4, 1915

In the Privy Council

RECORD.

No. 61 of 1914.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN:—

THE TORONTO SUBURBAN RAILWAY COMPANY,

Appellant,

—AND—

THE CORPORATION OF THE CITY OF TORONTO,

Respondent.

APPELLANT'S CASE.

1. This is an appeal from the Judgment of the Appellate Division of the Supreme Court of Ontario, dated the 4th day of June, 1913. The case came originally before the Ontario Railway and Municipal Board by way of application by the City of Toronto, dated 25th April, 1912, asking that the Appellant Company be ordered and directed to reconstruct and put in a proper and sufficient state of repair its tracks and substructures on Bathurst Street and Davenport Road in the City of Toronto, together with that part of the roadway used for railway purposes and eighteen inches on either side thereof. The Board ordered the Company to dig out and pave that part of the roadway used for railway purposes and eighteen inches on either side thereof with such material as the Engineer of the Board should direct. p. 7 p. 2 p. 2

2. On appeal to the Court of Appeal for Ontario, the Court held that the Board had jurisdiction to order the Railway to pave and to determine the character of the pavement, but that it could not delegate this power to its Engineer and referred the matter to the Board in order that the Board might itself direct what kind of material should be used in the paving. p. 7

3. From this Order of the Court of Appeal the Railway is now appealing.

4. The Appellant Railway contends that under the agreement in force between it and the Respondent Municipality it is obliged only to repair the said portions of the roadway not to construct a new roadway or pavement.

5. The Respondent Municipality wishes to construct a costly roadway and contends that the Appellant Railway is obliged to pave the said por-

APPELLANT'S CASE

tions of the roadway with such costly material. It is estimated that the difference in cost between a repair of the existing portions of the roadway and the construction of the proposed new roadway on those portions will be in the neighborhood of $50,000.

6. The agreement between the Respondent Municipality and the Appellant Railway will be found set out in the Record. The section dealing
p. 25 directly with the question of repair is for convenience set out here and reads as follows:

> "6. The Company shall where the rails are laid upon the trav-
> "elled portion of the road, keep clean and in proper repair that por-
> p. 27 "tion of the travelled road between the rails and for eighteen inches
> "on each side of the rail or rails lying on or being next to the travel-
> "led road, and in default the Township may cause the same to be done
> "at the expense and proper cost of the Company."

This agreement was made on the 4th day of September, 1899, and was confirmed by Statute of the Legislature of Ontario, being Chapter 124, 63 Victoria.

7. The Respondent Municipality contends that even if this agreement does not entitle them to require the Company to put down a new kind of
p. 16 pavement, still that the Board had under Section 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, Ontario, the power to order the Appellant Railway to do so, notwithstanding any agreement between the Railway and the Municipality.

8. The Appellate Division held:

(1) That the Railway Board had the power under Section 3 of
p. 6 the said Act to order the Railway to construct a new roadway not merely to repair the existing one, notwithstanding any agreement between the Railway and the Municipality.

(2) That the agreement gave the Municipality the right to compel the Railway to put down a new roadway and that it is not a sufficient
p. 5 compliance with the agreement merely to keep the existing roadway in proper repair.

9. The question to be decided is:

(a) Whether under the agreement in question the Company is obliged to do more than keep clean and in proper repair the roadway existing from time to time or whether whenever the Municipality desires to construct a new roadway the Municipality can require the Company to also construct a new roadway of similar character upon those portions of the highways occupied by their tracks.

(b) Whether if the Company is not so obliged under its agreement the Board has jurisdiction to make it do so, notwithstanding the agreement.

The Appellant submits the judgment of the Appellate Division of the Supreme Court of Ontario is wrong and should be reversed for the following, among other reasons:—

BECAUSE:—

1. Under Section 6 of the Agreement hereinbefore referred to the only duty upon the Appellant was to keep clean and in proper repair that portion of the roadway referred to and there was no duty imposed upon the Appellant to construct a roadway on that portion.

2. If the Municipality desired a new roadway or pavement it must put same down at its own cost and expense while under Section 6 of the agreement above referred to only the duty of keeping same clean and in proper repair would rest upon the Appellant.

3. The term keep clean and in proper repair does not include building or constructing a roadway or converting a mud or macadam road into a paved road.

4. The Statute of Ontario 10 Edward VII., c. 83, s. 3, does not authorize the Ontario Railway and Municipal Board to direct the Appellant to construct and pave the roadway in question.

5. The word "tracks" mentioned in said Section 3 of the said Act does not cover or include the roadway or roadbed on which such tracks are placed, but has the same meaning in the Act as it has in the agreement of September 4th, 1899, between the Appellant and the Municipality.

I. F. HELLMUTH,
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AND

THE CORPORATION OF THE CITY OF TORONTO, ... *Respondents*

Case for Appellants

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