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*Mar. 24-29.
*May. 1.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS.

AND

THE CITY OF TORONTO (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Breach of conditions — Liquidated damages — Penalty—Cumulative remedy—Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control—Territory annexed after contract—Abandonment of monopoly—55 V. c. 99 (Ont.).

Except where otherwise specially provided in the agreement between the Toronto Railway Company and the City of Toronto set forth in the schedules to chapter 99 of the statutes of Ontario, 55 Vict., in 1892, the right of the city to determine, decide upon and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract. Judgment appealed from (10 Ont. L.R. 657) reversed, Girouard J. dissenting.

The city, and not the company, is the proper authority to determine, decide upon and direct the establishment of new lines, and the service, time-tables and routes thereon. Judgment appealed from affirmed, Sedgewick J. dissenting.

As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon and direct the time at which the use of open cars shall be discontinued in the Autumn and resumed in the Spring, and when the cars should be provided with heating apparatus and heated. Judgment appealed from reversed, Girouard J. dissenting.

Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, it has no right of action against the city for grants of the privilege to others; the right of making such grants accrues, *ipso facto*, to the city, but is not

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*PRESENT:—Sedgewick, Girouard, Davies and Idington JJ.

the only remedy which the city is entitled to invoke. Judgment appealed from affirmed, Sedgewick J. dissenting.

Cars starting out before midnight as day-cars may be required by the city to complete their routes, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight their character would be changed to night-cars and all passengers entering them after that hour could be obliged to pay night-fares. Sedgewick J. dissenting.

APPEAL from the judgment of the Court of Appeal for Ontario(1), which in part affirmed and in part varied the judgment of Mr. Justice Anglin(2), upon a special case stating questions of law for the opinion of the court in pursuance of the consolidated rules (Ontario) numbers 372, 373 and 374, and the proceedings thereon.

The City of Toronto, in 1891, acquired the Toronto Street Railway with its appurtenances and property from its former owners and called for tenders for the purchase of the same together with the right and privilege of operating surface tramways in the city for a specified term of years, subject to certain conditions and limitations as to the establishment of new lines and branches and respecting the operation of the entire system. An agreement was subsequently entered into between the city and the successful tenderers, in September, 1891, for the purpose of carrying out the sale and the contract in respect to the franchises and privileges granted, which had been assigned to the appellants, and this agreement was validated by legislation under the 99th chapter of the statutes of Ontario, 55 Vict., in 1892. The agreement, bye-law and conditions in question are set

(1) 10 Ont. L.R. 657. (2) 9 Ont. L.R. 333.

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forth in the schedules to the statute and the issues to be decided on the present appeal are stated in the judgments now reported.

By the special case the following questions were submitted for the opinion of the court.

"Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon and direct:—

"1. What new lines shall be established and laid down and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended?

"2. What time-tables and routes shall be adopted and observed by the company?

"3. Whether if so determined by the city engineer with the approval of the city council cars which start before midnight must finish the route on which they have so started, though it may require them to run after midnight?

"4. At what time the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated?

"5. In the event of the decision of the court being in favour of the city on any of the above questions, is the city entitled to a decree for specific performance as to the matter so decided or in any and which of them.

"6. Is the privilege to the city to grant to another person or company for failure of the company to establish and lay down new lines and to open same for traffic or to extend the tracks and services upon any street or streets as provided by the agreement, the only remedy the city can claim?"

On hearing the special case Anglin J. decided, in effect, that the right to determine what new lines should be established was vested in the city, not only in respect to lines within its limits as constituted at the time of the contract but also in respect to lines in areas annexed to this city subsequently; that the remedy of the city was not restricted merely to the right of granting the privileges to others upon the failure of the company to construct new lines when required to do so; that the city could settle time-tables, fix the routes of cars, determine the seasons during which open cars might be used and how and when the cars should be heated, but that the city could not compel the company to continue to run, after midnight, cars which, having started before midnight, could not in due course finish their routes by that time. By the judgment appealed from the Court of Appeal affirmed the decision of Mr. Justice Anglin, except as to the running of day-cars after midnight, and decided that cars starting out upon their routes before midnight should finish such routes, even if it was necessary to run after midnight in order to do so.

Nesbitt K.C., and *Laidlaw* K.C., for the appellants.

Aylesworth K.C., and *Fullerton* K.C., for the respondent.

SEDGEWICK J.—This is an appeal by the defendants from the judgment of the Court of Appeal for Ontario affirming the judgment of Anglin J. in the special case agreed upon between the parties in the course of the action. The action was brought upon

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the agreements set forth as a schedule to chapter 99 of 55 Victoria (Ontario), 1892, between the plaintiffs and the defendants, relating to the purchase of the street railways and properties and street railway privileges, and involved, on one branch of the case, the questions: (1) Whether under the agreement the defendants were compelled to lay down new lines or extensions of lines in territory annexed to the city after the date of the agreement; (2) Whether the company had a right to choose the streets in the city upon which it would lay down its lines subject to the approval as to location, etc., mentioned in clause 12 of the conditions; (3) Whether the city also had the right under clause 14 of the conditions to require the company to lay down its rails and operate upon a street selected by the city, and if so required, could the company abandon such street or streets and so abandon its exclusive franchise to operate upon such street or streets, and thus allow the city to grant the franchise to another company, the Toronto Railway Company having no right to claim compensation by reason of such grant, or, could the city compel the company when so required to lay down its lines and operate its railway, or obtain any other remedy in addition?

