

LA BROOY v. PEREIRA.

M. C., Colombo, 7,813.

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Municipal Councils' Ordinance, No. 7 of 1887, s. 183—Failure to remove sunshades projecting into street—Meaning of "public street," "uncovered aqueduct"—"Permission" in s. 184—Right of Council to withdraw it.

Per curiam (MONCREIFF, J., dissenting).—In section 183 of "The Municipal Councils' Ordinance, 1887," the word "public street" does not mean "street" as defined in section 3. It means the roadway as used by the public for their passage along it, and might include a covered aqueduct, drain, or sewer, but not an uncovered one.

The words "uncovered" before the words "aqueduct, drain, or sewer" applies as well to drains and sewers as to aqueducts.

If a sunshade allowed to be put up by the Municipal Council does not project beyond the outer edge of the drain, it cannot be said to obstruct in any way the free passage of the public along the roadway.

Semble that the permission granted by the Chairman of the Municipal Council under section 184 to put up verandahs, balconies, &c., is not revocable capriciously.

Per MIDDLETON, J.—The Municipality, in granting a permission under section 184, give a great deal more than a simple license.

They may confer upon the grantee a right to carry out works which may cost him very considerable sums of money, and it is neither reasonable nor equitable that when a man has expended large sums of money on the faith of a duly granted right he should be exposed to a capricious revocation of it on the part of the grantor.

Section 183, even if it does not apply to obstructions lawfully made under section 184, although my view is that it must, at least shows that the Legislature recognize the equity of compensation where it becomes necessary to order lawfully erected obstructions to be removed.

Per LAYARD, C.J.—A projection, encroachment, or obstruction made by permission on terms, conditions, and limitations would be removable under section 183 on the expiry of the term, or on account of the happening or breach of one of the conditions attached to the permission, and being lawfully made in terms of the permission granted under section 184 the grantee would be entitled to the compensation mentioned in the proviso to section 183, so that neither section 183 nor its proviso would be rendered inoperative by reason of it being held that the terms of any particular permission granted under section 184, not being subject to any limitation or condition, amounted to an irrevocable grant.

THE facts of this case, which was argued on 4th April, 1905, are fully set forth in the judgment of Middleton, J.

Pereira, K.C., for accused, appellant.

Van Langenberg (with *Bawa*), for respondents.

19th April, 1905. MIDDLETON, J.—

The accused in this case was charged that "on or about the 22nd day of October, 1904, he did fail or neglect, after notice in writing issued under section 183 of Ordinance No. 7 of 1887

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from the Chairman of the Municipal Council, and served on him on the 6th October, 1904, to remove two projections, namely, two sunshades at his premises Nos. 163/165, St. Joseph's street, which project into and encroach upon the streets known as St. Joseph's street and New Urugodawatta road, to carry out the provisions of the said notice." He was convicted on the above charge and sentenced to pay a fine of Rs. 50, and in default to suffer simple imprisonment for one month "if he fails to remove the encroachment within one week from payment by the Municipal Council of the compensation to be hereafter assessed."

The accused appealed against this conviction, and the Municipal Council appealed against that part of the order of the Magistrate which obliged them to pay compensation to the accused.

The evidence heard was to the effect that the accused had put up unshades that projected over the drain running along the front of his house. It was not proved either by plan C or by the oral evidence that the sunshades projected beyond the edge of the drain adjacent to the roadway. It was also in evidence that the accused had received a permit from the Chairman of the Municipality to build according to a plan marked E, which showed sunshades; that in June last he got notice to remove the sunshades; that he took them down and shortened them, and that the drip of the rain water from the sunshades is now into the drain, and that he had provided gutters on the sunshades. There is no evidence to show that the sunshade in question would in fact in any way obstruct the passage of a public roadway, nor was there any evidence that if they did drip into the drain such a drip would do any damage.

In the first place, as I read the conviction in this case, the defendant is only to be fined Rs. 50, or in default imprisoned for a month if he fails to remove the alleged encroachment within one week from payment by the Municipal Council of the compensation to be hereafter assessed.

He was not ordered to remove the alleged obstruction on payment of compensation, and fined in addition, as appears to have been supposed during the argument.

Before the fine can be levied the Municipality must pay the necessary compensation; and that is no doubt the reason of their cross-appeal.

For the defendant appellant, it is contended that no contravention of section 183 of the Ordinance has been proved, inasmuch as the sunshade is not shown to project beyond that edge of the open drain or aqueduct which is next the public roadway.

As I read that section it provides (1) against any obstruction of the free passage along the public street; (2) against any obstruction into or upon any uncovered aqueduct, drain, or sewer.

