Judgment of the Lords of the Judicial Committee on the Appeals of the Toronto Railway Company v. *the Corporation of the City of Toronto, from the Court of Appeal of Ontario; delivered 2nd August* 1901.

Present at the Hearing:

LORD HOBHOUSE.
LORD DAVEY.
LORD ROBERTSON.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The controversy between the parties to this appeal has sprung out of a deed of agreement bearing date the 1st of September 1891, made between the Plaintiffs below who are now Respondents, and the Defendants below who are now Appellants, and confirmed by an Act of the Legislature of Ontario 55 Vict. cap. 99. By it the Plaintiffs grant to the Defendants certain street railways in Toronto and other property upon the terms specified. The parties have disagreed as to the meaning of those terms in many respects; but there remain now only three points on which the Defendants contend that the judgment of the Court of Appeal ought to be varied.

The first point, apparently the most important, relates to the rent payable by the Defendants. By the 15th clause of the agreement the Defendants covenant "that they will yearly and "every year during the term covered by this "agreement pay to the Corporation through its

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" City Treasurer the sum of $800 per annum per " mile of single track, or $1,600 per mile of " double track, occupied by the rails of the said " railways within the said limits (not including " turn-outs, the length of which are to be " approved of by the City Engineer)." A dispute has arisen as to the meaning of the word "turn-outs." The Plaintiffs say that it means a side track on which a train can be shifted in order to let another train on the main track pass it. The Defendants contend that it includes all curves and deviations by which carriages are enabled to pass from one line of rails to another.

The term is a term of art, and both books and oral evidence taken at the trial have been adduced to explain it. The effect of the evidence is to show that it is most properly and generally used in the sense alleged by the Plaintiffs, though it may be casually used to denote any kind of deviation. The language of conditions of sale which are made part of the agreement supports the same conclusion; for it speaks of turn-outs and curves in a way implying that the latter are not included in the former. Both Courts have held that the Plaintiffs are right in their construction.

Their Lordships have difficulty in understanding on what grounds the Defendants maintain their view. The ground most clearly stated is that turn-outs as interpreted by the Plaintiffs apply only to single tracks, whereas all the Defendants' tracks are double. But as the agreement clearly contemplates the construction of single tracks that argument has no force. Their Lordships cannot discover that there is any substantial reason for disturbing the judgment of the Court below on this point.

The next question arises out of the same clause of the agreements. It requires an almost microscopic examination to appreciate, and its

effect as measured in money must be but small. As their Lordships understand the case, the measurements made by the Plaintiffs, and upheld by both decrees below, include in the mileage to be paid for all curved lines of rail from the point at which they part from a straight line to the point at which they again merge into a straight line. The Defendants contend that the mileage for which they are bound to pay is not the length of the various rails, but only the length of that which in the 8th condition of sale is called "the street railway portion of the "roadways," and which the Plaintiffs are bound to keep in repair for some space on each side of the rails. So far as a curve keeps within this portion of the roadways, it ought not, the Defendants say, to be measured for rent.

It seems to their Lordships that the Plaintiffs follow the literal construction of Section 15 of the agreement, and that Section 8 of the conditions does not affect that construction. The miles on which the rent is calculated are miles occupied by the rails. When a pair of rails parts company with a straight line it is rightly measured as occupying so much mileage. The Courts below have taken care that double charges shall not be made for the same rail by measuring it once as the straight line, and once again as a curve not yet disengaged from the straight line. The observation already made as to the construction of Section 15 also disposes of the question as to what has been called the diamond where rails cross each other at right angles.

The third point relates to a claim for some pavements or roadways laid down by the Toronto Street Railway Company. That was a company which in the year 1861 took from the Plaintiffs a grant or lease of the right to make street railways and of the use of roadways or pavements for that purpose; all resumable at the end of 30 years. There were divers stipulations between

the parties as to repairs and alterations, and obligations consequent thereon. In case of resumption the value of the Company's property was to be determined by arbitration.

In the year 1877 an Act of the Ontario Legislature (40 Vict., cap. 85) made some provisions on this subject :—

Section 3 provides that "whenever the city "shall change the kind of paving (not being "macadam, cobble, or building stone) thereafter "to be constructed on any street traversed by "the railway before such paving is worn out, "whereby the same is dispensed with, the city "shall make good to the company the value "of the existing paving for the purpose of the "company."

And by Section 5 it is enacted—

"That if the corporation of the city should at "any time elect to assume the street railway "under the provisions of the agreement and "bylaw in that behalf, the arbitrators ap-"pointed to determine the value of the real "and personal property of the company should "also estimate as an asset of the company the "value to the company of any permanent pave-"ment thereafter constructed or paid for by the "company for the balance of the life of the said "pavement."

The Plaintiffs did resume in the year 1891 when the prescribed process was followed. By the award of 15th April 1891 the Plaintiffs were ordered to pay to the Street Railway Company the sum of 1,453,788 dollars for the property specified in a schedule. The second item of that schedule is as follows :—

"The interest of the said Company in all "pavements and road-beds on the streets of said "city (basis of valuation of which is shown in "award)."

The materials of the pavements were no part of the basis of valuation. The sum awarded was

paid by the Plaintiffs to the Street Railway Company.

Thus having become the sole owners of the whole subject-matter, the Plaintiffs granted to the Defendants by the deed on which they now sue all the railways and property acquired by them from the Street Railway Company under the arbitration and award. The Defendants contend that they have not got the whole subject of the grant, because the Plaintiffs have not made over to them the materials of the pavements. They make this matter the subject of counterclaim, and they obtained a decree from the First Court, which has been discharged by the Court of Appeal, and which they now seek to restore. The question is, whether the Plaintiffs acquired the pavements from the Street Railway Company. If so, they have transferred them to the Defendants; otherwise not.

The case appears to their Lordships to be quite free from doubt. The only difficulty consists in the multiplicity of documents. The first Court seems not to have distinguished between the right to use the pavements and the ownership of their materials and to have considered that a prior judgment of the Ontario Court affirming a right of property in the Street Railway Company settled the point in favour of the Defendants. The matter is fully and clearly expounded by Mr. Justice Osler, who delivered the judgment of the Court of Appeal in a way which leaves nothing further to be said. He makes clear these propositions: that the Street Railway Company's property in the pavements was the use of them during the granted term as long as they would last; that when the holding of that Company was terminated by the Plaintiffs they were to be paid for the unexhausted value of the use taken away from them and accruing to the Plaintiffs; that they were so paid in

terms of the award; that this species of property passed to the Defendants by the grant of September 1891; but that the materials of the pavement, as distinguished from the right to use them, remained throughout the property of the Plaintiffs, and were not acquired by them from the Street Railway Company nor granted by them to the Defendants.

In their Lordships' judgment all the subjects of this appeal have been rightly decided, and they will humbly advise His Majesty to dismiss it. The Appellants must pay the costs.