f. 1913.

No. 64 of 1914.

In the Privy Council

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

BETWEEN

THE TORONTO SUBURBAN RAILWAY COMPANY,

(RESPONDENT) *Appellant,*

AND

THE CORPORATION OF THE CITY OF TORONTO,

(APPLICANT) *Respondent.*

CASE FOR THE RESPONDENT.

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1. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, delivered on the 4th day of June, 1913, on an appeal by the appellant from an order of the Ontario Railway and Municipal Board dated the 25th day of June, 1912. Record p. 7 Record p. 2

RESPONDENT'S CASE.

2. The Ontario Railway and Municipal Board had, on the application of the respondent, by the said order, directed the appellant " to dig out and pave that part of the roadway used for railway purposes and eighteen inches on either side thereof," of Bathurst Street and Davenport Road, in the municipal limits of the respondent, and had provided that " in case of difference between the applicant and the respondent as to the kind of pavement to be put down, the matter shall be determined by the Board's engineer."

3. The said judgment appealed from remitted the matter to the Ontario Railway and Municipal Board in order that the said Board should determine the kind of pavement to be used, but declared that " the said Board had jurisdiction to order the appellant to pave those portions of the streets named in the said order, which, by the said order, they were ordered to pave, with such material as the Board may order," and further that " according to the true construction of the word ' tracks ' under section 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, chap. 83, such word includes all that part of any roadway occupied by the said Railway Company." It is to the declaratory portion of the judgment appealed from that the appellant takes exception.

Record p. 16

4. The Ontario Railway and Municipal Board was constituted by Statute 6 Ed. VII. chap. 31 (Ont.) (1906). By sec. 16 of the Ontario Railway and Municipal Board Act, 6 Ed. VII. chap. 31 (Ont.) (1906), as amended by 2 Geo. V. chap. 37, sec. 2 (Ont.) (1912), it is provided: "The Board shall have all the powers and authority vested in it by ' The Ontario Railway Act, 1906,' and shall also have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested;

(*a*) Complaining that the company or any person or municipal corporation has failed to do any act, matter or thing required to be done, by this Act, or the said Act, or the special Act, or by any regulation, order, or direction made thereunder by the Lieutenant-Governor in Council, the Board or by any inspecting engineer, or by any agreement entered into by the company with any municipal corporation, or any stipulation, term or condition in any by-law of a municipal corporation, accepted or acted upon by the company or any person, or has done, or is doing, any act, matter or thing contrary to or in violation of this Act, or the said Act or the special Act, or any such regulation, order or direction, or any such agreement, or any such stipulation, term or condition in any such by-law.

(*b*) Requesting the Board to make any order, or give any direction, sanction or approval, which by law it is authorized to make or give."

5. By " The Ontario Railway and Municipal Board Amendment Act, 1910, 10 Ed. VII. chap. 83, sec. 3, (Ont.)," it is provided: " Whenever in the opinion of the Board repairs or improvements to or changes in any tracks, switches, terminals or terminal facilities, motive power or any other property or device used by any railway company in or in connection with the transportation of passengers, freight or property ought reasonably to be made thereto in order to promote the security or convenience of the public or of the employees of the company, or to secure adequate service or facilities for the transportation of passengers, freight, or property, the Board, after a hearing had either upon its own motion or after complaint, shall make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every railway company shall make all repairs, improvements, changes and additions required of it by any such order within the time and in the manner specified in the order." Record p. 16

6. The appellant is a street railway company incorporated under a special Act of the Ontario Legislature, 57 Vict. chap. 94, (1894), under the name of The Toronto Suburban Street Railway Company (Limited), and empowered to take over, inter alia, all the assets, franchises, rights, powers and privileges and all other real or personal property of the Davenport Street Railway Company (Limited), and in such case the Statute provides that the appellant is to be substituted for the latter company in respect of any agreements entered into by it with municipal corporations for the construction of street railways. Record p. 16

7. The Davenport Street Railway Company (Limited), had been incorporated on the 11th day of February, 1891, under the Ontario Joint Stock Companies Act, with the powers conferred by the Street Railway Act of Ontario, and had on the 20th day of April, 1891, entered into an agreement with the Municipal Corporation of the Township of York for the construction of an electric street railway upon, amongst others, the streets referred to in the order of the Ontario Railway and Municipal Board, viz.: Bathurst Street and Davenport Road. Record p. 18

8. This latter agreement was ratified and confirmed by Statute, 57 Vict. chap. 94 (Ont.) (1894), above referred to, and appears as Schedule " B " to this Statute. It is declared to be binding upon the parties thereto and upon the appellant. Record p. 16

9. By section 3 of this agreement it is in part provided: " All the space between the rails and at least one foot six inches immediately adjoining the outside of each rail, as directed by the township engineer or by the Council, shall be paved or macadamized and kept constantly in good order and repair." Record p. 19

10. Under this agreement an electric street railway was constructed and operated upon the travelled portion of Bathurst Street and Davenport Road and other streets by the Davenport Street Railway Company (Limited), and their successor in title, the appellant.

