THE MONTREAL STREET RAILWAY COMPANY..... APPELLANTS;

AND

THE CITY OF MONTREAL.....RESPONDENT.

1909
*Dec. 15, 16.
1910
*March 11.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tramway—Provincial railway—"Through traffic"—Constitutional law—Legislative jurisdiction—Powers of Board of Railway Commissioners—Construction of statute—R.S.C. (1906) *c.* 37, *s.* 8(*b*) *—"B. N. A. Act,"* 1867, *ss.* 91, 92.

"The Railway Act," R.S.C. (1906) ch. 37, does not confer power on the Board of Railway Commissioners for Canada to make orders respecting through traffic over a provincial railway or tramway which connects with or crosses a railway subject to the authority of the Parliament of Canada. Davies and Anglin JJ contra.

Per Fitzpatrick C.J. and Girouard and Duff JJ.—The provisions of sub-section (*b*) of section 8 of the "Railway Act" are *ultra vires* of the Parliament of Canada.

APPEAL from an order of the Board of Railway Commissioners for Canada which directed the Montreal Park and Island Railway Company to grant the same facilities in regard to passenger rates and service to the citizens of Mount Royal Ward, in the City of Montreal, as were given to the residents of an adjacent municipality, to enter into arrangements with the appellants to carry the order into effect, and ordering the appellants to enter into the necessary agreements.

The City of Montreal, on 1st February, 1909,

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

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lodged a complaint with the Board of Railway Commissioners against the Montreal Park and Island Railway Company (which operates a tramway subject to the authority of the Parliament of Canada, confined within the limits of the Island of Montreal), alleging, amongst other things, that that company refused to place the citizens residing in Mount Royal Ward, in the City of Montreal, on the same footing as those of the Town of Notre Dame de Grâce and the Town of Outremont, municipalities of which the boundaries are contiguous to the City of Montreal, and complaining of the rates charged for the carriage of passengers in the service and operation of the tramway. At the time of the complaint, and for some time previously, the Montreal Park and Island Railway was connected with the tramway of the appellants, which is a railway authorized by the legislature of the Province of Quebec and subject to its jurisdiction. On the 6th of April, 1909, the Board ordered that the appellants should be made a party in the proceedings before them upon the complaint and to shew cause why they should not join with the Montreal Park and Island Railway Company in establishing a through route and through rates for the service in the operation of their tramway. After hearing the parties upon the application, the Board, on the 4th of May, 1909, made the order now appealed from, of which the operative part was as follows: —

"It is ordered that the Montreal Park and Island Railway Company be and it is hereby directed to grant the same facilities in the way of services and operation, including the rates to be charged by it, to the people residing in the said Mount Royal Ward that it grants to the people residing in the Town of Notre-

Dame de Grâce; and that it forthwith enter into the necessary agreements for the purpose of removing the said unjust discrimination; and that, with respect to through traffic over the Montreal Street Railway, the Montreal Street Railway Company be and it is hereby required to enter into any agreement or agreements that may be necessary to enable the Montreal Park and Island Railway Company to carry out the provisions of this order."

The appellants contended that, upon the true construction of section 8 of "The Railway Act" and of sections 91 and 92 of the "British North America Act, 1867," the Board had no jurisdiction over their tramway; and that, being a provincial corporation operating a provincial tramway only in the Island of Montreal and having no connections with any railway or tramway outside the Province of Quebec, neither their company nor their tramway was subject to the provisions of the Dominion "Railway Act," nor to the jurisdiction of the Board.

Special leave to appeal was granted, under the provisions of section 56 of the "Railway Act," by Mr. Justice Duff, on the question —

"Whether, upon a true construction of sections 91 and 92 of the "British North America Act, 1867," and of section 8 of the "Railway Act" of Canada, the Montreal Street Railway Company are subject, in respect to through traffic with the Montreal Park and Island Railway Company to the jurisdiction of the Board of Railway Commissioners for Canada."

Aimé Geoffrion K.C. and *F. Meredith K.C.* (*Hague* with them), for the appellants.

Atwater K.C. and *Butler* for the respondent.

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The Chief Justice.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be allowed for the reasons given by Mr. Justice Duff.

GIROUARD J.—I agree with my brother Duff.

If the incidental or ancillary rule is to be applied in a case like this, then the power of the provincial legislatures under section 92, sub-section 10, of the "British North America Act, 1867," with regard to local railways is simply wiped out. To-day the question may be only the transportation of persons, tomorrow it may involve the carriage of goods and even perishable articles and, as a consequence, the supply of refrigerators, cars, cold storage warehouses, switching and stations.

I think the appeal of the Montreal Street Railway Company should be allowed with costs.

DAVIES J. (dissenting).—Appeal from an order of the Board of Railway Commissioners respecting "through freight."

The "British North America Act, 1867," in the distribution of legislative powers between the Dominion Parliament and provincial legislatures expressly excepts, in section 92, from the class of "local works and undertakings" assigned to provincial legislatures, in addition to those undertakings which connected one of the provinces with another or which extended beyond the limits of the province and others specifically described, the following —

sub-section (*c*)—such works as *although wholly situate within the province* are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, etc.

Section 91 confers on the Parliament of Canada exclu-

sive legislative authority over all classes of subjects so expressly excepted from section 92.

The Montreal Park and Island Railway originally constructed under a provincial charter was such a work, and, being declared by Parliament to be "for the general advantage of Canada" became a Dominion railway subject in all respects to the legislative powers of the Dominion Parliament and, as a consequence, to the "Railway Act" of 1906, ch. 37. Section 8 of that Act reads as follows:—

> Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to,—
>
> (*a*) The connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing;
>
> (*b*) The through traffic upon a railway or tramway and all matters appertaining thereto;
>
> (*c*) Criminal matters, including offences and penalties; and
>
> (*d*) Navigable waters;
>
> Provided that, in the case of railways owned by any provincial government, the provisions of this Act with respect to through traffic shall not apply without the consent of such government.

The Montreal Park and Island Railway at the time or shortly after it became a Dominion undertaking or work, was or became physically connected with the Montreal Street Railway, which is a provincial road operating under a provincial charter, and part of the Montreal Park and Island Railway line was leased to and other parts operated by the Montreal Street Railway Company, under a somewhat complicated traffic arrangement between the two companies, involving running rights by each company's cars over the other lines and the leasing of some of the Montreal Street Railway Company's cars to the Montreal Park and

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Island Railway Company. At the time the application was made to the Board of Railway Commissioners the physical connection of the two roads existed and passengers were carried directly over one road to and over the other under such traffic agreement and running rights. The carriage of passengers is declared by paragraph 31 of section 2 to be included in the word "traffic" whenever used in the Act.

The 317th section of the Act confers the amplest powers upon the Board of dealing with the traffic upon railways and expressly includes "through traffic" and through rates.

The question we have to decide is whether or not the Montreal Street Railway by reason of its physical connection with the Montreal Park and Island Railway and the traffic arrangements before referred to are amenable and subject to the jurisdiction of the Board with respect to "through traffic" passing from the Montreal Park and Island Railway over its line and *vice versâ*.

A distinction was attempted to be made at the argument between the Board's jurisdiction over through traffic on a federal road which was *interprovincial* and that over a road which though federal was wholly within the limits of a province.

The appellants contended that section 8 of the "Railway Act" should be limited in its application to such provincial railways as connect either directly or indirectly with lines extending beyond the limits of the province and as the Montreal Street Railway was not so connected the section could not be made applicable to them.

For myself I fail to appreciate the distinction suggested. If the physical connection of a provincial railway with a federal interprovincial railway brought the

former road under and subject to the jurisdiction of the Board of Railway Commissioners so far as through traffic passing over it and the federal railway was concerned it seems to me that the same result must follow if such federal railway happened to be itself confined within provincial limits. It is not the physical limits alone of the railway which gives Parliament legislative jurisdiction over it. If the railway connects one province with another or extends beyond the limits of a province it comes within the exception (*a*) of sub-section 10 of section 92 of the "British North America Act," and if being wholly within the limits of a province it is declared by the Parliament of Canada to be for "the general advantage of Canada" it comes within the exception (*c*) of that sub-section.

In either case and in both cases alike when an undertaking or work is brought within such exceptions it becomes subject to the exclusive legislation of the Dominion, and I fail altogether to understand how it can be held that the physical connection of a provincial road with one of such federal roads, would operate to give the Board of Railway Commissioners jurisdiction over the through traffic over it and not to do so in the case of such connection with the other federal road. The mere accident that the federal road in one case is confined to a single province and in the other runs beyond the provincial boundary cannot determine the question. That must surely depend upon whether or not it is a federal road carrying "through traffic" over a provincial one quite irrespective of its limits within or without a province.

