IN THE MATTER OF ORDER NO. 7473 OF THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA, RESPECTING FENCING AND CATTLE-GUARDS;

AND

THE CANADIAN NORTHERN RAILWAY COMPANY..... APPELLANTS;

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*Nov. 19, 22.
*Dec. 13.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railway—Fencing—Uninclosed lands—Jurisdiction of Board of Railway Commissioners—Construction of statute—"The Railway Act," R.S.C. 1906, *c.* 37, *ss.* 30, 254.

Under the provisions of "The Railway Act" the Board of Railway Commissioners for Canada does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not inclosed and either settled or improved; it can do so only after the special circumstances in respect of some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of the case. Duff J. *contra.*

The "Railway Act" empowers the Board to order that, upon lines of railway not yet completed or open for traffic or in course of construction, where they pass through inclosed lands, the railway companies should construct and maintain such fences or take such other steps as may be necessary to prevent cattle and other animals from getting upon the right-of-way. Idington J. *contra.*

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

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APPEAL from an order of the Board of Railway Commissioners for Canada on a question as to the jurisdiction of the Board.

The Canadian Northern Railway Company, one of the companies subject to the jurisdiction of the Board of Railway Commissioners for Canada, appealed from the order whereby, among other things, it is required that all railway companies subject to the jurisdiction of the Board should, as to all railway lines completed, owned or operated by them where the lands on either side of the railway are not inclosed, settled or improved, on or before 1st January, 1911, erect and maintain on each side of the right-of-way fences with swing gates at farm crossings, and that, as to lines not yet completed or opened for traffic or in course of construction where the railway is being constructed through inclosed lands it should be the duty of the railway company at once to construct such fences or take such other steps as would prevent cattle and other animals escaping from such inclosed lands. The question to be decided was, whether or not under section 254 of the "Railway Act" or otherwise the Board of Railway Commissioners for Canada had jurisdiction to make those provisions of the order.

In giving reasons for the making of the order, the HON. J. P. MABEE, Chief Commissioner, said:

"At every sitting of the Board from Winnipeg to Victoria complaints were made against the railway companies in connection with the fencing, or rather the defective and non-fencing of their right-of-way, and that the law regarding cattle-guards was not complied with. Claims innumerable for stock killed, and refusal to make compensation were disclosed. Many cases appeared where stock had been killed upon

the track and farmers were afraid to ask for compensation for fear of being involved in endless litigation.

"It would seem, perhaps, that upon the whole the absence of fences along the right-of-way is a more fruitful source of loss to the rancher and farmer than defective cattle-guards, or their absence.

"Cases were given where those in charge of the construction of railways entered upon improved and inclosed land, threw down the fences, made no attempt to inclose the right-of-way, allowing stock to get out upon the highways, thus injuring crops, and in some instances these cattle were killed upon distant railway tracks. Whether these wrong-doers were independent contractors or servants or officers of the railways under construction did not appear, but, so far as this Board has power, it is determined that such high-handed and unreasonable conduct shall cease.

"The 'Railway Act' is clear upon the questions of fencing and cattle-guards, and the time has arrived when something must be done to compel the observance of its provisions.

"Section 254 provides as follows:

" '1. The company shall erect and maintain upon the railway:

" '(*a*) Fences of a minimum height of four feet six inches on each side of the railway;

" '(*b*) Swing gates in such fences at farm-crossings of the minimum height aforesaid, with proper hinges and fastenings, provided that sliding or hurdle gates constructed before February 1, 1904, may be maintained; and

" '(*c*) Cattle-guards on each side of the highway at every highway crossing at rail level with the highway.

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"'2. The railway fences at every such highway crossing shall be turned into the respective cattle-guards on each side of the highway.

"'3. Such fences, gates, and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

"'4. Wherever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates, and cattle-guards, unless the Board otherwise orders or directs.'

"There has been no order of the Board respecting fencing through uninclosed or unimproved lands, and the practice of the companies, so far as I can learn, has been to leave their right-of-way entirely unfenced, until the adjacent owner or owners had erected side-fences, when such owner or owners would be expected to call upon the company to erect its fences. Cases, however, were presented where the side-fences had been long since erected, but yet the railway fences had not been erected.

"We have been furnished with no information by the railway companies of the amounts paid by them for cattle killed upon their lines, or of the number of claims they have disputed, but from the large number of cases that were brought to the attention of the Board, where compensation has not been made, the better opinion perhaps is that the disputed claims vastly exceed those in which settlements have been made, if not, the companies have been paying out very large sums that would have been much better spent in protecting their rights-of-way.

"Now the statute defines clearly the kind of fence

and cattle-guard that must be provided; the fence must be at least four feet, six inches high, and it and the cattle-guards must be 'suitable and sufficient to prevent *cattle and other animals* from getting on the railway.'

"It is just as incumbent upon the companies to fence against hogs as it is against horses, yet it is not pretended that any attempt has been made to do so, and instances were given where farmers had so many hogs killed that they were compelled to abandon any attempt to raise them.

"It seems to be the practice in Manitoba, Saskatchewan, some parts of Alberta and British Columbia to remove the cattle-guards entirely in the winter time. This is done, it was said, to facilitate the operation of the snow ploughs. It was not shewn by any railway expert that this practice is necessary, but it was shewn by many Saskatchewan farmers that it was more important to them to have the cattle-guards in place during winter than any other season, as during the other seasons their cattle were mostly pasturing in the hills in charge of herders. At any rate these cattle-guards have been removed during the winter months without authority and unless a great deal more can be shewn than has yet appeared, the practice must cease. Furthermore, the railway companies must establish and maintain cattle-guards that will prevent cattle and other animals from getting upon the railways. This is the requirement of the law, and I know of no reason why it should not be complied with.

