THE TOWN OF BERLIN.....APPELLANTS;

AND

THE BERLIN AND WATERLOO STREET RAILWAY COMPANY } RESPONDENTS.

1909
*Nov. 18.
1910
*Feb. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Street railway—Franchise—Assumption by municipality—Principle of valuation—Operation in two municipalities—Compulsory taking—R.S.O. [1897] *c.* 208.

By sec. 41 of the "Ontario Street Railway Act" (R.S.O. [1897] ch. 208), no municipal council shall grant to a street railway company any privilege thereunder for a longer period than twenty years, and at the expiration of a franchise so granted, or earlier if so agreed upon, it may, on giving six months' previous notice to the company, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value of the same to be determined by arbitration.

Held, reversing the judgment of the Court of Appeal (19 Ont. L.R. 57), that the proper mode of estimating the value of the "railway and all real and personal property in connection with the working thereof," was not by capitalizing its net permanent revenue and taking that as the value, but by estimating what it was worth as a railway in use and capable of being operated, excluding compensation for loss of franchise.

Held, also, that in view of the provisions in the "Street Railway Act" authorizing the municipality to assume owership of a street railway operating in two or more municipalities the company in this case whose railway was taken over by the Town of Berlin was not entitled to compensation for loss of its franchise in the municipality of Waterloo.

On the expiration of its franchise the company executed an agreement extending for two months the time for assumption of ownership by the municipality, but did not relinquish possession until six months more had elapsed. During the extended time an

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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Act was passed by the legislature reciting all the circumstances, ratifying and confirming the agreement for extension and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the court.

Held, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immediately on the expiration of the franchise its effect was, not to confer on the municipality a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions.

The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent. over and above the actual value of the property.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment of Mr. Justice Britton, who affirmed the award of arbitrators appointed to determine the value of the Berlin and Waterloo Street Railway, the ownership of which had been assumed by the Town of Berlin on termination of the company's franchise.

Under the provisions of the "Ontario Street Railway Act" the Town of Berlin assumed ownership of the Berlin & Waterloo Street Railway when its twenty-year franchise expired. The arbitrators appointed to determine the value of the railway stated in their award that

"We find, award, adjudge and determine the value of the railway of the Berlin and Waterloo Street Railway Company, Limited, and of all the real and personal property in connection with the working thereof to be the sum of seventy-five thousand two hundred dollars ($75,200.00), which sum is the actual present value of the railway and of the real and personal property in connection with the working thereof, not taking into account or in any way dealing with the bonded

(1) 19 Ont. L.R. 57.

debt of the company, which is a charge upon the property of the company and which bonded debt was stated to us to be thirty thousand dollars.

"We further find, award and determine that the said railway and the said real and personal property so valued by us consist of and include the railway and all the real and personal property specified or mentioned in the schedule marked "A" hereto annexed, and that the above mentioned sum so found by us is the value of the said railway and property free and clear and fully and completely discharged of and from all mortgages, debentures, bonds, debts, liens, incumbrances, claims and demands whatsoever, either at law or in equity of every nature and kind whatsoever.

"In arriving at the above value we have valued the railway as being a railway in use and capable of being used and operated as a street railway and have not allowed anything for the value of any privilege or franchise whatsoever, either in the Town of Berlin or in the Town of Waterloo.

"It was argued before us on behalf of the Street Railway Company that the mode and principle of valuation should be to ascertain the amount of the present net earning power of the railway and to capitalize this amount so as to reach the correct value of the railway and the real and personal property in connection therewith. We have not been able to assent to that contention and have not reached our valuation as above in any way on that basis, but have considered only the actual present value.

"It was argued on behalf of the Berlin and Waterloo Street Railway Company that if our valuation was upon actual present value, we should add to the amount found by us as such present value, ten per

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cent. of that value as for compulsory taking. We have not been able to accede to this contention and have not added anything on that account."

