

1931
June 1
Aug. 6

CITY OF SAINT JOHN..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Contract—Interpretation—Acts of party as aid to interpretation—Covenant to repair.

Suppliant by its action asks that the respondent be ordered to pay for the repair of a street on which a spur line of the Intercolonial Railway was located, by virtue of an agreement, reading in part as follows:

1. "The City hereby grants unto His Majesty the right to extend one spur track of the Intercolonial Railway from the said tracks of said railway on the Ballast Wharf, in the City of Saint John, along Charlotte street to Broad street, such tracks to be located in such portion of the street as may be approved by the Commissioner of Public Works and the Road Engineer of the said City."

2. "In consideration of the foregoing licence His Majesty HEREBY AGREES that HE will keep the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid, in proper repair at all times to the satisfaction of the Commissioner of Public Works of the said City. * * * * * " The Respondent claims He is only obliged to repair the space occupied by its rails.

1931
 CITY OF
 SAINT JOHN
 AND
 HIS MAJESTY
 THE KING

Held that the word "aforesaid" in par. 2 above cited refers back to the "portion" in par. 1; and that "the portion of Charlotte street lying between the Ballast Wharf and Broad street aforesaid" relates, and was intended to relate only to "such portion of the street" whereon the tracks were to be located. That the words "lying between the Ballast Wharf and Broad street" in the second paragraph merely limit the length of the spur line, and that by the said contract the respondent is only obliged to keep repaired that portion of the street whereon the spur track was located.

2. The street in question was built 70 years ago on crib work, into the harbour, and then filled in. The western wall, built of timbers lying on top of one another and used as a wharf, being in a state of disrepair, the city have called on the respondent to pay for its repair, under the above cited contract, at a cost of over \$17,000.

Held further that, as a covenant to repair is not a covenant to make a new thing, and inasmuch as to do what the suppliant now requires of the respondent would practically amount to reconstruction of the whole of said wall, such work does not come within the meaning of "repairs" called for by the covenant in the contract.

PETITION of Right by suppliant herein for an Order that respondent pay to the suppliant the cost of repairing a certain street in the city of Saint John on which the tracks of the Government Railway had been laid.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Saint John.

J. D. P. Lewin and *A. N. Carter* for suppliant.

I. C. Rand, K.C., for respondent.

The questions of law raised and the facts are stated in the Reasons for Judgment and in the headnote.

The PRESIDENT, now (August 6, 1931) delivered the following judgment.

This is a Petition of Right brought by the Corporation of the City of Saint John, N.B., in respect of a written agreement entered into between the Corporation and His Majesty the King, represented therein by the Minister of Railways and Canals for the Dominion of Canada. By the terms of the agreement the Corporation granted to the Intercolonial Railway the right, privilege, or licence, to extend one spur

1931
 CITY OF
 SAINT JOHN
 AND
 HIS MAJESTY
 THE KING
 Maclean J.

track along Charlotte street, within the corporation limits, from what is known as the Ballast Wharf, as far as Broad street.

The agreement was entered into in January, 1914, and after a recital of the date of execution of the agreement, and of the parties thereto, the remaining paragraphs of the agreement, which for convenience I shall number one, two and three, are as follows:

1. The city hereby grants unto His Majesty the right to extend one spur track of the Intercolonial Railway from the said tracks of said railway on the Ballast Wharf, in the city of Saint John, along Charlotte street to Broad street, such tracks to be located in such portion of the street as may be approved by the Commissioner of Public Works and the Road Engineer of the said city.

2. In consideration of the foregoing licence His Majesty HEREBY AGREES that HE will keep the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid, in proper repair at all times to the satisfaction of the Commissioner of Public Works of the said city, and at the expense of the Intercolonial Railway of Canada and also that His Majesty upon receiving sixty days' previous notice from the Common Council of the said city so to do, such notice to be given to the Minister of Railways and Canals aforesaid, shall and will take up the track hereby authorized to be laid and will remove the rails of the same from the said street.

3. His Majesty further agrees to pay to the said city yearly the sum of One Dollar as rental for the privilege hereinbefore granted.

