Hopkins v. Hamilton Electric L. & C. Power Company.

Judgment in action tried at Hamilton. The plaintiff is the owner of and resided in house No. 366 Victoria avenue north, in the City of Hamilton. The defendants, during the year 1900, built on a lot adjoining the house a brick building, covering the whole lot, in which they placed three large engines for transforming and distributing electric power. The plaintiff, owing to the vibration caused by the engines, has been obliged to vacate the house. The defendants are a consolidation of two companies (one incorporated under 61 Vict. ch. 68, O.), under the Ontario Joint Stock Companies Act. Under R. S. O. ch. 200, sec. 3, they obtained powers to conduct electricity through the streets with the consent of the city, and under sec. 4 they obtained the powers conferred on gas and water companies under R. S. O. ch. 199, secs. 24, 25, 26 and 55, and under ch. 68, supra, secs. 13 to 20 of the Ontario Railway Act are made applicable to them: Held, that the general clause in the Railway Act conferring power to take land, and those clauses providing for surveys and the filing of a plan, etc, with the Commissioner of Crown Lands not having been included in ch. 68 (supra) the defendants have not the powers conferred by secs. 19 and 20, and they have no power to expropriate; that the defendants have committed a nuisance and their liability depends upon a consideration of their duties, powers and the manner in which they have exercised the latter. There is no general rule. A company obliged to serve the public, and clothed by statute with authority to do certain things, may do them as authorized by the statute without committing a nuisance, and without making compensation for injury; Hammersmith v. Brand, L. R. 4 II, L. 471; London v. Truman, 11 A. C. 45; on the other hand, where the powers are permissive and capable of being executed without committing a nuisance, and no provision is made for compensation, the powers must be executed so as not to create a nuisance; Metropolitan v. Hill, 6 A. C. 193; Rapier v. London (1893) 2 ch. 588; C. P. R. v. Parke (1899) A. C. 535. The defendants, here, having no power to expropriate land, not being compellable to exercise their powers, and though permitted to buy land to erect buildings upon and operate works for their business, and not being expressly bound to compensate persons injured by the their operations, are only entitled to exercise their powers so as not to create a nuisance, even though without creating a nuisance they could not conduct their business. Shelfer v. City of London, etc., Co. (1895) 1 c. 287 is conclusive as to relief to which plaintiff is entitled. Injunction granted to come into effect on 1st October next, restraining defendants from carrying on their works so as to occasion a nuisance to plaintiff, who may have a reference as to damages to be assessed under rule 552 down to time of assessment. Costs of action, including discovery, to plaintiff. Costs of reference reserved. Entry of judgment stayed until 25th September next.

Re McMaster Estate and City of Toronto.

Judgment on case stated by the judge of the county of York pursuant to section 85, 1, R. S. O., chapter 234, upon the appeal of the trustees of the estate from the decision of the court of revision of the city of Toronto, confirming the assessment of $20,000 as the income of the trustees derived from the estate, which by order in council approved by the Lieutenant-Governor, was referred to a judge of the Court of Appeal for Ontario, and by him referred (sub-section 7) to the full court for its opinion thereon. There are four trustees, three of whom reside in Toronto and one in London, Ontario. The net income of the estate for the last financial year was $33,248.50, of which $8,504 16 was derived from rents and real estate. After payment of two annuities the trustees paid to the Home Missionary Society $2,000, and to McMaster University $23,064.37. The expenditure of both these institutions exceeds their gross revenue. The sum received by the society went to pay the salary and expenses of the superintendent, who resides in Toronto and pays taxes under section 35 of the Act. The sum received by the university (its only endowment), together with students' fees, constitutes the only fund for payment of salaries of professors and lecturers, who all reside in Toronto, and also pay income tax. The question raised is whether cognizance can be taken of the destination of the income assessed, in determining the liability of the trustees to be assessed in respect of it, and if this is answered in the affirmative, whether under the circumstances the trustees are to be assessed in respect of it. McDougall, County Judge York, held that it was not open to him to apply any equitable constructions to the assessment act if the language is plain: Partington vs. Attorney-General, L. R., 4 E. & I., App. 123 per Lord Cairns; that the apparent intention of the act is to ignore trusts, and the language (secs. 44, 46) is clear that personal property (which includes income) vested in or under the control of trustees, as in this case, must be regarded for the purpose of assessment as their own property, and the income as their income; and that, subject to the $400 exemption allowed upon all incomes derived from any source other than personal earnings, the assessment must be confirmed. Held that being personal property in the sole possession of trustees the income in question is taxable under sec. 46 of the assessment act. The destination of it, whether to university purposes or private beneficiaries, is immaterial, and it is not within sec. 7, sub-sec. 24, the language of which is quite inapt to describe the relation of cestui que trust and trustees, and the latter's duty to pay over the income of the property in his hands. If the legislature had intended to exempt it under the act of 1897, as being devoted to university purposes and as really being the property of the university or taxable only on the footing of the university being the owners, they would doubtless have enacted in regard to it, as they have done in regard to university buildings and grounds by sec. 7, sub-sec. 4. Refer to re Canada Life Assurance Co., 25 A. R. 312. Judgment below affirmed and appeal dismissed with costs.

Re McPherson vs. Public School Trustees Section 7, Township of Osborne.

Judgment on appeal by defendants from order of the Judge of the county of Huron, dismissing motion for a new trial in a plaint in the Fifth Division Court, brought to recover a balance of salary alleged to be due to plaintiff by defendants. The trial judge held that the agreement, dated in 1897, under which the plaintiff had since taught in the school, was void for want of defendants' corporate seal, but that a previous agreement, dated 17 December, 1894, under seal, containing this clause: "(5) This agreement shall also be construed to continue in force from year to year unless and until it is terminated by the notice hereinbefore prescribed," was still in force, not having been terminated as required by sec. 19, ch. 292, R. S. O., the meeting of the trustees not having been duly called. One trustee received at five minutes to 9 in the evening a notice of a meeting to be held at 9, and besides the minutes of the meeting were not duly kept. Judgment was entered for plaintiff under sub-sec. 6 of sec. 77 of the Public Schools Act, for the amount of his salary in arrear, and because it was in arrear for three months additional. Held that the agreement of 1897 was not invalid, a direction having been given to the trustees in the plaintiff's presence to the officer having the custody of the seal to attach it, and the agreement having been acted on for two years, and the plaintiff having upon the faith that it was binding agreed to receive less salary. To permit the defendants to rely on the omission to affix the seal to defeat the agreement would be to permit them to practice a gross fraud upon the plaintiff. Held, also, the Judge below was right in holding that the agreement of 1894 is valid, the one of 1897 never having become operative, according to the defendants' contention, the one of 1894 must continue in force until a new one is made. Instead of suing for wrongful dismissal under an existing agreement, plaintiff might have sued for wages pro rata up to his discharge, adopting it and treating it as unjustifiable: Lilly vs Erwin, 11 A. & E., N. S., 742. This he has done and he is entitled to succeed because he has earned