THE ELECTRIC SUPPLY CO. OF VICTORIA LTD.

and

THE BALLARAT CITY COUNCIL

O P I N I O N

Home & Wilkinson,
413 Collins Street,
Melbourne.

Re THE ELECTRIC SUPPLY CO. OF VICTORIA LTD. and

THE BALLARAT CITY COUNCIL.

O P I N I O N.

The questions raised by this Case are of great importance, but except as regards one I cannot say I have any real doubt as to what the answers should be.

The first and main question concerns the power of the Council, having regard to its Agreement with the Electric Supply Co. of Victoria Ltd. (which I shall hereafter refer to as "the Company"), to licence motor vehicles to ply for hire along the routes along which the Company's trams run. In my opinion the Council has that power, notwithstanding such Agreement.

It must be constantly kept in mind that the Council's power with regard to the construction, management, and control of trams is derived from the Tramways Act, either that of 1915, or the corresponding preceding legislation, and it is really immaterial which, for the relevant provisions have remained unchanged. I refer to the Act of 1890 under which the latest Order-in-Council was obtained, and the power given by Section 3 is to construct tramways when authorised as provided in the 2nd Schedule, the provisions of which take effect as if contained in the Act. Referring to that Schedule, Clause 6 requires the Order-in-Council to specify the nature of the traffic for which the tramway is to be used, and requires many other details to be specified, and the Order granted may by Clause 9 be extended or amended from time to time.

Section 5 of the Act enables a Council which has obtained an Order-in-Council to delegate the authority conferred by such Order to construct maintain and manage such tramway, subject to such conditions and stipulations not inconsistent with any of the provisions contained in such Order, and the delegatee is, when the Agreement of Delegation is approved by the Governor-in-Council, to have the rights, powers, privileges, and obligations which were by the Order granted to or imposed on the Council. Further powers are given by Part III of the Act whereby the delegatee from the Council may assign with the appropriate convents, but the powers, rights, privileges, and obligations, remain the same.

It will thus be seen that, if the Council attempted to give further rights and powers to the Company than are by the various Orders-in-Council conferred on itself, such attempt would fail, because it would be ultra vires the Council. The latter body, however, has not even attempted to go beyond its powers, for a reference to the Deed of Delegation of the 30th October 1902 delegates its authority, subject to the observance and performance by the Company of all the provisions conditions and stipulations not inconsistent with any of the conditions and stipulations in such Orders as are contained in the said Agreement of the 16th November 1900, and of the Assignment of the 22nd May 1902. The Order in Council does not go beyond tramway traffic.

One would not expect, in view of what I have written, that the Agreement referred to of the 16th November 1900 would go beyond the Council's authority, and in my opinion it does not. The Council grants, as far as it lawfully can but not further or otherwise, power to enter upon and do certain works on certain streets and "thereon to alter and reconstruct" certain tracks, "to extend and construct" certain new lines, and "to maintain and manage tramways".

By Clause 27 the Company is to have "the exclusive right to run tramcars on the lines to be reconstructed and constructed" etc.

Then comes Clause 29. In my judgment there is no foundation in this clause for the contention that the Council undertakes not to grant to any other person a right to conduct traffic which would compete with the Company's tramway. That clause deals, I think, with the construction and working

of further tram lines, and provides that the first option of constructing and working these shall be given to the Company. The only suggestion of a basis for the Council's contention lies in the word "traffic", but in my judgment it does not sustain the contention, and if it did it would be ultra vires. I therefore answer this question as I have said.

2. The second question with regard to the licensing by the Council of motor cars and agreements made by the Council with the owners thereof, involves a consideration of certain provisions of the 13th Schedule of the Local Government Act which have been adopted by the Ballarat Council, and which now appear at pp. 29 et seq. of the Council By-laws left with me.

I am not clear from the statement of facts whether such motor cars as have been licenced have *been licenced as "hackney carriages" or as "municipal stage carriages"*, but I would point out that if the motor car runs between fixed termini within the prescribed space, then a "hackney carriage" licence is not the appropriate licence, and the vehicle should be licenced as a "municipal stage carriage". The fees for the two classes of licence vary, and there are other differences, e.g. see Clauses 14 and 32. The Agreements referred to in the Brief seem to be something collateral to the licence, and I am unable to see what power the Council had to enter into them, or has now to enforce them severally against the other party thereto, who now refuses to be bound by it.