Then it is admitted that with respect to such "through traffic" the provincial legislature has not the jurisdiction to legislate. If in such case the Dominion Parliament has not jurisdiction then such

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jurisdiction does not exist anywhere, and we would have the curious anomaly existing of an enormous class of traffic known as "through traffic" being carried over two roads, one federal and one provincial, without either Parliament or the legislature having jurisdiction over such through traffic. Such a condition is, it seems to me, in view of the construction heretofore placed upon the "British North America Act" impossible. The power to legislate with regard to such through traffic rests somewhere. So far as the federal or Dominion road is concerned it undoubtedly rests with the Dominion Parliament, but to exercise such power effectively the Board of Railway Commissioners to whom it has been given by Parliament must necessarily have some jurisdiction over the provincial road with which the federal one is physically connected. Such jurisdiction of course goes no further than the control of "through freight" renders necessary. In my opinion it goes that far. Parliament does not possess, as was suggested, a concurrent authority with the provincial legislature to control this through traffic. If as I have argued it has authority to legislate at all on the subject under the exception to sub-section 10 of section 92 of the "British North America Act" it has exclusive authority. Assuming there was a domain in which the legislation of the Dominion and of the province might overlap then if the Dominion alone has legislated or if both Dominion and province have legislated and the two legislations conflict that of the Dominion must prevail. *Grand Trunk Railway Co.* v. *Attorney-General of Canada*(1), at page 68, and *City of Toronto* v. *Canadian Pacific Railway Co.*(2), at page 58.

(1) [1907] A.C. 65.

(2) [1908] A.C. 54.

In the present case it seems to me that when Parliament legislated the field with respect to "through traffic" was covered. Section 8 of the "Railway Act" clearly deals with just such a case as this and if *intra vires* must of course govern. That it necessarily deals with property and civil rights or other matters assigned by section 92 to provincial legislation is no argument against its validity. If it is legislation to the effective exercise of a power exclusively vested in the Dominion or even held to be fairly ancillary to such that is sufficient. The jurisdiction of the legislature over "local works and undertakings" as over "property and civil rights" in the province is quite consistent, as said by the Judicial Committee in *Toronto Corporation* v. *Canadian Pacific Railway Co.* (1), at page 59,

> with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province.

See also *Toronto Corporation* v. *Bell Telephone Co.* (2).

My conclusions therefore are that the "British North America Act" confers jurisdiction upon the Dominion Parliament under the exceptions to section 10 of section 92 to legislate on the subject-matter of "through freight." That legislation has been enacted in section 8 of the "Railway Act" in terms wide enough to reach the case of "through freight" passing from a federal to a provincial road physically connected and that the Board in assuming a jurisdiction over the provincial road for the purpose of giving effect to its order respecting such through freight was acting within its powers.

I would dismiss the appeal therefore with costs.

(1) [1908] A.C. 54. (2) [1905] A.C. 52.

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IDINGTON J.—The Board of Railway Commissioners for Canada directed, amongst other things,

> that with respect to through traffic over the Montreal Street Railway, the Montreal Street Railway Company be, and it is hereby, required to enter into any agreement or agreements that may be necessary to enable the Montreal Park and Island Railway Company to carry out the provisions of this order.

The former company now appeals on the ground that the Board had no jurisdiction to make such direction.

The appellant is a corporation created by 24 Vict. ch. 84, of the old Province of Canada for the purpose of constructing and operating street railways in the City and Parish of Montreal.

Its original powers have been many times added to by enactments of the legislature of the Province of Quebec.

The manifold details of all these legislative provisions original and supplementary need not be entered into; but we must, I think, observe that from the beginning powers were given to enter into contracts with the said city and adjoining municipalities relative to the construction of the railway, reparation and grading of the streets used, the location of the railway, the time and speed of cars, the amount of license to be paid by the company annually, the *amount of fares to be paid by passengers* and generally for the safety and convenience of passengers, and the conduct of the company relative to non-obstruction or impeding of the ordinary traffic.

Its right to fares at all and its entire existence for any useful or profitable purpose depend upon such a contract. Either the contract has been observed or not. If broken the law gives a remedy; and if persistently broken, more than one remedy. Persistent default means forfeiture.

If observed, how can Parliament venture to amend it? A step or two in its history unfolds the reason or excuse or peradventure as I conceive proves Parliament never intended such interference.

The railway has been changed from having been of the kind served with horse power to that of electric motors, but it has been operated throughout as a street railway for passengers only, since shortly after the company's incorporation. It never had power to perform other service save in recent years for carrying mails; enlarged by a permission to acquire power (which has not, so far as appears, become effective) from the municipalities, under 6 Edw. VII. ch. 57, sec. 5 (Que.), to carry freight.

The Montreal Park and Island Railway Company is a corporation originally incorporated by the legislature of the Province of Quebec by 48 Vict. ch. 74, which Act was also amended by adding further powers.

It was of a different character from the other company. It combined the features of a passenger railway with that of hauling freight, and did not depend on the use of streets or highways as the other, but chiefly acquired its rights of way over lands near or adjacent thereto. In short it was a general purpose railway. Merely noting just now these facts and this difference in the character of the roads I will later on refer to the legal results thereof.

In 1893, after it had been partly constructed and operated the fact became evident that its services could be made much more beneficial to the public by its arranging with the Street Railway Company to carry, from certain points such of its passengers as desired to reach places served by that road and to which the Montreal Park and Island Railway did not run.

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Pursuant to section 12 of its charter giving power to do so a traffic arrangement was made with the appellant by a contract between them on the 11th July, 1893, which was to endure for twenty-five years, for the conveyance of passengers through and between the City of Montreal and its surburban municipalities.

Each was bound by this contract to build and develop its system as specified and thus increase the business the other might thereby expect to reap some benefit from.

Some cars of the Street Railway Company were to be leased to the other company, but if not enough supplied thus for its own use it might build its own.

Some of these cars were to be used interchangeably by each company running them over the roads of the other.

It followed as travel increased over each road that many cars of each company would not run at all on the other road, but deliver its passengers at its own terminus, or point of junction with the other road.

From each of those who get in the cars that run over the track of the other road an extra fare, but less than the full fare, is exacted.

From each of those unfortunate enough to get on a car confined in its running to the road it belongs to and, getting off that to begin a new journey, full fare may be exacted. It is not pretended in either case that greater fares are exacted than the city contracted for in granting the franchise to run, which is the basis on which the various rights of all concerned rest.

Each company collects its own fares. The agreement provides for this. Indeed, very likely neither could lawfully do otherwise.

Some citizens found in all this a grievance, not-

withstanding the beneficent effect of the agreement in ameliorating prior conditions sanctioned by the contract of the city made on their behalf. This grievance, along with the other presently to be referred to, was ventilated before the Board.

It was the kind of grievance that has at some period or other had to be endured in I think every large city on this continent as the result of civic want of foresight in permitting, without adequate control, more than one company to use the city's streets.

It is not necessary to follow in detail, but yet better to bear in mind, in a general way, how the municipalities in the district of or about Montreal, one after another, created by the same legislature, and authorized by it to do so, each conferred franchises and made bargains to be served respectively by either of these systems.

Rates of travel in each, roughly put at five cents for passing through its own bounds, seem to have formed the basis for such bargains.

Annexations of growing suburbs to the rapidly growing city followed (possibly beyond what was expected), and thus the commercial, social and legal problems became day by day more complicated.

These companies, however, all the time were (until what I am about to advert to happened) under the control of the legislature of Quebec.

Not only were they necessarily under such control as corporations created thereby, with "provincial objects," but also by virtue of that other exclusive power conferred by the "British North America Act," sec. 92, sub-sec. 10, on that legislature.

It might also be observed that by the same Act the subject of "municipal institutions" was assigned to

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the same exclusive control; and that the purpose of the creation of the appellant was essentially to aid in street travel over highways peculiarly within the control of the respective municipalities, created from time to time by such legislature. These municipalities were also endowed thereby, as no other legislative power could, with the capacity of contracting in such manner as to each might seem meet for its own safety and convenience and for taxation of its street railway companies, being either direct or having relation to the licensing power and license of each by such municipal corporations respectively.

One might, if it saw fit, as so many do, adopt the method of exacting as a condition of its concession a *pro ratâ* share of the fares or net profits thereof, thinking (if such a word can be used in that connection) to make money thereby.

Another (perhaps thinking a little more deeply that such methods might only increase the citizen's own burdens), might forego the fancied benefit and stipulate instead for a lower fare than the other one which was possibly reaping in its treasury but a small fraction of the increase included in the higher fare.

I know not whether such varying bargains were made or not. I know that they were possible and probable results of the provincial legislation under which the conditions we have to deal with were created. These facts must not be lost sight of when we try to measure either the purpose or result of the other legislation we have to pass upon.

Can any one pretend that it is competent for the Dominion Parliament in such a case to meddle at all? The legislature may have been unwise; the municipalities may have been improvident; the condition

so created may have been, if you will, intolerable; but the power to rectify it rested in the local legislature or in the existing law governing the civil rights of the parties.

Let us now turn to see what happened legislatively to even appear to render such interference by Parliament possible. Let us also then examine this legislation now in question and in doing so have due regard to the presumptions, that Parliament can never have intended to invade the rights of any province, or violate the sanctity of any contract or amend the corporate creations of another legislature.

After entering into the above mentioned agreement the Montreal Park and Island Railway Company had itself incorporated by the Parliament of Canada by 57 & 58 Vict. ch. 84, whereby it was so declared to be a work for the general advantage of Canada. In this very legislation the validity of its then existing contracts with others is recognized and affirmed.

