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*Nov. 26, 27.
*Dec. 11.

THE HAMILTON STREET RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

THE CORPORATION OF THE CITY OF HAMILTON (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Agreement with Electric Street Ry. Co.—Use of streets — Payment for — Percentage of receipts — Traffic beyond city—Validity of agreement.

By agreement between the City of Hamilton and the Hamilton Street Ry. Co. the latter was authorized to construct its railway on certain named streets and agreed to pay to the city, *inter alia*, certain percentages on their gross receipts.

Held, following *Montreal Street Ry. Co.* v. *City of Montreal* ([1906] A.C. 100) that such payment applies in respect to all traffic in the city including that originating or terminating in the adjoining Township of Barton.

Held, also, that as, when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic and not on the portion within the city only.

Held, further, that the power of the company to construct its railway was not derived wholly from its charter, but was subject to the permission of the city corporation; the city had, therefore, a right to stipulate for payment of such percentages and the agreement therefor was *intra vires*.

The judgment of the Court of Appeal (10 Ont. L.R. 575), affirming that of Meredith J. at the trial (8 Ont. L.R. 455) was affirmed.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment at the trial(2) in favour of the plaintiffs.

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*PRESENT:—Fitzpatrick C.J., and Girouard, Davies, Idington, and Duff JJ.

(1) 10 Ont. L.R. 575. (2) 8 Ont. L.R. 455.

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The questions raised for decision on the appeal are stated in the above head-note and in the judgments published herewith.

Nesbitt K.C. and *Armour K.C.* for the appellants. *Corbett* v. *South Eastern and Chatham Railway Companies Managing Committee*(1), at p. 20, gives the canon of construction to be adopted in this case.

A municipality has no common law rights; *Attorney-General* v. *Manchester Corporation*(2), and the validity of a by-law can be disputed at any time; *Mann* v. *Edinburgh Northern Tramways Co.*(3).

Blackstock K.C. and *Rose* for the respondents cited *Stiles* v. *Galinski*(4); *City of Montreal* v. *Montreal Street Railway Co.*(5).

THE CHIEF JUSTICE.—The appeal is dismissed with costs. I agree with the opinion stated by Mr. Justice Davies.

GIROUARD J. also concurred with His Lordship Mr. Justice Davies.

DAVIES J.—The appeal in this case is from a judgmen of the Court of Appeal for Ontario, confirming a judgment of Meredith J., holding that the by-laws of the city and the agreements between it and the street railway company were binding upon the company, so far as the disputes in question in this action were concerned, and obliged the company to continue to pay to

(1) [1906] 2 Ch. 12.
(2) [1893] 2 Ch. 87.
(3) [1893] A.C. 69, at p. 79.
(4) [1904] 1 K.B. 615.
(5) 34 Can. S.C.R. 459; [1906] A.C. 100.

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the city, yearly, during the term it had acquired the right to operate its street railway in Hamilton, certain percentages provided in these by-laws and agreements upon their gross receipts.

Several subsidiary questions also were raised and argued. One was as to the effect of certain legislation enacted subsequently to the by-laws and agreement which, it was contended, validated these documents, if that was necessary. Another was that the acceptance by the company of the city's consent to construct and operate a railroad on its streets, in the first instance, and an extension subsequently of the term of years during which they were permitted to operate the road, combined with their uniform practice for many years in paying voluntarily the percentages agreed upon precluded them from now setting up the invalidity of the bargain; and still another, that under the agreement itself they were only bound to account to the city for traffic which originated in the city and not for that which originated in the Township of Barton, even though it terminated in the city.

It was not contended by the city before us that the company was bound to account for any traffic which originated and terminated outside of the city limits, in the Township of Barton, but it was contended that for all traffic attributable to the operation of the railway in the city, wherever it originated or terminated, the company was accountable.

The authority of *The Montreal Street Railway Co.* v. *The City of Montreal*(1) is conclusive in favour of this contention, if authority was needed in its support.

The only debatable question, to my mind, on

(1) (1906) A.C. 100.

this branch of the case, was whether the company had to account for the whole receipts arising from traffic originating or terminating within the city limits, or only for a proportion of such receipts to be estimated in accordance with the rule approved of by the Judicial Committee in the *Montreal Street Railway Case*(1). I agree with the courts below that they have to account for the whole. The only outside municipality is that of the Township of Barton, and the proportion of mileage of the railway in that township to that in the city is very small.

