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*April 7.
*May 6.

THE BRITISH COLUMBIA ELECTRIC RAILWAY CO..... APPELLANTS;

AND

THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION CO. AND THE CITY OF VANCOUVER..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Constitutional law—Provincial tramway—Jurisdiction of Board of Railway Commissioners — Highways — Overhead crossings—Apportionment of cost—Legislative jurisdiction—Ancillary powers —"Interested parties"—Construction of statute—"Railway Act," R.S.C., 1906, *c.* 37, *ss.* 8, 59, 237, 238—(*B.C.*) 8 & 9 *Edw. VII., c.* 32—"*B.N.A. Act*, 1867," *s.* 92, *item* 10.

On an application by the City of Vancouver, the Board of Railway Commissioners for Canada authorized the Corporation of the City of Vancouver to construct overhead bridges across the tracks of a Dominion railway company, which had been laid down during the years 1909 and 1910 on certain streets in the city, and ordered that a portion of the cost of construction of two of these bridges and of the depression of the tracks at the crossings thereof by the Dominion railway should be borne by a tramway company which derived its powers through provincial legislation and an agreement with the city pursuant to such legislation under which it operated its tramways upon these streets. By the agreement the tramway company became entitled to use the city streets with reciprocal obligations by the city and the company respecting their grading, repair and maintenance, and it was provided that the city should receive a share of the gross earnings of the tramway company. On appeal to the Supreme Court of Canada from the order of the Board:—

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

Held, Duff and Brodeur JJ. dissenting, that, in virtue of sections 8(*a*), 59, 237, and 238 of the "Railway Act," R.S.C., 1906, ch. 37, as amended by chapter 32 of 8 & 9 Edw. VII., the Board of Railway Commissioners for Canada had jurisdiction to determine the "interested parties" in respect of the proposed works and to direct what proportion of the cost thereof should be borne by each of them. The *City of Toronto* v. *Canadian Pacific Railway Co.* ((1908) A.C. 54); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* ((1899) A.C. 367); *City of Toronto* v. *Grand Trunk Railway Co.* (37 Can. S.C.R. 232); *County of Carleton* v. *City of Ottawa* (41 Can. S.C.R. 552), and *Re Canadian Pacific Railway Co. and York* (25 Ont. App. R. 65), followed.

Per Duff and Brodeur JJ., dissenting.—(1) The Parliament of Canada, when it assumes jurisdiction, under the provisions of item 10 of section 92 of the "British North America Act, 1867," in respect of a provincial railway, *quâ* railway, must assume such jurisdiction over the work or undertaking "as an integer." (2) The order of the Board cannot be sustained as being made in the exercise of the Dominion power of taxation. (3) As there is no Dominion interest concerned in the provisions of the order under appeal, and the Dominion Parliament has no power to compel the provincial company to assume the burden of the cost of the proposed works, or any portion thereof, the Board of Railway Commissioners had no jurisdiction to assess a proportion of their cost upon the tramway company. (4) The cases cited above must be distinguished as they do not sustain, as a valid exercise of ancillary power by Dominion authority, any enactment professing to control a provincial railway company.

(NOTE.—Leave to appeal to the Privy Council was granted on 14th July, 1913.)

APPEAL from the order of the Board of Railway Commissioners for Canada, dated on the 14th of October, 1912, in so far as it directs the appellants to pay a proportion of the cost of overhead crossings at the intersections of the tracks of their tramway by Hastings and Harris Streets, in the City of Vancouver, B.C., upon the ground that the Board had no jurisdiction to order the appellants to pay any part of the cost of such works.

The order appealed from is recited in full in the

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judgment of Mr. Justice Duff, at page 108 of this report.

R. A. Pringle K.C. and *E. Lafleur K.C.* for the appellants. Upon the true construction of section 8 of the "Railway Act," and of sections 91 and 92 of the "British North America Act, 1867," the Board had no jurisdiction over the electric tramway of the appellants, the appellant company being a provincial corporation, operating a provincial tramway only in the City of Vancouver, and having no connection with any railway or tramway outside the Province of British Columbia, and not subject to the provisions of the Dominion "Railway Act," nor to the jurisdiction of the Board.

The first point to be considered is whether or not that Act of itself gives jurisdiction in such a case as the present. Section 8 reads as follows: "Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to (*a*) the connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing." We note particularly the definite distinction made between "a railway connected with or crossing any railway within the legislative authority of the Parliament of Canada," and, "a railway declared by Parliament to be a work for the general advantage of Canada," shewing that, in the mind of the legislature,

a railway which connects with a railway having a Dominion charter does not by reason of such connection become a railway declared by Parliament to be a work for the general advantage of Canada. Section 8 of the "Railway Act" should be limited in its application to such provincial railways as connect, either directly or indirectly, with lines extending beyond the limits of the province, and in view of the provisions of the "British North America Act," it could not have been the intention to subject provincial lines, having no such connection, to the provisions of the "Railway Act." The Act must be interpreted as dealing with matters properly subject to the legislative authority of the Parliament of Canada, and it would be contrary to the spirit of the Act to make it apply to purely provincial undertakings.

The Board had no jurisdiction under sections 237 and 238 of the "Railway Act" as amended by chapter 32 of 8 & 9 Edw. VII., sec. 5, or under any other section of said Act, to order the appellants to pay any proportion of the cost of the bridges referred to in the order.

We crave leave to refer to the following authorities: *Montreal Street Railway Co.* v. *The City of Montreal*(1); *Attorney-General for Ontario* v. *Attorney-General for Canada*(2), at p. 360; *City of Montreal* v. *Montreal Street Railway Co.*(3); Maxwell's Interpretation of Statutes (4 ed.), pp. 163, 211; *Colquhoun* v. *Heddon*(4); *Merritton Crossing Case*(5); *Duthie* v. *Grand Trunk Railway Co.*(6).

Andrew Haydon, for respondents, the Vancouver, Victoria and Eastern Railway and Navigation Com-

(1) 43 Can. S.C.R. 197.
(2) (1896) A.C. 348.
(3) [1912] A.C. 333.
(4) 25 Q.B.D. 129.
(5) 3 Can. Ry. Cas. 263.
(6) 4 Can. Ry. Cas. 304.

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pany. We do not admit that the portion of the cost of constructing the crossings referred to in the order complained of is equitable as against us, and consider that a larger portion of the cost of construction should have been apportioned to be paid by the British Columbia Electric Railway Co.

