

THE MONTREAL STREET RAIL- } APPELLANTS; ¹⁹⁰⁵
 WAY COMPANY..... } *May 15, 16.
 *June 13.

AND

THE MONTREAL TERMINAL } RESPONDENTS
 RAILWAY COMPANY..... }

ON APPEAL FROM THE BOARD OF RAILWAY COMMIS-
 SIONERS FOR CANADA.

*"Railway Act, 1903," secs. 23, 184—Construction, etc., of street rail-
 way or tramway—Removal of tracks, etc.—Board of Railway
 Commissioners for Canada—Jurisdiction—Condition precedent
 —Use of highways in cities and towns—Consent by municipal
 authority—Approval of by-law—Quebec Municipal Code, arts.
 464, 481.*

In the case of a street railway or tramway or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by sec. 184 of the "Railway Act, 1903," must be by a valid by-law approved and sanctioned in the manner provided by the provincial municipal law, and, in the absence of evidence of such consent having been so obtained, the Board of Railway Commissioners for Canada have no jurisdiction to enforce an order in respect to the construction and operation of any such railway. The order appealed from was reversed and set aside, the Chief Justice and Girouard J. dissenting.

APPEAL from an order of the Board of Railway Commissioners for Canada made on the 27th December, 1904, upon leave granted under sec. 44 (3) of the "Railway Act, 1903"(1).

The order directed that the appellants should at their own cost and expense, within forty-eight hours

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

(1) 35 Can. S.C.R. 478.

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after service of the order, remove the rails, ties, etc., laid by them at the intersection of Ernest Street and Pius IX. Avenue in the Town of Maisonneuve, and restore the roadway as nearly as possible to its original condition, and that the costs of the application should be paid by the appellants to the respondents.

The circumstances under which the dispute arose are as follows:

The Montreal Terminal Railway was declared to be for the general advantage of Canada by the Act 57 & 58 Vict. ch. 83. It passed through the Town of Maisonneuve and, in virtue of its charter and an agreement with the town, the respondents obtained an order under sec. 175 of the "Railway Act, 1903," from the Board of Commissioners for Canada dated 8th June, 1904, approving of proposed branch lines upon Ernest Street among others. On 30th September, 1904, a further order was made by the Board under sec. 184 of the Railway Act, granting leave to carry and operate the said branch line along and upon said street upon obtaining the consent of the Town of Maisonneuve. The respondents proceeded with the construction of said branch line across the intersection of Ernest Street and a projected street, named Pius IX. Avenue, when the appellants, who operate a tramway which extends into the Town of Maisonneuve, on the 15th of October, 1904, laid a double set of tracks, sixty feet in length, across Ernest Street at said intersection, thus obstructing the work of the respondents, crossing their proposed line and preventing them from laying their rails. No other rails were laid on either side of the rails forming the obstruction to connect them with the appellants' tramway.

Upon application by the respondents the Board of

Railway Commissioners, under secs. 23 and 44 of the Railway Act, by the order appealed from ordered the appellants to remove the obstructing rails.

The appeal is taken under the first part of paragraph 3 of sec. 44 of the Railway Act, and involves the question merely of the jurisdiction of the Board to make the order complained of.

Campbell K.C. for the appellants. The order appealed from is beyond the jurisdiction or authority of the Board of Railway Commissioners, because the respondents had no power to enter into a contract with the town for the construction or operation of an electric street railway; they had no charter power to construct or operate any such railway. The appellants had power to construct the track on Pius IX. Avenue both from the Legislature of Quebec and the Town of Maisonneuve, and the line so constructed was its property. The order in question could not be carried out without the destruction of the appellants' property and interference with its civil rights, matters wholly under the jurisdiction of the Legislature of Quebec and the courts having civil jurisdiction in that province.

The Railway Act does not confer upon the Board of Railway Commissioners any authority to authorize the use by federal corporations of the streets of municipalities unless the company should first obtain the consent by by-law of the municipality validly passed, approved and sanctioned under the provisions of the existing municipal laws, in the present case, arts. 481 and 484 of the Quebec Municipal Code. It does not confer, and could not confer, any authority to order the destruction of property or to affect civil rights except in so far as sec. 101 of the British North America Act, 1867, permits.

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Section 7 of the "Railway Act, 1903," does not bring a provincial electric railway within the purview of the Act, so far as the removal or destruction of the railway of the provincial company is concerned, but only as to "connection" or "crossing," both of which words imply the continued existence of the provincial work.

If any provisions of the "Railway Act, 1903," can be construed so as to empower the Board to order the demolition of the works of a provincial company, it is *ultra vires* to that extent.

