

*Privy Council Appeal No. 130 of 1913.*

**The West India Electric Company, Limited** - *Appellants,*  
*v.*  
**The Attorney-General for Jamaica** - *Respondent.*

FROM

**THE SUPREME COURT OF JUDICATURE OF JAMAICA.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 29TH JULY 1914.

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*Present at the Hearing :*

LORD DUNEDIN.  
LORD ATKINSON.

LORD SUMNER.  
SIR JOSHUA WILLIAMS.

[*Delivered by* LORD SUMNER.]

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This action was brought by the appellants, The West India Electric Company, Limited, against the Attorney-General for Jamaica, as representing the Executive of the Colony, in order to settle various questions long in issue between the Company and the Government. Most of them relate to the interpretation of the Kingston and St. Andrew Tramway License, 1897, which is held by the Company, and to the character and extent of the control over the Company's undertaking which the Governor in Privy Council is entitled to exercise thereunder.

Accordingly, it is an action for a series of declarations of rights and liabilities. Some objection seems to have been taken at the hearing by the Attorney-General to the form or competence of the proceedings but it was not pressed. Their Lordships have no reason to think that the suit is defective

either in form or substance, but in any case they are satisfied that no such objection is now open to the respondent in this appeal.

The chief declarations prayed fall into two groups. The subject-matter of both is the right of the public, alleged by the respondent and denied by the Company, to be carried for one fare between any two points in one district of the tramway system, even though it may be necessary to change cars for the purpose. On this two claims were asserted by the Governor in Privy Council and disputed by the Company.

He claimed to be entitled, before approving the Company's time table, to make their acceptance of this claim of right in favour of the public a condition of his approval, and to be entitled to withhold it pending such acceptance, although under the License the timetable could not become effective till approved. He claimed also the right to insert in the time table, under the form of approving it, such alterations of car routes as he might think suitable for the purpose of attaining the same result or of giving effect to other contentions raised with regard to the Company's obligations and the powers of the Executive under the License. These other contentions relate to the running of "market cars." There is a third question in controversy between the parties, which is wholly disconnected from any of the above and relates to the rates on the Company's power-station. It may be dealt with separately.

The tramway system is the same as that dealt with in the Glen Campbell case already decided. The present action, indeed, had been begun before Mr. Glen Campbell raised in a concrete form the controversy about the right to transfers, which this case raises generally. It is therefore sufficient to refer to their Lordships' decision in that appeal for a description of the

tramway system and for the grounds upon which they concluded in effect, that the appellants are right and the Attorney-General for Jamaica wrong in this controversy. Nevertheless, there is no reasonable objection in their Lordships' view to making a declaration of right upon this issue in the present action.

It follows that, throughout the dispute which went on from 1907 to 1912 between the Company and the Executive on the subject of time tables and rules, the Governor in Privy Council was wrongly advised in asserting a right which that decision negatives, and in seeking to obtain from the Company their admission of that right and to give it practical effect *in invitos*. The controversy, however, travelled beyond this issue. It is therefore necessary to give some account of its origin and development, and to consider at length the nature and extent of the functions of the Governor in Privy Council under the terms of the License.

The time table of the tramway system involves three things, the routes on which the cars ply, the frequency with which they run on their respective routes, and the times at which they leave, pass, or arrive at particular spots on those routes. There was a time table duly approved, which came into force in 1905. In many respects its routes followed, and in some they departed from the "tramways," enumerated in Schedule A attached to the License. In 1907 the Company desired to alter this time table, and a new one was submitted for the approval of the Governor in Privy Council. It was the subject of discussion and correspondence and was withdrawn. Another was substituted and also submitted for approval, and so on.

1912 came and still no approval had been obtained for a time table to supersede that of 1905, except that, in March 1907, the Governor

in Privy Council approved an altered time table to take effect for one month only. The objections and requirements of the Executive were substantially the following, (1) an offer to approve the proposed time table . . . on condition that, if the Company desired to cease to run Belt Line cars, they should "issue transfer tickets to enable every passenger to make any journey within one district on payment of one fare" (12th April 1907). This was repeated in slightly different terms on 23rd October 1911; (2) a claim to prescribe the routes, on which the cars should be run, which took several forms; first, the condition above quoted; second, a statement on 25th October 1909 that "the Governor in Privy Council is not prepared to approve of any time table, which does not by the arrangement of its routes secure to the members of the public their right under the License to be carried between any two points in one district for one fare"; third, an intimation, dated 23rd October 1911, that "His Excellency proposes . . . to make in Council rules as to the time for the licensees to run passenger cars on the following basis:— . . . (6) Avenue line. Service as at present. Two cars starting every 24 minutes from Victoria Market to run in a belt." The same proposal included other paragraphs, "directing cars to be operated on more than one tramway," as the appellants describe them, which need not be set out in full; fourth, a notice, dated 5th February 1912, that "the Governor in Privy Council would be prepared to approve of a time table on the lines of that submitted . . . on condition that the East Street belt line is either maintained as a circular route, or arranged to begin and end at Cross Roads." His Excellency on 7th February 1912 declined to waive this condition.

