

Friday, December 20.

SECOND DIVISION.

[Lord Low, Ordinary.]

OGSTON v. THE ABERDEEN
DISTRICT TRAMWAYS COMPANY.

*Burgh—Street—Management of Streets—
Obstruction—Nuisance—Interdict—Title
to Sue.*

Where the management of the streets in a burgh is vested in a public authority, it has alone the title to interfere, and the duty of interfering, to prevent a use of the streets causing obstruction to traffic or a nuisance to the public using the streets.

A tramway company, with the approval of the town council of a burgh, adopted a certain method of clearing their lines of rails from snow. An action to interdict the company continuing this method was brought by a member of the public, who alleged that it caused an obstruction to his use of the streets and was injurious to the health of his horses.

Held that the action was incompetent.

James Ogston of Norwood, manufacturer in Aberdeen, raised an action of interdict against the Aberdeen District Tramways Company, incorporated by Act of Parliament. The complainer prayed the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents, and all others acting by their authority, (1) from removing the snow, hail, slush, or other matter of a like kind, from the lines of tramway running through the public streets or thoroughfares of Aberdeen, on to or upon the sides of the said streets or thoroughfares between the said lines of tramway and the foot-pavements, . . . or otherwise from so removing said snow, hail, slush, or other like matter as in any way to interfere with, interrupt, or impede the traffic along the said streets and thoroughfares, . . . and (2) from putting or scattering upon the said streets and thoroughfares and lines of tramways, or any part thereof, . . . or the lines of tramways therein, salt, or any other similar substance, or otherwise from doing so in time of frost, or when there is snow or slush on the ground."

On 28th November 1895, after a proof, the Lord Ordinary (Low) refused interdict. In the following note to this interlocutor the facts of the case are fully stated:—

Note.—"The complainer, who is a manufacturer in Aberdeen, seeks to have the Aberdeen Tramways Company interdicted from removing snow from the Tramway lines on to the sides of the streets, so as to interrupt or impede the traffic along the streets; and also from scattering salt on the tramway lines in time of snow.

"There is no dispute as to what the respondents actually do. When there is a considerable fall of snow (and it is only in the case of a considerable fall of snow that the alleged nuisance arises) they send a

snow-plough along the tramway lines, which to a great extent clears the snow off the lines, and also off a space of from a foot to eighteen inches on either side of the lines. The snow so cleared from the lines is, of course, heaped up by the action of the snow-plough on either side of the street. Although the snow-plough removes the bulk of the snow from the part of the street operated upon, it does not entirely remove it, and in particular it does not remove it from the grooves in the rails. In order, therefore, to remove the snow from the grooves so that the tramway traffic may be carried on, and to remove the remainder of the snow upon the part of the street occupied by the tramway lines so that fresh snow may not be thrown by the traffic into the grooves, and also that the horses dragging the tramway cars may not slip, the snow-plough is followed by a cart of salt, which is sprinkled upon the lines, and the remaining snow thereby melted.

"It is proved that if the snow was not removed from the grooves, tramway traffic could not be carried on, because the cars would leave the rails. It is further proved that the only known method of effectually removing snow and ice from the grooves is by the use of salt.

"As soon as possible after the respondents have treated the part of the streets occupied by the tramway lines in the way which I have described, the town authorities send rotary brushes over the parts of the streets so treated, which sweep the melted snow and slush off the lines towards the sides of the streets. The town authorities then collect the snow and slush which has been piled on either side of the tramway lines into heaps, which they afterwards remove in carts.

"After the operations of the respondents are completed, and before the town authorities have carried away the heaps of snow, there is no doubt that a very inconvenient state of matters exists. The centre of the street where the tramway lines are is absolutely cleared, but upon either side of the lines are banks of snow (varying in depth according to the amount of the snowfall) and a quantity of slush at a low temperature caused by the mixture of snow and salt. The Town Council say that they remove the snow from the streets as quickly as they possibly can, but in the heavy and protracted snowstorm which occurred during the winter of 1894-95 it is proved that the heaps of snow and slush sometimes remained for many days—so long as a week in some cases—before they were removed.

"During the continuance of that state of matters a carriage using the street meets with no obstruction so long as it can keep upon the tramway track. But if it meets a tramway car, or requires to draw into the pavement, it has to be dragged through or over a bank of snow or slush, it may be several feet in depth, and the horses have to pass through or stand in a slush of low temperature composed of brine and half-melted snow.

