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*June 11.
*June 24.

THE HAMILTON STREET RAILWAY COMPANY (DEFENDANTS) } APPELLANTS;

AND

ROBERT WEIR AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Negligence—Obstruction of highway—Street railway—Trolley poles between tracks—Statutory authority—Protection by light.

The Act incorporating the Hamilton Street Railway Co. authorized the City Council to enter into an agreement with the company for the construction and location of the railway. A by-law passed by the Council directed that the poles for holding wires should, on part of a certain street, be placed between the tracks, which was done under supervision of the City Engineer.

Held, reversing the judgment appealed against (32 Ont. L.R. 578), that the location of the poles was authorized by the legislature and did not constitute an obstruction of the highway amounting to a nuisance; the company was, therefore, not liable for injury resulting from an automobile while driven at night coming in contact with the pole.

Held, also, that as on the City Council was cast the duty of regulating the operation of the railway in respect to traffic and travelling on the street and it had made no regulation as to lighting the pole the company was under no obligation to do so.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial in favour of the plaintiffs.

On the 23rd day of May, 1913, at about nine o'clock in the evening, the respondent Robert Weir was driv-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 32 Ont. L.R. 578.

ing an automobile in an easterly direction along King Street, being a public highway in the City of Hamilton, and came into collision with a pole supporting the trolley wires belonging to the appellants situated on the devil strip between the tracks of the said appellants' line of railway, which were situated on King Street immediately north of a park in the centre of the street, known as the Gore Extension, and by reason of the said collision, the respondent's automobile was damaged and the respondent Robert Weir and another occupant of the car, the respondent Gladys Weir, to some extent injured.

The action came on for trial before the Honourable Mr. Justice Latchford with a jury on the 21st of April, 1914, at the sittings holden at Toronto, when questions were submitted to the jury, who found the company guilty of negligence and respondents not guilty of contributory negligence. The trial judge entered judgment upon these answers in favour of the respondents, Robert Weir and Gladys Weir, for the sum of $1,035.20, the action being dismissed as to the claims of the respondents, James Gowans Kent and Caroline Kent.

From this judgment an appeal was taken to the Appellate Division of the Supreme Court of Ontario and that court gave judgment dismissing the appeal with costs, the Honourable Mr. Justice Hodgins dissenting, the Honourable Mr. Justice Leitch expressing no opinion.

From that judgment the appellants appealed to the Supreme Court of Canada.

The statute incorporating the appellants and under the authority of which the municipal corporation of

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the City of Hamilton had power and control over the location of the poles of the appellant company is chapter 100 of 36 Victoria (1873), more particularly sections 7, 15 and 16.

"7. The company are hereby authorized and empowered to construct, maintain, complete and operate a double or single iron railway, with the necessary side tracks and turnouts, for the passage of cars, carriages and other vehicles adapted to the same, upon and along streets and highways within the jurisdiction of the Corporation of the City of Hamilton, and of any of the adjoining municipalities as the company may be authorized to pass along, under and subject to any agreement hereafter to be made between the council of the said city and of said municipalities respectively, and of the said company and under and subject to any by-laws of the said corporation of the said city and municipalities respectively, or any of them, made in pursuance thereof * * * and to construct and maintain all necessary works, buildings, appliances and conveniences connected therewith."

"15. The council of the said city and of any of the said adjoining municipalities, or any of them, and the said company, are respectively hereby authorized to make and to enter into any agreement or covenants relating to the construction of the said railway; for the paving, macadamizing, repairing and grading of the streets or highways; and the construction, opening of, and repairing of drains or sewers; and the laying of gas and water pipes in the said streets and highways; the location of the railway, and the particular streets along which the same shall be laid; the pattern of rail; the time and speed of running of the cars, the time within which the works are to be commenced;

the manner of proceeding with the same, and the time for completion; and generally for the safety and convenience of passengers; the conduct of the agents and servants of the company; and the non-obstructing or impeding of the ordinary traffic."

