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PATTERSON v. FARRELL.

Appeal allowed. Judgment appealed from discharged. Judgment for the plaintiff for proportion of land tax payable on land of an assessable value of £24,870 *attributable to the period from 8th December* 1910 *to 30th June* 1911 *with costs of action.*

Solicitors, for the appellant, *Darvall & Horsfall.*
Solicitors, for the respondent, *Brahe & Gair.*

B. L.

[HIGH COURT OF AUSTRALIA.]

NIELSEN . . . . . APPELLANT;
PLAINTIFF,

AND

THE BRISBANE TRAMWAYS CO. LIMITED RESPONDENTS.
DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *May* 7, 8, 9.

Griffith C.J., Barton and Isaacs JJ.

Corporation—Nuisance—Non-repair of road—Negligence—Tramways Acts 1882-1890, *Qd.* (46 *Vict. No.* 10, 54 *Vict. No.* 16), *secs.* 50, 78—*Suspension of provisions by Governor in Council.*

By sec. 50 of the Queensland *Tramways Acts* 1882-1890 the respondent Company were bound to maintain and keep in good repair (subject to the direction of the Municipal Council) such portion of the roads on which their rails were laid as lay between the rails and for a space of eighteen inches on either side. Power was, however, given to the Governor in Council by sec. 78 to suspend the operation of all or any of the provisions of certain sections, among which was sec. 50. By a Proclamation dated 4th June 1902, the provisions of sec. 50 were suspended—

Held, that a person injured by reason of one of the rails of the respondent Company projecting above the surface of the roadway had no right of action against the Company.

Decision of the Supreme Court of Queensland affirmed.

APPEAL from the Supreme Court of Queensland.

The appellant was riding on a bicycle along a street on which the respondent Company's tram lines were laid, and owing to one of the rails projecting above the surface of the roadway he was thrown off and suffered injury. He brought an action in the District Court claiming £200 damages and obtained a verdict for £147 2s. 6d. On appeal to the Full Court this judgment was reversed by a majority of the Court, on the ground that the suspension of sec. 50 of the *Tramways Act* 1882 relieved the Company from liability for accidents arising from the existence of a nuisance caused by the projection of the rails of their tramway above the surface of the roadway in such a way as to impede and obstruct the ordinary traffic of the street.

From this decision the plaintiff now appealed, by special leave, *in formâ pauperis* to the High Court.

Macrossan (with him *Murphy*), for appellant. The respondents originally set up a defence of contributory negligence which they have now abandoned. Apart from its sections altogether the Act shows by the short title that the Tramway Company are liable for negligence that in any way obstructs the traffic: *Vestry of St. Luke* v. *North Metropolitan Tramways Co.* (1). As to heading of Statutes, see *Fletcher* v. *Birkenhead Corporation* (2). The case of *Fielding* v. *Morley Corporation* (3) lays down that the title is a part of the Act. The suspension of sec. 50 does not relieve the Company because they are liable otherwise: *Midwood & Co. Ltd.* v. *Manchester Corporation* (4); *Ogston* v *Aberdeen District Tramways Ltd.* (5). But for the fact of the Tramway Company putting down their rails no nuisance would have arisen in this case: *Oliver* v. *North Eastern Railway Co.* (6); *Rex* v. *Kerrison* (7); *Hertfordshire County Council* v. *Great Eastern Railway Co.*

(1) 1 Q.B.D., 760.
(2) (1907) 1 K.B., 205.
(3) (1899) 1 Ch., 1.
(4) (1905) 2 K.B., 597, at p. 604.
(5) (1897) A.C., 111.
(6) L.R. 9 Q.B., 409.
(7) 3 M. & S., 526; 105 E.R., 708.

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(1); *Leech* v. *North Staffordshire Railway Co.* (2); *North Staffordshire Railway Co.* v. *Dale and others* (3). The Company must maintain their rails relatively to the surface of the road so as not to impede the traffic: *Dublin United Tramways Co.* v. *Fitzgerald* (4); *Howitt* v. *Nottingham and District Tramways Co. Ltd.* (5); *Alldred* v. *West Metropolitan Trams Co.* (6); *Barnett* v. *Mayor &c. of Poplar* (7). The plaintiff relies mainly on sec. 33, which provides that the tram rails must not create a nuisance: *Hourigan* v. *Bendigo Tramways Co. Ltd.* (8); *Geddis* v. *Proprietors of the Bann Reservoir* (9). Under secs. 35 and 36 the Company clearly has power to repair. Apart from sec. 31 there is a liability for nuisance at common law.

