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*Mar. 19, 20.

*May 1.

THE CORPORATION OF THE CITY OF TORONTO (PLAINTIFFS) } APPELLANTS;

AND

THE TORONTO STREET RAILWAY COMPANY (DEFENDANTS).. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of contract—Street railway—Permanent pavements—Arbitration and award.

The Toronto Street Railway Company was incorporated in 1861, and its franchise was to last thirty years, at the expiration of which period the City corporation could assume the ownership of the railway and property of the company on payment of the value thereof to be determined by arbitration. The company was to keep the roadway between the rails and for eighteen inches outside each rail paved and macadamised and in good repair using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard.

The City corporation laid upon certain streets traversed by the company's railway permanent pavements of cedar blocks, and issued debentures for the whole cost of such works. A by-law was then passed, charging the company with its portion of such cost in the manner and for the period that adjacent owners were assessed under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, but refused to pay for subsequent years on the ground that the cedar block pavement had proved to be by no means permanent but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates, it was held that the Company was only liable to pay for permanent roadways and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with but an agreement was entered into by which all matters in dispute to the end of the year 1888 were

*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ

settled, and thereafter the company was to pay a specific sum annually per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said streets *now* extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends."

This agreement was ratified by an act of the legislature passed in 1890, which also provided for the holding of the said arbitration which having been entered upon the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow this claim an action was brought by the city to recover the said amount.

Held, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance and repair of the said streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration. etc., must be considered to have been inserted *ex majori cautela* and could not do away with the express contract to relieve the company from liability.

Held further, that by an act passed in 1877, and a by-law made in pursuance thereof, the company was only assessed as for local improvements which, by the Municipal Act constitute a lien upon the property assessed but not a personal liability upon owners or occupiers after they have ceased to be such; therefore after the termination of the franchise the company would not be liable for these rates.

APPEAL from a decision of the Court of Appeal for Ontario affirming, by an equal division, the judgment at the trial for the defendants.

The facts of the case are stated in the judgment of the court delivered by Mr. Justice Gwynne, as follows:—

Upon the 26th of March, 1861, the plaintiffs entered into an agreement with one Alexander Easton, for the

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construction of street railways in the City of Toronto, and for the maintenance and operation thereof for the period of thirty years from the said 26th March, 1861, upon certain terms and conditions therein mentioned, the only ones of which necessary to be set out here are the 3rd, 17th, 18th and 20th.

It was provided by the 3rd that the roadway between, and within at least one foot six inches on each side of the rails should be paved or macadamised and kept constantly in good repair by the said Easton, who should also be bound to construct and keep in good repair crossings of a similar character to those adopted by the corporation at the intersection of every railway track and cross streets. By the 17th, that should the proprietors neglect to keep the track or the roadway, or the crossings between and on each side of the rails, in good condition, or to have the necessary repairs made thereon, the city surveyor or other proper officer should give notice thereof requiring such repairs to be made forthwith, and if not made within a reasonable time the said surveyor or other officer as aforesaid should cause the repairs to be made, and the amount so expended might be recovered in any court of competent jurisdiction.

By the 18th—That the privilege granted by the agreement should extend over the period of 30 years from the date of the agreement, but that at the expiration thereof the corporation might, after giving six months notice prior to the expiration of the said term of their intention, assume the ownership of the railway and all real and personal property in connection with the working thereof, on payment of their value, to be determined by arbitration, and that in case the Corporation should fail in exercising the right of assuming the ownership of the said railway at the ex-

piration of 30 years as aforesaid, they might at the expiration of every five years to elapse after the first 30 years, exercise the same right of assuming the ownership of the said railway, and of all real and personal estate thereunto appertaining, after one year's notice to be given within the twelve months immediately preceding every fifth year as aforesaid, and payment of their value to be determined by arbitration. By the 20th—that the agreement should only have effect after the legislation necessary for legalizing the same should have been obtained.

By an act of the legislature of the late province of Canada passed on the 18th May, 1861, 24 Vic. ch. 83, the said Alexander Easton and others were incorporated as "The Toronto Street Railway Company," and thereby the said agreement of the 26th March, 1861, was ratified and confirmed and held to be valid and binding upon the said city of Toronto and the Toronto Street Railway Company. The company having become insolvent a new company by the same name and subject to all the obligations imposed upon the former company by the said agreement with the city and by the said act, 24 Vic. ch. 83, was incorporated in the place and stead of the former company by a statute of the Ontario legislature, 36 Vic. ch. 101, passed on the 29th March, 1873. By another act of the same legislature passed on the 2nd March, 1877, 40 Vic. ch. 85, it was enacted as follows, among other things:

1. That the said Toronto Street Railway Company should be bound to construct, renew, maintain and keep in good order and repair, the roadway between the rails, and one foot and six inches outside of each rail, using for that purpose the same material and mode of construction as that which should from time to time be adopted and used for the remaining portion of the street by the corporation. Provided, that where

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the corporation of the city of Toronto should adopt and use in any street or portion of street traversed by the railway a permanent pavement of wood, stone, asphalt or other material of the like permanent character, the said Street Railway Company should not in such case be bound to construct the same or to pay more than the cost price of such pavement over the space between their rails and for one foot six inches outside of each rail, and as against the said company, that such price should not, in any case, exceed the sum of two dollars and fifty cents per square yard.