The maximum fares permitted by the agreement to be charged between the city and the company have always been charged by the latter, and, when they extended their line into the Township of Barton, they entered into an agreement with that municipality to carry passengers from that township into all parts of the city *for the city rates.* Practically they agreed that there should be no charge for the short carriage to the city limits. There is, therefore, no basis for apportionment and nothing to apportion. The charge they make is that for the carriage within the city limits and that only, and the agreement with Barton makes no provision for the payment to that municipality of any percentage. These circumstances entirely distinguish the case on that point of apportionment from that of the City of Montreal.

I am also of opinion, concurring with the courts below, that all receipts for tickets sold must be accounted for, and that there is no possible means by which any deduction could be made for tickets sold, but alleged not to have been actually used. These receipts are clearly part of their gross receipts.

As to the main question argued, namely, the in-

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validity of the by-laws and agreement so far as they make provision for the payment of the percentage of profits, I am unable to accept the appellants' reasoning. That reasoning, as I understand it, was that the company and city had no power whatever to contract together, except within the powers specifically given them; that all these powers are to be found in sections 7, 8 and 15 of the company's charter; and that the general words of section 7 authorizing the city to consent to the construction and operation of a street railway on its streets,

> under and subject to any agreement hereafter to be made between the council of the said city and the said company,

was controlled by and limited to the special subjects on which the city and the company were authorized by section 15 to enter into agreements. The radical defect underlying that argument is the assumption that the company had the power to construct and operate its railway in the municipalities by its charter and that the only control, or anything left to the city, related to the proper regulations of such powers.

Support was sought for this argument in the decision of the Privy Council in *The Bell Telephone Case*(1), but even a casual reference to that case and the language used by the Dominion Parliament in conferring powers upon that company shews how entirely inapplicable it is to the case now before us.

Here we have the legislature of Ontario conferring a naked power upon the company to construct and operate street railways in the City of Hamilton and the adjoining municipalities on such streets

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

as the company may be authorized to pass along, under and subject to any agreement hereafter to be made between the council of the said city and of the municipalities, respectively, and the said company.

The section goes on to provide that the operation of the railway shall be by such motive power as the city council may authorize.

Now, assuming for a moment, that the language "under and subject to any agreement" is ambiguous and must have some limitation put upon it, I utterly deny that there is any ground whatever for inserting, as such limitation, the enumeration of powers respecting the construction of the railway afterwards specified in section 15. The two sections had entirely different objects. The naked power of constructing and operating street railways given to the company in the first part of section 7 is subject to the limitation that it can only be exercised with respect to such streets as the city council might authorize and designate and only as to them subject to any agreement to be made between the city and the company. I construe that to mean that the city could impose such reasonable conditions within their municipal powers as they thought fit. I see no reasons for putting limitations upon the power of the city council to impose conditions under which alone they would authorize their streets to be used for street railways so long as these conditions are not such as would be altogether beyond and at variance with their municipal powers. There is nothing unreasonable or unjust in the conditions attached to the consent given in this case. On the contrary, they appear to be eminently fair and reasonable in their general character. Of course, I know nothing and say nothing about their details, but I speak of the principle of exacting some percentage

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on the gross profits from the company as a condition of conceding to them the privilege they were asking of turning their naked and useless power into a living and probably beneficial right. The denial of the power to impose any such condition as a percentage of profits necessarily involves a denial of the power to impose any limitation as to time. So that, if the argument of the company is sound, the city only could consent to a perpetual charter binding the citizens for all time and could not impose any condition whatever excepting such regulations as were within section 15.

The special subjects on which by section 15 the parties were authorized to agree were those which would naturally arise *after* the city had given its consent, after the powers of the company had been changed by such contract into a right, and relate, as will be seen, to the regulations of those rights, the paving of the streets, the construction of drains and sewers, the laying of gas and water-pipes, the particular streets along which the railway should run, pattern of rail, time and speed of cars, time within which the works were to be commenced, manner of proceeding with the same, and the time for completion and generally the safety and convenience of passengers, conduct of the agents and servants of the company and the non-obstructing or impeding of the ordinary traffic.

