THE TORONTO GRAVEL ROAD AND CONCRETE COMPANY (LIMITED), (DEFENDANTS)..... } APPELLANTS;

AND

THE CORPORATION OF THE COUNTY OF YORK (PLAINTIFFS). } RESPONDENTS.

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*May 28.

*Nov. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ry. Co.—Agreement with municipality—Construction of tramway—Traction engine—Agreement to withdraw and discontinue use—Right to use steam engine under.

An agreement was entered into under the authority of an Act of the Parliament of Ontario between the municipality of York and the Toronto Gravel Road and Concrete Company, under which the latter were to have a right to construct a tramway from their gravel pits to the city of Toronto. One of the clauses of the agreement was as follows: "So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use and employment of the said traction engine and of any other traction engine upon or along such public highways."

Under this clause the company claimed the right to put steam engines upon the road over such public highway.

Held, affirming the judgment of the Court of Appeal, that the use of steam engines was an infraction of the said clause.

APPEAL from a decision of the Court of Appeal for Ontario, refusing to set aside the judgment of the chancellor in favor of the respondents.

This was an action against the appellants to restrain them from using steam engines upon a tramway con-

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

*[Leave to appeal to the Privy Council has been granted in this case.]

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structed by virtue of an agreement between them and the respondents, the municipality of he county of York. The concluding clause of the agreement, under which the respondents claim that the use of steam engines is prohibited, is set out in the above head note. Judgment was given for the municipality on the hearing before the chancellor, and such judgment was sustained by the Court of Appeal. The company appealed from the last mentioned judgment to the Supreme Court of Canada.

Robinson Q.C. for appellants.

The point raised on this appeal is whether the defendants have the right to use steam as a motive power on their road.

The first statute to be looked at is the R. S. O. ch. 186 from 31 Vic. ch. 34 "to regulate use of traction engines on highways." 36 Vic. ch. 114 (O.) incorporated the respondents' company and 37 Vic. ch. 90 gives them the right to operate their tramway by steam power. It is under this statute, and the agreement of the 10th August, 1874, made with the respondents, that the whole case depends.

The Ontario statute 37 Vic. ch. 90 gives the appellants the right to operate their tramway by steam power wherever located, and it was to such a tramway (that is, one that could be operated by steam) that permission to locate upon the highway in question was given to the appellants by the respondents under the agreement of the 10th August, 1874.

There is no implied obligation in this agreement not to use steam. The respondents contend that the implication arises strongly under the agreement that we were to use horses as the motive power. We contend that the onus is upon them to show we have waived our statutory right to use steam power.

The corporation thought, as they say, they were get-

ting rid of steam in every form. The appellants say the agreement was to prevent the use only of the traction engine. It is a *casus omissus*. Whose business was it to put it in the agreement? It was the respondents' for they were seeking to deprive us of a right given us by said statute.

But the respondents could not, by any agreement or by-law, curtail or reduce our chartered rights, and the statute 37 Vic. ch. 90 having regulated the method of use (*ex. gr.* the speed) in case steam was used, it was out of the power of the respondents to prohibit the use of steam as a condition attached to the use of the highway question.

Calder & Hebble Nav. Co. v. *Pilling* (1); *Queen* v. *Governors of Darlington School* (2); questioned in *Dean* v. *Bennett* (3).

Even if the respondents had the power to attach the condition that steam could not be used they have not done so, and the right of the appellants to use steam as a motive power upon the tramway under the act remains unimpaired by any terms or conditions contained in the agreement of the 10th of August, 1874.

Osler Q. C. follows:

The condition of the parties at the time necessitated an agreement. The traction engines were destroying the business of the toll roads of the county of York. We had a charter giving us a right to use a tramway with steam power. We had to get the consent of the municipality to construct, and there is nothing authorizing the interference with the operation of the road after construction. The method of construction is one thing, the mode of operation another. There are cases in which a railway may run along a highway with the consent of the municipality, but the

(1) 14 M. & W. 76. (2) 6 Q. B. 682.
(3) 6 Ch. App. 489.

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municipality cannot give assent and make it a condition that the trains shall be run by horses. With reference to street railways there is power to regulate not only the construction but the operation. There is no similar provision here.