Record p. 25

11. On the 4th day of September, 1899, a new agreement was entered into between the municipal corporation of the Township of York and the appellant expressly terminating and superseding the former agreement of April 20th, 1891, and defining the terms and conditions under which the street railway of the appellant should be operated.

Record p. 23

12. By Statute 63 Vict. chap. 124 (Ont.) (1900), the name of the appellant was changed to The Toronto Suburban Railway Company, and the agreement referred to in paragraph 11 hereof ratified and confirmed with some slight amendments immaterial to the present case, such agreement being made Schedule " B," to such Statute.

Record pp. 27, 29, 31

13. Sections 5, 6, 20, 22, 23, 28 of the said Agreement are as follows:

" 5. All tracks laid on any portion of the travelled street or road shall, so far as is practicable, conform to the street or road, and shall be laid flush with the streets so as to cause the least possible impediment to the ordinary traffic of the streets.

" 6. The Company shall, where the rails are laid upon the travelled portion of the road, keep clean and in proper repair that portion 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 travelled road, and in default the Township may cause the same to be done at the expense and proper cost of the Company.

" 20. All persons using the said street or streets shall be at liberty to travel upon any portion of the roadway occupied by the Company's railway and in the same manner as upon other portions of the highway, and vehicles of every description are to be allowed upon such portion of the highway, it being provided, however that the Company's cars shall have the first right-of-way over the said railway, and all vehicles of persons travelling on that portion of the highway occupied by the railway shall turn out upon meeting or being overtaken by any of the Company's cars so as to give them full right-of-way, provided, however, that no person shall be allowed upon any bridge or part thereof built by the Company, or solely for the Company's use, but such bridge or bridges shall be guarded.

" 22. The alignment of the Company's track, the location of switches and the grades of the roadbed of its railway shall be prescribed by the township engineer or such engineer as the Township may appoint for the purpose, and all work done under the authority of this agreement shall be done in the most substantial manner, and according to the best modern practice under the superintendence and to the satisfaction of the said engineer, with a right of appeal to the Township Council, and the Company shall pay to the said engineer or engineers such compensation for his services as the Township may from time to time certify.

" 23. The rights and privileges conferred by this agreement shall extend over a period of twenty years from the date of these presents, which said period shall be renewed or extended for a further period of ten years in the event of legislation being obtained enabling this to be done, and the Township hereby agree upon the request of the said Company to forthwith aid in procuring such legislation. Upon the expiration of the term of thirty years granted by this agreement, or at such other time as this agreement may be terminated, the Township shall grant to the Company a renewed agreement for a further term of twenty years upon such terms and conditions as shall be mutually agreed upon between the Township and the Company, or determined by arbitration under the provisions of the Municipal Act, and so on at the end of each term of twenty years will grant further renewals for a like term under and subject to the same covenants, provisoes and agreements as are herein contained, except in so far as the same may be varied by mutual agreement or by arbitration as aforesaid, provided, however, if at the expiration of any one of such terms the Company or the Township is unwilling to renew on the terms determined upon by arbitration the Township may at its option take over the railway and all the real and personal property necessarily used in connection with the working of the said railway at a value to be determined by agreement or arbitration as aforesaid, and the privileges of the Company shall continue until the ownership is assumed by the Township.

" 28. Should the Company neglect to keep their track or roadway in good condition according to the terms of this agreement, or to have the necessary repairs according to this agreement made thereon, the Township may give notice requiring such repairs to be forthwith made, and it is agreed between the parties hereto, that a certificate of the engineer for the time being of the Township as to the necessity for such repairs in order to keep the said track or roadway in good condition according to the terms of this agreement shall be binding and conclusive upon the Company, and if, after such notification given

requiring such repairs to be made the Company do not within ten days begin and carry to completion with all reasonable diligence and complete such repairs within thirty days from the receipt of such notice or such further time as the said engineer may allow, the franchise granted by this agreement shall be null and void and at an end, and the Township shall be at liberty at their option to remove the rails of the said Company and to place the said highway in a proper state of repair at the expense of the said Company, the Company agreeing to pay for such work on demand.

