THE CITY OF WINNIPEG (PLAINTIFF) ..... APPELLANT;

AND

FREDERICK F. BROCK AND CHARLES ROBERT MUTTLEBERRY (DEFENDANTS) ..... RESPONDENT.

1911
*Oct. 17, 18.
*Nov. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Municipal corporation—Closing streets—"Passage of by-law"—Coming into force of by-law—Time for appealing—3 & 4 Edw. VII. c. 64 (Man.) —"Winnipeg City Charter" — Construction of statute.

A municipal by-law for the diversion and closing of certain highways and the transfer of the land to a railway company provided that it should "come into force and effect" on the execution of a supplementary agreement between the municipal corporation and a railway company "duly ratified by council"; it also determined the classes of persons and property entitled to compensation in consequence of being injuriously affected by the diversion and closing of the streets. The statute (3 & 4 Edw. VII. ch. 64, sec. 708, sub-sec. *c*(1)), conferring these powers, gave persons dissatisfied with the determination the right to appeal to a judge "within ten days after the passage of the by-law." Another by-law was subsequently enacted by which the first by-law was "ratified and confirmed and declared to be now in force." The defendants, who had been excluded from the class of persons to receive compensation, appealed to a judge, under the section of the statute above referred to within ten days after the enactment of the second by-law.

Held, that the terms "within ten days after the passage of the by-law" in the statute had reference to the date when the by-law affecting the streets and determining the classes entitled to compensation became effective; that the first by-law did not come into force and effect in such a manner as to injuriously affect

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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the defendants until it was ratified and confirmed by the subsequent by-law, and, consequently, the defendants' appeal came within the time limited by the statute.

Judgment appealed from (20 Man. R. 669) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the decision of Mathers C.J., in the Court of King's Bench, by which an injunction had been granted restraining the defendants from proceeding to an arbitration, pursuant to the provisions of the "Winnipeg City Charter," to determine the amount of compensation in damages to which they might be entitled in consequence of the diversion and closing of certain highways by a municipal by-law.

The circumstances of the case are stated in the head-note and in the judgments now reported.

Wallace Nesbitt K.C., O. H. Clark K.C. and *Christopher C. Robinson* for the appellants.

Aikins K.C. and *C.P. Wilson K.C.* for the respondents.

THE CHIEF JUSTICE.—The question here is: Was by-law 4264 passed in September, 1907 ?

By "passed" I presume is meant that at that date the by-law was so complete in itself that it effected the purpose for which it was intended, although, possibly, it might not be brought into force until a later date.

The object in view was the closing of certain streets. Can it be said that within the four corners of the by-law, as it then stood, could be found the authority necessary to close the streets the result of which

(1) 20 Man. R. 669.

would be to injuriously affect the plaintiffs' property without any further step being taken except to bring the by-law into force? Distinguishing between that which is necessary to make a by-law complete and effective and that which is necessary to bring it into force, it seems to me clear that the first by-law was not completed and never became effective until the second by-law was passed confirming the supplemental agreement.

The argument for the appellant is that when the supplemental agreement was executed it had retroactive effect. If the by-law was not complete, inasmuch as it did not effectively accomplish the purpose for which originally it had been made until the second agreement was executed — within what delay would appeal lie? From the date of the by-law or the date of the supplementary agreement?

Until such a by-law effectively closing the street was passed the respondents had no interest upon which they could found a judicial proceeding. They could not be affected by something that was not done.

The second by-law purports to close the street. Otherwise what is the meaning of this expression in the agreement of the 24th of August, 1907? The words used are:—

> Now, therefore, in consideration of the premises and in consideration of the city passing a by-law closing up the streets and lanes referred to in its said agreement, dated the 20th day of October, 1906, the company hereby declares as follows; etc.

If the streets had been closed by the first by-law, why insert that provision in the supplemental agreement? On the whole, I agree with my brother Idington, and, for the reasons which he gives, I would dismiss this appeal.

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DAVIES J.—The substantial question to be determined in this appeal is whether a certain by-law of the City Council of Winnipeg, No. 4264, professing to ratify and confirm an agreement made between the city and the Canadian Northern Railway Company for (*inter alia*) the closing up of certain streets of the city and the construction by the company of a subway under one of the streets of the city was "duly passed" within the meaning of sub-section *c*(1), of section 708 of the Winnipeg Charter on the day the by-law bears date, the 30th day of September, A.D. 1907, when it formally passed the council, or on the 20th day of July, 1908, when a second by-law was passed, No. 5050, ratifying and confirming by-law 4264.

