

The Toronto Railway Company - - - - *Appellants*

*v.*

The Corporation of the City of Toronto - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1920.

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*Present at the Hearing:*

VISCOUNT FINLAY.

VISCOUNT CAVE.

LORD SHAW.

[*Delivered by LORD SHAW.*]

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The question in this case has reference to the removal of snow which falls on the lines of a street railway which runs through the city of Toronto. The judgments of the Court below have affirmed the liability of the appellants, the Railway Company, for the cost of the removal by the respondents, the city, of snow swept by the appellants from the tracks of their railway on to the solum of the streets on the side of the tracks.

The respondents sued the appellants for the cost of the removal of that snow, and on the 13th April, 1918, Mr. Justice Lennox, who tried the case, gave a judgment in the respondents' favour for \$16,118.44. This judgment was affirmed by the Appellate Division of the Supreme Court of Ontario on the 18th December, 1918.

In 1891 the respondents entered into an agreement, of date the 1st September of that year, with George Washington Kiely and others, called the "purchasers," for the sale to them of the street railways or tramways then existing in the city of Toronto, together with the exclusive right to operate surface street railways in the city for the period and on the terms set forth in the document. By an Act of the Ontario Legislature, passed in 1892 (55 Vict. C. 99), the appellants were incorporated in order to take over

and work this contract, and the agreement was declared valid and binding, with certain provisos which the Act contained. These need not be entered upon further than to refer to Section 25 of the statute, the terms of which will be hereinafter quoted. Following upon the statute, the appellants operated the street railways in Toronto and have continued to do so under the agreement and Act.

Thereafter, and particularly since 1900, there has been a copious stream of legislation bearing upon the Ontario railways and upon the powers and functions of the Ontario Railway and Municipal Board. These statutes stand chronologically as follows :

1900, 63 Vict., c. 102. This Act (passed, it has been said, in consequence of certain judicial pronouncements) amended the Act of 1892 by adding a section thereto dealing with the enforcement of agreements and giving power to the Court to inquire into any alleged breach thereof and make such order as may be necessary "in the interests of justice to enforce a substantial compliance with the said Act" . . . and to "enforce the same by order and injunction." It further, by Section 5, gave power to the Court, "notwithstanding any rule of law or practice to the contrary," to make an order for specific performance in the event of a particular breach or breaches.

In 1904 the Act 4 Edw. VII., Ontario, c. 93, was passed, still further amending the Act of 1892 and providing for the liability of the appellants, in the event of their neglecting or refusing to give a reasonable service of cars, to pay sums of \$100 per day, recoverable by action by the Corporation "in any Court of competent jurisdiction."

In 1906 came the Ontario Railway Act (6 Edw. VII c. 30), a general Act, which, however, by Section 5, preserved the effectiveness of any special Acts by making these prevail in the event of any conflict with the provisions of the general statute. In the same year (1906) was passed the Ontario Railway and Municipal Board Act.

These two respective statutes—the one dealing with the railway and its powers, and the other with the Board and its powers—are repeated as follows:—In 1913 there were the two Acts, 3 & 4 Geo. V, c. 36 (the Railway Act) and c. 37 (the Board Act). Then in 1914 came the Revised Statutes (c. 185 of that year being the Railway Act and c. 186 being the Board Act).

This wealth of legislation is to some extent accounted for by revision merely, but it also contains a certain frequency of change, and it is manifest that appeals to the Legislature to readjust the relations of the city and the Railway Company were well known and were accompanied with success. In the result the task of judicial interpretation becomes, on the part of the Judges in the Courts below, increasingly complex. Their Lordships have, as the Courts below had, to thread their way through these Acts, and they have come to a conclusion which agrees in substance with the judgments appealed from.

There are, in fact, only two points in the appeal. The first is a point of jurisdiction, it being maintained that (in view of the

comprehensive powers of the Railway Board) courts of law have no jurisdiction to give a decree for payment to the Corporation in respect of a tort arising out of a breach of the obligations resting upon the Railway Company under the Act of 1892, which confirmed the agreement of 1891. The other point has reference to what is the sound construction of that statute and agreement.

This judgment will take these points in their order.

I. On the point of jurisdiction, the appellants found upon Section 260 of the Act of 1914, which, as already mentioned, is a repetition of the Acts of 1913 and 1906. The material portions of Section 260 are as follows :—

“ 260.—(1) Where a railway or street railway is operated in whole or in part upon or along a highway under an agreement with a municipal corporation, and it is alleged that such agreement has been violated, the Board shall hear all matters relating to such alleged violation and shall make such order as to it may seem just, and by such order may direct the Company or person operating the railway, or the municipal corporation, to do such things as the Board deems necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as in its opinion constitute a violation thereof.

