1909
*Dec. 16.
1910
*March 11.

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY } APPELLANTS;

AND

THE CITY OF MONTREAL..... RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Consideration of complaints—Evidence—Rejection—Agreement as to special rates—Unjust discrimination.

A company operating, subject to Dominion authority, a tramway through several municipalities adjacent to the City of Montreal, and having connections and traffic arrangements with a provincial tramway in that city, entered into an agreement under statutory authority with one of the municipalities whereby, in consideration of special privileges conceded in regard to the use of streets, etc., lower rates of passenger fares were granted to persons using the tramway therein, for transportation to and from the city, than to denizens of the adjoining municipality with which there was no such agreement. On the hearing of a complaint, alleging unjust discrimination in respect to fares, the Board of Railway Commissioners for Canada refused to take the agreement into consideration when tendered in evidence to justify the granting of the special rates and ordered the company, appellants, to furnish the service to persons using the tramway in both municipalities at the same rates of fare. On an appeal, by leave of the Board, in respect of the propriety of overlooking the contract, submitted as a question of law:—

Held, Davies and Anglin JJ. dissenting, that, as the existence of the contract was one of the elements bearing upon the decision of the question of substantial similarity in circumstances, the Board should have admitted the evidence so tendered in regard to the agreement in consideration of which the special rates of fares had been granted.

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

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APPEAL by leave of the Board, under section 56(3) of "The Railway Act," from an order of the Board of Railway Commissioners for Canada, dated 4th May, 1909.

The circumstances of the case are shortly stated in the head-note and more fully set out in the judgments now reported. The appeal was in respect of the same order as was brought in question in the case of *The Montreal Street Railway Co.* v. *The City of Montreal*(1); and the order granting leave to appeal, on the question submitted, was as follows: —

"It is ordered that leave be granted to The Montreal Park and Island Railway Company to appeal to the Supreme Court of Canada from the said order, dated the 4th day of May, 1909, upon the following question, which is hereby declared to be, in the opinion of the Board, a question of law, namely, whether it is right or proper for the Board, in making the said order, to overlook the contract bearing date the 7th day of November, 1907, and made between the said Montreal Park and Island Railway Company and the Municipality of Notre-Dame de Grâce ?"

The contract mentioned is the agreement referred to in the head-note.

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

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

THE CHIEF JUSTICE.—In order that justice may be done it is necessary for the Commissioners to consider the agreement under which the appellants obtained permission from the Municipality of Notre-Dame de

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Grâce to enter upon its streets. We are not now called upon to decide what effect, if any, is to be given to that agreement in the consideration of the complaint made as to unjust discrimination; but it may serve to explain or justify the alleged difference in treatment complained of by the respondents and should therefore in that view not be overlooked. To meet the charge of unjust discrimination as between the two adjoining municipalities, the railway company attempted to shew that the circumstances were not substantially similar by producing the agreement under which they had been permitted to enter and are now allowed to operate their railway upon the streets of Notre-Dame de Grâce; but the Commissioners apparently were of opinion that the question was to be decided upon a bare consideration of the money fares charged. It is manifest, in my opinion, that the cost of construction and of operation are essential elements to be considered in the determination of the question as to whether the circumstances in which the company operated its road in the adjoining municipalities are substantially similar.

The appellants were required by the Parliament of Canada (6 Edw. VII. ch. 129, sec. 6) to obtain the consent of the municipality before they could enter upon its streets and the Quebec legislature (8 Edw. VII. ch. 97) approved of the by-law under which the railway company occupies those streets. To justify the charge of unjust discrimination between two adjoining municipalities on the ground of difference of treatment it is necessary that all the circumstances connected with the cost of construction and operation of the railway should be considered and the conditions under which the railway obtained the permission from

the municipality to enter upon the streets should be taken into account in this case as any other item in the cost of construction. If in the absence of an agreement the company had been obliged to make a large money payment to obtain the consent of the municipality to enter upon its streets, it is possible that the charge to the passengers to or from that municipality would have been the same as in the case of Mount Royal and the reasonableness of the charge made to the residents of the latter municipality is not to be determined by a mere comparison with the charge made in the adjoining municipality without any knowledge of the circumstances under which the lesser fare is collected.