"The provisions of clause 4 have been abused, and this statutory exemption from fencing has been used by the companies to free themselves from making compensation in innumerable cases of meritorious claims.

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This condition of affairs cannot be permitted to continue; it works great hardship upon the public, and is of little or no benefit to the railway companies. The conditions in the West have greatly changed since this exemption was granted to the companies, and as they are compelled at some stage of the undertaking to erect fences, I am clearly of the opinion that no hardship will be imposed if that stage is made the initial one.

"I am aware that in various parts of the country no necessity now exists, and possibly never will, for the erection of fences. The formal order may contain a provision that railway companies, the lines of which have already been constructed, may apply to exempt certain sections of the road from the operation of the order, when, if conditions are shewn that such course will entail no hardship upon the public, the Board may so declare. The like course may be taken where railways are in course of construction, and as to such latter, when application is made to open the road for traffic, the fences, cattle-guards, highway and farm-crossings and gates shall all form part of the work necessary to be completed according to the statute and the Board's regulations, before permission is given to operate the road. I am convinced that this course will, in the end, be less expensive for the railway companies, as the erection of fences, gates, etc., can all be carried on at the time of construction at less cost than later on, to say nothing of saving liability for damage claims for stock killed and law costs in defending, even if successful.

"Many complaints were made that in the construction of the railway lines the highway crossings were left in an impassable state, causing endless incon-

venience and trouble to the public. I confess I am at a loss to understand such disregard of the rights of others, and such selfish and inconsiderate conduct upon the part of those constructing the railways, or responsible for their construction. If these works are let out to contractors, the railway companies may as well at once understand that they must make some provision in their contracts that will compel their contractors to treat the public with ordinary decency. This Board has no control over the contractors and can deal only with the railway companies. These highway crossings can be constructed at less expense when the grading is being done than later on, after the road is completed; and with respect to roads not yet completed, they will not be opened for traffic until every highway crossing opened for travel is put into the condition called for by the Board's regulations. As to these railways now in operation, all highway crossings, opened for travel, must be put into the condition called for by the regulations within one year from this date.

"A draft order embodying the foregoing may be sent to all the companies, and its settlement spoken to by them at the May meeting of the Board at Ottawa."

It did not appear that there had been any special application made to the Board in respect to any designated locality, nor that the necessity of fencing any defined portion of any particular line of railway had been inquired into and determined by the Board; and the order, by its terms, applied to the whole of the Dominion of Canada and affected all railways subject to the "Railway Act," R.S.C. 1906, ch. 37.

Chrysler K.C. for the appellants. The Board has no power to make a general order such as this, but

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must deal with each locality as an application is made in respect thereto. Section 25, Cyc. 1534, as to definition of locality. See also as to liability to fence generally, *Cortese* v. *Canadian Pacific Railway Co.* (1); *Biddeson* v. *Canadian Northern Railway Co.* (2); *Phair* v. *Canadian Northern Railway Co.* (3); *Hunt* v. *Grand Trunk Pacific Railway Co.* (4); *Canadian Pacific Railway Co.* v. *Carruthers* (5).

Ford K.C., Deputy-Attorney-General of Saskatchewan, supported the order.

THE CHIEF JUSTICE.—The provisions of the order complained of as made in excess of the jurisdiction of the Board of Railway Commissioners are fully set out in the opinion of Mr. Justice Anglin. The question to be decided on this appeal is whether, under section 254 of the "Railway Act," or otherwise, the Board has jurisdiction to make such provisions. That section (section 254, par. 1) imposes upon all railway companies under the jurisdiction of the Parliament of Canada the general obligation to erect and maintain fences, gates and cattle-guards to be constructed in accordance with certain requirements set out in detail in the section.

An exception to the general obligation contained in paragraph 1 is made in sub-section 4 of the same section 254, with respect to

> *any locality* in which the lands on either side of the railway are not enclosed and either settled or improved.

In such a locality the company is not subject to the

(1) 7 Can. Ry. Cas. 345.
(2) 7 Can. Ry. Cas. 17.
(3) 5 Can. Ry. Cas. 334.
(4) 18 Man. R. 603.
(5) 39 Can. S.C.R. 251.

general obligation to erect and maintain fences, gates and cattle-guards unless the Board otherwise orders and directs. In the context "any locality" does not include all Canada. The word *locality* qualified by *any* conveys the idea of a portion of Canadian territory confined within a limited area. In making the order the Chief Commissioner assumes that power exists in the Railway Board to make a general order applicable to all Canada, irrespective of localities, and he says:

> The provisions of clause 4 have been abused, and this statutory exemption from fencing has been used by the companies to free themselves from making compensation in innumerable cases of meritorious claims. This condition of affairs cannot be permitted to continue; it works great hardship upon the public, and is of little or no benefit to the railway companies. The conditions in the West have greatly changed since this exemption was granted to the companies, and, as they are compelled at some stage of the undertaking to erect fences, I am clearly of the opinion that no hardship will be imposed if that stage is made the initial one.
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> I am aware that in various parts of the country no necessity now exists, and possibly never will, for the erection of fences. The formal order may contain a provision that railway companies, the lines of which have already been constructed, may apply to exempt certain sections of the road from the operation of the order, when, if conditions are shewn that such course will entail no hardship upon the public, the Board may so declare. The like course may be taken where railways are in course of construction, and as to such latter, when application is made to open the road for traffic, the fences and cattle-guards, highway and farm-crossings and gates shall all form part of the work necessary to be complete according to the statute and the Board's regulations, before permission is given to operate the road. I am convinced that this course will, in the end, be less expensive for the railway companies, as the erection of fences, gates, etc., can all be carried on at the time of construction at less cost than later on, to say nothing of saving liability for damage claims for stock killed and law costs in defending, even if successful.

