

Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of The Melbourne Tramway and Omnibus Company, Limited, v. Kidney; and The Melbourne Tramway and Omnibus Company, Limited, v. The Corporation of the City of Melbourne, from the Supreme Court of Victoria; delivered the 12th April 1905.

Present at the Hearing :

LORD DAVEY.

LORD LINDLEY.

SIR FORD NORTH.

SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

These two Appeals raise the same question, viz., whether the Appellants, the Tramway Company, are liable to pay to the Corporation of Melbourne licences for tramcars and for their drivers and conductors. Kidney, the Respondent in the first Appeal, may be treated as representing the Corporation of Melbourne, and although it is now admitted that the Order appealed from in the first Appeal was wrong, yet as that Appeal was brought solely to support the second Appeal, it follows that if the Tramway Company fails on the second Appeal the first must fall with it. Both are intended to raise the same question.

The power of the Corporation of Melbourne to grant licences and to charge licence duties for public carriages and for their drivers and conductors is conferred by the statutes of the Colony of Victoria known as the Licensed Carriages Statute, 1864, and the Carriages Act, 1890, and by certain by-laws made in 1880 and

1903 under their authority. It is not necessary to dwell upon these statutes and by-laws; it is sufficient to say that under them and under Section 22 of the Melbourne Tramway and Omnibus Company's Act, 1883 (which will be presently noticed) licences have to be got for the cars, drivers, and conductors employed on the tramways constructed under its powers.

Then comes the question, who is to pay for these licences? It appears to their Lordships, as it did to all the Judges in the Colony who have had to consider the case, to be plain that the Tramway Company is liable to pay licences for their tramcars and drivers and conductors employed on the tramways unless such liability is excluded by the Melbourne Tramway and Omnibus Company's Act, 1883 (47 Vict., No. 765) and the agreement scheduled thereto, and certain Acts amending it, viz., No. 815 (1884) and No. 952 (1887). The Tramway Company maintains that it is exempted from this liability by the provisions in Section 54 of the Act of 1883 which, it says, has imposed the liability on the Tramway Trust, and also by the express terms of Clause 14 (4) of the agreement scheduled to the Act of 1883. The Courts of Victoria decided this question against the Tramway Company, but the Chief Justice dissented. Hence these Appeals.

The question really turns on the Clause 14 (4) of the agreement above referred to, taken in connection with Sections 22 and 54 of the Act of 1883. In order to understand these provisions it is necessary to appreciate the general scheme of this Act. It recited that the making of the tramways therein mentioned would be of public advantage, and that the Melbourne Tramway and Omnibus Company, Limited (*i.e.*, the Appellant Company), was willing to construct them, and it empowered the Company to make the tramways specified in the first Schedule (Section 3), with

the consent of the local authorities of the cities, towns, and boroughs through which they passed. By Section 22 the Company was given exclusive power to run carriages with flanged wheels on the tramways, and "except where otherwise provided for by this Act and subject thereto," the carriages of the Company, the Company as their owners, and their drivers and conductors were to be subject to the provisions of Part I of the Licensed Carriages Statute 1864 (now the Carriages Act, 1890). The Act contained a number of clauses not material on the present occasion; and the only other sections which need be referred to are the 53rd and 54th.

The 53rd Section confirms the agreement set forth in the fourth Schedule, and then follow the words, "and that agreement shall be carried into execution in like manner in all respects as if that agreement were set forth in the body of this Act and were thereby in terms enacted."

The agreement set out in the fourth Schedule is between the Corporation of Melbourne and eleven other municipal corporations of the first twelve parts, and the Tramway Company of the thirteenth part. It recites that the Tramway Company had applied to these corporations for their consent to the Act of 1883, which they had given, and the agreement provides for the construction by the corporations of the tramway through the boroughs mentioned. If more than one of the corporations elect to come in under the agreement, they are empowered to unite in borrowing money to construct tramways within their own municipal limits. To carry out this scheme a corporate body is created called "The Melbourne Tramways Trust," or more shortly "The Trust" (Clause 5), and this Trust is to exercise the powers of the corporations constituting it in constructing the tramways within their municipal limits (Clause 8). Power is

given to the corporations to be substituted for the Tramway Company in respect of so much of the tramway as may be within their respective municipal limits, and upon being so substituted the Trust is to have all the powers of the company "as to the construction, maintenance, use, and working of the tramways within the municipal limits of such corporations." Then comes Clause 14, by which the Trust is required, within five years after the passing of the Act, to construct, with the approval of the Tramway Company, all the portions of the tramway within the municipal limits of the corporations represented on the Trust; and the Trust is to grant a lease for 30 years of the tramway so constructed. For this lease the Tramway Company is to pay to the Trust interest on the money borrowed for constructing the tramway, and certain percentages to form a sinking fund for paying off the money borrowed; and the Company is further to keep the tramway in repair, and hand the same over to the Trust at the end of the term in good working order. Then comes the clause on which the whole controversy really turns, and which is as follows:--

(4) "In consideration of the payments aforesaid the Trust shall give to the Company possession of the several tramway lines according as such shall be completed and shall be available for the running of carriages thereon, and the Company shall during the currency of the lease have the sole right of use of the tramway with carriages having flange wheels or other wheels suitable only to run on the rails of the tramway and also of demanding and taking the tolls and charges authorized by the Act. Provided always that the Company shall not be entitled to exact fares or tolls exceeding those specified in the Act. And the Company shall be liable to no other payment to the Trust or to the several corporations represented thereon for proportion of profits or otherwise howsoever except for municipal rates."