This award was affirmed on appeal therefrom by Mr. Justice Britton, but on further appeal it was sent back to the arbitrators by the Court of Appeal, which held the true principle of determining the value of the company's property to be by capitalizating its net permanent revenue and taking that as the value. The municipality then appealed to the Supreme Court of Canada.

The franchise of the company expired in September, 1906, and by agreement between the company and the municipality the time for the latter to assume ownership was extended to November 1st, but possession was not given up until May, 1907. In April, 1907, the legislature of Ontario passed an Act reciting all the circumstances, confirming the agreement for extension and authorizing the town council to take possession on paying the amount of the award subject to variation thereof on appeal.

Shepley K.C. and *Drayton K.C.* for the appellants. The franchise cannot be regarded in determining the value of the railway. See *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board*(1); *Toronto Street Railway Co.* v. *City of Toronto*(2); *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh*(3).

Bicknell K.C. and *McPherson K.C.* for the respondents, cited *London County Council* v. *London Street Tramways Co.*(4); *Toronto Railway Co.* v. *City of*

(1) [1893] A.C. 444.
(2) [1893] A.C. 511.
(3) [1894] A.C. 456.
(4) [1894] 2 Q.B. 189.

Toronto(1); *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.*(2).

THE CHIEF JUSTICE.—I would allow this appeal for the reasons given by the Chief Justice of Ontario, to which I can find very little that is useful to add.

It is impossible for me to distinguish this case from *The Toronto Street Railway Co.* v. *The City of Toronto* (3). The statute and by-laws under which the company respondent operated its railway in the Towns of Berlin and Waterloo practically constitute an agreement which is in terms identical with that made between Easton and the City of Toronto. In that case the precise point on which the Court of Appeal proceeds was negatived as appears by the reasons for appeal, paragraph 14 of which reads as follows:

> In any case whether the franchise, as such, is property to be valued under the 18th resolution or not, the proper method of arriving at the value of the "railway" was and is to capitalize its earning power, and, as the learned arbitrators have admittedly not proceeded upon that basis, the matter should be referred back with proper directions upon the subject.

The respondent obtained its franchise and privileges in and upon the streets of Berlin and Waterloo subject to the right of the appellant to assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value to be determined by arbitration. This is, therefore, not a case of compulsory taking to fix the amount of compensation to which the respondents are entitled not only for their railway, but for the undertaking, which would include the charter, in-

(1) 22 O.R. 374. (2) 12 App. Cas. 315.

(3) 20 Ont. App. R. 125; [1893] A.C. 511.

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corporation and charter rights. This is an arbitration under an agreement to ascertain, at the expiry of the twenty years period for which the municipal franchise was granted, and when the right to use the streets had lapsed, the value not of the undertaking, but of the properties enumerated in the agreement as a railway and all real and personal property in connection with the working thereof, or, in other words, this is an arbitration to fix the value of that part of the undertaking in which the respondents had, at that time, an interest, the property of the line without any privileges of user.

I would allow the appeal with costs.

DAVIES and IDINGTON JJ. concurred in the opinion stated by Anglin J.

DUFF J.—I agree with the conclusion of the Chief Justice of Ontario and with the reasons upon which it is based. I would allow the appeal.

ANGLIN J.—With great respect for the opinion of the learned judges who constituted the majority of the Ontario Court of Appeal, I am of opinion that this appeal should be allowed.

All questions as to the right of the Town of Berlin to give the statutory notice, under section 41 of the Revised Statutes of Ontario, 1897, ch. 208, and to acquire the railway of the Berlin and Waterloo Street Railway Company, as to the sufficiency of such notice and as to the validity and efficacy of the arbitration had and award made are concluded in favour of the municipality by the statute 7 Edw. VII. ch. 58, subject

only to any variation on appeal in the amount allowed by the arbitrators.

