OREGON SUPREME COURT DECISIONS

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State of Oregon, ex rel, v. Swigert, et al.

The State of Oregon, ex rel., C. A. Gray, Robert D. Inman, James Maguire, M. O. Collins and H. M. Esterly, as commissioners of the Port of Portland, a corporation, plaintiff, v. C. F. Swigert, C. F. Adams John Driscoll, Archie Pease, P. L. Willis, John C. Ainsworth and William D. Wheelwright, defendants. Quo Warranto Proceeding. Argued and submitted May 25, 1911. M. G. Munly, H. H. Riddell, Will R. King (and W. A. Munly on brief) for Relators. C. E. S. Wood (Williams, Wood & Linthicum, on brief) for defendants. W. S. Uren (and Stephen A. Lowell on brief) Amici Curiae. Eakin, C. J. Demurrer sustained, and complaint dismissed.

This is an action in the nature of quo warranto commenced by an original proceeding in this court under Sec. 2 of Art. VII of the Constitution, as amended November 8, 1910, which provides that "the supreme court may in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings." The relators were appointed by the governor as commissioners of the Port of Portland and they bring this action for the purpose of removing from office the defendants, who constitute the board of commissioners appointed by the legislature on February 26, 1903, or subsequent thereto to fill vacancies in the commission.

The Port of Portland was first created by an act of the legislative assembly on February 18, 1891, as a municipal corporation. By Sec. 9 of the act (Laws 1891—794) the power and authority given to the corporation is vested in 15 commissioners named therein, and their successors in office to be chosen as provided in the act. Section 12 provides that if an appointed commissioner neglects to qualify or removes from the corporation limits his place shall be deemed vacant, and all vancanies so occurring, or occurring from death, resignation or other cause, shall be filled by the remaining members of the board.

On February 18, 1899, the legislative assembly amended Sec. 9 of the act (Laws 1899, 150) by appointing nine commissioners to constitute the board, their successors to be chosen as hereinbefore provided. March 1, 1901, the charter was re-enacted and by Sec. 25 (Laws 1901, 430) seven commissioners were appointed to constitute the board to serve until their successors in office are chosen as hereinafter provided, and by Sec. 28 if a commissioner refuses to qualify, or removes from the corporate limits, his office shall be deemed vacant, and that all vacancies arising in the commission from any cause shall be filled by the remaining members of the commission by election, until the next session of the legislature when the vacancies so created shall be filled by election by the legislative assembly.

By the act of the legislative assembly of February 26, 1903, Sec. 25 of the charter was again amended (Law 1903, 340) appointing Swigert, Driscoll, Adams, Pease, Spencer, Willis and Thomas, as the board of commissioners but making no change in the duration of the term of office or the manner of choosing their successors in office. At the session of 1905 Ainsworth was elected to fill the vacancy caused by the resignation or absence of Spencer. At the 1907 session Wheelwright was elected to fill the vacancy caused by the absence of Swigert from the port, and Swigert was elected to fill the vacancy caused by the resignation of Thomas.

On February 2, 1911, the legislative assembly passed an act providing for the appointment of commissioners for the government of ports having a population of more than 100,000. The first clause of Sec. 1 of which is involved here, viz.: "Every municipal corporation of the class designated and known as 'Ports' which contains within its boundaries a population of more than 100,000, as shown by the last federal census, shall be governed by a board of seven commissioners." The act provides that the commissioners shall be appointed by the governor for a term of four years in the manner therein provided. Pursuant to the provision of the act, the governor appointed the relators, together with S. M. Means and Joseph Goodman as such commissioners. The two last named neglected to qualify or accept the office and the relators bring this proceeding to establish their right and title to the offices as commissioners of the Port of Portland.

Defendants demur to the complaint for the reason that it does not state facts sufficient to constitute a cause of action, relying upon the unconstitutionality of the solid legislative act of 1911.

