1914

*May 22.
*June 19.

THE CITY OF HAMILTON..... APPELLANT;

AND

THE TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY, RESPONDENT.

CASE STATED BY THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Constructed line of railway—Deviation — Application by municipality — "Special Act"—Stated case—Question of law—Statute—"Railway Act," R.S.C., 1906. *c.* 37, *ss.* 2 (28), 3, 26, 28, 55, 167—(*Ont.*), 58 *V. c.* 68—(*D.*) 58 *& 59 V. c.* 66.

Under the provisions of section 55 of the "Railway Act," R.S.C. 1906, ch. 37, the Board of Railway Commissioners for Canada may, of its own motion, state a case in writing for the opinion of the Supreme Court of Canada upon a question of jurisdiction which, in the opinion of the Board, involves a question of law.

The Board of Railway Commissioners for Canada has no power under sec. 167 of the "Railway Act," R.S.C., 1906, ch. 37, to order deviations, changes or alterations in a constructed line of railway, of which the location has been definitely established, except upon the request of the railway company. Anglin, J. *contra.*

Per Fitzpatrick C.J. and Idington J.—The Dominion statute 58 & 59 Vict. ch. 66, confirming the municipal by-law by which the location of the portion of the railway in question was definitely established constitutes a "special Act" within the meaning of the "Railway Act," R.S.C. 1906, ch. 37, secs. 2(28) and 3.

Per Anglin J.—The power of the Board of Railway Commissioners for Canada to order deviations, changes or alterations in a constructed line of railway is not limited to diversions within one mile from the line of railway as constructed.

STATED CASE referred by the Board of Railway Commissioners for Canada, under section 55 of the

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

"Railway Act," R.S.C. 1906, ch. 37, for the opinion of the Supreme Court of Canada on a question as to its jurisdiction which, in the opinion of the Board, involved a question of law.

The Stated Case submitted by the Board was as follows:—

"The following case which, in the opinion of the Board, involves questions of law, is stated by the Board for the opinion of the Supreme Court of Canada:—

"1. The Toronto, Hamilton and Buffalo Railway Company was incorporated by Act of the Legislature of the Province of Ontario, chapter 75, 1884, and under that Act was authorized to construct a railway from a point in or near the City of Toronto to a point in or near the City of Hamilton, and thence to some point at or near the International Bridge, or Cantilever Bridge, in the Niagara River, and with full power to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands, if any, lying between the points aforesaid.

"2. By chapter 86 of the statutes of 1891, passed by the Parliament of the Dominion of Canada, the undertaking of the Toronto, Hamilton and Buffalo Railway Company was declared to be a work for the general advantage of Canada, reserving to the company all the powers, rights, immunities, privileges, franchises, and authorities conferred upon it under and by virtue of the above recited Acts of the Legislature of the Province of Ontario.

"3. By section 4 of the federal Act all the provisions of the 'Railway Act' were made to apply to the Toronto, Hamilton and Buffalo Railway Company,

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in so far as they were applicable to the undertaking, and except to the extent to which they were inconsistent with the provisions of the said Acts of the Legislature of the Province of Ontario.

"4. By-law No. 755, passed by the municipal council of the City of Hamilton on the 25th day of October, 1894, and confirmed by Ontario statute, 58 Victoria, 1895, chapter 68, and by Dominion Act, chapter 66, 1895, fixed a definite location of the company's line in the City of Hamilton. The conditions of the by-law were complied with and the line constructed along Hunter street, in the City of Hamilton, in accordance with the provisions of the by-law referred to, and in accordance with the map or plan duly approved under the provisions of the 'Railway Act.'

"5. The present application on behalf of the city is for an order requiring the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway into the city from Hunter street to a location in the north end of the city in common with the Grand Trunk and the Canadian Northern Ontario Railway companies.

"6. The application was heard at the sittings of the Board held in Hamilton on the 10th day of October, 1913, at which counsel representing the city, the Toronto, Hamilton and Buffalo Railway Company, the Canadian Pacific and Grand Trunk Railway Companies, and certain property owners, were present. Counsel for the Toronto, Hamilton and Buffalo Railway Company contended that the Board was without jurisdiction to make the order applied for.

"7. After hearing argument and reading the submissions filed, and taking time to consider, the Board came to the conclusion that, for the reasons set out

in the judgments of the Chief Commissioner and the Assistant Chief Commissioner, it had power, if so advised, to make such an order; and this conclusion was announced to the parties interested.

"8. At the request of counsel for the Toronto, Hamilton and Buffalo Railway Company, who expressed his intention of appealing from this decision, the merits of the application were not gone into, and counsel was asked to proceed to perfect his appeal without delay.

