

THE MUNICIPALITY OF THE } 1890
COUNTY OF CAPE BRETON (DE- } APPELLANTS; *Oct. 29.
FENDANTS)..... }
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AND

THOMAS E. MCKAY (PLAINTIFF).....RESPONDENT. *May 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Appointment of board of health—R. S. N. S. 4th ser. c. 29—37 V. c. 6 s. 1 (N.S.)—42 V. c. 1 s. 67 (N.S.)—Employment of physician—Reasonable expenses—Construction of contract—Attendance upon small-pox patients for the season—Dismissal—Form of remedy—Mandamus.

Sec. 67 of the act by which municipal corporations were established in Nova Scotia (42 V. c. 1) giving them "the appointment of health officers * * * and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S. 4th ser. providing for the appointment of boards of health by the Lieutenant Governor in Council. Ritchie C.J. doubting the authority of the Lieutenant-Governor to appoint in incorporated counties.

A board of health appointed by the executive council by resolution employed M., a physician, to attend upon small-pox patients in the district "for the season" at a fixed rate of remuneration per day. Complaint having been made of the manner in which M.'s duties were performed he was notified that another medical man had been employed as a consulting physician, but refusing to consult with the new appointee he was dismissed from his employment. He brought an action against the municipality setting forth in his statement of claim the facts of his engagement and dismissal and claiming payment for his services up to the date at which the last small-pox patient was cured and special damages for loss of reputation by the dismissal. The act (R.S.N.S. 4th ser. c. 29 s. 12, allows the board of health to incur reasonable expenses, which are defined (by 37 V. (N.S.) c. 6 s. 1) to be services performed and bestowed and medicine supplied by physicians, in carrying out its provisions, and makes such expenses a district, city

PRESENT.—Sir, W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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or county rate to be assessed by the justices and levied as ordinary county rates.

Held, Per Fournier, Gwynne and Taschereau JJ. affirming the judgment of the court below, that the contract with M. was to pay him \$6.50 per day so long as small-pox should prevail in the district during the season; that his dismissal was wrongful and the fulfilment of the contract could be enforced against the municipality by action.

Per Ritchie C.J and Strong J. That there was sufficient ground for the dismissal of M. Assuming, however, his dismissal to have been unjustifiable, M's. only remedy would have been by mandamus to compel the municipality to make an assessment to cover the expense incurred. But the claim being really one for damages for wrongful dismissal it did not come within the "reasonable expenses," which may incurred by a board of health and made a charge on the county, and the municipality was, therefore, not liable.

Per Patterson J. That the proper remedy for the recovery of the expenses mentioned in said sec. 12 is by action and not by mandamus to compel an assessment, but a claim for damages for wrongful dismissal does not come within the section and is not made a county charge.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the plaintiff at the trial.

The plaintiff in his statement of claim alleges that he is a duly qualified medical practitioner for Nova Scotia; that he was employed by the defendants through "the board of health for District No. 4 North Sidney," to attend certain person there ill of the small-pox and who might thereafter during the "then season" become ill of that disease in District No. 4; that the board agreed to pay plaintiff for his services at the rate of \$6.50 per day for said period; that the plaintiff relinquished his other practice in order to attend to his duties under this agreement with the board of health; that the board of health nevertheless discharged plaintiff and employed other practitioners; that the plaintiff has suffered special damage by reason of such

a wrongful dismissal; that persons would not employ him for fear of contagion and by reason of his dismissal the public were led to believe he had neglected his duty. And plaintiff claimed damages to the amount of \$700, viz. \$350 for salary from 12 March to 8 May 1880, at \$6 50 per *diem*, and \$550 for special damages for wrongful dismissal.

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The defence states: That defendants did not employ plaintiff; that the board of health was not legally appointed; that the board of health did not employ plaintiff; that plaintiff did not give up his other practise; that defendants did not through board or otherwise agree to pay plaintiff for his services; that defendants never discharged plaintiff, or employed other practitioners; that provisions of chap. 29 of revised statutes were not complied with, and board had no authority to employ plaintiff; that board having appointed another physician to act with plaintiff as consulting physician and surgeon, plaintiff refused to act or consult with such physician and for that reason board dismissed him.

The action was tried before Mr. Justice Macdonald without a jury, who found a verdict and entered judgment for the plaintiff for \$300.

From the evidence given on the trial of this case the following facts appeared: In the month of February, 1880, small pox broke out at North Sydney, Cape Breton. About the 9th or 10th of February meetings of the inhabitants were held to consider the best means to be used to prevent the spread of the disease, and a board of health was chosen, the persons comprising which were subsequently by a commission under the great seal of the province, bearing date the 16th February, 1880, duly constituted by the Lieutenant Governor a board of health, pursuant to the provisions of the Revised Statutes, N.S., 4th series, ch. 29, sec. 2, for