It got no powers by such Act of incorporation or by any Act which would constitute it one of either of the classes of works specifically excepted from the operation of sub-section 10 of section 92 of the "British North America Act"; save within sub-section (*b*) thereof, that of having been declared to be a work for the advantage of Canada.

And to clear the ground I may as well state neither company fell otherwise within any of such exceptional classes.

The relations between the two companies remained the same as fixed by the agreement.

The "Railway Act" enacted in 1903 which provided for the constitution of a Board of Railway Commissioners for Canada provided what appears now as

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section 8 of the "Railway Act" in the Revised Statutes of 1906, as follows: —

> Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to,—
>
> (*a*) The connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing;
>
> (*b*) The through traffic upon a railway or tramway and all matters appertaining thereto;
>
> (*c*) Criminal matters, including offences and penalties; and
>
> (*d*) Navigable waters;
>
> Provided that, in case of railways owned by any provincial government, the provisions of this Act with respect to through traffic shall not apply without the consent of such government.

It is upon this section that the Board has founded its order. It was moved thereto by the fact that in 1907 the Montreal Park and Island Railway Company had made a bargain with the municipality of Notre-Dame de Grâce, lying beyond Montreal's limits entirely, to serve its people there with transportation of passengers into Montreal at a five-cent fare, in consideration of receiving a fifty-year franchise from the municipality and exemption from taxation. This the municipality was enabled to give by special legislation of the provincial legislature. The existence of the agreement of the appellant above referred to doubtless helped by its comprehensive nature to enable the Montral Park and Island Railway Company to carry out this bargain.

It is conceded that the Montreal Park and Island Railway Company is subject to the jurisdiction of the Board.

It is attempted to maintain therefore (as if it were a matter of course) that as the result would be to give

this district better passenger rates than some other districts there is that unjust discrimination Parliament had in view.

Inasmuch as the only question we have to decide is whether or not the appellant falls within the power of the Board to make the order appealed from, which directs it to remedy this alleged unjust discrimination by abandoning its right under the agreement and entering into some other agreement, I pass no opinion upon whether there in fact is any such discrimination or not.

It is urged that as there is in fact that physical connection the agreement provides for and passengers by means thereof pass from one road on to the other there is through traffic, in fact, falling within the meaning of sub-section (*b*).

Is that the sort of thing therein meant by "through traffic" ?

Was the street railway system of any city or town in Canada supposed to have been within the range of things so legislated about in the "Railway Act" ? Was interference thereby with the charters of such roads, the terms of their contracts with the municipalities served, their rates and tolls all dependent on such contracts, and their contracts with each other ever in the contemplation of any one promoting or enacting such legislation ?

I most respectfully submit not. An omnibus line or other means of transportation might as well be held to fall within through traffic if Parliament so willed.

The right to deal with these street railways and their proprietors, as to crossings to be made either by them over roads under the jurisdiction of Parliament

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or by such latter roads over street railways, is undoubtedly vested in Parliament.

The right of such a local company, to seek when endowed by its charter with powers to do so, connection of any kind, with the creation of Parliament either physical or limited to the establishment of a through rate or route may also be well within the jurisdiction of Parliament. And I submit the words of the first part of the section and of sub-section (*a*) can become operative in such cases and thus be given a meaning without doing violence of the kind I have indicated, as obviously is involved in the giving of effect to respondent's contention.

Sub-section (*b*) it is urged means something much more than implied in either suggestion. I agree that it may be so for the first part of the section extends to or asserts a jurisdiction over every kind of railway described therein; and uses apt words to cover each class or kind. When however distributing the purpose and limit of the asserted jurisdiction it changes this; and in sub-section (*b*) relied upon by the respondent, the words "street railway" disappear. It is the through traffic upon a "railway or tramway" that alone is covered thereby. "Tramway" by its origin means a freight road. In Britain the term is very commonly extended to cover street railways, but not so here.

Besides street railways, many local general purpose railways authorized by some special Act of the legislature of a province, may have been had in view.

I am not called upon to express any opinion of whether or not it would be safe to assume that Parliament in any of these cases could, properly observing the terms of section 92, sub-section 10, of the "British North America Act," assert without the actual or implied sanction of their parent local legislature this

jurisdiction over them. I can, however, easily conceive of this legislation having an application thereto that never could have been intended to apply to or render mere street railways subject to the jurisdiction of Parliament.

Neither the appellant's origin, history or present conditions lend colour to its being of the class included in sub-section (*b*) any more than its being in any way related to sub-section (*d*).

We may now turn to section 317 so much relied upon by respondent to define traffic and to bring as a result by virtue of the words "through traffic" in sub-section (*b*) appellant within the jurisdiction claimed.

Section 317 in its whole scope, and in its very language, so clearly relates to a traffic that includes at least carriage of freight as part of the service to be considered that I fail to find therein any encouragement for me to venture to apply it in the sense of aiding the claim set up by respondent.

We have no legislative interpretation of the phrase "through traffic," but we have in this Act the following interpretation given of "traffic" by sub-section 30, of section 2, as follows: "Traffic means the traffic of passengers, goods and rolling stock."

This it is to be observed is not a definition in the disjunctive form necessary to give the effect contended for, by applying the Act to a street railway used only for passengers.

The purview of the Act as a whole seems to forbid us interpreting it as if intended to invade needlessly the subjects of either civil rights, or legislative provisions relative to municipal institutions, or the contracts of municipal corporations, or local works and undertakings all of which would be asserted and

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assisted by a maintenance of this jurisdiction now called in question. I do not deny the possible meaning claimed for these sections, but I would not impute to Parliament in any such case the intention to so enact unless I found it written in the clearest possible language.

I cannot therefore impute it when the doing so must only rest upon inferences drawn from a section or two exhibiting a general purpose of producing equality in some things relative to certain classes of dealings. Those inferences do not necessarily extend beyond these things over which Parliament has undoubted jurisdiction.

When we are referred to section 317 to find what "through traffic" means, let us observe that the section expresses or implies as essential thereto that the Board can create or define it, can insist upon it, and direct the facilities for it and I rather think the accommodations for it also.

It seems going very far to draw such extensive powers over provincial legislation and its products, from such a basis as is thus suggested in the classification of transportation, yet it is surely impossible to draw any line between that claimed specifically here and all else thus directly connected with and involved in the proposition. It is not a part but the whole of the subject-matters of and appertaining to through traffic as indicated in the Act which are covered.

Another view of this case occurs to me and that is this; assume federal relations and limitations out of the case and all the above recited legislation by both Parliament and legislature to have been enacted by one legislative body and all the contracts and acts done pursuant thereto could it be said in considering such an Act as the "Railway Act" if passed by such a

legislature of plenary capacity that it must have been intended thereby to abrogate all such preceding legislation and dissolve everything in municipal and other contracts resting thereupon in the way involved herein? I think not.

Again, it is strangely claimed as a basis for the right of interference that an agreement exists which it is claimed provides for through traffic.

Either the agreement is outside the range of or an infringement of sub-section 7 of section 317.

If it can be held to fall within that section then it may be null and void or have become so thereby, but how can that extinction of it become a foundation for the jurisdiction to enforce the making of a new contract and that regardless of the corporate powers to do so ?

But confirmed, as already pointed out, by Parliament itself, how can the "Railway Act" be held to have been meant to invade the sanctity of a contract thus affirmed?

In this regard, possibly section 3 of the Act averts such a result. Neither this view nor that section was put forward in argument.

But having regard to the nature of the legislation that takes a step for the express advantage of Canada by declaring the work removed because of that character it seems to me quite arguable and possibly conclusive on the whole issue involved.

I have thus far proceeded upon the assumption that Parliament properly regarding its constitutional limitations could never have been supposed to have intended what is claimed. I have arrived at the conclusion that its language (though susceptible of such construction) does not necessarily warrant any such

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assertion of power. Its language must always be read in light of the limits of its constitutional jurisdiction. That language used here when so read is clear, operative, effective and limited.

The case, however, was chiefly argued upon the broad question of whether Parliament could or not so deal with appellant, its charter and its contracts as is implied in the maintenance of the part of the order complained of.

I have no hesitation in saying that in my judgment such legislation by Parliament, as this is claimed to be, against the will of the local legislature creating such corporations as the municipalities, and those others for helping local street travel would be *ultra vires*, and if this must be held to have such meaning it is *ultra vires*.

The legislative power in relation to those elements of municipal government and all it implies, "local works and undertakings" and "corporations with local objects" together with "property and civil rights" has been confided exclusively to the local legislatures subject to the checks of the veto, and in regard to local works of their being declared by the Parliament of Canada for the advantage of Canada or two or more provinces thereof and then removed into the jurisdiction of and there to be dealt with by Parliament.

In passing I may remark Parliament having that power and yet not having exercised it is, I agree, as was urged, a cogent argument against any intention in the Act to found the interference asserted.

I am not oblivious of the apparent invasion already made by holding that Parliament may impose upon municipalities duties of guarding railway crossings for which the legislature may never have made pro-

vision in the capacity given its municipal creations or otherwise by delegating to them the power of direct taxation to provide therefor.

The case of *Toronto* v. *Grand Trunk Railway Co.* (1), I admit carried the matter far and was upheld in the Privy Council.

That was a case not of directing anything as incidental and ancillary to the construction of the railway or the necessities of the case, but like what is now in question; shall we call it the peace, order and good government of the people of Canada?

