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*May 9.
*May 25.

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

THE CHATEAUGUAY AND NORTHERN RAILWAY COMPANY (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Construction of railway—Injunction—Interested party—Public corporations—Franchises in public interest—Lapse of chartered powers—"Railway" or "tramway"—Agreement as to local territory—Invalid contract—Public policy—Dominion Railway Act—Work for general advantage of Canada—Quebec Railway Act—Quebec Municipal Code—Limitation of powers.

An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy and cannot be enforced by the courts.

Per Sedgewick and Killam JJ.—A company having power to construct a railway within the limits of the municipality has not such an interest in the municipal highways as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways with the permission of the municipality under the provisions of article 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorize the construction of a tramway by an existing corporation notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by non-user within the time limited in its charter.

Per Girouard and Davies JJ.—A railway company which has allowed its powers as to construction to lapse by non-user within the time limited in its charter and which does not own a railway line

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ. (*Note.* The Chief Justice took no part in the decision of the court.)

within the limits of a municipality where such powers were granted has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway. Where a company subject to the Dominion Railway Act, with powers to construct railways and tramways, has allowed its powers as to the construction of new lines to lapse by non-user within the time limited, it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of article 479 of the Quebec Municipal Code.

APPEAL from the judgment of the Court of King's Bench, appeal side, confirming the *dispositif* of the judgment of the Superior Court, District of Montreal, (Pagnuello J.) which maintained the plaintiff's action and made absolute the injunction restraining the defendants perpetually from constructing the tramway in question in the suit.

The action was for an injunction to restrain the defendants from constructing a tramway being built by them on a highway between the City of Montreal and a point in the Parish of Longue Pointe, and for damages. The grounds of action were:

1. That the plaintiffs and defendants had, on 6th February, 1899, entered into an agreement, that they would abstain from constructing lines of their respective railways in each other's local territory and that the attempted construction of the railway or tramway in question within the limits of the Parish of Longue Pointe was in violation of this agreement;

2. That the defendant company had not power to construct the railway in question, as any powers it may have had for that purpose had lapsed under the provisions of section 89 of the Dominion Railway Act, under which the defendants had been placed by a Dominion statute, 57 & 58 Vict. ch. 84, declaring their undertaking to be a work for the general advantage of Canada; and,

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3. That the defendants had not complied with the provisions of the Dominion Railway Act as to the deposit of plans and were constructing the railway along an existing highway without leave from the Railway Committee of the Privy Council.

The defence was that the alleged agreement was invalid; that the tramway was being constructed under the authority of a municipal by-law and with the permission of the turnpike company which owned the highway; that the provisions of sections 89, 131 and 138 of "The Railway Act" were not applicable to tramways; that the plaintiffs had sold their line of railway so far as it had been constructed and had lost their charter rights and powers by non-user and, consequently, had no interest sufficient to maintain their action.

The judgment of the Superior Court maintained the plaintiffs' action in all respects, made absolute the interim injunction which had been issued and condemned the defendants to pay plaintiffs the sum of $500 for damages assessed by the trial judge. On appeal to the Court of King's Bench, appeal side, the *dispositif* of the Superior Court judgment was confirmed for the sole reasons that it was considered that the plaintiffs had established a sufficient status and interest to sustain their action and that, at the date of the action, the defendants had, by limitation of time, lost their statutory right to construct a new line of tramway such as they had commenced in the municipality of Longue Pointe.

Macmaster K.C. and *Campbell K.C.* for the appellants. The legislation specially affecting the rights and powers of the appellants consists of the Quebec statutes 48 Vict. ch. 74; 49 Vict. ch. 85; 51 Vict. ch. 65 and the Dominion Act,—57 & 58 Vict. ch. 84, besides the Dominion and the Provincial Railway

Acts and the Municipal Code. The company have power to construct railways and tramways in the Island of Montreal and it is submitted that, as regards tramways, the provisions as to limitation of time in the "Railway Act" do not apply. There are many distinctions to be drawn between railways and tramways, and provisions necessary and applicable to one would be quite out of place in respect to the other. See definitions of "tramway" in the Encyclopædia Britannica and Standard Dictionary, also Larousse, Dictionnaire, *vo.* "Tramway"; *Matson* v. *Baird & Co.* (1).