“(2) The Board may take such means and employ such persons as may be necessary for the proper enforcement of such order, and in pursuance thereof may forcibly or otherwise enter upon, seize and take possession of the whole or part of the railway, and the real and personal property of the Company, together with its books and offices, and may, for that purpose, assume and take over all or any of the powers, duties, rights and functions of the directors and officers of such Company and supervise and direct the management of such Company and its railway in all respects, including the employment and dismissal of officers and servants of the Company, for such time as the Board shall continue to direct such management.

“(3) Upon the Board so taking possession of such railway and property, it shall be the duty of every officer and employee of the Company to obey the orders of the Board or of such person as it may place in authority in the management of any or all departments of such railway.

“(4) The Board shall, upon taking possession, have power to demand and receive all money due to, and to pay out all money owing by, the Company, and may give cheques, acquittances and receipts for money to the same extent and in as full and ample a manner as the proper officers of the Company could do if no such order had been made.”

There can be no doubt that the Board, in the event of violation of the agreement, is thus vested with very strong powers. It may make “ such order as to it may seem just ” and direct the Company to do what “ the Board deems necessary for the proper fulfilment of such agreement.” And in the event of the Railway Company remaining obdurate, the Board may itself enter into possession of the property and business and carry on the latter.

The situation in which the parties found themselves—more particularly in the years 1914 and 1915—is shown in the correspondence which has been produced—a correspondence which discloses the acute differences which prevailed between the parties on this subject of the removal of snow from the street railway tracks. The Railway Company declined to budge from a certain position which it took up, that it had a right to put the snow on the same places of deposit as were used by the city. All appeals

by the latter were met by dilatory tactics, culminating in a refusal to do anything else than they were doing, that is to say, putting the track snow on the streets, and leaving it there. In these circumstances the Judge of the County Court was called in as arbitrator, and he affirmed the duty of the Railway Company under the agreement. This was disregarded. Then proceedings took place before the Railway Board. They had the same result; and that Board found its orders met with the same policy of obstruction and non-compliance.

The point as to jurisdiction arises here and may be put thus :— Was the city in these circumstances excluded from all Common Law remedy for the expense consequent upon the performance of an act of administration which they had themselves to take up in the interests of public convenience and for the avoidance of public danger—an act which, if the view of the Courts below be correct, was one which fell to be performed by the street railway company.

It may seem natural to observe that the strong powers vested in the Railway Board should be held to include, not only the doing of such things, but the making of such orders for payment of money as would clear up the situation which had been created; but their Lordships, after full consideration of the statutes, do not see in them any clause which either expressly or by implication gives the Railway Board a power to grant a decree for a sum of money due as upon tort or in respect of breach of contract, as already referred to. It would require, in their Lordships' opinion, the clearest expression or the clearest implication, in order to confer such a jurisdiction upon a statutory Board, and it would further require the clearest expression or implication in order to oust the jurisdiction of the ordinary Courts of the country to whom awards of damages for failure of duty, breach of contract, or commission of tort are matters of plain and everyday jurisdiction. They accordingly find, agreeing with the Courts below, that they had jurisdiction to deal with the action and give a decree in respect to the claim sued for.

II. As to the merits of the dispute between the parties, it is, in their Lordships' view, unnecessary, and therefore undesirable, to make further reference to the statutes and agreement than by quoting Section 25 of the Act of 1892 and Sections 21 and 22 of the agreement of 1891. The sections of the agreement are as follows :—

“ 21. The track allowances (as hereinafter specified), whether for a single or double line, shall be kept free from snow and ice at the expense of the purchaser, so that the cars may be used continuously; but the purchaser shall not sprinkle salt or other material on said track allowances for the purpose of melting snow or ice thereon, without the written permission of the city engineer, and such permission shall, in no case, be given on lines where horse power is used.

“ 22. If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the city engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but, should the quantity of snow

or ice, &c., at any time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks, sixteen feet six inches, and for single tracks, eight feet three inches) shall, if the city engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the city engineer."

The section of the statute is as follows:—

"25. And whereas doubts have arisen as to the construction and effect of Sections 21 and 22 of the said conditions, it is hereby declared and enacted that the said Company shall not deposit snow, ice, or other material upon any street, square, highway, or other public place in the city of Toronto, without having first obtained the permission of the city engineer of the said city, or the person acting as such."