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It is sought by the Municipality to give the word " street " in this section an interpretation under section 3, which would bring within its meaning the drain or aqueduct itself, even though uncovered.

I cannot, however, believe, looking at the introduction of the word " public " before the word " street " in section 183 and the prohibitory part of the section, that the Legislature meant to use the word " street " in the sense given it in section 3, or could have thought that any vehicle or person would have any right or even wish to use an uncovered drain for passage as part of the street.

In my opinion the words " public street " in that section mean the roadway as used by the public for their passage along it, and might include a covered aqueduct, drain, or sewer, but not an uncovered one. So long as the sunshade does not project beyond the outer edge of the drain I cannot see that it obstructs in any way the free passage of the public along the roadway, which in my opinion is what the first prohibitory part of the section is aimed at. If it merely hangs over the drain, even with the water dripping from it, I cannot see how it can obstruct, project, or encroach into or upon the drain, and there is no prohibition against overhanging the drain.

Some doubt was expressed during the argument as to whether the word " uncovered " applied on the grammatical construction of the sentence to drain or sewer as well as aqueduct.

My experience of the appearance of these so-called aqueducts is that they act as both drains and sewers; and other sections of the Ordinance show that the Legislature contemplated sewers and drains being uncovered.

I think that the word " uncovered " in the section applies as well to drains and sewers as to aqueducts. In my view of the matter, therefore, no obstruction or encroachment within the words of section 183 was proved against the defendant.

For the Municipality, however, it was argued, assuming the sunshades to be an obstruction, that even if the Chairman gave a permission under section 184 he could withdraw it arbitrarily, and that permission having been withdrawn in the case before us, the defendant was an offender in renewing it after an alleged endeavour to bring it within the terms of the Ordinance, and because when it was re-erected it was not lawfully erected, therefore the Municipality were not compellable to pay compensation under the latter part of section 183.

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MIDDLETON, J. The Municipality, in granting a permission under section 184, give a great deal more than a simple license.

They may confer upon the grantee a right to carry out works which may cost him very considerable sums of money, and it is neither reasonable nor equitable that when a man has expended large sums of money on the faith of a duly granted right he should be exposed to a capricious revocation of it on the part of the grantor.

Section 183, even if it does not apply to obstructions lawfully made under section 184, although my view is that it must, at least shows that the Legislature recognize the equity of compensation where it becomes necessary to order lawfully erected obstructions to be removed.

Even if that section did not apply, in my opinion the permission of the Chairman would involve the grant of an interest which would on the analogy of the cases quoted in *Wood v. Leadbitter* (13 M. & W. 838) be irrevocable.

It is not necessary for me to decide this latter contention of the Municipality, as in my opinion the erection of the sunshades has not contravened section 183, and for that reason I would hold that the conviction is bad and should be quashed and the accused acquitted.

MONCREIFF, J.—

According to the decisions of the English Courts the meaning of the word "street" in statutory provisions of this description is a matter of law; it does not depend on the popular sense of the word. Section 3 of the Municipal Councils' Ordinance certainly makes the drain in question part of a street "over which the public has a right of way," and therefore part of a public street. The words in the interpretation which include drains have been added to the terms borrowed from English Acts. This drain is overhung by the sunshades; the erection therefore of the sunshades falls within section 183 of the Ordinance.

It is said that the sunshades, which are of modest dimensions, escaped observation when the plans submitted by the appellant were examined and permission for their erection was given. Section 184 confers on the Chairman power to give permission.

Section 183 gives the Chairman power to order the removal of certain obstructions, whether made before or after the commencement of the Ordinance and whether made "lawfully" or not.

I am unable to agree with the suggestion that the "lawfully made" obstructions contemplated do not include obstructions made by permission of the Chairman. No obstruction could be lawfully made after the commencement of the Ordinance except by permission of the Chairman.

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It is said that the permission given was an irrevocable grant; for no limit of time was fixed. That is a large construction to place on words which are harmless in appearance. A mere license is revocable; it simply makes an action lawful which without it would have been unlawful. I have been unable to find among English decisions any authority in point. From that fact I should have inferred that the permission was not meant to be withdrawn if the Ordinance had not expressly provided for its withdrawal. To employ the terms used in *Thomas v. Sorrell (1679)*, *Vaughan 351*, the permission or license made lawful the erection of the sunshades, which would otherwise have been unlawful. As I have said, the Chairman is authorized to remove projections lawfully made after the commencement of the Ordinance or hereafter (that is, made by his permission); and then, according to the argument, he is forbidden to remove them because they were lawfully made. I do not think that the Chairman's permission was meant to be irrevocable; I think the provision says exactly the reverse.