It is submitted that the intention of the Legislature was to confer upon the company the power to build one or more railways direct from the centre of the city towards adjacent municipalities that could not easily be reached by the Montreal Street Railway, but that in those cases where the municipalities could be reached by extension of the Montreal Railway Company's system, then the appellants could construct a tramway. Powers to build a railway or to build a tramway are given in the statute in the alternative, and the two words have a distinct and different meaning. The ordinary policy which limits the time for the construction of a railway is due to the fact that railways have powers of expropriation and to cross or use highways by authority of the Railway Committee of the Privy Council; but, in the case of tramways, this policy is not applicable, because a tramway, in using the streets, does so under the control of the local authorities and upon terms dictated by them. The Railway Act defines "railway" in sec. 2, sub-sec. (*q*) —to mean "any railway which the company has authority to construct or operate, and includes all stations, depots, wharves, property and all works con-

(1) 3 App. Cas. 1082.

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nected therewith, etc.", whilst sub-sec. (*w*) defines "undertaking" as meaning "the railways and works of whatever description which the company has authority to construct or operate." If "railway" as defined includes or is equivalent to "tramway," even when the powers are given to a company in the alternative, then "railway" must read as having the same meaning consistently throughout the Act and such a reading would be inconsistent. For instance, if section 307 applies to tramways, nearly every tramway in Canada must have been a Dominion railway, and the extensions made from time to time under contracts with municipalities would have been illegal unless the tramways had had their charters extended by Parliament. The provisions relating to fares, tickets, traffic arrangements, servants and tolls would all apply to tramways if the word "railway" is equivalent to "tramway." The result would upset existing practices. See *dicta* in the case of *The Toronto Railway Co.* v. *The Queen* (1), and the express reservation made by the Privy Council in the same case (2).

Except upon the construction that their tramways are railways within the meaning of the Railway Act it cannot be argued that the appellants' power to build tramways has expired for there is no time limited for the construction of tramways.

On the other hand the respondents' powers for the construction of new lines of railway expired under the provision of the Quebec statutes, 58 Vict. ch. 64, sec. 29 and 62 Vict. ch. 75, sec 6; they have sold the whole of their constructed line and have no interest to maintain the injunction and no business interest to be protected.

The respondents were not serving the Parish of Longue Pointe as part of their local territory and the

(1) 25 Can. S. C. R. 24. (2) [1896] A. C. 551 at p. 557.

construction of the tramway in question is not a violation of the agreement as to invasion of territory. Under any circumstances the appellants, as an existing corporation, could construct the tramway under the provisions of Art. 479 of the Municipal Code and any agreement to the contrary would be *ultra vires* and invalid as against public policy. It is not possible to construe the contract as enabling the respondents to exclude others from Longue Pointe while not building itself in that municipality and not seeking traffic there. The clear intention in giving the two companies power to construct over the same territory was to ensure to such territory the advantages of tramway connection with Montreal; and while it might not be the policy that both should construct to the same point or in the same districts, it certainly was not the policy that the two companies enjoying those powers might by agreement between themselves exclude any locality from the advantages of connection with either of them.

As to damages none were proved and no details could be given. Strictly speaking the plaintiffs could not by any possibility sustain damage owing to the presence on the Longue Pointe road of ties and rails the property of the appellants. The construction had only been commenced for a day when they took their action. Nothing but the actual operation of the railway could cause any damage to anybody and as this had not taken place there could be no damage.

Lafleur K.C. and *Beaudin K.C.* (*Lemieux K.C.* with them) for the respondents. The statute 62 Vict. ch. 75 (Que.) was assented to on the 10th of March, 1899, and it recognized the contract invoked by the plaintiffs dated 6th February, 1899. It is in evidence that this contract was passed as the result of opposition which the appellants made to the

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proposed amendments to the respondents' charter granting extended powers, and that, as the result of a compromise, the agreement was embodied in the form of a contract, and the plaintiffs became bound by the statute not to establish, build or operate branches in territory in which appellants had built their electric railway, so long as the latter should not extend its line into the limits of Maisonneuve, Longue Pointe, Pointe-aux-Trembles and Rivière des Prairies. The contract on the part of the appellants recites this clause of the statute, and then sets forth that "The Chateauguay & Northern Railway Company undertakes not to construct its line on the territory of the party of the second part (The Park and Island Railway Company), and the said party of the second part undertakes not to construct its line on the territory of the party of the first part." There is evidence to the effect that the territory of the respondents included, at that time, the municipalities of Maisonneuve, Longue Pointe, Pointe-aux-Trembles and Rivière des Prairies, they having there constructed their line of railway, while the appellants' territory was included in the line from the City of Montreal to Sault au Recollet, Cartierville and Lachine. The breach of this contract is sufficient cause for the injunction and for damages. As the appellants are subject to the Dominion Railway Act and have not complied with the provisions of its sections 89, 131 and 138, they have no power to construct the tramway in question, nor to enter into any agreement in respect to it. The Municipal Code cannot help them for they are governed entirely by the Railway Act and, consequently, they have no statutory authority and their works are an intrusion upon and an obstruction of the highway. The respondents hold lands and are rate-

payers in the municipality and are entitled to the injunction against an improper use of the highway and to protect their business interests being interfered with by a rival company in the manner complained of.