"9. A draft form of order upon which to base an application for leave to appeal was submitted by counsel for the Toronto, Hamilton and Buffalo Railway Company, and order No. 21087, dated December 24th, 1913, issued as a result of this application. The said order No. 21087 is not in terms in the form of the draft order submitted by counsel, and for that reason counsel refuses to perfect his appeal, but raises the objection that the Board is without power to act in the premises.

"10. The only order made by the Board was the order No. 21087, referred to, declaring that it had jurisdiction to entertain the application and to make an order directing the deviation of the line of the Toronto, Hamilton and Buffalo Railway Company within a distance of one mile from its present location. The merits of the case were not gone into.

"11. The city objects to this order, contending that the Board's power to order a diversion in the premises was not limited to a diversion within one mile from the present location of the railway.

"12. The statutes relating to the said company contained in the printed volumes of the statutes of the Parliament of Canada or of the Legislature of

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the Province of Ontario, the judgments and proceedings herein, shall be deemed to be and shall be read as part of this case.

"13. The questions involved being, in its opinion, questions of law, the Board, under section 55 of the 'Railway Act,' may of its own motion state a case in writing for the opinion of the Supreme Court of Canada; and, in pursuance of this power, the questions submitted for determination by the Supreme Court of Canada are as follows:—

"(1) Whether, as a matter of law, the Board of Railway Commissioners for Canada has the power, on an application by the City of Hamilton, to make an order directing the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway from its present location in the City of Hamilton to some other location in the said city?

"(2) Whether, if the Board has power to order such diversions, such power is limited to a diversion within one mile from the railway as already constructed?"

The issues raised on the argument in the Supreme Court of Canada are referred to in the opinions of the Judges now reported.

M. K. Cowan K.C. and *F. R. Waddell K.C.* were heard on behalf of the City of Hamilton.

Hellmuth K.C. and *J. A. Soule* for the railway company.

The hearing took place on the 22nd of May, 1914, when the court was pleased to take the matter into consideration and, on the 19th of June, 1914, the ma-

jority of the judges answered the first question in the negative and, consequently, considered that it was unnecessary to give any answer to the second question. His Lordship Mr. Justice Anglin answered the first question in the affirmative and the second question in the negative.

The following reasons for their opinions were delivered by the judges who heard the reference.

THE CHIEF JUSTICE.—I agree with Mr. Justice Idington.

IDINGTON J.—The answers to the questions submitted relative to the jurisdiction of the Railway Commissioners of Canada must be chiefly dependent upon whether the legislation contained in 58 & 59 Vict. ch. 66, is to be held a "special Act" within the meaning of that term in the "Railway Act."

The applicant passed a by-law No. 755, in 1894, granting a bonus of $225,000 in aid of respondent upon the terms and conditions set out therein and agreed on between said parties.

Part of said terms and conditions thereby imposed was that the railway should pass through the City of Hamilton by a southerly route which is set out with great detail in the specifications forming part of the said by-law. Another clause in the said terms and conditions provides that the said company should build by the 1st September, 1895, and always maintain a first-class passenger station in a central part of the City of Hamilton and all regular passenger trains on said railway running from or through Brantford to Toronto, or from Toronto to or through or from Brantford to Welland, or Welland

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to Brantford, should stop at such principal passenger station of the company in Hamilton, and that all regular passenger trains running through Hamilton should stop at such station, and should build and maintain a second passenger station within said city at or near Locke street south of Main street.

All this was declared by said Act confirming said by-law to be binding upon the parties to this litigation and respondent seems to have conformed to the said terms and conditions.

It is proposed by the applicant now to change the location of all this part of the line so definitely exacted by the terms of said by-law, so validated by said Act, and direct the line of railway to be so "diverted, changed or altered" that the railway shall run, instead of on the routes so adopted, along the Grand Trunk Railway route on the north side of the city where that road and station existed long before the existence of the respondent.

I think said legislation must be held to be "a special Act" within the meaning of that term as interpreted in section 2, sub-section 28, of the "Railway Act," and applied by giving thereto the effect designed by section 3 of said Act, which is as follows:—

> 3. This Act shall, subject to the provisions thereof, be construed as incorporate with the special Act, and, unless otherwise expressly provided in this Act, where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the special Act shall, in so far as is necessary to give effect to such special Act, be taken to override the provisions of this Act. 3 Edw. VII., ch. 58, secs. 3 and 5.

It seems to me that the subject-matter of this special Act involves the definite and permanent location of the railway at the place in question and that "the provisions of said special Act" must, in so far

as is necessary to give effect to such special Act, be taken to override the provisions of the "Railway Act" relative to the location of railways or changes in regard thereto.