Dandurand K.C. and *Belcourt K.C.* for the respondents. It is too late now for the appellants to question the jurisdiction of the Board; besides this we contend that the Board had full jurisdiction to make the order.

The appellants were represented before the Board at the hearing and answered the application by counsel; they joined issue on the merits and accepted the jurisdiction and they are now estopped from questioning the jurisdiction of the Board. They accepted the tribunal, and there is nothing, in law, to prevent the Board from adjudicating in the matter. The question of jurisdiction, if any there was, could only arise on account of the personality of the appellants, *i.e.*, the fact of their incorporation by the provincial legislature. The jurisdiction *ratione personæ* is not a question of public order and a tribunal which on that ground would not have jurisdiction of right can validly adjudicate with the consent, even tacit, of the parties. Pothier, *Traité de Procédure*, ch. 2, sec. 4, sub-secs. 2 et 3; *L'Union St. Joseph de Montréal v. Lapierre* (1); *Oakes v. City of Halifax* (2); Beauchamp, *Jurisprudence of the Privy Council*, p. 611, No. 62; p. 624, Nos. 101, 104, 105, 108, 109, 111.

(1) 4 Can. S.C.R. 164.

(2) 4 Can. S.C.R. 640.

Under any circumstances the Board had full jurisdiction in the matter under sec. 23 of the Railway Act, and the appellants had violated the orders, previously made by the Board in June and September, by laying tracks across the respondents' line without the previous authorization of the Board as required by sec. 177. They acted contrary to orders based on secs. 175 and 184 of the Railway Act by obstructing the construction and operation of the branch line authorized and sanctioned by said two orders. The Board, therefore, had complete jurisdiction in the matter, and appellants cannot as a provincial railway claim exemption from the operation of the "Railway Act, 1903." The words of sec. 23 are conclusive; every violation of the Act brings the offender under the jurisdiction of the Board. Section 7 of the "Railway Act, 1903," enacts that every steam or electric street railway or tramway authorized by special Act of the legislature of any province crossing the line of a railway subject to the legislative authority of the Parliament of Canada comes under the Act as regards such a crossing. Even supposing the terms of the Act did not make it specially applicable in the premises, under the rules governing the interpretation of statutes the Board would still have jurisdiction because the Act was passed with a certain object and a tribunal constituted to carry out that object; consequently, that tribunal is vested with all the powers necessary to that end, even though such powers are not specially mentioned. *Beauchamp*, Jurisprudence of the Privy Council, p. 765, No. 127. If the appellants can defy the Board the power given respondents, under authority delegated by Parliament, would be set at naught and the orders of the Board would be utterly valueless.

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Under sec. 92 of the British North America Act, 1867, railways declared to be for the general advantage of Canada are excluded from the classes of subjects in relation to which the legislatures may exclusively legislate and, by sec. 91, the Parliament of Canada may legislate upon any matter not exclusively assigned to the provinces. This has been done by special Acts concerning the company and by the Railway Act. It is true this legislation in its operation affects a purely local company, but it does so only incidentally and without taking the right of crossing under certain conditions from the appellants. In many instances Dominion legislation incidentally affects provincial subjects, but the principle now well determined by jurisprudence is that the incidental effects of a federal law over provincial matters does not affect its validity. See Lefroy, *Legislative Power in Canada*, prop. 36, p. 416, prop. 37, p. 425 (*f*). Under such circumstances the balance of power being with the federal authority (secs. 91 and 92 B. N. A. Act) and local interests being subservient to general interests, the federal law must govern. Lefroy, prop. 46, p. 52 (*f*). Railways are the arteries of trade and commerce and the principal factors therein and conflicts between railways of the character in question in this case are of a nature to interfere with trade and commerce. It is therefore natural that the law to govern in such a case should be the federal law, the regulation of trade and commerce being assigned exclusively to the federal authority.

As to civil rights, all the appellants can claim is the right of constructing lines and branch lines in localities determined by its charter for the purpose of carrying passengers, and, incidentally, laying tracks for the purpose of establishing said lines. They can-

not, however, shew any law or statute authorizing them to obstruct any other railway, and yet that is what they have done wilfully and maliciously. Their object was not the construction of a line to carry passengers, but merely a wilful obstruction. How, then, has the Railway Act or the Board interfered with its civil rights? See *Masten, Company Law*, p. 90, No. 11.

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The orders of the Board in June and September, 1904, have not been attacked, they are still in full force and effect and manifestly within the powers of the Board. This court ought not to interfere with the order of the 27th December, 1904, as it is merely a consequence of the previous orders and for the purpose of enforcing them.