4. That in every case of construction or renewal of any kind of permanent pavement upon any of the streets occupied by the said Street Railway Company, the said company should have the option of constructing their portion of any such pavement, or at their request the said corporation of the city of Toronto should construct the same and that in every such case the corporation should assess an annual rate, (covering interest and sinking fund extending over the like period as that upon which the assessment upon the adjacent ratepayers is adjusted) upon the said company for the cost thereof not exceeding the sum of two dollars and fifty cents per square yard with full power to the said corporation to raise such sum by an issue of debentures and to collect the same in the manner provided under the Municipal Act for the construction of local improvements.

5. That if the corporation should at any time elect to assume the said street under the provisions of the agreement and by-law in that behalf, the arbitrators appointed to determine the value of the real and personal property of the said company should also estimate, as an asset of the Company, the value to the said company of *any permanent* pavement thereafter *constructed*

or paid for by *the said company* for the balance of the life of the said pavement.

In the year 1882, and subsequent years up to and inclusive of 1888, the corporation constructed upon some of the streets of the city which were traversed by the company's railway cedar block pavements or roadways as and for *permanent pavements* and, at the request of the company, constructed their part under the provisions of the above statute, and they issued debentures to cover the cost of the whole of the said respective works, and passed by-laws whereby they charged to the company, under the provisions of the said statute, that portion of such respective works, payable by annual instalments or assessments, covering cost, interest and sinking fund in the same manner and for the like period as adjacent ratepayers were charged, rated and assessed for the said respective works under the provisions of the Municipal Act for the construction of local improvements; the rates charged for their several works were spread over periods varying from eight to twenty years. In the year 1884, the City of Toronto procured another act to be passed upon their petition by the Ontario Legislature. 47 Vic. ch. 59, whereby it was, among other things, enacted that;

"In the case of the Toronto Street Railway Company or any other body corporate, who may be assessable under any general or special act for the payment of the cost of any portion of any work, improvement or service otherwise than in respect of real property fronting or abutting on any street benefitted by such improvement, work or service the said company or body corporate, as the case may be, shall be assessable respectively at their head office, either in one sum for their share of the costs of the work or improvement, or in case the cost of the work is payable in instalments, then for such per annum, for the term of years within

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which the other portions of *such debt* are made payable as will be sufficient to pay off the amount of the *debt created* on the security of their assessment, together with interest at the same rate per annum as is chargeable and payable in respect of the other portions of the debt, and such assessment shall constitute a lien and charge upon any real estate owned by or belonging to the said company or body corporate."

On the 7th June, 1886, the corporation of the city passed a by-law entitled:

"A by-law to provide for an issue of five per cent ten year local improvement debentures, being the proportion to be borne by the Toronto Street Railway Company of the cost of construction of cedar block roads on certain streets herein named, and for rating the said Toronto Street Railway Company therefor."

The by-law then recites six several by-laws passed by the city during 1885, for raising by the issue of local improvement debentures, payable at the expiration of ten years from the date of issue of the same, the amount for which the railway company is said to be liable amounting in the whole to $24,258.07; it then recites the above provisions extracted from 40 Vic. ch. 85, and 47 Vic. ch. 59. It then recites that the corporation of the city had at the request of the Toronto Street Railway Company constructed their portion of the said pavements on the several streets mentioned in the by-law, the aggregate cost of the same amounting to the sum of $24,258.07, and that it was necessary, pursuant to the said recited acts in that behalf, to make provision for the issue of debentures, and for the raising annually, by a rate to be levied on the Toronto Street Railway Company, the sum required to be provided for the payment of the interest on said debentures during their currency, and for their payment at maturity. The by-law then enacts:

1st. That the sum of twenty-four thousand two hundred and fifty-three dollars and seven cents be raised by loan by this corporation at the security of the special rate hereby imposed and that the debt so to be created is further guaranteed by the Municipality at large and that the debentures amounting to the said sum be issued by the corporation therefor.