14. By orders of the Ontario Railway and Municipal Board dated respectively, January 25th, 1909, and November 25th, 1909, certain lands were detached from the municipal limits of the corporation of the Township of York and added to the municipal limits of the respondent, such orders taking effect, according to their terms on February 1st, 1909, and January 10th, 1910, respectively.

15. As will be seen from the map printed herewith, the portions of Davenport Road and Bathurst Street dealt with by the order of the Ontario Railway and Municipal Board appealed from, are situate within the limits of the lands so annexed to the Municipal limits of the respondent, as aforesaid, and the respondent has succeeded to the rights and obligations of the corporation of the Township of York in respect of its said agreement with the appellant.

16. At the date of the said agreement, viz., September 4th, 1899, Bathurst Street and Davenport Road, including the portions occupied by the appellant's railway, were unpaved roads. It does not appear from the proceedings before the Ontario Railway and Municipal Board whether or not the same were macadamized, but as before pointed out, the obligation imposed on the appellants by their former agreement was to keep their portion of such roads, " paved or macadamized."

17. Section 606 (1) of the Municipal Act, 3 Ed. VII. chap. 19 (Ont.) (1903), provides as follows: " (1) Every public road, street, bridge and highway shall be kept in repair by the Corporation, and on default being subject so to keep in repair, the Corporation, besides being subject to any punishment provided by law, shall be civilly responsible for all damages sustained to any person by reason of such default, but the action must be brought within three months after the damages have been sustained."

This section has been in force since 1873, and first appeared in a somewhat different form in 1851 in the Statute 13-14 Vict. chap. 15, sec. 1 (Canada).

18. On April 25th, 1912, the respondent applied to the Ontario Railway and Municipal Board for an order " ordering and directing the company (the appellant) to re-construct 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." Record p. 1

19. The application of the respondent was heard by the Board on June 25th, 1912, and as in the interval between the notice of application and the hearing the streets in question had been inspected by the Board's engineer, and as there was no dispute between the parties as to the facts, no evidence was taken on the said application. Record p. 9

20. It was conceded on the application that the whole roadway, including the portion thereof for which appellants were responsible, was in a state of great disrepair, and that a new modern pavement was required to meet public needs owing to the importance of highways in question, but the appellants contended that the respondent must furnish such paving and that the obligation of the appellant was limited to keep it in repair.

21. The Board, after hearing argument on the said application, made the order in question in this appeal. Record p. 2

22. The appellant appealed from the said order to the Appellate Division of the Supreme Court of Ontario, the appeal being argued on February 24th, 1913, and judgment being given as above on June 4th, 1913. Record p. 7

23. The reasons for judgment of the Court were delivered by Meredith, C.J.O., who held that the question of what constituted keeping a pavement in the tracks of a railroad company in good order and repair was to be determined somewhat at least by reference to existing and surrounding conditions, and that " having regard to the provisions of paragraph 6, the proximity of the roads to a large and rapidly growing city, the duration of the franchise granted to the appellants by the agreement, the right of the public to use for the purpose of travel that part of the highways on which the railway should be constructed and the powers and duties under the Municipal Act of municipal corporations as to highways " the requirement in the agreement in question compelled the appellant to co-operate with the city and to put its portion of the roadway in the same condition as the rest of the street, even though that necessitated the laying of a new pavement. Record p. 4

24. The learned Chief Justice also held that under sec. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, 10 Ed. VII. Record p. 16

chap. 83 (Ont.), above referred to, the Board had jurisdiction to make the order in question.

25. Maclaren and Magee, JJ.A., concurred in the reasons for judgment of the learned Chief Justice, and Hodgins, J.A., agreed in the result.

26. The respondent submits that the judgment of the Appellate Division of the Supreme Court of Ontario is right and should be affirmed for the following reasons:

REASONS.

1. The Ontario Railway and Municipal Board had jurisdiction under 10 Ed. VII. chap. 83, sec. 3 (Ont.), to order the appellant to pave its portions of the streets in question with such material as it should order.

2. The said Board had jurisdiction as aforesaid by virtue of 6 Ed. VII. chap. 31, sec. 16 (Ont.) (1906), as amended by 2 Geo. V. chap. 37, sec. 2 (Ont.) (1912).

3. The agreement of September 4th, 1899, between the appellant and the respondent's predecessor in title should be construed with regard to the existing and surrounding conditions and with regard also to the circumstances likely to arise during the term of the agreement.