A. G. Blair for the Board of Railway Commissioners for Canada. The order appealed from was necessary to enforce the former orders. The jurisdiction of the Board to make the orders made in June and September is not and cannot be questioned. The Board, consequently, was vested with all the necessary authority for the enforcement of the former orders, validly made in June and September, when they judged it proper to do so in deciding upon the respective rights of the applicant company and the contestants. Both parties appeared before the Board, submitted to their jurisdiction as a special tribunal, presented their respective contentions, and the decision they arrived at ought to be binding upon both of them.

THE CHIEF JUSTICE (dissenting).—This case comes up under sec. 44, sub-sec. 3, of the "Railway Act, 1903," by special leave, on an appeal upon a question of jurisdiction from an order of the Board

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of Railway Commissioners. The order appealed from, dated the 27th day of December, 1904, reads substantially as follows:

IN THE MATTER OF

The application of the Montreal Terminal Railway, hereinafter called "The Applicant Company" under sec. 23 of the "Railway Act, 1903," to the Board for an order directing the Montreal Street Railway Company to remove the two sets of rails which the said company has placed across the line of the applicant company in course of construction, and across the width of Ernest Street in line with the projected street known under the name of Pius IX. in the town of Maisonneuve.

WHEREAS by an order of the Board, dated the 8th day of June, 1904, the plans, profiles and books of reference of proposed branch lines of the applicant company along and upon Adams Street, Ernest Street, Sherbrooke Street, Orleans Street, LaSalle Street, and Second Avenue, in the Town of Maisonneuve, were approved and sanctioned subject to the terms and conditions of an agreement bearing date the 30th day of April, A.D. 1904, made between the Corporation of the Town of Maisonneuve and the Montreal Terminal Railway Co., the applicant company being also authorized to construct, maintain and operate the said branch lines;

WHEREAS by a further order of the Board, dated the 30th day of September, A.D. 1904, leave was granted under sec. 184 of the "Railway Act, 1903," to the applicant company to establish and operate its line of railway on Ernest Street, Orleans Street, Sherbrooke Street, LaSalle Street, Adams Street, and Second Avenue, in the Town of Maisonneuve, in accordance with the terms of the said agreement of the 30th of April, 1904;

WHEREAS this application was heard in the presence of counsel for the applicant company and for the Montreal Street Railway Company; and it appearing from the evidence adduced for the applicant company, under and by virtue of the above recited orders of the 8th of June and the 30th of September, 1904, had proceeded to establish and operate its line of railway along said Ernest Street, in the Town of Maisonneuve; and

WHEREAS during the night of the 15th of October, 1904, the Montreal Street Railway Company did lay double rails across the line of the railway of the applicant company, at the intersection of said Ernest Street with Pius IX. Avenue, thereby obstructing and impeding the establishment of the applicant company's line of railway as authorized by the said orders of the Board of the 8th of June and the 30th of September, 1904, said obstruction being in violation of the said orders—therefore

IT IS ORDERED

That the Montreal Street Railway Company do, at its own cost

and expense, remove, within forty-eight hours after the service upon it of this order, the rails and other obstructions so laid down by the said Montreal Street Railway Company at the intersection of Ernest Street and Pius IX. Avenue, in the Town of Maisonneuve, and restore the roadway as nearly as possible to its original condition.

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In answer to the respondents' application to the Board for that order, the appellant company had pleaded as one of the grounds for their opposition to the respondent's application that:

The Town of Maisonneuve had no power to grant to the Montreal Terminal Railway Company and the Montreal Terminal Railway Company had no power to acquire from the Town of Maisonneuve the right to construct or operate branch or circuit lines by electricity in the town and the contract referred to as passed before Ecrement, Notary, on the 30th day of April, 1904, was *ultra vires* of the town and, moreover, could not under the statutes of the Province of Quebec, bind the said town, except with the approval and sanction of the municipal electors of the said town and the approval of the Lieutenant-Governor-in-Council, neither of which approvals had been obtained.

The appellants, by that plea, based their opposition to the order of the 27th December, 1904, which they now appeal from on the ground of the illegality of the two previous orders of the Board, one of June, 1904, and the other of September, 1904, which are the foundation, in express terms, of the last order, of 27th December last, now appealed from.

By the said order of June, the Board had decreed:

That the branch lines of the applicant company (the present respondent) as shewn on and by the plans, profiles and books of reference on file with the Board under No. 12957, file No. 343, be and the same are hereby approved and sanctioned, subject to the terms and conditions of agreement bearing date the 30th day of April, 1904, and made between the Corporation of the Town of Maisonneuve and the Montreal Terminal Railway Company;

That the applicant company be and they are hereby authorized to construct, maintain and operate the said branch lines.

