

There will be judgment for the defendant dismissing this action, with costs to be taxed.

Action dismissed with costs.

Solicitors for the plaintiff: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.

Solicitors for the defendant: Mason, Foulds, Davidson & Arnup, Toronto.

[SCHROEDER J.]

Re Carter and the City of Sudbury et al.

Franchises — Powers of Municipality to Grant — Special Act Incorporating Street Railway Company — Powers of Company — Franchise to Operate Motor Buses — The Municipal Franchises Act, R.S.O. 1937, c. 277, s. 3(1), as re-enacted by 1947, c. 70, s. 1.

Street Railways — Powers of Company — Operation of Buses — Terms of Franchise and Act of Incorporation — The Railway Act, R.S.O. 1937, c. 259, s. 1(u).

Statutes — Interpretation — Agreement Made Schedule to, and Confirmed by, Special Statute — Whether Agreement to be Construed as Part of Statute — Effect of Interpretation Section in General Act.

A company was incorporated by special Act with power to construct and operate "a railway to be operated by steam or electricity" within a defined area. By an agreement with the City of S. (assented to by the municipal electors) the company was granted a franchise to construct and operate "a street railway" within the city. This agreement was ratified and confirmed by a special Act of the Legislature, to which it was made a schedule. In 1949 the City passed two by-laws purporting to authorize the company to operate motor buses. These by-laws were not ratified by the electors, and they did not set out any term for which the powers were conferred.

Held, the by-laws were invalid for non-compliance with s. 3(1) of The Municipal Franchises Act, as re-enacted in 1947. The company being a creature of statute, its powers were limited to such as were conferred by the statute. *London County Council v. The Attorney-General et al.*, [1902] A.C. 165, applied. The agreement between the company and the City should be read and construed as a part of the statute confirming it, and as itself a statutory enactment, since the statute did more than merely ratify and confirm it. *The Ottawa Electric Railway Company v. The City of Ottawa*, [1945] S.C.R. 105 at 122; *Winnipeg v. Winnipeg Electric Railway Company* (1921), 31 Man. R. 131; *City of Toronto v. Toronto R.W. Co.* (1918), 44 O.L.R. 308 at 316, affirmed [1920] A.C. 455, applied. The statute, being one that conferred exceptional privileges trenching on general rights, was subject to the principle of strict construction, and so construed it authorized the construction and operation of a street railway and the operation of cars which would run on rails constructed in the manner provided by the agreement. *The Grand Trunk Railway Company of Canada v. James* (1901), 31 S.C.R. 420, applied. It could not be said that the company had power under its Act of Incorporation, or was authorized by the agreement, to operate buses, and the definition of "street railway" in s. 1(u) of the Ontario Railway Act (made applicable by the special Act of Incorporation) could not confer on the company any power not specifically conferred on it by its Act of Incorporation. *Reg v. Pearce* (1880), 5 Q.B.D. 386 at 389, applied. The 1949 by-laws, accordingly, did not merely authorize an extension of the railway service, for which authority was provided by the earlier by-law (assented to by the electors), but constituted the grant of a new right, and could accordingly be valid only if they complied with The Municipal Franchises Act.

A MOTION to quash two by-laws of the City of Sudbury.

5th May 1949. The motion was heard by SCHROEDER J. in Weekly Court at Toronto.

G. W. Mason, K.C., and S. P. Parker, for the applicant.

H. F. Parkinson, K.C., and J. M. Cooper, K.C., for the City of Sudbury, respondent.

J. W. Pickup, K.C., for the Sudbury-Copper Cliff Suburban Electric Railway Company, respondent.

18th May 1949. SCHROEDER J.:—The applicant, a resident ratepayer of the city of Sudbury, moves in these proceedings to quash two by-laws of the City of Sudbury, being By-law no. 3017, passed on the 25th January 1949, and By-law no. 3032, passed on the 28th February 1949. By-law no. 3017 is in the following terms:

"1. The City of Sudbury hereby grants to the Sudbury-Copper Cliff Suburban Electric Railway Company the right and privilege of operating its buses over the route defined in the schedule attached hereto, such privilege to continue until such time as this by-law is revoked."

