Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of The Corporation of the City of Toronto v. *The Toronto Railway Company, from the Supreme Court of Canada, and of The Toronto Railway Company* v. *The Corporation of the City of Toronto, from the Court of Appeal for Ontario; delivered the 26th April* 1907.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Collins.*]

The questions in these Appeals turn upon the construction of the Agreement, confirmed by Statute, regulating the rights of the Appellants and Respondents respectively in regard to the working of a certain street railway in the City of Toronto. Prior to the 1st September 1891 the principal Appellants, hereinafter called "the Corporation," had become the owners of the said railway which they proposed to sell and offered for sale by tender subject to conditions prepared by their Engineer. The tender of one George Kiely and others was accepted, for whom the Respondents in the principal Appeal, hereinafter called "the Railway Company," were substituted on the terms of an agreement which was confirmed by Statute 55 Vict., cap. 99. The Railway Company thenceforth have continued to work the railway. Disputes having arisen between the parties

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as to their rights in relation to the said railway the Corporation in 1903 commenced proceedings to have them determined. These proceedings were ultimately carried to the Supreme Court of Canada, from whose judgment the first of these Appeals now comes before their Lordships. The main Appeal is by the Corporation upon one point, pursuant to special leave thereto enabling them. The Railway Company by the like leave raise several points by way of objections to the said judgment in lieu of a formal Cross-Appeal.

The second Appeal, in which the Railway Company are the Appellants, is from the Court of Appeal for Ontario, and arises out of proceedings commenced by the Corporation in 1905 to enforce certain clauses of the above-mentioned Agreement.

The question on the main Appeal is: Has the Corporation street railway powers under the Agreement over streets within new territorial additions to the City during the term therein mentioned ?

The Supreme Court, over-ruling in this respect the decision of the Courts below, has decided by a majority of three to one that it has not. The reasons given in the Judgments of Sedgewick and Idington, JJ., with whom Davies, J., concurred, seem to their Lordships so full and satisfactory as to make it unnecessary to say more than that they adopt and agree with them. The injustice involved in the contrary view, which would enable the Corporation to compel the Railway Company to extend their lines at an indefinite expense, and for indefinite distances, where the maximum fare chargeable for any distance is 5 cents, seems to their Lordships insuperable. Their Lordships are of opinion therefore that on this point the Corporation fails.

The objections raised by the Railway Company seem to be in substance two—

1. Where under Condition 14 the Railway Company has been required to lay down new lines or extend tracks and car service as recommended by the Engineer and approved by the City Council according to the terms of the Condition, can the Railway Company, having regard to Condition 17, be compelled to carry out such requirement or pay damages if they do not?

2. Can the Corporation insist upon the Railway Company following such routes and stopping at such places as are determined by the City Engineer and approved by the City Council?

The question of stopping is also the subject of the Railway Company's Appeal from the Court of Appeal for Ontario.

The Supreme Court (Sedgewick, J., dissenting) have answered these questions in favour of the Corporation against the Railway Company.

With respect to the first of these two questions there can be no doubt that by the bargain between the parties the Railway Company were to acquire not merely the material of the railway undertaking but the exclusive right "to "operate surface street railways in the City of "Toronto." That is "the privilege" to be disposed of by the first Condition of Sale.

By the preamble of the Statute the Act is said to be "to the intent and purpose that the "Company may carry out the agreement with "the City of Toronto for the purchase of the "street railways and properties and the street "railway privilege of and belonging to the City "of Toronto, and may work the said railways."

By Clause 1 it is declared that under the agreement the purchasers are entitled to the exclusive right and privilege of using and *working* the street railways in and upon the streets of the City of Toronto with certain

exceptions. And by Clause 4 the Company shall, subject to the provisions and conditions of the Agreement—

"Have full and exclusive power to acquire, construct, "complete, maintain, and *operate* . . . . a double or "single track street railway with the necessary side tracks, &c. ". . . . upon or along all or any of the said streets or "highways of the City of Toronto, subject to the exceptions "and under the qualifications contained in the first section "hereof, and to take, transport, and carry passengers upon the "same . . . . and to construct and maintain . . . . "all necessary and convenient works . . . . required for "the *due and efficient working thereof* . . . . and shall "have full power to carry out, fulfil, and execute the said "agreement and conditions."

