk Railway Company at its own expense when it constructs a double track.

“That the cost of all works in connection with the construction and maintenance of the said undercrossing, save and except the superstructure provided for in the immediately preceding paragraph, shall be borne by the applicant company.

“That the said works are to be carried on under the direction and supervision of an Engineer to be appointed by the Grand Trunk Railway Company, who is to receive a reasonable remuneration for services rendered; and that all works directed to be done under this Order shall be subject to the supervision of the Chief Engineer of the Board.”

Barwick K.C. and *G. F. Macdonnell* for the appellants.

Chrysler K.C. for the respondents.

A. G. Blair, Jr., for the Board.

SEDGEWICK J.—This appeal is dismissed with costs. I agree in the reasons stated by my brother Davies.

GIROUARD J.—I am for dismissing this appeal with costs. The Board had jurisdiction, and even if their decision is wrong we cannot interfere.

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DAVIES J.—This appeal comes before us on permission granted by Idington J. upon a question as to the jurisdiction of the Board of Railway Commissioners in making an order allowing the appellant railway to cross the track of the respondent railway to direct that the masonry work of the under-crossing should be sufficient to allow of the construction of an additional track on the line of the respondent railway.

Davies J.

The only question for our determination is that of jurisdiction and the argument at bar resolves itself into this, that there was nothing on the face of the record to justify the part of the order appealed against. It was, of course, conceded that over the whole subject matter in dispute the Board had complete jurisdiction, and Mr. Barwick admitted that if any evidence had been given on the part of the respondent company of an intention to build the second track within a reasonable time no objection could be raised to the order.

A perusal of the "Railway Act, 1903," under which the Board is constituted will shew how very careful Parliament was to invest the Railway Board with the most complete powers over the persons, companies and subject matter placed under its jurisdiction.

Section 41 enacts that

no order of the Board need shew upon its face that any proceeding was had or given or any circumstance existed necessary to give it jurisdiction to make such order.

And section 42

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that the finding or determination of the Board upon any question of fact within its jurisdiction should be binding and conclusive upon all courts.

From the statute creating the Board it would seem that there are three modes in which its orders can be attacked. One is by way of appeal to the Supreme Court of Canada on a question of law when permission so to appeal is granted by the Board. A second is the mode adopted here of appealing to such court on a question of jurisdiction when permission so to appeal is granted by a judge of this court; and the third is the right of review vested in the Governor in Council in his discretion either upon petition of any interested party or on his own motion.

The point raised here is a very nice one, but from the best consideration I can give it I have reached the conclusion that it is not so much a question of jurisdiction as it is one of law which could only come before us by leave of the Board or one involving the merits of the order made—which can only be reviewed by the Governor in Council.

The question is: Was the term or provision objected to a reasonable one to impose upon the granting of the order asked for by the appellant company? And that is a matter over which the Board had jurisdiction, and the objection simply is that the Board acted on insufficient evidence.

It would seem, therefore, to be more properly either a matter for review before the Governor in Council or one for determination as a matter of law on a reference by the Board.

At any rate there is not, in my opinion, such a manifest defect of jurisdiction in the Board in the imposition of the provision complained of that justifies our setting it aside. The objection is not founded on the absence of any essential preliminary or in the

nature of the subject matter. It is simply that the Board has made an order in the absence of definite evidence which it was competent to make had proper materials been before it. It assumes that having general jurisdiction over the subject matter the Board properly entered on the inquiry, but miscarried in the course of it, a miscarriage which a court of appeal alone could rectify.

See *The Colonial Bank of Australasia v. Willan* (1) at page 443.

IDINGTON J.—The appellants applied to the Board of Railway Commissioners for Canada for leave to construct their road across the respondents' road and this was granted; but it was made a term of the order

that the masonry work of the said under-crossing shall be sufficient to allow of the construction of an additional track on the line of the Grand Trunk Railway Company, the superstructure of such additional track to be supplied by the Grand Trunk Railway Company at its own expense when it constructs a double track.

The question raised is whether or not this term was *ultra vires*.

The limit of authority given to the Board in dealing with the questions of such railway crossings is that in sub-section 2 of section 177 of the "Railway Act, 1903," which is expressed by the words

the Board may by order grant such application on such terms as to protection and safety as it may deem expedient * * * as under the circumstances appear to the Board best adapted to remove and prevent all danger of accident, injury or damage, etc.