In *The City of Toronto* v. *Canadian Pacific Railway Co.*(1), it was held that sections 187 and 188 of the "Railway Act" of 1888 were *intra vires* of the Parliament of Canada. These sections were reproduced in the Act of 1903 as sections 186 and 187. In the consolidation, chapter 37, R.S.C., 1906, section 186 appears somewhat more in detail as section 237, and section 187 appears as section 238. Both of these sections were repealed and new sections, considerably amplified but having the same objects in view, were re-enacted in 1909, by chapter 32 of 8 & 9 Edw. VII. Consequently it is not now open to the appellants to contend that these sections are *ultra vires*. See, also, *Grand Trunk Railway Co.* v. *Attorney-General of Canada*(2); *The City of Montreal* v. *Montreal Street Railway Co.*(3). An important feature in the latter case is that the judgment only purports to deal with sub-section (*b*) of section 8, and it is stated that upon the other sub-sections it is unnecessary to express an opinion. It is submitted that sub-section (*a*) of section 8 is *intra vires* of the Parliament of Canada. The federal legislation in connection with this matter is as follows: "Railway Act," 51 Vict., ch. 29, sec. 4; amended by 63 & 64 Vict. ch. 23, sec. 1; and the "Railway Act," 1903, 3 Edw. VII., ch. 58, sec. 7.

The control over the physical crossing should rest in some one body; that body cannot be the legislature

(1) [1908] App. Cas. 54. (2) [1907] A.C. 65.
(3) [1912] A.C. 333.

of the province. The safety of the public travelling on a federal line of railway is of importance. The difficulties referred to in the judgment of the Judicial Committee in the *Montreal Street Railway Case*(1), arising out of dual control, do not exist in the present case. If the Parliament of Canada has not control over the matter of crossings, it would be possible for a provincial line, by building across the proposed route of a federal line, to prevent the construction of the federal line connecting one province with another. It necessarily follows from the fact that Parliament is given power to authorize the construction of lines connecting one province with another, that it must have complete jurisdiction over the matter of ordering such crossings, and, as incidental thereto, the making of orders for protection and safety of the public at such crossings.

For the purpose of carrying out the building of a federal railway, Parliament is empowered to take provincial lands. *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(2).

J. G. Hay for respondent, the City of Vancouver. The decision of the Board in respect to all questions of law and fact cannot now be considered; their decision thereon is final; *James Bay Railway Co.* v. *Grand Trunk Railway Co.*(3). The order complained of is *intra vires* and is justified under sections 8(*a*), 59(2), 237(2)(3), and 238 of the "Railway Act." The Dominion had authority to make these enactments, and also the amendment effected by 8 & 9 Edw. VII., ch. 32, secs. 4 and 5, such legislation being necessary to carry out the ancillary control germane to the

(1) [1912] A.C. 333.
(2) [1906] A.C. 204.
(3) 37 Can. S.C.R. 372.

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subject: *City of Montreal* v. *Montreal Street Railway Co.*(1), at p. 346; *Cushing* v. *Dupuy*(2); *Tennant* v. *Union Bank*(3); *Re Canadian Pacific Railway Co. and County and Township of York*(4), at p. 72; *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(5); *City of Toronto* v. *Grand Trunk Railway Co.*(6), *per* Girouard J., at p. 238, Davies J., at pp. 240, 241, 243, and 244, Idington J., at p. 248; *Grand Trunk Railway Co.* v. *Attorney-General of Canada*(7); *City of Toronto* v. *Canadian Pacific Railway Co.*(8), *per* Collins L.J., at p. 58; *City of Montreal* v. *Montreal Street Railway Co.*(9), *per* Idington J., at pp. 213 and 215 to 217; Duff J., at pp. 227, 230, 231 and 232; Girouard J., at p. 200; Anglin J., at pp. 237 to 246 and the cases there exhaustively collected and quoted; also the same case on appeal to Privy Council (1), at p. 346. While it was held that sub-section (*b*) of section 8 of the "Railway Act" was *ultra vires*, no such decision was given as to sub-section (*a*) and the subject matters of the two provisions are dissimilar. In the present case there is no attempt to interfere with or regulate the affairs of the appellants *quâ* railway, but it is ordered to pay a certain proportion of cost in like manner as if it had been any other kind of a corporate body or any natural person.

The appellant cannot escape because of being incorporated by or exercising powers given by a provincial legislature. If such an argument were sound the city or any municipality or joint-stock company created by and under the exclusive legislative

(1) [1912] A.C. 333.
(2) 5 App. Cas. 409.
(3) [1894] A.C. 31.
(4) 27 O.R. 559; 25 Ont. App. R. 65.
(5) [1899] A.C. 367.
(6) 37 Can. S.C.R. 232.
(7) [1907] A.C. 65.
(8) [1908] A.C. 54.
(9) 43 Can. S.C.R. 197.

control of the provincial legislature could escape liability, and municipalities have time and again been held liable in just such cases as the present. *Re Canadian Pacific Railway Company and County and Township of York*(1), at p. 570; *City of Toronto* v. *Grand Trunk Railway Co.*(2), at p. 244; *City of Toronto* v. *Canadian Pacific Railway Co.*(3); *County of Carleton* v. *City of Ottawa*(4); MacMurchy and Denison "Railway Law of Canada" (2 ed.), p. 27. If such an argument were sound the present "Railway Act" would be practically unworkable and useless in very many respects.

Even if section 8(*a*) were alone relied on, the present case is one of "connection or crossing." That for the protection of the crossing it is necessary to elevate the appellants' tracks and the city streets for some distance on each side of the actual point of contact of the tracks can surely make no difference. That is a matter entirely for the Board to determine. By section 59 the Board may order any "person" interested to pay the cost or a portion thereof. The appellant is a "person" interested. By section 34, sub-section (20): "Person" includes any body corporate and politic. *City of Toronto* v. *Grand Trunk Railway Co.*(2), at p. 242; *City of Toronto* v. *Canadian Pacific Railway Co.*(3), at p. 59. On the evidence there is no doubt that the appellants are not only interested, but directly benefited by the proposed work, and the Board so found.

Under sub-section (3) of section 238 of the "Railway Act," as amended by 8 & 9 Edw. VII., ch. 32, sec. 4, power is not limited to persons "interested," but is

(1) 27 O.R. 559; 25 Ont. App. R. 65.
(2) 37 Can. S.C.R. 232.
(3) [1908] A.C. 54.
(4) 41 Can. S.C.R. 552.

