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*Oct. 28, 29.
*Dec. 13.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA..... } APPELLANTS;

AND

W. N. ROBERTSON..... RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Grand Trunk Railway of Canada—Passenger tolls—Third-class fares—Construction of statutes—Repeal—16 Vict. c. 37, s. 3 (Can.)—Amendments by subsequent railway legislation.

The legislation by the late Province of Canada and the Parliament of Canada since the enactment of section 3 of the statute of Canada, 16 Vict. ch. 37, in 1852, has not expressly or by implication repealed the provisions of that section requiring third-class passenger carriages to be run every day upon the line of the Grand Trunk Railway of Canada, between Toronto and Montreal, on which the fare or charge for each third-class passenger shall not exceed one penny currency for each mile travelled.

APPEAL from an order of the Board of Railway Commissioners for Canada directing that the Grand Trunk Railway Company of Canada should run every day throughout the length of its line, between the City of Toronto, in the Province of Ontario, and the City of Montreal, in the Province of Quebec, at least one passenger train having in it third-class carriages for passenger traffic, and that the fare or charge for each third-class passenger by such train on said portion of the company's railway should not exceed two cents for each mile travelled, and that the company should,

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

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forthwith, file passenger tariffs for that portion of its railway embodying said rate.

Special leave for the appeal was granted, in the order appealed from, by the Board of Railway Commissioners.

The circumstances of the case are fully stated by the learned Chief Commissioner Killam in his judgment delivered at the time of the making of the order appealed from, as follows:

THE CHIEF COMMISSIONER.—"This is an application for an order directing the Grand Trunk Railway Company of Canada to issue third-class tickets at the rate of one penny per mile for each mile travelled, and directing the company to provide at least one train having in it third-class carriages which shall run every day throughout the length of its line.

"The application is based upon a clause in the original Act of incorporation of the Grand Trunk Railway Company of Canada, 16 Vict. ch. 37, passed by the Parliament of the Province of Canada in the year 1852. Section 3 of that Act was as follows:

> 3. And be it enacted, that the gauge of the said railway shall be five feet six inches and the fare or charge for each first-class passenger by any train on the said railway, shall not exceed two pence currency for each mile travelled, the fare or charge for each second-class passenger by any train on the said railway shall not exceed one penny and one half penny currency for each mile travelled, and the fare or charge for each third-class passenger by any train on the said railway, shall not exceed one penny currency for each mile travelled, and that, at least, one train having in it third-class carriages shall run every day throughout the length of the line.

"The portion dealing with the gauge of the railway was repealed by Act of the Parliament of Canada, 36 Vict. ch. 18, sec. 23. None of the remainder of the section has ever been expressly repealed; and, if it

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still remains in force, the Board is bound, under the general jurisdiction given by section 26 of 'The Railway Act,' to order and require a railway company to do any act, matter or thing which such company is or may be required to do under its special Act, to make the order applied for.

"The contention on the part of the company is that the provisions in question have been impliedly repealed by subsequent legislation. Section 2 of the special Act was as follows:

> And be it enacted, That the several clauses of the "Railway Clauses' Consolidation Act," with respect to the first, second, third and fourth clauses thereof, and also the several clauses of the said Act with respect to "Interpretation," "Incorporation," "Powers," "Plans and Surveys," "Lands and their valuation," "Highways and Bridges," "Fences," "Tolls," "General Meetings," "Directors—their Election and Duties," "Shares and their Transfer," "Municipalities," "Shareholders," "Actions for indemnity and fines and penalties and their prosecutions," "Working of the Railway," and "General Provisions," shall be incorporated in this Act with the following modification for the ninth provision in the clause of the said Act, with respect to "Plans and Surveys" * * * and with the further exception of any enactments in the said clauses which may be inconsistent with the express provisions and enactments of this Act, in like matters: And the expression "this Act" when used herein shall be understood to include all the clauses of "The Railway Clauses' Consolidation Act" which are incorporated with this Act.

"The clauses with respect to 'tolls' in the 'Railway Clauses' Consolidation Act,' 14 & 15 Vict. ch. 51, were contained in section 14 of that Act, and were, so far as of present importance, as follows:

> Tolls shall be from time to time fixed and regulated by the by-laws of the company or by the directors if thereunto authorized by the by-laws or by the shareholders at any general meeting, and shall and may be demanded and received for all passengers and goods transported upon the railway or in the steam vessels to the undertaking belonging * * * "And all or any of the said tolls may by any by-law be lowered and reduced and again raised as often as it shall be deemed necessary for the interests of the undertaking: Provided that the same tolls shall be payable at the same

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time and under the same circumstances upon all goods and persons so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-laws relating to the tolls." * * * No tolls shall be levied or taken until approved of by the Governor in Council nor till after two weekly publications in the *Canada Gazette* of the by-law establishing such tolls and of the Order in Council approving thereof. * * * Every by-law fixing and regulating tolls shall be subject to revision by the Governor in Council from time to time after approval thereof as aforesaid.

