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*Feb. 23, 24.
*May 2.

THE TORONTO RAILWAY COMPANY ..... APPELLANTS;

AND

THE CORPORATION OF THE CITY OF TORONTO AND THE CANADIAN PACIFIC RAILWAY COMPANY ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Provincial crossing—Dominion railway—Change of grade—Elimination of level crossing—Substitution of subway—Public protection and safety—Power to order provincial railway to share in payment of cost—"Railway Act" ss. 8(a), 59 and 288.

The provisions of the "Railway Act" empowering the Board of Railway Commissioners to apportion among the persons interested the cost of works or constructions which it orders to be done or made are *intra vires*.

On Avenue Road, Toronto, the tracks of the Toronto Ry. Co. crossed those of the C. P. Ry. Co. at rail level. On report of its chief engineer that this crossing was dangerous the Board, of its own motion, ordered that the street be carried under the C. P. Ry. tracks. This change of grade relieved the Toronto Ry. Co. from the expense of maintaining an interlocking plant and benefitted it otherwise.

Held, that the order was made for the protection, safety and convenience of the public; that the Toronto Ry. Co. was a "company interested or affected by such order"; and that the Board had jurisdiction to direct that it should pay a portion of the cost of the subway. *British Columbia Electric Railway Co.* v. *Vancouver, Victoria and Eastern Railway Co.*, [1914] A.C. 1067, distinguished.

The agreement between the Toronto Ry. Co. and the City of Toronto by which the former was given the right to lay its tracks on certain streets including Avenue road did not affect the power of the Board to make said order.

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

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APPEAL from an order of the Board of Railway Commissioners for Canada on certain questions of law, by leave of the Board, and on a question of jurisdiction, by leave of the Chief Justice of Canada.

The following are the questions so submitted to the Supreme Court of Canada for decision:—

"1. That the Board of Railway Commissioners for Canada had no jurisdiction to order the Toronto Railway Company to contribute to the cost of the construction of the subway at Avenue Road.

"2. That by reason of the terms of the agreement between the Toronto Railway Company and the City of Toronto, dated the 1st day of September, 1891, and confirmed by 55 Vict., chap. 99, the Toronto Railway Company should not have been ordered to contribute to the cost of the said subway.

"3. By reason of the agreement between the Toronto Railway Company and the City of Toronto, dated the 1st day of September, 1891, and the Act of the legislature confirming the same, that the said Toronto Railway Company is entitled to the use of the said street in the exercise of its franchise. And because the City of Toronto and the Canadian Pacific Railway Company agree upon the elimination of the grade at the crossing of the said street by the Canadian Pacific Railway Company it does not entitle either party to call upon the Toronto Railway Company to contribute to the cost of the same."

D. L. McCarthy K.C. for the appellant. The order of the Board was not made for the protection of the public but was merely a matter of municipal improvement. The fact that the appellant company was benefitted did not empower the Board to saddle it with a portion of the cost. *British Columbia Electric Rail-*

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way Co. v. *Vancouver, Victoria and Eastern Railway Co.*(1).

W. N. Tilley K.C. for the respondents the Canadian Pacific Railway Co. referred to *City of Toronto* v. *Canadian Pacific Railway Co.*(2); *Ottawa Electric Railway Co.* v. *City of Ottawa*(3).

Colquhoun for the respondent the City of Toronto.

THE CHIEF JUSTICE.—This is an appeal by leave against an order of the Board of Railway Commissioners for Canada dated the 12th November, 1914, made in the matter of the apportionment of the cost of the grade separation work at North Toronto (exclusive of Yonge street), whereby and so far as the appellants are alone concerned it was ordered

that 10% of the cost of the separation of grades at Avenue Road, North Toronto, be borne and paid by the Toronto Street Railway Company.

The "Railway Act" gives power to the Railway Board where a railway is constructed across a highway to order that the railway be carried over the highway and to order what portion, if any, of cost is to be borne respectively by the municipal or other corporation or person in respect of such order. Though perhaps not very clearly worded, the meaning of section 238 must be that such order must be with a view to the protection, safety and convenience of the public.

That this enactment is *intra vires* of the power of Parliament I do not think admits of doubt; it was so decided in the case of *City of Toronto* v. *Canadian Pacific Rly. Co.*(2). We have therefore only to consider

(1) [1914] A.C. 1067. (2) [1908[A.C. 54.
(3) 37 Can. S.C.R. 354.

whether or not the order so far as it directed the appellant to pay a portion of the cost was made without jurisdiction.

At the argument much stress was laid by counsel for the appellant on the case of *British Columbia Electric Railway Co.* v. *Vancouver, etc., Railway Co. and The City of Vancouver*(1); indeed, I apprehend that but for that case the present appeal would hardly have been brought. The decision of the Judicial Committee in that case, however, depends upon the facts of the particular case. The application to the Railway Board for an order for four streets to be carried across the railway on viaducts was made by the city corporation and their Lordships approved of the statement that

> the occasion for the application arose from the necessity of determining the permanent grade of these four streets.

The judgment continues:—

> It follows therefore that the application was a matter between the corporation and the railway company alone. * * * It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a proportion of the cost of the improvements because they were of opinion that the tramway company would benefit by them. * * * The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefitted by the works, gave them jurisdiction to make them pay the cost or a portion of it.
>
> There is nothing in the "Railway Act" which gives any such jurisdiction.

Now the facts in the present case are wholly different. It is abundantly clear from the record that the substantial and, indeed I think I may say only, reason for the order of the Railway Board for this grade separation was the elimination of dangerous crossings. That incidentally the tramway company will be benefitted by the separation of the grades can-

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not of course bring the case within the ruling of the Judicial Committee in the Vancouver Case. If the tramway company could have been ordered to pay part of the cost though they derived no benefit from the work, it would be absurd to suppose that they could not be so ordered because they did obtain benefit.

It can make no difference that occasion was taken for abolishing this crossing when the separation of grades in a neighbouring street was decided upon. The two subways were naturally and properly ordered as part of one scheme for the public safety and convenience.

Whatever the rights of the appellant and the City of Toronto, respondent, under their agreement they are only as between the parties and cannot affect the validity of the order of the Railway Board.

DAVIES J.—This is an appeal from an order of the Board of Railway Commissioners directing the Toronto Railway Company to pay a portion of the cost of a subway ordered by the Board to be constructed at Avenue Road in the City of Toronto. Leave to appeal was granted by the Chief Justice on the ground that the Board had no jurisdiction to make the order complained of.

Leave to appeal was also granted by the Chief Commissioner upon certain questions of law;

1. As to the power of the Board to order the appellant to contribute to the cost of the construction of the subway in question.

2. As to the effect of an agreement between the appellant and the City of Toronto upon the granting of the order appealed from; or, as I understand the questions, whether that agreement precluded the Board from making such order.