There is a similar dispute with regard to "market cars," a particular kind of vehicle which, by Section 13 of the License, the appellants are bound to operate "on such portions of the tramways and at such times as the Governor in Privy Council shall from time to time approve or direct," and as to which, by Section 37, "the Governor in Privy Council may from time to time make, alter, and amend rules . . . (2) as to the market cars, regulating them, and the time of their departure (subject to clause 13 hereof.)" On 20th February 1912 a rule was made which prescribed, among other things, that "market cars shall leave Papine at 6 a.m. and 8 a.m. daily, and proceed to the Victoria Market," a route which involves running cars over several of the tramways named in the License, and out of one district into another.

The substance of the appellants' objection to these requirements of the Executive is that His Excellency ought to approve or disapprove a time table upon its merits within a reasonable time of its being submitted to him; that he is not entitled, under colour of his powers of approving time tables or of making market car regulations under the License, to endeavour to secure for the public, either by negotiations or by indefinitely withholding his decision, advantages which the appellants are not compellable by law to give and in the interests of their shareholders are not minded to grant; and that he is not entitled under the like colour to interfere with or to prescribe the routes upon which the appellants *bonâ fide* think fit to run and operate their cars.

It has been questioned before their Lordships whether any occasion has arisen for declarations of the kind desired, the appellants having, both in correspondence and in their pleadings, based

their argument as to routes on the supposition that specific tramways or routes are definitely fixed by the License and Schedule, and the Governor, on the other hand, having, at one time at least, disclaimed any right to interfere with the routes of the cars. This disclaimer, however, took place as long ago as September 1907, and since then, sometimes directly, sometimes indirectly, but evidently of set purpose, the Governor has endeavoured to prescribe routes, either by refusing approval on the ground that the time table submitted breaks up a former continuous route, or by requiring that cars should be run on routes of his selection as a condition of his approval. The market rule of 1912, made a few weeks before the commencement of this action, formally and in terms prescribed a route on which through market cars should run.

It is true that the appellants in argument before their Lordships declined any longer to rest this part of their case on the provisions as to particular tramways contained in Section 9 and Schedule A of the License, as they do in the first declaration asked for in the prayer to their statement of complaint. If their Lordships had been of opinion that the Governor's attitude was strictly based upon this contention about Schedule A, and would have been different if the case had been presented to him as it has been to their Lordships, they would not have thought fit to deal with this part of the case at all. Their Lordships do not think that the course taken by the Governor was based simply on opposition to this contention, which the Company have now dropped. At the very outset, on 1st July 1907, the appellants wrote to the Governor :—"The Government has no power " to dictate the routes over which any particular " service of cars should be given. Schedule A

“ of the License defines and describes the  
“ Company’s statutory obligation in this respect,  
“ and any arrangement whereby the routes  
“ defined by that schedule of the License, are  
“ extended or made to overlap or interlap is a  
“ matter solely within the discretion of the  
“ Company.” It was in answer to this lucid  
contention that the Governor sent the disclaimer  
above-mentioned, which has since been aban-  
doned. Their Lordships are therefore of opinion  
that the appellants are not disentitled to have  
this matter dealt with on this appeal, and it is to  
be hoped that, the more matters of real con-  
troversy can now be finally settled, the greater  
is the likelihood of good relations prevailing  
between the owners of the tramway and the  
Executive, which only seeks to know its powers  
and the measure of its public duty.