Eakin, C. J.: On June 4, 1906, Sec. 2 of Art. XI of the constitution was amended to read: "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state of Oregon." Prior to this amendment it was in the power of the legislature, by special act, to amend the charter of the port as it saw fit, as to the number of commissioners, their term of office, and the time and manner of their election, but such changes could have been accomplished only by legislative act. The legislature could not have appointed commissioners at a joint session of the two houses except to fill vacancies, which authority it still has as it is the appointing power named in the charter. If an act has been passed by the legislature, fixing the duration of the term of office and appointing new commissioners, or authorizing the governor to appoint them, its effect would have been to amend or repeal the former provisions of the charter in those particulars, as fully as Sec. 9 of the charter of 1891 was amended by the act of 1899, or that amendment again amended in Secs. 25 and 28 in the charter of 1901, and again in 1903. But by the amendment of Sec. 2, Art. XI of the constitution, the power to amend or repeal the charter was taken from the legislature. The plaintiff's seek to avoid the effect of that amendment, contending that the act of 1911, referred to, is a general law and, therefore, not within the inhibition of the constitutional amendment; that the clause of Sec. 1 thereof, above quoted, included all ports which contain a population of over 100,000 as shown by the last federal census, makes it general as to all ports that are now are hereafter may come within that classification. On the other hand defendants urge, (1) that such a classification confines its application, and was intended to apply, to the Port of Portland, and (2) that the classification attempted threby is arbitrary and not based on real distinction, and therefore is special, and with this latter view we agree.

The provision of the act that "every municipal * * * port which contains within its boundaries a population of more than 100,000, as shown by the last federal census," refers to the last census before the enactment. It means a present condition as fixing the class that may come within the law and cannot be construed to include ports thereafter created or that may subsequently acquire that population. It includes only such ports as at that time had the necessary population of which there was but one—the Port of Portland.

This question was well considered in Ladd v. Holmes, 40 Or. 167, 173 in which Mr. Justice Wolverton says: "A statute, however, which is plainly intended to affect a particular person or thing, or to become operative in a particular place or locality and looks to no broader or enlarged application, may be aptly characterized as special and local and falls within the inhibition * * *. It may be stated as a positive rule of general application that all acts or parts of acts attempting to create a classification of cities by population which are confined in their operation to a state of facts existing at the date of their adoption or any particular time, or which by any device or subterfuge exclude other cities from ever coming within their purview, or based upon any classification which in relation to the subject concerned is purely illusory, or founded upon unreasonable * * distinctions," are special and local. The opinion states the rule very clearly and we believe correctly. Counsel for plaintiff suggest that, so far as the opinion holds that the reference therein to the last federal census in the present tense would mean unmistakly the census of 1900, is clearly dictum, but we do not so consider it. The question in that case was whether the classification "as shown by the last state or federal census" was comprehensive enough to make it a general law, and the opinion first ascertains the rule for the purpose of applying it to the facts in the case before it. But if considered as only dictum yet we find that it is a correct statement of the law and is fully supported by the argument of the opinion and authorities cited, and is directly applicable in this case. The classification of the statute here considered confines its operation to a state of facts existing at the date of its adoption and excludes all other ports from ever coming within its purview and is, therefore, special.

Furthermore, the classification must be upon some real and actual distinction as a justification for it. We conceive that no distinction exists for a different rule in ports of 100,000 population than for those with a lesser population as to the limitation of the term of office or time or manner of election. No reason is named in the act, nor is any suggested by counsel. If none exists then the classification is illusory and without existence in fact and the law is special. There must be a difference in the situation, circumstances and requirements of the ports as the ground for the classification and not special legislation under that guise: Richards v. Willard, 176 Pa. St. 213; Blankenburg v. Black, 50 Atl. (Pa.) 198. And we conclude that the classification is an arbitrary one and that the law in fact aplies only to the Port or Portland and exempts from its provisions all other ports.

