Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The City of Montreal v. *The Montreal Street Railway Company (Respondents) and The Attorney-General for the Dominion of Canada and The Attorney-General for the Province of Quebec (Intervenants), from the Supreme Court of Canada; delivered the 16th January* 1912.

PRESENT AT THE HEARING:

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

[DELIVERED BY LORD ATKINSON.]

This is an Appeal by special leave from a a judgment of the Supreme Court of Canada pronounced upon the 11th of March 1910, whereby an Appeal from a certain Order of the Board of Railway Commissioners for Canada, dated the 4th of May 1909, was allowed, the said Order set aside, and it was declared that the said Commissioners had no jurisdiction to make the Order appealed from.

The facts of the case are few and are undisputed.

There are in the city of Montreal and the adjacent township two so-called railways. One of these is the Montreal Park and Island Railway, hereafter styled for convenience the Park Railway, and the other the Montreal Street

Railway, which is in fact a tramway laid along the streets of that city and its suburbs, and for convenience may be styled the Street Railway. These railways being constructed on the Island in the St. Lawrence on which the city of Montreal stands are, of course, situate wholly within the Province of Quebec. They connect physically at several points both within and near the limits of the city, and arrangements have been entered into between the Companies owning them by which the cars of each railway run over the lines of the other, and passengers are conveyed from points on one system to points on the other over the permanent way of both. It is not disputed that there is conducted over these lines "through traffic" within the meaning of the statute hereafter referred to.

The Park Railway, though originally constructed and worked under the powers conferred by certain enactments of the Provincial Legislature, was, by a statute of the Canadian Parliament (57 & 58, Vict., c. 84), amended by two other similar statutes (59 Vict., c. 28, and 6 Edward VII., c. 129), declared to be a work for the general advantage of Canada. Railways so declared were in this case called "federal" railways to distinguish them from railways situate wholly within a province, and under the exclusive control of the Provincial Legislature styled provincial railways. It is admitted that by this declaration the railway to which it refers was withdrawn from the jurisdiction of the Provincial Legislature, that it passed under the exclusive jurisdiction and control of the Parliament of Canada, and, small and provincial though it was, stood to the latter in precisely the same relation as far as the enactments upon the true construction of which this case turns, as do those great trunk lines, also federal railways, which traverse the Dominion from sea to sea,

and were originally constructed and are now worked in exercise of the powers conferred by the statutes of the Parliament of the Dominion of Canada. The Board of the Railway Commissioners was created by a Dominion statute (3 Edward VII., c. 58), entitled "The Railway "Act." The Commissioners are officials of the Dominion Government, and in the exercise of their powers are outside the jurisdiction and beyond the control of any Provincial Legislature or Government.

A complaint having been made to them that an unjust discrimination had been made by the Park Railway Company in respect of the rates charged and of the service and operation of this railway between the residents of a certain ward in the city of Montreal, named the Mount Royal Ward, and the residents of an outlying township, named the town of Notre Dame de Grace, in both of which localities they have stations, the Order appealed from was made. It purported to have been made under the authority and by virtue of the powers conferred upon the Commissioners by the Railway Act. By it they directed, first, that the Park Railway Company should 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 as it grants to those residing in Notre Dame de Grace, and that it should forthwith enter into the necessary agreements for the purpose of removing the unjust discrimination which they had found in fact to exist; and, secondly, that with respect to "through" traffic over the Street Railway, the Street Railway Company should "enter into any "agreement or agreements that may be necessary "to enable" the former Company to carry out the provisions of this Order.

The Park Railway, having by statutory declaration become in the manner mentioned a

federal railway, it is admitted that the first portion of this Order dealing with the "unjust discrimination" which it was found to have made was *intra vires*, but the validity of the second part of the Order is challenged, and it has, on behalf of the Street Railway Company, been from the first insisted that the Commissioners had no jurisdiction whatever to make it.

