

Judgment of the Lords of the Judicial Committee of the Privy Council on the two consolidated Appeals of The British Columbia Electric Railway Company, Limited v. W. F. Stewart and others, from the Court of Appeal for British Columbia (P.C. Appeal No. 20 of 1912); delivered the 23rd July 1913.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.

LORD DUNEDIN.

LORD ATKINSON.

LORD SHAW.

LORD MOULTON.

[DELIVERED BY LORD ATKINSON.]

These are Appeals by special leave from two Orders of the Court of Appeal of British Columbia, dated the 29th of November 1911 and 15th of December 1911 respectively.

By the first of these Orders leave was refused to the British Columbia Electric Railway Company, Limited, styled in the case the Appellant Company, to be added as parties in an Appeal then pending in the Court of Appeal in which four electors of the Municipality of Point Grey in British Columbia were Appellants, and the Corporation of Point Grey were Respondents, and to intervene and prosecute the same.

By the second the Court of Appeal allowed an appeal against an Order of Mr. Justice Morrison, dated the 27th February 1911, and decided that a certain byelaw passed on the

10th of September 1910 by the Corporation of Point Grey, styled The Electric Tramway Byelaw, 1910, No. 15, should be quashed as invalid on the ground that it was either *ultra vires* or had not received the assent of the electors of the municipality.

Since special leave to appeal was obtained a new byelaw, to practically the same effect as the first, has been passed by the Corporation of Point Grey, submitted to a poll of the electors, and approved of by them, but upon the terms that the right of the Appellant Company to prosecute the Appeals which they had obtained special leave to prosecute should not be thereby affected. Neither the Corporation nor any of the electors appeared on the hearing of the Appeals before their Lordships. The particular feature of the byelaw which, it was contended, necessitated its submission to the electors for their approval was this, that it, in effect, granted by Charter to the Appellant Company "a right, franchise or privilege" within the meaning of the 64th section of the Municipal Clauses Act, 1896, of British Columbia. The sole question for decision is whether this construction of the agreement is right.

The facts so far as material to the decision are as follows. Some distance to the south-east of the city of Vancouver, in British Columbia, is situate on the Fraser River the city of New Westminster. To the west of the former city, at the extreme end of the promontory which forms the southern boundary of English Bay, is situate the municipality of Point Grey.

The Appellant Company was incorporated by the Consolidated Railway and Light Companies Act of 1894 and given powers to acquire the franchises, rights, properties, and privileges of other companies. In exercise of these powers

it acquired by purchase the property, rights, powers and privileges of three companies, namely, the New Westminster and Vancouver Tramway Company, the Vancouver Electric Railway and Light Company, Limited, and the North Vancouver Electric Company. In the year 1896 an Act (Statutes of British Columbia 1896 Ch. 55) was passed to amend this Act of 1894, to change the name of the Appellant Company into that of the Consolidated Railway Company, to confirm these purchases and to vest in the Appellant Company under its new name all the property, rights, privileges, powers and franchises of the three aforesaid companies. This statute, in addition, by its 33rd, 39th, 41st, 52nd, 53rd, and 54th sections enacted, as far as is material, as follows:—

“S. 33. The Company is hereby authorised and empowered to construct, maintain, complete, and operate a single or double track street railway, tramway or railway, with all necessary switches, side tracks and turn-outs, and all other requisite appliances in connection therewith, upon and along such streets within the cities of Vancouver and New Westminster as the mayor and council of the said cities respectively may direct, and under and subject to any byelaws of the corporation of the said cities made in that behalf, and also to construct and maintain a tramway or tramways, railway or railways, between the said cities of Vancouver and New Westminster, and in the districts adjacent to the said cities, and over and upon such lands as the Company may acquire, and along such road or roads between the limits of the said cities as may be specified by any municipality through which the same may be constructed.”