I respectfully submit to the authority of that decision in the wide field it operates upon but, as it so often happens principles of legal or constitutional action are not always carried to their logical conclusions, I await results before going further, and relieving, by virtue only of Dominion legislation, a municipality from a contract its provincial legislative creator enabled it to make, and thereby bound it to observe.

Legal history and especially constitutional history is full of illustrations of the recoil as it were remaining instead of that of the original force moving further forward.

It was urged here as there that the power claimed was but ancillary to the main purpose of the Act and thus being merely incidental thereto for the due efficiency thereof might well be exercised.

Amplify thus every possible exercise of each of the exclusive powers and the residuary powers committed to Parliament, to the fullest extent and if you please in the most logical manner, of the kind involved in the claim, and there would not be much left of the provincial powers; when we have regard to the doctrine

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

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that where each has a legislative power that of the local legislature must yield to the supremacy of Parliament.

Perhaps the best answer to such a reflection is that men, collectively, seldom feel bound to observe any kind of logic in any sequence of their acts; and that public opinion however illogically evoked is the only safeguard and ultimate court of appeal.

Meanwhile, we, sitting here, must so far as we can, have some regard to the meaning of these words "exclusively make laws," designed to cover such matters as we are now dealing with.

These words are used in an instrument that obviously implies some limitation upon them in order that other exclusive powers given by like words and assigned elsewhere may be effectively exercised.

Can any limits be thus or otherwise imposed than those arising out of the necessity for giving effective scope and operation to the due exercise of those other exclusive powers or as Lord Watson called it "necessarily incidental" at page 360 of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1)? Neither phrase perhaps accurately defines everything to be considered, but in the pages 359, 360 and 361 of that judgment the subject of those limitations is comprehensively and with many needful qualifications dealt with in such a way as to be, if I may be permitted to say so, a practically safe guide in other cases as well as that there in hand. But clearly it was not followed by the draftsman of these sections as his guide.

Can desirableness or expediency or the residuary powers ever be invoked to justify imposing further limitations than that which necessity so defined draws after it?

(1) [1896] A.C. 348.

To classify anew by such elastic, sectional, cross classifications the subject-matters of legislative jurisdiction as this "through traffic" attempt indicates, must invariably lead to trouble.

If the existence of mere relation of some kind, however remote the relation to the subject dealt with, can justify Parliament in annexing everything of that sort as ancillary to its exclusive powers it might in virtue of its power over navigation undertake in all its details the solution of the sewerage question in the cities and towns along the Ottawa River because some of them empty their sewers therein.

I do not allude to the right to prohibit that, but the assertion, instead thereof, of a right to cure the evil by regulating everything to be done in respect thereof and therefor, by these municipalities. It would be as justifiable as undertaking to manage the street railway of Montreal, because that road had some relations with another over which Parliament, legislatively speaking, had entire dominion.

I think we must in the development of what the "British North America Act" has provided ever have regard to the consequences of any decision we come to, including that of the bearing our holding may have in relation to other matters even not directly in appearance involved therein.

Instead of merely drifting, let us try to see whither we are drifting.

If it were necessary to elaborate upon the actual issue now raised a great deal might be said and more forcibly said than is suggested by a consideration of the several conditions of things I have outlined. I have throughout so outlined these to suggest the many and obvious difficulties in the way of holding as *intra*

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vires such legislation by Parliament, if assumed to be of the character claimed, and in the next place of imputing to Parliament by language which is ambiguous that which involves such a dangerous challenge of the products of legislative conditions; in this case ratified by itself.

As to the argument that the power to rectify an evil must exist wholly in one legislature, I should have thought but for its persistent reiteration that it was obviously futile.

Every one can recognize many cases where it does not exist; and also many persons fancy theoretically that if it were not for the partition of legislative powers necessarily incidental to the federal system many evils might be more speedily and more efficiently rectified, instead of sometimes being only partially cured by the effort of one legislative power.

Every intelligent man however knows, if he has watched the moulding of public opinion, how fallacious the theory is. Indeed, the converse is, I believe, the case in a large degree. Passing that, what is the argument worth?

The need of this very power sought to be exercised in relation to through traffic exemplifies how cautious we should be in assuming that the limitation of legislative power in relation to furnishing a complete remedy necessarily leaves our country entirely helpless as the argument implies. The evils incidental to the operation of that traffic were and perhaps are international in some of the ranges of its development yet must we wait for others and refrain from any amelioration because clearly the entire power does not lie with our Parliament.

In like manner and in a less degree is involved the dealing with all roads within Canada.

Parliament can by asserting its power over those roads owing existence to it and obedience to its mandates pretty effectually check any evil of the kind aimed at. Public opinion will soon bring if need be the supplementary aid of other powers.

Strong measures short of the invasion of provincial rights can easily be devised, possibly within the present Act, and made to be effectual, if there is an evil practice to be cured.

It is clear that the order is an interference with provincial legislation in relation to four of the most important subjects assigned to the exclusive legislative jurisdiction of the provinces. It is clear also that there was no necessity for Parliament to provide for such an interference. It is to my mind equally clear that the maintenance of such a pretension of power on the part of Parliament would breed infinite disorder.

I think the appeal must be allowed. The respondent's improvidence and unsuccessful effort to be relieved therefrom perhaps deserve that we should give costs against it, but for the manner the case was presented by the appellant to the Board.

Instead of merely properly presenting its respectful compliments to the Board it ought to have set forth some of the basic facts of a most complicated condition of things as reason for its protest against the jurisdiction.

With respect I hardly think the failure to do so was fair to the Board.

DUFF J.—The appeal is based upon the contention that section 8, sub-section (*b*), of the "Dominion Railway Act" is *ultra vires*. The enactment is as follows:

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8. Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to * * *

(*b*) The through traffic upon a railway or tramway and all matters appertaining thereto.

The phrase "through traffic" is, I think, used in the Act in the sense of traffic originating on one railway and terminating on another. With respect to such traffic, all railway companies to which the provisions of the Act are applicable are required by section 317, sub-section 1, —

according to their respective powers to afford to all persons and companies all reasonable and proper facilities * * * for the interchange of traffic between their respective railways and for the return of rolling stock;

and by section 317, sub-section 2, —

Such facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and, in the case of goods shipped by car load, of the car with the goods shipped therein, to and from the railway of such other company, at a through rate; and also the due and reasonable receiving, forwarding and delivering by the company, at the request of any person interested in through traffic, of such traffic at through rates.

Such companies are, by sub-section 3, forbidden to

(*a*) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever;

(*b*) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person or company;

(*c*) subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever; or,

(*d*) so distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects.

Any company having a railway connecting with another in such a way as to form a continuous line with it or which intersects another railway is required by sub-section 4 to

afford all due and reasonable facilities for delivering to such other railway, or for receiving from and forwarding by its railway, all the traffic arriving by such other railway without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction is offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf.

By sub-section 5 it is enacted that

The reasonable facilities which every railway is required to afford under this section, shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by any such company, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways.

By the seventh sub-section it is provided that any agreement made between any two or more companies contrary to section 317 shall be "null and void."

The Railway Board is given very full powers to determine as a question of fact in particular cases as well as by regulation to declare, what shall constitute "similar circumstances and conditions" or "unjust and unreasonable preferences or advantages"; and to decide whether in any given case a company has or has not complied with the provisions of section 317 as well as to declare by regulation what shall constitute compliance or non-compliance with these provisions.

The Board, moreover, may for the purposes of section 317,

order that specific works be constructed or carried out, or that property be acquired, or that specified tolls be charged, or that cars, motive power or other equipment be allotted, distributed, used, or moved as specified by the Board, or that any specified steps, systems,

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or methods be taken or followed by any particular company or companies, or by railway companies generally. Section 318(3).

There are other important provisions touching the regulation of through traffic, but it will not be necessary to refer to them specifically.

I think the question whether such enactments as applicable to provincial railways and tramways (that is to say railways and tramways subject generally to the legislative authority of the province) are within the competence of Parliament must turn upon the construction of sub-section 10, of section 92, and sub-section 29, of section 91, of the "British North America Act." I think that is so for this reason. These sections deal specifically with the division of legislative powers touching the subjects of railways and railway traffic; and although in the absence of such provisions those subjects (in the Dominion aspects of them and for general Canadian purposes) might have been held to fall within the general introductory clause of section 91 as well as within sub-section 2 of that section (Trade and Commerce), still I think a specific subsection having been devoted to the distribution of the legislative powers in regard to railways and cognate subjects between the Dominion and the provinces we must look there for the law upon that subject.

The sub-sections for consideration are as follows: Section 92:—

10. Local works and undertakings other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(*b*) Lines of steamships between the province and any British or foreign country;

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of

Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

Section 91, sub-section 29: —

Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

The exclusive authority to legislate in respect of a railway wholly within a province is by virtue of these enactments vested in the provincial legislature, unless that work be declared to be for the general advantage of Canada; in that case, exclusive legislative authority over it is vested in the Dominion. It is no doubt true that Dominion legislation in respect of a work of the latter class may affect directly a work of the former class and it may be that as necessarily incidental to the legislative powers of the Dominion in respect of a railway wholly within the province, but declared to be for the general advantage of Canada the Dominion might legislate directly in respect of the provincial railway upon a subject-matter in respect of which the province might have legislated in the absence of Dominion legislation. For example, two such railways intersect, the exercise of the powers of the Dominion to legislate for the protection of the public as affected by the operation of the Dominion railway might involve the passing of regulations touching the traffic through the point of intersection of the provincial railway and an area surrounding that point of intersection embracing to some extent the provincial line.