There is no question here of paramount  
emergency or of necessity of state. In the  
exercise of statutory powers the Governor in  
Privy Council has granted to the appellants the  
right to make and work tramways subject to  
the reservation of certain powers to himself.  
Virtually the License is a parliamentary bargain  
the terms of which have to be construed. There  
are two reasons why the powers reserved or  
given by Sections 13, 35 and 37 should be  
limited to the terms of those sections and any-  
thing that is necessarily implied by them. One  
is that these powers of regulation and control are  
in the nature of derogations from a grant; the  
other is that, when undertakers, incorporated to  
make and work tramways, receive authority to  
carry on an undertaking, the good sense of the  
thing requires *primâ facie* that they should be  
masters in their own house and among other  
things should manage the tramcars, which they  
are certainly more likely to do well than is His  
Excellency in Privy Council. As Lord Collins

says in *Toronto Corporation v. Toronto Railway* (1907 A.C. 324), where, as in the present case, the tramways company had been given the power of "operating" the tramways, "what-ever else the word 'operating' may include" it seems to their Lordships most certainly to "embrace the right to determine the routes of the different cars and their inter-relations. This seems to lie at the root of successful management of the enterprise and ought to be in the hands of those who are responsible for getting the best monetary return out of it." Reading together Sections 13 and 37 it will be seen that the power to "approve or direct" the "operation" of market cars is exercisable by making "rules regulating them and the time of their departure." The words in Section 13, most relied on by counsel for the respondent, viz., "on such portions of the tramways . . . as the Governor shall . . . direct," must therefore correspond to and fall within the words "regulating them" in Section 37 (2), and in the opinion of their Lordships are not such as to express a clear power to prescribe the route of the market car and to fix its starting point and the end of its journey, which is what the regulation of 1912 purports to do. A derogation so large from the appellants' enjoyment of their grant and management of their own affairs is not in their Lordships' opinion to be found in the sections in question. So too Section 35 (to which Section 37 (3) is ancillary) is limited to time-tables as the subject-matter, to approval as the Governor's function, and, as his power of interference, to alteration so as to obtain a ten minutes' service at certain places and times of day by acceleration or by addition of cars. Their Lordships deal only with these sections. They are not concerned to interpret the other sections, under which breaches of duty on the appellants' part can be dealt with,



or to define the other powers, which the Executive may have, for preventing abuses and protecting the public. It is enough to add that these sections cannot be employed to obtain indirectly what they do not authorise the Governor to do directly, nor can the use or the refusal of the intervention, which they provide for, be made the consideration for a bargain or the instrument for exerting pressure. It is not enough that the sections should be resorted to, as they doubtless were and must be, *bonâ fide* for public reasons; they must be resorted to according to their terms and only for their expressed objects.

A separate question is raised in this appeal, unconnected with the powers of the Executive or the operation of the Tramways. When the appellants were incorporated by Law 33 of 1897, and obtained the License, their scheme contemplated a power-house and tramways, all contained within the parishes of Kingston and St. Andrew. Section 20 (b) of the License provided that "the licensees shall, as and by way of return to the road authorities for the use of their streets and roads, pay into the public treasury a sum of money equal to 4 per cent. of the gross receipts of their undertaking; any sum so lodged shall be applied in repaying to the licensees all rates and taxes, the proceeds of which are devoted to parochial purposes, except water rates, which shall have been paid by them during the preceding six months, and the balance shall be divided by the Governor in Privy Council between the several road authorities over or along or across whose streets or roads the licensees run their cars." It was afterwards found that the Rio Cobre, in the parish of St. Catherine, afforded a favourable site for generating electric current by water power, and

accordingly the actual power-house is now erected in that parish at a spot twenty-one miles from the parishes of Kingston and St. Andrew. In obtaining legislative sanction for this change in their undertaking under Section 5 of Law 38 of 1898, the appellants did not procure the insertion of any words bearing upon Section 20 of their license, or giving them any mode of recoupment for the rates, which of course they pay for their power-house and installation in the parish of St. Catherine. They now allege that these rates come within the words of Section 20 of the License, "all rates . . . which shall have been paid by them during the preceding six months," and that the amount of them must therefore be added to the moneys, which the public treasury refunds to them out of the sum, which they lodge in the treasury under the section. The Attorney-General for Jamaica contests this on the grounds that no part of the undertaking was at the time of the License intended to be or authorised to be created outside the parishes of Kingston and St. Andrew; that the words in Section 20 (b), "the several road authorities over or along or across whose streets or roads the licensees run their cars" (which road authorities do not include the parish of St. Catherine), make it plain that all that is intended is a refund of the rates paid to the parishes of Kingston and St. Andrew out of the sum lodged in the treasury, "as and by way of return to the road authorities for the use of their roads"; and that an application of the clause to St. Catherine's rates could only be authorised if the Act of 1898 had contained words appropriate to extend it, at the time when the powers of selecting a site for the generating station were extended.

