Privy Council Appeal No. 61 *of* 1932.

The Bell Telephone Company of Canada - - - - *Appellants*

v.

The Canadian National Railways - - - - - *Respondents.*

The Bell Telephone Company of Canada - - - - *Appellants*

v.

The Canadian National Railways - - - - - *Respondents.*

The Montreal Light, Heat and Power Consolidated - - - *Appellants*

v.

The Canadian National Railways - - - - - *Respondents.*

The Montreal Light, Heat and Power Consolidated - - - *Appellants*

v.

The Canadian National Railways - - - - - *Respondents.*

The Montreal Tramways Company and others - - - *Appellants*

v.

The Canadian National Railways - - - - - *Respondents.*

The Montreal Tramways Company and others - - - *Appellants*

v.

The Canadian National Railways - - - - - *Respondents.*

The Bell Telephone Company of Canada - - - - *Appellants*

v.

The Canadian National Railways - - - - - *Respondents.*

The Bell Telephone Company of Canada - - - - *Appellants*

v.

The Toronto, Hamilton and Buffalo Railway Company and others - *Respondents.*

(*Consolidated Appeals*)

FROM

THE SUPREME COURT OF CANADA.

AND

Privy Council Appeal No. 98 *of* 1932.

The City of Montreal - - - - - - - - *Appellants*

v.

The Canadian National Railways - - - - - *Respondents.*

FROM

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MAY, 1933.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

In these appeals the validity of four orders made by the Board of Railway Commissioners for Canada is challenged. Appeals Nos. 1, 3 and 5 arise out of an order of the Railway Board, No. 45,410 of the 16th September, 1930, relating to a subway in d'Argenson Street, Montreal; here the appellants are respectively (*a*) the Bell Telephone Company of Canada; (*b*) the Montreal Light, Heat and Power Consolidated; and (*c*) the Montreal Tramways Company and the Montreal Tramways Commission; the respondents are in each case the Canadian National Railways. Appeals Nos. 2, 4 and 6 arise out of an order of the Railway Board, No. 45,427 of the 9th September, 1930, relating to a subway in St. Antoine Street, Montreal, and the parties are again the same. The seventh appeal arises out of an order of the Railway Board, No. 46,083 of the 8th January, 1931, relating to a subway in St. Clair Avenue, Toronto, and in this case the Bell Telephone Company are the only appellants, the Canadian National Railways being again the respondents. The eighth appeal arises out of an order of the Railway Board, No. 45,813 of the 14th November, 1930, relating to certain street works in Hamilton, Ontario. Here the Bell Telephone Company are once more the appellants, but the respondents on this occasion are the Toronto, Hamilton and Buffalo Railway Company and the Corporation of the City of Hamilton. These eight appeals were consolidated by the Order of His Majesty in Council of the 21st July, 1932, granting special leave to appeal. There is in addition before their Lordships a separate appeal in which two of the above-mentioned orders of the Railway Board, Nos. 45,410 and 45,427, relating respectively to the d'Argenson Street subway and the St. Antoine Street subway are also called in question by the City of Montreal, which was granted special leave to appeal by Order in Council of the 10th November, 1932. This separate appeal was called on and argued along with the eight consolidated appeals.

The works to which the orders of the Railway Board relate involve alterations in the level of existing streets in or on which the appellants, who provide various public utility services, have laid or constructed ducts, mains, cables, posts and other plant and appliances necessary for the purposes of their undertakings. The execution of the works consequently necessitates the removal of the appellants' plant and the replacing of it at an altered level. By the orders impugned the Railway Board has directed the appellants to do the necessary work of removing and relaying their plant and the appellants dispute the jurisdiction of the Railway Board to pronounce such orders. There are points common to all the appeals, but there are special considerations applicable respectively to the group of Montreal appeals, the Toronto appeal and the Hamilton appeal.

The appellants other than the City of Montreal applied for and were granted leave to appeal to the Supreme Court of Canada

against the orders of the Railway Board. The Supreme Court unanimously dismissed the appeals. Their Lordships have now to consider whether the Supreme Court decided rightly in upholding the jurisdiction of the Railway Board to pronounce the orders in question.

Following the sequence of the appellants' argument, their Lordships will deal in the first place with the

ST. ANTOINE STREET SUBWAY, MONTREAL.

It appears from the statement of facts that the Canadian National Railway Company some time ago prepared a comprehensive scheme for the readjustment and improvement of their terminal facilities in the City of Montreal. The Government obtained a report on the whole project from an eminent British engineer and thereafter an Act, 19-20 George V, ch. 12, was passed entitled the Canadian National Montreal Terminals Act, 1929, hereinafter referred to as " the Terminals Act."

Section 2 of this Act reads as follows :—

> " 2. The Governor in Council may provide for the construction and completion by the Canadian National Railway Company (hereinafter called ' the Company ') of terminal stations and offices, local stations, station grounds, yards, tracks, terminal facilities, power houses, pipes, wires and conduits for any purpose, bridges, viaducts, tunnels, subways, branch and connecting lines and tracks, buildings and structures of every description and for any purpose, and improvements, works, plant, apparatus and appliances for the movement, handling or convenient accommodation of every kind of traffic, also street and highway diversions and widenings, new streets and highways, subway and overhead streets, and also approaches, lanes, alleyways, and other means of passage, with the right to acquire or to take under the provisions of section nine of this Act or otherwise lands and interests in lands for all such purposes, all on the Island of Montreal in the Province of Quebec, or on the mainland adjacent thereto, as shown generally on the plan or plans thereof to be from time to time approved by the Governor in Council under the provisions of section seven of this Act: the whole being hereinafter referred to as the ' said works,' and a short description whereof for the information of Parliament but not intended to be exhaustive, being set out in the schedule hereto."

