THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE CANADIAN PACIFIC RAILWAY COMPANY..... APPELLANTS;

1909
*Nov. 29, 30.
1910
*Feb. 15.

AND

THE CITY OF TORONTO..... RESPONDENT.

(TORONTO VIADUCT CASE.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Jurisdiction of Board of Railway Commissioners—Deviation of tracks—Separation of grades—"Highway"—Dedication—User—Public way or means of communication—Access to harbour—Navigable waters—Construction of statute—"Special Act"—R.S.C. 1906, *c.* 37, *ss.* 2(11) (28), 3, 237, 238, 241; 56 *V. c.* 48(*D.*).

Prior to 1888, the Grand Trunk Railway Company operated a portion of its railway upon the "Esplanade," in the City of Toronto, and, in that year, the Canadian Pacific Railway Company obtained permission from the Dominion Government to fill in a part of Toronto Harbour lying south of the "Esplanade" and to lay and operate tracks thereon, which it did. Several city streets abutted on the north side of the "Esplanade," and the general public passed along the prolongations of these streets, with vehicles and on foot, for the purpose of access to the harbour. In 1892, an agreement was entered into between the city and the two railway companies respecting the removal of the sites of terminal stations, the erection of overhead traffic bridges and the closing or deviation of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act (56 Vict. ch. 48), providing that the works mentioned in the agreement should be works for the general advantage of Canada. To remove doubts respecting the right

*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

1909

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

of the Canadian Pacific Railway Company to the use of portions of the bed of the harbour on which they had laid their tracks across the prolongations of the streets mentioned, a grant was made to that company by the Dominion Government of the "use for railway purposes" on and over the filled-in areas included within the lines formed by the production of the sides of the streets. At a later date the Dominion Government granted these areas to the city in trust to be used as public highways, subject to an agreement respecting the railways, known as the "Old Windmill Line Agreement," and excepting therefrom strips of land 66 feet in width between the southerly ends of the areas and the harbour, reserved as and for "an allowance for a public highway." In June, 1909, the Board of Railway Commissioners, on application by the city, made an order directing that the railway companies should elevate their tracks on and adjoining the "Esplanade" and construct a viaduct there.

Held, Girouard and Duff, JJ. dissenting, that the Board had jurisdiction to make such order; that the street prolongations mentioned were highways within the meaning of the "Railway Act"; that the Act of Parliament validating the agreement made in 1892 was not a "special Act" within the meaning of "The Railway Act" and did not alter the character of the agreement as a private contract affecting only the parties thereto, and that the Canadian Pacific Railway Company, having acquired only a limited right or easement in the filled-in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communication between the streets and the harbour.

APPEAL from an order of the Board of Railway Commissioners for Canada by leave of the Board on a question of law and on a question of jurisdiction by leave of Mr. Justice Duff.

The material facts on which the order of the Board was based are sufficiently set out in the above head-note. The order, omitting the portion respecting damages and costs was as follows:—

"In the matter of the application of the City of Toronto, hereinafter called the "city," for an order directing the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company, hereinafter called the "railway companies," to carry York

Street and certain other streets in the said city under the tracks of the said railway companies.

"Upon hearing the evidence, and counsel for the city, the railway companies, the Toronto Board of Trade and a number of land-owners in the said city—

"It is ordered and directed:—

"1. That the railway companies, within two years from the date of this order, construct a four-track viaduct from a point west of John Street to a point at or near Berkeley Street, with three tracks on either side of such viaduct east of Church Street, at the present grade of the Esplanade, with all necessary cross-overs and as shewn on a plan filed by the Grand Trunk Railway Company on April 27th, 1909, except where changes as hereinafter set forth are necessary, and except that Bay and Yonge Streets shall each have a total width of eighty feet between abutments under the viaduct, and that from the point of junction of the Canadian Pacific Railway Company and the Grand Trunk elevated tracks at or near Berkeley Street to Scott Street, the centre line of the viaduct shall be located on the southerly boundary of the Esplanade, except at the curve in the tracks in the vicinity of West Market Street.

"2. That the Canadian Pacific Railway Company elevate two tracks from the point at or near Berkeley Street where the said tracks will connect with the tracks on the viaduct referred to in paragraph 1, to Queen Street, providing a clear headway of fourteen feet over the following streets, Parliament, Trinity and Cherry, and a clear headway of ten feet over Vine and Front Streets; and that the railway companies construct a bridge to carry the highway at Eastern Avenue over the railway tracks with a clear headway

1909

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

of twenty-two feet six inches over the base of the rail; the openings at Front and Vine Streets to be each thirty feet between abutments and at Parliament, Trinity and Cherry Streets to be each a width of sixty-six feet between abutments.

"3. That the Grand Trunk Railway Company, within two years from the date of this order, elevate two tracks from the point at or near Berkeley Street where the said tracks will connect with the tracks on the said viaduct, to Logan Avenue, providing a clear headway of fourteen feet over the following streets, Parliament, Cherry, Eastern Avenue and Queen Street, and ten feet over Trinity Street.

"4. That the railway companies, within two years from the date of this order, construct bridges to carry the highways at John Street and Spadina Avenue over the tracks on the said viaduct or the extension of the said tracks westerly, with a clear headway over the base of the rail of twenty-two feet six inches.

"5. That the Canadian Pacific Railway Company be permitted to construct and maintain two tracks at grade, one on either side of its elevated tracks, that on the north side commencing at or near Queen Street and crossing the intervening streets between Queen and Parliament Streets, and that on the south side commencing at or near the Don Esplanade, crossing intervening streets and passing under the Grand Trunk Railway Company's elevated tracks referred to in paragraph 3, between Parliament and Berkeley Streets, with a clear headway of seventeen feet and an opening of the width of seventeen feet, measured at right angles to the track.

"6. That the Grand Trunk Railway Company be permitted to construct and maintain a track, at grade,

at or near Berkeley Street, under the tracks of the Canadian Pacific Railway Company, referred to in paragraph 2, with a clear headway over the base of the rail of seventeen feet. The width of the opening under the said tracks to be seventeen feet, measured at right angles to the track.

"7. That concurrently with the completion of the works ordered in paragraphs 1, 2 and 3, and as soon as the railway companies can operate their trains thereon, the railway companies shall alter and arrange their yards and sidings so that no tracks on ground level shall cross Bay Street, Yonge Street or Church Street, in the said city.

"8. That after the completion of the work ordered in paragraphs 1, 2 and 3, and as soon as the railway companies can run their trains thereon, no locomotive or car be moved on tracks at ground level between Church Street and Parliament Street during the months of May, June, July, August and September, except between the hours of 10 p.m. and 6 a.m.; Provided, however, that cars containing fruit or other perishable merchandise may be moved across streets within the said limits at any time when a flagman on foot precedes the train (engine, car or cars) to warn persons on such streets that a train is approaching.

"9. That the city shall, within one year from the date of this order lay out, complete and dedicate a new street south of the viaduct, from the easterly limit of Church Street produced to the westerly limit of Berkeley Street produced, which shall have a width of at least forty-seven and one-half feet, and acquire the lands necessary therefor, and pass all necessary by-laws for that purpose; and shall grade the said street; the share of the cost of such work as between

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

the railway companies to be reserved for further consideration, along with the questions covered by paragraph 14 hereof.

"10. That the said street shall be paved by the city, pursuant to its powers under the Municipal Act, the Canadian Pacific Railway Company to pay one-half the cost of paving."

Armour K.C. and *MacMurchy K.C.* for the Canadian Pacific Railway Co.

Blackstock K.C. for the Grand Trunk Railway Co.

Dewart K.C. and *Chisholm K.C.* for the City of Toronto.

GIROUARD J. (dissenting).—We have been treated to an interesting though rather long history of certain lands and water lots in front of the city of Toronto, for many years known as the Esplanade, going as far back as old Muddy York in 1818. As I understand the case, I do not think it is at all necessary, for the purposes of this appeal, to go so far back. It cannot be denied that from 1855 and after, the Grand Trunk Railway Company had been authorized to use, and did in fact use, certain parts of the Esplanade for the purposes of their railway, and that likewise in 1888 the Canadian Pacific Railway Co., in right of the Quebec and Ontario Railway Co., held water-lots to the south of the Esplanade which they filled in, and where they put their tracks, yards and sheds and have used them ever since, subject to certain subsequent alterations. The location and operation of these railways were made not only with the consent of the corporation of the City of Toronto, but also with the ex-

press approbation of the competent legislatures. If the present Railway Commission had not been created with most extensive, and even legislative powers, I would feel inclined to apply the rule held by the Privy Council in the case of the *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.* (1), but I believe that now that decision cannot have any application.

Here the applicant is not the Attorney-General claiming a *jus publicum* over certain railways, but the Railway Commission first *ex proprio motû*, and later on, on the special application of the City of Toronto, has taken cognizance of the situation and has ordered certain works to be done for the "protection, safety and convenience of the public," crossing over certain railways. Extraordinary powers, far exceeding any existing in the Railway Acts of any other country, are given to the Railway Board, and it might be possible that the Board had jurisdiction to issue the order given to build a viaduct and other works specified in the Order No. 7,200, dated 9th June, 1909, unless prohibited by some statute from so doing.

The reasons advanced by the Commissioners for giving this order may be unreasonable, and the work to be done even absurd; this court has nothing to do with any such possibilities, and unless it can be shewn that the Board has no jurisdiction or acted contrary to the Railway Act, this court cannot interfere, for the Board can do almost anything in relation to railways, except when prohibited by Parliament. As we held in a recent case, *In re Canadian Northern*

(1) [1906] A.C. 204.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Girouard J.

Railway Co.(1), the Board cannot change the "Railway Act" of the Parliament of Canada; and I have arrived at the conclusion that, in this instance, they have violated that Act, because the subject matter of the order given by them has already been provided for by the parties and the legislatures interested, not exactly in the same manner and by the same kind of works, that is a viaduct, but by other works which had been found satisfactory to all intents and purposes and must stand until otherwise ordered by Parliament.

There is no doubt that the two railway companies all along, from the very first day they obtained possession of their lands in front of the City of Toronto for the purposes of their railways, knew that the cross streets abutting on the Esplanade might one day be prolonged to the water's edge, so as to afford public access to the front lots and to the bay or lake, in a convenient and safe manner, due regard being given to the growth of a progressive commercial city. All the plans and documents produced shew the possible prolongation of these cross streets. The two railway companies soon realized the situation and finally came to an arrangement with the City of Toronto to secure this end. On the 26th July, 1892, they came to an agreement called the Esplanade or Tripartite Agreement, which was confirmed by the Ontario Legislature, 55 Vict. ch. 90, and also by the Parliament of Canada, 56 Vict. ch. 48. Expensive works were executed, for instance overhead traffic bridges with approaches for vehicles and foot passengers, the closing of certain streets, the deviation of others, the acquisition, aban-

(1) 42 Can. S.C.R. 443.

donment and exchange of lands, the raising and removal of tracks, including the erection of a vast Union Station, etc. The construction of these heavy works involved the expenditure of large sums of money amounting to several millions, the Union Station alone having cost the railways $1,370,000, and was approved of by the Parliament of Canada by Vict. ch. 48. It must be observed with reference to the opinion of the learned chairman of the Board that this agreement entirely excluded forever the proposition of a viaduct. I find in his opinion a fair recapitulation of these works, comprehensive enough to give some idea of their magnitude. He says:—

On July 26th, 1892, the city, the Grand Trunk Railway Company and the Canadian Pacific Railway Company, the latter representing also the Toronto, Grey and Bruce Railway Company, the Ontario and Quebec Railway Company and all its other leased lines, entered into what is called the "Esplanade Tri-partite Agreement" in which appear most elaborate provisions relating to the rights of the railway companies upon the Esplanade and for the construction of the Union Station. I deal with only a few of its provisions: Par. 4 provided for the erection of private overhead bridges. (5) The city agreed to prevent the public crossing the tracks on the Esplanade between Yonge and York Streets, except at Bay Street, and the Grand Trunk Railway Co. waived its contention that it was not liable to contribute to the cost of making or protecting level crossings at Church, Yonge and Bay Streets. (7) Provided for the construction of the York Street bridge and declared it to be a public highway. (9) Provided for deviating York Street, closing a portion of it and the Esplanade. (10) The Grand Trunk agreed to construct the John Street bridge. (11) Provision was made for closing Esplanade from York Street to Brock Street and portions of Simcoe, Peter, and John Streets. (15) The railway companies agreed to pay $15,000.00 to the city for conveyance of the portions of streets agreed to be closed. (17) The city consented to the Grand Trunk Railway Co. obtaining a patent from the Crown of the prolongation of Peter Street and the companies consented to the city obtaining a patent of the prolongation of Simcoe and York Streets, all to the Old Windmill Line.

