J. H. RODD (PLAINTIFF) .....APPELLANT; 1910

AND *Nov. 23. *Dec. 23.

THE MUNICIPAL CORPORATION OF THE COUNTY OF ESSEX (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Statutory duty—County officers—Office accommodation—Discretion—Mandamus.

The courts should not interfere by mandamus with the reasonable exercise by a County Council of its discretion in selecting the place in the county at which an office shall be provided for the County Crown Attorney and Clerk of the Peace.

Judgment of the Court of Appeal (19 Ont. L.R. 659) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment at the trial in favour of the plaintiff.

The plaintiff, as County Crown Attorney and Clerk of the Peace for the County of Essex, applied for a mandamus to compel the municipality to provide him a proper office. In his statement of claim he set out the fact that Windsor is by far the most important place in the county, and that an office there instead of at Sandwich, the county town, would be the most convenient for the public; also that the office had been at Windsor for many years prior to 1908, when the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Idington, Duff and Anglin JJ.

(1) 19 Ont. L.R. 659.

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County Council refused to continue it and provided and could provide none at Sandwich.

At the trial Falconbridge C.J. held that the allegations in the statement of claim were proved while those in the statement of defence were not; that suitable offices could not be provided at Sandwich; and that the plaintiff was entitled to a mandamus to compel the corporation to provide one at Windsor. This judgment was reversed by the Court of Appeal.

Wigle K.C. for the appellant. By the Ontario "Municipal Act" certain officers of the county must reside in the county town. No such provision is made as to the County Crown Attorney and Clerk of the Peace, and the maxim *expressio unius est exclusio alterius* applies. See *Morgan* v. *Crawshay*(1).

If the corporation fails in its duty to provide a proper office for these officials they may do so themselves at its expense. *Lees* v. *County of Carleton*(2).

A. H. Clarke K.C. for the respondent.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Anglin.

GIROUARD J.—I would dismiss this appeal for the reasons given in the court below.

IDINGTON J.—It is important that the records of which the Clerk of the Peace is custodian, should not only be safely kept from risks of fire but in such orderly manner as to be readily accessible to whom-

(1) L.R. 5 H.L. 304. (2) 33 U.C.Q.B. 409.

soever their inspection may concern. For this purpose alone a vault in the court house would seem the best arrangement.

It is necessary also that offices in the court house should be available in connection therewith to serve the same officer as Clerk of the Peace and County Crown Attorney whilst discharging his duties in connection with the sittings of the several courts at which he must attend in the court house.

Under the peculiar conditions that have developed in Essex, where the largest city therein is two miles from the court house, it is not to be expected that any man, who would be a desirable incumbent of the office, should stay in the court house continuously.

On the one hand the people who wish to see him at other times than on the occasions of a court sitting, would have to travel two miles out of their usual business resort to transact a piece of business that may not require ten minutes of attendance.

On the other hand, the officer is generally a man in such active practice that he cannot afford to inconvenience his general clients and himself by staying two miles from the centre of business in the county.

An allowance for a share of office rent in Windsor to supplement the periodical use of some offices in the court house is not a very large item, and the refusal by respondent's council to do what had long been done for many years in that regard, is not to be commended.

However regrettable it may be that the respondent's council have not seen their way to act otherwise, and in some such way as I have indicated as a reasonable solution of the difficulties, I do not see how we can help appellant.

The law does not seem to have been yet put in such

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shape as to enable us to interfere with the jurisdiction of the county council in the matter.

If we allowed the appeal and granted a mandamus the court could only execute it so far as to enforce the furnishing of accommodation in or near the court house, which has been offered and rejected.

It is not to be supposed that the council are acting in bad faith in the offer made and, though not as expressly continued in their pleadings as it might have been, I doubt if we should be justified in assuming as necessary a mandamus limited to an office in or near to the court house.

The sort of office so far provided in the court house is entirely inadequate.

I think the appeal must be dismissed.

DUFF J.—The appellant, Mr. Rodd, is the County Crown Attorney and Clerk of the Peace for the County of Essex, and the municipal corporation of that county is bound to provide him as the incumbent of these offices with proper office accommodation under section 506 of the "Municipal Act" of Ontario.

The county town of Essex is Sandwich. Mr. Rodd resides and carries on the practice of his profession in Windsor. The County Council profess their willingness to provide office accommodation for Mr. Rodd at the court house in Sandwich. The learned Chief Justice of the Court of King's Bench, who tried the action, held that there is no place in the court house or in the county town which is suitable or which can be made suitable for the performance of the official duties of Mr. Rodd, who, indeed, before the commencement of the action, had informed the council that he would not occupy an office in Sandwich.