The Town of Berlin is in possession of the railway and the company does not now dispute the right of the municipality to retain and operate it. The sole question presented for determination upon this appeal is whether, on a proper construction of sections 41 and 42 of the Revised Statutes of Ontario (1897), ch. 208,

> the value of the railway and of all real and personal property connected with the working thereof

is limited to its value as

> a railway in use and capable of being used and operated as a street railway—

which the arbitrators have allowed—or should be deemed to include, as part of the property to be valued and paid for, the privilege or franchise of operating the railway or any part thereof as a privilege or franchise in perpetuity, or for a further term of definite or indefinite duration; whether the amount to be paid by the municipality is only the present value of the tangible or corporeal property of the company taken as a whole and available for immediate use, or includes, in addition, compensation for the loss or deprivation of a profitable franchise or privilege terminated by the act of the municipality.

Mr. Justice Britton, affirming the finding of the arbitrators, held that the former is the correct view of the extent of the company's right to compensation. The Chief Justice of Ontario, dissenting in the Court of Appeal, took the same view. The majority of the judges in that court, however, reversing the judgment of Mr. Justice Britton, held that the company is entitled to be paid a sum equal to a capitalization of its

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income, everything abnormal in such income being eliminated.

I shall first deal with the question as if the present case were admittedly governed by section 41 (R.S.O. 1897, ch. 208), alone, *i.e.*, as if the entire railway had consisted of a line or lines within the corporate limits of the Town of Berlin and all proper steps had been taken and an award and payment of the amount thereby fixed had been duly made in time to permit of the assumption of the railway by the municipality immediately upon the expiry of the twenty years' term mentioned in section 41.

That the Berlin and Waterloo Street Railway Company had a privilege of which their enjoyment was limited to a term of twenty years,

> at the expiry of which the privilege or franchise of the railway company ceased,

is, I think, incontrovertible upon the authority of *Toronto Street Railway Co.* v. *The City of Toronto* (1).

It is obvious that an amount based upon capitalization of revenue or profits earned by the company during some period preceding the expiry of the twenty years' term would include an allowance or compensation for loss of franchise, because such earnings or profits are attributable not merely to the capital invested in the physical constituents or corporeal property of the company, but also to the exercise of the privilege of operation. Without a railway system the franchise would not be profit-earning; without a privilege to operate the railway system would not be revenue-producing. What proportion of the earnings or profits should be treated as the legitimate return

(1) [1893] A.C. 511, at p. 515.

from the capital invested in corporeal property—rails, ties, rolling stock, etc.—and what proportion should be ascribed to the exercise of the franchise, it would be extremely difficult, if not impossible, to determine. Unless, therefore, the terms

> the railway and all real and personal property in connection with the working thereof

include the franchise or privilege to operate, notwithstanding its terminable character, the value of the former cannot be ascertained by a capitalization of the revenue or profits of the company during any period short or long.

The construction of the statute as to the subject-matter of the valuation to be made cannot, I venture to think, be dependent, as suggested by Garrow J.A., upon whether the company's undertaking has been carried on at a loss or whether it has been productive of profit. Neither are we concerned whether, upon what may otherwise be found to be the proper interpretation of the statutory contract, the municipality will

> gain at the end of the twenty years at the expense of the company.

As pointed out by Lord Adam, in the passage from his judgment in the *Edinburgh Tramways Case,* in 1894(1), at page 698, quoted by Moss C.J.O., when the company accepted its franchise from the municipality under the statute 48 Vict. ch. 16, secs. 18 and 19, it took it, not as a right which would belong to it in perpetuity, but as a privilege, the enjoyment of which by it should be terminable; it took it subject to the contingency of the municipality exercising the power to terminate its

(1) 21 Ct. Sess. Cas., 4 ser., 688.

