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Hislop v. McGillivray (Township)

[1888] O.J. No. 50

15 O.A.R. 687

Ontario Court of Appeal

Hagarty C.J.O., Burton, Patterson and Osler JJ.A.

May 8, 1888.

Municipal Act (1883) secs. 524, 531, R. S. O. 1887, ch. 184 secs. 524, 531 -- Original road allowance -- Discretion of council so open -- Mandamus.

Municipal councils cannot be compelled by mandamus to open for travel an original road allowance.

Whether they will do so, is a matter which rests entirely in the discretion of the council.

Judgment of the Q. B. D. 12 O. R. 749, affirmed on this ground.

Secs. 524, 531, of the Municipal Act considered.

The general duty to repair imposed by the latter exists only in regard to travelled roads, and not to roads which have never been opened. Such duty can only be enforced by indictment.

Moulton v. Haldimand, 12 A. R. 503, on this point referred to and followed.

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1 THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 12 O. R. 749, and came on to be heard before this Court, on the 9th April, 1888. HAGARTY C.J.O., BURTON, PATTERSON, AND OSLER JJ.A.

McCarthy, Q. C., and R. M. Meredith, for the appellant.

Meredith, Q. C., for the respondents.

2 The facts are fully stated in the report of the case in the Court below.

3 May 8, 1888. PATTERSON J.A.:-- The plaintiff in his statement of claim sets out that he is a farmer and has for many years owned and lived on lot number eight in the sixth concession of the township of McGillivray, which abuts on the allowance for road between the sixth and seventh concessions, and that he has no means of ingress to or egress from his lot by any other road or highway abutting the lot.

4 The lot is described as containing one hundred acres and is, I understand, properly a half lot, running to the centre of the concession and having therefore no allowance for road at the rear and not having any such allowance between it and the adjoining lot on either side. [15 OAR Page688]

5 The rights which the plaintiff claims in this action are asserted on several grounds as formulated in paragraphs 3, 4, 5, 6, and 7 of his statement. Paragraphs 3 and 4 charge the defendants with stopping up the road allowance, and paragraphs 6 and 7 allege promises respecting it. All that needs to be said of these four paragraphs is that they are not supported by evidence, and that no question respecting them was left to the jury.

6 The claim relied upon is to be found in paragraph 5, which is in the words:

> "5. It was and is the duty of the defendants to maintain and repair the said road and to keep the same in repair, yet the defendants have not maintained and repaired and kept in repair the said road."

7 This count might properly be disposed of on the demurrer, which is included in the defence as pleaded, on the ground that there is no such duty at common law upon the defendants as is alleged in this paragraph and that it asserts a wider duty than that imposed in terms by the statute which merely declares that "every public road, street bridge and highway shall be kept in repair by the corporation."

8 We may, however, disregard the pleadings, because it seems to have been agreed at the trial that certain questions should be answered by the jury. It was not agreed that the jury's findings of fact should be unquestioned; but the agreement as to the questions to be asked serves to limit the range of the discussion.

9 The jury found that the portion of road in question was part of the original allowance; that the defendants had the financial ability to make it reasonably fit for travel; that it is practicable to make it reasonably safe and fit for travel without encroaching on the lands adjoining it; that it would have been a reasonable expenditure of money to make it fit for travel; that the defendants had reasonable time and opportunity do the works necessary to make it fit for travel or to provide some other means of ingress and egress to his lot, No. 8; that if the [15 OAR Page689] plaintiff had not convenient means of ingress and egress to his lot, No. 8, the want of it was due to the default of the defendants; that under all the circumstances in evidence the defendants should have made the portion of the allowance for road fit for travel; and that the defendants in determining not to make the road in question, so determined in good faith.

10 Other material facts on which the argument has proceeded were not matters of dispute, and it was doubtless thought unnecessary to formulate them in the shape of findings by the jury.

11 The plaintiff bought lot 8 from the Canada Company about the year 1849 and went to live upon it. The allowance for road across the front, or north end of the lot, was and is still impassable

by reason of natural obstructions from steep hills and by reason of two tracts of marshy land where a river twice crosses the line.