2nd. That during ten years the currency of the debentures to be issued under the authority of this by-law the sum of $1,212.05 shall be raised annually for the payment of interest and the said debentures and also the sum of $1,940.25, shall be raised annually for the payment of the debt making in all the sum of $3,152.90 to be raised annually as aforesaid, and that an annual rate and assessments therefor is hereby imposed on the Toronto Street Railway Company over and above all other rates and assessments which sum shall be annually inserted on the collectors local improvements tax rolls for, and be collected at the head office of, the said Toronto Street Railway Company in the ward of St. James or any other ward in which said office may be from time to time located, in each year for the next succeeding ten years *and shall be payable to and collected by them in the same* way as other rates on the said rolls.

This by-law was produced for the purpose of showing the manner in-which the Railway Company were charged, assessed and rated by the City for the several works constructed by the City and charged to the Railway Company as the party chargeable therefor under the above statutes. The first of the rates charged by such by-laws or any of them became due under the by-laws in that behalf in the year 1883 ; the company paid the City the amount of rate imposed as payable in that year, so did they likewise the rates imposed as payable respectively in the years 1884-5 and 6.

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Upon the ground that, as they contended, as early in the said year 1886 the cedar block roadway adopted by the corporation proved itself to be wholly defective and by no means permanent and wholly inapplicable to and insufficient for the purposes of streets upon which the company were operating their lines of street railway tracks, and that in addition to such defect in the material of the roadway the corporation were guilty of gross negligence in the manner in which they laid the cedar blocks and constructed the roadways upon which the company operated the railways, they contended that they were not only relieved from all liability purported to be imposed upon them by the said by-law but that the corporation were liable to them for damages sustained by reason of the insufficiency of such cedar blocks as a roadway and the alleged negligent manner in which they were laid, and the company refused to pay any further sums so charged and rated against them or for any repairs the necessity for which was occasioned by such insufficiency of the roadway.—In consequence of such refusal the corporation of the City brought an action against the company in the month of December, 1886, and in their statement of claim in such action filed in the month of January, 1887, they claimed the sum of $6,000 for monies alleged to have been expended by them in the years 1882-83-84-85 and 86 in making repairs on streets traversed by the company's lines of railway between the rails and for eighteen inches outside of each rail in consequence of the alleged neglect of the company to make such repairs after notice contrary, as was contended, to the provisions of the statutes in that behalf, also for damages alleged to have been paid by the city to persons alleged to have suffered injury by reason of such alleged neglect of the company. To this statement of claim the company pleaded

by way of defence that for the reasons above stated they were not at all liable to be charged for the construction and repair of roadways which, as they insisted, were not permanent roadways, but on the contrary were wholly defective and inadequate for the purpose for which they were constructed not only by the insufficiency and defect of the material used but also by the negligent mode of construction; and they denied all liability under the statutes to the City for the damages alleged to have been sustained by them by reason of the alleged neglect of the company or otherwise, and on the contrary they claimed by way of counter claim $10,000 as damages sustained by them by reason of the wholly defective character of the roadway as adopted and constructed by the City. Judgment was rendered in this action by the High Court of Justice for Ontario on the 20th day of December 1888, whereby the court did declare and adjudge as follows :—

" 1. That the defendant company is bound to keep in repair such *permanent* pavements as the plaintiff corporation may have laid upon the streets used by the defendants for the purpose of its traffic, over the space between the tracks, and for eighteen inches outside the same."

" 2. That the defendant company is liable to pay to the plaintiff such damages as it may have suffered or paid by reason of the non-repair by the defendant of *such permanent* pavements aforesaid over the space aforesaid."

" 3. That the plaintiffs were and are bound to use reasonable care, skill and diligence *in selecting pavements to be laid as permanent pavements* over the space aforesaid, and over the remainder of the said streets, so far only as the pavements upon the said space has been or is affected thereby ; and *if negligent in such selection, the defendant is not liable to pay for such construction or*

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to repair as for a *permanent* pavement; and if such reasonable care, skill and diligence in such selection was not exercised by the plaintiff corporation, it is liable to the defendant for any losses caused by such negligence."

"4. That the plaintiff was and is bound to use reasonable care and skill in the construction of such permanent pavements on the streets aforesaid, and on the remainder of the said streets, so far only as the pavement on the space aforsaid has been, or is affected thereby; AND *if such pavements were so negligently constructed as not to be permanent, the defendant is not liable to pay for such construction or to repair, and the plaintiff was and is liable in such case to the defendant for any losses caused by such negligence.*"

"5. And this court doth further order and direct that it be referred to Edmund John Senkler, Esquire, of the City of St. Catharines, under subsection one of sec. 101 of the Judicature Act to inquire and report."