By-law no. 3032 is in the following terms:

"1. The Sudbury Copper-Cliff Suburban Electric Railway Company (hereinafter referred to as the Company) is hereby authorized to operate buses for the transportation of passengers so as to provide a bus service for the area known as Gilman and Simcoe Streets in the City of Sudbury over the route designated on the schedule hereto attached and marked with the letter 'A'.

"2. The Sudbury Copper-Cliff Suburban Electric Railway Company (hereinafter referred to as the Company) is further hereby authorized to operate buses for the transportation of passengers so as to provide a bus service for the area known as the David, Marion and McNaughton Street in the City of Sudbury over the route designated on the schedule hereto attached and marked with the letter 'B'.

"3. Such authorization is granted to the said company on the condition that the said service is commenced within thirty days immediately after the passing of this by-law."

The motion is based on three grounds:

- (1) that the by-laws were passed without the assent of the municipal electors;
- (2) that the by-laws do not limit the period for which the rights purported to be granted shall subsist;
- (3) that the operation of buses is beyond the ambit of the powers of The Sudbury-Copper Cliff Suburban Electric Railway Company.

On the hearing of the motion The Sudbury-Copper Cliff Suburban Electric Railway Company, (hereinafter called "the Railway Company"), being directly affected, asked to be added as a party and I acceded to that request and heard the submissions made by it through counsel.

Subs. 1 of s. 3 of The Municipal Franchises Act, R.S.O. 1937, c. 277, as re-enacted by 1947, c. 70, s. 1, reads as follows:

"A municipal corporation shall not grant to any person nor shall any person acquire the right to use or occupy any of the highways of the municipality except as provided in *The Municipal Act*, or to construct or operate any part of a transportation system or public utility in the municipality, or to supply to the corporation or to the inhabitants of the municipality or any of them, gas, steam or electric light, heat or power, unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted or acquired has been assented to by the municipal electors."

It is not disputed that the by-laws attacked had not been submitted to the electors of the Corporation of the City of Sudbury (hereinafter referred to as "the Corporation") for their assent and the by-laws on their face do not appear to set forth the period—or any defined period—for which the rights conferred are to be enjoyed, so that on first impression both by-laws would seem to be bad for want of compliance in both respects with the provisions of the statute quoted.

It is, however, contended by the Railway Company and on behalf of the Corporation that the effect of both by-laws involved on the part of the city council nothing more than carrying into effect the duties and obligations imposed upon council by the provisions of a pre-existing agreement entered into between the Corporation and the Company, which was validated by provincial statute. It becomes necessary, therefore, to examine this legislation.

The Railway Company was incorporated by an Act of the Province of Ontario being 1912, c. 149. Section 2 of that private Act confers upon the company the following powers:

"The Company is authorized and empowered to survey, lay out, construct, complete, equip and maintain a railway to be operated by steam or electricity, or partly by one and partly by the other, from a point at, in or near the Town of Sudbury,

thence westerly to a point at, in or near the Town of Copper Cliff; also from a point at, in or near the said Town of Sudbury, thence easterly to a point at, in or near the Village of Coniston, also from a point at, in or near the said Town of Sudbury to the Creighton Mine; and also from a point at, in or near the said Town of Sudbury to the Blezard Mine, with power to construct branches or extensions at different points along the route, not exceeding ten miles in length, and to connect with other railways now operating or under construction within the said territory."

