Reasons for the Report of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of The Canadian Pacific Railway Company v. The Corporation of the City of Toronto and the Grand Trunk Railway Company of Canada, from the Supreme Court of Canada, and from the Court of Appeal for Ontario; delivered the 10th May 1911.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD ROBSON.

[DELIVERED BY LORD ATKINSON.]

At the close of the arguments of these Consolidated Appeals, their Lordships intimated that they would humbly advise His Majesty that they should be dismissed. They will now give their reasons for the decision at which they arrived.

The first is an Appeal from a Judgment of the Court of Appeal of Ontario, dated the 17th of September 1907, confirming a Judgment of Mr. Justice Anglin; and the second is an Appeal from a Judgment of the Supreme Court of Canada, dated the 15th of February 1910. By the first of these Judgments a certain order of the Railway Committee of the Privy Council of Canada,

[30.] J. 52. 100.—5/1911. E. & S.

dated the 14th of January 1904, and purporting to be made under the 238th section of the Canadian Railway Act, 1906, whereby the two railway companies, the Canadian Pacific Railway Company and the Grand Trunk Railway Company of Canada, were ordered to carry a bridge over their respective lines at Yonge Street in the City of Toronto, called the Yonge Street Bridge, was held to be *intra vires* and valid, and by the second an order, dated the 9th of June 1909, of a certain body called the Railway Board, created by a statute, styled in the Case of the Appellants "the Viaduct Order," whereby the two Companies were ordered, amongst other things, to construct an elevated viaduct some miles in length for the purpose of carrying two of the tracks of each of their respective lines through the said city, was also held to be *intra vires* and valid.

The second of these orders, namely, the "Viaduct Order," practically supersedes the first, inasmuch as the bridge at Yonge Street will not be required if the viaduct be constructed.

It is scarcely necessary to point out that their Lordships are not concerned with the ethics of these orders. They are not called upon to express any opinion whatever as to whether the orders are just or unjust, oppressive or the contrary. The Legislature of Canada has thought it right to confer on these two bodies, the Railway Committee and its successor the Railway Board wide powers. If these powers be abused, or be found to be in their exercise hurtful, the Legislature which conferred them can withdraw or restrict them, or subject their exercise to control. But the only questions with which their Lordships have, in this case, to deal, in addition to that of the competency of the Appeals to be presently disposed of, are first, whether the Committee and the Board, had, under

this section of the Act of 1906 as amended by the Canadian Railway Act of 1909, jurisdiction to make the order which they have made. And secondly, the question whether a certain Statute of the Parliament of Canada (56 Vict. 48) validating a certain agreement entered into by the two Railway Companies aforesaid and the Corporation of the City of Toronto, styled the Tripartite Agreement, and authorising certain works to be executed upon the said Railways, which, being executed, have brought the said lines into their present state and condition, is a Special Act within the meaning of said Act of 1906, and, if so, whether its provisions are to prevail over those of the section of this latter Statute under which the impeached orders purport to have been made.

As to the preliminary point, that an Appeal does not lie in this case from these Judgments of the before-mentioned Courts, it is to be borne in mind that these are Appeals to His Majesty to exercise his Royal prerogative as an act of grace. In the case of *Théberge* v. *Laudry*, 2 A. C. 102, Lord Cairns, though he held that from the peculiar nature of the jurisdiction exercised by the tribunal in that case—the trial of an election petition—an appeal to the Crown did not lie, yet at page 106 he is reported to have said that he did not desire to imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away except by express words.

In *Cushing* v. *Dupuy*, 5 A. C., page 409, the Act there under consideration, a Bankruptcy Act, affecting ordinary civil rights, contained the words "The judgment of the Court to which "under this section the appeal can be made "shall be final." Yet it was held that these were not sufficient to derogate from the Royal prerogative. *Moses* v. *Parker* (1896) A.C. 245,

was a case somewhat resembling *Théberge* v. *Laudry*. It was there held that as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the hands of the Judges as the persons from whom the best opinions might be obtained, and not as a court administering justice between the litigants, such functions do not attract the prerogative of the Crown to grant appeals. In the case of *In re* the Will of Wi Matua, deceased, (1908), A.C., page 448, in which the statute then under consideration declared that the decisions of the Native Appellate Court should in litigation in the region of probate be final, it was held that the Royal prerogative was not excluded.

