Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Toronto and York Radial Railway Company, v. The Corporation of the City of Toronto, from the Court of Appeal for Ontario; delivered the 14th November 1913.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD SHAW.
LORD MOULTON.

[DELIVERED BY LORD MOULTON.]

This is an appeal by leave of the Supreme Court of Ontario from an order of the Appellate Division of that Court dated the 13th day of February 1913, allowing an appeal from an order of the Ontario Railway and Municipal Board pronounced on the 17th day of June 1912 and setting aside such order. The history of the litigation in this matter is as follows:—

The Toronto and York Radial Railway Company is a railway company which, so far as is material to the decision of the present case, may be taken to be the successors in law to the Metropolitan Street Railway Company of Toronto, which was incorporated by an Act of Legislature of the Province of Ontario passed in the 40th year of the reign of Queen Victoria, and chaptered 84 for the purpose of constructing, maintaining, and operating railways upon and along streets and highways within the jurisdiction of the Corporation of the City of Toronto, and of any of the adjoining municipalities as they might be

authorised to pass along, under and subject to any agreement thereafter to be made between that Company and the Councils of the said City and of the said municipalities, and subject to any byelaws of the same.

At the date of the passing of the said Act and until the first day of January 1888 the portion of Yonge Street, to which this case relates, was within the County of York, but by Proclamation dated the 24th September 1887 the boundaries of the City of Toronto were extended so as to include a portion of such county, such proclamation to take effect from the 1st day of January 1888. By virtue of such extension almost the whole of the aforesaid portion of Yonge Street became included within the boundaries of the City of Toronto, but a small portion at the northern end situated opposite to and to the south of Farnham Avenue still remained within the County of York.

Prior to the above-mentioned extension of the boundaries of the City of Toronto, and while the said portion of Yonge Street was still within the County of York, an agreement dated the 25th June 1884 was made between the Municipal Council of such county and the Metropolitan Street Railway Company of Toronto. By the terms of that agreement the Railway Company obtained the right to construct, maintain, complete, and operate a rail track in, upon, and along the above portion of Yonge Street, such track to be located and constructed on the west side only of the said street, according to plans to be approved. The Company undertook to run at least two cars each way, morning and evening, on a regular time table at such times as would best meet the wants of the residents and the general public. The privilege and franchise granted by the agreement were to extend over a period of 21 years from its date, and subject to the observance of the

conditions and agreements therein contained (which covered many matters not directly relevant to the present dispute) the Company were to have the exclusive right and privilege to construct a street, rail, or tramway in and upon the said portion of Yonge Street. By a further agreement between the same parties dated the 20th day of January 1886 the privileges granted by the preceding agreement were confirmed and enlarged in various respects not relevant to the present case, otherwise than that by Clause 16 of this agreement the privilege and franchise granted by it in the previous agreement were made to extend over a period of 31 years from the 25th day of June 1884 so that they will expire in June 1915.

It is solely under the two agreements above referred to that the Metropolitan Street Railway Company of Toronto acquired and that their successors, the present Appellants, possess the right to maintain and operate the Street Railway along the portion of Yonge Street to which this case relates, and they are bound in respect of such privilege and franchise by all the terms and conditions of such agreements. Very numerous Acts of Parliament (being either general Railway Acts relating to all Railways in the Province or special Acts relating to the Appellant Company or Companies of which it is the successor) were cited in the argument, but their Lordships are unable to discover in any of such Acts any legislative provision which exempts the Appellants from the performance of the conditions of the agreements under which they have obtained these privileges and franchises which they still enjoy. According to the well-known principles of the construction of statutes, clear words are required to give to them a meaning which would interfere with existing contractual arrangements, and their Lordships are of opinion that so far as concerns

the said privileges and franchises obtained under the said two agreements, such words are entirely absent in the present case. It is unnecessary, therefore, to examine in detail the portions of these statutes which were cited in argument excepting so far as may be necessary to understand the decision of the Ontario Railway and Municipal Board which formed the subject of the Appeal to the Court below.

By an Act of 1893 the Metropolitan Street Railway Company of Toronto changed its name to the Metropolitan Street Railway Company and by an Act of 1897 it again changed its name to the Metropolitan Railway Company, but such changes of name have no effect on the rights of the parties to this dispute. On the 6th day of April 1894 an agreement was made between the Municipal Corporation of the County of York and the Metropolitan Street Railway Company, whereby amongst other things it was provided that the Company might deflect its line from Yonge Street and operate same across and along private properties after expropriating the necessary rights of way under the provisions of the statutes in that behalf. At the date of such agreement, the County of York had no rights whatever in the portion of Yonge Street to which the present dispute relates, except the small portion at the northern end hereinbefore referred to, and it is not contested that the agreement in question could not affect the rights of the Appellants otherwise than with regard to such portion of their track in Yonge Street as lay north of the then boundary of the City. But it is necessary to refer to this agreement, inasmuch as much reliance was put upon it as justifying the deviation from Yonge Street, north of the City boundary. Their Lordships do not feel called upon to decide whether as against the Municipality of the County of York,

the Appellants acquired the right to make the line in its new position, or whether its so doing would be consistent with their duties, or within their powers in other respects because they are of opinion that nothing done under the powers of this agreement can in any way affect the rights of the Respondents with regard to the portion of Yonge Street owned by them and situated within their own jurisdiction.

