Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The City of Montreal v. The Montreal Street Railway Company, from the Court of King's Bench for the Province of Quebec (Appeal Side); delivered the 24th June 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

Under a contract dated the 8th of March 1893, expressed in English and made between The Montreal Street Railway Company and the City of Montreal, embodying a by-law (No. 210) passed by the City on the 21st of December 1892, the Company has established and is now operating lines of railway in Montreal for the conveyance of passengers by means of electric cars.

In order to determine a controversy as to their relative obligations under this contract both parties agreed to submit to the Court under Article 509 of the Code of Civil Procedure, Province of Quebec, the following questions:—

(*a*) Whether the Company is bound not only to keep its tracks clear from ice and snow but also to remove or cause to be removed from the

streets and convey elsewhere the snow which is so cleared from its tracks ?

(*b*) Whether the Company without the permission of the City Council can use for the purpose of clearing the snow and ice from its tracks any electric sweepers, rotary brushes, or other similar apparatus which sweeps said snow or ice on to the street ?

The Superior Court answered both questions in favour of the Company. The Court of King's Bench affirmed the decision of the Superior Court, Ouimet J. dissenting.

The answer to the two questions submitted to the Court depends mainly on the three following Articles of the contract to each of which is subjoined a reference to the corresponding section of By-law No. 210 which is expressed in French.

Article 3. The City shall grant the said Company all licenses, rights, and privileges necessary for the proper and efficient use by electric power to operate cars in the said streets in the manner successfully in use elsewhere, including the right to open said streets for the purpose of inserting and maintaining, and to insert and maintain poles for supporting the wires conveying electric power, but only for the service of their cars and not otherwise, provided that the said City be not bound to supply any land, water, or other property whatever. (By-law Section 2).

Article 16. The Company shall under instructions from the City keep their track free from ice and snow, and the City may at its option remove the whole or such part of ice and snow from curb to curb as it may see fit from any street or part of street in which cars are running, including the snow from the roofs of houses thrown or falling into the streets, and that removed from the side walks into the streets with the consent of the City, and the Company

shall be held to pay one-half of the cost thereof. (By-law Section 30).

Article 30. The cars will be held to run the year round without interruption, but should this prove impracticable during the winter season, sleighs may be substituted for cars at the option of the City Council. (By-law Section 25).

The only other Articles to which it is necessary to refer as bearing on the relations between the City and the Company are Articles 36, 48, and 42.

By Article 36 the Company agreed to pay to the City a percentage upon the total amount of its gross earnings rising gradually from 4 per cent. of its gross earnings up to $1,000,000 to 15 per cent. above $15,000,000. (By-law Section 35.)

By Article 48 it was declared that By-law No. 148, which had formerly governed the relations between the Company and the City, was repealed and that the Company relinquished all privileges under it and all contracts and arrangements entered into between the Company and the City "in order that they may "be absolutely subject to the present contract "dating from the date hereof." (By-law Section 42.)

The duration of the contract was to be the period of 30 years from the 1st of August 1892 (Article 42). At the expiration of that period and at the end of every subsequent period of five years the City was to have the option of taking over the undertaking at a valuation.

In the region of Montreal there is a long cold winter and a heavy snow fall. The practice is to give up wheeled traffic during the winter time and to use sleighs.

For many years before 1893 the Company had worked its traffic by horse power. No attempt was ever made at that time to keep the track of the railway open in winter. The Company used

sleighs as everybody else did. The sleighs ran on the snow under which the track was buried. The snow in the streets beaten down by the traffic stood at a height of about 18 inches or so. Some surface snow was occasionally removed when the fall was very heavy; but, generally speaking, the City, as the street authority, did little more during the winter than level the roadway, clearing off the inequalties caused by the masses of snow falling from the roofs or removed from the side walks. It was not until the breaking up of the frost in Spring that the snow and slush were carted away from the streets in order to prevent flooding in cellars and basements of houses.

The introduction of electricity has altered the situation altogether. By means of electrical cars furnished with rotary brushes always ready, started at the beginning of a snow storm and kept moving to and fro night and day until the snow ceases to fall, it becomes practicable to keep the track open during the winter. The effect of clearing the track is to leave a trench or ditch in the middle of the street dangerous for ordinary traffic. The only thing to be done to prevent continual accidents is to take away the snow in the streets to within about 6 inches of the ground, as it is not possible to leave more than 5 or 6 inches on the track between the rails. It was in view of this change of circumstances and methods that the contract of the 8th of March 1893 was made.

During the winter of 1893–1894 the Company, at the request of the City, did all the carting, and the City afterwards repaid the Company one half of the cost of the work. This system proved unsatisfactory, and so the City itself undertook the work. Differences, however, soon arose between the City and the Company as to the true interpretation of the Contract. The City insisted

that if the cost of clearing the streets was to be divided equally, it would throw upon it more than a fair share of the expense. After some negotiation an agreement was made, to last for five years, that the Company should contribute every year a fixed sum per mile. When this agreement came to an end, the differences between the two parties were renewed, and ultimately, as already stated, these differences were submitted to the Court for decision.

