

33, 1933

In the Privy Council.

No. 21 of 1932.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE OTTAWA ELECTRIC RAILWAY COMPANY - *Appellant*

AND

CANADIAN NATIONAL RAILWAYS

AND

10 THE CANADIAN PACIFIC RAILWAY COMPANY *Respondents.*

CASE FOR THE RESPONDENTS.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada (Anglin C.J., Newcombe, Rinfret, Lamont and Cannon J.J.) delivered on the 18th May, 1931, dismissing an appeal from an Order of the Board of Railway Commissioners for Canada dated 5th March, 1928. Record.
p. 173.
pp. 85-86.

2. On the 14th July, 1927, the Municipal Corporation of the City of Ottawa (hereinafter referred to as "the City") made an application to The Board of Railway Commissioners for Canada, under sections 257 and 264 of the Railway Act, 1919, for an Order requiring the Appellant and the Respondents or some one or more of them to replace the existing Somerset Street Bridge or viaduct in the City of Ottawa, which carries Somerset Street and the tracks and right of way of the Appellant over the Respondents' tracks, with a bridge of sufficient breadth and of such construction as would afford safe and adequate facilities for all traffic on the said street and for an Order apportioning the cost of such new bridge between the Appellant and the Respondents or between some one or more of them and the City as the Board might direct. pp. 1-2.

The application alleged that Somerset Street Bridge was originally constructed at the cost of the Appellant and was thereafter enlarged at the joint cost of the Appellant and the City and that the bridge had fallen into

RESPONDENTS CASE.

Record. a state of disrepair and was dangerous to traffic and that it would be necessary to replace it by a more modern structure of greater breadth.

3. Section 257 of the Railway Act, 1919, under which the said application was made, is in part as follows :—

“ 257. (1) Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.”

Section 264 of the Railway Act 1919 is as follows :—

“ 264. Every structure by which any railway is carried over or under any highway or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure.”

pp. 2-4.

4. In the Appellant's answer to the application it was alleged, *inter alia*, that the Somerset Street Bridge consisted of a bridge built in 1907 for vehicular traffic and (on the north thereof) a bridge built about 1896 for Street Railway traffic upon which other vehicular or foot traffic was permitted; that the Appellant was the absolute owner of the north bridge; that the south bridge had been built in order that the public should not drive or walk on the north bridge which was said to be dangerous for such traffic; that the application was occasioned by an increase in vehicular and pedestrian traffic, the Appellant's vehicles then comprising less than sixteen per cent. of the vehicular traffic; that the Appellant's sole obligations with respect to any bridge were set forth in an agreement between the City and the Appellant dated 28th June 1893; that all obligations and expenses relating to the construction, repair or maintenance

of the bridges other than those set out in the said agreement were to be borne by the City or parties other than the Appellant and that the order of the Board of Railway Commissioners dated 13th March, 1907, was made at a time when the volume and nature of the traffic were radically different from that now prevailing and was based upon conditions which do not now exist.

Record.

5. The Respondents did not object to the replacement of the bridge but contended that by virtue of two agreements between the Appellant and the Respondents dated respectively the 8th August 1896, and the 21st August 1896, no part of the cost of constructing and maintaining the bridge ought to be placed on the Respondents.

pp. 5-6.

6. The material parts of the said agreement dated 8th August 1896, between the Appellant (therein referred to as "the Electric Company") and the Respondent the Canadian Pacific Railway Company (therein referred to as "the Railway Company") are as follows:—

"Whereas the public highway in the City of Ottawa, formerly known as Cedar Street and now known as Somerset Street, is and has been carried over the St. Lawrence and Ottawa Branch of the Railway Company's Line by means of an over-head bridge :

p. 124, l. 5.

"And whereas the Electric Company have been authorised by the Corporation of the City of Ottawa to construct a line of Street Railway upon Somerset Street or Cedar Street to the westerly limit of the City :

"And whereas the Electric Company in consideration of the premises and of the money payment hereinafter set forth, have agreed with the Railway Company to assume and take over the liability (if any) of the Railway Company for the maintenance and repair of the said bridge and the approaches thereto and to indemnify the said Railway Company against all liability therefor :

"Now therefore this Indenture witnesseth that, in consideration of the premises and of the sum of eight hundred dollars (\$800.00) now paid by the Railway Company to the Electric Company, the receipt whereof is hereby acknowledged, the parties, for themselves, their successors and assigns, mutually covenant, promise and agree to and with each other in manner and form following:—

"1. The Electric Company shall and will from time to time and at all times hereafter, indemnify and save harmless the Railway Company from and against all liability to maintain, alter, repair or re-construct the said bridge or the approaches thereto, and also from and against all claims for damages of every nature or kind whatsoever, or for any penalty imposed upon the

Record.

said Railway Company, by reason of any defect or default in the said bridge or crossing or the approaches thereto.