I am also of opinion that the Board had no power or authority to compel the Montreal Street Railway, a provincial corporation, to enter into an agreement for the purpose of enabling the appellants to carry out the order made against them with respect to transfers to all points on all lines operated by the Montreal Street Railway in the Town of Westmount or the City of Montreal. The passenger in possession of a transfer goes from one train to another, that is to say, passes from a railway owned or operated by a corporation under the control of the Dominion Parliament to a railway owned or operated by a corporation under the control of a provincial legislature, and the conditions under which the latter company is to carry its passengers from one point to another upon its own railway is not to be determined by the Dominion Board of Railway Commissioners.

GIROUARD J.—It is admitted that the rate charged for railway transportation on the Island Railway and

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The Montreal Street Railway to passengers from Mount Royal Ward, in the City of Montreal, was greater than that charged to passengers from Notre-Dame de Grâce. The railway company met this complaint by tendering in evidence a contract with the Town of Notre-Dame de Grâce by virtue of which passengers from that municipality became entitled to some favourable treatment. The Board, however, declined to consider this contract, holding that it was not proper for them to do so, being a private agreement, and ordered the stopping of the differential rates as amounting to "unjust discrimination" and finally ordered that the railway company do enter into an agreement with the Montreal Street Railway for the purpose of removing the said discrimination.

The question is: Was the Board justified in refusing to take consideration of said contract?

In my humble opinion I think it was the duty of the Board to consider that contract. The contract was legal, being in fact expressly provided for by section 18 of the "Cities and Towns Act," 3 Edw. VII. ch. 38 (Que.). That statute empowers cities and towns to grant, under certain conditions, rights, franchise and privileges as may be agreed upon, such as running rights over streets, exemption from taxation and exclusive franchise. The Island Railway was therefore bound to get the consent of the municipality before acquiring these rights which were granted by the above contract. How can it be said that in such a case there can be "unjust" discrimination ?

Moreover, I do not understand how the Board can lawfully order the Island Company, true a federal railway, to obtain from the Montreal Street Railway, a provincial railway, an agreement to remove the said

discrimination. In my humble opinion railways like the Street Railway Company are entirely out of the jurisdiction of the Railway Board.

I would therefore allow the appeal of the said Island Railway Company with costs against the City of Montreal.

DAVIES J. (dissenting).—Appeal *re* "unjust discrimination" in traffic.

This appeal from the order of the Board of Railway Commissioners arises out of an application made by the City of Montreal to the Board for an order directing the Montreal Park and Island Railway 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 Mount Royal Ward of the city, that it grants to the adjoining Town of Notre-Dame de Grâce, which adjoins but is outside of the city limits.

After a lengthy hearing (the Montreal Street Railway, a provincial road, having been made a party to the proceedings) the Board made the desired order, and further directed that with respect to "through traffic" over the Park and Island Railway and the Montreal Street Railway the latter road should enter into the necessary agreements with the Park and Island Road to ensure the carrying out of the order.

Both railway companies have appealed to this court, the street railway on the ground of want of jurisdiction in the Board to deal with "through traffic" over its lines, and the Park and Island Road, on the ground that in determining whether or not the rates charged by them to and from the Town of Notre-Dame de Grâce and those charged to and from Mount Royal Ward unjustly discriminated against the latter, the

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Board refused to consider an agreement made between the railway and Notre-Dame de Grâce fixing for certain considerations in the agreement expressed rates to and from that town.

On the appeal relating to the jurisdiction of the Board to deal with the question of through rates (1) I have already given my opinion affirming the Board's jurisdiction, to which I need do no more than refer.

The question now for decision is a narrow though most important one.

The form in which it is put by the Board in granting leave to appeal on a matter of law is "whether it is right or proper for the Board in making the said order to *overlook* the contract bearing date the 7th November, 1907, and made between the Montreal Park and Island Railway Company and the Municipality of Notre-Dame de Grâce."

The contract in question was put in evidence at the hearing and is printed in the appeal case before us, but it is perfectly plain from the reasons given by Chief Commissioner Mabee that the Board refused to consider that contract or give weight to it in making their order. I interpret the question of law we are asked to answer to mean as if put in this form: Was the Board justified in refusing to consider that contract in determining the question of "unjust discrimination ?" And I would answer that it was. Mr. Geoffrion in his argument before us contended that it was a piece of evidence they were bound to consider and could not ignore, though, of course, he admitted that the weight they should give it was entirely for the Board and could not be considered by us.