The main question of the jurisdiction of the Board to make the order involves the constitutionality of the provisions of the "Railway Act" under which it professedly was made, and also involves the questions whether, assuming the sections to be constitutionally valid, the order of the Board was really and truly made under its paramount power of providing at railway and highway crossings for the safety and protection of the public, or whether the subway at Avenue Road was a matter really and practically of street improvements merely, the cost of which the appellants could not be obliged to contribute to.

Passing by for a moment its constitutional validity, sec. 227 of the "Railway Act," as amended by the Act of 1909 regulating the crossing of railway lines by other railway tracks or lines, vests very ample and complete powers in the Railway Board alike as to the terms, conditions and incidents subject to which such crossing may be allowed, as also with respect to the kind and nature of such crossing, and when read in conjunction with sections 28 and 32 of the "Railway Act" would authorize the Board to proceed under such section 227 as well on its own motion, as on a special application for leave to permit a crossing; and as well with respect to an existing crossing which had been allowed by it or by its predecessor the Railway Committee of the Privy Council as with respect to a right to a new crossing sought to be obtained.

When it is once made clear to the Board of Railway Commissioners that the public protection and safety requires that a crossing of railway tracks applied for should only be granted on certain terms and conditions or that an existing crossing requires additional safeguards and protection, then I think under the

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227th section of the Act coupled with the 28th, 29th, 32nd and 59th sections the powers of the Board are complete for the purposes the legislature intended and may be exercised by them either of their own motion or on special application made to them.

If I am wrong in my construction of these sections of the Act, I am still of the opinion that under the special circumstances of this case, namely, where the double tracks of the Toronto Street Railway along Avenue Road cross the double tracks of the Canadian Pacific Railway where they cross that road, the Board had ample powers under section 258 relating to highway crossings to make such order as to the protection, safety and convenience of the public as it did make in this case and including that part of the order assigning the proportion of the costs of the new protection works to the Toronto Street Railway which in the judgment of the Board that street railway should assume and pay.

Then comes the question whether in making the order now in appeal assigning the street railway's contribution towards the construction work ordered, the Board acted under its paramount power of providing for the protection and safety of the public at these railway crossings on this public street or highway, or made it for some other reason or motive.

Mr. McCarthy contended strenuously that they did not make it under the paramount power for protection and safety and that the assessment of the Toronto Street Railway was not legal or justifiable, because it was based, as he contended, upon the grounds that the Toronto Street Railway Company were relieved of the expense of contributing to the cost of operating the then interlocking plant necessi-

tated by their crossing at rail level the tracks of the Canadian Pacific Railway and were also relieved of the possibility of an accident at that crossing. That was, he contended, the real reason for assessing a contribution towards the subway upon the Toronto Railway.

No doubt some observations were made by the Assistant Chief Commissioner in the reasons given on the 5th May, 1914, for the order assessing a portion of the cost of the protection works ordered on and at Avenue Road which give colour to this argument.

These observations and the argument at bar on the point necessitated a very close scrutiny of the entire record of the proceedings before the Board of Railway Commissioners at its several meetings in order to determine what the real grounds were on which the order complained of was made. I have made such a scrutiny with the result that no doubt exists in my mind that the controlling ground which moved the Commissioners to make the order in question was the safety and protection of the public and that the separation of the grades at Avenue Road was ordered mainly if not entirely for that reason, and not with any idea of municipal improvement. The observations made by the Assistant Chief Commissioner in his reasons for making the subway order were intended, I think, not as reasons for the making of the order for the subway, but rather as reasons in support of the quantum of the cost which they had allotted to the Toronto Railway Company to pay.

The then existing interlocking plant at the crossing in question which constituted the protection and safety provided for the public at this point was no doubt sufficient for the day and times when it was

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ordered. But the City of Toronto, it is a matter of common knowledge, has enormously increased its population during the past few years. The traffic on its principal streets has greatly increased and the Board, in acting as it did in making the order, had the benefit of a report on the subject it was dealing with made by its engineers and a knowledge of the facts gained from such report and the plans before it and from the repeated discussions by counsel at its several meetings and from, I assume, actual views of the locality made by its members.

Mr. Maclean, one of the Board of Railway Commissioners, in his reasons for concurring in the order appealed from, says:—

> At the hearing, Mr. Geary, for the city, pressed with great earnestness the contention that the city should not be called upon to contribute to the cost of the grade separation. The work, however, is undoubtedly in the *interest of public safety. The element of danger which was manifestly present* was attributable not only to the increase of traffic on the railway, but also to the increase of traffic on the highways. The railway was rightfully in its location, under proper sanction of law; and the Board is, in my opinion, justified in following the methods of division of cost which it hitherto has applied. The fact that the method of distribution of cost has had the sanction of precedent is, to my mind, by no means the most important factor.

On the whole, I repeat, the only conclusion I could draw from a careful reading of the whole record is that the paramount consideration which weighed with the Board and moved it to make the order was the "protection, safety and convenience of the public."

Then with regard to the constitutional validity of the sections in question, I cannot entertain any doubt. Similar legislation was before this court in the case of *The City of Toronto* v. *The Grand Trunk Railway Co.*(1), when the constitutional validity of sections 187 and 188 of "The Railway Act of 1888" was in-

(1) 37 Can. S.C.R. 232.

volved. Substantially, and for the purposes of this constitutional argument, these sections are the same as those of the present "Railway Act" now before us. This court held these sections to be *intra vires* of the Parliament of Canada. Leave to appeal was refused by the Privy Council.

Subsequently the question of the constitutional validity of these sections 187 and 188 of "The Railway Act of 1888" was brought before the Judicial Committee in the case of the *City of Toronto* v. *The Canadian Pacific Railway Co.*(1), when they were held to be *intra vires* and where it was further held that a municipal corporation was a "person interested" within the meaning of the words of the section.

In delivering the judgment of their Lordships, Lord Collins says:—

> In the present case it seems quite clear to their Lordships that if, to use the language above quoted, "the field were clear," the sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the Legislature which enacted them, and were, therefore, *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reasonable that those who derived special advantages from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provision are alike reasonable and *intra vires* of the Dominion Legislature, and on the principles above cited must prevail, even if there is legislation *intra vires* of the provincial Legislature dealing with the same subject matter and in some sense inconsistent.

I find myself in the face of the different provisions of the "Railway Act" and the decisions of the courts

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upon them quite unable to appreciate or accept the argument that the Toronto Street Railway is not a company "interested or affected" in the change of grades at the Avenue Road and the protective works ordered there within the meaning of the sections of the Act applicable.

