Privy Council Appeal No. 134 *of* 1918.

The Toronto Railway Company - - - - - *Appellants*

v.

The Corporation of the City of Toronto - - - - *Respondent*

FROM

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA AND THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1919.

Present at the Hearing:

VISCOUNT FINLAY.
VISCOUNT CAVE.
LORD SUMNER.
LORD PARMOOR.

[*Delivered by* VISCOUNT FINLAY.]

This is a case in which special leave has been obtained by the Toronto Railway Company to appeal against three orders. The first of these orders was made on the 3rd July, 1909, by the Railway Board for Canada and directed that the Toronto Railway Company should bear a certain proportion of the costs of the construction of a bridge which the Corporation was by the Order authorised to construct for the purpose of carrying the highway of Queen Street East, Toronto, with the tracks thereon of the Toronto Railway Company, a Provincial railway, over the tracks of the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Railway Company, all three Dominion railways. The second order was dated the 30th November, 1917, and by it the Railway Board directed that the Toronto Railway Company should make a payment of $80,000 on account towards the cost of construction. The third order appealed against was dated the 4th February, 1918, and was made by Middleton, J., of the Supreme Court of Ontario, refusing a stay of execution against the Toronto Railway Company.

It was urged on behalf of the appellants that the Order for payment of part of the costs of construction was not authorised by the Railway Act. On behalf of the respondents, the Corporation of Toronto, it was contended, first, that special leave to appeal from orders of the Railway Board cannot be granted; secondly, that the order for special leave to appeal in the present case ought to be rescinded, on the ground that the relevant facts were not correctly stated in the petition; and, thirdly, that the order for payment of part of the costs of construction made against the Toronto Railway Company was authorised by the Railway Act and could not be impeached.

Queen Street East is a public highway in Toronto running east and west, and along it runs the appellants' railway. It was crossed on the level by the railways of the Canadian Pacific, the Grand Trunk, and the Canadian Northern Railway Companies. On the 20th June, 1905, an application was made by the Toronto Corporation to the Railway Board under Section 186 of the Railway Act of 1903, for an order permitting the Corporation to construct a high level bridge over the tracks of the railways crossing Queen Street East, and for an order determining the proportions in which the costs of construction should be borne by the railways and other parties interested. This application was served on the several railway companies, one of which was the Toronto Railway Company, the present appellants. The application was heard in April, November and December, 1906, by the Railway Board. The Toronto Railway Company appeared by Counsel before the Board. On the 12th December their Counsel admitted the jurisdiction of the Board to order the Company to contribute a part of the costs as a party interested, but later in the day he stated that this concession was made only for the purpose of the argument in case some other remedy should be open to him.

On the 3rd July, 1909, the Railway Board made the principal order appealed against. It is in the following terms :—

> "In the matter of the application of the City of Toronto, hereinafter called the 'Applicant,' for authority to build a high level bridge over the Don Improvement and the tracks of the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Ontario Railway Company, at Queen Street East, in the City of Toronto :
>
> "Upon hearing evidence and what was alleged by counsel for the Applicant, the Toronto Street Railway Company, the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Ontario Railway Company—
>
> "It is ordered :
>
> "1. That the Applicant be, and it is hereby, authorised to construct a bridge to carry the highway and the tracks of the Toronto Street Railway Company over the tracks of the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Ontario Railway Company, where such tracks cross Queen Street East, in the City of Toronto.
>
> "2. That the Applicant submit detail plans of the proposed bridge and approaches thereto for the approval of an engineer of the Board by the

15th day of September, 1909, and construct the bridge ready for traffic by the first day of July, 1910.

"3. That the cost of the construction of the bridge and approaches and the land damages, if any, shall be paid as follows: The City of Toronto, fifteen (15) per cent.; The Toronto Street Railway Company, fifteen (15) per cent.; the Canadian Pacific Railway Company, thirty-five (35) per cent.; the Canadian Northern Ontario Railway Company, twenty-five (25) per cent.; and the Grand Trunk Railway Company (Belt Line), ten (10) per cent.

"4. That, upon completion, the said bridge shall be maintained by the Applicant; the cost of such maintenance, with the exception of the cost of the maintenance of the roadway and sidewalks on said bridge and approaches, shall be paid as follows: By the City of Toronto, seventy (70) per cent.; by the Canadian Pacific Railway Company, ten (10) per cent.; by the Canadian Northern Ontario Railway Company, ten (10) per cent.; by the Grand Trunk Railway Company, ten (10) per cent.; the cost of the maintenance of the roadway and sidewalks on said bridge and approaches shall be borne entirely by the Applicant.