"The same provisions respecting tolls appeared in the Consolidated Statutes of Canada, ch. 66; and by section 2 of that Act,

when not otherwise expressed, this and the following sections to the one hundred and twenty-fifth shall apply to every railway authorized to be constructed by any Act passed since the thirtieth day of August, 1851; * * * and this Act shall be incorporated with every such Act, and all the clauses and provisions of this Act, unless they are expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby so far as applicable to the undertaking and shall, as well as the clauses and provisions of every other Act incorporated with such Act, form part of such Act and be construed together therewith as forming one Act.

"This legislation of the Province of Canada remained in force until the formation of the Dominion of Canada.

"In 1868, in the first session of the first Parliament of the Dominion, was passed 'The Railway Act, 1868,' in section 12 of which were embodied the provisions just mentioned respecting tolls, with the following addition:

12. No by-law of any railway company by which any tolls are to be imposed or altered, or by which any party other than the members, officers and servants of the company are intended to be bound, shall have any force or effect until the same has been approved and sanctioned by the Governor in Council.

"The last mentioned Act did not in terms repeal the previous railway legislation of the Province of Canada, and it does not appear to have had any appli-

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cation to the Grand Trunk Railway, as the clauses dealing with its application made it apply to railways thereafter to be constructed under the authority of any Act passed by the Parliament of Canada.

"The Act of 1868 remained in force until 1879, when it was replaced by 'The Consolidated Railway Act, 1879.' That Act provided that the provisions of the Act from section 5 to section 34, both inclusive, should

> apply to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada, and shall, so far as they are applicable to the undertaking, and, unless they are expressly varied or excepted by the special Act, be incorporated with the special Act, form part thereof, and be construed therewith as forming one Act.

"By section 102 of the Act of 1879, the 'Railway Act, 1868,' and various Acts amending it, were expressly repealed; but, again, no mention was made of the Act contained in the Consolidated Statutes of Canada.

"In section 17 of the Act of 1879 were again embodied the before mentioned provisions respecting tolls, including the addition made in 1868. By subsection 6,

> All or any of the tolls may, by any by-law, be reduced and again raised as often as deemed necessary for the interests of the undertaking; but the same tolls shall be payable at the same time and under the same circumstances upon all goods and by all persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-law relating to the tolls.

"By the Act of 1883, 46 Vict. ch. 24, sec. 12, subsection 6 of section 17, of 'The Consolidated Railway Act, 1879,' was repealed and the following substituted therefor:

> And whereas, it is expedient that a railway company should be enabled to vary the tolls upon the railway so as to accommodate

them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular persons, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular persons, therefore it shall be lawful for the company, subject to the provisions and limitations herein and in their special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway as they shall think fit: provided that all such tolls be, at all times and under the same circumstances, charged equally to all persons, and after the same rate, whether per ton, per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway.

"While section 6 of the Act of 1883 declared certain lines of railway, among others the Grand Trunk Railway, to be works for the general advantage of Canada, and provided that:

3. Railway companies by this Act brought within the legislative authority of Parliament shall have one year from the passing hereof within which to comply with the provisions of sub-section 5, section 15 of "The Consolidated Railway Act, 1879."

and section 1 of the Act of 1883, made sections 48 and 49 of 'Consolidated Railway Act, 1879,' applicable

to every railway (except Government railways) and railway company subject to the legislative authority of the Parliament of Canada.

the Act of 1879 was not otherwise made generally applicable to the Grand Trunk Railway or to railways constructed under authority of the Parliament of Canada.

"In 1886, upon the coming into force of the Revised Statutes of Canada, another Act, chapter 109, known as 'The Railway Act,' was substituted for the

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previous general railway Acts of the Dominion. By section 3 of that Act, part one, containing the sections numbered from 4 to 39 inclusive, was made applicable

to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada.

part two was made applicable

to all railway companies and railways within the legislative authority of the Parliament of Canada, except Government railways;

and part three

to all railway companies operating a line or lines of railway in Canada, whether otherwise within the legislative authority of the Parliament of Canada or not.

"In section 16 (included in part one) of that Act were embodied the previous provisions respecting tolls, with the amendment made by the Act of 1883. The general railway Act of the Province of Canada (1) was not among the Acts repealed upon the coming into force of the revised statutes.

"In 1888 another Act, known as 'The Railway Act,' 51 Vict. ch. 29, was substituted for R.S.C. ch. 109, which was then repealed. By section 2, subsection (*t*), the expression "Special Act" means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, and includes all such Acts.

"By section 3:

This Act, subject to any express provisions of the special Act, and to the exception hereinafter mentioned, applies to all persons, companies and railways within the legislative authority of the Parliament of Canada, except Government railways.

"By section 6:

(1) C.S.C. ch. 66.

If in any special Act it is provided that any provisions of any general Railway Act in force at the time of the passing of the special Act is excepted from incorporation therewith, or if the application of any such provision is extended, limited or qualified, the corresponding provision of this Act shall be excepted, extended, limited or qualified in like manner.

"By section 223:

Subject to the provisions and restrictions in this and in the special Act contained, the company may, by by-laws, or the directors, if thereunto authorized by the by-laws, may from time to time, fix and regulate the tolls to be demanded and taken for all passengers and goods transported upon the railway, or in steam vessels belonging to the company.