1891 the police district of North Sydney. At a meeting of
 THE MUNI- this board, held on the 17th February, a resolution was
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 OF THE passed "that a doctor be secured and retained by the
 COUNTY OF board to attend upon all the small pox patients who
 CAPE are and may, the present season be attacked with the
 BRETON disease of small pox in district No. 4, under board's
 v. jurisdiction at the rate of \$6.50 per day." At a sub-
 McKAY. sequent meeting of the board held on the same day,
 — there is a minute as follows: "Dr. McKay being pre-
 sent agreed to take charge of the small pox patients at
 the rate of \$6.50 per day under the conditions of the
 resolution passed by the board this morning; all medi-
 cines and drugs to be provided by the board, and his
 services to the board thereunder to commence from the
 18th February instant; thereupon a resolution was
 passed that Dr. McKay be engaged for such purposes
 and under such conditions." The plaintiff in his
 disposition says: "The matter was discussed and
 the board decided they would not retain us by the
 month, as they did not know how long the disease
 would last, and that they thought they should pay us
 so much a day, viz., \$6.50, with the understanding that
 whichever doctor was engaged his services were to be
 retained as long as there should be a small pox patient
 under the jurisdiction of the board that season." Sub-
 sequently he says: "I was present at the afternoon
 meeting. They asked me if I would attend the small-
 pox patients on the terms stated in the resolution passed
 at the morning meeting. I said I would. Then a
 resolution was passed that I should be engaged and
 services accepted under those considerations."

Plaintiff entered upon his duties immediately after
 the passing of the resolution of 17th February and con-
 tinued his services up to the 12th of March. On the
 last mentioned day the plaintiff received a communica-
 tion from the secretary of the board informing him that

the board had passed the following resolution, viz. : 1891
 “Resolved that the board courteously dispense with the services of Dr. E. N. McKay from this date, as they consider the service of two doctors unnecessary for the present, and that the services of Dr. McPherson be retained until further notified ;” and the secretary’s letter concludes as follows : “You will therefore consider yourself relieved from further attendance on behalf of this board and upon such patients from this date.” The circumstances which led to this dismissal appear to have been the following : Sometime before the 5th of March the board passed the following resolution : “Resolved that a doctor be engaged by this board to visit the hospital daily as a consulting physician and to report his opinions of the treatment and condition of the patients therein to this board daily.” And in the letter of the secretary of the 5th of March communicating this resolution to the plaintiff, the secretary added, “I am instructed by the board to request that you consult with Dr. McPherson and then inform the board through the secretary by 10.30 o’clock, a.m. to-morrow whether you will consent to act together in pursuance with such resolution. Please reply punctually.”

The plaintiff did not answer this letter until the 8th of March, when he wrote to the secretary as follows : “I will not act in pursuance with the inclosed resolution, but I will continue my services to the board as I have heretofore done and consult Dr. McPherson upon such occasion as I would like to ascertain his opinion respecting the condition and treatment of such patient or patients as may happen to come under my care from time to time. I mean ascertaining his opinion in serious cases only. If the board send Dr. McPherson to the hospital daily to report my treatment and condition of patients I will throw no obstacle in the way, but I

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will consult him only in cases of emergency. You know, Mr. Hearn, that I consented only to one clause embodied in that resolution, neither will I. Bear in mind that while I do not throw any obstacle in the way of the board with regard to sending Dr. McPherson to the hospital daily to make a report he does not prescribe to any patient under my treatment without my consent." Upon this resolution of dismissal was passed and the plaintiff discontinued his services from the 12th of March up to which date he was paid for his services from the 18th of February at the rate of \$6.50 per diem. The plaintiff having brought an action against individual members of the board in which he failed (1) instituted this action against the company in 1886.

The learned judge who tried the cause having given judgment for the plaintiff as before mentioned the defendants appealed to the Supreme Court in Banc by which court the appeal was, after argument, dismissed. The judgment of the court was delivered by Mr. Justice Townshend who held that under sec. 12 of ch. 29 R. S. N. S. (4th series) the municipality was rendered liable to the plaintiff on the contract entered into by the board of health. Mr. Justice Ritchie also delivered a short judgment holding that on the authority of *McKay v. Moore* (1) the statutory provision already mentioned was to be held as imposing liability on the defendants, but also stated his opinion to be that in "most cases" the proper remedy to enforce the obligation imposed on the municipality by sec. 12 of ch. 29 (4th series), will be found to be a writ of mandamus to compel an assessment.

The Municipality appealed to the Supreme Court of Canada.

W. B. Ritchie for the respondent. The executive

(1) See *McKay v. Moore* 4 Russ. & Geld. 326.

council could not appoint this board. The act of 1879 vested the power of appointment in the municipality and that repeals the former act so far as the two are repugnant. Maxwell on Statutes (1); *New London Railroad Company v. Boston and Albany Railroad Company* (2).

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The board could not bind the municipality by such an agreement as this. See *Smith v. Corporation of Col-lingwood* (3); *Re Derby and Local Board of Health* (4).

In any event the municipality is only liable, under the statutes, for services actually performed.

The evidence shows justification for the dismissal.

Henry Q. C. for the respondent. The action is on a contract for services covered by the statutes and not an action for a tort.

The statutes make the municipality liable for expense incurred by the board of health which is explained to mean services such as those in this case.

