Privy Council Appeal No. 16 *of* 1916.

The Corporation of the City of Toronto - - *Appellants,*

v.

The Toronto Railway Company - - - - *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 23RD JUNE, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
EARL LOREBURN.
LORD SHAW.

[*Delivered by* THE LORD CHANCELLOR.]

This appeal has arisen out of an application by the respondent company to the Ontario Railway and Municipal Board, under section 250 of "The Ontario Railway Act of 1914," asking the approval of plans for a proposed extension of a street railway. The Board made an order in favour of the respondent upon this application on the 9th September, 1915; from this order the present appellants appealed to the Appellate Division of the Supreme Court of Ontario, by whom the order of the Railway Board was confirmed, and the present appeal is against that judgment.

On the original hearing, certain technical objections were taken on behalf of the appellants, but these were summarily overruled by the Railway Board, who regarded them as devoid of substance or merit. Such objections do not admit of elaborate argument, and, although maintained before the Supreme Court and on the hearing of this appeal, it is unnecessary for their Lordships to deal with them further than by saying they are quite satisfied the decisions of the Board and of the Supreme Court were correct.

The real substance of the dispute depends upon the construction of an agreement made on the 1st September, 1891, between the appellants and the predecessors in title of

the respondents, by which powers were granted for creating street railways over streets within the jurisdiction of the city, and of a statute by which that agreement was confirmed.

The appellants, as the governing body of the City of Toronto, have power to grant rights of running tramways or street railways over all the streets within their jurisdiction, subject to the limitations imposed on their authority by the provisions of The Streets Railway Act of 1887, a statute which provided that no municipal council shall grant to a street railway company any such privilege for a longer period than twenty years. The boundaries of the city have from time to time been altered. In 1884 and up to 1887 the northern boundary extended to a line drawn east and west through the junction of a street known as Yonge Street and the Ontario and Quebec Railway Tracks, now the Canadian Pacific Railway. The roads north of this point were, at this date, vested in the County of York, by whom the powers of granting railway rights over these portions of the roads were enjoyed and exercised. By virtue of two agreements, made respectively in 1884 and 1886 between the County of York and the Street Metropolitan Railway Company of Toronto, the County of York, in exercise of such powers, granted to the Street Metropolitan Railway the right to construct a street railway along Yonge Street, northwards from the northern limit of the city boundary as it was then constituted. These rights were subject to forfeiture in certain events, but, unless forfeited or otherwise extinguished, the rights continued until the 25th June, 1915.

No doubt whatever has arisen as to the power of the County of York to enter into these agreements, or of the extent or validity of the rights obtained by the Metropolitan Street Railway under their terms, and, indeed, the Corporation of the City of Toronto would have had no direct right or interest in the streets at all but for the fact that the municipal boundaries of the city were, in 1887, extended in a northerly direction for an extent of some 1,320 feet. The effect of this was to place the portion of Yonge Street and the other streets lying within this extended area under the jurisdiction of the city, and this portion of the roads was accordingly conveyed to the appellants by the County of York, but such conveyance was expressly made subject to all existing rights of the public or any person or Corporation, and, in particular, to the rights of the Metropolitan Street Railway in respect of the road known as Yonge Street.

In 1891 the appellants determined to offer for sale the right to operate street railways upon its streets, a tender made by the predecessors in title of the respondents for the purchase of these rights was accepted, and the agreement which has caused this dispute was entered into on the 1st September, 1891, to carry the purchase into effect. By this agreement the Corporation granted to the purchasers for a period of twenty years from the date of the agreement, and a further term of ten