In order to determine then whether or not the Board could ignore the agreement we must look at its terms

(1) 43 Can. S.C.R. 197.

and the conditions existing at the time it was entered into. The contention was that the right of the company to run its railway or tramway along the streets of any municipality was by the express terms of its charter made to depend upon the consent of the municipality being first obtained by by-law (see section 6 of 6 Edw. VII. ch. 129), and that in order to obtain such consent the company had been obliged to stipulate for the carriage of the passengers between Notre-Dame de Grâce and the City of Montreal at a certain rate. Such being the case it was argued that while there might be discrimination between that agreed rate and the rate charged to and from the adjoining ward of the city, such discrimination was not "unjust" and that it was "unjust discrimination" alone which the statute provided against.

I am not prepared to say that even if the company was obliged in order to obtain the privilege of running its railway along the streets of a municipality, to pay for the privilege, they could adopt such a mode of payment as would enable them to discriminate against an adjoining municipality in the matter of rates. They could pay for the privilege in cash or in any other way they agreed with the municipality, but they could not, in my opinion, adopt a mode of compensation for the concession of the right which they could afterwards invoke to excuse or justify, either directly or indirectly, discrimination. So far as the municipality discriminated against and those using the railway to and from it were concerned the discrimination was not the less unjust because the company chose to adopt this mode of payment for the privilege of laying down their rails in the streets and operating their road. The 315th section of the "Railway Act" which governs

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the case was enacted to secure so far as might be possible equality of rates under "substantially similar circumstances and conditions." The 4th sub-section is peremptory, "no toll shall be charged which unjustly discriminates between different localities." Does the fact that instead of paying a round sum in cash or otherwise to one locality for the privilege of running its road over certain streets the company for reasons of its own agrees instead to charge a low toll or rate to and from that locality, justify it in refusing to give to an adjoining locality, other conditions being equal, the same rate, and in this way create a discrimination which as between the two localities is unjust. If cash was paid for the privilege could they plead that in justification of the discrimination? If the cost of the building of the road to one locality exceeded that of the cost to another, could such excess in cost be advanced to justify the discrimination and prove it not to be unjust? Are these elements and facts which the Board have to inquire into and weigh when determining what is "unjust discrimination"? If they are there is no end to the discrimination which companies might create and not contravene the Act. If it was otherwise held and if a company could refuse to one locality rates which they had conceded to another under substantially similar circumstances and conditions and make the granting of the lower rates dependant upon the locality granting concessions to them it seems to me it would amount practically to a transfer to the company of the powers now vested in the Board of determining rates as between localities. I agree with the Chairman when he says "we cannot take into consideration matters of that sort in the administration of this law."

But apart from all that, I fail to find in the agreement put in evidence any such consideration paid by the company for the privilege of using the streets of Notre-Dame de Grâce. The agreement as to rates with the municipality of Notre-Dame de Grâce was not for the privilege simply or for that privilege at all. It was for an exclusive franchise for operating its road on the ground surface for passengers, freight and mails within the limits of the town for fifty years, and also for *exemption forever* from payment of municipal taxes, which the town might at any time have power to levy on the company, its movable or immovable property or franchises, with certain limited and specified exceptions.

It was this *exclusive* privilege for half a century, and this *exemption forever* from taxes, which the company was buying from the town which formed the consideration for the rate or toll of five cents agreed upon. It was not the mere purchase of the consent required by statute for the laying of the rails. That statutory permission to use the streets simply for the running of the tramway does not appear on the face of the agreement to be part of the consideration at all (see section 7 of the agreement). It was the *monopoly* and the *exemption* the company was buying, something the "Railway Act" certainly was not passed to encourage and neither of which could be held to be a "circumstance or condition" which the Board should consider in determining the question of "unjust discrimination."

The municipalities which would grant similar monopolies and exemptions would, I presume, get in return the lower rates. Those that would refuse would have to pay the higher and so the unjust

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discrimination clause would be practically defeated. The Railway Board brought into existence to prevent amongst other things unjust discrimination was asked practically, by giving weight to the agreement in this case, to sanction the practice.

I do not stop to inquire as to the legality of such an agreement by a municipality. It is said the agreement was subsequently validated by the local legislature. But if it was that would not justify it being invoked and given weight to by a Dominion Board acting under a Dominion Act in a proceeding to determine what was or was not "unjust discrimination" in rates or tolls upon railways as between different localities. Such validation if it took place goes no further than confirming an act of the municipality which certainly without express legislative authority would be *ultra vires* the municipality.