Attention has been directed to The Railway Act, R.S.O. 1937, c. 259, and to the fact that by s. 9 of the Act of incorporation the provisions of The Ontario Railway Act, 1906, apply to the company and to the railway constructed or to be constructed by it and that by virtue of s. 16(b) of The Interpretation Act, R.S.O. 1937, c. 1, the provisions of the present Railway Act apply thereto. Section 1 (u) of The Railway Act provides that in that Act and in any special Act, in so far as The Railway Act applies thereto:

"'Street railway' shall mean a railway constructed or operated along and upon a highway under an agreement with or by-law of a city or town, although it may at some point or points deviate from the highway to a right of way owned by the company, under the powers conferred by section 243, and shall include all portions of the railway within the city or town and for a distance of not more than one and one-half miles beyond the limits thereof, although such one and one-half miles may be constructed under a by-law of or agreement with a municipal corporation other than that of such city or town, and shall also include any part of an electric railway which lies within the limits of a city or town and is constructed or operated along and upon a highway and shall include busses and other vehicular means of transportation operated as part of or in connection with a street railway." (The italics are mine.)

The effect of the two sections lastly mentioned can be no greater than to subject the Railway Company, and any busses which it may operate as part of its business, to the provisions of the general Railway Act of the Province. They can hardly be claimed to have the effect of conferring upon the company any powers not specifically conferred upon it by the Act of the

corporation or of adding to such powers in any respect so as to support the Railway Company's claim to the right to provide transportation by means of busses or by any other means not authorized by the terms of the incorporating statute.

"... an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain": per Lush J. in *Reg. v. Pearce et al.* (1880), 5 Q.B.D. 386 at 389.

"Another important rule with regard to the effect of an interpretation clause is, that an interpretation clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended. If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration": Craies on Statute Law, 4th ed. 1936, p. 195, citing *Reg. v. The Justices of Cambridgeshire; Reg. v. The Justices of Shropshire; Reg. v. The Justices of Gloucestershire* (1838), 7 Ad. & E. 480 at 491, 112 E.R. 551.

It is to be noted that interpretation clauses are not to be used for the purpose of enacting under the guise of definition, and have often fallen under severe judicial criticism by reason of failure to observe that rule.

In *London County Council v. The Attorney-General et al.* [1902] A.C. 165, it was held that where a corporation is the creature of statute its powers are confined to such as are, expressly or by necessary implication, conferred by the statute, so that the London County Council, constituted by The Local Government Act, 1888, and having thereunder, and in virtue of other statutes, the power of acquiring and working tramways, was not entitled to run a service of omnibuses, such service not being a necessary incident of the business of a tramway company.

On 25th August 1913 the council of the City of Sudbury enacted By-law no. 343 authorizing the City to enter into an agreement with the Railway Company. This by-law received the

assent of the municipal electors in due course and an agreement was entered into. Both the by-law and the agreement were valid and confirmed by statute in the year 1914, being c. 125 of that year. It is important to consider the provisions of s. 2 of the latter statute for the purpose of determining whether or not it did more than merely validate and confirm the agreement between the Corporation and the Railway Company. This section reads as follows:

"By-law Number 343 of the Municipal Corporation of the Town of Sudbury set forth in Schedule 1 to this Act is ratified and confirmed and declared legal and valid notwithstanding any want of jurisdiction on the part of the said Municipality to pass the said by-law and notwithstanding any defect in substance or in form of the said By-law or in the manner of passing the same and the said Corporation of the Town of Sudbury is authorized and empowered to do all necessary acts for the full and proper carrying out of the said By-law; and the agreement set forth as Schedule 'A' to the said by-law when executed by the said Corporation of the Town of Sudbury and the said railway company the parties thereto, shall be binding upon the said Corporation of the Town of Sudbury and the ratepayers thereof and likewise upon the said *The Sudbury-Copper Cliff Suburban Electric Railway Company*." (The italics are mine.)

By s. 1 of the said Act the time for commencement and completion of the railway was extended.

It will be observed that something more than mere ratification and confirmation of the agreement is accomplished and the agreement should, therefore, in fact be construed as a statutory enactment: see *The Ottawa Electric Railway Company v. The City of Ottawa*, [1945] S.C.R. 105 at 122, 57 C.R.T.C. 273.

It is not sufficient for the purpose of making a schedule or agreement a part of an Act that words in the Act merely confirm and validate the schedule or agreement. There must be words in the Act from which there can be inferred the intention of the Legislature to make the schedule or agreement part of the Act. *Winnipeg v. Winnipeg Electric Railway Company*, 31 Man. R. 137 [1921] 2 W.W.R. 282, 59 D.L.R. 251.