"(1). Whether the plaintiff corporation has laid permanent pavements upon the streets occupied by the defendant company, due regard being had to the occupation of the streets by the company and otherwise, and to all and every other matter or cause affecting the said pavements, and entering into the consideration of the question of their permanence."

"(2). As to the cost of the repairs made by the plaintiffs to *permanent pavements* on the streets occupied by the defendant company."

"(3). The loss or damage which has been suffered or paid by the plaintiff for or by reason of the neglect of the defendants to repair such portions of said streets."

"(4). Whether the plaintiff has been negligent in selecting pavements as permanent on streets occupied by the defendants, and if so, the loss or damage, if

any, sustained by the defendants from such negligence."

" (5). Whether the plaintiff has been negligent in constructing the aforesaid pavements, and if so the loss or damage, if any, sustained by the defendants from such negligence."

" (6). And this court doth further order that on this motion for judgment, all questions of law or fact arising upon the pleadings or report of the said referee, and not determined by the court on the 1st, 2nd, 3rd and 4th findings of the court as aforesaid, shall be open for argument, and that this declaration shall not be construed as restricting or taking away from the parties any rights reserved or given to them by subsection one of section 101, or the practice thereunder, but shall be construed as adding to or enlarging such rights, if those given by this order are not reserved or given by said subsection."

The plaintiffs neither appealed from this order nor did they take steps to procure the inquires and report by the said order directed to be taken and made; but instead thereof negotiations for a settlement of the differences between the parties were entered into for the purpose of settling by arbitration or mutual agreement the several matters of difference in the said action and in other actions which appear also to have been pending between the parties, which negotiations terminated in an agreement by way of compromise being executed by and between the parties under their respective common seals upon and bearing date the 19th day of January, 1889, by which it was among other things mutually covenanted as follows:

" All matters in issue *in the several actions* which were pending between the city and the company on Dec. 31st, 1888, and all claims made therein by the company upon the city and *vice versâ* up to said date are hereby settled upon the following basis:"

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"1. The company is to pay the city forthwith the amount of the company's debenture account for 1887 ($17,095.36) with interest at five per cent from December 31st, 1887 and for 1888 ($22,378.56) with interest at five per cent from September 10th, 1888, to date of payment."

"2. From December 31st, 1888, the company is to pay the city, *in lieu of all claims on account of debentures maturing after that date*, and *in lieu of the company's liability for construction — renewal—maintenance—and repair in respect of all the portions of streets occupied by the company's tracks* at the rate of $600.00 per mile of single track (or $1,200 per mile of double track), per annum, so long as the franchise of the company to use the said streets or any of them *now* extends, such sum to be paid quarterly on January 1st, April 1st, July 1st, and October 1st in each year, in respect of the three months immediately preceding the said dates respectively, the first of such quarterly payments to be made on the first of April, 1889, and if there be a broken quarter, then at the same rate for such broken quarter on the last day thereof."

"(4). The said *payments shall be accepted by the city in full satisfaction and discharge of all claims* upon *the company in respect of the construction*—renewal—maintenance—and repair, *of all the aforesaid portions of said streets;* and also in respect of all claims by the city upon the company for damages and costs suffered or paid by the city by reason of the non-construction or non-repair thereof by the company; and hereafter the city shall undertake the construction—renewal—maintenance and repair of all the aforesaid portions of said streets, but not of the company's tracks, ties and stringers."

"(5). As between the company and the city, the city shall have the sole right in every case from time to time to determine the kind of road bed or beds,

pavement or pavements, if any, to be laid down, constructed or maintained upon the said streets or upon the portions thereof occupied or used by the company, and the manner in which the same shall be constructed; and the liability of the city to the company in respect of the renewal, repair and maintenance of roads shall be as defined by sec. 531 of the Municipal Act save that *the city shall* be bound to indemnify the company against any damages or costs which the company may have to pay to third parties by reason exclusively of neglect on the part of the city to repair or to keep in repair the portions of the streets aforesaid."

Section 10 makes provision for the case of the city authorizing the construction of new lines of track upon any of the streets already traversed by the railway of the company. Then:

" (11). This agreement is not to affect the rights of either party in respect of any of the matters referred to in the 18th resolution set out in by-law 353 of the city of Toronto or of any question arising out of the same nor in respect of any matter not herein specifically dealt with, nor shall this agreement have any operation beyond the period over which the aforesaid franchise now extends."

" (12). In consideration of the foregoing it is further agreed that all claims by the city against the company in *respect of construction*,—or renewal of roadways—repairs of roadways—and damages by reason of non-repair thereof, up to the date of this agreement shall be abandoned and that all actions pending on the 31st December, 1888, between the city and company shall be forthwith dismissed by the *respective plaintiffs*."

