ROBERT HISLOP (PLAINTIFF).....APPELLANT ; 1889

AND *Nov. 28.

THE CORPORATION OF THE TOWNSHIP OF McGILLIVRAY (DEFENDANTS)..... RESPONDENTS. 1890 *June 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Municipality—Duty of—Road allowance—Obligation to open—Substitution in lieu thereof—Jurisdiction of court over municipality—C. S. U. C. c. 54.—R. S. O.* (1887) *c.* 184 *ss.* 524, 531.

H. was owner of, and resided on, a lot in the eighth concession of the Township of McG. and under the provisions of C.S.U.C., c. 54, an allowance was granted by the Township for a road in front of said lot. This road was, however, never opened owing to the difficulties caused by the formation of the land, and a by-law was passed authorising a new road in substitution thereof. Some years after H. brought a suit to compel the township to open the original road or, in the alternative, to provide him with access to his lot, and also to keep said road in repair and pay damages for injuries caused by the road not having been opened.

*Held,* affirming the judgment of the court below, that the provisions of the act, C.S.U.C., c. 54, requiring a township to maintain and keep in repair roads, etc., and prohibiting the closing or alteration of roads, only applied to roads which had been formally opened and used and not to those which a township, in its discretion, has considered it inadvisable to open.

*Held* also, that the courts of Ontario have no jurisdiction to compel a municipality, at the suit of a private individual, to open an original road allowance and make it fit for public travel.

APPEAL from the Court of Appeal for Ontario (1) affirming the judgment of the Queen's Bench Division (2) in favor of the township.

This suit was instituted in 1885, and in his statement of claim the plaintiff alleges, in substance, that

PRESENT.—Sir W. J. Ritchie C. J. and Strong, Taschereau and Gwynne JJ.

(1) 15 Ont. App. R. 687. (2) 12 O. R. 749.

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he has been for many years owner in fee of lot number eight in the sixth concession of the township of McGillivray,—that the original allowance for road in that concession was in front of his lot and that he had no access to his lot over any other public road—that defendants had stopped up said road and prevented him from having access to his lot by means thereof—that he has been excluded from such access for many years without any compensation therefor or being supplied with other means of access to his land—that defendants have not maintained said road, as was their duty—that they from time to time promised to maintain and repair it but have always neglected so to do—that they frequently promised him compensation for closing said road but he has never received the same; and he prayed

1. Compensation and damages.

2. An injunction compelling defendants to open said road or provide other means of access to his land.

3. An injunction compelling defendants to repair said road; and

4. General relief.

By the statement of defence it was alleged that plaintiff was owner of the east half of lot seven in the seventh concession of the township—that the road in front of plaintiff's lot had never been opened in consequence of natural and physical difficulties rendering it impossible or, at all events, practically impossible from the great expense it would have involved—that it would not have been an honest exercise of their discretion to open the road under the circumstances—that another road was opened in lieu of the said road which is available to plaintiff in going to and from his lot—that plaintiff acquiesced in the substitution of the new road and accepted the same in lieu of any right he might have in respect to the original allowance—that

plaintiff has other means of access to his lot—that defendants have offered to construct a roadway from the new road to plaintiff's lot which he refused to accept—and defendants submitted that it was entirely in their discretion whether the road should have been opened or not and the exercise, in good faith, of such discretion could not be reviewed by the court.

By his reply the plaintiff admitted that he had means of access to his land, but averred a large expenditure in order to procure the same. He also admitted defendant's offer to provide him a roadway, but alleged that they always neglected to do so. Subject to these admission issue was joined.

On the trial of the action the jury found that defendants had the financial ability to open the original road and that it could have been made fit for travel without encroaching on adjoining lands—that it would have been a reasonable expenditure of public money to make it fit for travel—that from default of defendants the plaintiff had not a convenient means of access to his lot—that defendants should have opened the road, but they acted in good faith in determining not to do so; and they awarded plaintiff $1. damages.

Judgment was entered for the plaintiff, but was set aside on motion to the Divisional Court (1), Wilson C. J. being of opinion that the plaintiff had not made out a case for the relief he asked, and Armour J. that the discretion of a municipal council in such a case could not be interfered with and that, under any circumstances, plaintiff's only remedy would be by indictment of the council. The Court of Appeal affirmed the judgment of the Divisional Court, and the plaintiff appealed to the Supreme Court of Canada.