Section 7 provides that

> " 7. The general plan or plans of the said works and amendments or additions to such general plan at any time made shall, on the recommendation of the Minister of Railways and Canals, be subject to the approval of the Governor in Council. . . ."

The scheme included the erection of a new passenger station at Lagauchetiere Street, where the railway company's line from the north emerges from the tunnel under Mount Royal and the construction of elevated railway tracks connecting the new station with the existing railway system to the south. The first item in the schedule is " (*a*) central passenger terminal facilities," being the new passenger station, described as occupying an area bounded on four sides by existing streets, including St. Antoine Street on the south. The second item is " (*b*) viaduct and elevated railway . . . crossing over existing streets," being the new

line proceeding southwards from the new station, " with connections to existing railway facilities and Harbour Commissioners' trackage."

The railway company, as required by the Terminals Act, duly prepared a general plan of the works, which was submitted by the Minister of Railways and Canals to the Governor in Council with a recommendation that it be approved. On the 2nd July, 1929, the Governor in Council approved of this general plan and of the construction by the railway company of the works indicated in red thereon, on the location sanctioned by the Minister as also shown thereon in red.

The general plan showed the proposed viaduct and elevated railway, being item (*b*) in the schedule, proceeding southwards from the new station and crossing at right angles over St. Antoine Street, which runs east and west along the southern boundary of the new station site.

St. Antoine Street had not previously been crossed at this point by any railway on the level or otherwise, and it was necessary in order to provide sufficient headroom under the proposed new overhead track that the existing level of the street should be lowered for a length of about 500 feet. This involved a disturbance of the plant which the appellants had laid in or on the street at its existing level for the purpose of providing the public with telephone, gas and electricity and tramway services, and necessitated the removal of this plant and its replacement in or on the street at a lower level.

The railway company in the beginning of 1930 submitted to the Railway Board two general plans of the works, which included *inter alia* the construction of a subway in St. Antoine Street. These plans were approved by the Railway Board by Order No. 44,433 of the 13th March, 1930, subject to the submission and approval of detailed plans. Thereafter the railway company in April, 1930, forwarded to the Railway Board a detailed plan " showing proposed clearances in height and widths of roadways and sidewalks on St. Antoine Street " and requested the Railway Board's approval thereof. The application stated that copies of the plan were being served on, among others, the present appellants, and asked that the Railway Board should direct these parties to " move such of their facilities as are affected by the construction as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board."

On the 9th September, 1930, the Railway Board made the Order No. 45,427 now challenged, the text of which is as follows :—

" In the Matter of the application of the Canadian National Railways, hereinafter called the ' Applicants,' under Section 256 of the Railway Act for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on general plan and profile No. YIA 31.10.4,

dated August 16th, 1930, on file with the Board under file No. 9437.319.13 :

UPON the report and recommendation of the Chief Engineer of the Board and reading the submission filed,

THE BOARD ORDERS :

1. That the Applicants be, and they are hereby, authorised to construct a subway on St. Antoine Street, in the City of Montreal, Province of Quebec, as shown on the said general plan and profile on file with the Board under file No. 9437.319.13 ; detail plans of the proposed structure to be filed for the approval of an Engineer of the Board.

2. That the City of Montreal, the Montreal Light, Heat & Power Consolidated, the Montreal Tramways Company, the Bell Telephone Company of Canada, the Electrical Commission of the City of Montreal, the Canadian Pacific Railway, Telegraph Department, the Dominion Electric Protection Company and the Montreal Tramways Commission be, and they are hereby, directed to move such of their utilities as may be affected by the construction of the said subway, as and when required to do so by the Chief Engineer, Operating Department, of the Applicants.

3. That all questions of costs be reserved for further consideration by the Board.

(Sgd.) H. A. McKEOWN,
Chief Commissioner,
The Board of Railway Commissioners for Canada."

This order, it will be observed, purports to be made under Section 256 of the Railway Act (R.S.C. 1927, ch. 170, amended by S.C. 1928, ch. 43 ; S.C. 1929, ch. 54 ; and S.C. 1930, ch. 36). The Railway Act is a statute of general application. Section 5 enacts that, subject as therein provided, it shall " apply to all persons, railway companies and railways within the legislative authority of the Parliament of Canada. . . ." As regards its relation to " Special Acts," it is enacted by Section 3 as follows :—

3. Except as in this Act otherwise provided,

(*a*) this Act shall be construed as incorporate with the Special Act ; and

(*b*) where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to over-ride the provisions of this Act."

A " Special Act " is defined by Section 2 (28) as " any Act under which the company has authority to construct or operate a railway or which is enacted with special reference to such railway."

Section 256, under which it is maintained by the respondents that the Railway Board had jurisdiction to pronounce the order in question, is in the following terms :—

" 256. Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway affected.