“S. 39. The councils of any municipality in the Province of British Columbia and the Company are hereby respectively authorised, subject to the provisions of this Act, to make and to enter into any agreement or covenant relating to the construction of the said railway for the paving, macadamizing, repairing and grading of the streets or highways, and the construction, opening of, and repairing of drains or sewers and the laying of gas and water pipes in the said streets and highways, the location of the railway, and the particular streets along which the same

shall be laid, the pattern of rails, the time and speed of running the cars, the amount of fares to be paid by passengers, the time in which the works are to be commenced, the manner of proceeding with the same, and the time for completion, and generally for the safety and convenience of passengers, the conduct of the agents and servants of the Company, and the non-obstructing or impeding of the ordinary traffic."

41. The Company shall have full power and authority to use and occupy any, and such parts of any, streets and roads and highways as may be required for the purposes of its railway track, the laying of the rails and the running of its cars: Provided always, that the consent of the council of any municipality, when within such municipality, and of the Chief Commissioner of Lands and Works for the time being of the Province of British Columbia, when the streets, roads, and highways are not within a municipality, respectively, shall be first had and obtained, who are hereby respectively authorised to grant permission to the Company to construct its railway as aforesaid within their respective limits across and along, and to use and to occupy, the said streets or highways, or any part of them, for that purpose, upon such conditions as to plan of construction, and for such period or periods as may be respectively agreed upon between the Company and such council or the Chief Commissioner of Lands and Works aforesaid.

"S. 52. The Company shall have the power to enter
 " into and conclude any agreement with any other tramway
 " or railway company, or any corporation, for leasing or
 " selling to them the property, real or personal, rights,
 " contracts, privileges, powers, and franchises of the
 " Company, or any part thereof, or for the working or
 " managing of any of its lines of railway, or for running
 " powers over the same, or any part thereof: Provided
 " that such agreement shall be approved of by two-thirds
 " in value of the shareholders at any special meeting
 " called for that purpose."

"S. 53. The Company shall have power to enter into
 " contracts with any person or persons, corporation or
 " corporations, and with any municipality in the said
 " Province, for building and equipping street railways
 " and for lighting the streets of any municipality and
 " supplying it or them with power and heat, and any such
 " contract shall be valid and binding for the term of years
 " thereby agreed upon on the Company and any such

“ person or persons, or any municipality, corporation or corporations, so contracted with.”

The powers conferred by these enactments on the Appellant Company are very wide.

The 33rd and 41st sections are somewhat obscurely worded. They purport to deal with five different classes of railway lines. It was not suggested by Sir Robert Finlay, who appeared for the Company, that it was intended by the framers of this Act that municipalities in districts adjacent to either of these cities should not have power to specify the roads, streets and highways, within their limits, upon which railways should be laid, and it would appear to their Lordships that the construction of these ambiguous sections which would confer this power upon them, should, if possible, be preferred. They think it is possible, and that the sections can, without doing any violence to their language, be so interpreted. The learned Chief Justice, apparently, held that the Statute only authorised the Company to construct lines of railway in those districts adjacent to one or other of the two cities which lay between those cities. His words as reported are :

“The same section (*i.e.*, section 33) also confers upon the Respondents power to construct and operate tramways in the districts adjacent to the said cities, but does not expressly confer any rights to construct its lines over the streets and highways of such adjacent districts other than such as lie between the limits of the said two cities. The rights given over streets or highways by the said section are confined to the said cities and to streets lying between them.

Their Lordships cannot adopt this view, as they understand it. They think, as has already been indicated, that where the lines of railway are constructed in districts adjacent to either of the cities, though not lying between them, and

are laid along or across the roads, streets or highways, situate within the limits of a municipality, the governing body of that municipality have vested in them all the powers conferred by these sections, in that behalf, upon municipal authorities.

The Governing Body concerned in the present case is the Corporation of Point Grey, and the lines of railway with which the case is conversant are admittedly laid along streets and highways within that municipality.