It is alleged that the Dominion statute, 56 Vict. ch. 48, merely recognized the capacity of the parties

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Girouard J.

to enter into such an agreement. The Dominion statute could not give capacity to the City of Toronto. This was done by the Ontario statute. The Dominion statute was necessary to make the scheme agreed to permanent and final until otherwise provided for by Parliament.

Section 1 enacts that

> all works done or to be done in order to give effect to the agreement hereinafter mentioned, as well as those affected by it, are hereby declared to be works for the general advantage of Canada.

They cannot, therefore, be considered as private works of railway companies. They are to all intents and purposes federal works remaining under the exclusive jurisdiction of the Dominion Parliament, under section 92, par. 10, of the British North America Act.

Some authorities have been quoted by the Railway Board to the effect that although an agreement between the parties be ratified by an Act of the Legislature, it still remains a private contract. See *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Railway Co.*(1), at page 468. But this Ontario case is not a parallel one, for it was a mere ratification of an agreement without any such clause as is found in section 1 of 56 Vict. ch. 48, and therefore has no application.

Some reference has also been made by counsel to a decision of the Ontario High Court, confirmed by the Court of Appeal, with respect to the Yonge Street bridge. This decision may affect some other branches of the case, which I do not intend to deal with, but has no bearing upon the point under consideration. It is not even mentioned in their judgments(2). It is

(1) 25 Ont. App. R. 462.

(2) *Yonge Street Bridge Case*, 6 Ont. W.R. 852; 10 Ont. W.R. 483.

only fair to add that the Railway Board does not refer to this decision.

The Railway Commission now proposes to destroy all those works and provide a new scheme still more elaborated and "enormously expensive," observes the chairman, even before ascertaining the financial aspect of the enterprise, for the purpose of giving protection, safety and convenience to the public; involving also the erection of a new Union Station. Can they do so, or is it necessary to apply to the Parliament of Canada? That is the whole question. Section 3 of the Railway Act says in express terms that:

> Where the provisions of this Act or of any special Act passed by the Parliament of Canada, relate to the same subject matter, the provisions of the special Act shall, in so far as is necessary to give effect to such special Act, be taken to override the provisions of this Act.

Then section 2, par. 28, says:

> "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.

The Railway Board considers "that the fair meaning of the words *with special reference to such railway* is with respect to the *construction or operation* of the railway"; but this is not what the statute says. The interpretation given by the Board has reference only to one part of sub-section 28, and says nothing of the enactment "with special reference to such railway." I cannot understand, moreover, how there can be any doubt that 56 Vict. ch. 48 is an Act having special reference to the railways on the Esplanade. But even if we were to take the interpretation given by the Board, it seems to me that all the works executed under the Tripartite Agreement are works dealing with the construction and operation of the railway.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Girouard J.

I finally submit that the Railway Board has no jurisdiction over the subject matter, which has been fully dealt with and settled by that Special Act of the Parliament of Canada, and that the Dominion Parliament can alone deal with it again. The Railway Board seem to be conscious of the difficulty they are labouring under, for the chairman remarks in his opinion that "both the agreement and the clauses of the General Act deal with public protection, safety and convenience," and therefore with the same subject matter.

It is finally contended that on the 19th of May, 1909, and before the order in council in question in this case was settled, the above legislation was swept away by section 8 of 8 & 9 Edw. VII. ch. 32. The decision upon the point in dispute was pronounced long before it was passed, although the formal order was not settled until after. I cannot see how this amendment to the Railway Act can have that effect. I do not see how it can have any application, as that amendment is not a mere matter of procedure, but a matter of jurisdiction affecting vested rights. It would be iniquitous to apply such a statute to a case like the present one without an express enactment to that effect. *Williams* v. *Irvine*(1). See also decisions quoted in Am. & Eng. Encycl. of Law, *vo.* "Statutes," page 693, *notes* (2 ed.).

I would, therefore, allow the appeal of the Canadian Pacific Railway Company and the Grand Trunk Railway Company of Canada, with costs against the City of Toronto.

DAVIES J.—This is an appeal upon questions of jurisdiction and law from an order of the Board of

(1) 22 Can. S.C.R. 108.

Railway Commissioners directing the elevation of certain railway tracks of the Grand Trunk Railway and the Canadian Pacific Railway, in the City of Toronto.

The proceedings began by an application on the part of the two railway companies for the Board's approval of plans for a new Union Station at Toronto, which involved necessarily what the elevation of the station should be as well as those of the railway tracks that entered it.

The Board during the hearing of the application and thinking the occasion opportune to consider the elevation of these tracks for the protection, safety and convenience of the public directed the city to make the necessary application and the city did so.

The jurisdiction of the Board to make the order it did is challenged upon two grounds; one that there was no highway within the meaning of the 238th section of the Railway Act, upon or along or across which the Canadian Pacific Railway was constructed which was admittedly necessary to give jurisdiction; the other that the matter in dispute and disposed of by the order related to the same subject matter as that dealt with by a special Act of Parliament, and by section 3 of the Railway Act, R.S.C. 1906, in such case

> the provisions of the special Act shall in so far as it is necessary to give effect to such special Act, be taken to override the provisions of this Act.

As stated by the Chief Commissioner in his opinion when granting the order in question:

> The one broad question for determination is whether this separation of grade shall be accomplished by the city streets being carried over the lines of railway tracks or whether the latter should be carried over the streets.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

The special Act invoked as ousting the jurisdiction of the Board was one passed in 1893, declaring (1) all works to be done or in pursuance of the agreement therein mentioned to be works for the general advantage of Canada; (2) an agreement dated 26th May, 1892, made between the Grand Trunk Railway Company, the Canadian Pacific Railway Company and the City of Toronto "to be in force and binding upon the parties thereto"; and (3) that each of the parties might do what was necessary to carry out its undertaking under that agreement.

The Act did not profess to embody the agreement or to make it part of the statute. Its first provision was necessary as the Union Station provided for was for the use and benefit of two Dominion railways, and as there might be doubts whether the railways or the city had the power to bind themselves in the several respects they did the agreement was declared to be binding upon the parties to it each of whom was authorized to carry out its undertaking as specified in the agreement.

Substantially the agreement provided for the erection of a new Union Station in the City of Toronto for the necessary opening, deviation and closing of certain specified streets, consequent upon its erection, for the construction of York Street bridge, and for the prevention of the public crossing over the tracks of the railways on the Esplanade between Yonge and York Streets. Incidentally no doubt these provisions had in view and did not ignore the public safety, but their object and purpose was to enable the Union Station to be erected and provide for access to it by the railway tracks and the public.

By no reasonable construction of language can this

Act be called a special Act dealing with the "safety, protection and convenience of the public" as those words are used in the amended section 238 of the Railway Act.

The agreement sanctioned by Parliament was a private agreement made between the railways and the city in which no doubt some public interests were considered, but which mainly concerned the interests of the respective parties. Like many other agreements it may have to be interfered with or perhaps overridden either in whole or in part by the Board while exercising their important functions and duties, and as in the case before us where they find it necessary to order anything to be done for the public safety or protection to the prejudice or damage of a corporation or company they take care to consider that fact in awarding the proportion of cost which such interested party must bear in the works ordered.

I have not any doubt that this Act is not such a one as could oust the jurisdiction of the Commissioners under section 238 of the Railway Act.

The main contention, however, of the Canadian Pacific Railway Co. was that there was no "highway" upon, along or across which its line of track was constructed which alone could give the Board jurisdiction.

On this question we had prolonged arguments in which the historical aspects of the case as well as the legal ones were thoroughly examined.

I do not think it necessary to go back further than the date when and the authority under which the "Don Branch" was constructed.

That branch railway adjoins on the south the Esplanade along the southern portion of which the tracks of the Grand Trunk Railway are laid.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

By common consent that Esplanade is a highway and all the streets leading to it from the city are highways, and at the time the Don branch was authorized to be constructed the waters of the harbour washed against the southern side of the Esplanade.

No one disputes the right of the public to reach the waters of the lake or harbour along these streets and across this Esplanade, and no question of jurisdiction could be raised by the Grand Trunk Railway Co. if the proposed work related to its road alone.

The judgment of the Judicial Committee in the case of *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.*(1), was invoked in support of the proposition that the construction of the Don branch of the Ontario and Quebec Railway, by the Canadian Pacific Railway Co. as the lessee of that railway effectually and legally obstructed and put an end to any rights of passage previously and at the time existing across the lands or waters on and over which such branch was built.

For my part I am quite unable to see how the decision in that case applies to the one we have now before us. In the British Columbia case above cited the Judicial Committee held that the special Act authorizing the construction of the Canadian Pacific Railway authorized the taking by the railway company of all Crown lands provincial as well as Dominion necessary for the undertaking; that a proper construction of sections 91 and 92 of the British North America Act authorized the Dominion Parliament to dispose of provincial Crown lands for the purposes of this Interprovincial railway; that the Dominion Government had issued a Crown grant to the Canadian Paci-

(1) [1906] A.C. 204.

fic Railway Co. under section 18(*a*) of their incorporating Act including all the foreshore in question at the street ends; that apart from this the foreshore in question being found as a fact to be a part of the harbour of Vancouver was clearly subject to Dominion legislation; that section 18 of the Canadian Pacific Railway Act gave the necessary authority to the company to take the foreshore there in dispute for the purposes of the railway; that the company had properly exercised the powers so given to them and appropriated the foreshore; and that such appropriation of necessity included the right to obstruct any rights of passage previously existing across that foreshore.

In the case before us there is no exercise of any power or right arising under the Canadian Pacific Railway Act, nor is there any analogous or similar Dominion legislation to that authorizing the construction of this "Don branch." No grant has been made to the Ontario and Quebec Railway Co. or to the Canadian Pacific Railway Co., its lessee, of any part of the lands; the sole right or authority which the company has or had to construct its line in the place it has constructed it along and adjoining the south side of the Esplanade and in front of the streets leading from the city to the harbour is to be found in (1) the order in council of the 25th January, 1887; (2) 51 Vict. ch. 53, confirming the said order in council; (3) the order in council 23rd March, 1893, for a grant to the Canadian Pacific Railway Company of an easement "for railway purposes over the extensions of the streets from Berkeley to Bay streets"; and (4) the grant to the company following and in pursuance of that order in council.

The question is: Did these orders in council, this

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

statute and this grant give or convey to the Ontario and Quebec Railway Co. or to its lessee, the Canadian Pacific Railway Co., anything more than a bare easement or right to construct its branch line on the location specified and defined in the orders in council and the grant and subject to the limitations expressed in those documents and without prejudice to the public rights of communication with the waters of the harbour?

The contention of the appellants is that they got a title to the exclusive occupation of the spaces which formed the prolongations of the several streets and had a good title thereto in fee simple or if not that at least an exclusive license of occupation under which they had spent large sums of money and which could neither be derogated from nor revoked by the Crown.

I am quite unable to accept this contention. The first order in council of January, 1887, did nothing more and professed to do nothing more than sanction the building of a branch line of the Ontario and Quebec Railway, called the "Don branch," under six miles in length, pursuant to the provisions of the 18th subsection of sec. 7 of the Consolidated Railway Act, 1879; and approve of the maps and plans submitted shewing the location of the line, and fixing the time for construction as the 30th November, 1887.

In May following, 1888, the statute 51 Vict. ch. 53, was passed which amongst other enactments declared that the Ontario and Quebec Railway Company

> might at any time *within three years* from the passing of the Act construct and complete the branch of its line referred to in the said order in council of 25th January, 1887.

This Act gave no new nor further power or authority for the construction of the branch than that

given by the order in council. It merely extended the time within which the work had to be completed.

Sub-section 7 of the General Railway Act of 1879, under which the governor in council alone had power to sanction the building of the branch line, prescribes the conditions which must exist before the sanction sought for is given, and amongst them is the deposit in the County Registry office of the maps and plans indicating the location of the line, which plans the governor in council must approve of before the company could exercise its powers of expropriation.

Turning to plan No. 7, which was filed in the Registry office and submitted to and approved of by the governor in council in the above order which plan is signed by the president of the Canadian Pacific Railway Co., by the Deputy-Minister of Railways and Canals and certified by the Registrar as having been deposited in the Registry Office it appears that the several streets from Berkeley Street to York Street, twelve or thirteen in number, are clearly and distinctly shewn as prolongations of the streets opening on and upon Esplanade Street out into the harbour as far as the Windmill Line.