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extended to any municipality "or other corporation or person." The provisions of the "Railway Act" of 1888 (secs. 187 and 188), under which many of the cases in point have been decided, limited the power to "any person interested." The decision of the Board as to whether or not the appellant is a person or party interested is one of fact which cannot be interfered with. Even if it is not a question in fact the Board's decision is still conclusive and binding and cannot be reviewed on this appeal. "Railway Act," sec. 26, sub-sec. (5); sec. 54, sub-sec. 3; sec. 56, sub-sec. 9; *Re Canadian Pacific Railway Co. and County and Township of York*(1), at p. 569; (2), at p. 73; *Re Grand Trunk Railway Co. and City of Kingston*(3); *City of Toronto* v. *Grand Trunk Railway Co.*(4), at pp. 238 and 239; *Grand Trunk Railway Co.* v. *Village of Cedar Dale* (5); *County of Carleton* v. *City of Ottawa*(6); MacMurchy and Dennison's Railway Law of Canada (2 ed.), p. 27.

THE CHIEF JUSTICE.—I am of opinion that the Board had jurisdiction to hear the application and give the relief asked for by the municipality with respect to the highway bridge and to assess the cost upon the parties interested.

I would dismiss the appeal with costs.

DAVIES J. agreed with Anglin J.

IDINGTON J.—It seems to me quite clear that the Board had jurisdiction to make the order complained of. Unless we hold that a local railway company con-

(1) 27 O.R. 559.
(2) 25 Ont. App. R. 65.
(3) 8 Ex. C.R. 349; 4 Can. Ry. Cas. 102.
(4) 37 Can. S.C.R. 232.
(5) 7 Can. Ry. Cas. 73.
(6) 41 Can. S.C.R. 552.

cerned in a crossing of a Dominion railway is something superior to and more sacred than a mere municipal corporation, the principle applicable to the case is completely covered by authority.

There was a railway constructed by the Dominion railway company now in question before the change in the law which section 238*a* of the Act brought about, and a part of it across the streets in question so that we must look at the law as decided relative to the older railways.

Every "person interested" had been theretofore held liable to contribute. Municipal corporations were held to be liable. It dawned at last on some part of the stupid public when the doctrine was pushed rather far, that railway companies, like others, ought to furnish the expenses of averting the dangers they had created.

But even then section 238*a* was the utmost Parliament could see its way to give in way of relief from such a state of things.

It seems idle to say it can be relied on for relief herein against an old railway simply by reason of its needing new sidings.

The appeal should be dismissed with costs.

Since writing the foregoing I have had the privilege of reading my brother Duff's opinion and may be permitted to add that, though I cannot see my way to distinguishing between a municipality having jurisdiction over a street and a street railway company running over a street, yet I never have been able to understand how making others pay for their right-of-way and incidental protection against the dangers they have created, or may create, is a necessarily incidental part of the powers of Parliament over a certain class

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of railways. In my dissenting judgment in the case of *City of Toronto* v. *Grand Trunk Railway Co.*(1), at pages 244 *et seq.*, I tried to shew that it never had been so intended originally, and if the words used could be held wide enough it was not *intra vires* Parliament to so enact. The recoil, from the mode of treatment of the power of Parliament which prevailed in that and other cases, came in the *Montreal Street Railway Case* (2). And section 238*a* above referred to, seems to indicate a railway can be built and run without such powers. Then, if so, wherein is the incidental necessity for pretending to exercise such a power ? Unless necessarily incidental to efficient exercise of the power Parliament has it not, and seems by section 238*a* to have written the condemnation of such an exercise of power. However, until the courts above pass further I must, as I view the results of the appeals thereto, bow to and follow what seems to me the principle thereof.

DUFF J. (dissenting).—This is an appeal by the British Columbia Electric Railway Co. from an order made by the Board of Railway Commissioners, dated the 14th October, 1912, which is as follows:—

ORDER OF BOARD.

Order No. 17,840.

Monday, the 14th day of October, A.D. 1912.

H. L. Drayton, K.C., Chief Commissioner. D'Arcy Scott, Asst. Chief Commissioner.

James Mills, Commissioner. A. S. Goodeve, Commissioner,

Upon the hearing of the application at the sittings of the Board held in the City of Vancouver on the 29th day of July, 1912, the applicant, the Vancouver, Victoria and Eastern Railway and Navigation Company, and the British Columbia Electric Railway Company being represented by counsel at the hearing, the evidence offered and what

(1) 37 Can. S.C.R. 232. (2) 43 Can. S.C.R. 197; [1912] A.C. 333.

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was alleged; and upon the reading of the answer filed on behalf of the British Columbia Electric Railway Company and the reply of the Vancouver, Victoria and Eastern Railway and Navigation Company—

It is ordered as follows:—

1. The applicant is hereby authorized to construct Hastings Street, Pender Street, Keefer Street, and Harris Street across the tracks of the Vancouver, Victoria and Eastern Railway and Navigation Company, in the said City of Vancouver, by means of overhead bridges, as shewn on the plan filed with the Board under file No. 20062; detail plans of the said structures to be submitted for the approval of the chief engineer of the Board.

2. Twenty per cent. of the cost of the actual construction work at each of the crossings on Pender and Keefer Streets, not to exceed in each case the sum of $5,000, shall be paid out of the Railway Grade-Crossing Fund; twenty-five per cent. of the remainder of the cost of such work shall be borne and paid by the applicant and seventy-five per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing Harris Street bridge, not to exceed the sum of $5,000, shall be paid out of the Railway Grade-Crossing Fund; twenty per cent. of the remainder of such cost to be paid by the applicant, twenty per cent. by the British Columbia Electric Railway Company, and sixty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing the Hastings Street bridge shall be paid by the applicant, twenty per cent. by the British Columbia Electric Railway Company and sixty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company.

3. *The cost of depressing the tracks of the Vancouver, Victoria and Eastern Railway and Navigation Company shall be included in the cost of the work.*

4. The cost of maintaining the said Keefer, Pender, Harris and Hastings Street bridges shall be borne and paid, fifty per cent. by the applicant and fifty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company.

5. In case of dispute between the parties in carrying out the terms of this order, the same shall be settled by the chief engineer of the Board.

(Sgd.) H. L. DRAYTON,
Chief Commissioner.

Board of Railway Commissioners for Canada.
Examined and certified as a true copy under section 23, "The Railway Act."
(Sgd.) A. D. CARTWRIGHT,
Sec. of Board of Railway Commissioners for Canada.
Ottawa, Oct. 25th, 1912.

