Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Toronto Railway Company v. *The Corporation of the City of Toronto, from the Court of Appeal for Ontario; delivered the 8th November* 1905.

Present at the Hearing:

LORD MACNAGHTEN.

LORD DAVEY.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal from the Court of Appeal for Ontario. The result of the Appeal to that Court was that the Appellants, the Toronto Railway Company, were found liable to the Corporation of the City of Toronto for the payment of a mileage rate in respect of 940 feet of street railway track in Queen Street or Lake Shore Road west of Roncesvalles Avenue. They were, besides, ordered to pay interest on the moneys recovered in the action, but at a lower rate than that fixed by the Court from which the Appeal was brought. These two points are the only matters involved in the present Appeal. All other questions between the parties have been settled in the course of the action.

The action was brought in 1897 on a contract dated the 1st of September 1891, under which the Railway Company acquired from the Corporation the exclusive right of working street railways within the city, which at that time extended no further west than Roncesvalles Avenue. This privilege or franchise was granted

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for a term of years in consideration of the payment of certain mileage rates. Disputes, however, soon arose about measurements. In February 1897 the Corporation brought this action against the Railway Company, claiming a large sum over and above the periodical payments which had been made from time to time. At the original hearing in 1898 it was, among other things, declared that the Company were not liable to pay a mileage rate in respect of the 940 feet of track in dispute. On appeal this part of the Order was discharged, and it was referred to the Master in Ordinary to enquire and report by whom the track was constructed, and at what time and what rights of running upon it the Railway Company possessed. The Master, after reviewing the evidence taken before him, found that this portion of the track was constructed by the Railway Company on or about the 30th of June 1893 as part of their own undertaking, and that their rights of running upon it were governed by the agreement of the 1st of September 1891, and were subject to the same obligations as were imposed upon the Company with reference to their other tracks. The Master's finding was upheld in the Divisional Court and also in the Court of Appeal. In their Lordships' opinion the conclusion thus arrived at is plainly right. At the date when this piece of the track was laid the portion of Queen Street or Lake Shore Road on which it was constructed was within the limits of the city, and no person or body other than the Corporation of the City had any jurisdiction or control over it or any right of interfering with its surface. As the Chief Justice observes: "The only lawful way in which the line could "then be laid was under authority from the "Plaintiffs." The position of the Corporation was undisputed, and their consent was taken

for granted and treated as a matter of course. It was not until four years later, after the commencement of the action, that the Railway Company professed to have derived their authority from another source. The evidence offered in support of that suggestion is unsatisfactory and altogether inconclusive.

The question as to interest is not so simple. If the law in Ontario as to the recovery of interest were the same as it is in England, the result of modern authorities ending in the case of *The London, Chatham, and Dover Railway Company* v. *The South-Eastern Railway Company* (1893, A. C. 429) would probably be a bar to the relief claimed by the Corporation. But in one important particular the Ontario Judicature Act, R. S. O. 1897, cap. 51, which now regulates the law as regards interest, differs from Lord Tenterden's Act. Section 113, which is a reproduction of a proviso contained in the Act of Upper Canada 7 Will. IV., ch. 3, sect. 20, enacts that "interest shall be payable in all cases in "which it is now payable by law or in which it has "been usual for a jury to allow it." The second branch of that section (as Street, J., observes) is so loosely expressed as to leave a great latitude for its application. There is nothing in the Statute defining or even indicating the class of cases intended. But the Court is not left without guidance from competent authority. In *Smart* v. *Niagara and Detroit Rivers Railway Company*, 12 C.P. 404 (1862) Draper, C.J., refers to it as a settled practice "to allow interest on "all accounts after the proper time of payment "has gone by." In *Michie* v. *Reynolds*, 24 U.C.R. 303 (1865), the same learned Chief Justice observed that it had been the practice for a very long time to leave it to the discretion of the jury to give interest when the payment of a just debt had been withheld. These two cases

are cited by Osler, J. A., in *McCullough* v. *Clemow* 26 O. L. R. 467 (1895), which seems to be the earliest reported case in which the question is discussed. To the same effect is the opinion of Armour, C.J., in *McCullough* v. *Newlove* (27 O. L. R. 627). The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right. Acting on this view the Divisional Court and the Court of Appeal, consisting in all of seven learned Judges, have given interest in the present case, though not without some hesitation on the part of Britton, J., in the Divisional Court, and some hesitation on the part of Osler, J.A., in the Court of Appeal.

Their Lordships have come to the conclusion that the judgment under appeal ought not to be disturbed. The question is one in which the opinion of those familiar with the administration of justice in the Province is entitled to the greatest weight. Their Lordships are not satisfied that the decision of the Court of Appeal, which evidently has been most carefully considered, is in any respect erroneous.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be dismissed.

The Appellants will bear the cost of the Appeal.