The proposed line, sanction for the building of which was thus sought, necessarily crossed each of these streets or prolongations of streets which at that time of course were south of the Esplanade covered with water. All that appeared in the map or plan therefore which the governor in council was asked to approve was certain streets, sanction for the crossing of which was sought and obtained.

It would be a singular construction to place upon such a sanction that it operated to shut up and close the street, and enabled the railway company after

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

expropriating the lands of the private owners and building its roadbed, absolutely to shut out the public from access to the harbour from the city and *vice versâ*.

In my judgment this order in council and statutory extension of time with the implied confirmation contended for gave the company no power whatever to enter and construct their railway on these Crown lands which formed part of the harbour and were designated as streets on the plan.

It merely gave the sanction required by the then general Railway Act to the construction of the branch and so enabled the company to take steps to purchase or expropriate the lands necessary for the purpose or so far as they were Crown lands to obtain a right to cross them on such terms as the Crown chose to impose, or a deed or conveyance of the lands if the Crown chose to give it.

Without however taking any such steps as far as these intervening spaces called streets on the plan were concerned, and without any other authority than the order in council and the statute referred to, the company entered and built their road and operated it till 1893, when the discovery of their utter want of title was made.

Now what are the facts proved with respect to these intervening spaces in the harbour called streets as they abutted on the Esplanade at the time before and when the Don branch was built. Evidence was given and not contradicted that so far as eight or nine of them were concerned the city had constructed wooden slips, as they were called, at their junction with the Esplanade, which slips had been used by the public for years with horses and carts or wagons as ways or communications

with the harbour for the purpose of getting lake water and selling the same to the citizens of Toronto. The watermen drove their horses and carts across the Esplanade and down these slips, procured the water they required and crossed back again. The public in other ways used these slips or wooden ways built upon stone and secured by piles driven in the bed of the lake for the ordinary purposes of leaving the city to go upon the lake or getting to the city from the lake.

There is not a scintilla of evidence that such right of way or passage was ever called in question by anyone.

The introduction into the city of water by means of pipes of course put an end to the necessity for continuing this manner of using these ways to obtain water, so that when the Canadian Pacific Railway Co. built in 1888 the Don branch abutting upon the Esplanade and running across these prolongations of streets while the foundations and remains of the slips were there and were covered up by the railway filling the special user of them as a means of procuring water had ceased.

So far as the crossing at the foot of Yonge Street is concerned the question whether it had been prolonged beyond the Esplanade and constituted a public way or crossing was tried some years ago before the High Court of Ontario at great length with the result that the Court found in favour of the public right and the finding of Mr. Justice Anglin, the trial judge, supported by elaborate and convincing reasoning was on appeal confirmed by the unanimous judgment of the Court of Appeal.

The leading opinion of that court delivered by Chief Justice Moss leaves no doubt upon my mind that the evidence in that case fully justified the findings.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

There is no doubt that no such ample evidence was or could be procured with respect to the user of the ways or communications from the other streets to the harbour. Such a public and continuous user as was shewn always to have existed at Yonge Street after the Esplanade was constructed, did not, of course, exist at the ends of the other streets, but as I have stated evidence of some user though perhaps slight was given.

Pausing for a moment at this point in the chronological statement of the facts let us see what was the legal situation in the year 1888 when the Don branch was built.

The public right of access to and from the streets to and from the waters of the harbour had not been denied or prevented.

The Canadian Pacific Railway Co. simply filled up the harbour, level with the Esplanade, opposite to the ends of the streets and filled in with planks between the rails of their railway, thus giving the public the same right of access as they previously had and practically and *de facto* if not *de jure* extending the highways or streets and Esplanade to the extent of the width of their embankment on the prolongation.

That condition continued until the year 1893 without any attempt being made to exclude the public from the user of the Don branch as a street or highway in so far as it was prolonged into the harbour opposite to the streets leading to and on the Esplanade from the city.

Discovery had then been made that the branch had been constructed across the Crown property in these prolongations of streets without authority. Application was made, by the Canadian Pacific Railway

officials, to obtain that authority and the order in council of March, 1893, was, on report from the Minister of Railways, granted.

This order in council sets out the existence of the application by the Canadian Pacific Railway Co. to have been for a

grant of the right to construct, maintain and use for railway purposes two or more railway tracks and appurtenances and the roadbeds therefor on and over eleven parcels of land, etc.

Then follow the descriptions of these parcels severally as the prolongations of the respective streets leading to and across the Esplanade.

The order in council recites the representations of the company on which they sought to have the order granted to have been that these lands were "held by the Government in the interests of Canada" and

under the impression that the order in council of 25th January, 1887, and the Don Act, 51 Vict. ch. 53, gave the company the right to do so, it some time ago constructed tracks over the said lands and had been using them for railway purposes but, having been advised that this right was not complete unless the approval given by the order in council be followed by a formal grant, it now prayed *that its right to use the said tracks* be confirmed by such a grant.

The order in council further recited that

the company further points out that the giving of this easement will not interfere with the Crown granting to the City of Toronto or to any other party *a full title to the said parcels of land subject only to the use for railway purposes* above mentioned.

The order in council therefore recommended

that there be granted to the Canadian Pacific Railway Co., its successors and assigns in perpetuity, the right to construct, maintain and use for railway purposes two or more railway tracks and appurtenances and the roadbeds therefor on and over the said eleven parcels of land, etc.

The grant followed in the same terms as the order in council recommended and was dated 10th June, 1903.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

Next in order came the Crown grant from the Dominion Government to the City of Toronto of these eleven parcels of land being the eleven street prolongations from the Esplanade southward to Lake Street, which was reserved for a highway. This grant was dated 28th November, 1894, and was given to the corporation

> in trust that the corporation, its successors and assigns should use each of the said parcels as and for a public highway either in the shape of a water-slip as portion of Toronto Harbour or as a street, or as partly one and partly as the other as to the corporation should seem meet, subject always to the terms and conditions in respect of the same embodied in the agreement dated 15th March, 1888, between the corporation, the Canadian Pacific Railway Co. and certain riparian owners known as "The Windmill Line Agreement."

This "Windmill Line Agreement" to the terms and conditions of which this grant was thus made subject does not, for the purposes we are discussing, in my judgment, affect the result.

The legal result which followed these several orders in council and grants was to vest the title of the soil in all these prolongations of the streets beyond the Esplanade and between it and Lake Street, in the corporation of the City of Toronto in trust to use them as public highways as expressed in the grant with a right to the Canadian Pacific Railway Company to use for railway purposes two or more railway tracks and the roadbeds therefor across the parts of these prolongations of streets immediately adjoining on the south the Esplanade.

It gave the company this easement and nothing more. Subject to that easement the land became the city's in trust for public streets or slips or both as the corporation should decide.

The legal result was that the Canadian Pacific

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

Railway tracks and roadbed which up to this time had been a *de facto* street or highway, subject to the railway easement, became on and afterwards one *de jure*, just as the adjoining tracks and road bed of the Grand Trunk Railway on the Esplanade were parts of a public highway subject to a similar easement.

The public right of access to the waters of the harbour had been, so far as the Crown could do so, secured and placed beyond doubt and the Crown's title in these extensions of the streets transferred to the city in trust for the public as highways or streets or slips. Under the statutory powers given the Crown with respect to the beds or soil of public harbours there can be no doubt as to the validity of this grant to the city or as to its effect as vesting the fee in the soil in the city corporation.

Suppose that at any time the city had determined to execute this trust and fill up any one of these street extensions or prolongations with earth from the Canadian Pacific Railway roadbed to Lake Street and had sent down their horses drawing carts filled with clay for the purpose, is it conceivable that the Canadian Pacific Railway Co. could have prevented them crossing their roadbed from the Esplanade in order to carry out the purpose of the corporation in so fulfilling its public trust?

The only right the Canadian Pacific Railway Co. had was one to an easement for railway use and subject to that, in my opinion, the right of the city to have its carts cross the railway from the embankment to fill and construct the street prolongations was incontestable.

Suppose again the city had completed its purpose and carried out its trust with regard to any one or

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Davies J.

more of these street prolongations south of the Canadian Pacific Railway tracks to the extent of say one hundred yards or more of the distance towards Lake Street would not there be alike a *de jure* and a *de facto* crossing there, a road, a street, a way which the public could use of right which the Canadian Pacific Railway Co. beyond their right of user of their own tracks for railway purposes could not interfere with?

Now for a moment let us look at the Railway Act and the nature or kind of highway which must exist to give the Board of Railway Commissioners jurisdiction under the 238th section.

The word "highway" is used in the section and is defined in sub-section 11 of sec. 2 of the Railway Act as including "any public road, street, lane or other public way or communication." If the public right of access between the city and the harbour by way of the streets and the Esplanade is not a public "road, street or lane" it is in my judgment a "public way or communication." These latter words, I would humbly submit, are peculiarly apt to describe the public right of access I am speaking of and which the Board of Commissioners on ample evidence found to exist.

If I am wrong in that even then I hold that the various orders in council and grants following them, vesting in the company and the city the several rights and titles in these street extensions I have before referred to coupled with the *de facto* filling in of these streets for the full breadth of the Don branch roadbed extended the streets, at any rate to the extent of that filling in, as far as the waters of the harbour and thus gave jurisdiction to the Board. There was originally a *de jure* "way or communication" which ripened on the filling in into a *de facto* public road or

street the legal title to which was vested in the city in trust for the public as a street but subject to the railway easement.

With regard to the minor but important questions as to the legal exercise by the Board of their jurisdictional powers, I am satisfied to rest my judgment upon the reasoning of Anglin J., with which I concur. The appeal therefore should, in my opinion, be dismissed with costs.

IDINGTON J.—The question raised is whether or not the Board of Railway Commissioners had jurisdiction to make the order complained of.

The order rests on section 238 of the Railway Act as it stood as amended by 8 & 9 Edw. VII. ch. 32, section 5, of which the first sub-section, and that most material herein, is as follows:—

> Where a railway is already constructed upon, along or across any highway, the Board may, upon its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

The material facts are in a narrow compass. The City of Toronto fronts upon the navigable water of

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

Lake Ontario. There is a street of the city now known as Front Street running parallel with the lake shore. Between that and the lake there was formed at an early date a parallel street known as Esplanade Street, one hundred feet wide.

The relation of the construction of this to the work of constructing the Grand Trunk Railway and the relation of the city corporation and the Grand Trunk Railway Company, which involved several agreements between them in regard to said works, though all gone into very fully at the trial and in argument before us, need not now, so far as I see, concern us.

Indeed their consideration has to my mind tended to obscure the real issues now to be disposed of. Some comprehensive knowledge of their results have, however, to be borne in mind and especially so the construction of the Esplanade and its character as a street whereon all men may go as of right.

The Grand Trunk Railway Company did not appear in this appeal and, so far as it is directly concerned, may be considered out of the question.

The admitted facts are that this Esplanade was so constructed that the south side thereof formed after its construction the north boundary of the lake and that the Grand Trunk Railway was built upon and along the southerly fifty-two feet of the Esplanade in the late fifties.

The Canadian Pacific Railway Co. as lessees of another railway company known as the Ontario and Quebec Railway Company which had constructed its road from the east and entered Toronto on the north side thereof some two miles from the lake desired an entrance to the lake front and applied to the Governor in Council then having the powers given by the Con-

solidated Railway Act, 1879, for sanction to the building of a branch line called the "Don Branch" under six miles in length.

The application as appears from the face of the order made thereupon was under the provisions of the 18th sub-section of section 7 of said Act.

That sanction was given in the following words:—

> The Minister considering it desirable that the company should be permitted to build this branch, recommends that due sanction be given therefor, and that the maps and plans submitted, shewing the location of the line from a point on the main line of the Ontario and Quebec Railway, on lot 12, in the 3rd concession from the bay, in the township of York, to a point on the Esplanade in the City of Toronto, near York Street, be approved, and further, that the time for the construction of the said branch be fixed as on or before the 30th of November, 1887.

It is most important to understand exactly the nature of this concession for upon the correct interpretation thereof turns the rights of the parties who have appeared before us.

This sub-section 18 indicates its purposes and prohibits work until as provided a company applying under it shall have given the notices specified and prior thereto shall

> have deposited in the Registry Office of any city, county, or part of a county, in which the line or any part thereof is to be constructed, the maps and plans indicating the location of the line, and until the company shall have submitted the same to, and such maps and plans shall have been approved by the Governor in Council, after the expiration of the notice.