The judgment was delivered on the 25th of May, 1904, all the judges who heard the arguments being present except His Lordship the Chief Justice, who took no part in the judgment rendered.

SEDGEWICK J.—I concur in the judgment allowing the appeal with costs, for the reasons stated by His Lordship Mr. Justice Killam.

GIROUARD J.—I concur in the judgment allowing the appeal with costs, for the reasons stated by His Lordship Mr. Justice Davies.

DAVIES J.—In this case I am of the opinion that the appeal must be allowed on the ground that the respondents (plaintiffs) had not at the date of their present action sufficient legal interest to entitle them to the injunction prayed. The trial judge, under a mistaken idea as to the meaning of the amendment in the plaintiffs' charter extending the time for the construction of the railway it was authorized to build, held that the plaintiffs' powers existed at the time of the commencement of the action. The Court of King's Bench while pointing out his error and holding that the plaintiffs' power of construction had ceased and that the company had previously sold the portion of the railway constructed by it going from Maisonneuve, a suburb of Montreal, to Bout de l'Isle, comprising thirteen miles of road, held, nevertheless, that there was no positive proof that these thirteen miles constituted all the plaintiffs' constructed line and that the court should therefore assume that the plaintiffs had

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sufficient legal interest to bring and maintain the action. I cannot accede to this conclusion.

That the company's powers of construction had expired is admitted; that the portion of the line they had constructed was sold and disposed of by them is proved and not challenged; and the defendant company in its pleadings expressly stated that at the time of the institution of the action, and for more than two years previously, the plaintiff company had no railway or works. The plaintiff company did not answer this allegation and did not attempt to prove that at the time of the institution of the action they had any railway or works. It is true that the Montreal Terminal Railway Company, to whom the plaintiff company had sold its constructed line of railway, had, in June, 1902, before the plaintiffs' powers of construction had expired, conveyed back to the plaintiffs certain lands upon which a railway might be built from Bout de l'Isle to the City of Montreal. But, as a matter of fact, that plaintiff company had allowed its chartered powers of constructing a railway to expire, and the mere possession of several pieces of land a long way off from the tramway, the construction of which was sought to be enjoined, but without any power of railway construction, would not of itself constitute such a legal interest as would be necessary to enable it to maintain such an action as this. The question is not whether the corporate existence of the plaintiff company had ceased, but whether their chartered powers of constructing railways or other works having ceased, their interest to oppose the construction by another company of such railways had not ceased, and, in my opinion, as they had sold and parted with all the line of railway they had constructed and gave no evidence of the possession of any property which the contemplated construction of the railway by appellant com-

pany would necessarily injure, I do not think they could maintain this action.

This conclusion, if correct, would dispose of the appeal and make it unnecessary to say anything upon the very important questions raised at the hearing, first, as to what was the legal effect of the agreement made between the companies whereby the appellant company contracted not to build a railway in certain parts of the Island of Montreal designated as "the territory" of the respondents; and, secondly, whether the chartered powers of the appellant company had expired and whether they were bound by the provisions of the Dominion Railway Act. But there are good reasons why the other important points should be dealt with and disposed of. And, right at the threshold of the first question upon the agreement, I desire to say that I entertain grave doubts whether it is not void for uncertainty. It speaks of the "territory" of the plaintiffs and the defendants but does not describe nor define what is meant by territory. It is quite admitted that the words do not cover all of the territory across or over which the companies respectively had chartered powers to build railways, and I doubt whether it would be possible to determine from the agreement itself what was meant or to admit oral evidence which would explain it.

