

1882 ~~~~~ *Mar. 6. ~~~~~ 1883 ~~~~~ *Jan'y 11.	THE GRAND JUNCTION RAILWAY } COMPANY } APPELLANTS ;
AND	
	THE CORPORATION OF THE } COUNTY OF PETERBOROUGH, } AND JOHN BURNHAM, THE } RESPONDENTS. WARDEN, AND EDGCOMBE } PEARSE, THE TREASURER THEREOF }

ON APPEAL FROM THE COURT OF APPEAL, ONTARIO.

Municipal by-law, validity of—Grant of bonus to railway company by municipal by-law—Remedy—Action at law—Mandamus—34 Vic., ch. 48 (O.), construction of.

By 18 Vic., ch. 33, the Grand Junction Railway Co. was amalgamated with the Grand Trunk Railway Co. of Canada. The former railway not having been built within the time directed, its charter expired. In May, 1870, an act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railway Co., but gave it a slightly different name, and made some changes in the charter. After this, in 1870, a by-law to aid the company by \$75,000 was introduced into the county council of *Peterborough*. This by-law was read twice only, and, although in the by-law it was set out and declared that the ratepayers should vote on said proposed by-law on the 16th November, it was on the 23rd November that the ratepayers voted on a by-law to grant a bonus to the appellant company, construction of the road to be commenced before the 1st May, 1872.

At the time when the voting took place on the by-law, there was no power in the municipality to grant a bonus. On the 15th February, 1871, the Act 34 Vic., ch. 48 (O.) was passed, which declared the by law as valid as if it had been read a third time, and that it should be legal and binding on all persons, as if it had been passed after the act.

On the same day of the same year, ch. 30 was passed, giving power to municipalities to aid railways by granting bonuses.

*PRESENT—Sir W.J. Ritchie, Knt., C.J., and Fournier, Henry, Tasche-reau and Gwynne, JJ.

The 37 *Vic.*, ch. 43 (*O.*) was passed, amending and consolidating the acts relating to the company. 1882

In 1871 the company notified the council to send the debentures to the trustees who had been appointed under 34 *Vic.* ch. 48 (*O.*). In 1872 the council served formal notice on the company, repudiating all liability under the alleged by-law. Work had been commenced in 1872, and time for completion was extended by 39 *Vic.* ch. 71 (*O.*). No sum for interest or sinking fund had been collected by the corporation of the county of *Peterborough*, and no demand was made for the debentures until 1879, when the company applied for a mandamus to issue and deliver them to the trustees.

THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPORATION OF
THE COUNTY
OF PETER-
BOROUGH.

Held, affirming the decision of the court below, that the effect of the statute 34 *Vic.* ch. 48 (*O.*), apart from any effect it might have of recognizing the existence of the railway company, was not to legalize the by-law in favor of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, there being certain other defects in the said by-law not cured by the said statute, the appellants could not recover the bonus from the defendants.

Per *Gwynne, J.*, (*Fournier* and *Taschereau JJ.*, concurring). As the undertaking entered into by the municipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in *Ontario* in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the statutes in force then regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of *mandamus*, which the writ of *mandamus* obtainable on motion without action still is.

Per *Henry, J.*, that if appellants had made out a right to file a bill to enforce the performance of a contract ratified by the Legislature, they would not have the right to ask for the present writ of *mandamus*.

APPEAL from a judgment of the Court of Appeal for *Ontario*, reversing a rule of the Court of Queen's Bench, granting a writ of *mandamus*, commanding the

1882 corporation of the county of *Peterborough* to issue debentures for \$75,000 and interest, in accordance with the terms of a certain by-law respecting the Grand Junction Railway Company and the *Peterborough* and *Haliburton* Railway Company, alleged to have been passed by the county council, and adopted by the rate-payers.

THE GRAND JUNCTION RAILWAY CO.
v.
THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

The facts of the case will be found stated in the judgments of *Ritchie*, C.J., and *Gwynne*, J.

Mr. *Robinson*, Q.C., for appellants :

The question which arises on this appeal is whether the appellants are entitled under the by-law in question and the subsequent legislation to a *mandamus* commanding the respondents to issue debentures of the corporation of the county of *Peterborough* for the sum of \$75,000, and to deliver the same to trustees. The Court of Appeal decided the case principally upon the ground that there was no company in existence entitled to receive the money.

The most important question in view of the judgment appealed from is as to the incorporation of the Grand Junction Railway Company.

[The learned counsel then referred to the several statutes which relate to the incorporation of this company, and which are referred to in the judgment of *Gwynne*, J., and contended that they clearly recognize and declare the existence of the Grand Junction Railway Company, and make valid and binding the by-law granting a bonus to that company. Citing *Field* on Corporations (1); *McAuley et al* v. *Columbus, Chicago & Indiana Central Ry. Co.* (2); *Thomas v. Dakin* (3); *Conservators River Tone* v. *Ash* (4);

(1) P. 33.

(2) 83 Ill. 348.

(3) 22 Wend. 94.

(4) 10 B. & C. 891.

Stebbins v. Jennings (1); *The Orville and Virginia Railroad Co. v. The Supervisors of Plumas County* (2); *Neil v. Board of Trustees* (3); *Bow v. Allenstown* (4); *Liverpool Ins. Co. v. Manchester* (5); *Illinois G. T. Ry. Co. v. Cook* (6).]

1882
THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

The by-law is not merely declared legal, valid and binding, as if it had received a third reading, but it is added: "The said by-laws are hereby declared legal, valid and binding upon the corporations respectively, and on all others whomsoever." This is a distinct, independent enactment, complete and effectual in itself, and not affected or qualified by the words preceding, which it is said only declare it legal as if it had received the third reading, or by those succeeding, which it is said only direct the corporation to act upon it as if it had been proposed after the passing of the Act.

The reference to the provisional directors of the *Grand Junction Railway Company* in section 11 of 34 Vic., c. 48, O. shews that the company named in the Dominion statute is referred to. It is plain, beyond doubt, from the language of this Act, that the Legislature intended to make the by-law completely, and not only to a limited extent, binding upon the county, and that they regarded and intended to treat and recognize the Grand Junction Railway Company as a corporation to which the bonus could legally be given. This they had full power to do. It is true that a mere erroneous assumption or recital of fact or law in a statute is not conclusive, but it is otherwise if it be clear that the Legislature intended that the law or fact should be as recited, or if to deny the law to be as assumed by the Legislature would, in effect, be to abrogate the statute; and this case is of that character. The statute and the by-law confirmed by it are made

(1) 10 Pick. 187.

(2) 37 Cal. 354.

(3) 31 Ohio 21.

(4) 34 New Hamp. 372.

(5) 10 Wall. 566.

(6) 29 Ill. 237.

1882 inoperative by holding that there was no corporation or association competent to receive the bonus; *Norton v. Spooner* (1); *Postmaster General v. Early* (2); *Hardcastle* on Statutes (3).