In pursuance of the authority conferred upon the municipality by sections 7, 15, and 16, by-law No. 624 of the City of Hamilton, was passed and is incorporated as schedule "A" to an Act respecting the Hamilton Street Railway Company, being 56 Vict. ch. 90 (1893)—section 28 of the said by-law providing as follows: "All poles shall be placed on the sides of the street, except on King Street, between Hughson and Mary Streets, where they shall be placed between the tracks, and all the poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes." And section 31 provides that "all works of construction and repair and of removal and spreading of snow or ice shall be done, and all poles shall be placed under the supervision and to the satisfaction of the city engineer."

The pole in question was located in the position it occupied at the time of the accident, in the year 1893, by Mr. Haskins, who was city engineer at that time, and was erected under his directions. Subsequently, before the accident, an application was made by the street railway company to remove the poles on the devil-strip between Hughson and Mary Streets, of which the pole in question was one, but the municipality refused to entertain their application.

D. L. McCarthy K.C. and *A. H. Gibson* for the appellants, referred to *National Telephone Co.* v.

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Baker (1); *McLelland* v. *Manchester Corporation* (2).

Howitt for the respondents. No statutory authority could justify the obstruction of the highway by placing the pole in the middle of the street. See *Aikinson* v. *City of Chatham* (3).

THE CHIEF JUSTICE.—I would allow this appeal.

DAVIES J.—I confess myself unable fully to appreciate the meaning of the statement of the learned judge who delivered the judgment of the second Appellate Division of Ontario, and on which that judgment was founded as to "the limited character of the power of the provincial legislature to interfere with a public highway."

I have always understood that when legislating within any of the powers conferred upon it by the 92nd section of the "British North America Act," the powers of the provincial legislature are plenary except in so far as its legislation may be over-ridden or controlled by legislation of the Parliament of Canada under some one of the enumerated powers of section 91 of that Act.

No such question, however, of the clashing of the powers of the Parliament and the legislature arises in this case.

In my judgment the by-law under which the pole in question was placed in its specific location in the street was fully authorized by the incorporating statute of the appellant company and the pole must, therefore, be held to have been there properly.

(1) [1893] 2 Ch. 186. (2) [1912] 1 K.B. 118, at p. 130.
(3) 26 Ont. App. R. 521.

The finding of the jury that the trolley poles "should have been placed in a uniform position" cannot be upheld under the proved facts and the law. The company placed the poles in the places where they were directed by the city authorities under the by-law to place them. No other negligence on the defendants' part was found and this specific finding excludes any other.

I think, therefore, the appeal must be allowed and the action dismissed with costs including any costs which may have been incurred by the city the third party to the action.

IDINGTON J.—The appellant company is found by the verdict of a jury, maintained by the judgment of the Appellate Division of the Supreme Court of Ontario, guilty of negligence because its "trolley poles should have been placed in a uniform position along the entire thoroughfare," and, therefore, condemned to pay damages suffered by the respondents in consequence of driving, at thirteen miles an hour, along that part of the street whereon the appellant's electric street railway was constructed and colliding with one of the said trolley poles, although there was alongside the said railway a travellable space of street twenty-five feet in width upon which they might easily have driven.

The Legislature of Ontario which has absolute legislative power in the premises delegated to the municipal council of the corporation of the City of Hamilton the powers contained in the following amongst other sections:—

7. The company are hereby authorized and empowered to construct, maintain, complete, and operate a double or single iron rail-

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way, with the necessary side tracks and turnouts, for the passage of cars, carriages, and other vehicles adapted to the same, upon and along streets and highways within the jurisdiction of the Corporation of the City of Hamilton, and of any of the adjoining municipalities, as the company may be authorized to pass along, under and subject to any agreement hereafter to be made between the council of the said city and of said municipalities respectively, and the said company, and under and subject to any by-laws of the said corporation of the said city and municipalities respectively, or any of them, made in pursuance thereof, and to take, transport, and carry passengers and freight upon the same, by the force or power of animals or such other motive power as they may be authorized by the council of said city and municipalities respectively by by-law to use, and to construct and maintain all necessary works, buildings, appliances, and conveniences connected therewith.