Passing by that objection, however, I am of the opinion that the courts ought not to enforce and will not enforce an agreement by which a chartered company undertakes to bind itself not to use or carry out its chartered powers. I do not think such an agreement ought to be enforced because it is against public policy. If enforceable it practically amounts to an amendment and limitation of the chartered powers granted to the company by Parliament. Who can tell whether Parliament would have granted the

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limited powers only had they been asked or would have agreed to pass an amending Act limiting these powers or the areas within which they were exercisible as the agreement contemplated? Of course if it is lawful for a company possessing special statutory powers to bind themselves for a consideration not to exercise them in part they can do so in whole. The courts have no right to speculate whether Parliament would or would not have granted these chartered powers to the defendant company over the limited area. Parliament alone can enact the limitation, and neither courts of justice nor companies can substitute themselves for Parliament. If the principle is once conceded that chartered companies which have obtained powers from Parliament, presumably for the public good, can by contract with a rival company, or with others, limit themselves and their successors not to use those powers in whole or in part, the most serious consequences might result and the chief object of Parliament in chartering companies authorized to construct railways in certain sections of country or to promote legitimate rivalry and competition in such construction, might be defeated. The stronger company could in all cases buy up the weaker and a premium would be given to the creation of what are called, at the present time, "Trusts". I do not think the courts should lend their aid in any way to defeat the policy and object of Parliament with regard to the powers it has conceded to companies, even if the officials for the time being controlling those companies should agree to a limitation of their powers, and the then existing shareholders confirm the agreement.

The question has already been discussed by the House of Lords in the case of *Ayr Harbour Trustees* v

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Oswald (1), where it was decided that an agreement by a public body not to use their special powers was invalid, and this whether the body be one which is seeking to make a profit for shareholders or a body of trustees acting solely for the public good.

In that case Lord Blackburn says:

I think that where the legislature confers powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal* v. *Birmingham Canal* (2), and on which the late Master of the Rolls acted in *Mulliner* v. *Midland Railway Co.* (3).

In the United States similar conclusions have been reached by the courts. In *Chicago Gas Light Co.* v. *Peoples' Gas Light Co.*, (4) a contract by a corporation, authorized to manufacture and sell illuminating gas in a city, to discontinue such manufacture was held *ultra vires* and void; similarly held in *Re Appeal of Scranton Electric Light and Heat Co.* (5).

Then as to the powers of the appellant company under its charter to construct the road under the Municipal Act. The original charter obtained by it from the Quebec Legislature was superseded by the later charter obtained by it from the Parliament of Canada, 57 & 58 Vict., ch. 84. In this last Dominion charter the defendant company is declared to be a body

(1) 8 App. Cas. 623.
(2) L. R. 1 H. L. 254.
(3) 11 Ch. D. 611.
(4) 2 Am. St. R. 124; 121 Ill. 530.
(5) 9 Am. St. R. 79; 122 Pa. St. R. 154.

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corporate within the jurisdiction of the Parliament of Canada. The *undertaking* of the company is declared to be a work for the general advantage of Canada, and the Railway Act of Canada is made to apply to the company *and its undertaking* instead of the Acts of the Province of Quebec and the Railway Act of Quebec. Nothing is said expressly as to the time within which its chartered powers are to be exercised, but as the "Railway Act" of the Dominion was expressly made applicable to it, we turn to the latter Act and find section 89 expressly prescribing that if the railway authorized by any special Act is not finished and put in operation seven years from the passing of such special Act, then the powers granted by such Act or by the Railway Act shall cease *and be null and void as represents so much of the railway as then remains uncompleted.*

It is therefore perfectly clear to me that these chartered powers terminated on the 23rd July, 1901, and that at the time the company began the construction of what is called the tramway under contract with the Municipality of Longue Pointe acting under the Quebec Municipal Act, its powers of construction were utterly at an end, so far at any rate as the new proposed work was concerned.

The only answer attempted to be made to this argument was that the work the appellant company proposed to build was a tramway and not a railway, and this because it was to be built on a highway and not through the lands of private persons. But without entering upon these fine distinctions between railways and tramways I think the answer is a simple one.

Both by their Provincial and by their Dominion charters the company defendant were authorized to construct and operate railways or tramways from certain points in the City of Montreal to the various

municipalities situated on the Island of Montreal. They could do either one thing or the other, or both, but whatever mode of construction they adopted was by the Act 57 & 58 Vict. ch. 84, declared to be a work for the general advantage of Canada, and subject to the provisions of the Railway Act. It would be preposterous to suggest that if the defendants called their works of construction a railway they would be obliged to complete it within the seven years prescribed by the Railway Act, whereas if they called it a tramway they could construct it at any time that might suit their convenience.

The learned judges of the court of appeal in dealing with the attempted distinction have come to the conclusion that it cannot have the effect of relieving the defendants from the limitations and subsequent disabilities resulting from section 89 of the Railway Act, and I fully concur in that conclusion.