Feez K.C. (with him *Woolcock* and *Henchman*), for respondents. The respondents in this case are a statutory constructing authority, and they have certain rights. If they have properly performed the duties imposed upon them they are free from liability. By the word surface is meant the permanent level of the road: *Dunedin City and Tramway Co. Ltd.* v. *Ross* (10). Under sec. 29 the Company cannot alter the level of the street. The only time when the Company would be compelled to lower the rails would be in the event of the Local Authority deciding to lower the level of the street: Sec. 60 of the *Local Authorities Act* 1902 (Queensland) (2 Edw. VII. No. 19). The Company had no right to interfere with the maintenance and repair of the road: *Morris* v. *Canterbury Tramway Co.* (11). By surface is meant the surface at the times the rails were laid down: *Eddy* v. *Ottawa City Passenger Railway Co.* (12). The only liability of the respondents is such as arises under the Act: *Canadian Pacific Railway Co.* v. *Roy* (13); *Birch* v. *A. M. P. Society* (14); but sec. 78 takes away the liability from the Company. A road authority is not liable for non-repair: *Thompson* v. *Mayor &c. of Brighton* (15). The

(1) (1909) 2 K.B., 403.
(2) 29 L.J.N.S. (M.C.), 150.
(3) 8 E. & B., 836.
(4) (1903) A.C., 99.
(5) 12 Q.B.D., 16.
(6) (1891) 2 Q.B., 398.
(7) (1901) 2 K.B., 319.
(8) 22 V.L.R., 273.
(9) 3 A.C., 430.
(10) 13 N.Z. L.R., 366.
(11) 10 N.Z. L.R., 524.
(12) 31 Upp. Can. Q.B., 569.
(13) (1902) A.C., 220.
(14) 4 C.L.R., 324.
(15) (1894) 1 Q.B., 332.

respondents constructed and maintained their tramway in the way in which they were bound to do it, and have in no way interfered with the public rights, and no action will lie against them.

Macrossan, in reply.

GRIFFITH C.J. This case has been very fully and ably argued. We have had the advantage of reading the judgments of the learned Judges of the Supreme Court, and nothing can be gained by taking further time to consider the matter. The question for determination depends entirely upon the construction of a Statute, the *Tramways Act* 1882. It is not unimportant to remember the date of the Act—1882, when the conditions of Queensland and the towns of Queensland were in many particulars very different from what they are now. The Act was framed to be applied in a country in its then condition. Some arguments have been used which might suggest that the legislature had in its contemplation streets like the streets in an old English town where many are paved with stones and most are at least macadamised. Those who remember what was the condition of things 30 years ago in Queensland know that there were absolutely no paved streets, and very few that could be said to be properly macadamised. That the legislature had that state of things under their consideration is shown by sec. 30 which deals with the case of the construction of a tramway on a street which is only partially made or metalled—that is to say still partly in a state of nature. When we come to read the directory provisions of the Act we must take them as applicable to such a state of things, and not to the very different state of things which exists and has long existed in long settled countries like England.

Tramways may be constructed either by the municipal authorities or by companies. Part IV. of the Act which is headed "The Construction of Tramways by Companies" contains a series of provisions dealing with that subject. A constructing company must obtain a franchise from the Governor in Council before the granting of which he must be satisfied that no reasonable objection is offered by the local authority (sec. 8.)