15. The council of the said city, and of any of the said adjoining municipalities, or any of them, and the said company, are respectively hereby authorized to make and to enter into any agreement or covenants relating to the construction of the said railway; for the paving, macadamizing, repairing, and grading of the streets or highways; and the construction, opening of, and repairing of drains and sewers; and the laying of gas and water pipes in the said streets and highways; *the location of the railway*, and the particular streets along which the same shall be laid; the pattern of rail; the time and speed of running of the cars, the time within which the works are to be commenced; the manner of proceeding with the same, and the time for completion; and generally for the safety and convenience of passengers; the conduct of the agents and servants of the company; and the non-obstructing or impeding of the ordinary traffic.

16. The said city, and the said municipalities, are hereby authorized to pass any by-law or by-laws, and to amend, repeal, or enact the same for the purpose of carrying into effect any such agreements or covenants, and containing all such necessary clauses, provisions, rules, and regulations for the conduct of all parties concerned, including the company, and for the enjoining obedience thereto, and also for the facilitating the running of the company's cars, and for regulating the traffic and conduct of all persons travelling upon the streets and highways through which the said railway may pass.

The said council pursuant thereto passed a by-law which permitted the use by appellant of certain streets for its railway, and amongst other things relative thereto, provided as follows:—

28. The poles to be used for the company's wires on James Street, from Cannon Street to Hunter Street, and on King Street,

from Bay Street to Mary Street, shall be of iron and of the most improved pattern, except where the company shall use the poles of any telegraph or telephone company, and the wooden poles used by the company shall all be straight and perpendicular, and as nearly as possible of the same shape and size, and shall be dressed and painted throughout, and all poles shall be placed on the sides of the street except on King Street, between Hughson and Mary Streets, where *they shall be placed between the tracks*, and all the poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes.

31. All works of construction and repair and of removal and spreading of snow or ice shall be done, and all poles shall be placed under the supervision and *to the satisfaction of the city engineer.*

The poles complained of were accordingly placed as directed some twenty years before this accident now in question. The location of the railway was wholly within the power of the council. Ample reason is assigned for placing the poles as was done.

The matter was wholly within the legislative power thus conferred upon said council who no doubt exercised their best judgment (aided as appears by able and experienced counsel as to the law and by an engineer of skill) relative to public safety and convenience.

I do not think it is competent for a jury to sit in review upon such legislative work twenty years later, and to find that such legislative action was an act of negligence.

And if it was not negligence on the part of the councillors so directing, it certainly could not be negligence on the part of the appellant bound to conform therewith or have their road removed off the street.

I am also unable to understand how a gentleman driving an automobile, on a dark and misty night, at the rate he admitted over that side of the street whereon the appellant's track was laid, even though well lighted, could be acquitted of negligence, when he had

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no occasion for such a proceeding and a reasonably wide street alongside the track to travel upon. Possibly the city council has been guilty of negligence in failing (if it has) to pass and enforce a by-law prohibiting such conduct.

I think the action should have been dismissed and that this appeal should be allowed with costs throughout and the action dismissed.

DUFF J.—There are two questions:—First, is the company liable as for nuisance in placing its poles where it did place them? That question must be answered in the negative for the short reason that by-laws passed under the authority of statute expressly required the poles to be placed where these poles were placed. The precise thing that was done was authorized by the legislature. It, therefore, could not be a nuisance in contemplation of law. If harm arises from the placing of poles where the legislature directs they shall be put, such harm, as Lord Blackburn said, is *damnum absque injuriâ*. As to the authority of the legislature, with great respect, I think item 10 of section 92, "British North America Act," must have been overlooked. If the construction of the "British North America Act" adopted below were accepted the result would be that every provincial railway crossing a highway with its locomotives, and every tramway worked under provincial authority in the streets of a city, is a public nuisance.