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I think the Court of Appeal rightly dismissed the action, because I do not think the evidence warrants the conclusion that the County Council might not in a reasonable exercise of their discretion decide that the plaintiff in his official capacities ought to be domiciled in the county town. That being so, it follows, of course, that a refusal to provide an office in Windsor accompanied by an offer to furnish accommodation at Sandwich does not necessarily amount to a refusal to perform the duty of providing "proper offices" in accordance with the enactment mentioned.

In view of the position taken by Mr. Rodd criticism of the accommodation actually furnished at Sandwich appears to be irrelevant. A mandatory order at the suit of the plaintiff directing something which the plaintiff has from the outset declared would be useless to him would involve a startling disregard of the considerations which govern the court in the exercise of its discretionary powers; and there can be no remedy in damages first because there has been no refusal to provide accommodation at Sandwich, and secondly, because if there had been, the plaintiff, whose action, if any, is an action on the case(1), cannot be said to have suffered any harm through the failure to furnish accommodation which admittedly he would not have used.

ANGLIN J.—I agree in the view that, having regard to the provisions of section 506 of the "Consolidated Municipal Act of Ontario," the selection of the place at which it shall provide an office for the Crown Attorney and the Clerk of the Peace rests with the

(1) *Mayor of Salford* v. *County Council of Lancashire*, 25 Q.B.D. 384, at p. 391.

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County Council, and while the courts may compel the performance of the duty of making the selection, where a conscientious judgment has been exercised by the body to whom that duty is committed, the court will not substitute its sense of fitness for that of such body. Judicial interference might be warranted if it were shewn that the discretion of the County Council had not been exercised "in a manner fair, candid and unprejudiced." Upon the evidence, such a case has not here been established. Having regard to the fact that some of his duties render it necessary that the Crown Attorney should have an office in the county court house, it is impossible to say that in determining that any office which it should provide must be in the court house, the conduct of the council was "arbitrary, capricious or biassed." *Rex* v. *Askew*(1).

It is not contended for the appellant that he is entitled to have two offices provided for him at the public expense. If it be necessary for the discharge of some of his duties, as is admitted, that the Crown Attorney should have an office in the court house, however desirable it may be that he should also have an office in Windsor, the statute does not, I think, impose on the County Council the duty of providing it.

Although it would appear from their judgments that the learned judges of the Court of Appeal regarded the right of the appellant to an office in the City of Windsor, at the expense of the County of Essex, as the only substantial question in this action, it is now urged that the right of the appellant to a *proper* office in Sandwich, (which it has been found the County Council failed to furnish for him,) was also in issue. This right is asserted in the statement of

(1) 4 Burr. 2186, at p. 2189.

claim, and is repeated in the reasons against appeal in the Court of Appeal. The prayer for relief covers it. The finding of the learned Chief Justice of the Court of King's Bench that the office provided in the county court house was unsuitable and inadequate, is well supported by the evidence, and has been affirmed in appeal. The statutory duty of the council to provide a proper office, etc., is clear. If there were nothing more in the case, assuming that a private action for such relief might be maintained by the appellant, his prayer for a mandamus requiring the County Council to provide him with a *proper* office should perhaps be acceded to.

But mandamus is a discretionary remedy which will not be granted merely to enforce some abstract right so as to entail upon the defendant expense and trouble without any substantial benefit or advantage accruing therefrom to the plaintiff. To the remedy of mandamus the maxim *lex neminem cogit ad vana seu inutilia peragenda* applies. *The King* v. *The Bishop of London*(1). Moreover, notwithstanding that an applicant may have made out a case of strict legal right, in the exercise of its discretionary power the court will consider his motives, and if not convinced of their propriety, will withhold relief. *The Queen* v. *Liverpool, Manchester and Newcastle-upon-Tyne Railway Co.*(2). Antecedent demand and refusal must also be made clear.

The plaintiff gave the following evidence at the trial:—

I may say frankly that I told the County Council, I think in the June session a year ago, that it was not a proper place for me to perform the duties of my office, that I could not do it properly living

(1) 13 East 418, at p. 420(*n*). (2) 21 L.J.Q.B. 284.

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in Sandwich, and it would be useless for them to provide any office here if they intended me to perform, if I was expected to perform, the duties of my office properly. I could not do it here at all; I would not come; that was the truth of the matter. I told them I would not come here and I would not do it for my own sake, and it would not be proper so far as my office is concerned. My presence in Windsor, so far as my duties are concerned, is imperative.

In view of this attitude of the plaintiff, the discretion of the court will, in my opinion, be properly exercised in refusing the mandamus for which he asks. His apparent failure to press this part of his claim before the Court of Appeal renders this course all the more proper.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wigle & Rodd.*

Solicitors for the respondent: *Clarke, Bartlet & Bartlet.*