Privy Council Appeal No. 64 *of* 1916.

The Toronto and York Radial 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 23RD OCTOBER, 1916.

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD PARMOOR.]

The appellants applied, under section 250 of an Act respecting Railways, R.S.O., 1914, c. 185, to the Ontario Railway and Municipal Board for the approval of certain plans to provide the necessary switches and turnouts to the appellants' property required by them for the purpose of operating their railway. The proposal was, in effect, to provide terminal accommodation on a site which the appellants had purchased, and to cross for this purpose a portion of the side walk on the west side of Yonge Street by a spur line on the level. Although the appellants had authority to construct or extend their railway upon any highway or part of a highway, section 250 prohibits them from beginning the construction of their railway or of any extension thereof upon any highway or part of a highway without having first obtained the permission and approval of the Board. The section does not confer any additional powers on the appellants, but imposes a limitation to protect public interest. Section 105, sub-section 8, enacts that the Board shall not have power or authority to require or permit a company, without the consent of the Corporation of the Municipality, to construct or lay down within the Municipality more tracks or lines than, in its agreement with the Corporation

or the bye-law of the Council of the Corporation of the Municipality, it has authority to construct and lay down, but the agreement or bye-law shall govern as to the number and locality of the tracks and the streets or highways upon which the railway may be constructed.

The Board approved of the plans of the appellants, subject to any modification that might appear proper to be made after hearing the objections of the respondents on engineering grounds. The plans were amended to comply with the objections on engineering grounds made by the respondents, and, as amended, were finally approved on the 2nd day of September, 1915. The respondents appealed to the Appellate Division of the Supreme Court of Ontario on two grounds: (1) that the appellants had no franchise in respect of the street and adjoining land proposed to be used, and (2) that in any event the consent of the Municipal Council of the city was necessary. After the general argument had concluded, a memorandum was sent by the Registrar of the Appellate Division, saying that the Court would sit on the 13th November, 1915, to hear what counsel had to say, if anything, on the point "what jurisdiction had the County of York under the circumstances" stated in the memorandum "over the portion of Yonge Street in question." On the 13th November the counsel for the respondents asked for an adjournment, and the counsel for the appellants objected that the question should not be determined without an opportunity to give evidence. On the 15th November the respondents informed the Court that they had decided not to submit any further argument in the matter of the question of the franchise of the appellants. In view of this notification the counsel for the appellants assumed that it would not be necessary to appear further before the Court. No argument was addressed to their Lordships in support of the opinion expressed in the judgment of Hodgins, J. A. Their Lordships think that the question of the franchise of the appellants was not properly before the Appellate Court, and they are unable to entertain a question not raised at the trial, and on which, if it had been raised, it was open to the appellants to have called evidence in answer to the case made against them.

On the first ground of appeal, that the appellants had no franchise in respect of the street and adjoining land proposed to be used, Garrow, J. A., with whom Maclaren, J. A., and Magee, J. A., agreed, does not pronounce a final opinion. The Metropolitan Street Railway Company of Toronto was incorporated in 1877. This company had no authority to construct or operate their railway along streets and highways within the jurisdiction of the Corporation of the City of Toronto, and of any of the adjoining municipalities, except under and subject to an agreement thereafter to be made between the Councils of the city and of the municipalities and the company. In 1884 an agreement was made between the Metropolitan

Street Railway Company of Toronto and the Municipal Council of the County of York. This agreement is scheduled to an Act of 1893 which changed the name of the company to the "Metropolitan Street Railway Company." In August 1894 a further agreement was made between the Municipal Corporation of the County of York and the Metropolitan Street Railway Company. This agreement is scheduled to an Act of 1897. The agreement and the privileges and franchises thereby created are confirmed in the Act, and declared to be existent and binding upon the parties to the same extent and in the same manner as if the several clauses and agreement were set out as part of the Act. The rights conferred under this agreement have been transferred to and are now vested in the appellants. There is a provision in the Act that, in the event of the City of Toronto extending its limits so as to include any portion of the railway, such extension of limits should not affect the rights of the company at the date of such extension, or its property then situate within such extended limits, and that the powers conferred on the company by the Act should remain as if the city limits had not been extended. The City of Toronto was subsequently extended to include the portion of Yonge Street across which it is proposed to construct the spur line, and the ambit of the franchise which the appellants claim, and the conditions of its user, so far as are material to the present appeal, are to be found in the terms of the agreement of 1894.

The section of the agreement which determines the extent and nature of the appellants' franchise for the purpose of operating their railway—as distinct from its location and construction—is section 7. There is a difference in the sections which give powers to the appellants to locate and construct their railway and those which give powers to the appellants to operate the railway when located and constructed. For the purpose of operating the railway, sub-section (3) of section 7 confers a wide authority. It authorises not only the construction and maintenance of such culverts, switches, and turnouts as may from time to time be found necessary for operating the appellants' line of railway on Yonge Street or leading to any of the cross streets leading from Yonge Street, but also for the purpose of leading to any track allowances or rights of way on lands adjacent to Yonge Street, where the line deflects from Yonge Street, or to the appellants' power-houses and car-sheds. The plan, which the Board approved, shows that the turnouts, or spur lines, which cross a portion of the side walk on the west side of Yonge Street, are for the purpose of leading to track allowances or rights of way on land which is the property of the appellants, and to which there is a proposed deflection of the line from Yonge Street. The works approved are therefore within the terms of the franchise which has been vested in the appellants under the statutory agreement, if they are acquired for the purpose of operating the railway of the appellants.