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rights; it took, therefore, with the full knowledge that except in so far as the statute may have otherwise provided, all its profits from its undertaking and investment must be made out of its earnings during the period for which the statute permitted that the privilege of operating should be committed to it, and, that, upon the extinction of its rights in the franchise, its right to compensation would be merely that which its statutory contract with the municipality confers. As tersely put by Garrow J.A.,

> Each has, had, or is entitled to have, simply what was bargained for.

Whether the privilege of operation held by the company ceased to exist, or whether it continued in existence but was by the statute transferred to the municipality is an academic rather than a practical or material question. If transferred to the municipality, it was so by the operation of the statute. It ceased to belong to or to be exercisable by the company; it was no longer available to it for its benefit or profit. It was, after the statutory notice and upon the expiry of the twenty years, in no sense property of the company. Of the privilege to operate the company had been rather a lessee or a licensee than an owner. Its rights therein were temporary. Upon their termination the municipality became again seized in possession of its reversionary interest. To quote the language of Lord Shand, in the *Edinburgh Tramways Case*(1), at p. 487:

> It is true that the local authority by the purchase acquires a more extensive right—a right of a permanent nature. This might follow, as it appears to me, because of the direct right of property, or other direct interest, which the local authority has in the streets, and be-

(1) [1894] A.C. 456.

cause, having once acquired the undertaking, the local authority is under no obligation thereafter to sell it, as the promoters were. The permanent right thus acquired is not, however, conferred by the promoters, or acquired from them, but is conferred by the special provision of the statute.

Moreover, the company originally acquired its franchise for nothing—probably because of the temporary and terminable character of the rights which it received. If it was then intended that it should obtain a right to be compensated on the taking over of the railway upon the same footing as if it had been granted a franchise in perpetuity, it may well be that the municipality would have secured from the company a substantial consideration for the grant of such a franchise. There do not, therefore, appear to be any peculiarly equitable considerations which should affect in favour of the company the construction of the statutory contract between it and the municipality. The question is simply: For what has the legislature required that the municipality should pay on assuming the ownership of the railway?

That of which the statute says that the municipality shall pay the value is

the railway and all real and personal property in connection with the working thereof,

which it is authorized to assume. The company's privilege of operating being no longer available to it or exercisable by it, I am unable to see how it can be regarded as still subsisting as something for which the company is to be paid as part of its railway and property assumed by the municipality. The company's right of property in the railway, upon the expiry of the twenty years of enjoyment of the privilege of operation, appears to be what Lord Watson, in

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the *Edinburgh Tramways Case*(1), at page 469, describes as property which does not carry with it the privilege of future user, but is such

> that others than the owner selling may either possess or be in a position to acquire such privilege.

All interest of the company in the franchise having ceased to exist, it cannot be part of the "railway" or of the "property" which the municipality acquires from it.

As pointed out by Mr. Justice Britton, in sections 42 and 45 the assumption of the railway by the municipality is referred to as a purchase. In a purchase that for which payment is made is what the vendor is able to sell—what the purchaser acquires from him. The franchise or right to operate the lines after they have been taken over, both within its own corporate limits and in those of the adjacent municipality, the town acquires, not from the company, but from the legislature under the statute. I cannot understand a purchase from the company of a right or privilege which "was not theirs to sell." *Edinburgh Tramways Case*(1), *per* Lord Watson, at page 473.

The word "railway" is defined in the interpretation section of chapter 208 as including a "tramway." In no provision of the statute, other than sections 41 and 42, is it employed in a sense which could comprise the franchise or privilege of operation. In every instance it is used as descriptive merely of the physical structure owned by the company, which, according to Lord Watson, is its "primary and natural meaning" (1), at p. 471. In section 41 it is used not as the equivalent of the undertaking of the company, which would

(1) [1894] A.C. 456.

include all its property, but as descriptive of one part of that undertaking, for the value of which, with that of other parts—"all real and personal property"—payment is to be made. Having regard to the words "in connection with the working thereof," which immediately follow them, the words "all real and personal property" seem descriptive of "physical objects." *Kingston Light, Heat and Power Co.* v. *Corporation of Kingston*(1).