"By section 227:

No tolls shall be levied or taken until the by-law fixing such tolls has been approved of by the Governor in Council, nor until after two weekly publications in the *Canada Gazette* of such by-law and of the Order in Council approving thereof; nor shall any company levy or collect any money for services as a common carrier except subject to the provisions of this Act.

"By section 228:

Every by-law fixing and regulating tolls shall be subject to revision by the Governor in Council, from time to time, after approval thereof; and after an Order in Council altering the tolls fixed and regulated by any by-law, has been twice published in the *Canada Gazette*, the tolls mentioned in such Order in Council shall be substituted for those mentioned in the by-law, so long as the Order in Council remains unrevoked.

"The Act of 1888 was repealed upon the coming into force of the 'Railway Act, 1903,' which substituted the Board of Railway Commissioners for the Governor General in Council as the authority having jurisdiction to approve and revise the tolls of railway companies, and which made important changes in regard to railway tariffs. The following provisions of that Act are important:

3. This Act shall apply to all persons, companies and railways (other than Government railways) within the legislative authority

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of the Parliament of Canada, and shall be incorporated and construed, as one Act, with the special Act subject as herein provided.

4. Any section of this Act may, by any special Act passed by the Parliament of Canada, be excepted from incorporation therewith, or may thereby be extended, limited or qualified. It shall be sufficient, for the purposes of this section, to refer to any section of this Act by its number merely.

5. If in any special Act heretofore passed by the Parliament of Canada it is enacted that any provision of the general railway Act in force at the time of the passing of such special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such special Act, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited or qualified in like manner; and, unless otherwise expressly provided in this Act, where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the special Act shall be taken to override the provisions of this Act in so far as is necessary to give effect to such special Act.

6. Where any railway, the construction or operation of which is authorized by a special Act passed by the legislature of any province, is declared, by any special Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the special Act of the provincial legislature as are inconsistent with this Act, and in lieu of any general railway Act of the province.

251. The company or the directors of the company, by by-law, or any such officer or officers of the company as are thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

2. All such by-laws shall be submitted to and approved by the Board.

3. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.

4. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any services as a common carrier, except under the provisions of this Act.

256. All tariff by-laws and tariffs of tolls shall be in such form, size and style, and give such information, particulars and details, as the Board may, by regulation, or in any case, prescribe.

257. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed, and may designate the date at which any tariff shall come into force.

2. Any tariff in force (except standard tariffs, hereinafter mentioned) may, subject to disallowance or change by the Board, be amended or supplemented by the company, by tariffs, in accordance with the provisions of this Act.

263. The tariffs of tolls which the company shall be authorized to issue under this Act for the carriage of passengers between points on the railway shall be divided into two classes, namely:

The maximum mileage tariff, herein referred to as the "Standard Passenger Tariff";

And reduced passenger tariffs, herein referred to as "Special Passenger Tariffs."

2. The "Standard Passenger Tariff" shall specify the maximum mileage tolls to be charged for passengers for all distances covered by the company's railway; such distances may be expressed in like manner as provided herein in respect of "Standard Freight Tariffs."

3. "Special Passenger Tariffs" shall specify the toll or tolls to be charged by the company for passengers in every case where such tolls are lower than the tolls specified in the company's "Standard Passenger Tariff."

264. A "Standard Passenger Tariff" shall be filed, approved and published in the same manner as required by this Act in the case of a "Freight Standard Tariff."

2. Until the company files its "Standard Passenger Tariff" and such tariff is so approved and published in the *Canada Gazette*, no tolls shall be charged by the company.

3. When the provisions of this section have been complied with, and except in the case of special passenger tariffs, the tolls in the "Standard Passenger Tariff" shall be the only tolls which the company is authorized to charge for the carriage of passengers.

265. All special passenger tariffs shall be filed by the company with the Board, and published as required by section 274, three days before any such tariff is intended to take effect, or within such time, or in such manner as the Board, owing to the exigencies of competition or otherwise, may require.

The date of the issue and the date on which, and the period, if any, during which, any such tariff is intended to take effect, shall be specified thereon.

2. Upon any such tariff being so duly filed the company shall until such tariff is superseded or is disallowed by the Board, charge the toll or tolls as specified therein, and such tariff shall supersede

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any preceding tariff or tariffs, or any portion or portions thereof, in so far as it reduces or advances the tolls therein, but until such tariff is so duly filed, no such toll or tolls shall be charged by the company.

"Section 214 required every railway company to furnish adequate and suitable accommodation for receiving, loading, carrying, unloading and delivering traffic, and to furnish and use all proper appliances, accommodation and means necessary therefor; and section 253 required it to afford to all persons all reasonable and proper facilities for the receiving, forwarding and delivering of traffic. Section 14, also, gave to the Board power, where the required accommodation was not furnished, to order the company to furnish the same; and an amending Act, passed in 1906, 6 Edw. VII. ch. 42, sec. 23, gave the Board power to order that specific works be constructed or carried on, or specified steps, systems, or methods taken. Section 212, sub-section 2, of the Act of 1903, empowered the Board to make regulations

> providing for the protection and safety of the public, of property, and of the employees of the company with respect to the running and operation of trains by the company,

which provision was amended by the Act of 1906, sec. 18, so as to authorize the Board to make regulations

> generally for the protection of property and the protection, safety, accommodation and comfort of the public and the employees of the company in the running and operation of trains by the company.