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The position of the centre line of the tramway is prescribed by sec. 28 which provides that:—"The Company shall not, except with the consent in writing of the council, alter the levels of any street." That means, I suppose, that they are to take the street as they find it. It is to be remarked that in a new country where municipal councils and local authorities have not unlimited funds it very often happens that the level at which the roadway is first formed is not the permanent level of the street. The council may not be able to afford to make up the street to that level, to raise up the lower parts of the surface and cut off the elevations so as to make a really good road, but they do the best they can. Very often perhaps they will cut off a piece from the top of a hill and with the material fill up the adjoining hollows, and from year to year, as their funds increase they gradually improve the street, until, at last, they have made a street such as, for instance, Queen Street, which used to be a series of hills and hollows, and is now a tolerably level roadway. The Company, then, is not to alter the levels—that is, they are to take the street as they find it. Then it is provided by sec. 32 that:—"The tramway shall be constructed and maintained in the manner following":—First the distance between the rails is prescribed. Then it is provided that "The uppermost surface of each rail shall be on a level with the surface of the street." Secs. 36 and 39 define the duties of the Company as regards the breaking up of the surface. The legislature were aware, as was everybody else, that it was necessary to dig holes in the street to put down the foundations of the tramway and fill the holes up again. In view of that necessity the meaning of the direction I have just quoted is apparent. When the rails are laid down they will be uncovered; the sleepers will be uncovered; and the foundations will be uncovered. The Company must cover all that up and do it in such a manner that the surface of the street and the surface of the rails will be on a level. That is the duty as to construction. Then the next section, sec. 33, provides that the tramway shall be so constructed and maintained as not to impede or obstruct the ordinary traffic of the street. It seems to have been sometimes assumed in argument that the only way in which a tramway can obstruct the ordinary traffic of a street is by the

rail being above the surface. That is not so. There are many other ways in which it may obstruct traffic. For instance, the groove in the rail may be in such a condition as to catch the wheels of vehicles, or, if the tramway is laid with a guard rail, the space between the guard rail and the rail may be sufficient to catch the wheels. It is quite a mistake, therefore, to suppose that an obstruction can arise only from the tram rail being above the level of the street.

With this preface I proceed to consider sec. 33, on which the learned Judge who was in the minority in the Full Court mainly relied. The direction is that the tramway "shall be constructed and maintained" so as not to impede or obstruct the ordinary traffic of the street. Now, it is clear that the thing to be maintained is the thing that was to be and has been constructed. What was to be constructed? The answer, of course, is: the fabric of the tramway in all its details, which is required to be so constructed, *quâ* fabric as not to impede the traffic of the street. Being so constructed, it is to be so maintained. That involves, among other things, that it is to be maintained at the same level at which it was required to be laid down. If, then, the complaint made were that at a particular moment the surface of the rails was higher than the surface of the street, I should be disposed to say that sec. 33 had nothing to do with the matter, and that if there were no more in the Act, and if the plaintiff sought to set up such a duty on the part of the Company, he would have to rely upon the doctrine of *Rex* v. *Kerrison* (1), more recently stated by *Fletcher-Moulton* L.J. in *Hertfordshire County Council* v. *Great Eastern Railway Co.* (2). If there were any doubt on the point, sec. 33 being found in the Part of the Act relating to construction by companies should be read with the context, and, so reading it, I should think that that was, at least, the *primâ facie* meaning of the words. It is obvious, however, that the expression "maintain the tramway" may be used in a sense covering the maintenance of the road alongside the tramway. If the provision had been simply for the construction of tramways by municipal authorities, and they were required to maintain the tramway in such a way as not to impede

(1) 3 M. & S., 526, at p. 527. (2) (1909) 2 K.B., 403.

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public traffic, it might be contended that the word "maintain" included the maintenance of the road. But, *primâ facie*, that is not involved in the meaning of the word as used in sec. 33. It is desirable, therefore, to see whether there are any other provisions in the Act which show of what the legislature was thinking. When we turn to sec. 50, which is in Part V., under the heading of "Maintenance of Tramways," we find this provision:—"The Company shall at their own expense at all times maintain in good condition and repair with such materials and in such manner as the Council direct and to their satisfaction—(1) So much of the road upon which the tramway is laid as lies between the rails thereof; and (2) So much of the road as extends eighteen inches beyond the rails of and on each side of the tramway."