SIR W. J. RITCHIE C. J.—It is very clear from the evidence that there was no contract whatever between the municipalities of the county of Cape Breton and the plaintiff, and that the defendants never directly nor through the board of health for district No. 4 North Sydney actually employed the plaintiff as alleged in paragraph 2 of the claim, and never directly nor through said board agreed to pay plaintiff for his services as alleged in paragraph 3; nor does it appear that the defendants ignored such an agreement as there referred to, or ever discharged the plaintiff from the performance of that or any agreement or employed other medical practitioners as alleged in paragraph 4. Issues on all these most material allegations were raised by the defendants' defence paragraphs 2, 5 and 7, and being

(1) 2 ed. p. 197.

(3) 19 U. C. Q. B. 259.

(2) 102 Mass. 386.

(4) 19 O. R. 51.

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unsustained by any evidence should have been found for the defendants. The plaintiff, the evidence shows, was employed by a board of health constituted by a commission issued by the Lieutenant Governor of Nova Scotia on the 16th February, 1880. But it does not appear from the evidence that any sanatory orders were ever made or orders given prescribing the duties of such boards as required by the act R.S.N.S., 4th ser. ch. 29, and an issue has been raised as to the due constitution and appointment of this board in that no such sanatory orders have been made nor the duties of said board prescribed, and paragraph 9 of the defence also alleges that persons acting or purporting to act as the board of health for the district of North Sydney appointed the plaintiff as physician and surgeon to have the care and attention of small-pox patients, and that complaints having been made of want of skill and attention the board appointed another physician with whom the plaintiff refused to act and consult, and he ceased to attend persons ill and afflicted with small-pox, and the said board was compelled to employ other physicians and they discharged the plaintiff from the position aforesaid.

In the same volume of the revised statutes p. 288 title 13 is ch. 57 "of municipalities in incorporated counties," which the County of Cape Breton appears to have been. By section 56 municipal corporations shall have the appointment of health officers, health wardens and health inspectors, and a board of health with the authority and powers given to justices in general or special sessions by the 29th and 30th chapters. These statutes do not give the sessions any power to appoint a board of health, but to appoint health officers with power to enter houses, etc., and report their condition to the board of health, and if the sessions do not appoint such health wardens the board of health shall

appoint them. Sessions of not less than seven justices on requisition from the board of health may order a general vaccination, and it is also enacted, page 375 of the Revised Statutes that "nothing in this chapter contained shall be construed to repeal or affect the provisions of any law or enactment now in force except so far only as such law or enactment shall be inconsistent with or repugnant to the provisions of this chapter or the attainment of the objects and purposes thereof."

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Without expressing any positive opinion I incline to think that this enactment authorising municipal corporations to appoint boards of health is inconsistent with the authority of the Governor to appoint a board of health in an incorporated county. The conflict of jurisdiction of two boards of health in the same county, one appointed by the Governor and the other by the municipal council, so likely to arise and productive of so great inconvenience, is such that I scarcely think that the legislature could have contemplated the existence of two such bodies in the same county but that in unincorporated counties, if any, the power continued in the governor in which case the reasonable expenses would be assessed by the justices in session and levied and collected as provided by the 12th section of chapter 29, while in incorporated counties the appointment would be confined to the municipal councils. But be this as it may, in the view I take of this case it is unnecessary to decide this or the other questions I have referred to, because I think this action cannot be maintained against the municipality under any circumstances, though I may say if the only question in the case was the dismissal of the plaintiff as at present advised I should say there was ample ground for it. All that is made a charge on the county by ch. 29 are the reasonable expenses al-

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ready incurred or hereafter to be incurred by any board of health, and the act of 1874, cap. 6, expressly declares that the words reasonable expenses in the said 12th section shall be construed to include all medical attendance and services bestowed and performed and medicine supplied by physicians when required to be bestowed, performed and supplied under the provisions of such chapter. How can it be said that this claim for a wrongful discharge by the board of health, whereby as he alleges the defendants (though in point of fact they had nothing to do with the matter) discharged plaintiff and employed other medical practioners, are services bestowed and performed and medicine supplied when required to be bestowed or performed, when his complaint is that he never bestowed or performed any services or supplied medicines because he was discharged from doing so ? How can he possibly bring the special damage he alleges he suffered by reason of his patients not employing him from dread of infection and contagion, or that by such discharge and employment of other medical practitioners it was indicated and so believed and understood by many persons who would likely employ him that he improperly cared for and attended such patients and was not a competent medical practitioner, within the terms of the statute as services bestowed and performed and medicine supplied ? If they do not come within the definition of the statute of reasonable expenses they are not a charge on the county. If the plaintiff has a legal claim which has become a county or district charge in my opinion his remedy for its recovery is not by action against the municipality. The law fixing the charge has given the remedy which is clearly not by action. I think it is clearly established that where a pecuniary obligation is created by statute, and a remedy is expressly given for enforcing it, that

remedy must be adopted. The case of the *Vestry of St. Pancras v. Battersby* (1), clearly established this. In the present case the language is:—

The reasonable expenses incurred, &c., by any board of health shall be a county or district or city charge and shall be assessed by the justices in session (now by the municipal council) in incorporated counties and levied and collected in the same manner and at the same time as the ordinary county rates.