In the absence of Dominion regulations the province would be empowered no doubt in respect of its own line to make such regulations upon that subject as it should see fit. But such regulations would

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be overborne when inconsistent with Dominion legislation. It is upon this principle that the respondents seek to support the authority of the Dominion to pass the enactments of the "Railway Act" to which I have referred and to make them applicable to provincial railways intersecting and connecting with Dominion railways. It is said that the legislation is ancillary to the exercise of the Dominion powers in respect of Dominion railways; the principle relied upon is authoritatively stated by the Judicial Committee in the following passage in the judgment upon the Liquor Licenses appeal (1), at page 359: —

> It was apparently contemplated by the framers of the "Imperial Act of 1867," that the due exercise of the enumerated powers conferred upon the Parliament of Canada by section 91 might, *occasionally and incidentally*, involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency, the concluding part of section 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Ins. Co. of Canada* v. *Parsons* (2), that the paragraph just quoted "applies in its grammatical construction only to No. 16 of section 92." The observation was not material to the question arising in that case, and it does not appear to Their Lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include, and correctly describes, all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature. It also appears to Their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private, in those cases where such legislation is *necessarily incidental* to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illus-

(1) *Attorney-General for Ontario* v. *Attorney-General for Canada;* [1896] A.C. 348.

(2) 7 App. Cas. 96, at p. 108.

trated by Sir Montague Smith in *Citizens' Ins. Co.* v. *Parsons*(1), at pages 108 and 109, and in *Cushing* v. *Dupuy*(2), and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada*(3), and in *Attorney-General of Ontario* v. *Attorney-General for Canada* (4).

I do not think the principle enunciated in this passage is sufficient to support this legislation as it stands. There is not here the slightest suggestion, and I do not think there can be found in any of the cases the slightest suggestion, that the Dominion has power of its own will to enlarge the limits of its legislative authority. These limits are fixed by the Act itself. What is and what is not within the meaning of the passage quoted

> necessarily incidental to the exercise of the powers committed to the Dominion under section 91

in such a way as to give the Dominion the power to enact it must be determined by the courts. What we have to ascertain in this case is whether in conferring upon the Railway Board the large powers over provincial railways constituted by the legislation under consideration, the Dominion has been legislating in a way that is necessarily incidental to the exercise of its legislative authority in respect of Dominion railways.

Let me observe again that the Imperial legislature has said *uno flatû,* so to speak, that the exclusive legislative authority in respect of local railways declared to be for the general advantage of Canada, shall be vested in the Dominion, while the exclusive legislative authority in respect of all other such railways shall be vested in the province. Although these respective authorities, as I have already mentioned, are not so

(1) 7 App. Cas. 96.
(2) 5 App. Cas. 409, at p. 415.
(3) [1894] A.C. 31, at p. 46.
(4) [1894] A.C. 189, at p. 200.

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delimited as to be always and in all cases mutually exclusive, that is because there must be cases in which it is impossible for the Dominion to legislate fully in respect of its railways without passing legislation touching and concerning railways which are provincial. To the extent of that necessity we are justified in implying a power in the Dominion to legislate for the provincial railways notwithstanding the circumstance that, broadly speaking, the exclusive legislative jurisdiction in respect of the provincial railways has been committed to the province; but the implication must, I think, be limited by this necessity. It is observable also we have not such a case here as those in which the scope of one of the sub-sections of section 91 has to be determined in relation to the scope of that provision of section 92 which deals with property and civil rights. This latter was the case in *Tennant* v. *Union Bank*(1), and *Attorney-General of Ontario* v. *Attorney-General for Canada*(2). In both these cases it was pointed out that it would be impossible for the Dominion to proceed a single step in legislating effectively in regard to banking or in framing a system of bankruptcy law without invading the field marked out by the broad words "property and civil rights." The legislature in conferring upon the Dominion the power to deal with banking and the power to deal with bankruptcy and insolvency, was in each case carving a field out of property and civil rights. In the present case, on the other hand, the Act is dealing with two separate subjects, the boundaries of which can cross one another only incidentally and occasionally. The provision defining the provincial power must be read together

(1) [1894] A.C. 31. (2) [1894] A.C. 189.

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with the provision defining the Dominion power, in order to ascertain the limits of either. It is little to the purpose to say that where Dominion legislation and provincial come into conflict the first prevails. That is only so where the Dominion is acting within the limits of the area in which the constitution permits it to act, and the whole question here is whether in enacting the legislation in question the Dominion was acting within or without these limits.

The effect of the legislation under consideration is that for the purposes of through traffic a provincial railway, merely because it crosses a Dominion railway, may be made part of the Dominion system, and indeed in respect of the control over it vested in the Board becomes a part of that system. It seems to me that the terms of sub-section 10 shew clearly that this is what was not to take place, unless the provincial railway be declared to be a Dominion work as a whole. I am utterly at a loss to understand how it can be contended that merely because a railway, A-B, crosses a railway, C-D, the power to legislate for A-B involves the power to legislate for C-D, to the extent of making C-D a mere adjunct to A-B for the purposes of through traffic—when the law is that the power to legislate for C-D generally is vested in another body.

How can it be said that legislation respecting such through traffic—involving the requirements that C-D shall provide facilities for such traffic, enter into agreements for joint rates, submit to the regulation of the Dominion Board in respect of such rates, and otherwise comply with the provisions above mentioned—is necessarily incidental to the exercise of the legislative powers of Parliament respecting A-B? In many cases —and the present is obviously one of them—the traffic

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over the provincial railway (assuming compulsory joint traffic arrangements to go into effect) would be the principal and that over the Dominion railway merely subsidiary. Can it fairly be said that in passing legislation which may thus change *in toto* the character of the undertaking of the provincial railway Parliament is, in substance, exercising its powers to legislate for what if the legislation become effective must be the subsidiary undertaking? Then it is argued that there must be found vested in one single authority the power to legislate wholly with regard to through traffic. But division of legislative authority is the principle of the "British North America Act," and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division that is the end of the federal character of the Union. That is not the true solution; the true solution lies as Lord Herschell said in the *Fisheries Case* (1), in the exercise of good sense by the legislatures concerned. It is obvious that with respect to through traffic upon Dominion and provincial railways the difficulty could be met by declaring the provincial railway to be a work for the general advantage of Canada (and the postulate upon which the respondent's argument rests—that such legislation in respect of the provincial railways should be necessary for the conduct of business on a Dominion railway — would surely be sufficient ground for such a declaration), or by the constitution of a joint board or separate boards authorized to act together and empowered to deal with such cases.

That it might be convenient that the Dominion and the provincial railway should have joint traffic ar-

(1) [1898] A.C. 700, at p. 714.

rangements and that these should be under a single control does not advance the argument of the respondents. The same argument would apply to the case of a provincial line of steamships having a terminus near a station or terminus of a Dominion railway or a provincial telephone line or telegraph line which it might be thought useful to link up with the railway telegraph system. Does anybody seriously think that legislative control of the railways involves (as necessarily incidental to it) under the sub-sections quoted, the legislative power to effect such amalgamations and to reorganize the provincial undertakings to suit the exigencies of the altered conditions? I am wholly unable to understand the ground upon which it can be held that merely because of physical juxtaposition such provincial undertakings so long as they remain provincial can be held (to the broad extent necessary to support such legislation as that in question here) incidental (for legislative or other purposes) to such a Dominion railway—and (in the legislative aspect) especially when it has been declared that the provincial undertaking shall generally be under the exclusive legislative control of the province.

ANGLIN J. (dissenting).—The question upon which leave to appeal has been given under the provisions of sub-sections 2 and 3, of section 56, of the "Dominion Railway Act," is expressed in the orders by Mr. Justice Duff and of the Board of Railway Commissioners in identic terms, as follows: —

Whether upon a true construction of sections 91 and 92 of the "British North America Act" and of section 8 of the "Railway Act of Canada," the Montreal Street Railway Company (the present appellant) is subject, in respect of its through traffic with the Montreal Park and Island Railway Company, to the jurisdiction of the Board of Railway Commissioners of Canada.

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The construction and operation of the Montreal Street Railway is authorized by special Acts of the legislature of the Province of Quebec, and it still remains a railway under provincial control. The Montreal Park and Island Railway, though originally built as a provincial undertaking, having been declared by Parliament to be a work for the general advantage of Canada, is now under federal control.

The question formulated for determination by this court involves two distinct questions — the first, whether or not an order affecting a provincial railway in respect of through traffic received by it from, or transmitted by it to a federal railway is within the purview of section 8 of the "Dominion Railway Act"; and the second, whether, if it purports to authorize the making of such an order, this legislation is or is not *ultra vires* of Parliament.