Now, each and all of these matters specified in section 15 are confined to necessary and proper regulations and arrangements on matters arising after the consent of the city had been first obtained to the construction within its borders at all of the street railway.

The agreement, however, which is authorized to

be entered into between the parties by section 7, and under and subject to which alone they could enter into the city limits and construct their railway, by necessary inference, in my opinion, authorizes an agreement limiting as well the time during which the consent was to operate as a payment of money for the concession made. That such payment should take the form as well of a mileage payment for each mile of track laid as also for a percentage of the gross profits is, to my mind, neither unreasonable nor *ultra vires*.

The appeal should be dismissed with costs.

IDINGTON J.—The appellants are resisting payment of certain percentages of their "gross receipts" which, by an agreement of 26th March, 1892, they covenanted to pay to the respondents.

The case was tried by Mr. Justice Meredith, who gave judgment for respondent, and then appellants carried the case to the Court of Appeal for Ontario, and that court dismissed the appeal.

From that judgment appellants have appealed to this court.

The statement of claim sets forth the material parts of certain statutes, by-laws and agreements upon which respondent rested its claim.

The appellant's statement of defence consists of a denial of indebtedness under the by-laws, agreements and other matters thus set forth, and a counterclaim for recovery of over-payments by error or mistake

in excess of percentages on the receipts of the defendants (now appellants) *to which the plaintiff* (now respondent) *was entitled under the by-laws or agreements* referred to in the statement of claim, etc.

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The plaintiff (now respondent) replied to this by joining issue, and, as to the counterclaim, pleading the Statute of Limitations.

Not a word about the agreements being *ultra vires* appears in the pleadings which were thus closed on 14th May, 1903.

On 23rd June, 1904, counsel signed a memorandum of admissions for use on the trial. Nothing is there suggested of any of the by-laws or agreements, which are those in question here, being *ultra vires* or in any other way invalid.

One may see, in the frame of the pleadings and these admissions, that there was foreshadowed a contest or contests raising questions I will presently refer to over the construction of these documents, but could hardly expect the doctrine of *ultra vires* to be likely to arise.

It may be that in those pleadings it was open to the appellants to raise such questions. I am by no means so clear that when a party has solemnly made such an unconditional admission of by-laws and agreements that he can turn round and say that they are utterly void, and, if not entirely so, were so as to the clauses and paragraphs that the whole suit was about. I would incline to take it as an admission of a valid by-law.

This was not observed by me during the argument before us and no observations were made upon it.

The arguments were addressed to the questions of agreements and by-laws being *ultra vires* and the questions incidental thereto and the cases which the pleadings present.

I suggested during the argument that if there was anything in what appellants contended for, their

rights on the streets of Hamilton had no legal ground to rest upon. Appellants' counsel sought to shew that this was not necessarily so. I think he was unsuccessful in that regard.

Of course, if the whole foundation of appellants' rights to operate on said streets an electric road are gone, or rather never existed, the cause of action in question may be gone also.

I think it will, however, enable a better apprehension of what is involved in this contention as to *ultra vires,* to consider the question first from the point of view I suggested.

Have the appellants any right to operate an electric railway in Hamilton?

If so, on what does such right rest? Can that right be rested upon something severable from the claim to a correlative right of the respondent such as it sets up herein?

The appellants were incorporated by 36 Vict. ch. 100 (Ontario), for the purpose of constructing and operating a street railway "in the City of Hamilton and adjoining municipalities." Section 7 thereof is as follows:

> The company are hereby authorized and empowered to construct, maintain, complete and operate *a double or single iron railway,* with the necessary side-tracks and turn-outs, for the passage of cars, carriages and other vehicles adapted to the same, upon and along streets and highways within the jurisdiction of the corporation of the City of Hamilton, and of any of the adjoining municipalities, as the company may be authorized to pass along, *under and subject to any agreement hereafter to be made between the council of the said city and of said municipalities respectively, and the said company,* and under and subject to *any by-laws of the said corporation of the said city* and municipalities respectively, or *any of them, made in pursuance thereof,* and to take, transport and carry passengers and freight upon the same, by the *force or power of animals or such other motive power as they may be authorized by the council of the said city and municipalities respectively by by-law to use* and to construct and

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maintain all necessary works, buildings, appliances and conveniences connected therewith.

