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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JANUARY 20TH, 1920.

TORONTO R.W. CO. v. CITY OF TORONTO.
(SNOW CASE).

Street Railway—Agreement with City Corporation—Removal by City Corporation from Streets of Snow and Ice Deposited thereon by Street Railway Company—Action to Recover Cost of Removal—Jurisdiction of Court—Jurisdiction of Ontario Railway and Municipal Board—Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 260—Construction of Act Incorporating Railway Company, 55 Vict. ch. 99, sec. 25 (O.)—Construction of Agreement of 1891, Conditions 21 and 22—Damages—Breach of Statutory Prohibition—Tort.

Appeal by the Toronto Railway Company from the judgment of the Appellate Division of the Supreme Court of Ontario, City of Toronto v. Toronto R.W. Co. (1918), 44 O.L.R. 308, affirming the judgment of LENNOX, J., S.C. (1918), 42 O.L.R. 603, in favour of the plaintiffs, the Corporation of the City of Toronto, in an action for the recovery of the cost of the removal by them of snow swept by the railway company from the tracks of their railway on to the solum of the streets on the side of the tracks.

The appeal was heard by VISCOUNT FINLAY, VISCOUNT CAVE, and LORD SHAW.

D. L. McCarthy, K.C., for the appellants.

G. R. Geary, K.C., and Irving S. Fairty, for the respondents.

LORD SHAW, reading the judgment of the Board, said, after stating the facts, that there were, in fact, only two points in the appeal. The first was a point of jurisdiction, it being maintained that (in view of the comprehensive powers of the Ontario Railway and Municipal Board) Courts of law had no jurisdiction to give a

decree for payment to the city corporation in respect of a tort arising out of a breach of the obligations resting upon the railway company under the Act of 1892, 55 Vict. ch. 99, which confirmed the agreement of 1891. The second question was as to the sound construction of that statute and agreement.

On the point of jurisdiction, the appellants founded their contention on sec. 260 of the Ontario Railway Act, R.S.O. 1914 ch. 185. Under it, the Board, in the event of violation of the agreement, was 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 company remaining obdurate, the Board may itself enter into possession of the property and business and carry on the latter.

Were the city corporation, in the circumstances of the case, 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 was correct, was one which fell to be performed by the street railway company?

It might seem natural that the strong powers vested in the 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, did not see in them any clause which, either expressly or by implication, gave the Board a power to grant a decree for a sum of money due as upon tort or in respect of breach of contract. It would require, in their Lordships' opinion, the clearest expression, or the clearest implication, to confer such a jurisdiction upon a statutory Board, and it would further require the clearest expression or implication to oust the jurisdiction of the ordinary Courts of the country, to which 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.

Upon the question of construction, their Lordships referred to sec. 25 of the Act of 1892 and clauses 21 and 22 of the agreement of 1891. They considered that the city corporation were quite within their 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 company, was one to recoup which the company were under obligation. So far as the payment was

concerned, it would make no difference whether it should be ascribed to damages for breach of contract or to damages in tort; but, in the opinion of their Lordships, the payment fell to be made as damages for tort committed in the breach of a statutory prohibition.

Appeal dismissed with costs.

JANUARY 20TH, 1920.

TORONTO R.W. CO. v. CITY OF TORONTO.
(PENALTY CASE).

Street Railway—Penalty for Non-compliance with Order of Ontario Railway and Municipal Board—Confirmation of Order by 7 Geo. V. ch. 92, sec. 17 (O.)—Failure to Furnish and Operate Additional Cars within Time Fixed by Order—Power to Impose Penalty Given by sec. 260a of Ontario Railway Act as Enacted by Amending Act 8 Geo. V. ch. 30, sec. 4—Criminal Matter—Powers of Provincial Legislature—British North America Act, secs. 91 (27), 92 (15)—Enforcing Compliance with Previous Order—Lapse of Time Fixed by Previous Order—Validity of Order of Board—Punishment of Past Breach—Procedure of Board—Penalty Imposed without Notice to Railway Company—Status of Board—"Superior Court."

An appeal by the Toronto Railway Company from the judgment of the Appellate Division of the Supreme Court of Ontario, Re Toronto R.W. Co. and City of Toronto (1918), 44 O.L.R. 381, affirming an order of the Ontario Railway and Municipal Board of the 19th April, 1918, requiring the appellants to pay to the city corporation, respondents, the sum of $24,000.

The appeal was heard by VISCOUNT FINLAY, VISCOUNT CAVE, and LORD SHAW.