The Railway Board is constituted by the Railway Act of 1906 (3 Ed. 7, c. 58). By Section 26 very extensive powers are given to them as to the orders they may make affecting the rights and obligations of railway companies. For the purpose of exercising their jurisdiction they are a Court of Record, and have all the powers of a Superior Court. By Section 56, Sub-section 2, an Appeal, if allowed by a Judge of the Supreme Court, lies to that Court from the Board on any question of jurisdiction, and by Sub-section 3, on any question of law by leave of the Board to the same tribunal. By Sub-section 5 of the same Section the Supreme Court is to certify to the Board its opinion on the question of jurisdiction or of law so referred to it, and the Board is to make an order in accordance therewith. And by Sub-section 9 it is provided that the order of the Board is to be final, and is not to be restrained or reviewed, questioned or removed by prohibition, injunction, &c.

It is argued that, as the Supreme Court only certifies its opinion, the order made is the order

of the Board and this is declared to be final. But a Court of Appeal, unless empowered to make such an order as they think the Court appealed from should have made, can only certify its opinion to the Court appealed from, leaving it to the latter to act upon the opinion so expressed and to make the proper order. That is merely machinery, however. Moreover, it is expressly provided by Sub-section 3 of Section 56 that the Court is to determine the questions of jurisdiction and of law referred to it. These determinations are decisions of that tribunal, and in their Lordships' opinion the language of the section is not sufficient, according to the authorities cited, to take away the prerogative of the Crown.

They therefore think that an Appeal to the Crown lies from the Judgments appealed against.

The question of the jurisdiction of the Committee or the Board to make the orders complained of depends in the first instance on whether these respective lines of rails are laid "upon or along or across a highway" as that word is defined by Section 2, sub-section 11 of this Statute of 1906. That is the condition precedent which must be satisfied before jurisdiction attaches. Now, a highway is defined to include "any public road, street, lane or other "public way or communication."

The material facts necessary to be considered in order to determine the question of the jurisdiction of the Committee and Board to make these orders are as follows:—The City of Toronto lies along the northern shore of that part of the Lake of Ontario called the Harbour of Toronto. Its streets run, for the most part, parallel to the shore, east and west, and at right angles to the north and south. Of the first class, the nearest to the shore was Front Street. In the

year 1840, before either of the railway lines was constructed, these cross streets ran down from the north and debouched upon Front Street, which it was only necessary to cross to gain ready access to the Harbour.

On the 21st of February in that year the Crown, by Patent, granted to the City of Toronto all the land lying between the top of the bank of the harbour and the water's edge within the limits therein mentioned, and also granted certain lands covered with water situate in front of the City of Toronto, called water lots, therein described, to hold in trust for the public purposes of the city, and from time to time to lease the said water lots and strips of land for terms not exceeding 50 years, reserving such reasonable rent as the Mayor, Aldermen, and Common Council of the city should order and direct, subject to certain covenants, to fill up the same and build thereon, and also to make an esplanade running east and west. The portions of the subaqueous soil of the harbour opposite the termination of the streets running north and south were reserved to the Crown. These inlets, save to the extent hereinafter mentioned, have never been built upon, and the water of the bay still flows over them. They are called *slips*.

The esplanade not having been built by the Corporation of Toronto, an Act of the Province of Canada was passed on the 15th of June 1853, enabling them to contract with any person or persons who might be willing to construct it in front of and upon the water lots described in the Letters Patent.

In exercise of this power the Corporation entered into a contract, bearing date the 30th of August 1856, with the Grand Trunk Railway Company, for the construction of an esplanade along the water front, 100 feet wide, upon the line originally designed in the Patent of 1840.