"All of the before mentioned provisions of the Act of 1903, with the amendments, are embodied in the present 'Railway Act,' R.S.C. ch. 37.

"It appears to me that neither the Act of 1868, nor that of 1879, nor part one of the Act in the revised statutes, nor the amendments of either (except in

some particulars not material to the present application) applied to the Grand Trunk Railway Company. By the terms of the principal Acts, they were to apply only to railways constructed under the authority of an Act passed by the Parliament of Canada; and I agree with Mr. Nesbitt's contention that the Parliament of the former Province of Canada was not included. Some amendments extended the application of particular provisions. See 38 Vict. ch. 24, sec. 4 (1875), and 46 Vict. ch. 24, sec. 12 (1883). This view appears to be supported by the decisions in *Scott* v. *Great Western Railway Co.*(1); *Allan* v. *Great Western Railway Co.* (2); *Re St. Catharines and Niagara Central Railway Co.* v. *Barbeau*(3); *Toronto Belt Line Railway Co.* v. *Lauder*(4); and by the language of Burton J., in *Bowen* v. *Canada Southern Railway Co.* (5).

"The Act of 1888, was, by its terms, applicable to all persons, companies, and railways within the legislative authority of the Parliament of Canada, except Government railways. These terms clearly included the Grand Trunk Railway Company and its lines of railway; but this was 'subject to any express provisions of the special Act'; and section 6 further indicated that the special Act was to govern. Further, section 223, which authorized the company or the directors to fix and regulate the tolls, did so 'subject to the provisions and restrictions in this and in the special Act contained.'

"What I have said is sufficient to dispose of the contention that the amending Act of 1883 affected the limitation imposed by the company's special Act, but

(1) 23 U.C.C.P. 182.
(2) 33 U.C.Q.B. 483.
(3) 15 O.R. 583.
(4) 19 O.R. 607.
(5) 14 Ont. App. R. 1.

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it is to be noticed that the powers of the company were, under that Act, to be exercised

subject to the provisions and limitation hereinafter and in their special Act contained.

"While not material to the construction of the amendment, it is interesting to note that, as shewn by the Hansard report of the discussion in Parliament, the amendment of 1883 was introduced by Mr. McCarthy, M.P., for the purpose of making the provision against discrimination more clear. See Hansard, vol. 13, pp. 141, 558 *et seq.*

"In my opinion, therefore, the clause requiring the running of third-class carriages and limiting third-class fares was not affected by any legislation prior to the Act of 1903.

"As has been said, the provisions of the special Act have not been expressly repealed. None of the enactments in 'The Railway Act, 1903,' or in the present 'Railway Act,' are explicitly inconsistent with those provisions. The contention on the part of the railway company is that, in effect, those enactments, and particularly the portions relating to tolls and those giving the Board jurisdiction respecting the accommodation, etc., to be furnished by the company, are so inconsistent as impliedly to repeal the provisions of the special Act.

If two inconsistent Acts be passed at different times, the last is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way.

"Per Lord Langdale, M.R., in *Dean and Chapter of Ely* v. *Bliss*(1), at page 582. But a 'repeal by implication is never to be favoured.' Per Field J. in *Dobbs* v. *Grand Junction Waterworks Co.*(2), at page 158.

(1) 5 Beav. 574.

(2) 9 Q.B.D. 151.

We ought not to hold a sufficient Act repealed, not expressly as it might have been, but by implication, without some strong reason.

"Per Lord Bramwell, in *Great Western Railway Co.* v. *Swindon and Cheltenham Extension Railway Co.* (1), at page 809.

A later Act of Parliament hath never been construed to repeal a prior Act, without words of repeal, unless there be a contrariety and repugnancy between them, or at least some notice taken of the former law in the subsequent one, so as to indicate an intention in the law-makers to repeal it.

"Per Lord Hardwicke L.C. in *Middleton* v. *Crofts*(2).

The court must be satisfied that the two enactments are inconsistent before they can from the language of the later imply a repeal of an express prior enactment.

"Per Byles J. in *Conservators of the River Thames* v. *Hall*(3), at page 419; and in the same case Keating J. said (at page 420):

I entirely agree with my brother Byles, that, before we come to that conclusion, we are bound to satisfy ourselves that it is a necessary implication.

When the repeal is not express, the burden is on those who assert that there is an implied repeal to shew that the two statutes cannot stand consistently the one with the other.

"Per Chitty J. in *Lybbe* v. *Hart*(4).

The intention to repeal must appear even more strongly where the first provision is contained in a statute of a private or special nature, in which case the maxim *generalia specialibus non derogant* usually prevails.

A later statute in the affirmative shall not take away a former Act, and *eo potius* if the former be particular and the latter be general.

"*Gregory's Case*(5).

(1) 9 App. Cas. 787.
(2) 2 Atk. 650, at p. 675.
(3) L.R. 3 C.P. 415.
(4) 29 Ch.D. 8, at p. 15.
(5) 6 Rep. 19b.

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The law will not allow the exposition to revoke or alter, by construction of *general* words, any *particular* statute, where the words may have their proper operation without it.

