IN THE MATTER OF CERTAIN LEGISLATION OF THE PROVINCE OF ALBERTA RESPECTING RAILWAYS. 1913 *Feb. 19, 20, 21. *May 6.

REFERENCE BY HIS ROYAL HIGHNESS THE GOVERNOR-GENERAL IN COUNCIL.

Railways—Powers of construction and operation—Conflict of laws—Provincial legislation—Interference with Dominion railways—Constitutional law—Jurisdiction of legislature—Construction of statute—7 Edw. VII. c. 8, s. 82 (Alta.)—2 Geo. V. c. 15, s. 7 (Alta.)—"B.N.A. Act," 1867, ss. 91 and 92.

It is not competent to the Legislature of the Province of Alberta to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or with the operation of railways subject to the jurisdiction of the Parliament of Canada.

Brodeur J. *contra*, was of the opinion that such legislation would be within the jurisdiction of the provincial legislature provided that in its effect there should be no unreasonable interference with federal railways.

REFERENCE by His Royal Highness the Governor-General in Council of questions for hearing and consideration as to the validity of certain legislation by the Legislature of the Province of Alberta respecting the construction and operation of railways.

The questions referred to the Supreme Court of Canada pursuant to the authority of section 60 of the "Supreme Court Act" are as follows:—

"1. Is section 7 of chapter 15 of the Acts of the Legislature of Alberta of 1912, intituled 'An Act to amend the Railway Act' *intra vires* of the provincial legislature in its application to railway companies authorized by the Parliament of Canada to construct or operate railways?

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*PRESENT: Davies, Idington, Duff, Anglin and Brodeur JJ.

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"2. If the said section be *ultra vires* of the provincial legislature in its application to such Dominion railway companies, would the section be *intra vires* if amended by striking out the word 'unreasonably' ?

"Would the said section be *intra vires* if amended to read as follows: (3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as such lands do not form part of the right-of-way, tracks, terminals, stations, station grounds or lands required for the construction or operation of any railway within the legislative jurisdiction of the Parliament of Canada' ? "

Section 82 of chapter 8 of the statutes of the Province of Alberta, 1907, intituled "The Railway Act," is as follows:—

"82. The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of any other railway company and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor in Council first obtained or to any order or direction which the Lieutenant-Governor in Council may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

"(2) Such approval may be given upon application and notice and after hearing the Lieutenant-Governor in Council may make such order, give such

directions and impose such conditions or duties upon either party as to the said Lieutenant-Governor in Council may appear just or desirable, having due regard for the public and all proper interests and all provisions of the law at any time applicable to the taking of land and their valuation and the compensation therefor and appeals from awards thereon shall apply to such lands and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section."

3. By section 7 of chapter 15 of the statutes of Alberta, 1912, intituled, "An Act to amend the Railway Act," the "Railway Act" of Alberta, 1907, is amended by adding thereto the following:—

"(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct, or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority."

Newcombe K.C., Deputy-Minister of Justice, for the Attorney-General for Canada. The enactment in question may be construed to empower any company or person authorized to construct a railway by the Legislature of Alberta to take possession of, use or occupy any lands belonging to any railway company within the legislative authority of the Parliament of

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Canada; to use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of such Dominion railway, and to have and exercise full right and powers to run and operate trains over and upon any portion or portions of the Dominion railway, subject to the approval of the Leiutenant-Governor in Council. It will be observed also that sub-section 2, of section 82, of the Alberta "Railway Act," contemplates that notice of the application for approval may be given to the Dominion company, and that the Lieutenant-Governor in Council, after the hearing, may make such order and give such directions and impose such conditions and duties upon the Dominion company as to him appears just or desirable, having due regard for the public and other interests. It may be observed, moreover, that the provisions of sub-section 3 apply only in so far as the taking of the lands does not unreasonably interfere with the construction and operation of the Dominion railway.

It is urged on behalf of the Attorney-General for Canada that sub-section 3 is *ultra vires,* and that it would remain *ultra vires* even if its application were still further limited by striking out the word "unreasonably." The subject-matter of the legislation is Dominion railways which fall within the exclusive authority of the Parliament of Canada under section 91 of the "British North America Act, 1867." This field of legislation is wholly withdrawn from the local legislatures. It is not referable to any class of subjects enumerated in section 92.

Reference is made to the following cases decided by the Judicial Committee of the Privy Council: *Canadian Pacific Railway Co.* v. *The Corporation of the*

Parish of Notre Dame de Bonsecours(1); *Madden* v. *Nelson and Fort Sheppard Railway Co.*(2); *City of Toronto* v. *Bell Telephone Co. of Canada*(3); *Attorney-General for British Columbia* v. *Canadian Pacfic Railway Co.*(4); *L'Union St. Jacques de Montréal* v. *Bèlisle*(5); *Grand Trunk Railway Co.* v. *Attorney-General of Canada*(6); *La Compagnie Hydraulique de St. François* v. *Continental Heat, Light and Power Co.* (7).

It is submitted that it is, upon the authorities, abundantly plain that the railway lands of a Dominion Railway company cannot be expropriated by provincial authority or encumbered by works or operations not sanctioned by Parliament. Moreover, the rights completely acquired by companies incorporated by Parliament in the execution of its enumerated powers may be enjoyed unaffected by the operation of any local statute intended to modify or subordinate these rights. The local legislature cannot have the power to take away what Parliament gives. Local powers of expropriation, such as they are, are subordinate to the paramount powers of Parliament.