Section 6 of the "Railway Act" which may be applicable to the railway in question does not restrict the operation of this section three, which may be read therewith.

The case of *Canadian Pacific Railway Co.* v. *City of Toronto*(1), relied upon by applicant has hardly any resemblance to this case. There was presented in that case a tripartite agreement validated by Parliament which possibly covered a small part of the field of public safety there in question but by no means that which was involved in applying section 238. There the special Act covered only a small corner of the subject-matter of public safety. Here the special Act covers absolutely the whole question of location which is the subject-matter involved.

It is made clear by the judgment of the Chief Commissioner that everything relative to public safety is eliminated from the question. And nothing is left but the subject-matter of location of the railway which seems to me identical with that determined by the by-law and contract and conditions made permanently binding by the special Act. No one has ventured to distinguish the subject-matter of the special Act, from that of section 167 relied upon, by setting up that the subject-matter in the latter is not location, but change of location. If such a suggestion occurs to any one, I may repeat what I have just pointed out that this special Act was by its terms

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

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intended to be perpetual, and thus overrides anything providing for change of location and leaves the section 167 to operate where there can be no such conflict.

It is suggested by the judgment of the Chief Commissioner that as this special Act, by section 8, provides that nothing in the Act contained shall affect any rights or powers conferred by the "Railway Act" on the Railway Committee of the Privy Council, to which the Board may be considered the statutory successor, therefore, this power now invoked has been excepted from the operation of the special Act.

When we turn to the then existing "Railway Act" and consider the provisions thereof relative to the rights or powers of the then Railway Committee, the only semblance of any such "right or power" therein, such as now appears in section 167, is to be found in section 11 of the "Railway Act" of 1888, sub-section (*b*),

> changes in location for lessening a curve, reducing a gradient or benefiting the railway or for other purposes of public advantage.

I cannot think this provision should ever have been resorted to in way of justifying the Railway Committee in directing such a change as now contemplated.

And it may be observed that the restriction, in said section 8, upon the operative effect of the rest of the special Act can only be read in light of the then existing "rights and powers of the Railway Committee."

Later extensions of powers to the railway company or even to the committee, of which I can find none bearing hereon, could not affect the question presented.

Moreover, the right of changing location within a lateral mile's limit, originally rested with the railway company and the restrictions now existent are results of later enactments.

It is not necessary that I should here trace out in detail all these changes by means of which the curious evolution has taken place whereby the present jurisdiction of the Board was first given in way of restriction upon the railway company and then it was given the power of its own motion to direct that to be done which the railway company had got power to do with its sanction.

A study of this legislative development does not help in way of finding jurisdiction in the Board and for doing what it is now alleged it can do relative to old established things, including contracts, and the correlative rights, duties and obligations arising therefrom.

I conclude upon the foregoing grounds alone that there is no jurisdiction such as claimed.

On the narrower ground of the actual meaning of section 167 as it stands, and assuming no special Act in the way, I should doubt very much indeed if any such change as involved in doing what is contemplated was ever the purpose of the section.

There are a great many pieces of parallel railway lines lying within a mile or a few miles of each other which public opinion, if enlightened and well directed, might well have prevented the building of and saved millions of wasted capital entailed in such building. Economic pressure may ultimately eliminate much of this duplication.

If we should answer the first question submitted in the affirmative and the second in the negative, I

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can conceive of the Board being urged to use that measure of power, so implied, and its other extensive powers to ameliorate the conditions of things brought about by such improvidence. But should any court say, looking at the purview of the provisions creating and empowering the Board as provided by this "Railway Act" in Canada, that such an attempt by the Board would properly fall within its jurisdiction?

I put this illustration of what seems to me the logical and perhaps not undesirable outcome of the answers applicant seeks herein to the questions submitted in order to test the validity of the argument that rests upon a reading only of the two or three sections referred to, without looking at their place and purpose in the Act as a whole. Tried by such a test I do not think section 167 was ever by its framers dreamt of as going so far.

I also desire to illustrate thereby the view I take of the right now challenged in argument to submit these questions.

I have no doubt regarding the right of the Board under the 55th section of the "Railway Act" to submit as a question of law a case involving only a question of its jurisdiction.

In some cases it may conceivably be most expedient to do so before involving a costly investigation that may do no good and indeed do much harm.

At the same time the concrete case might often bring into their true relation many of the facts, circumstances and considerations that need sometimes to be weighed in order to apprehend the true bearing of the question of jurisdiction.

I should answer the first question in the negative and in doing so the second question needs no answer.

