Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Toronto Street Railway Company v. *the Corporation of Toronto, from the Court of Appeal of Ontario; delivered 29th July* 1893.

Present:

THE EARL OF SELBORNE.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

This is an appeal from a judgment or order of the Court of Appeal for Ontario dated the 17th January 1893, dismissing the appeal of the present Appellants from an order of the Chancery Division of the High Court of Justice for that Province dated the 5th April 1892 which dismissed the Appellants' motion to set aside or refer back an award to certain arbitrators.

By an Act for incorporating the Toronto Street Railway Company passed on the 18th May 1861 one Alexander Easton and such other persons as should become shareholders of the Company were incorporated by the name of "The Toronto "Street Railway Company," and were authorized to construct a railway upon and along any of the streets or highways in the City of Toronto and the municipalities immediately adjoining the limits of the city, and were given power to use and occupy such parts of the streets or highways as might be required for the purpose of their

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railway track, provided that the consent of the city and municipalities should be first obtained. And the city and municipalities were authorized to grant permission to the Company to construct the railway and use and occupy the streets and highways for that purpose upon such conditions and for such period or periods as might be agreed upon between them.

By an agreement made before the passing of the Act, on the 26th March 1861, between the Corporation and Easton, reciting certain resolutions of the Common Council of the City of Toronto passed on the 14th of the same month, the Corporation granted to Easton the exclusive right and privilege to construct maintain and operate street railways in along and upon King Street, Queen Street, and Yonge Street in the said city for the term of thirty years mentioned in the 18th resolution, upon the conditions contained in the recited resolutions.

The 18th resolution is as follows:—

"The privilege granted by the present agreement shall extend over a period of thirty years from this date, but at the expiration thereof the Corporation may, after giving six months' notice prior to the expiration of the said term of their intention, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of their value, to be determined by arbitration, and in case the corporation should fail in exercising the right of assuming the ownership of the said railway at the expiration of thirty years as aforesaid the corporation may at the expiration of every five years to elapse after the first thirty years, exercise the same right of assuming the ownership of the said railway, and of all real and personal estate thereunto appertaining, after one year's notice, to be given within the twelve months immediately preceding the expiration of every fifth year as aforesaid, and on payment of their value, to be determined by arbitration."

The agreement provided that it should only take effect after the legislation necessary for legalizing it should have been obtained, which was done by the 16th section of the Act before mentioned, which empowered the Corporation to pass any by-law or by-laws for the purpose of

carrying the agreement into effect. A by-law for that purpose was passed on the 22nd July 1861.

The Company having become insolvent an Act was passed on the 23rd January 1869 enabling the mortgagee of the railway to sell it, and enacting that the purchaser should have all the rights privileges and franchises granted to or possessed or enjoyed by the Company by or under their Act of incorporation. The railway was sold by the mortgagee, and the Appellants who were incorporated by an Act passed on the 29th March 1873 became the owners of it, and stand in the place of the original Company and have the same rights and privileges.

On the 23rd November 1889 the Corporation of Toronto gave notice to the Appellants that they intended at the expiration of the term of the franchise granted to Easton by the resolutions and the agreement and the by-law of the 22nd July 1861, and other franchises subsequently granted by the Municipal Council at different times for the said term to the Toronto Street Railway Company, to assume the ownership of the railways of the Company and of all real and personal property in connection with the working thereof on payment of their value to be determined by arbitration. Three arbitrators were duly appointed, of whom two made an award on the 15th April 1891, in which they found that " the right and privilege to construct, " maintain and operate street railways upon " certain streets in the City of Toronto, was " granted to the said Easton, for the period of " thirty years from the date " mentioned in the agreement of the 26th March 1861 " only, and " not in perpetuity, and that all street railways " constructed in the City of Toronto by said " Easton, or by the Toronto Street Railway " Company, have been constructed and operated

" under privileges for the same term of thirty " years and not in perpetuity " and in valuing the said railways they did not allow anything for the value of any privilege or franchise extending beyond the said period of thirty years.