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Cresswell J. in the case cited states the principle, which is entirely applicable to this case, very tersely when he says:—

I also am of opinion that a pecuniary obligation and the mode of enforcing it are indissolubly united by the statute and cannot be severed.

It would be a very strange thing if the municipalities could be sued the moment the expense was incurred by all or any of the parties who may have given medical attendance or bestowed and performed services or supplied medicine and other necessities for combating the disease or in carrying out the powers of the act and the municipality be thus harrassed by actions and put to great cost when they have no funds to meet these expenses, and possibly before the time has arrived when the amount could be assessed, levied and collected. It would be most unreasonable that these parties should be allowed to obtain judgments and be in a position to sell the municipal property for their satisfaction to the possibly great inconvenience and loss of the municipality. I think this cannot be so. The only fund those who supply medical attendance or other services or materials and necessities can look to is that provided by the statute, namely, the county charge to be assessed as provided. The legislature having provided municipalities with no other funds to meet these expenses if parties are not satisfied to

(1) 2 C. B. N. S. 477.

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rely on this they should not render the services or supply the necessaries, and if inconvenience should arise from any such cause the legislature must interfere and provide other means for their payment, and in the event of the municipality failing to assess in a proper case the only means of compelling it is to do so, so far as I am aware, is by the prerogative writ of mandamus. Should an application be made for a mandamus in this case it would be open to the municipality to raise all or any of the questions discussed before us or to which I have referred or any other they may be advised would afford an answer to such an application. In the meantime this appeal must be allowed and the action dismissed with costs in all the courts.

STRONG J.—In my opinion this appeal must succeed. As regards the objection that the power of the Lieutenant Governor to appoint boards of health conferred by sec. 2 of cap. 29 (R.S.N.S. 4 series) is superseded, and that section repealed by implication, by sec. 56 of ch. 57 (R. S. 4 series), it appears to me that there is no foundation for such a contention. The board of health contemplated by sec. 56 of cap. 57 seems to have been a general board for the whole municipality, the words of the statute being “a board of health.” The board provided for by sec. 2 of cap. 29 is on the other hand a local board restricted to such place or district as the Lieutenant Governor may prescribe. It is therefore impossible to say that these two provisions are so inconsistent that they cannot stand together but must be regarded as repugnant to each other to such an extent that the prior enactment is to be taken to be by implication repealed by the latter.

I do not think the appointment was void because the Lieutenant Governor did not make sanatory regulations under sec. 1 of ch. 29. The board enforcing such sana-

tory regulations as the Lieutenant Governor might prescribe was no doubt to perform certain duties to which the making of sanatory regulations was an indispensable preliminary, but there were other duties incidental to such a body which were incumbent upon the board irrespective of any regulations by the Lieutenant Governor defining the nature of these latter duties, these being such as usually and without any specific provisions by the executive power are well understood as appertaining to such bodies as local boards of health. In the execution of these latter functions I have no doubt that it was within the power of the board to employ a medical man to take charge of a hospital for small-pox patients and to attend to such patients generally, and that his remuneration would be a "reasonable expense" under sec. 12. I am, however, of opinion that sec. 12 would not authorize such an action as the present against the municipality. The county are in no way a party to the contract between the respondent and the board of health. The latter body are not appointed by the county, and are not in any sense its officers or agents. Any liability of the county for the contracts of the board must rest entirely upon the statute and be limited by its terms. The present action is substantially one for a wrongful dismissal by the board in breach of the contract with the respondent, the respondent having been paid the full compensation for his actual services up to the date of the dismissal. Then, what is there in the statute to warrant such an action in respect of the conduct of the board against the municipality? The words of sec. 12 (in which clause of the statute, if anywhere, we must find the liability sought to be enforced), are not that the county shall be bound by the contracts of the board but merely that the "reasonable expenses" of the board shall be a "county, district or city charge" to be assessed, levied

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and collected in the same way as ordinary rates. Then what is the proper construction of these words? Can they be so interpreted as to include a liability such as the respondent insists upon in this action? I may here turn aside for a moment to notice a point which was raised in the court below founded upon the word "district." I have no hesitation in adopting in its entirety the construction of the Supreme Court of Nova Scotia attributing to this word the meaning of a municipal district, such as those which in some cases in Nova Scotia have been formed out of part of a county. The whole context and the preceding and following words "county" and "city" indicate this to be the true meaning.

But, to return to the question of municipal liability, how can it be said that imposing a duty upon the county to raise by the imposition of a rate the amount required to defray the expenses of a board of health creates any privity of contract between the creditors of the board and the company? I can see nothing to justify such an extension of the language actually used which would be requisite in order to give such an operation to the statute. No doubt there is a duty resting on the company to raise the amount of the expenses, but the existence of that duty is not sufficient to support such an action as the present for a breach of contract by the board. The appropriate remedy for the enforcement of that duty is the writ of mandamus. Therefore, it appears to me that no action is maintainable against the county for any breach of contract by the board.