S. B. Woods K.C. and *O. M. Biggar* for the Attorney-General for Alberta. It will be observed that the qualifying words at the end of sub-clause (2) of section 82, of the Alberta "Railway Act," emphasizes the necessity of the local railway company (by which is meant a railway company incorporated by or under the legislative authority of the Province of Alberta) obtaining the opproval of the Board of Railway Com-

(1) [1899] A.C. 367.
(2) [1899] A.C. 626.
(3) [1905] A.C. 52.
(4) [1906] A.C. 204, at p. 210.
(5) L.R. 6 P.C. 31, at p. 37.
(6) [1907] A.C. 65.
(7) [1909] A.C. 194.

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missioners for Canada whenever it is by law required to obtain such approval, in addition to taking the necessary steps under the local Act (by which is meant the Alberta "Railway Act" and amendments) to entitle it to acquire such lands or interests in lands as it finds necessary in order to carry out its undertaking.

The word "land" or "lands" in the local Act is defined as including "all real estate, messuages, lands, tenements and hereditaments of any tenure."

It is submitted that the amendment in question is *intra vires* of the Legislature of Alberta under section 92, sub-section 10, of the "British North America Act, 1867."

A railway to be constructed from one point in the province to any other point in the same province and not going outside of the provincial boundaries is a local work, and undertaking, and may be authorized to be constructed by a provincial legislature. *City of Montreal* v. *Montreal Street Railway Co.*(1). The power of legislation to authorize the construction of a certain work necessarily carries with it the power to enact such legislation as may be required to prevent the purpose of the grant of such power being defeated, even though, in so legislating, the provincial legislature may interfere with or affect a work authorized to be constructed by the Dominion Parliament. The converse of this principle, namely, that Dominion legislative jurisdiction necessarily extends to such ancillary provisions as may be required to prevent the scheme of a Dominion Act from being defeated, even where such ancillary provisions deal with or encroach upon matters assigned to the provincial legislatures under section 92, has been affirmed by the Privy Coun-

(1) 43 Can. S.C.R. 197; [1912] A.C. 333.

cil in *Cushing* v. *Dupuy*(1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(2); *Attorney-General of Ontario* v. *Attorney-General for Canada*(3). The Privy Council have also held in *Bank of Toronto* v. *Lambe*(4), that where a power falls within the legitimate meaning of any class of subjects reserved to the local legislatures by section 92, the control of these bodies is as exclusive, full and absolute as is that of the Dominion Parliament over matters within its jurisdiction. Upon this subject the following appears in Todd's Parliamentary Government in the British Colonies (2 ed.), p. 436, in discussing the principal above mentioned with regard to Dominion legislation: "The converse of this principle has also been maintained by the courts in respect to local legislation upon assigned topics which may appear to trench upon prescribed Dominion jurisdiction."

In *Bennett* v. *The Pharmaceutical Association of the Province of Quebec*(5), Chief Justice Dorion states that the court considered it a proper rule of interpretation that the powers given to Parliament or the provincial legislature to legislate on certain subjects included "all the incidental subjects of legislation which are necessary to carry on the object which the "British North America Act" declared should be carried on by that legislature." See also *Ex p. Leveillé* (6); *Reg.* v. *Mohr*(7); *In re Prohibitory Liquor Laws* (8); *In re De Veber*(9); *Jones* v. *The Canada Central Railway Co.*(10), *per* Osler J. and *per* Haggerty C.J. in

(1) 5 App. Cas. 409.
(2) [1896] A.C. 348, at p. 360.
(3) [1894] A.C. 189, at p. 200.
(4) 12 App. Cas. 575, at p. 586.
(5) 1 Dor. Q.B. 336, at p. 340.
(6) 2 Cartwright 349.
(7) 7 Q.L.R. 183, at p. 191.
(8) 24 Can. S.C.R. 170, at p. 258.
(9) 21 N.B. Rep. 401, at p. 425.
(10) 46 U.C.Q.B. 250, at p. 260.

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Reg. v. *Wason*(1), after referring to *Cushing* v. *Dupuy*(2).

This principle has been followed to support the provisions of provincial laws dealing with procedure to enforce the penal provisions of provincial acts in a number of decided cases and it is submitted is applicable to the present case. The power of the province to legislate in respect of this subject-matter is not to be restricted or its existence denied, because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament. *Bank of Toronto* v. *Lambe*(3); *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*(4).

It is further submitted that the fact that the Dominion Parliament has power to legislate in respect of Dominion railways in a way analogous to the legislation the subject-matter of this reference, in no way interferes with the competence of the provincial legislature to enact the law in question. Both legislatures are equally supreme within their respective jurisdictions. It is, therefore, submitted, that as, under the terms of the "British North America Act" the right of a province to authorize the construction of a railway line that lies wholly within that province is exclusively wthin the legislative powers of that province (excepting always the right of the Dominion to authorize the construction of such a work under the provisions of section 92, sub-section 10*c*, by declaring the same to be for the general advantage of Canada or for the advantage of two or more of the provinces) it follows, that there is necessarily involved in this right

(1) 17 Ont. App. R. 221, at p. 232.
(2) 5 App. Cas. 409.
(3) 12 App. Cas. 575, at p. 586.
(4) [1892] A.C. 437, at pp. 441-3.

the right to so legislate that the work so authorized to be constructed can be carried to completion, and for this purpose to give a railway company authorized by the province to build such a line, the power to acquire either the land or such interests in the land of a Dominion railway company (and whether such land lies between the right-of-way fences of the Dominion railway company or is land owned by it as a land grant or otherwise) as will enable the provincial railway to complete its authorized works.