Throughout this opinion I shall for brevity and convenience use the term "provincial railway" to signify a railway not owned by a province, but subject to provincial legislative authority; and the term "federal railway," to designate a railway subject to federal legislative authority, though not owned by the Dominion.

The effect of the statutory declaration that it is a work for the general benefit of Canada has been to render the Park and Island Railway a federal railway to the same extent and as completely as if it were inter-provincial or extended beyond the limits of the Province of Quebec. Its federal character once established exists for all purposes and the jurisdiction of Parliament over it and over everything that is necessarily incidental and ancillary to its operation and to the proper carrying out of the public services which it

has been established to render is neither greater nor less than that which Parliament possesses over other federal railways such as the Canadian Pacific and the Grand Trunk.

I entirely fail to appreciate the distinction which the appellants have sought to draw between a federal railway constructed wholly within one province and having no extra-provincial connection and an inter-provincial railway. Both are alike excepted from section 92 of the Act.

A brief consideration of the form of section 8 of the "Railway Act" will make it clear that it applies equally to provincial railways connecting with each class of federal railways. The necessity for federal regulation in respect to "the connection or crossing" must be the same whether the federal railway be such because it is inter-provincial, or because it has been declared to be for the general advantage of Canada. The first paragraph of section 8, which describes the railways to be affected, applies equally to clause (*a*) dealing with "connection or crossing" and to clause (*b*) dealing with "through traffic." This description was not meant to include certain railways for the purpose of clause (*a*) and to exclude the same railways for the purpose of clause (*b*). Whatever may be its proper construction and effect, clause (*b*) applies to the Montreal Street Railway connecting with the Park and Island Railway equally with clause (*a*). I find no justification for excluding from the operation of either part of section 8 any railway (including a street railway) constructed under provincial authority which connects with a railway within the legislative authority of Parliament, however the authority of Parliament may have arisen.

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We must next inquire what is the "through traffic upon a railway or tramway" to which clause (*b*) relates. Section 8 declares that certain railways

> shall be subject to the provisions of this Act relating to * * * through traffic, etc.

There are several sections of the "Railway Act" which "relate to" through traffic. In some of them through traffic obviously means traffic carried between terminal points on the same railway as distinguished from traffic carried between intermediate stations. From others, particularly those dealing with interchange of traffic and "through rates" for such traffic (section 317) to be provided for by a "joint tariff" (section 334), it is plain that through traffic may also include traffic originating upon one railway and carried to or towards its destination on another. Section 8 deals entirely with the connection or crossing of two railways and it is intended to provide for matters arising out of such connection or crossing. It subjects every provincial railway crossing or connecting with a federal railway to federal legislation in respect to "the through traffic on the railway or tramway." Obviously it was not meant — it could not have been meant — to attempt to control through traffic on a provincial railway or tramway in the sense of traffic carried upon it between its own termini. That would be a distinct invasion of provincial rights; it would be direct and substantive legislation on a subject within the exclusive domain of the provincial legislature. Equally clearly the section does not apply to similar traffic on a federal railway; such traffic is fully provided for elsewhere in the statute. It is therefore, reasonably certain that the "through traffic" to which the section is meant to apply is traffic carried from a

point on one of the connecting railways to a point upon the other; and it matters not whether it is the point of origin or that of destination which is on the federal railway. But for the serious discussion of it at bar and doubts then expressed by some of my learned brothers, I should not have thought the meaning of "through traffic" in section 8 open to question. I should add that "traffic" in the "Railway Act" means "the traffic of passengers, goods and rolling stock," (section 3(31)) but not necessarily of all three. The carriage exclusively either of freight or of passengers is, I think, within this definition.

I am satisfied that the order in appeal deals with matters within the purview of section 8 of the "Railway Act."

I am also of the opinion that this legislation is *intra vires* of Parliament.

If it had no connection with or did not cross a federal railway, the Montreal Street Railway would, no doubt, be a "local work or undertaking" within clause 10 of section 92 of the "British North America Act," and not within any of the exceptions to that clause, and therefore under the exclusive legislative control of the province. Whether, when the railway with which it is connected became a federal railway, it ceased, as contended by counsel for the respondents, to be such a local work or undertaking as should be deemed for any purpose exclusively within the legislative control of the province it is unnecessary to determine. Assuming that, notwithstanding this connection, the Montreal Street Railway still remains a local work or undertaking within clause 10 of section 92, I am of opinion that the Dominion legislation authorizing the order now in appeal is nevertheless valid.

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The Park and Island Railway, having been declared to be a work for the general advantage of Canada, is within exception (*c*) to clause 10 of section 92. Railways expressly excepted from this clause are, under clause 29 of section 91, one of the enumerated subjects declared to be within the exclusive legislative authority and control of the Dominion. In regard to them Parliament is clothed with plenary powers of legislation, including power to enact measures which may trench upon provincial legislative authority when such enactments are truly or properly ancillary or necessarily incidental to the complete and effective control of such federal railways.

From the judgment of Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), I extract the following passage, found at pages 359-360: —

> It was apparently contemplated by the framers of the "Imperial Act of 1867," that the due exercise of the enumerated powers conferred upon the Parliament of Canada by section 91 might, occasionally and incidentally, involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency, the concluding part of section 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Ins. Co. of Canada* v. *Parsons* (2), that the paragraph just quoted "applies in its grammatical construction only to No. 16 of section 92." The observation was not material to the question arising in that case, and it does not appear to Their Lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include and correctly described all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature. It also appears to Their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the

(1) [1896] A.C. 348.

(2) 7 App. Cas. 108.

extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Ins. Co. of Canada* v. *Parsons* (1), at page 109, and in *Cushing* v. *Dupuy* (2), at page 415; and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada* (3), at page 46, and in *Attorney-General of Ontario* v. *Attorney-General for Canada* (4), at page 200.

If the regulation of "through traffic" on a connecting provincial railway, in the sense in which that phrase is used in section 8 of the "Railway Act," is "necessarily incidental" to the effective control of the traffic of the federal railway with which the connection exists, the power of Parliament to enact section 8 appears to be strictly within and completely covered by Lord Watson's language.

In several subsequent cases the power of Parliament to pass incidental or ancillary legislation which touches one or other of the subjects assigned by section 92 to the provincial legislatures has been recognized.

Thus its right to prohibit contracts whereby railway companies seek to relieve themselves from liability to employees for injuries sustained through negligence or breach of statutory duty, though involving an interference with the civil right of freedom of contract, was upheld in *Grand Trunk Railway Co.* v. *Attorney-General for Canada* (5). Lord Dunedin, in delivering the judgment of the Judicial Committee, says, at page 68: —

> The true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is *truly ancillary to railway legislation*. It seems to Their Lordships that, inasmuch as these railway

(1) 7 App. Cas. 96.
(2) 5 App. Cas. 409.
(3) [1894] A.C. 31.
(4) [1894] A.C. 189.
(5) [1907] A.C. 65.

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corporations are the mere creatures of the Dominion legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in doing so, it does touch what may be described as the civil rights of those employees. But this is inevitable and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers.

And the law in question was upheld as "properly ancillary to through railway legislation."

The right of Parliament in the exercise of its ancillary power to subject to its statutes creatures of a provincial legislature so far as "reasonably necessary," although in regard to the particular subject-matter dealt with there should be inconsistent provincial legislation, is established in *Toronto Corporation* v. *Canadian Pacific Railway Co.*(1), at pages 58, 59; *City of Montreal* v. *Gordon*(2).

Not only is Parliament empowered incidentally to control corporate bodies owing their existence to a provincial legislature, but the very property of a province itself has been held to be subject to the control and disposition of Parliament in the exercise of its jurisdiction to provide for the construction and operation of federal railways. *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(3).

The same principle was also illustrated in an early decision that Parliament has the power to impose upon provincial courts duties in connection with the carrying out and enforcement of its laws. *Valin* v. *Langlois* (4).

(1) [1908] A.C. 54.
(2) Cout. Cas. 343.
(3) [1906] A.C. 204.
(4) 5 App. Cas. 115; 3 Can. S.C.R. 1.

In cases of conflict between Dominion legislation and provincial legislation otherwise valid, the subordination of the latter is again recognized in the last pronouncement of the Judicial Committee upon the subject. *La Compagnie Hydrauliquc de St. François* v. *Continental Heat and Light Co.*(1).

But while this incidental or ancillary jurisdiction of Parliament is fully established, no definition of what should be deemed "necessarily incidental" or "truly ancillary" is found in any decision binding on this court. No doubt this is partly due to the difficulty of framing a definition which would be at once sufficiently comprehensive and sufficiently restrictive, because what is incidentally necessary must vary in each case with the circumstances, and partly to deference to the advice given in *Citizens' Insurance Co.* v. *Parsons*(2), at page 109, and approved of by the Judicial Committee in later cases, not to enter

> more largely upon the interpretation of the statute (the "British North America Act") than is necessary for the decision of the particular question in hand.

But in considering whether certain legislation should be deemed necessarily incidental, or truly or properly ancillary, we receive some assistance from expressions of judicial opinion in regard to particular matters.

Thus in a comparatively early case the right of Parliament to interfere with many matters, otherwise exclusively within provincial jurisdiction, as incidental to bankruptcy legislation was recognized. *Cushing* v. *Dupuy*(3), at page 415. Interference with executions is instanced as a legitimate exercise of this

(1) [1909] A.C. 194. (2) 7 App. Cas. 96.
(3) 5 App. Cas. 409.