"5. That any matter in dispute between any of the parties hereto with regard to the carrying out of the provisions of this order, shall be determined by the chief engineer of the Board."

On the 10th September, 1909, the Toronto Railway Company gave notice of application to the Railway Board, under Section 56 (3) of the Railway Act, 1906, for leave to appeal to the Supreme Court, on the ground that, as a matter of law, the Company should not have been ordered to pay any portion of the cost of construction. This application was on the 15th September refused by the Railway Board. On the 21st of the same month the Company applied, under Section 56 (2) of the Railway Act, for leave to appeal to the Supreme Court on the question whether there was jurisdiction to make the order. This application was refused by Mr. Justice Duff and no attempt was made to get leave to appeal from this refusal.

The second order appealed against, for payment to be made on account, was not made till the 30th November, 1917, and is subsidiary to the principal order of the 3rd July, 1909; it was made a Rule of the Supreme Court of Ontario under Section 46 of the Railway Act, 1906, in January, 1918. The third order appealed against—that of the 4th February, 1918—is a refusal to stay execution.

A petition for special leave to appeal was presented in July, 1918, nine years after the date of the principal order appealed against. The petition for special leave contains the following paragraph, which has reference to the great lapse of time which had taken place:—

"19. That since the year 1909 the whole question involved has been in dispute between your Petitioners and the City of Toronto; that until the year 1917 your Petitioners were unaware whether and to what extent the City of Toronto would finally press for payment of the expenses of the said bridge by your Petitioners; that after the judgment given in the case of the British Columbia Electric Railway Company, Limited, v. Vancouver, Victoria and Eastern Railway and Navigation Company and the Corporation of the City of Vancouver (1914 A.C. 1067) upon appeal to Your Majesty in Council (the reasons for which judgment, in your Petitioners' submission, show that there is no jurisdiction in the said Board

to order your Petitioners to pay such expenses) your Petitioners hoped that no further attempt would be made by the City of Toronto to obtain an order for such payment; that matters remained still in dispute pending any attempt by the City of Toronto to get a final order, and, further, pending the settlement of all outstanding disputes (of which there are several) upon the expiration of your Petitioners' franchise in the year 1921; but that by the procedure now adopted the City of Toronto have sought to obtain a very large sum of money from your Petitioners, to payment of which your Petitioners submit the City of Toronto are not entitled."

At the opening of the case Mr. Geary made a preliminary objection to the jurisdiction, decision on which was reserved until the case should have been heard. Mr. Geary contended that it was not competent to grant special leave to appeal to His Majesty in Council direct from the Railway Board. Their Lordships, after full consideration, have arrived at the conclusion that the Railway Board is not exempt from the prerogative of the Crown to grant special leave to appeal. The Railway Board is not a mere administrative body. It is a Court of Record, and it may be of importance that in some special cases its decisions on points of law should be taken on special leave direct to His Majesty in Council. The prerogative of granting special leave to appeal is, *prima facie*, applicable to all Courts in His Majesty's Dominions, and their Lordships cannot see any ground which would warrant them in holding that the Railway Board is exempt from the general rule. At the same time, their Lordships must add that, in their opinion, this is a power which, in the case of the Railway Board, should be very sparingly exercised. There is by the Railway Act a general power conferred on the Governor in Council, either on his own motion or upon petition, to vary or rescind any order of the Railway Board (Section 56). By the same section there is given an appeal to the Supreme Court on any point of law, leave being obtained from a Judge of that Court, and provision is also made for an appeal to the Supreme Court, with leave of the Railway Board, on any question of jurisdiction.

Having regard to these provisions, it would appear that the power of granting special leave to appeal from orders of the Railway Board should be cautiously exercised and only under special circumstances.

Mr. Geary further contended that the special leave in the present case ought to be rescinded, on the ground of inaccuracy in the statements made in paragraph 19 of the petition. This point will be dealt with at a later stage of this judgment.

Their Lordships proceed to consider the case upon its merits. It depends upon the terms of the Railway Act, and the relevant enactments are contained in the Act of 1906, with the amendments introduced by the Railway Act of 1909. The most material sections are Section 59 and Sections 237 and 238, both of which latter are amended by the Act of 1909.