Section 1 gives the power to construct the tramway in accordance with the act of Parliament, and this includes the right to use steam. Then the municipality, by the 84th section of the Joint Stock Road Act, had the right to charge tolls only on horses and other animals, and the section as to tolls means only to provide for tolls allowed by law.

No case was made out for the rescission or reformation of the agreement in question, and in any event the respondents are estopped by their laches from claiming any such relief. *Campbell* v. *Edwards* (1).

Cassels Q. C. for respondent:

It is obvious from the agreement that what the parties contemplated was the use of a tramway or street railway.

The letter of the president, Mr. Lamond Smith, written to Mr. Morse on the 4th June, 1874, and by him enclosed to the county, and the petition presented to the county, and the further letter of Mr. Lamond Smith of the 10th July, 1874, written to the chairman of the committee on the roads and bridges of the county of York, ask the right from the county to make a tramway or street railway.

What was in the minds of the Toronto Road Co., and what was asked from the county, was the right to construct a tramway or street railway, and the term "tramway" used in the agreement is plainly synonymous with the term "street railway." The reference in the agreement approving the use of the tramway by horses, carriages and teams of parties using

(1) 24 Grant 152.

the Kingston road also shows that what was contemplated was a street railway. *Smith* v. *Hughes* (1).

Kerr Q. C. follows:

The moving cause for the negotiations was the removal of a nuisance caused by the steam and noise of the traction engine. A tramway is constructed and used in the manner contemplated by the parties until the bill was filed. The rail was a tramrail, the motive power was horses.

This is not the case of parties in the trade dealing with one another, and having reference to a particular kind of traction engine. In any event, in order to support the appellants' contention it is necessary to go into the evidence, in order to ascertain and prove what kind of traction engine was contemplated by the parties when the agreement in question was entered into, and it is submitted on the part of the present respondents, that if the case is viewed in this light that the evidence greatly preponderates in favor of the contention of the county.

The effect of granting the demand of the defendants would be make this road practically a branch of the Grand Trunk Railway.

Robinson Q. C. in reply.

Sir W. J. RITCHIE C. J.—I think the term "traction engine," referred to in the agreement, contemplated a steam engine for locomotion upon common roads, and should receive that construction as being the common and ordinary understanding of the term, not only in common parlance, but by lexicographers, (the last edition of the Imperial Dictionary thus defines it "a steam locomotive engine for dragging heavy loads on common roads,") as distinguished from a carriage supporting and driven by a steam engine and used to

(1) L. R. 6 Q. B. 597.

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draw railway carriages, but also because the parties were making provision against the use of such an engine and others of a similar character, and there is is nothing in the agreement to show that locomotives were in the contemplation of either party, but the inference from the provisions of the agreement is to the contrary. This construction is no narrowing of the terms of the agreement, but is only giving to the language used its fair and legitimate meaning in reference to the matter then under discussion, namely, the removal of the traction engine then in use and the use thereafter of engines of a similar character. If so, had the company ever obtained the leave or consent of the council to use steam locomotives, and was this consent necessary?

The question of using steam, apart from the traction engine then in use, was not, in my opinion, a matter in the contemplation of either party. The municipality wished to get rid of the nuisance occasioned by a traction engine running on the road, and the company was desirous of getting authority to lay down, in lieu thereof, a tramway for the purposes of an ordinary street railway to be propelled by horse power, and there is nothing in the agreement to show that the municipality consented to the use of steam on such tramway, but the irresistible inference is to the contrary. The company, no doubt, wanted to get rid of the use of steam on the public road, and the agreement was doubtless entered into with that view by substituting an ordinary street railway in lieu thereof. It can hardly be supposed that it could have been contemplated by either party that the agreement got rid of the steam one day—for which the company obtained the great advantage of laying down a tramway—and they could, the next day, place a similar steam locomotive, though of a different nature, on the road, and

that, too, without any provision for tolls or restriction of any kind. Instead of this, I think all the agreement, fairly construed, was intended to confer on the company was the right to lay the tramway and use it as an ordinary street railway, thereby, by necessary implication, excluding the use of steam. And I entirely agree with the learned Chief Justice, that the language of the deed points to the use of horse power alone.