A sub-section (*b*) of this sub-section, gives for the purposes thereof to every

> such company the powers given them with respect to their main line, by the Act incorporating the company.

The power of expropriation in such Acts was exercised by the company in respect of the lands of pri-

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

vate owners but nothing was done to acquire title to the lands of the Crown crossed by this projected railway.

The Ontario and Quebec Railway Co. before proceeding to build obtained from Parliament an Act extending time and confirming said order in council but, beyond the extension of time, this Act (which also dealt with other matters) added nothing to the order and neither by express terms nor impliedly, when we have regard to its purview and the frame of some of its reservations, in any way affected the rights of the Crown.

The appellants or its lessor proceeded to build this branch line without acquiring from the Crown the lands necessary for its construction and in doing so crossed some eleven parcels of land covered by the waters of the harbour and belonging to the Crown; without a shadow of title to do so, save possibly that implied in the general right to cross highways. But were these even highways to be crossed?

Some years later in 1893, the solicitor of the Canadian Pacific Railway Company, having discovered the oversight, made an application to the Minister of the Interior for a grant to that

> company, its successors and assigns in perpetuity, of the right to construct, maintain and use for railway purposes two or more railway tracks and appurtenances, and the roadbeds therefor, on and over eleven parcels of land in the City of Toronto, in the Province of Ontario, containing in the aggregate fifty-six hundredths of an acre, more or less, and being bounded respectively

—as therein appears.

This was conceded by an order in council of 23rd February, 1893, which shews it was assented to by the Ministers of Marine and Fisheries and of Public Works as well as by the Minister of the Interior. As

to whether that was or not a proper compliance with section 19 of ch. 39, of the Revised Statutes of Canada, I pass no opinion.

That section amongst other things provided,

> And any portion of the shore or bed of any public harbour vested in Her Majesty, as represented by the Government of Canada, not required for public purposes, may, on the joint recommendation of the Ministers of Public Works and of Marine and Fisheries, be sold or leased under the authority aforesaid.

It seems these eleven parcels formed part of the bed of Toronto Harbour on Lake Ontario and lay next along the southerly side of the above mentioned Esplanade.

In the order in council there appears this express statement:—

> That the company further points out that the giving of this easement will not interfere with the Crown granting to the City of Toronto or to any other party a full title to the said parcels of land, subject only to the use for railway purposes above mentioned; a use which the Government and the city officials, and all other parties interested, have for several years understood that the company had or was to have.

On the 10th June, 1893, a patent was issued to the Canadian Pacific Railway Company for said parcels of land in consideration of a dollar, granting

> its successors and assigns (so far as we have power to grant the same) the right to construct, maintain, and use for railway purposes two or more railway tracks and appurtenances and the roadbeds therefor, as part of the Ontario and Quebec railway on and over eleven parcels of land situate in the City of Toronto.

It is to be observed that this transaction can hardly be called a sale; that the necessary concurrence of Ministers named in the statute was, if had, rather informally so; that in its terms a doubt is carried on the face of the instrument as to its legality; that the grant is not to the company building or owning but to its

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

lessees; and that it ends by an express declaration that if no right to grant existed, it is accepted with such risks by the company.

The respondent, apparently wishing to escape from what was implied in this transaction, sought in argument herein to discard this order in council and this grant, and claimed boldly that the original order in council permitting the branch line to be constructed had the effect of granting to the company named therein the fee in these lands of the Crown crossed by the construction of the branch.

No such contention can be properly maintained.

The Crown lands are just as sacred as any other lands and are not disposed of in that way or impliedly disposed of at all.

It never was the intention of the Minister of Railways and Canals or within the scope of any such order to grant lands of any kind, but only to grant the power and capacity to take and hold the necessary lands when the title thereto had been got from the Crown or others concerned as owners.

And when we find that these very lands can only be disposed of in the way specified in the statute already referred to the contention seems futile.

Support was, faintly I must say, sought in the case of *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(1), or something therein. The Crown had made a grant there. Hence as well for that reason as the nature of the whole case and all it originated in or rested upon it had no resemblance to this case.

Then again the very maps or plans filed in the Registry Office, and thereby submitted to found the application for the original order in council had

(1) [1906] A.C. 204.

plainly set forth thereon these lands as parts respectively of Yonge Street and a large number of other streets of the city, as if they extended a considerable distance to the south of the lands in question. I think these plans were intended to represent the continuation of such of these streets as such from the south side of the Esplanade, though necessarily obscured on the plan by the shading of the lines representing the intended location of the tracks of the projected branch line crossing same.

What appeared in this application was no more than the crossing of any other street or public highway.

Instead of an apparent grant of land springing from the order resting on such a plan there is apparently involved the mere concession of a right to cross as over a supposed highway or highways so far as these lands were concerned. We are not informed whether anything else was placed before the Ministers to displace such clear inferences of fact and intention.

What is claimed to have resulted in law is the grant of the fee simple in said lands; in other words, is the right to put a fence thereon across a mile of the front of Toronto preventing men from going on and over these numerous tracts of space where undoubtedly before they had a clear right to go and had so gone for years. Such is the right claimed or nothing.

When we consider that a legislative concession of such a character as that must be clear before the public rights can be so invaded or such supposed to have been an intent of these so legislating, and we do not find it clearly so expressed the claim fails. At least all the surrounding circumstances attendant upon the execution or constitution of such a document under which the creation of such an alleged grant with such

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

consequences as claimed is involved ought to be demonstrative of such intention before we can fairly attribute such a purpose to those responsible therefor —instead of being as I submit they are of the reverse character.

If the Governor in Council is to be supposed aware, despite the appearances of the plan, that these street extensions were covered by the waters of the lake then he and his council might as well be supposed aware also of the schemes of the city recognized by the prior grant, fifty years before, of the Crown to the city of the lands on either side thereof which clearly contemplated a possible filling up of these spaces and the constructing of streets to serve the uses of such grant and those made thereunder.

The scheme involved in that early grant to the city might look either to the reclamation of that part of the lake from the waters thereof and the construction of suitable buildings thereupon; or to the construction of wharves and such like over the water.

But having regard to the width of the spaces left ungranted the former would seem the more probable.

In either case it evidently was a reservation of ways of access to the lands or wharves, and consistent in either case with a means of passage by the public by land or water to that beyond, whatever it might be or might become; either lake, or land, or water, on either side.

All this makes clear, to my mind, that the power of the railway company to prohibit the passage across its tracks as implied in the theory of a grant in fee of the roadbed, never was in the mind of any human being.

I have not overlooked the provisions of sub-section

3 of section 7 of the Railway Act of 1879, prohibiting and enabling, nor can I overlook the constitutional limitations, conditions and methods by which such enabling consents might have been got. They were not got and must not be presumed to have been got by virtue of something else than such express consent to fulfil a present definite purpose as the statute implies; a different thing entirely from the wavering thing given for an entirely different purpose by the order in council relied on, and which might become determinate in two years or changed as need be.

The city on the 28th of November, 1894, obtained a grant, for what such grant was worth, from the Crown of these parcels of land forming extensions of streets including the lands up to the south side of the Esplanade being several of those crossings now in question.

Wharves and industrial establishments have been erected south of this railway branch, and the several means of access thereto furnished over many of these lands so granted, have daily been used for years by thousands as of right. So long as the water covered them they were highways of a kind, and the merely filling in, under and by virtue of or without such authority as here found, did not end the right of travel over them.

Nothing has ever transpired to prevent the use of such means of access. It obviously was the purpose of every one that they should be so used. Works of accommodation—not very expensive, it is true—have been added and kept in repair by the city for no other purpose than to promote this use as of right.

It seems idle to put forward the reservation of individual proprietors in arranging with the railway company for, and in respect of the making of their grants

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

of right of way, as in any way limiting this paramount right of travel.

What the Board had to consider was not alone the technical definition of a highway given by the Ontario Legislature or its predecessor, but the use as of right of a means of communication set forth as follows:—

"highway" includes any public road, street, lane, or other public way or communication.

This right every one of the public had, by means first of the streets joining the Esplanade on the north, thence across that a public highway, and thence into the lake itself a highway.

An additional strip of some feet in width was granted the railway company in 1904, which in express language so reserves the right that its very terms forbid any question of this right of crossing, and is in itself a recognition thereof. Its acceptance with such condition by the appellant implied an acknowledgment of respondent's claims herein.

Besides all these things it is to be observed that the Board's findings of fact as such are conclusive, and in this case the findings of Mr. Justice Anglin are expressly accepted by the Board without distinction of law from fact.

Does that under section 54 of the Railway Act imply an acceptance of the *primâ facie* case, and if so with what results so far as we are concerned?

I have, for the foregoing manifold reasons, no doubt of this being a crossing such as referred to in the above section 238 of the Railway Act, and the consequent jurisdiction over it by the Board.

Is there anything else to consider? It is said the power is excepted by virtue of what flows from an agreement known as the tripartite agreement entered

into between the city, the Canadian Pacific Railway Co., and Grand Trunk Railway Co., on the 26th July, 1892, long before the Board was constituted with its extensive powers.

The appellant, the Canadian Pacific Railway Company, submits, that inasmuch as the said agreement provided for the elimination in the future from the results of the local operation of the railway many elements of danger then and still existent, including the same as those sought to be relieved against by the order of the Board, and as the scheme of the said agreement had for its chief purpose such elimination of danger, it must, when ratified, as it was by Act of Parliament, be taken that a special Act, relative to the same subject matter as that dealt with by the Board, existed within the meaning of sec. 3 of the Railway Act, and being so related to the same subject matter of street crossings overrides the provisions of the Railway Act in this regard.

If the validity of the argument will not stand on such assumption, of identity, of elements of danger, and the chief purpose of the agreement, giving added strength (not, in fact, therein), then all weaker positions must inevitably fall.

I desire the utmost supposition of the case to be the test.

As the Chief Commissioner points out a private agreement ratified by Act of Parliament remained but a private contract.

It furnished and furnishes no security to the general public. It supplied no method but the will of the contracting parties for carrying out such provisions as it contained.

It does not seem when we have regard to the nature

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

of public rights, wrongs and remedies, as at all legislation that deals with them.

All it does is to validate corporate Acts and covenants, which might, but for it, have been of no binding effect, as between the parties. It is the private right alone that is dealt with. No one could be indicted for breach of anything therein provided as if in the way of imposing the discharge of a public duty.

A few words might have changed all this, but they are not in this private Act.

It is not necessary to go further than to point out that Parliament, eleven years later, constituted a Board for the express purpose of securing to the public their enjoyment not only of all such safeguards as legislative ingenuity had been able to devise, but helpless to execute, for the protection, safety and convenience of the public; because public opinion and the private contract system and legislative sanctions had all broken down, and an executive power was needed to effectuate the purpose of so many endeavours of the kind in question.

Three years later section 238 seems to have been transformed from an inefficient sort of thing to what evidently was meant to be a most drastic sort of legislation intended, as the terms of the 3rd sub-section thereof indicates, if need be, to override such objections as now set up.

I have no doubt, in the absence of the most express legislation, by clear language or implication in a special Act dealing with the very thing, that sec. 238, even as it stood in its early form, was intended to have been acted upon by the Board notwithstanding any such arrangements of a contractual nature as relied on now to take the case out of the Act.

If the tripartite agreement had, in its every provision, not been a mere private contract, but an Act of Parliament, I doubt if it would, in the language of section 3, have overridden the plain provision of section 238, so far as operative at all, as originally enacted.

As it now stands it is radically different from all that the provisions of the tripartite agreement expresses or implies. I therefore cannot see any grounds for finding such provisions to be "like" and relative "to the same subject matter."

Some forcible remarks, well addressed elsewhere, no doubt, on the injustice of thus in effect sweeping aside the realization of that which was expected from this agreement, were put before us.

However rich the field furnished by the history of the relations of these corporations with each other may be in food for thought on the part of the ethical philosopher in quest thereof, in an inquiry as to the uses and development of a corporate conscience, our present sphere of duty in the premises does not lead us to enter therein.

The next question is: Has the jurisdiction thus founded been exercised in such a way as to fall within the powers conferred by the section?

The most formidable objection made is that the section contemplated the elevation of the whole railway or the whole highway within the meaning given those respective words in the interpretation clauses of the Act, and not merely a part of either.

It has I confess caused me far more difficulty than any other in this case to arrive at a satisfactory solution of the construction of this section.

The solution of what should be done has, if the

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Idington J.

Board has the power, been properly made. It ameliorates what indeed seems a strong measure. I do not think, if we can help it, a construction (however much it may suit appellant's present purposes) that would on the one hand needlessly invade the rights of property or on the other render the statute nugatory, should be adopted.

