Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of ***The Winnipeg Street Railway Company*** v. ***The Winnipeg Electric Street Railway Company, and the City of Winnipeg,*** *from the Court of* ***Queen's Bench, Manitoba;*** *delivered* 30*th June* 1894.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The first question raised in this appeal depends upon the construction of a deed of Indenture, which was made, on the 7th July 1882, between the Mayor and Council of the City of Winnipeg, of the first part, and the Appellants who will hereafter be referred to as "the Company," of the second part. If the judgment of the Court below upon that point be affirmed, the Appeal must necessarily fail.

The Company were incorporated by an Act of the Legislature of Manitoba (45 Vict. c. 37), which received the Royal assent upon the 27th May 1882, the object of their undertaking being generally described as the construction, maintenance, and operation of street railways within the City of Winnipeg. In furtherance of that object, they were empowered to use and occupy such parts of the streets of the City as might be required for the purpose of constructing and using their railways, subject

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always to the condition, that they should obtain the consent of the City to the construction of their works, and should only use and occupy such portions of the streets as were required for that purpose, for such period, and upon such condition as might be agreed on between them and the City.

At the time when the Company obtained their Act, the City of Winnipeg had statutory authority to pass bye-laws "for regulating and governing "street railway companies and fixing the rates "to be charged thereon." Three days afterwards a consolidating Statute (45 Vict. c. 36) was passed in favour of the City, which *inter alia* conferred the power to make bye-laws "for "authorising the construction of any street "railway or tramway upon any of the streets "or highways within the City, and for "regulating and governing the same, and for "fixing the rates to be charged thereon."

The City authorities gave their consent to the Company's undertaking being carried out, upon terms which were first specified in a bye-law passed by the Mayor and Council upon the 12th June 1882. It was thereby provided that the bye-law should not come into operation until an agreement had been made with the Company, as contemplated in their Act of Incorporation. The indenture already mentioned was then executed; and, in so far as it bears upon the present case, it simply repeats the substance of the bye-law. According to its terms, the privileges conceded to the Company were to endure for the period of twenty-five years from its date, it being in the option of the City to acquire the Company's undertaking, at the expiry of that period, upon their giving five years previous notice to that effect.

The Company at once proceeded with their

enterprise, and before the year 1892, they had completed and were in course of working upwards of nine miles of street railways; and they also contemplated, and had made arrangements for the extension of their system to other streets within the City. On the 1st February 1892 the Mayor and Council passed a bye-law authorising James Ross and William McKenzie to construct railways upon the streets of the City. The Respondent Company (herein-after referred to as "the new Company") then obtained an Act of the Provincial Legislature (55 Vict. c. 56), which received the royal assent on the 26th April 1892, incorporating them for the purpose of their taking over the rights conceded to Ross and McKenzie, and carrying out the scheme sanctioned by the bye-law of the 1st February, which was scheduled to the Act.

The new Company's bill was opposed by the Company, who alleged that under their own Act, and their subsequent agreement with the Mayor and Council, they were entitled to a monopoly, for the period of five and twenty years from and after the date of the agreement, of all those streets in which their railways had already been opened for traffic, and also of certain other streets in which they had intimated that they were willing and ready to construct and operate railways. For the purpose of safeguarding any exclusive privilege to which the Company might be able to establish their legal right, the following clause was inserted in the new Company's Act:—"Nothing contained in "this Act or in the schedule thereto shall in any "way affect or take away any right held by, "vested in, or belonging to the Winnipeg Street "Railway Company, if any such there be, but "any such right may be held and exercised "by the Winnipeg Street Railway Company as "fully and effectually as if this Act had not

" been passed, but nevertheless the Winnipeg " Electric Street Railway Company shall have " power to cross, build and operate its line " of railway across the lines of the Winnipeg " Street Railway Company subject to the " provisions of the Manitoba Railway Act." It is unnecessary to criticise the enactments of the clause, because it was not disputed, in the argument addressed to their Lordships, that these would be sufficient to protect any such privilege as that which is claimed by the Company in this appeal.

The Company commenced the present suit by presenting to the Court of Queen's Bench (in Equity) a bill of complaint against the new Company, and against the City of Winnipeg. The relief sought by the Company need not be recited at length. They craved, *inter alia*, a declaration of the exclusive rights which they claim, against both Respondents, and an injunction restraining the new Company from constructing or operating railways in any street occupied by them, or in any street not then occupied by them, until an offer had been made to them of the privilege of constructing a railway upon it, and had not been accepted by them within two months. In defence to the suit, the Respondents maintained, in the first place, that the Company were not possessed of any exclusive privilege, and that the City had therefore power to sanction the construction of railways by the new Company, in any street of the City, whether it was already occupied by the Company or not; and, in the second place, that, if the City had in fact agreed to give the Company a monopoly of the railway traffic in certain streets, the agreement was *ultra vires* and void. These appear to have been the only points discussed in the Courts below; and the argument addressed to their Lordships, by

Counsel for the Company, was strictly confined to them.

The cause was tried before Mr. Justice Bain, who dismissed the Bill of Complaint with costs; and his decision was affirmed, on a rehearing by way of appeal, by a Full Court, consisting of Taylor C.J., with Dubuc and Killam J.J. In the Court of First Instance, the learned Judge did not deal with the first point; but, assuming the alleged privilege of the Company to have been conceded by the City, held that it was void in law. In the Full Court, both points were decided against the Appellants.