FOURNIER J. concurred.

HENRY J.—I am of the opinion that the appeal should be dismissed. The agreement was entered into between the parties, after the appellants had been running their traction engine for some years, in consequence of the people who usually used the highway becoming excited in consequence of numerous accidents and making application to have its running discontinued by the corporation.

The law of construction is well settled that all written contracts should be construed according to the intention of the parties to be gathered from the instrument, together with the surrounding circumstances if the words of the instrument are susceptible of more than one meaning.

Here the permission was given to use the traction engine for a tram-railroad. A tram-railroad is not generally understood to be a road worked by steam engines. Horses are to be used. That is referred to in the letter written by Mr. J. L. Smith. The permission therefore was but a license to substitute on a tram-railroad a traction engine for horses.

Although strictly speaking a traction engine may be stationary, yet it is generally understood to be a locomotive engine. Etymologically, it means an engine capable of drawing on a tram-railroad. Then they say "we are not to use a traction engine, but we want to

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use our engine not on a tram-railroad but on an ordinary railroad." I have yet to learn that a locomotive in use on an ordinary railway is not a traction engine.

These parties had not authority to lay down an ordinary railway, but what is essentially different, a tram-railway. Everybody knows that a tram-railway is one almost always worked by horses.

The following is the authority:—

The company shall be at liberty forthwith to lay down and construct a tram-way, in accordance with the last mentioned act of the Parliament of Ontario, for the carriage of freight and passengers upon and along the Kingston road, from the gravel beds or pits of the said company in the townships of York and Scarboro' to the city of Toronto.

Construing that agreement it does not appear that the parties intended an ordinary tram-railroad to be operated by horses.

Then the agreement concludes thus:—

So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county and shall discontinue the use and employment of the said traction engine and of any other traction engines upon or along such public highways.

Now, if the appellants intended when entering into that agreement to use not a locomotive ordinary traction engine, but an ordinary locomotive railway engine it was I think an inception of fraud.

I have come to the conclusion that it was not the intention of either of these parties when this agreement was entered into that the appellants should have the right to use a steam engine on an ordinary railway, as they now claim, and that the words "any other traction engine" must be construed to include any kind of locomotive engine. I think the appeal should be dismissed with costs.

Taschereau J.—Concurred.

GWYNNE J.—The point involved in this case appears

to me to be free from doubt upon the true construction of the agreement of August, 1874, in the light of the surrounding circumstances. By an Act of the Legislature of the province of Ontario 36 Vic. ch. 114, the defendants were incorporated as a company for the purpose, among other things, of excavating, hauling and selling gravel and sand for building and other purposes, and for making and selling a composition called cement, and for these purposes they were empowered to acquire and hold lands, &c. In the pursuit of their business they acquired lands in the township of Scarborough from which they excavated gravel, which they hauled in trucks drawn by a traction engine along the Kingston road, a public highway belonging to the defendants, to the city of Toronto for sale, &c. This traction engine they used under the authority of another act of the Legislature of Ontario 31 Vic. ch. 34, by which it was enacted that it should be lawful for any person to employ traction engines for the conveyance of freight and passengers over any public highway in the province, subject to certain provisions therein, and among such provisions that no traction engine so to be employed should exceed in weight twenty tons, and that the speed of any traction engine should at no time exceed the rate of six miles per hour, and in cities, towns and incorporated villages the rate of three miles per hour, and that the width of the driving wheels of all such engines should be at least twelve inches and the wheels of the trucks or waggons should be four inches in width for the first two tons capacity, load and weight of truck included, and an additional half inch for each further ton. The use of those traction engines and trucks by the defendants upon the public highway belonging to the plaintiffs being authorized by act of parliament could not be abated as a nuisance, but the use of them on the Kingston road, a public

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thoroughfare in the immediate vicinity of the city of Toronto, did nevertheless, in fact, prove to be an intolerable nuisance to the public having occasion to travel on the highways; a nuisance not merely arising from these properties of the engine, which gave it the appellation of a traction engine as distinguished from other engines, but from the use of steam as the propelling power.