"*Lyn* v. *Wyn*(1).

The general principle * * * is that a *general* Act is not to be construed to repeal a previous *particular* Act unless there is some express reference to the previous legislation on the subject or unless there is a necessary inconsistency in the two Acts standing together.

"Per Bovill C.J. in *Thorpe* v. *Adams*(2), at page 135.

Unless two Acts are so plainly repugnant to each other than effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together.

"Per A. L. Smith J. in *Kutner* v. *Phillips*(3).

It is a fundamental rule in the construction of statutes that a subsequent statute in general terms is not to be construed to repeal a previous particular statute unless there are express words to indicate that such is the intention, or unless such an intention appears by necessary implication.

"Per Bovill C.J. in *The Queen* v. *Champneys*(4), at page 394.

In order to shew that a particular Act is repealed by a general Act by implication, it is not enough to shew * * * that the particular Act may have become useless or futile, that is to say, that the subject-matter of the particular Act comes within the terms of the general Act; it must be shewn, as it seems to me, that there are enactments in the general Act, when rightly construed, inconsistent with the maintenance of the particular Act.

"Per Brett J. in *The Queen* v. *Champneys*(4), at page 404.

Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely

(1) Bridg. (O.) C.P. 122, at p. 127.
(2) L.R. 6 C.P. 125.
(3) (1891) 2 Q.B. 267, at p. 272.
(4) L.R. 6 C.P. 384.

by force of such general words, without any indication of a particular intention to do so.

"Per Lord Selborne L.C. in *Seward* v. *The "Vera Cruz"* (1), at page 68.

"See also, the enunciation of similar principles by Sir W. Page Wood V.C., *Fitzgerald* v. *Champneys* (2), at pages 53-61.

"But all of these statements admit that, if the intention of Parliament to that effect sufficiently appears, the later Act should be construed as repealing or varying the former Act, whether special or general, and several cases have been cited in which the courts have adopted such construction. In most of these the circumstances and the nature of the enactments vary so much from those with which we have now to deal, that they do not appear to afford us any material assistance.

"In these cases the principles before stated are not contravened; in some they are expressly acceded to. Usually, the decisions turned upon the view taken by the court of particular language or of the scope and intention of the legislation as understood by the court. I will cite from but two of them. In *Daw* v. *Metropolitan Board of Works* (3), Willes J. said:

The rule of construction of Acts of Parliament as laid down by Vice-Chancellor Wood in *The London and Blackwall Railway Company* v. *Board of Works for the Limehouse District* (4), is no doubt a very wholesome one. A subsequent general enactment will not derogate from a prior special enactment. When, as the learned judge says, the legislature has had a special case in view, and has specially legislated upon it the inference necessary is that it does not intend by a subsequent general enactment not referring to the former to deal with those matters which have already been specially provided for. The rule *generalia specialibus non derogant* is properly appli-

(1) 10 App. Cas. 59.
(2) 2 J. & H. 31.
(3) 12 C.B.N.S. 161, at pp. 178, 179.
(4) 26 L.J. Ch. 164.

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cable to such a case. * * * In the present case, however, the rule cannot apply. * * * The powers conferred by the two (Acts) are substantially, if not strictly, the same. So soon as you find that the legislature is dealing with the same subject-matter in both Acts, so far as the later statute derogates from and is inconsistent with the earlier one, you are under the necessity of saying that the legislature did intend in the latter statute to deal with the very case to which the former statute applied.

"And in *Great Central Gas Consumers' Company* v. *Clarke*(1), Keating J. said:

I agree that, where we find in an Act of Parliament a prohibition against a public company exacting more than a prescribed rate, we should require a very clear enactment in a subsequent Act to remove the restriction. But it is equally clear, that if we find in a later Act of Parliament provisions which are utterly inconsistent with those of an earlier Act, we are bound to give effect to the later provisions.

"And in the same case, in error, (2), Pollock C.B. said:

Although that section is not in terms repealed, yet it becomes a clause in a private Act of Parliament quite inconsistent with a clause in a subsequent public Act. That is sufficient to get rid of the clause in the private Act. Looking at the 19th section of the general Act, we think it is impossible to read it otherwise than as repealing the 24th section of the private Act. We are bound as well by the plain words of the Act as by the general scope and object of it, and also by the justice of the case.

"By section 3 of the Act of 1903, that Act was to be incorporated with and construed as one Act with the special Act, subject as in the general Act provided; and by section 5, in the event of inconsistency between the general Act and any special Act passed by the Parliament of Canada relating to the same subject-matter, the provisions of the special Act were to be taken to override the provisions of the general Act in so far as should be necessary to give effect to the special Act. These provisions are combined in section 3 of the present 'Railway Act.' This would settle

(1) 11 C.B.N.S. 814, at p. 841. (2) 13 C.B.N.S. 838.