"Protection and safety" from "danger of accident, injury or damage" would seem to cover all that the Board is entitled in this regard to aim at. All other provisions on the subject of such crossings in other

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sections and in this sub-section are but means to the ends of "protection and safety." Are "protection and safety" directly or indirectly secured by the requirement in this order? No evidence was taken. No statements, as admissions, were put before the Board. Statements were made to which I will presently advert.

In some cases that come before the Board the nature and very essence of the questions raised are such, are so clearly part of what the Board was constituted to pass upon, that formal evidence is not called for to establish a jurisdiction in the Board. There often needs nothing more than the statement of the case for the purpose.

There are other cases, however, in which the questions raised may not be of this character and, for the purpose of finding out whether or not jurisdiction does exist, evidence of a more or less complicated character must be heard and considered. The question raised here is of this latter character.

The distinction between the two kinds of cases is well illustrated by the case in hand. The permission to one railway to cross another is of the first named class. The incidental power of fixing the terms upon which that may be done may be of the secondly named class.

In determining the issue here raised it is not self-evident just how far the Board may go. The questions of "protection and safety" must depend on evidence. The jurisdiction to deal with such questions must rest more or less on evidence shewing that the case comes within the meaning of the phrase as used in the sub-section I have referred to. In every such case, the Board must, in the first place, determine whether the

facts have brought the matter within their jurisdiction or not.

The Board is so far master of the situation that, if there be any evidence to support a case of jurisdiction, this court cannot interfere with the finding of fact that the Board has made. If upon the evidence, however, this court should be of opinion that there was no evidence to support the jurisdiction or no jurisdiction given upon the facts as determined by the Board, it would become the duty of this court to interfere.

Let us apply these principles to this appeal. It appears upon the case before us that the Grand Trunk Railway had no double track, but only a single track at the point in question.

It was admitted in argument that the charter of the Grand Trunk Railway Company gave power to build a double track. The exercise of that power (it is suggested by paragraph 8 of the case) is subject to leave not yet given. I am unable to find such restriction. Even if it exist, I think that the question is: Can the Board of Railway Commissioners look beyond existing conditions of structure and anticipate what is soon to happen?

I think, although it was not, as I understood, conceded by Mr. Barwick, that there may exist cases of prospective double-tracking, in its relation to a crossing by another railway, that have to be considered in making the order allowing the crossing. Where it is clearly the purpose of the senior road immediately to lay a double track I think such a case must fall within this class.

Take the case of a declared intention to proceed with double-tracking, perhaps extensive preparations made, and where it was quite apparent that the work

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of double-tracking would within every reasonable probability, arising from the surrounding facts and circumstances, be done before the crossing works could be finished. Can it be that, in such a case, the bare chance of which may have moved a few days earlier than the other in announcing a purpose or in beginning to execute it, must determine the whole question of jurisdiction?

It seems to me as if all the facts must be considered and, if the senior road shew a *bonâ fide* present intention to proceed with double-tracking, it might well be said to have shewn a case that fell within the needs of "protection and safety" from "accidents," etc.

Clearly the doing of the work one month in one way, as if for a single track, and next month supplementing the work, or by doing it again in another way, would be doing that which might, I imagine, be in entire disregard of the "protection and safety" of either the travelling public or those engaged in such construction work.

It might be that an immediate purpose of the kind might be simulated. In such a case it would be for the Board to determine what the facts really were. Thorough investigation would make that plain.

This case is presented in a most unsatisfactory way. It seems to me that the appellants, when before the Commissioners, could hardly have had any idea of raising the issue they are now raising, else it would have been made apparent on the record. So far from raising the question of jurisdiction, it was assumed by all parties, as a matter of course, that whatever order in regard to providing for double-tracking might be made, was wholly within the discretion of the Board.

If, notwithstanding the impression of the parties,

there was, in fact, no jurisdiction, we are not relieved from all responsibility.

The case of *Farquharson v. Morgan* (1) shews that, where want of jurisdiction is made clear, it is the duty of the court to prohibit, even though the parties had acquiesced.

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There is not, in any case where evidence is necessary to shew how the jurisdiction arose, any legal presumption in favour of jurisdiction. The question to be answered here must be: Is there any evidence in support of the jurisdiction?