And by the order of September, the respondent

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company were granted leave to establish and operate their line of railway on Ernest, Orleans, Sherbrooke, LaSalle and Adam Streets and Second Avenue, in the Town of Maisonneuve, Province of Quebec, in accordance with the terms of agreement entered into between the said applicant company and the Corporation of the Town of Maisonneuve, under the date of 30th April, 1904.

I understand that the majority of the court are of opinion that this appeal from the order of December should be allowed upon the ground taken as above by the appellants in their plea that the two previous orders referred to are illegal because they are based, as appears on their face, upon the contract with the Town of Maisonneuve of the 30th of April, 1904, which, as pleaded by the appellants, was *ultra vires* of the said town.

I have to dissent from that conclusion upon the simple ground that the said contract cannot be impugned by the appellant company in such a collateral proceeding as this one is, especially in the absence of one of the parties to that contract, the Town of Maisonneuve.

The Board of Railway Commissioners had not the power to set it aside. They had to treat it as in full force and effect. They might have suspended their proceedings, had the appellants applied for it, so as to allow them to regularly impeach the said contract and the by-law which authorized it before the provincial tribunals having jurisdiction in the matter. But in the absence of any application to that effect they had to treat it as legal and valid and give effect, as they have done, to their two first orders.

The appellants would have this court substitute itself, as a court of first instance, for the provincial

tribunals of original jurisdiction in the matter. This in my opinion, we should refuse to do.

Though unnecessary for the determination of this appeal, in the view taken by the majority of the court, I feel in duty bound to say that there is, in my opinion, no foundation whatever for the appellants' contention that the "Railway Act, 1903," in any of the sections in question in this case or referred to by the parties, is *ultra vires* and unconstitutional.

The Railway Board's action would be paralyzed in its most important functions were their powers curtailed as the appellants contend they should be.

Its powers are extensive no doubt, but they necessarily had to be, in the public interest, for the efficient control and administration of the railway system of the country.

GIROUARD J. (dissenting), concurred with the Chief Justice.

DAVIES J.—This is an appeal granted by leave of a judge of this court under sec. 44 of the "Railway Act, 1903," from an order of the Board of Railway Commissioners made on the 27th December, 1904, ordering the immediate demolition and removal of an obstruction laid down by the Montreal Street Railway Company upon the road-bed for a railway built by the Terminal Railway Co. (respondents) at the intersection of Ernest Street and Pius IX. Avenue in the Town of Maisonneuve, and to restore the road-bed as nearly as possible to its original condition.

The only question for us to determine is whether the Board of Railway Commissioners had jurisdiction to make the order appealed from.

The road-bed of the respondents at the intersection of the two streets in the Town of Maisonneuve

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had been made after the company had entered into a contract with the town for the construction of an electric road, of which the road-bed in question formed a part, through the limits and along and across certain streets of the town.

A by-law, or resolution on which to base one, had been introduced into the town council and passed by it, authorizing a contract to be entered into with the respondents for the construction of this road, but it was admitted that such by-law had never as a fact been submitted to the ratepayers or to the Lieutenant-Governor-in-Council for approval as prescribed by sec. 481 of the Municipal Code of Quebec.

The 23rd section of the "Railway Act, 1903," confers upon the Board of Commissioners full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested and (*inter alia*) sub-sec. (b).

Requesting the Board to make any order or give any direction, sanction or approval which by law it is authorized to make or give.

I cannot have any doubt that in making any order within its jurisdiction the Board has full and complete power to make it effective, and that, if in the case before us the Board was invested with power to make an order on the subject of this obstruction, the form it adopted would not be open to the objections taken to it as infringing upon the powers and charter rights of a provincial railway or to property and civil rights within the province. I have had occasion so very lately to discuss the plenary powers which Parliament possesses to legislate under the enumerated sub-sections of sec. 91 of the B. N. A. Act, 1867, that I need not repeat my arguments here(1).

(1) *In re Railway Act*, 36 Can. S.C.R. 136.

Then, as to the authority of the Board in this case we are referred to the 184th section of the Railway Act. It reads:

The railway may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board as hereinafter provided, but the Board shall not grant leave to any company to carry any street railway or tramway, or any railway operated or to be operated as a street railway or tramway, along any highway which is within the limits of any city or incorporated town, until the company has first obtained consent therefor by a by-law of the municipal authority of such city or incorporated town.

Sub-section 3 of the above section reads:

Nothing in this section shall deprive any such company of rights conferred upon it by any special Act of the Parliament of Canada, or amendment thereof, passed prior to the present session of Parliament.

Several questions were discussed at the bar arising out of this section.