In the result, therefore, I am of the opinion that the appellants' powers of construction having expired it was not competent for them to enter into any agreement with the municipalities for the construction of a tramway so called under the Municipal Act; and that as they had chosen to seek powers from the Parliament of Canada and obtained them on the condition and basis that their undertaking was a work for the general advantage of Canada and to be subject to the provisions of the Railway Act of Canada instead of the Acts of the Province of Quebec, any work they undertook pursuant to the powers by that special Act given must have been completed subject to all the provisions of the Railway Act which were applicable to the undertaking.

I do not think, however, their agreement not to exercise their chartered powers can be invoked as ground for obtaining an injunction, such agreement being in derogation of their chartered powers; but as

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I am also of opinion that the respondent company had not the interest necessary to maintain the action, the appeal should in my opinion be allowed, the injunction dissolved, and the action dismissed.

KILLAM J.—I agree with my brother Davies in thinking that the contract upon which the plaintiff company relies is one which should not be enforced by the courts. In *Doane* v. *Chicago City Ry. Co.* (1), Gray J. laid down a principle, which I conceive to be sound,

> that an agreement by a corporation exercising a franchise for the public convenience, that it will not exercise it where the convenience may be thereby promoted, is invalid.

In that case an agreement by a street railway company with a private individual that it would not construct more than a single line of railway upon a certain street was held to be unenforceable. The principle is supported by *Thomas* v. *The West Jersey Railroad Co.* (2); *Gibbs* v. *The Consolidated Gas Co. of Baltimore* (3); and *Central Transportation Co.* v. *Pullman's Palace Car Co.* (4), as well as by the cases to which my brother Davies has referred.

Before the passing of the Act of the Quebec Legislature, 62 Vict. c. 75, containing the prohibition against the Chateauguay Company building in municipalities in which the Park and Island Company had built so long as the latter should not extend its lines into the municipality of Longue Pointe and other municipalities, the Parliament of Canada had passed the Act 57 & 58 Vict. c. 84, declaring the undertaking of the Park and Island Company to be a work for the general advantage of Canada and the company a body corporate and politic within the legislative authority

(1) 51 Ill. App. 353.
(2) 101 U. S. R. 71.
(3) 130 U. S. R. 396.
(4) 139 U. S. R. 24.

of the Parliament of Canada, and expressly authorizing the company to construct railways or tramways from the City of Montreal to the various municipalities in the island of Montreal.

It seems impossible, then, for either company to rely upon the Quebec Act, 62 Vict. c. 75, as impliedly sanctioning an agreement on the part of the Park and Island Company to abandon any of its corporate powers.

The Park and Island Company was proceeding with the construction of a tramway authorized by the municipal authority under the powers given by the Municipal Code, Art. 479. The municipality did not attempt to exercise the extended powers given by the Act 63 Vict. c. 61. It appears to me that the direction in that statute to give the preference to the Chateauguay and Northern Railway Co. or another specified company applied only to the arrangement authorized by the Act, and in no way limited the power of the municipality under the Municipal Code.

I am also of opinion that it is not open to the Chateauguay and Northern Railway Company to raise any objection to the status or corporate powers of the body authorized by the municipality to construct such a work, or to set up its non-fulfilment of the conditions prescribed by the Railway Act of Canada. By art. 479 of the Municipal Code, a municipal council may authorize an incorporated company, a natural person, or a firm, to construct and operate tramways in the municipality, and, for this purpose, to lay its rails on and run its cars over the public highways. As the Chateauguay and Northern Railway Company had no exclusive or preferential rights in these respects, and no interest which could entitle it to object to the municipal council conferring these powers upon natural persons or partnerships, it could

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have no right to question the corporate powers of another corporation with which the council might choose to deal or the fulfilment by the latter corporation of conditions precedent required by its charter.

If for any reason the work of the Park and Island Railway Company will constitute an unlawful erection or obstruction upon the highway, the Chateauguay and Northern Railway Company is not shewn to have such an interest in the highway, or to have suffered, or to be likely to suffer such damage by its obstruction as to warrant it in maintaining the action.

In the view which I take, the expiration of the period with in which the Chateauguay and Northern Railway Company should have completed its works and its want of present ownership of a railway are not important as affecting the result of this case.

Whatever railways, or powers to construct railways or tramways, the Chateauguay and Northern Railway Company may possess, it does not appear to me that the Park and Island Company has done or threatens anything which is or would be a violation of any legal right of the Chateauguay and Northern Railway Company.

I would allow the appeal, and dismiss the action with costs in all courts.

Appeal allowed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitors for the respondents: *Lafleur, MacDougall & Macfarlane.*