

vs. Toronto and G. T. R. (1911), A. C. 461. In that case, the method of protection at certain streets was by agreement fully provided for. That agreement, as the bylaw in the present case, was ratified both by Parliament and Legislature. It is true that, since the agreement was made, the scope of railway operation dealt with was enlarged, the C. P. R. having acquired an additional 26 ft. of land to the south of and enlarging its former right of way; so the special act—as the agreement had become—really did not deal with the whole of the questions considered by the Board, and consequently did not in any way interfere with the Board's jurisdiction under the provisions of the general act. The decision, however, does not proceed on any such ground, but upon the broad, general principle that the subject matters are not the same. The judgment of Lord Atkinson, who stated the reasons for their Lordships' decision in the Toronto case reads as follows: "If the subject matter of the special act and that of sec. 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 sec. 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 as contemplated by sec. 3."

As in the Toronto case, the company proceeded under the special act,—built its line and supplied its station and facilities. In my view, however, the enabling special act does not in effect provide that the company's work or appliances shall never be altered or changed, no matter how surrounding circumstances and conditions may change, or however inadequate and faulty the facilities so supplied may become.

A distinction, of course, exists between this and the Toronto case, in that it cannot fairly be said that the change here is necessary in order to protect the public in the use of highway crossings over the existing railway. The railway company has already filed plans for an overhead structure along Hunter St., the effect of which would be to eliminate highway crossings now more or less dangerous; but the subject matter of the bylaw and the validating legislation not being the question of the Board's jurisdiction or the limitation of that jurisdiction, should the act, under any other section, give jurisdiction to the Board to make an order as applied for, it seems to me that the cases are parallel.

In the Toronto case, the particular subject of consideration, in so far as this question is concerned, was the fact that the special act provided specifically for a certain measure of highway protection leaving the railway on the level—the jurisdiction of the Board to nevertheless elevate the railway for the protection of those using the highway was sustained. In this case, the special act undoubtedly fixes the railway location, an object, however, as much removed from the general question of the Board's control over the railway as that of the protection of the Toronto crossings could be said to be.

I should also point out that sec. 8 of the Dominion statute validating the agreement (58-59 Vic., ch. 66), specially provides that nothing in the act contained should affect any rights or powers conferred by the Rail-

way Act on the Railway Committee of the Privy Council. This provision would seem to indicate the intention to continue public control of the railway through the agency then used for such progress—the Railway Committee of the Privy Council—to which the Board may be said to be the statutory successor (sec. 11 of the Railway Act).

Dealing with the second objection, sec. 167 provides—"If any deviation, change, or alteration is required by the company to be made in the railway, or any portion thereof as already constructed, a plan of the portion of such railway proposed to be changed, showing the deviation, change, or alteration proposed to be made shall be submitted for the approval of the Board, and may be sanctioned by the Board."

Under sub-sec. 2, the plan of the portion of the railway proposed to be changed, if sanctioned, will be dealt with in the manner that the act provides for the original plan; and, under sub-sec. 3, the company may then make the deviation, change, or alteration, and all provisions of the act will apply to such portion of the line in the same manner as they applied to the original line.

In dealing with the approval of location plans, the Board, while bound by the general location as approved by the Minister, may, unless the Minister otherwise specifically directs, sanction a deviation of not more than one mile from any one point on the location approved by the Minister (sec. 159, sub-sec. 3 Railway Act). The approval of the Board must be obtained before construction takes place.

Under sec. 26, sub-sec. 2, "The Board may order and require any company to do forthwith any act, matter, or thing which such company is or may be required or authorized to do under this act."

Sec. 28 also provides that "the Board may, of its own motion, inquire into, hear, and determine any matter or thing which, under this act, it may inquire into, hear, and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this act."

Sub-sec. 2 further provides that the Board's powers may be exercised from time to time, or at any time as the occasion may require. Sec. 29 provides that the Board may review, rescind, change, alter, or vary any order or decision made by it, while sec. 32 (2) gives the Board like powers in regard to regulations and orders made by the Railway Committee of the Privy Council.

I have had much difficulty in arriving at a conclusion as to the proper effect to be given to sections 26 and 28. It seems to be clear that, as a result of the provisions of sec. 28, the Board, of its own motion, may determine any question it would have a jurisdiction to determine on application or complaint. This section, however, of itself does not enlarge that jurisdiction which the Board would otherwise have after an application or a complaint was made to it.

Looking at the sections dealing with the locations of lines themselves, it might be said that the duty was thrown upon the company of submitting its location plans; that location questions were matters relating to the policy and business venture of the company and were directly dependent upon financial considerations. Hitherto, the Board's jurisdiction does not seem to have been exercised in compelling the company to file location plans, or in compelling the company to construct its railway by a specified time. It seems to have been taken for granted that the company was bound by the provisions of the act as to when the work of construction should be

commenced and as to when it should be finished, and that the Board's duty was to see that location plans, if filed, were proper, and work, if constructed, was sufficient and safe.

The Board's jurisdiction in dealing with a deviation is similar to that the Board exercises in dealing with the general location plan; and the fact that the Board's province as indicated by the appropriate section in each case is that of sanctioning instead of ordering is probably the reason why no application in the past seems to have been pressed for an order requiring either original railway construction or deviation in the supposed interests of any particular parties.

It must further be borne in mind that, so far as branch line construction required for industrial purposes is concerned, the Board's power is not confined to a mere sanctioning of the proposition by the railway; but the Board may order the construction of branch lines for industrial purposes under the provisions of sec. 226 of the act.

The language of the act differs in dealing with duties of the company to the public, on the one hand, and rights of the company which it may or may not exercise, on the other. For example: Signboards at highway crossings shall be erected and maintained (sec. 243); farm crossings shall be provided (sec. 252); modern and sufficient apparatus shall be provided and be used on all trains (sec. 264); on approaching highway crossings, the whistle shall be sounded and the bell shall be rung (sec. 274); and, under sec. 284, the company shall furnish adequate and suitable accommodation.

On the other hand, questions not related to the protection of the public either using the highways or the trains, and not concerned with the proper demands of traffic, but rather related to the management of the company itself, or the manner in which the statutory powers of the company may be exercised, seem to be dealt with in a different manner. For example: The company may make bylaws for "the appointment of all officers, servants, and artificers, and the prescribing of their respective duties and compensation to be made therefor" (sec. 121, ss. b). The company, again may exercise the general powers for the purposes of the undertaking contained in sec. 151 of the act, and which includes, under ss. (f), the construction and operation of the railway, and under ss. (p), the right, from time to time, to alter, repair, or discontinue it, and substitute another in its stead, as well as a general power which it may exercise to do all acts not enumerated necessary for the construction, maintenance, and operation of the railway, ss. (q). In like manner, under sec. 176, the company may take possession of the lands of other companies, subject, of course, to the Board's approval being first obtained. It is not necessary to multiply further instances for the purposes of showing an apparent distinction in the position of companies under certain sections of the Act.

In order to find a jurisdiction in this case, it seems to me that it is necessary to rely upon sections 26 (ss. 2), and sec. 28, and to treat said sections as applicable, notwithstanding any implication which might otherwise arise by reason of the different manner in which obligations, on the one side, and rights of the company, on the other, are treated. Apart from such sections, the Board's jurisdiction, in a case of a deviation, is to sanction and not to order. Under an analogous section, 261, the late Chief Commissioner held that the Board cannot open a road for traffic against the desires of the company or without its making an application for an order for such