The next question is whether there is evidence of negligence to go to the jury in the failure to provide a light. I think the answer to that also lies in the fact that the company was authorized to put its poles where it did put them, the city council having power

to exact conditions for the protection of the traffic, and the city council also assuming the lighting of the streets. I do not think that any jury would be entitled to find that in these circumstances any legal duty was cast upon the railway company to apply itself to the question whether the lighting provided by the municipality in the particular locality was or was not sufficient for the protection of persons using the highway.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed.

The ground of the plaintiffs' claim, which has been upheld in the provincial courts, is that they were injured as the result of an automobile in which they were travelling colliding with a trolley pole of the defendants placed in the middle of the space between the double track, commonly called the devil-strip, on King Street in the City of Hamilton. This they allege was an unlawful obstruction of a highway amounting to a nuisance. The defendants maintain that they were obliged by the provisions of the statute under which their railway is constructed and operated to place and maintain the pole in question precisely where it was. There is no doubt that the pole was placed where a by-law of the municipality expressly required that it should be. The contention of counsel for the respondents is that the provincial statute does not authorize such a by-law, and that, if it does, the statute is *pro tanto ultra vires*.

Its incorporating statute (36 Vict., ch. 100), authorizes and empowers the appellant company

> to construct, maintain, complete and operate a double or single iron railway * * * upon and along streets and highways within the

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jurisdiction of the corporation of the City of Hamilton * * * subject to any agreement hereafter to be made between the council of the said city * * * and the said company and under and subject to any by-laws of the said corporation of the said city * * * made in pursuance thereof * * * and to construct and maintain all necessary works, buildings, appliances and conveniences connected therewith.

It is further enacted that

the council of the said city * * * and the said company are respectively hereby authorized to make and to enter into any agreement or covenants relating to the construction of the said railway * * * the location of the railway and the particular streets upon which the same shall be laid * * * and generally for the safety and convenience of passengers, the conduct of the agents and servants of the company and the non-obstructing or impeding of the ordinary traffic;

and the city is authorized

to pass any by-law or by-laws and to amend, repeal or enact the same for the purpose of carrying into effect any such agreements or covenants and containing all such necessary clauses, provisions, rules and regulations for the conduct of all parties concerned, including the company and for the enjoining obedience thereto and also for the facilitating the running of the company's cars and for regulating the traffic and conduct of all persons travelling upon streets and highways through which the said railway may pass.

The by-law in question was passed under this legislation and was subsequently appended as a schedule to an amending statute (56 Vict. ch. 90), which, however, does not in terms approve or confirm it. The effect of this legislation is discussed in the dissenting judgment of Mr. Justice Hodgins and I concur in his opinion that it empowered the municipality to enact the by-law under which the pole in question was placed and maintained where it was.

But I cannot agree with the view of the learned judge that there should be a new trial to permit of an investigation being made to ascertain whether some such precaution as the placing of a light on the pole should have been taken. There is no by-law or regu-

lation of the municipality which prescribes anything of the kind and it was to the council of the municipality and not to the defendants that the legislature entrusted the regulation of the operation of the railway so far as it might affect the safety of traffic on the highway. In my opinion the statute and the by-law afford a complete answer to the plaintiff's claim.

Mr. Justice Sutherland appears to think that if the by-law in question is authorized by the provincial statute the latter involves an interference with the legislative jurisdiction of Parliament over criminal law. "Common nuisance" as defined in the Criminal Code would not cover an obstruction in a highway authorized by a provincial legislature in which control over highways as local works and undertakings is vested. Moreover, we are now concerned merely with a question of civil rights, over which the legislature of the province had undoubted jurisdiction. With respect, I am unable to appreciate the ground on which the learned judge bases his view that there has been an invasion of federal jurisdiction.

I would, for these reasons, allow the defendants' appeal and would dismiss this action with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Gibson, Levy & Gibson.*
Solicitors for the respondents: *Gregory & Gooderham.*