

however imperfect or inexact in declaring a railway authorised by an Act passed in 1872 to have been always a railway within the meaning of the Act only passed in 1877, still leaves no room for doubt upon the main point, that the legislature at least in 1893 did not intend this railway to be regarded as a street railway, and so within the provisions of sec. 18 of the Street Railway Act passed in 1883.

For these reasons, I am of the opinion that the railway in question should be regarded as a railway within the meaning of the Railway Act of Ontario, and not as a street railway, and that the opinion of the Board that sec. 18 of the Street Railway Act of 1883 applies is erroneous.

Coming now to the question of franchise. By sec. 12 of C. S. C. ch. 66, it was provided that no railway should be carried along a highway unless leave had been obtained from the proper municipal authority. Similar language is found in R. S. O. 1877 ch. 165, sec. 21.

Under these provisions the permission to use the highway did not require to be conferred by by-law and might even be acquired by acquiescence. See *Township of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 503. And there was apparently no provision for a leave once given being afterwards recalled. The only difference between these provisions in the general Act and that contained in sec. 4 of the original Act of incorporation, 35 Vict. ch. 64, is that in the latter statute a by-law was expressly made necessary, and the municipal council in granting the permission might also "regulate." There is the same total absence of any express power of recall, which would not necessarily be included in the power to regulate, and no provision of any kind is made for such an event, such as is contained in the Street Railway Act, where the Municipal Council declines to renew.

There is no doubt, on the evidence, that permission to occupy the streets was granted by a by-law passed in the year 1873, in pursuance of which the railway was constructed, and under which, apparently without objection, it was operated for a great many years. And there is absolutely no evidence to indicate that the leave thus originally granted was in any way limited or conditional. So that upon the present material the conclusion, in my opinion, would be that it was unlimited and unconditional.

I would, however, much prefer not to pronounce finally upon the matter of the extent of the franchise. It is a highly important subject to both parties, and indeed may involve the rights of bondholders and others not represented before the Board or before us. The lost by-law, or a copy, may yet be recovered, or more satisfac-