In view of these considerations the statutory description of the subject-matter to be valued, of which the ownership is to be assumed by the municipality, appears to be apt to define precisely what has been valued by the arbitrators in the present case, but inapt to cover, in addition, a franchise or privilege of operation.

The tenor of the authorities to which I have referred, although they deal with statutory and contractual provisions not identical with those now under consideration, is consistent only with this view.

If, therefore, the railway of the Berlin and Waterloo Street Railway Company had been wholly within the corporate limits of the Town of Berlin and all necessary proceedings had been regularly and promptly taken under section 41 of the Revised Statutes of Ontario, 1897, ch. 208, in my opinion the arbitrators would have been justified in excluding from their valuation any allowance in respect to the franchise or privilege to operate.

But much stress was laid by counsel for the respondents upon the fact that the railway in question lies not in a single municipality, but in at least two

(1) 20 Times L.R. 448.

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municipalities. It was pointed out that as a result of the taking over of this railway the Town of Berlin has acquired not merely a right to operate a street railway upon its own streets and within its own corporate limits, but also a right to operate such a railway in the Town of Waterloo, with "all the powers and authority theretofore enjoyed by the company." (Section 42.) This right, it is said, the Town of Berlin could not otherwise have acquired, and for this privilege or franchise counsel for the company argue that it is entitled to receive compensation.

Section 42 of the statute (R.S.O. [1897] ch. 208), which provides for the case of a company

> whose line or lines is or are situated in two or more municipalities,

gives to one of such municipalities (ascertained by the statute),

> the right to exercise the power of purchase herein conferred.

This right of purchase is that created by the next preceding section, and is the same right with the same incidents as is conferred on a municipality in regard to a railway which does not extend beyond its territorial limits. In such a case it is for

> the railway and all real and personal property in connection with the working thereof

that the company is to be paid. What these terms, in my opinion, mean, as used in section 41, I have endeavoured to state. Under section 42 *quoad* the company the railway is to be dealt with under the provisions of section 41; *quoad* the other municipalities interested, provision is made by sections 43 and 44 for the protection of their rights and the making of such terms in regard to the operation of the railway by

the municipality assuming ownership as will ensure to such other municipalities due compensation for the value of the franchise or privilege to be exercised within their limits. Whatever the rights of the company may have been within any of the municipalities into which its lines extend those rights were all acquired subject to the provisions of the statute, including those of section 41, which are made applicable by section 42. They were taken with the knowledge and upon the contractual basis that their enjoyment by the company might be terminated by the exercise by one of the municipalities of the powers conferred by sections 41 and 42. The policy of the Act appears to be that the company shall be entitled to compensation for the same subject-matter whether the railway taken over operates in a single municipality or in several municipalities. In neither case, in my opinion, is it entitled to be paid for a franchise or privilege of operation, the term of its right to the enjoyment of which has expired. In each case whatever rights in the nature of a franchise or privilege to operate the purchasing municipality becomes entitled to exercise are conferred upon it not by the company, but by the statute. It is not the policy of the statute in the one case that the municipality should be obliged to buy back the right to use its own streets, nor in the other that it should have to pay the company for that part of the franchise which the statute confers upon it, but permits it to exercise only for the benefit of and as quasi-trustee for the other municipalities interested. In other words, in both cases alike the company is to be paid only for that which it really held as its own property and which the assuming municipality in fact acquires from it.

It was very strongly argued by Mr. Bicknell that

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because the Town of Berlin failed to exercise its right of assuming the railway immediately upon the expiration of the twenty years' period, a franchise for a further period of five years became vested in the company under sub-section 2, of section 41.

By an agreement of the parties providing for the appointment of arbitrators, etc., the time for assuming the ownership of the railway was extended from the 8th of September, 1906, to the 1st of November, 1906. The railway was not in fact taken over until May, 1907, when the company relinquished possession on receiving the sum awarded by the arbitrators.

