

HOUSE OF LORDS.

Tuesday, July 9, 1907.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord Macnaghten, Lord James of Hereford, and Lord Atkinson.)

ATTORNEY-GENERAL v. MERSEY RAILWAY COMPANY.

Railway—Omnibus Service—Incidental Powers—Ultra Vires.

A railway company started a service of omnibuses from their station to and through a town. The omnibuses ran in connection with trains, but carried ordinary passengers for any distances. They had no special powers in their Act.

Held that the omnibus business as carried on by the company was not incidental to the undertaking of the railway, and accordingly was *ultra vires*.

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS, MOULTON, and BUCKLEY, L.JJ.), (1907) 1 Ch. 81, who, upon certain undertakings being given by the respondents, discharged an order of WARRINGTON, J. (1906) 1 Ch. 811, granting an injunction.

The facts appear from their Lordships' opinions *infra*.

LORD CHANCELLOR (LOREBURN)—In this case the question is whether a railway company is entitled to run a number of omnibuses which, it says, are incidental to the railway enterprise itself. The rule of law has been laid down in this House to the effect that it must be shown that the business can be fairly regarded as incidental to or consequential upon the use of the statutory powers, and it is a question in each case as to whether it is so or not. In the present instance I do not think that this business of running an omnibus system can be regarded as fairly incidental to or consequential upon the statutory enterprise. It seems to me that in substance it was an undertaking for enabling the railway company to compete successfully with a ferry which belongs to other people. It is unnecessary to elaborate the distinctions between this and other cases that have been quoted, because I do not believe that much assistance is derived by reasoning from analogy when the question at issue is in substance a question of fact, or at least a mixed question of fact and law. It is sufficient to say that in my opinion in the present case it has not been shown that this enterprise was incidental to the statutory enterprise, and in this I agree with the judgment given by Warrington, J., who granted an injunction. The Court of Appeal have limited the injunction or, what comes to the same thing, have refused the injunction, but required an undertaking. In my view the undertaking is one which could not be carried out in a business sense; and I think that

it involves the admission that, under restrictions such as are included in the undertaking, this business would be *intra vires*. I think that it would not, and accordingly I am of opinion that the order appealed from should be reversed.

LORD ASHBOURNE—I quite agree with the judgment of the Lord Chancellor.

LORD MACNAGHTEN—I am of the same opinion. It seems to me that the order which has been discharged by the Court of Appeal must be restored. I think that the judgment of Warrington, J. was perfectly right, and that no other order was possible. I have some difficulty in following the train of reasoning which led two learned judges of the Court of Appeal to replace it by an illusory undertaking, while they both admitted, if I understand their views rightly, that what this railway company were actually doing when the Attorney-General intervened, and what they claimed a right to do, was in contravention of the principles laid down in this House. As regards the judgment of Buckley, L.J., who thought that this action ought to have been dismissed, I most respectfully dissent from it. It seems to me that the illustrations which the learned Lord Justice gives, if I may say so with all deference, are somewhat wide of the mark; and they are perhaps open to this further objection, that they are not in the least degree required if the question proposed in his judgment is to be accepted as the test question in the case. The question there formulated is this—"Are the defendants really running the omnibuses here in question for the purposes of their railway, and so as to obtain and give facilities for better traffic over their line; or, is the omnibus business really an independent business in which they look substantially to general street traffic? No one can suggest that this company are carrying on a business which can properly be described as an independent business, or that they are looking substantially to general street traffic." That, I venture to think, is not the question at all. The question is this—"Is the business of omnibus proprietors, as they were carrying it on when the action was brought, reasonably incidental to their business as authorised by their special Act?" The principle to be applied is perfectly clear. The difficulty is all in its application. Hundreds of cases may be suggested in which the thing done comes very near the line, and may fairly be open to a difference of opinion. Speaking for myself, I cannot see what is to be gained by discussing such cases, real or imaginary, however interesting the discussion may be. Here I think that the railway company have transgressed the line. It may be that in doing what they wish to do they cannot help it, but that, in my opinion, is no justification for their action. If they wish to extend their undertaking beyond the limits authorised by their charter the proper course is to apply to Parliament for further powers. In my opinion a matter of this

sort is much better left to Parliament. There everybody who has a right to be heard will be listened to, and the interests of the public will be protected. I venture to think that the Court may perhaps place itself in a ridiculous position if it attempts to regulate a commercial enterprise by impossible conditions and elastic and unsubstantial undertakings. I am of opinion that the order of Warrington, J., ought to be restored, with costs here and in the Court of Appeal.