the matter if the special Act had been one passed by the Parliament of Canada, in which case, although earlier than the general Acts, the provisions of the special Act would prevail. But the portion of the Grand Trunk Railway to which the present application refers was constructed under a special Act of the late Parliament of Canada. I have some doubt whether section 6 of the Act of 1903, and the similar section of the present 'Railway Act,' under which the general Act is to apply to the exclusion of such of the provisions of a special Act of a provincial legislature as are inconsistent with the general Act, were intended to cover the case of a special Act passed by a Parliament of a province before the Union. The definition of the terms 'Legislature of any Province,' and 'Provincial Legislature,' in section 2, sub-section (*r*) of the Act of 1903, and section 2, sub-section 20, of the present Act, is probably wide enough to include such Parliaments; and the Grand Trunk Railway was declared by an Act of the Parliament of Canada to be a work for the general advantage of Canada. That declaration was included in an Act amending the general railway Act, which, though referring specifically to the Grand Trunk Railway and other named railways, may not come within the definition of a 'Special Act.' The Grand Trunk Railway was a railway connecting one province with another, and thus became *ipso facto,* upon the formation of the Dominion, subject to the legislative authority of the Parliament of Canada without a declaration that it was a work for the general advantage of Canada. Section 6 was probably intended to apply to railways constructed under special Acts of provincial legislatures passed after Confederation.

"Possibly, however, this may not be important,

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since section 6 embodies the most important of the before-mentioned principles, that the prior special Act is repealed or affected by the general Act only where there is inconsistency between them; and I take it that, under either view, the burden is upon the party asserting it to point out the inconsistency, and that this should be made clear.

"The clause in the special Act is two-fold; it limits the fares for different classes of passengers, and it requires the running of third-class carriages. Necessarily, under the latter portion, there was some obligation upon the company to furnish reasonable accommodation; some obligation to give some attention to the comfort and convenience of third-class passengers, even though this accommodation and attention should not be of the same character as required for the other classes. The legislation requiring the furnishing of adequate and suitable accommodation, and the affording of reasonable and proper facilities, could certainly not effect a repeal of the provision for running third-class carriages, nor, in my opinion, can the legislation empowering the Board of Railway Commissioners to make regulations providing for the protection, safety, accommodation and comfort of the public. Whatever the obligations under the present Act or the former Acts, these could not satisfactorily be enforced by the ordinary methods in the ordinary tribunals. The Board of Railway Commissioners was created to be the tribunal for the settling of these and other matters affecting railways and railway companies. It does not appear to me that the creation of such a tribunal was in any way inconsistent with the continuance of the obligation imposed by the special Act, or could effect its repeal or evidence an intention

of Parliament that the obligation should be no longer effective.

"Under the 'Railway Clauses Consolidation Act' and all the succeeding legislation, down to the Act of 1903, railway tolls were subject to the approval of, and to be altered by, the Governor in Council. This limitation upon the company's powers was embodied in the special Act by reference to the general Act. The jurisdiction of the Governor in Council could exist, therefore, consistently with the limitation as to fares imposed by the special Act, and it does not appear to me that the substitution of the Board of Railway Commissioners as the body which is to approve, and which has the jurisdiction to alter, railway tolls, makes any change in this respect. Under the former legislation, all the railway tolls required the approval of the Governor in Council; under the present, it is only the standard or maximum tariffs which must be approved by the Board; and railway companies are authorized to make special tariffs imposing tolls lower than those in the standard tariffs. The practice has been for the companies to obtain approval of standard passenger tariffs, not distinguishing between classes, and to provide for second-class fares by special tariffs. Third-class fares could be provided for in the same way. I do not think that the provisions authorizing special tariffs are necessarily inconsistent with the limitations imposed by the special Act or that they are sufficient to indicate the intention of Parliament that the company, in framing special tariffs, was to be free from such limitations.

"I am not informed whether the third-class carriages were at any time used upon the company's railway. To my mind it is clear that the obligation to

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use them, and to carry at fares limited as in the special Act, continued up to the coming into force of the Act of 1903. I am unable to find in the subsequent legislation any sufficient indication of the intention of Parliament to abolish the system originally imposed upon the company, as having become obsolete or unnecessary.

"The imposition of this system was one of the terms and conditions upon which the company was granted its franchise, and it should not readily be presumed that Parliament intended to relieve the company from such terms and conditions.

"The application is limited to the portion of the Grand Trunk Railway between Toronto and Montreal, and it is unnecessary to consider whether the obligation ever extended to any other portion of the company's lines.

"In my opinion there should be an order requiring the company to run every day, throughout the length of its line between Montreal and Toronto, at least one train having in it third-class carriages, and forbidding it to charge third-class passenger fares at more than two cents per mile, and directing it to amend its special tariffs accordingly.

"The operation of this order, however, should be stayed a sufficient time to enable the company to appeal."

Wallace Nesbitt K.C. and *D. L. McCarthy* for the appellants. We submit that section 3 of 16 Vict. ch. 37, has been repealed by 46 Vict. ch. 24, sec. 12, which substitues a new provision in the place of sub-section 6, of section 17, of "The Consolidated Railway Act, 1879," expressly authorizing the alteration and varia-

tion of the tolls by the special Act authorized to be taken. The words "subject to the provisions and limitations in the special Act contained" evidently refer to the requirements of the special Act relating to machinery. They cannot refer to the tolls themselves, as otherwise they would nullify the whole section. Quite apart from the section the railway company could have varied their tolls within the range set by the special Act. The only object of the section must have been to enlarge this range. The learned Chief Commissioner suggests that the Act of 1879 does not apply to the appellants and that, consequently, 46 Vict. ch. 24, sec. 12, being an amendment to that Act, likewise failed of such application. Section 2 of the Act of 1879, provided that, amongst others, the section amended by this section (12) should apply to every railway constructed "under the authority of any Act passed by the Parliament of Canada," which may, perhaps, be said to exclude the appellants, but, by section 6 of the same Act, their railway was declared to be a work for the general advantage of Canada, and sub-section 2 of this section goes somewhat farther and seems to amount to an enactment bringing the railways mentioned in sub-section 1 within the railway legislation of the Dominion. Sub-section 3 of the section certainly bears out that conclusion and is difficult to explain on any other basis. See also 47 Vict. (D.) ch. 11, sec. 1.