In *City of Toronto v. Toronto R.W. Co.* (1918), 44 O.L.R. 308 at 316, 46 D.L.R. 435, affirmed [1920] A.C. 455, 17 O.W.N. 503, 51 D.L.R. 48, Riddell J. stated: "The contract is, by sec-

of the Act (1892) 55 Vict. ch. 99, sec. 1 (Ont.), declared to be valid and legal and to be binding upon the . . . parties:" but it is not made a part of the Act, so that it becomes itself statutory, as was the case with the agreement considered in this Court recently in *Re City of Toronto and Toronto and York Radial R.W. Co. and County of York* (1918), 42 O.L.R. 545 [43 D.L.R. 49, 23 C.R.C. 218]. While legal and binding, it is legal and binding as a contract upon the parties, it is no different from any other contract: *City of Kingston v. Kingston Electric R.W. Co.* (1898), 25 A.R. 462, at pp. 468, 469, and cases cited."

In my opinion s. 2 of the 1914 statute above mentioned does a great deal more than did the statute referred to by Mr. Justice Riddell in the case just mentioned.

This statute is one which confers exceptional privileges on the Railway Company and it has been held that Acts which establish monopolies or confer exceptional exemptions and privileges correlatively trenching on general rights are subject to the principle of strict construction: see Maxwell on The Interpretation of Statutes, 9th ed. 1946, p. 298; see also Maxwell at p. 289 where the learned author states:

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights."

At p. 305 of the same work the learned author, dealing with the construction of private Acts, states that enactments of a local or personal character which confer any exceptional exemption from a common burden or invest private persons or bodies for their own benefit and profit with privileges and powers interfering with the property or rights of others, are construed against those persons or bodies more strictly, perhaps, than any other kind of enactment; and later:

"The Courts take notice that the statutory powers are obtained on the petitions framed by their promoters and, in construing them, regard them, as they are in effect, as contracts between those persons, or those whom they represent, and the Legislature on behalf of the public and for the public good. Their language is therefore treated as the language of their promoters, who asked the Legislature for them and, when doubt arises

as to its construction, the maxim (ordinarily inapplicable to the interpretation of statutes) that *verba cartarum fortius accipiuntur contra proferentem*, or that words are to be understood most strongly against him who uses them, is justly applied. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment grants and against those who claim to exercise them. Indeed, if words in a local or personal Act seem to express an intention to enact something unconnected with the purposes of the promoters which the committee, if they had done their duty, would not have allowed to be introduced, almost any construction, it has been said, would seem justifiable to prevent them from having that effect."

Even if the view be taken that the agreement annexed as a schedule to the 1914 Act is not to be regarded as having become part of the statute itself, it is still subject to a strict construction. Maxwell in the same edition, at pp. 306-7, writes:

"Even if such statutes were not regarded in the light of contracts, they would seem to be subject to strict construction on the same ground as grants from the Crown, to which they are analogous, are subject to it. As the latter are construed strictly against the grantee on the ground that prerogatives, rights, and emoluments are conferred on the Crown for great purposes and for the public use and are, therefore, not to be understood as diminished by any grant beyond what it takes away by necessary and unavoidable construction, so the Legislature, in granting away, in effect, the ordinary rights of the subject, should be understood as granting no more than actually passes by necessary and unavoidable construction."

It should be mentioned in passing that by s. 454 of The Municipal Act, R.S.O. 1937, c. 266, the soil and freehold of highways is vested in municipalities having jurisdiction over them but municipalities are not in the strict sense trustees of the rights of the general public to use those highways. I had occasion to deal with this point in *Williams and Wilson Limited v. The City of Toronto and The Attorney-General for Ontario*, [1946] O.R. 309, [1946] 4 D.L.R. 278, where it was held that the Attorney-General is the representative of the Crown in its capacity as *parens patriae* and is charged with the protection of the rights of the general public with respect to property which has become

devoted to highway purposes. Certainly when any person or group of persons or any private body is given the right to operate a transportation system over municipal highways, the rights of the general public with respect to the user and enjoyment of such highways is affected and the reason for the application of the principle of strict construction with reference to the particular rights conferred upon such persons or bodies would undeniably be well founded.