2. The Board may, by order, grant such application in whole or in part and upon such terms and conditions as to protection, safety and convenience of the public as the Board deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or

highway be temporarily or permanently diverted, or that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of the granting of the application in whole or in part in connection with the crossing applied for, or arising or likely to arise in respect thereof in connection with any existing crossing."

* * * *

The immediately preceding section, as amended in 1930, provides as follows :—

"255. The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorised, but shall not without such leave, be carried upon, along or across any existing highway. . . ."

If the Railway Board had jurisdiction under Section 256 to authorise the crossing of St. Antoine Street by the proposed railway viaduct and the construction of the requisite subway, this had the effect of bringing into operation Section 39 of the Act, which reads as follows :—

"39. When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid."

It is in the exercise of the power which they claim to possess under this section that the Railway Board have directed the appellants to move their plant in the street and the main grievance of which the appellants complain is that they are in consequence left entirely in the hands of the Railway Board as regards the cost of carrying out the work of removal and replacement of their plant.

In disputing the jurisdiction of the Railway Board to pronounce the order in question the appellants in the first place contended that Section 256 of the Railway Act, under which the order purports to be made, was entirely displaced by the provisions of the Terminals Act. That Act, they said, itself authorises the construction of the railway viaduct across St. Antoine Street, and what Parliament has itself authorised cannot be the subject of authorisation by the Railway Board. Section 256 of the Railway Act confers a discretion on the Railway Board to grant or to refuse an application for authority to carry a railway across a highway, and therefore, the appellants argued, it can

have no application to a case where Parliament has already granted the requisite authority, either directly, or indirectly through the Governor in Council, and where there is consequently no discretion left for the Railway Board to exercise. The argument in short is that Section 256 of the Railway Act is ousted by the Terminals Act and so cannot be invoked either by the Railway Board or by the respondents to justify the order in question.

This argument, in their Lordships' opinion, is founded on a misconception of the purpose, province and effect of the Terminals Act. That Act does not profess to do more than authorise the Governor in Council to " provide for " the construction by the railway company of a list of various kinds of works of the most miscellaneous description, shown " generally " on a plan or plans to be approved by the Governor in Council and of which " a short description " is set out in the schedule " for the information of Parliament but not intended to be exhaustive." No provision is made for detailed plans, books of reference or any of the usual machinery essential for carrying out a statutory enterprise which involves interference with public and private rights. No doubt it appears from the general plan and the schedule that the viaduct forming item (*b*) of the schedule is to be carried across St. Antoine Street between certain named streets running north and south but that is all. No details are given as to the height of the viaduct over the street, its relation to the existing roadway and buildings, or any of the other engineering features of the work. The schedule, it may be noted, concludes with the words: " Nothing in this Schedule is to be taken to restrict the general powers of the Company as expressed in the foregoing Act or other Acts relating to the Company." The fact of the matter is that the purpose of the Terminals Act was to give Parliamentary sanction to the scheme as a whole and to provide means for raising the necessary capital. Section 3 is the real pivot of the Act; it empowers the Governor in Council to authorise the guarantee of the principal and interest of securities to be issued by the railway company to an amount not exceeding $50,000,000, in respect of the construction and completion of the works. The granting of this guarantee necessitated that Parliament and the Governor in Council should be informed and approve generally of the nature of the scheme to which the public credit was to be pledged. These essentials being secured by the Act, everything else is left to be worked out by the already existing statutory machinery available for the purpose.

This is in consonance with what their Lordships were informed is the usual private legislation procedure in Canada in connection with railway bills, whereby Parliament merely sanctions the general scheme and authorises the raising of the requisite capital, delegating to the Railway Board the determination of all the practical details of the construction of the line. The promoters

of the Terminals Act had obviously in view Section 21 of the Canadian National Railways Act (R.S.C. 1927, ch. 172, amended by S.C. 1928, ch. 13; S.C. 1929, ch. 10; and S.C. 1930, ch. 6). That section enacts as follows :—

> " 21. With the approval of the Governor in Council and upon any location sanctioned by the Minister of Railways and Canals, the company may from time to time construct and operate railway lines, branches and extensions or railway facilities or properties of any description in respect to the construction whereof respectively Parliament may hereafter authorise the necessary expenditure or the guarantee of an issue of the Company's securities."

The Terminals Act seems precisely to satisfy the requirements of that section, but no more absolves the railway company from compliance with the general railway law than does that section itself. As Rinfret J. points out in his judgment, " In no respect is the Act self-contained," and it could never be carried into execution without recourse to other existing legislation. It would indeed have been surprising if Parliament by the Terminals Act had displaced all the powers which the Railway Board possesses for securing the protection of the public in the matter of railway crossings, without itself providing any substituted safeguards. Mr. Geoffrion for the appellants suggested, if their Lordships understood him aright, that although Section 256 of the Railway Act was ousted, Sections 263 and 264 might still apply and afford sufficient protection to the public. These sections provide that at overhead railway crossings the highway must not be narrowed to less than twenty feet or have a clearance of less than fourteen feet, and that safe and adequate facilities for traffic must be afforded. But Section 263 opens with the words " unless otherwise directed or permitted by the Board," which link it with the other relative provisions of the Act, including Section 256, and it would be a curious result if the Terminals Act were to have displaced some while preserving others of the sections in the fasciculus headed " Highway Crossings, etc." which embraces Section 255 to 267 inclusive.