It must necessarily follow that the provincial legislature has power to give to its creature the right to interfere to some extent with a railway brought into existence by the Parliament of Canada because the taking of such land or interests in land under such legislation by the provincial railway must of necessity interfere to some extent with the Dominion railway. So long as such interference is not unreasonable or undue and is only such as is necessarily involved in the acquiring of such land or interests in land (including therein a right-of-way or easement over the land or through the land) the giving of such rights is within the competence of the provincial legislature. Whether the boundary line of provincial power has been exceeded must be determined by the courts in each case where such question is raised, and if upon the determination of such fact it be found that the rights purported to be given under the provisions of the provincial Act do interfere to such an extent with the construction and operation of the Dominion railway as to be unreasonable or undue, then such authority given by provincial legislation will not be effective and will confer no rights upon the recipient of it. The province cannot use its authority to authorize the

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construction of railways within its boundaries in such a way as to prevent the construction and operation of Dominion railways, nor, conversely, can the Dominion use its authority to authorize the construction and operation of railways so as to prevent the construction and operation of a provincial railway, but each legislative jurisdiction can interfere with the operation of other railways in so far as it may be reasonably necessary to carry out its authority to construct or authorize the construction of a railway within its jurisdiction. Such right or power is, by implication, reserved to each legislative body by the terms of the "British North America Act."

The provision in the local Act, the subject of this reference, is not and cannot be covered by Dominion legislation, and it necessarily follows that unless the legislation that is here attacked is within the competence of the province, a Dominion railway can at any time prevent the construction of a provincial railway, and conversely a provincial railway can prevent the construction of a Dominion railway by merely refusing to negotiate for the right to pass through its properties.

There are certain provisions of the Dominion "Railway Act" purporting to regulate traffic at the point of crossing of a Dominion and provincial railway. R.S.C., 1906, ch. 37, sec. 8 (*a*); 151 (*e*) 176 and 227. But even they do not purport to give a Dominion railway company the power to acquire the land of or running rights over the land of a provincial railway company or *vice versa*: see *Preston and Berlin Street Railway Co.* v. *Grand Trunk Railway Co.* (1) (May, 1906); but have, apparently, been sup-

(1) 6 Can. Ry. Cas. 142.

ported on the ground of public safety and convenience: *Re Portage Extension of Red River Valley Railway*(1); *Canadian Pacific Railway Co.* v. *Northern Pacific and Manitoba Railway Co.*(2); *Credit Valley Railway Co.* v. *Great Western Railway Co.*(3); *Niagara, St. Catharines and Toronto Rway. Co.* v. *Grand Trunk Rway. Co.; Stanford Junction Case*(4); *City of Toronto* v. *Grand Trunk Rway. Co.; York Street Bridge Case*(5). In *City of Montreal* v. *Montreal Street Railway Co.*(6) it was held by the Privy Council that the right of Parliament to enact section 8 of the "Railway Act," so far as it applied to provincial railways, could not be supported under the general power to legislate regarding the peace, order and good government of Canada insomuch as it trenched upon the provincial power of legislation under sub-section 10 of section 92 of the "British North America Act," and was *ultra vires* of the Parliament of Canada. It would appear from this that section 227, so far as it affects provincial railways, is also *ultra vires.*

The effect of striking out the word "unreasonably" in the section in question would be to confine the operation of the provincial statute to the land of Dominion railway companies outside of and other than the land included in the right-of-way fences of the Dominion railway. The legislation of the province is *intra vires* in this regard. The considerations above referred to apply to the answer to this second question.

(1) Cass. Dig. (2 ed.) 487; Cout. Dig. 1226.
(2) 5 Man. R. 301.
(3) 25 Gr. 507.
(4) 3 Can. Ry. Cas. 256.
(5) 4 Can. Ry. Cas. 62.
(6) [1912] A.C. 333.

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The lands of Dominion railway companies, outside of the right-of-way fences, are subject to the local law just as much as the lands of any other companies or individuals and there would appear to be no good reason why they should not be subject to this law as well as to such a law, for instance, as the provincial "Land Titles Act." The taking of such land, or interests therein, does not in any way interfere with the construction or operation of Dominion railways and it could be only upon this ground that the Act would be beyond the competence of the province.

It is, therefore, submitted that the answers should be in the affirmative.

DAVIES J.—I would answer both questions in the negative, and in doing so would explain that I adopt the construction put by counsel at the argument upon the questions. As I understood counsel, it was agreed that the words "lands of the company" in the section we are asked to determine the validity of, meant the right-of-way and the stations and terminals in connection therewith of a railway built under the authority of the Dominion Parliament, and were not intended to refer to or include lands granted by way of subsidy merely and not included in such right-of-way, stations and terminals. The real question, counsel agreed, we were desired to answer was whether the provincial Parliament could so legislate as to force a crossing of a provincial railway over and across a Dominion railway.