In construing an instrument in writing, the court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and the function of the court is limited to construing the words employed; it is not justified in forcing into them a meaning which they

cannot reasonably admit of. Its duty is to interpret, not to enact. It may be that those who are acting in the matter, or who either framed or assented to the wording of the instrument, were under the impression that its scope was wider and that it afforded protection greater than the court holds to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret an instrument. The question is not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the parties if violence were done to the language in which the instrument has taken shape; but such a course would on the whole be quite as likely to defeat as to further the object which was in view.

Bearing in mind these observations, it is apparent that the City of Toronto owning the railway, then operated by horse cars, advertised the same to be sold to the highest bidder, together with and in addition to such railway, the exclusive privilege of operating surface street railways within the limits of the City of Toronto as is shewn by the bye-law, No. 2920, passed on 27th July, 1891, which recites the ownership by the City of Toronto of the Toronto Street Railway and all the real and personal property in connection with the working thereof, and that the city had asked by public advertisement for tenders from persons seeking to acquire the said railway and the privileges of operating surface street railways in the City of Toronto.

Certain conditions were made, numbered from 1 to 47, and the tender of Messrs. Kieley, Mackenzie and Everett was accepted, and the contract, contain-

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ing some thirty clauses, was entered into on the 1st day of September, 1891, and subsequently, in 1892, an Act was passed validating the agreement and the conditions and tenders therein referred to, and declaring, by its first section, that under the said agreement the purchasers acquired

> and are entitled to the exclusive right and privilege of using and working the street railways in and upon the *streets* of the said City of Toronto (except certain portions) for the full period of thirty years from the first day of September, 1891, * * * subject, nevertheless, to all the conditions, provisoes and restrictions in the said agreement expressed or contained, and as hereinafter mentioned.

And by the fourth clause therein it was enacted that:

> (1) After the said agreement has been duly assigned to the company it shall, subject to the provisions and conditions contained therein, have full and exclusive power to acquire, construct, complete, maintain and operate * * * along all or any of the said streets or highways of the City of Toronto, subject to the exceptions and under the qualifications contained in the first section hereof.

And further providing by section 19, sub-section 4, for a special case of annexation to the City of Toronto of an outside municipality or any part thereof.

In my opinion the city clearly only purported to deal with streets within its jurisdiction. Outside municipalities into whose area the company might desire to extend its operations had independent powers in these respects, and the Act provides that with them the company could make separate arrangements, and without going in detail through the various provisions in the conditions, agreement and statute, it appears to me plain that by the special reference contained in section 19, sub-section 4 of the Act, the parties did not intend to provide for territory subsequently annexed and as to which the city,

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at the time, had no right to give any franchise or make any contract.

On the second part of this branch of the case, it appears to me plain that the city granted the exclusive right to construct, maintain and operate their railway along all or any of the said streets or highways of the City of Toronto subject to the exceptions, etc., contained in the conditions and agreement, and, so far as the right of construction is concerned, I think the only over-riding exception to this power is that contained in clause 12 of the conditions, namely, that the gauge of the system was fixed and the location of the railway on any street should not be made by the company or confirmed by the council until plans thereof, shewing the proposed position of the rails, style of rail to be used, and the other works in each such street had been submitted to and approved in writing by the city engineer, and I think the language of the Privy Council in the case of *The City of Toronto* v. *The Bell Telephone Company of Canada* (1), is applicable. To this extent, this clause and clause 14 are derogations from the grant to construct and use and work a railway along any of the streets, and make plain the meaning of "subject to the conditions, provisoes," etc. I cannot understand how the right to use and operate street railways which has been conferred upon the company along all or any of the streets can be made effective unless they have a right to lay down the rails upon the street and to operate the cars upon them.

On the third part of this branch of the case, I am of opinion that clauses 14 and 17 must be read together, and that the city may require the company

(1) [1905] A.C. 52.

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to extend its tracks and street-car service on such streets as may be from time to time recommended by the city engineer and approved by the city council, etc., but that the language does not import that the purchaser *"shall* build," but, upon such requisition being made, the company has the right to abandon the privilege which it had purchased, and that, on so abandoning, it had no right of action against the city for granting the privilege of laying down lines on such streets, and the city had the right to make such grant to another, and that these two clauses contain both the rights and remedies of the parties. In my opinion failure to comply with the requisition *ipso facto* creates the right of granting a privilege to another person or company, and that is the only remedy, and the remedy which the parties have themselves seen fit to provide. It has been stated in the Court of Appeal that this is an illusory remedy, but reference to *Winnipeg Street Railway Co.* v. *Winnipeg Electric Street Railway Co.*(1), and *The City of Toronto* v. *The Toronto Street Railway Co.*(2), at page 35, shews that it has apparently been a most effective remedy in the past.