The first question in this appeal is whether this valuation is right, the Appellants contending in the lower Courts and before their Lordships that the Act of 1861 conferred a perpetual franchise or statutory right to use the streets for the purpose of the railway, and that this is property in connection with the working of the railway which should be valued. Their Lordships do not accede to this. Their opinion is well expressed in the judgment of Mr. Justice Burton who says "The " agreement and the by-law expressly limit the " grant of the privilege to 30 years, a definite " and certain date, but they contain an additional " provision that on notice six months previously " to the expiry of that term of the intention of " the corporation to assume the ownership of the " railway, and all real and personal property in " connection with the working thereof, they may " do so at a valuation. It is true that the agree- " ment provides that if the corporation should fail " to exercise its option of assuming the owner- " ship, the grant shall continue for a further " period of five years, and so at the expiration " of each succeeding five years, but that con- " tingency never arose. We are dealing there- " fore with the license or consent given for that " fixed term of 30 years at the expiry of which, " according to my reading of the agreement, the " corporation having elected to exercise its option " of purchasing, the privilege or franchise of the " railway company ceased." Their Lordships cannot usefully add anything to this opinion.

It has been seen that the railway was first made upon three streets only, and is said to have been then only 11 miles in length. It was sub-

sequently extended to other streets, partly by agreements between the City and the Company dated the 29th July 1881 and the 29th July 1884, and partly informally by resolutions of the Council requiring an extension, the total length being said to be now 60 miles. Another objection taken by the Appellants to the award is that one period of thirty years is applied to all the street railways. The answer to this is that the Act of 1861 gives power to construct a railway upon and along any of the streets or highways in the City of Toronto and the adjoining municipalities. All the lines were intended to form part of one system and must be subject to the same condition as to the termination of the privilege. Any other construction would cause great inconvenience and confusion in the working of the railway. The agreements of 1881 and 1884 expressly provide that the lines then agreed upon shall when built be considered as coming to all intents and for all purposes within the operation of the former agreement by-laws and statutes except as therein otherwise expressly provided. It may be presumed that the other extensions where there was no formal agreement were made on the same conditions.

Only one other question remains. By the agreement of 1861 Easton was bound to pave or macadamize and keep in repair the roadway between and within at least one foot six inches from and outside of each rail. By an Act passed in 1876 the Company were bound to use the same materials and mode of construction as was from time to time adopted for the remainder of the street by the City. By another Act passed in 1877 this Act was amended, and it was provided by the 4th section that the Company should have the option of constructing their portion of the pavement of any street occupied by them, or that at their request the Corporation should construct

it and assess an annual rate upon the Company, covering interest and a sinking fund not exceeding 2 dollars and 50 cents per square yard, with power to the Corporation to raise such sum by the issue of debentures and to collect the same in the manner provided under the municipal Act for the construction of local improvements. The 5th section provided that if the Corporation should elect to assume the railway the arbitrators should estimate as an asset of the Company the value to the Company of any permanent pavement thereafter constructed or paid for by the Company "for the balance of the life of the "pavement." Debentures were issued by the Corporation, and disputes having arisen between it and the Company an agreement was made between them on the 19th January 1889. By that it was agreed that from the 31st December 1888 the Company was to pay the city, in lieu of all claims on account of debentures maturing after that date, and in lieu of the Company's liability for construction renewal maintenance and repair in respect of all portions of the streets occupied by the Company's tracks, at the rate of $600 dollars per mile of single track (or $1,200 per mile of double track) per annum so long as the franchise of the Company to use the said streets or any of them then extended; and that such payments should be accepted by the city in full satisfaction and discharge of all claims upon the Company in respect of the construction renewal maintenance and repair, and that thereafter the city should undertake the work in question. The arbitrators have found that the Company is not entitled to be paid for permanent pavements constructed by the city subsequently to the 31st December 1888, and have not allowed anything in respect of them. The Appellants contend that these pavements are within the provisions of the Act of 1877 and that their value should

have been estimated as an asset of the Company according to that Act. Their Lordships are of opinion that the arbitrators were right in this matter. By the agreement the city undertakes the construction renewal maintenance and repair of the portions of the streets on its own account, and the annual payments are not made for the construction &c., but for relieving the Company from the liability to it. The pavements ceased by the agreement to be constructed, as they were under the Act of 1877, by the Corporation at the request of the Company. From that time the annual payment must be considered to be made for the use by the Company of that which the Corporation constructed and kept in repair.

The result is that in the opinion of their Lordships the decision of the Court of Appeal should be affirmed, and they will humbly advise Her Majesty to affirm it and to dismiss this appeal. The Appellants will pay the costs of it.