Now, as I read and understand section 82, of chapter 8, of the Act of the Legislature of Alberta, 1907, it was only intended to have application to railways authorized to be constructed by the provincial legisla-

ture, and not to railways constructed under authority of the Dominion Parliament. It would seem that the latter sentence of sub-section 3 of section 82 making the approval of the Dominion Board of Railway Commissioners essential in addition to that of the Lieutenant-Governor in Council *"where it was necessary* to obtain the approval of such Board," was inconsistent with this construction. I accept, however, the explanation of Mr. Woods, counsel for Alberta, that the words in question were inserted in the section by inadvertence or mistake and never should have been there.

Then we have the legislation of 1912 amending the provincial "Railway Act" of 1907 by adding the section respecting the power of the legislature to pass which we are asked. It reads as follows:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority.

It refers to railways the construction of which is authorized by the Dominion Parliament and attempts to apply the provisions of the railway legislation of 1907 to such Dominion railways so as to authorize the crossing of such railways by provincial railways.

I do not think such legislation *intra vires* of the local legislatures. The exclusive power to legislate with respect to Dominion railways is, by the 29th sub-section of section 91 of the "British North America Act," conferred upon the Dominion Parliament.

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It is a "matter coming within one of the classes of subjects enumerated in section 91," and being such is not to be deemed to come within those classes of subjects assigned exclusively by that Act to the provincial legislatures.

The provincial legislature while having full power to authorize the construction of a local or provincial railway, cannot in so doing either override, interfere with or control or affect the crossing or right of crossing of a Dominion railway by a provincial railway. Legislation respecting the crossing of Dominion railways by provincial railways is exclusively vested in the Dominion Parliament, and being so vested by virtue of one of the enumerated classes of subjects of section 91, is explicitly withdrawn from the jurisdiction of the local legislature.

The clause in question would give rise to endless difficulties. As it now stands, it is open to the fatal objection that it would refer to the ordinary courts of the land the determination of the question whether the crossing of a Dominion railway by a provincial railway was an "unreasonable interference" with the Dominion railway's operations. This is a question which the Dominion Board of Railway Commissioners alone is authorized to deal with and its decision is final.

But the omission of the word "unreasonably" would not make the legislation *intra vires,* as the subject-matter was not one within the jurisdiction of the local legislatures at all, being as I have said, withdrawn from them by the latter part of section 91.

It was contended strongly by counsel for the province that not only had the legislature of the province power to authorize the crossing of Dominion railways

by provincial ones, but that they had power to authorize the crossing of navigable streams or marine hospital lands or lands reserved for military camps or forts or defence.

The argument was logical enough, granting the premises assumed, namely, that the *exclusive power* to build local railways necessarily involved the power to cross these streams, lands, defence works and Dominion railways.

But it omits to take cognizance of the rule so often and necessarily applied by the Judicial Committee in the construction of the "British North America Act," that the enumerated subject-matters of legislation assigned to the Dominion Parliament are not deemed to come within the matters assigned exclusively to the provincial legislatures though *primâ facie* they may appear to do so, and the further rule of construction that if there is a common field of legislative action within which Parliament and the legislatures are alike competent to legislate, when Parliament occupies the field and legislates, as it has done with respect to the subject-matter under discussion, under one of the enumerated clauses of section 91, its legislation is supreme and overrides that of the local legislatures.

IDINGTON J.—We are asked whether or not the Alberta legislature can amend the "Railway Act" of that province, adding to section 82 thereof the following:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct, or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority,

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and if not will striking out the word "unreasonably" therein render the clause *intra vires*? Any legislative enactment under our federal system, which partitions the entire legislative authority, ought to be approached in the spirit of assuming that the legislature did not intend to exceed its powers; and if an interpretation can reasonably be reached which will bring it within the power assigned the legislature in question, and given operative effect, then that meaning ought to be given it.

Of course, if the plain language is such that to give it operative effect must necessarily involve doing that which is beyond the power assigned the legislature then the Act must be declared null.

Again, the language used is sometimes capable of a double meaning according to the respective surrounding circumstances to which it may be sought to be applied.

In such case the court on the one hand must refuse to give such effect to the language as will maintain anything *ultra vires* the legislature, and on the other give such effect to it as will within the purpose and power of the legislature render it effective.

Then, again, the subject dealt with may be of that complex character that concurrent legislation on the part of a provincial legislature and Parliament is absolutely needed to effectuate satisfactorily the purpose had in view.

To the man accustomed to deal only with the legal product of a single legislature possessing paramount legislative authority over all matters that can be legislatively dealt with, this latter situation seems almost incomprehensible. The situation often exists, must be reckoned with and dealt with accordingly.

We must not too readily knock aside a provincial enactment. It may be not only susceptible of use, but be actually needed to give operative effect to the authority of Parliament which in a sense may be paramount in authority and power in relation to what the legislature may be attempting yet not possessed of the entire field. The recent case of the *City of Montreal* v. *Montreal Street Railway Co.*(1), relative to the question of through traffic furnishes an illustration of how co-operative legislation by a province might have rendered that of Parliament more effectual, or far-reaching in its results.