LORD JAMES OF HEREFORD—I desire to add a few observations to those which have already been made by your Lordships. It seems to me that we have to look at the state of circumstances that existed on the 23rd December 1905, when the relator instituted this action, and to determine whether at that time the allegation which was made, that the defendants carried on the business of omnibus proprietors, and ran, plied for hire, or worked omnibuses for the purpose of carrying passengers in the streets of Birkenhead, was or was not proved. Whatever has occurred since by way of modification of the business I think ought not to govern this case at all, and therefore the terms made in the Court of Appeal cannot now be regarded as controlling this action. If by those modifications the defendants have brought themselves within their powers, they wanted no undertaking, they wanted no authority, they would raise no cause of action. If they have not done so they have only maintained the state of things that existed in the month of December 1905. Now I am anxious to say that I do not think that it is the intention of your Lordships in any way to prevent railway companies from considering the convenience of their customers, the persons whom they are carrying. No doubt there are certain things incidental to the carriage of passengers which can be done. Of these, perhaps that which would be most attractive would be the giving of refreshments on the line. That is not, I presume, authorised in express terms by the statute, but it is incidental to the carriage of passengers. In the same way, the meeting of passengers, or delivering them at their places of abode to which they wish to go, by an omnibus may well be carried on without exceeding the statutory powers. But in this case that was not the state of things that existed at the time when this action was brought. Here we see, if reference be made to the plan, that it is proved that the course of the omnibuses was to cling, as it were, to the tramways as competitors with them, and to take passengers by these omnibuses who would otherwise have gone by the Birkenhead tramways. It was not confined to dealing with the passengers on the railway, it was an open omnibus business, picking up passengers wherever they could find them, for the profits of the omnibuses and not for the convenience of the railway passengers. Therefore it seems to me that this case is taken outside of all these cases that have been mentioned where, incidentally to the business of the rail-

way company, or any other company business was carried on that was not specially mentioned in the statutory powers, and that this was an independent business which this company attempted to carry on. The danger of accepting the argument of the defendants is that the natural consequence would be to give to a railway company power to carry on a special business as a railway company, which they never had power to carry on, because if bringing passengers as feeders to a railway is incidental to that railway company's business it could not be confined to bringing them by omnibuses, you might bring them by tramcars, or by cars moved by steam power, and that would simply be an extension of the railway. If the railway company could overcome the difficulty of taking land without compulsory powers, if they could take land by agreement, they would be able to bring into existence new railways not authorised by statute, and would, I presume, be entitled to impose their own terms and tolls unregulated by legislative control, if they thought fit to do so. That would be a principle which your Lordships would be very slow to sanction or approve, and I think that the result would be to extend the power of railway companies in a very dangerous manner.

LORD ATKINSON—I concur. I think that the system of omnibus traffic which was in existence at the time when this suit was instituted was not reasonably incidental to carrying out the undertaking which the railway company was authorised by statute to carry out, and therefore it was *ultra vires*. I must say for myself that if the principles which have been urged in favour of this practice were to be generally applied, it would seem to me to dispense with the necessity of getting statutory powers for enterprises which would in effect be established in competition with those for which statutory powers were obtained, if only they ultimately brought passengers to the stations of the railway company. I do not think that such projects were ever intended to be protected as incidental to the business of a railway company authorised by statute to carry on railway transit, and therefore I think that they are *ultra vires*.

Order appealed from reversed.

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