The next question involves substantially the point whether the city engineer, under the 26th clause of the conditions, really has the management of the company, or whether, as one would have supposed, the company had the right of management of its own business subject to the express provisions in the public interest for the city engineer to regulate the number of cars and the intervals at which the same should run on the various routes, both as to day cars and night cars.

(1) [1894] A.C. 615. (2) 15 Ont. App. R. 30.

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In my opinion it is the legitimate rule of construction to construe words in an instrument in writing with reference to the words found in immediate connection with them. See *Robertson* v. *Day*(1), at page 69; also as explained in *Inglis* v. *Robertson*(2), at page 630. The headings must be read in connection with the groups to which they belong and interpreted by the light of them.

And, so construing the instrument, I think that having in mind the fact that at the date of the sale it had not been determined whether horse cars should be continued, or whether on main lines the use of electricity, either by overhead trolley (single or double) or storage battery, or by what is known as the slot system, or cable cars, should be adopted, the use of the word "service" in section 26 must be limited to its context and cannot be taken as an over-riding word destroying all meaning in the subsequent conditions, and rendering 27, 28, 36, 37, 38 and 39 substantially useless. The wide meaning given to the word "service" in the courts below would render wholly unnecessary the subsequent particular provisions. I think such a construction entirely destructive of the ordinary canons of construction adopted by the courts. I think the cardinal feature to be borne in mind is that the company were empowered to "use and work" the railway, which involves necessarily the idea of operation through its board of management. I view the fact that an existing system of nearly sixty-two miles in length, enabling the routing of cars through various streets, coupled with the fact that routes are assumed to exist by the wording of the conditions, is evidence that the ordinary

(1) 5 App. Cas. 63. (2) [1898] A.C. 616.

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management and routing of cars must be left to the company, and I find no word anywhere in the agreement which would justify the assumption that "routes" could be *created* by the city engineer, whose sole duty is to regulate, under 27 and 28, the time of starting of the cars on *such routes* as the company lays down, and to fix the intervals at which cars should run. Even if the word "service" is given an extended meaning under clause 26, that service is confined to what is necessary on each main line, part of same or branch, which in no sense confers a right of creating or fixing the routes, which it was admitted involved a *service* on various main lines or parts of same or branches and, therefore, a much greater scope than a mere service on a main line or branch taken by itself. The right of regulation in the city engineer which I have indicated, seems to me to conserve all the rights that any person could be reasonably supposed to have contemplated at the time. The company are bound under section 33 to give transfers and to so arrange the system that the transfers could be made effective. The company, not the engineer, is to "make the arrangements," that is, route the cars; the engineer is to approve. They are also bound to start the cars on their routes under 27 and 28 under the direction of the city engineer, and necessarily the engineer having the control of the interval between cars must control the *number of cars* and so conserve the rights of the public to the accommodation which was sought for, namely, to have as many cars in service as the engineer might determine, and to have those cars so routed that the transfer system would be effective. This seems to me to make a clear and harmonious

document and to give effect to the *various conditions* under their various *headings,* and so read also gives effect to the language both of the statute and the conditions and leaves the company in the management of its business, subject to the qualifications that were intended.

Another branch of the case is as to the right of the city engineer to determine the time for running open and closed cars, heating, etc. The headings and the language of clause 36 seem to me to completely negative the suggestion that the city engineer can regulate these matters. It seems to me that the parties must have had in mind a rule of law that any passenger would have a right to complain of improper accommodation, and that it would be for a jury to determine in any case whether the company was complying with the provisions of clause 36, and it is not for the city engineer.

Another branch of the case dealt with the running of the cars up to midnight. It seems to me perfectly plain that the proper construction of the document is that the first day-car shall not be compelled to start before 5.30 a.m., and that no day-car can be compelled to run *after midnight.* The city engineer has a right to start night-cars at such hour as he deems necessary and he can in this way see to it that cars for the accommodation of passengers are kept running on the streets. It was admitted by both counsel that there was no dispute between the parties as to question of fares; that a person who entered a day-car up to midnight had a right to a ride in that car to the end of its route, and under clause 33 a right to transfer to a night-car, without extra fare, and that any person entering a car for the first time after midnight

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had to pay double fare. Be that as it may, it seems to me quite plain that no day-car can be compelled to run after midnight, and if the city engineer attempted to start day-cars upon a route fixed by the company which would compel any such day-car to run after midnight, the company has a right to so arrange its routes that the all day-cars may finish their run at midnight.

