

1894 THE CITY OF HALIFAX (PLAINTIFF)...APPELLANT;

*May 4, 5.

AND

*May 31.

JAMES REEVES (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Public Street—Encroachment on—Building “upon” or “close to” the line—Charter of Halifax secs. 454, 455—Petition to remove obstruction—Judgment on—Variance.

By sec. 454 of the charter of the City of Halifax any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the City Engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained the Supreme Court, or a judge thereof, may, on petition of the Recorder, cause it to be removed.

A petition was presented to a judge, under this section, asking for the removal of a porch built by R. to his house on one of the streets of the city which, the petition alleged, was upon the line of the street. A porch had been erected on the same site in 1855 and removed in 1884; while it stood the portion of the street outside of it, and since its removal the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved but the judge held that it was close to the line so used by the public and ordered its removal. The Supreme Court of Nova Scotia reversed his decision. On appeal to the Supreme Court of Canada:

Held, that the evidence would have justified the judge in holding that the porch was upon the line but having held that it was close to the line while the petition only called for its removal as upon it, his order was properly reversed.

An objection was taken to the jurisdiction of the Supreme Court of Canada on the ground that the petition having been presented to a judge in chambers the matter did not originate in a superior court.

Held, Taschereau J. dissenting, that the court had jurisdiction. *Canadian Pacific Railway Co. v. Ste. Thérèse* (16 Can. S.C.R. 606) and *Virtue v. Hayes* (16 Can. S.C.R. 721) distinguished.

*PRESENT:—Sir Henry Strong C.J. and Fournier, Taschereau, Sedgewick and King JJ.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment of a judge on the hearing of a petition by the city council to remove an obstruction on a public street.

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The facts of the case sufficiently appear from the above head-note.

A preliminary objection was taken by respondents counsel to the jurisdiction of the court to entertain the appeal the petition having been presented to a judge and thus, on the authority of *Canadian Pacific Railway Co. v. Ste. Thérèse* (1), and *Virtue v. Hayes* (2), not having originated in a superior court.

The majority of the court were of opinion that there was jurisdiction, and the case was heard on the merits.

MacCoy Q.C. for the appellants referred to *Spackman v. Plumstead Board of Works* (3); *The Queen v. Berger* (4).

Newcombe Q.C. for the respondent.

The judgment of the majority of the court was delivered by:

KING J.—A preliminary question as to the jurisdiction of the court to entertain the appeal was dealt with by His Lordship the Chief Justice upon the argument, and the cases of *Canadian Pacific Railway Co. v. Ste. Thérèse* (1) and *Virtue v. Hayes* (2) distinguished.

Then as to the merits: The complaint is for erecting a porch upon the street line without first obtaining the certificate of the city engineer as to its location. To support this charge it is not necessary to prove that the building is beyond the line. The act makes it the duty of persons intending to build upon or close to the

(1) 16 Can. S.C.R. 606.

(2) 16 Can. S.C.R. 721.

(3) 10 App. Cas. 229.

(4) 10 Times L.R. 380.

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street line to apply to the city engineer to lay down the line. It is not to be taken that this refers to an intention to encroach. A building is upon the line of the street if the line of the building, in whole or in part, coincides with that of the street. A building encroaching on the street is likewise upon the line. The act extends also to buildings that are close to the street line, although not upon it. "Close to" is an approximate term and admits of more or less separation between the line of the building and the true line of the street. The object of the act is to provide that the street line may be authoritatively and conclusively settled by the city engineer, who in such matter acts as on a judicial inquiry. The defendant having been charged with building upon the line of the street without first making application for the engineer to lay out the line, it is for the city, as the plaintiff in the case, to prove that the building was upon, *i.e.*, coincident with, or beyond, the street line. In the case of a street that has no recorded boundaries the determination of its line may depend upon the extent and nature of the public use and of the adjacent occupations. Here the porch, the erection of which is complained of, occupies the site of a porch built in 1855, and removed in 1884, the foundation of which was found covered with three feet of earth. During the time that the old porch existed the space outside of it was a travelled portion of the street, and since its removal the place where it had been was used as part of the sidewalk. The defendant says that before he put up the present porch the place where he put it was "just like the rest of the sidewalk." Assuming that the defendant was entitled to the site of the old porch, the part outside of it was public street, and the line of the old porch coincided with the line of the street, and was therefore upon it, and upon the evidence the learned judge might very

well have found this, and also that the porch complained of was upon such line.

A difficulty, however, arises by reason of the finding that the porch was close to the line of the street, and that the exact line was not located. There may be implied in this an adjudication that the porch was not upon the line of the street, and as it is in respect of a wrongful building upon the line of the street, and not for a wrongful building close to the street, that the proceedings are instituted it would appear that the order complained of is open to objection, and that the judgment reversing it should be sustained. This appeal is therefore to be dismissed with costs.

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TASCHEREAU J.—In my opinion the objection raised by the respondent to our jurisdiction on this appeal is well taken, and I would quash the appeal.

Appeal dismissed with costs.

Solicitor for appellant: *W. F. MacCoy.*

Solicitor for respondent: *C. Hudson Smith.*