On the 11th May 1911 the proceedings in this matter were commenced by an application being made to the Ontario Railway and Municipal Board on behalf of the Appellants for the approval by the Board of "a plan to deviate the "track on the metropolitan division from Yonge "Street to a private right of way" which was described as being about 125 feet to the west, running parallel with Yonge Street. On looking at the plan it is obvious that this is a misdescription of the proposal, in that the proposed line lies only partially upon land proposed to be acquired by the Railway Company, and that it crosses in four or five places public highways which are not and necessarily cannot be described as portions of a private right of way. The object and effect of the proposed plan is plain. The Company desired by it to take the line off Yonge Street without obtaining the consent of the Municipality, and it was not concealed from their Lordships in the argument that it would in future be contended that thereafter they would not be using the franchise or privilege obtained by the agreements of 1884 and 1886, or be affected by the fact that such franchise and privilege would terminate in June 1915.

The Respondents, the Corporation of Toronto, opposed the application, and contended that the Company had no right to deviate from Yonge Street, and that the Board had no jurisdiction to

allow the deviation. The Board rejected that contention, and on the 25th day of October 1911, they delivered a written opinion to the effect that the Company had the right to deviate to their own right of way. It has been strongly contended before their Lordships, as it was in the Court below, that the Respondents were bound forthwith to appeal against this expression of opinion of the Board, and that their not having done so should have been punished by a refusal of leave to appeal from the operative order subsequently made by the Board, or should at any rate preclude them from disputing the correctness of the view of the Board as to the law of the case in any subsequent proceeding. Their Lordships are of opinion that there is no foundation for such a contention. The application to the Board was to approve a plan, and until it had made an operative order it was not incumbent (even if it was permissible) upon any objector to appeal against interim expressions of the view of the Board in matters of fact or law. It might well be that the operative order might not have been objectionable to the Corporation, and until they learnt its terms they could not be required to decide whether they would dispute it or not.

On the 17th June 1912 the Ontario Railway and Municipal Board made an order approving the plans filed by the Appellants and on the 16th September 1912 leave was obtained to appeal against that order. On the 13th February 1913 the Appellate Division of the Supreme Court of Ontario gave an unanimous judgment allowing the appeal and setting aside the order and it is from this decision that the present appeal is brought.

Their Lordships are of opinion that the decision of the Appeal Court was right and should be affirmed. The line of the Appellants

in the portion of Yonge Street which ever since 1st January 1888 has been within the City of Toronto has been held and operated by the Appellants or their predecessors under and by virtue of the franchises and privileges obtained by them under the agreements of 25th June 1884 and 20th January 1886. It is true that these agreements were made with the County of York (within whose jurisdiction this portion of Yonge Street then lay) and not with the City of Toronto but by the Indenture of 20th August 1888 the County of York conveyed to the City of Toronto the whole of its interests in the portion of Yonge Street within the City. It is not necessary to decide whether under the circumstances the Corporation of Toronto became formally the successors of the County of York under the agreement, so far as it related to this portion of the track, to such an extent that they could have enforced obedience to the terms of the agreement by proceedings in their own name, because even if that were not so, the County of York were clearly trustees on behalf of the Corporation of Toronto of their rights under these agreements with regard to such portion of the track and could not have released the Appellants from any of its conditions otherwise than by the request or with the consent of the Corporation of Toronto. The Appellants are thus bound by the whole of the obligations of those agreements so far as they relate to such portion of the track. As has already been said there has been no statutable release from those obligations, and it is clear beyond the necessity of argument that if those obligations still exist the proposed new line is not in conformity with them. Their Lordships further are of opinion that the proposed line is neither a deviation nor a deflection within the

meaning of the statutes quoted in the argument, relative to the powers of Railway Companies in general or the Appellants in particular to deviate or deflect their track, but is a new line which the Appellants are desirous of constructing and operating without having obtained any franchise or statutory authority so to do.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The Appellants will pay the cost of the appeal.

In the Privy Council.

THE TORONTO AND YORK RADIAL RAILWAY COMPANY

v.

THE CORPORATION OF THE CITY OF TORONTO.

DELIVERED BY LORD MOULTON.

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