I am of opinion that the order to fence in any excepted locality must be made in the exercise of a judicial discretion on proper cause shewn, that is to say, the Commission must judicially find as a fact that

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the company with respect to a particular locality is not entitled to the benefit of the statutory exemption. The intention of Parliament clearly was to except from the general obligation to fence any locality wherein the lands through which the railway passes were "not enclosed and either settled or improved," on the presumption that, in places where such conditions existed, fences, gates and cattle-guards were unnecessary. The Chief Commissioner gives as his reason for making the order that

> as they (the railway companies) are compelled at some stage of the undertaking to erect fences,

presumably because, at that stage, the adjoining lands will be settled or improved, in the meantime, the companies are not entitled to the benefit of the exception created in their favour by Parliament and this notwithstanding that the Commissioner is aware

> that in various parts of the country no necessity now exists and possibly never will exist for the erection of fences.

To order the erection of fences at a time when the Commissioners admit they are not required and in places where the necessity for them will, in the opinion of the Commissioners, never arise is, in my opinion, *ultra vires* of the Commission. The Act clearly indicates that each individual case is to be considered before an order is made with respect thereto. To make a general rule obliging the companies to fence and imposing upon them the *onus* of procuring and giving evidence as to the absence of necessity for fencing in order to get the benefit of the exception created in their favour is to completely alter the policy of the Act.

As to lines not yet complete or open for traffic or in course of construction, I am of opinion that the

Commissioners have jurisdiction to oblige all railways, where they pass through enclosed lands, to fence or take such other steps as are necessary to prevent cattle or other animals from escaping from the inclosed lands through which the railway passes, whether the railways are being operated by trains or are merely in course of construction.

I agree, as to this portion of the order, with the conclusion reached by Sir Louis Davies.

GIROUARD J.—I think the appeal should be dismissed in every respect, except with regard to fences and cattle-guards on lands on either side of the railway that are not enclosed or either settled or improved, unless in "any locality" the Board has ordered otherwise. I am not called upon to express an opinion as to the exact meaning of the words "any locality"; whether it refers to a province, a district or any place in any province; it is sufficient for me to say that these words do not mean the whole Dominion. The order of the Board seems to be reasonable and even wise; but it is too general and should be given by the Parliament of Canada, who alone can change the policy expressed in article 254, par. 4, of the "Railway Act." Otherwise I agree with the Board.

The appeal is therefore allowed in part and dismissed in part, without costs.

DAVIES J.—This is an appeal challenging the jurisdiction of the Board of Railway Commissioners to make the General Order No. 7473, providing substantially that all completed railway lines owned or operated by companies should on or before the 1st January, 1911, where the lands on either side of the rail-

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way were not enclosed, settled or improved, have erected and maintained

on each side of the right of way fences of a minimum height of 4 ft. 6 inches, with swing gates at farm crossings, etc.;

and also providing with respect to lines of railway not completed or opened for traffic that where such lines are being constructed through enclosed lands it should be the duty of the company

to at once construct such fences or take such other steps that will prevent cattle and other animals escaping from such enclosed lands.

After much consideration I have reached the conclusion that such part of the order as requires all railway companies subject to the Board's jurisdiction and owning or operating completed lines running through lands "which were not enclosed, settled or improved on either side of the railway," to "erect and maintain on each side of the right of way fences of a minimum height of 4 ft. 6 in.," is in excess of the jurisdiction of the Board.

The determination of the question turns upon the proper construction of the 254th section of the "Railway Act of 1906." That section after imposing a duty upon the company to provide for the erection and maintenance generally of fences, swing gates at farm crossings, and cattle-guards at highway level crossings, contained a 4th sub-section, reading as follows:

Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs.

The language of the section is unfortunately somewhat obscure and ambiguous.

I construe it to have reference to the passage of a railway through a locality in which lands on either

side of the railway are not enclosed and *not* either settled or improved. In such cases, that is in what is popularly known as wilderness or wild or waste or forest or prairie lands unenclosed and not settled or not improved, the duty on the companies' part to fence shall not exist unless and until the Board otherwise orders or directs. It seems to me from the insertion of the words "any locality" which govern and control this sub-section, that the intention of Parliament was not to vest a general power in the Board of imposing the duty of fencing these special lands upon the companies irrespective of previous investigation or inquiry with regard to them and the necessity of fencing arising from the existing special conditions such investigation might disclose, but a special power exercisable with regard to any locality the Board might choose to investigate. Parliament no doubt wisely did not define what was intended as a locality. That too was left to the Board. Whether it was ten miles or one hundred miles or more in length was left open. So I should hold that the Board would have jurisdiction to investigate with respect to any area of such lands as the section embraced as to the conditions existing there, and after such investigation make such order as to fences, gates and cattle-guards as in its judgment was necessary and desirable.