The recent decision of the Privy Council in the *British Columbia Electric Railway Co.* v. *Vancouver, Victoria and Eastern Railway Co. and The City of Vancouver*(1), was of course much relied upon by the appellant who sought to make the facts of this appeal analogous to the facts of that case. Superficially there may be some resemblance between the facts in both cases, but it is only superficially. The head-note to the report of the British Columbia Electric Railway case before the Privy Council states the facts and the decision as follows:—

> The corporation of the City of Vancouver, wishing to alter the grading of four streets in the city which were crossed by the tracks of a Dominion railway, applied to the Board of Railway Commissioners for Canada for authority to carry the streets over the railway tracks on bridges. Along two of the streets in question a railway company, working wholly within the province under provincial statutory authority, ran tramways. The Board authorized the work and ordered that a part of the cost of construction should be borne by the provincial company, on the ground that that company would benefit by the alteration:—
>
> *Held*, that the order, so far as it imposed part of the cost of the proposed work upon the provincial railway company, was not within the powers conferred upon the Board of Railway Commissioners by the "Railway Act" and was invalid.

Turning to the reasons for the judgment of the Judicial Committee, as pronounced by Lord Moulton, it will be seen how utterly inapplicable that judgment is to the case before us. His Lordship in the first place entirely agrees with the remarks of Duff J. of this

(1) [1914] A.C. 1067.

court as to the *ground and reason* of the application of the corporation to the Railway Board. He goes on to say:—

Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised.

His Lordship then adds:

It follows therefore that the application was a matter between the corporation and the railway company alone.

The proposed works for which the authority of the Railway Board had been asked and granted was a matter merely of "street improvements" and he goes on to say:

It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a proportion of the cost of the improvements because *they were of the opinion that the tramway company would benefit by them.*

And later he sums up his reasons for judgment by saying:

The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefitted by the works gave them jurisdiction to make them pay the cost or a portion of it. There is nothing in the "Railway Act" which gives any such jurisdiction.

He further points out that the order does not come under the powers of section 59 of the "Railway Act":

It does not direct that any work should be done. It is an order of a *purely permissive character* granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of s. 59 relate to a wholly different class of cases.

The substance of the judgment, as I understand it, is that on the facts the works for which the electric

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company was ordered, on the application of the corporation of the city, to pay a portion of the cost were not works ordered by the Board "for the safety and protection of the public" at railway or highway crossings, but were merely a matter of street improvements, and that the order was of a

> purely permissive character granting a privilege to the corporation which they might exercise at the expense of a third party.

There is nothing comparable between such a proposed work and the one ordered in this case. The one is a matter merely of "street improvements" for which a "permissive order" is given and a part of the expense of which if undertaken at all by the corporation is ordered to be paid by an electric company because the works may benefit it. The other, the one before us, is a work ordered by the Railway Commissioners under, as I hold, their paramount power of ordering works at highway and railway crossings for the safety and protection of the public.

As I hold the sections of the Act in question, and before by me specially referred to, to be *intra vires* of the Parliament of Canada and the works ordered to have been so ordered not as a matter of street improvements but for the safety and protection of the public, I would dismiss the appeal against the jurisdiction of the Board with costs.

I would answer the questions of law submitted to us as follows:

The first question in the affirmative;

The second question: I do not think the agreement referred to in the second and third questions precluded the Board from making the order requiring the Toronto Railway to contribute to the cost of the subway ordered.

IDINGTON J.—The Railway Commissioners for Canada, clearly intending to promote the safety of the public and solely for that purpose, acting upon their own initiative, as empowered to do when they see fit for such a purpose, ordered on the 13th September, 1910, their approval of a plan dated May, 1910, filed by the railway company.

The plan so referred to was the result of many meetings and much work by both the officers of the Canadian Pacific Railway Co. and of the Board, in the way of meeting the wishes of the latter to have some of the many grade crossings done away with.

It appears from the circular of 15th July, 1909, that the Board had been prompted, to take the steps it did, by Parliament in 1909 providing aid for the elimination of grade crossings, and by the discussion therein, and the general expression of public opinion.

Such being the origin of what led up to the order of 13th September, 1910, and the subsequent history exhibiting the determination of the Board on the subject, I read this order made, after hearing all the parties concerned, as an imperative direction to the railway companies concerned to eliminate the Avenue Road grade crossing and separate there the grades at crossing of the two railways.

The informal nature of the order leads me to state thus why I assume it must be treated as an order of the character I ascribe to it.

The parties concerned never seem to have supposed it anything else, but like people of sense acted upon it as if it must be obeyed.

The Canadian Pacific Railway Co. apparently had the burden of the work imposed upon it but the other company was put for many months to great inconven-

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ience before venturing to lay its rails on the subway thus created.

In making the order the Board reserved the question of the cost of work and all implied therein for a future hearing, if the parties could not agree.

When that came the appellant disputed any liability and denied any power in the Board to deal with the subject, as it (the appellant) was a purely provincial corporation.

Nevertheless the Board ordered the appellant to pay ten per cent. of the cost and allowed it to appeal on three questions for our decision.

The first is as follows:—

> 1. Whether the Board had power to order the Toronto Railway Company to contribute to the cost of the construction of the subway in question,

and merely involves the question of jurisdiction in respect of which leave to appeal had already been given by the Chief Justice of this court.

I think, having regard to what appears in the case and which I have tried to epitomize, and also to the general scope of the "Railway Act" and direct requirements of many provisions more or less bearing upon the powers of the Board and especially those of section 8, sub-section (*a*), section 59 and section 238 of the "Railway Act" that the Board had jurisdiction to make the order now in question.

Section 238 clearly expresses the power to deal with the whole matter by directing the separation of grades.

Section 8, sub-section (*a*) as clearly indicates the crossing of these roads as a subject matter within the jurisdiction of the Board.

And section 59 seems to enable the Board to apportion the cost between those interested and direct payment accordingly.

These sections must be read in the form they now respectively stand, for section 238 as it stood in the R.S.C. 1906 has been repealed and been much expanded by the section substituted therefor in 8 & 9 Edw. VII., ch. 32, sec. 5, probably to meet the *Toronto Viaduct Case*(1) which I am about to refer to, and incidentally to put beyond question the powers of the Board over such a subject matter as grade crossings. The latter section enables in express terms the Board of 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, etc.

My only difficulty in the case is an apparent conflict of authority raised by the decision relied upon in the argument by appellant's counsel to which I am about to refer.

On the one hand we have these clear and explicit provisions of the "Railway Act" as it stands amended and the decision of the Judicial Committee of the Privy Council maintaining decisions of this court and Ontario courts holding, under the provisions of the "Railway Act" as it then stood before the Act was made so explicit as it now is, that mere municipal corporations only indirectly interested were liable to contribute even to a less effective (and only secondary) means of providing for the safety of the public.