The sections which then follow relate to a large number of details of the general railway legislation, and amend a number of the sections of the "Consolidated Railway Act, 1879," which originally applied only to railways "constructed or to be constructed under the authority of any Act passed by the Parliament of Canada"; so that, apparently, the understand-

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ing of the Dominion Parliament, in 1884, was that the application of these sections had then become extended to include all railways within the legislative authority of the Dominion. It is true that the section introduced in 1883 by 46 Vict. (D.) ch. 24, sec. 12, was modified and its application changed. But if the effect of 16 Vict. ch. 37, sec. 3, was thus annulled, the repeal of the later statute would not again give effect to the earlier one. Hardcastle on Statutes (3 ed.), p. 319, and R.S.C. (1906), ch. 1, sec. 19.

In the second place we contend that the operation of 16 Vict. ch. 37, sec. 3, is excluded by the operation of section 6 of the present "Railway Act"(1).

The appellants' railway is declared to be a work for the general advantage of Canada by 46 Vict. ch. 24, sec. 6. As to 16 Vict. ch. 37, being a "special Act," see R.S.C. (1906), ch. 37, sec. 2, sub-sec. 28, and as to its being passed by the legislature of a province, see R.S.C. (1906), ch. 37, sec. 2, sub-sec. 20. To see the full force of section 6, R.S.C. (1906), ch. 37, compare it with section 3 of the same Act, under which where the railway is incorporated by special Act of the Parliament of Canada, precisely the contrary rule is to prevail.

In the third place we contend that the operation of 16 Vict. ch. 37, sec. 3, is likewise excluded by the operation of the present "Railway Act," taken as a whole; that, in other words, there is a repeal by implication of the provisions of the earlier special Act by those of the later general Act.

For the authorities bearing on the question of the repeal of a special Act by implication, see *Bramston*

(1) R.S.C. 1906, ch. 37.

v. *The Mayor of Colchester*(1); *Great Central Gas Co.* v. *Clarke*(2); *Daw* v. *Metropolitan Board of Works*(3); *Duncan* v. *Scottish North Eastern Ry. Co.* (4); *Charnock* v. *Merchant*(5); *In re The Duke of Marlborough's Parliamentary Estates*(6); *Brown* v. *McMillan*(7); *Luckraft* v. *Pridham*(8); *Re Cuckfield Burial Board*(9); *Stuart* v. *Jones*(10); *Reg.* v. *Bridge*(11); *Goodwin* v. *Sheffield Corporation*(12); *Parry* v. *Croydon Commercial Gas Co.* (13); *Mersey Docks and Harbour Board* v. *Lucas*(14), at page 116.

When the present "Railway Act," is examined, provisions are found quite inconsistent with the provisions of the earlier statute. An elaborate scheme for the regulation of the tolls of all railways is set forth in sections 314 to 339. Sections 269 and 284 also provide for the regulation of the accommodation to passengers. Sections 26 and 30 amongst others give the widest powers to the Board to enforce the provisions of the Act. We find in the Act a general uniform system of regulation of tolls and accommodation and complete machinery provided for enforcing the same. This is surely inconsistent in intention and in fact with the rigid special requirements of 16 Vict. ch. 37, sec. 3. We submit most strongly that the present case falls within the principle of the authorities above cited and that the earlier special Act must be taken to be impliedly repealed by the later general provisions.

(1) 6 E. & B. 246.
(2) 13 C.B. (N.S.) 838.
(3) 31 L.J.C.P. 223.
(4) L.R. 2 H.L. Sc. 20.
(5) (1900) 1 Q.B. 474.
(6) 8 Times L.R. 179.
(7) 7 M. & W. 196.
(8) 6 Ch.D. 205.
(9) 19 Beav. 153.
(10) 1 E. & B. 22.
(11) 24 Q.B.D. 609.
(12) (1902) 1 K.B. 629.
(13) 15 C.B. (N.S.) 568.
(14) 51 L.J.Q.B. 114.

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As regards the requirement in 16 Vict. ch. 37, sec. 3, with regard to the running of third-class carriages, it is to be observed that, if the requirement as to tolls falls, the requirement as to third-class carriages necessarily falls also. The classes are distinguishable, under the statute, only by the tolls. There is nothing in the statute requiring them to be labelled in any particular way. It is quite open to the appellants, once the difficulty as to tolls is removed, to say: "We regard our 'Pullman' cars as first-class, our first-class as second-class, and our second-class or our smokers as third-class carriages."