The contention on the part of the City Council was that the Company ought to pay at least two-thirds of the expense instead of one-half. They put their case in two ways. They maintained that the Company was bound not merely to keep its track clear of snow and ice, but to remove from the streets altogether the snow and ice cleared off its track. In the event of this contention failing, they insisted that, inasmuch as it was provided that the Company should keep its track clear "under instructions "from the City," it was competent for the City to prohibit the use of electric brushes and other similar appliances, and so to bring the Company to terms.

The Superior Court and the Court of King's Bench rejected both the contentions of the City. As regards the second point, the Court of King's Bench held that the provision as to "instructions from the City" applied only to the extent of the work to be done and not to the mode to be adopted for its accomplishment. As to the first point, both Courts held that the Company was merely bound to keep its track free from snow and ice, and under no obligation to take away the snow and ice from the street. They thought it clear "que l'intention et l'objet "des deux parties étaient de considérer la neige "qui tombe sur les toits, les trottoirs, et la rue, "et la glace qui se forme sur cette dernière

" comme une seule et unique masse, et de diviser " en deux parts égales le coût du transport de " tout ce qui devrait en être enlevé d'un trottoir " à l'autre,—from curb to curb, including the " snow from the roofs, and that removed from " the side."

Agreeing entirely in the reasons appearing in the Judgment of the Court of King's Bench delivered by Blanchet, J., and in the observations added by Sir Alexander Lacoste, C.J., their Lordships do not think it necessary to do more than express very briefly their concurrence in the conclusions arrived at by the Courts of Quebec.

It seems to their Lordships that there is really no difficulty in ascertaining the meaning and effect of Article 16 of the Contract. The learned Counsel for the Appellants laid great stress upon the fact that the Contract does, in the clearest possible terms, leave the removal of ice and snow to the discretion of the City Council. " The " City may, at its option, remove the whole " or such part of ice and snow from curb to curb " as it may see fit from any street or part of street " in which cars are running." It is a mere option, it was said, and nothing more. That is perfectly true as between the City and the Company. The City is under no obligation to the Company as regards the removal of the snow. It is not a matter in which the Company has much interest. To the shareholders it would be no loss of profit, and perhaps not a matter of much regret if the streets on which the electric cars are running were impassable to all vehicular traffic except its own. But it must have been within the contemplation of both parties that, as soon as the Company cleared its track, it would be incumbent on the City, in the discharge of its duties as the road authority, to remove the snow from the streets so as to make them safe for

ordinary traffic. The obligation of the City is an obligation to the public, not to the Company, but for all that it is an obligation which the City Council cannot decline or neglect. It seems to their Lordships that, when this is borne in mind, Article 16 becomes clear enough. It describes a continuous operation. Once begun the work must go on. The Company and the City take different and separate parts. But the operation is a combined operation, and in the result the work is to be paid for jointly. The Company is bound to clear its track. There is no provision as to how it is to be done. Seeing that the inhabitants are permitted to tumble snow from the roofs of their houses into the street, and to throw into the street snow from the sidewalks, it would be almost absurd to contend that the Company, clearing its track for the benefit of the City as well as for its own benefit, is not at liberty to sweep the snow into the street. There are no words expressly or impliedly forbidding it to do so. The option of the City (which is really an obligation, though not an obligation to the Company) is to remove the snow "from curb to curb." Between those limits, of course, is included the Company's track.

In connection with this part of the case an argument was advanced at the Bar which does not appear to have been advanced in the Courts of Quebec. It was an argument founded upon the case of *Ogston* v. *The Aberdeen District Tramways Company*, A. C. 1897, page 111. In that case it was held that a Tramway Company was committing a nuisance not merely by flooding the streets with briny slush injurious to the feet of horses, but also by piling snow from its track in ridges or lumps upon the surface of the streets. The argument as put forward at their Lordships' Bar seemed to be

an argument drawn, not so much from the principles laid down in the House of Lords, as from the facts of a particular case where the surrounding circumstances were different. It by no means follows, as indeed a careful perusal of the Scotch case will show, that what is a nuisance in Aberdeen would be a nuisance in Montreal. In Aberdeen winter snow is not permanent. In Montreal it is, and the inhabitants are invited, or at any rate permitted, to throw the snow which is an inconvenience to them into the middle of the streets. Be this as it may, if the true construction of the Contract be (as their Lordships think it is) that the Company is permitted by the street authority to clear the snow from its track by sweeping it into the street, there can be no room for the contention that that operation is to be treated as a nuisance.

As regards the second question their Lordships also agree with the Courts of Quebec. The contention of the City that, in order to exact terms which they would consider more equitable, they are entitled to put pressure upon the Company by refusing to allow it to use the readiest and best, if not the only, means of doing that which it had contracted to do, is not a contention which commends itself to their Lordships. There is however no foundation for the position assumed by the City. The City granted to the Company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets "in the manner successfully in use else-" where." It is in evidence that electric sweepers are the only appliances which could enable the Company to run its cars all the year round without interruption as required by Article 30 of the Contract. These electric sweepers are in use in Quebec, Ottawa, Toronto, St. Paul,

Minneapolis, and Winnipeg, where the climatic conditions are much the same as those in Montreal. Their Lordships think that the use of these appliances is authorized by the provisions of Article 5 of the Contract and that no further authority from the City is required.

Their Lordships will therefore humbly advise His Majesty that the Appeal ought to be dismissed. The Appellants will pay the costs of the Appeal.