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There are several grounds of appeal. It will be convenient first to consider the contention that the order in question is so far as it professes to direct the appellants to pay a portion of the cost of the overhead bridges which the municipality is thereby authorized to construct is an order which the Parliament of Canada could not empower the Board of Railway Commissioners to make. The Vancouver, Victoria and Eastern Railway is a railway originally authorized by the Legislature of British Columbia, but afterwards declared to be a work for the general advantage of Canada and thereby brought under the jurisdiction of Parliament. The British Columbia Electric Railway Co., which I shall refer to as the Electric Company, is a company which under an Act of the Legislature of British Columbia has power to operate an electric railway in Vancouver upon obtaining the consent of the municipality, and the Electric Company and the municipality respectively are authorized to enter into an agreement respecting the grading and maintenance of the highways through and upon which the electric railway runs. I shall have to refer in the course of this judgment to some of the terms of the agreement entered into pursuant to this authority. Prior to 1909 the Vancouver, Victoria and Eastern Railway Co., which I shall call the Dominion Company, had constructed a line to the City of Vancouver and had a passenger and freight station there. Some time during the year 1909 (the exact date does not appear) this company laid down a line from False Creek, where its station was, northerly to the south shore of Burrard Inlet. This line was constructed under authority of an order of the Board of Railway Commissioners made in the month of May, 1907. It crossed Harris

and Hastings Streets (running east and west), two of the streets referred to in the order under appeal. At the time the order of May, 1907, was made, the Electric Company had constructed its railway on Harris Street, that is to say, it had laid down on that street a single track, but had no tracks on Hastings Street. When the Dominion Company laid down its line across these streets in 1909, the Electric Company had in the meantime constructed a second track on Harris Street and had also laid down a track on Hastings Street, but it seems that this track had not yet been connected with their city railway system. In the year 1910 (6th Sept.), on the application of the Dominion Company, an order was made by the Board authorizing it to construct two additional industrial tracks from False Creek to Burrard Inlet alongside and parallel to the track laid in 1909 and crossing, of course, the streets already referred to. This application was opposed by the Municipality of Vancouver and by the Electric Company, and the order contains a clause in the following words:—

> That owing to the low-lying nature of the ground through which the said tracks were run and the probable necessity in future of carrying the said streets or some of them over the said tracks, all questions relating to the separation of grades and the distribution of the cost thereof are hereby reserved.

The order under appeal was made upon the application of the municipality; and the circumstances in which that application came to be made were clearly stated to the Board by Alderman Baxter. There is no dispute whatever about the facts. In 1912 the Municipal Council of Vancouver decided to put permanent pavements on four streets running east and west (two of which were Harris and Hastings Streets) which were crossed by the three tracks of the Dominion com-

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pany already mentioned. As was anticipated by the Board in 1909, it was thought that the streets at the place where these tracks crossed were too low and it was considered desirable to elevate the grade of the streets. It was accordingly decided to construct, with the leave of the Board, overhead bridges carrying the highways over these tracks. A by-law was passed by the Council authorizing the construction of these bridges, but on being submitted to the ratepayers was not confirmed as the law of British Columbia required. It was then determined by the Council to apply first to the Board for leave to construct the bridges and for an order apportioning the cost between the Dominion Company and the municipality and then to propose another by-law authorizing the municipality to carry out the scheme as sanctioned by the Board. Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand, the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets and these could not be granted owing to the inability of the municipality to give the grade of the streets. The Council preferred the former of the two alternative courses because, as Mr. Baxter put it, they recognized that the street grades were too low and must eventually be raised.

The application to the Board then was an application made pursuant to the reservation contained in the order of 1909 to authorize the municipality to con-

struct bridges across the Dominion Company's tracks (if the municipality, by the ratepayers, should approve the proposals of the council in respect of the grades of these streets), and to declare the respective proportions of the cost of the bridges to be paid by the Dominion Company and the municipality.

It will be observed also that the order made was a permissive order leaving it to the discretion of the municipality whether the bridges should be built or not. The order is not an order directing precautionary measures to be taken for the public protection against the dangers of a railway crossing. The tracks in question are for the transport of freight only to and from the company's dock on the harbour front. The statement by Mr. MacNeil, for the Dominion Company, which was not questioned at all, was that there would not be more than two "movements" of freight in each twenty-four hours on these tracks, and that if necessary these "movements" could all take place at night. The real scope, purpose and effect of this order is that it gives permission to the municipality to put into effect, if it sees fit, the Council's proposals to carry these highways over the railway as a necessary part of a design to elevate the grades of the streets; the protection which may incidentally be afforded was not in any sense the object nor was the necessity of it the ground of the order.

It is convenient, I think, to put the question I am now considering in this form:—Could the Parliament of Canada have validly passed, as part of an Act authorizing the construction of the Dominion railway, an enactment having the identical scope, purpose and effect of this order in so far as it levies a part of the

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cost of constructing these bridges upon the Electric Company ?

The only ground upon which such legislation could be sustained would be that it was legislation in execution of the Dominion powers in relation to a Dominion railway.

I think such legislation would not be legislation relating to the Dominion railway, but legislation relating to the Electric Company and its rights in the matter of running its cars on the streets of the municipality.

Looking at the matter broadly, the order seems in relation to each of these highways to be an order requiring the Electric Company to contribute to the cost of the construction of a bridge as part of a municipal highway and the justification of the order appears from the judgment of the Assistant Chief Commissioner to be that when the bridge is constructed the Electric Company will have the right to use it and that the construction of the bridge will enable that company to work its railway more efficiently, more economically and with increased security against injuries to its passengers through accident. An order which on such grounds requires the Electric Company to contribute to the cost of constructing or improving a highway of the municipality, if and when the municipality decides to construct or improve it, seems to be an order in substance and in truth dealing with the Electric Company in its relations with the municipality; and none the less so that in order to construct the work the leave of the Dominion must be obtained because of the fact that the highway crosses a Dominion railway. In so far as the order authorizes the highway to cross the railway it is, of course, a pro-

per exercise of authority in relation to the Dominion railway; so also in so far as it casts upon the Dominion Company a part of the cost of works made necessary by the fact that its railway is there and in so far also as it requires the approval of the bridge by the engineer of the Commission. But the direction that the Electric Company shall pay for the advantages it will gain from this change by reason of the fact that it has under the law the right to use the highway in its altered condition is a direction which deals with a different subject-matter altogether. Indeed, it may be noted that even if the order were an order directing the construction of these bridges as a measure of public safety, the matter of the terms on which the local railway is to be entitled to use them would just as clearly be a matter exclusively of local interest outside the purview of the Dominion power relating to railways.