It is the southern end of Charlotte street, which now ends at the Ballast Wharf, so called, in Saint John harbour, that is involved in the controversy; that end of this street was in the past known as Charlotte street extension. Originally, the area now comprised in the Extension formed a part of the harbour of Saint John, and was land covered with water. The Extension was originally a structure of crib work, about sixty feet in width, extending from what was then the end of Charlotte street, in the city of Saint John, to the Ballast Wharf; the crib work was gradually filled in and it is now a solid fill. The Extension was the result of a disagreement between the civic and military authorities respecting access to the Ballast Wharf, away back in 1858; the differences were composed by the construction of the Extension, towards the cost of which the Imperial authorities bore a portion. The west side of the Extension, for a great part at least, is bounded on the waters of Saint John harbour, and that side of the Extension was used as a wharf. This side wall of the Extension was faced by square timbers lying horizontally one above

the other, from below the bed of the harbour up to the surface of the Extension, forming a solid wall, and was built over seventy years ago. Several mooring posts were placed on that side of the Extension, and there for many years, vessels loaded and unloaded cargo. I should observe that this wall also serves as a retaining wall to hold back the earth filling in the Extension, and if it were not for this wall I doubt if the Extension or street could be permanently preserved.

1931
 CITY OF
 SAINT JOHN
 AND
 HIS MAJESTY
 THE KING
 Maclean J.

The western side wall of the Extension, for a distance of three hundred feet in length and some sixteen feet down the face of the wall, and also a portion of the surface of the Extension near the wall, is undoubtedly in a condition of disrepair, and it is claimed by the corporation, that it would cost about \$17,000 to repair the wall, which amount is claimed in damages herein by the corporation. The corporation contends that under the terms of the agreement, the respondent is obliged to maintain in repair the whole length and width of the Extension, between the Ballast Wharf and Broad street, including the western wall or wharf side of the Extension, while the respondent's contention is that it is obligated under the agreement to keep in repair only that portion of the Extension whereon is located the ties and rails of the spur track. The whole issue, as it developed at the trial, relates only to the question as to whether the respondent is liable for the repair of the western side wall of the Extension, under the agreement.

Mr. Carter, counsel for the corporation, contended that Charlotte Street Extension was a public street and nothing else, and was not to be treated as being partially, or in any sense, a wharf, while Mr. Rand, the respondent's counsel urged that the western wall was essentially a wharf, and could not properly be considered, in so far as this case was concerned, as a part of Charlotte Street Extension, or as a portion of that street. I have no doubt whatever that the Extension was popularly known as a street, and, the western wall, as a wharf. I think the use of both terms may be justified, but for convenience sake I shall hereafter refer to the Extension as a "street", that to be inclusive of the wall or wharf. The western wall in question was used by ships as a wharf for very many years; at the time the

1931
 CITY OF
 SAINT JOHN
 AND
 HIS MAJESTY
 THE KING
 Maclean J.

agreement was entered into and subsequent thereto, it was used as a wharf by the leave and licence of the corporation; the Annual Reports of the corporation appear to have treated it as a wharf; the corporation collected for the use of the same varying amounts annually as wharfage; and it made slight repairs to the wall or wharf, subsequent to the date of the agreement. Further, it would appear to me, that the corporation transferred, a few years ago, to the Saint John Harbour Commissioners the western side wall of the street, as part of the Saint John harbour shipping facilities, all of which I understand, were owned by the corporation, and it would also appear that the Saint John Harbour Commissioners have since been asserting jurisdiction over the wharf side of the street. In the books of the corporation, capital expenditure made in connection with the wharf side of the street, is designated as Charlotte Street Extension Wharf account. I think it is clear that the western wall was known and used as a wharf, but in my view of the case, I do not find it necessary to make any deductions therefrom in reaching a conclusion.

I have ventured to relate all these facts because much importance was attached to them by counsel at the trial, and possibly they may contribute something towards ascertaining what was in the minds of the parties, when the agreement was entered into, if the agreement itself does not clearly reveal the intention of the parties, or if it is ambiguously expressed. The agreement apparently did not originate with the parties thereto, but was the outcome of the interposition of others, shippers I assume; there was no correspondence, and apparently no serious oral negotiations, between the parties leading up to the agreement, and it is upon the precise terms of the written document itself that both parties rely. The facts of the case are rather unusual, and one can hardly look to decided cases for assistance.