The Legislature in drafting section 183 had in view sections 69 and 70 of "The Towns Improvement Clauses Act, 1847," from which provisions it is plain that the application of compensation for the removal of projections, erected after the commencement of our Ordinance or "hereafter," was intentionally inserted. Section 70 of the Act mentioned provided "that if such obstructions or projections shall have been lawfully made the Commissioners shall make reasonable compensation to every person who suffers damage by such removal or alteration." The section applies only to projections erected before the passing of the Special Act. Those erected after the passing of the Act are dealt with in section 69; no compensation is given for removing them, and in each case the projection must be "an obstruction to the safe and convenient passage along any street." Here obstruction to "safe and convenient passage" is not an essential but an alternative. The extension of compensation in our Ordinance to cases arising after the commencement of the Ordinance or hereafter is evidently deliberate, and negatives in my opinion the suggestion of an irrevocable grant.

I regret to be unable to agree with the majority of the Court.

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I have had the great advantage of reading both my brothers' judgments. It is unnecessary for me to repeat here the facts of this case, as they will be found fully recited in the judgment of my brother Middleton. Further, it is not requisite for me, for the purpose of this judgment, to decide whether when permission subject to no terms or conditions is granted under section 184 of Ordinance No. 7 of 1887 the person obtaining such permission has obtained an irrevocable grant, or whether the Chairman is justified in giving notice under section 183 notwithstanding that permission, as in my opinion section 183 is inapplicable to the circumstances of the present case. I wish, however, to point out that even if we declared such a grant was irrevocable it would not, as argued on behalf of the Municipal Council, necessarily render inoperative so much of section 183 as refers to projections, encroachments, or obstructions erected after the commencement of the Ordinance, and further that the enactment in the proviso for compensation in respect of such projections, encroachments, or obstructions lawfully made after the commencement of the Ordinance does not necessarily negative an irrevocable grant. For the Chairman in granting permission under section 184 may attach to it such reasonable terms, conditions, and limitations as to him seem meet, and need not give such a permission as would amount to an irrevocable grant. A projection, encroachment, or obstruction made by permission on such terms, conditions, and limitations would be removable under section 183 on the expiry of the term, or on account of the happening or breach of one of the conditions attaching to the permission, and being lawfully made in terms of the permission granted under section 184 the grantee would be entitled to the compensation mentioned in the proviso to section 183, so that neither section 183 nor its proviso would be rendered inoperative by reason of it being held that the terms of any particular permission granted under section 184, not being subject to any limitation or condition, amounted to an irrevocable grant.

I agree with my brother Moncreiff that section 3 of the Ordinance No. 7 of 1887 gives a meaning to the word "street," which certainly would make the drain in question part of a street. That meaning, however, the section itself enacts, is only to apply if the context permits of it. The question then remains, does the context in section 183 permit of the word "street" as used in that section being interpreted as applying to an "uncovered drain?" Reading the section carefully it appears to me that the context requires that a distinction should be drawn between the

words "public street" as there used and the words "uncovered aqueduct, drain, and sewer." The portion of the section referring to street uses the words "safe and convenient passage along any public street;" these words are not apposite to uncovered aqueducts, drains, or sewers, which certainly are not convenient passages or ways for the public to walk along. Again, if the Legislature intended that the words "public street" as used in section 183 should include an "uncovered drain," it would not have enacted that portion of the section dealing with uncovered aqueducts, drains, and sewers. The fact that the section has made special and separate provision with regard to uncovered aqueducts, drains, and sewers, is to me a clear indication that the intention was to draw a distinction between the words "a public street" as used in that section and the words "an uncovered aqueduct, drain, or sewer." There is good reason for the Legislature drawing the distinction; a sunshade or other projection overhanging an uncovered drain, as far as I can see, would cause no damage or injury to the drain, whilst if it overhangs a portion of the roadway the rain dropping from the sunshade might cause injury to the road. The Legislature has expressly omitted to enact in section 183 that any projection overhanging an uncovered aqueduct, drain, or sewer must be removed after notice, and the enactment in that section regarding a public "street," when read with the context and with that portion of the section which expressly and definitely deals with "an uncovered aqueduct, drain, or sewer," seems to distinguish between the latter and a "street" and to require that in interpreting the section I should exclude them from the street. Further, I am justified in so doing in view of the Legislature having expressly enacted in section 3 that "street" should not be given the meaning assigned to it in that section if the context otherwise requires, and the context in my opinion does otherwise require.

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I agree with my brother Middleton that the conviction is bad and must be set aside. The cross-appeal with regard to compensation consequently need not be considered and must be dismissed.