Section 59, by its first sub-section, provides in effect that when the Board, in the exercise of any power vested in it by that Act or by the special Act, by order directs any . . . works

. . . it may order by what company, municipality or person interested in or affected by such order the same shall be constructed. Sub-section (2) provides that the Board may order by whom, in what proportion, and when, the expenses of such works shall be paid.

This section applies to every case in which the Board by any order directs works, and gives it power to " order by what company, municipality or person interested in or affected by such order " they shall be constructed, and to order by whom the expenses of construction shall be paid. There is not in sub-section (2) any definition of the class of persons who may be ordered to pay such expenses, but it seems clear that sub-section (2) must be read with reference to the immediately preceding provision and that such an order may be made only on a company, municipality or person interested in or affected by the order directing the works. It appears to their Lordships that where the Board, in the exercise of its statutory powers, makes such an order as was made in the present case on the 3rd July, 1909, that is a case in which the Board by order directs works to be constructed within the meaning of Section 59. It would be reading the words " by any order directs " in that section too strictly if they were held to apply only to cases in which the order takes the form of a command for the execution. They are satisfied by an order of the Board giving authority for the construction to a municipality or other applicant and containing directions with regard to it such as are contained in this order of the 3rd July. It follows that in such a case the Board may order by what company, municipality or person interested in or affected by the order directing the works the expenses should be paid.

Where a responsible public body applies for leave to construct the works, no formal command for their execution is wanted; leave is enough, such as was granted by clause 1 of the present order. But clause 2 orders the submission of detailed plans by the 15th September, 1909, and that the bridge be ready for traffic by the 1st July, 1910. The applicant takes the leave with the orders in clause 2, and these orders might be enforced by the Board. To treat completion by the 1st July, 1910, as merely a condition on which the leave was granted is to ignore the fact that completion by that date is in terms ordered, and such a construction would leave the Board and the public with no redress except the cancelling of the leave. The same observations apply to the filing of the plans.

It is impossible to treat this order as merely permissive; it is mandatory.

Sections 237 and 238, as they stood in the Act of 1906, made provision for the case of a railway crossing a highway, or *vice versâ*, but did not contain any provision as to the payment of expenses of the works. Section 59 would apply to the case of any order made under either of these sections, as being made under the Act of which Section 59 forms part.

These sections are, however, repealed by the Act of 1909 (8 and 9 Edw. VII, c. 32), and replaced by the new Sections 237 and 238 as they now stand in the Railway Act.

The new Section 237 deals with the case of an application for leave to construct a railway upon, along or across a highway, or a highway along or across a railway. It provides for the submission to the Board of plans and profiles, and empowers the Board by order to grant the application on such terms as it thinks proper, or to order that the railway be carried over, under or along the highway, or *vice versâ*, or that there should be a diversion of either, or that protective measures, by employment of watchmen or the execution of other works, be taken to diminish the danger of the crossing.

The new Section 238 deals in its first sub-section with the case of a railway already constructed upon, along or across any highway, and provides that in such case the Railway Board may, of its own motion or on application on behalf of the Crown or any municipality or other corporation, or any person aggrieved, order the Company to submit plans to the Board, and may make orders such as are authorised by Section 237 for the avoidance of danger. Sub-section (3) contains a provision for the payment of the expenses which is applicable to orders alike under Section 237 and Section 238. The words of this Sub-section should be quoted :—

> "Notwithstanding anything in this Act or in any other Act, the Board may, subject to the provisions of Section 238A of this Act, order what portion, if any, of cost is to be borne respectively by the Company, municipal or other corporation, or person, in respect of any order made by the Board under this or the preceding section, and such order shall be binding on and enforceable against any railway company, municipal or other corporation, or person named in such order."

Whatever be the construction of this sub-section, there is nothing in it to put an end to the application of Section 59 to orders under Sections 237 and 238. The power given by Section 59 applies in the case of any order made by the Board in the exercise of any power vested in it by the Railway Act. As Sections 237 and 238 are part of the Railway Act, it follows that Section 59 applies to orders made under them. The order is, therefore, good by virtue of Section 59, and it is unnecessary to consider how far it might also be supported under Section 238 (3).