If by-law No. 4264 was so duly passed on the day of its date, 30th September, 1907, then, so far as the question is concerned, the defendants, respondents, were too late in appealing to Chief Justice Dubuc on the 28th July, 1908, and this appeal from the judgment of the Court of Appeal for Manitoba should be allowed.

If, on the contrary, the by-law No. 4264 was not duly passed within the meaning of sub-section *c*(1), until the 20th July, 1908, when by-law 5050 ratifying and confirming the supplemental agreement and the original agreement as amended by the supplemental one and also ratifying and confirming by-law 4264 and declaring it "to be now in force," then this appeal must be dismissed and this action brought to have it declared that the order of Chief Justice Dubuc of the 8th October, 1908, adding the names of the defendants to the names of those determined by the by-law 4264 to have been injuriously affected by the exercise of the powers contained therein was *ultra vires* must be dismissed.

The original agreement made between the city and the railway company was entered into the 20th October, A.D. 1906. The by-law 4264, as to the day of the legal passage of which the controversy turns, sets forth the agreement of 1906 in full and in its enacting part: (1) ratifies and confirms the agreement; (2) grants to the company the privileges of entering upon the streets and building a subway specified in section one of the agreement; (3) stops and closes up those portions of public streets bounded as therein specified; (4) provides for the conveyance of the closed-up streets to the company; and, (5) limits the persons who might be injuriously affected by the exercise of the powers contained in the by-law and in the said agreement and who were entitled to compensation for damages by reason thereof under the provisions of the Winnipeg Charter to those having an interest in any part of

real estate fronting on that part of Pembina street occupied or opposite the subway and its approaches.

The defendants (respondents) not being within this class of persons were, therefore, excluded from claiming damages for any injurious affection of their lands.

Then follows the clause on the construction of which the controversy centres.

6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the 24th day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

Done and passed in council assembled this 30th day of September, A.D. 1907.

To complete the chronological statement of the important facts I may here state that this supplemental agreement dated the 24th August, 1907, was, at the

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date of the passing of by-law 4264, under consideration of and awaiting the decision of the company and the city. Beyond the fact that it materially changed, in one respect at least, the obligations of the company to the city with respect to the construction of the viaduct it had no direct bearing upon the compensation to which the defendants, respondents, might be entitled.

The supplemental agreement having eventually been executed by the company and the city, the city council, on the 20th July, 1908, passed by-law 5050, (1) ratifying and confirming the supplemental agreement and also ratifying and confirming the first agreement of 20th October, 1906, as amended by this supplemental agreement, and further declaring—

(2) That the by-law No. 4264 is hereby ratified and confirmed and declared to be now in force.

In my judgment the by-law of 30th September, 1907, No. 4264, cannot be said to have been "passed," within the meaning of the statute in that regard, as to persons it excluded from those entitled to compensation for injurious affection of their lands, until the 20th July, 1908, when by-law 5050 ratified and confirmed both the supplementary agreement and by-law 4264 and declared the latter "to be now in force."

If by-law 4264 was clearly not in force until by-law 5050 so declared it, there would seem to me to be an end to the question. Formally and technically passed, it might have been, but, as so passed, it was without life or force and could not be said to authorize the injurious affection of any lands or the vested rights of any one.

Clause 6 of the by-law made it clear that before it ever could have any efficacy or operation, the supple-

mentary agreement of 20th August, 1907, modifying the original one set out at length in the by-law, should not only be executed, alike by the company and the city officials, but that such by-law 4264 and the execution of the agreement supplementary by the city officials should be duly ratified by council.

It does not seem to me that any application on the part of the defendants could have been successfully made to a judge to have their names added to the class of persons declared to be injuriously affected by the by-law No. 4264 within the ten days following this formal passing through council. Such applicants would be at once met by section 6, declaring that such by-law was not in force and might not ever come into force and that, as it stood, it did not and could not operate to affect any person injuriously. To do so required further action alike on the part of the company and the city — action which might never take place, but was essential to give life and vitality to the by-law.

The limit of time imposed upon parties who claimed that their properties were injuriously affected by the city by-law closing up streets, etc., and who desired to appeal from a determination excluding them from the class of persons entitled to compensation was short; — only ten days.

But, in my judgment, that limitation is applicable only to a by-law which was only really effective and which did or might in its operation injuriously affect other lands than those declared in it to have been affected. It could not have application to the case of a by-law such as this, which not only was not in operation or effective when formally passed, but was expressly stated on its face not to have any effect

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until certain named contingencies occurred which might, as a fact, never occur.