When we add to these complexities an ambiguity of expression, too often found in statutes, the task of answering such questions as are now submitted becomes increasingly difficult. And when we add thereto the need not only of considering a few concrete facts such as a single case involves, but also the whole range of possible human activities, in the indefinite field thus submitted for us to pass upon, our native humility and modesty are startled and we are tempted to say we do not know.

However, though I have not by any means exhausted the definition or classification of legislative products likely to arise under our federal system, I have indicated some of the manifold considerations that have to be borne in mind in determining whether or not the above section is worthless or may be made use of either in its present shape or when modified in the way suggested.

The subject-matters presented and arguments thereon seem to require I should do so and thus guard

(1) [1912] A.C. 333.

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or qualify the results to be stated in any answers that can be given to the questions submitted.

One difficulty suggested is whether or not the questions should be looked at in light of the fact that the Canadian Pacific Railway Co., clearly a Dominion legislative product, subsidised by a land grant partly situated in Alberta, might be affected by the legislation in another way than is involved in the merely crossing of its track by a local railway.

Counsel seemed to agree that that complicated question ought to be eliminated from the problems before us. But I am not quite sure that they were agreed on any substituted form of question if indeed it was competent for them so to agree. Counsel arguing for the Attorney-General for the Dominion, on whose advice the submission is made, and who is the minister in charge of such a reference, and I incline to think must be treated as if *dominus litis* in such references as those requiring an advisory opinion, has relieved us so far as he can from answering in a way to touch upon questions relative to lands in said subsidy.

I am not sure that his waiver would help much were it a reference of a concrete case involving some right as between the Dominion and a province. It is here, however, merely a question wherein it is desired by the government to be advised before vetoing or refraining from vetoing the legislation. It has also been throughout the argument painfully obvious to my mind that if the legislation is *ultra vires* then it can hurt no one, not even the Canadian Pacific Railway Co., and if it is clearly *intra vires* it would in such case at least so far as relating to said lands, hardly concern any one else than the Legislature of Alberta.

It seemed finally in argument to be, as between

parties arguing before us, a question of the right of a provincial railway to cross a Dominion railway by virtue solely of the provincial legislative authority.

I have not and never had supposed any one else could have had any doubt upon such a point.

The Dominion Parliament having by virtue of its exclusive powers over the enumerated subjects in section 91 of the "British North America Act," created a corporate power and thereby conferred on one or more persons the power to construct or cause to be constructed a railway, that railway cannot be crossed by any other railway company which with its work is only the product of the somewhat analogous powers given by section 92 to provincial legislatures over "local works and undertakings."

I have considered the elaborate argument addressed to us to the contrary and hope I understand it.

As to that parallel drawn between the incidental or necessarily implied powers which have been held to be part and parcel of the power conferred by the powers given the Dominion over the enumerated subjects of section 91 and the supposed need to give vitality to the powers of the provinces over local works and undertakings by means of implying similar incidental and necessarily implied powers in anything to be enacted in order to the carrying into execution of any such provincial powers, I have just this to say.

I agree the analogy holds good until the attempt to give operative effect to it runs against the exclusive precedent power and its products.

The "British North America Act" expressly assigns to the Dominion Parliament in and for the purposes of the executing of the powers over the enumerated subjects in section 91 and the exception in section

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92, sub-section 10, such exclusive and paramount authority over the subject-matters therein mentioned that when we have regard to the matters of the business in hand as when a railway crossing of a Dominion railway by a provincial railway has to be constructed it is clear that it must be affected either by virtue of concurrent legislative provisions covering all that is necessary to provide for executing such a purpose with due security for the safety of all those concerned in the construction and use of the physical product called a crossing, or by virtue of the power having the exclusive and paramount authority referred to exercising the full power necessary to determine the means of executing such a purpose.

Having regard to the nature of the business in hand and the clear language of the "British North America Act," I think the full effect I suggest must be given the predominant or paramount powers I have mentioned. After these powers have been exercised all that the provincial legislature is given must be read as subject thereto.

The argument for the proposition that the powers assigned the province must be given such full effect as to enable the local road to accomplish a crossing without relying upon the authority of the Dominion, was attempted to be supported by the recent decision in the *Marriage Laws Case*(1). I am disposed to think the point well taken as mere matter of argument put forward for consideration. It is to be observed, however, that the opinion therein was merely advisory and decides nothing and is of no consequence in relation to the interpretation and construction of the "British North America Act," save so far as the rea-

(1) 46 Can. S.C.R. 132.

soning upon which it proceeded when applied to said Act commends itself to those having to deal therewith.

Then having due regard thereto I am, with great respect, quite unable to understand how any express and exclusive dominating power such as given by the Act to the Dominion despite the so-called exclusive authority subject thereto given the provinces, is ever in any case to be minimized, much less deleted from the Act because of some apparently inconsistent power given the provinces. If need be to discard either, it is the subsequent and subordinate power that must be deleted, as it were, in order to give the precedent and paramount power its full effective operation.

The use of the adverb "exclusively" in section 92, and adjective "exclusive" in section 91, unfortunately leads those not examining the whole, to assume each must have the same effect. But the language used when analyzed as it has been so often renders it clear that the general purpose was to subordinate the powers of the legislatures, no matter how it might affect them, to those of Parliament, over the said enumerated subjects.