THE GRAND JUNCTION RAILWAY CO. v. THE CORPORATION OF THE COUNTY OF PETERBOROUGH. The 37 Vic. ch. 43, passed by the provincial Legislature, in effect grants all the rights intended to be vested in the Grand Junction Railway Company under the statutes of the Dominion or of the Province, to the company under the same corporate name. This includes the right to the bonus in question, which was intended to be granted to the company by the statutes already mentioned.

The 39 Vic., ch. 71, *Ontario*, contains a further recognition of the company as existing before the 39 Vic., and the by-law in question as valid and in force. See sections 1, 6; *Toronto & Lake Huron R. W. Co. v. Crookshank* (4); *Smith v. Spencer* (5).

The construction placed upon these statutes, it is submitted, defeats the plain intention of the Legislature—an intention which they have clearly expressed, and which it was within their jurisdiction to carry out.

Then as to the question of the trustees, one of the learned judges, Mr. Justice *Cameron*, held that no trustees had been duly appointed to whom the debentures could be delivered. All the judges of the Court of Appeal were of a contrary opinion.

Trustees have been appointed in sufficient compliance with the by-law. It was not necessary that such trustees should have been appointed by name by the Legislature. They were appointed under the provisions made for that purpose by the statute, and were entitled under the terms of the by-law (section 7) to receive the debentures.

(1) 9 Moo. P. C. 103.

(2) P. 244.

(3) 12 Wheat. 136, 148.

(4) 4 U. C. Q. B. 309, 318.

(5) 12 U. C. C. P. 277.

Mr. *Hector Cameron*, Q.C., followed on behalf of the appellants :—

The Legislature of *Ontario*, before passing 34 *Vic.*, ch. 48, which makes valid and binding upon the corporation of *Peterborough* the by-law in question, had all the facts before them, and their intention, as is apparent by the language used, was to make the by-law in question as valid and as binding as if it had been read a third time and all defects were cured.

As to the point taken by respondents, that it is impossible to levy a rate without contravening sec. 10 of the *Ontario* Act, 34 *Vic.*, ch. 48, I submit the allegation is not proved, and that there is no proof that it would have required more than two cents in the dollar to be levied at the time the by-law was passed. It is no answer to say we cannot pay a debt of 1870 because we have incurred debts since, which prevent us from levying more than two cents in the dollar. On this point I refer to Mr. Justice *Patterson's* judgment in the court below.

Then as to laches. The bonus could legally be claimed only when the road was built to *Peterborough*, and only since eighteen months the road has been running as far as *Peterborough*.

The omission to file the plan is not an answer to this application for a mandamus. Such filing is essential only to the legal exercise by the company of their compulsory power to take land; but the question here is, has there been an actual commencement of the work in due time? Such a commencement has been proved, and the corporation cannot set up the non-compliance with the statute as regards the plan, as forming a sufficient ground for their refusal to deliver the debentures. *Stratford and Great Western Co. v. County of Perth* (1). Per *Burton* and *Moss*, JJ.

1882
THE GRAND
JUNCTION
RAILWAY Co.
v.
THE CORPORATION OF
THE COUNTY
OF PETER-
BOROUGH.

1882
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.

[The learned counsel then argued that the Dominion statute 33 *Vic.*, ch. 53 was not *ultra vires*, and that all the legislation which had taken place on this subject was *intra vires*.]

Mr. *Bethune*, Q.C., and Mr. *Edwards*, for respondent :

The learned counsel after referring to the different statutes relating to the incorporation of the respondents and arguing that the Dominion Statute 33 *Vic.* ch. 53, was *ultra vires*, and that the legislation of *Ontario*, in so far as it attempted to interfere with the Dominion legislation was and is void, and upon which points the court expressed no opinion, proceeded as follows :

But assuming the validity of these statutes, the appellants are not entitled to have the *mandamus* for which they ask for the delivery of the said debentures.

The legislation hereinbefore referred to has not had the effect of making valid the by-law.

On the 23rd of November, 1870, the by-law was submitted to the electors of the then county of *Peterborough*, and was carried by a small majority of the electors who voted upon it.

At the time of the submission of the said by-law, the said county of *Peterborough* had no power to pass any by-law for granting any bonus to any railway company.

At that time, the county of *Peterborough* consisted of the municipalities which at present compose it, and also of the municipalities which now compose the District of *Haliburton*, which has since been set apart without any provision whatever having been made for any portion of the debt proposed to be created by this by-law being borne by the district of *Haliburton*.

So far as the vote in that part of the former county of *Peterborough*, which now constitutes the county of *Peterborough*, was concerned, the majority of the rate-

payers voted against the granting of the said bonus. 1882
 The whole vote polled was less than the majority of THE GRAND
 the entire votes of the ratepayers of the then county of JUNCTION
Peterborough. RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.

No notice whatever was given of any intention to apply to the legislature to confirm the by-law of the county of *Peterborough*, nor, as the bill was originally introduced, was that object contemplated, so far as appeared on the face of the bill, and the respondents had no notice at all, until after the statute 34 *Vic.*, ch. 48, was passed, that it was intended to affect the by-law which is in question here.

The first section of the statute confirms the by-law of *Belleville*; the first part of the second section confirms the by-law of *Seymour*, but in the second section there is also introduced a provision respecting the by-law in question.

It will be observed that the number of the by-law in question is not given in the said Act, and it is submitted that the description which is given in the act is not one which is apt to describe the by-law in question. It is not stated to be the by-law of the corporation of the county of *Peterborough* in express words, and the by-law which is thereon assumed to be made valid by the legislature is a by-law which was approved of by a majority of the duly appointed qualified voters in the county of *Peterborough*; the by-law in question was not approved of by a majority of the duly qualified voters in the county of *Peterborough* on the day named, but was only approved of by the majority of the voters who voted on the by-law. This section of the statute should not be construed so as to make valid the said by-law.

Section 10 of the Act last mentioned provides that nothing contained in that Act should authorize any

1882 increased rate to be assessed for the purposes thereof beyond the rate limited in the Municipal Act of 1866. It is clear that if this by-law be enforced, that provision of the statute will have to be violated.

THE GRAND JUNCTION RAILWAY CO. v. THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

37 Vic. ch. 43, entitled, "An Act respecting the Grand Junction Railway Company," recited that the appellants had by their petition prayed that all Acts relating to the company should be consolidated, amended and reduced into one Act, and by the first section enacted that all the rights, powers and privileges intended to be vested in the Grand Junction Railway Company under the several statutes passed by the Parliament of the late Province of *Canada*, by the Parliament of the Dominion of *Canada*, and by the Legislature of the Province of *Ontario*, relating to the said company, were thereby declared to be vested in the shareholders of the company under the name of the Grand Junction Railway Company. Section 2 of that statute purported to repeal amongst other Acts the Act 16 Vic. ch. 43, already referred to, and the Act of the Parliament of *Canada*, 33 Vic. ch. 53. None of the other provisions contained in that statute are *ex post facto* in their operation, or in any wise affect the by-law which is here in question.

39 Vic, ch. 71 (O.), sec. 6, assumed to confer upon the railway company power to consent to changing the line or route of their railway if requested by the county of *Peterborough*.

This was passed also without notice to the county of *Peterborough*, and has never been acted upon in any manner by the said county.