On the 20th of April, 1907, the legislature of Ontario, in an Act which recites the circumstances in which the railway came into existence, the steps taken by the municipality towards acquiring it, the agreement for the appointment of arbitrators and the award made on the 29th of December, 1906, expressly authorized the town, upon payment of the amount of the said award, to take over and enter into possession of the railway, etc., and ratified and confirmed the agreement and award,

> subject, however, to such variation in the amount of the award as may be made on appeal.

Because this Act does not in express terms provide that the municipality may assume possession of the railway on the same footing as if it had in fact paid for and had assumed possession of it immediately upon the expiration of the twenty years' period, the respondents maintain that they are entitled to an award on the basis of their being compulsorily deprived of a franchise which they allege they had become entitled to enjoy for a further term of five years.

Such, they argue, is, upon its proper construction, the effect of the statute of 1907.

While this Act is by no means clear or free from ambiguity, read as a whole, and having regard to the recital of the proceedings, the affirmance of the award and the express limitation, on the question of amount, of the right to vary it upon appeal, it is, I think, clear that the legislature intended not to confer upon the town a new right of expropriation in respect of an extended franchise, but merely to further extend for a reasonable period (no date being stated), the time for taking over the railway upon the expiry of the twenty years' franchise, as the parties themselves had already extended it by the very agreement which the statute confirms. Having before it this agreement, which provides for the holding of an arbitration under section 41 of the Revised Statutes of Ontario, 1897, ch. 208, and for its completion after the expiry of the twenty years' term, and an award which on its face was a valuation of

> the railway and of all real and personal property used in connection therewith

as of the date to which the expiry of the twenty years' period had been extended under the agreement of the parties, which incorporated the provisions of the "Ontario Arbitration Act"—an award which explicitly proceeds upon the basis that the franchise and privilege of operation of the company had been determined and that no allowance should be made in respect thereof, and expressly so states—the legislature ratified and confirmed both the agreement and the award and authorized the town upon payment to the company of the sum awarded to take over and enter into possession of the railway, subject only to such varia-

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tion of the amount of the award as may be made upon appeal.

It is to me inconceivable that we should have had a statute in any such form if the legislature had intended to confer upon the municipality a new right of expropriation in respect of an extended franchise, such as the company now contends had become vested in it. The company had by its own agreement already waived payment for and assumption of the railway on the very day on which the twenty years' term expired and had thereby waived its right, if the agreement were carried out, to claim any extension of franchise under the statute. Circumstances having arisen which rendered legislation necessary—the failure of the arbitrators to make an award before the 1st of November, the date fixed by the agreement for taking over the road, and the existence of a bonded debt on the railway for which provision had to be made—the legislature, ratifying all that had been done, merely further extended the time for the actual payment of the amount of the award and the taking over of the road.

Having reached the conclusion that, apart entirely from the provisions of the Act of 1907, the arbitrators properly construed section 41 of the Revised Statutes of Ontario, 1897, ch. 208, in excluding from their valuation everything in respect of franchise or privilege to operate, it is unnecessary to consider whether that statute of 1907 does not, by confining the right of appeal from the award to the *amount* awarded, entirely preclude the view that it is open to the present respondents to maintain upon appeal that the arbitrators should have included in their valuation such additional subject-matters as the right or franchise to operate, which they had explicitly excluded from their award. I express no opinion upon this question.

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As to the claim made that the arbitrators should have allowed ten per cent. above the actual value of the property acquired from the company as compensation for its being compulsorily taken, it suffices to say that the statute defines the rights of the company and does not provide for such an allowance.

For these reasons I would allow this appeal with costs in this court and in the Ontario Court of Appeal, and would restore the judgment of Mr. Justice Britton.

Appeal allowed with costs.

Solicitors for the appellants: *Scellen & Weir.*

Solicitors for the respondents: *McPherson & Co.*