The Toronto Railway Company's lines ran along the surface of Queen Street East and crossed on the level the lines of the three Dominion Railway Companies. The order of the Railway Board involved carrying the highway, with the lines of the Toronto Railway Company upon it, by a bridge over the lines of the Dominion railways. The Toronto Railway Company was therefore, beyond all question interested in or affected by the works ordered. How far the Toronto Railway Company benefited by these works, and what proportion of the costs it was fair to throw upon that Company, was entirely a matter for the Railway Board to decide.

The first objection raised by the appellants to the order as to costs was that the railway of the Toronto Railway Company is a provincial railway, and that any enactment giving power to throw upon it the costs of works would be *ultra vires* of the Dominion Parliament. Reference was made to Section 92 of the British North America Act, which gives the provincial legislature the exclusive right of making laws with regard to local works or undertakings not declared by the Parliament of Canada to be for the general advantage of two or more of the provinces. It was also urged that the provincial railway company was not interested in or affected by the works in question. Both of these objections are answered by the decision of this Board in the case of *The Toronto Corporation* v. *The Canadian Pacific Railway Company* (1908, A.C. 54). The order of the Railway Committee of the Canadian Privy Council to which that case relates had been made in 1891. under the Dominion Railway Act, 1888. It directed gates and watchmen at certain level crossings on the Canadian Pacific Railway within the area of the municipality of Toronto. and provided that the cost should be borne, as to one-half. by the Corporation. The Toronto Corporation paid their annual contributions under the order down to 1901. They then refused further payment. and the action was brought by the Canadian Pacific Railway Company to enforce it. The sections under which the order was made were Sections 187 and 188 of 51 Vict., c. 29 (the Railway Act of 1888). Section 187 gave the Railway Committee power in the case of level crossings to direct works or protection by a watchman or by a watchman and gates. Section 188 was as follows :—

> "The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof, and of any such measures of protection, between the said company and any person interested therein, as appear to the Railway Committee just and reasonable."

It was decided in that case by the judgment of this Board, affirming the Canadian Courts, that the enactment throwing the expenses in part on parties interested was *intra vires* of the Canadian Parliament. Lord Collins in giving judgment said that there was nothing *ultra vires* in the ancillary power conferred by the Sections (187 and 188) to make an equitable adjustment of the expenses among the parties interested (p. 58). Corporations interested in such works are subject to the legislation of the Dominion Parliament as to their cost though generally subject only to the Provincial Legislature. On the second contention, viz., that the provincial railway company was not a person interested, Lord Collins, after pointing out that the word " person " includes a municipality. said :—" And their Lordships fully concur in the conclusion and reasoning of Meredith, J.A., in the Court below that in this case the municipality was a person interested." The municipality was interested in respect of its guardianship of the safety of the public, and the interest of the Toronto Railway

Company in the present case is obvious on the mere statement of the facts.

The two sections on which the decision in the Toronto case in 1908 proceeded were replaced in the Railway Act of 1903 by Sections 186, 187 and 47 of that Act, and in the Act of 1906, originally and as amended in 1909, by Sections 237 and 238 and Section 59. The reasoning of the judgment in the case of 1908 is just as applicable to cases arising under these substituted enactments. The contention of the appellants that it is *ultra vires* of the Dominion Parliament in legislating for a Dominion railway to make incidental provision affecting provincial municipalities or railway companies, appears to their Lordships to be based on no principle. It is not a case in which there is any meddling by the Dominion Parliament with the working of a provincial railway company; there is only a provision that it shall bear cost of works in relation to the Dominion railways which affected the provincial line. To hold that such a provision was *ultra vires* would give rise to very great difficulty in dealing with railways by legislation under any scheme of federation.

The authority chiefly relied upon by the appellants was the judgment of Lord Moulton in the *Vancouver Case* (1914, A.C. 1067) reversing a decision of the Supreme Court of Canada reported in 48 S.C. Can. Reports, 98.

In that case there were certain streets in Vancouver which were crossed on the level by the lines of the Vancouver, &c., Railway Company, a Dominion company. On application made by the Corporation of the City of Vancouver, the Railway Board, on the 14th October, 1912, made an order authorising the applicant to carry these streets across the tracks of the Vancouver, &c., Railway Company by means of overhead bridges, as shown on the plans filed with the Board (detailed plans to be submitted). There is nothing in this order, as in the case now under consideration, directing that the works should be completed by a particular date. In this respect the order in the Vancouver case stands in marked contrast to the terms of the order in the present case. The lines of the British Columbia Electric Railway Company, a provincial railway, ran along certain of these streets, crossing the Dominion Railway Company's lines, before the bridge was constructed, on the level, and afterwards by the bridge. The order contained a direction that part of the cost of constructing the bridge was to be paid by the Electric Railway Company, and on appeal by the Electric Railway Company from this part of the order, it was held by the Supreme Court of Canada that it was *intra vires* (Duff, J., and Brodeur, J., dissenting).