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ancillary power in *Attorney-General for Ontario* v. *Attorney-General for Canada*(1), and the Lord Chancellor (Herschell) says, at page 200, that

> a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated.

As ancillary to its control of the banks and banking system of Canada, Parliament has the power to legislate in regard to the negotiability of warehouse receipts for banking purposes, although in such legislation an interference with civil rights is clearly involved. The authority to legislate in respect to banking transactions is plenary and

> may be fully exercised, although with the effect of modifying civil rights in the province. *Tennant* v. *Union Bank of Canada*(2), at p. 47.

In *Re Railway Act*(3), at page 142, Mr. Justice Davies says:

> Exclusive legislative authority on railways, such as are here enumerated, being vested in the Dominion Parliament, that Parliament has, as a consequence, full and paramount power so to legislate upon such matters as fully, properly and effectively to carry out the construction, management and operation of these railways. In so legislating it matters not that they infringe upon the powers of legislation with regard to property and civil rights assigned to the provincial legislatures. Such invasion is admittedly necessary to enable the Parliament properly and effectively to legislate. The main and controlling question is, therefore, whether the legislation in question can be said to be fairly and reasonably within the plenary and exclusive powers of the Dominion Parliament enabling it effectively to control the construction, management and operation of the classes of railways excepted from sub-section ten of section ninety-two and embraced within sub-section twenty-nine of section ninety-one. I think it may be fairly so held.

In *City of Toronto* v. *Grand Trunk Railway Co.*

(1) [1894] A.C. 189. (2) [1894] A.C. 31.
(3) 36 Can. S.C.R. 136.

(1), the same learned judge quotes as the equivalent of "necessarily incidental and ancillary" the phrase used by Osler J.A., in *Re Canadian Pacific Railway Co. and Township of York*(2), at page 72, "eminently germane, if not absolutely necessary."

In the latter volume, at page 407, is reported a unanimous decision of the Ontario Court of Appeal(3) that Dominion legislation declaring a federal railway company liable "for the full amount of damages sustained" by reason of a breach of statutory duty is *intra vires* and entitles an employee, or, if he be killed, his relatives to recover such damages where the breach of duty is that of a fellow-employee, notwithstanding the limitation imposed by the provincial "Workmen's Compensation Act." Burton C.J.O., says, at page 411:—

> I think such a power is incident to the general legislation entrusted to them (the Dominion Parliament) to construct and deal with such undertakings and ought not to be restricted in the way suggested.

In *McArthur* v. *Northern and Pacific Junction Railway Co.*(4), Burton J.A., says, at page 111:—

> It must be clear, apart altogether from authority, that when power is given to the particular legislature to legislate on a certain subject, such power includes all the incidental subjects of legislation which are necessary to carry it into effect;

and Osler J.A., says, at page 125, that legislation conferring a right of action for damages arising from the cutting of timber upon a plot of land of limited width, on either side of a federal railway, owned by the Crown in right of the province, but under timber license, is

> well within the competence of Parliament to pass in order to legislate generally and effectually on a subject within its exclusive powers,

(1) 37 Can. S.C.R. 232.
(2) 25 Ont. App. R. 65.
(3) *Curran* v. *Grand Trunk Railway Co.*, 25 Ont. App. R. 407.
(4) 17 Ont. App. R. 86.

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even though it may to some extent trench upon the subject of property and civil rights.

In *Citizens' Insurance Co.* v. *Parsons*(1), Ritchie C.J., said, at pages 242-3: —

The Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

The learned Chief Justice repeated this statement in *The Queen* v. *Robertson*(2), at page 111, and at page 139, Fournier J., said: —

dans une cause assez recente, j'ai eu occasion de dire, et je le répéte, que le gouvernement federal a, sans doute, le pouvoir de toucher incidemment à des matières qui sont de la jurisdiction des provinces. Mais dans mon opinion, ce pouvoir ne s'étend pas au-dela de ce qui est raisonnable et nécessaire à une législation ayant uniquement pour but le légitime exercice d'un pouvoir conféré au gouvernement fédéral.

I extract the following passage from the judgment of Rose J., in *Doyle* v. *Bell*(3), at page 335: —

I do not understand by the use of the word necessary, as found in various decisions and text-books, that it is meant to lay down the doctrine that to bring within the powers of the Dominion legislature any provision of an enactment respecting a subject within the exclusive jurisdiction of such legislature, and which provision might affect civil rights, it must necessarily appear that without such provision it would be impossible to carry into effect the intentions of the legislature, or that probably no other provision would be adequate. On the contrary, it seems to me that if such provision might, under certain circumstances, be beneficial and assist to more fully enforce such legislation, then it must, at all events on an appeal to the courts, be held to be necessary, that is, necessary in certain events. Surely the legislature must be allowed some and, in my opinion, a very wide discretion as to the mode of enforcing its own enactments. It cannot be that the courts are to sit in judgment on the exercise of such discretion and dictate to the legislature whether they shall adopt this or that mode, because in the opinion of the courts one mode is the more convenient or better, or at least as well adapted to effect the purpose of the legislature.

(1) 4 Can. S.C.R. 215. (2) 6 Can. S.C.R. 52.
(3) 11 Ont. App. R. 326.

In delivering the judgment of the Court of Queen's Bench in *McDonald* v. *Riordan*(1), the late Mr. Justice Würtèle expressed views which would restrict the incidental jurisdiction of Parliament within very narrow limits. The judgment of the Court of Queen's Bench that Parliament had the right to legislate as to the disqualification of the directors of federal railway companies was affirmed in this court(2), and, as the decision is reported, "for the reasons given in the court appealed from." But I cannot think that this court meant to adopt or to indorse the views of the learned Quebec judge upon the limitations of the ancillary legislative jurisdiction of Parliament.

I fully recognize that, as stated by Palmer J., in *Attorney-General for Canada* v. *Foster*(3), at page 164: —

> Where the line of necessity is to be drawn in each particular case is the great difficulty that lawyers have to contend with when expounding our constitution. It must, I think, be determined by a consideration of the general scope of the legislation called in question. There must be a reasonable limitation of its encroachment upon subjects that are exclusively within the power of the other legislature.

Nevertheless, Lord Hobhouse says in the *Parsons Case*(4), at pages 108-9: —

> In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them, the limits of their respective powers.

Having regard to the general tenor of the authorities to which I have referred, it is clear that when, in order to make effective and to fully carry out the object of substantive legislation upon one of the sub-

(1) Q.R. 8 Q.B. 555.
(2) 30 Can. S.C.R. 619.
(3) 31 N.B. Rep. 153.
(4) 7 App. Cas. 96.

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jects enumerated in section 91, it becomes necessary to assert and exercise ancillary powers which trench to some extent upon the domain assigned to provincial legislation, Parliament possesses these powers. In determining whether particular legislation is or is not within them, "absolute necessity" is not the test; it is rather "reasonable necessity." Is the authority to pass such legislation requisite "to prevent the scheme of the (substantive) act from being defeated"; to permit of a "plenary" exercise of a power expressly conferred; to allow Parliament to exercise "its full and paramount power so to legislate upon the railways enumerated "as fully and effectively to carry out the * * * operation of these railways"; to provide for matters "eminently germane, if not absolutely necessary" to legislation upon an enumerated subject; to cover "incidental subjects" of legislation upon an assigned subject; to ensure that Parliament may "legislate generally and effectually on a subject within its exclusive powers"; to make provisions "just and reasonable and necessary" in legislating for a purpose within "the power conferred on the federal government" ? Can this legislation be said

> to be fairly and reasonably within the plenary and exclusive powers of the Dominion Parliament enabling it effectively to control the * * * operation of the classes of railways

under its jurisdiction ? — These are criteria indicated in the cases to which I have referred by which the reasonable necessity and the truly ancillary character of incidental legislation may be tested.

The late Mr. Justice Rose would have supported such legislation if beneficial and of assistance in more fully enforcing legislation respecting a subject within the exclusive jurisdiction of Parliament. The legisla-

tion now before us, however, appears to answer the more conservative judicial tests which I have mentioned.

In considering the necessity for federal control of "through traffic," it is well to have in mind that section 8 of the "Railway Act" applies to the great railway systems of Canada and the local lines connecting therewith, as well as to such railways as those now before the court; and that "traffic" includes freight as well as passenger traffic. One legitimate purpose of the "Railway Act" of Canada is to prevent undue discrimination in rates in respect of traffic upon railways under federal control when carried under similar conditions and between points similarily situated. If federal railway companies may, indirectly and through the instrumentality of distinct provincial corporations operating local connecting railways, defeat the purpose of this federal legislation against undue discrimination, it would seem that, in respect of through traffic, such local railways should be subject to federal control in order to "prevent the scheme of the Act being defeated."