I say these municipal corporations were only indirectly interested for they had only, in regard to highways, a duty to keep them in repair. They might or might not own them and had only a limited authority

(1) [1911] A.C. 461.

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to levy taxes, in short were mere creatures of the local legislature liable to have their powers expanded or contracted as it saw fit. Nevertheless they were held parties interested.

These cases are represented by what appears to be the final authoritative decision of the Judicial Committee in the case of *City of Toronto* v. *The Canadian Racific Railway Co.*(1).

It would seem as if the appellant running a street railway across the Canadian Pacific Rly. Company's (respondent's) railway in the locality and situation such as described in the opinion judgment of the Board should be much more directly interested in the safety of the public at that crossing point than any mere municipal corporation.

No one ever supposed for an instant that so long as the highway was kept in repair the municipality was liable for any of the numerous accidents at such crossings. But even provincial railways and tramways have had to suffer in that regard.

Yet, on the other hand, years after the decision above referred to and when section 238 of the Act had been amended and other legislation passed dealing with the very grave question of grade crossings and seeking through the Board to eliminate them in part at least, we have the decision of the court above in the case of the *British Columbia Electric Railway Co.* v. *Vancouver, etc. Railway Co.*(2) reversing an order of the Board maintained by this court, approving of a plan for separating the grades as in the order here in question, and directing the appellant (there in question) to contribute to the expense of executing that plan of separation.

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

(2) [1914] A.C. 1067.

The difference between the scheme propounded in that plan and the one involved herein is that the municipal corporation plan there was to carry its highway, and therewith the B. C. Electric Railway, over the steam railway, by a bridge instead of as here in question providing for the crossing by the raising of the C. P. Rly. track and the highway going under in a subway wherein the appellant might lay a new track and thus attain identically the same object which was to separate the grades and thus ensure the safety of the public.

One other difference was that the application there was made to the Board by the municipal corporation and here the proceeding is one initiated by the Board.

I am puzzled to know how that creates any substantial difference for section 238 as amended expressly provided for "any municipal or other corporation" moving in the matter. Nor can I see that because that municipal corporation incidentally desired something to proceed in way of settling its street grades contemporaneously with executing a most desirable purpose of eliminating one or more grade crossings, their application should be held null.

It is quite clear that the Board imagined they were acting within the legislation promoting the abolition of grade crossings, for by the order made in that case it provided for three grants of $5,000 each being paid out of the Railway Grade Crossing fund, created by Parliament for the express purpose of eliminating progressively the grade crossings.

The only other distinction between that case and this would seem to be that the order was permissive or conditional instead of being peremptory. Probably that was a gentler method of accomplishing the desired

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result and could hurt no one, unless and until acted upon, and then would execute the wishes of the Board.

The relations between the appellant and the municipality at that particular juncture added force to the vigorous objections made to that phase of the order.

The distinction between the permissive and conditional character of that order especially under the circumstances existent in connection therewith and this one, clearly made on the initiative of the Board, and free from obvious difficulties suggested in the other, I think distinguishes the two cases sufficiently to maintain the order now in question without at all disregarding the decision of the court above.

It is to be observed that the court above refrained from acting upon the view of the law presented by the minority judgment in that case in this court. That is the more noticeable for the court above drew its statement of fact from that very judgment which strenuously maintained the position that it would be *ultra vires* Parliament to enact anything upon which such an order as there in question could be founded.

The alleged power of Parliament is what appellant also challenges and denies herein and thus raises the only really important question in this case.

Unless and until it is expressly held by the court above that it is not, as heretofore supposed, to be within the power of Parliament to deal effectively with all relating to crossing railroads (whether they are both the properties of corporate creations of Parliament or one or more the property of a provincial corporation and the other of Parliament) so long as one is the creation of Parliament, I think we are bound by the view taken by the court above in the earlier

Toronto case, and certainly not overruled in this later *British Columbia Electric Railway Company's Case* (1), to abide by what I think has become settled law.

That view of the law was upheld in this court in the case of *In re Alberta Railway Act*(2), and in the same case in the Privy Council, *Attorney-General for Alberta* v. *Attorney-General for Canada*(3), at page 370.

I am not disposed to confine as suggested should be done the words of the "Railway Act" referring to crossing railways to the mere physical contact of a crossing on the level, for the sections of the Act already referred to evidently contemplate a crossing where there is no such crossing contact possible.

Indeed in our country in many places such a thing would be impossible, yet control of the crossings must fall under the words "crossing railways."

I therefore think the appellant came for the purposes of this case within the jurisdiction of the Board.

The leave given originally to appellant to cross the Canadian Pacific Railway on Avenue Road ended, as I understood Mr. McCarthy frankly to concede, when the Board decided on another mode of crossing. And it follows that it must, in using the new method of effecting that crossing, be held assenting to the Board's adoption of the new plan. It must abide by the terms imposed upon its impliedly assenting thereto and accepting and using that new mode.

I say impliedly for there was no express order made in that regard.

Counsel assumes that the appellant had a right to use the highway and needs no more. I do not think it is any answer in law. It is ingenious, but will not

(1) [1914] A. C. 1067. (2) 48 Can. S.C.R. 9.
(3) [1915] A. C. 363.

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stand examination, as someone may find to his cost should he running a car plunge through that subway at the moment of an accident on the spot, when he might need authority for being there at all, and wish his master had got an express order from the Board giving him the right to be there.

As to the other two questions presented I see nothing in the agreement between the appellant and the city disabling the Board from dealing with the matter as it has.

There may be something fairly arguable as to the power of the Board to have placed upon the city part of the burden of the cost, either under the decisions I have referred to, or under those coupled with the terms of the agreement.

I can find nothing in either as a matter of law imperatively binding the Board to do so. And when the safety of the public is the chief thing involved, then the inutility of contracts or implication therein for or by way of binding the power of the Board was exemplified in *Canadian Pacific Railway Co.* v. *City of Toronto et al*(1), and in the same case in this court. Sections 237 and 248, possibly enacted to fit that case and all such like, were made to predominate over everything else standing in the way of the Board.

I express, indeed have, no opinion as to the legal right to remedy now by one against the other of such contracting parties as the appellant and the city.

Perhaps if the orders of the Board presented in a formally express manner the exact authority it is presuming to act under, the doing so might avoid some confusion and possible miscarriage of what it intends to direct.

(1) [1911] A.C. 461.

I may also add that much we heard of the Yonge Street crossing and its relation to the questions involved herein seems to me beside that which we have to deal with.

Yonge Street crossing turned out to be a mere question of public convenience which is equally within the power of the Board as that relative to the safety of the public.

It has nothing to do with the questions raised herein except historically, as it were.

I see no reason why the Board should not deal with both questions at the same time.