The following paragraphs of the agreement attached to the 1914 statute as schedule "A" were put forward by counsel as the portions of the agreement most relevant to the matters under consideration in the case at bar, and they are reproduced hereunder:

"5. The said Company, its successors and assigns, shall, subject to the conditions, restrictions, obligations, and provisions hereinafter contained, have in so far as the Corporation has power to grant the same, the authority, right and privilege to lay out, construct, complete, maintain and operate, by electricity and with the consent of the Corporation to be expressed by by-law any other power but steam, subject to the consent and approval of the engineer to be first had and obtained as a condition precedent to the construction of each and every part of the said railway, a street railway consisting of a single or double track, with necessary side tracks, switches, crossovers and turnouts, for the passage of cars upon and along the following streets and highways of the Town of Sudbury, that is to say: Regent, Lorne, Elm, Durham, Monk, College, Kathleen, Tedman, Morin Avenue, Notre Dame Avenue, Lisgar, Larch, Cedar, Station, Nelson, John, Elizabeth, McNaughton and Annie Street, and also to erect, construct and maintain upon the said streets and highways all poles, cables, wires and overhead constructions necessary to operate the said railway by trolley system or by any other system of electricity as the motive power, or by any motive power other than steam, for the term of twenty years from the date of the final passing of the by-law of the Corporation authorizing the entering into of this agreement, it being expressly provided and agreed that the town engineer in giving his approval as hereinbefore provided for, shall have the right to prescribe the situation, location and manner of construction of the said railway, poles, cables, wires and overhead constructions."

"6. Provided the Company first obtains the consent of the Corporation to be expressed by by-law passed by the Council of the said Corporation, it may, subject to the consent and approval of the engineer as hereinbefore provided for and to all other the terms, provisions, and conditions of this agreement, substitute other streets and highways within the municipality, or parts thereof, for the streets and highways named in paragraph five hereof, provided, however, that the provisions of this paragraph shall not be construed so as to prevent the Corporation from granting rights to any other railway or railways upon any streets or highways not hereinbefore expressly mentioned."

"9. The said Company shall also be entitled with the consent and approval of the Corporation expressed by by-law, subject to the terms, provisions and conditions of this agreement, to extend its street railway service along any other of the streets or highways of the Town of Sudbury, although the same are not specially named in this agreement."

"10. It is further provided and agreed that in the event of the Corporation determining that there should be a street railway service on any other street or highway in the Town of Sudbury other than those mentioned in paragraph five hereof, and in the event of their passing a by-law for such purpose, then the said Company shall thereupon proceed to construct a street railway on such other street or streets, highway or highways, or portions thereof as may be set out in the said by-law, and shall commence such construction within three months after notice shall be given by the Corporation to the Company setting out the provisions of such by-law, provided, however, that if within thirty days from the receipt by the said Company of such notice the Company shall give notice that it will not accept such by-law, and will not proceed to construct such railway upon the streets and highways, or parts thereof designated in said by-law, or if after having received the said notice above provided to be given by the Corporation the said Company shall not proceed with the necessary work of constructing and completing the same within the time limited by such notice as given by the Corporation, the Corporation may itself construct or grant authority to construct a railway upon any such streets, highways, or parts thereof to any other person or persons, firm or corporation, and in such case said company, person or persons, firm or the corporation

itself shall be entitled to construct such railway in accordance with any such agreement as may be entered into between the Corporation and the said person or persons, firm or corporation, and shall be entitled to cross the street railway line of the Company, the party of the second part hereto, with their railway at such point or points as may be necessary, or may be designated by the Council of the Corporation, and further if required by the Corporation by by-law the said Company shall accept transfers from the line or lines of any such company, person or persons, firm or the Corporation itself, upon such terms as to the place of transfer, amount of payment to be made therefor, and otherwise as the said Corporation by such by-law shall determine and direct, provided, however, that in case the Company shall be dissatisfied with the determination of the Corporation, the Company may appeal to the Ontario Railway and Municipal Board, whose decision shall be final."

