

The whole railway was constructed and operated until August, 1913, when the appellant company tore up its tracks from the Delta westerly to Sherman avenue, and it had since had no line between these points, but had continued to operate the remainder of its railway.

The appellant company had paid into Court the amount to which the respondent corporation was entitled for that part of the railway which was still in existence and operated by it. The contest was as to the obligation of the appellant company to pay for the whole distance covered by the grant made to it under the by-law.

The contention of the appellant company, so far as it depended on the meaning of para. 24 of the by-law, was well-founded.

What the appellant company obligated itself to pay was the agreed rate for every mile or pro rata for a portion of a mile of railway operated on the county roads under the by-law. The respondent corporation's contention would require that para. 24 should be read as providing for the payment for every mile or portion of a mile of the railway which the by-law gave authority to operate. According to the terms of the agreement, the appellant company was liable to pay the mileage rate only for the railway which it actually operated.

The appellant company was not estopped by the judgment in a former action between the parties from contesting its liability to pay for the whole mileage of the railway as constructed: *County of Wentworth v. Hamilton Radial Electric R.W. Co. and City of Hamilton* (1914-16), 31 O.L.R. 659, 25 O.L.R. 434, 54 S.C.R. 178. The question raised in this action was not in issue and was not raised or decided in the former action.

Reference to *Howlett v. Tarte* (1861), 10 C.B.N.S. 813, 827; *Humphries v. Humphries*, [1910] 1 K.B. 796, [1910] 2 K.B. 531, distinguishing it; *Cooke v. Rickman*, [1912] 2 K.B. 1125.

if, however, there was to be found in the by-law any provision the effect of which was to obligate the appellant company to operate the railway on the Main street road from Sherman avenue to the Delta and on King street from the Delta easterly to the Saltfleet town-line, the respondent corporation would be entitled to recover an equal sum as damages for the breach of that obligation.

Although there was in the by-law, in terms, no provision that the whole railway should be operated, the by-law did provide (para. 9), that the railway between the termini mentioned in the by-law should be constructed and operated before the 15th November, 1905; and (para. 13) that the company should place