This agreement was ratified and confirmed by an act of the Ontario Legislature passed on the 7th April, 1890, 53 Vic. ch. 105, and all acts and parts of acts of

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the legislature inconsistent therewith were thereby repealed. By that act it was further enacted that:

"The corporation of the city of Toronto may at once proceed to arbitrate under the 18th resolution recited in the agreement of the 26th March, 1861, printed as Schedule "A" hereto and the said city of Toronto and the Toronto Street Railway Company shall in every reasonable way facilitate such arbitration. The arbitrator or arbitrators to be named shall proceed, so as if possible to make the award not later than the 13th March, 1891. If from any cause the award shall not be made by such time, or if either party be dissatisfied with such award, the said corporation of the city of Toronto shall nevertheless be at liberty to take possession of the said Toronto Street Railway and all the property and effects thereof real and personal on paying into court either the amount of such award if the award be made, or if not upon paying into court or to the company such sum of money as upon notice given to the said Toronto Street Railway Company a divisional Court of the Chancery Division of the High Court of Justice may order, and upon and subject and according to such terms stipulations and conditions as the said Divisional Court shall in every such order direct or prescribe; provided always that this section shall not be construed to affect the rights of the parties in any way under the said agreement save as herein provided."

The arbitration was subsequently entered into under the terms and provisions of the said 18th resolution of the agreement of the 26th March, 1861. Upon the arbitration, the city corporation presented a claim by way of reduction of the amount to be allowed to the company as and for the value of their real and personal property being arbitrated upon the sum of $146,000 as the cash value of the several annual instalments to become pay-

able in the years ensuing the termination of the company's franchise, as declared and enacted by the said several by-laws of the City Council charging, rating, and assessing the company with their proportion of the cost of the construction of roadways, for which the corporation had issued debentures as aforesaid. Against this claim of the city the company produced the said agreement of the 19th January, 1889, confirmed by the act of the legislature above recited, insisting that it operated as a release of all right and claim, if any, the corporation had to enforce payment of such instalments. The arbitrators were of opinion that the agreement did operate as such release. They rejected the claim of the city, and made their award, whereby they awarded, adjudged and determined the value of the railways of the said Toronto Street Railway Company, and of all real and personal property in connection with the working thereof, to be the sum of one million four hundred and fifty-three thousand seven hundred and eighty-eight dollars, subject however to the following incumbrances, amounting in the whole to the principal sum of six hundred and forty thousand two hundred dollars, that is to say: Debentures issued by the Toronto Street Railway Company under the authority of the act of the Ontario legislature, 47 Vic. ch. 77, for the principal sum of six hundred thousand dollars, payable on the 1st of July, 1914, bearing interest at six per cent per annum, also mortgages set out in the award for the principal sum of forty thousand two hundred dollars with interest thereon.

In the month of September, 1891, the city corporation instituted the present action against the defendants for the purpose of asserting their right to recover, independently of the said award, and notwithstanding the refusal of the said arbitrators to enter-

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tain the said claim of the plaintiffs to be allowed the said sum of $146,000, the several rates by the said by-law of the city imposed upon and declared to be payable by the defendants in the several years subsequent to the termination of the franchise, until the payment of the debentures issued to cover the amounts so charged upon the defendants should be fully paid, and in their statement of claim they allege that although the defendants had duly paid or accounted to the plaintiff for the rates which so became due and payable to the plaintiffs, prior to the year 1891, they refused to pay the sum of $22,266.30, which they allege had since became due in respect of the said rates, and they pray for a declaration that the defendants are liable to pay the said rates so declared to be, and made, payable subsequently to the termination of the defendant's franchise, and an order for payment of the said sum of $22,260.30, and interest from the 26th day of August, 1891. To this action the defendants have pleaded by way of defence the said agreement of the 19th January, 1889, and the judgment rendered in December, 1888, in the action then pending between the city and the company, and insisted that the said agreement operated as a release of all liability of the defendants in respect of all rates which by the said by-laws were declared to be and and were made payable subsequently to the 26th March, 1891. They also pleaded the said arbitration and the claim thereby of the plaintiffs of the said sum of $146,000, and the disallowance thereof by the arbitrators and their award, and insisted that the award operated as a bar of the plaintiffs' claim in this action. By way of alternative defence they pleaded like matters to the matters of fact alleged by them in their defence to the action instituted by the plaintiffs against them, which was pending when the said

agreement of the 19th Jan., 1889, was entered into, upon which they relied in case they should fail upon their other grounds of defence above stated. Upon the trial before Mr. Justice Falconbridge, that learned judge was of opinion that the said agreement of the 19th January, 1889, did operate as such release as was contended for by the defendants and accordingly the said action was, by his judgment affirmed by the judgment of the High Court of Justice for Ontario, dismissed with costs. Upon appeal from this judgment to the Court of Appeal for Ontario the court was divided, and the appeal was therefore dismissed. The Chief Justice of the court entirely concurred with the judgment of Mr. Justice Falconbridge, declaring himself to be of opinion that the agreement of 19th January, 1889, was a final settlement of all matters between the parties as to pavements, roadway, costs of construction and repairs, and of everything in dispute relating thereto, or to money claims for or against each party, past, present or future, and he proceeded to give his reasons for entertaining this opinion.