The argument in support of the Dominion jurisdiction is that the power to pass such legislation is necessarily incidental to the power to make laws in relation to all matter comprised within the subject-matter — Dominion railways.

This proposition is said to be established by certain decisions of the Privy Council and of this court. These decisions I shall consider in detail and at present it is sufficient to say that there is no decision involving the question of the extent or the existence of any power in the Dominion (as incidental to its control of Dominion railways) to assess against a provincial railway company the cost of works made necessary by the construction of a Dominion railway across a municipal highway and there is no decision

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upon the question whether the Dominion has power to assess the cost of works constructed by a municipality against a provincial railway company benefited by such works merely because such works are so situated with reference to a Dominion railway that the municipality must get the leave of Dominion for executing them.

The provisions of the B.N.A. Act with which we are immediately concerned are sections 91(29) and 92(10).

By these provisions local railways wholly within the limits of a single province and not declared to be for the general advantage of Canada come within the exclusive legislative jurisdiction of the province. That does not mean, of course, that such railways in respect of matters which are not properly comprehended within the subject-matter of railways, but which really fall within Dominion jurisdiction under some other head of section 91 are exempt from the authority of the Parliament of Canada. If a provincial railway company is about to make a negotiable instrument or to deal with a bank, it must do so subject to the Dominion law relating to negotiable instruments and banking. Such railways as railways, however (in respect, that is to say, of all matters that are subject-matter of "railway legislation strictly so called"), so long as the Dominion does not assume jurisdiction in the manner provided for by the Act, are primarily under the exclusive jurisdiction of the local legislatures. The works and undertakings dealt with by these sections are as Lord Atkinson explains in *City of Montreal* v. *Montreal Street Railway Co.*(1), "physical things, not services";

(1) [1912] A.C. 333.

and they are things of a special character. Railways, telegraph lines and like works from the practical point of view must for some purposes be regarded as entireties, and the law recognizes that by treating them so in many instances. The "British North America Act" seems to treat them so in these provisions as subjects of legislative jurisdiction. The framers of the Act recognized that the national interest might require the taking over of local works by the Dominion and the Act provides for that, but the Dominion, when it assumes jurisdiction, must assume jurisdiction of the work or undertaking as a whole. Primarily then the effect of the provisions of the Act with regard to a railway which is local in the sense mentioned is that, in its character of railway, it is "as an integer," to use Lord Watson's phrase in *Redfield* v. *Corporation of Wickham*(1), under the exclusive control of the province until the Dominion assumes jurisdiction in the manner provided for. After that it passes in the same character under the exclusive jurisdiction of the Dominion.

In *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(2), speaking of the extent of the control over Dominion railways committed to Dominion by these provisions, at page 372 Lord Watson says:

> Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; * * * It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament.

It cannot, I think, be doubted that, primarily, the jurisdiction committed to the province by these pro-

(1) 13 App. Cas 467, at p. 477. (2) [1899] A.C. 367.

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visions in regard to local railways is as extensive as the jurisdiction thus described. And the considerations I have already referred to appear to me to be quite sufficient to shew that the order in its application to the Electric Company is an order in relation to a matter falling strictly within the subject of "local works and undertakings" assigned to the province by section 92 (10).

It cannot, therefore, be and is not contended that the order appealed from in so far as it professes to levy a contribution upon the Electric Company is

> legislation falling strictly within any of the classes specially enumerated in section 91

in the sense in which those words are used by Lord Herschell in the *Fisheries Case*(1), at page 715.

It is perhaps unnecessary to observe in passing that the order obviously cannot be sustained as made in exercise of the Dominion power of taxation.

It is contended, however, and this is, no doubt, the ground upon which this order must be sustained, if it can be sustained at all, that there is vested in the Dominion Parliament in addition to its authority to enact railway legislation strictly so called in relation to the subject of Dominion railways a power to pass laws which though not legislation of that character would be suitable ancillary provisions to a Dominion railway law; and it is further contended that such ancillary legislation may be legislation relating to a provincial railway and of such a character that from a provincial point of view it would properly be described as "railway legislation strictly so called." I do not think it is necessary for the purpose of this appeal to pass upon the question whether such legisla-

(1) [1898] A.C. 700.

tion is competent to the Dominion, without a formal assumption by the Dominion of exclusive jurisdiction over the provincial railway in the manner provided for by the Act. There is no doubt something to be said for the opposite view.

Where by reason of the relative physical situation of a Dominion railway and a provincial railway or other circumstances legislation strictly relating to the Dominion railway in its operation necessarily and incidentally affects a provincial railway it may be assumed that the Dominion legislation would be unobjectionable from the constitutional point of view. But once you pass beyond that and admit there is (in the absence of an assumption of complete jurisdiction) vested in the Dominion authority to pass legislation which relates to a provincial railway as such or to a provincial railway company as railway company, and which, admittedly is not legislation relating strictly to a Dominion railway you are obviously in difficulties in assigning limits to the jurisdiction.

If the proposed action of the Dominion respecting the provincial line appears to the provincial legislature or the provincial body charged generally with administrative responsibility in relation to the provincial line in the honest exercise of its judgment to be so impracticable in a business sense or so incompatible with the objects of the undertaking that it ought not to be agreed to, it does not seem wholly extravagant to say that from the provincial point of view it would be unreasonable to force the proposal upon the province against its will; in other words, that from the provincial point of view on any such question of reasonableness the province is the final judge.

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Then, if the necessities of the case from the Dominion point of view require that the Dominion view shall prevail against the provincial, the question may be asked:—Have we not reached the stage at which the Act contemplates the assumption by the Dominion of complete jurisdiction?

The other alternatives are that the Dominion is in all cases the final judge of the necessity of its own intervention — an alternative which, I think, is negatived by the decision of the Privy Council in the *City of Montreal* v. *Montreal Street Railway Co.*(1); or that when such a conflict arises it rests with the courts in each case to determine whether the particular enactment in so far as it relates to the provincial railway or the provincial railway company is one that is so essential to the effective exercise of Dominion legislative authority relating to Dominion railways (under the provisions quoted above) that power to pass it must be taken to have been conferred by the grant of that authority. I assume for the purpose of deciding the question before us that in some degree some such power is comprehended within that authority; limited by the necessity above indicated of the existence of which, when it is disputed, the courts must in the last resort be the judges.

In this view then in every case in which a conflict does arise the point for determination must be whether there exists such a necessity for the power to pass the particular enactment in question as essential to the effective exercise of the Dominion authority as to justify the inference that the power has been conferred. *The City of Montreal* v. *The Montreal Street Railway Co.*(1), at pages 342-345.