I think the appeal should be dismissed with costs.

ANGLIN J.—The Toronto Railway Company, a provincial corporation operating a line of electric tramway on Avenue Road, a public street in the City of Toronto, appeals against an order of the Dominion Board of Railway Commissioners, whereby it is required to pay one-tenth of the cost of constructing a subway ordered by the Board at the crossing of Avenue Road by the tracks of the Canadian Pacific Railway Company, a Dominion corporation operating a steam railway. At the point in question there had been since 1902 a crossing at rail level of the tracks of the Canadian Pacific Railway, by the tracks of the Toronto Railway, authorized by orders of the Railway Committee of the Privy Council made on the application of the Toronto Railway Company under sections 173–177 of the Dominion "Railway Act" of 1888—the predecessors of ss. 227–229 of the present "Railway Act," R.S.C., 1906, c. 37. By those orders the Toronto Railway Company was required to provide, and to pay the cost of maintaining, certain additional protection at this highway

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crossing ordered by the Railway Committee in consequence of the advent of its tramway.

In 1909 the Dominion Parliament established a fund for

> aiding in the providing by actual construction work of protection, safety and convenience for the public in respect of highway crossings of the railway at rail level.

and placed the administration of this fund, subject to certain restrictions, in the hands of the Railway Board ("Railway Act," s. 239 (*a*) enacted by 8 & 9 Edw. VII., c. 32, s. 7.)

The record discloses that the proceedings which led to the making of the order for the separation of the grades of the C. P. Railway and of Avenue Road, including the grade of the Toronto Railway, were initiated on July 1st, 1909, by the Railway Board of its own motion for the purpose of carrying out the intention of Parliament in passing the legislation of that year embodied in s. 239 (*a*) of the "Railway Act." No doubt the project for the elimination of the level crossing at Yonge Street which was first taken up, probably because it was the most important, led to the consideration of the neighbouring crossing at Avenue Road and to the direction given by the Board, on the recommendation of its chief engineer, that the C.P.R. Company should submit plans covering the elimination of the latter level crossing as well as that at Yonge Street. But it is equally clear that the Board in giving this direction and in making its subsequent order for the separation of grades and the construction of the subway at Avenue Road was not solely influenced by the fact that the carrying out of the Yonge Street project rendered the work at Avenue Road desirable, if not necessary, but was actuated largely, if not chiefly, by the consideration that the level

crossing at Avenue Road itself was highly dangerous and that its elimination was demanded in the interests of "the protection, safety and convenience of the public." As the Chief Commissioner (Mr. Mabee) remarked, when making an order on the 17th June, 1910, adding the Toronto Railway Company as a party because it was interested in the Avenue Road crossing, though not in that at Yonge Street, plans for both having been presented,

> These plans now certainly take care of two very dangerous crossings.

The Canadian Pacific Railway Company had itself reported Yonge Street and Avenue Road as dangerous crossings and counsel representing it alluded to that fact at the meeting of the Board at which the subway plans were approved. The appellant's somewhat disingenuous reference to the grade of Avenue Road as having been "altered by arrangement between the municipality and the Dominion road" is an obvious attempt to bring this case within the purview of the recent decision of the Privy Council in the *British Columbia Electric Railway Co.* v. *Vancouver, Victoria and Eastern Railway Co.*(1).

Moreover, if the proceedings should be regarded as having been commenced solely in respect of the Yonge Street crossing, under s.s. 1 of s. 238, as enacted by 8 & 9 Edw. VII., c. 32, s. 5, the Board is empowered to deal not only with any highway crossing at which in its opinion the protection, safety and convenience of the public require that it shall order works to be executed or other measures to be taken, but also with

> any other crossing directly or indirectly affected.

The question presented is whether under these

(1) [1914] A.C. 1067.

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circumstances the Railway Board had jurisdiction to order the Toronto Railway Company to bear a portion of the cost of the works which it directed at Avenue Road. Its jurisdiction is contested upon two grounds —that the Dominion "Railway Act" does not purport to confer such jurisdiction upon it; and that, if it does, the legislation is *ultra vires*.

For the sake of brevity I shall speak of railways under the legislative jurisdiction of the Parliament of Canada as Dominion railways and of railways or tramways under provincial legislative jurisdiction as provincial railways or tramways.

It is obvious that in the present case there are two matters in respect of which the Railway Board may have jurisdiction—one, the crossing of the Dominion railway by the provincial tramway; the other, the crossing of the Dominion railway by the street or highway. These crossings are separately dealt with by the "Railway Act"—the former by sections 227–229; the latter by sections 237 *et seq.* For sections substituted for ss. 237 and 238 of R. S. C. c. 37, see 8 & 9 Edw. VII., c. 32, ss. 4–6.

By s. 8 (*a*) of the Dominion "Railway Act" every provincial railway or tramway which connects with or crosses a Dominion railway is made subject to the provisions of that Act relating to the connection or crossing of one railway or tramway by another, so far as relates to such crossing. The provisions thus made applicable are ss. 227 and 229. (*British Columbia Electric Railway Co.* v. *Vancouver Victoria and Eastern Railway Co.*(1), at p. 1075).

Under s. 227 the crossing of a Dominion railway by the tracks or lines of any other railway company with-

(1) [1914] A .C.1067.

out leave of the Board, is prohibited: by s.s. 3 the Board is empowered (*a*) to grant a crossing application on such terms as to protection and safety as it deems expedient; (b) to change the plan submitted and fix the place and mode of crossing; (c) to direct that one line or track or one set of lines or tracks be carried over or under another line or track or set of lines or tracks; (d) to direct the construction of such works, structures, etc., as appear to it best adapted to remove and prevent all danger of accident, injury or damage.

This section, *ex facie*, deals only with an application for leave in the first instance to cross a Dominion railway and does not explicitly cover the case of a change or modification becoming necessary or desirable in the protection or character of a crossing already established. It is argued for the respondents, however, that the order of the Board may be treated as having terminated the existing right of level crossing, which had been granted to the Toronto Railway Company by the Railway Committee of the Privy Council, and that, having regard to all the circumstances, that company should be deemed to have been again an applicant to the Board for leave to cross the Dominion railway, this time by means of a subway. Under s. 29 of the "Railway Act" the Board may

> review, rescind, change, alter or vary any order or decision made by it,

and by s. 32 (2) it is given the like power in respect of orders which had been made by the Railway Committee of the Privy Council, which it succeeded. The Board would, therefore, seem to have been competent to vary the order originally made by the Railway Committee of the Privy Council, which granted the application of the Toronto Railway Company to cross the tracks of the C. P. R. at rail level, by directing under

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clauses (b) (c) and (d) of s.s. 3 of s. 227, that the mode of crossing should be changed, that the lines or tracks of the Toronto Railway should be carried under those of the C. P. Railway and that works or structures deemed by the Board best adapted to remove or prevent all danger of accident, injury, or damage should be constructed, etc. The Board might make such an order *sua sponte* (s. 28); and by s. 59 it is empowered to

> order by what company, municipality or person interested or affected

by any order made for the construction of works, and in what proportion, the cost and expense thereof shall be paid. It would seem to follow that without treating the Toronto Railway Company as an applicant to it for a right to cross the lines or tracks of the C. P. Railway by means of or through a subway, the Board, subject to the question of the constitutionality of the Dominion legislation, in view of the provisions of s. 8 (*a*), had jurisdiction, exercising the powers conferred on it by ss. 28, 29, 32 (2), 227 (3) and 59, to make the order in question.