Further, I doubt if there was anything more than a contract for services from day to day. The word "season" in the connection in which it is used in the resolution is too indefinite to have any precise signification. The respondent himself in his deposition says

he accepted the employment on the terms embodied in the resolution, and by these terms he must therefore abide, and he cannot go outside of them and annex an additional term which he says vaguely was spoken of, viz., that the employment was to last as long as there remained any small-pox patients which would have continued it to the 5th of May. I do not, however, rest my judgment on this point.

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Next, assuming the action to be maintainable, was there not good ground for dismissal? Surely there was nothing unreasonable in the proposition of the board that Dr. McPherson should act in conjunction with the respondent as a consulting physician. In his letter of the 8th of March, addressed to the secretary of the board, the respondent positively refused to comply with the ordinances of the board in this respect. Having taken this course of refusing to obey the reasonable and lawful directions of his employers he must, it seems to me, abide by the consequences and submit to the resolution discharging him from employment, which the board having clearly the right so to do saw fit to pass.

The appeal must be allowed with costs.

FOURNIER J.—I am of opinion that the appeal should be dismissed for the reasons given by Mr. Justice Gwynne.

TASCHEREAU J.—I also agree with my brother Gwynne that this appeal should be dismissed.

GWYNNE J.—This case turns, in my opinion, upon the construction to be put upon section 12 of ch. 29 of the Revised Statutes of Nova Scotia, 4th series, as that section is amended by ch. 6 of the acts of 1874. I entertain, no doubt, that the board of health for poll-

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 CIPALITY well constituted by the commission issued by the
 OF THE Lieutenant Governor of Nova Scotia bearing date the
 COUNTY OF 16th of February, 1880. The contention of the learned
 CAPE counsel of the appellants, that chapter 29 of the 4th
 BRETON series of the Revised Statutes which gives power to
 v. the Lieutenant Governor to appoint boards of health
 McKAY. the Lieutenent Governor to repeal by implication by sec. 67 of ch. 1 of
 Gwynne J. the acts of 1879, cannot be entertained.

The 4th series of the Revised Statutes constituted an act consisting of several chapters all equally in force. By chapter 29 of that act the Lieutenant Governor was authorized to constitute boards of health, and to appoint the members thereof. By chapter 57 of the same act, sec. 56, it was enacted that the county municipal corporations constituted under the act

shall have the appointment of health officers, health wardens, and health inspectors, and a board of health with the authority and powers given to justices in general or special sessions by chapters 29 and 30.

It is obvious that the powers thus conferred upon county municipal corporations did not repeal the powers given to the Lieutenant Governor to constitute boards of health by chapter 29 of the same act. It may be that the legislature thought it prudent thus to provide against the injurious consequences which might result in the case of neglect or delay upon the part of the municipal authorities, but whatever may have been the motive for retaining both provisions it is clear that sec. 56 of ch. 57 of the 4th series did not repeal sec. 1 of ch. 29 of the same series.

Here ch. 1 of the acts of 1879 is but a reconsolidation into one act of the laws relating to county municipal corporations, and while by its 88th section it repealed ch. 57 of the 4th series it re-enacted in its 67th section in identical terms the provisions contained in the 56th sec. of ch. 57 of the 4th series and thus expressly

referred to chs. 29 and 30 of the 4th series as still in full force and effect. It is clear, therefore, that ch. 1 of the acts of 1879 did not repeal the 1st sec. of ch. 29 of the 4th series any more than did sec. 56 of the above chapter 57. That this is so is further apparent by reference to the act which constitutes the 5th series of the Revised Statutes, for there in chapter 26 the 1st section of ch. 29 of the 4th series, which is the section which authorizes the Lieutenant Governor to appoint boards of health, is re-enacted verbatim, and in sec. 80 of ch. 56 of the same act is re-enacted the power vested in the municipal councils of county corporations to appoint boards of health as follows :—

The municipal council shall have the appointment of health officers, health wardens and health inspectors and a board of health who shall have the powers conferred by chapters 26 and 27 of the Revised Statutes.

These statutes, 26 and 27 of the 5th series, being identical with chs. 29 and 30 of the 4th series, save only that the words "municipal councils" &c., are substituted for the words "courts of general or special sessions," it is not disputed that upon the 19th February, 1880, the board of health which was appointed by the Lieutenant Governor by the commission bearing date the 16th of said month of February did in point of fact pass a resolution for engaging the services of a medical man to attend to small pox patients, which resolution was in the following terms :—

That a doctor be secured and retained by the board to attend upon all the small pox patients who are, and may the present season, be attacked with the disease of small pox in District No. 4 under the board's jurisdiction at the rate of \$6.50 a day.

It is admitted also that at a meeting of the board the plaintiff,

Dr. McKay, being present agreed to take charge of the small pox patients at the rate of \$6.50 under the resolution passed by the board this morning, all medicines and drugs to be provided by the

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1891 board, and his services to the board thereunder to commence from the
 18th February instant,
 THE MUNI- and that thereupon a resolution was passed by the
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 BRETON that Dr. McKay be engaged for such purpose and under such conditions.