And again, in sec. 33, already mentioned, we find it provided that before a tramway is constructed on a street only partially made or metalled, the Company shall, if required by the Council, make and metal a clear metalled space of not less 12 feet (1) between the lines of a double line of tramway, or (2) on one side of the line of a single tramway. In two instances, therefore, the legislature has directly imposed a duty on the Company with respect to the formation of the road—first, the obligation to make and metal the road in certain cases, and, secondly, to maintain part of the road in a good condition of repair. This indicates that the legislature recognized what I suppose everybody must recognize, that it is one thing to maintain the fabric of a tram line, and another to maintain the road in which it is laid. Under those circumstances what would seem to be the *primâ facie* meaning of sec. 33 seems to be conclusively established to be the true meaning. I think, therefore, that sec. 33 has no application to the present case.

A more serious argument was that founded upon the case of *Rex* v. *Kerrison* (1). But for sec. 78 there would be much weight in that argument, but the legislature has, by sec. 78, dealt specially with the obligation imposed by sec. 50, and has authorized the Governor in Council to suspend it. It is clear that the plaintiff's real complaint is not that the rail was, when laid, above the surface of the road, or that there is any default on the part

(1) 3 M. & S., 526, at p. 527.

of the Company in leaving the rail where it is, but that there has been default in the maintenance of the road. So long as sec. 50 applied to them they were bound to maintain it, and it may be that, apart from sec. 50, they would have been under some obligation to maintain it in such a way as to prevent the rails from becoming dangerous. But the legislature has thought fit to prescribe by sec. 50 a definite rule governing their obligations in that respect, and has also provided that the Governor in Council may suspend those obligations, and in this case they have been suspended. Under sec. 79 that suspension cannot be made except either on an application by a local authority, or on a petition signed by no less than one-third of the owners or occupiers of the rateable property fronting the street, or a petition from the company itself. Notice is required to be given in the *Gazette*, objections may be made, and finally the Governor in Council may exercise his discretion in the matter. The result of suspending the obligation of that section is, of course, that the Company are no longer under a statutory obligation to do the very thing that is here complained of as not being done. It is true that the statutory obligation is to do rather more than to keep the rails level with the road where they join, and it was contended that when they are relieved from the larger obligation they are still subject to the smaller one. That argument impressed me for some time. But it loses sight of the consideration that sec. 50 both declares and delimits their obligations. The subject of the complaint is, as I have said, that the Company have not kept the road in good repair. Upon whomsoever the duty may lie of maintaining the road, that duty has not been performed, but it does not lie upon the defendants. I think, therefore, that under those circumstances it cannot be said that the defendants have been guilty of any breach of any duty imposed upon them by the Statute. I have already pointed out that what is complained of here is not a failure to maintain the tramway in such a manner as not to impede or obstruct the ordinary traffic in the street, but a failure to maintain the roadway as distinguished from the fabric of the tramway. Of course, in one sense, the tramway was not maintained in such a manner as not to impede the ordinary traffic of the street, because if the tramway had not

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been there that particular obstruction would not have occurred, but that arose, not from any failure to maintain the line as it ought to be maintained, but from the failure of the road authority, whatever it was, if there was any upon whom any duty is imposed to maintain the road. The real cause of the accident was not that the tramline was wrongfully there, but that, the tramline being lawfully there, persons whose duty it was to keep the roadway in repair, did not do so.

Under these circumstances I think that the plaintiff has not established any cause of action against the defendants. Whether and how far the local authority is responsible, it is unnecessary to express an opinion. I am disposed, however, to think that when this Act of 1882 was passed the law as laid down by the Privy Council in the case of *Borough of Bathurst* v. *Macpherson* (1) was supposed to govern local authorities in Australia. That decision has since been much qualified, and it may be that a question may hereafter arise from that point of view. With respect to the authorities relied upon by the majority in the Supreme Court, particularly *Howitt* v. *Nottingham and District Tramways Co. Ltd.* (2) and *Alldred* v. *The West Metropolitan Tram Co.* (3), although they are not directly in point, I think it would be almost impossible to decide this case adversely to the defendants without disregarding the reasoning of the learned Judges by whom those cases were decided. A similar obligation to that of sec. 50 was imposed upon the Tramway Company, but they were allowed to make an agreement with the Local Authority to do the work, and it was held that, having made such an agreement, they were relieved of the obligation, and that an action did not lie for not performing it. It is true that in those cases the same agreement which relieved them of the obligation imposed it upon another body, but I do not think that that is a sufficient reason for distinguishing them.