But it must appear either expressly from the face of the order or from some record of the proceedings of the Board or be otherwise fairly to be inferred from them that the Board was exercising its powers with respect to some defined locality and was not merely making a general order covering all the localities throughout Canada through which all the railways subject to its jurisdiction ran. Such an order would

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be practically legislation in itself and not an exercise of the definite and limited powers given by Parliament. In my opinion Parliament did not intend to delegate to the Board a power to legislate, but a very broad general and, no doubt, desirable power to impose upon the railway companies duties with respect to fencing in certain designated areas of land called "localities" from which duties the statute, until the Board otherwise ordered, exempted them. Parliament obviously intended by limiting the exercise of this power to "localities" that it should not be exercised unless and until the Board having examined or enquired into the conditions had determined that these were such as called for the exercise of their powers so far as the "locality" inquired into was concerned. It is not pretended that any such necessarily precedent investigation and inquiry as would justify a general power such as the one now being considered had been made. Indeed, the contrary appears to be the fact.

With respect to that part of the order relating to lines not completed or opened for traffic or in course of construction where the railway is being constructed through inclosed lands which directs the railway company to

> at once construct such fences or take such other steps that (*sic*) will prevent cattle and other animals escaping from such enclosed lands,

I am of the opinion that the Board had jurisdiction to make the order directing immediate construction of fences or alternative steps deemed by them necessary and sufficient. The criticism upon the language of this particular order made by Anglin J. (with whose conclusion I agree) and who suggests a varia-

tion in its language is, I think, sound. If the language of the Act is adhered to and its words at the end of sub-section 3 of section 254, namely, "from getting on the railway" literally followed and substituted for those inserted in the order, namely, "escaping from such inclosed lands," I think many difficulties with respect to its enforcement in the future will be avoided.

IDINGTON J.—I fear this order exceeds the jurisdiction of the Board of Railway Commissioners.

The "Railway Act," by section 254, prescribes the duty of the railway companies in regard to fencing.

In no other part of the Act is the subject dealt with except section 242, sub-section 2, and that part relative to cattle-guards to which I will presently refer.

Sub-section 4 is as follows:

> Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle-guards *unless the Board otherwise orders or directs.*

It is by this excepting part of the clause, and by that alone, put within the power of the Board to deal with this matter of fencing through

> any locality in which the lands on either side of the railway are not inclosed and either settled or improved.

To appreciate properly the nature and scope of that dealing and of the duties imposed upon the Board and jurisdiction given it by virtue of only these excepting words, for everything turns upon the range of this exception, I have searched through the Act to find if and how such excepting phrases are used elsewhere therein.

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I have also endeavoured to find in how far and in what cases and manner a general legislative power or specific power of regulation is given.

For by its nature this order must rest upon the legislative powers of the Board which are quite distinct from its judicial and administrative powers.

Their legislative power is not confined to the subject-matters indicated in section 30 of the Act, extensive as these are, but in many places is specifically given either expressly or by clear words of implication on and over a great variety of subjects.

For example, in the minor matters of practice and procedure in section 51, and of what and how plans are to be filed as is required by sections 164 and 165 and many others, all relevant to the conduct of the business of the Board, legislative power is expressly given, though from the nature of each of such subjects such powers might have been left to repose in necessary implication if any should be so left.

Then of a more important and more distinctively general legislative character we find section 264 implies by its language a general power to direct certain things relative to equipment of cars and locomotives and enabling by express words the passing of a general regulation suspending from time to time compliance with the provisions of that section.

We also find illustrations in section 269 which enables making regulations for working trains; section 284, sub-section 4, which seems to imply making general regulations for traffic accommodation; section 321, as to classification of freight traffic; section 340, as to the limiting of liability or right to contract as to same; section 357, as to publication of tariffs, and section 400, as to increased tolls in a certain class of cases.

These are some of many of a like kind covering many spheres of action and mingled as it were in some cases with many express statutory provisions on the like subject-matters.

It is this feature of the Act which impresses me.

Where Parliament felt it might have failed to cover every emergency it has expressly or by clear implication conferred the legislative power to cover the omissions experience might find needful. What is the proper inference to be drawn if it is not that where the legislative power as in the cases in hand is not clearly given, it is not intended to be exercised ?

Then we have the numerous exceptions, somewhat slightly varied in language, of the same nature as that covered by the exception under consideration.

For example, section 180, sub-section 5, uses the expression "except by leave of the Board." Section 236, "unless otherwise directed by the Board." Section 242, "unless the Board otherwise directs."

I find in these illustrations two distinct and different methods of dealing with matters relegated to the Board.

Where the matter is intended to be dealt with legislatively, Parliament has uniformly found it necessary to say so, and distinctly confers the power. Where it is intended the Board shall act in its judicial or administrative capacity then in many cases we find the

"unless the Board otherwise directs" or its equivalent. Here the expression is that of "orders or directs"

even more clearly, I think, pointing to a specific adjudication.

Then we have the "locality" referred to of which there must be many. It is surely clearly intended that

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the words "unless the Board otherwise orders or directs" at the end of the sentence should be held to relate to the antecedent part of the sentence which the word "locality" limits.

It seems to have been intended to confine the ordering or directing to each locality as the subject or place in respect of which a hearing is to be had and action is to be taken.