“ 2. The Electric Company further agree that, if it should at any time become necessary to re-construct the present bridge, or to alter same, plans of such alteration, or of the new bridge to be constructed, shall first be submitted to and approved of by the Railway Company.

“ 3. The Railway Company hereby assign and set over to the Electric Company all the rights of the Railway Company on or connected with the said bridge and the approaches thereto. 10

“ Provided that nothing herein contained shall be construed as divesting the Railway Company of the fee simple in the railway right of way under the said bridges and approaches.

“ Provided further, that, in the event of the Railway Company's requiring at any time to widen the span of the said bridge, they shall be entitled to do so at their own proper costs, charges and expenses.”

pp. 125-127.

The agreement between the Appellant and the predecessor of the Respondent the Canadian National Railways dated the 21st August, 1896, is in similar terms.

p. 5, l. 13.

It was also contended on behalf of the Respondent the Canadian Pacific Railway Company that its Railway line, having existed prior to the opening of Somerset Street, was “ senior ” and not, under decisions of the Board of Railway Commissioners, liable to contribute to the cost of the re-construction of the bridge. 20

p. 105, l. 1.

7. The lines of the two Respondents which are parallel and close together were originally crossed by two bridges. The Appellant subsequently to the agreements of August 1896 at its own expense filled up the depression between the two bridges and laid a continuous floor upon them and the intervening earth embankment. It also replaced the wooden bents of the bridges with concrete abutments and put in steel girders. Provision was made for the accommodation of vehicular and pedestrian traffic and the Appellant laid its street railway tracks upon this structure and has used it for the operation of its cars over the steam railways. 30

p 127.

8. The effect of the agreements of 8th and 21st August 1896 had, it is submitted, been determined by the Board of Railway Commissioners for Canada adversely to the Appellant's contention in 1907, on an application to the Board by the City, dated the 16th November, 1906, for an Order under the provisions of the Railway Act, 1903, directing the Appellant and the Respondents to submit a plan and profile for the widening of the Somerset Street bridge and the approaches thereto. 40

9. Following the application, on the 13th March, 1907, the Board of Railway Commissioners for Canada (A. C. Killam, Chief Commissioner, Hon. M. E. Bernier Deputy Chief Commissioner and James Mills, Commissioner) gave judgment (Order No. 3684) directing, inter alia, the Appellant to widen the said bridge by sixteen feet according to the plans to be submitted to and approved by the Board and ordered the City to pay to the Appellant one-fourth of the expense involved in the said addition. Record.
p. 132.

10. The Chief Commissioner, in his reasons for judgment delivered on the 13th March 1907, stated that the only substantial question for consideration was as to the body which should bear the cost of the alteration. The City of Ottawa had offered to bear one-fourth of the expense and he held, accepting the contentions of the present Respondents or their predecessors, that in view of their agreements with the Appellant and in the view that the necessity for the widening of the bridge arose wholly from its use by the Appellant, that the remaining three quarters of the expense should be borne by the Appellant. p. 128, l. 25.
p. 130, l. 33

11. On the 5th March 1928, the Board of Railway Commissioners delivered judgment in the present case (Order No. 40417) authorising the City to re-construct the Somerset Street bridge in accordance with plans to be filed for the approval of an engineer of the Board, directing that the bridge should be 58 feet in width and ordering that the City should bear and pay the cost of the construction of the sidewalks and the paving of the roadway and that the remainder of the cost of the bridge should be borne 60 per cent. by the Appellant and 40 per cent. by the City. p. 85.

12. Mr. Commissioner McLean in his reasons for judgment (con-
curred in by Mr. Commissioner Vien K.C.) dated 23rd February 1928, adopted the reasons for judgment of Chief Commissioner Killam delivered the 13th March 1907, and held that by virtue of the agreements of 8th and 21st August 1896, the Respondents were exonerated from bearing any part of the cost of the re-construction of the bridge. pp. 60-73.
p. 70, l. 23,
et seq.