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DUFF J.—The Board of Railway Commissioners states the following case:—

"The following case which, in the opinion of the Board, involves questions of law, is stated by the Board for the opinion of the Supreme Court of Canada:—

1. The Toronto, Hamilton and Buffalo Railway Company was incorporated by Act of the Legislature of the Province of Ontario, ch. 75, 1884, and under that Act was authorized to construct a railway from a point in or near the City of Toronto to a point in or near the City of Hamilton, and thence to some point at or near the International Bridge, or Cantilever Bridge, in the Niagara River, and with full power to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands, if any, lying between the points aforesaid.

2. By ch. 86 of the statutes of 1891, passed by the Parliament of the Dominion of Canada, the undertaking of the Toronto, Hamilton and Buffalo Railway Company was declared to be a work for the general advantage of Canada, reserving to the company all the powers, rights, immunities, privileges, franchises, and authorities conferred upon it under and by virtue of the above recited Acts of the Legislature of the Province of Ontario.

3. By sec. 4 of the federal Act all the provisions of the "Railway Act" were made to apply to the Toronto, Hamilton and Buffalo Railway Company, in so far as they were applicable to the undertaking, and except to the extent to which they were inconsistent with the provisions of the said Acts of the Legislature of the Province of Ontario.

4. By-law No. 755, passed by the Municipal Council of the City of Hamilton on the 25th day of October, 1894, and confirmed by Ontario statute, 58 Vict. 1895, ch. 68, and by the Dominion Act, ch. 66, 1895, fixed a definite location of the company's line in the City of Hamilton. The conditions of the by-law were complied with and the line constructed along Hunter street, in the City of Hamilton, in accordance with the provisions of the by-law referred to, and in accordance with the map or plan duly approved under the provisions of the "Railway Act."

5. The present application on behalf of the city is for an order requiring the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway into the city from Hunter street to a location in the north end of the city in common with the Grand Trunk and the Canadian Northern Ontario Railway companies.

6. The application was heard at the sittings of the Board held in Hamilton on the 10th day of October, 1913, at which counsel representing the city, the Toronto, Hamilton and Buffalo Railway Company, the Canadian Pacific and Grand Trunk Railway Companies, and certain property owners, were present. Counsel for the

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Toronto, Hamilton and Buffalo Railway Company contended that the Board was without jurisdiction to make the order applied for.

7. After hearing argument and reading the submissions filed, and taking time to consider, the Board came to the conclusion that, for the reasons set out in the judgments of the Chief Commissioner and the Assistant Chief Commissioner, it had power, if so advised, to make such an order; and this conclusion was announced to the parties interested.

8. At the request of counsel for the Toronto, Hamilton and Buffalo Railway Company, who expressed his intention of appealing from this decision, the merits of the application were not gone into, and counsel was asked to proceed to perfect his appeal without delay.

9. A draft form of order upon which to base an application for leave to appeal was submitted by counsel for the Toronto, Hamilton and Buffalo Railway Company, and Order No. 21,087, dated December 24th, 1913, issued as a result of this application. The said Order No. 21,087 is not in terms in the form of the draft order submitted by counsel, and for that reason counsel refuses to perfect his appeal, but raises the objection that the Board is without power to act in the premises.

10. The only order made by the Board was the Order No. 21,087, referred to, declaring that it had jurisdiction to entertain the application and to make an order directing the deviation of the line of the Toronto, Hamilton and Buffalo Railway Company within a distance of one mile from its present location. The merits of the case were not gone into.

11. The city objects to this order, contending that the Board's power to order a diversion in the premises was not limited to a diversion within one mile from the present location of the railway.

12. The statutes relating to the said company contained in the printed volumes of the statutes of the Parliament of Canada or of the Legislature of the Province of Ontario, the judgments and proceedings herein, shall be deemed to be and shall be read as part of this case.

13. The questions involved being, in its opinion, questions of law, the Board, under sec. 55 of the "Railway Act," may of its own motion state a case in writing for the opinion of the Supreme Court of Canada; and in pursuance of this power, the questions submitted for determination by the Supreme Court of Canada are as follows:—

(1) Whether, as a matter of law, the Board of Railway Commissioners for Canada has the power on an application by the City of Hamilton, to make an order directing the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway from its present location in the City of Hamilton to some other location in the said city.

(2) Whether, if the Board has power to order such diversion, such power is limited to a diversion within one mile from the railway as already constructed.

The questions submitted relate to the jurisdiction of the Board and it is contended on behalf of the railway company that a question touching the jurisdiction of the Board can be raised before this court only in one way:—viz., by an appeal under section 56(2). I agree with the learned Chief Commissioner that section 55 confers upon the Board authority "of its own motion" to state a case for the opinion of this court upon any question of jurisdiction which, in the opinion of the Board, is a question of law.