I do not doubt more than one such might be included in one order.

The order made is, I think, clearly of a legislative character.

It is a recasting of the scheme of the section. It throws on the railway company the onerous burthen Parliament had relieved it of and then provides for a special application and relief thereupon.

I am inclined to think it more in accordance with good, practical, common sense, if I may be permitted to say so, than the plan of the Act.

Yet it is distinctly legislative in character, and that where the phrase used is not an apt one to confer such powers, and the sentence, as a whole, does not imply action of that kind, but of a judicial and administrative character relative to a specific case as it arises.

I cannot assign legislative power to the phrase without leading to possible absurdities or at least inconsistencies when we consider its use elsewhere.

Another consideration weighs much with me, and that is this. When a *specific* Act or thing has been dealt with by the Board, and a question raised of its jurisdiction by appeal here, our decision ends the matter unless appealed to the Privy Council by those concerned.

In the case of any excess of jurisdiction relative to some legislative power or assertion of such power where none exists and the jurisdiction is left unattacked or by us improvidently maintained, no one is so concerned as to carry the matter to the ultimate appellate court. Those indirectly so may await some specific accident case in which to raise it and carry the matter as a test then to the Privy Council with very undesirable results if the jurisdiction is not upheld, unless a more extensive meaning is given section 56, sub-section 9, than I assign to it.

Unless the legislative power is clear it better be made so, or in case of doubt be resolved (as we do in regard to our own) against jurisdiction.

The question of power as to fencing in places where construction is in process seems more clearly beyond the Board's jurisdiction than the other.

The suggestion that these orders might be rested upon section 30, sub-section (*g*), is not tenable. The fact that cattle-guards are named and fences omitted is surely enough in itself to dispose of that. Cattle-guards are referred to as well as fences in section 254. But the question of what was the best kind of cattle-guard long agitated those concerned and possibly does yet. It was necessary to give the power to the Board of deciding as to a specific form or device of cattle-guard, and insisting if need be on its adoption by the companies when something found to fill the bill and they might naturally be reluctant to change all their old devices.

No such question rose before the mind of any one in regard to fencing. That was doubtless thought to be finally disposed of and to need no more legislation.

It seems to me the appeal must be allowed.

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DUFF J. (dissenting).—The validity of the second of the impeached provisions depends upon the construction of the 4th sub-section of section 254, read, of course, with such other provisions of the Act as may throw light upon it. The effect of the whole section (254) appears to me to be this: The territory through which any given railway passes is for the purpose of the section conceived as embracing two classes of localities: 1st, those in which the lands on both sides of the railway are neither inclosed and settled nor inclosed and improved; and 2nd, localities in which some of the lands on at least one side of the railway falls within one or other of those categories; and the enactment imposes upon the railway company the duty of maintaining fences, cattle-guards and farm-crossings in the last mentioned class of localities and does not impose that duty in respect of the first mentioned. But this is not the whole of the legislative provision. The positive requirement to fence when the railway passes through a locality of the second class is only the irreducible minimum of this kind of protection for the public which is ordained by the Act. In respect of the first class of localities no such absolute duty is imposed; but the whole question of fencing, etc., in such localities is reserved to be dealt with by the Board of Railway Commissioners.

This view of the section is that upon which the Board of Railway Commissioners appears to have acted, and although (since my learned brothers agree in thinking it erroneous), I must, of course, be wrong, I cannot profess to entertain any real doubt that the Board has correctly interpreted the intention of the legislature.

The rival view of sub-section 4, put forward by Mr.

Chrysler, is that the Board is empowered to make an order or direction under sub-section 4, touching the subjects there dealt with only when satisfied judicially upon special considerations applicable to a specified locality that the measures provided for by the order are necessary. I shall briefly give my reasons for thinking this construction untenable—and the grounds upon which I think the view of the Board of Railway Commissioners should be supported will appear as I proceed.

In any suggested view of the power in question one does not readily see upon what principle the exercise of it can be described as the exercise of a judicial function. Assuming the authority to be confined to the promulgation of orders and directions applicable only to a specified railway and to a defined locality—it is still quite obvious that in determining in a given case whether such an order or direction shall or shall not be given, the Board does not act upon any rule, principle or standard prescribed for it by the statute or by any other authority; it acts only upon such principles and standards as in the exercise of its own judgment it sets up for itself. And that is by no means all. An order of the Board under this enactment assuming it to be a specific order in the sense mentioned, actually alters the law governing the specific case dealt with. The company being, prior to the order, under no duty to fence becomes—solely in consequence of the order itself—subject to an obligation to do so; and the order itself—when published in the manner prescribed—has, by virtue of section 31 the same force as if enacted in the "Railway Act." The order, in a word, does not merely give rise to a legal duty to some individual or determinate body of individuals;

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but constitutes an enactment on the violation of which the company is subjected to the same consequences as if it were found in the Act itself.

Such specific commands (as distinguished from rules or regulations governing all cases falling within a general description), although usually classed by legal writers as administrative are strictly legislative in their character. There may no doubt be cases in which it would be difficult to draw the exact line between functions that are in this sense administrative and functions that are judicial. Still the broad distinction between a function which finds its operation in determining what the law is to be for the future (whether governing one case or governing many cases) and that which is concerned with the application of some existing general rule, principle or standard to a particular case is a very plain and very familiar distinction. It is admirably illustrated in this sentence from the judgment of the Supreme Court of the United States in *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Rly. Co.*(1), at page 499:

> It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act;

and it seems not to be at all difficult of application in the case before us.

