HENRY ABELL (PLAINTIFF).....APPELLANT;

1920

*Nov. 26.
*Dec. 17.

AND

THE CORPORATION OF THE COUNTY OF YORK (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Highway—Dedication—Reservation of easement—Title to soil—Ontario Municipal Act, 1913, s. 433—3 Edw. VII, c. 19, s. 601 (Ont.)

Prior to 1913 the soil and freehold of roads and highways in Ontario were vested in the Crown and the roads and highways themselves in the respective municipalities subject to any rights in the soil reserved by the person who laid out such road or highway." Sec. 433 of the Municipal Act, 1913, repealed these provisions and vested the soil and freehold of roads and highways in the municipalities without any reservation of right. Prior to 1913 land had been dedicated for a highway with the right reserved to maintain a raceway across it.

Held, Davies C. J. dissenting, that sec. 433 did not take away the right so reserved; to effect that purpose clear and unambiguous language is necessary and a mere inference from the repeal of the provisions protecting the rights reserved is not sufficient; and that the purpose of sec. 433 was to do away with the confusion arising from the joint proprietorship over roads and highways to which effect can be given without causing the injustice of taking private property without compensation.

Judgment of the Appellate Division (45 Ont. L.R. 79) reversed and that of the trial judge (39 Ont. L.R. 382) restored.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial (2) in favour of the plaintiff.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 79; 46 D.L.R. 513. (2) 39 Ont. R. 382.

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A single question of law was raised on this appeal, namely, whether or not sec. 433 of the Municipal Act, 1913, by repealing a provision which protected private rights in a highway existing when it was acquired by the municipality, had the effect of depriving the owner of such rights. The trial judge held that it had not such effect and the Appellate Division that it had.

H. J. Scott, K.C. for the appellant.

Lennox for the respondent.

THE CHIEF JUSTICE:—The contest in this case is as to the right of the now appellant to maintain a raceway in connection with his mill property under the surface of a highway called Pine Street in the village of Woodbridge.

The question in dispute depends upon the proper construction of the 433rd section of the Municipal Act, 1913. That section reads as follows:

433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act.

The law applicable down to the enactment of this section was 3 Edw. VII, ch. 19, section 601, as follows:

601. Every public road, street, bridge, or other highway, in a city, township, town or village—except any concession or other road therein, which has been taken and held possession of by any person in lieu of a street, road or highway laid out by him without compensation therefor—shall be vested in the municipality subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.

It is not contended that there was any express reservation of appellant's rights within the meaning of those words in section 433.

Agreeing as I fully do with the reasoning of Sir William Meredith, Chief Justice of Ontario, who delivered the judgment of the Appeal Court, concurred in by Maclaren, Magee and Hodgins JJ., I would dismiss this appeal with costs.

The legislature has since altered section 433 and its proper construction is not now of public importance, and as I have nothing material to add to the Chief Justice's reasons for judgment, I content myself with a simple concurrence therein.

IDINGTON J.—The question raised herein is whether or not the appellant's easement of carrying a mill raceway across a highway constituted solely by the dedication of the predecessors in title through whom appellant claims, who obviously had reserved such easement, has been taken away by section 433 of the Municipal Act of 1913, which reads as follows:—

> 433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act.

I should be very unwilling to assume that the legislature ever intended to exercise its undoubted but extreme power of taking any man's property and transferring it to another without due compensation. I cannot think that it intended deliberately to do so as is contended for herein. Such legislation, if ever attempted, must be construed in the most restricted sense.

Much stress is laid upon what is claimed to be the clear meaning of the language used.

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The introductory words "unless otherwise expressly provided" are read by those urging this view as if it were absolutely necessary to have the express provisions framed in the form of a deed or other instrument of that sort.

It seemed at the close of the argument as if respondents were willing to concede that, for example, a statutory right of a railway crossing or running along the highway might be such an express provision. But why so? Surely that sort of provision is often beyond the legislative jurisdiction of the provincial legislature as much as any private grant.

It is not an express provision within the power of the legislature, much less within the literal meaning of the words in question in the connection in which they are used, which would seem possibly to imply something expressly provided by the legislature.

Passing this more or less arguable proposition I am decidedly of the opinion that unless the narrow limits suggested thereby or something akin thereto is to be adhered to, the words "otherwise expressly provided" are quite comprehensive enough to cover a claim such as the reservation of this easement claimed by appellant, and all other rights established by law as that is; just as effectually as those created by other statutes for purposes of railways crossing or running along the highway or the use of parts of the soil by watermains of water supply companies, and such like.