Without expressing any opinion, therefore, upon the question whether or not the Chief Justice in hearing the appeal of the defendants, respondents, was acting as judge of the court or as *persona designata*, I am of the opinion that the appeal should be dismissed.

IDINGTON J.—The appellant is a municipal corporation of which the powers that it enjoys are set forth in its amended charter, 3 & 4 Edw. VII. ch. 64.

One of the amendments therein relates to the power to close streets, and convey same, or part thereof, to a railway company, and is for our present purpose fairly abbreviated as follows:—

(*c*) For diverting or closing up any roads, streets * * * or lanes * * * or any part or parts thereof * * * and for conveying the same or any part thereof to a railway company * * * or to any person * * * and a conveyance to a railway company or to any person, made in pursuance of such by-law, shall absolutely vest in the company or person the fee simple in the land intended to be or purporting to be conveyed by the city to the company or person, and for determining what persons or classes of persons (if any) are injuriously affected by the exercise of the powers contained in this sub-section, and are entitled to compensation for damages by reason thereof, and no other persons or classes of persons shall be so entitled unless such determination shall be amended, on appeal to a judge of the Court of King's Bench as hereinafter provided, and any advantage which the real estate, trade or business of any person may derive from the exercise of such powers * * * shall be deducted from such compensation and the amount of any claim for compensation by any person, entitled, as above provided, which shall include any damage to trade or business, shall, if not mutually agreed upon, be determined by arbitration under this Act.

(*c*1) If any person be dissatisfied with the determination as to persons, or classes of persons, injuriously affected, as above mentioned, he may appeal therefrom to a judge of the Court of King's Bench, in which case he shall, within ten days after the passage of the by-law, apply to a judge sitting in chambers and produce to the judge a copy of the by-law and shew by affidavit that he is interested and such facts and circumstances as he claims entitle him to suc-

ceed upon such appeal. The judge, after service upon the city of a summons to shew cause in such behalf, may change, add to or diminish the persons or classes of persons so determined by the by-law, or may dismiss such appeal, and, according to the result of such an appeal, may award costs for or against the city. The decision of such judge shall be final and conclusive, and shall not be appealed from or moved against by any party.

The mayor, treasurer and comptroller of the appellant, professedly acting on its behalf, executed an agreement dated 20th October, 1906, which the vice-president and secretary of the Canadian Northern Railway Company also executed apparently on behalf of latter. This agreement recited that said company had asked the city to close certain streets and lanes which the company required to be closed in order that it might establish principal workshops there, and that the company had agreed to construct a subway and overhead bridge according to terms and stipulations thereinafter provided. Thereby the city, in consideration of the premises, granted permission to the company to enter upon Pembina Street (one of those to be closed) and thereon construct a subway sixty-six feet wide, and the company agreed to construct accordingly as specified, that the construction should be commenced in seven months from date thereof and completed within sixteen months from said date, but, if the company raised the grade of its road and yard, the city was to extend the term limited for completion for six months.

The agreement provided for a number of details, incidental to this project, which need not be referred to.

Then the company covenanted to establish upon the ground indicated and forever there maintain the principal buildings and workshops of its system between Lake Superior and the Rocky Mountains. The

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buildings were specified and the work of construction was to begin forthwith and be completed in two years from said date. The company agreed to indemnify the city

> from all actions, causes of actions, claims, damages and compensation to or in respect of any real estate (if any) injuriously affected by the construction of the subway and the overhead bridge, and the closing of said streets and lanes including damages (if any) to trade or business carried on thereon by reason of or resulting from anything done thereunder, which the city might be obliged to pay.

But it was thereby declared and determined, pursuant to sub-section (*c*) of section 708 (being that above abbreviated), that no person or class of persons were injuriously affected by the exercise of the powers contained in said sub-section, in respect of the closing of said streets and lanes, or entitled to compensation for damages by reason thereof.

It was graciously stated, in the closing part of the sentence setting this forth, that nothing therein

> contained should affect the rights conferred by said sub-section of appeal to a judge of the Court of King's Bench.

The irony of this gracious concession becomes more apparent when we observe that there is, in the sub-section named, no such right of appeal conferred, but only is by another sub-section not named in the entire agreement.

By what authority the appellant's mayor and other officers executed this, nowhere appears before us. And when questioned in argument here and it was pointed out from the Bench that the transaction of any such business by appellant must be authorized by a by-law, as required by section 472 of the charter, it was only faintly suggested in answer that there probably existed a by-law of appellant authorizing and directing the agreement.