Such being the character of the authority exercise-able is the exercise of it limited in the way contended for; that is to say, must any order under it be confined in its application to a specific railway and to a defined locality?

(1) 167 U.S.R. 479.

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Looking first at the language of the sub-section itself it is at once apparent that regarding only the grammatical sense of the words employed the authority of the Board to "otherwise order or direct" is not in any way subject to any such limitation. Is there any ground for implying it? I think there is none; on the contrary there are very cogent reasons against such an implication. On the construction proposed it is obvious that before exercising its authority in any particular case the Board must first determine and define the locality in respect of which the order is to be made. Its jurisdiction *ex hypothesi* must rest upon the correctness of its own view, that the locality so defined is a locality within the meaning of the section —the notion of "locality" having no sort of relevancy except in that sense. Now the most cursory examination of the section will reveal the pitfalls besetting the path of an authority exercising a jurisdiction resting on such a condition. What is a "locality" within the meaning of this sub-section? What are "local considerations?"

Assume, for example, a railway passing through a string of localities, some falling under sub-section 4, while in the others sub-section 1 is applicable; and that the Board considered it desirable that the line should, through all of them, be fenced. The Board has power to enforce sub-section 1 by an order directing fencing in localities to which it applies and to make a similar order in respect of the other localities under sub-section 4. In other words, the Board has power to direct fencing throughout the whole line and has determined it is desirable to do so. According to the construction contended for it is at this point that the difficulties of the Board begin. In order to

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carry into effect its determination it must, according to that view, first ascertain and define in a series of separate orders the exact limits of the localities in respect of which it is exercising its authority under sub-section 4. Having *ex hypothesi* as enforcing sub-section 1 or as exercising the power given by sub-section 4, the authority to direct fencing throughout the whole line, and having determined to do so, the Board is disabled from exercising at once all its powers by the promulgation of a single order, but must, as a condition of its jurisdiction, first proceed to segregate the localities falling within sub-section 4—while a mistake in this process of labelling would in any particular case be fatal to the validity of the order.

It is obvious that such a construction must in practice give rise to much uncertainty in the application of the enactment and afford a field for much preliminary controversy upon the authority of the Board in particular cases; so much so, indeed, that I fear it will rob the provision of any sort of practical efficacy. I take it to be axiomatic that you must not imply a term in a statutory enactment if it is likely to defeat the purpose of the enactment as disclosed by the words actually used; and on this ground alone the implication suggested is not, I think, admissible.

It is further to be observed that the subject of the regulation of structures upon a railway in the aspect of that subject which touches the public safety is dealt with in another section of the Act (section 30 (*g*)), which confers upon the Board in respect of such structures and for the purpose of protecting the property and persons of the public the broadest powers of general regulation. The language of that provision is certainly extensive enough to embrace the subjects

of fencing and cattle-guards, and the subject of cattle-guards is expressly mentioned. No doubt the first sub-section of section 254 does, within the field of its operation, displace the authority conferred by section 30(*g*), at all events as regards the subject of fencing; but sub-section 4 must, I think, be read with the earlier provision, and reading the two provisions together the most natural construction of the words "unless the Board otherwise orders or directs" seems to be that localities to which sub-section 4 applies, or in other words, localities not subject to sub-section 1 are, in respect of the subjects mentioned, reserved to be dealt with by the Board in this exercise of the general powers given by section 30(*g*). If that be the true view there can be no doubt that the form of the Board's orders, the circumstances in which they are to be made, and the considerations by which, in making them, the Board is to be governed, are all in the largest manner left to the Board itself to determine.

As to the first provision I think that under the Act as it now stands there is, in respect of localities falling within the scope of the first sub-section, an unqualified duty to fence. The provision, it is true, is drawn in such a way as to embrace localities within sub-section 4 as well, but in the view of that sub-section already stated, the provision is not by reason of the generality of its terms open to objection.

I should, therefore, dismiss the appeal with costs.

ANGLIN J.—The Canadian Northern Railway appeals against so much of a general order pronounced by the Board of Railway Commissioners, *proprio motû*, as requires, amongst other things, that

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(*a*) All railway companies subject to the jurisdiction of the Board shall as to all railway lines completed, owned or operated by them, where the lands on either side of the railway are not inclosed, settled or improved, on or before Jan. 1st, 1911, erect and maintain on each side of the right of way, fences of a minimum height of four feet six inches with swing gates at farm crossings with minimum height aforesaid with proper hinges or fastenings.

And prescribes that

(*b*) As to lines not yet completed or opened for traffic or in course of construction * * * where the railway is being constructed through inclosed lands it shall be the duty of a railway company to at once construct such fences or take such other steps that (*sic*) will prevent cattle and other animals escaping from such inclosed lands.

The order further provides that:

6. Where it shall be made to appear to the Board that no necessity exists for the fencing or other works hereinbefore directed, the company or companies may apply to the Board for exemption from fencing, and other works, and such exemptions may be made as the Board deems proper.

Section 254 of the Dominion "Railway Act" (R.S.C. 1906, ch. 37) reads as follows:

254. The company shall erect and maintain upon the railway,—

(*a*) fences of a minimum height of four feet six inches on each side of the railway;

(*b*) swing gates in such fences at farm crossings of the minimum height aforesaid, with proper hinges and fastenings: Provided that sliding or hurdle gates, constructed before the first day of February, one thousand nine hundred and four, may be maintained; and

(*c*) cattle-guards on each side of the highway, at every highway crossing at rail level with the railway.