In the Judicial Committee it was held on appeal to be bad as regards the directions as to costs, and the *ratio decidendi* appears on pages 1074 to 1076 of the Report. Their Lordships would particularly refer to the following passages in the judgment delivered by Lord Moulton:—

> "Their Lordships entirely agree with the remarks of Duff, J., as to the ground and reason of the application of the corporation to the Railway

Board. Referring to the statement made at the hearing by Mr. Baxter, who represented the corporation, he says:—'Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised.' It follows, therefore, that the application was a matter between the corporation and the railway company alone.

* * * * * *

"It is sufficient to point out that the order is not made under Section 59 nor does it come within its provisions. It does not direct that any work should be done. It is an order of a purely permissive character granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of Section 59 relate to a wholly different class of cases."

Lord Moulton treats the order of the Board as merely permitting the corporation to make a municipal improvement in the grading of the streets. The order is not regarded as proceeding on any consideration of danger arising from the level crossing or as having anything to do with the railways as such. The matter was treated as one merely of street improvement for which a permissive order was given by the Railway Board. The keynote of the judgment is struck in one sentence on page 1074:—"It follows therefore that the application was a matter between the corporation and the railway company alone." The judgment proceeds on the principle that the assent of the Board was asked merely because the viaduct would cross the Dominion railway, and that this gave no jurisdiction to make the Electric Company pay the costs of construction. The order was treated as not falling within either Section 59 or Section 238 of the Railway Act; indeed, the latter section is not even mentioned in the judgment.

In *The Toronto Railway Company* v. *The City of Toronto* (1916, 53 S.C. Can. Reports, 222) the Supreme Court had to deal with a case in which the tracks of the Toronto Railway Company in Avenue Road, Toronto, crossed the tracks of the Canadian Pacific Railway Company on rail level. The Chief Engineer of the Railway Board had reported to the Board that the crossing was dangerous, and the Board of its own motion ordered that the street be carried under the Canadian Pacific Railway Company's tracks. It was held that the order was made for the protection, safety and convenience of the public; that the Toronto Railway Company was a company interested in or affected by the order, and that the Board had jurisdiction to direct that it should pay a portion of the cost of the subway. The Chief Justice treated the order as being made under the

provisions of Section 238. He pointed out that the substantial reason for the order was the elimination of dangerous crossings, and that it could make no difference that occasion was taken for abolishing these crossings when the separation of grades on a neighbouring street was decided upon, and said that the facts were wholly different from those in the Vancouver case. Davies, J., said (page 229) that the controlling ground for the order was the safety and protection of the public, while in the Vancouver case it was merely a matter of street improvement. Anglin, J., said, at page 255, that the Judicial Committee in the Vancouver case viewed the matter as one of street improvement merely, in which the municipal corporation and the Dominion Railway Company were alone concerned.

In the present case the order appears to their Lordships to be in substance mandatory, and to be made for the protection and convenience of the public with regard to the crossings of the railways. What was done may have improved the streets, but it was certainly not a mere matter of street improvement. Their Lordships therefore think that the Vancouver case is distinguishable from the present.

Their Lordships are of opinion that Section 46 of the Railway Act, 1906, is not *ultra vires*, and that the objection taken to the procedure followed in making the order a Rule of Court fails. On this point they are content to refer to the judgment of Middleton, J.

For these reasons, in the opinion of their Lordships, the appeal fails on the merits.

There is, however, another aspect of the case on which it appears desirable that some observations should be made.

The substantive order against which leave was obtained to appeal was made so long ago as the 3rd July, 1909. The orders of the 30th November, 1917, and the 4th February, 1918, were merely subsidiary. The fact that so long a period had elapsed since the order was made was one which would militate strongly against the granting of special leave. It must have been to meet this difficulty that paragraph 19 was introduced into the petition. It appears to their Lordships that the allegations in that paragraph are not borne out by the documentary evidence to which their attention was drawn by the Counsel for the respondents.