The Company's Act (Section 9) gives them power and authority (subject always to the consent of the City) to "use and occupy any "and such parts of any of the streets and high-"ways aforesaid, as may be required for the "purposes of their railway track, the laying of "the rails and the running of their cars and "carriages." The same clause authorises the City to grant permission to the Company to construct their railway, as aforesaid, "across and "along, and to use and occupy the said streets "or highways, or any part of them, for that "purpose, upon such condition, and for such "period or periods as may be respectively agreed "upon between the Company and the said City."

It appears to their Lordships that the language of the statute confers upon the Company no right to use and occupy any part of the streets and highways within the City, beyond what is strictly necessary for the temporary purpose of constructing their railways, and for the permanent purpose of maintaining them in repair, and conducting traffic upon them. Their Lordships do not find a single expression tending to show that the Legislature either intended that no tramways, other than those of the Company, were to occupy the streets of Winnipeg, or had

it in contemplation that the Company were to obtain a monopoly from the Council of the City. There is no indication of any such monopoly to be found among the matters specially enumerated in Section 17 of the Act as the subjects of the agreement which the City Council have statutory authority to make with the Company. It necessarily follows, that the exclusive privilege claimed by the Company, if it has any existence, must be derived from the Indenture of the 7th July 1882.

By the terms of the Indenture, the Mayor and Council of the City grant to the Company, their successors or assigns, the right to construct, maintain, and operate, and from time to time to remove and change, "a double or single track "railway with the necessary side tracks, switches "and turn-outs for the passage of cars, carriages "and other vehicles adapted to the same, upon "and along any of the streets or highways of the "City of Winnipeg, and to run their cars, take "transport and carry passengers upon the same "by the force and power of animals, or such other "motive power as may be authorised by the said "Council of the said City." The only authority given is expressly limited to the construction, maintenance, and operation, in each street which the Company may select for that purpose, of a railway, consisting of a single or double line of rails, with needful appurtenances; and the words which confer that authority are immediately followed by the declaration "and such railway "shall have the exclusive right of such portion "of any street or streets as shall be occupied by "the said railway, and shall be worked under "such regulations as may be necessary for the "protection of the citizens of said City."

That declaration appears to their Lordships to have been inserted in the agreement, with the object of defining the extent of the uses which

the Company were to have of the streets of the City for the purposes of their undertaking. The Company argued that the words last quoted ought to be construed as a declaration that the Company's railway was to be the only railway permitted to occupy any part of those streets into which it might be introduced by them. In their Lordships' opinion, any such construction would be contrary to the plain meaning of the words of the agreement, which, in substance, import that the Company are to have no use or occupation of, and no concern with those portions of any street which are not actually occupied by their double or single line of rails.

The main, and the only plausible argument addressed to this Board for the Company, in support of their claim to a monopoly, was founded on the terms of a clause which occurs towards the end of the Indenture. It runs thus:—"In the event of any other parties pro-"posing to construct street railways on any "of the streets not occupied by the parties to "whom the privilege is now granted, the "nature of the proposal thus made shall be "communicated to them, and the option of con-"structing such proposed railway on similar "conditions as are herein stipulated shall be "offered, but if such preference is not accepted "within two months, then the parties of the "first part may grant the privilege to any other "parties."

Their Lordships do not think that it is going too far to say, that, laying aside the terms of that stipulation, there is not a single expression in the deed of agreement which gives the least countenance to the suggestion that the Municipal Council intended to grant to the Company an exclusive right to use and occupy any street for railway purposes. Those clauses of the deed,

which deal directly with the use and occupation of the streets which are to be enjoyed by the Company, are not only silent upon the question of exclusive right, but are conceived in terms which it is exceedingly difficult to reconcile with the theory of an intention to create such a right. Had there been any such intention, nothing would have been easier than to indicate its existence, in the proper place, either expressly or by implication. In such circumstances, their Lordships are of opinion that the leading clauses of the agreement, which define the Company's rights of user and occupation, cannot be qualified by a subsidiary clause, such as that upon which the Company relies, unless its terms are clear and coercive. They are unable to hold that the terms of the clause in question are in themselves sufficient to control the plain meaning of the previous stipulations, and to constitute the right of monopoly which the Appellant Company claims.

The clause in question assumes that other parties than the Company may propose, and obtain powers, to construct, maintain and work street railways within the limits of the City of Winnipeg; and, in that event, all that it really provides is that the Company are to have a preference over these rivals, to the extent of having the first opportunity of making a railway in streets to which their undertaking has not yet been extended. Its terms are certainly calculated to suggest that neither the Council, nor the Company did, at the time, anticipate that the rival schemes of those other parties would be carried to the length of competing with the Company, in streets where they had already constructed, or in streets where they would be the first to construct their railway lines. But a mere expectation of that kind falls far short of a legal obligation. It cannot imply

an undertaking, on the part of the Council, that in the event of a rival Company obtaining statutory powers, and desiring to compete with the Appellant Company in those streets in which their system has already been established, the Council shall be bound, although against the interest of the community which it represents, to refuse its assent to the new scheme, and to allow the Company to remain in the enjoyment of a monopoly.

Such being the opinion of their Lordships, it becomes unnecessary to consider whether, if a monopoly had been conceded, the concession would have been *ultra vires* of the Council.

Their Lordships will therefore humbly advise Her Majesty that the judgments appealed from ought to be affirmed. The Appellant Company must pay one set of costs to the Respondents.