* * * *

4. Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs.

The provisions of the order of the Board as to such portions of railways as pass through lands "not inclosed, settled or improved," the appellants contend are a reversal of the policy of Parliament, as declared

by sub-section 4 of section 254 of the "Railway Act." This clause of the statute, they maintain, contemplates that as a general rule a railway company shall not be obliged to fence its right of way through lands not inclosed and not settled or improved, and that the obligation to fence the railway through such lands shall arise only when the Board of Railway Commissioners shall so order and direct in each particular locality.

I appreciate the difficulty of defining the limits of a "locality," or determining what extent of territory it may embrace. But I am satisfied that an order directing the erection of fences along the lines of all railways which pass through uninclosed lands not settled or improved in any part of Canada is not an order for the erection of such fences in "any locality" within the meaning of that phrase as used in sub-section 4 of section 254.

Mr. Ford, in supporting this part of the order, argued that the earlier part of sub-section 4 was merely meant to describe the kind of country in which a railway company is not, without an order of the Board, general or particular, required to erect and maintain fences; and that that sub-section contemplates that the Board may make a general order for the fencing of all railways wherever they pass through uninclosed lands not settled or improved. If the sub-section had read—"wherever the railway passes through lands on either side of the railway not inclosed, etc."—this interpretation might be maintained; but it obviously treats the words, "through any locality," as mere surplusage and excludes them from consideration in the construction of the clause. This seems to me contrary to the fundamental canon of con-

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struction which requires that in construing a statute effect shall if possible be given to every word.

As I read clause 4, it imports that an order requiring fencing shall be pronounced only when the Board is judicially satisfied that in the localities in regard to which such order is made fencing is necessary. To reach such a conclusion judicially presupposes investigation and inquiry as to the localities to be affected by the order, as a result of which the Board is satisfied that necessity for fencing there exists. The recital in the written opinion of the Chief Commissioner of the circumstances which led to the making of this order and the presence in the order itself of paragraph 6 above quoted, satisfy me that the part of the order now under consideration was not pronounced in the proper exercise of the judicial functions of the Board after investigation of the circumstances of all localities in Canada in which railways pass through uninclosed lands, not settled or improved, but that it is rather a declaration by the Board that, after an investigation, admittedly partial, but in its opinion sufficiently extended, it has reached the conclusion that, as to all portions of railways passing through such lands in any part of Canada, the railway companies should, *primâ facie* and generally, be required to fence, and that the burden should be cast upon them of obtaining exemption from this obligation by satisfying the Board that in particular localities no necessity exists for fencing, etc. Such an order is, in my opinion, tantamount to legislation repealing sub-section 4 and substituting for it a provision precisely the reverse in policy, operation and effect. To do this was, I think, notwithstanding the very broad terms in which the sections of the statute

conferring and defining its jurisdiction are couched, beyond the power of the Board of Railway Commissioners.

I agree, therefore, with the contention of the appellants, that the Board had not jurisdiction to pronounce this general order requiring that every railway company throughout Canada, wherever its lines pass through uninclosed lands, not settled or improved, shall erect and maintain statutory fences, with swing gates along their right-of-way, unless it shall apply for and obtain exemption from the Board. I think the appeal of the Canadian Northern Railway Company against this portion of the order should be allowed.

This part of the order was treated by counsel for the railway company as made under sub-section 4, of section 254. No doubt it was so intended. That sub-section, however, deals with

> any locality in which the lands on either side of the railway are not inclosed *and either* settled or improved.

In drafting the order the words "and either" have been, no doubt inadvertently, omitted. Without them the clause of the order under consideration is wider than the exception created by sub-section 4, of section 254, and would cover uninclosed lands though "settled or improved." In such cases any departure from the language of the statute, however unimportant it may appear, is always fraught with danger. If this paragraph of the order could be otherwise supported under sub-section 4, of section 254, it would probably be necessary to remit it to the Board for modification by inserting the words of the statute which have been omitted.

As to the other part of the order to which exception

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is taken, it will be noted that the direction is not necessarily to fence. It is to

construct such fences or *take such other steps* that will prevent cattle and other animals escaping from such inclosed lands.

By section 2, sub-section 21, "railway" is defined as including "property real or personal and works connected therewith." Having regard to this definition I see nothing in section 254 which requires the Board to abstain from ordering that fences shall be erected along the right of way before the railway is ready for operation, when, it is admitted, the duty to fence exists and may be enforced. Where the railway passes through inclosed lands, *i.e.*, where the right-of-way of the company—its real property—is carried through inclosed lands, the statute says that "the company shall erect and maintain upon the railway," *i.e.*, upon its real property,

fences * * *, suitable and sufficient to prevent cattle and other animals from getting on the railway,

i.e., on such real property.

But if, as argued by Mr. Chrysler, the obligation to fence under section 254 arises only when the railway commences operation, the Board, in my opinion, had power, under section 30, clause (*g*), to pronounce the portion of their order now under discussion. By that section it is provided that

the Board may make orders and regulations * * * (*g*) with respect to the * * * methods, devices, structures and works to be used upon the railway (which includes its real property) so as to provide means for the due protection of property.