For instance, point A is on "The Transcontinental" —a through federal railway connecting at point B with "The Dominion," a federal branch line controlled by an entirely independent company, upon which is situate point C; at point B "The Transcontinental" also connects with "The Provincial," a local railway operating under provincial incorporation, but controlled by the interests which control "The Transcontinental." On "The Provincial" is situate point D, equi-distant with point C from point B. If this provincial railway should not be subject to federal control in respect to "through traffic," the rate between points A and D

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might, without any direct discrimination on the part of "The Transcontinental," be considerably greater than the rate between points A and C in respect of the same class of traffic. A "through rate" might be refused between the former points because the provincial company would not make a "joint tariff"; or an uncontrolled charge by the provincial company between points B and D might result in a gross case of discrimination in rates between point A and the equidistant points C and D.

It may not be absolutely necessary to the existence and operation of federal railways that such discrimination should be prevented, but it is certainly reasonably necessary to the satisfactory management and control of traffic upon them that such matters should be subject to efficient regulation. Otherwise, as in the illustration given, the interests controlling a federal railway might be in a position, through the medium of a connecting provincial railway also under their control, to thwart the purpose of unquestionably valid Dominion legislation against unfair discrimination. The plenary exercise of the power to legislate in regard to federal railways would therefore seem to embrace the control of provincial railways in respect of "through traffic" and it can scarcely be gainsaid that legislation for the regulation of such "through traffic" is "eminently germane, if not absolutely necessary," to legislation in regard to federal railways themselves.

Again, for certain classes of through perishable freight traffic, *e.g.:* fish, fruit, dairy products and meat — it may be essential that there should not be trans-shipment *en route* and specially constructed cars may be required. Should "The Provincial," under control independent of "The Transcontinental," refuse to

haul to their destination on its line cars of "The Transcontinental," this traffic to and from points on "The Provincial" might be seriously interfered with, if not destroyed. Morover, refusal by "The Provincial" to co-operate at the point of connection with "The Transcontinental" in the transfer of such cars from one road to the other might create difficulties and inconveniences which would unduly impede the traffic. Cars specially constructed for certain kinds of traffic and of which the supply may be limited might be improperly detained upon "The Provincial" and grave delay and inconvenience be thus caused to shippers as well as loss of business to the federal railway.

Cars employed for the traffic in fish, meat, dairy products and fruit require to be "iced" efficiently and at regular intervals. By slight neglect in this connection serious damage might be caused. Yet, unless the Dominion Railway Commission has some control over "through traffic" after it leaves the federal railways and before it reaches them, it might be extremely difficult, if not impossible, to secure satisfactory regulation in regard to such matters as "icing."

Many other difficulties, with which nothing but a single controlling power can be relied upon to cope effectively and satisfactorily, might, no doubt, be suggested by experienced railwaymen. But these illustrations suffice to demonstrate the reasonable necessity of federal control in respect to "through traffic" over provincial railways which connect with federal railways.

It may be suggested that the same purpose could be accomplished by joint or concurrent legislative action by Parliament and the provincial legislature. There is no such legislation; and if an attempt were made

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to arrange for it, there is no certainty that the views of the two legislative bodies would be the same. Again, if the Dominion Railway Commission and a provincial railway commission were each empowered to deal with such matters in regard to federal and provincial railways respectively, there would be no assurance that the standards of both would be alike or that joint action would be practicable; and if the authority were divided only joint action could be effective. At all events, the existence or non-existence of federal legislative jurisdiction cannot depend upon these considerations.

Again it is urged that such power on the part of Parliament or its creature, the Dominion Railway Commission, would be open to abuse and that, in the guise of regulations in respect of "through traffic," a provincial railway might be subjected to interference in regard to its rolling stock, its time schedules, its very rails themselves, their gauge and their weight, such as would virtually remove the undertaking from provincial control, or would render it extremely difficult for the provincial authorities to exercise in regard to it that supervision to which they are entitled. Meeting a similar objection in the *Fisheries Case*(1), Lord Herschell said, at page 713: —

> The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected.

And in *Bank of Toronto* v. *Lambe*(2), Lord Hobhouse, speaking of the exclusive legislative powers of the provinces, said, at page 586: —

(1) [1898] A.C. 700. (2) 12 App. Cas. 575.

To place a limit upon it because the power may be used unwisely, as all powers may, would be an error and would lead to insuperable difficulties in the construction of the "Confederation Act."

And again, at page 587: —

If * * * on the due construction of the Act a legislative power falls within section 92, it would be quite wrong * * * to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament.

The Commission created by Parliament for the administration of its railway legislation should be relied upon to have due regard to the fact that the authority of Parliament to enact such provisions as are contained in section 8 of the "Railway Act" is restricted by the rule of reasonable necessity; and "it must be assumed that" it

will exercise the judicial powers which have been entrusted to it in a just and reasonable manner,

per Osler J.A., in *Re Canadian Pacific Railway Company and Township of York*(1), at page 73. If it be open to inquiry here, I find nothing in the order now in appeal which indicates disregard by the Railway Board of this moral restriction upon its powers. The learned Ontario judge of appeal also says: —

I do not think that questions of *ultra vires* can be decided by unreasonable or extravagant suppositions.

Finally it was objected that the "British North America Act" provides a means by which Parliament can assume control over the Montreal Street Railway, viz.: by declaring it to be a work for the general advantage of Canada, and that, the statute having provided this means for acquiring control, no other is open. But to declare a railway to be a work for the general advantage of Canada involves the assumption

(1) 25 Ont. App. R. 65.

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of complete and entire control of it by Parliament and in the case of many local railways which connect with federal railways that may be undesirable. Moreover, if this be a good ground of objection to the Dominion legislation in regard to "through traffic" it is equally applicable to the legislation in the same section in regard to control of the physical crossing or connection. It is inconceivable that whenever Parliament desires to compel a provincial railway crossing or connecting with a federal railway to conform to federal legislation in regard to the actual physical crossing or connection it must assume complete control of the provincial railway by declaring it to be a work for the general advantage of Canada.

It should be noted that the section of the "Railway Act" now under consideration deals only with cases in which provincial railways actually connect with or cross federal railways. By this legislation Parliament does not purport to empower the Railway Commission to order a provincial railway to establish such a connection and it is not necessary now to consider whether Parliament could or could not confer such authority.

Counsel for the respondents contended that Parliament is empowered by the residuum clause of section 91 of the "British North America Act" to deal with "through traffic" as a subject not covered by any of the several clauses of section 92. I think it must be admitted that, in the absence of federal legislation dealing with it, provincial legislation in regard to the carriage on a provincial railway of "through traffic" received from or destined for a federal railway would be *intra vires* under clause 10 of section 92. If so, the right of Parliament to subject a provincial railway to

federal legislation in respect of "through traffic" cannot arise under the residuum clause of section 91. The Judicial Committee has said that legislation under this clause may not

> encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92. *Attorney-General for Ontario* v. *Attorney-General for Canada* (1).

Effective legislation in regard to the through traffic dealt with by section 8 of the "Railway Act" must trench upon the legislative authority of the provinces over provincial railways. *Ex hypothesi* legislation which does so encroach would seem to be *pro tanto* not within the residuum clause, which only confers power

> to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

Moreover, the "subjects" of railway legislation assigned respectively to Parliament and the provincial legislatures by the "British North America Act" appear to be, to the former federal railways, as described in the exceptions to clause 10 of section 92, and to the latter local railways not within such exceptions. The division of jurisdiction seems to be according to the character of the railways and not according to the nature of the traffic carried or the business done. I therefore agree with Mr. Geoffrion that "through traffic" can scarcely be regarded as a distinct subject of legislation not covered by any of the enumerated classes of either section 91 or section 92 and therefore within the legislative power of Parliament under the residuum clause.

But, if not within the residuum clause, and if, as seems clear, it be a matter requiring legislative regu-

(1) [1896] A.C. 348, at p. 360.

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lation, since the provisions of sections 91 and 92 exhaust the entire legislative field, except as to matters specifically covered by other sections of the Act — *e.g.*, section 93, *Bank of Toronto* v. *Lambe*(1), at page 587 — it follows that "through traffic" must be within the legislative jurisdiction either of Parliament or of the local legislatures or of both.

It seems clear that a provincial legislature cannot alone deal with this subject, because in no circumstances can it legitimately enact "railway legislation" affecting a federal railway. *Madden* v. *Nelson and Fort Sheppard Railway Co.*(2); *Canadian Pacific Railway Co.* v. *The King*(3). Joint or concurrent legislative control, or joint or concurrent control by two bodies of Commissioners, deriving power respectively from Parliament and the local legislature, would be so uncertain and subject to so many difficulties and contingencies that it might often result in failure to make provisions necessary for the regulation of such traffic. It seems to follow that only legislative jurisdiction vested exclusively in Parliament can effectually provide for "through traffic." This consideration confirms the conclusion that such jurisdiction has been conferred by the "British North America Act."

I am, therefore, of opinion that the provisions of the eighth section of the "Railway Act" should be held to be *intra vires* of Parliament as "truly ancillary to (federal) railway legislation" and "properly ancillary to through railway legislation" and as

necessarily incidental to the exercise of the powers conferred by (one of) the enumerative heads of clause 91,

(1) 12 App. Cas. 575. (2) [1899] A.C. 626.
(3) 39 Can. S.C.R. 476.

namely, the jurisdiction given by clause 29 of section 91 over railways excepted from clause 10 of section 92.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson, Hague, & Holden.*

Solicitors for the respondent: *Ethier & Co.*