"A large body of evidence was led as to the effect of such slush upon horses, and of

course there was a good deal of difference of opinion among the skilled witnesses. I am satisfied, however, that slush caused by a mixture of snow and salt does frequently injure horses which stand in or are frequently driven through the slush, even if there is no previous abrasion of the skin of the leg, and if a horse has a cut or an abrasion of the skin of the leg, contact with briny slush is apt to convert what might otherwise be a trivial matter into a serious sore.

"The complainer's case is that the state of matters which I have described is a nuisance; that he is entitled to proceed directly against the author of the nuisance, especially as the Town Council, upon the matter being brought before them by the complainer, repudiated all responsibility for the respondents' actings; and that it is no answer on the part of the respondents to say that there would be no nuisance if the town authorities were more expeditious in removing the heaps of snow.

"It appears that in 1886 the complainer made a complaint to the Town Council in regard to the action of the Tramway Company in putting the snow in heaps at the sides of the streets, and putting salt upon the snow. He also sent to the town clerk an opinion of counsel which he had obtained. After considering the matter the Town Council 'instructed the clerk to inform the secretary of the Tramway Company that the Council are advised that the operations referred to are in both cases unwarrantable and illegal, to request that the company will in future discontinue the proceedings complained of, and to intimate that if the request is not complied with, the Council will be compelled to have recourse to legal proceedings.'

"That resolution was intimated by the town clerk to the respondents, but no action was taken by the Town Council to prevent the respondents removing the snow from the track and using salt, and they have continued to do so until the present time.

"In the beginning of 1895 the complainer again brought the matter before the Town Council, and requested that they would take proceedings against the respondents. The complainer subsequently intimated a claim of damages to the Town Council for injuries which he alleged that one of his horses had received by being driven through the salt slush. In reply the town clerk wrote to the complainer's agents on the 8th February 1895 as follows—'The operation complained of is, as you are aware, not carried out by the Town Council, but by the Tramway Company, and under these circumstances I am instructed to inform you that the Town Council repudiate all responsibility with the matter.'

"After receipt of that letter the complainer brought the present note of suspension and interdict against the Tramway Company. After the note was presented the Town Council made a remit to the Streets and Roads Committee to consider the matter, and the Committee sent in a report, which was approved by the Council, in

which they expressed the opinion that if the complainer was successful serious inconvenience would be caused to the public, and recommended that 'such members of the Council as may be selected by the company should be authorised to give evidence on behalf of the Council in favour of the respondents.'

"Accordingly, the Provost and other members of the Council appeared as witnesses, and gave evidence to the effect that they were now satisfied that it was in the public interest that the respondents should be allowed to clear their lines as they have been in the habit of doing, and that they approved of the method adopted by the respondents.

"These being the circumstances under which the question arises, the first point to be considered is the respondents' plea of all parties not called. That plea, of course, is founded upon the fact that the Town Council are not made parties to the action.

"Now, the management of the streets is vested in the Town Council, and it is their duty to see that there is no obstruction placed in the streets, and that substances dangerous or offensive to the public are not put upon the streets. Therefore, if the result of the action of the respondents was to cause obstruction to the traffic, or a nuisance to the lieges, it was the Town Council who had the title to interfere, and (as guardians of the public interests in the streets) the duty of interfering. If, then, in the case of obstruction or nuisance in a street, the Town Council, or other local authority in whom the streets are vested, do not take action, or refuse to take action, is any citizen entitled to apply for interdict against the alleged wrongdoer without calling the Town Council or other local authority? In the general case I do not think that an application for interdict at the instance of the individual against the wrongdoer would be sustained, unless the local authority was also called, because the footing upon which such a proceeding would be brought, and the justification for bringing it, would be that the local authority had neglected or refused to do their duty.

"These considerations are, I think, very applicable to the present case, because what the respondents have done is to clear a part of the streets of snow, with the acquiescence and approval of the Town Council, and witness after witness for the complainer admitted that there would be nothing to complain of in the operations of the respondents if the Town Council had with due expedition removed the snow and slush from the sides of the streets."