There is, however, in the Terminals Act itself a clear indication that Parliament contemplated that the provisions of the Railway Act regarding the crossing of highways would apply to the works in question, for in Section 8 it deals specially with the case " where streets or highways are affected by the said works but are not crossed by the company's tracks . . . and by reason thereof the Board of Railway Commissioners for Canada has no jurisdiction under the Railway Act with respect thereto " ; here the plain implication is that where streets or highways *are* crossed by the company's tracks the Railway Board will have jurisdiction.

Reference was made to Section 162 of the Railway Act, which confers general powers on railway companies, including " (*n*) power to divert or alter the position of any water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric

lines, wires or poles," to Section 163, which requires the company to restore any plant so diverted or altered, and to Section 164, which provides for the payment of compensation for any damage done by the company in the exercise of its powers. The appellants in their effort to extricate themselves from Section 39 of the Railway Act under which the work of removing and relaying their plant has been directed to be done by them, point to the fact that the Railway Board may, under Section 39, order third parties to execute work " except as otherwise expressly provided," and suggest that under Section 162 there is express provision that the railway company is itself to carry out the work of removing and relaying public utility plant and that consequently the appellants cannot be ordered to do so. But Section 162 is expressed to be " subject to the provisions in this and the special Act contained " and it is plain that the extensive permissive powers of that section do not oust the controlling powers of the Railway Board. Another suggestion was that Section 2 of the Terminals Act requires that all the works should be carried out by the Canadian National Railway Company itself, and that by this it is " otherwise expressly provided " within the meaning of Section 39 of the Railway Act so as to preclude the Railway Board from ordering any other parties to execute any part of the works. It is enough to say that in their Lordships' opinion Section 2 of the Terminals Act imports no such restriction.

It is worth noting in disposing of this first branch of the appellants' argument that the order of the Railway Board does not authorise in general terms the crossing of St. Antoine Street by the proposed new viaduct, as to which it might be said that Parliament had already given the necessary authority. What it does do is to authorise the construction of a subway on St. Antoine Street " *as shown on the general plan and profile on file with the Board*," neither of which had received or required to receive the approval of Parliament or of the Governor in Council. For the construction of the subway in the particular manner shown on this plan and profile the Railway Board's authorisation was appropriate and requisite and involved no usurpation or infringement of what Parliament had itself chosen to enact in the Terminals Act.

But if the arguments of the appellants hitherto discussed are, as their Lordships' hold, ineffectual to invalidate the order of the Railway Board, the appellants have another string to their bow. They next contend that Sections 256 and 39 of the Railway Act have no application at all to the Canadian National Railway Company by reason of the terms of the Canadian National Railways Act, which is the general charter of the Company. They refer to Section 17 of that Act, which, as amended, reads as follows :—

> " 17.—(1) All the provisions of the *Railway Act* shall apply to the Company, except as follows :—

"(*a*) such provisions as are inconsistent with the provisions of this Act;

(*b*) the provisions relating to the location of lines of railway and the making and filing of plans and profiles, other than highway and railway crossing plans;

(*c*) such provisions as are inconsistent with the provisions of the *Expropriation Act* as made applicable to the Company by this Act.

(2) (*a*) All the provisions of the *Expropriation Act*, except where inconsistent with the provisions of this Act, shall apply *mutatis mutandis* to the Company;"

* * * *

The argument is that on a sound construction of this section the provisions of the Expropriation Act which are thereby substituted for those of the Railway Act furnish the relevant legislation applicable to the matter in hand, and in particular exclude the applicability of Sections 256 and 39 of the Railway Act.

Commenting on the original edition of this section, the Board in *Boland* v. *Canadian National Railway Company* [1927] A.C. 198 observed at p. 205 that it employed "a very involved method of expression." It cannot be said that in its amended form the section presents a more happily inspired example of legislation. Subsection (1) starts by applying to the Canadian National Railway Company all the provisions of the Railway Act with certain exceptions. The only provisions expressly excepted are those mentioned in (*b*); the other provisions to be excepted are those which are found on examination to be inconsistent with (*a*) the Act under construction, or (*c*) the provisions of the Expropriation Act as made applicable to the company by the Act under construction. Now under head (*b*) the express exception of the provisions of the Railway Act relating to the making and filing of plans and profiles is qualified by the addition of the words "other than highway and railway crossing plans." This is an exception upon an exception and is tantamount to an express enactment that the provisions of the Railway Act relating to the making and filing of highway and railway crossing plans are to apply to the Canadian National Railway Company. The provisions of the Railway Act so made applicable to the Canadian National Railway Company cannot be displaced by any provisions of the Expropriation Act, for subsection (2) in applying all the provisions of the Expropriation Act to the company expressly excepts such of its provisions as are "inconsistent with the provisions of this Act" and one of "the provisions of this Act" is that the provisions of the Railway Act relating to the making and filing of highway and railway crossing plans are to apply to the company. It would therefore be inconsistent with "the provisions of this Act" to apply to the company any provisions of the Expropriation Act relating to the making and filing of highway and railway crossing plans for to these matters "this Act" has expressly applied the provisions of the Railway Act. And these provisions of the Railway Act cannot be excluded by

subsection (1) (*c*) for they cannot be inconsistent with the provisions of the Expropriation Act "as made applicable to the company by this Act." inasmuch as the Expropriation Act is made applicable to the company under the exception of the Railway Act provisions in question.