It was argued that, because fences are dealt with by section 254, and are not specifically mentioned in clause (*g*) of section 30, it must be taken that it was not intended thereby to empower the Board to order

the erection of fences as a method, device, structure or work for the protection of property. The order may be complied with without the erection of fences, if other adequate steps are taken. It directs that the railway company shall "construct such fences or take such other steps, etc." Moreover, section 254 either applies to the right-of-way before the rails are laid, or it does not. If it applies the order in appeal may be supported as an enforcement of its provisions (section 30 (*h*) and (*i*)); if it does not so apply, its presence in the statute affords no reason for excluding from the purview of section 30(*g*), as something elsewhere specifically provided for, the erection of fences as a means for the due protection of property pending the completion of the railway.

I think it is clear that either under sub-section 1, of section 254, or under the comprehensive language of clause (*g*), of section 30, the jurisdiction which they have here exercised is conferred upon the Board of Railway Commissioners.

It has been suggested that sub-section 1 does not apply to all localities in which the railway passes through inclosed lands, but only to those in which it passes through lands which are not only inclosed, but also settled or improved. This is said to be the effect upon sub-section 1 of the exception made by sub-section 4.

It is, I think, incontrovertible that such portions of every railway as are not within the exception in sub-section 4, are within the first sub-section. To understand the limitations upon the application of sub-section 1, it is, therefore, necessary to ascertain with precision what parts of a railway are within sub-section 4.

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By sub-section 4 are excepted not all localities in which lands are "not inclosed," but only those in which there are lands not inclosed which are also not "either settled or improved," *i.e.*, localities in which there are (*a*) lands not inclosed and not settled, or (*b*) lands not inclosed and not improved. Uninclosed lands which are improved or settled, and unimproved or unsettled lands which are inclosed are not within the exception. Therefore, localities in which the lands answer to either of these latter descriptions are within sub-section 1.

If they are not, it must be because they are within the exception; and if so, the exception is in reality of all localities in which the lands are not inclosed, whether improved or unimproved, settled or unsettled; and the words, "and either settled or improved," are read out of the exception.

The only other possible construction of the exception is to read the word "not" as applicable only to "inclosed," which would be equivalent to inserting the word "are" after the word "and," so that the phrase would read—"in which the lands * * * are not inclosed and (are) either settled or improved"—a palpably wrong construction, because it would exclude from the exception the very localities in which fencing is least of all requisite, viz., those in which the lands are neither inclosed nor settled or improved.

I, therefore, think that all localities in which the lands on either side of the railway are inclosed, whether they are improved or unimproved, settled or unsettled, are within sub-section 1, because clearly not within the exception; and in addition sub-section 1 covers localities in which such lands, though not inclosed, are either settled or improved. Otherwise

either localities in which the lands answer the latter description are unprovided for—which is contrary to the view that the section, as a whole, embraces all parts of all railways—or all localities where lands are not inclosed are within the exception—a construction which, as already pointed out, involves reading out the words "and either settled or improved."

I have not overlooked the decision of Street J. in *Phair* v. *Canadian Northern Railway Co.*(1). Without expressing any opinion as to the correctness of that decision upon the language of the statute as it then was, it suffices to say that Parliament has since altered the phraseology of sub-section 4 and it is not unreasonable to suppose that by the alteration of the phraseology it intended to effect some change in the law. But whether this be so or not, sub-section 4, as it now stands, must be given that construction for which its present form seems to call.

No doubt before the railway is under actual construction, although the right-of-way has been fully acquired, the owners, through whose inclosed farms it runs, would be amply protected by and fully satisfied with an order requiring the company to maintain intact the line fences crossing their right-of-way or to take other steps sufficient to prevent cattle "escaping from such inclosed lands." Under clause (*g*) of section 30, if section 254 is not applicable, such an order might be made. But if section 254 applies—as I think it does—the only order authorized is an order requiring the erection and maintenance of statutory fences, etc., "to prevent cattle and other animals from getting on the railway." That the Board would have jurisdiction to make such an order I think sufficiently

(1) 6 Ont. W.R. 137.

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clear; its reasonableness would not be for our consideration; but it would scarcely seem necessary before construction is commenced to require the company to fence in order to prevent cattle getting upon its right-of-way, which is then for all practical purposes, still part of the farms through which it runs. Whether as a condition of exempting it from the obligation to fence its right of way before construction, the Board could order that the company should, until actual construction commences, maintain existing farm fences so as to prevent cattle escaping from inclosed lands through which its right-of-way passes may be open to some question; but, having regard to the provisions of sub-section 2, of section 30, I incline to think that such an order might be made.

The order in question, however, relates only to cases "where the railway is being constructed." It, therefore, would seem inapplicable to cases in which the work of construction has not yet commenced. Where construction is actually proceeding it is in many localities accompanied by dangers to cattle and other animals straying upon the right-of-way quite as great as those incidental to the actual operation of a railway. In such cases not only in my opinion has the Board the power to require the erection of statutory fences to prevent "cattle or other animals from getting on the railway," but it would be entirely reasonable that such an order should be made.

For these reasons I am of opinion that the portion of the order of the Board dealing with inclosed lands, "where the railway is being constructed," has not been successfully attacked, and that as to it the appeal should be dismissed.

The order should, however, be varied by substitut-

ing for the words "escaping from such inclosed lands" the words of the statute—"from getting on the railway." This alteration we cannot make; but the necessary amendment will no doubt be made by the Board itself.

Appeal allowed in part.