We submit that that portion of 16 Vict. ch. 37, sec. 3, is no longer in force, which requires that the fare or charge for each third-class passenger by any train on our railway shall not exceed one penny currency for each mile travelled and that at least one train having in it third-class carriages shall run every day throughout the length of the line of the said railway; and that the decision of the Board of Railway Commissioners for Canada is wrong and should be set aside.

Curry K.C. for the respondent, and *Bayly K.C.* for the Attorney-General of Ontario.

The portion of section 3 of 16 Vict. ch. 37, dealing with the gauge of the railway was expressly repealed by Act of the Parliament of Canada, 36 Vict. ch. 18, sec. 23. The remainder of the section has never been expressly repealed, and it still remains in force, and it has not been impliedly repealed by the provisions of 46 Vict. ch. 24, sec. 12.

The clauses with respect to "tolls" in the "Rail-

way Clauses' Consolidation Act," 14 & 15 Vict. ch. 51, were, by section 2 of the special Act made a part of that Act, and the learned Chief Commissioner finds that the clause requiring the running of third-class carriages and limiting third-class fares, was not affected by any legislation prior to the Act of 1903.

The contentions that the operation of 16 Vict. ch. 37, sec. 3, is excluded by the operation of section 6 of the present "Railway Act," and by the operation of that Act, taken as a whole, and that there is a repeal by implication of the provisions of the earlier special Act by those of the later general Act are fully answered by the learned Chief Commissioner.

We therefore submit that that portion of 16 Vict. ch. 37, sec. 3, which requires that the fare or charge for each third-class passenger by any train on the railway of the appellants shall not exceed one penny currency for each mile travelled, and that at least one train having in it third-class carriages shall run every day throughout the length of the line of railway is still in force.

THE CHIEF JUSTICE.—This appeal is dismissed for the reasons given by Chief Commissioner Killam in the judgment appealed from.

GIROUARD J. concurred in the dismissal of the appeal.

IDINGTON J.—I agree with the reasoning of the learned Chief Commissioner. It seems to me impregnable. I desire only to add one or two observations arising out of new ground taken by the appellants.

It is claimed before us that the statute, 18 Vict.

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ch. 33, of the late Province of Canada, and not 16 Vict. ch. 37, is to be looked to as the incorporating Act of the appellant company. It is said, section 4 of that incorporated the "Railway Clauses' Consolidation Act" as part and parcel of the Act of this later incorporation and, thus, the special tariff of passenger tolls fixed by 16 Vict. ch. 37, sec. 3, is got rid of.

A careful consideration of the whole of 18 Vict. ch. 33, and even section four thereof relied on itself, does not support this contention.

The general scope and purpose of that Act was to amalgamate a great many lines with that of the main Grand Trunk line, now in question, and the respective companies owning them with the Grand Trunk Railway Company of Canada, incorporated by 16 Vict. ch. 37, and all are to be called The Grand Trunk Railway Company of Canada.

The old order of things remains, in all other respects, unchanged. There is the old corporate body, the old corporate name, the old main line extended, and all under the same old charter with some new powers and properties, but with the old right to provincial subsidy and the corresponding duty to discharge which was imposed as consideration for granting the subsidy.

Again, it is contended here that the Board of Railway Commissioners have, by virtue of the "Railway Act of 1903," obtained greater powers over the tolls than had the Governor in Council, under the "General Railway Clauses' Consolidation Act," 14 & 15 Vict. ch. 15, in force when the appellants became incorporated.

I think a comparison of sub-section 5, of section 14, of that Act with section 251 of the Act of 1903

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will shew there is not much ground for this contention.

Even if clearly so, as I think it is not, what would there be in such a state of things so inconsistent with as to repeal the obligations created by 16 Vict. ch. 37, sec. 3, on which the Board has proceeded to make the order complained of?

Still less argument, if possible, as against the order in question, is there in the new powers of the Board over the kind of cars and accommodation generally to be furnished by the company in operating its lines. Is it to be supposed that the company, if free from any supervision whatsoever, would have persisted to the present hour in using only tallow dips, such as obtainable in A.D. 1852, and insisted in depriving third-class cars of all the decencies and utilities for preserving some of the decencies of life, in travelling?

If such be held by the company to be part of its inalienable right, I fear it cannot maintain that precious right in face of this new statute, but, all the same, I have no doubt the Commissioners can and will, if it become clearly part of their duty to give directions as to third-class cars, properly discriminate between the several classes of cars each class of fare may entitle a passenger to enter. They may possibly improve them all a bit as compared with 1852 without hurting any one or even the company.

I think the appeal should be dismissed with costs.

MACLENNAN J.—After a very full and careful consideration of the legislation enacted during the many years which have elapsed since the passing of the special Act of 1852, and the reasons and arguments which

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were addressed to us on behalf of the appellants, I am of opinion that the appellants have failed to shew that the enactment in question has been repealed either expressly or by implication.

I agree with the statement of reasons for judgment given by the Chief Commissioner of the Railway Board, and cannot usefully add anything thereto.

I would dismiss the appeal with costs.

DUFF J. concurred in the reasons stated by Chief Commissioner Killam for the judgment appealed from.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondent: *James W. Curry.*