This covers the various questions which were submitted other than the fifth, and as to that it seems to me that granted that there may be some other remedy open, the remedy is certainly not open to the court of compelling the company to lay down the line so required, since that would entirely destroy the provision of the contract which permits the company to abandon the street upon which it is so required to lay down a line.

The appeal should be allowed with costs.

GIROUARD J.—I have come to the conclusion that the Court of Appeal has correctly answered the questions submitted for our determination. The answer to the first question might be open to some doubts, but they are not strong enough in my mind to cause me to dissent from the views they took. I am, therefore, of opinion that the present appeal should be dismissed with costs for the reasons given by Mr. Justice Osler.

DAVIES J.—The respondent corporation, having in the year 1891 acquired from its former owners the then Toronto Street Railway with its property and appurtenances, called for tenders for the purchase of the same together with the right and privilege of

operating surface street railways in the City of Toronto for a specified time, all tenders being subject to certain conditions of sale which had been previously agreed to by the city council and published with the call for tenders.

Certain parties successfully tendered and an agreement was made between them and the city in September, 1891, for the purpose of carrying out the sale and contract. The award under which the city had become the owner of the street railway, containing (*inter alia*) schedules describing the property, the conditions, the tender and the city by-law authorizing the execution of the agreement were each and all expressly incorporated with the agreement and made part and parcel of it.

The successful tenderers subsequently applied to the Legislature of Ontario for an Act of incorporation enabling the company to be incorporated to take over from them the contract and agreement they had made with the City of Toronto so that the company might carry out the agreement for the purchase of the street railway and own and operate the same.

The necessary legislation was passed by the Province of Ontario, 55 Vict. ch. 99.

The agreement was declared, in section 1, with all its schedules to be valid and legal and binding upon the parties and it was further declared that under it the purchasers acquired and were

> entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the said City of Toronto

excepting certain specified portions of such streets.

The 4th section of the Act, upon which much reliance was placed by the appellant in support of its

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argument for the right to lay down a street railway on any street it might select within the city, enacted that:

(1) After the said agreement has been duly assigned to the company it shall, subject to the provisions and conditions contained therein, have full and exclusive power to acquire, construct, complete, maintain and operate, etc., a double or single track street railway, etc., upon or along all or any of the said streets or highways of the City of Toronto subject to the exceptions and under the qualifications contained in the first section," etc.

The first question to be determined before proceeding to answer those submitted for our decision in this appeal is whether this Act of incorporation and the declarations it contains were in any way intended to alter, extend or enlarge and did in fact alter, extend or enlarge the rights, liabilities, obligations or privileges of the parties to the agreement or whether it was merely intended to validate the agreement and confer upon the company the rights and privileges of the individual parties who had successfully tendered and entered into the agreement with the city subject to the obligations and liabilities of these parties under that agreement.

I am of the opinion that the incorporating Act was not intended to do more than the latter and that to determine the relative rights, liabilities and obligations of the respective parties to this appeal we are relegated to the agreement and all its schedules and parts which were validated by the incorporating Act and must determine from them the extent and nature of these rights, liabilities and obligations.

Sections one and two of the agreement confer full and exclusive powers of constructing, completing, maintaining and operating street railways upon all or any of the streets of the city but they do not confer

any right to do so beyond the right prescribed by the agreement, conditions, etc.

I have had the advantage of reading the judgments prepared by my brothers Sedgewick and Idington and for the reasons given by them I concur in the answer to the first question that there is no obligation on the part of the railway company, appellant, to lay down tracks and establish services on streets in territorial area added to the city since the date of the agreement.

I agree with the courts below and with my brother Idington that the railway company has not the right to build extensions of the main line or branches within the city as it existed at the time of the agreement excepting as it may be required to do so under the 14th clause of the agreement. That clause seems to be the only one expressly providing for the establishment and extension of new or additional lines on the streets.

It was contended that a further right was given by the statute to the company to build on any street they chose in their own uncontrolled discretion. A construction of the contract and legislation validating the same conferring such a right would, in my opinion, be a very startling one and would require very clear language to support it. The exclusive power to build and operate no doubt is given but the right to exercise the power is controlled by the agreement and can be exercised only when called into existence under and in manner provided for by the 14th clause. Even under the 11th clause of the agreement the city while conceding to the company the *right* to change the method of operating the street railway to electric power so far as *then existing tracks were con-*

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cerned reserved complete control as to when the change to electric cars should be made so far as *branch lines or extensions of the main line* and branches were concerned. To give the company the exclusive power to construct and operate street railways on any streets of the city and so prevent competition was one thing. To confer the uncontrolled right of building and operating on any street the company might from time to time select was quite another and different thing. On this branch of the question I concur with the Court of Appeal and my brother Idington.