A. C. Clauson, K.C., and D. L. McCarthy, K.C., for the appellants.

G. R. Geary, K.C., and Irving S. Fairty, for the respondents.

VISCOUNT CAVE, reading the judgment of the Board, said, after stating the facts, that it was contended, first, that sec. 260*a* of the Ontario Railway Act, as enacted by 8 Geo. V. ch. 30, sec. 4, if it was to be construed as authorising the imposition of a penalty for a past offence, dealt with a criminal matter, and was therefore beyond the powers of the Provincial Legislature, exclusive legis-

lative authority in relation to the criminal law (including the procedure in criminal matters) having been reserved by sec. 91 (27) of the British North America Act, 1867, to the Parliament of Canada. This contention should not prevail. In a series of cases, commencing with Hearne v. Garton (1859), 2 E. & E. 66, and ending with Ex p. Schofield, [1891] 2 Q.B. 428, it was held that the imposition of a fine or penalty (not being by way of reimbursement) for the breach of an order of a public authority is matter of criminal and not civil procedure. But, in construing the British North America Act, it is necessary to read secs. 91 and 92 together; and regard must be had to the fact that sec. 92 (15) gives to a Provincial Legislature exclusive power to make laws in relation to the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made within the scope of its powers. The Act now in question fell within the latter provision, and was, therefore, within the powers of the Legislature of Ontario.

Secondly, it was contended that, as, under the order of the 27th February, 1917, the first 100 additional cars were to be placed in operation not later than the 1st January, 1918, there was a complete breach of the order on that date; and, accordingly, there could not after that date be such a non-compliance with the order as to subject the company to the penalties authorised by the Act. Their Lordships were unable to agree with this contention. The substance of the thing to be done was to put the additional cars in service. The limit of time was a further and subsidiary provision; and, notwithstanding the breach of this latter provision, the direction to provide the cars remained in force.

But, thirdly, it was argued on behalf of the appellants that the order of the 19th April, 1918, was not authorised by the Act of 1918, as it was an order not for enforcing compliance with the order of the 27th February, 1917, but for punishing a past breach of the order; or, in other words, that the only order contemplated by the new sec. 260*a* was an order fixing a period within which some existing or future order should be complied with, and imposing a penalty for every day of default after that period had elapsed. In their Lordships' opinion, that was the true construction of the section. By it the Board is authorised to impose penalties for non-compliance with its orders, but subject to the condition that such penalties must be imposed "for the purpose of enforcing compliance" with those orders; and this expression points, not to the summary imposition of a penalty for a past breach without previous warning, but to the imposition of a penalty in advance and for the purpose of procuring by means of such an inducement obedience to the order. Further, it was plain that sec. 260*a*, although general in its terms, was passed with special reference to

the liabilities of the Toronto Railway Company under the order of the 27th February, 1917; and it was not to be supposed that the Legislature of Ontario, knowing that a breach of that order had occurred and could not be remedied without some further allowance of time, intended to authorise the imposition of a daily penalty commencing from the day following that on which the Act became law. It was not the intention of the Legislature that the Board should be authorised to impose penalties except after giving to the railway company a warning that after a specified period penalties would be imposed, and an opportunity of avoiding them by compliance, within that period, with the requirements of the Board; and, accordingly, the order of the 19th April, 1918, was not authorised by the Act.

Apart from the above considerations, the procedure adopted by the Railway and Municipal Board in making the order was open to question. The railway company appeared before the Board on the 19th April, 1918, for another purpose. No claim had been made by the city corporation for penalties under the recent Act, no notice or summons had been given or issued by the Board which indicated that the question of penalties would come under consideration, nor was this question even referred to at any time before judgment was delivered. Accepting the view that the company were gravely in default, they were yet entitled, before being subjected to a heavy penalty, to have notice of the claim and an opportunity to meet it. Whatever view, therefore, might be taken as to the construction of sec. 260*a*, it seemed doubtful whether the present order could stand.

No opinion was expressed upon the question whether the Ontario Railway and Municipal Board should be regarded as a "Superior Court" within the meaning of sec. 96 of the British North America Act.

The appeal should be allowed, and the respondents should pay the costs of this appeal and of the appeal to the Appellate Division.

Appeal allowed.

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 24TH, 1919.

STEPHENSON v. BROWN.

Trees and Timber—Trees Cut on Plaintiff's Land in Excess of Authority—Finding of Trial Judge—Damages—Appeal.

Appeal by the defendant from the judgment of ROSE, J., ante 335.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, SUTHERLAND, and MASTEN, JJ.

William Proudfoot, K.C., and G. H. Gilday, for the appellant.