Let us for the moment presume there was such a by-law, in conformity with said section 472, which is as follows:—

472. The jurisdiction of the council shall be confined to the city, except where authority beyond the same is expressly given; and the powers of the council shall be exercised by by-law when not otherwise authorized or provided for.

The declaration and determination set forth above, as in the agreement must, by the very nature of the contract and of the by-law power given, be presumed to have been duly and judicially reached and determined by such by-law.

The business was ended. The later steps and by-laws were useless. Are the questions now raised thereanent to be treated as academical? Why, when presumably determined by a by-law adopting the judgment set forth as above, did the city council not let it rest? How could they revise, as it will presently appear they did, the work so done? They, on the theory of a by-law authorizing and directing the agreement with this declaration, were *functi officio.*

The appellant has failed to take any such position heretofore and can hardly hope to take it now in such a proceeding as this. Yet it is the true position and answers any one choosing to refer to and rely upon the agreement and by-law No. 4264 (to be referred to presently) as anything but an offer. And hence the story I have related has a direct bearing on what has been argued before us as will presently appear.

The said agreement further provided

that the city in so far as it has authority, will duly stop and close up those streets and lanes, etc., etc.,

and convey them to the company. This, it is to be noted, is a something to be done in the future.

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Time was to be deemed to be the essence of the agreement.

Again the company binds itself thereby, as soon as it has commenced any of the works contemplated, to promptly and diligently carry on the work to completion.

By paragraph 12, near the close of the agreement, it was provided as follows:—

> Should the company fail or neglect to carry out the covenants or conditions or any of them in this agreement contained, then on such default on the part of the company the streets and lanes or parts of streets and lanes hereby contracted to be conveyed to the company shall revert to and be vested in the city, and the city is hereby authorized at the costs and expenses of the company to do all things necessary to restore said streets and lanes, or parts of streets and lanes to the original condition before the execution of these presents.

There does not seem to have been anything more done by any one until the 24th day of August, A.D. 1907, when we find another agreement of that date purporting to be made between the city and the company. This recites an alleged error in the above mentioned agreement, and that the company agreed to amend it and also to provide a permanent crossing to be used in case of necessity.

The suggested amendment was evidently important and the new proposition perhaps much more so. Both were to be carried out by putting in the two clauses now appearing in this new agreement. And, following them, it was provided that this agreement should be read and construed as and part of the said agreement of 20th October, 1906.

The attestation clause indicates a complete execution, but it is frankly admitted that, at least, the company did not execute until some time in the summer of the following year.

Chief Justice Mathers, the trial judge, states it was not executed until the 20th of July, 1908, and he says, in the next sentence, that on that day another by-law, No. 5050, upon which respondents rest their claim, was passed. I infer the date may have been stated by counsel before him and that he has given the correct date.

On the 30th September, 1907, a by-law, No. 4264, had been read by the city council in which the agreement of the 20th October, 1906, to which I have so fully referred, was set out in full, and the council therein proceeds to enact, first, that the agreement thereinbefore set out is ratified and confirmed; secondly, that the city grants the right and privilege in the first paragraph of the agreement so set out, and thirdly,

there is hereby stopped and closed up those portions of public streets and lanes contained within the areas bounded as follows:—

and then describes the land. The fourth section of the by-law enacts that:—

The city by deed executed by its proper officers shall convey to the Canadian Northern Railway Company the respective parcels of land occupied by the portions of streets and lanes hereinbefore described and directed to be closed up, any of which the city by said agreement agreed to convey to the company under paragraph eight, and to and at the time agreed upon.

Sections 5 and 6 are as follows:—

5. It is hereby determined that persons who are, or may be injuriously affected by the exercise of the powers contained in this by-law and in the said agreement, and who are entitled to compensation for damages by reason thereof under provisions of the Winnipeg Charter, are all persons having any estate or interest to the extent of such estate or interest in real estate hereafter described, or any part thereof, that is to say, as follows:—

Real estate fronting upon that part of Pembina street occupied or opposite the subway and its approaches.

6. This by-law shall come into force and effect on the execution of

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the supplementary agreement dated the twenty-fourth day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

Let us observe that this section 5 is quite inconsistent with the adjudication set forth in the agreement presumably adopted by a missing by-law.

This by-law, it is now strongly contended, was passed on the day it bears date, within the meaning of the word "passage" in the amended charter, subsections (*c*) and (*c*1) relative to the by-laws thereunder, and must be held to mean in law that this inchoate and incongruous business was so ended then and there that the respondents were bound to have appealed to the judge within ten days from date of said by-law.