The specification annexed to this agreement contained the following three passages :—

" Streets.—From Brock Street to Berkeley Street in-
" clusive there are to be sixteen streets graded so as to
" connect the Esplanade with the natural shore of the Bay.

" Brock Street, Peter Street, and John Street, will have
" to be graded to the form of inclined planes of no greater
" degree of inclination than one foot rise in sixteen and a
" half feet horizontal.

" All the other streets will be formed by level embank-
" ments of corresponding height to the Esplanade, and
" extending from its rear line to junction with the several
" streets as they now slope down to the water."

The map referred to in this Agreement, No. 4, clearly shows that the line of the shore o f the harbour opposite Front Street was irregular ; that many wharves had been built along it jutting out into the lake far beyond the line of the proposed esplanade, and that land covered with water intervened between the line of the proposed esplanade and Front Street.

This contract was admittedly carried out, and the esplanade constructed under it. The last-mentioned space was filled up, and the cross streets coming from the north, which theretofore debouched on Front Street, were prolonged across this newly-formed land and made to debouch on the esplanade. The lines of the Grand Trunk Railway were laid along the esplanade on the level, under the authority of a Statute of the Province of Canada passed in the month of June 1857 (20 Vict. c. 80), a space, 40 feet wide from its southern side, being reserved for that purpose. By Section 7 of this Act, lands or property belonging to the Crown, as the soil and bottom of all these great lakes in Canada do, are exempted from its operation.

By a statute of later date, 18th March 1865 (28 Vict. c. 24), it was enacted that the esplanade should be deemed a public highway, and the Corporation were empowered to grant to the

Grand Trunk Railway and two other railway companies named therein a right of way over an additional 12 feet 6 inches of its surface on the southern side. But it is by Section 3 expressly declared that nothing contained in the Act should be construed to grant to these railway companies, or any of them, an estate in fee in the esplanade or any part of it.

In pursuance of this enactment, the Corporation of Toronto, by deed dated the 19th of April 1865, granted to the Grand Trunk Railway and the two other companies named therein, the Great Western and Northern, a right of way over, upon, and along 12 feet 6 inches in width off the south part of the Esplanade Street adjoining the northern limit of the south 40 feet thereof, and extending along Esplanade Street from York Street to the eastern limit of the esplanade, for railway purposes, on the terms and conditions in the said statute and the agreement already mentioned set forth, subject, however, to the condition that none of the railway companies should block up or obstruct any of the public streets or crossings leading over the railway tracks to the wharves or water frontage with any trains, cars or other railway appliances. The above-mentioned condition precedent was, therefore, as to this line admittedly satisfied. The main point of controversy is—Has it been satisfied in respect to the other line? It is clear from the provisions of the before-mentioned statutes, and from the contents of the several documents referred to, that up to this period, at all events, whatever right the public may have had to pass down the several cross streets already mentioned, to traverse Front Street, and thus gain access to the harbour and its waters, was preserved to them unabated. According to the parol evidence in the case this right has up to the present been freely, openly, and continuously enjoyed without

let or hindrance by members of the public, and, most important of all, having regard to some of the points relied upon by Mr. Armour in his able argument, has been sedulously guarded by the legislature as well as by the Ministers of the Crown. The fact that a member of the public had to traverse the made dry land to the south of Front Street and cross the esplanade before he reached the shore of the harbour instead of reaching it as theretofore almost directly from that street itself, could not alter the nature or extent of his right of access to the waters of the lake. After the construction of the esplanade some of the owners and lessees of the water lots filled up their lots, converting them into dry land, and built piers and warehouses upon them; the spaces, however, immediately opposite the several cross streets which would have formed the sites of their prolongations into the harbour, were never granted away by the Crown, but were kept open and used by the public as a means of access to and from the waters of the lake.

Things admittedly remained in this position till the year 1887–88, when the Ontario and Quebec Railway sought authority to construct, and subsequently actually constructed, the branch line called the Don Branch connecting the City of Toronto with their main line. It was subsequently leased to, and is now worked by, the Canadian Pacific Railway Company.

