

MEREDITH, J.

JULY 9TH, 1904.

TRIAL.

CITY OF HAMILTON v. HAMILTON STREET R. W.
CO.

Street Railways—Agreement with Municipality—Payment of Percentage of "Gross Receipts"—Powers of Company and of Municipal Corporation—Passenger Fares outside Municipality—Unearned Profits.

Action upon a covenant contained in an agreement, under seal, made between the parties to this action, and dated the 26th March, 1892, whereby defendants agreed to pay to plaintiffs a certain proportion of defendants' "gross receipts."

F. Mackelcan, K.C., for plaintiffs.

E. D. Armour, K.C., and G. H. Levy, Hamilton, for defendants.

MEREDITH, J.—Two objections, now requiring consideration, are made to this claim: first, that the covenant was one beyond the power of the parties, or of one of them, to make; and second, that it does not include the moneys in question.

The express and direct legislative authority, of the parties, upon the subject, is contained in the 7th and 15th sections of the defendants' Act of incorporation—36 Vict. ch. 100 (O.)—sec. 7 providing that the defendants might construct and operate a railway upon and along streets and highways within the jurisdiction of the plaintiffs, and of any of the adjoining municipalities, under and subject to any agreement to be made between the council of the plaintiffs, and of the said municipalities respectively, and the defendants, and under and subject to any by-laws of the plaintiffs and municipalities respectively, or any of them, made in pursuance thereof; and sec. 15 giving both parties authority to contract in respect of certain specified subjects, none of which seems to include such a covenant as that in question.

If the first question for consideration had arisen soon after the passing of the Act, there would have been very much to be said in support of the defendants' contention; it might have been found a difficult thing to discover any legal power in the plaintiffs to exact or take for their own use and