Before considering that fully I will continue the story. The deferred execution of the agreement having taken place on the 20th July, 1908, by-law No. 5050 was passed. Its enactments are as follows:—

1. The supplemental agreement dated the twenty-fourth day of August, A.D. 1907, between the City of Winnipeg and the Canadian Northern Railway Company respecting the amendment to the agreement between the said parties dated the twentieth day of October, A.D. 1906, is hereby ratified and confirmed, and said agreement dated the twentieth day of October, A.D. 1906, is hereby ratified and confirmed as amended.

2. By-law No. 4264 is hereby ratified and confirmed, and declared to be now in force.

Within ten days of the passage of this by-law the respondents appealed, under the amendment first quoted above, to the then Chief Justice of the Court of King's Bench for Manitoba, who then issued a summons which was served on appellant, and on its hearing the latter appeared as the order recites and the learned Chief Justice made an order putting respondents on the list of those entitled to have damages assessed.

It seems no objection was specifically taken to the jurisdiction of the learned Chief Justice, but an argument was made that the time must be computed from the date of by-law No. 4264, and not from that of No. 5050.

The order made curiously enough refers to the former by-law, but not to the latter.

Nothing more was done until the 10th of November, 1910, when notice was given by respondents to appellant, naming an arbitrator under the Act, to determine the damages owing the respondents.

No explanation is given for the delay, but I assume it probably was felt by the respondents that until the works had been proceeded with the injury might not be properly appreciated.

Thereupon the appellant moved for an injunction to restrain the respondents from proceeding.

The motion was, by consent, turned into one for judgment and Chief Justice Mathers ordered as applied for. From that order an appeal was taken to the Court of Appeal and the order reversed.

The appellant now seeks by this appeal to have the order restored. Is it not clear that the first agreement was in fact abandoned and the situation as if it had never existed ? Is it not also clear it had been broken and become impossible of execution ?

The question raised is whether the words "the passage of the by-law" are to be confined to the date of by-law No. 4264, or the date of by-law No. 5050, when the former first became effective, according to the conduct of the appellant and its very language in the latter by-law.

The appellant's claim is certainly remarkable and most unjust.

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The language of by-law No. 4264 seems to indicate that that by-law was not to be passed or considered so until ratified by the council, as it was by the later by-law No. 5050.

It is urged the language used in the former refers to a then ratification by the council of the amending agreement. It can only be reasonably claimed, at the most, that the language is so very ambiguous that the conduct of those using it may well be looked at as a guide to its meaning, and if so their appeal seems hopeless.

For nothing can be clearer than that the later by-law is that which the council of appellant rested upon to give vitality to the whole business about which they were concerned.

Test the issue raised by the obvious legal position that by-law No. 4264 left the matter in.

It would have been most hopeless for the respondents to have acted on the assumption that by-law No. 4264 had been passed.

How could they have ventured to nominate an arbitrator to settle their damages? How could they have approached any judge to ask him to name another, if the appellant's council had refrained from appointing, or a third, in case driven to resort to the provision in that behalf, to fill up the board of arbitrators? How could they appeal to any judge, as the very sections first above quoted require and entitle until they could present him a complete and valid by-law? It would have seemed as hopeless an attempt as ever was launched to have tried any of these things.

But if the court had taken such a view and constituted the board, how, it may be asked, could its

award be enforced ? What authority could the appellant's council have to levy and pay such damages ? Yet these might all have been the realities produced if the respondents had promptly proceeded in the Autumn of 1907, as it is now urged was their legal duty, and got put on the list, and had an arbitration. Nor does the absurdity end there if we look at the long history I have set forth. The appellant's mayor and, if legally authorized, its council, also had determined in October, 1906, no one entitled to claim for injury; and a year later tentatively reversed this finding whilst waiting for the railway company to decide whether to accept the new offer or not.

The times named in the original agreement for the company to proceed had long since elapsed. Their contract, if such it was, had been broken, and the hypothetically closed streets had, as the agreement provided for, automatically reverted to the city by virtue of the terms I have quoted.

The power of the city had become exhausted by the terms of the first agreement if we assume a by-law had been properly passed, to direct and authorize it.

The adoption, in by-law No. 4264, by the city of this broken contract, was a most questionable proceeding. But until the matters involved in said contract had been rehabilitated by the mutual agreement thus alleged, by-law No. 4264 stood entirely as an offer.