Under the 77th section of the Act the burden of proving that the lower toll was not unjust discrimination rests upon the company and is not, in my opinion, discharged in any degree by shewing that the lower rate was a consideration for a monopoly of railway privileges and an exemption from taxation purchased by the company from the locality to which they had granted such lower rate. It is, to my mind, impossible to conceive how the purchase of such a monopoly and exemption could operate to make that discrimination just which otherwise would be unjust. Neither the monopoly nor the exemption were necessary to the operation of the road. They were merely incidents the possession and enjoyment of which would make those operations more profitable for the company, but at the expense of the public, and the destruction of any possible competition.

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My brother Idington has called my attention to the case of *Holwell Iron Co., Ltd.* v. *Midland Railway Co.*(1). It was an appeal from a decision of the Railway and Canal Commissioners(2), and being a decision by the Court of Appeal, confirming that of the Commissioners, is of course entitled to the greatest respect. The facts of that case were such as to make the decision of little service to us on this appeal. There an agreement was attacked which had been entered into forty years previously between the Railway Company and the Stavely Hill Iron Co. The railway at that distant period wanted to acquire a strip of land running right through the property of the Stavely Co. on which a private line was laid and also other lines of the Stavely Co. It was obvious, as the Master of the Rolls said, that the claim for severance would be enormous unless provision was made for conveying coal and iron and other materials to and from the company's property on each side of the line. Accordingly the railway company, acting under special powers, purchased from the Stavely Co. the land and railways in question, and all locomotives, engines, etc., belonging to the railways and used for the purposes of the company's business. The consideration was £29,788 plus an agreement on the railway company's part to continue to efficiently work the whole of the traffic of or connected with the Stavely Company's business as it had previously been worked by the latter company. It was these terms which it was contended amounted to the railway company granting exceptional terms to the Stavely Company to the prejudice of the appellants. The question there determined involved the proper construction of section 27 of the

(1) 26 Times L.R. 110.

(2) 25 Times L.R. 158.

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"Railway and Canal Traffic Act, 1888," providing against "undue preference" being given by a railway company to one *rival trader* as against another trader. The Court of Appeal held that the inequality of rates complained of might be explained and accounted for by a fair and honest bargain, the consideration for which had been duly conveyed to and enjoyed by the railway company. The Master of the Rolls was of the opinion that the only question of law open to the appellants was that the agreement was one which the Commissioners could not look at because it was illegal and void, and that when once this point of law was decided in the negative the Commissioners should give it consideration. He winds up his opinion, however, with the following pregnant words: "Nothing that I have said is intended to apply except to a case *where land is taken and arrangements are made for what is to be done on and with reference to the land so taken.*" As he had previously said: "It (the agreement) only provides for certain services to be rendered by the railway company on land the subject-matter of the agreement. It in no way resembles an agreement to purchase goods in return for future gratuitous services to be rendered by the purchaser to the vendor."

Looking at the statute the court was there construing and the special facts of the case on which the decision turned, I cannot say that it is an authority for one or other of the rival contentions in this appeal, though I think the principle underlying the decision to be gathered from the last few sentences of the opinion of the Master of the Rolls quoted by me above supports the ruling in the case before us of the Board of Commissioners.

For the reasons I have given I would dismiss this appeal with costs.

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IDINGTON J.—The decision in the Montreal Street Railway Company's appeal from the same order as made herein renders the question submitted rather of an academical character.

I should have preferred this decision postponed until the judgment passed upon by the court above in review of said decision if to be appealed.

We may assume that the Board has jurisdiction over this appellant, but until we know whether or not our decision in the other case is to stand the conflicting considerations bearing upon the question asked are somewhat perplexing.

At the threshold stands the question of the validity of the contract between the two companies.

We have not had it argued in all its bearings and much less so in the new light our decision presents it.

For the reasons I have given in the other case I think it is valid. Amongst other reasons I have given is that which I find in an Act cited confirming this company's contract, but the view I have presented as derived therefrom was not touched in argument, if I remember correctly.

Yet the Board held or assumed it invalid or to be ended in some way.

If ended how can appellant, having doubtless contracted with Notre-Dame de Grâce on the faith of that contract continuing, be dealt with justly without an examination of the contract now in question and all that upon which it is founded ?