12 In order to provide a practicable road for travel in lieu of this portion of the original allowance the township council about twenty-five years ago opened a road, which is spoken of as the forced road, and which, leaving the concession line on lot seven, which adjoins lot eight on the west, runs northerly and easterly through part of the seventh concession and rejoins the concession line at lot ten, thus forming a loop which nowhere borders on the plaintiff's lot eight.

13 Efforts were made on more than one occasion, on the part of the council to accommodate the plaintiff by providing convenient access from his residence to this forced road or to some other highway.

14 The object was not attained.

15 In the Divisional Court the late Chief Justice, Sir Adam Wilson, whose opinion was not against the abstract right to maintain the action, considered that the plaintiff's own conduct in connection with those projects disentitled him to relief by mandamus which he asked for.

16 Mr. Justice O'Connor, who had tried the action, thought [15 OAR Page690] the plaintiff entitled to recover; and the present Chief Justice held that the action should be dismissed.

17 It unfortunately happens that the judgment written by him has been lost and we have only a summary by the reporter to the effect that Mr. Justice Armour was understood to hold that sec. 531 of the Municipal Act of 1883 applied only to highways which were highways in fact as well as in law; that the allowance for road in question was only a highway in law and not in fact; and that the opening of it was entirely in the discretion of the council, whose discretion could not be interfered with by the court and that under any circumstances indictment was the only remedy.

18 These conclusions coincide so closely with my own opinion that I should probably have simply adopted the judgment by which they were supported if it had been accessible.

19 The plaintiff asserts against the council the right to have the concession road along the front of lot eight made into a road fit for travel. He owns the adjoining half of lot seven, and has in that way access from his farm to the forced road, but he insists on the right to have a practicable road at the front of lot eight, and if I do not misunderstand his claim, to have the allowance across the whole front of that lot made practicable as a road. The evidence shews that though this is not impossible as an engineering enterprise the expense would be very great, and that the road is required only for the convenience of the plaintiff and his brother, who lives on lot nine, and not for the general public.

20 The claim depends entirely on what is, in my opinion, a misapprehension of the scheme of our municipal law respecting roads, and upon failing to keep in mind the distinction between highways which owe that designation only to section 524 of the Act of 1883, and the highways in relation to which the decisions in English cases have been pronounced.

21 Section 524 includes, amongst ways that are to be deemed common and public highways, all allowances made [15 OAR Page691] for roads by the crown surveyors in any town, township or place already laid out or hereafter laid out.

22 The system of survey in laying out any town, township or place is and always has been, as a rule, to lay out cone cessions and lots of uniform size and rectangular shape, the allowances for

roads being made at regular intervals between concessions and lots without any regard to the adaptation of the ground for the purposes of a highway. The inevitable result is that many such allowances can never become travelled roads, either by reason of absolute unfitness or by reason of the outlay required to make roads of them; and this has always been recognized by the Municipal Institutions Acts; 9 Vict., ch. 8, and 22 Vict., ch. 99, sec. 319, which corresponds with sec. 552 of the Act of 1883; -- and see secs. 550 (1) (9), 551 and 565.

23 Still they remain statutory highways, and the rights of the public to such uses as they are capable of remain, unless they are stopped up under section 550, or in possession of a private person and enclosed with a lawful fence under the circumstances mentioned in section 552.

24 The position of the piece of the concession line in front of lot 8, in the view of the statute, may be deduced from this section 552, though the section does not directly apply to it. The section deals with a part of a government allowance for road, "which has not been opened for public use by reason of another road being used in lieu thereof." That exactly describes the place in question. If the owner of the adjoining lot has it enclosed by a lawful fence he is to be deemed legally possessed thereof, as against any private person until a by-law has been passed by the council for opening it. If he has not enclosed it, which is the present case, the section, does not affect it; but, all the same, it is a part of a government allowance for road which has not been opened for public use.