It is conceded that, as a motive power, electricity, or rather electric force, thus applied, could not be within the contemplation of any one then.

Horses were used to carry out what the parties hereto then agreed upon and a road of that kind was operated until 1892.

What the terms of that agreement may have been, we are not able to say. It was swept away, or supposed by every one, up to the trial of this case, to have been swept away by the one now before us.

Counsel informed us in the course of the argument that the road itself and all its equipment had become pretty well worn out by 1892.

The need of a new and better system being felt, respondent's counsel, on the 26th March, 1892, passed a long by-law covering such terms as by this time had become of common use to define the relations between a municipal corporation and an electric railway company. Amongst other things it provided for the payment by the appellants to the respondents of the percentages of earnings designated "gross receipts" now in question by way of compensation for the use of the streets.

The last two clauses of this by-law are most significant and important for the purpose of understanding the questions now raised.

It is urged by appellants that the preceding paragraphs of this by-law, which contain most explicit provisions for the payment by appellants to respondents of the percentages intended to be covered thereby, were all *ultra vires,* and that any assent thereto by the appellants was also *ultra vires.*

Of these last two clauses of this by-law, No. 33 is as follows:

This by-law and the powers and privileges hereby granted shall not take effect or be binding upon the said city unless formally accepted by the said railway company, within ten days after the passing hereof, *by an agreement which shall legally bind the said company to pay to the city corporation the sums mentioned in this by-law*, and to perform, observe and comply with all the agreements, obligations, terms and conditions herein contained, and shall be approved by the city solicitors, or one of them, and such agreement, when so approved, shall also be executed under the city seal by the mayor or the chairman of finance and the city clerk.

It is followed by clause 34, repealing many named by-laws (I take it, all the former by-laws conferring rights upon the company to use the streets), and all others so far as inconsistent; such repeal to

take effect only upon and from the coming into force of this by-law and the agreement referred to in the last preceding paragraph.

Then follows, in same clause, a reservation of right to run with horses for six months.

The company immediately entered into an agreement, which recites what had been done and is intended, and the operative clauses following such recitals contain, first, a covenant binding the respective parties, and then proceeds as follows:

The company do hereby accept the said by-law and agree with the city corporation to pay the city corporation the sums mentioned in the said by-law and to perform, observe and comply with all the agreements, obligations, terms and conditions therein contained.

Now, in face of this, the appellants claim they have the right to reject part, and insist on accepting and acting under other parts. But they seem to overlook the comprehensive nature of this agreement.

They also seem to overlook that the destruction of any substantial part of the contract, such as that

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involved in the *ultra vires* issue raised, would tend to destroy the whole contract. But, more strange than all that, the powers and privileges granted by the by-law, as the above section 33 thereof shews, *were not to take effect or be binding upon the city*

unless formally accepted by the railway company, within ten days after the passing thereof, by *an agreement which shall legally bind the said company to pay to the city corporation the sums mentioned in this by-law.*

Now, if the agreement is, in this regard, not valid and binding, there never existed any concession on the part of the city to the company authorizing the use of the streets for the purposes of constructing thereon an electric road.

Section 7 would be the only authority. Clearly the first part of that, in itself and without relation to the authorizing power of the city at the close of the section, never could have conferred such a right.

It hardly needs to be stated that the construction and operation of an old system of horse-tramway (and that is all that was given and taken under the first part of section 7), is entirely a different thing from the construction and operation of an electric road. The appliances of the latter are of such a character that their use requires much to be guarded against. The establishment of it involves considerations of an entirely different character from those arising from constructing and operating a horse-tramway. A concession of a kind that would authorize the former is, and implies, so much of a different nature from that which the company had acquired authority to obtain, that I am surprised to find it assumed, as it evidently was by the contracting parties, that, without amendment, the city and company were supposed to have authority to

act under section 7 and to enable the making of a contract to build and operate an electric road.

The appellants contended stoutly that the first part of the section gave a right to construct and operate a road unfettered by any restrictions of the city, save as to those matters within sections 8 and 15.