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 Gwynne J. he was a duly qualified medical practitioner within
 the Province of Nova Scotia, and that as such he was
 employed by the defendants, through the board of
 health for district number four North Sydney, in the
 County of Cape Breton, to attend certain persons then
 ill of smallpox, and who might thereafter, during the
 then season, become ill of that disease in the said dis-
 trict No. 4, and that the defendants, through the said
 board, agreed to pay plaintiff for his services \$6.50 per
 day for the period, and that plaintiff gave up his other
 practice as a medical practitioner, and endeavored to
 heal and cure such sick persons, and gave them his
 care and attention, and was willing to continue his
 services, yet defendants ignored said agreement, and
 whilst persons were sick of the said disease during the
 said season in said district the defendants discharged
 the plaintiff and employed other medical practitioners
 —whereby plaintiff suffered damage, &c.

The defendants, in their statement of defence, admit
 that plaintiff is a duly qualified medical practitioner
 as alleged, but deny that they employed the plaintiff
 through the alleged board of health or otherwise.
 They then deny that the board of health was duly
 constituted. They deny that the plaintiff was at all
 employed by the said alleged board of health—and
 they deny that the defendants, through the said board
 of health or otherwise, agreed to pay the plaintiff for
 his services, and they say that they never discharged
 the plaintiff, nor did they employ other medical prac-
 titioners, and finally they pleaded certain allegations

by way of justification of the dismissal and discharge of the plaintiff by the board of health that employed him.

The learned judge who tried the case, in his judgment, declared that no evidence was produced at the trial of any justification for dismissal of the plaintiff, and he found all the issues in favor of the plaintiff and rendered a judgment in his favor for \$350.00 and costs.

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This judgment, upon appeal, was affirmed by the Supreme Court of Nova Scotia, from the judgment of which court in affirmance of the judgment of the trial judge this appeal is taken.

The argument before us consisted for the most part of merely technical objections.

1. That the board of health that employed the plaintiff was not legally constituted.

2. Assuming it to have been that the contract made with the plaintiff by the board was the contract of the defendants ;

3. That the action was substantially for a wrongful dismissal and that for such wrong the defendants were not liable, their liability being limited to what is prescribed by sec. 12 of c. 29 of the revised statutes of Nova Scotia 4th series as amended by c. 6 of the acts of 1874.

As to the first of these objections I have already expressed my opinion to be that the board of health that employed the plaintiff was duly constituted.

As to the 2nd and 3rd of the objections as above stated they are purely of a technical character for, under the statutory provisions as to amendments required to be made as well by the court below as by this court, in order that the true question in issue between the parties shall be determined, the pleadings can, and should even now, be amended if necessary so as to raise such true questions, but they do, I think,

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sufficiently raise such questions, which are not whether the contract entered into by the board of health with the plaintiff is strictly speaking the contract of the defendants, or the dismissal of the plaintiff by the board if wrongful, the wrongful act of the defendants but

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1. Whether the plaintiff fulfilled the contract upon his part in all things which according to a reasonable construction of the contract were to be fulfilled by him.

2. Whether the board of health fulfilled the contract in all things, which according to a reasonable construction of it were to be performed by them.

3. Whether, assuming the first question to be answered in the affirmative and the second in the negative, the defendants are by sec. 12 of c. 29, 4th series, as amended by c. 6 of the acts of 1874, liable to the plaintiff to pay him the amount agreed by the board to be paid to him for his services, namely, \$6.50 per day, as long as the small pox should prevail in that season, which it is not disputed was until the 5th of May, 1880. These are the real points in issue between the parties which they went down to try, and which in point of fact were tried, and which are now before us for our decision.

Now, the first point to be determined is: What is the true construction of the contract?

The resolution of the board under which the plaintiff agreed to render his services at \$6.50 per day was that

a doctor be secured and retained to attend upon all small pox patients which were then and during that season might be attacked with small pox in the District No. 4 under the jurisdiction of the board.

It was in accordance with this resolution and for the purposes thereof that the plaintiff was engaged, secured and retained, and, for the remuneration of \$6.50 per day during such time in the then season that there

should be small pox patients in the district under the jurisdiction of the board, he agreed to render his professional services. To fulfil this contract upon his part it was natural that he should have given up, and he says that he did give up, his general practice in order to keep himself always in readiness to attend to small pox patients and to fulfil his contract. The reasonable construction then of this contract appears to me to be that thereby the plaintiff was secured, retained and engaged to attend to all small pox patients there should be during the season in the District No. 4 under the jurisdiction of the board. And if he kept himself in readiness to attend to all such small pox patients so long as there should be any requiring medical attendance, and did attend to all such as he was permitted by the board to attend, he must, I think, be held to have fulfilled his contract according to its reasonable construction in all things upon his part to be performed. That he did so fulfil his contract the learned judge who tried the case has found as matter of fact, and that point must be held to be determined in the plaintiff's favor.