Subject again to the question of constitutional validity, I think it also had jurisdiction to make that order under s. 238, as enacted by 8 & 9 Edw. VII., c. 32. The subject matter before it was the crossing of a Dominion railway by a highway as well as by a provincial tramway. Sec. 238, unlike s. 227, expressly deals with existing crossings. The jurisdiction of the Board under s. 238 to order, of its own motion, or upon complaint or application, that the highway be carried under the railway and that the works in its opinion best adapted to remove or diminish the danger or obstruction in respect of such crossing be constructed is unquestioned. Its power under s. s. 3 of s. 238

or s. s. 2 of s. 59 to order the payment of a portion of the cost of such works by the provincial municipal croporation which controls the highway at the actual crossing has not been challenged since the decision of this court in *City of Toronto* v. *Grand Trunk Railway Co.*(1), from which the Privy Council refused leave to appeal(2); its right to require another municipal corporation in control of an adjacent portion of the highway not actually crossed by the railway also to contribute to the cost of the works ordered was expressly affirmed by the Judicial Committee, when challenged not merely upon the construction of s. 188 of the "Railway Act" of 1888 and s. 47 of the "Railway Act" of 1903 (corresponding respectively to s. 238 and s. 59 of the present statute), but also upon the constitutional validity of these provisions. It was then held that a municipal corporation in either position was a "person interested" within the meaning of s. 188 of the Act of 1888—"a municipality or person interested or affected" within the meaning of s., 47 of the Act of 1903; *City of Toronto* v. *Canadian Pacific Railway Co.* (3).

The language of the present s. 59 is the same as that of s. 47 of the Act of 1903; that of the present s. 238 (3) is—

> The Board may order what portion, if any, of the cost is to be borne respectively by the company, municipal or other corporation, or person

on whose application the Board may, under s. s. 1, order the construction of the works.

It was also held by the Privy Council that

> there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee (now the Board) to make an equitable

(1) 37 Can. S.C.R., 232. (2) 37 Can. S.C.R., p. ix.
(3) [1908] A.C. 54.

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adjustment of the expenses among persons interested. * * * Both the substantive and the ancillary provisions are alike reasonable and *intra vires* of the Dominion Legislature. *City of Toronto* v. *Canadian Pacific Railway Co.*(1), at pp. 58-9.

The substantive provision empowered the Board to order the works; the ancillary, to apportion the cost and to direct payment.

In respect of the constitutional validity of the sections of the "Railway Act" in so far as they authorize the imposition of the cost of works or precautionary measures upon persons or bodies other than the Dominion railway concerned, I am unable to discern any real ground of distinction between municipal corporations, the creatures of, and, in all their relations, subject to the control of, the provincial legislatures, to which exclusive legislative power in regard to "municipal institutions in the province" has been committed by clause 8 of s. 92 of the B. N. A. Act, and "local works and undertakings" (including provincial railways), which are likewise placed under exclusive provincial control by clause 10 of the same section. Since the Dominion railway company might, however inequitably, be required to bear the entire burden of the expense of crossing protection, it cannot be said to be absolutely necessary that the Railway Board should have authority to impose any part of that expense on any other person or on any other corporation, Dominion or provincial. In regard to both municipal corporations and provincial railway corporations alike Dominion interference must be confined to what is

necessarily incidental to the exercise of the powers conferred on it by the enumerative heads of clause 91 of the B. N. A. Act

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Canada(1)), other than "the regulation of trade and commerce." *City of Montreal* v. *Montreal Street Rly. Co.*(2). The right of the Dominion Parliament to provide for

an equitable distribution among the persons interested

of the expense of furnishing

reasonable means for safe-guarding in the common interest the public and the railway

when Dominion railways are crossed by highways has been expressly recognized in the Privy Council in *City of Toronto* v. *Canadian Pacific Railway Co.* (3), as something within the ancillary power of Parliament —as necessarily incidental to its exclusive jurisdiction over

lines of * * * railways * * * connecting the province with any other province or provinces or extending beyond the limits of provinces. B.N.A. Act, s. 92, clause 10 (*a*).

The power to order municipal corporations to contribute to the cost of crossing works cannot be any more necessary to complete and effective legislative jurisdiction over Dominion railways than the like power in respect of tramway companies whose lines cross such railways. Neither provincial railways nor municipal highways are dealt with by the Railway Board as such under the legislation in question. Both the provincial railway company and the municipal corporation are dealt with under it merely as bodies interested in crossings of Dominion railways and because of such interest, affected by the orders of the Board.

The question remains whether under the circumstances of the present case the Toronto Railway Company is

(1) [1896] A.C. 348, at p. 360. (2) [1912] A.C., 333, at pp. 343, 344.
(3) [1908] A.C. 54.

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a "company, municipality or person interested in, or affected by, the order" for the construction of a subway at Avenue Road and the depression of its tracks involved therein, within the purview of s. 59 of the "Railway Act," or a "corporation or person" on whose complaint or application the Board might have ordered the works under s. 238 of the same Act. Whether the order of the Board should be viewed solely as an exercise of its power under s. 238 (supplemented if need be by s. 59), the Toronto Railway Company being concerned because of its presence and rights upon the highway, or whether as to that company the order should also be regarded as made under the provisions of clauses (c) and (d) of s.s. 3 of s. 227, supplemented by the provisions of ss. 28, 29, 32(2), 59 and 8(*a*) I entirely fail to appreciate the force of the contention that the company is not a "company interested or affected" within the meaning of s. 59 by the order of the Board for the change in conditions at the Avenue Road crossing or that it is not a "corporation" on whose application that order might have been made under s. 238 and therefore under s.s. 3 liable for such portion of the cost of the works directed as the Board has ordered it to bear. The order for the separation of grades and the construction of the subway certainly affects the Toronto Railway Company very directly. It deprives it of its existing right of level crossing and provides for it a new and much more advantageous means of crossing the Dominion railway. It may well be too that the width and depth of the subway ordered depended, to some extent at least, upon the use of the highway by the Toronto Railway for its double lines of track. Its presence upon the highway may have constituted the chief element of danger in the

existing level crossing. I find it difficult to conceive how it could properly be held that the Toronto Railway Company was not interested or affected or was not a "corporation" within s.s. 1 and 3 of s. 238.