I do not think it is necessary to pass upon the question whether the provisions of the by-law of October 25th, 1894, which had the force of statute by virtue of 58 Vict. ch. 68 (Ont.) and 58 Vict. ch. 66 (Dom.) constituted a "special Act" within the meaning of section 2(28) of the "Railway Act" or whether "the subject-matter" of section 167 of the "Railway Act" is within the meaning of section 3 of the "Railway Act" "the same subject-matter" or one of "the same subject-matters" as those in respect of which provision is made by the by-law and validating enactments; I shall assume for the purpose of this judgment that the rights of the parties now in controversy are governed by the enactments of the "Railway Act."

I will only add that the authority conferred by section 167 must, in my opinion, be exercised subject to the provisions of any special Act. Section 3 of the "Railway Act" makes it imperative to hold that, in so far as the situs of the railway line or railway works is rigorously fixed by the special Act, the special Act must govern. To what extent the special Act does define the situs of the railway to the exclu-

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sion of the authority of the Board under section 167 is a question which, of course, must be determined by the proper construction of the special Act itself.

On this assumption I have not been able to convince myself that the proposed diversion would not be a "deviation, change or alteration" within the meaning of section 167 and within the authority of the Board to sanction on the application of the railway company. I can see no valid reason—that is to say no reason on which I am entitled to act judicially—why a "deviation" authorized by section 167 after the construction of the railway must be confined within the limits expressly laid down in respect of a "deviation" permitted by section 159 before construction. It is, of course, a proper subject for comment that on the reading of section 167, which I think is the right reading, the discretion of the Board, subject to the provisions of the special Act is unqualified as regards the physical limits of lateral deviation; while by section 159 a limit of one mile is specifically laid down. Various explanations of this seeming inconsistency of policy may be suggested, but the discussion of such possible explanations does not appear to me to be relevant to the only question before us. Our duty is to construe the language which Parliament has used. I find in section 167, as regards this matter of the limits of lateral deviation, words which are quite unequivocal. I cannot refuse to give effect to them because, when read according to their plain meaning, they give a result which does not appear to be entirely consistent with inferences that may be derived from other parts of the Act as to the policy of Parliament. To do that would be legislating.

Before proceeding to discuss what appears to me to be the real point in controversy, it should be observed that the learned Chief Commissioner in his reasons for judgment has made it very plain that this is not a case for the exercise of the powers given by sections 237 and 238 and that the jurisdiction of the Board to grant the application, if it exists, must be rested upon section 167.

That section is in the following terms:—

167. If any deviation, change or alteration is required by the company to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, a plan, profile and book of reference of the portion of such railway proposed to be changed shewing the deviation, change or alteration proposed to be made, shall, in like manner as hereinbefore provided with respect to the original plan, profile and book of reference, be submitted for the approval of the Board, and may be sanctioned by the Board.

2. The plan, profile and book of reference of the portion of such railway so proposed to be changed shall, when so sanctioned, be deposited and dealt with as hereinbefore provided with respect to such original plan, profile and book of reference.

3. The company may thereupon make such deviation, change or alteration, and all the provisions of this Act shall apply to the portion of such line of railway so at any time changed or proposed to be changed, in the same manner as they apply to the original line.

4. The Board may, either by general regulation or in any particular case, exempt the company from submitting the plan, profile and book of reference as in this section provided, where such deviation, change or alteration, is made or to be made, for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting the railway or for any other purpose of public advantage, as may seem to the Board expedient, if such deviation, change or alteration does not exceed three hundred feet from the centre line of the railway, located or constructed, in accordance with the plans, profiles and books of reference deposited with the Board under this Act.

5. Nothing in this section shall be taken to authorize any extension of the railway beyond the termini mentioned in the special Act.

Read alone, that is to say apart from the provisions to which I am about to refer, the contention

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that the Board has authority under this provision to order a "deviation, change or alteration" against the opposition of the railway company, would hardly be susceptible of plausible statement. The real point to be determined is:—What is the effect of this section when interpreted by the light of sections 26(2) and 28? These last mentioned sections are in the following words:—

26. (2). 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 or authorized 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 Acts; and shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or of fact.

28. The Board may, of its own motion, or shall upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.

(2) Any power or authority vested in the Board under this Act may, though not so expressed in this Act, be exercised from time to time, or at any time, as the occasion may require.