Mr. Justice Osler also concurred in the judgment of Mr. Justice Falconbrige, and was also of opinion that the plaintiffs having acquired the ownership of the defendants' railway, and of all their real and personal property in connection with the working thereof, in respect of which ownership alone the local improvement assessments in question were imposed, the defendants' liability in respect of such assessments then came to an end, and the plaintiffs were not entitled to recover in respect of any assessments falling due under the terms of the by-laws after such roadway and property were so acquired by them.

Mr. Justice Burton and Mr. Justice Maclennan were of a contrary opinion. Hence the appeal to this court.

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Robinson Q.C., and *S. H. Blake* Q.C. for the appellants.

McCarthy Q.C. for the respondents.

The judgment of the court was delivered by:—

GWYNNE J.—(His Lordship stated the facts as above set out and proceeded as follows:—

In the judgment of the Chief Justice of the Court of Appeal for Ontario and of Mr. Justice Osler I entirely concur. It cannot be doubted that the judgment of Mr. Justice Rose in the action instituted in 1887 by the city against the company was favourable to the contention of the company as set out in their statement of defence to that action in so far that, if the matters of fact directed to be inquired into should have been found in favour of the company, would they not only have been freed from liability for the rates imposed, (and not paid), or to be imposed for the construction of the streets as constructed by the city, or for their maintenance and repair as constructed, but would possibly have recovered the amounts then already paid by them for such rates, and other damages which they alleged they had suffered by what they insisted was the default and neglect of the city corporation. Instead of the plaintiffs in that action proceeding with the reference and inquiries directed for the purpose of determining the facts necessary for the final adjudication in the action the parties agreed upon terms which can be regarded in no other light than that of a compromise of their respective contentions, but if the contention of the plaintiffs in the present action should prevail the defendants, instead of agreeing with the plaintiff upon a compromise of their respective contentions, must be held to have, in substance and effect, surrendered every point for which they had contended, and to have submitted to the plaintiffs' contention as if every fact had been concluded against the defendants

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upon the reference and inquiries directed. Now the agreement of January, 1889, provides that:

All matters in difference between the city and the company on December 31st, 1888, and all claims made therein *by the company* on the city and *vice versâ*, up to said date, are hereby settled upon the following basis:—

1. The company is to pay the city forthwith the amount of the company's debenture account for 1887, ($17,095.96), with interest at five per cent. from December, 31st, 1887, and for 1888, ($22,373.56), with interest at five per cent from September 10th, 1888, to date of payment.

2. From December 31st, 1888, the company is to pay the city, *in lieu of all claims on account of debentures maturing after that date, and in lieu* of the company's *liability for construction*—renewal—maintenance and repair in respect of all the portions of streets occupied by the company's tracks at the rate of $600 per mile, single track, or $1200 per mile, double track, per annum, so long as the franchise of the company to use the said streets or any of them extends.

4 The said payments shall be accepted by the city in full satisfaction and discharge of all claims upon the company *in respect of construction, renewal, maintenance and repair* of all the aforesaid portions of the said streets; and also in respect of all claims by the city upon the company for damages and costs suffered or paid by the city *by reason of the non-construction* or non-repair thereof by the company, *and hereafter the city* shall undertake the *construction, renewal,* maintenance and repairs of the aforesaid portions of the said streets, but not of the company's tracks, ties and stringers.

Now the *company's debenture accounts*, above referred to, the instalment claimed in respect of which by the city for the years 1887 and 1888 the company agreed to pay, were the aggregate amounts of the principal sums and interest declared to be charged upon the company by the city by-laws in that behalf for which the city had issued debentures to raise the money expended in construction of the cedar block roadways, which the company insisted were by no means permanent roadways and that therefore they were not at all liable therefor. By payment of the instalments of such debenture accounts made payable in the years 1883, '84, '85, '86, '87 and '88, the company satisfied and

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discharged all the liability, if any, there was imposed upon them in respect of the said "debenture accounts" up to the 31st December 1888. Then the 2nd paragraph of the agreement provides that the company shall, after the said 31st December 1888, so long as their franchise to use the said streets *now extends* (in the very words of this paragraph), pay to the city the annual sums therein mentioned *in lieu* of all claims of the city *on account of debentures* maturing after the 31st December 1888 *and in lieu of the company's liability for construction, renewal*, maintenance and repair, and by the 4th paragraph the city covenants, and their covenant is ratified by act of Parliament, to accept such annual sums in full satisfaction and discharge of all claims upon the company in respect *of the construction*—renewal, maintenance and repair of all the aforesaid portion of the said streets, &c., &c.