(1) [1912] A.C. 333.

I do not think the order before us satisfies this test.

In applying this test one should not lose sight of the fact that there is no case in which a Dominion enactment professing to control a provincial railway or a provincial railway company as such has been sustained as a valid exercise of the ancillary power now contended for. There is only one case in which such an enactment has been considered and in that case (*City of Montreal* v. *Montreal Street Railway Co.*(1)) the Dominion legislation was held to be *ultra vires*.

It may further be observed that—if we except cases dealing with matters that have been considered to fall *primâ facie* within item 13 of section 92, ("property and civil rights") or item 16 of section 92, (matters mere local or private within the province)—I do not think there is any case in which it has been held that legislation by the Dominion (which was admittedly in relation to a matter not falling *strictly* within the enumerated subjects of section 91 and which at the same time admittedly related to a matter falling within one of the enumerated subjects of section 92) was legislation which could validly be enacted as ancillary to the exercise of the powers conferred by section 91. It has, of course, been pointed out frequently that you cannot proceed a step in such matters as bankruptcy and banking without directly altering the general law relating to property and civil rights; and matters which from a provincial point of view are "merely local and private" may, from the Dominion point of view, cease to be so and assume Dominion importance by reason of their relation to matters which have become subjects of legislation under section 91.

(1) [1912] A.C. 333.

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On the other hand, in the argument on the *Fisheries Case*(1), Lord Watson said:—

> If you except the liquor question, and I do not wish to re-open discussion about that with regard to the cases at the present moment, because some parts of them are not entirely satisfactory to my own mind, and I have a difficulty in reconciling them; but, apart from that, there is no warrant for saying that both may act effectively, except in this case there is one exception, the general law of the province relating to property and civil rights is subject-matter of legislation by the provincial legislature; and that general law, applicable to property and civil rights, governs a great many cases in which by section 91 exclusive power is given to the Dominion Government; but until that legislation is enacted the general law rules. Bankruptcy is an illustration.

I am not quoting this observation of Lord Watson's (made *arguendo*) as an authority on the construction of section 91. I quote it merely as a statement of fact shewing the state of the decisions in 1898, the year in which the observation was made.

I wish to emphasize the fact that up to the present time the only cases in which the courts have sustained the attempt on the part of the Dominion to exercise an ancillary overriding power have been cases in which the legislation regarded from the provincial point of view would be considered to be legislation dealing with a subject-matter falling within the classes of subjects included in No. 13 or No. 16 of section 92; and to suggest that when it is proposed to exercise such a paramount subsidiary power in relation to matters clearly falling within other classes specifically mentioned in that section great care ought to be observed in order to ascertain whether the Dominion has really been invested with the authority it claims to possess.

I venture to think with great respect that the point of view from which those two sections ought to be regarded is indicated in the following passage in

(1) [1898] A.C. 700.

the judgment of the Judicial Committee in *Citizens' Insurance Co.* v. *Parsons*(1), pp. 108 and 109:—

It is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in section 91; it is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practicable construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

Since the decision in the *Parsons Case*(1) the necessity of attending to the provisions of section 92 in ascertaining the limits of the enumerated powers conferred by section 91, has been illustrated in the follow-

(1) 7 App. Cas. 96.

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ing cases: In *Cunningham* v. *Tomey Homma*(1), it was necessary to consider the scope of the Dominion authority in relation to "Aliens and naturalization" in its bearing upon matters falling within the first of the articles of section 92 which invests the provinces with exclusive authority over the constitution of the provincial governments "notwithstanding anything in this Act." In *City of Montreal* v. *Montreal Street Railway Co.*(2), already referred to, the Dominion authority relating to Dominion railways had to be interpreted in its bearing upon the subject of provincial railways. In the *Marriage Reference Case*(3), the limits of Dominion authority in relation to "Marriage and Divorce" had to be considered with reference to the jurisdiction conferred upon the provinces in relation to "The solemnization of Marriage." In *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(4), Lord Watson pointed out that the exclusive character of the Dominion authority over a Dominion railway, *quâ* railway, does not exclude the power of the province to subject that part of it lying within the boundaries of the province to provincial taxation.

In the matter of railways the Imperial Legislature while conferring exclusive jurisdiction upon the Dominion in respect of certain classes of railways has, in the same breath, so to speak, declared that exclusive jurisdiction with respect to local railways is vested in the province. It seems to be pre-eminently a case (especially in view of the power conferred upon the Dominion by pursuing the course prescribed by the Act to assume complete jurisdiction over local works and undertakings) in which for interpreting and de-

(1) [1903] A.C. 151.
(2) [1912] A.C. 333.
(3) [1912] A.C. 880.
(4) [1899] A.C. 367.

fining the scope of the Dominion authority reference should be had to the terms in which authority in respect of railways is conferred upon the province.

Assuming, therefore, that there may be circumstances in which the Dominion possesses an overriding ancillary jurisdiction to legislate for a provincial railway as such, it is necessary — in determining the scope of the ancillary power and whether in any particular instance the circumstances have arisen which justify the exercise of it, — to decide that question in light of the facts that plenary legislative jurisdiction respecting the provincial railway has been specifically conferred upon the province; and that from the provincial point of view it is the province which was intended to be the final judge as to the desirability of any proposed legislation relating to the provincial railway.

It is to be noted that unity of control in respect of the management of the provincial railway and the constitution and powers of the company *quâ* railway company is not less important than unity of control in respect of the construction, alteration and repair of the railway itself. In the case of a street railway, for example, such matters as the control of rates, the compensation by way of division of receipts or otherwise to be paid by the company to the municipality or the province for the enjoyment of its privileges; the mutual rights and obligations of the company and the municipality in respect of the use, construction, maintenance and repair of highways and the incidence as between the company and the municipality of the cost of works required for the protection of the public; all these matters one would expect to find assigned as subjects of legislative jurisdiction to the same legislative

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authority. See *City of Toronto* v. *Bell Telephone Co.* (1), at pages 57 and 59.

In considering whether the order under appeal can be sustained as made in exercise of some ancillary power vested in the Dominion I wish to emphasize these features of the particular question before us. 1st. It seems to me to be quite clear that the Dominion would have no power to compel the municipality to do the specific things authorized by this order.