The argument in favour of jurisdiction is that by the combined operation of these two last quoted sections, whatever the Board has power to sanction or authorize at the request or upon the application of the railway company, it has power to order of its own motion against the will of the railway company; and if that is the effect of them there can be no doubt upon the question of the jurisdiction here. In *Grand Trunk Railway Co. v. The Department of Agriculture of Ontario*(1), the Chief Justice, Mr. Justice Gir-

(1) 42 Can. S.C.R. 557.

ouard and Mr. Justice Anglin adopted the view just expressed as to the effect of these provisions. Of the other three members of the court, who took part in that decision, Mr. Justice Davies and Mr. Justice Idington expressed no opinion on the point. My own opinion, which I stated in my judgment in that case, was against the proposed construction of these sections. As in duty bound, I have re-considered carefully the opinion I then formed in light of the discussion of the subject by the learned Chairman of the Board in his reasons now before us and the conclusion I then formed is unchanged. I will briefly re-state my opinion as to the real meaning of these sections. As to section 26(2) : it will be observed that the power there given is expressly made exercisable only in so far as is "not inconsistent with this Act," and, therefore, when it is suggested that an authority given by some particular section of the Act that on its face is only an authority to pronounce permissive orders is by the operation of this provision converted into an authority to pronounce mandatory orders, it is necessary in each case to ascertain from the section by which the specific authority is given, whether or not such a result is consistent with the true intendment of that section. This consideration alone, in my opinion, would forbid the application of section 26(2) to section 167 in the manner now contended for: for the language of section 167 itself contemplates, it appears to me, the initiative of the railway company as a substantive condition of the Board's jurisdiction, which is merely to "approve" and "sanction" something "proposed" by the railway company.

I think, however, with respect, apart altogether from this, that the application of section 26(2) in

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the manner proposed is inconsistent with the real purpose and meaning of section 26(2) itself, which is, it appears to me, to give to the Board a power to make mandatory orders for the strictly limited purpose or regulating the time and manner in which some authority shall be exercised which has been conferred by Parliament directly or mediately through the action of the Board. The section does not say that

> the Board may order and require any "company to do any act" * * * "which such company * * * is or may be authorized to do."

What the section provides is that where the company is or may be authorized or required to do something by an Act of Parliament or by the Board—the Board may order that it shall be done

> forthwith or within or at any specified time and in any manner prescribed by the Board.

The section authorizes the regulating of companies and persons when exercising powers conferred by the Act or by the Board by prescribing the time and manner in which such powers shall be exercised. To read the section as authorizing the Board by a mandatory order to convert a permissive authority to do something, into a obligation to do it, is to go beyond the necessary scope and meaning of the language used. Applying the section according to the proposed construction to the provisions of the Act as a whole it becomes reasonably clear that the construction extends the effect of the section far beyond the real purview of it. The learned Chairman of the Board in the opinion now before us, has called attention to some of the provisions which bring into relief the difficulties of this construction.

Coming now to section 28:—I think that is a section dealing with procedure only. Where power is given to the Board to investigate and make consequential orders upon application, the Board may of its own motion investigate and order. But the language of the section is hardly the language that would have been used to provide that in every case in which a railway company is authorized to do something, with the sanction of the Board, the Board is to have authority by mandatory order to compel the company to do it. How inapt the words are for such a purpose appears when one attempts to apply those words to section 167. Section 28 provides that

> the Board may, of its own motion, inquire into, hear and determine any matter or thing, which under this Act it may inquire into, hear and determine upon application or complaint.

Now what is the "matter or thing" in respect of which the Board has jurisdiction by the express terms of section 167 to "inquire into, hear and determine"? The "matter" of the inquiry, hearing and determination is:—Shall the Board give or withhold its sanction to a deviation, change or alteration *proposed to be made by the railway company,* as shewn upon a plan, profile and book of reference which have been *submitted by the railway company* for the Board's approval. Granting sanction or refusing sanction to something proposed by the railway company is the matter which the Board is to investigate under this section. Reverting now to the language of section 28, this, then — the giving or withholding of its sanction—is the matter which the Board

> may of its own motion inquire into, hear and determine

and with respect to which it shall have the same powers as upon applications by the railway company. Such

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is the result of a strict application of the language of section 28 to section 167, and the result is in itself sufficient to demonstrate that the earlier section has no proper application to the later.

For these reasons, I think the first question should be answered in the negative. What I have said will indicate what my answer to the second question would have been if I had answered the first in the affirmative.