This distasteful exercise in dialectics confirms the impression which a less sophisticated reading of the section conveys that the Act while intending to arm the Canadian National Railway Company generally with the very drastic powers which the Expropriation Act confers on the Minister of Public Works was careful to secure that the company should remain subject to the Railway Act in the matter of the making and filing of highway and railway crossing plans.

But it is necessary to consider what is the scope of this reservation. The Board in the passage in *Boland's* case already referred to raises but does not decide the question whether the words include "the authorisation of the construction of the crossing indicated by the plans" or mean merely "a piece of paper with a drawing on it." Their Lordships are of opinion that the reservation, though no doubt inartistically expressed, was intended to have and has the effect of subjecting the Canadian National Railway Company to the provisions of the Railway Act contained in the two groups of sections headed "Crossings and Junctions with other Railways" and "Highway Crossings, etc.," extending respectively from Section 252 to Section 254 and from Section 255 to Section 260, and excludes the company from possessing the more autocratic powers which the Expropriation Act by Section 3 gives to the Minister in the matter of works affecting railway and highway crossings. The statute not unnaturally fixes upon the step of making and filing plans as the distinctive stepin relation to any work under the Railway Act, for a perusal of the statute shows that it is through its power of ordering and approving or disapproving plans that the Railway Board in general makes its jurisdiction effective. Faced again with the implication from Section 8 of the Terminals Act that Parliament regarded the Canadian National Railway Company as subject to the jurisdiction of the Railway Board in the matter of highway crossings, the appellants were constrained to argue that if Parliament so understood then Parliament was labouring under an error in law. Their Lordships do not find this imputation justified.

Their Lordships accordingly hold that Section 17 (as amended) of the Canadian National Railways Act has not the effect of rendering Section 256 (and consequently Section 39) of the Railway Act inapplicable to the respondent company.

A third point taken by the appellants may be briefly dismissed. The argument which they submitted was that their plant in or on the streets being of the nature of "land" within the statutory meaning the respondents must resort to the statutory provisions applicable to the compulsory acquisition of land.

The short answer is that the respondents do not intend and are not empowered to acquire any part of the roadway of St. Antoine Street. When the street works are completed the respondents will not own a yard of the highway. When the Railway Board, in authorising a railway company to carry its track overhead across a highway, orders the company to lower the level of the highway the railway company is not required to purchase the stratum of roadway which has to be excavated and removed. The lowering of the level of the highway is a work which the Railway Board can order the railway company (or a third party) to execute *in alieno solo*, and the question of who shall bear the cost of the work is left to the Railway Board to determine. The railway company acquires nothing.

The appellants also referred to Section 260 of the Railway Act, which requires a railway company at its own cost and expense, except where otherwise agreed, to provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway. This section, however, relates only to cost and does not affect the present question of jurisdiction.

Their Lordships have now dealt with all the grounds on which the appellants in their argument at the bar have challenged the jurisdiction of the Railway Board to pronounce the order relating to the St. Antoine Street subway. In their Lordships' opinion, the attack on the order fails at all points and the judgment of the Supreme Court dismissing Appeals Nos. 2, 4 and 6 ought to be affirmed.

Their Lordships now turn to the case of the

D'ARGENSON STREET SUBWAY, MONTREAL.

D'Argenson Street is a highway extending in a northerly and southerly direction through the south-westerly section of the city of Montreal. It is crossed overhead by the existing tracks of the respondents, the highway passing under the railway by a subway. The scheme for the improvement of the respondents' traffic facilities in Montreal, which was sanctioned by the Terminals Act, included a reconstruction and lengthening of this subway so as to enable additional tracks to be carried over the highway. D'Argenson Street is not mentioned by name in the Terminals Act, but the work of extending the d'Argenson Street subway is admittedly included in the schedule to the Act under item " (*e*) Grade separation by means of elevated or depressed or underground tracks or streets as may be determined, between St. Henri and Point St. Charles." The present subway was in existence when the appellants laid in the solum of the highway the ducts, mains and cables which form part of the plant of their public utility undertakings. The proposed extension of the subway will necessitate the lowering of the level of additional portions of the highway and consequently the displacement and relaying of the appellants' plant throughout these portions. It will be

observed that the only material distinction between this case and that of the St. Antoine Street subway is that in this instance the highway is already crossed overhead by railway tracks, whereas in St. Antoine Street there was no existing railway crossing.

The procedure before the Railway Board in the case of this subway followed the same lines as in the case of the St. Antoine Street subway and on the 16th September, 1930, the Railway Board made the Order No. 45,410, whose validity the appellants challenge. The order is in the same form as the St. Antoine Street order *mutatis mutandis*. It authorises the railway company " to construct a subway at d'Argenson Street in the City of Montreal on the line of the said railway between Point St. Charles and St. Henri as shown on the said general plan on file with the Board " and it directs the appellants and others " to move such of their utilities as may be affected by the construction of the said subway," all questions of costs being reserved for further consideration by the Board. The order professes to be made under Section 256 of the Railway Act, as in the St. Antoine Street case. This is presumably right as the application was for authority to carry additional tracks over the highway and the extensions of the subway north and south are treated as new subway works. Section 257, which their Lordships will set out when they come to deal with the Toronto case, no doubt deals with the case of a railway already constructed across a highway, but is apparently concerned with alterations of grade and other protective measures with regard to the tracks as they are and does not or may not relate to such a case as the present, where additional tracks are proposed to be carried over the highway and additional subway works are necessitated. To this latter case Section 256 appears appropriate ; it is not in terms limited to the case where there is no existing railway track across the highway.