Now the words in the 2nd paragraph "*in lieu* of all claims on account of debentures maturing after that date" (the 31st December 1888) and the words "*in lieu* of the company's liability for *construction*" &c., &c., plainly relate to the liability of the company in respect of all debentures then already issued for streets upon which the cedar block pavements had been constructed, and in fact the language according to its natural and ordinary meaning covers the whole of the company's liability for *construction* of cedar block roadways then already constructed or thereafter to be constructed by the city. So the acceptance in the 4th paragraph by the city of the said sums by the said 1st and 2nd paragraphs agreed to be paid, when paid, in full satisfaction and discharge of all claims upon the company *in respect of construction* &c., plainly relates to the same liability spoken of in the 2nd paragraph, of the defendants to pay *for the construction* of the cedar block pavements then constructed, that is to say the total debt charged by

the by-law upon the company for the construction of such streets and by such by-law made to be a *debitum in presenti* although payable *in futuro* by annual instalments and charged as a lien upon the company's railway and other property. The plain and natural construction of these paragraphs, taking them together unaffected by any other paragraphs in the agreement, is that the company are discharged from all liability in respect of any debentures maturing after the 31st December 1888 at any time on account of *construction*, *renewals*, &c., of the roadways in streets traversed by the company's railway tracks, and from all liability in respect of such construction in the past, and the city expressly covenants to undertake and bear in the future the whole cost of construction—renewal—maintenance and repair of all the portions of the streets which as they had contended the company were liable for, *except the company's tracks, ties and stringers*, which alone the company are themselves to construct, maintain and repair. So construed the compromise of the contentions of the respectives parties and the reasonableness of it in the state of the facts as existing when the agreement was entered into is apparent, namely, the company abandon their claim of exemption from liability for cost of *construction* by reason of the defect of the cedar block pavement adopted by the city, and of its want of permanency and of the negligence of the city in the manner of "construction;" and they agree to pay and bear the instalments remaining unpaid for the first six years imposed by the terms of the by-law in that behalf, and to pay the annual sums mentioned in paragraph 2, *in lieu* of all further liability whatever as to construction, renewal &c., and the city in consideration of such payments agree to accept them in full satisfaction and discharge of all claims against the company for *construction* &c., of cedar block pave-

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ments on the streets wherein they had then already been constructed and they undertake for the future to take upon themselves the burthen of construction renewal &c., &c., which they up to then contended that the company were liable for. Upon these terms of mutual concession the parties respectively agree to abandon their respective claims as theretofore asserted. The plaintiffs however contend that the 2nd paragraph is to be read as if the words.

"so long as the franchise of the company to use the said streets or any of them now extend," should be read as if inserted after the words *maturing after that date*, thus : "From December 31st, 1818, the company is to pay the city, in lieu of all claims, on account of debentures after that date, so long as the franchise of the company to use the said streets or any of them now extends, &c., &c."

The paragraphs 2 and 4 read together, apart from all other paragraphs, leave no room in my opinion for such a construction, but it is argued upon behalf of the city, that read in connection with paragraph 11 that is the true construction, but in this contention I cannot concur. The necessity for the insertion of paragraph 11 is not very apparent, it seems to have been unnecessarily introduced, *ex majori cautelâ* of an over cautious draftsman. It's first sentence appears to provide against the agreement being construed to affect the rights of either party under the 18th paragraph of the agreement of March, 1861, entitling the city to terminate the company's franchise at the expiration of 30 years from date, and providing in such case for an arbitration ; but there does not seem to be anything in the agreement which could have been construed to affect such rights if the 11th paragraph had not been inserted.

The second sentence provides that the agreement shall not be construed to affect the rights of either party in respect of any matter not therein specially

dealt with. How it could if the 11th clause had not been inserted it is difficult to say; moreover upon the question whether or not a particular matter has been specifically dealt with must be determined apart from the 11th paragraph, in other words that paragraph cannot unsettle a matter specifically dealt with apart from that paragraph. The question here is whether the liability of the defendants for instalments charged by the by laws to mature after the expiration of the company's franchise has been specifically dealt with apart from the 11th paragraph; that paragraph therefore cannot be appealed to upon that question, and that such liability has been specifically dealt with and satisfied, and discharged by the provisions contained in paragraphs 2 and 4 appears to me to be clear; then the last sentence of the paragraph appears to have been inserted for the purpose of placing beyond all doubt, that the agreement as to the annual payments by the company, and the undertaking of the company to bear the burthen of future *construction, renewal, &c., &c.*, should not extend beyond the 26th March, 1891, in case the company should not then terminate the franchise of the company, but should suffer it to continue for a longer period under the terms of the agreement of March, 1861; that provision could not possibly have the effect any more than the previous sentence to unsettle a matter specifically settled apart from the 11th paragraph.