ANGLIN J.—Although the questions submitted in the stated case concern the jurisdiction of the Railway Board, I think it clear that they are also questions of law and, as such, properly the subject of a stated case under sub-section 1 of section 55 of the "Railway Act." It is true that in section 56 a distinction is made between questions of law and questions of jurisdiction, the right of appeal upon the latter being made conditional on the leave of a judge of this court being first obtained. But section 56 provides for cases in which the Board has already professed to exercise jurisdiction by making an operative order, or has dismissed an application on the ground that it lacks jurisdiction to entertain it. Its decision in either case may properly be made the subject of an appeal. Section 55, on the other hand, provides not for appeals but for cases in which, before pronouncing on order or otherwise dealing with the matter pending before it, the Board desires to be advised by this court upon some question arising in such matter. It is immaterial that the question is one which affects its jurisdiction. The Board is authorized by section 55 to state any question which is in its opinion a ques-

tion of law. If authority for this view be needed it is to be found in *Essex Terminal Railway Co.* v. *Windsor, Essex and Lake Shore Rapid Railway Co.* (1), cited by the learned Chief Commissioner, as more fully appears in the judgment of the late Chief Commissioner Killam, reported in 7 Can. Ry. Cas. 109, 124.

For the reasons assigned by me in *Grand Trunk Railway Co.* v. *Department of Agriculture of Ontario* (2), I am of the opinion that the Board has jurisdiction to order, on the application of any other person or body interested, or of its own motion, any deviation, change, or alteration which section 167 empowers it to sanction or authorize on the application of a railway company. While the power and discretion entrusted to the Board under such an interpretation of the Act may seem very wide, it must be borne in mind that considerations of public safety or public convenience may sometimes imperatively require a deviation, change or alteration to which the railway company affected may, from motives of economy or for other reasons, be opposed. To restrict the jurisdiction of the Board under section 167 to cases in which the company applies for its sanction of a deviation, change or alteration, might, therefore, prove very undesirable, and might defeat the purpose of Parliament in enacting section 28 and section 26 (2) of the "Railway Act." Moreover, the company always has the right of appeal to the Governor in Council under sub-section 1 of section 56 in any case in which it feels that due regard has not been paid to its interests.

(1) 40 Can. S.C.R. 620. (2) 42 Can. S.C.R. 557.

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There is, no doubt, an incongruity in restricting the power of the Board, when sanctioning the plan, profile and book reference under section 159, to authorizing a deviation of not more than one mile from the location approved by the Minister of Railways (even this limited power it may not exercise where the Minister so directs) and the unrestricted power to

> sanction any deviation, change or alteration * * * in the railway or any portion thereof as already constructed or as merely located

which section 167 purports to confer. When proceeding under the latter section the location of the entire railway or of any part of it may be changed without the approval of the Minister of Railways being required, provided there is no extension beyond the termini mentioned in the special Act (sub-section 5), I was at first disposed to think that, inasmuch as section 167 applies to a railway "merely located and sanctioned" as well as to a "railway already constructed," it should be read as subject to a restriction similar to that imposed by the proviso to sub-section 3 of section 159, because otherwise, while the power of the Board to authorize a deviation would be restricted by the limitation of one mile when it is sanctioning the plan, profile and book of reference, upon that sanction being given authority to sanction a deviation not so restricted would at once arise. But while the existence of such an anomaly is difficult to understand, in view of the fact that in sub-section 4 Parliament expressly restricts the power of the Board, when proceeding by general regulation, to sanctioning deviations not exceeding 300 feet, and by sub-section 5 provides that extensions beyond the

termini fixed by the special Act may not be authorized as deviations, changes or alterations, I am unable to treat the omission of any other limitation on the power conferred by sub-section 1 as accidental, or to justify reading into it the restrictions contained in the proviso to sub-section 3 of section 159. Here again the right of appeal to the Governor in Council, given by sub-section 1 of section 56, affords what may well have been deemed a sufficient guarantee and protection against the exercise of the very wide powers conferred on the Board in such a manner as unduly to prejudice the interests of the railway companies or of the public.

Although the proposal of the City of Hamilton is novel in its character and involves a more extensive change than the Railway Board is usually asked to sanction, having regard to the fact that section 167 provides for

> any deviation, change or alteration * * * in the railway or any portion thereof,

and to the restrictions expressly imposed by sections 4 and 5 adverted to above, I am unable to understand how it can be successfully maintained that the suggested scheme is not within the purview of sub-section 1. What is proposed is the deviation of a portion of the respondents' railway. There is no suggestion of an extension beyond the termini fixed by the special Act. The Board may grant the application in whole or in part, or in some amended form, or may reject it *in toto* as undesirable, or extravagant, or unnecessary in, or contrary to, the public interest.