The Dominion authority might (what has not been done in this instance) determine that considerations of public safety arising out of the presence of the Dominion railway required that after a given date the highways in question and the Dominion railway should no longer cross each other by level crossings. The Dominion authority might also determine that in the event of the highways being carried over the railway by viaducts a stated portion of the cost should be borne by the Dominion company. But the question whether on the one hand the municipality should undertake the works necessary to carry the highway over the railway under the conditions laid down by the Dominion authority or whether in the alternative the highways should be closed would be a purely local question the determination of which is committed absolutely to the provincial authorities, that is to say, to the provincial legislature in the last resort, and it is impossible to see on what ground it can be pretended that the Dominion could be concerned in such a question as a matter affecting its control of Dominion railways. Assume, for example, that the ratepayers of Vancouver had refused to give the sanction of their approval to the scheme proposed by the Municipal

(1) [1905] A.C. 52.

Council. While the Dominion might stop the highway traffic over the Dominion railway until appropriate arrangements should be made I do not suppose it would be contended that it could force the municipality, against the express provisions of the provincial law governing the municipality as such, to construct the bridges in question. If in the local interest it were necessary that the bridges should be constructed then it is entirely in the hands of the provincial legislature in the last resort to compel the muncipality to act. So with regard to the Electric Company. The provincial authorities (in the last resort the provincial legislature) have full power to compel the Electric Company to act reasonably in relation to all interests concerned.

2nd. No Dominion interest is concerned in the provision of the order to which exception is taken.

I do not repeat what I have already said upon the point that the subject-matter the Board is dealing with in the order against the Electric Company is the subject of the reciprocal rights and obligations of the municipality and the Electric Company in respect of the use of the municipal highways. In respect of the construction of these bridges, the separation of grades having been decided upon, the only matters of Dominion concern from the point of view of the Dominion in exercising control of Dominion railways are these;—the convenience of the bridge in relation to the working of the railway; the sufficiency of the bridge for the support of the highway traffic which may concern the safety of the public in relation to the railway as well as the safety of the railway; and the proportion of the cost of construction and maintenance which ought to be contributed by the Dominion

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company as being an expenditure necessitated by the presence of the railway.

These matters being disposed of what Dominion interest remains to be provided for? In determining the proportion of cost to be assessed against the Dominion Company the Dominion authority may, of course, properly consider the fact that the bridges are to be used by a provincial railway in pursuit of a presumably profitable business; but that proportion being fixed how can the exercise of authority over Dominion railways be affected by the distribution of cost as between the municipality and the Electric Company? What necessity can there be for interposition in such matters by the Dominion railway authority?

One more relevant consideration appears to be as indicated in the judgment in *City of Montreal* v. *Montreal Street Railway Co.*(1), that the matter of the reciprocal rights and obligations of the Electric Company and the municipality is esentially a local and not a Dominion matter. The equities as between these local bodies in respect of the incidence of the cost of these viaducts cannot be fairly appraised without regard to their mutual obligations in respect of other matters; their relations must in any adequate view of them for the purpose of adjusting such equities be looked at as a whole. It is the local legislature or the appropriate local administrative body, which can best deal with these relations in their entirety. It must be observed that the power contended for is a paramount power and if this order is valid there could be no constitutional objection to a like order in face of express legislative enactment by the province to the contrary. I conclude that, if the point were to be determined on

(1) [1912] A.C. 333.

principle, apart from decided cases, the possession by the Dominion of the authority contended for is not essential to enable the Dominion to exercise its powers in relation to Dominion railways.

I come now to the decisions. The proposition said to be established by them is this:—ancillary authority is committed to the Dominion in relation to Dominion railways to adjust the burden of the cost of any work *authorized or required* by the Dominion railway authority in connection with the construction or operation of a Dominion railway among the persons, companies, and municipalities "interested in" or "affected by" such work. That is the formula which is said to be deducible from the decided cases. The formula leaves something to be desired in point of precision. Nobody disputes, of course, that there must be some limit upon this power which is ascribed to the Dominion as incidental to its authority respecting railways. The expressions "interested in" and "affected by" seem altogether too vague to furnish a reliable test for determining that limit. Then who is to decide the question whether a given person or company is "interested in" or "affected by" a given work? The suggestion appears to be that the question is to be determined finally as a question of fact by the Dominion railway authority. But in the absence of some governing principle by which the railway authority is to be guided it seems that in this view the whole matter is left at large and that the formula is worthless. The limit of the overriding jurisdiction of the Dominion in respect of a provincial railway as such cannot finally depend upon the view of a Dominion railway authority as to what in the particular circumstances is reasonable or equitable.

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When the cases relied upon are examined it seems to be perfectly plain that no such principle, if principle it can be called, is established by them. The three cases cited are: *City of Toronto* v. *Grand Trunk Railway Co.*(1); *The Carleton County Case*(2), and the *City of Toronto* v. *Canadian Pacific Railway Co.*(3). The first observation to be made upon these cases is that in none of them did any question arise as to the existence or the limits of an overriding jurisdiction in the Dominion in respect of provincial railways. In none of them was a provincial railway company concerned. There are some observations in the judgments delivered in the first and second cases (which were decisions of this court) of a very general character; but those observations in so far as they are material must be taken to have been superseded by the judgment of Lord Atkinson speaking on behalf of the Privy Council in the *City of Montreal* v. *The Montreal Street Railway Co.* (4). The decision of the *City of Toronto* v. *Canadian Pacific Railway Co.*(3) was a decision of the Privy Council. The dispute was a dispute between the municipality of Toronto and the Canadian Pacific Railway Co. The municipality had applied to the Railway Committee of the Privy Council for an order requiring the Canadian Pacific Railway Company to erect gates and keep a watchman at a place where the railway crossed one of the municipal streets, and as a measure of public safety the order was made; part of the cost of maintenance being assessed upon the municipality. After paying the contribution as directed for several years, the municipality disputed the authority of the Railway Committee in respect of that

(1) 37 Can. S.C.R. 232.
(2) 41 Can. S.C.R. 552.
(3) [1908] A.C. 54.
(4) [1912] A.C. 333.

part of the order. Before the Privy Council the order was impeached as an interference with the matter of civil rights in the province, and it was sustained.

With regard to this decision it may be observed: 1st. That the application to the Railway Committee was made by the municipality. As having control of highways the municipality would be certainly acting within its powers in requesting the Railway Committee to take action to compel the railway company to provide for the protection of the public and in submitting itself to such conditions as those imposed upon it in that case.