The attempt has been made in many cases to give the subordinate provincial powers such operative effect as the language defining them at first blush might warrant, notwithstanding the precedent dominating power given over the enumerated subjects in the sub-sections of section 91 to the Dominion had not been exercised or at least exhausted or because they had been exercised later than the provincial powers apparently bearing on the same subject.

These attempts always failed in the courts of last resort until the *Marriage Laws Case*(1). The trend of

(1) 46 Can. S.C.R. 132.

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authority in many cases including some of those cited to us, had run so strongly the other way as to become the subject of adverse criticism on the ground that the powers claimed by the Dominion had been carried further than in fact necessary for the due execution of the particular power involved, and thus needlessly invaded the field assigned the provinces.

There is a mass of authority of this kind in the way of decisions in concrete cases, which having binding authority we must observe, despite later merely advisory opinions, even if apparently conflicting, though possibly not.

Then it is said, pursuing same line of argument relative to the power claimed by the enactment now in question, that the Dominion has not by express enactment taken possession of the field and, therefore, the province has authority to enact, and a line of cases is cited to us which it is urged give expression to such a doctrine. When examined these cases do not support the alleged doctrine. In most of them there is nothing more than that a province may have in the exercise of its power over property and civil rights enacted a law which perhaps has been superseded *pro tanto* by an enactment of Parliament in the exercise of its exclusive legislative authority over the enumerated subjects in section 91. This has been sometimes expressed as a taking possession by the Dominion of the same field or part of the same field or as overlapping, as it were, in the same field by concurrent legislation. A more accurate mode of expression is that subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91. (Clement's Canadian Constitution (2 ed.), page 172, quoting from the judgment of the Judicial Committee

of the Privy Council in the case of *Hodge* v. *The Queen* (1), at page 130.)

With great respect I think the metaphor of a supposed field, as it has sometimes been expressed, is not quite accurate, and in other cases the true limits of the respective powers have been, as result of its misapplication, misapprehended. For example: When by virtue of its authority over property and civil rights a legislature has enacted something giving a right of property, and later the Dominion Parliament has in the due exercise of its exclusive powers over bankruptcy enacted something else which of necessity invaded that right of property, it may in doing so disturb apparently existent rights of property and other civil rights. But such rights of property always were held subject to such disturbing power.

That part of the field of property and civil rights which Parliament may thus have taken possession of, never had existed in the province. It had only exercised its undoubted power over property and civil rights so far as competent for it to do so, but had never occupied the same field as the expression "taking possession of the field" so often implies. The bank or Dominion railway company, for example, operate by virtue of the exclusive authority of Parliament. These corporate bodies rest such operations in the field of property and civil rights sometimes solely upon the authority of Parliament in ways that the legislature of a province with all its power over property could not enable, and at other times upon the authority of both Parliament and legislature.

The purposes and objects to be attained by each legislative power are the measure by which their re-

(1) 9 App. Cas. 117.

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spective legislative fields are constituted and they never can be the same field though the physical appearance as result of obedience to the law either may enact, may produce often a semblance that seems to justify the expression.

Great confusion of thought often exists because people do not stop to think and discriminate between these exclusive powers of Parliament and the residual power which Parliament has for the "peace, order and good government of Canada," but which in its turn is subordinate to the so-called exclusive powers given in section 92 to the provincial legislatures.

The gravest error is likely to grow out of this confusion by accustoming the legislative and judicial mind, if I may say so, to look upon the Dominion as possessing a general supervision or superior power over identically the same thing as the province is entitled to deal with, but which it has not save by the indirect means of the veto power over provincial enactments.

The notion sometimes prevails that, as of course, the legislation of a province must bend before that of Parliament. It must before the paramount exclusive legislative authority given over specified subjects, but not before what Parliament asserts merely by virtue only of this residual power.

In the case of the matter in hand I think there are two answers to the contentions founded on the theory put forward. The Dominion Parliament has, I incline to think, taken possession of the field which I will call the subject of crossing of railways, of which one or more may happen to be a Dominion railway, and has dealt in detail with all the immediate acts involved in carrying out such a purpose, so that in a proper case

there should not be a legal difficulty in accomplishing a crossing of such railway as in question.

But even if it has not gone quite so far I think its enactment under which one of the railways within its exclusive control has been constructed and is being operated, has in itself such force and effect that a provincial legislature cannot interfere to force by its own unaided act a crossing thereof by one of its own creations.

Is there then any purpose which the said section submitted herein can subserve ? Is there anything on which it can so rest as to be possibly *intra vires* the legislature ?

It is quite clear that Parliament has no power to add to a provincial corporation a capacity not already given it. If such a railway company has not been given directly or impliedly the capacity to cross another railway, Parliament cannot give it that capacity except by declaring it a work for the benefit of Canada.

In like manner, if as is contended, Parliament has not so dealt with the subject of crossing and there is nothing enabling it and the Dominion railway charter expressly or impliedly disables it from being done, then I conceive it is quite competent for a legislature to pass some such Act as the section in question to be conditional in its operation upon corresponding legislation being duly enacted by Parliament.