*R. M. Meredith* for the appellant, as to the right of the plaintiff to have the road opened and maintained,

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cited *Re McArthur and Corporation of Southwold* (1), *Cubitt* v. *Lady Maxse* (2), *Dovaston* v. *Payne* (3).

On the construction of the statute *Eastern Counties Railway Co.* v. *Marriage* (4), *Wood* v. *Hurl* (5).

That the municipality should open the whole road, *Reg.* v. *Eastern Counties Railway Co.* (6), *Rex* v. *Severn and Wye Railway Co.* (7), *Reg.* v. *French* (8).

*Meredith* Q.C. for the respondents. As to rights of landowners see *Fritz* v. *Hobson* (9), *Yeomans* v. *County of Wellington* (10).

An action will not lie for the injury complained of. *Burton* v. *Dougherty* (11).

Nor is mandamus an apt remedy in such case. *Brooks* v. *County of Haldimand* (12); and see *Slattery* v. *Naylor* (13).

SIR W. J. RITCHIE C.J.—For the reasons given by the Court of Appeal I am of opinion that this appeal should be dismissed.

STRONG J.—Concurred in the reasons given by Mr. Justice Gwynne for his decision.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—The plaintiff in the year 1850 entered into possession of lot No. 8, in the 6th concession of the township of McGillivray as the owner thereof in fee simple. At the time of his so entering into posses-

(1) 29 U.C.C.P. 216.
(2) L. R. 8 C. P. 715.
(3) 2 Sm. L. C. 8 ed. 142.
(4) 9 H. L. Cas. 32.
(5) 28 Gr. 146.
(6) 10 A. & E. 531.
(7) 2 B. & Al. 648.
(8) 4 Q. B. D. 512.
(9) 14 Ch. D. 542.
(10) 43 U. C. Q. B. 522; 4 Ont. App. R. 301.
(11) 19 N. B. Rep. (3 P. & B) 51.
(12) 3 Ont. App. R. 73.
(13) 13 App. Cas. 446.

sion of the lot the road allowance between the 6th and 7th concessions in front of the adjoining lot No. 7, by reason of a steep hill in that part of the said road allowance, was and still is utterly impassable except on foot, and no work has ever been done upon it. In front of lot No. 9, also, there was and still is another steep hill. The plaintiff and his brother, who owns lot No. 9, prior to 1862 constructed for their own convenience, with some rough timbers, what is called a corduroy bridge, across a stream which crosses the road allowance in front of lot No. 9, so as to make a footpath across the stream, and they also cut away a little piece of the hill on the east side so that a person could walk up and down the hill. The road allowance between those two hills in front of plaintiff's lot, No. 8, is comparatively level, so that if the two hills should be cut down, and the lowlands at their base filled up to the level of the road allowance in front of lot No. 8, a reasonably fair road could be made which would give free access to the plaintiff's lot; but the execution of such work would have been so difficult and expensive that the municipal council of the township, in the year eighteen hundred and sixty-two, because of the great difficulty and expense attending the making the road allowance in front of those lots fit for travel passed a by-law in virtue of which they constructed a road across part of the east half of lot No. 7 and across lots Nos. 8 and 9 and part of lot No. 10 in the seventh concession of the said township, and which is described in the by-law by metes and bounds and is stated to be in place of the original allowance for road between the sixth and seventh concessions, that is, in place of that part of such road allowance which lies between the terminal points of the new road.

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(His Lordship then set out the substance of the pleadings (1) and proceeded as follows).

Now, by the issues thus joined, the plaintiff's case appears to be reduced to a claim by him for compensation in damages for monies alleged to have been expended by him in providing himself with means of access between his said lot No. 8 and the new road opened by the defendants by by-law as alleged in their statement of defence, or as alternative relief in lieu of such compensation, or to speak more correctly, by way of compelling the defendants to render to the plaintiff such compensation, that the defendants may be com pelled (for the sole convenience of the plaintiff, and as the plaintiff insists that the defendants, notwithstanding the opening of the new road, are still in law bound) to open, and to maintain fit for travel, that part of the said original road allowance which lies between the terminal points of the new road, so as to give *thereby* access to the plaintiff's lot No. 8, which he could not have along such original road allowance so long as that part of it is left in its natural state. At the trial a large field of enquiry was entered upon, and questions were submitted to the jury by the learned judge who tried the case which, in the view which I take, appear to me to be not very material to the determination of the case. It did, however, appear upon the evidence of the plaintiff himself that very shortly after the opening of the new road under the by-law of 1862 he purchased the east half of the adjoining lot No. 7, for the purpose of obtaining thereby access between his lot No. 8 and the original allowance for road between the 6th and 7th concessions of the township, close to the place where the new road is made, to diverge from the original road allowance and enter upon the east half of lot No. 7, in the 7th concession. It also appeared that about the same time the council