The facts demonstrate of necessity that everybody concerned must concur in restoring the broken contract, or in re-creating it in an amended form. And if the old one was to be used, then, in doing so something had to be done by mutual consent to waive the breaches already apparent and accede to the amendments submitted and insisted on.

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I will not say such a thing was impossible; but I do say that in my opinion it was quite impossible for one party thereto to do that which not only needed waiver, but an entire abrogation of the terms of the agreement then become absolutely impossible when No. 4264 was read, and the farce gone through of calling it a by-law which was to adopt an impossible contract.

The clear truth is, nothing could be done, and everything attempted by by-law 4264 was a nullity, until the parties to the contract had mutually agreed. This stage, for reasons that do not appear on the surface, had never been reached.

No by-law could, under this statute, be held to be within the proper competence of the council until a railway company and the city had mutually so agreed that the council could pass such a by-law as required to close the streets. Indeed, I think the by-law for the latter purpose could only be properly passed after such an arrangement was come to as could justify closure of streets. In default of a by-law to direct the first agreement, it was null and, in my opinion, no such by-law can in law be presumed, though, for argument's sake, assumed above. Thence no proper foundation existed for by-law No. 4264 to rest on in the way of closing of streets.

It is entirely beside the question to point to cases where there may be a by-law properly passed dependent upon the happening of a named event or lapse of time.

The foundation for this appellant's council's power to pass a by-law closing streets as provided, had not been laid when this alleged by-law 4264 was read.

Its first effort, if ever carrying sparks of vitality,

had proved abortive. Its second had no justification in law unless and until there had been reached a mutual agreement. It is quite obvious that there was not only a hitch in arriving at such an agreement, but that it never was supposed by the council there was anything to be hoped for until the company had yielded and acceded to the much more onerous terms than those originally proposed to them.

Suppose all those whom the council finally declared, (contrary to their first declaration and determination), entitled to damages, had proceeded and had them assessed between September, 1907, and July, 1908, I suspect they and appellant's council would have realized the absurdity of the present contention.

However much the curative section 525, to which we are referred, may help over the vicious first step of adjudging as was done and of which I say nothing save to note the gross impropriety of such a proceeding, it cannot help to render competent that which was entirely incompetent.

I may remark we have no evidence of the proceedings having been taken to render said curative section operative.

I have the gravest doubt as to the propriety of this whole proceeding. The question of jurisdiction was not properly raised as it should have been, if doubted, and then been followed by an appeal or prompt application for prohibition, or default that the question raised before the judge when the time came for a judge to nominate an arbitrator. As an application for an injunction it raises a question of the discretion of the court, in cases of application for injunction, wherein the imperative requirements of settled practice have not precluded such discretion,

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and if discretion ever was to be exercised it certainly does not appear on these facts a proper case for exercising it to perpetrate an injustice. Moreover, the restraining an arbitration which has, on appellant's theory, no legal foundation and can determine nothing has been refused. See *North London Railway Co.* v. *Great Western Railway Co.*(1). As this feature of the case was not fully argued I do no more than express my doubts.

I think the appeal should be dismissed with costs.

DUFF J. agreed with Davies J.

ANGLIN J.—In my opinion the phrase "the passage of the by-law" in sub-section *c*(1), of section 708, of the Winnipeg Charter (3 & 4 Edw. VII. ch. 64, sec. 15 (Man.)), means a final enactment of the by-law by the municipal council such that no further action by it in the nature of confirmation or ratification is requisite in order to make the by-law operative or effective. Where a by-law provides that it shall come into force only upon its being subsequently ratified or confirmed by the council "the passage of the by-law" is consummated only when such ratification or confirmation is had. The concluding clause of by-law 4264 of the plaintiff corporation is as follows:—

> 6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the twenty-fourth day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

Although ungrammatical, however read, having regard to all the circumstances, including the subsequent action of the council in passing by-law 5050,

(1) 11 Q.B.D. 30.

this provision of by-law 4264 was, I think, intended to make the efficacy of that by-law for any purpose dependent entirely upon its subsequent ratification by the municipal council. This ratification was given by by-law 5050 and the time for the appeal provided for by clause *c*(1), of section 708, ran only from the date of the enactment of that by-law.

In this view of the case it seems quite unnecessary to refer to the other matters presented in argument.

The appeal fails and should be dismissed with costs.

BRODEUR J.—I agree in the opinion stated by my brother Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *Theodore A. Hunt.*

Solicitors for the respondents: *Aikins, Fullerton, Coyne & Foley.*