Turning now to the agreement itself. It purports to grant to His Majesty, the right to extend one spur track of the Intercolonial Railway from the Ballast Wharf, *along Charlotte street*, as far as Broad street, *such tracks to be located in such portion of the street as may be approved*, by certain named officials of the corporation; the licence is terminable on sixty days' notice by the corporation,

whereupon the railway is to remove the rails. Then the agreement states that in consideration of the licence, or privilege, to lay the one spur track, which in fact was laid quite close to the western wall of the street, His Majesty will keep "*the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid*" in proper repair, etc." In my opinion, "the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid", relates, and was intended to relate, only to "*such portion of the street*" (Charlotte street) whereon the tracks were to be located as directed by the corporation authorities. The words "lying between the Ballast Wharf and Broad street", in the second paragraph, merely limit the length of the spur line along Charlotte street, and were used only for that purpose; beyond that they have no significance, and in construing the agreement these words might well be eliminated, because they were unnecessary, the length of the track having been previously determined in paragraph one. Therefore, it seems to me, that in the second paragraph the important words should read: "the portion of said Charlotte street * * * aforesaid", and if read with the words "such tracks to be located in such portion of the street" in the first paragraph, then, I think, that the proper interpretation to be placed upon the combined paragraphs is that the "portion" to be kept in repair, is "the portion of said Charlotte street" whereon the tracks were by the terms of the agreement to be located. "Portion" in the first paragraph undoubtedly means that portion of Charlotte street to be occupied by the spur track between the Ballast Wharf and Broad street, and the words "the portion of said Charlotte street" in the second paragraph has reference, I think, to the portion lengthwise of Charlotte street whereon the spur track was to be located. The use of the words "the portion of said Charlotte street" and "aforesaid" in the early lines of the second paragraph, makes it quite clear to me that the "portion" to be kept in repair is the same "portion" of Charlotte street whereon the spur track might be located, between the two mentioned points, and not the whole width of the street inclusive of the western wall. After the spur track was laid down, the corporation, in 1916, asphalted the surface

1931
 CITY OF
 SAINT JOHN
 AND
 HIS MAJESTY
 THE KING
 Maclean J.

1931
 CITY OF
 SAINT JOHN
 AND
 HIS MAJESTY
 THE KING
 Maclean J.

of that portion of Charlotte street east of the spur track, constituting the major portion of the width of the street, and it was not then contended that the railway was liable for the cost of this improvement to the surface of the street between the Ballast Wharf and Broad street. The conduct of the corporation, for many years subsequent to the date of the agreement, would indicate that it interpreted the agreement in the same light as did the railway authorities. It would seem improbable that, for a licence or privilege, and not a demise, terminable on sixty days' notice, such an onerous obligation, as is claimed by the corporation, should be imposed upon or accepted by the railway authorities, without the same being clearly and unequivocally expressed in the agreement. I am of the opinion that it is only that portion of the surface of Charlotte street, between the Ballast Wharf and Broad street, whereon is located the spur track, that the respondent is required, by the terms of the agreement, to keep in repair.

Furthermore, as was contended by Mr. Rand, I doubt if the agreement can be construed to mean that the respondent was obligated to repair the side wall of the wharf or street, to the extent claimed by the corporation. Evidence was given to show that the operations of the railway on the spur track, and its user of the wall, seriously damaged the wall. I do not think this was established, but in any event, I doubt if it is important. It is doubtful if, under the terms of the agreement, the respondent had the right to use the wharf or wall except upon payment of the usual wharfage charges. The repair work, claimed as necessary to be done, means virtually the reconstruction of the whole wall down to the bed of the harbour, which is hardly, I think, a repair of the wall. Some years ago the most southern end of the same wall was wholly reconstructed by building a new wall outside the old wall, and filling in the space between the old and the new wall, causing a "jog" in the southern end of the west wall of the street. This is probably the form of reconstruction that should be followed in this case, and in fact, I think, this was recommended. The portion of the wall here in question was, I understand, constructed at the same time as the portion that was reconstructed, and that is now over seventy years ago. The three hundred feet of the wall in question was

bound, in the very nature of things, to require very substantial reconstruction now or in the early future. To do what the corporation now requires of the respondent would be to reconstruct the whole wall, with the exception of a few of the lowest tiers of timber that have been preserved, chiefly because they were always under the water, or the gravel and mud. It is not unfair to assume that should the wall in question be reconstructed to the extent claimed to be necessary by the corporation, that it would last another fifty or seventy years. A covenant to repair is not a covenant to make a new thing, or a thing different from that which the licensee or tenant took when he entered into the covenant. *Lister v. Lane* (1).

The petition is therefore dismissed and costs will follow the event.

Judgment accordingly.

1931

CITY OF
SAINT JOHN
AND
HIS MAJESTY
THE KING

Maclean J.