There can be no doubt under this head, but in any case the finding of the Board would be conclusive on a question of fact. It is not necessary to decide whether the spur line in question is for the purpose of leading to power-houses and car-sheds of the appellants, and the evidence under this head is not satisfactory. Section 11 further gives a considerable power of constructing turnouts for the purpose of deflecting the line of railway from Yonge Street in order to operate the same across and along private properties after expropriating the necessary rights of way. It was argued on behalf of the respondents that their Lordships had decided in the case of The Toronto and York Radial Railway Company *v.* The Corporation of the City of Toronto in a sense contrary to the franchise which is claimed on behalf of the appellants. The decision of their Lordships in the above case was given on different grounds and is in no way inconsistent with their Lordships' construction of the franchise conferred by sub-section (3) section 7 of the agreement of 1894. Lord Moulton, in delivering the judgment of their Lordships, says: —

"On the 11th May, 1911, the proceedings in this matter were commenced by an application being made to the Ontario Railway and Municipal Board on behalf of the appellants for the approval by the Board of 'a plan to deviate the track on the Metropolitan Division from Yonge Street to a private right of way,' which was described as being about 125 feet to the west, running parallel with Yonge Street. On looking at the plan, it is obvious that this is a misdescription of the proposal, in that the proposed line lies only partially upon land proposed to be acquired by the railway company, and that it crosses in four or five places public highways which are not and necessarily cannot be described as portions of a private right of way."

Their Lordships therefore find that, for the purpose of operating the railway, the appellants have the franchise which they claim in respect of the street and adjoining lands proposed to be used, and determine in their favour the question on which Garrow, J. A., preferred not to give a final opinion.

The second point, that in any event the consent of the Municipal Council of the City was necessary before the Board could approve the plans submitted to them, remains to be considered. Garrow, J. A., bases his judgment on the necessity of such approval and holds that such approval is the very basis of all the work to be afterwards undertaken on Yonge Street. The relevant sections of the 1894 agreement which determine the rights of the respondents in reference to works proposed to be constructed on Yonge Street at the site in question, and to which attention was directed during the argument on behalf of the respondents, are sections 2, 3, 4, 5, 8, 9, 10, 17, 27, 28. Sections 2, 3, 4, and 5 apply to the location and construction of the railway and not to works which, after the location and construction, are required for the purpose of operating the railway so located and constructed.

It is clear that, before the work of construction is commenced, plans setting forth the proposed location of the tracks must be approved by the Committee appointed by the Council, and that such location cannot subsequently be altered without the consent of the Committee. There is a further protection that the line shall not be put in operation upon any section until the county engineer has certified that such section has been constructed in compliance with the terms of the agreement. Stringent limitations of a similar character are inserted in the agreement of 1884 scheduled to the Act of 1893. It must be assumed that all these conditions were fulfilled before the line of the appellants was put in operation. Section 8 authorises the appellants to change the location of its lines of track to any portion of Yonge Street with the consent of the Committee of the Council, but there is no proposal in the approved plans to change the location of any lines of track already located and constructed to a different portion of Yonge Street. Sections 9, 10, 17, and 27 relate to the method and conditions under which the appellants shall carry out works within their authority. They come into operation in the construction of works after approval, and it cannot be assumed that the appellants will not in every way adopt the prescribed method and comply with the prescribed conditions. Section 28 comes within the same category. It provides that the alignment of the tracks, the location of the switches, and the grades of the roadbed shall be prescribed by the county engineer.

In the present case the Board, before approving the plans of the appellants, took care to ascertain whether they were satisfactory on engineering grounds to the City of Toronto. They considered the objections of the City of Toronto on engineering grounds, procured a report thereon of their own engineer, and before approval amended the plans of the appellants to comply with the objections made on behalf of the City of Toronto. In effect, there was no difference on engineering grounds between the City of Toronto and the appellants when the Board finally approved the plans for carrying a spur line on the level across the sideway on the west side of Yonge Street. In the event of any difference arising between the City and the appellants as to any matter or thing to be done or performed under the terms of the agreement, the agreement contains an ample arbitration section.

Their Lordships are of opinion that the appellants succeed, and will humbly advise His Majesty that the appeal be allowed, with costs here and in the Court below.

In the Privy Council.

THE TORONTO AND YORK RADIAL RAILWAY COMPANY

v.

THE CORPORATION OF THE CITY OF TORONTO.

DELIVERED BY

LORD PARMOOR.

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