Moreover, it is practically not disputed that the existence in the Commissioners of the jurisdiction challenged, depends itself upon this further consideration, namely, whether, having regard to the provisions of the ninety-first and ninety-second sections of the British North America Act, the Parliament of Canada have any jurisdiction, power, or authority, express or implied, to enact the eighth section of the before-mentioned Railway Act, so far as it affects provincial as distinguished from federal lines. This was in effect the question of law raised by way of appeal from the Order of the Commissioners for the decision of the Supreme Court. It is by the Order of the former body, dated the 8th of June 1909, framed thus: "Whether upon the true construction of "Sections 91 and 92 of the British North "America Act, and of Section 8 of the Railway "Act of Canada, the Montreal Street Railway is "subject in respect of its through traffic with the "Montreal Park and Island Railway Company, "to the jurisdiction of the Board of the Railway "Commissioners of Canada."

It is to be observed that the question is framed in a general form. The jurisdiction of the Commissioners or of the Dominion Parliament is not made to depend in any way on the character, nature, or volume of the "through" traffic. Nor upon the question whether it is of such a kind as to confer special advantages upon Canada or upon two or more of its provinces. And, indeed, Counsel on behalf of the Appellants at the hearing before

their Lordships boldly contended that once a line of railway, though wholly provincial, *i.e.*, situate wholly within one particular province, and not federal, connects with a federal line, and "through" traffic is conducted over both, the jurisdiction of the Commissioners attaches at least so far as this "through" traffic, whatever its character or amount, is concerned.

The Supreme Court by a majority of its members answered the question so put to them in the negative. The question for the decision of their Lordships is whether their answer is right in point of law.

The eighth section of the Railway Act runs as follows :—

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

"(*a*) The connection or crossing of one railway or "tramway with or by another, so far as concerns the "aforesaid connection or crossing;

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

"(*c*) Criminal matters, including offences and penalties; "and

"(*d*) Navigable waters:

"Provided that, in the case of railways owned by any pro- "vincial government, the provisions of this Act with "respect to through traffic shall not apply without the "consent of such government."

It will be observed that if the argument of the Appellants be right this section would seem to subject a provincial railway authorised by an Act of the Provincial Legislature to all the provisions of this statute of the Canadian Parliament dealing not only with the physical connection or crossing of the two lines and with

the through traffic, but also with criminal matters, offences, and penalties, whether connected with the through traffic or not, and further with the relations of the provincial line and its traffic with navigable waters. As to all these matters the jurisdiction and control of the local legislature is superseded or overborne, comparatively little is left to that authority, and the line itself is placed in this unfortunate position that its local traffic is put under the jurisdiction and control of the Provincial Legislature and the officials of the local government, and its through traffic, with all these other matters, is subjected to the jurisdiction and control of the Dominion Legislature and the officials of the Dominion Government. A most unworkable and embarassing arrangement.

Now the effect of Sub-section 10 of Section 92 of the British North America Act is, their Lordships think, to transfer the excepted works mentioned in sub-heads (*a*), (*b*), and (*c*) of it into Section 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament.

These two Sections must then be read and construed as if these transferred subjects were specially enumerated in Section 91, and local railway as distinct from federal railway were specifically enumerated in Section 92.

The matters thus transferred are :—

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

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

(*c*) Works, wholly situate within the province, but declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces.

These works are physical things, not services. The appropriate number of the group would probably be 29 or 29 (*a*). It has accordingly been strongly urged on behalf of the Respondents that if it be desirable in the interest of the Dominion to place the through traffic on a provincial line, such as the street railway, under the control of the Railway Commissioners, owing to its nature, character, or amount, the proper course for the Dominion Parliament to take, and the only course it can legitimately take, is by statutory declaration to convert the provincial line into a federal line, thus removing it from the class of subjects placed under the control of the legislature of the province, and placing it amongst the classes of subjects over which it has itself exclusive jurisdiction and control. And further, that there is nothing in the British North America Act to show that such an invasion of the rights of the Provincial Legislature, as is necessarily involved in the establishment of this embarassing dual control over their own provincial railways, was ever contemplated by the framers of the British North America Act. It has, no doubt, been many times decided by this Board that the two Sections 91 and 92 are not mutually exclusive, that their provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a Provincial Legislature over a field of jurisdiction common to both the former must prevail; but, on the other hand, it was laid down in the *Attorney-General of Ontario* v. *The Attorney-General of The Dominion* (1896), A.C. 348; (1) that the exception contained in Section 91, near its end, was not meant to derogate from the legislative authoritive given to Provincial Legislatures by the sixteenth sub-section of Section 92, save to the extent of enabling the Parliament of Canada

to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in Section 91 ; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in Section 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the Provincial Legislature by Section 92 ; (3) that these enactments, Sections 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in Section 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in Section 92 ; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by Section 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces ; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in Section 91, namely, the regulation of trade and

commerce. Taken in their widest sense these words would authorize legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in Section 92, and would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involves in respect of one of the matters enumerated in Section 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concern the peace, order, and good government of Canada nor upon the ground that they deal with the regulation of trade and commerce.