I am also of opinion, answering the 6th question, that if the company should fail to establish any new line which it was required to establish under the 14th clause the remedy of the city for breach of the requirement is not confined to what in many if not in most cases would be the illusory one of granting the privilege to establish such line to some other person or company but that it may resort to its other remedies under the contract. The specific power to make such a grant might, in certain conceivable cases, be a desirable one for the city to possess while quite illusory as a remedy in others and was properly introduced into the agreement for the purpose of avoiding difficulties which the exclusive powers granted to the company would probably give rise to. But it was not intended as the only remedy the city might resort to arising out of the neglect of the company to carry out its obligations.

Then with respect to the time-tables and routes to be adopted and observed by the company I adopt the reasoning of Anglin J. He says:

> Reading clauses 26, 27 and 28 of the conditions together and having regard to the tenor of the whole agreement, I think the con-

clusion is inevitable that both time-tables and routes are within their purview. The city engineer cannot satisfactorily or efficiently exercise his right to determine speed, service and intervals between cars unless he also possesses power to decide upon and fix routes. His right to determine, with the approval of the city council, the "service" necessary upon all lines is unrestricted and is quite wide enough to include the power to specify the routes to be established and maintained. Given the routes and condition No. 27, fixing the hours of starting and finishing the daily runs, the making of time-tables is nothing more than a convenient method of exercising the right to determine speed and intervals.

For these reasons and those given by the Court of Appeal I concur with the answer given by it to the second question.

Much was said at the argument before us as to the unreasonableness of such a construction with which I do not agree. It seems to me that to allot to the company the determination of the routes while giving the power and imposing the duty on the city engineer of determining alike the "speed" and the service necessary on each main "line" as also the "intervals" between which day-cars are to run would be more likely to create chaos than the construction I have concurred in as the proper one.

The contention put forward by the company as the proper answer to question 3, namely, that day-cars are not to be started at a later hour than would clearly enable them to finish their route before midnight is not I think the proper one. By this construction it was admitted that day-cars could not be started on any of the routes after 11 or 11.15 o'clock p.m. I think a fair answer to the question is that cars started before midnight as day-cars must finish the route on which they have so started though it may require them to run after midnight or transfer their passengers to a car which would carry them to their destination, but that at midnight they, *eo instanti*, change

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their character to night-cars and all passengers entering them after that hour must pay the *night fares.*

I concur in the answer proposed to question 4 by my brother Sedgewick and Idington and in the disposition made by them of the 5th question.

IDINGTON J.—This is an appeal from the judgment of the Court of Appeal for Ontario.

The case is reported in 10 Ontario Law Reports, page 657, maintaining in part and varying in part the judgment of Mr. Justice Anglin in 9 Ontario Law Reports, 333.

I am of opinion that the answer given to the first question by the Court of Appeal should be varied, so as to exclude the obligation of the railway company to establish and lay down tracks and services on streets in territorial area added to the city since the date of the agreement.

I am unable to see anything in the contract binding the railway company in respect of future extensions of the city, save so far as is expressed in clause 16 of the conditions of sale incorporated with the agreement and section 19 of the Act whereby the appellants became incorporated and bound to execute the agreement entered into by the purchasers.

I cannot see how these provisions may be so enlarged as to imply that all the rest of the contract must necessarily be held as intended to become operative in any new territory annexed to the city, whenever and wherever such additions might happen to be made.

To provide in express terms for such a contract, as operative and binding from the execution thereof, would have been beyond the powers of the municipal corporation.

It is said, however, that it was unnecessary to have made any provision anticipating such extensions because the contracting parties well knew that the City of Toronto was likely to expand within thirty years from the date of the contract, during which the franchise created thereby was to exist, and must be taken to have contracted in light of that anticipation and in light of the provisions of the Municipal Act to continue the corporate existence, in such cases of addition to a municipality, so as to give the municipality the same powers over the new territory as it had over the old.

I am, after fully considering all these things, still unable to apprehend how any such implication must necessarily exist, in a contract such as we have to pass upon, as would make all the covenants between the parties that bound them in relation to the old territory operative upon the new.

The provisions for continuous existence of the city and all its corporate powers when its territorial limits have been extended are merely relative to jurisdiction. It would seem as if the necessity for expressly providing, as the Municipal Act does, that in the case of annexation of new territory the by-laws of the city shall be held to apply to the new territory, suggests that contracts of this nature, if to operate upon the new territory, must do so by express provision made therefor. There is none shewn in the Municipal Act or any other act. There is none in this contract.

Status and jurisdiction are not in any way the same thing as a contract, which either may enable to be made. The contract may, and generally must, remain valid even if the status be lost or the jurisdic-

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tion be increased or diminished. But can its operative field be *of necessity* affected by any such change and especially in a contract of this nature?

There seems to me to be a confusion of ideas in contending that this jurisdiction over a defined area and the inhabitants thereof must, of necessity, give such legal effect to a contract with a municipal corporation to do something to or in relation to its property as existent before extension as to bind the contracting parties to do or submit to have the things contracted for done to the new extension of property or domain.

But for what has been brought under our notice and stoutly maintained I would have said that such a case needed only to be stated to carry with it refutation. If it need, as it seems to need, refutation I may illustrate the distinction by something like unto what may come to be within the range of modern possibilities.