Before adverting further to the possible power derivable from the authorizing part at the end of section 7, I would call attention to cases distinguishing the effect of different powers.

The case of *Attorney-General* v. *Pontypridd Urban District Council*(1), cited by the appellants' counsel for another purpose, seems to apply to the point I am now taking.

I need not enlarge upon it, but refer to the judgment therein of Mr. Justice Farwell, and especially at pages 450 to 453. The substance of it is this, that a municipal corporation acting in the exercise of a power for one particular purpose, cannot be presumed to have thereby been exercising any other one of its powers. If it acquired land as for one particular purpose, even though that purpose may be made remotely to be adapted to supply some of the wants of the other purpose, it cannot be held to have acted in execution of the powers given to carry out the other purpose. See also the case of *Attorney-General* v. *Mersey Rly. Co.*(2), following *London County Council* v. *Attorney-General*(3).

Here, beyond peradventure, the appellants never intended, and could not have intended, when incorporated, the construction of such an unknown thing as an electric road. They applied for leave to operate a

(1) [1905] 2 Ch. 441. (2) 95 L.T. 387.
(3) 86 L.T. 161; [1902] A.C. 165.

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road whereon the force or power of animals would be used as the motive power. When they conceived it necessary in their interest to use some other power, they felt it incumbent upon them, as I am quite clear it was incumbent upon them, to apply to the city authorities to permit the adoption of some other motive power. It was a power inconceivable to the minds of ordinary men at the time when section 7 was enacted. It is not in the words of the section. It may be possible to rest its adoption on the words enabling to do what the city would agree to be done in that regard. It has no other existence in law.

Moreover, there is this to be observed in the reading of section 7 that the *subject matter over which the corporation of the city was given special control, was the application of the kind of motive power to be used.* The company were in any case to construct and operate, under and subject to any agreement to be made between the council of the city and the company, and they were to be subject to any by-laws of the said corporation made pursuant to such agreement. But beyond all that, and particularly germane to what has become the subject of discussion in this suit, they were

> to take, transport and carry passengers and freight upon the same (that is the road) by the force or power of animals or such other motive power *as they may be authorized by the council of the said city and municipalities respectively by by-law to use.*

It is quite clear that unless this latter part of section 7 can be relied upon to support the concession implied in the by-law and agreement now in question, that the company never had the slightest vestige of a right to construct upon the streets of Hamilton an electric street railway. By virtue of what authority did they do so?

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The 7th section above quoted manifestly never conferred any such power unless by virtue of this power of authorization by the city. It might be held that this was put there to meet all future possible emergencies such as elsewhere discussed.

The doctrine of *ultra vires* in this case goes to the destruction of the whole contract, the whole concession, or is not operative at all.

I do not wish to say anything further to disturb. I will accept rather than do so, the theory proceeded upon by a number of the judges in the courts below, that there had come to be, by virtue of the several enactments relative to this agreement and this by-law, such a legislative recognition of its validity as at this distance of time, in light of all that has happened, might be relied upon to support the by-law and contract as duly established.

If ever circumstances existed that would entitle the inference to be drawn, in the absence of express and explicit words of enactment, of legislative confirmation of a by-law and agreement, this seems to be that case.

The fact that the legislature of Ontario had some years earlier, in regard to companies incorporated under the "Street Railway Act," given, by section 13 thereof, power to the municipalities to exact a license, might also be borne in mind. The power given municipalities to own and operate such roads is also illustrative.

These provisions are only of value here as shewing that the policy of that legislature was such that indirect confirmation, if possible to infer at all, was not so repugnant to that policy and prevalent opinion as to forbid such inference.

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Assuming the contract valid, as I think down at least to May, 1904, the parties all believed it to be, what is the true construction of it in relation to the accountability of the appellants to the respondents for the percentage of "gross receipts" agreed upon?

I accept the suggestion made in the courts below that the gross receipts must be confined to the receipts for traffic or passengers. I also see no difficulty in coming to the conclusion that if the instruments before us were intended to, and expressed the intention, that it was agreed between the parties to make the respondents account for the Barton fares as part of the gross receipts, they must do so. The percentage of gross receipts might well be taken as the measurement of the price the municipality were exacting for the franchise.