Is the contract valid or is it invalid by reason of infringing the policy of the "Railway Act" ? Or is sub-section 7, of section 317, of the "Railway Act," which in terms does not include contracts like this, to be taken as the boundary of that policy and compre-

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hending everything of a contractual nature which is to be held prohibited and void ?

The appellant is surely entitled to know on what ground the Board proceeds and if it declares the contract a violation of the Act, and hence invalid and the franchise gone as an obvious result of illegality, the appellant may when directed to equalize its rates or fares prefer equalizing by levelling up rather than a general lowering.

Indeed, it may be a financial impossibility to do otherwise.

The power given by 8 Edw. VII. ch. 97 (of Quebec), validating the by-law of Notre-Dame de Grâce had, so far as that legislature could, authorized the contract with the appellant to grant the franchise.

The appellant had been given by 6 Edw. VII. ch. 129 (of the Dominion), the right to run upon the streets of a municipality, but only by and with the latter's consent.

Is there any implication therein that the terms contained in such consent are authorized? In solving such a question the well-known practice of engrafting on such consents specific contracts can hardly have been overlooked by Parliament.

I express no opinion. I merely suggest. Is there not an implication that Parliament has sanctioned what is now complained of?

Many other views occur to me but, in any way I can look, I see no escape from a consideration of the agreement in order that justice be done.

It could never have been the purpose of Parliament to remove all inequality by violating manifest principles of justice.

Certainly the powers of the Board given in some

cases to sanction inequality do not indicate that anything but justice, and not mere inequality, is to be the sole guide.

The case of *The Holwell Iron Co.* v. *Midland Railway Co.*(1), of which the report has come to hand since argument herein, suggests the way the Court of Appeal in England looked at an analogous case and statute, where the court was confined, as we are, to the mere issue of jurisdiction. With what inference of fact the Board may draw we have nothing to do.

I would allow the appeal without costs for the same reasons as in the other case(2) so far as applicable.

DUFF J.—I agree in the opinion stated by the Chief Justice.

ANGLIN J. (dissenting).—By an order of the Board signed by the Assistant Chief Commissioner of the Board of Railway Commissioners for Canada, No. 7975, leave was granted to the Montreal Park and Island Railway

to appeal to the Supreme Court of Canada from the order (No. 7405) dated the 4th of May, 1909, upon the following question, which is hereby declared to be in the opinion of the Board a question of law, viz.: whether it is right or proper for the Board in making the said order to overlook the contract bearing date the 7th day of November, 1907, and made between the said Montreal Park and Island Railway Co. and the Municipality of Notre-Dame de Grâce.

The "Railway Act" (section 56, sub-section 3) makes conclusive the opinion of the Board that any question, in regard to which leave to appeal is granted by it, is a question of law; and upon such leave being given the right of appeal is conferred.

The question, stated in the order granting leave above quoted, considered merely in itself, appears to

(1) 101 L.T. 695. (2) 43 Can. S.C.R. 197.

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be susceptible of more than one interpretation. It might refer to an entire exclusion of the contract as evidence, so that the Board would not be apprised of its nature and purport, or it might refer to a refusal by the Board, though fully apprised of the nature and terms of the contract, to treat its existence or the consideration upon which it is founded or the rights and obligations to which it gives rise as facts which should influence the Board in determining the issue of unjust discrimination with which they were dealing. I exclude accidental or inadvertent omission to take the contract into consideration as something which it cannot have been intended to submit, although the expression "to overlook" is more often used to cover such a case than any other. An entire exclusion of the contract — in the sense of a refusal to receive it in evidence, based upon its inadmissibility — would raise a question of law. But upon a determination by the Board, with the contract before it and full knowledge of its purport and effect and of the circumstances in which it was entered into, that no weight should be given to these facts or conditions in deciding whether there had or had not been unjust discrimination, a question of law cannot, I venture to think, arise, in view of the provisions of section 318 that

> the Board may determine as questions of fact whether or not traffic is or has been carried under substantially similar circumstances and conditions and whether there has in any case been unjust discrimination, etc.

Nevertheless, if the question upon which the Board intended to give leave to appeal be whether or not it has the right so to determine, the statute apparently precludes our treating it as a question of fact notwithstanding that, under section 318, an issue of unjust discrimination is to be disposed of as a question of fact.