42 Vic. ch. 57, by the 2nd section thereof, extended the time for the completion of the railway to the town of *Peterborough* to the year 1880, so far as a by-law of the town of *Peterborough*, which was provided for in the first section, was concerned; but this statute contains no reference whatever to and does not affect the

county of *Peterborough* or the by-law in question here. 1882

No rate has ever been struck for the levying of any THE GRAND
of the sums of money necessary to provide for the pay- JUNCTION
ment of debentures referred to in the by-law. RAILWAY CO.

The construction of the railway was not begun with-
in the time limited in the Act of 1870 as the respondents
contend, although the appellants allege that some work
was done within the period of two years from the pass-
ing of the Dominion Act, yet the respondents submit
that there could be no commencement of the work
because the plan and book of reference containing the
location of the railway was not then filed in the office
of the clerk of the peace as required by the statute in
that behalf. THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

The railway was certainly not completed to the town
of *Peterborough* within six years from the passing of
the Act.

On the 27th of June, 1872, the respondents served a
notice upon the appellants repudiating the delivery of
the debentures.

No demand was made for the said debentures until
29th of October, 1879.

The respondents also rely upon the reasons contained
in the judgment of the judges in appeal, and upon the
following authorities:—*Stratford & Lake Huron Rail-
way v. Corp. of the County of Perth* (1); *Brooks v. County
of Haldimand* (2); *Fry on Specific Performance* (3); *The
People v. Seneca, C. P.* (4); *High on Extraordinary
Remedies* (5); *Luther v. Wood* (6); *re Goodhue, per
Strong, J.* (7); *Hardcastle on Statutory Law* (8).

Mr. Robinson, Q.C., in reply.

(1) 38 U. C. Q. B. 112.

(2) 3 Ont. App. R. 73.

(3) P. 321.

(4) 2 Wendell 365.

(5) P. 196.

(6) 19 Grant, 348.

(7) 19 Grant, 449.

(8) P. 240.

1883

RITCHIE, C. J. :—

THE GRAND
JUNCTION
RAILWAY CO.

v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Upon application of the Grand Junction Railway the Court of Queen's Bench of *Ontario* made the following order :

Upon reading the rule *nisi* granted herein, before the Honorable Mr. Justice *Osler*, on Friday the twenty-first day of November, A.D. 1879, and the affidavit of service thereof, and upon hearing counsel for all parties, it is ordered that a writ of mandamus do issue out of this honorable court, commanding the said the corporation of the county of *Peterborough*, and *John Burnham* the warden, and *Edgcombe Pearse* the treasurer, and the said corporation and the said treasurer thereof for the time being, forthwith to issue debentures of the said corporation, to be sealed with the corporate seal of the said municipality, and signed by the said warden and treasurer thereof, or the warden and treasurer for the time being, for the sum of seventy-five thousand dollars (\$75,000) and interest thereon, in accordance with the terms of a certain by-law, entitled :—"A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of one hundred thousand dollars, to be given by way of bonus to the said Grand Junction Railway, and the said *Peterborough* and *Haliburton* Railway Company, in the manner and proportion following; that is to say: Seventy-five thousand dollars to the Grand Junction Railway Company, and twenty-five thousand dollars to the *Peterborough* and *Haliburton* Railway Company," and to deliver the said debentures to the trustees respectively appointed for receiving and holding of moneys, or securities for moneys, awarded by way of bonus towards the construction of the Grand Junction Railway. And it is further ordered that the said corporation, and the said *John Burnham* and *Edgcombe Pearse*, or the warden and treasurer thereof for the time being, do pay the costs of and incidental to this application and the said writ of mandamus forthwith after taxation thereof.

From this order the respondents appealed to the Court of Appeal of *Ontario*, which court reversed the judgment of the Queen's Bench and discharged the rule with costs. The present appeal is from this judgment, and, among the grounds of appeal, it is alleged that at the time of the passing of the said by-law there

was no power on the part of the said municipality to grant the aid in question, and that the statute of *Ontario*, 34 *Vict.*, ch. 48, sec. 1, had not the effect of making valid the said bonus; the respondents in their reasons against the appeal contending that: The Grand Junction Railway Company were and are entitled to the bonus referred to in the by-law in question, and that the municipality had the power to grant the bonus in question, and the Legislature of the Province of *Ontario* have expressly authorized, sanctioned and legalized the said by-law granting the said bonus.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.
 Ritchie, C.J.

A number of points were raised, but as these are at the very foundation of the relators' right to ask for a *mandamus*, and as I think they must be decided unfavorable to them, and as this disposes of the matter, it seems to me quite unnecessary and useless to discuss the other questions.

As to the right of the municipality to grant a bonus in 1870, it seems clear that the special act of the Grand Junction Railway Company had not provided for giving assistance in that shape, and the general power to do so did not find its way into the municipal law until the passing of the act of 34 *Vict.*, ch. 30 on 15th February, 1871.

And as to the by-law, there is no pretence for saying that it has any effect, unless such as it has received from subsequent legislation, and the only legislation with respect to the by-law is the 34 *Vict.* ch. 48, and therefore any efficacy or vitality the by-law has or ever had, must be derived from this act, the 2nd section of which is as follows:

Section 2. That the by-law numbered two hundred and forty-five, passed by the corporation of the township of *Seymour*, and intituled "A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway, and for the issuing of debentures

1883 therefor to the amount of thirty-five thousand dollars, to be given by way of bonus to the said Grand Junction Railway Company by the municipality of the township of *Seymour*;" also a certain by-law intituled, "A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of one hundred thousand dollars, to be given by way of bonus to the said Grand Junction Railway Company and the said *Peterborough* and *Haliburton* Railway Company, in the manner and proportion following; that is to say: Seventy-five thousand dollars to the Grand Junction Railway and twenty-five thousand dollars to the *Peterborough* and *Haliburton* Railway Company," and which was approved of by a majority of the duly qualified voters in the county of *Peterborough*, on the twenty-third day of November, in the year of Our Lord, one thousand eight hundred and seventy, be, and the same is hereby declared legal, valid and binding, as if the same had received the third reading of the county council of the said county of *Peterborough*; the said by-laws are hereby declared legal, valid and binding upon the corporations respectively, and on all others whomsoever; and the said several corporations above-mentioned shall respectively proceed to issue debentures and act upon such by-laws in all respects in the same manner as if the said by-laws respectively had been proposed after the passing of this act.

1883
THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.
Ritchie, C.J.

Section 11. A majority of the provisional directors of the Grand Junction Railway Company may at any time, at any meeting of which all the provisional directors shall have had notice by resolution; add to the numbers of said provisional directors such persons as they may think proper, and such persons so added shall have all the rights and powers they would have had, had they been named provisional directors in the act incorporating the said company.