The contention of the appellants claims too much. Their powers were extended in 1898 by Law 35 of that year, Section 1, to the "trans-

“action of any business necessary or incidental to any of the purposes of this Company.” Whatever buildings they might erect or whatever works they might construct in Jamaica in execution of their extended powers would be locally rateable, and even though they had no connection either with generating power for their Kingston tramways or with operating them, they would, on the appellants’ construction of the words “all rates . . . which shall have been paid by them,” lead to a further deduction in diminution of the rent payable by the appellants for the use of the roads in Kingston and St. Andrew’s parishes. This the appellants disclaim, but the disclaimer is politic not logical. To avoid a *reductio ad absurdum* they virtually have to amend Section 20 (b) of their License by inserting words, which would make it read “all rates and taxes . . . which shall have been assessed on their tramways undertaking, or any part thereof, and paid by them during the preceding six months.”

On the other hand the scheme of Section 20 is this: The appellants use the roads in the parishes of Kingston and St. Andrew, in which they are ratepayers in respect of their lines and works, a good deal more than ordinary ratepayers do; accordingly they are to pay rent for a way-leave and that rent is to be in respect of their excess user over that to which they would be entitled as simple ratepayers or as members of the public. The rent is a percentage on their gross receipts without even first deducting rates paid. Rates must be paid at one time and annual gross receipts may be ascertainable at another, and conceivably the rates paid may equal or exceed 4 per cent. on the gross receipts for the year selected. To avoid claims for return of money overpaid, the machinery adopted is payment into the treasury of 4 per cent. on the gross

receipts, with a subsequent refund of a sum equal to the amount of rates paid, and an appropriation of the balance, if any, among the road authorities. This shows that the equalisation intended is between rates paid to the parishes of Kingston and St. Andrew and a rent for way-leaves, measured by the excess of 4 per cent. of the Company's gross receipts over such rates, if any, and payable also to the same parishes, as being the road authorities. It is true that if, as was originally intended, the appellants had erected their power-house in Kingston parish or St. Andrew's, the amount of the rates thereon would have been added to the sum to be refunded to them out of the treasury under Section 20 (b) of the License, but if they do not erect the power-house there they pay no rates on it there, and accordingly get no deduction or refund in respect of it. When for their own purposes they sought powers to erect it in St. Catharine's parish, it was their business, if they wished to bring the St. Catharine's rates under Section 20 (b) to have procured the insertion of words for the purpose.

Between these conflicting arguments their Lordships are of opinion that the latter is right, and that in the result the appellants' action was rightly dismissed upon the subordinate issue as to the St. Catherine's parish rates, but otherwise should have succeeded. The only relief claimed was by way of declarations of rights, and their Lordships think that the following declarations should have been made :—

(a) That the plaintiff company has the right under the License, as well in respect of market cars as of ordinary passenger cars, to charge each passenger for one journey by any one car between any two points on its regular route in one district, a fare not exceeding 2*d.* in the case of cars other than market cars, and not exceeding

three-fourths of the ordinary passenger tariff in the case of market cars, and is not under obligation to run any of its cars over more than one of the routes, which it fixes by public announcement, or to give transfers or transfer tickets.

(b) That the Governor in Privy Council is not entitled under Section 35 of the License to withhold consideration of a time table submitted to him or to refuse approval of it on the grounds only that it does not provide for the running of through cars or for the running of cars on any particular route, or on the ground only that the plaintiff company refuse to give transfers or transfer tickets.

(c) That the Governor in Privy Council is not entitled under Section 13 and Section 37 (2) of the License, or either of them, to withhold consideration of a time table for market cars submitted to him, or to refuse approval of it, only on the grounds mentioned in declaration (b).