years if legislative authority could be obtained for such extension, "The exclusive right . . . . . to operate surface street railways in the City of Toronto, excepting on the Island and on that portion, if any, of Yonge Street from the Ontario and Quebec Railway tracks to the north City limits, over which the Metropolitan Street Railway claims an exclusive right to operate such railways, and the portion, if any, of Queen Street West (Lake Shore Road) over which any exclusive right to operate surface street railways may have been granted by the Corporation of the County of York, and also the exclusive right for the same term to operate surface street railways over the said portion of Yonge Street and Queen Street West (Lake Shore Road) above indicated, so far as the said Corporation can legally grant the same." This agreement was, as is shown upon its face, in excess of the powers of the Corporation, and the necessary statute for its confirmation was obtained on the 14th April, 1892. On the 25th June, 1915, the rights of the Metropolitan Street Railway ceased over that portion of Yonge Street which was brought within the boundary of the City in 1887, and the respondents accordingly claimed that, by virtue of their agreement, they were then entitled, for the residue of the term which such agreement created, to use this portion of the street for the purpose of their railway. The appellants deny that the agreement conferred any such right. They assert that at the date of the agreement the Corporation had no power legally to grant any franchise over this portion of Yonge Street, and that consequently the only rights that were conferred in respect of this area were those that would have arisen if the grants to the Metropolitan Street Railway, made by the County of York, had for any reason been found to have been invalid and void on the 1st September, 1891.

Their Lordships are quite unable to take this view. At the date of the agreement no question whatever existed and no doubt had arisen as to the rights possessed by the Metropolitan Street Railway. Such rights were regarded by all parties as valid and subsisting, capable no doubt of termination in certain events, but, unless those events occurred, continuing on to the 25th June, 1915. Subject to those rights, whatever they might be, and subject to the restrictions imposed by the Street Railway Act of 1887, the Municipal authorities of the City of Toronto had full power to deal with the franchise of these roads in such a manner as they thought would best serve the interests of the inhabitants of the Municipality. The agreement that was made granted a term of years beyond the authorised period, but it was intended to apply for legislation authorising this extension, and the agreement must be construed throughout upon the hypothesis that this authority would be, as in fact it was, duly obtained. The grant, therefore, was to run street railways in the City of Toronto for a total period of thirty years, with an absolute exception in respect of the Island and

a limited exception in respect of those parts of Yonge Street and Queen Street where exclusive rights had been granted by the County of York. So far however, as the excepted portions of those streets were concerned, a grant for the same period was made by the Corporation, so far as they could legally grant the same, that is so far as they could legally grant the same if the agreement was effectively confirmed by a subsequent statute. The only colour of explanation that can be given by the appellants of the distinct grant on the part of the City of Toronto over these excepted portions of the street is that to which reference has already been made, namely, that the grant to the Metropolitan Street Railway might be declared to be void, *ab initio*, or to have ended before the 1st September, 1891, a contingency which nobody contemplated and which there was no reason or justification to apprehend. The only meaning, in their Lordships' opinion, which this agreement is capable of bearing is that the grant it contained, which was made for good consideration, was a grant which would take effect whenever such antecedent rights were for any reason to cease.

It has been suggested in argument that such a grant would be beyond the powers of the Corporation as creating a reversionary interest in the franchise of the roads. No authority whatever was produced to aid this contention, and their Lordships are unaware of any principle that could be invoked in its support.

It is also said that such a power is open to abuse, and so doubtless are all powers enjoyed by municipal authorities, but it would be a wrong and dangerous method of determining the true limits of such powers to consider the mischief their improper exercise might produce.

Their Lordships consider the terms of the agreement itself do not, when once the facts are understood, present any real difficulty. It is the manner in which these rights have been confirmed by statute which gives rise to the only question of uncertainty in the case. This statute is 55 Vic., cap. 99, Sect. 1, 4 (1). Its description, to which reference is permissible for the purpose of determining its construction, is stated to be an Act to incorporate the Toronto Railway Company and to confirm an agreement between the Corporation of the City of Toronto and certain persons called the purchasers. The agreement and the conditions and tenders referred to are set out in the schedule to the statute in the usual way, and are declared to be valid and legal, and binding upon all the parties. So far as the statute sought to validate and confirm the agreement, nothing further than this was required; but, as is not unusual in statutes of this description, the Act proceeded to explain the effect of the agreement, and it is the difference between the terms in which this explanation is given and the terms of the agreement itself which has caused all the confusion in