The defendants also themselves appear to have found that the use of the traction engine and trucks upon the highway was not sufficiently convenient for the advantageous carrying on of the business for which they were incorporated and in which they were engaged, for they applied to the Ontario Legislature for an act to amend their act of incorporation which was passed upon the 24th March, 1874. By this Act 37 Vic. ch. 90, the defendants were empowered to construct a double or single tramway or way of wood, or of iron, or wood and iron and other materials, from their gravel beds in the township of Scarborough in the county of York through the township of York to some point within the city of Toronto; and to take and hold all lands necessary for the purpose, with full power to carry and transport on and over their said roadway in cars, carriages and other vehicles gravel and other property and passengers at such reasonable rates as the directors of the company for the time being should impose, and it was enacted that the said road might be worked by horse or other power; but if by steam that the rate of travelling should not exceed ten miles per hour. They were by this act also empowered to construct a wire tramway from and to the points aforesaid for the purpose of carrying and transporting gravel and other freight and to acquire take and hold all lands necessary for the use, objects and conveniences connected in any way therewith or aiding the traffic thereof;

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and to operate the same by stationary steam engines; and by the act it was further provided that the councils of the municipalities through or in which the said tramways or roads might be constructed might by by-law or otherwise permit the company to construct the same or some or any part thereof in, along, over, and upon, the highways and streets, upon such terms and conditions as might be agreed upon between them. Now by this act the defendants had power given to them either to construct a wire tramway on their own property to be acquired for the purpose, to be operated by stationary engines or to construct an ordinary tramway in like manner on their own property to be operated by locomotive steam power or by horse power, or, to make use of the public highways either for the purpose of a wire tramway or of a tramway to be operated by locomotive steam power or by horse power, but the public highways could be used for any of the above purposes only with the consent of the municipalities whose highways were proposed to be affected, first obtained, and upon such terms and conditions as might be agreed upon between such municipalities and the defendants. The defendants, probably from motives of economy, seem to have preferred, if they could obtain permission, to construct their tramway upon the Kingston road which was the property of the defendants to acquiring land of their own for the purpose. In order to obtain the assent of the municipality to whom that road belonged it was obviously necessary that the defendants should explain to the council of that municipality, the county of York, what species of tramway they proposed constructing, namely, whether a wire tramway, or an ordinary tramway, and if the latter whether to be operated by locomotive steam power or by horse power In view of the objection which had been raised by the public to the use of the traction

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engine which was propelled by steam, the use of which as the propelling power was the chief cause of objection to the traction engine, it was naturally to be expected that the council of the municipality would withhold their consent to the construction of the tramway on the highway if locomotive steam engines should be the propelling power intended to be used. In the month of July, 1874, the defendants applied to the council of the county of York for permission to lay their tramway on the highway, and after divers negotiations with property owners along the road and the members of the county council, a draft agreement dated the 24th of July, 1874, was adopted in council and was reduced to a completed agreement dated the 10th of August, 1874, and was signed by the warden and clerk of the council of the county of York, with the common seal of the county attached, and by the vice-president and the managing director of the defendants' company, whereby the defendants obtained permission to construct their tramway on the terms and conditions therein mentioned. This instrument after reciting that the defendants are the owners of a traction engine which, under the authority of an act of the Parliament of Ontario, had been employed for the conveyance of freight over the public highways of the county of York, and that by a certain other act of the Parliament of Ontario the defendants were authorized upon certain terms and conditions to construct tramways for the conveyance of freight and passengers upon and along the public highways of the said county of York, and that one of such terms and conditions was that before constructing said tramway upon or along such public highways the consent of the said corporation should be first had and obtained; and that the defendants had applied to the said corporation for leave to lay down and construct a tramway upon and along the Kingston road, being one