The appellants challenged the jurisdiction of the Railway Board to pronounce the present order upon the same grounds and with the same arguments as their Lordships have already held to be unavailing in the case of the St. Antoine Street order. It is obviously even more difficult in this case to argue that Parliament has by the Terminals Act specifically authorised this particular work, so as to oust the jurisdiction of the Railway Board, when regard is had to the very vague and general terms of item (*e*) in the schedule, quoted above. It suffices accordingly for their Lordships to find, for the reasons assigned in the St. Antoine Street case, that the judgments of the Supreme Court in Appeals Nos. 1, 3 and 5 were also well-founded and should be affirmed.

The seventh appeal relates to the

ST. CLAIR AVENUE SUBWAY, TORONTO.

St. Clair Avenue is a highway running east and west through the north-westerly section of the City of Toronto. It is crossed

on the level by the track of the respondents, the Canadian National Railway Company. In the solum of the highway the Bell Telephone Company, who are the only appellants in this case, some twenty years ago constructed an underground conduit in which are laid their telephone lines and cables.

According to the statement of facts the city of Toronto in 1922 made application to the Railway Board for an order that the Canadian Pacific Railway Company and the present respondents be required to collaborate with the city in the preparation of a joint plan for the separation of grades in the north-west portion of the city. After sundry procedure the Railway Board on the 9th May, 1924, made an order under Sections 257 and 259 of the Railway Act directing *inter alia* that a subway be constructed at St. Clair Avenue. No steps were taken to construct this subway until in 1930 the respondents intimated to the Railway Board that arrangements for the construction of a subway at St. Clair Avenue had been completed and submitted a plan which they asked the Railway Board to approve. The plan showed a diversion of the respondents' line a short distance to the west and a subway in St. Clair Avenue over which it was proposed to carry the respondents' track. The respondents in their application asked the Railway Board to authorise the construction of the subway and the diversion of their line, at the same time requesting the Railway Board to order the appellants and others to make the necessary changes in their facilities when requested to do so by the respondents' chief engineer. The work was stated to have been approved by Order in Council under Section 21 of the Canadian National Railways Act. On this application the Railway Board on the 8th January, 1931, made the order now challenged whereby, purporting to act under Sections 178 and 257 of the Railway Act, they authorised the respondents to construct a subway under their tracks where they cross St. Clair Avenue and to divert their main line to the west, as shown on the plan and profile on file with the Board, and further directed the appellants and others to move such of their facilities as might be affected by the construction of the subway, reserving the question of the cost for the further consideration of the Board.

The following are the material parts of Sections 178 and 257 of the Railways Act under which the order purports to have been made :—

> " 178. If any deviation, change or alteration is required by the company to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, a plan, profile and book of reference of the portion of such railway proposed to be changed, showing the deviation, change or alteration proposed to be made, shall, in like manner as hereinbefore provided with respect to the original plan, profile and book of reference, be submitted for the approval of the Board, and may be sanctioned by the Board."
>
> * * * *
>
> " 257. Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or

application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected."

* * * *

The appellants in impugning the jurisdiction of the Railway Board to pronounce this order cannot of course found any argument on the Terminals Act, which relates only to Montreal. But in submitting that Section 257 of the Railways Act was inapplicable to this subway they advanced all the other arguments which they used in the Montreal appeals and which their Lordships have already so fully discussed. It will be enough to say that in their Lordships' opinion these arguments are as ineffectual with regard to Section 257 as they have been shown to be with regard to Section 256 in the Montreal appeals.

Two special points, however, call for notice. The appellants draw attention to the fact that the order proceeds on Section 178 as well as on Section 257, and maintain that this is not a case of constructing a subway at a point where there is an existing railway crossing, but is a case of constructing a new diverted line and a new crossing. They further argue that at any rate Section 178 of the Railways Act is not saved by Section 17 of the Canadian National Railways Act and that the Expropriation Act is accordingly applicable to the work. But the appellants overlook the fact that Section 257 expressly authorises the Railway Board to order, where there is an existing crossing, that the railway be permanently diverted, and if the plan for the alteration of an existing crossing includes an incidental diversion of the railway this may fairly be held to be within the reservation in Section 17 of the Canadian National Railways Act, which saves the provisions of the Railway Act relating to the making and filing of highway and railway crossing plans, even if Section 178 is not otherwise applicable to the respondents, as to which their Lordships express no opinion.

The other point taken by the appellants was that Section 257, even assuming it to be applicable generally to the respondents, is inapplicable to this particular case inasmuch as the respondents are here themselves the applicants, whereas the section contemplates action either by the Railway Board or by some third party *in invitum* of the railway company. There is nothing in this

point. If the Railway Board may act in the matter of its own motion there is nothing incompetent in its being set in motion by an application by the railway company. Moreover the history of this case shows that the initiative was originally taken with regard to St. Clair Avenue by the city of Toronto, and the railway company in submitting the application upon which the present order was made was only seeking to effectuate the Railway Board's previous order that the level crossing in this street should be eliminated by the construction of a subway.