The recent case of *British Columbia Electric Railway Co.* v. *Vancouver Victoria and Eastern Railway Co.* (1), was much relied upon at bar by counsel for the appellant. In that case, in the opinion of the Judicial Committee, "the ground and reason of the application" of the municipal corporation, on which the Board acted, was municipal convenience and improvement. It was, in their Lordships' opinion,

> a matter between the corporation and the railway company alone,

from which the proper inference would seem to be that the order made by the Board was not regarded as an

> order as to the protection, safety and convenience of the public

within s.s. 1 of s. 238, in respect of which under s.s. 3 the Board might order that a portion of the cost of the works should be borne by a corporation or person other than the Dominion railway or the municipal corporation at whose instance they were directed or sanctioned. In such a case the Judicial Committee negatives the right of the Board to order payment of a portion of the cost of the works merely because some benefit would accrue therefrom to the body or person upon whom it is sought to impose that burden. The order made by the Board did not "direct that any work should be done;" it was merely permissive. Therefore their Lordships held that it was not within the purview of s. 59.

Dealing with the question presented solely as one of construction of the "Railway Act," and determin-

(1) [1914] A.C. 1067.

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ing nothing as to the power of Parliament to confer upon the Railway Board the jurisdiction which it had attempted to exercise, their Lordships held that, in ordering the provincial tramway company, whose tracks running along the highway crossed the tracks of the Dominion railway company at rail level on two of the four streets in question, to pay a part of the cost of constructing bridges on those two streets to carry the highway, and incidentally the tracks of the tramway company, over those of the Dominion railway, the Board had exceeded the jurisdiction which the statute purports to confer upon it. But they rejected the contention of counsel for the Dominion railway company that, on the authority of *Grand Trunk Pacific Railway Co.* v. *Fort William Land Investment Co.*(1), the whole order should be rescinded.

The application to the Railway Commission in *British Columbia Electric Rway. Co.* v. *Vancouver, Victoria and Eastern Rly. Co.*(2) was made under ss. 237 and 238 of the "Railway Act," as enacted by 8 & 9 Edw. VII., c. 32. As it concerned existing crossings, s. 238 was the provision applicable. The Railway Board dealt with the matter as one of grade separation. The sentence of the judgment of the Assistant Chief Commissioner in which he grants the application is as follows:—

> In this matter the Board is of the opinion that the application should be granted for the approval of grade separation at these four streets, Hastings, Pender, Keefer, and Harris.

After directing that the work on the four streets should be proceeded with at once, he adds

> Therefore having decided that much, it is incumbent on us to say in what proportions the cost shall be borne by the interested parties.

(1) [1912] A.C. 224. (2) [1914] A.C. 1087.

After dealing with the circumstances, making special allusion to the very considerable traffic on the tramway as indicative of the desirability of grade separation from "the point of view of safety and convenience," the learned Commissioner pointed out the advantages to the tramway company of an overhead crossing and it was ordered to pay 20% of the cost of the works. By the order the Commissioners directed that towards the cost of one of the two crossings in which the tramway company was interested $5,000 should be paid out of the fund established by the legislation of 1909 ("Railway Act," s. 239 (*a*))

> for the purpose of aiding in the providing by actual construction work of protection, safety and convenience for the public in respect of highway crossings at the railway at rail level.

They regretted that the limitation precluding aid for more than three crossings in any one municipality in one year prevented their giving a like sum out of the fund towards the other crossing.

Nevertheless, their Lordships of the Judicial Committee viewed the matter dealt with not as one in which the action of the Board had been influenced by considerations of protection, safety or convenience of the public, but as one of street improvement merely, in which the municipal corporation and the Dominion railway company were alone concerned. There is no allusion in their judgment to s. 238, as enacted by 8 & 9 Edw. VII., c. 32, the third sub-section of which in explicit terms empowers the Railway Board to apportion amongst the "company, municipal or other corporation or person" on whose complaint or application it might have proceeded, the cost of any works or protection which it might order under s. s. 1. There was no similar provision in s. 238 of the "Railway Act" as it appears in c. 37 of the R. S. C. of 1906, and, if

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I may make the suggestion without disrespect, it would almost seem that the provisions of the amendment in 8 & 9 Edw. VII. had escaped their Lordships' attention. The point made as to the permissive character of the order pronounced by the Railway Board and the consequent inapplicability of s. 59 appear rather to support that view. Prior to the amendment of 1909 the authority to apportion the cost of works ordered under s. 238 depended on s. 59; since that time s. 238 itself contains the empowering provision.

In the present case the order is not permissive but mandatory. The proceedings were instituted not by a municipal corporation but by the Board itself. They were prompted by the legislation of 1909 providing a fund to aid in the construction of works for the protection, safety and convenience of the public. That the Board was influenced by considerations of public safety was made clear in what took place prior to the addition, on the 7th of June, 1910, of the Toronto Railway Company as a party interested and again when the decision was finally reached on the 13th September, 1910, to order grade separation and subways at Yonge Street and Avenue Road and to reserve for further consideration the question of cost. It is not at all improbable that one of the chief sources of danger in the case of Avenue Road was the crossing at rail level at the foot of a steep hill of the double tracks of the C. P. Railway by the double tracks of the Toronto Railway. The advantages to the latter company of the subway crossing are obvious. That it was affected by the order and interested in the work seems to me to be as indisputable as that it was a corporation on whose complaint or application the

order for the works might have been made (s. 238 (1)). This case is therefore in several respects clearly distinguishable from that of *British Columbia Elec. Rly. Co.* v. *Vancouver, Victoria and Eastern Rly. Co.*(1) as viewed by their Lordships of the Judicial Committee. With great respect, assuming jurisdiction, the facts that the presence and operation of the Toronto Railway Company at the crossing had very largely contributed to the danger to be removed and that the substituted method of crossing would be distinctly advantageous to it, seem to me most cogent reasons for requiring it to contribute to the cost of making the necessary change.

In *Ottawa Electric Railway Co.* v. *City of Ottawa*(2), an order similar to that now complained of, made against the Ottawa Electric Railway Company, which happened to be a Dominion corporation, was sustained by this court explicitly on the ground that it was a "person interested or affected" within the meaning of s. 47 of the "Railway Act" of 1903. Section 47 corresponds to present s. 59. When the Ottawa Electric case was decided s. 238 did not contain the provision enabling the Board to apportion cost now found in s.s. 3. The decision of this court in *British Columbia Elec. Rly. Co.* v. *Vancouver, Victoria and Eastern Rly. Co.*(1), that s. 59 of the "Railway Act" and s. 238 as enacted by 8 & 9 Edw. VII., c. 32, are *intra vires* of the Dominion Parliament was not affected by the judgment of the Privy Council on the appeal(3).