James McCullough and John W. McCullough, for the plaintiff, respondent.

The judgment of the Court was read by SUTHERLAND, J., who, after stating the facts and reviewing the evidence, said that the findings of the trial Judge could not, upon the evidence, be disturbed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1920.

WATT v. HITCHCOCK.

Contract—Architects—Remuneration for Services—Quantum—Percentage of Total Cost of Work Done—Ascertainment upon Reference—Costs.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 16 O.W.N. 355.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

J. A. E. Braden, for the appellants.

T. G. Meredith, K.C., for the defendants, respondents.

THE COURT allowed the appeal with costs here and below on the Supreme Court scale. One month allowed to the parties within which to agree, if possible, as to the amount due to the plaintiffs.

Failing such agreement, there shall be a judgment for the plaintiffs declaring that they are entitled to 3½ per cent. on the total cost of the work, which shall mean alterations to the building and cost of plumbing, heating, and electrical work. Reference to the Master at London to ascertain the amount to which the plaintiffs are entitled according to the declaration; the amount found by the Master to be paid by the defendants. The costs of the reference shall be in the discretion of the Master. The amount paid into Court will be paid out to the plaintiffs on account of the amount which shall be found due to them.

SECOND DIVISIONAL COURT. FEBRUARY 26TH, 1920.

SUPERIOR COPPER CO. LIMITED v. PERRY AND SUTTON.

Company—Shares—Action for Amount of Call Made by Directors—Validity—7 Edw. VII. ch. 117 (O.)—8 Geo. V. ch. 20, sec. 30 (O.)—Ontario Companies Act, R.S.O. 1914 ch. 183, sec. 15 (6), (7)—Jurisdiction of Ontario Court—Defendant Resident in Foreign State—Assignee in Bankruptcy—Assessment of Shareholders—Bona Fides—Defences to Action—By-law of Directors—Confirmation by Shareholders—Service out of the Jurisdiction—Determination of Right in Former Action—Res Adjudicata.

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The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

M. L. Gordon, for the appellant.

R. McKay, K.C., and A. W. Langmuir, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

RE REID—LATCHFORD, J.—FEB. 27.

Executors—Passing Accounts in Surrogate Court—Executors Charged with Sums Said to be Gifts by Testator in Lifetime—Jurisdiction of Surrogate Court—Investigation in another Forum.]—An appeal by the executors of the will of R. H. Reid, deceased, from the order of a Surrogate Court Judge upon the passing of the appellants' accounts. By the order the executors were charged with sums of money which came to their hands before the death of the testator, and which were said to be gifts. The executors were the father and brother of the testator. The appeal was heard in the Weekly Court, Toronto. LATCHFORD, J., in a written judgment, said that the learned Judge of the Surrogate Court might have had ample grounds for the conclusions now the subject of attack; but what the grounds were did not clearly appear. The matters in dispute could not properly be investigated on the passing of the executors' accounts; and, from circumstances disclosed, they should be fully investigated in a proper forum. The learned Judge suggested that they should be determined in an action against Andrew Reid and Philip Clayton Reid, brought by the residuary devisees and legatees, the children of the testator, by their next friend. The validity or invalidity of the alleged gifts of $600 and $2,690, obtained from the testator when he was slowly dying, could be established satisfactorily in no other way. In the meantime, or until advised that an action will not be begun, judgment upon the appeal will be withheld. W. C. Mikel, K.C., for the executors. E. J. Butler, for the widow and children of the testator.

CORRECTION.

In SELICK v. NEW YORK LIFE INSURANCE CO., ante 463, in the catch-words, second line, for "Trial Judge" read "Counsel."

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Employee in Course of Employment Injured by Negligence of Third Person—Election to Claim Compensation from Board—Payment of Compensation-money by Board—Board Subrogated to Rights of Injured Person—4 Geo. V. ch. 25, sec. 9—Action Brought by Injured Person against Wrongdoer—Recovery of Judgment for Damages and Costs—Action Maintainable in Name of Injured Person—Amount of Judgment to be Paid to Board—Consent of Board after Judgment to Withdrawal of Election—Appeal from Judgment—Meaning and Effect of "Subrogation." *Hutton* v. *Toronto R.W. Co.*, 16 O.W.N. 236, 45 O.L.R. 550.—APP. DIV.—*Toronto R.W. Co.* v. *Hutton*, 17 O.W.N. 293.—S.C. CAN.

See Master and Servant, 1.

WRIT OF SUMMONS.

See Company, 5—Practice, 1, 5, 6.