

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Western Counties Railway Company v. The Windsor and Annapolis Railway Company, from the Supreme Court of Nova Scotia, delivered 22nd February 1882.

Present :

LORD BLACKBURN.

LORD WATSON.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR ARTHUR HOBHOUSE.

In the present case, each of the contending parties claims the exclusive right to possess and work the Windsor Branch Railway, in the province of Nova Scotia. This line was originally constructed as one of the public railways of the province, and was intended to be part of a general system connecting Halifax and other towns of importance with the frontier of the province of New Brunswick. After the passing of the British North America Act, 1867, and in accordance with its provisions, all railways belonging to the province of Nova Scotia, including the line in question, passed to and became vested in the Dominion of Canada.

The Chief Commissioner of Railways for Nova Scotia, acting under authority conferred upon him by the provincial Act, 28 Vict., chap. 23, entered, in November 1866, into an agreement with Messrs. Punchard, Barry, and Clark, of London, whereby those gentlemen became bound

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to make a railway, which was to be their own property, from Windsor, one of the termini of the branch in question, to Annapolis. By that agreement it was *inter alia* provided that, before the new line from Windsor to Annapolis was opened by Messrs. Punchard, Barry, and Clark, a traffic arrangement was to be made between them and the Provincial Government "for the mutual use and enjoyment of their respective lines of railway between Halifax and Windsor, and Windsor and Annapolis, including running powers, or for the joint operation thereof, on equitable terms to be settled by two arbitrators, to be chosen by the parties in case of difference."

By an Act of the Legislature of Nova Scotia, passed upon the 7th May 1867 (30 Vict., chap. 36) Messrs. Punchard, Barry, and Clark were constituted a body corporate, by the name of the Windsor and Annapolis Railway Company; and the agreement of November 1866 between them and the Chief Commissioner of Railways was, by the same Act, adopted and confirmed.

The Windsor Branch Railway became the property of the Dominion upon the 1st July 1867, being the day appointed by Her Majesty, in terms of Section 4 of the British North America Act, for the provisions of that Act coming into operation. And, on the 22nd September 1871, the Government of Canada, as then owners of the railway, and in implement of the obligation to make a "traffic arrangement" which is contained in the agreement of November 1866, entered into a new agreement with the Respondents, the Windsor and Annapolis Railway Company.

It is unnecessary to consider in detail the whole terms of the agreement of 1871. Its provisions, so far as bearing upon the present case, are in substance these. The exclusive use and possession of the Windsor Branch Railway was

made over to the Respondent Company, with running powers over the trunk line, also belonging to the Dominion Government, which connects the Windsor Branch with Halifax. The Dominion Government was to maintain the Windsor Branch as well as the trunk line in workable condition, whilst the Respondent Company undertook to render and adjust regular monthly accounts of all traffic carried by them over these lines, and to pay to the Government, not later than 21 days from the end of each month, one third of their gross earnings from such traffic. The Company also undertook to provide rolling stock, and to run a certain number of trains daily, with stated hours of departure and arrival, and to conduct their business and traffic with impartiality and fairness. No right of re-entry was reserved in case of the Company's failure punctually to make payment of one third of their earnings, but it was stipulated (Art. 19) that "in the event of the Company failing to operate the railways between Halifax and Annapolis, then this agreement shall terminate, and the authorities may immediately proceed to operate the railway between Halifax and Windsor as they may deem proper and expedient." Last of all, it was provided that the agreement should take effect upon the 1st day of January 1872, and continue for twenty-one years, and be then renewed on the same conditions, or upon such other conditions as might be mutually agreed on.

In accordance with the foregoing agreement, the Respondent Company in January 1872 took possession of and worked the Windsor Branch line. Shortly afterwards the monthly payments due to Government fell into arrear, but these arrears were paid in full in November 1872, in consequence of a threat that Government would resume possession of the railway. During the

following year the Company again failed to make payment of the third of the traffic receipts for which they were to the Dominion Government, who intimated that, unless all arrears were paid up on or before the 1st October 1873, they would resume possession.

On the 22nd day of October 1873, an Order of the Privy Council of Canada was passed, approving of a report, dated the 21st of the same month, from the Minister of Public Works, “stating that the Windsor and Annapolis Railway Company had failed to operate the railway known as the Windsor Branch, mentioned in Order in Council of the 22nd September 1871, and to comply with the other terms and conditions of that Order in Council, and now owe \$30,000 to the Government of Canada, and though repeatedly called upon to pay have failed to do so, and recommending that, inasmuch as the said Company have failed to operate one of the railways between Halifax and Annapolis, the Government of Canada, known as ‘the authorities’ by the said Order in Council, do proceed immediately to operate the railway between Halifax and Windsor.”