From the language of this statute, I am of opinion that it was passed on the assumption that the by-law intended to be validated had been regularly before the county council, had had two readings, in fact had gone regularly through all its stages before the council, had by them been duly submitted to the qualified voters of the county in the manner and at the time provided for by the by-law, had been voted on at the time and in the manner fixed by the council, and required no further action than to be read a third time and duly

sealed, and the Legislature never intended arbitrarily to impose this bonus on the county of *Peterborough* apart from and independent of the county council and the ratepayers; had such been their intention, a simple enactment to that effect, without reference to any by-law or vote, would have accomplished that object; but, in my opinion, the Legislature intended merely to confirm and complete what they supposed had been acted on by the council, and regularly voted on and assented to by the ratepayers, by supplying the omission to read it a third time by practically dispensing with such reading.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.
 Ritchie, C.J.

Had, then, this so-called by-law been before the council, read twice, and by them referred to the ratepayers? The evidence on this point is, to my mind, conclusive to the contrary.

First we have the affidavit of *Edgecombe Pearse*:

I *Edgecombe Pearse*, of the town of *Peterborough*, in the county of *Peterborough*, clerk and treasurer of the said county, make oath and say:

1. I am and have been ever since the early part of the year one thousand eight hundred and seventy clerk and treasurer of the said county of *Peterborough*.

2. No by-law such as that mentioned and referred to in the rule *nisi* herein was ever passed by the council of the said county, nor any by-law granting aid to the said railway company, and there is no such by-law among the records of my office.

3. In the month of October, one thousand eight hundred and seventy, a by-law was introduced in the said council, and read first and second time, proposing to aid the said Grand Junction Railway and the *Peterborough* and *Haliburton* Railway Company. The said proposed by-law was not drawn up in regular form, but consisted of a skeleton of a by-law and a number of resolutions and fragmentary parts, and was, according to the best of my recollection and belief, delivered to *James Stratton* in that form for publication in the "Examiner" newspaper, and the same was not returned to my office, to my knowledge, and the same is not now in my office, and is not now in existence to my knowledge.

4. In the by-law as published in the said "Examiner" newspaper,

1883 on the twentieth day of October, A. D., 1870, and in the notice thereof, the day fixed for taking the votes of the ratepayers thereon, was the 16th day of November, A. D. 1870, such day being, according to the best of my recollection and belief, the day fixed by the council upon the second reading, and in the said newspaper of the twenty-seventh of October and following issues the same was changed to the twenty-third day of November.

THE GRAND JUNCTION RAILWAY CO. v. THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

Ritchie, C.J.

5. Such second reading took place on the fifteenth day of October, A.D. 1870, and on said day the council adjourned, and no meeting of the council was held between the said fifteenth day of October and the fourteenth day of December following, and there was no resolution or motion of the council passed, or any other authority given, to my knowledge, in any way by said council, to enable any person to make any alterations in such proposed by-law.

6. No alterations were made in such proposed by-law by me, nor was I a party in any way to any such alterations, to the best of my recollection and belief.

7. In the month of December, A.D. 1870, and also in January, A.D. 1871, respectively, there were unsuccessful motions in said council for a third reading of what purported to be the by-law in question, but the by-law which had passed the first and second readings was not then before the council, the proposed by-law, the third reading of which was moved, being that published, as I understood, in the "Examiner" newspaper of the twenty-seventh of October and following issues, and which contained, as I verily believe, some material changes from the by-law which passed such second reading.

Then we have the affidavit of *James Stratton* :

I, *James Stratton*, of the town of *Peterborough*, in the county of *Peterborough*, Collector of Customs, make oath and say :

I was in the year one thousand eight hundred and seventy, publisher of the *Peterborough* "Examiner" newspaper, in which newspaper the alleged by-law in question herein to provide for the aiding in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, was published in the month of October in that year.

2. The then warden of the county, *S. S. Peck*, Esquire, the reeve of the township of *Minden*, and who, as a resident of that part of the county through which the *Peterborough* and *Haliburton* Railway was to pass, was interested in and strongly in favor of the proposed by-law, attended at the office of the said newspaper at the time of the first publication thereof, the same having been printed off from what

was given to me as the original of such proposed by-law, as the same had passed the second reading before the council of said county. 1883

3. The said *S. S. Peck*, then in my presence made several material alterations in the by-law, and the same was printed with such alterations without being again submitted to or approved by the council of said county, and the by-law as published was in several material points different from that which had been furnished to me by the clerk of the council as having passed the second reading. THE GRAND JUNCTION RAILWAY CO. v. THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

4. I say that material alterations were made by the said *S. S. Peck* in the seventh, eighth, eleventh and sixteenth paragraphs of such by-law, although I cannot now particularly recall the matter of all of such changes. Ritchie, C.J.

5. The proposed by-law was first published in the issue of the same newspapers of the twentieth day of October, the meeting or session of the council at which the by-law had been proposed and passed through its second reading having been closed on the fifteenth day of October, and between the said publication on the twentieth, and the next on the twenty-seventh day of October, the said by-law was further altered in the eleventh and sixteenth paragraphs, and during such interval there was no session of the council to approve of or consent to such alterations.

6. In the issue of said newspaper of the twentieth day of October, in the eleventh paragraph, the last two payments were to be made as follows: "To the further amount of five thousand dollars when a branch of the said road to the village of *Minden* shall have been completely graded; and for the further amount of five thousand dollars whenever such branch of the said road to the said village of *Minden* should have been completed," and in the issue of the said newspaper of the twenty-seventh day of October and following issues, the words "a branch of" and "such branch of" were omitted.

7. In the sixteenth paragraph of such by-law, and in the notice thereof, published with such by-law as first published on the twentieth day of October, it was set out and declared that the votes of the ratepayers of the municipality of the county of *Peterborough* should be taken on the said proposed by-law on Wednesday the sixteenth day of November, and in the issue of said newspaper of the twenty-seventh day of October and following issues, that such votes should be taken on the twenty-third day of November, and in such notice the statement of the date of the first publication was changed from the twentieth to the twenty-seventh day of October, as set out in such notice.

8. According to the best of my recollection and belief, the said changes in the last two paragraphs referred to, were also made by the said *S. S. Peck*.

1883 9. I believe that such paper constituting the alleged by-law as delivered to me, was destroyed in my office as being no longer of any use.

THE GRAND
JUNCTION

RAILWAY CO.

v.

THE CORPO-
RATION OF
THE COUNTY
OF PETER
BOROUGH.

Ritchie, C.J.

Then we have the affidavit of *R. D. Rodgers* :

I, *Robert David Rodgers*, of the village of *Ashburnham*, in the county of *Peterborough*, Esquire, make oath and say :

1. I was, in the years one thousand eight hundred and seventy and seventy-one, a member of the council of said county, and in the latter year was warden of said county.

2. The alleged by-law in question herein, was never properly before the council of said county, but on its first and second readings consisted merely of fragmentary and imperfect clauses and resolutions, and owing to the fact that material alterations were made therein after such second readings, and without the knowledge or consent of the council, the said alleged by-law as voted on by the ratepayers was never looked upon or regarded by the council as legal or valid.

3. The council had not, nor had I, as such warden, any notice of the intention of the company to obtain the passing by the legislature of that part of the act thirty-four *Victoria*, chapter forty-eight, declaring such alleged by-law valid and binding, as if the same had received the third reading of the council, and such council were not in any way parties to or petitioners for such legislation.