In the case of a "municipal stage carriage" it seems to me the same result might have been obtained by Clause 14, and action under that clause would bind the person to whom the licence was granted.

If in fact a vehicle only licenced as a "hackney carriage" (which by definition in Clause 2 excludes a "municipal stage carriage") is being used as a "municipal stage carriage", I think an offence against Clause 12 is being committed.

4. *I next deal with the question I have numbered 4 in the Brief as to the power of a person* licenced in respect of a "hackney carriage" to ply for hire along the routes they run, or whether such a person is restricted to picking up at the appointed stands. I would refer to what I have written in answer to the last question in so far as the question has reference to running on defined routes. If, however, the "hackney carriage" does not run between fixed termini within the prescribed space, and does not otherwise act so as to bring it within the definition of a "municipal stage carriage", then I think it is not limited to plying for hire at the appointed stands, so long as it complies with Clause 26. That Clause permits, I think, a picking up of passengers away from the appointed stands, so long as the hackney carriage stops only such reasonable time as is required for picking up passengers. Of course "plying for hire" covers many other cases than the one I have just adverted to. See Sales v Lake (1922) 1 K.B. 553 at 556, where Lord Trevethan C.J. points out that *"to ply for hire" two conditions must be satisfied* - (1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2) The owner or person in control who is engaged in or authorises the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers. If any of these vehicles are licensed as "municipal stage carriages" then Clause 27 sufficiently sets out what may be done as to picking up passengers en route.

In answering both this and the question I have numbered 2, I have assumed that the Bendigo By-laws do not differ from those of Ballarat. If they do differ, I am not in a position to answer the questions submitted so far as they relate to Bendigo, without seeing their By-laws.

3. The last question to be answered is that I have numbered 3. I must assume the Council's right to frame these By-laws, and that they will act intra vires, for on these matters it is not

possible to express an opinion, till I see just what the Council proposes to enact. The Council would, I presume, make the proposed By-law by virtue of whatever powers it possesses, and I observe that Clause 48 of By-law No. 87 adopted from the 13th Schedule gives powers to make regulations for inter alia fixing the routes and places of call for municipal stage carriages. S. 197 of the Local Government Act 1915 may also be invoked by virtue of the power to regulate traffic and processions. On the assumption that the Council makes a valid By-law prescribing the routes to be taken by the licenced cars, and prohibits them from travelling along other routes, the question whether such By-law from the time of its enactment will affect those who have obtained licences at a date prior to such enactment is a very nice one. In my opinion the answer to it depends on the nature of the licence granted. The form of licence is not before me, and I assume it to be silent on the question whether the licensee must obey By-laws from time to time in force. Unless this assumption is correct the question put hardly arises, but the question - what is the proper construction of the licence granted?

On this assumption, is the licence a licence to use a "hackney carriage" or "municipal stage carriage" on condition of obeying only such By-laws as then may be in existence, or is it a licence to use such vehicles on condition of obeying such By-laws as may from time to time be passed? It may be said that the power given by Clause 3 is to licence to ply for hire "within the prescribed space", and that there is no power to cut down the area to which such licence applies. On the whole I think this contention is not sound, and that the words "within the prescribed space" are used in contra-distinction to an area outside that space. The words, I think, limit the area beyond which there is no power to licence, but do not prevent the Council by properly enacted By-laws from exercising other powers within that area.

Again, it may be said that to allow a subsequently passed By-law to limit the right conferred by the licence is to give the By-law a retrospective operation, and a By-law having such an operation would be unreasonable, and therefore invalid. If such were the effect of the By-law, this would be a contention difficult to resist. But the By-law would not have a retrospective operation, in my opinion, if the licence is to do the act licenced subject to such By-laws as may be from time to time in force. On the whole I think this latter view is the correct view of the effect of the licence, but the point is doubtful, and I think, if such a By-law as I am told is projected, is passed, the Council would be well advised not to raise this troublesome question during the currency of existing licences.

Licences issued after the passage of the By-law must, I think, ~~xx~~ clearly be subject to its operation.

CHARLES J. LOWE.

13/2/24.