Privy Council Appeal No. 64 of 1914.

The Toronto Suburban Railway Company - *Appellants,*

v.

The Corporation of the City of Toronto - *Respondents.*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JANUARY 1915.

Present at the Hearing:

THE LORD CHANCELLOR. LORD PARKER OF WADDINGTON.
LORD DUNEDIN. LORD SUMNER.
SIR JOSHUA WILLIAMS.

[*Delivered by* THE LORD CHANCELLOR.]

This is an Appeal from a judgment of the Appellate Division of the Supreme Court of Ontario affirming, with a variation on a minor point, an order of the Ontario Railway and Municipal Board. The question in the case which presents real difficulty arises on the construction of an agreement made on 4th September 1899, and confirmed by the Toronto Suburban Street Railway Company Act, 1900. This agreement was made between the Corporation of the township of York, within the limits of which was at that time the land on which part of the railway was situate, and the Railway Company. In 1909 this land was included within the municipal limits of the respondents, who succeeded to the rights and obligations of the other corporation. Under the agreement referred to the Railway Company was

given the right to construct, maintain, and operate "an iron or steel rail or tramway, single "and double tracks," subject to certain conditions, along certain roads and streets, including portions of Bathurst Street and Davenport Road, within the land referred to, the motive power to be either electrical or horse power, unless the Corporation should consent to some other power. The Township Engineer and the Town Council were to prescribe the location of the tracks. These tracks when laid on any portion of the travelled road were, so far as practicable, to conform to the street or road, and were to be laid flush with the streets so as to cause the least possible impediment to traffic. Clause 6 was in these terms :—

"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."

By clause 20 all persons using the street were to be at liberty to travel upon any part of the roadway occupied by the railway and in the same manner as upon other portions of the highway. The agreement also enabled the Corporation to take up any part of the street or road along which the railway was constructed for the purpose of altering the street or road grade, and for other purposes, which were to include all those which were within the province and privileges of a Municipal Corporation. There was also a clause enabling the Corporation, in case the Company should neglect to keep their track or roadway in good condition, according to the terms of the agreement, or to have the prescribed repairs made, to give notice to the Company, and in default of the latter executing the repairs, to effect them, and recover

the cost from the Company, and to determine their rights under the agreement. The rights and privileges of the Railway Company under the agreement were to endure for twenty years.

In April 1912 the Respondents applied to the Ontario Railway and Municipal Board, which had power and authority to deal with such matters vested in it under the Ontario Railway Act, 1906, for an order directing the Appellant Company to—

"reconstruct and put in a proper and sufficient state of "repair its tracks and substructures in Bathurst Street and "Davenport Road in the City of Toronto, and eighteen "inches on each side thereof."

The controversy which arose on this application was substantially as follows. The roads in which the rails had been originally laid were at that time mud roads or at all events unpaved. The respondents at the date of the application desired that these roads should be reconstructed and to that end dug out and paved with blocks. The appellants did not contest their liability to keep the portion of the roads between the rails and for eighteen inches on each side of them in repair—but they maintained that they were under no obligation to re-construct this space so as to make it a roadway of an improved character, such as the respondents were designing for the rest of the roadway on each side.

In support of their case the respondents relied, not only on the Agreement itself, but on the Ontario Railway and Municipal Board Act, 1910. This Act provided that 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 services or facilities for the transportation of passengers, freight, or property, the Board, after a hearing had either upon its own motion or after complaint, should make an order directing such repairs, improvements, changes, or additions to be made within a reasonable time, and in a manner to be specified.

As the result of the application the Board made an order directing the appellants to put in a proper and sufficient state of repair its tracks and sub-structures in Bathurst Street and Davenport Road, and to dig out and pave that part of the roadway used for railway purposes and eighteen inches on either side thereof, the applicants being ordered to pave the remaining parts, the Board's engineer to supervise and direct the carrying out of the order and in case of difference to determine the kind of pavement to be put down.

On appeal by the appellants to the Supreme Court it was declared that the Board had jurisdiction to make the order, and that the word "tracks" in section 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, included all that part of any roadway occupied by the railway. The portion of the order of the Board appointing the engineer to determine the kind of pavement to be used was, however, varied on the ground that it did not, as it should in the view of the Court have done, prescribe the kind of pavement which the appellants were to lay, and it was remitted to the Board to itself determine what the kind of pavement should be.