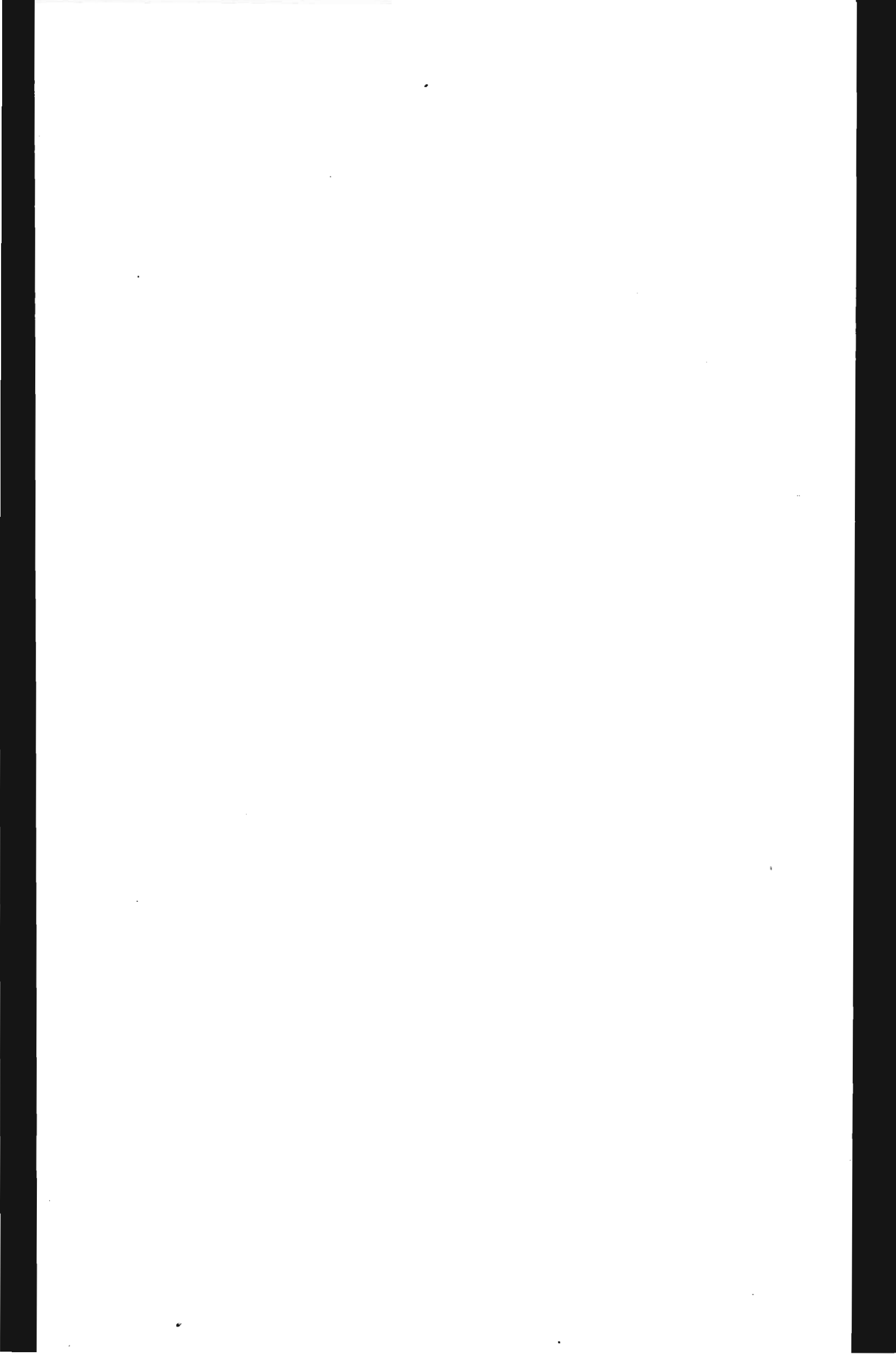
(d) That the Governor in Privy Council is not entitled, either in respect of ordinary passenger cars or of market cars, to make the exercise of his powers under Sections 13, 35 or 37 of the License respectively, conditional upon the plaintiff company's running cars on a route indicated by him, or to refuse to exercise them unless the plaintiff company agree to run cars on a route indicated by him, or to prescribe or require that cars shall start from or run to any points or proceed by any route prescribed by him, as a condition of or as part of the exercise of his powers thereunder.

(e) That the rule respecting market cars, dated 20th February 1912, is *ultra vires* so far as it imposes on the plaintiff company the route which their cars are to follow.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be

allowed with costs, that the judgments of the Supreme Court of Jamaica entered on 11th September 1913, and the judgment of the Chief Justice of Jamaica in favour of the defendant, dated 30th May 1913, which it affirmed, be set aside, save in so far as they refused to make declaration (K), and decided against the plaintiff's claim to deduct the St. Catherine's parish rates and that judgment be entered for the plaintiffs in the action for the aforesaid declarations, with costs in both courts.

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In the Privy Council.

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THE WEST INDIA ELECTRIC  
COMPANY, LIMITED

2.

THE ATTORNEY-GENERAL FOR  
JAMAICA.

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DELIVERED BY LORD SUMNER.

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