This branch, not being more than six miles in length, Sub-section 18 of Section 7 of the Railway Consolidation Act of 1879 (42 Vict. c. 9) applied; so that it became necessary, before the line could be made, that the Governor in Council should not only approve of its location, as shown upon plans deposited in his office, but should also sanction the making of the line, as well as the appropriation

by the promoters, of the lands necessary to be taken for its construction.

The Governor in Council made an order, dated the 25th of January 1887, approving of the location of the line and sanctioning the making of it, but not containing any express provision for the appropriation of any lands belonging to the Crown. This order was followed by a statute passed 22nd May 1888 (51 Vict. c. 53) authorising the construction of the line and extending the time for its completion to three years, and enacting that the Company should not be restrained by anything contained in it from entering Toronto by the said branch, or *from expropriating* the lands necessary to build their branch. From the map No. 7 referred to in this order it appears that the branch line was to be carried on an embankment abutting on the southern side of the esplanade, resting on the subaqueous soil of the harbour, and consequently upon the shore ends of the water lots and of the slips. The portions of those water lots to be acquired are marked in red, while the inlets, 12 in number, each 66 feet wide, from York Street to Berkeley Street, opposite the several cross streets, including Yonge Street and Bay Street, are coloured white up to the side of the esplanade, and bear the names of the streets to which they are opposite. They are thus evidently treated as the sites of the contemplated prolongation of the streets, the names of which they bear. It was the location and making of the line so delineated and described, which the Governor in Council by his Order of the 25th of January 1887 sanctioned.

By an Agreement dated the 15th of March 1888, five weeks after the Governor in Council has thus sanctioned and approved of the making of the branch line, the Crown provided for a

further encroachment on the harbour, and agreed to grant its soil and bottom to the Corporation up to the New Windmill line, expressly excepting however thereout "*the strips of land, and land* "*covered with water which* coincide with the "southward prolongation of all the streets "now running to the South front of the "esplanade."

In the face of these documents, Mr. Armour contended that the Governor-General in Council had by expressly sanctioning, on the 25th of January 1887, the construction of the branch line, and approving of its location, impliedly sanctioned the acquisition by the Ontario and Quebec Company of the fee simple of the portions of the subaqueous soil of the slips on which their embankment was built; and that the public right of access to the remaining portion of the slip was on the authority of *The Corporation of Vancouver* v. *The Canadian Pacific Railway*, 23, Supreme Court Reports, p. 1, thereby destroyed; and further, that as the Company are prohibited from alienating the land so acquired in fee, they could not dedicate anew to the public a right of way over those lands, and that, therefore, any public right of way which might theretofore have existed could not be re-created.

In their Lordships' view the facts do not sustain this contention, and the decision in the Vancouver case which was based on the terms of a particular statute differing entirely from those contained in the statutes referred to in this case, does not apply.

Moreover, in their Lordships' opinion the words "public communication" as distinguished from "public road, street, lane, or public way," must have been introduced into the definition of a highway to meet a case where the members of the public use or traverse a particular route as a means of arriving at, or returning

from, a particular place whether they do so as of right or by leave and license, express or implied. These words, they think, do not authorise a trespass; but short of that they apply to an actual user by the public whether as of right or not. Indeed it is but natural that this should be so, inasmuch as the action both of the Committee and the Board is directed to promote and secure the convenience and protection of the public, and the danger to the public is the same whether its members traverse the lines of a railway upon which trains run, as of right, or by express or implied permission.

As far then as the highway point is concerned, their Lordships are of opinion that the Railway Committee and the Railway Board had jurisdiction to make the orders they respectively made. The point of law arising on the application of Section 3 of the Railway Act of 1906 to the Tripartite Agreement of the 26th of July 1892, and the statute confirming it, 56 Vict. c. 48, passed 1st April 1893, remains for decision.