On the same day (the 22nd October 1873) the Governor General in Council, subject to the sanction of Parliament, approved of a proposal made by the Appellant Company for a transfer to them of the Windsor Branch Railway, upon these conditions :—

“1st. The said Company will undertake to receive the said railway and appurtenances on the first day of December, Anno Domini eighteen hundred and seventy-three, and from that date to work it efficiently and keep the same in repair at their own proper costs and charges, collecting, receiving, and appropriating to their own use all the tolls and earnings of the same.

“ 2nd. That on the completion of the Western Counties Railway from Yarmouth to Annapolis (now in course of construction), the said railway and appurtenances, from Windsor to the trunk line, shall be and become absolutely the property of the said Western Counties Railway Company.

“ 3rd. That, in consideration of the premises, the said Company hereby engage to prosecute the work of building the railway from Yarmouth to Annapolis, and complete the same with all reasonable despatch.”

On the 30th October 1873, the Governor General in Council approved, subject as before to parliamentary sanction, of a further proposal made by the Appellant Company in these terms :—

“ 1st. That the Western Counties Railway Company shall carry, free of charge, all passengers holding Government tickets, on all their passenger trains running between Halifax and Windsor Junction.

“ 2nd. That the said Company, or their agents or assigns, shall have running powers over the Intercolonial Railway, between Halifax and Windsor Junction, with such privileges as have been hitherto granted in the agreement with the Windsor and Annapolis Railway.”

On the 26th May 1874, an Act was passed by the Parliament of Canada (37 Vict., cap. 16), entitled, “ An Act to authorize the transfer of “ the Windsor Branch of the Nova Scotia Railway “ to the Western Counties Railway Company.” The proposals of the Appellant Company, which were provisionally agreed to by the Orders in Council of the 22nd and 30th October 1873 respectively, were set forth at length in Schedules A and B appended to the Act, and are referred to and sanctioned by the enacting

clauses. It will be necessary, hereafter, to examine this statute more closely, because the Appellant's case is mainly founded upon its provisions, and the parties are widely at variance as to their true import and effect.

Upon the 22nd June 1875, the Respondent Company entered into an agreement with the Minister of Public Works of Canada, by which the Company, on the one hand, undertook to alter the gauge of the Windsor and Annapolis Railway from five feet six inches to the standard gauge of four feet eight and one half inches, to deliver to the Minister a certain quantity of locomotives and other broad gauge plant, and to release all claims and demands against the Government of Canada up to the 1st day of July 1875. On the other hand it was agreed that, upon the change of gauge being effected, all arrears of traffic receipts, due by the Company to the Government, which had accrued up to 1st January 1875, should be discharged, and that the Minister of Public Works should then deliver to the Company a like quantity of narrow gauge engines and rolling stock. It was further stipulated that the Company should, on or before the 31st July 1875, make payment of the third of gross earnings which had accrued after the 1st January 1875, and that the proportion of such traffic earnings due to the Government, and thereafter accruing, should "be paid monthly, " as provided in the said agreement under which "the Company hold and work the branch " as aforesaid, which (except as aforesaid) is " hereby declared in all respects in full force " and effect." In pursuance of this agreement the Respondent Company altered the gauge of their line, and regularly made the payments therein stipulated, and an exchange of engines and rolling stock was also made in terms thereof.

The Respondent Company remained in full possession of the Windsor Branch line, and continued to work the same, from the beginning of the year 1872 until the 1st day of August 1877. On that date the Dominion Government took possession of the Windsor Branch line; and on the 24th September following transferred the possession of it to the Appellant Company under the agreement scheduled to the Canadian Act of the 26th May 1874.

The Respondent Company, upon the 10th October 1877, filed a bill in the Supreme Court of Nova Scotia against the Appellant Company, wherein it was prayed, *inter alia*, that the latter Company should be ordered to deliver up possession to them of the Windsor Branch Railway. The Appellant Company appeared and demurred to the Bill, but their demurrer was, on the 11th March 1878, overruled by the Judge in Equity, and an appeal taken against that judgment was dismissed by the Supreme Court sitting in Banco, upon the 29th August 1878, James, J., alone dissenting. The cause then returned to the Judge in Equity, and after the Appellant Company had put in their answer, and evidence had been adduced by both parties, Mr. Justice Ritchie, upon the 1st March 1880, gave judgment in favour of the Respondent Company with costs; and his judgment was affirmed with costs by the Supreme Court of Nova Scotia, on the 6th April 1881, James, J., being again the only dissentient Judge.

