35, 1936

In the Privy Council.

No. 23 of 1935.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

BETWEEN

GEORGE PARDEW LOVIBOND, on behalf of himself and on behalf of himself and all others, the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assigns - - - (*Plaintiff*) *Appellant*

AND

GRAND TRUNK RAILWAY COMPANY OF CANADA, CANADIAN NATIONAL RAILWAY COMPANY, and THE ATTORNEY GENERAL OF CANADA

(*Defendants*) *Respondents.*

CASE FOR THE RESPONDENTS.

RESPONDENTS' CASE.

RECORD

1. These consolidated appeals are brought by special leave from an order of the Court of Appeal for Ontario dated 28th June, 1933, dismissing the Appellant's appeal from a judgment of Mr. Justice Kerwin delivered 24th February, 1933, which dismissed the action, and from an order of the Court of Appeal for Ontario dated 1st November, 1934, allowing an appeal by the Respondents from an order of Mr. Justice Middleton dated 2nd June, 1934, which admitted an appeal by the Appellant to His Majesty in His Privy Council from the order of 28th June, 1933. p. 101 p. 64 p. 48 p. 88 p. 79

2. The appeal from the order of 28th June, 1933, raises a question as to whether the Supreme Court of Ontario has jurisdiction to entertain the action as now constituted and without a fiat and the appeal from the order of 1st November, 1934, raises a question as to whether under the Privy Council Appeals Act of Ontario, R.S.O. 1927, Chapter 86, the Appellant p. 64 p. 88

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was entitled to appeal as of right to His Majesty in His Privy Council from the first mentioned order.

3. The plaintiff in the action attacks the validity of certain legislation of the Parliament of Canada, orders in council and other proceedings leading up to the acquisition by the Crown of the issued capital stock (except certain guaranteed stock) of the Grand Trunk Railway Company of Canada, the amalgamation of such company with the Canadian National Railway Company and the vesting in the Crown of the total capital stock of the amalgamated company.

4. The Grand Trunk Railway Company of Canada (hereinafter referred to as the Grand Trunk) was incorporated in 1852 by special Act of the Legislature of the Province of Canada, 16 Victoria, Chapter 37. The issued capital stock of the company consisted of the following :—

4% Guaranteed stock	£12,500,000
First Preference 5% stock	3,420,000
Second Preference 5% stock	2,530,000
Third Preference 4% stock	7,168,055
Common stock	23,955,437
	£49,573,492

5. The Canadian National Railway Company was incorporated in 1919 by statute of the Parliament of Canada, 9 & 10 George V, Chapter 13. The Governor-in-Council was empowered by this Act to transfer to the company stock acquired by His Majesty in any railway company.

6. His Majesty was authorized by statute of the Parliament of Canada (1919), 10 George V, Chapter 17, known as the Grand Trunk Railway Acquisition Act 1919, to enter into an agreement with the Grand Trunk for the acquisition by the Government of the entire capital stock of the Grand Trunk except the 4% guaranteed stock of £12,500,000, the value of the stock to be acquired to be determined by a board of 3 arbitrators. The agreement was to provide for the transfer to or vesting in the Government or its nominees of the preference and common stock upon the issue of new guaranteed stock in exchange therefor.

7. The agreement was entered into under date of 8th March, 1920 and was ratified by Dominion Statute, 10–11 George V, Chapter 13, Clause 2, provided for the delivery to and acquisition by the Government of the preference and common stock and clause 13 provided for the vesting of the stock in the Government or its nominees.

8. The award of the board of arbitrators was delivered on 7th September, 1921, the majority (The Honourable Sir Walter Cassels and the Right Honourable Sir Thomas White) finding that the preference and common stocks were of no value. An appeal from the award on certain questions of law was taken to the Judicial Committee and was dismissed on 10th November, 1922.

9. All the preference and common stocks were vested in the Minister of Finance in trust for His Majesty by Order in Council dated 19th January 1923, which contained directions that the necessary entries in the stock registers and other books be made. RECORD

10. The Canadian National Railway Company and the Grand Trunk entered into an agreement dated 30th January, 1923, to amalgamate under the name of Canadian National Railway Company and the agreement was approved by Order in Council. The capital stock of the amalgamated company was to be the equivalent in Canadian money of the par value of the preference and common stocks of the Grand Trunk, namely, $180,424,327·70 and one share having a face value of such amount was to be issued to His Majesty in trust for the Minister of Finance and the shares held by the Minister of Finance in the capital stock of the Grand Trunk were to be surrendered to the amalgamated company for cancellation.