By Section 19 the Company is empowered, with the consent of the local corporations in the County of York, to acquire privileges to build *and operate* surface railways within the limits of such municipalities, with the proviso that, if such local municipalities should be annexed to the City of Toronto within the period of the main agreement, the Company shall have all the rights and be subject to the conditions of the main agreement, and shall be discharged from all agreements and conditions with the local municipalities.

By Clause 11 of the Agreement scheduled to the Act the right granted is "the exclusive "right . . . upon the aforesaid conditions "*to operate* surface street railways in the City "of Toronto."

By Clause 15 the Company are to pay to the Corporation $800 per annum per mile of single track or $1,600 per mile of double track occupied by the rails within the said limits. They are also, by Clause 16, bound to pay monthly percentages varying from 8 to 20 per cent. according to the amounts thereof upon the gross receipts. It would seem, therefore, to be perfectly clear that it was intended to confer upon the Company in the fullest possible way the power of "operating" the street railway system. It was obviously fair

that this should be so, as the difference between profit and loss would probably depend mainly on the skill brought to bear on the operating, and the Company had the exclusive interest in the net profits, the Corporation getting their percentages from the gross receipts. It is into a bargain whose main features are what has been described that the series of provisions out of which the questions now under discussion arise are introduced, and the true effect of these provisions can only be reached by looking at them in reference to the whole bargain. Coming then to the two clauses most material to the first question under discussion, viz., the 14th and the 17th clauses, it would seem that they ought to be construed so as to harmonise as far as possible with the general provisions of the bargain.

They run as follows :—

(Clause 14). "The purchaser will be required to establish "and lay down new lines and to extend the tracks and street "car service on such streets as may be from time to time recom- "mended by the City Engineer and approved by the City "Council, within such period as may be fixed by By-law to be "passed by a vote of two-thirds of all the members of the said "Council, and all such extensions and new lines shall be "regulated by the same terms and conditions as relate to the "existing system, and the right to operate the same shall "terminate at the expiration of the term of this Contract."

(Clause 17.) "In case the purchaser fails to establish and "lay down any new line, as aforesaid, and to open the same "for traffic, or to extend the tracks and services on any street "or streets within such period as may be fixed by By-laws of "the City Council, to be passed as herein provided, the "privilege of laying down such new lines or extensions on the "street or portion of street so abandoned by the purchaser "may be granted by the said Council to any other person or "company, and the purchaser shall in such case have no claim "against the City for compensation."

The 14th clause appears on its face to derogate from the exclusive rights conferred on the Company in the clauses already cited to operate the railway along all or any of the streets or

highways of the City of Toronto. The exclusive right in terms negatives the participation of any other person or persons in that right, while the word "operate" in its context seems to embrace the working of the street railway as a system, and to carry with it the right to include or exclude certain streets in or from such system. To hold that the 14th clause enables the Corporation to compel the Company to incur the expense of making a railway in streets where in the view of the latter it cannot be worked at a profit or beneficially introduced into their system, would be to adopt an interpretation so much out of harmony with the unambiguous provisions of other clauses that their Lordships ought not to do so unless the wording is so plain as to leave no alternative. But it seems to their Lordships that, as pointed out by Sedgewick, J., a mitigation of the apparent hardship is to be found in Clause 17, which deals with the consequences which are to follow on the failure by the Company to lay down the new line according to the requirements of the Corporation, viz., that the privilege, which the clause treats as thereby abandoned by the Company, of laying down new lines or extensions in such streets, may be granted by the Council to any other person or company, and the Company deprived of any claim against the City for compensation in consequence. This interpretation, which is that which commended itself to Sedgewick J., seems to their Lordships to be quite open on the language of the clauses, and by treating the remedy thus provided by the Statute as displacing every other, avoids the hardship and inconsistency of the view adopted by the majority. The argument so much relied on in the Court below, that by Clause 12 of the

Agreement the Company had covenanted to perform the 14th condition, is thus displaced.