25 When section 531 enacts that every public road, street bridge, and highway shall be kept in repair by the corporation and attaches to the default in the performance of that duty the liability to indictment and the responsibility [15 OAR Page692] for all damages sustained by any person by reason of such default, it is obvious that the public highway intended is not a road allowance across precipitous hills or through a lake or morass where no sane man would think of spending money or labour in the attempt to make a road -- road allowances of that description may easily be found, and they are under section 524 common and public highways. Nor is there any necessity for carrying the idea of this statutory highway into section 531. We have there, it is true, the term, "public highway," but when we read in connection all the associated words, "public road, street, bridge and highway," as well as have regard to the purpose of the enactment, it is plain that travelled roads, &c., including allowances for roads on which the corporation has, by opening them, invited the public to travel, are intended, and not a road which has never been opened, but in lieu of which another has been provided and is used by the travelling public.

26 The duty to repair, where it exists, and where it is only the general duty created by section 531, can only be enforced by indictment, as was held by Chief Justice Armour. We pointed out the same thing in this Court in Moulton v. Haldimand, 12 A.R. 503, where some of us considered that specific duties such as those imposed by section 535 on county councils might be enforced by mandamus, but all agreed that indictment was the only mode of enforcing performance of the general duty to repair.

27 On these two grounds the plaintiffs action, even if prosecuted on behalf of the public, would fail, and it, of course equally fails, so far as he asserts rights simply as one of the public.

28 The same difficulty, from the duty created by section 531 attaching only with respect to travelled roads or road allowances opened for travel, stands in the way of the assertion of rights in the character of owner of lot 8, and there are other insuperable difficulties.

29 It is a fallacy to regard our municipal corporations as boards of commissioners charged with the care and maintenance [15 OAR Page693] of the highways of their districts. Some of their func-

tions under section 531 may resemble those of such bodies, though even than they necessarily have a wide discretion as to the mode of performing the duty to keep in repair the roads with which the section deals.

30 It must not be forgotten that they are the representatives of the ratepayers exercising on their behalf the discretion vested in them, which discretion extends to (amongst other, things) the opening and stopping up of government allowances for road, subject as to the stopping up, to certain express restrictions.

31 I am not prepared to say that the court could properly interfere so far as to require a municipal council to entertain the question of opening such a road and to exercise its discretion upon it; but if jurisdiction to that extent could properly be assumed, it could, as I apprehend, go no farther.

32 We have here the fact found that the council, having considered the question, decided in good faith not to open this allowance.

33 My opinion, therefore, is that we should dismiss the appeal with costs.

34 OSLER J.A.:-- It is shewn that in the year 1862 the defendants, being satisfied that it was impracticable, or nearly so, and at all events extremely inconvenient and expensive, to open that part of the original road allowance which the plaintiff now seeks to compel them to open, acquired land for the purpose of laying out and constructing another road in lieu thereof some 300 feet or so to the north. This road they have ever since maintained and kept in repair and the plaintiff has always had access thereto from his farm. It does not appear that the original road allowance has ever been sold or taken possession of by the person or persons who gave the land for the new road and the council have in the bonâ fide exercise of their discretion always refused to open and construct for travel a road upon the part of the original road allowance in question. [15 OAR Page694]

35 It is in my opinion a matter which rests in the discretion of the council as representing the whole municipality to determine whether they will open for travel a road over any particular road allowance within their jurisdiction. When they have so opened it, and until they by by-law legally close it, they are no doubt bound by law to keep it in a state of repair suitable to the condition of the community and adequate to their wants.

36 But I am aware of nothing in the Act which gives, as it were, an appeal from the discretion of the council to a jury, or to the court, or imposes upon them any such specific duty, or entrusts them with such a power to be exercised in favour of persons specifically pointed out, as a Court can direct the performance of. The council must be best qualified to judge, and I think it was intended that they should be the judges, having regard to their intimate knowledge of the affairs and wants of the municipality, whether from a judicial point of view, or the necessities of the case, or otherwise, it is desirable to open any particular road allowance, or whether the needs of the community may not be better served by opening a road in lieu thereof.

37 2. If the discretion of the council was open to review, my opinion would be that in the circumstances of this case it had been properly exercised.

38 On both grounds, the action, which is entirely novel and a mere experiment, fails, and the appeal must be dismissed.

39 HAGARTY C.J.O. and BURTON J.A. concurred.

40 Appeal dismissed with costs.

41 [This case has been since carried to the Supreme Court].

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