Moreover the order seems to me to provide for what in a correct sense is substantially the elevation of the railway.

A complete railway is to be elevated. A subsidiary part of its serving tracks, which may be used for mere siding accommodations is permitted under regulations as other

> measures taken as under the circumstances appear to the Board best adapted to remove or diminish the dangers of obstruction in the opinion of the Board arising or likely to arise in respect of *such portion of the crossing, if any, or any other crossing directly or indirectly affected.*

These words seem to indicate the contemplation of just such a case as that found here, and to detract from the force of the argument that the whole railway is to be elevated.

Indeed it comes to the question of whether two of the several means specified or indicated disjunctively as they are in the section can be coupled or not in the same order. For example can the employment of watchmen not be directed in the case of a diversion of track or highway, which in its diverted path might yet need some such additional safeguard?

If it had been a case of doubt to be only solved by increasing the burthen upon the railway companies I should have been more loath in face of doubt of that kind to pronounce in favour of jurisdiction. But when the probable consequence is the alternative of

an order to elevate every track on the whole of these roads, no matter whether merely used for siding accommodation or otherwise, in order to comply with the alleged literal meaning of the words used I pause to see if it is possible to find another meaning in the section which may be more consistent with the rule of construction in section 15 of the Interpretation Act, which directs every Act to be deemed remedial and accordingly to

> receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

Section 48 of the Railway Act also seems comprehensive enough to be, and may be, applicable.

It seems to follow from these several considerations that the jurisdiction of the Board has in this regard not been exceeded.

The other objections as to York Street bridge, and the closing of the streets indicated, I do not think have much weight. They are covered by the necessities of exercising the jurisdiction and the express provision for the diverting of highways, if we apply the section above partly quoted. I also am inclined, though doubting, to think section 31, sub-sec. (*b*) of the Interpretation Act may also be relied upon.

The Yonge Street order of the Privy Council does not seem at all to interfere, seeing the Board has the power to rescind the order.

This order, if effective, is a substitutionary rescission of it.

No point was made of the appellant, as lessee, not being liable or at all events without its lessor being joined.

I think this appeal must be dismissed with costs.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Duff J.

DUFF J. (dissenting).—This in an appeal from an order of the Board of Railway Commissioners raising the question of the jurisdiction of the Board to entertain an application by the municipality of Toronto respecting the lines of the Grand Trunk Railway and Canadian Pacific Railway running along and adjacent to the Esplanade, a street running east and west in that city, and for an order directing the construction of a viaduct and the placing of the railway tracks upon it.

The order was made in professed exercise of the powers of the Board under sections 237 and 238 of the Railway Act. Admittedly a condition of the jurisdiction of the Board is that both these railways had been constructed *"upon, along, or across"* one or more highways. The Chief Commissioner, in upholding the jurisdiction of the Board, appears to have proceeded upon two grounds:—First, that both these railways were constructed "along" a highway, the Esplanade; secondly, that they are both constructed upon or across a number of streets running admittedly to the northerly limit of the Esplanade, and, according to the contention of the respondent and the decision of the Chief Commissioner, proceeding further and crossing both railways.

As it has never been disputed that the line of the Ontario and Quebec Railway in question lies to the south of the Esplanade, the highway referred to by the Chief Commissioner, we must take it, I think, that the Chief Commissioner has acted upon the view that this line, running as it does *alongside* the Esplanade in the locality in question, is for that reason a railway constructed "along" a highway within the meaning of section 238.

I do not think this construction can be supported. When one looks at the history of these sections, it seems clear that this is not the sense in which prior to the Act of 1903 the word "along" was used in the legislation out of which sections 235 to 243 developed. The first sentence of section 15 of the Consolidated Railway Act of 1879, is as follows:—

> The railway shall not be carried along an existing highway, but merely across the same in the line of the railway, unless leave has been obtained from the proper municipality or local authority therefor.

"Along" in this sentence seems to be used to express longitudinal direction in contradistinction to "across," and to mark the case in which the railway is to be constructed upon the highway in a direction corresponding generally to that of the highway rather than in the general direction of the railway line itself; and the other parts of the section hardly permit any other view of the meaning of the word. The same phraseology is used in the same sense in section 183 of the Consolidated Act of 1888. The Act of 1903, with which, in substance, the present Act in this particular corresponds, provided that whether the railway was to be carried "across or along or upon" a highway the leave of the Railway Commissioners must first be obtained. The addition of the word "upon" can hardly be held to alter the meaning of the other words. I am not much concerned to dispute that upon this construction there is some superfluity. A distinguished judge once said that Parliament is seldom parsimonious of language, and the following passage from Lord Selborne in *Hough* v. *Windus*(1), seems appropriate here:—

(1) 12 Q.B.D. 224, at p. 229.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Duff J.

I cannot admit that there is any such presumption against fullness or even superfluity of expression, in statutes or other written instruments, as to amount to a rule of interpretation controlling what might otherwise be their proper construction. No doubt, when the words admit of it, that interpretation which makes them more officious with respect to the clear and ascertained policy of the statute, or purpose of the instrument, is (in general) to be preferred to that which makes them less so.

* * * * * * * * *

And I adhere to an opinion expressed by myself in the House of Lords more than ten years ago in *Giles* v. *Melsom*(1), which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, that "nothing can be more mischievous, than the attempt to wrest words from their proper and legal meaning, only because they are superfluous."

At the time that part of the line the Ontario and Quebec Railway, which is now in question (a part, that is to say, of the Don branch of that railway) was authorized, the Esplanade—upon the southerly part of which the line of the Grand Trunk Railway was constructed—was, as I have said, a highway running east and west. A number of streets running north and south admittedly came to the northerly limit of the Esplanade. South of the Esplanade between Berkeley Street to the east and York Street, which was the westerly limit of the branch in question, and extending as far southward as a line known as the old windmill line, the bed of the harbour had been granted or leased to individuals —with the exception of a series of strips enclosed by lines formed by the production south of the boundaries of the streets already mentioned running north and south to or across the Esplanade. The intervening spaces between these strips were at the southerly front of the Esplanade occupied by wharves and other structures. That the strips of harbour bed mentioned were

(1) L.R. 6 H.L. 33.

at that time still vested in the Crown in the right of the Dominion, nobody disputes. That Toronto harbour or bay was then a navigable water subject to the public right of navigation, or that these strips or street prolongations, as I shall call them, were part of the harbour in this sense, that the bed and the waters of the harbour there were subject to the public right of navigation, can hardly be called in question. Not only is there no evidence except of the most equivocal kind suggesting any intention on the part of the Crown to devote these strips to highway as distinguished from harbour purposes, but nobody suggests that there was any statutory authority by which the Crown could merely by a declaration of intention convert a part of the harbour of Toronto into something that was not a part of that harbour. The effect of the Revised Statutes of Canada (1886), ch. 39, section 11, I will discuss when I come to the grant of 1894, upon which the respondents rely.

I do not understand the learned trial judge in the *Yonge Street Bridge Case* (1) (upon which the learned Chief Commissioner relies) to dispute that the prolongation of Yonge Street was at the time the authority was obtained for the building of the Don branch a public navigable water part of the harbour of Toronto. Nor do I understand from the judgment of the Chief Justice of the Court of Appeal that he disagrees with that view. With respect to some of the other prolongations there is another point to consider. There is some evidence to the effect that at some time prior to the construction of the Don branch there were at the southern face of the Esplanade on these prolongations, structures called "slips," consisting of an apron of

(1) 6 Ont. W.R. 852; 10 Ont. W.R. 483.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Duff J.

wood resting at the upper end on the Esplanade, and at the lower end, upon a crib. It is said that these slips were used as landing places for limited purposes, but more generally as conveniences for filling water-carts with water which was peddled about the streets of Toronto. There is nothing to shew by what authority these slips were put there. There is nothing to shew the date when they disappeared. The fair inference from all the evidence is, I think, that they had all completely disappeared in 1887 with the exception of the remains of one at Bay Street. The evidence (at all events) is altogether too vague and too meagre to support any finding that in any of these prolongations what was formerly the bed of the harbour was not still the bed of the harbour in 1887. There is no finding by the Board or the Chief Commissioner inconsistent with this view.

When then the Don branch was constructed by placing solid structures adjoining the Esplanade across these street prolongations was it constructed "upon, along or across" a highway within the meaning of section 238 of the Railway Act? The view most strongly pressed upon us was that the word "highway" by the interpretation clause is defined as including "any public road, street, lane, or other public way, or communication"; and it is argued that the word as it appears in sections 237 and 238 must be read as convertible with (as a mere symbol standing for) the whole of this definition.

With great respect I think so to apply the definition is to misapprehend the office of this interpretation clause. *Meux* v. *Jacobs*(1), *per* Lord Selborne; *Dechène* v. *City of Montreal*(2), at p. 645; *The Queen*

(1) L.R. 7 H.L. 481, at p. 493. (2) [1894] A.C. 640.

v. *The Justices of Cambridgeshire*(1). In the Act of 1879, under which the Don branch was authorized as well as in all the consolidations of the Railway Act down to that of 1906, the meanings assigned by the interpretation clauses to the words there defined are assigned subject to the usual condition that there shall be nothing in the subject or context repugnant to such a construction. It is quite clear that the highways referred to in section 238 are highways of the same class as those referred to in section 237 and that, again, those dealt with in the latter section are the same things as are dealt with in section 235. The whole group of sections beginning with section 235 and ending with section 243, and headed "Highway Crossings," is designed to deal with highways of the same class obviously. If one examine these provisions (the most cursory examination is sufficient), there are the strongest indications, I think, that in them the legislature was not dealing with navigable waters or the beds of navigable waters; and this becomes perfectly plain when we look at the group of sections beginning with section 230 and ending with section 234, headed "Navigable Waters," and compare that with the group in which sections 237 and 238 occur.

The enactments in the second group are exactly appropriate to highways on land; those in the first group exactly appropriate to the subject with which they profess to deal. The difference between the two groups of sections is perhaps even more marked if we look at the Act of 1879, and at the Consolidated Act of 1888. In section 15, which is the provision of 1879 dealing with highway crossings, the authority to which

(3) 7 A. & E. 480, at p. 491.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Duff J.

the railway company must resort, where leave is required, is the "proper municipal authority," an authority which as such (except in rare cases) could have nothing whatever to do with navigable waters. Again the group of sections in that Act dealing with navigable waters, sections 66 to 68, refer the railway company as we should have expected to the Railway Committee of the Privy Council, where authority is required to put its works on the bed of any such water. Nobody can doubt that when the company proposed to construct its works in these prolongations the authority to which application must be made (after the consent of the Governor in Council under section 7, sub-sec. 3 had been obtained), was not the municipal authority, but the authority named in section 68 (the Railway Committee), and that section 15 could not possibly apply to such a situation.

These prolongations were not then in themselves highways within the meaning of section 238, and in crossing them the railway company was not by reason of that circumstance alone constructing a railway "upon or across" a series of highways. But the argument is put in another way. It is said that there was a public right of access to the waters of the bay from the Esplanade and *vice versâ,* which was interfered with, and that the parts of the harbour occupied by the railway, being subject to this right, were "highways" (using that word in the sense of "public way or communition") distinct both from the Esplanade and the harbour itself. With every respect, I am unable to follow this argument. There was a public right of passage, up and down, let us say, Yonge Street, to the Esplanade, and then across the Esplanade (whether Yonge Street crossed the Esplanade seems to me to

be immaterial) and to and from its southern boundary. There was a public right to use for navigation and all purposes reasonably incidental thereto that part of the harbour which came up to the Esplanade opposite to or at the end of Yonge Street. The public had a right to be on the highway for highway purposes, and they had a right to go from the highway south for any purpose reasonably connected with navigation. They had a right to go from the harbour on to the highway. But these rights were rights which arose solely from the circumstance that the southern line of the Esplanade here merely marked the contiguity of a land highway and a public harbour. If the Esplanade had ceased to be a public highway, and had become private property, the public right to cross it to get to the harbour would have ceased to exist, not because the rights of the public appertaining to the harbour had in any way been impaired, but because the land highway had ceased to go down to the harbour. And so, if the public rights of navigation should, in respect of the prolongation of Yonge Street, be extinguished, and that prolongation become private property, the right of the public to get to the harbour from the southern face of the Esplanade through this prolongation would cease to exist, not because any public right in respect of the highway had been affected, but because that particular locality had ceased to be part of the harbour. Let us suppose, for example, that the Don branch should have crossed the Yonge Street prolongations some distance south of the Esplanade, would anybody have suggested that the crossing there was a highway crossing within sections 237 or 238?