Some of the points, unsuccessfully maintained by the Appellant Company in the Courts of Nova Scotia, were not pressed in the argument addressed to this Board. The two propositions seriously maintained by the Appellants were these:—(1) that the Act passed by the Parliament of Canada upon the 26th May 1874 (37 Vict.,

chap. 16) extinguished all right and interest which the Respondent Company had in the Windsor Branch Railway, by virtue of the agreement of 22nd September 1871, and transferred to the Appellant Company a present right to the exclusive possession, and a future right to the exclusive property, of the said railway; and (2) that the Parliament of Canada had, under the provisions of the "British North America Act, 1867," ample legislative authority to take away without compensation, any right in or relating to the railway which might be vested in the Respondent Company, and to transfer it to the Appellants. It is not disputed that, if either of these propositions be not well founded, the Appellants' case must fail.

The 108th section of the "British North America Act, 1867," which must be read in connection with the third schedule of the Act, had the effect of transferring, upon the 1st day of July 1867, to the Dominion of Canada all railways which were the property of the province of Nova Scotia. Their Lordships are of opinion that it had not the effect of vesting in Canada any other or larger interest in these railways than that which belonged to the province at the time of the statutory transfer. Accordingly, the Dominion took the property of the Windsor Branch Railway, subject to the same obligation by which the right of the Provincial Government was affected, viz., to enter into a traffic arrangement with the Respondent Company, in terms of the agreement confirmed by the Provincial Statute of the 7th May 1867; and it was in pursuance of that obligation that the Dominion Government entered into the agreement of 22nd September 1871. The agreement thus made was valid, and must continue to receive effect until it has been terminated by the

default of the Respondent Company, by the mutual consent of parties, or by the action of a competent Legislature.

As already stated, the Appellant Company maintains that the agreement in question has been put an end to by the Act of a competent Legislature. In dealing with that contention, it will be convenient to consider, in the first place, whether, on the assumption that the Dominion Parliament had authority to enact the 37th Vict., chap. 16, the provisions of that Act do extinguish those rights in relation to the Windsor Branch, which are conferred upon the Respondent Company by the agreement of 1871.

The proposals, or provisional agreements, which are scheduled to the Act 37 Vict., chap. 16, contain two distinct stipulations, the one relating to the possession and use, and the other to the property, of the Windsor Branch Railway. By the first, the Appellant Company "undertake to receive " the said railway and appurtenances on the first day of December, Anno Domini eighteen hundred " and seventy-three," and to work it efficiently thereafter. Although the Company undertake to receive, there is no corresponding obligation laid upon the Government to give them possession of the railway, either upon the 1st December 1873, or at any other specified date. By the second of these stipulations it is provided that, upon the completion of the Western Counties Railway, then in course of construction, from Yarmouth to Annapolis, the Windsor Branch Railway and its appurtenances shall be and become the absolute property of the Appellant Company. The Governor General, with advice of his Council, would probably have been entitled, by virtue of the administrative powers conferred upon him by the 12th section of the "British North America Act, 1867," to make a valid agreement in regard to the possession and working of the

line; but it is, at least, very doubtful whether he would have had the right to alienate the property of the line, without the sanction of the Dominion Parliament. Be that as it may, the Parliament did interpose upon the 26th May 1874, to the effect, the Appellants say, of destroying the previously subsisting agreement between the Government and the Respondent Company.

Neither in the Act 37 Vict., chap. 16, nor in the Schedules appended to it, is mention made of the agreement of 22nd September 1871, or indeed of any right or interest of the Respondent Company in the Windsor Branch Railway. The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the Respondent Company, unless it appear, by express words, or by plain implication, that it was the intention of the Legislature to do so. That principle was affirmed in "Barrington's case" (8 Coke, 148*a*), and was recognized in the recent case of "The River Wear Commissioners *v.* Adamson" (L. R., II.; H. L. App., 743). The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain—that, in order to take away the right, it is not sufficient to show that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shown that the Legislature have authorized the thing to be done, at all events, and irrespective of its possible interference with existing rights.

It appears to their Lordships that there is nothing in the provisions of the Dominion Act, 37 Vict., chap. 16, to warrant the inference that the Parliament of Canada must have intended thereby to enact that immediate possession of the Windsor Branch, for the purpose of working it, was to be given to the Appellant Company, under

the agreements scheduled, even though there should be a subsisting arrangement for the working of the line. Indeed the contrary appears from the 2nd section of the Act, to which reference will be made hereafter.