There is a correspondence between the corporation and the Toronto Railway Company set out in the respondents' appendix of documents. Their Lordships have been referred particularly to the letters dated the 6th and 7th October, 1910, the 9th and 11th May, 1911, the 23rd April, 1912, the 4th September, 1912, the 25th and 30th October, 1912, the 11th April, 1913, the 13th May, 1913, the 17th and 19th June, 1913, the 24th July, 1913, the 7th August, 1913, the 25th July, 1914, the 20th August, 1914, the 2nd and 30th September, 1914, the 20th October, 1914, and the 8th and 13th December, 1915. Attention has also been

called to the application to the Railway Board by the corporation on the 21st July, 1915 (R. p. 161), the answer of the Toronto Railway Company, dated the 13th August, 1915, challenging the jurisdiction (R. p. 161), the reply of the Corporation dated the 18th August, 1915 (R. p. 162), the order of the Railway Board dated the 20th October, 1915 (R. p. 163), the letters of the 26th, 28th and 30th October, 1915 (R. p. 164–5) and the final order on this application of the Railway Board, the 13th November, 1915, directing the Toronto Railway Company (appellants) and other companies to pay their proportions on account and rescinding the order of the 20th October from which the appellants had been omitted.

Paragraph 19 of the petition for special leave opens with the statement " that since the year 1909 the whole question involved has been in dispute between your petitioners and the City of Toronto." Their Lordships cannot find that before the above-mentioned answer by the appellants on the 13th August, 1915, to the respondents' application to the Railway Board dated the 21st July, 1915 (R. p. 161) the appellants ever disputed their liability for their share of the expenses of construction after the dismissal of their applications for leave to appeal to the Supreme Court in September, 1909. On the contrary, the correspondence proceeds on the footing of their liability.

Paragraph 19 goes on to allege :—

> " that until the year 1917 your Petitioners were unaware whether and to what extent the City of Toronto would finally press for payment of the expenses of the said bridge by your Petitioners."

Their Lordships are unable to find anything in the correspondence that could lead the petitioners to doubt that the City would press for payment. Indeed, the liability of the petitioners is constantly asserted and there are many letters pressing for payment.

It is incumbent on the petitioners in any case in which special leave is applied for to see that the facts are correctly brought to the notice of the Board, and if at any stage it is found that there has been failure to do so, the leave may be rescinded.

In the present case no reflection is made upon the good faith of those who represented the Toronto Railway Company on the application for special leave. The terms of paragraph 19 of the petition would appear to be due to ignorance of the facts without any intention to mislead. But it is of great importance that the rule laid down by Lord Kingsdown in *Mohun Lall Sookul* v. *Bebee Doss* (8 M.I.A., p. 193), should be maintained. He said :—

> " Where there is an omission of any material facts, whether it arises from improper intention on the part of the Petitioner, or whether it arises from accident or negligence, still the effect is just the same, if this Court has been induced to make an order which, if the facts were fully before it, it would not or might not have been induced to make."

Their Lordships desire to express their agreement with the observations made in the judgment in *The Mussoorie Bank v.*

Raynor (1881, 7 A.C. 321). Lord Hobhouse, in delivering the judgment of the Board, said :—

> " At the same time, their Lordships desire it to be distinctly understood that an Order in Council granting leave to appeal is liable at any time to be rescinded with costs if it appears that the petition on which the Order was granted contains any misstatement or any concealment of facts which ought to have been disclosed. In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal ; but they do not think there was any intention to mislead. . . . Still, if there has been any material misstatement, it is not sufficient to clear the case of bad faith."

Lord Hobhouse then quoted the passage from Lord Kingsdown which has been cited above, and, after examining the facts of the case before him, said :

> " Their Lordships are of opinion that the petition is very faulty and that due care was not shown in its preparation. But on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed."

In that case, therefore, the appeal was heard and allowed, but without costs.

In that case the misstatement related only to one of three grounds, the other two being sufficient to justify leave. In the present case paragraph 19 is addressed to the delay in presenting the petition which, if unaccounted for, might, and probably would, have led to the refusal of leave.

Owing to the course which the case has taken it is not necessary now to deal further with this point, but their Lordships think it proper to say that, if the occasion had arisen for deciding on this objection, it would have been a matter for their grave consideration whether the leave should not be rescinded, however innocent the misrepresentation.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

THE TORONTO RAILWAY COMPANY

v.

THE CORPORATION OF THE CITY OF TORONTO.

DELIVERED BY VISCOUNT FINLAY.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.