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Then as to the board of health the true construction of their contract is, I think, that they engaged and retained the plaintiff to attend to all small pox patients within the jurisdiction of the board who during the season should require medical attendance, and that he should be paid \$6.50 a day during such period or so long as the plaintiff should fulfil his part of the contract. If, therefore, they prevented him attending to small pox patients within the district under the jurisdiction of the board who during the season required medical attendance they committed a breach of their contract which can only be justified and excused by there being pleaded and proved sufficient cause in excuse of such breach; and it

1891 appears that in point of fact although the board permitted the plaintiff to attend small pox patients from the 18th February to the 12th of March, 1880, they did, from thence until the 5th May, when there ceased to be any small pox patients requiring attendance in the district under the jurisdiction of the board, prevent the plaintiff from attending any such patients although he was ready and willing to attend them, and the board procured the attendance of another medical man without any justification of such their breach of their contract with the plaintiff, as the learned judge who tried the case has found. Under these circumstances the plaintiff's contract entitled him to be paid the \$6.50 per day until the said 5th of May, and the only remaining question is whether the sections of the statutes referred to impose upon the defendants a liability to pay the plaintiff what must be admitted to be due to him under the terms and conditions of his contract.

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The 12th sec. of c. 29 of the 4th series as amended by sec. 1st of c. 6 of the acts of 1874 reads as follows:—

The reasonable expenses already incurred or hereafter to be incurred by any board of health in carrying out the provisions of this chapter, including all medical attendances and services bestowed and the medicines supplied by physicians when required by any board of health to be bestowed, performed and supplied under the provisions of this charter, shall be a county district or city charge and shall be assessed and levied and collected in the same manner and at the same time as the ordinary county rates.

Upon the true construction of this clause there can, I think, be no doubt that it was competent for the board of health of the district No. 4, in the county of Cape Breton, to engage and retain the services of a medical man to be always in readiness to attend all small pox patients within the district under the jurisdiction of the board of health for as long as the disease should prevail in the district.

Having regard to the infectious nature of the disease

and to the interference which constant attendance upon patients suffering from it would necessarily have with the medical man's general practice, it was legally reasonable, and indeed perhaps absolutely necessary, that the contract with the medical man engaged and retained should be for the whole period that the disease should prevail in the district as was done by the contract between the board of health and the plaintiff; and as the plaintiff has fulfilled that contract in all things to be performed upon his part the amount for which he contracted to render his professional services and which the board of health agreed should be paid to him at \$6.50 a day so long as there should be small pox patients in the district is by the statute made a charge and liability upon the county corporation which they are bound to pay.

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It has been suggested here, though not apparently in the court below, and no such defence is put upon the record, that the plaintiff's remedy is not by action but by mandamus. Apart from the point that no such defence has been raised upon the record I am of opinion that there is no weight in the objection now suggested for two reasons.

1st. Because I think that the true construction of the statute is to make the amount as agreed upon between the board of health and the medical man whose services have been engaged and retained by them to be a charge upon the county corporation and a liability or debt due by them to the medical man, and in such a case the medical man so engaged and retained is vested with his common law right to enforce by action the liability and charge which is imposed upon the corporation by the statute. The statute in express terms imposes the amount which the plaintiff is entitled by his contract to demand and receive a charge and liability upon the

1891 corporation and it enables the corporation to reimburse
 THE MUNI- themselves by levying an assessment in the same man-
 CIPALITY ner and at the same time as the "ordinary county rates,"
 OF THE levied to pay all other liabilities of the corporation.
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 — prevent the miscarriage of justice is so extensive that
 Gwynne J. the court can if necessary direct a prayer for a manda-
 — mus to be added to the statement of claim, and the
 judgment of the court under order 53 of ch. 104 of the
 Revised Statutes 5th series may order a mandamus to
 issue to compel the defendants to levy a rate, but, as I
 have already said, the statute under the circumstances
 appearing in the case imposes the amount which is
 due to the plaintiff as a charge and liability upon the
 corporation which can be enforced by action against
 the corporation and they can reimburse themselves.
 The appeal therefore, in my opinion, should be dis-
 missed with costs.

PATTERSON J.—There is only one point in this case
 on which I entertain any serious doubt.

I have no doubt that the law contained in chapter
 29 of the 4th series Revised Statutes, was in force in
 1880, when the transactions in question took place,
 and is, in fact, still in force. My brother Gwynne has
 dealt fully with that subject, and I have nothing to
 add to what he has said. I am also of opinion that the
 proper remedy for the recovery of the expenses men-
 tioned in the 12th section of the act, whether those
 expenses have been paid by members of the board out
 of their own pockets, or are due to persons who have
 rendered services or furnished supplies under the orders
 of the board, is by an action like the present one, and
 not by mandamus to compel the making of an assess-
 ment.