(1) See p. 280.

of the township offered to acquire and give to the plaintiff a road from the new road across lot No. 8, in the 7th concession, to his lot No. 8 in the 6th concession, near the place where the north-westerly extremity of that lot abuts on the original allowance for road between the said 6th and 7th concessions. The witnesses for the defendant allege that the plaintiff at first agreed, and afterwards refused, to accept this road. The plaintiff admits that the offer was made to him, but says that he insisted upon having given to him also a road along the length of his lot No. 8, and the lot to the south of him to the next concession allowance for road to the south, which I understand to be the road between the 4th and 5th concessions. Being asked if the township did not afterwards offer to give him, as he was not satisfied with the road offered to him through lot No. 8 in the 7th concession, a road along the rear of lots Nos. 9 and 10, to a side line running along lot 10, he answered "yes;" and being asked if he had agreed to take that road, he answered "yes." Lot No. 9 belonged to plaintiff's brother, lot 10 to one Charlton. It appeared also in evidence that the township council agreed with Charlton for a road three rods in width across his lot for $46, and a deed of the land to the municipality was prepared for execution by him, but the plaintiff prevented the execution thereof by intervening and purchasing from Charlton a road of two rods in width, which the plaintiff and his brother have ever since used. Now, as to this road, the clearest evidence was given that the plaintiff had agreed to accept it, and afterwards intervened to prevent its being acquired for him by the municipality.

Having been asked, "if he did not, after agreeing with the township to take a road through Charlton's lot, go and buy the road himself behind the township's back," he answered, "yes." And being asked,

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"whether that was not done by him in order to prevent the township giving him that road," he answered, "yes, to be sure it was, it was not much of a road, any how." But the question having been repeated, if he had not agreed to take it, he answered, "yes."

It is then abundantly clear that the plaintiff has provided himself with access to his lot No. 8, which the township were willing and offered to give him at their expense, and which, after having agreed to accept, he himself intervened to prevent their acquiring and giving to him.

The question now is whether, under these circumstances, the plaintiff is entitled to the relief prayed for in his statement of claim or to any relief. The answer to this question must depend upon the provisions of the Municipal Institutions Act, ch 54 of the Consolidated Statutes of Upper Canada, the statute which was in force affecting the matters in issue when the new road was opened under the by-law of the municipality passed in 1862. Under the 315th section of this act the municipal council of the township of McGillivray had jurisdiction over the original road allowances within the municipality, subject to certain provisions in the act contained.

The only provisions affecting the case now under consideration are those mentioned in the 318th and 321st sections, by the former of which it was enacted that no council should close up any original road allowance (or other roads) whereby any person should be excluded from ingress and egress to and from his lands and place of residence over such road, but that all such roads should remain open for the use of the persons who require the same. This section, as its language, plainly as it appears to me, intimates, refers only to original road allowances, or other roads which had

already been opened, and which, therefore, should remain open for the use of the person whose lands abutted thereon.

By the 321st section it was enacted that no council should pass a by-law for the stopping up, widening, diverting or selling any original road allowance, or for establishing, opening, stopping up, &c., &c., or selling any other public highway, road, &c, &c., until certain notices of the intended by-law should be published in a manner prescribed in the act. By the 330th and 331st sections the council of every township municipality was empowered to pass by-laws, among other things, for enforcing the performance of statute labor, or a commutation in money in lieu thereof—for regulating the manner and the divisions in which statute labor or commutation money should be performed or expended—for opening, making, preserving, improving, repairing, &c., &c., roads, &c., &c., within the jurisdiction of the council, subject to certain restrictions in the act contained—for selling an original road allowance to the parties next adjoining whose lands the same is situated when a public road has been opened in lieu of tbe original road allowance, and for the site or line of which compensation has been paid—and for selling, in like manner, to the owners of any adjoining land any road legally stopped up or altered by the council; and in case such persons respectively should refuse to become the purchasers at such price as the council should think reasonable then for the sale thereof to any other person for the same or a greater price. The first part of this sub-section appears to refer to the case of a new road opened by the municipality in lieu of an original road allowance or a part of an original road allowance, which had never been opened and made fit for public travel, and the second part to roads which