This agreement provided, amongst other things, for the closing and diverting of certain streets in the said city; for the construction by the Companies of two bridges over both the railway lines at York Street and John Street, and the maintenance of these bridges as public thoroughfares; for the extinguishment by the city of the existing right of the public (if any) to cross the esplanade at the point where York Street, as diverted, touches it, except at Bay Street; for the cost of the maintenance and construction of certain level crossings over both these lines of rails opposite some of the cross streets; for the abandonment of the site the companies had acquired for their Union Station, and the substitution of an alternative site, and for the construction of the works necessary to effect these several changes.

Article 21 of the Agreement is to the effect that "except as therein otherwise provided the "provisions of the Railway Act and the Muni- "cipal Act so far as application to anything "herein contained shall form part of this "Agreement as if expressly set out therein." The assumption on which this Agreement is based is obviously this, that both the lines of railway should continue to run on the level as theretofore. The Agreement could not of itself confer on the Companies power to carry out the many works, and make the many alterations contemplated by it. It was necessary to obtain Parliamentary powers for that purpose. And accordingly this Act of the Dominion Parliament, 56 Vict. c. 48, was obtained, ratifying and validating the Agreement, enacting that all the works done, or to be done, under it, as well as those affected by it, were works for the general advantage of Canada, and further enacting that each of the parties to the Agreement "might do "whatever is on its part necessary in connection "with any of the said works in order to carry "out and give effect to its undertaking as "embodied in said Agreement." It was by this statute that power and authority were conferred upon the Company to carry out the works specified in, and operate their lines in the manner contemplated by, the Tripartite Agreement. Their Lordships are therefore clearly of opinion that this Act was a special Act within the meaning of the Section 2 sub-section 28 of the Act of 1906. But though the Act empowers the Companies to construct their works and operate their railways in the way proposed, it does not enact that the works it authorises shall, if made, never be altered, no matter how surrounding circumstances may change. To give to it such a construction would result in paralysing both the Committee and the

Board, and in defeating entirely the object of this remedial statute, the Railway Act of 1906.

It has been urged that the works contemplated by the Viaduct Order can only be carried out at enormous cost, and would, if carried out, amount to a physical transformation of the whole system of these two railways, over about five miles of their length; two of each of their four tracts being elevated into the air, and two others left at their former level, but blocked and interrupted so as to be of comparatively little use for through traffic, and that the access of trains to the contemplated station would be cut off or impeded. This may all well be, but the answer to it is (1) that the words " or may order that the " railway may be carried over, under, or along " the highway " have been introduced into Section 238 by the Amending Act of 1909, as if to meet such a case as this, and to confer upon the Board the powers they have exercised; and (2) that unless restricted by the provisions of Section 3 of the Act of 1906, the Board where it has jurisdiction, may make any order of this kind which it deems expedient for the protection, safety, or convenience of the public.

Now Section 3 enacts that where the provisions of the Act of 1906 and of any special Act passed by the Parliament of Canada relate to the same subject matter the provisions of the special Act so far as is necessary to give effect to it are to be taken to override the provisions of the Act of 1906. If the subject matter of the Special Act and that of Section 238 of the Act of 1906, as amended, were the same, then there would undoubtedly be a conflict between the two enactments; but they are not the same; the specified works, the power to construct and use them, form the subject matter of this Special Act. The subject matter of Section 238

is the control of the Board over the Railway Companies, and the power conferred upon it to require the Companies to construct such works as it may deem necessary for the protection and convenience of the public. These are wholly different matters. The two Statutes can stand together. Effect can be given to each. There is no conflict between their provisions, such as is contemplated by Section 3. Section 3 consequently does not restrict in any way the power of the Board; and the question of law referred to the Supreme Court, like that of jurisdiction, was, therefore, in their Lordships' view, rightly decided by the Courts whose decisions have been appealed from. The Appeals should accordingly be dismissed and the Appellants will pay the costs.

In the Privy Council.

THE CANADIAN PACIFIC RAILWAY COMPANY

v.

THE CORPORATION OF THE CITY OF TORONTO AND THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1911.