In their Lordships' view the effect of section 33 is to confer upon, and vest in the Appellant Company every power, privilege, franchise, and right necessary to enable them to construct their lines of railway along any of the streets, roads and highways within the limits of the municipality of Point Grey. They think that the 41st section enables the Company to use and occupy wholly or partly such of these streets, roads and highways as may be necessary for the purposes of their railway, and that both sections combined vest in the Company all the power necessary to enable them to operate these railways when constructed.

These very wide powers, privileges and franchises are, however, limited and restricted in their use and exercise in three different directions. First, by the provision requiring the consent of the Corporation to be given to the exercise of the Company's powers; secondly, by the provision giving to the Corporation the right to specify the streets and highways along which the rails shall be laid; and thirdly, by the provision that the Corporation may dictate the manner in which and the terms upon which the railway shall be constructed and operated. These powers of the Corporation are, however, of a restrictive, not

of a donative character. They do not enable the Corporation to give, grant or confer any right, power, or privilege whatsoever upon the Company. Their only function is to circumscribe or impose conditions upon, the exercise by the Company of the rights, powers and privileges already conferred upon it by the legislature.

It was not, as their Lordships understand, contended that a byelaw merely expressing the consent of the Corporation to the construction by the Company of a railway or tramway over the particular streets or highways in Point Grey selected by the Corporation itself, and nothing more would, under the provisions of the 64th section of the Municipal Clauses Act, 1896, require the approval of the electors. That section runs thus—

“Notwithstanding any law to the contrary a municipal council shall not have the power to grant to any person or corporation any particular privilege or immunity or exemption from the ordinary jurisdiction of the Corporation, or to grant any charter bestowing a right, franchise, or privilege, or give any bonus or exemption from any tax, rate or rent, or remit any tax or rate levied or rent chargeable unless the same is embodied in a byelaw which, before the final passage thereof, has been submitted to the electors of the municipality who are entitled to vote upon a byelaw to contract a debt, and which has received the assent of not less than three-fifths in number of the electors who shall vote upon such byelaw. Any such byelaw which does not receive the assent of the electors as aforesaid shall not be valid.

It was, however, decided by the Court of Appeal that the Corporation had by the 31st Clause of an agreement in writing entered into between them and the Company on the 10th of September 1910, touching the construction by the Company of their tramway or railway upon certain specified streets in the municipality of Point Grey, done or attempted to do an act prohibited by this section, namely, had granted

a charter bestowing upon the Company "a right franchise or privilege" within the meaning of the section. The byelaw held to be invalid authorised the Reeve and clerk of the Corporation to affix the corporate seal to this Agreement. This was duly done. If the Corporation have by this instrument bestowed "a right privilege or franchise" on the Company within the meaning of this section, the so-called Byelaw, which is in reality merely a resolution passed by the Corporation, is admittedly invalid since it never was submitted to the electors as required.

This Agreement is a very lengthy document. It commences by reciting that under the 33rd and 41st sections of the Consolidated Railway Companies' Act, 1896, the Company are authorised and empowered to construct and maintain a tramway along such roads in the districts adjacent to the cities of Vancouver and New Westminster as may be specified by the council of the municipality in which these roads and highways are situate on the terms to be fixed by that body. It proceeds to recite that full power and authority is given to the Company to use and occupy any parts of the streets, roads, and highways in the municipality as may be required for the purpose of its railway track, the laying of its rails, and the running of its cars, provided the consent of the Council (*i.e.*, the Corporation) be first had and obtained. and that the latter body had full power to give such consent upon such conditions as to plan of construction and for such period or periods as might be agreed between them. It further recites that the Corporation had requested the Company to construct and operate an electric street car system within the district of Point Grey, which the Company have expressed their

willingness to do on the terms and conditions hereinafter stated, and then proceeds to provide that the Council in exercise of the powers conferred upon it by the Statute of 1896 consents to the Company's constructing, and for a period of 40 years from the date of the execution and delivery of the indenture, operating an electric street railway or tramway of the kind therein described on the terms therein mentioned, the intention being that they should confer upon the Company the consent of the Corporation to use the said streets and no other interest therein. These terms are on the whole in their effect very onerous on the Company.