If a fire isurance company should undertake with a municipal corporation for a fixed compensation the fire risk for a number of years of all the houses within its bounds, or a life insurance company undertake in like manner for such a term to pay at the death of each of the inhabitants a certain sum of money, and the risks were in either case within the term without further consideration doubled or trebled simply by joining one municipality to another and the name and jurisdiction of the one, thus supposedly contracted with, extended to include the increased size, surely there could not be found any one to claim that such added risks in such a contract were within the terms of the contract or the reasonable intendment thereof.

On the other hand, if, by an enactment, power were given to a municipality to insure the houses and inhabitants therein against fire and death respectively, and the defined area of the municipality were added to by legislation, it would not surprise or shock any one, if the defined area were then doubled, to find it contended that the power of insurance could be exercised within the increased district and for the added inhabitants.

Why are we likely to be surprised or shocked by the first proposition and undisturbed by the second? Plainly because the reasonable or probable intendment was obviously against the first proposition and yet might be within the second. And why? The first relates to a contract, the other to extended power or authority implied in extended jurisdiction.

Apply this to the case in hand.

When we look at the thing they are contracting about, the nature of the enterprise involved, the many uncertain factors in the operation of such a contract, even within a well-known and defined area, and we reflect how much more complicated the contract must be if projected into the future possibilities that might arise in relation to any added territory, we seem to be forbidden to entertain the thought that any such contracting parties could have intended to apply the terms agreed upon for thirty years to territory over which neither party had any domain or any security for the future condition thereof in any regard, and especially in regard to the value thereof for the purpose of constructing therein or extending therein a system of street railway.

We must bear in mind that the key note of this contract is an exclusive right for thirty years. We

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must also bear in mind that whilst the city could assure the company in regard to the exclusive right within the then existing boundaries that there was no power that could exclude any other railway system from existing or coming into existence in what was likely to become part of the territory to be added in course of time to the city.

Ambitious suburban towns might spring up, with municipal powers enabling them to construct such railways and form such alliances in regard to the transportation of their own people not only through and about their own town but to do business with and in the centre of the greater town. We might find existent railways, at the time this contract was executed, which in all probability would grapple with the situation and make accessory to their business the entire travel of such suburban towns. The chances were entirely, one would say, in favour of such development, rather than that the territory to be occupied by these suburban towns would remain and be in regard to railway service, for years before and at annexation, like a blank sheet of paper to have written over it the policy of the City of Toronto in relation to street railways.

To assume that such adjacent territory might possibly within thirty years be annexed might be reasonable; but to assume that it would be annexed in the same plight and condition in every way in relation to the development of street railway business as when this contract was entered into is something that the common knowledge of any one living upon this continent with observant eyes is unlikely to believe was assumed.

I can hardly comprehend how the varying and

variable conditions likely to arise, beyond the power of control of the contracting parties here, could have been adequately dealt with within their limited powers in any other way than that in which it was dealt with in section 19 of the incorporating Act or in something of a similar way.

The parties anticipated, as was likely, that the company might pave the way for future annexations and pave the way also for future accommodations and future extensions of the relation of the contracting parties hereto and encouraged the company to extend its tracks into the suburban district. Hence in relation thereto they provided for the junction of tracks by stipulating that the grade should be appropriate to such junction. And in the event of annexation such extensions of the company's lines were to become subject to the terms of this contract.

If we find that the contracting parties had no power to go beyond the then area of the city or right to assume the continuation of things beyond that in the same condition, how can we attribute to them any such purpose or intention as that of extending the contract thereto as within their contemplation? How can we under such a contract unless by express language seek to bind them? How can we where they have by express language partially dealt with this problem hold that there was any reasonable intendment to go beyond what they have so expressed? It seems to me, with every respect, that if ever there was a case in which the maxim *"expressio unius est exclusio alterius"* was applicable this must be one.

I do not read the judgment of the Privy Council (1), as deciding this question at all. The court was

(1) *Toronto Ry. Co.* v. *City of Toronto*, [1906] A.C. 117.

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dealing with one of those very extensions of a line which the contract expressly provided for as far as it could then provide for it.

The company having sought to take it out of the operation of this contract by maintaining they had built not by virtue thereof, but under another charter, refused to pay the mileage contracted for. That was decided against it and the decision upheld by the Privy Council. Needless to say that had the Privy Council judgment been otherwise than of this character and an express decision upon the point now in question we would not have been now troubled with it.

I am of opinion, further, that the power to direct the establishment and laying down of new lines within the city as it existed at the date of the agreement came entirely within the scope of clause 14 of the conditions of sale.

I agree with Mr. Justice Osler when he says that,

> one cannot read the contract between these parties without seeing how anxiously—I do not know how effectively—the city has attempted to provide in many respects for the control of their streets and for the protection and convenience of the public.