The result is that in their Lordships' opinion this appeal also should be dismissed.

The eighth of the consolidated appeals has next to be considered. This relates to

SUBWAYS, ETC., IN HAMILTON, ONTARIO.

Here the Bell Telephone Company are again the sole appellants, but in this case the respondents are the Toronto, Hamilton and Buffalo Railway Company and the Corporation of the City of Hamilton. Thus the complicated problems which their Lordships have had to solve in the Montreal and Toronto appeals, in consequence of the special legislation applicable to the Canadian National Railways, fortunately, do not present themselves again. There is no question as to the application of the Railway Act to the respondent railway company. The questions which arise relate to the scope of the Railway Board's powers under that Act with regard to certain of the works which it has sanctioned by its order.

The joint application of the respondents to the Railway Board is dated the 30th October, 1930, and requested approval of a plan showing an extensive series of alterations in the system of the respondent railway company in the city of Hamilton, and authorisation of the various works shown on the plan. These works included the deviation of a considerable length of the railway, the construction of a new elevated track crossing a number of streets by means of overhead bridges, the formation of subways in these streets, the closing and the diversion of certain streets and the erection of a new station.

On the 14th November, 1930, the Railway Board, purporting to act under Sections 162, 178, 188, 199, 201, 252, 255, 256 and 262 of the Railway Act, made an order No. 45,813 authorising the railway company to carry out the proposed works. The first four paragraphs of the order relate to the proposed deviation, the overhead bridges, the subways and the compulsory acquisition of land. In the fifth paragraph it is ordered

> "5. That the city close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington within the limits indicated on the said plan and divert Hunter, Aurora and Liberty Streets as shown on the said plan."

The sixth paragraph relates to the relocation of one of the railway company's lines, the seventh to the construction of the

new station, and the eighth to the reconstruction of a street railway or tramway in one of the subways. By the ninth paragraph the appellants and other public utility companies are ordered to reconstruct, alter or change the respective works of each in order to carry out the changes in the railway shown on the said plan and profile. The order concludes by reserving for the further consideration of the Railway Board the apportionment of the cost of the works.

The appellants have ducts, conduits, poles, wires, cables and other plant in or on a number of the streets whose level requires to be altered for the purpose of the new subways and also in or on the portions of the streets to be closed. In so far as the appellants challenged the jurisdiction of the Railway Board to order them to reconstruct, alter or change their plant in the streets to be carried under the new elevated tracks by means of subways, the appellants' contentions were the same as those which they advanced in the Toronto case except that the arguments arising from the special statutory position of the Canadian National Railways were not open to them. These contentions, for the reasons already assigned, can have no better success in the present instance and their Lordships accordingly hold that so far as the subways are concerned the order impugned was within the competence of the Railway Board.

The appellants, however, raised a special point with regard to paragraph 5 of the order, quoted above, and argued that the Railway Board had no power to order the city of Hamilton to close portions of the streets mentioned or any streets. They submitted that the only jurisdiction which the Railway Board has over highways is conferred by Sections 256 and 257 of the Railway Act, set out above, and that these sections do not authorise the making of an order on the city to close highways.

The objection of the appellants is a highly technical one for the city of Hamilton, which has power under municipal legislation to close streets, has agreed with the respondent railway company that the portions of the streets in question should be closed and has joined with the railway company in requesting the Railway Board to order that they be closed. The object of the appellants presumably in insisting on their objection to the matter being made the subject of an order by the Railway Board is that it is only when the Railway Board has power to make an order that it is authorised by Section 39 of the Railway Act to direct work to be done by third parties. Consequently if the Railway Board had no power to order the closing of the streets it could not order the appellants to execute any work necessitated by the closing of the streets.

In dealing with this rather intricate question, it is important to have in mind the nature of the extensive scheme of railway reconstruction which is shown on the plan prepared by the railway company, agreed to by the city and sanctioned by the

Railway Board. In its main features it is a comprehensive scheme of what is called grade separation for the elimination of level crossings in the streets of Hamilton. In the preamble of the agreement between the city and the railway company it is recited that the city " has requested the railway company to proceed with grade separation in the city of Hamilton which will necessitate a change in the route and grades of the railway," and the removal and replacement of certain of the railway company's tracks and other works. The preamble proceeds to recite that " the changes and alterations from the present location of the railway of the railway company between the said points involves a deviation slightly to the south of its present route and the elevation of its tracks, construction of underpasses at certain streets, and the closing and diversion of other streets, the construction of a new station and other building and facilities . . ."; that " the changes in the said location of the railway necessitate the consideration and settlement of grade separation problems in the said city " ; and that " the works hereinafter set forth comprised in and connected with grade separation are of mutual benefit to the city and the railway company." By Article 6 of the agreement the city agrees to close certain streets and to divert certain streets all as shown on the plan and to convey to the railway company the portions of the streets to be closed. From all this it plainly appears that the project is one for dealing with existing highway crossings in the city in the interest of the protection, safety and convenience of the public. That is just the kind of problem with which the Railway Board is by Section 257 empowered to deal. The railway at present crosses on the level a whole series of transverse streets in Hamilton, including Charles, Hunter and Baillie Streets, in which the appellants are interested because of the presence of their plant in the solum of those streets. The Railway Board in dealing with an existing crossing may among other things order that the highway be permanently diverted (which presumably includes the closing of the portion of the highway diverted) and that " such other work be executed . . . or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such " crossing.