Mr. Belcourt contended strongly that the section did not apply at all because the provincial charter gave the company power to build it with the consent of the municipality, and that the charter granted by the Dominion Parliament subsequently (57 & 58 Vict. ch. 83) in its second section preserved this right to it. A careful comparison of the two charters convinces me that this contention cannot be sustained.

The Dominion charter prescribing exactly through what municipalities the roads the company (thereby made a Dominion corporation) were authorized to build should run, applying to the company and its undertaking the Dominion Railway Act, and making complete provision for the construction and operation of the undertaking it authorized, necessarily repealed the general powers of the provincial charter, giving general powers to build anywhere in the Island

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of Montreal. The powers conferred by the two charters were inconsistent, and the later Dominion legislation having been applied for by the company itself repeals the provincial legislation with which it is inconsistent, excepting in so far as any of the latter powers are specifically retained.

Mr. Belcourt argued that the power to build was retained by the 2nd section of the Dominion charter as being a "right or privilege acquired," but I think Mr. Campbell's answer was irresistible that the true meaning of the words of that section is that they apply only to assets and liabilities of the company, and not to its charter powers.

Even if that was not so, and if the company retained, after obtaining its Dominion powers, the full powers originally granted by the local legislature, I would have no hesitation in holding that the consent of the municipality which by the local charter was made a condition precedent of the right to build, meant a legal consent, a consent in the way and manner prescribed by the Municipal Act, a consent by by-law approved of by the ratepayers and Lieutenant-Governor-in-Council.

Then sec. 184 of the Railway Act applying what does it mean? It says:

The railway (which by the interpretation clause in this case means the railway authorized by the Dominion charter) may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board as hereinafter provided.

And then it goes on to provide that the Board shall not grant the leave until the company *has first obtained the consent of the municipality, city or town*, as the case may be. This consent of the municipality, to be evidenced by a by-law, is made a condition precedent to the exercise by the Board of its powers.

The method of evidencing that consent is by by-law, and this must, of course, comply with the requirements of the provincial law in that regard, defining what is necessary to constitute a valid by-law. In Quebec such a by-law must be approved of by the majority in number and value of the electors, proprietors of taxable real estate, as well as by the Lieutenant Governor in Council.

Two *ex parte* applications were made to the Board of Railway Commissioners by the respondent company, one in June, 1904, under the 175th section of the Railway Act, authorizing the construction of branch lines of not more than six miles in length, asking for the approval of plans of the company shewing the proposed lines of which this line in question is one, and the other on the 30th September, 1904, under the 184th section of the Act for leave to carry and operate its line along certain streets of Maisonneuve the line in question being one. Both applications were granted.

As to the former it is perhaps not necessary for me to express an opinion whether the clauses authorizing six mile branches apply to such an undertaking as that authorized by the respondent company's charter. Reading that charter carefully, as comprised in the two statutes, 57 & 58 Vict. ch. 83, and 62 & 63 Vict. ch. 76, I have no personal doubt that they do not, because it is evident that Parliament defined with great care the places through which and the extent to which the company might build, and the extension of the branch line sections into the charter would be quite inconsistent with its specific and definite provisions, and, in fact, be quite incongruous.

With respect to the latter order of the 30th September authorizing the running of the railway on the

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streets of Maisonneuve, it was an *ex parte* order made on the application of the Montreal Terminal Railway Co., and expresses upon its face to have been made upon the consent of the Corporation of the Town of Maisonneuve filed with the Board.

The Board knowing well that it could only make its order conditionally on the existence of a consent of the municipality evidenced by a by-law assumed the existence of such by-law and gave the order.

The railway company which made the application took the order at its peril. The consent referred to in the order does not profess in any way to say that the by-law had been approved as required by law, nor is there anything in the record from which such approval could be inferred.

Such approval was, in my opinion, necessary to the validity of the by-law and to enable the Board to make the order it did.

We are asked to presume that the by-law was submitted to the ratepayers and approved, but I think we cannot do that in the face of a by-law which professed to dispense with such an essential. Everything necessary to give validity to the proceedings of the Board in a case in which it has jurisdiction may well be presumed, but not the existence of facts on which the jurisdiction itself depends. And more especially not the existence of two essential facts necessary to the validity of a third fact, the by-law, where the third fact, the by-law, is proved, but the two others antecedent and indispensable facts are absolutely without mention, and nothing is said from which their existence could be inferred.

When the application was made for the order to remove the obstruction now in immediate question, the appellant company pleaded in answer not only the

absence of any proof of the facts, but also their *non-existence*. The Board, therefore, made the order now before us in this appeal with full knowledge that certain facts necessary to give them jurisdiction were non-existent and not proved or without appreciating the importance of the objection. In my opinion it is fatal to the validity of the order impeached which, therefore, must be set aside.