All such like rights would be obliterated by maintaining the interpretation of the Appellate Division of the Supreme Court of Ontario of the said section, unless resting upon the provision of some Dominion legislation.

I agree so fully with the reasoning of Mr. Justice Middleton in his dissenting opinion that I need not enlarge.

I do not think that the amending Act of 1919 in any way helps or hinders either side in such a case as this pending at the time it was passed. Counsel for the respondent after taking his point having had time to consider the objections thereto, with commendable frankness, admitted so on resuming his argument.

I think the appeal must be allowed with costs throughout and the learned trial judge's judgment restored but not to go into effect for six months in which, meantime, if so advised, respondent can remedy the wrong or expropriate appellant's property in the said easement.

DUFF J.—This appeal turns on a dry question of law, namely, the application of section 433 of the Ontario Municipal Act of 1913. The section is in the following words:—

433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act.

This section replaced sections 599 and 601 of the Municipal Act of 1903, the text of which was in these words:—

599. Unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out according to law, and every road allowance reserved under original survey along the bank of any stream or the shore of any lake or other water, shall be vested in His Majesty, His Heirs and Successors.

601. Every public road, street, bridge or other highway, in a city township, town or village—except any concession or other road therein, which has been taken and held possession of by any person in lieu of a street, road or highway laid out by him without compensation therefor—shall be vested in the municipality subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.

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It has been held by the majority of the Appellate Division that the effect of the legislation of 1913 is to abrogate rights existing at the time the legislation was passed secured by the provision of sec. 601 that the interest vested in the municipality shall be

subject to any right in the soil reserved by the persons who laid out such road, street, bridge or highway.

Sections 599 and 601 of the Act of 1903 have had a place in the Ontario municipal legislation for many years and have been the subject of a good deal of discussion and the general effect of the decisions appears to be correctly stated by Mr. Biggar in his Municipal Manual at p. 818, namely, that as regards highways created by dedication "the soil and freehold" were vested in the municipality subject as in that section 601 provided. In this general view of sec. 601 the Act of 1913 effected, as regards such highways, no change in the law presently relevant, unless, as has been held by the Appellate Division, by repealing section 601 it did as regards such highways abrogate the rights secured by the language above quoted. I am unable myself to agree with this conclusion and I think that section 14 s.s. (c) of the Interpretation Act points to the principle which ought to be applied if indeed its language does not expressly cover the case. That section is in these words:—

14. Where an act is repealed or whenever any regulation is revoked, such repeal or revocation shall not, save as in this section otherwise provided,

* * * * * * * * * *

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment, regulation or thing so repealed or revoked.

In the case at least of highways established by dedication after the passing of section 601 or its parent enactment, one is not, I am inclined to think, exceeding the bounds of reasonable construction in holding that the right of the dedicand was a right "acquired under the Act" and therefore protected by this clause. But whether that be or be not strictly so the Act of 1913 ought, I think, to be read in light of the canon of construction laid down in *Canadian Pacific Ry. Co.* v. *Parke* (1), applying the language of Lord Blackburn in *Metropolitan Asylum District* v. *Hill* (2):—

> It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears.

The words "soil and freehold" are not words of such aptness and precision as one might have expected to find if the intention had been to transfer the full and unincumbered proprietorship *a coelo usque ad centrum;* and indeed obviously the *dominium* of the municipality is subject so long as the highway remains a highway to the public right of passage exercisable by all His Majesty's subjects.

In the result the construction contended for would disable the municipality from acquiring only a stratum of land sufficient for highway purposes in a case in which the acquisition of the soil *ad centrum* (in the case e.g. of a highway laid out over a mining property) might entail a great deal of unnecessary expense and inconvenience. The better view appears to be that the subject matter with which the legislature is dealing is the title held at the time of the passing of the Act by the Crown or by some public authority subject to the public right of user as a highway. If that is the

(1) [1899] A.C. 535. (2) [1881] 6 App. Cas. 193, at p. 208.

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subject matter to which the enactment is directed and I think that conclusion is justified by the character of the existing legislation, then the principle of construction applies that general words should not be extended so as to involve collateral effects upon the rights of individuals which the legislature must be presumed not to have contemplated. *Railton* v. *Wood* (1).