Then again, as to the question involved in the judgment of Mr. Justice Osler, upon what principle can the contention of the plaintiffs be entertained apart from the agreement of January, 1889? By the act of 1877, in virtue of which the several by-laws were passed charging the company with a share of the cost of construction of the cedar block pavements under which by-laws the present claim is asserted, the corporation

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is made liable only in the same manner as is provided under the Municipal Act for the construction of local improvements; now the cost of the construction of local improvements is charged as a lien upon the real property benefited by or charged by the by-laws for the construction thereof for a portion of the construction of such improvement and the annual instalments to cover principal, interest and sinking fund to redeem the debentures issued for such works as are made chargeable upon, and payable by the owner and occupant of the property upon which the cost of construction is charged as a lien, but, after the persons or person who were or was owners or owner of the real property charged with such lien, have or has ceased to be owners or occupants, owner or occupant, such persons or person never have been held to be or supposed to be personally liable for instalments maturing after they ceased to be such owners or occupants although the lien upon the property still remains, and the subsequent owners and occupants for the time being become liable therefor. Now in the present case the company are no longer owners or occupants of the railways in question; they were transferred by them to the city after the city terminated their franchise, and the debentures issued for construction of the roadways became, in so far as the amount chargeable and charged upon the company as for their portion of the cost of the construction, a lien upon the property so transferred to the company. If then the company after ceasing to be owners or occupants of the railway and real property which the company had while its franchise lasted, should be held liable for the instalments accruing under the by-laws in respect of such cost of construction after the company's franchise had determined, and after they had ceased to be owners or occupants of the said railways and real property, they would be liable upon a princi-

ple not provided by the Municipal Act in respect of the liability of persons charged, rated and assessed in respect of local improvements. Then it was argued that it must be held, that upon the arbitration the defendants were allowed for the value of the roadways to them, to the full amount of the proportion of the cost of construction which by the by-laws were charged, rated and assessed upon them by the city, and that, therefore, they must be liable for the rates maturing as payable after the termination of their franchise. But in making such an allowance, if any such was made to the defendants by the arbitrators, they would have erred, in my opinion, and such error, if committed, could not now be rectified by holding the present action to be maintainable. By the act 40 Vic. ch. 85, the arbitrators were bound to estimate as an asset of the company *any permanent pavements* or roadways *thereafter constructed by the company* only *to the value of such permanent roadways to the company and for the balance only* of the life *of such pavement*. In the settlement of January, 1889, the contention of the company was, that the roadways as they were constructed by the city were *not permanent*, and were of no value to the company, and that, therefore, they were not liable for any part of the cost of construction thereof, although charged therewith by the by-laws in that behalf. It was upon this contention that the company entered into the compromise contained in the agreement of January, 1889, which the arbitrators construed to be, as it was contended by the defendants to be, a release and discharge of the company, by the city, from all future liability under those by-laws, for construction, &c. Upon the compromise having been executed and payment by the company of the instalments made payable by the by-laws in the first six years, the company might possibly have been regarded on the arbitration as

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entitled to an allowance for any value to the company of such roadways, so far as such outlay was concerned, but the compromise having been entered into by the company, upon the contention that the roadways as constructed by the city were of no value to the company, it is not likely that the arbitrators, construing the agreement of January, 1889, as they did, would have allowed anything even for such outlay, but however that may be, the question raised now by the plaintiffs is not, whether they did or did not make any allowance in respect of such outlay, but whether they allowed anything to the company for the value to them of roads which the company never did construct, but which were constructed by the city, and the company's liability to pay any portion of the construction of which the company had disputed upon the ground that they were not permanent, and were of no value to them, and in support of their contention of exemption from which liability accruing subsequently to the date of the compromise agreement they produced and relied upon that agreement. I can see no ground for the contention that the arbitrators did make any such allowance. If they did it could not now make any difference, nor in any manner alter the construction which in this action we are bound to put upon the agreement of January, 1889.

The appeal must therefore be dismissed with costs in all the courts, and the judgment of Mr. Justice Falconbridge affirmed.

Appeal dismissed with costs.

Solicitor for appellants: *C. R. W. Biggar.*

Solicitors for respondents: *Maclaren, Macdonald, Merritt & Shepley.*