It follows, therefore, that the Act and Order if justified at all must be justified on the ground that they are necessarily incidental to the exercise by the Dominion Parliament of the powers conferred upon it by the enumerated heads of Section 91. Well, the only one of the heads enumerated in Section 91 dealing expressly or impliedly with railways is that which is interpolated by the transfer into it of sub-heads (*a*), (*b*), and (*c*) of Sub-section 10 of Section 92. Lines such as the street railway are not amongst these.

In other words, it must be shown that it is necessarily incidental to the exercise of control over the traffic of a federal railway in respect of its giving an unjust preference to certain classes of its passengers or otherwise, that it

should also have power to exercise control over the "through" traffic of such a purely local thing as a provincial railway properly so-called, if only it be connected with a federal railway. The Commissioners have by the three hundred and seventeenth section of the Railway Act vast powers over federal railways. They can compel the companies who own such lines to make all the arrangements therein mentioned for receiving and forwarding traffic of all kinds, through or local, and also to compel them to conduct their business so as not to give an unjust preference to any person or persons or body or bodies corporate; but it is not to be assumed that the provincial railway companies would in the reasonable conduct of their business refuse to make such agreements with federal railway companies as would enable the latter to discharge the obligations which might be placed upon them under this section, and still less is it to be assumed that the Provincial Legislature would fail to exercise their own legislative powers to compel recalcitrant companies over which they had control to enter into such agreements if they refuse to do so. As long as it is reasonably probable that the provincial companies will enter into such agreements, or will be coerced to enter into them by the Provincial Legislature which control them, it cannot be held, their Lordships think, that it is necessarily incidental to the exercise by the Dominion Parliament of its control over federal railways that provincial railways should be coerced by its legislation to enter into these agreements in the manner in which it sought to coerce the Street Railway Company in the present case to enter into the agreements specified in the order appealed from. There is not a

suggestion in the case that the "through" traffic between this federal and this local line, or between any other federal or local line, had attained such dimensions before this Railway Act was passed as to affect the body politic of the Dominion. If it had been so the ready way of protecting the body politic was by making such a statutory declaration in any particular case or cases as was made in reference to the Park line. The right contended for in this case is in truth the absolute right of the Dominion Parliament wherever a federal line and a local provincial line connect to establish, irrespective of all consequences, this dual control over the latter line whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any classes of the customers of the former line. In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unauthorized invasion of the rights of the legislature of the Province of Quebec.

One of the arguments urged on behalf of the Appellants was this: The through traffic must, it is said, be controlled by some legislative body. It cannot be controlled by the Provincial Legislature because that legislature has no jurisdiction over a federal line, therefore it must be controlled by the legislature of Canada. The answer to that contention is this, that so far as the "through" traffic is carried on over the federal line, it can be controlled by the Parliament of Canada. And that so far as it is carried over a non-federal provincial line it can be controlled by the Provincial Legislature, and the two Companies who own these lines can thus be respectively compelled by these two legislatures

to enter into such agreement with each other as will secure that this "through" traffic shall be properly conducted; and further that it cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of "through" traffic.

On the whole, therefore, their Lordships are of opinion that Section 8, sub-section *b*, of the Railway Act is, as regards provincial lines of railway properly so called, *ultra vires*, (upon the other sub-sections it is unnecessary to express any opinion); that the Order of the Commissioners of the 4th of May 1909 was, in respect of its second part, made without jurisdiction; that the decision of the Supreme Court was right, and that this Appeal should be dismissed with costs. The Intervenants will pay any costs incurred owing to the interventions. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE CITY OF MONTREAL

v.

THE MONTREAL STREET RAILWAY COMPANY (RESPONDENTS) AND THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND ATTORNEY-GENERAL FOR THE THE PROVINCE OF QUEBEC (INTERVENANTS).

DELIVERED BY LORD ATKINSON.

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

1912.