It seems to me, therefore, to be clearly impossible to maintain that at the time they were made, these

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

crossings were highway-crossings. They were, for the purpose of applying the statute, crossings of navigable waters. It seems to me to be equally clear (assuming the railway to have been lawfully constructed across these street prolongations), that the public rights of navigation there and the rights ancillary thereto were extinguished by the construction of these crossings. They were extinguished because as such it became upon the construction of the railway physically impossible any longer to exercise them. Once the spaces became filled up, it became obviously impossible that the public should use them in the way they were used before, and in the only way which the public had a right to use them before. *Corporation of Yarmouth* v. *Simmons*(1), at pages 524 and 526.

When it is argued that the public right to get to the waters of the harbour was not extinguished, but was reserved by implication, I suppose what is really meant is that for the rights formerly lawfully exercisable by the public in the place occupied by the railway, there was substituted some other right. That substituted right is said to be a right of passage across the tracks of the railway and, therefore, the part of the railway subject to that right is said to be a land highway—a highway within the meaning of sections 237 and 238. Whether such land highways over the tracks of the Canadian Pacific Railway were ever substituted for the rights extinguished by the construction of the railway is perhaps the principal question raised on this branch of the argument. The contention that such highways came into existence is based upon several grounds: First, it is said that public right of passage across the railway—it is not put precisely

(1) 10 Ch.D. 518.

in this way, but in effect, I think, I am putting the contention fairly—was one of the terms implied, at all events, if not expressed, in the consent under which these parts of the harbour were occupied by the railway. Then it is said that under the authority of a certain agreement dated 1892, called the Tripartite Agreement, ratified by Parliament and by the Legislature of Ontario, certain highways were constructed across the railway. The first, I think, is the main ground upon which the decision in the *Yonge Street Bridge Case*(1) proceeded, both at the trial and in the Court of Appeal, which decision, as I have said, is accepted and acted upon by the Chief Commissioner, and if I do not mistake the views of the majority of this court, I think it is the principal ground upon which they also proceed.

The first point to consider is whether the company in occupying the parts of the harbour in question with its works, was acting legally in accordance with the terms of the authority conferred by the Railway Act of 1879, which admittedly governed it. The principal provisions applicable are section 7, sub-sec. 3, and section 68. As to section 68, it has never been suggested that the approval of the Railway Committee was not obtained, and we may assume that the course of the company in that respect was regular. It is argued, however, that the consent required by section 7, sub-sec. 3, by reason both of the fact that the lands occupied were Crown lands, and that they constituted part of the bed or beach of a lake, was not procured until some time after the railway was constructed, and was then procured upon such terms as to constitute the public right of passage contended for. Before discussing the

(1) 6 Ont. W.R. 852; 10 Ont. W.R. 483.

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

documents, which are said to shew the necessary consent under section 7, sub-sec. 3, it will be convenient to look a little at the terms of that section. It is to be observed that the enactment prescribes no particular form of words or of instrument in which the consent is to be embodied, and the force of this circumstance is emphasized by the provisions of sub-section 4, which expressly provides that in certain cases the license and consent are to be under the hand and seal of the Governor. Any instrument, and any form of words sufficient to evidence the consent of the Governor in Council, in fact, would, I think, be sufficient under sub-section 3. The documents relied upon are an order in council of the 25th of January, 1887, and an Act of the Dominion Parliament of 22nd of May, 1888. By the order in council sanction is given for the building of the Don branch, and the maps and plans shewing the location of the line are approved. By the Act the company is authorized at any time within three years from the passing of the Act to construct and complete the branch referred to in the order in council, which is set forth in the schedule to the Act. It is not disputed that the branch was constructed in accordance with the maps and plans that were before the governor in council and, one must presume, before Parliament. We must assume as I have already said, that the approval of the Railway Committee under section 68 was obtained. I am not able to convince myself that in these circumstances the consent of the governor in council under section 7, sub-sec. 3, has not been sufficiently established. It is idle, it seems to me, to suggest (at all events, the onus is upon those who do suggest it), that this order in council was passed and this statute was enacted in ignorance of the fact that the Don branch was being constructed along the water

front of Toronto south of and adjoining the Esplanade; and, in part, in spaces which were parts of the harbour. The map produced shews, as plainly as anything could shew to any one having the slightest knowledge of the locality, that such was the case. I am not able to follow the suggestion that this statute and order in council amounted to nothing more than a consent to a street crossing. It must be observed that the function of the Governor in Council under section 18 was confined in its operation to branch lines. The approval of the location and the maps and plans of the main line was not required under the Act of 1879, or the Act of 1888. Even under the Railway Act as it stands to-day, it is only the approval of the general location that is required. In the case of branch lines (which could not exceed six miles in length), the whole responsibility was thrown upon the governor in council. In such circumstances the suggestion referred to is not one to which, I think, much weight should be attached.

But the order in council contains much more than an approval of plans; it expressly sanctions the building of the line according to the plans, that is to say, in the places actually afterwards occupied by the railway, and the statute confirms that sanction.

I am not concerned at present to consider the precise interest in these lands which passed to the railway company on the construction of their works under the authority thus conferred. For the present the question is, was the railway lawfully there? If a sufficient consent was obtained within the meaning of subsection 3, then the railway was lawfully there. If such a consent was not obtained it was not lawfully there, and the railway company were trespassers as against the Crown and (assuming the public to have been

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

actually prejudiced thereby in the exercise of the right of navigation, or any right ancillary thereto), the works in the localities under discussion were a public nuisance. I do not think the respondent pressed its point quite so far as to say that the company was acting wholly without authority in constructing its works in these places, but I am not able myself to find any middle ground; either there was a consent within the statute or there was not. Without such consent there was an absence of statutory authority for the occupation of any Crown lands or of any part of Toronto Harbour.

If my view be correct that the consent required is sufficiently evidenced by the order in council and the statute, then I must say I cannot find, at this point, anything to shew the creation or reservation of any public right of passage across these parcels of land. It cannot surely be said (in every case in which railway works should be placed on the bed or shore of a navigable water under the authority of sub-sec. 3), that for the public right of navigation thereby interfered with, there would be substituted, *ipso jure,* a public right of passage over such works. I do not, for the moment, consider the question whether the Governor in Council would have power to reserve such a right as one of the terms of consent. It is sufficient for the present to say that there is no evidence whatever down to the time I am speaking of, to shew that any such term was imposed. It is convenient to observe at this point, however, that the consent under the sub-section mentioned and the statutory authority flowing from the consent is to occupy the area to which it relates for railway purposes. *Primâ facie,* at all events, that appears to me to involve the exclusion of any such gene-

ral right of passage as was here contended for. *Attorney-General of British Columbia* v. *The Canadian Pacific Railway Co.*(1), at page 212.

I do not suppose that the sufficiency of the statute or order in council for the purpose suggested would have been impeached at this date, had it not been for some transactions between the railway company and the Dominion Government, six years later, in 1893. In that year an application was made by the Canadian Pacific Railway Company under the provisions of section 19, ch. 39 of the Revised Statutes of Canada, 1886, for a formal grant of the parts of the prolongations now in question; and under the authority of that statute a grant was made to the Canadian Pacific Railway of

> the right to construct, maintain, and use for railway purposes two or more railway tracks and appurtenances and the roadbeds therefor, as part of the Ontario and Quebec railway and over eleven parcels of land situated in the city of Toronto, in the Province of Ontario, in our Dominion of Canada, containing in the aggregate fifty-six one-hundredths of an acre, more or less, and, being bounded respectively as follows, that is to say.

Assuming there had been no previous consent under the Railway Act, that, of course, was in itself a sufficient consent. But it is said that this consent was given upon terms involving the reservation of a public right of passage across the railway. This contention is based upon the terms of the company's application in part, and in part upon the order in council under which the grant was made. I do not think, myself, that the terms of the company's application (except to the extent to which they are incorporated expressly or impliedly in the order in council or the grant), are relevant upon the question whether in point of fact

(1) [1906] A.C. 204.

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

such a term was imposed by the Governor in Council. They are not referred to in the grant; the parts of the order in council which refer to them and which respondent relies upon as evidencing the constitution of such rights of passage are as follows:—

> The Minister further states that the company represents that these lands are held by the Government in the interests of Canada, and under the impression that the order of His Excellency the Governor-General in council, dated 25th January, 1887, and the Dominion Act, 51 Vict. ch. 53, gave the company the right to do so, it some time ago constructed tracks over the said lands, and has been using them for railway purposes; but having been advised that this right is not complete unless the approval embodied in the said order in council be followed by a formal grant, it now prays that its right to use the said tracks be confirmed by such a grant.
>
> That the company further points out that the giving of this easement will not interfere with the Crown granting to the city of Toronto or to any other party a full title to the said parcels of land, subject only to the use for railway purposes above mentioned; a use which the Government and the city officials, and all other parties interested, have for several years understood that the company had or was to have.

These paragraphs do not appear to me to impose any terms upon the railway company. They record an admission by the company which, taken at the highest against it, may be said to embody an understanding upon which the grant issued—that the grant should not prevent the vesting of a "full title" to the parcels in question in the municipality of Toronto subject to the use of them for railway purposes. I do not profess to understand the meaning of the words "full title," but whatever they may mean there is surely nothing here which, upon any fair construction of the words, can be held to impose the condition that the right of the railway to use these parcels for railway purposes should be subject to the right of the public to use them as a highway. The vesting of a title to the parcels subject to

the railway company's interest in them is a vastly different thing from that. If it be asked, what other purpose could such a grant to the municipality serve, the answer is, that for the moment I am dealing with the question whether public rights of passage were created by this transaction through the imposition of terms by the Governor in Council; what the parties may have had in view for the future is another thing.

Here the respondents at the threshold of their contention are confronted with an important question touching the extent of the powers of the governor in council concerning the creation of highways over a railway line with or without the consent of the company or of the municipality or of both. If, as Mr. Armour contended, the works had already been sufficiently sanctioned, and the Governor in Council were then *functus officio,* in respect of terms, and if no term establishing public rights of way had been imposed, then we have upon this contention to consider the bald question, whether the railway and the Governor in Council in such circumstances had any legal authority to create highways over these parcels. I think they could not do so. The Consolidated Railway Act of 1888 was in force at the time of this transaction. That Act contains special provisions which, in my opinion, were intended to be exhaustive with respect to the creation of public rights of way over a railway. I think that such rights of way could not be created except by the authority of the Railway Committee acting (at the time in question) under the powers conferred by section 11 or section 14 of the Railway Act: *Canadian Pacific Railway Co.* v. *Guthrie*(1); *Town of High River* v. *Canadian Pacific Railway Co.*(2). The

(1) 31 Can. S.C.R. 155. (2) 6 Can. Ry. Cas. 344.

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

Railway Committee of the Privy Council did not derive its powers in any way from the Governor in Council as a whole; it was a statutory body with a purely statutory mandate, and the statutory duties assigned to it were clearly not exerciseable in the first instance by the larger body; and it is not suggested that in this transaction there was any action of the Railway Committee. Assuming on the other hand the Governor in Council with respect to terms were not *functus officio,* I do not think the section of the Act authorizing that body to impose terms where Crown land or the bed of a navigable water was to be occupied can fairly be held to authorize the doing of something, such as the creation of a highway, where there were special provisions of the Act providing machinery through which alone that thing could, in general, be done. It is not, in a word, to be taken as vesting in the Governor in Council in the cases to which it applied a general dispensing power in respect of the provisions of the Railway Act. Doubtless the company might be compelled to submit to an undertaking not to oppose an application to the Railway Committee or to pay the cost of the construction of the crossing if a highway should be ordered by that body or even to make an application to the Railway Committee for such an order. But none of these things was done here. Nor is the position strengthened at all, in my opinion, by the subsequent grant to the municipality of these parcels in 1894. It is perfectly true that the grant is expressed to be made to the grantee in trust to use the subjects of it for the purposes of highways; but it is also made subject to the terms of the Windmill Line Agreement, and by the provisions of that agreement the prolongation of the streets could not, without the consent of the

riparian owners, be filled up for a period of ten years nor until the space described as Lake Street in that agreement should have been filled in and converted into a highway under the terms of it; nor at all after the expiration of fifteen years. The suggestion that this grant in itself amounted to a dedication of those parts of the harbour corresponding to the prolongations of the streets is one with which I wholly disagree; section 19, ch. 39, under which it purports to be made, authorizes the Governor in Council to sell or lease parts of the beds of harbours, but nothing in that enactment professes to authorize the construction of any work, in the subjects of grants made under it, which would be an interference with the public right of navigation. Hundreds of grants have been made since Confederation under this statute, and many before Confederation under similar statutes in all parts of Canada; but it has never been supposed that such grants *per se* conferred any authority to interfere with the public right of navigation; where any structure having such effect is to be erected —except under the authority of some such statute as the Railway Act—resort is to be had to the machinery provided by the Act relating to Works in Navigable Waters, which, at the time in question, was ch. 92, R.S.C. (1886), an Act in *pari materiâ* with section 19, ch. 39, and, for the purposes of construction, to be read with that enactment. Moreover the enactment (sec. 19, ch. 39) provides that no grant under the authority of it should be held to justify any interference with riparian rights; the municipality was therefore both by the statute and the grant thrown back upon the Windmill Line Agreement for its authority to fill up these prolongations. The grant was

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

made doubtless with a view to enable the city in accordance with the provisions of that agreement, and in compliance with the Dominion statute relating to Works in Navigable Waters to convert these strips of harbour into streets when the proper time should arrive. When that should occur it was doubtless contemplated by all parties that crossings over the parcels in question should be provided; but that they should be provided through the machinery furnished by the Railway Act for that purpose.