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of the public highways of the said county from their gravel beds or pits in the township of Scarborough through the township of York to the city of Toronto, and that the said corporation had agreed upon the terms and conditions thereinafter mentioned to give their consent to such application, it was thereby agreed: 1st. That the defendants should be at liberty to lay down and construct a tramway in accordance with the last mentioned act of the parliament for Ontario for the carriage of freight and passengers upon and along the Kingston road, from the defendants' gravel pits aforesaid to the city of Toronto; 2nd. Among other things that the said tramway should be constructed so as to interfere as little as possible with the ordinary traffic of the said highway; 4th. That tolls to be collected should not exceed the same as for ordinary conveyances, viz., not more than 7 cents for cars drawn by one horse and 10 cents for cars drawn by two horses; 5th. That the said company should, if required, run not less than two passenger cars daily each way (or in lieu thereof an omnibus or sleigh) from the Don Bridge to Norway at such hours as might be found most convenient for the company and the public so long as the said tramway is in use; 6th. In case of horses, carriages, teams, or other vehicles or animals meeting or being overtaken by the horses, waggons, carriages, or other vehicles of the said company travelling upon the said tramway, the said company should have the first and immediate rights of way over and upon the said tramway; and 7th. So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use and employment of the said traction engine and of any other traction engine upon or along such public highways. Now, from this agreement, it is apparent that the with-

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drawing of the traction engies not only from the Kingston road, but also from all highways in the county of York, was made one of the conditions upon which permission to lay a tramway at all was granted, and although no express provision is inserted to the effect that steam shall not be used as a motive power, the reason for that is apparent, namely, that the provisions numbered 4, 5 and 6, making special provision for the use of horse power, which provisions are quite inconsistent with the use of steam which was also the chief objectionable feature in the traction engine, show unmistakeably that what the parties to the agreement were intending to provide for, was the construction of a tramway to be operated with horse power; and that the permission which the defendants intended to be understood as asking for, and which the plaintiffs intended to grant, was permission to construct such a tramway. There cannot, I think, be a doubt that the defendants well knew that the council of the municipality understood the defendants to be applying for permission to lay a tramway to be operated by horses as the motive power, and that the defendants intended to be so understood, and that such was the extent of the permission which the council of the county intended to grant. It is inconceivable that a municipality which insisted upon the withdrawal of traction engines from all highways of the county mainly because of their being operated by steam, as a condition of granting permission to the defendants to construct the tramway, would have ever given their consent if steam power was to be used on the tramway. Upon the agreement being perfected the defendants constructed their tramway suitable only for the use of horse power, and so maintained and used it for about five years, when they proceeded to construct a railway for the purpose of and with the intention of giving up horse power and using steam as the

motive power.

The learned counsel, Mr. Robinson, in his argument before us, and also, as appears by the judgment of Hagarty C.J., in his argument before the Court of Appeal for Ontario, submitted that the true state of the case was that at the time of the agreement being made and entered into both the plaintiffs and the defendants thought only of horses as the motive power, but he contended that steam not being expressly excluded, the statutory right, as he called it, of the defendants now to construct their tramway so as to use, and to use, steam power thereon, was not interfered with; but if neither party thought of steam as the motive power to be used, but both did think of horse power, and only of horse power, and made express provision pointing to the use of horse power, and not pointing to the use of any other power, these provisions, coupled with the well known objection the public had to the use of the traction engines, because of their being propelled by steam, as clearly indicate an intention to exclude steam power as if it had been in express terms excluded. And as to the argument that the statutory right, as it was called, of the defendants to use steam was not interfered with by the agreement, the answer is that the defendents have no statutory right to use steam power on a tramway constructed on a highway nor to have a tramway at all on a highway without the consent of the municipality owning the highway for that purpose first obtained, which permission when called in question the defendants must show. Here the defendants show only permission to lay a tramway on the Kingston road which permission makes provision plainly pointing to its being worked by horse power and has no provision applicable to steam being used as the motive power, the defendants therefore, in my judgment completely fail to show a permission co-exten-

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sive with the right which they assert of using steam power, and it is in my judgment quite unnecessary to rest upon the argument so much insisted upon on the one side that the term traction engine being used as describing the only engine expressed to be excluded, authorized the defendants to use any other description of engine, and on the other side that every locomotive steam engine is a traction engine and that therefore every species of steam engine is expressly excluded. The appeal should, in my opinion, be dismissed with costs and the perpetual injunction and the decree granted by the Court of Chancery maintained with costs in all the courts.

Appeal dismissed with costs.

Solicitors for appellants: *C. & H. D. Gamble.*

Solicitors for respondents: *Blake, Kerr, Lash & Cassels.*