Section 54 of the Act of 1883 is as follows:—

"In the event of more than one of the several corporations named in the said agreement electing as provided in the said agreement to be substituted in the place of the Company and

“ upon the formation of the Tramways Trust mentioned in the
 “ said agreement such Trust shall be subject to the provisions
 “ of this Act with respect to the construction maintenance care
 “ and working of the tramways by this Act authorized to be
 “ constructed within the municipal limits of the corporation
 “ represented on the Trust and the conveyance and regulation
 “ of the traffic thereon, and shall save as herein expressly pro-
 “ vided be bound to observe and perform all the obligations
 “ and conditions and make all the payments by this Act imposed
 “ on the Company with respect to the several matters above
 “ mentioned in the same manner and to the same extent and
 “ effect as if such Trust had been authorized by this Act to con-
 “ struct such tramways and had been named in this Act instead
 “ of the Company.”

This Act was followed by The Melbourne Tramway and Omnibus Company's Additional Branches and Amendment Act, 1884 (48 Vict. No. 815) which confirmed and incorporated an agreement between the Trust and the Company relating to some branch lines. This agreement contained a clause set out in paragraph 12 of the Appellant's case. This clause is similar to Section 54 of the Act of 1883 above set out, and applies to the branch lines to which the supplemental agreement particularly referred. There was another amending Act in 1887, but it does not appear to their Lordships to be material on the present occasion.

All the corporations referred to in the agreement in the fourth Schedule to the Act of 1883 elected to come in under it and the Trust referred to above was formed. Tramways were constructed as contemplated. A lease of them was granted to the Tramway Company on the terms mentioned in the Acts and the Tramway Company has since been working them. The Company is the owner of the cars, and engages their drivers and conductors. Neither the municipal corporations nor the Trust work the tramways.

The Appellants contend that the last words of Clause 14 (4) of the scheduled agreement

are to be taken without any restriction and exempt the Tramway Company from the payment of the licence duties for the cars and their drivers and conductors. The Respondents, on the other hand, contend that the words relied upon by the Appellants have no application to carriages, drivers, or conductors, and must be read with reference to what is leased, *i.e.*, the tramway and nothing else. Their Lordships are of opinion that this restricted construction is the true one and ought to prevail. The case of *The Corporation of Glasgow v. The Glasgow Tramway and Omnibus Company* (L.R. 1898, A.C. 631), which was relied upon by the Appellants' Counsel, does not appear to their Lordships to be in any way inconsistent with this view.

It is impossible to study the Acts of 1883 and 1884 and the agreements set out in the Schedules to them without seeing that a marked difference is drawn between the Trust and the Company. The two may be equivalent when (if ever) the Trust not only owns the tramways, but works them. Until, however, this happens the tramway and its owners are clearly distinguished in the Act from the cars and their owners. The lease referred to in Clause 14 of the Agreement, in the Schedule to the Act of 1883, and in the Schedule to the Act of 1884, is confined to the tramways and has no reference to cars not belonging to the Trust. The payments to be made by the lessees are for the use of the tramways, and the exemption from other payments must in good sense be treated as exemptions from other payments in respect of what is leased and paid for. This was the view taken by the majority of the Judges of the Supreme Court.

The Chief Justice dissented, and, notwithstanding his exhaustive examination of the

various enactments bearing upon the subject, their Lordships are unable to concur with the conclusion at which he arrived. Their Lordships have felt, and do feel, great difficulty in ascertaining the exact meaning and effect in all cases of some of the sections in the Acts; but this difficulty is not sufficient to disturb their view of the true meaning and effect of the clause referred to, when applied to the circumstances with which they have to deal.

Their Lordships cannot accede to the suggestion that in Section 22 of the Act of 1883 the words "the Company" should, in the events which have happened, be read as "the Trust." This might, perhaps, be allowable if "the Trust" owned and ran the cars; but would be wholly unjustifiable in any other case.

Section 54 of the Act of 1883, and its equivalent in the Agreement in the Schedule to the Act of 1884, give rise to greater difficulty. But here, again, their Lordships are unable to see that the effect of these clauses is to substitute "the Trust" for "the Company," when the Trust owns the tramways and "the Company" owns the cars and works the traffic on them. The difficulty of doing this is fully dealt with in the Judgments of Mr. Justice Hodges and Mr. Justice Hood. Their Lordships think that the section must be read as imposing upon the Trust the obligations previously imposed upon the Company with reference to the construction, maintenance, and working of the tramways so long and so far as the Trust undertakes any of these operations. There is nothing to exempt the Tramway Company from its obligations so long as it works the tramways. But if and whenever the Trust has to do so, and becomes the owner of the cars, and hires the drivers and conductors, it will become liable to pay the

licence duties in the place of the Company. Great reliance is placed on the words "except" "where otherwise provided for by this Act and" "subject thereto" in Section 22, but these words seem to qualify only the application of the Carriages Act to the Company, some of the provisions of which (*e.g.*, as to the fixing of fares) are by express words excluded. Their Lordships are quite content to adopt the reasons for their judgment given by the two learned Judges who formed the majority of the Court.

It follows from the foregoing observations that the by-laws of 1903 of which the Tramway Company complains are not *ultra vires*, and that the Tramway Company must comply therewith.

The two Appeals having been consolidated, their Lordships will humbly advise His Majesty to dismiss them both, and the Appellants must pay the costs. As regards the first Appeal it is admitted that, as the by-laws then stood, the Order appealed from was wrong. But it was shortly afterwards put right for all practical purposes, and an Appeal from it was wholly unnecessary.