Next with regard to the last question, which involves what has been called in the argument the "routeing" of the cars, and the places of stoppage.

As has been already shown from the passages cited, the exclusive right of "operating" the street railways has been in the most explicit terms conferred upon the Company. Now whatever else the word "operating" may include, it seems to their Lordships most certainly to embrace the right to determine the routes of the different cars and their inter-relations. This seems to lie at the root of successful management of the enterprise, and ought to be in the hands of those who are responsible for getting the best monetary return out of it. How far then has this exclusive discretion, which would seem *primâ facie* at all events to be conferred on the Company, been displaced by other provisions in the bargain?

The clause mainly, if not exclusively, relied on for the Corporation was the 26th of the Conditions of Sale:—

"The speed and service necessary on each main line, part "of same, or branch, is to be determined by the City Engineer "and approved by the City Council."

This clause is the last of a fasciculus, of which the heading is "Track, &c., and Road-"ways," and, as was held in *Hammersmith Railway Company* v. *Brand* (L. R., 4 H. L., 171), such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation. On looking through the clauses down to the 26th, it is clear that "Tracks, &c., and Roadways" refer to the physical condition of these entities, and not to the course or direction of the cars, which is

the governing idea in the word "Routes." The words of Clause 26, therefore, *primâ facie*, are not addressed to the routes at all, in the sense involved in the controversy in this case, viz., as their Lordships understand it, the course which each car is to take from the start to the end of its journey. It is said that the word "service" embraces it, but it seems to their Lordships that *primâ facie* in its context it ought not to be so construed, and further, that if service were to be construed in a sense wide enough to include the marking out of routes, a great many of the special provisions which follow* would be superfluous, as already covered in the wide interpretation of "service." Indeed, Clause 33 seems to be inconsistent with such an interpretation, for it assumes that the arrangements necessary to enable a passenger to have a continuous ride from any point on the railway to any other point on a main line or branch within the City limits are to be made by the Company, though "with the approval of the Engineer and "the endorsation of the Corporation." Therefore on the question of "routeing" also their Lordships agree with the view of Sedgewick J.

* *E.g.* 27, 28, 33, 36, 37, 38, 39.

With regard to the question of stopping, which arises more specifically on the second Appeal, the argument in favour of the Company seems to their Lordships still stronger, for here there is a specific provision, Clause 39, regulating the matter and negativing any other implied power in the Engineer.

Their Lordships will therefore humbly advise His Majesty that an Order should be made declaring and ordering:—

That neither the City nor the Company have any street railway powers under the said agreement over streets within new territorial additions to the City during the term therein mentioned.

That under Clauses 14 and 17 of the Conditions the privilege to grant to another person or Company for failure of the Company to establish and lay down new lines and to open same for traffic, or to extend the tracks and services upon any street or streets as provided by the Agreement, is the only remedy that the City can claim.

That subject to the above conditions it is for the Company and not for the City Engineer, with the approval of the City Council, to determine what new lines shall be laid down on streets within the City as existing at the date of the Agreement and what routes shall be adopted by the Company.

That subject to Condition 39 it is for the Company and not for the City Engineer to determine where cars shall be stopped for the purpose of taking on and letting off passengers.

That the judgments of the Supreme Court and the Court of Appeal for Ontario be varied so far as is necessary to give effect to the above declarations.

And that the Corporation do pay to the Railway Company the costs incurred by them in the several Canadian Courts in respect of the questions raised in these consolidated Appeals so far as such costs have not already been awarded to them by any of the said Courts.

The Corporation will pay to the Railway Company their costs of the consolidated Appeals to His Majesty in Council.