I have purposely refrained from entering into any discussion of the supposed rights of the appellants as it did not appear to be necessary for a decision of the only point here involved, viz.: the jurisdiction of the Railway Board to make the order.

The appeal should be allowed with costs against the respondents in this court and before the Railway Board.

NESBITT J.—I have had the opportunity of reading the judgment of my brother Davies, and while agreeing in the result, desire to add a few words as to my reasons for so concurring.

I think the Board of Railway Commissioners have full power to enforce any order which they may make in any case where they have jurisdiction; and that the fullest possible effect should be given to the language contained in the latter part of sec. 23 of the "Railway Act, 1903." The very object of the Act would be otherwise defeated if it was necessary to apply to the courts of the various provinces to enforce orders made by the Board.

The order, however, made in this case must be justified under secs. 177 and 184 of the Act, and, in order to bring itself under the latter, I think the applicant company must shew it has obtained an effective by-law of the municipality according to the provincial

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law governing the making of such by-laws by municipalities; at least in the absence of express federal legislation empowering the building of the railway without such formalities being complied with. In this case Parliament merely authorizes the building of the railway upon obtaining the consent of the municipality, which must be interpreted to mean consent in legal form, and in this case consent as defined by sec. 481 of the Municipal Code. This authority was expressly denied, and the only evidence before us shews a lack of such authority, and sitting as we do in appeal we have a right to examine the evidence essential to jurisdiction required by the 184th section of the Railway Act.

I express no opinion as to the application of the 175th section of the Act to electric tramways chartered to run between certain defined termini. The section was originally applicable to steam railways, which required short branches for the development of traffic arising from industrial or mining enterprises coming into existence near the main line, but by sec. 118 it may be very plausibly argued that Parliament has enabled any tramway chartered by it and declared to be for the general advantage of Canada to take advantage of the very extensive powers originally intended to serve public needs in the case of trunk lines.

I agree with my brother Davies as to the meaning to be attached to the words "right or privilege acquired" used in the second section of the Dominion Act referred to.

I would allow the appeal with costs.

INDINGTON J.—This is an appeal from the Board of

the Railway Commissioners for Canada under sec. 44, sub-sec. 3, of the Railway Act, which provides that:

An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction.

Section 23 of the said Act gives jurisdiction to the Board to inquire into, hear and determine any application by or on behalf of any party interested within sub-sections (a) and (b) of the said section. The latter sub-section provides as follows:

And the Board may order and require any company or person to do forthwith or within or at any specified time and in any manner prescribed by the Board so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required to do under this Act or the special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act or the special Act, and shall have full jurisdiction to hear and determine, etc., etc.

The question raised here is whether or not what was complained of before the Board comes within the part of the section I have quoted.

It seems that the appellants and respondents are rival companies, which I will assume for the present (but I am not expressing or to be held as here expressing any opinion upon the point), had each the power to build railways in the Town of Maisonneuve upon fulfilling the conditions of law enabling them to operate within the said town.

The appellants anticipating their future operations, in the way of construction within the said town, whilst the respondent company were building the road along Ernest Street, laid down at the intersection of that street with Pius IX. Avenue, transversely across Ernest Street, three lengths of rails, forming a double track, as if to become part of the railway when built along Pius IX. Avenue. The appellants had not at

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the time in question built any part of their road upon Pius IX. Avenue, but, avowedly, were laying down this small portion of track in the hope of getting some advantage as the senior road, when the questions would come to be determined of the two roads crossing each other at this junction, the mode of affecting the crossing, and the burthen to be borne by the respective companies in relation to the establishment and continuation of said crossing.

I look upon that proceeding as highly irregular and that in doing it the appellant company stand in the same light as any one else, other than the railway company, in placing such an obstruction on the public highway would be in. Those doing any such act might be proceeded against, by the municipal authorities or ratepayers specially interested, or by the respondent company if they had acquired the right to lay a track upon Ernest Street and were obstructed thereby, in the ordinary courts of justice having jurisdiction in that behalf, to have such obstruction removed, and the parties putting it there restrained from a continuation of such obstruction, or laying down or erecting any such at any other place on the street over which the respondent company had a right to lay their track.

I cannot understand, on the facts, that what was complained of was anything more than any other obstruction that evil disposed persons might be guilty of placing upon the street for the purpose of obstructing the respondent company or any other purpose.

To make this clear let us turn to the paragraph of sec. 23 that I have quoted and analyze it. It enables as follows: The Board to

(1). Order and require any company or person to do * * * any act, matter or thing which such company or person is or may be required to do under this Act or the special Act.