Is it, however, the correct construction of the documents in question that these fares must be accounted for? There can be, under the ruling in the Privy Council in the case of *City of Montreal* v. *Montreal Street Rly. Co.*(1), no doubt but that the appellants must account for the fares received in respect of passengers travelling over the Hamilton portion of the road, whether their journey originated in the township of Barton or in the City of Hamilton.

The contract in that case and the contract in this case, have so much in common in that regard, that I accept the authority of the Privy Council interpreting the Montreal contract as conclusive upon this point.

I think there is no foundation in reason for the contention that if a ticket happened to be sold in Barton, entitling a passenger to travel over the entire 18.796

(1) (1906) A.C. 100; 34 Can. S.C.R. 459.

miles of the appellants' track in Hamilton, though the passenger may only have used 50 feet of the track in the Township of Barton, his fare need not be accounted for. I state the proposition as I understand it was presented in argument, unillustrated of course by the contrast of distances I present. It refutes itself. I will not labour with it.

The accountability in respect of the earnings of the company beyond the city, in respect of fares for journeys not projected into the city, stands on a somewhat different footing. The circumstances, the expressions in the statute, in the by-laws, and in the agreement in this case, must be carefully looked at to see whether or not this case is distinguishable from that of *Montreal* v. *Montreal Street Railway*(1) in the Privy Council.

The Act of incorporation recites the appellants' charter members as petitioning the legislature for incorporation for the purpose of constructing and operating a *street railway in the City of Hamilton and adjoining municipalities.* Clearly this was one enterprise at its very inception.

The Montreal Street Railway at its inception, for the purpose of construction as an electric road, was confined by the language to the City of Montreal.

The company in this case is not confined to, and never was, but entitled to go beyond Hamilton and into any adjoining municipality. The adjoining municipalities are few. They do not extend far. It is not unreasonable to suppose that the parties to this contract perceived that it was a matter of very little consequence; too trifling to consider in light of the question of auditing and determining what amount of

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fares might be collected for services in any one of the adjoining municipalities, as distinct from the fares collected for services rendered in the City of Hamilton.

Surrounding the City of Montreal there were and are populous suburbs, and a continuous stretch of municipal corporations of that character. It might shock one knowing the locality and knowing the condition as to population and business relations with Montreal, on the part of the inhabitants of these populous suburbs, to find a claim set up for earnings, through miles of such a district.

On the other hand, if it would not shock, but it would surprise any one to find that, when this contract was formed, any great stress was laid by either party to the contract as to the amount of fares possible to be collected for services in Barton alone as distinct from journeys by the inhabitants of Barton into the city. The amount involved was so trifling at the date of the accounting now in question, that the city solicitor seems to have been willing in the Court of Appeal to abandon the consideration of it, rather than face the expense involved in settling the trifling sum that would be coming to the City of Hamilton as the product of such investigation.

This surrender of counsel may have been an inadvertence. We are assured by the appellants' counsel that it has, by virtue of the small amount in question being added to the aggregate of services in Hamilton, brought about a total that passes the line at which an increased percentage is drawn.

In that way, the item is possibly an important one.

I doubt very much if such a consideration was ever present to the minds of anybody concerned in the

framing of this by-law or contract. I would rather come to the conclusion that in consideration of being free from the trouble and annoyance of keeping separate accounts as to the earnings for Barton services, as distinguished from the earnings for Hamilton services, and all that that implies, the appellants had abandoned anything to be gained by making the distinction.

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The foregoing considerations, along with the difference in the inception of the relations, between the Montreal case and this, and the interpretation put upon the contract by the contracting parties in this case for many years, seem to distinguish this case from that, as determined by the Privy Council.

I cannot say that this small branch of the case is entirely free from doubt. I have no doubt that the parties, if they really seriously considered it, intended that Barton fares should go with Hamilton fares as a basis for the percentage. My only doubt is as to whether the expressions used can in law fairly be so read as expressing that intention.

I also think the admission on which the case was tried implies a valid by-law.

I think the appeal should be dismissed with costs.

DUFF J. concurred for the reasons stated by Davies J.

Appeal dismissed with costs.

Solicitors for the appellants: *Gibson, Osborne, O'Reilly & Levy.*

Solicitor for the respondents: *Francis Mackelcan.*