The latter proceeding would be very inconvenient, if not impracticable. It cannot have been the intention of the legislature that boards of health should incur a debt, payable only by means of an assessment made for the purpose, for every service rendered. If such were the idea it would of course apply to all services important or trifling, to the wages of a char-woman as well as to the fees of a physician. The statute, it is true, gives no direction for providing funds by the county in advance of the assessment which can only be collected once a year. The enactment of section 12 is, that the reasonable expenses incurred by the board shall be a county or district charge, and shall be assessed by the justices in session and levied and collected in the same manner and at the same time as the ordinary county rates. This might perhaps have been more happily expressed, but it means, as I think is sufficiently plain, that the operations of the board of health are to be conducted at the expense of the county or district—"district" evidently denoting a district with a municipal organization, such as those mentioned in chapter 57 of the Revised Statutes 4th series—and the provision referring to the assessment, which may have been inserted *ex majore cautela*, and may not have been strictly necessary, does not demand any other construction than that the expenses which the county is made liable for may be included in the ordinary estimates of money required for public purposes.

The making of these estimates was a duty of the grand jury of the county, and the assessments were made under orders of the sessions by the 21 ch. of the Revised Statutes 4th series, until those functions were transferred, 42 V.c. 1, s. 49, to the municipalities in 1879.

This understanding of the effect of sec. 12 is borne

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out by reference to cognate provisions of provincial acts, as well as to the other sections of chapter 29. Thus we have in section 11 an allusion to direct payments by the board of health. The section requires that a yellow flag shall be displayed on houses where there is small pox, and enacts that the expense shall be borne by the board; and section 9 which is strictly in *pari materia* with section 12, enacts that amounts for vaccinating poor people,

when examined and allowed shall be assessed for and paid as other county and city charges.

Sometimes express provision has been made for procuring, in advance of the collection of the rate, the funds necessary to pay debts which are made a county charge. Thus, sec. 5 of ch 21 (4th series), authorized the grand jury to present sums required for certain local purposes, and empowered the sessions, who were to assess the localities for the amounts, to appoint commissioners to expend the money and to authorise the commissioners to borrow the amount, adding these words :

And any money borrowed under this chapter shall be a county or district charge and bear interest till paid.

This money was evidently to be borrowed on the credit of the county or district, and not of the special local assessment.

There is part of an act printed in appendix A to the Revised Statutes, 4th series, which authorized the Provincial Government to advance money to pay compensation for buildings removed or destroyed for railway purposes, which money was to remain a county charge, to be raised by assessment and returned to the provincial treasury. In the present instance members of the board raised money by giving their own notes, as we are told by one of them. I see no reason why they should not have been supplied by the county with money to pay their way.

Even a temporary loan effected by the council, such as under one of the statutes commissioners were authorized to procure, and under another might be made by the government, must be a matter of frequent occurrence when there are not funds on hand. No difficulty of the kind involved in the point in discussion was made with regard to the money paid to the plaintiff for his services up to the date of his dismissal, and the objection is not put upon the record. I infer from these circumstances that the construction I apply to the statute has been already recognized as the appropriate and practical one.

The doubt I have is whether the plaintiff's claim is one of the "reasonable expenses" incurred by the board of health which are, by section 12, made a county charge. The term "reasonable expenses" is a very comprehensive one, but its elasticity is limited by the effect of the act of 1874, chap. 6, which declares that it "shall be construed to include all medical attendance and services bestowed and performed, and medicines supplied by physicians when required by any board of health to be bestowed, performed and supplied under the provisions of chapter 29."

I do not see my way to give to the term "reasonable expenses" in section 12 a more extensive signification, as applied to professional claims of a physician, than that which this explanatory statute gives to it. The question, therefore, is whether the present claim can properly be treated as being for "medical attendance and services bestowed and performed."

Now, if the claim is regarded as one for wrongful dismissal I must answer the question in the negative. The board of health had no power to bind the county by an executory contract, or to make the county liable for a breach by the board of its own contract. Services refused and forbidden, and therefore left unperformed, cannot properly be called services bestowed and per-

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formed. I, for some time, was inclined to think that, the agreement being to pay the plaintiff \$6.50 a day for his attendance on smallpox patients during the season, that scale of remuneration having been adopted in preference to \$200 a month which had been proposed, the gross amount of \$6.50 multiplied by the number of days during which there were any small-pox patients that season might be treated as the sum agreed to be paid for whatever services the plaintiff performed during the season he, of course, performing, as has been found in his favor, all that the board required of him.

The judgment practically proceeds upon that computation.

On reflection, however, I am satisfied that that mode of bringing the plaintiff's claim within the letter of section 12, as explained by the act of 1874, puts too great a strain upon the terms of the contract, under which the plaintiff would clearly be paid in full if paid \$6.50 at the close of each day while he was bestowing attendance or performing services. It would, besides, by doubling the rate at which the professional services were valued, make the remuneration unreasonable, while the charge on the county is for reasonable expenses only.

We thus come back to the form in which the plaintiff has presented his claim, viz.: for damages for wrongful dismissal, and in that shape it is not, in my opinion, made a county charge.

On this ground I think the appeal should be allowed with costs and the action dismissed with costs.

*The court being equally divided
the appeal was dismissed with-
out costs.*

Solicitors for appellant: *Borden, Ritchie, Parker &
Chisholm.*

Solicitors for respondent: *Henry, Ritchie & Henry.*