It does not seem to me that such an enactment need be in very exact terms conditional if it is capable of such use or application.

It certainly ought to be held that a legislature is competent to make a tender of such legislative assist-

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ance if we are to work out our federal system in all its bearings.

I must not, however, conceal the fact that I made such a suggestion in the *Marriage Laws Case*(1), and expressed the view that it was quite competent for Parliament to so act upon or by virtue of its powers therein involved, but in view of the result of that case in the Judicial Committee of the Privy Council(2) there is room to argue that such a doctrine as I here enunciate and have often laid down has no foundation.

Parliament certainly has the power to aid thus the treating and dealing with other countries. No one ever questioned it in known instances, and surely it is quite competent for it to so deal with the provinces.

In fact it has heretofore and until the *Marriage Case*(1) so dealt with them.

I have no serious difficulty in this case in so holding if the section can be read, as if conditional, for example, upon due leave being got from the Board of Railway Commissioners to render it operative. So far as that may, if possible, be implied the section may be *intra vires*.

As at present advised I do not think the proviso relative to Railway Commissioners at the end of the sub-section which precedes this amending sub-section, is effective for such purpose, or can be imported into this new legislation as if part thereof.

But the purpose of the submission as indicated by the possible amendment to the section as proposed and the withdrawal of the possible bearing of the enactment upon the Canadian Pacific Railway lands assigned by virtue of its subsidy, seems to be tentative

(1) 46 Can. S.C.R. 132. (2) [1912] A.C. 880.

and, therefore, the liberty extended to us instead of a single affirmative or negative answer, to answer in such a way as to deal with the value of the enactment as giving a right to cross a Dominion railway without the leave of the Board of Railway Commissioners for Canada, or other means given or to be given by authority of Parliament.

My answer, therefore, is that the section as it stands or would stand after striking out the word "unreasonably" would not, without the authority of Parliament or some person or body duly delegated its power in the premises, be effective as giving the right to any provincial railway company to cross a Dominion railway.

DUFF J.—Section 82(2) of chapter 8 of the Alberta statutes of 1907 contains these words:—

> And in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section,

and in view of that clause it may be doubted whether the power conferred upon provincial railway companies by the first sub-section ought not be held to be exercisable in respect of the "lands" of Dominion railways only after the Board of Railway Commissioners for Canada has pursuant to its lawful powers in that behalf given its approval to the proposed action of the provincial railway company.

It may further be doubted whether on the true construction of section 7 of chapter 15 of the Act of 1912 the amendment effected by that enactment is not limited to authorizing the provincial railways with the approval of the Lieutenant-Governor in Council as

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well as that of the Board of Railway Commissioners for Canada to "take possession of, use or occupy" *lands* of any Dominion railway company as contra-distinguished from "right-of-way tracks, terminal stations or station grounds."

If such be the effect of these enactments they are obviously unobjectionable from a constitutional point of view.

Both parties, however, desire us to deal with the question whether provincial legislation can or cannot validly confer upon a provincial railway company compulsory powers for the purpose of enabling it to construct its line across the line of a Dominion railway by way of level crossing and to run its trains over the line when constructed. I think the question must be answered in the negative. It is, of course, impossible to construct a railway across another existing railway in such a way as to form a level crossing without altering in some degree the physical structure of the works of the existing railway.

Legislation authorizing such action on the part of a provincial railway company and requiring the Dominion railway company to submit to such alteration of the structure of its works, and to the passing of the trains of the provincial railways across its line, in so far as it is merely permissive or facultative, is legislation strictly relating to the provincial railway and if it stopped there would as such be within the powers of a provincial legislature. But in so far as it affects to confer authority upon or compulsory powers as against the Dominion company it is legislation relating to a Dominion railway as such. In that respect it is legislation of a character that the Dominion alone has power

to enact. Some of the powers of the Dominion in respect of Dominion railways are (it could hardly be disputed) exclusive powers. In *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* (1), at page 372, Lord Watson said:—

> The "British North America Act," whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament. It, therefore, appears to their Lordships that any attempt by the Legisature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers.

Legislation, therefore, authorizing the altering for railway purposes of the structure of the works of a Dominion railway, and the running of trains over the works as altered is legislation upon a subject which as subject-matter for legislation *necessarily* falls within the field exclusively assigned to the Dominion.

The works dealt with by section 92 (10) are, as Lord Atkinson observed in the judgment in *City of Montreal* v. *Montreal Street Railway Co.*(2), "things not services." Some of them at all events (railways and telegraph lines, for example,) are things of such a character that for many purposes they must be treated as entireties. The observations of his Lordship in the

(1) [1899] A.C. 367. (2) [1912] A.C. 333.

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judgment just mentioned suggest that as far as possible they should be so regarded when considered as subject-matter of legislation. In that view it seems to follow that when you have an existing Dominion railway all matters relating to the physical interference with the works of that railway or the management of the railway should be regarded as wholly withdrawn from provincial authority. *Fisheries Case*(1), at page 715; *Madden* v. *Nelson and Fort Sheppard Railway Co.*(2), at page 628. Questions of a similar character may arise when a projected Dominion railway is to cross a provincial railway. What compulsory powers the Dominion is entitled to exercise in such a case over the provincial railway in respect of the crossing and matters incidental thereto without assuming complete jurisdiction over the provincial railway by declaring it to be "a work for the general advantage of Canada," is a subject which does not require discussion here.