I will not labour with the question. It is to be gathered from the entire scope and purpose of the contract as a whole that clause 14 I have referred to was intended to be the governing authority in regard to the establishment of new lines.

There could be in the minds of those concerned in the business no doubt but that the city would prefer to have as many tracks and as much street car service as could possibly be got. The thing to be feared was not that the city would object to the rail-

way company laying down a new track, but that it might be tardy in doing so.

The company, on the other hand, had to fear lest the desire for new lines would go beyond the bounds of reason and justice and hence the provision that two-thirds of all the members of the council must assent before such an obligation could be imposed upon the company.

The social and commercial forces at work would solve the rest.

There need not and should not be two parties armed with authority to outline where new lines should be run. One authority, or source of authority, should suffice.

This interpretation of the contract will become more apparently correct by the application of the propositions that I am about to submit in relation to question 2.

If the city engineer had the right to direct which route should be taken, as I think he had, it would almost necessarily follow that effective operation could only be given to that power by the same remaining in the same hands that directed the placing of new lines.

It seems to me it would have been a manifest absurdity that the exercise of these powers so related if not absolutely dependent on each other should be in different hands.

Much has been said of the meaning of the word "service" as used in the 26th condition of sale. It is urged that it applies to and was intended to apply to the subjects, or some of the subjects, under the head of "Tracks, etc., and Roadways," of which clause 26 is the last.

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It has been especially urged that inasmuch as the electric or other new system of motor or a combined system were contemplated that a selection from the varieties of motive power or mechanical means of applying motive power might be what was referred to. I cannot accept any one of these suggestions; indeed I think that the application of clause 26 to such subject matters or any one of them would be strained. Paragraph 26 hardly seems germane to most of the paragraphs that precede it under this heading.

In almost everything provided for under the heading of "Tracks, etc., and Roadways" the city engineer and council, or both, are in each particular case, including selection of motive power, referred to as the determining authority. It was not necessary for the purpose of applying their authority to any of these subject matters to reiterate it in clause 26 or to connect it with the use of the words "the speed" as is done in the clause 26, which reads as follows:

> 26. The speed and service necessary on each main line, part of same or branch, is to be determined by the city engineer and approved by the city council.

What is the most obvious meaning that the word "service" can have in such a sentence in such a contract? What was the purpose of every appliance, track, car, motive power and the service of the men all combined but to furnish a *service?* What was that service? The transportation of passengers on these tracks, in these cars, by means of this motive power.

The transportation of the largest number of passengers that could possibly be induced to accept the use of these cars was the object of the entire contract and all that relates to the contract. But for the reiteration in detail of some particular parts of what

were covered by the words used in 26 there could not have rested a shadow of doubt in regard to what the word "service" here means.

The draftsman, like many others, has in the two following sections of these conditions seen fit to specify particulars as to day-cars and night-cars and thereby weaken the force of the general and comprehensive expression of the ideas present to his mind in framing clause 26. The power of generalization, the apt use of words to express a generalization when the idea has been once seized and the courage to leave such expression as first and best bodied forth are very often more or less wanting in the drafting of documents such as we are now dealing with.

Clause 13 of the agreement seems intended to rectify these defects in the agreement and conditions by adding,

> it being understood that the reference to particular matters to be performed by the purchasers shall not diminish or limit the obligations of this agreement.

Making allowances for these considerations and having regard to the latter part of clause 13 just quoted, I have no hesitation in accepting the word "service" here as conclusively meaning all that is implied in fixing a route. Not only is the wise selection of routes necessary to maintain the service (that is, the transportation of passengers), in the highest degree of efficiency in working the railway but it is of the very essence of such service that it shall be so determined as to so meet the requirements of those using the streets that there will be accommodated the largest possible number that can be accommodated by means of a given mileage of track. The citizens would probably feel more promptly and acutely than

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the shareholders of the company the lack of the best possible service. The engineer would therefore be more responsive to new demands than the manager of the company.

When we couple routes with speed and what in both respects is to be done on the main line or part of same or branch we have almost everything that in relation to service can be advantageously determined by the city engineer and approved by the city council, including, of course, what sections 27 and 28 specially covered.

The manifest purpose was to control the lessees or contractors who might fail, as they do in such cases, to go to the expense of modifying a service as it becomes less efficient than it may have formerly been.

From time to time a spur is needed in every public service.

What we are asked here to do is to suppose that any and every efficient means of supplying this was omitted.

Speaking of the possible incompetency of a city engineer to discharge such a duty is beside the question. It would be equally to the purpose to speak of the manager of the company as possibly incompetent. We must assume both contracting parties intended to have efficient officers. We cannot overlook the facts that both parties to the contract were deeply interested in the best financial results being got, and that though this was the case the interest of the company was and is only temporary whilst that of the city is perpetual.

The engineer and manager in order to produce the best results should work harmoniously, each giving the best of his skill and knowledge and results

of his experience to the other. One would suppose in such kind of a partnership that the final decision ought to rest with those nominated by the parties who undoubtedly have the greatest and a continuous interest.