The act here challenged is an attempt to amend Secs. 25 and 28 of the charter of the Port of Portland by changing the duration of the term of office of the commissioners and the appointing power, and the time and manner of their election in violation of Sec. ? Art. XI of the constitution. It is also objectionable because the attempted classification of ports affected by its previsions is arbitrary and illusory, and therefore the act is void, and the relators are not the commissioners of the Port of Portland.

The demurrer is sustained, and complaint dismissed.

Templeton v. Williams Bros. Transfer Co., Clackamas County.

Charlotte Templeton, respondent, v. E. Williams, A. L. Williams, J. E. Williams and David Williams, partners as Williams Bros. Transfer Co., appellants.

Appeal from the circuit court of Clackamas county. The Hon. Thomas A. McBride, judge. Argued and submitted June 6, 1911. Joseph E. Hedges, attorney for respondent. Walter A. Dimick, (Dimick & Dimick on the brief). Bean, J. Affirmed.

This is a suit to enjoin the use of a barn in Oregon City, Clackamas county, Oregon, as a nuisance. From a decree in favor of plaintiff defendants appeal.

Plaintiff is the owner of lots 3 and 4, block 62, in said city, upon which are two dwelling houses, while defendants are the owners of lots 5 and 6 of said block, upon which, within about 15 feet of one of plaintiff's dwellings and about 60 feet from the farther house, there has lately been constructed a barn 40 by 80 feet in dimensions, in which are stabled some 16 horses, defendants being in the drayage business. There was for several years upon the lots of defendants an old barn, which was torn down, and in its place the new barn erected.

Plaintiff alleges that during a large portion of the year, when the prevailing wind is from the southwest, the stench and obnoxious odors from the stable are carried into the dwellings, causing the plaintiff and her tenants great discomfort; that it causes an accumulation of flies and vermin and the fostering of rodents in and about the houses, and renders her property both less useful and less valuable.

Defendants deny the material allegations of the complaint, alleging that the old barn had been there for 20 years, of which fact plaintiff was aware when her dwellings were erected; that the barn is connected with the city sewer system, and that it is kept in a cleanly manner.

Bean, J. Except in degree there is but little difference in the testimony on the part of plaintiff from that of defendants. The testimony shows plainly that the barn is constructed of wood, and located in a residence portion of the city; that about 16 horses are kept therein, and that the noise made by them often disturb the slumbers of the occupants of the nearer dwelling; that when the wind blows from the direction of the stable, obnoxious odors emanate therefrom and blow into the house, in order to keep out which the occupants are at times compelled to close their doors and windows; that it causes an accumulation of house and green flies in and about the dwellings, and that while the stable is connected with the city sewer system, and kept as clean as it well can be when used, nevertheless it causes the annoyances and discomforts mentioned by plaintiff in her complaint, and which are shown by the testimony; that it creates an unsanitary condition for a residence locality, and deteriorates the value of plaintiff's property. The occupants of the nearer house, being caused the greater amount of discomfort, tends to show that in this instance "distance lends enchantment," or at least diminishes the obnoxious odor. In fact the strong point of the defense seems to be that the wind sometimes blows other than toward plaintiff's dwellings, and while defendants do not seem to notice the annoyance as much as plaintiff and her tenants, yet one of them testifies that he had noticed the stench from the small barn of another neighbor, when a horse and cow were kept therein. It is shown that the odor from the old barn was at times "pretty rank." The testimony on the part of defendants appears to be merely in the line of minimizing the noise and offensive odors.