There are two further observations:—

1. In the view I have just expressed (namely, that legislation such as that under consideration conferring authority upon a provincial railway to alter for railway purposes the physical structure of the works of a Dominion railway without the consent of the Dominion railway company or the sanction of the Dominion Parliament and all legislation relating to the management of such a railway is legislation upon a subject which since it necessarily falls within the subject of Dominion railways can only be enacted by the Dominion) no question of the so-called doctrines of "overlapping powers" and "necessarily incidental powers"

(1) [1898] A.C. 700. (2) [1899] A.C. 626.

can arise; and the points raised during the able discussion of those subjects by counsel of Alberta do not require consideration.

2. As is shewn by Lord Watson's judgment in *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(1) (and, indeed, it must be obvious when we consider the numerous cases in which jurisdiction over the railway of a provincial company has been assumed by the Dominion by declaring the railway to be a work for the general advantage of Canada after the company had received a large land subsidy from the province,) the fact that exclusive jurisdiction in relation to a Dominion railway, as railway, is vested in the Dominion is not incompatible with the possession by the province of some authority over the Dominion railway company as land owner; how far in legislating for a provincial railway the province has authority to confer compulsory powers as against a Dominion railway company as land owner is a question upon which I express no opinion.

ANGLIN J. agreed with Davies J.

BRODEUR J. (dissenting).—We are asked by this reference to declare whether section 7 of chapter 15 of the Act of the Legislature of Alberta of 1912 is *intra vires.*

The Legislature of Alberta passed in 1907 a "Railway Act," and section 82 of that Act provided: —

> The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of any other railway company and have and exercise full

(1) [1899] A.C. 367.

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right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor in Council first obtained or to any order or direction which the Lieutenant-Governor in Council may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

(2) Such approval may be given upon application and notice and after hearing the Lieutenant-Governor in Council may make such order, give such directions and impose such conditions and duties upon either party as to the said Lieutenant-Governor in Council may appear just or desirable, having due regard for the public and all proper interests and all provisions of the law at any time applicable to the taking of land and their valuation and the compensation therefor and appeals from awards thereon shall apply to such lands and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section.

It seems to me that the legislation had in view not only the crossing of provincial railways, but also of federal railways because of the reference therein to the Board of Railway Commissioners for Canada. But the definition in the Act of the word "company" made it somewhat doubtful whether the above quoted provisions would apply to federal railways and a new sub-section was added in 1912 by chapter 15, section 7, which reads as follows:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such legislative authority.

By the "British North America Act" sub-section 10 of section 92, the provincial legislature may exclusively make laws in regard to local works and undertakings.

A railway built within the boundaries of a province is subject to the legislative control of that province.

The corporate powers of such a railway company, its rights and obligations are essentially under such legislative control.

Its power to build a line from one point to another is granted by the provincial legislature and the provincial legislature alone can give such authority. If in its course the railway comes in contact with federal works it may be subject to some federal regulations, but the enabling power to cross those federal undertakings rests essentially with the province.

A provincial railway may have to cross a navigable river. Navigation is under the legislative authority of the federal Parliament and laws have been passed by that Parliament as to the manner in which bridges could be put on those rivers (R.S.C. 1906, ch. 115). In such a case the provincial railway will be required to follow the federal regulations, but the right to build a bridge shall have to be granted to the company by the local legislature.

The legislation, the constitutionality of which is contested, deals with the crossing of railways.

In the case of two provincial railways the executive authority of the province is empowered to deal with the matter, to give its approval and impose such conditions as it may appear just or desirable having due regard for the public interests. In the case of the crossing of a federal railway the provincial railway is still bound to obtain the approval of the provincial government; but, as I read the statute, that provincial railway will also require the approval of the Board of Railway Commissioners for Canada which is the federal authority having executive and judicial control over federal railways.

The power conferred by the legislation upon the provincial railway to cross a provincial or federal rail-

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way is such an enabling power as was within the legislative authority of a provincial legislature.

The claim that the federal Parliament is the only authority that could give such enabling power is unfounded, because the provincial railway company could not construct its line through or over or below a federal railway, unless the federal authorities would be willing to pass the necessary legislation. The powers then granted by sub-section 10 of section 92 of "British North America Act" would become illusory. The enabling power rests with the provincial authority and a regulative power recognized by the provincial legislation may be exercised by the federal authorities.

The crossing of railways is of constant occurrence. The provincial legislature in creating local railway companies have the power to confer upon them as an incident of their legislative authority in the matter the right to cross any other railway, local or federal. But that must be done, of course, without interfering unreasonably with the construction or operation of the other railway. It is precisely what the legislation has provided for in this case.

But there is more. The legislature far from encroaching upon federal legislative or executive authority has enacted that where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so. There is in the "Railway Act" a legislation regarding the crossing of provincial railways by federal railways. It may be doubtful whether such legislation was within the power of the federal authority, but then concurrent legislation was advisable and it is what was done. The Act in question provides for en-

abling and concurrent legislation that was within the legislative authority of the Province of Alberta.

For those reasons I would answer that section 7 of chapter 15 of the Act of the Legislature of Alberta, in 1912, is *intra vires*.