These considerations, of course, cannot decide the meaning of the contract if clearly expressed in a different sense; but such considerations are an obvious answer to so much of what was strenuously advanced in argument as needed to be borne in mind for the purpose of interpreting correctly this contract.

When we try to find how this word "service" has been applied in other parts of the same contract we see in every instance where it has been used, except in clause 41, it is applicable to, and can, I think, only be fairly read as being applied to the transportation of passengers.

In clause 14 it is contradistinguished from the tracks and properly described as a street car service. In condition 17 it is again used in contradistinction to the tracks, and in 33 it is used in harmony with the idea of transportation of passengers, when it provides for the transfer service as a means of carrying out the transportation. And when used in the condition 36 it is the car that is designed for what? For service in the transportation of passengers. The same may be said to be true of its use in condition number 40.

I do not think it derogates from the force of this to find that the word "service" is used in 41 in relation to the word "men" in its original sense.

Time-tables and routes are but incidental to the same idea of transportation of passengers. Stoppages may be also, but though referred to in argument they do not seem covered by any of these questions.

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As to the third question, I am unable to appreciate what this dispute is about. We have been assured by counsel for the appellants that there is not and has never been any claim to turn out a passenger who may have entered upon a car near midnight before that passenger was carried to his destination. We also are assured that no such passenger has ever had exacted or claimed from him the double fare payable after midnight.

I can conceive that the use of a day-car after midnight when passengers are few may entail extra expense upon the company and that the gradual introduction of the night-car instead of the day-car would be less burthensome for the company and quite as serviceable for the greater part of the time as carrying out the requirements of the city engineer. At other times this might not be so.

I am unable, however, to see how the requirements of the citizens and other passengers can be ensured, by any other means, within the specifications in this contract, than those the city engineer has adopted. I can conceive of a manager in the car-barn being able, from day to day, and night to night, to accurately determine whether or not the requirements of the travelling public would or would not be served by putting on night coaches earlier than midnight. I am unable, however, to see how the city engineer can foretell all this. If these parties cannot accommodate each other in any other way than by a rigid interpretation of the provisions of the contract in this regard it must be applied. I think undoubtedly the correct answer has been given by the Court of Appeal to this third question.

As to question 4 and the answer thereto, I am

unable to concur in the view expressed by the Court of Appeal.

I think it would be impossible to carry out by any hard and fast rule, consistently with the greatest degree of the comfort and convenience of the passengers, just what the city engineer has chosen to lay down. The requirements in spring months and fall months might vary from week to week, from day to day in changeable weather such as occasionally occurs in spring and autumn. Such an interference with the carrying on of the appellants' business is undesirable and ought therefore not to be inferred as intended. It does not form an essential part of the service and so necessarily come within clause 26 as I interpret it.

Clause 36 I think provides all that is to be looked at in this connection. The section on this point reads thus:

> Cars are to be of the most approved design for service and comfort, including heating, lighting, signal appliance, numbers and route boards.

Plainly the cars here spoken of are not those that are in the barn but those that are actually running, and they must be heated, lighted, as well as otherwise according to the most approved design.

That does not entitle a company to put out a summer car in winter weather or a winter car in summer weather. It leaves, as there is no power given to any one expressly or as I think impliedly to determine the matter, the parties complaining, either passengers or covenantees, to their respective remedies on this which by force of clause 13 of the agreement is part of a covenant.

A persistent defiance of the requirements of this

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covenant can be dealt with also upon the facts either in a case seeking to rescind the charter or otherwise quite as efficiently as the requirements of the engineer had he the power to specially direct in this regard as I do not think he has. That in the same section there are two objects committed to the determination of the city engineer and that the cars or heating thereof as described are not so intrusted to his direction is to my mind conclusive that it never was intended that anything further should be open to the respondents or others than the usual remedies for a breach, or for persistent breaches of contract on the part of such a corporation as the appellants'.

I would therefore answer question 4 in the negative.

I have no doubt of question 5 being properly passed over for the reasons given in the court below.

I have no difficulty in assenting to and upholding the answer of the Court of Appeal to the 6th question. But for the able and strenuous argument addressed to us I should have supposed the question was not arguable. There is to my mind as clear as can be a covenant to observe each one of the provisions in this contract and one of them is the obligation resting upon the company to obey the requirement of the city council and the city engineer when that is made known in the manner described in clause 14.

In effect we are asked to give the same meaning to the word "require" as if it were "request" or something that did not imply an obligation upon those subjected to it. I cannot assent to such a proposition.

The option rests with the city to accept this alternative of clause 17 or pursue their remedies on the

covenant or possibly (upon which point I express no opinion) do both.

I am of opinion that the judgment of the court below should be varied accordingly and the appeal to that extent allowed.

Appeal allowed in part with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin and Harcourt.*

Solicitor for the respondent: *W. C. Chisholm.*