First, we will state briefly the rule of law, which we think should govern a case of this kind: A man should so use his own property as not to injure another, or the property of another. Fish v. Dodge, 47 Am. Dec., 254. A stable or barn is not a nuisance per se, but may become one from the manner in which it is constructed or maintained, or by reason of its improper location being necessarily injurious to a neighbor. 29 Cyc., 1181; Shiras v. Olinger, 50 Ia., 571. Where the odors from a stable on adjoining premises are so offensive as to render the occupany of the property by tenants materially uncomfortable and disagreeable, an owner, injured in his property rights, is entitled to an injunction. In cases, however, where the nuisance consists of the manner in which the stable or barn is kept, an injunction should be granted to prevent continuance of the causes constituting the nuisance. In such a case there is not an unreasonable interference with the defendants' rights. A person about to erect a livery stable with a plank floor upon his own land, on a public street in a city, near a hotel owned by another, where its location would cause irrevocable injury to the hotel owner, resulting, in consequence of the unhealthy effluvia arising therefrom, the collection and swarming of flies, and the stamping of horses therein, in the loss of health and comfort to such family, and in the loss of patronage to his hotel, the erection of the stable would operate as a nuisance to the adjoining owner, and he would be entitled to an injunction, restraining its erection. Joyce, Law of Nuisances, Secs. 204, 205; Catlin v. Valentine, 38 Am. Dec., 567; Ashbrook v. Commonwealth, 89 Am. Dec., 616; Dargan v. Waddill, 49 Am. Dec., 421.

If plaintiff's property is reduced in value through the use of this barn, it is urged by defendant's counsel that her remedy is in an action for damages, in support of which Blagen v. Smith, 34 Or., 394, is cited, where Mr. Justice Moore, at page 403, remarks: "A private nuisance, however, may in some instances become so intolerable to a party whose property, or the enjoyment thereof, is affected thereby, that its discontinuance becomes an imperious necessity, in which case equity only can afford the immediate relief demanded, because the slow process of the law courts is not adequate to the occasion." We do not think, however, that this case bears out such a theory, or that any remedy at law would be adequate. "The keeping of horses in a stable adjoining plaintiff's premises, and the noise resulting therefrom, with the fact of moisture and dampness, * * * afford sufficient ground for relief by injunction." High, Injunctions, Sec. 780.

Since the commencement of this suit, no temporary restraining order having been issued, the barn in question has been used in the manner in which, as we understand, defendants intend to use it in the future. While they have made a strenuous endeavor to so construct the stable as to suppress obnoxious effluvia arising therefrom, and minimize the noise the horse would naturally make; connected the same with the sewer, and freely used the broom, yet doors are made to be opened, and the doors and windows of the barn have necessarily been open part of the time, with the results as indicated. From the photographs in evidence the barn is not unsightly, apparently being a useful, substantial building, and in some parts of the city would not be objectionable. But, because in olden times both man and beast were housed under the same roof, is no reason why at the present time a stable should be used in the residence district of a city, where it becomes a nuisance to adjacent houses. Old things have passed away to a certain extent, and many changes have taken place in the customs and manners of civilized life. Plaintiff's testimony is corroborated to quite an extent by that of one of the defendants, who testifies that, "I looked for them to declare the old barn a nuisance."

According to the evidence, we conclude that the use of the barn is a nuisance, and that the plaintiff is entitled to have the same enjoined from such further use. It is complained, upon the part of defendants, that the findings of the lower court are to the effect that the barn itself should be abated as a nuisance. We do not so understand the findings of fact or conclusions of law, but if the decree of the lower court is susceptible of such a construction, we think it should be given a modified construction, so as to declare the present use of the barn a nuisance, and that the defendants be required to abate the same, but that they be permitted to use the building, as now located, for other purposes.

It follows that the decree of the lower court is affirmed.

STATE NEWS.

No trace has yet been found of the murderer of the Hill family. Rewards aggregating $2750 are now offered for his apprehension.

McMinnville is organizing a taxpayers' association, for the purpose of protecting the taxpayers.

A man supposed to be insane has terrified the suburbs of Oregon City for two days, but so far has managed to elude the officers and others looking for him.

A Lane county hop growers is putting crude oil on the roads, to protect h's crop from dust, and he says "it pays."

A humming bird at Pendleton has its nest on a telephone wire. Her babies should be sad gossips.

Two Pilot Rock men pleaded guilty Tuesday to putting sawdust in a stream, and paid $50 each for so doing.

Inland Empire crop reports are optimistic.