There are a few other observations I should like to make. It may seem at first sight shocking that there should be no redress for an injury happening in consequence of the neglect or omission of somebody or other to guard against such dangers in the street.

(1) 4 A.C., 256.
(2) 12 Q.B.D., 16.
(3) (1891) 2 Q.B., 398.

But when you come to consider how many other dangers there are in roads partially or imperfectly formed where there is no tramway, the neglect or the omission, which is the better word, of the local authority to remove a possible obstruction arising from a tramrail does not seem to be a very great addition to the dangers that necessarily exist in a country such as this, where the roads are many and long, and the means of keeping them in perfect order are comparatively small. And, though the Court may sympathize with the plaintiff, we are bound to administer the law as we find it. The appeal must therefore be dismissed.

BARTON J. This action was brought on the ground that the Company so negligently constructed and maintained the tramway between the Albion Hotel at Albion, and the old Sandgate Road that the upper surface of one of the rails of the tramway projected above the surface of the highway so as to impede and obstruct the ordinary traffic of the street, whereby on 4th March 1911 the plaintiff while lawfully passing on his bicycle along the said highway was thrown down and injured. Full reference has already been made to most of the material sections, but to make myself understood I must necessarily make some quotations. The *Tramways Act* 1882 provides in sec. 32, subsec. 2, that the tramway shall be constructed and maintained so that the uppermost surface of each rail shall be on a level with the surface of the street; and the next sec. 33 (1) provides that "The tramway shall be so constructed and maintained as not to impede or obstruct the ordinary traffic of the street." This section may be compared with sec. 50. Sec. 30 is the only case in which a duty is cast upon the Company to construct roadway as distinguished from tramway, and sec. 50 is the section which states in specific terms the liability of the Company to maintain and repair roadway as such. Now the Act very clearly distinguishes between the roadway or street and the tramway. In sec. 32 we find that distinction made in terms already quoted. Sec. 33 (1) forbids any impediment or obstruction of the ordinary traffic of the street by the manner in which the tramway is constructed or maintained, the section again drawing the distinction. In secs. 35 and 36 we find the same thing. In sec. 35 the Company may

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break up the street for the purpose of constructing, maintaining, or renewing the tramway. That is to say it may break up the roadway where it has to do something by way of either building, or keeping up, or laying the tramway as distinct from the street. By sec. 36, when the Company require to break up the street they are to give the council seven days' notice of their intention, specifying the time when they will begin operations and describing the portion of the street intended to be broken up. They can of course only break up the street for the purpose of either laying down the tramway in the first instance or maintaining it, or making renewals of any parts of it. In other respects they have nothing to do with the street. As far as the maintenance of the street for ordinary traffic is concerned that is the duty of the council, under the *Local Authorities Act.* Sec. 60 of that Act charges the council with the construction, maintenance, management and control of all roads, and other necessary public works within the area. To what extent then are the local authorities relieved of that duty by this tramway Statute? Well, the tramway cannot be laid without interfering with the surface of the street, and the surface has to be restored by some one. To that extent construction or rather renewal of the street is cast upon the Company. They cannot construct their tramway without doing that much work on the street; but, apart from the requirement of sec. 30 in certain special cases, the Statute has not cast upon them any duty of keeping up the streets along which the tramways pass, except by sec. 50, which binds them to maintain in good condition and repair the street between the rails and also a space of 18 inches on each side. Now, as already pointed out, we have in sec. 30, apart from the mere construction of the tramway itself, the only duty of constructing roadway itself cast upon the tramways Company; and that section enters into this case only for purposes of interpretation, as the street in which the accident happened is not such a street as is contemplated in that section. In sec. 50 the duty of the Company with respect to street repairs is expressed, and that section is suspended by Order in Council. Then we have this state of things, that the Company, having to a certain extent by Statute the power of interfering with the roadway for the purpose of constructing the tramway, have