The preamble of the Act recites the proposed transfer of the railway to the Appellant Company, and also a Resolution of the Canadian House of Commons, of date the 23rd of May 1873, to the effect that the Government should be authorized to enter into negotiations for the transfer of the Windsor Branch to some reliable Association or Company, "upon condition that such Company extend the railway from Annapolis to Yarmouth." It makes no reference to any right belonging to or asserted by the Respondent Company, nor does it refer to that part of the scheduled agreement which relates to the willingness of the Appellant Company to undertake to receive the railway and appurtenances upon the 1st December 1873. It is impossible, therefore, to gather from the terms of the preamble an intention to terminate at once any temporary right of possession which might belong to the Respondent Company. The transfer of the railway was obviously not expected to take place at once. It was dependent upon a condition which might never be fulfilled, and which admittedly has not yet been fulfilled, viz., the completion of the line from Yarmouth to Annapolis by the Appellant Company. Besides, the transfer of the property of the railway is nowise inconsistent with the fact of working arrangements affecting the transferor's right continuing to affect the right of the transferee.

Then comes the leading enactment of the statute, as contained in Sec. 1, which is in these terms :—"The agreements herein-before referred to, and set forth in the Schedules A and B to this Act, being such as were adopted by the

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“ orders of the Governor in Council of the
“ twenty-second and thirtieth days of October
“ eighteen hundred and seventy-three, and all
“ the matters and things therein contained, are
“ hereby approved, and declared to be as effectual
“ to all intents and purposes as if the said agree-
“ ments had been entered into in pursuance of
“ sufficient authority in that behalf, given before
“ the adoption of such agreements by Act of the
“ Parliament of Canada.”

It was argued for the Appellants that the effect of the preceding clause is precisely the same as if the Parliament of Canada had, prior to October 1873, passed an Act authorizing the Governor in Council to make an agreement with the Appellant Company in terms of the proposals set forth in Schedules A and B. That argument appears to be well founded; but what would have been the effect of such antecedent statutory authority? Their Lordships are unable to discover any term in the contract, contained in Schedules A and B, binding the Government to give the Respondent Company immediate possession of the line, or to transfer the property of the line, free of all contracts or arrangements whatsoever; and, if such an obligation cannot be inferred from the language of the agreements sanctioned by the Legislature, it is impossible to derive, from the language of this section, any intention to defeat the Respondent Company's right of possession.

It appears to their Lordships that, even if the terms of these proposals had contemplated the immediate transfer of possession to the Appellant Company, that would not have been necessarily conclusive against the Respondents in this Appeal. There is a great difference between giving authority to make an agreement, and authorizing it to be made and forthwith carried out so as to override and destroy all private rights that may stand in its way.

The second, and only other section of the Act, provides that, until arrangements are completed for giving possession of the line to the Appellant Company, for the purpose of working it until the completion of their line from Annapolis to Yarmouth, the Government shall have power to make such other arrangements as may be necessary, "by continuing the working of the same by the Windsor and Annapolis Railway Company, or otherwise." These provisions certainly do not suggest that it was in the contemplation of Parliament that immediate possession of the Windsor Branch Railway was to be given to the Appellant Company, for the purpose of operating it; on the contrary, they are apparently intended to meet the case of the Government declining to give possession of the line to the Appellant Company at the time when the latter had undertaken to receive it. Nor do these provisions necessarily indicate that, if there should be a subsisting working agreement with the Respondent Company, or any other Company, that agreement was to be set aside, in order to admit of the Government making such an arrangement as is provided for in this section. In case of there being no such standing agreement in the way, the powers conferred upon the Government are very wide; and, even if the agreement of 1871 had been determined, it is by no means clear that the agreement of 22nd April 1875 would not give the Respondent Company right to continue their possession of the line.

In the view which their Lordships take of the import and effect of the Canadian Act, 37 Vict., chap. 16, it becomes unnecessary to decide whether, if it had chosen to do so, the Parliament of Canada would have had the power to extinguish the rights of the Respondent Company under the agreement of 22nd September 1871. Whether that power is given by the provisions of the

“ British North America Act ” to the Dominion Parliament, or to the Legislature of Nova Scotia, is a question of difficulty and importance ; but seeing that it does not arise for decision in the present case, their Lordships express no opinion whatever in regard to it.

Their Lordships will, therefore, humbly advise Her Majesty that the judgments of the Courts below ought to be affirmed, and the appeal dismissed. The Appellants must pay the costs of the appeal.