That must be determined by the sense in which we take the statements made at the hearing.

It was stated that the Grand Trunk Railway Company intended to put down a double track. Was this said as, and is it to be taken as meaning, an intention to do so within such time as clearly and beyond peradventure would give jurisdiction to the Board of Commissioners to deal with the claims springing out of such an intention, when disposing of the application for a crossing?

It was expressly conceded, when the statement was made before the Board, that it was made in good faith. It was argued that, notwithstanding that, there should not be imposed upon the appellants any such terms.

Statements and arguments were blended together by the parties in their respective support of, or repelling of, the propositions submitted to the Board, and that is the kind of record now presented to us upon which to pass upon one of the most difficult questions of jurisdiction likely to arise. The very unsatisfactory condition of the evidence, for such statements and their acceptance as fact by those concerned are to be

(1) [1894] 1 Q.B. 552.

1906 received as evidence, makes the case more difficult
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GRAND I am, in the light I have presented the matter, in-
TRUNK clined to think that the statements before the Board
Ry. Co. are rather a slender basis for the inference necessary
Idington J. to support the jurisdiction.

I do not wish to assent to the proposition that, if the question of jurisdiction be doubtful, we must refrain from exercising the duty imposed upon us by the Railway Act. Where the jurisdiction is a matter of doubt, and the doubt appears in the construction of the statute, I think it clearly our duty to interfere. We lay down for this court the line (for the exercise of our jurisdiction) beyond which we cannot pass at where there is a doubt, whether this court have jurisdiction or not.

We hold, then, that we have not.

The same rule must apply in interpreting the "Railway Act" in relation to any question arising thereunder as to the jurisdiction of the Board of Railway Commissioners.

When the doubt arises, however, from the interpretation of the evidence to be considered and determined by the Board of Commissioners, we may be relieved to some extent from interfering.

The Board of Railway Commissioners may have read the facts which give the jurisdiction in a more liberal sense than we would do in such a case, but, as long as there is any evidence upon which reasonable men might say that the facts are thus and so, we cannot say, then, that there is no evidence and interfere. I cannot say, here, that there is no evidence; the doubt is as to whether the purport or effect of it is as shewing present intention to double-track or a mere prospect in the remote future.

I have confined my opinion to a present existing purpose as giving the limit of jurisdiction in this regard, and I assume the statements I have adverted to as possible evidence of that intention.

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We are not concerned, therefore, here to answer the question as to a more remote purpose. When such a case arises, I would desire to be free from the embarrassment of any present expression of opinion. I, therefore, express none.

I may be permitted to express the hope that, when parties go before the Board hereafter, they will, as they ought to, if intending to raise a question of jurisdiction, do so before the Board, and have the matter there thoroughly threshed out.

Prohibition, for which this proceeding before this court has in relation to the Board of Railway Commissioners been substituted by the "Railway Act, 1903," has been refused upon the ground that the objection to jurisdiction was not raised in the court trying the cause.

In *Moore v. Gamgee* (1) it was held that the right to object might be waived. I do not wish to express any final opinion upon the point as to whether or not this may be applicable to cases arising under the "Railway Act" in question. I rather incline to think that the purpose of the legislature in this Act was to impose an imperative duty on this court in relation to the jurisdiction of the other.

But if, in similar cases upon which the question of jurisdiction depends upon whether there is evidence to support it or not, parties have failed to thresh the matter out in the way I have suggested they may find a difficulty in getting leave to appeal.

I adhere to the opinion I entertained in granting

(1) 25 Q.B.D. 244.

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leave that it should be granted, as a general rule, where there is, as I think there was here, a fairly arguable case. Yet if it should turn out, on further investigation, that we have any discretion in such a case, I think it would be well exercised in refusing leave to appeal in a similar case.

The novelty of the practice introduced by the "Railway Act" allotting to this court the power we are now called upon to exercise is the only excuse for the matter having been left in the way the parties chose to leave it, and is also the only reason for adverting, at such length as I have done, to some of the principles that must be considered in administering this new jurisdiction.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I agree for the reasons stated by my brother Davies.

Appeal dismissed with costs.

Solicitor for the appellants: *G. F. Macdonnell.*

Solicitor for the respondents: *W. H. Biggar.*