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Upon an examination of the record I find that the agreement referred to was admitted in evidence. I find that its terms were discussed and the report of the proceedings leaves no doubt in my mind that the Board was fully apprised of those terms and of the circumstances in which the contract was made. The remarks of the learned Chief Commissioner in disposing of the complaint of unjust discrimination make it abundantly clear to me that he was cognizant of all these matters. It is equally clear that he determined that proof of the existence of these facts and conditions would not aid the railway company in establishing to the satisfaction of the Board that the discrimination which had been shewn or admitted was not unjust within the meaning of the "Railway Act." It would, therefore, seem that the question upon which it was really intended to give leave to appeal was not whether the contract and the circumstances surrounding it should be excluded as inadmissible evidence, but was in reality whether, having before it the contract and all necessary and proper information and evidence in regard thereto, it was right and proper for the Board to decide that no weight or effect should be given to these facts and circumstances in the determination of the question whether the discrimination is or is not unjust in this particular case.

That the evidence in question was admissible, if for no other reason, to enable the Board properly to consider whether or not the special rates accorded by the appellants to passengers to and from Notre-Dame de Grâce are in the interests of the public, I entertain no doubt. If the giving of these special rates was not "necessary for the purpose of securing * * * the traffic in respect of which" they are given, so as to

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bring this case within section 319—it seems obvious that there may be cases covered by that section which closely resemble this case. It is, I think, impossible to say that in no circumstances and under no conditions can an agreement for special rates be in the public interest, or be something which may affect the justice or injustice of a discrimination. But the admissibility of such evidence is one matter; the weight to be attached to it, or whether it is entitled to any weight in any particular case are very different matters; and it is because of the disregard of the contract by the Board in determining not to give it any weight in this case, that, if at all, the appellants may have ground for complaint.

Again, the words, "whether it is *right* or proper, etc.," present an ambiguity and a difficulty. If they mean whether the Board had the right, in the sense of the power, to disregard these matters as not entitled to weight in determining the justice or injustice of the particular discrimination (which may perhaps be regarded as a question of law) in view of the provisions of section 318 that question must, I think, be answered affirmatively. But if, as was argued, it was intended that this court should be asked to say whether, having the power so to deal with this evidence, the Board properly exercised that power and properly determined that these matters were not entitled to weight in disposing of the issue before it, I am, with respect, unable to conceive how that can be regarded as a question of law. The weight and effect which should be given by the Board to any evidence adduced before it upon an issue of unjust discrimination must in view of the provisions of section 318 be always a question of fact. I think we should therefore assume that the Board did

not intend to give leave to appeal upon this possible aspect of the question stated in the order.

To summarize: If, notwithstanding that the contract was in fact admitted in evidence and its terms and the circumstances in which it was made were apparently placed fully before the Board and were considered by it for the purpose of determining whether any weight should in the circumstances of this case be attached to them, the question for our determination is whether this evidence was or was not admissible, and if I thought that what had taken place was really an exclusion of the evidence as irrelevant, I would be of opinion that this appeal should be allowed. But, having regard to the proceedings before the Board and to the remarks of the learned Chief Commatter. I therefore conclude that the real question submitted is whether or not, as a matter of law, the Board submitted is whether, as a matter of law, the Board in dealing with this evidence, which was before it, had the right "to overlook" or disregard it, in the sense of putting it out of consideration, because it was in their opinion, in the circumstances of this case, not entitled to weight; and to that question, in my opinion, having regard to section 318 of the Act, the answer must be that in so doing the Board was within its rights.

As already stated I cannot conceive that the Board intended to submit for our consideration the question — what weight, if any, should be given by it to such a contract as a circumstance affecting an issue of unjust discrimination; and as this is apparently not necessarily the construction of the question as stated, I think we should not assume that this was the question upon which the Board gave leave to appeal as a ques-

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tion of law. Neither do I understand that we are asked to determine, as an abstract question, whether or not, under any or all circumstances, the policy of the "Railway Act" requires that the Board should refuse to attach any weight to an agreement between a railway company and a municipality which provides for special rates, on the ground that its existence can in no circumstances have any bearing upon an issue of unjust discrimination. We are dealing with an appeal in a concrete case and I confine my expression of opinion entirely to that case.

For these reasons I would dismiss this appeal with costs.

Appeal allowed with costs.

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

Solicitors for the respondent: *Ethier & Co.*