Two efforts were made to induce the council to read this alleged by-law a third time. 1st on the 14th of December, 1870, when the council resolved that "the by-law having been found to be illegal, &c., be resolved that it be not read but be laid over till the next meeting of the council," at which meeting, on motion that it be now read a third time, passed and numbered, on a vote the motion was declared lost. No more appears to have been heard of this by-law by the council, or of any application to the legislature in reference thereto, till after the passing of the 34 *Vict.*, ch. 48, and no application appears to have been made for the issue of any debentures from 1870 until 1879.

It is true that in answer to *Stratton's* affidavit, *S. S. Peck* states :

The said by-law was drawn by Mr. *W. H. Scott*, the county solicitor, to the best of my recollection and belief, and after being read a

first time was referred to a committee of the whole council and considered in detail, and certain alterations were then made in it, and after being read a second time as amended, and its publication ordered, it was sent to Mr. *Stratton*, the publisher of the "Examiner," for that purpose; but on seeing it in print, I discovered that it was incorrectly printed in some passages where alterations had been made in the committee of the whole, and I then caused Mr. *Stratton* to correct it so as to make it correspond with the by-law as read a second time by the council, and as there was not then sufficient time for the four weekly publications of the by-law as corrected before the day originally named in the by-law of the council for the voting upon it, after consulting such members of the council as I could communicate with, and with their approval, I altered the date for the taking the votes upon it, postponing it for a week so as to allow the requisite number of publications of the correct by-law to take place before the voting, and after being so published it was voted on and carried by a majority of the ratepayers who voted on it.

4. It is not the fact that I made any material alteration in the said by-law (save that of the date for voting on it) to make it different from the by-law as it passed the second reading by the council, but on the contrary the alterations I made in it as first published were only made to correspond with the by-law as read a second time.

5. When the by-law was brought up for a third reading, I voted against it, though in favor of granting the bonuses, because I preferred to have a new by-law passed rather than have one about which a question could be raised, or which would require an act to legalize it.

I think this unsatisfactory affidavit, which does not show in what particulars the by-law first published was erroneous, nor what alterations he made, nor from what data he made the alterations, and, as he cannot deny having altered the by-law in a most material particular, viz.: the day on which the voting by the taxpayers was to be held, and which the by-law originally before the council named, and which could only be fixed by the council, and as he had no authority whatever to interfere with the by-law, and there is no record of any by-law in the archives of the municipality, I think it is entirely insufficient to negative the affidavit of the clerk and treasurer, whose duty it was to trans-

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPORATION OF
 THE COUNTY
 OF PETERBOROUGH.
 Ritchie, C.J.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.
 Ritchie, C.J.

mit the documents as they were before the council to the printer (and who says he did so), confirmed as it is by the evidence of Mr. *Rodgers*, a member of the council, who swears that, owing to the fact that material alterations were made therein after such second reading, and without the knowledge and consent of the council, the said alleged by-law, as voted on by the ratepayers, was never looked upon or regarded by the council as legal and valid: and this statement again confirmed by the minutes of the council, which show that the council had voted that the by-law had been found to be illegal; and no attempt being made to contradict in any way these statements, I can come to no other conclusion than that this alleged by-law was never read twice by the council, and was never submitted by them to the ratepayers, and was, in fact, never before the council, nor in any way acted on till it was attempted to have it read a third time as the by-law which had been twice read and submitted to the taxpayers, that the by-law read twice was never submitted to the taxpayers, and neither such by-law nor the altered document was voted on at the time fixed by the council for taking a vote. Can it then be said that under the terms of this section of the 34 *Vict.* ch. 48, the Legislature intended to validate as a by-law of this municipality a document never read before the council and never in any way dealt with or acted on by them? As to this statement Mr. Justice *Burton* says:

We find that, on a petition of the railway company setting forth that *Belleville* and *Seymour* had each passed by-laws granting a bonus to the company, and that the validity of such by-laws had been questioned for want of power in the municipality to grant it, and praying that those particular by-laws should be ratified, in the enacting part of the bill, founded on such petition, a few words are inserted referring to a by-law of *Peterborough* nowhere before referred to either in the petition, the preamble, or in the published

notices required by the standing orders of the House, and which it is stated was approved of by a majority of the duly qualified voters, and declaring that such by-law shall be legal, valid and binding as if the same had received the third reading of the county council of the said county of *Peterborough*.

1883

THE GRAND
JUNCTION
RAILWAY CO.

v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Ritchie, C.J.

I think this is peculiarly an act as to which, if there is any doubt, a construction most favorable to the public should be adopted. Before going to the Legislature to obtain this substantially private act, and to create this heavy burden on the taxpayers, the promoters should have been careful to see that the information before the Legislature, on which they were asked to legislate, was full and accurate, and should have been cautious to ascertain that all the proceedings before the council and voters had been strictly regular and according to law, or, if there had been irregularities, a curing of the irregularities should have been obtained from the legislature in express terms. The legislature having expressly named the omissions they intended to cure, courts cannot, in my opinion, be asked to extend this curative process by implication to irregularities and matters and things to which, so far as anything appears in this statute, their attention does not appear to have been called.

I think on a fair construction of this act, no intention can be discovered to validate what, under the circumstances detailed in the affidavits, was no by-law at all; but, assuming a by-law to have been before the council, read twice and submitted regularly to the taxpayers, and, having received their assent, the Legislature intended to validate such a by-law by simply dispensing with a third reading and thereby supply that deficiency. But, there being in existence no such by-law, the act could not operate, by reason of the Legislature having acted on a misapprehension of fact. I think, therefore, the ratepayers, through the council, have a right now to

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.
 Ritchie, C.J.

raise this question in answer to this application for a mandamus, on the ground that it is not such a by-law as the Legislature contemplated making valid, and therefore the act is not applicable to it. It may be all true, if the third reading had taken place and the seal duly attached, that though the irregularities in the proceedings on the by-law might afford ground for a motion to quash, they could not, as Mr. Justice *Patterson* suggests, be successfully urged as reasons for holding the by-law void in any proceedings upon it; but, in my opinion, this is by no means the question before us. This is not a question of quashing an existing by-law, it is a question of the construction of a statute, and dependent thereon the question of the existence of a by-law. The contention is that by virtue of the statute a by-law exists. We are then to construe the statute and to discover what the intention of the Legislature was, and in my opinion that intention was to cure no irregularities, but merely to supply an omission, viz.: assuming everything to have been regular and legal, then and then only to treat it as if it had been read a third time, the very dealing with the third reading involving the absolute necessity of there having been two previous readings, showing clearly that the intention to make the passing of the act equivalent to a third reading was necessarily based on the by-law having had two previous readings.

Again we see in the statute another important and most material fact which no doubt operated largely on the mind of the Legislature. The statute says:

And which was approved of by a majority of the duly qualified voters of the county of *Peterborough* on the 23rd November, 1870.