One cannot peruse the documents and communications anterior to this action without seeing how the sections of the agreement in particular have afforded ground for maintaining different constructions thereof. Section 21 of the agreement is quite definite that the track allowances are to be kept free from snow and ice at the expense of the purchaser. That has not been challenged.—It is a general regulative section; and, under it, it must be acknowledged that the duty of clearance of snow from the lines rests with the Railway Company. The true question, and indeed the only one, arises after that duty has been performed, and is: What is to be done with the snow thus cleared away by the Railway Company on to the city streets? Notwithstanding Section 25 of the Statute, as above quoted, the dispute as conducted between the parties had reference mainly to the latter portion of Section 22 of the Agreement, which provides that should

"the quantity of snow or ice, &c., at any time exceed six inches in depth, the whole space occupied as track allowances . . . shall, if the city engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the city engineer."

There are no doubt certain troublesome questions of construction here. What is "the quantity of snow or ice?" Does that mean the accumulated quantity or does it mean the quantity of the fall? Further, does that part of Section 22 apply to a quantity of ice only so long as it is upon the track itself? If so, looking to the fact that some years ago rotary machines were provided which were sanctioned by the Board for the continuous clearing of the tracks, it is in the highest degree unlikely that the quantity of snow on these themselves would ever reach a height of six inches. Then, lastly, does the provision that the material is to be removed and deposited at such point or points on or off the street as may be ordered by the city engineer obliterate the duty altogether in the event of a specific point not being chosen by the engineer either in or out of the city? Their Lordships do not enter upon these questions (others might easily be figured), but they merely state them in order to indicate the value of the statutory interposition for the avoidance of trouble in the construction of these sections of the agreement.

In the opinion of their Lordships, Section 25 of the Act of 1892, which proceeds upon the preamble that doubts have arisen as to the construction and effect of the articles above quoted from the agreement, imposes a duty upon the Railway Company which is clear and absolute. It is that they "shall not deposit snow, ice, or other material upon any street, square, highway, or other place in the city . . . without having first obtained the permission of the city engineer." There does not seem to their Lordships to be any advantage in discussion or elaboration in regard to this section, its words being so plain.

The only point that remains is a point to be answered affirmatively or negatively. Did the Railway Company deposit that snow on the streets, &c., without the engineer's consent? There is no doubt that the Company did so. There is accordingly no doubt that the Company is in breach of its statutory duty. By the word "deposit" is meant the final disposal of the snow which is swept from the tracks. There must *ex necessitate* be an interim and quite temporary deposit of the snow as it is swept off the tracks on to the streets. That snow so swept off must, according to the statute, be deposited elsewhere than in the city unless the city engineer gives his consent.

That he would have given his consent to any reasonable arrangement their Lordships do not suggest any doubt; but in point of fact consent was not obtained from him, and that is an end of the matter so far as the section is concerned. Over and over again what he did was to order the accumulations to be taken to some point off the streets. This was his way of indicating that he did not consent to its remaining on the streets or public places; but before the Railway Company can claim any right under the section to leave a deposit of snow in the city they must first establish that *de facto* they have the engineer's consent to what they propose to do.

Their Lordships are relieved to think that this in substance may impose no great hardship. In answer to a question put to him on this subject to the following effect:—"You realise that, in the absence of mentioning a place to dump the snow, the Company, unless they had some place of their own, would have to take it outside of the city altogether?" Mr. Harris, the city engineer, replied: "Oh, no; they could do as we do. We get permission from private individuals to use it for dumping, and from the Harbour Commissioners Board to dump in the bay, and we got permission from the Park Commission to dump in some of the breathing spaces." Their Lordships do not take that as exhaustive of the opportunities for disposal which were and are open to the Railway Company, if it be willing and anxious to perform its statutory duty, but it indicates that it is confronted by no insuperable difficulty in this task.

Notwithstanding a statutory duty so clear as their Lordships have indicated, the Company continued to sweep the snow from the tracks and leave it on the streets. In those circumstances what were the city authorities to do? An emergency was created

which might be dangerous to traffic and to life. The Board thinks the city was quite within its rights in seeing to the streets being cleared, and that the expense so incurred, in so far as applicable to removing the improper deposit of the Railway Company, is one to recoup which the Company is under obligation. So far as the payment is concerned, it would make no difference whether it could be ascribed to damages for breach of contract or to damages in tort; but in the opinion of their Lordships the payment falls to be made as damages for tort committed in the breach of a Statutory prohibition.

Their Lordships will humbly advise His Majesty that the appeal stand dismissed with costs.

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In the Privy Council.

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THE TORONTO RAILWAY COMPANY

v.

THE CORPORATION OF THE CITY OF TORONTO.

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DELIVERED BY LORD SHAW.