(2) Forbid the doing or continuing of any act, matter or thing which is contrary to this Act or the special Act.

How can the specific act complained of here be said to have been forbidden? Under what section of the Railway Act or any special Act were the appellants forbidden to do such an act as is complained of here?

Such an act, wholly irregular, never was contemplated as having been likely to occur and come within this Act, or the powers given the Board by this Act; or when done by anybody as requiring a new remedy to be applied by this legislation.

The only section upon which reliance has been placed in argument here, to shew that what has been done had been forbidden by the Act, is sec. 177. That section forbids one railway company to cross or join the lines or tracks of another railway company without the leave of the Board.

There were no lines or tracks in existence here. It is clearly a misapprehension to apply this section to projected lines that may never be built.

What the section forbids is plainly, any company presuming to take to itself the right, for purposes of making a crossing, to meddle with the railway lines or tracks of any other company without permission. Thus far the public safety required some properly constituted authority to have the power of control. It is the public and the public interests alone that are to be looked to in every question coming up for interpretation under this legislation. The Board has been specially constituted for that protecting purpose. The conflicting powers that may exist only in theory and are not brought into operation as between two

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companies are something with which the Board has nothing to do.

It can still less be said that the removal that has been ordered of this obstruction was something contemplated by the Act. It seems to me that the plain ordinary meaning of either set of words I am referring to does not convey such a meaning as to clothe the Board of Railway Commissioners with power to enforce the civil rights of any company as against those who may have trespassed upon their property or, in any of the numerous ways one can conceive of, invaded their civil rights.

The whole scope and purpose of the legislation constituting the Board and assigning it certain powers is that the acts of the railway companies, as such, and the railway companies in their relation to each other, as such, shall be governed and controlled by the Board.

I am not desirous of laying down here any rule (as to what is the power of government or control incidental to the main purpose of this legislation, and incidental to the jurisdiction thus defined) that will apply to all cases.

I am clear, however, that the exercise of such powers as have been conferred upon the Board must be restricted within the literal meaning of the words I have quoted and what is necessarily implied or to be implied incidentally to giving that literal meaning full force and effect.

To permit of a wrong, such as I take it the appellant company were guilty of here, to be remedied by the action of the court of the Board of Railway Commissioners, would be but to open the door to the exercise of a wide jurisdiction over the railway companies, or any of them, in their relations to any or all of

His Majesty's subjects in their dealings with or in opposition to a railway company and be beyond the scope of the "Railway Act."

I would suggest that when any question arises out of any such relationship, whether of a contractual character or in the nature of a trespass or other wrong, which is brought before the Board, they should be careful to ask whether what has been complained of has been forbidden specifically by the "Railway Act" or a special Act or regulations duly made by the Board as such, or a something that has been required by the "Railway Act" or special Act or such regulations to be done by a railway company. And if not, then the parties should be remitted to the ordinary tribunals.

In speaking of regulations I mean general regulations not specific orders. As to such orders though the Act seems to give them binding authority till appealed from or rescinded, that is not to be stretched too far. *Primâ facie* they are valid and are declared by the Act to be valid.

But if they directed one railway company to amalgamate with another and be constituted one, or assigned the Parliament buildings to a railway company, I need not say such an order would be void. What may be intended by declaring such orders valid is to protect those who act under them, even if the orders turn out *ultra vires*.

The remarks of some members of the Board seem to indicate a different view taken in this case, and that may have lead to what I think is error in this order.

There is, however, another ground that I think is well taken if we are to assume that the evidence upon which it rests and the legal presumption arising from

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such evidence as is before us will permit us to say that the point is well taken. The point I refer to is this: The respondent company claimed to have entered into an agreement with the Corporation of the Town of Maisonneuve, giving the respondent the right to use the streets of the said town for the purpose of running their cars over them.

This agreement rests upon nothing but a resolution of the council of the town. It is said that there is no evidence of the absence of a by-law. The agreement upon its face purports only to be pursuant to a resolution of the council, and the contention was set up before the Board that there was no by-law sanctioned by the people (and it was not denied), and therefore I think the presumption relied on cannot apply. No by-law was ever passed giving the consent which the agreement shews. The Railway Act, sec. 184, provides as follows:

The railway may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board as hereinafter provided, but the Board shall not grant leave to any company to carry any street railway or tramway or any railway operated or to be operated as a street railway or tramway along any highway which is within the limits of any city or incorporated town until the company has first obtained consent therefor for a by-law of the municipal authority of such city or incorporated town.