Does not the insertion of this most important statement show that the legislation was likewise based on this, viz.: That as the majority of all the ratepayers were willing that this burthen should be imposed on

the county, it was reasonable that the minority should submit to the will of the majority? While this would be reasonable enough, it would be equally unreasonable that the burthen should be placed on the majority by the vote of a small minority, as was truly the case in this instance. We can only know the intention of the Legislature from the words in which it is expressed, and it would be, to my mind, a most violent construction to say that the Legislature intended to validate a by-law approved of by a small minority of the duly qualified voters, while, on the face of the Act, the Legislature has said the by-law to be validated was a by-law approved of by the majority of the duly qualified voters. Now, what is the true state of the case on this point?

1883
THE GRAND
JUNCTION
RAILWAY Co.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.
Ritchie, C.J.

The affidavits show, and it is not disputed, that the number of voters for the year 1870 were at least 3,000, exclusive of the village of *Ashburnham* and township of *Stanhope*.

Total votes polled for by-law.....	556
Against by-law.....	467
Majority.....	89

That is 1,023 votes out of 3,000, leaving 1,977, so that in fact but a third voted, and of that third there was a bare majority of 89. Can we say in the face of such a statement in the law that it was the intention of the Legislature to validate a by-law not approved of by a majority of the duly qualified voters, but by so slim a majority of so small a minority of the voters?

In view of the uniform legislation of *Ontario* would it not have been most unjust to this municipality to impose on it this burthen without any action on the part of the municipal council, or any assent of the rate-payers? and, unless we are obliged to do so, we must not suppose the legislature intended to do so palpable an injustice (1). This act was obtained at the instance

(1) See *ex parte, Corbett*, 14 Ch. Div. 122, 127 per Brett, J.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.

Ritchie, C.J.

of the relators, and must be construed strictly against them. If they have misled the Legislature by a misrepresentation of facts either intentionally or unintentionally, they cannot complain if such misrepresentation frustrates the object they have sought to obtain. It is clear that a statement of fact or law in a statute is not conclusive, but courts are at liberty to consider the fact, or the law to be different. And then again in construing this act we are to remember that when an intention to impose a charge is doubtful, that meaning must be adopted which is most beneficial to the public (1).

Under all these considerations I cannot bring my mind to the conclusion that there was any by-law of the county of *Peterborough* made valid by the statute 34 *Vict.*, ch. 48; at any rate this is made sufficiently apparent for the purposes of the application for a mandamus, and therefore I agree with the Court of Appeal in their conclusion, though not for the same reasons, and think this appeal should be dismissed with costs.

Thinking then as I do, there was no valid by-law I feel bound so to decide. To decide the case on such grounds as that the remedy is by suit, and not by mandamus, which can only arise in the event of there being a valid by-law, would be to my mind misleading, and induce further litigation, which, if I have arrived at a correct conclusion, I think should end here.

FOURNIER, J., concurred.

HENRY, J.:

It is unnecessary for me to go into all the particulars connected with the case after the exhaustive judgment delivered by the learned Chief Justice. I must say

that I had from the beginning a good deal of difficulty in sustaining the by-law that is in question here. In fact, it would be rather against my own inclination that I have arrived at that conclusion, because I think the equities are really with the company. The company did all that the municipal body had any reason to expect, and, although it was not done exactly within the time, still the municipality derived all the contemplated benefit from the opening of the railway; and it would have given me satisfaction if I had been enabled to arrive at the conclusion that the procedure adopted by the company could be sustained. However, I have been reluctantly obliged to come to a different conclusion. Particular reference is made to the fact that the by-law has been sustained and validated by the legislative action as to the third reading. Now, it is in evidence that the by-law never was read, never was passed the first or second reading, and it appears to me that the statute only validated the want of the third reading. It does not undertake to validate anything further, and, if the by-law is in other respects irregular, it appears to me the statute does not cover such irregularity. There is no question as to the facts in connection with this matter. They are all pretty much agreed upon. The question arises whether, there being no law at the time to authorize the first submission of this rate to the voters, the statute should not have gone further and have validated that submission, but it is silent on that.

I need not give a very positive opinion in reference to another point which was argued here, and that is as to the power, under our present constitution of the Local Legislature to alter a contract made or in existence between private parties. That the municipality here intended to enter into a contract, but did not, is patent on the face of the cir-

1883

THE GRAND
JUNCTION
RAILWAY Co.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Henry, J.
—

1883

THE GRAND
JUNCTION
RAILWAY CO.

v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Henry, J.

cumstances which have been produced in evidence.

Then the Legislature steps in and completes that contract. It appears to me that, if the Legislature has the power, under our present constitution, which is prescribed by the Imperial act, to complete or affect by legislation any contract entered into between a municipality and a railway company, there is nothing to restrain them from altering and interfering by legislation with a private contract between two individuals. I express no opinion as to the power of the Legislature of *Ontario* as to the act it has passed, but I would require some argument to convince me that the Local Legislatures, or even the Dominion Legislature, has the right to interfere so as to affect contracts entered into, or quasi-contracts entered into, between parties. It is a matter of great importance, and, of course, I give no opinion upon it here, but I may suggest it for the consideration of those who may be affected by legislation of that kind.

I think the equities, as I have said before, are strongly with the company. I regret that, under the circumstances, I am not able to give effect to the legislation that has been passed to carry out the views which the company entertain, but I think I am bound to coincide with the judgment which has been delivered by the learned Chief Justice, and to say that the party is not entitled to the remedy which he claims in this suit—that is, a mandamus. Another difficulty that suggests itself to my mind has not been removed. If the matter became by legislation a subject of contract between the parties, it appears to me that the parties had a legal remedy independent of that afforded by the writ of mandamus, and it is clearly laid down that a writ of mandamus should not lie where the parties had a legal remedy. I am in doubt whether the parties have made out a right to file a bill to enforce the per-

formance of the contract ratified by the Legislature. If he had that right, he had not the right to ask for a mandamus. With the statement of these views, I concur in the judgment of the learned Chief Justice.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.

TASCHEREAU, J. :—

I concur in the judgment of the court, and am of opinion, for the reasons given by Mr. Justice *Gwynne*, whose notes I had communication of, that this appeal should be dismissed.

I desire, however, to make an exception to what the learned judge says on the right of the Provincial Legislature to pass the act in question. So far I cannot say that I have any doubt on their right to do so, without, of course, thinking it necessary to decide the point at all in this case.

GWYNNE, J. :—

This was a motion made in the month of Nov., 1879, founded on affidavits, for a prerogative writ of mandamus to issue out of the Court of Queen's Bench for the Province of *Ontario*, commanding the corporation of the County of *Peterborough* and the warden and treasurer thereof, for the time being, forthwith to issue debentures of the said corporation to be sealed with the corporate seal of the said municipality, and signed by the said warden and treasurer, or by the warden and treasurer for the time being, for the sum of \$75,000 and interest thereon, in accordance with the terms of a certain by-law entitled, "A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of \$100,000 to be given by way of bonus to the said Grand Junction Railway Company in the manner and proportion following, that is to

1883 "say, \$75,000 to the Grand Junction Railway Company
 THE GRAND "and \$25,000 to the *Peterborough* and *Haliburton* Rail-
 JUNCTION way Company," and to deliver the said debentures to
 RAILWAY CO the trustees respectively appointed for receiving and
 v. holding of moneys or securities for money awarded by
 THE CORPO- the holding of moneys or securities for money awarded by
 RATION OF way of bonus towards the construction of the Grand
 THE COUNTY Junction Railway. The motion was made under the
 OF PETER- following circumstances:
 BOROUGH.
 Gwynne, J.