4. The said agreement imposed upon the appellant the necessity of the fulfilment of their duties thereunder in accordance with the "best modern practice," and if conditions required a modern pavement upon the travelled roadway, it was bound to so pave its share of such travelled roadway.

5. The obligations of the respondent under the Municipal Act and those of the appellant under the agreement in question in reference to the travelled portion of the roadway are the same and were so intended by the parties to the said agreement.

6. The respondent's statutory obligation to "keep in repair" its highways, as uniformly interpreted by the Courts, includes the duty of paving such highways with such material as is reasonably necessary having regard to surrounding conditions, and if the contention of the appellant that it is only bound to repair an unpaved road were to prevail, it would be entirely released from its obligation, as it is admitted that the whole of the travelled portion of the road must be paved.

7. "Repair" may, and must, where the state of disrepair is extreme, include reconstruction.

G. R. Geary,
Irving S. Fairty.

PLAN of the CITY OF TORONTO

SCALE 2000 FEET TO 1 INCH.

ALEXANDER & CABLE LITH. CO. TO.

COMPILED BY CITY SURVEYOR AND CITY ENGINEER

PUBLISHED BY CITY ENGINEER NOVEMBER 1912

REFERENCE

			Ac.
1	Original City Limits,	1834-1883, Area	5736.6
2	Yorkville, 46 Vic. Chap. 46,	Feb. 1, 1883, "	543.6
3	Brockton, 47 Vic. Chap. 59,	Mar. 25, 1884, "	1028.9
4	Riverdale, 47 Vic. Chap. 59,	Mar. 25, 1884, "	1318.9
5	North Rosedale, Ont., Proc.,	Jan. 3, 1887, "	99.0
6	Strip North of Queen, Ont., Proc.	" " "	57.8
7	Annex " No. 2	" " "	209.7
8	North "	Jan. 2, 1888, "	49.7
9	North "	" " "	17.0
10	North-west "	" " "	1052.9
11	West S. of No. 1	" " "	91.6
12	Parkdale, 52 Vic. Chap. 73	Mar. 23, 1889, "	650.2
13	Greenwood Side Line, Ont., Proc.	Jan. 6, 1890, "	35.3
14	Lake Shore Rd., 56 Vic. Chap 85,	May 27, 1893, "	12.7
15	Summerhill Ave., Ont. Proc.,	Oct. 2, 1903, "	3.6
16	Pt. Humber Bay & Lake W. of Island	" "	
17	Avenue Rd., Ont. Proc.,	Mar. 3, 1905, "	144.7
18	Rosedale, Ont., Proc.,	Nov. 15, 1905, "	244.1
19	Annex W. of Avenue Rd., Ont. Ry. and Mun. Bd.	Dec. 10, 1906, "	28.2
20	Deer Park, Ont. Ry. and Mun. Bd.,	Dec. 15, 1908, "	243.0
21	Baldwin Estate, "	" " "	51.3
22	East Toronto, "	" " "	535.4
23	Wychwood and Bracondale "	Feb. 1, 1909, "	567.2
24	West Toronto, Ont. Proc.,	May 1, 1909, "	1500.0
25	Midway, Ont. Ry. and Mun. Bd.,	Dec. 15, 1909, "	1353.7
26	Balmy Beach " "	" " "	187.0
27	Earlscourt and Dovercourt "	Jan. 10, 1910, "	639.1
28	Hilliwell Farm, Ont. Ry. and Mun. Bd.,	June 1, 1912, "	37.5
29	Moore Park, Ont. Ry. and Mun. Bd.	July 1, 1912, "	22.5
30	North Toronto, Ont. Ry. and Mun. Bd.,	Dec. 15, 1912, "	2610.0
31	Moore Park, Ont. Ry. and Mun. Bd.,	Dec. 15, 1912, "	270.0
32	Glebe Est., Ont. Ry. and Mun. Bd.,	May 1, 1914, "	74.0

ANNEXATIONS

In the Privy Council No. 64 of 1914

On Appeal from the Appellate Division of the Supreme Court of Ontario

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BETWEEN

THE TORONTO SUBURBAN RAILWAY COMPANY, - (RESPONDENT) *Appellant,*

AND

THE CORPORATION OF THE CITY OF TORONTO, - (APPLICANT) *Respondent.*

Case for the Respondent

FRESHFIELDS,
New Bank Buildings,
31 Old Jewry,
London, E.C.,
Solicitors for Respondent.