The complainer reclaimed, and argued—If the operations were injurious to the complainer, they were a nuisance which he was entitled to interdict, even although the result was to stop the tramway traffic for a time altogether. The evidence showed clearly that damage had been caused to the complainer by the actings of the respondents. The Lord Ordinary argued that the operations of the complainers were sanctioned by the Town Council. But the evidence showed that ten years ago the Town

Council complained of the method followed in clearing away the snow from the tramway lines. The complainer was entitled to interdict—*Barber v. Penley*, 1893, L.R., 2 Ch. D. 447; *Bellamy v. Wells*, 1891, 39 W.R. 108. The respondents argued that if the Town Council carted off the snow no nuisance would result from their operations, but whether the respondents were the sole cause of the nuisance or not, they contributed to it, and that was enough to make them liable to interdict—*Buccleuch v. Cowan*, December 21, 1886, 5 Macph. 214. Pleas of “public convenience,” and that great loss would be occasioned to the defender if interdict was granted, were not valid defences against an action for the interdict of a nuisance—*Montgomerie v. Buchanan's Trustees*, July 9, 1853, 15 D. 853; *Caledonian Railway Company v. Baird & Company*, June 14, 1876, 3 R. 839; *Shotts Iron Company v. Inglis*, July 26, 1882, 9 R. (H.L.) 78. In a question of this kind the Tramway Company had no special privileges. It was in the same position as a private individual. Section 62 of the Tramways Act 1870 (33 and 34 Vict. c. 78) specially provided that nothing in this Act was to take away or abridge the right of the public to the use of the roads along which the tramway was laid.

Counsel for the respondents were not called upon.

At advising—

LORD JUSTICE-CLERK—In considering this action it must be kept in view that what was found fault with as being done contrary to law was all in the nature of emergency proceedings. The streets in towns sometimes unavoidably become more or less obstructed by falls of snow, and there cannot be the slightest doubt that it is one of the first duties of the public authority to take some measures as rapidly as possible to clear the way for traffic. If the obstruction is slight, it can be cleared away quickly, but if the fall of snow be heavy, and the emergency is thus great, they must deal with the emergency as soon and as rapidly as they can.

When the Tramway Company was established under Act of Parliament, they got a right to use the streets in which their lines were laid without obstruction from any other traffic. This right was given to them on account of the necessity which they were under of keeping to a particular line. All other traffic must give way to the tram-car traffic so as not to obstruct it. The moment that a fall of snow of any depth took place, the tramway system was brought to a standstill, and it was necessary that the line of rails should be cleared. It must be kept in mind that that part of the street must be cleared even if no rails were there. It is the ordinary practice in cities to clear the centre of the streets by means of snow-ploughs, the necessary action of which is to pile the snow at the sides, and thus they keep the street open for traffic. If the Tramway Company having the use of the street for their rails proceed to open up the street in that way, they will be just doing for themselves and for the public what the

public authority would be bound to do in ordinary course if there was no tramway there.

In this case the Tramway Company clear the snow to the side and keep the street open, which is the thing the public authority ought to do, and I do not see what possible ground there can be for interdict against that. When there was a deep fall of snow it was the duty of the public authority to keep the street clear, and to see that it did not become or remain impassable, and I am at a loss to see why the Tramway Company should be found fault with when what they have done is exactly the same process which the public authority would have to go through, viz., to open up a passage in the middle of the street. There is therefore no good ground for interdict on the first branch of this case.

As regards the second point a different question arose altogether. It relates to injury by the use of salt upon the streets. I think if we were to express our own opinion, and give judgment accordingly, I, for one, would have very little difficulty in expressing my opinion, and with some emphasis. My own impression is that nothing more cruel to man and beast can be done than to shower salt on the streets in winter, producing a freezing mixture, and that it causes serious risk to health and even life I have no doubt. But I am not entitled in such a matter to act on private opinion or private knowledge. What was done was under the sanction of the public authority, and if they are really and seriously of opinion that this is the only reasonable way of keeping the streets clear, I do not think this Court are the judges of whether they are right in the matter or not. At the time of a heavy fall of snow or of a heavy frost, inconvenience and risk to the public must always necessarily be caused, and the public authority, the town council, are the proper judges in the matter, and have the responsibility imposed upon them of seeing that the streets are satisfactorily and properly kept open and clear. If the ratepayers are of opinion that the affairs of the city in that matter are mismanaged, so as to be injurious to their interests or their health, they have the remedy in their own hands.

LORD YOUNG—I concur.

LORD TRAYNER—I agree with the Lord Ordinary's judgment. I have only to add that if the case had come before me in the first instance, looking to the terms on which the interdict was prayed for, I should have been disposed to deal with the plea that the action is irrelevant in a different way from that which was adopted.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Complainer—D. F. Asher, Q.C.—Dickson—Abel. Agents—Auld & Macdonald, W.S.

Counsel for the Defenders—Sol.-Gen. Graham Murray, Q.C.—Ure—Dove Wilson. Agents—Morton, Neilson, & Smart, W.S.