It is argued also that in some way the railway company is estopped (by reason of its application, and of the terms of the grant to the company and of the grant to the municipality just referred to) from disputing the existence of these highways. I do not think that can be supported. The statutory grant received by the railway company is not a record; *The Queen* v. *Hughes*(1); and (since the Crown could, under the common law, convey by matter of record only) could not of itself have the effect of a common law conveyance in working an estoppel as against the grantee. *General Finance, Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Soc.* (2). It is possible—although I think it very doubtful—that the circumstances afford a ground for an equitable estoppel against the railway company respecting the extent of its interest in the parcels comprised in its grant. But I can find nothing in them to support any estoppel on the subject of public rights of passage. There is, however, a complete answer to this contention, if I am right in the view that highways could only be established over these parcels by means of the machinery provided by the

(1) L.R. 1 P.C. 81. (2) 10 Ch.D. 15.

Railway Act. It is quite too clear for argument that no act of the company, however effective to create an estoppel in other cases, could take effect by way of estoppel in establishing a highway where none existed, and when the statutory prerequisites for the creation of one had not been complied with; the company could not, in a word, by resorting to the expedient of creating an estoppel, add to its own statutory powers. *Great North-West Central Railway Co.* v. *Charlebois*(1).

I come now to the consideration of the agreement of 1892, and the statutes confirming it. There are two statutes, one (provincial), 55 Vict. ch. 90, giving the municipality authority to execute the agreement; and one (Dominion), 56 Vict. ch. 90, declaring the works to be for the general advantage of Canada, enacting (sec. 2) that the agreement shall be "in force and binding on the parties thereto," and (sec. 3), empowering the parties to do all things necessary to carry its provisions into effect. There are two rival views of the nature of this latter statute. The respondent argues that it is merely a statute authorizing an agreement *inter partes* which, notwithstanding the statutory authorization, still remains a private agreement. The appellants contend that it is a special Act within the meaning of the Railway Act creating a scheme with a view to providing accommodation for the two railways, and establishing means for the protection and for the convenience of the public in relation to those parts of the railways of the appellants, which are specially dealt with in the order appealed from, and that according to the terms of section 3 of the Railway Act the provisions of this special

(1) [1899] A.C. 114.

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

statute must displace sections 237 and 238 of that Act. I do not think that, on its construction of it, there is anything in the text of the agreement itself that materially supports the contentions of the respondent, but it is argued that the plan annexed to it shews crossings to be protected at Bay Street, Yonge Street and Church Street, and that section 5 of the agreement (taken with this plan) constitutes a binding admission that there were such crossings there at the time the agreement was entered into. Section 5 is as follows:—

> The city hereby agrees to extinguish, at its own expense, all the present rights (if any) of the public and of property owners to cross the railway track on the Esplanade, between Yonge Street and the point where York Street, as deviated, connects with Esplanade Street, except at Bay Street, and in consideration thereof each of the companies agrees to give up, without compensation, any right of crossing the said railway tracks between Yonge and York Streets, except at Bay Street, and for such consideration the Grand Trunk further agrees to waive its contention that it is not liable to contribute to the cost of making or protecting level crossings at Church Street, Yonge Street and Bay Street, and the Grand Trunk and the Canadian Pacific, without prejudice to their rights in any other transaction, agree to pay each one-half of the cost and maintenance of such by gates and watchmen at the latter crossing, such protection to be subject to the approval of the Railway Committee of the Privy Council of Canada, or to be made in such a way as it may direct.

Looking at the plan one sees that the so-called crossings at Yonge Street and Church Street are obviously contemplated crossings, having no existence in fact at the date of the agreement. As to Bay Street, I do not understand it to be disputed that south of the Esplanade that street was not filled in. The parties doubtless did anticipate that the Windmill Line Agreement of 1888 would be carried out, and that the street prolongations south of the Esplanade would eventually be filled in under the terms of that agreement, and the stipulations contained in article 5 of the

agreement were, no doubt, entered into in that view. The article, therefore, cannot fairly be read as containing any admission touching the existing state of affairs. Furthermore the railway companies never received the consideration mentioned, and it is doubtful whether the undertakings on the part of the companies have ever yet become operative. But there is an answer based upon broader grounds than these. If the agreement is to be treated merely as a private agreement, then any implied admissions can only be taken as admissions *inter partes* and cannot be effective to found jurisdiction any more than an agreement between the parties that the Board should have jurisdiction. The article itself provides that the undertaking of the Canadian Pacific Railway shall be without prejudice to its rights in any other transaction; and it would seem to be a violation of principle to use such an admission so guarded in a private agreement as an instrument for furthering a proceeding intended to destroy the situation which it was the object of the agreement to set up and maintain.

It may be argued that as by the third section of the ratifying Act, 56 Vict. ch. 48, each of the parties to the agreement is empowered to do whatever may on its part be necessary to carry out and give effect to its undertakings as embodied in the agreement, that the railway companies were authorized by this Act to permit the municipality to lay out highways across their respective railways at the place mentioned, and that in so far, at all events, as this was acted on such highways were validly constituted. This argument, I think, overlooks article 21 of the agreement, which provides that the Railway Act and the Municipal Act, so far as applicable to anything in the agreement, shall,

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

except where otherwise provided, form part of the agreement as if expressly set out in it. Assuming article 5 then to be rightly read as containing an undertaking on behalf of the companies to agree to the constitution of highways across their tracks (which was merely a private undertaking), it is quite clear that the formalities of the Railway Act and of the Municipal Act were not intended to be dispensed with. The authority given by section 3 of the Act is an authority to act in accordance with the provisions of the agreement. That clearly imports, I think, except where inconsistent with the terms of the agreement, those parts of the Railway Act and of the Municipal Act which relate to the subjects dealt with. I have not been able to satisfy myself that there is any evidence from which one can properly conclude that any public way was, in fact, laid out either at Yonge Street or at Church Street. With regard to Bay Street the evidence is hardly more satisfactory. It was not suggested that in respect to any one of these streets the sanction of the Railway Committee or of the Board of Railway Commissioners had been obtained to laying it out across the railways.

There is, of course, York Street bridge, the construction of which the agreement did authorize; but assuming the municipality to have established highway crossings at Bay Street and York Street, I do not think that would afford a sufficient ground for supporting the order in question. Having regard to the reasons given by the Chief Commissioner in support of the jurisdiction of the Board, I think it is perfectly idle to suggest that the Railway Board in directing the putting up of the structure in question did so primarily with the design of protecting the crossings at

these two streets alone. The Board has not exercised its powers with any such view; it has acted upon the assumption that it has power to deal with a series of crossings extending from Parliament Street to Spadina Avenue.

I think, however, that the view of the agreement of 1892 and the ratifying statutes expressed by my brother Girouard is the sounder view.

"Special Act" is defined by section 2, sub-sec. 28, of the Railway Act. I am not able to agree with the view of the learned Chief Commissioner that the effect of that definition is to limit the application of the term to statutes relating to the construction or the operation of a railway. That view seems to me to ignore the words, "which is enacted with special reference to such railway." The Act ratifying the tripartite agreement is clearly a statute enacted with reference to the Grand Trunk and Ontario and Quebec Railways, and I think section 3 of the Railway Act applies to it, and consequently that the provisions of the special Act, in so far as it is necessary to give effect to them, must be taken to override the general provisions of the Railway Act. I postpone for the moment the Act of 1909 relied upon by Mr. Dewart. I was impressed at the argument with the view that the Act in question does nothing more than ratify an agreement between private parties which, notwithstanding the Act, would be enforceable only as between the parties to it themselves, and that such a statute could not be said to be within the contemplation of Parliament when passing section 3 of the Railway Act. On further consideration I have come to the conclusion that this view of the Act of 1893 is founded upon some misconception of the character of the legislation,

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

and of the agreement thereby ratified. One of the parties to the agreement was the municipality of Toronto. That municipality was invested with authority over the public streets in the municipality; and in all the negotiations, agreements and legislation respecting the Esplanade and the situation of the railway companies there, the municipality had acted and had been treated as representing the inhabitants not only as regards public safety in the localities through which the railways passed, but as regards the convenience of industrial and other establishments with respect to shipping facilities. The agreement of 1892 provided for the recasting of the existing railway arrangements. There was to be a new Union Station. There was to be a change in the site of the station and yards of the Canadian Pacific Railway. There were to be facilities by which the Grand Trunk Railway was to have access to the waters of the harbour through the prolongation of two of the streets west of York Street. The site provided for the Canadian Pacific Railway was situated west of the western terminus of the Don branch, between the Union Station to the north and the harbour to the south. Traffic across the railways of all kinds was provided for by two bridges, one at York Street and one at John Street. The cost of maintaining level crossings at Bay Street, at Yonge Street, and at Church Street was provided for. The agreement, as framed, involved as its central and governing features, provisions for direct access, from the railway yards to the railway lines on the same level, direct access to the harbour by the railway companies from their yards and overhead bridges or protected level crossings for the purpose of carrying the highway traffic across the railways from the north to south and *vice versâ*. I have already pointed out

that the application of the Railway Act to the works in contemplation is provided for by article 21 of the agreement, where it is said that, except as otherwise provided in the agreement, the Railway Act shall form part of it so far as applicable to anything therein contained. What is the effect of this article? Surely when Parliament declared that this article should be valid, and that these works might be carried out according to the provisions of the agreement there was necessarily involved in this that, except as otherwise provided in the agreement, the Railway Act and all the sanctions of the Railway Act should, so far as applicable, govern everything to be done under the agreement and the operation of the works when completed. On the other hand, in so far as the agreement did otherwise provide, the statutory authority was an authority to carry out the scheme and operate the works when finished according to the terms of such special provisions. Reading article 21 and section 3 together then, we must, I think, look to this agreement for the provisions of the law governing those subjects with respect to which the agreement makes specific provision.

What then has this agreement to say with regard to the subject matters dealt with in the order appealed from? In express terms it provides for the maintenance of level crossings at Church, Yonge and Bay Streets. In express terms it provides for highway bridges at York and John Streets. If I am right in my view as to the character of the Act, there cannot be any question that the jurisdiction of the Railway Committee was excluded to this extent, that they were to have no power to make an order inconsistent with these provisions. Since, moreover, as I have

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Duff J.

pointed out, the purpose of the scheme obviously was in part to maintain the railway yards and the railway tracks on the same level, it is very clear that the order made is incompatible with it.

One is asked, however: Is it to be supposed that the legislature intended these provisions to fix for all time the situation of the railways on the water front? The answer, I think, is that the two railways concerned, and the municipality as representing the interests mentioned, having reached an arrangement satisfactory to themselves the Legislature was quite content to give effect to that arrangement in the expectation that for many years, at all events, it would not be necessary to disturb it. Nor do I think there is much force in the observation that only one or other of the parties to it could, while it remained executory, compel the others to carry out the undertakings embodied in it. We need not suppose the legislature to have been very tenderly concerned with respect to the interests of the railway companies. And as for the undertakings of these companies the cardinal fact is that the other party was the municipality which, in the very special sense I have mentioned, was treated as the guardian of the interests of the inhabitants in respect of the matters dealt with.

