Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Corporation of the City of Toronto v. *The Toronto Railway Company, from the Court of Appeal for Ontario; delivered the 18th March, 1910.*

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
LORD SHAW.

[*Delivered by Lord Macnaghten.*]

This is a singular Appeal and, in their Lordships' opinion, a very idle one. In form it is an Appeal from an Order of the Court of Appeal for Ontario dismissing an Appeal from an Order of the Ontario Railway and Municipal Board. In substance it is an attempt to avoid or impugn an Order of His Majesty in Council and to re-open a question finally determined in a litigation between the parties to the present controversy—the City of Toronto and the Toronto Railway Company.

It seems that in the year 1891 the City of Toronto acquired the ownership of the railway of a former Street Railway Company. The City advertised the railway with a new franchise for sale by tender. The tender of certain persons who proposed to become the purchasers was accepted, and on the 1st of September, 1891, an agreement of sale and purchase was executed

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by the City and the purchasers. To this agreement the conditions of sale were annexed and made part and parcel thereof.

In April, 1892, an Act of the Parliament of Ontario was obtained (55 Vic., cap. 99) incorporating the purchasers as the Toronto Railway Company, authorising the Company to purchase the railway, and confirming the agreement of the 1st September, 1891, which was scheduled to the Act together with the conditions of sale and the tender.

Questions afterwards arose between the City and the Railway Company, and among them a question as to which of the two had the right to select the streets for new lines when further accommodation was required in order to cope with increasing traffic.

These questions came to be the subject of litigation between the City and the Railway Company. Ultimately, on the advice of this Board, upon an Appeal from the Supreme Court of Canada, His Majesty was pleased, among other things, to Declare and Order that, subject to the said conditions of sale, it was for the Railway Company, and not for the City engineer with the approval of the City Council, to determine what new lines should be laid down on streets within the City as existing at the date of the said agreement and what routes should be adopted by the Railway Company.

On the 17th of May, 1907, on an application by the City against the Company in a case commonly called "the Overcrowding Case," the Ontario Railway and Municipal Board ordered the Company to construct between ten and fifteen additional miles of single track.

Proceeding to comply with the Order of the Board, the Company selected certain streets. These streets, as appears from the finding of the

Board, had at one time been approved by the City engineer. The City, however, did not approve of the recommendations of their own engineer, taking up the position that the Company had no right to build on streets even when recommended by the City engineer unless those streets were also approved by the City Council.

While this controversy was pending, the City procured the insertion of the following clause in an omnibus Bill promoted by them, which passed into an Act on the 14th of April, 1908, and is now the Act 8 Edward VII., c. 112:—

> "1. Notwithstanding anything contained in the Act passed in the fifty-fifth year of the reign of Her late Majesty Queen Victoria, and chaptered 99, and intituled An Act to Incorporate the Toronto Railway Company, and to confirm the agreement between the Corporation of the City of Toronto and George W. Kiely, William Mackenzie, Henry A. Everett, and Chauncey C. Woodworth; and notwithstanding any judicial decision interpreting the effect of the said Act and the said agreement, it is hereby declared that it is and always has been the true intent and meaning of the said Act that the rights retained by and secured to the Corporation of the City of Toronto by the said agreement as to the control and management of the streets of the said City, and as to establishing and laying down new lines of railway, and as to extending the street car service upon the streets of the said City, as may be from time to time recommended by the City Engineer and approved by the City Council, have not been and are not affected by the said Act, but said rights remain and are as set out in the said agreement scheduled to the said Act."

The Preamble of the Act contains recitals in reference to other matters dealt with in the Act, but it is silent as to the object of clause 1. It is difficult to understand the purpose of that clause. At first sight it looks as if it were aimed at His Majesty's Order and the advice tendered by this Board on the occasion of the former litiga-

tion. If that were indeed the aim, the bolt is very wide of the mark. In effect it seems to be nothing more than the affirmance of a proposition with which the Railway Company were never concerned to quarrel and with which they now profess to be in complete accord.

The next step was that the Railway Company made an application to the Railway and Municipal Board to have it declared that the Railway Company had the right to construct its railway upon the streets which it had selected and which were specified in the application.

On this application, which was opposed by the City, the Railway and Municipal Board determined that the Company had the right to select the streets mentioned in their application, and so declared. They found that the City had denied the Company's right and had prevented the Company from using the streets selected for their new lines and had violated and committed a breach of the agreement which they made with the Company. And so, under the authority vested in them by Section 63 of the Ontario Railway and Municipal Board Act, 1906, having regard to all the circumstances of the case, they thought it reasonable and expedient in their discretion to enjoin and restrain the City, their servants and agents from preventing or interfering with the construction by the Company of the railway upon the said streets mentioned in the application. A formal order to this effect was passed under the seal of the Board.

From this order the City appealed to the Court of Appeal for Ontario. The appeal was dismissed with costs.

On the hearing of the application to the Railway and Municipal Board, on the appeal to the Court of Appeal of Ontario, and on the hearing of this appeal, some reliance was placed on behalf

of the City on the enactment contained in the Act of 1908.

The argument on the part of the Appellants appears to be mainly founded on a shorthand note of some extracts from the speeches delivered by Counsel on the hearing of the former case, a line of argument which their Lordships are not prepared to follow or disposed to countenance.

The Judgment in the former case seems to be perfectly clear, and the Order of His Majesty is unaffected by the legislation of 1908.

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

The Appellants will bear the costs of the Appeal.

In the Privy Council.

THE CORPORATION OF THE CITY OF TORONTO

v.

THE TORONTO RAILWAY COMPANY

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