ANGLIN J.—The findings of the learned trial judge are now fully accepted with the result that the right of the appellant to maintain the raceways in question across Pine street, a public highway, prior to the enactment of the Municipal Act of 1913 (3 & 4, Geo. V, ch. 43) is conceded. The sole question on this appeal is whether that legislation destroyed or took away such right without compensation. Such a confiscatory effect will not be given to a statute unless it be inevitable. Maxwell on Statutes, 6 ed., 501. The intention to accomplish that result must be expressed in clear and unambiguous language, 27 Hals., Laws of England, No. 283. Here it has been inferred chiefly because of the omission in section 433 of the Municipal Act of 1913, which replaced sections 599 and 601 of the Municipal Act of 1903 (3 Ed. VII, c. 19), of the words

> subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.

It is obvious, as is pointed out by Justice Middleton, that there must be some restricton on the broad meaning which it is sought to attribute to the language of section 433. Certain rights which form part of the soil and freehold of highways were not thereby vested in the municipalities. I agree

(1) [1890] 15 App. Cas. 363, at p. 367.

with that learned judge that it is reasonably clear that the purpose of the change made by the Act of 1913 was to do away with some uncertainty and confusion that arose from the former legislation which, while providing that highways should be vested in the municipalities (s. 601), at the same time declared (s. 599) that the soil and freehold thereof were vested in the Crown. Apparently to overcome this difficulty the legislation of 1913 vested the soil and freehold in the municipalities, thus transferring to them the proprietary rights theretofore held by the Crown. The attainment of the purpose of the amendment does not require interference with easements, such as that held by the plaintiff, and reasonable effect, and I think the full effect intended by the legislature, can be given to the language of section 433 without involving their confiscation.

Moreover I doubt whether the language

the soil and freehold of every highway shall be vested—

is apt or appropriate to carry a mere easement enjoyed over the highway, since an easement is only a right in the owner of a dominant tenement to require the owner of servient land "to suffer or not to do" something on such land and neither forms part of the ownership thereof nor involves a right to any part of its soil or produce. Gale on Easements, 9 ed. 91.

In reaching the conclusion that the appeal should be allowed and the judgment of the learned trial judge (1), restored, I have entirely put out of consideration the amendment of 1919 (9 Geo. V. c. 46, s. 20) brought to our attention by Mr. Lennox. (See *Boulevard Heights* v. *Veilleux*) (2). If, notwithstand-

(1) 39 Ont. L.R. 382. (2) 52 Can. S.C.R. 185.

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ing ss. 18 and 19 of the Interpretation Act, any inference may properly be drawn from this enactment it would seem to afford an indication that the view of the effect of the legislation of 1913 above stated probably accords with what the legislature intended. Of course s. 19 precludes any inference that the statute of 1913 before the amendment of 1919 had the effect for which the respondent contends or that such amendment was necessary to give it the effect for which the appellant contends. The amendment was obviously passed to meet the decision of the Appellate Division in this case and may well have been introduced merely *ex majori cautela*.

The appellant is entitled to his costs here and in the Appellate Division.

BRODEUR J.—It is common ground that the street under which were the raceways in question had been dedicated as a public highway by the predecessor in title of the plaintiff-appellant and that the dedication was subject to his right as owner of certain mills to enjoy the raceways across the street.

The public highways were before 1913 partly vested in His Majesty and partly vested in the municipalities (1903, ch. 19, ss. 599 and 601).

The vesting in the municipality was made subject to any rights in the soil reserved by the person who laid out the road (section 601).

In the year 1913, it was enacted that all the roads would be vested in the corporation. It is true that the old sections 599 and 601 of the Municipal Act were repealed and that no formal provision was enacted as to the reservations that the former owners

of the road possessed under the old law. But it seems to me that the object of the statute of 1913 was simply to bring a change as to the vesting of the highways from His Majesty into the municipal corporations.

The repeal had not the effect of affecting any right, privilege or easement that the appellant possessed concerning those raceways (s. 14 R.S.O. ch. 1). The appellant still possesses the right which he reserved to himself when his predecessor made his dedication to use these raceways and continue the industrial development which he could make with his mills.

I entirely concur in the views expressed in the Appellate Division by Mr. Justice Middleton.

The appeal should be allowed with costs of this court and the order of the trial judge restored with a proviso however that it shall not become operative for a period of six months, to enable the municipality in the meantime, if it so desires, to expropriate the right or easement in question.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Aylesworth, Wright, Moss & Thompson.*

Solicitors for the respondent: *Lennox & Lennox.*