With respect to the level crossings indeed, and the protection to be afforded there, that subject was committed by paragraph 5 to the Railway Committee of the Privy Council, and in most of the provisions of the agreement in respect of the carrying out of which disputes might reasonably be anticipated some method for the speedy and authoritative settlement of them was provided for. In case of dispute, for example, in regard to the York Street bridge, the arbi-

ters were to be the Railway Committee. In respect of bridges, crossings, and approaches over the Grand Trunk Railway Co.'s tracks on the Esplanade disputes were to be submitted to the Chancery Division of the High Court of Justice, with a right of appeal to either party; and plans and specifications for the bridge at John Street were to be prepared by the city engineer of the City of Toronto, an engineer to be named by the Grand Trunk Railway Company, and, in the event of disagreement, by an umpire to be named by the Chief Justice of Ontario.

The contention of the respondent seems to me to lead to this conclusion—that these provisions which the legislature had declared to be binding upon the parties and which the legislature had authorized the parties to carry into effect might, next day, be completely nullified by the action of the Railway Committee of the Privy Council acting under sections 187 and 188 of the then existing Railway Act. With great respect, I cannot accept that view.

It is said, however, that the application of sections 237 and 238 to the works in question is made clear by an Act of 1909 amending section 241, sub-sec. 2 of the Railway Act. The Act is 8 & 9 Edw. VII. ch. 32, section 8, and is in the following words:—

241. Every structure by which any railway is carried over or under any highway, or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under, or through such structure.

2. Notwithstanding anything in this Act, or in any other Act, the provisions of sections 236 to 241, both inclusive, of this Act shall apply to all corporations, persons, companies and railways, other that Government railways, within the legislative authority of the Parliament of Canada.

It will have been observed that my view with respect to the character and effect of the agreement of

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

1892 and the ratifying statutes does not necessarily depend upon the application of section 3 of the Railway Act, but may be rested upon the circumstance that the agreement in itself plainly declared the intention that the provisions of the Railway Act should be applicable only to the extent to which it was not otherwise provided in the agreement, that is to say, that the provisions of the Railway Act were not to be applied in such a way as to alter fundamentally the character of the settlement embodied in the agreement. I do not think that the Act of 1909 displaces these provisions of the agreement relating to the application of the Railway Act. It is one thing to say that the sections mentioned shall apply to the Grand Trunk Railway, and to the Ontario and Quebec Railway generally; it is another thing to say that the Act of 1909 shall be held to abrogate the terms of this statutory settlement—a settlement entered into and sanctioned by the two legislatures with a view of providing for the special needs of a particular locality as touching not only the railways concerned but touching also the interests of the public as regards safety and as regards the accommodation of shippers on the railways and as regards the convenience of access to and from the harbour and passage across the railways. To some of the subject matters falling within the scope of the scheme, the Railway Act would, in the absence of such special legislation, have applied. To many others the Railway Act could have no possible application. It appears to me to be contrary to principle to hold that subsequent legislation dealing generally with highway crossings over railways should (without any special manifestation on the part of the legislature that it should so operate) be applied to the

specific crossings provided for by this legislative scheme in such a way as to abrogate the provisions relating to them, and furthermore to make it impossible to carry the scheme into effect as a whole, and in many respects to render fruitless the costly outlays made on the faith of the legislative sanction given to it. *Esquimault Water Works Co.* v. *City of Victoria*(1). I do not suggest that the provisions of the Railway Act referred to in the Act of 1909 are not to have any application whatever to the locality in question. It is not necessary to go further than this—that the provisions of the legislative arrangement of 1892, so far as they extend to the subjects dealt with in those sections, are to be regarded as paramount. The two following passages appear to me to be apposite. The first is from the judgment of Mr. Justice Willes in *Thorpe* v. *Adams*(2), at page 138:—

> The good sense of the law as laid down by my lord is quite obvious, because if a bill had been brought into Parliament to repeal a local Act, it would never have been allowed to pass into law without notice to the parties whose interests were affected by it, and opportunity being given to them to be heard in opposition to it, if necessary; whereas a general provision in a public Act is discussed with reference to general policy, and without any reference to private rights, with which there is no intention on the part of the legislature to interfere.

And the second from Lord Hobhouse, delivering the judgment of the Judicial Committee in *Barker* v. *Edger*(3), at page 754:—

> The general maxim is *generalia specialibus non derogant.* When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enact-

(1) (1907) A.C. 499, at p. 509. (2) L.R. 6 C.P. 125.
(3) [1898] A.C. 748.

1910

GRAND TRUNK RY CO. v. CITY OF TORONTO.

Duff J.

ment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim. The legislature found an area of land comparatively small in extent to be the subject of intricate disputes in which both Europeans and natives took part. Some of those questions fell within the scope of the Native Land Court and others did not. It was for the benefit of all parties that a single tribunal should adjudicate on the whole group of questions. Therefore, as Williams J. has stated, a new authority was given to the Native Land Court as regards both land and matters of account. It would require a very clear expression of the mind of the legislature before we should impute to it the intention of destroying the foundation of the work which it had initiated some four years before, and to which the court has ever since been assiduously addressing itself.

The appeal should be allowed with costs.

ANGLIN J.—For the reasons given by me at length in the *Yonge Street Bridge Case*(1), and approved of by the Court of Appeal for Ontario(2), I am of opinion that this appeal, in so far as it rests upon an allegation that the appellant company's tracks along the water front of the City of Toronto do not cross any highway, cannot be maintained. That Yonge Street exists as a highway crossed by these tracks was demonstrated in that case; that some ten other highways are likewise crossed by such tracks was shewn before the Railway Board in this case.

The evidence of actual user, prior to the construction of the Don branch, of the portions of such highways actually crossed by it was, it is true, "somewhat scanty, but it is perhaps as good as could reasonably be expected with respect to a time so far back." *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company*(3), at page 209.

(1) 6 Ont. W.R. 852. (2) 10 Ont. W.R. 483.
(3) (1906) A.C. 204.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Anglin J.

But the appellants, as grantees from the Crown of limited railway rights in the nature of quasi-easements, are estopped as against the respondents, privies of the Crown, and its grantees of the lands in question for highway purposes subject to such railway rights, from denying the existence of these highways. This part of the respondent's case is overwhelmingly established.

That over these other streets, as over Yonge Street, in respect to which I need not reiterate my views, the appellants had merely rights for the purposes of their railway in the nature of quasi-easements, similar to those which they enjoy at other highway crossings, is clearly shewn in the judgment of Mr. Justice Idington.

That these streets existed as highways within the definition of that term in section 2 (*k*) of the Railway Act, and that as such they were crossed by the appellants' railway when the order now in appeal was pronounced, in my opinion does not admit of doubt. Moreover, the Railway Board very properly assumed that it was clothed with jurisdiction to determine this question. *Williams* v. *Adams*(1).

The Board had authority to abrogate the Yonge Street bridge order of the former Railway Committee of the Privy Council (R.S.C. [1906] ch. 37, section 32 (2)). The order in appeal, inasmuch as it is inconsistent with the Yonge Street bridge order, is tantamount to an express rescission of the earlier order. The fact that the Yonge Street bridge order, made by the late Railway Committee, has not been in terms rescinded, therefore affords no objection to the jurisdiction of the Board to make the order now in appeal.

The provisions of the order in respect to the clos-

(1) 2 B. & S. 312.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Anglin J.

ing and removal of the York Street bridge may be supported as the rescission of an order of the Railway Committee, and also as a substantive order of the Board for the diversion of a highway.

The provisions directing the elimination of some tracks now in use, the elevation of "through" tracks, while allowing some sidings to be maintained on the level subject to restrictions as to their use, and the cutting off of direct access from the east to the appellants' freight yards involve considerations of two kinds—of policy and of jurisdiction. With considerations of the former class we are not concerned; the discretion of the Board is absolute, and its judgment final. I find nothing in any of these provisions which transcends the jurisdiction of the Board under section 238 of the Railway Act, as re-enacted by 8 & 9 Edw. VII. ch. 32, section 5, to

> make such an order as to the protection, safety and convenience of the public as it deems expedient * * * and (to order) that such other works be executed * * * or measures taken, as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, etc.

I am also of the opinion that there is no "special Act," within the meaning of that term, as used in section 3, of the Railway Act, applicable, which should be taken to override the provisions of section 238. The subject matter of that section—public safety and convenience—is not only not the same as any of those dealt with in the so-called special Acts relied on, it is also paramount to them in its importance. Moreover, I am not at all satisfied that a statute which validates and confirms a private agreement between corporations renders stipulations in that agreement equivalent to provisions of a "special Act" so that they

would, by virtue of section 3 of the Railway Act, override statutory provisions obviously intended to be of universal application such as are contained in section 238. *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Ry. Co.*(1).

But any possible doubt arising out of the so-called "special Acts" affecting the appellant company, would appear to be concluded by section 241(2) of the Railway Act, as re-enacted by 8 & 9 Edw. VII. ch. 32, section 8. Although the decision of the Board was announced in December, 1908, the order in appeal was not settled until, and it bears date, the 7th June, 1909; this Act was assented to on the 19th May, 1909. It provides that:—

> Notwithstanding anything in this Act, or in any other Act, the provisions of sections 236 to 241, both inclusive, of this Act shall apply to all corporations, persons, companies and railways, other than government railways, within the legislative authority of the Parliament of Canada.

Although the Grand Trunk Railway Company has not appealed from the order of the Board, the Canadian Pacific Railway Company claims the benefit of any objections to its validity which would have been open to the former company. The Grand Trunk tracks are admittedly constructed along and upon a public highway. It is, therefore, within the very terms of section 238. The company is required by the order to elevate some of these tracks. This is a permanent diversion of the railway. Diversion may, I take it, be perpendicular as well as horizontal. The order may also be viewed as requiring that "the railway be carried over * * * the highway." In either aspect it is within the purview of section 238.

(1) 25 Ont. App. R. 462, at p. 468.

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Anglin J.

That the order involves the erection of a structure which will in effect obstruct and destroy part of a highway seems to be an objection which should not be open either to the Grand Trunk Railway Company or to these appellants. For highway purposes, excepting the right of crossing the tracks, the part of the Esplanade upon which it is proposed that the viaduct shall be constructed has now no real value. It is for all practical purposes a railway right of way. Vehicles cannot be driven along it and they cross it only at street crossings. For the traffic of carriages and pedestrians easterly and westerly abundant provision is made by the remaining 48 feet of the Esplanade lying north of the Grand Trunk tracks and used as a public street. The crossing rights are provided for by the openings or passages to be made through the viaduct embankment as the order of the Board directs.

Neither in the fact that the order requires the elevation of the tracks of the Grand Trunk Railway Company, the laying of which on the Esplanade was authorized by pre-confederation legislation, nor in the fact that it involves the erection of a permanent embankment upon what is undoubtedly part of a highway subject to railway rights, do I find anything which exceeds the jurisdiction of the Board. By section 6 of the Railway Act the Grand Trunk Railway Company is explicitly declared to be subject to the provisions of the Dominion Railway Act, and provisions of its ante-confederation special Acts inconsistent with the provisions of the Railway Act are excluded and abrogated.

Provision is not made for the carriage of all the crossing highways through openings or passages in

the proposed embankment. Whether the railway companies are entitled to raise this objection is, at least, questionable. The highways not so provided for are in effect diverted so that the traffic upon them will cross the railways at other openings or passages to be provided for parallel and adjacent streets. There is express jurisdiction for the diversion of highways, and, given the jurisdictional fact of a highway crossing or crossed by a railway, the Board is the sole and final judge of when and how this power shall be exercised.

Finally counsel for the appellants object that while they are obliged to elevate their tracks along the water front, they are also required at other points, viz., at Eastern Avenue, and at Spadina Avenue, to carry their tracks under the highways, overhead bridges being directed for the accommodation of vehicular and passenger traffic. With the policy of the order in these particulars we are not concerned. The statute expressly authorizes the Board to order that at any particular crossing the railway shall be carried over or under the highway, and the highway over or under the railway. I see no reason why, if deemed advisable, the Board may not make one provision for one crossing and another provision for another crossing; no reason why it may not embody in one order provisions which it could certainly make in several orders.

To express an opinion upon the merits of the proposed viaduct as a solution of the difficulty caused by the location of railways along the water front of the City of Toronto would be impertinent to the questions before this court. Whatever view should be entertained as to the advisability of the erection of such a structure, the jurisdiction of the Board of Railway

1910

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

Anglin J.

Commissioners to order it, in my opinion, is unquestionable.

The appeal fails upon every point and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the Grand Trunk Railway Co., appellants: *W. H. Biggar.*

Solicitor for the Canadian Pacific Railway Co., appellants: *A. MacMurchy.*

Solicitor for the respondent: *W. C. Chisholm.*