carried out that duty satisfactorily, so far as we know in this case. The proper construction of the tramway is admitted. The Company's duty with regard to repairing the roadway, as it existed under sec. 50, which is obviously substituted for any common law liability of the Company as for a nuisance, is dormant. The question is whether, notwithstanding these facts, there is a duty of maintenance of roadway cast upon the Company by sec. 33 (1), which duty they have not performed? That is the duty which is alleged by Mr. *Macrossan* under sec. 33 (1), and it is, of course, if it exists, a duty the breach of which may be committed by allowing the traffic to impair the roadway without maintenance or renewal on their part. Well, the distinction between roadway and tramway being, as I have stated, so clearly drawn in the Act, not only in the section to which I have referred, but in other sections, we come then to the consideration, in another aspect, of sec. 32 (2), which I have read. This requires the constructing and maintaining of the tramway so as to keep the surface of the rail on a level with the surface of the street. Now, it is impossible to contend that it is the duty of the Company constantly to alter the rails or the bed in which their rails lie in relation to the street in such a way that for every casual variation in what I may call the local or casual, as distinguished from the general, level of a part of the street the rails shall be altered accordingly. That would involve alteration to the rails whenever the traffic wore out a foot or two of roadway. Such a meaning cannot rationally be put upon the section. We have to consider what duty of maintenance the defendant Company are under as to the tramway, and not with reference to the street. Does not maintaining, then, mean maintaining as constructed? I think it does, for the alternative interpretation is not rational; that is to say, the tramway having been constructed so that the uppermost surface of the rails is level with the surface of the street, it must be maintained at the level of its original construction, leaving the maintenance of the street or road itself to those whose ordinary business it is. Now that is of the greater importance because of its bearing on sec. 33 (1), which says the tramway is to be "constructed and maintained" so as not to obstruct or impede the ordinary traffic of the street, and if the words

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"construct" and "maintain" bear the meaning I have pointed out in sec. 32 (2), they bear the same meaning as they occur in sec. 33 (1), in the absence of any context to give them an altered meaning. That being so, the duty of maintenance by the Company so as not to obstruct the ordinary traffic is the maintenance of its own work, the tramway, as constructed. If the rails get out of order, if they wear out, or break, or become brittle, or if the sleepers or the ballasting need renewal or repair, it is the duty of the Company to attend to them, and prevent them from impeding or obstructing the traffic of the street. That is maintaining its tramway, and not the road. But no such duty is laid upon the Company as regards the road itself. If sec. 50 had not been suspended, or even if it had never been enacted, totally different considerations would have arisen. Had it never been enacted, the case of *Oliver* v. *North Eastern Railway Co.* (1), cited by Mr. *Macrossan*, and the cases on which it depends, such as *Rex* v. *Kerrison* (2), would have been most important authorities for his position. But the Company's common law liability, if I may so describe it, was removed by sec. 50, and that section, imposing a substituted liability, has been suspended. If I am correct in thinking that the duty of maintenance is merely maintenance of the tramway, and of that alone, as constructed, then matters unconnected with the tramway, such as casual alterations on the surface of the roadway, cannot be matters for which the Company are responsible.

It seems to me, therefore, that sec. 50 not being, for the purposes of this appeal, binding on them, the Company have not broken any duty which they were called upon to perform in relation to this work of their own, to which, in the absence of sec. 50, their duty is confined.

Even where the road impinges or borders on the rails as laid down, the duty cast upon the Company with respect to the tramway is quite distinct from any duty of the council to maintain and repair their roads. We are not here to consider whether there is any neglect on the part of the local authority rendering them responsible to the plaintiff. They are not parties, and we have no right even to form an opinion on that question. I feel

(1) L.R. 9 Q.B., 409. (2) 3 M. & S., 526.

myself driven to the conclusion that it is impossible, in the absence of sec. 50, to maintain an action against the Tramways Company for what has taken place in this instance. It may be a great hardship to the plaintiff that he cannot succeed, but we have only to determine the question of law involved. I am of opinion that under the law he has no cause of action against the Tramways Company, and therefore I agree that this appeal must be dismissed.