13. Mr. Commissioner Oliver who dissented, approved of the construction of a new bridge but he did not consider it either reasonable or expedient that the Board should order the Appellant to pay the cost ordinarily assessable against the steam railways. If the Respondents had under their agreements a remedy against the Appellant it seemed to him that they should seek that remedy in the Courts and not at the hands of the Board. He would have apportioned the cost (after deduction of the maximum amount permitted by law from the Grade Crossing Fund) equally between the Respondents and the City, the share of the railways to be divided between them in proportion to the bridge space occupied by their respective tracks and the Appellant to pay one-half of the amount chargeable to the City. pp. 73-84.
p. 83, l. 14.

p. 84, l. 6.

Record.
pp. 101-107.

14. On the application of the Appellant under section 52, subsection (3) of the Railway Act for leave to appeal to the Supreme Court of Canada the Board of Railway Commissioners, on the 17th December 1929, made an Order stating that the parties agreed the material facts set out in the Order including the said agreements of 8th and 21st August 1896 and granting leave to the Appellant to appeal upon the following questions which in the opinion of the Board were questions of law :—

p. 107, l. 3.

(1) Has the Electric Railway Company any obligation under the said agreements with the Steam Railways to indemnify the Steam Railways, or either of them, in any respect whatever with reference to such liability as the Steam Railways, or either of them, may have to contribute towards the cost of construction of a bridge such as provided for in the Board's Order No. 40417 ? 10

(2) If the answer to Question 1 is " Yes " does such obligation thereunder extend to (A) the whole or (B) part only of such cost that may be occasioned by the increased volume and the variation in character of traffic since the dates of the said agreements ?

(3) If the obligation extends to part only of the cost referred to in Question 2, then to what part ?

(4) If the Electric Railway Company has any obligation under the said agreements to indemnify the Steam Railways, or either of them, with respect to maintenance, what is the extent of the obligation ? 20

pp. 173-174.

15. On the 18th May 1931, the Supreme Court of Canada (Anglin C.J.C., Newcombe, Rinfret, Lamont and Cannon JJ.) gave judgment dismissing the appeal and answering the questions as follows :—

p. 174, l. 5.

(1) Yes.

(2) The whole.

(3) Not answered.

(4) Answered by answer to No. 2. 30

p. 175.

16. Chief Justice Anglin in his reasons for judgment (concurring in by Newcombe, Rinfret, Lamont and Cannon JJ.) held that the agreements entered into between the Appellant and the Respondents on the 8th and 21st August 1896, contemplated alteration or reconstruction of the bridge to meet the exigencies of highway traffic whenever and as often as might be necessary in the future. He considered that it must be assumed that the Board of Railway Commissioners first determined that the entire cost of the construction should be apportioned as between the City of Ottawa and the Appellant and Respondents in the proportion of forty per cent. to be paid

by the City and sixty per cent. by the Railways and that on that assumption the Board was entirely justified in taking into account the agreements referred to in determining how the proportion of the cost of the recent reconstruction of the bridge payable by the Railway Companies should be borne as between the Appellant and the Respondents, and that it was impossible to say that their decision that the whole sixty per cent. should be paid by the Appellant Company was wrong.

Record.

17. The Respondents submit that the judgment of the Supreme Court of Canada is right and should be affirmed for the following among
10 other

REASONS.

- (1) BECAUSE under the agreements made between the Appellant and the Respondents dated the 8th and 21st August 1896 respectively the Appellant is bound at all times thereafter to indemnify the Respondents against all liability to maintain, alter, repair or reconstruct the bridge in question.
- (2) BECAUSE the Board of Railway Commissioners was right in giving effect to the said agreements.
- 20 (3) BECAUSE at the point in question the line of the Respondent the Canadian Pacific Railway Company is the senior line.
- (4) BECAUSE the decision of the Board of Railway Commissioners in the previous application, on the 13th March 1907, was right and ought to be followed.
- (5) FOR the reasons given by the majority of the Board of Railway Commissioners and the Supreme Court of Canada in the present case.

W. N. TILLEY.

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R. H. M. TEMPLE.

E. P. FLINTOFT.

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FOR THE RESPONDENTS.

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