2ndly. It is one thing to say (where a highway crosses a railway or a railway crosses a highway by a level crossing), that it is within the jurisdiction of the Dominion as ancillary to its authority to make laws in relation to the railway to prescribe regulations with regard to the use of that part of the highway which is traversed by the railway with the object of securing the common safety of the public and the railway, or to require the municipality, consistently with the law governing the powers of the municipality, to concur with the railway company in taking measures for such common safety so long as the highway is used by the public; it is another thing to say that the grade of the highway being separated from the grade of the railway, the highway being carried over the railway, and all proper measures having been taken to secure the sufficiency of the highway, to support the highway traffic — it is another thing to say that in such circumstances it is within the province of the Dominion to regulate the traffic on the highway or to prescribe conditions (not aimed at the security

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of the public in relation to the railway or of the railway as affected by the presence of the highway), under which any particular kind of traffic shall be allowed to pass over it.

I cannot escape the conclusion that once the highway has been carried across the railway by means of overhead bridges and all conditions have been observed which the Dominion in the exercise of its discretion requires to be observed for securing the safety and efficiency of railway operation as it is or may be affected by the bridges and the safety of the public in using the highway as affected by the presence of the Dominion railway, then the matter of the regulation of highway traffic and of the terms as to tolls or otherwise upon which any particular class of traffic is permitted is purely a matter of local concern.

As to the position of the Electric Company I will only add to what I have already said, a reference to the fact that the agreement between the municipality and that company which, as I have already mentioned, both parties were empowered to enter into by an Act of the British Columbia Legislature, declares the terms and conditions upon which the Electric Company is entitled to use the municipal streets and the reciprocal obligations of the municipality and the company respecting the grading, repair and maintenance of those streets. There is also, as may be observed, a provision according to which the municipality shares in the gross receipts of the company. Their Lordships in the Privy Council, in passing upon *City of Toronto* v. *Canadian Pacific Railway Co.* (1), had not before them any question touching the power of the Dominion with regard to a matter of a nature

(1) [1908] A.C. 54.

so purely local as the rights of the electric company and the municipality *inter se* respecting the use of the municipal streets. Their Lordships treated the question before them as a question of how far the ancillary powers of the Dominion in relation to railways might extend to matters which *primâ facie* would fall within the heading "property and civil rights within the province." I think their Lordships' decision ought not to be treated as furnishing any principle governing the question which arises here.

In applying their Lordships' judgment to the determination of such a question it ought to be interpreted in the light of the subsequent judgment in the *City of Montreal* v. *Montreal Street Railway Co.*(1) and for the reasons already given upon the principles established by that judgment I do not think the order can be sustained.

There is another ground upon which the appeal ought, in my judgment, to succeed. Section 6 of the Act of 1909 is as follows:—

6. The said Act is amended by inserting the following section immediately after section 238 thereof:—

238*a*. In any case where a railway is constructed after the passing of this Act, the company shall, at its own cost and expense (unless and except as otherwise provided by agreement, approved of by the Board, between the company and a municipal or other corporation or person), provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway.

I have mentioned that the order in question was really made pursuant to leave given on the application of the Dominion railway company to cross the highway with its two industrial tracks in 1910. The enactment above quoted seems, therefore, to apply to the tracks laid down in 1910. On the evidence it is doubt-

(1) [1912] A.C. 333.

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ful whether the line built in 1909 was laid down before or after the passing of the Act of that year.

I cannot read section 6 as having no application to tracks such as those constructed in 1910. Each of these tracks was literally a "railway"; and the term "railway," as defined by the interpretation section, includes such tracks. I think the enactment referred to applies to every "railway" in the broadest sense constructed across a highway after the passing of the Act.

The Board had, therefore, no power to assess against the municipality or the Electric Company any part of the cost of works made necessary in consequence of the construction of the tracks of 1910; and since it is obvious the Electric Company and the municipality are (as they were intended by the Board to be) both charged by the order with part of the expenditure necessitated by the presence of these tracks, which included by the express terms of the order the *cost of depressing the tracks,* I think the order cannot be sustained.

ANGLIN J.—The appellant contests the validity of an order of the Board of Railway Commissioners on the grounds that (*a*) the "Railway Act" does not purport to authorize it; and (*b*), if it does, Federal legislation authorizing the making of such an order against the appellant, a provincial railway company, is *ultra vires.*

On the latter point the case is, I think, concluded against the appellant by such authorities as the *City of Toronto* v. *Canadian Pacific Railway Co.*(1); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de*

(1) [1908] A.C. 54.

Bonsecours (1) ; *City of Toronto* v. *Grand Trunk Railway Co.* (2) ; *County of Carleton* v. *City of Ottawa* (3), and *Re Canadian Pacific Railway Co. and The County of York* (4), at page 72.

On the former point I think it clear, apart from any difficulty presented by section 238*a*, enacted in 1909, that Parliament intended by sections 8(*a*), 59 and 237 and 238 (as amended by 9 Edw. VII. ch. 32) of the "Railway Act" (R.S.C. 1906, ch. 37) to confer jurisdiction on the Railway Board to determine who are "interested persons" and shall contribute as such to the cost of crossing-works and to distribute amongst them the burden of such cost.

When before the Board, the present appellant did not invoke or direct attention to section 238*a*, and the hearing would appear to have proceeded on the assumption that that provision did not apply. Nor was leave to appeal to this court granted in respect of any point which arises under it.

Although it would seem that two side-lines of the Vancouver, Victoria and Eastern Railway, crossed by one or both of the bridges in question, were constructed after the enactment of section 238*a*, there is no evidence that the main line of that railway was not built before section 238*a* was enacted. There are statements in the record which indicate that it was; and, nothing appearing to the contrary, this appeal should, I think, be dealt with on that assumption.

The crossing of the highway by the main line of the Vancouver, Victoria and Eastern Railway prior to the enactment of section 238*a* would give the Board jurisdiction to order the appellant company to bear a

(1) [1899] A.C. 367.
(2) 37 Can. S.C.R. 232.
(3) 41 Can. S.C.R. 552.
(4) 25 Ont. App. R. 65.

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portion of the cost of the crossing-works, and there is nothing to warrant an inference that the protection of a bridge-crossing was not rendered necessary by, and ordered on account of, the traffic on the main line of the railway. Neither is there anything to shew that the amount which the appellant will be required to pay is any greater by reason of the existence of the two side-lines subsequently built (if, indeed, such an increase would warrant interference with the order on jurisdictional grounds); and I know of no reason why anything should be assumed in favour of the appellant which might adversely affect the jurisdiction of the Board.

The appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR J. (dissenting) agreed with Duff J.

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Solicitor for the respondent, the City of Vancouver: *John G. Hay.*