The Board in this case upon an *ex parte* motion, in June last, made an order approving and sanctioning branch lines of the applicant company

subject to the terms and conditions of agreement bearing date the 30th day of April, A.D. 1894, and made between the corporation of the Town of Maisonneuve and the Montreal Terminal Railway Company.

and authorized the applicants to construct, maintain and operate the said branch lines.

On the 30th of September last, another *ex parte* order was made granting leave to the respondent to

establish and operate its lines of railway on Ernest and other streets in Maisonneuve in accordance with the terms of the agreement already referred to.

It was urged before us that it must be presumed from these orders that the Board acted regularly, and that it follows therefrom, as a presumption, that the necessary by-law of the municipal authority required by sec. 184 already referred to had existence, and that such may not only be presumed, but must be presumed until this order has been set aside.

I am unable to take that view. I think when the Board of Railway Commissioners had before them the facts stated on the application now in question and not controverted, that they should have observed that they had been led into error by the applicants as to these orders of June and September.

Moreover, I think it may well be said that when the Board made such orders the presumption was that they did not intend them to operate until consent had been got in the proper manner from the proper municipal authority.

I do not think there can be any question as to the intention of the legislature in enacting, as it has, in the Municipal Code. It is elementary law that every municipal corporation has only such powers as the legislature chooses to grant it. And the legislature, by art. 464 and art. 479, sub-secs. 4, 5, 6, of the Municipal Code, enacts as to the passing of by-laws as follows:

Art. 464:—Every municipal council has a right to make, amend or repeal by-laws, which refer to itself, its officers, or the municipality, upon any of the subjects mentioned in this chapter.

Art. 479:—Sub-sec. (4)—By acquiring the right of way in the municipality for any railway company, either by mutual agreement, or by paying the price of the lands necessary for that purpose, as established by an expropriation made for that purpose under the provision of the Railway Act.

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(5) To provide for the establishment, construction or running, within the municipality, of lines of omnibuses, stages or tramways driven by steam or electricity, undertaken and built by incorporated companies or by any person or firm.

(6)—To grant to any company, person, or firm of persons who undertakes or has already undertaken to establish, construct or run such lines of omnibuses, stages or tramways driven by steam or electricity, a privilege for laying rails and running omnibuses, stages or electric or steam cars over its roads and streets, or within the limits of the said municipality, and to grant such persons an exclusive privilege for ten years.

We have not been referred to any other power than is thus conferred.

Article 481 provides that :

Every by-law passed in virtue of the two preceding articles shall before coming into force and effect, be approved by the majority in number and in value of the electors being proprietors of taxable real estate who have voted in the municipality, and by the Lieutenant-Governor-in-Council.

No other power has been given the municipal authorities to speak on this subject. It is idle, in face of this, to argue that because a statute such as the special Act relied upon in this case has used the word "consent" without adding in what way to consent we are to infer some other power rather than that the law has expressly given.

There is only one lawful way in which the municipal authorities can exercise such high authority in the Province of Quebec. Elsewhere the need of such a restriction upon municipal councils has been much felt.

It would be rather shocking to find and tell the people of Quebec province, who are thus far in advance of others, that such proper legislation was of no avail to protect the ratepayers' municipality in the way it was intended they should be protected by restricting the authority of the council in such cases

until the people had expressed their will in the usual way.

I am satisfied also that sec. 184 I have quoted is not any authority for the Board of Railway Commissioners to act in any other case than where the consent of the municipal authority has been given by by-law.

The saving clause, sub-sec. 3 of that section, which the respondent's counsel relied upon, does no more than preserve the rights conferred by any special Act of the Parliament of Canada.

If any such company should have, independently of the Board of Railway Commissioners, authority to run over the streets of any city or town that must stand. It is not affected by the will of the Commissioners or the authority given to the Commissioners.

To give effect to the presumptions alleged to exist in this case would be to permit the respondents to take advantage of their own wrong.

I think it may well be laid down as a principle of action for all who apply to the Board of Railway Commissioners in cases such as we have before us that the utmost good faith should be observed.

I do not wish it to be inferred that I think that in this case there was any intentional bad faith. I rather infer that it was a mistaken view of the law that led to the present position of matters.

I think the appeal should be allowed. I do not think there should be any costs to either party. Though the appellants have succeeded on the law their conduct was such as should not be encouraged

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MONTREAL STREET RY. Co. in any way. They are entirely to blame, in attempting to do what they did, for all the expense and trouble that has ensued including this application.

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Appeal allowed with costs.

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Ry. Co. Solicitors for the appellants: *Campbell, Meredith,*
Idington J. *Macpherson & Hague.*

Solicitors for the respondents: *Dandurand, Brodeur*
& Boyer.