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had been opened but which should be legally stopped up or altered by the council; then by the 333rd section it was enacted that in case a person is in possession of any part of a Government allowance for road laid out adjoining his lot and enclosed by a lawful fence and which has not been opened for public use by reason of another road being used in lieu thereof, or is in possession of any Government allowance for road parallel or near to which a road has been established by law in lieu thereof, such person shall be deemed to be legally possessed thereof, as against any private person until a by-law has been passed for opening such allowance for road by the council having jurisdiction over the same; but by the 334th section no such by-law should be passed until notice in writing should be given to the person in possession, at least eight days before the meeting of the council, that an application will be made for opening such allowance. Then by the 337th section it was enacted that every public road, street, bridge and highway in a municipality shall be kept in repair by the corporation, and that the default of the corporation so to keep in repair shall be a misdemeanor punishable by fine in the discretion of the court, and that the corporation shall be further civilly responsible for all damages sustained by any person by reason of such default but the action must be brought within three months after the damages have been sustained. Then by the 343rd section it was enacted that the council of every township might pass by-laws for the stopping up and sale of any original allowance for road or any part thereof within the municipality and for fixing and declaring therein the terms upon which the same may be sold and conveyed, but no such by-law shall have any force unless passed in accordance with the three hundred and twenty-first section of the act, nor until confirmed by a by-law of

the council of the county in which the township is situate, at an ordinary session of the county council, but no sooner than three months nor later than one year after the passing thereof.

These are the only sections of the act affecting the plaintiff's rights as they stood when the new road was opened under the by-law of 1862, and from them it sufficiently, I think, appears that after the opening of the new road under the by-law of 1862, in substitution for the impracticable part of the original concession road allowance in front of lots 7, 8 and 9, which had never been opened, the municipality could not have been compelled at the suit of the plaintiff to pass a by-law for the opening of, or to open, the said piece of the said original road allowance in lieu of which the new road had been opened.

If any direct injury resulted to a private individual from any obstruction placed in a public travelled highway, whether on land or on water, which injury was other and greater than that occasioned to, or suffered by, the general public, the person so injured had his remedy by action at common law for damages, and in equity by injunction to restrain the continuance of the obstruction causing the injury. There is no lack of cases which establish this proposition. But that is a jurisdiction very different from that of a court assuming to dictate to a municipality established under the Municipal Institutions Acts from time to time in force in that part of Canada, formerly constituting the Province of Upper Canada, now the Province of Ontario, the times when, the places where, and the manner in which the council of the municipality should exercise its legislative jurisdiction over the original road allowances placed under their control. Hitherto no jurisdiction has ever been asserted by any court in that part of Canada now constituting the Province of

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Ontario to compel any one of the municipalities existing therein, at the suit of a private individual, to open an original road allowance, and to make it fit for being travelled upon as a public highway, and, in my opinion, no such jurisdiction exists in any court save under and in virtue of the jurisdiction conferred by ch. 23 of the Consolidated Statutes of Upper Canada, and which is now exercised by the High Court of Justice for Ontario, whereby a plaintiff may obtain a judgment, in an action instituted at his suit, for a writ of mandamus to issue commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested.

When the council of the municipality of the Township of McGillivray passed the by-law of 1862, and opened thereunder the new road which was substituted for that part of the original road allowance which was, in the opinion of the council, impracticable and unsuitable for a public highway, they were acting in the legitimate exercise of the jurisdiction vested in them by statute, and thereupon the new road so opened assumed the place of the piece of the original road allowance in lieu of which it was opened, and the municipality became subjected to the duty of maintaining and repairing it in the place and stead of the piece of the original road allowance for which the new road was substituted, and was authorized by the statute to sell, by a by-law to be passed for the purpose, the piece of the original road allowance to the owners of the adjoining lands of which the plaintiff was one; such owners, moreover, might have enclosed the half opposite to their respective lots, and have retained possession thereof against all persons, unless and until a by-law should be passed by the council for opening the same, which by-law could not be passed without notice to the persons in possession. I have already said that,