ISAACS J. I am also of opinion that the appeal should be dismissed. The complaint made by the appellant is that on the facts as stated by the learned District Court Judge the surface of the street was brought into such a state that the position of the rail relatively to the surface of the street was a breach of the condition upon which the tramways Company had a statutory right to maintain its tramway, and as the appellant suffered damage from this alleged breach of a statutory duty it is said that he is entitled to redress from the Company. The matter depends upon the proper construction to be given really to two sections, or to certain portions of two sections of the Act—32 and 33, and those two sections are intimately connected. Sec. 32 begins:—"The tramway shall be constructed and maintained in the manner following, that is to say," and the second sub-section proceeds:—"The uppermost surface of each rail shall be on a level with the surface of the street." Sec. 33 commences:—"The tramway shall be so constructed and maintained as not to impede or obstruct the ordinary traffic of the street." Now the same expression "constructed and maintained" is used in both sections, and the proper interpretation of the one provision has to my mind a very important influence upon the proper construction of the other. We must take it so far as we can that the provisions made by the legislature in the same Act in relation to the same subject matter and in the same words are consistent. For some time I had a little difficulty in properly understanding what was meant by the second sub-section of sec. 32. It will be observed that it does not say that the rail surface shall be on a level with the adjacent surface of the street any more than it says it shall be on a level with the surface of every part of the

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street. The surface of a street is not a dead level. If you consider the position of one rail first, it is evident that the enactment cannot mean, even in that case, that the whole of the uppermost surface of the rail shall be on a level with the surface of the street, because you would immediately ask yourself which side is referred to, and there is in every case some difference—in some cases a perceptible difference—between the level on one side of the rail and that on the other, and in fact the rails being between these two different levels corresponds precisely with neither. Still less will that level of the uppermost surface of the rail correspond with the surface of say 10 feet nearer the kerb; and then if we find in the sub-section that the uppermost surface of each rail shall be on a level with the surface of the street, it would mean if the contention were correct that the surface of the street generally was referred to, that every rail must be on the same level. That of course is impossible. More than that the council has power to alter what is called in the *Local Authorities Act* the level of the ground in a road as distinct from the level of the road, because it says if the council alters the level of the ground except in conformity with the level so fixed, it must pay compensation; so that it might alter the level subject to paying compensation. That would leave the tramway Company in a very difficult position. It might ask for compensation but it would not comply with that sub-section. Then the *Tramways Act* provides further that in the event of a street level being altered the Company shall alter the levels of the tramway to correspond. That cannot mean that if the local authority chooses to lower the level some little distance from the rail, or even adjacent to it, to some lower level the Company is bound to drop its rails to that level although the part of the road on which it rests remains the same as before. What I understand this sub-section to mean is this, that before any tramway is laid at all the street has a certain recognized level. His Majesty's subjects have the right to travel over that highway at that level, and when the tramways Company seeks permission from Parliament to replace with iron rails a portion of the ordinary material of which the highway is composed it receives that permission on this condition among others, that the material which it substitutes for macadam or other metal of the

road shall be placed at the same level as that which is taken away, that being the same condition which Mr. Justice *Blackburn* points out in the case of *St Luke's Vestry* (1) that a member of the public passing over the road is entitled to have the wheel of his vehicle pass over at neither a higher nor a lower level than it would otherwise pass over it. When we arrive at that position it seems to me to simplify all the rest of the case. The tramway is the property of the Company. The Company has to construct and maintain that tramway, and the words of the Act as to the meaning of tramway are substantially the same as those used in the English Statute. In the case of *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh* (2), the House of Lords had to consider what was meant by tramway. In 1894 App. Cas., at p. 464, *Herschell* L.C. defines tramway as the structure laid down on the highway, and nothing more. Lord *Watson* at page 471 describes it as the fabric of the tramway line. The Act of Parliament, under which this particular line was constructed, gives power by sec. 5 to construct, maintain, and work a tramway upon and through any street or other place, with all proper rails, plates, works, sidings, junctions, stations, approaches and conveniences connected therewith. Sec. 6 requires the plans to be deposited. That shows what is meant by the tramway—something which is not the road, but which is placed on the road, and it has of course conveniences connected with it. Now, it is said by the learned counsel for the appellant that there is a common law principle that when Parliament authorizes a thing to be done it does not authorize a nuisance. That is not strictly accurate. It all depends upon what Parliament has authorized. If what Parliament authorizes is a mere permissive act which may be done without committing a nuisance then a nuisance is not authorized, but if Parliament has authorized something which after taking all reasonable care and by applying the best scientific methods that are ordinarily adopted and reasonable in the circumstances, and if notwithstanding these precautions a nuisance is created, then Parliament must be taken to have authorized a nuisance to that extent. There are cases which show the distinction such as the *Metro-*

(1) 1 Q.B D., 760.