When apprised that the Toronto Railway Company intended to question the jurisdiction of the Railway Board to order it to bear a portion of the cost of the works at the Avenue Road crossing the Assistant Chief

(1) [1914] A.C. 1067. (2) 37 Can. S.C.R. 354.
(3) 48 Can. S.C.R. 98.

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Commissioner thought it proper to supplement a statement made when pronouncing that order, so that

> the reasons on which (his) judgment rested in regard to the division of cost * * * should be clearly set out.

His purpose apparently was to put it beyond doubt that the Board had been actuated by considerations of public protection and safety. That was clearly unnecessary in view of the history of the proceedings which led up to the order being made for separation of grades and approving of the subway scheme and plans, and of passages in them in which the dangerous character of the crossing at Avenue Road had been emphasized. Moreover, by the Board's order of the 12th November, 1914, payment of 20% of the cost of constructing three of the subways (not exceeding $5,000 in any one case) directed in connection with the grade separation scheme in North Toronto, of which the grade separation at Avenue Road formed a part, was authorized to be made out of the railway grade crossing fund established by s. 239 (*a*) of the "Railway Act" (8 & 9 Edw. VII. c. 32). This order could not properly have been made unless the work so aided was for the protection, safety and convenience of the public. The learned Commissioner probably thought it advisable, however, in view of the fact that when making the order for distribution of cost he had specially alluded to the undoubted advantages which the Toronto Railway Company would derive from the substitution of the subway for a level crossing, to state explicitly that the action of the Board in directing that substitution had been influenced by the danger of the existing level crossing. He had referred to the incidental advantages of a subway to the Toronto Railway Company not as a reason for ordering the separation of grades and the

construction of the subway but as a ground for imposing 10% of the cost on that company.

Mr. McCarthy objected to these additional reasons being considered and also challenged the accuracy of the allusions in them to an accident at the Queen Street crossing, owing to a tramway overrunning Scotch blocks which were set against it, and to another accident at Front Street. The records of the Railway Commission, produced by Mr. MacMurchy, bore out the statements of the Assistant Chief Commissioner as to both cases. Since the appeal to this court is confined to questions of jurisdiction and of law, I think it desirable that in cases which are to come here we should have full and explicit findings from the Board upon all matters of fact which may become material for our consideration. I can readily understand that in the hurry of disposing of the very numerous cases with which the Railway Board is called upon to deal, commissioners in stating the grounds on which they proceed may omit to advert expressly to facts present to the minds of themselves and the parties before them, but of particular moment only when a question of jurisdiction or of law is actually mooted. I agree with the view expressed by the learned Chief Commissioner, Sir Henry Drayton, that

> not only has the learned Assistant Chief Commissioner the right to deliver extended reasons for his judgment at any time that he desires, but that it was his duty so to do, in case any pertinent issue had not been covered in his previous reasons. Under the Act, questions of fact have to be disposed of by the Board, and all accessory findings of fact should be made by the Board so as to relieve the Justices of the Supreme Court from the consideration of all issues except the questions of law submitted.

The only remaining question is that raised in regard to the effect of paragraphs 13 and 18 of the agreement between the City of Toronto and the

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Toronto Railway Company whereby, that company contends, the city is obliged to furnish a right of way on its streets for the company's tracks. This provision, it is argued, relieves the company from all liability to contribute to the expense of alterations in the grades of streets. It may be that, as between the parties to it, the agreement entitles the company to indemnification from the city in respect of such cost. On that question of civil rights in the province the Dominion Railway Board was not competent to pass; and of course I express no view. But I find nothing in the agreement which in anywise interferes with the right of the Board to deal with the Toronto Railway Company as a company or person interested in and affected by its order for separation of grades and the construction of a subway at the Avenue Road crossing, or as a corporation on whose complaint or application that order might have been made and as such liable to bear the portion of the cost which the Board has deemed it proper to impose upon it. This was the view taken by this court in the Ottawa case already adverted to (37 Can. S.C.R. 354) of similar clauses in an agreement between the City of Ottawa and the Ottawa Electric Railway Company.

I would, for these reasons, answer the first question submitted by the Board of Railway Commissioners in the affirmative. To the second and third questions I would answer that I find nothing in the terms of the agreement referred to which precluded the Board making the order requiring the Toronto Railway Company to contribute to the cost of the subway at Avenue Road. The appeal against the jurisdiction of the Board to pronounce that order should be dismissed and the appellant should pay the costs of the respondents.

BRODEUR J.—I thought at first that the facts of this case were similar to those adjudicated upon in the *Vancouver Case*(1), but they are so different that I have come to the conclusion that this appeal should be dismissed.

The application for a subway was not made by the municipality as in the *Vancouver Case*(1) but the correspondence and the procedure shew that the Board of its own motion inquired into and determined the order complained of.

It is not a matter of municipal improvement that the Board acted upon but it was a question of the protection and safety of the public.

Mr. Commissioner McLean in his judgment puts that very clearly when he said:—

> The work is undoubtedly in the interest of public safety. The element of danger which was manifestly present was attributable not only to the increase of traffic on the railway but also to the increase of traffic on the highways.

It is true that the Assistant Chief Commissioner in his first opinion, dated the 5th of May 1914, mentions other grounds to justify the action of the Board, but he states also that the construction of a subway will remove the possibility of the accidents which the level crossing in spite of the protection already existing might render possible.

The street railway company became with regard to this crossing under the jurisdiction of the Board when it applied some years ago for a level crossing. The Railway Committee could have directed then that the tracks of the street railway should be carried under the tracks of the railway company (section 227, s.s. 3–6 "Railway Act") but it simply granted the applica-

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tion and ordered under the provisions of section 229 the adoption of appliances which were then considered sufficient for the public safety and convenience.

The street railway company remained concerning the carrying out of that order under the control and the jurisdiction of the Board and if later on the public interest required some better protection, the construction of a subway, for example, the Board could revise its former order and proceed to determine the condition in which the crossing should take place (28–29–227 "Railway Act").

The Board was empowered then under s. s. 3 of section 237 or 238 to determine what portion of the cost of the improvement should be borne by the street railway company.

The facts disclosed in the present case shew conclusively that the powers exercised are ancillary to the control which the Parliament of Canada has on federal railways.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants:
McCarthy, Osler, Hoskin and Harcourt.

Solicitor for the respondent the Can. Pac. Ry Co.:
E. W. Beatty.

Solicitor for the respondent the City of Toronto:
William Johnston.