The decision of the Supreme Court was based not merely on the terms of the agreement but also, as a separate ground of judgment, on the language of the section of the Act of 1910

already quoted. With the construction placed by the Court on this section their Lordships find themselves unable to agree. They cannot give to the word "tracks" used in the context in which it occurs in the section the wide interpretation placed on it by the Court, which extends it not only to the rails but to the ground occupied not only between the rails but up to eighteen inches on each side. They think that the words in the section "in or in connection "with the transportation of passengers, freight "or property," indicate an interpretation of a more restricted and literal kind, and exclude from the power given by the section the general roadway itself as distinguished from the rails, &c., laid upon it.

In the opinion of their Lordships the other question, which arises on the interpretation of clause 6 of the Agreement of 1899, presents greater difficulty, and it is only after much consideration that they have arrived at a conclusion on this point. It is argued that the obligation of the Railway Company extends to the portion of the travelled road which the Company occupy, in whatever improved condition that portion may have been put, the purpose of the section being to secure that the entire roadway shall be in the same condition throughout its entire breadth. This argument does not, however, suffice to determine the question at issue. It may well be that if the roadway has been improved by the respondents the standard of repair is what is contended for. But assuming this to be so, the conclusion does not warrant the further inference that the Company have bound themselves to change the condition of the portion of the roadway assigned to them by paving it and so raise the standard of their obligation. It is one thing to undertake to keep what is handed over in proper

repair on the footing of maintaining it in the state into which it has been put, and quite a different thing to interpret an agreement "to keep "clean and in proper repair" as imposing an obligation to lay a new pavement of a kind which did not exist, and was not provided for when the agreement was originally entered into, merely because the municipal authorities have themselves thought it right to improve the remainder of the roadway. Authorities were cited in the course of the argument in support of the different view of the operation of the words of the agreement which was taken by the Supreme Court of Ontario. But in construing a document such as that before them their Lordships do not think that decisions in other cases on the construction of provisions analogous to that before them are of much assistance in a question of this kind. Much turns in each case on the context. The document to be construed must be read as a whole, and in interpreting particular words these cannot be read without reference to what comes before and after. For example, the American case of *Mayor, &c., of New York* v. *Harlem Bridge Company* (186 N.Y., 304) was much relied on in the judgment of the Court below in the present appeal. But there the law of the State appears to have imposed a duty to keep—

"the surface of the street inside the rails and for one "foot outside thereof, in good and proper order and repair, "and conform the tracks to the grades of the streets or "avenues as they now are or may hereafter be changed "by the authorities of the aforesaid towns."

It was held that:—

"When the proper authorities, in view of the condition "of the street as shown to exist, decided that a granite "block pavement should be laid . . . the requirement "for repairing and keeping in good order compelled the "defendant to co-operate with the city and put the space "between its rails in the same condition as the rest of the "street, even though that necessitated the laying of a new "pavement."

It is no part of their Lordships' duty to say whether, if they had to construe a statute containing these words, they would have arrived at the same conclusion as the American Court of Appeals. It is sufficient to observe that the language in the present case differs materially from what the Court of Appeals had to construe. Here the obligation in clause 6 of the agreement is :—

"where the rails are laid upon the travelled portion of the "road to keep clean and in proper repair that portion of the "travelled road between the rails and for eighteen inches "on each side."

The tracks are, by clause 5, to conform to the street or road and to be laid flush with the streets. It may well be that if the respondents desire to pave the whole of the travelled road they may do so at their own expense, using the powers conferred on them by clause 17, to take up the street or road for any purposes within the province and privileges of a municipal corporation. But the restricted language of clause 6, which imposes an obligation on the appellants, appears to their Lordships on consideration *primâ facie* to confine that obligation to keeping in proper repair what is already there, and not to extend it to the doing of works which would give the portion of the road between and beside the rails a new character.

For these reasons their Lordships are of opinion that the Railway and Municipal Board had no jurisdiction to make the order appealed from, and that the Supreme Court of Ontario was wrong in affirming that order. They will therefore humbly advise His Majesty that this appeal should be allowed and the orders in question should be discharged. The respondents must pay the costs of this appeal and of the appeal to the Supreme Court of Ontario.

In the Privy Council.

THE TORONTO SUBURBAN RAILWAY COMPANY

v.

THE CORPORATION OF THE CITY OF TORONTO.

DELIVERED BY
THE LORD CHANCELLOR.

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