(2) (1894) A.C., 456.

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politan Asylum District v. *Hill* (1) and *Rapier* v. *London Tramways Co.* (2). On the one side there is the *London and Brighton Railway Co.* v. *Truman* (3). In the latter case Lord *Selborne* says (4):—"Here there can be no question that the legislature authorized acts to be done for the necessary and ordinary purposes of railway traffic which would be a nuisance at common law which being authorized are not actionable." That is the principle which has to be applied to the case where a tramway is authorized by Act of Parliament, and to the extent to which any inconvenience or interference with the highway is incidental to the proper use of the highway, then to that extent only is it covered. But Mr. *Macrossan* urges very strongly that sec. 33, sub-sec. (1), rebuts the presumption which I have just referred to. He says that that provides that the tramway shall be constructed and maintained so as not to obstruct the ordinary traffic of the street. I have said that sec. 32 has some influence on sec. 33, and here that influence comes in. When Parliament has stated certain specific conditions, and says that the tramway shall be constructed and maintained in a particular manner, it cannot be meant that the constructing and maintaining of the tramway in accordance with the directions is to be regarded as an illegal act. Mr. *Macrossan* cited the case of *Ogston* v. *Aberdeen District Tramways Co.* (5 and I pointed out what I thought was the distinction in that case. I find that the Privy Council in a later case draws the same distinction. I refer to the case of the *City of Montreal* v. *The Montreal Street Railway Co.* (6), and there Lord *Macnaghten* delivered the judgment of the Judicial Committee and in drawing the distinction, he said :—"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." In like manner I say that the construc-

(1) 6 App. Cas., 193.
(2) (1893) 2 Ch., 588.
(3) 11 App. Cas., 45.
(4) 11 App. Cas., 45, at p. 51.
(5) (1901) 2 K.B., 319.
(6) (1903) A.C., 482, at p. 489.

tion and maintenance of this particular rail at the level at which this surface was when it was constructed, and until the level of the street is altered in accordance with sec. 41 of the Act, cannot be regarded as a nuisance. The meaning of that sub-section, to my mind, is this, that there shall be no impediment or obstruction caused by the construction and maintenance of the tramway on the part of the Tramway Company. It is assumed by the legislature that they will do their duty, and that the local corporation will do its duty. If sec. 50 were in full operation it would be assumed that the Tramway Company would do their duty under that section, and the corporation would do its duty *ultra*. When that sec. 50 is suspended, and the local authority has the duty of looking after the road as distinct from the tramway, then Parliament assumes that that duty will be fulfilled, and if it is wrong to leave this depression in the road which is not part of the tramway, it must be assumed by Parliament that the proper authority, in the present instance the local authority, will repair that omission. Therefore, when in sub-sec. (1) of sec. 33, the legislature assumes that, it cannot mean that it becomes illegal on the part of the Tramways Company to allow its rail to remain in the position in which it was properly placed, and would be properly maintained, but for the wrongful omission of another authority. That, to my mind, ends the matter, and makes many of the cases cited irrelevant to this particular case. If Parliament had chosen to say that the tramway should not be conducted if a nuisance or obstruction arose, whether through the default of the Tramways Company or of any other person, it would be quite different, but it has not said that, and it would be most unreasonable if it had. We cannot, in the absence of the most express words, imagine Parliament would say anything so unreasonable. With the construction I have placed upon the section it seems to me that the inevitable result is that the Company are not liable, and I therefore agree that this appeal should be dismissed.

Appeal dismissed. Respondent not asking for costs, deposit to be returned to appellant.

Solicitors, for appellant, *O'Shea & O'Shea.*

Solicitors, for respondent, *Thynne & Macartney.*

N. McG.