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in my opinion, an original road allowance which never had been opened did not come within the above 318th sec. of chapter 54 of the Consolidated Statutes of Upper Canada—that such section applied only to roads which had been opened and by which a person had had access to his land, of which access the section enacted that he should not be deprived, but that, notwithstanding the opening of a new road in the place of the old, the latter by which any person had had access to his lands should remain open for the like purpose ; but assuming that section to apply to the case of a part of an original road allowance, like that in question here, which never had been opened, but in substitution for which, because of its unsuitability for a public highway by reason of natural obstacles existing there, a new road had been opened under a by-law, the council never has as yet assumed to exercise any jurisdiction or right to close it. It remains still in its former condition unless it has been taken possession of and enclosed by the respective owners of land fronting upon it, as it might have been under the statute which, it is moreover to be observed, imposed no obligation upon the municipality to provide other access for the plaintiff to his lot. This want of such a provision in the statute appears to have been considered a defect for the legislature in 1873, in the Consolidated Municipal Institutions Act of that year, 36 Vic., ch. 48, imposed a restriction upon the right of the municipality to close up any public road or highway by the 422nd section of that act by which it was enacted as follows :—

No council shall close up any public road or highway whether an original allowance or a road opened by the Quarter Sessions or any municipal council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, shall also provide for the use of such person some other convenient road or way of access to his said lands or residence.

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And this section has been further amended by sec. 544 of ch. 184 of the Revised Statutes of Ontario of 1887 which, in addition to the above re-enacted verbatim, enacts as follows:—

> If the compensation offered by the council to the owner of the lands, or the road provided for the owner in lieu of the original road as a means of ingress or regress, is not mutually agreed upon between the council and the owner or owners, as the case may be, then in such case the matters in dispute shall be referred to arbitration under the provisions of this act respecting arbitration.

Now, the only duty or obligation owed by a municipality in respect of these road allowances within its jurisdiction is such duty and obligation as has been imposed and is regulated by the Municipal Institutions Acts for the time being in force, and that duty or obligation is owed to the general public. It may be admitted that the plaintiff in the present case, as the owner of a lot of land fronting on the piece in question of the original concession road allowance, has a personal interest in the fulfilment of whatever duty, if any, still remains imposed by statute upon the municipality of the township of McGillivray in relation to such part of the said original road allowance in the interest of the general public; but apart from such duty, if any, so imposed, the township municipality owes no duty to the plaintiff or to any one in respect of such road allowance. The plain result, as it appears to me, of what has been done by the municipality under statutory authority is, that upon the opening of the new road under the by-law of 1862, in lieu of that piece of the original concession road allowance between the 6th and 7th concession of the township of McGillivray which, in the opinion of the council of the municipality, was wholly unsuitable for being opened as a public highway, the municipality ceased to owe and does not now owe any duty to any person to open that part of the said original road

allowance for which they have provided a new road by way of substitution; and as the statute, under which the municipality proceeded, imposed no obligation upon them to render any compensation to the plaintiff under the circumstances he is not in a position to maintain an action for damages or any other relief against the municipality. The piece of road allowance in question, although it never has been opened, has never been closed by the municipality; it remains still in the condition it always has been, and if sec. 544 of ch. 184 of the Revised Statutes of Ontario, of 1887, applies to an original road allowance which never has been opened, and if the council of the municipality should ever pass a by-law to close the piece in question, the plaintiff may perhaps then be able to claim "compensation and also some other convenient road or way of access to his said lands and residence" in the words of that section; but in such case in the event of any difference arising between the plaintiff and the municipality upon the matter it would have to be settled by arbitration under the provisions of the act, ch. 184, and not by action; the relief provided by sec. 544 is incidental only to the closing of a public road or highway by a municipality which can be done only by a by-law to be passed for the purpose under the provisions of the statute in that behalf.

It was suggested, but hardly argued and, indeed, it could not well be contended, that the injury to his land of which the plaintiff complains comes within the 531st sec. of the above ch. 184, which enacts that

every public road, street, bridge or highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained.

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But if the municipality is, under the circumstances above set forth, under no obligation to open the piece of road allowance in question, the latter cannot be a piece of road or highway which, under this section, they are bound to keep in repair.

Whether an indictment could be sustained in any case against a municipality under this section as for default in keeping in repair an original road allowance which had never been opened for travel it is unnecessary to determine, for it appears, I think, to be clear that the damage of which the plaintiff complains is not damage within the meaning of this section, namely, "damage sustained by reason of such default." The damage to the plaintiff's land of which he complains has always existed,—it arises from the natural conformation of the land at the place in question, and is attributable to that cause, whereas damages sustained by reason of the default of a municipality within the meaning of the 531st sec. of ch. 184 Revised Statutes of Ontario must, as it seems to me, be damages directly attributable to a cause of damage occasioned by the default of the corporation and for the existence of which cause they are therefore responsible.

For the above reasons I am of opinion that the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for appellant: *Meredith & Meredith.*

Solicitors for respondent: *Meredith & Cox.*