

*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Madden and another, Appellants, and The Attorney General for British Columbia (Intervenant) v. The Nelson and Fort Sheppard Railway Company, Respondents, and The Attorney General for the Dominion of Canada (Intervenant), from the Supreme Court of British Columbia, delivered 19th July 1899.*

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Present at the hearing :

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR EDWARD FRY.

SIR HENRY STRONG.

[*Delivered by the Lord Chancellor.*]

THEIR Lordships are of opinion that in this case the Judgment appealed from ought to be affirmed. The course of the argument has been rather to suggest that if there is no direct enactment in the Statute ("The Cattle Protection Act, 1891," 54 Vict. c. 1. (B.C.) as amended by "The Cattle Protection Act, 1895" 58 Vict. c. 7. (B.C.))—the validity of which is in question—to create any erection or construction of the works of the railway that it would avoid the objection of the statute being *ultra vires*. But their Lordships are not disposed to yield to that suggestion, even if it were true to say that this statute was only an indirect mode of causing the construction to be made, because it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly. But it is an under-statement of the difficulties in the way of the Appellants to speak of it as an indirect operation of the Statute to direct that this Company should erect fences and

provide against the particular class of accident which happened in this case, because the Provincial Legislature that passed this enactment seem to have been under the impression that they were not proceeding indirectly at all—that they were proceeding directly, and the preamble of their Statute points out what they were intending to do. That preamble recites:—

“ And whereas Railway Companies incorporated under the authority of the Parliament of Canada, or declared by the said Parliament to be for the general advantage of Canada, or for the advantage of two or more of the Provinces, do not recognise any obligation on their part to fence against such cattle: And whereas it is just that such Railway Companies should, in the absence of proper fences, be held responsible for cattle injured or killed on their railways by their engines or trains.” In other words, the Provincial Legislature have pointed out by their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the Provincial Legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the Provincial Parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly *ultra vires*.

Their Lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision, in the case of the *Canadian Pacific Railway Company v. The Corporation of the Parish of Notre*

*Dame de Bonsecours*, L.R.A.C. (1899), p. 367. where it was decided that although any direction of the Provincial Legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the Provincial Legislature, the railway company were not exempted from the municipal state of the law as it then existed, that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company, unless they create such and such works upon their roadway. That is manifestly and clearly beyond the jurisdiction of the Provincial Legislature.

The only further observation their Lordships have to make is, that these propositions are sufficient to dispose of this case, and that so far as the judgment in the Court below is concerned, they do not propose to adopt in all respects, or to agree with some of, the remarks made as to the state of the common law, and as to how the common law would have existed without this legislation. Although it is unnecessary to consider that point, their Lordships are not to be taken as adopting the reasons given by the judges in the Court below upon the common law. The reasons given by their Lordships justify them in saying they will humbly advise Her Majesty that this Appeal be dismissed. There will be no order as to costs.