The portion of Article 31 of the Agreement which is relevant runs thus:—

“31. In the event of the Corporation or any other person or persons or body or bodies corporate proposing or being desirous of constructing a street railway or street railways on any of the streets within Point Grey other than those upon which the Company shall have constructed a street railway or have a street railway in course of construction in accordance with the provisions herein contained, the Company shall be requested in writing to build such desired or proposed railway and operate the same upon the terms and conditions in this agreement contained, and the Company shall within sixty (60) days thereafter notify the Corporation whether it is willing to build and operate such street railway, and in the event of the Company refusing or neglecting within sixty (60) days from such request to signify its willingness to build and operate on any of said streets, or in the event of the Company neglecting or refusing to commence the building of such railway on any of the said streets within six months after expiration of the said sixty (60) days, or to complete same within twelve (12) months from the date when it signified its willingness to build and operate such railway, the Corporation shall then have the right to construct and operate the entire line specified on any such street as shall not have been constructed.”

This article does not in the opinion of their Lordships confer upon the Company any autho-

rity or power to make any tramway or railway in any street. The Company already possessed all necessary power and authority for that purpose. It got them from another source. The Corporation could, if so disposed, have *uno flatu* by one deed consented to the exercise by the Company of their powers over every street then existing in the municipality or thereafter to be constructed there, or they could have given that wide consent from time to time by successive documents. What they have done by this Agreement is to give their consent to the exercise by the Company of their powers over some streets, with a covenant that in certain events, and under certain circumstances they will consent to the Company exercising their powers over other and additional streets, thus giving them a kind of preference over competitors, should an expansion of the railway system be determined upon. This may or may not be a prudent bargain for the Corporation to make. It may enable the Company to earn great gains and profits by the exercise of its statutory powers and privileges, but neither the Court of Appeal nor their Lordships have any concern with such matters. The sole question for their decision is the validity of the byelaw in point of law. By the 39th article of the Agreement it is expressly provided that it shall not be taken or construed so as to confer "any exclusive right or powers on or to the said Company."

The 42nd article of the Agreement, providing that the Agreement itself was to enure for the benefit of, and be binding on the assignees of the Company, was absolutely necessary as the 52nd section of the Railway Company's Act of 1896 expressly confers upon the Company the power to lease or sell their undertaking

and all their contracts, privileges, franchises, and powers to any railway or tramway, company or corporation. That power, like the others, was conferred by the legislature. The Railway Companies' Act of 1896, and the Municipal Clauses Act of 1896 were passed in the same session of the British Columbian Legislature, but the latter was chapter 32 of the Statutes of that year and the former chapter 35 and presumably later in date. If there is a repugnancy between them the later Statute must prevail, *Moore v. Robinson*, 2 B. and Ad. 817, 821, 822. The Municipal Clauses Act of 1896 was re-enacted in 1906, but this does not effect a repeal of the Railway Act not repealed by the Statute which has been re-enacted.

Their Lordships are therefore, with all respect to the learned judges of the Court of Appeal, unable to concur with them. They think that the Agreement and Byelaw of the 10th September 1910 did not amount to a charter bestowing a "right, franchise, or privilege" on the Company within the meaning of the 64th section of the Municipal Clauses Act of 1896, that the byelaw impeached was therefore valid, the judgments and decisions appealed against erroneous, and should be reversed but without costs, and they will humbly advise His Majesty accordingly. There will be no costs of these Appeals.

In the Privy Council.

THE BRITISH COLUMBIA ELECTRIC
RAILWAY COMPANY, LIMITED,

2.

W. F. STEWART AND OTHERS.

DELIVERED BY LORD ATKINSON.

LONDON:

PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.