Having regard to the provisions inserted in the statutes confirming the agreement between the rail-

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way and the City of Hamilton, which expressly save the powers conferred by the "Railway Act" on the Railway Committee of the Privy Council, to which the Board of Railway Commissioners has succeeded, and to the decision in *Canadian Pacific Railway Co.* v. *City of Toronto and Grand Trunk Railway Co.*(1), I agree with the Board of Railway Commissioners that there is nothing in these special Acts which ousts its jurisdiction under the "Railway Act" to deal with the present application of the City of Hamilton.

The merits of that application have not yet been considered by the Board and it must of course be assumed that, if it should be granted in whole or in part, it will be only upon such terms as will do justice between the parties and afford to the respondent company's interests every protection to which they may be entitled.

In a country such as this, with its vast extent of territory, and conditions varying in its different provinces and constantly changing owing to its rapid development, it is necessary that the powers of a body such as the Railway Commission should be very wide. Much more must be entrusted to its discretion than may be found necessary in older lands where fixed and settled conditions are to be encountered. In dealing with questions affecting the jurisdiction of the Board great care should be taken that judicial decisions do not impose upon it fetters and restrictions which Parliament did not intend, and which might impair its usefulness and seriously hamper its

(1) [1911] A.C. 461; 42 Can. S.C.R. 613.

exercise of the beneficent control which it was meant to have.

I would, for these reasons, answer the first question of the stated case in the affirmative and the second in the negative.

BRODEUR J.—This is a reference by the Board of Railway Commissioners. Brodeur J.

The respondents contend, at first, that we have no jurisdiction to hear this case because the matter in controversy is not a question of law, but a question of jurisdiction.

Section 55 of the "Railway Act" empowers the Board of Railway Commissioners to state a case in writing for the opinion of the Supreme Court of Canada upon a question which, in the opinion of the Board, is a question of law.

In this case the Board was called upon to decide whether an application by the City of Hamilton is within the contemplation of the "Railway Act." That application is made for the purpose of diverting the line of railway of the respondents from a certain location in the City of Hamilton.

The main point raised on the merits of the application is that the diversion of a line of railway can be ordered only when such deviation is asked for by the railway company itself, and that the Board is without jurisdiction to order such a diversion where the proceedings are instituted by a municipal corporation, as in this case.

The Board, in order to decide that point, had to construe the provisions of the "Railway Act," especially the provisions of section 167. In their op-

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inion that was a question of law and they had power to refer the matter to this court in order to have it determined.

In general principle questions involving the jurisdiction of a tribunal are questions of law because they involve the application of a statute to some particular proceedings.

This court, therefore, is competent to hear the reference and to decide the issue in law raised.

Having disposed of this preliminary objection, I will now consider the question whether the Board had the power, on the application by the City of Hamilton, to make an order directing the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway from its present location in the City of Hamilton to some other location in that city.

Parliament, by a special Act, determines at first in a general way where a railway company might build its railway. Then a map shewing the general location of the line requires to be approved by the Minister of Railways.

The company, after the approval of that general location of its line must obtain from the Board of Railway Commissioners an approval of a plan and of the book of reference that shews the precise location of the line.

The Board, in considering the plan and book of reference, is bound by the general location as approved by the Minister with the exception, however, that a deviation of not more than one mile from any one point of that general location may be determined by the Board. But this power of the Board to order a deviation is not absolute; for the Minister may

direct that a location which he has approved will not be altered.

There is no evidence before us that such a restriction has been provided by the Minister.

The plans were approved several years ago and the railway was then located and built.

Now the City of Hamilton asks for an order from the Board to divert that line of railway.

In my opinion the Board cannot grant such an application, because the diversion is not asked for by the railway company itself. The section of the "Railway Act" which deals with the matter is section 167 which reads as follows:—

> If any deviation, change or alteration is *required by the company* to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, a plan, profile and book of reference of the portion of such railway proposed to be changed, shewing the deviation, change or alteration proposed to be made, shall, in like manner as hereinbefore provided with respect to the original plan, profile and book of reference, be submitted for the approval of the Board, and may be sanctioned by the Board.

Such changes as that requested by the City of Hamilton in the location of the line of railway in question can be made only at very great cost, and there may be cases where the financial situation of a company would not authorize such a large expenditure. It is only fair, just and equitable that the initial application should come from the company itself.

The evident object of the city is to concentrate all the lines of railway passing through the city. It may be a desirable object. But I fail to find in the "Railway Act" the power for the Board to order the closing of some lines and the exclusive use of some

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other. That could be done only by a common agreement or at the request of the company itself.

For these reasons I am of opinion that the first question submitted should be answered in the negative.

It does not become necessary for me then to answer the second question.

There should be no costs on this reference.