The Grand Junction Railroad Company was originally incorporated by an Act of the Legislature of the Province of Old *Canada*, 16 *Vic.*, ch. 43, with power to construct a railway over any part of the country between *Belleville* and *Peterborough*, and from the town of *Peterborough* to the city of *Toronto* to intersect the main trunk line of railway proposed to be constructed, and also from *Peterborough* aforesaid to some point west thereof on *Lake Huron*, as should be decided upon by the company. By a clause of the Railway Consolidation Act, which was incorporated with the special act, it was enacted that if the construction of the railway should not be commenced, and ten per cent of the capital stock should not be expended thereon within three years after the passing of the special act, or if the railway should not be finished and put in operation in ten years from the passing of the special act, the corporate existence and powers of the company should cease. The same legislature by 16 *Vic.* ch. 37 incorporated the Grand Trunk Railway Company.

By 18 *Vic.* ch. 33, the Grand Junction Railway Company, together with certain other railway companies, were united with the Grand Trunk Railway Company, and by this act it was provided that the Governor in Council might, upon such terms and conditions as he should think fit, by Order in Council extend the period allowed by the several special acts

therein recited for the completion of the railways and works thereby respectively authorized. 1883

THE GRAND
JUNCTION
RAILWAY CO.

v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Gwynne, J.

Nothing appears to have been done towards the construction of the Grand Junction Railway or towards the creation of the capital stock of the company prior to the passing of the Dominion statute 33 *Vic.* ch. 53. By that act, after reciting the incorporation of the Grand Junction Railroad Company by 16 *Vic.* ch. 43, and the amalgamation of that company with the Grand Trunk Railway Company, with the view of securing the construction of the Grand Junction Railroad under the auspices of the Grand Trunk Railway Company, but that the latter company had declined the construction of the Grand Junction Railroad, but were willing that the charter of the Grand Junction Railroad should be re-invested in and restored to those persons and corporations now interested in the construction thereof, and that divers persons named had petitioned Parliament representing the above facts, and had prayed that an act might be passed to revive the charter of the Grand Junction Railroad Company, and to place the said company in the same position as it held before its amalgamation with the Grand Trunk Railway Company, with power to make arrangements with the said Grand Trunk Railway Company for the use of part of their line, and for station and other accommodation at *Belleville*, and for other purposes, and that it was expedient to grant the prayer of such petition, it was enacted that all the powers, rights and privileges, vested in the Grand Junction Railroad Company by the act 16 *Vic.* ch. 43 should be and were thereby restored to and vested in certain persons therein named, and such other persons as should become shareholders in the said company after the passing of the said act, and that the said corporation in the act named should in all respects have, hold and exercise the said power

1883
THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.
Gwynne, J.

as fully as the parties originally named in the said act 16 Vic. could and did hold and exercise the same, and all powers in respect of subscribing for and holding stock in the said company, and all other powers whatsoever by the said act granted to municipal corporations and others should be continued by this act, and might be exercised as fully and effectually as they might have been under the said act 16 Vic., and that the name of the said company should be the Grand Junction Railway Company. By the 6th sec. it was enacted that, as soon as one-tenth part of the authorized capital should be subscribed, the directors should have all the powers mentioned in the 10th sec. of the act of 16 Vic. By the 7th sec.—that it should be lawful for the company and the Grand Trunk Railway Company to make arrangements for the use of a part of the line of the Grand Trunk Railway Company at or near *Belleville*, and for station accommodation, and for such other purposes connected with the working of the traffic from one line to the other as the said two companies might think for their mutual interest and the public convenience, and for payment of compensation for said accommodation as they might agree upon; and by the 8th sec.—that the company should have power to construct their railway over any part of the country lying between *Belleville* and *Peterborough*, and thence to such point on the *Georgian Bay* as might be decided on, but not to the city of *Toronto*, and that the railway authorized should be commenced within two years and completed to *Peterborough* within six years from the passing of the act which received the royal assent on the 12th May, 1870. In the month of October, 1870, the municipal council of the corporation of *Peterborough*, not having any power to grant aid by way of bonus to this proposed railway, although the act of incorporation of the *Peterborough and Haliburton Railway Company*

purported to confer upon them such a power as regards the railway of that company, caused to be prepared an instrument which received two readings in the council, and which professed to be a by-law to provide for aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough and Haliburton* Railway, and for the issuing of debentures therefor to the amount of \$100,000, viz., \$75,000 to the former, and \$25,000 to the latter.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.
 Gwynne, J.

This instrument, after reciting that the municipal council of the county of *Peterborough* had determined to give as a bonus the sum of \$75,000 to the Grand Junction Railway Company, and the sum of \$25,000 to the *Peterborough and Haliburton* Railway Company, subject to the provisions thereafter contained, proceeded to enact, as follows :

1. That a bonus of the sum of \$75,000 be granted to the Grand Junction Railway Company, and a bonus of the sum of \$25,000 be granted to the *Peterborough and Haliburton*, subject to the conditions hereinafter specified.

2. That in order to procure the said sum of \$100,000 the municipal council of the said county of *Peterborough* shall issue debentures of the said corporation to the amount of the said sum of \$100,000 to be sealed with the corporation seal of the said municipality, and signed by the warden and treasurer thereof, and no one of the said debentures shall be for a less sum than \$100.

3. That the said debentures shall be made payable in 20 years from the day hereinafter appointed for the by-laws to take effect at the office of the treasurer, &c.

4. That they should bear interest at 6 per cent.

5. That for the payments of the said debentures a rate of $4\frac{3}{100}$ mills in addition to all other rates should be levied annually.

6. That the said respective sums should be paid to said respective companies in such debentures, so to be issued and taken and received by the said respective companies, in payment of such bonus at par value.

7. That the warden of the said county of *Peterborough* shall pay and deliver such debentures to the amount of \$75,000 to the said The Grand Junction Railway Co., or to whomsoever may be appointed by them to receive the same, at the time and in the manner following,

1883 that is to say, to the amount of \$25,000 *whenever* and so soon as the
 THE GRAND said Grand Junction Railway shall have been completely graded from
 JUNCTION the eastern limit of the county of *Peterborough* to the town of *Peter-*
 RAILWAY CO. *borough*, and to the remaining amount of \$50,000 whenever and, so
 2. soon as the iron of the said railway shall have been completely laid
 THE CORPO- from the said eastern limit of the county of *Peterborough* to the said
 RATION OF town of *Peterborough*, and then only upon the certificate of the Chief
 THE COUNTY Engineer of the said railway of the performance of the said conditions,
 OF PETER- and upon the conditions hereinafter next mentioned, that is to say,
 BOROUGH. that such proposed railway shall cross the river *Trent* at or near the
 Gwynne, J. village of *Hastings*, and shall thence proceed between the villages of
 ——— *Allandale* and *Keene* to the town of *Peterborough*, that the gauge of
 such railway shall not be less than 4 feet 3½ inches.