11. The present action was commenced on 26th December, 1931, in the name of the plaintiff on behalf of himself and on behalf of himself and all others, the registered holders on 18th January, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada their personal representatives or assigns. The plaintiff in his representative capacity sought a declaration that the legislation, orders in council and agreements hereinbefore referred to and other proceedings in connection therewith were invalid. The plaintiff on his own behalf sought an order directing the rectification of the Grand Trunk stock register by restoring his name as a shareholder and the transfer of certain shares to his name and in the alternative damages in the respective amounts of $9,733·33, $4,379·95, $28,713·33 and $12,920·95. pp. 3–5 p. 14 pp. 15–16

12. The defendants in their statement of defence raised the following amongst other points of law :—

> 23. The plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right. p. 28
>
> 24. The Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.
>
> 25. An action by the Plaintiff either personally or in his representative capacity for the declarations referred to in paragraph 5 of the Statement of Claim will not lie even though the Attorney-General of Canada be a party defendant.

13. The points of law above referred to were by order of Chief Justice Rose dated 14th January, 1933, set down for hearing before the trial. p. 36

14. The argument of the points of law was heard by Mr. Justice Kerwin who by a judgment delivered on 24th February, 1933, gave effect to the defences raised in paragraphs 23 and 24 of the Statement of Defence and dismissed the action. In the view he took as to these defences he did not consider it necessary to express an opinion as to paragraph 25. He was pp. 49–51

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satisfied that in order to succeed in any part of the claim the plaintiff must obtain a declaration that the relevant acts passed by the Parliament of Canada were *ultra vires* and that the Crown never obtained title to the shares of stock of the Grand Trunk Railway Company of Canada held by the plaintiff and those whom he represents. In his opinion the matter was concluded by the judgment of the Judicial Committee in *Attorney General for Ontario* v. *McLean Gold Mines Limited*, 1927, A.C. 185, where it was held that a claim to set aside certain proceedings resulting in forfeiture of mining claims to the Crown for non-payment of taxes and a grant to another person, could not be maintained by action but only by Petition of Right.

pp. 65–77

15. An appeal to the Court of Appeal for Ontario consisting of Mulock, C.J.O., Latchford, C.J.A., Riddell, Middleton and Masten, JJ.A. was dismissed. Each of the learned judges was of opinion that the principle

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laid down in the *McLean* case was applicable. Riddell J.A. thought a declaration should not have been made that the Exchequer Court had exclusive jurisdiction as the real question was " Has the Supreme Court of Ontario jurisdiction ? " and with that amendment would dismiss the appeal. Masten J.A. was of the same opinion.

16. An application was made by the Appellant on 30th May, 1934, to Middleton J.A. for an order admitting an appeal to His Majesty in His Privy Council from the order of the Court of Appeal and approving security. Objection was taken on behalf of the Respondents that an appeal did not lie as of right under the Privy Council Appeals Act of Ontario, R.S.O., 1927, Chapter 86, the material provision of which reads as follows :—

> 1. Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council; and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council. R.S.O. 1914, c. 54, s. 2.

Middleton J.A. over-ruled the objection and admitted the appeal.

17. An application was then made by the Respondents to Masten J.A. for leave to appeal to the Court of Appeal from the order of Middleton J.A. Masten J.A. was of opinion that the only question involved in the proposed appeal to the Judicial Committee was one of jurisdiction to entertain the action and granted leave to appeal.

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p. 91

18. The Court of Appeal by order made on 1st November, 1934, allowed the appeal and set aside the order of Middleton, J.A. Mulock C.J.O. thought the matter in controversy at that stage was whether the Court had jurisdiction to entertain the action and that that question superseded any matter in controversy respecting the merits of the action. The question of jurisdiction did not involve any pecuniary amount and in his view an

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appeal did not lie as of right under the Ontario Statute. Macdonnell J.A. reviewed the history of the legislation and held the appeal was not competent. In his view the result of the proposed appeal would not decide the fate of any sum of money but only an incidental point of practice and procedure. Fisher, J.A. reached the same result. pp. 94–100 pp. 92–93

Riddell J.A. (dissenting) interpreted the statute as meaning that an appeal should lie to the Judicial Committee whenever the amount in controversy in litigation in the Supreme Court exceeds the sum or value of $4,000. pp. 91–92

Davis J.A. took the view that the order of Middleton J.A. admitting the appeal was not appealable and did not deal with the matter further. pp. 93–94

The Respondents submit that the appeal from the order of the Court of Appeal dated 28th June, 1933, should be dismissed for the following amongst other

REASONS

1. Because the action seeks to void the title of the Crown.
2. Because the Appellant's only proper procedure was by Petition of Right.
3. Because the Supreme Court of Ontario is without jurisdiction to entertain the action.
4. Because the judgment of the Court of Appeal was right for the reasons stated.

The Respondents submit that the appeal from the order of the Court of Appeal dated 1st November, 1934, should be dismissed for the following amongst other

REASONS

1. Because the right of appeal is governed by the matter in controversy in the proposed appeal.
2. Because the matter in controversy in the appeal relates solely to the jurisdiction of the Court.
3. Because the judgment did not determine any of the rights asserted in the action.
4. Because the majority judgment of the Court of Appeal was right for the reasons stated.

W. N. TILLEY,

F. P. VARCOE,

C. F. H. CARSON.

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CASE FOR THE RESPONDENTS.

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