In the present case the proposal is to deal with the existing series of level crossings by reconstructing the railway on a higher level and by constructing subways in certain of the cross streets and closing others. There can be no question of the competence of the Railway Board to authorise the construction of what is in effect a new stretch of railway track on a higher level. Physically this would have the effect of blocking the transverse streets and necessitating either the construction of subways or the closing of the portions of the streets where the existing level crossings are situated. It may be noted in passing that among the general powers conferred by Section 162 on railway companies

is the power under head (*k*) to make or construct *inter alia* permanent embankments and fences across any highway which the railway intersects. It would seem to be open to the Railway Board, when dealing as here with a whole series of level crossings, to decide that the measure best adapted to remove the danger due to these crossings was to order that the railway be reconstructed at a higher level and that at some of the existing level crossings subways be provided, while at others the crossings be abolished and the portions of streets at present crossed on the level be closed. The closing of that portion of a street which is occupied by an existing level crossing is in their Lordships' view a method or measure for dealing with the danger which it is within the competence of the Railway Board to order. The Railway Board is no doubt mainly concerned with railway works. It may be that technically it is not empowered to order a municipality to perform the administrative act of officially declaring a portion of a street to be closed. But it may apparently sanction the construction of railway works which will have the effect of physically blocking a street and it may also apparently authorise the acquisition by a railway of a portion of the highway for the purpose of its works and thereby put that portion of the highway out of use. The closing of a portion of a highway may thus be an incident of works which the railway may execute and the Railway Board may sanction and their Lordships are of opinion that it is not incompetent for the Railway Board to order or permit the closing of the portion of a highway crossed by an existing level crossing at any rate where, as here, this is incidental to a general scheme of rearrangement of level crossings in connection with an alteration of the railway and where, as here, the public authority having charge of the highways not only consents, but is a party to the application to the Railway Board. If that be so, and the Railway Board can in such circumstances order or sanction the closing of a portion of the highway there would appear to be no incompetency in directing the city, as the appropriate party, to effect the closing. The justification for the order impugned is that it is a measure incidental to a scheme for dealing with the series of existing level crossings in the streets of the city.

The appellants finally suggested that the real purpose of closing Hughson Street was to enable the new station to be built upon part of it. The railway company has power under Section 162 (8) of the Railway Act to construct stations and the Railway Board under Section 188 must approve of the location of any proposed station. If the approved location is situated in part on a highway and the construction of the station involves the blocking of the highway, it would appear that the Railway Board may incidentally approve of and permit the necessary closing of the part of the highway affected. Their Lordships, however, agree with the Supreme Court that the materials for

dealing with this point have not been made available and for the present purpose it is sufficient to say that the appellants have not established any case on this ground for attacking the order of the Railway Board.

Their Lordships are accordingly of opinion that the judgment of the Supreme Court in this case should be affirmed and the appeal dismissed.

The separate appeal by the city of Montreal against orders Nos. 45,427 and 45,410 relating to the subways in St. Antoine Street and d'Argenson Street need not detain their Lordships long. The appellants own sewers, water conduits and electric wire conduits in these streets and this plant will have to be removed and relaid in the course of the construction of the subways. The city did not appeal to the Supreme Court against the orders of the Railway Board, but as already stated were granted special leave to appeal here by Order of His Majesty in Council. In their printed case they adopt in every respect the joint cases of the appellants in the other appeals against these orders, which their Lordships have already considered. Having made common cause with these other appellants, they must suffer the same fate. In any case this appeal would seem unmaintainable in view of the letters produced in which the appellants inform the Railway Board that they have no objection to the orders against which they are now appealing. But it is unnecessary to pursue the matter further.

Their Lordships will humbly advise His Majesty that the eight consolidated appeals be dismissed and the judgments of the Supreme Court affirmed, and that the separate appeal of the city of Montreal be also dismissed. The respondents will have their costs of the appeals.

In the Privy Council.

THE BELL TELEPHONE COMPANY OF CANADA

v.

THE CANADIAN NATIONAL RAILWAYS

THE BELL TELEPHONE COMPANY OF CANADA

v.

THE CANADIAN NATIONAL RAILWAYS

THE MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED

v.

THE CANADIAN NATIONAL RAILWAYS

THE MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED

v.

THE CANADIAN NATIONAL RAILWAYS

THE MONTREAL TRAMWAYS COMPANY AND OTHERS

v.

THE CANADIAN NATIONAL RAILWAYS

THE MONTREAL TRAMWAYS COMPANY AND OTHERS

v.

THE CANADIAN NATIONAL RAILWAYS

THE BELL TELEPHONE COMPANY OF CANADA

v.

THE CANADIAN NATIONAL RAILWAYS

THE BELL TELEPHONE COMPANY OF CANADA

v.

THE TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY AND OTHERS.

AND

THE CITY OF MONTREAL

v.

THE CANADIAN NATIONAL RAILWAYS.

Consolidated Appeals.

DELIVERED BY LORD MACMILLAN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2

1933.