The franchise was granted to the Railway Company for a period of 20 years and was to be continued for successive periods of 5 years thereafter in the absence of any effort on the part of the Corporation to take the Railway Company's assets over as provided by clause 41 of the agreement. The agreement is still in full force and effect.

Now what was substantially authorized by the agreement and by-law of 1913 and by the terms of the statute of which they became a part was the construction and operation of a street railway and the operation of cars, whether propelled electrically or by motive power other than steam, which would run on rails constructed in the manner provided by the agreement. Clause 9 of the agreement empowering the Railway Company, with the consent of the Corporation, to "extend its railway service" along other streets not named in the agreement, must be read along with and subject to the provisions of clause 5.

In *The Grand Trunk Railway Company v. James* (1901), 31 S.C.R. 420, 1 C.R.C. 422, it was held that "railway" ordinarily means a way on which a train passes by means of rails. It must receive that meaning unless there is some all-powerful necessity compelling a departure from it and justifying the addition of other entities. The Court, by a majority, held that "railway" does

not extend to "railway property" on the interpretation of The Railway Act, 1888, c. 29, as amended by 1890, c. 28.

Counsel opposing this motion urged very strongly that the words "street railway" and "railway service" must be given a liberal construction even if the agreement is to be regarded in the light of a statutory enactment, and should be so construed as to include the operation of motor buses on the streets mentioned in the schedules to the by-laws under consideration. This argument is advanced having regard to the definition of "street railway" contained in The Railway Act of Ontario quoted above. For the reasons hereinbefore mentioned, I entertain the opinion that these words must be strictly construed and I find myself unable to agree with the contention made on behalf of the respondents.

Reliance is placed on the decision of the Judicial Committee of the Privy Council in *British Columbia Electric Railway Company, Limited v. Stewart et al.*, [1913] A.C. 816, 14 D.L.R. 8; C.R. [1913] A.C. 337, 5 W.W.R. 25, 25 W.L.R. 227. It may be stated at once that if the extension of the transportation service purporting to be authorized by the by-laws which are the subject of challenge in the present proceedings, were directed to an extension of the railway service as contemplated by the terms of the agreement between the Corporation and the Railway Company, the situation in the case at bar would be almost identical with the situation which existed in the case cited, and these by-laws would not require the assent of the electors at the present time, nor would it be necessary that the period during which the rights should subsist should be set forth in the by-laws; but what it is sought to authorize by these by-laws is an extension of the transportation service by means of motor buses, by means of a totally different kind of conveyance from that authorized by the agreement and by-law of the year 1913, to which the electors have assented.

As already stated, I feel that I am precluded by authority from giving effect to the very wide construction of the terms of the franchise agreement which has been urged upon me by counsel for the respondents. I hold that what By-laws 3017 and

3032 have sought to accomplish does not constitute the authorization of a mere extension of the railway service, for which authority is provided by the by-law and agreement of the year 1913 which then received the assent of the electors of the municipality. The recent by-laws constitute a grant to the Railway Company of the right to use or occupy certain highways of the municipality and to operate part of a transportation system in the municipality in a manner not heretofore authorized by by-law. Their effect, therefore, is to grant a new right which can only be granted subject to the provisions of s. 3(1) of The Municipal Franchises Act as amended. There being non-compliance with the provisions of the statute in the two respects mentioned earlier, I have no alternative but to grant the relief claimed by the appellants on this motion.

It is accordingly directed that an order issue quashing the said by-laws. The costs of this motion shall be paid by the respondents to the applicant forthwith after taxation thereof.

By-laws quashed.

Solicitors for the applicant: Lang, Michener, Day & Cranston, Toronto.