the case. The actual words which give rise to the difficulty are these :—

"It is hereby declared that under the said agreement the purchasers acquired and are entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the said City of Toronto, except that portion of Yonge Street, north of the Ontario and Quebec Railway, and that portion of Queen Street (Lake Shore Road) west of Dufferin Street; and that the purchasers acquired and are entitled to such right and privilege (if any) over the said excepted portions of Queen Street and Yonge Street as the Corporation of the City of Toronto had at the time of the execution of the said agreement power to grant for a surface street railway."

Now, in the first place, it is remarkable that the island, which was totally excepted from the terms of the original grant, is not excepted at all from the description given in the Act of Parliament, and, if the words of the statute were taken to be those which defined and created the rights of the purchasers, they would be entitled to use the island for the purpose of their street railway, although it had been carefully excluded from the terms of the purchase.

Their Lordships think that in an Act of this description a provision, of the nature mentioned, is to be regarded rather by way of explanation and identification of the agreement which has been confirmed, than by way of creation of actual and independent rights. But even if they were to be otherwise regarded, in their Lordships opinion, the statute merely expresses in clumsy and obscure language exactly the same conditions as those expressed in the original agreement. The right and privilege, if any, over the excepted portion of Queen Street, which the City of Toronto at the time and execution of the agreement had power to grant, were the rights and privileges which were to commence when the existing franchise ended. It is quite true that if that franchise ran its full length, apart from the Act of Parliament, there would have been no right or privilege which the Corporation could grant at all. But the statute must be read in light of the fact that the agreement was thereby validated, and the right and privilege which the Corporation had power to grant at the date of the agreement must be construed as meaning the right and privilege which the Corporation had power to grant, assuming—for this was the whole basis of the agreement—that the agreement itself was legalised. The appellants urge strongly that this gave no effect to the words "if any," and that due effect can only be given to these by making the assumption that in certain circumstances no such rights or privileges could be enjoyed by the Corporation, and this assumption can, they urge, only be satisfied by regarding the grant as one to take effect if the existing grants were void; but if assumptions are to be made for which there is no warrant in the facts, it would be just as reasonable to assume that the period of the existing grant might cover, or be extended so as to cover, the whole period of

thirty years, and in that case the words "if any" would have just as sensible a meaning as on the other hypothesis. In truth, the words are often needlessly used by way of caution, and it would be unreasonable to give them such weight as to destroy the obvious meaning of the statute or document in which they are contained.

The view expressed by their Lordships was that taken by the Railway Board, and in the result by the Supreme Court; but their Lordships think the appellants were right in urging that the judgment of the Supreme Court did not depend upon any independent investigation of the matter, but that they regarded themselves as bound by a judgment of this Board in a dispute which related to the rights over a portion of Queen Street where a similar question arose, in the case of *The Toronto Railway Company* v. *The Corporation of the City of Toronto* (1906, A.C. 117). In forming this view their Lordships think that the Supreme Court were in error. The judgment referred to did not proceed upon this basis, but upon a ground entirely independent of whether the grant were made subject to the rights over Queen Street or no.

It is unfortunate that, in these circumstances, their Lordships have not the advantage of the considered opinion of the Judges of the Supreme Court in this case, but the judgment of the then Court of Appeal in the case of *The City of Toronto* v. *The Toronto Railway Company* (5, O.W.R. 130) is quite clear upon the kindred question which arises with regard to the portion of Queen Street, and with that judgment their Lordships are in entire agreement.

Throughout this judgment reference has only been made to the Yonge Street area, for the question of principle which governs the one governs the other also, and there is no need for separate consideration of the second street. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE CORPORATION OF THE CITY OF TORONTO

v.

THE TORONTO RAILWAY COMPANY.

DELIVERED BY
THE LORD CHANCELLOR.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1916.