8. That in the event of any trustee or trustees being hereafter appointed by the Legislature for the receiving and holding of moneys or securities for moneys awarded by way of bonus towards the construction of the said Grand Junction Railway, the said warden shall within six weeks after the final passage of this by-law or within six weeks after the passage of such legislative enactment, which ever shall last occur, hand over and deliver such debentures to the said amount of \$75,000 to such trustee or trustees, to be by them held and paid over and delivered to the said company in accordance with and subject to the provisions and conditions of this by-law, and not otherwise.

9. That the warden of the said county should be a director of the said Grand Junction Railway Co.

10. That unless the construction of the Grand Junction Railway as to that portion thereof within the county of *Peterborough* shall have been commenced on or before the first day of May, 1872, this by-law in so far as the same provides for the issue of the said debentures to the said amount of \$75,000 shall become and be null and void and of no effect, and such of the said debentures thereupon issued, if any, cancelled.

[The 11th and 12th clauses related exclusively to the *Peterborough and Haliburton* Railway.]

13. That the rolling stock of both railways should have sliding axles, so as to permit to the rolling stock of each to be used upon the other and upon the Grand Trunk Railway.

14. That in the event of any one portion and not the whole of this by-law becoming effete and of none effect under the provisions of the 10th and 12th sections thereof, by reason of one of such proposed railways not having been commenced within the time hereby limited for the purpose, the said rate to be levied as aforesaid shall be sufficient

only to cover the interest and sinking fund for the redemption of the debentures remaining valid under that portion of this by-law remaining in force and effect.

15. That this by-law shall take effect and come into force on the 16th day of December, 1870.

1883
THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPORATION OF
THE COUNTY
OF PETER-
BOROUGH.

The 16th section provided for taking the votes of the ratepayers upon the by-law and appointed the time and places for taking the poll of such votes.

This proposed by-law having received two readings the poll of the votes of the ratepayers thereon was taken upon the 23rd November, 1870, at which poll out of a number of freeholders in the county qualified to vote exceeding 3,000 in number, only 1,023 votes in all were cast, of which 556 were for approving of the by-laws and 467 against it

Gwynne, J.

It will be observed here that the time of this poll of votes being taken, assuming it to have been taken at the time authorized by the proposed by-law as voted on in council, a point about which there was a dispute, all that was necessary to perfect the by-law, in so far as it related to the grant of \$25,000 to the *Peterborough* and *Haliburton* Railway, was that the by-law should receive its third reading in the council of the municipality. At a meeting of the council held on the 14th December, 1870, for the special purpose of deciding whether the proposed by-law should be confirmed and passed or not, it was moved and seconded that the by-law granting \$75,000 to the Grand Junction Railway and \$25,000 to the *Peterborough* and *Haliburton* Railway be now read a third time, passed, signed, and the corporate seal of the county attached, and by way of amendment to that motion it was moved, seconded and resolved, that "the by-law granting a bonus to the *Peterborough* and *Haliburton* Railway Co. and the Grand Junction Railway Co having been found to be illegal, "and very grave doubts exist as to whether an act can

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.
 Gwynne, J.

“ be obtained to legalize the same, owing to a majority of
 “ the municipalities having given an adverse vote there-
 “ on, and as the municipality of *South Monaghan* is not
 “ represented here, owing to the death of its late reeve,
 “ the by-law be not read a third time, but be laid over
 “ until the next meeting of council.” At the next meeting
 of the council held upon the 27th day of January, 1871,
 it was moved and seconded: “ That whereas at the last
 “ session of the municipal corporation of the council of
 “ *Peterborough*, the third reading of the by-law granting
 “ a bonus of \$75,000 in aid of the Grand Junction Rail-
 “ way was, by resolution passed by said corporation in
 “ session assembled, postponed until the present session,
 “ and whereas the said by-law was submitted to the rate-
 “ payers of the said County of *Peterborough* in accordance
 “ with the provisions of the Municipal Act, and a majority
 “ of the votes cast having been in favor of the said by-law,
 “ be it therefore resolved that the said by-law be now read
 “ a third time, passed and numbered, and the corporation
 “ seal attached thereto.” Upon this motion being
 made, it was found it was not in order, and
 upon a motion being thereupon made and seconded
 to the effect that the decision of the warden
 in ruling the third reading of the by-law to be out of
 order be not sustained, being submitted to the council,
 the council resolved that it should not be sustained, and
 thereupon the motion for the third reading of the by-law
 was submitted to the council, and there having been a
 tie of votes thereon, the warden gave his casting vote
 against the motion, which was thereby lost, and so the
 council refused to pass the said proposed by-law, and
 the same never did become a by-law passed and approved
 according to law by the council. Prior to the proposed
 by-law having ever been introduced in the council or
 read a first time, in the month of September, 1870,
 the Grand Junction Railway Company caused to be

published in accordance with the provisions of the standing orders of the Legislature of *Ontario*, the following notice of an application to be made to the Legislature at its next sitting, namely :

“Application will be made to the Legislature of the Province of *Ontario* at its next sittings for an Act to legalize and confirm any and all by-laws passed by any of the municipalities through which the line of the Grand Junction Railway passes, granting bonuses to the said company to assist in the construction of their railway. Also, for power to the corporations of the townships of *Sidney*, *Thurlow*, *Rawdon*, and the village of *Sterling*, and the corporation of the town of *Belleville* in the county of *Hastings* ; also, the corporations of the townships of *Seymour* and *Percy* in the county of *Northumberland*, and the corporations of the townships of *Asphodel* and *Otonabee* in the county of *Peterborough* ; also the corporations of the county of *Hastings* and county of *Peterborough* respectively, and any other municipal corporation whatsoever through which or near to which the said line of railway will pass, to grant bonuses to said company to assist in the construction of the said railway, with power to charge the same on all or part of the municipality so granting such bonuses, and for power to part of any of said corporations to grant such bonus, and to charge the part of such corporations so granting the same with the payment thereof,” and generally for all the powers in the premises necessary to make the said efficient and effectual and for other purposes.”

Upon this notice having been given and upon the petition of the Grand Junction Railway Co. the Act, 34 *Vic. ch. 48* was passed. This act recited that :

Whereas the corporation of the town of *Belleville* had passed a by-law granting aid by way of bonus to the Grand Junction Railway Co. to the extent of \$100,000, and whereas the corporation of the town

1883
THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPORATION OF
THE COUNTY
OF PETER-
BOROUGH.
Gwynne, J.

1883 ship of *Seymour* had also passed a by-law granting aid by way of bonus to the said railway company to the extent of \$35,000, and whereas the validity of the said by-laws is questioned for want of power in said municipalities to grant such aid, and the said railway company have by their petition prayed * * * *
 THE GRAND JUNCTION RAILWAY CO. for an act authorizing the several municipal corporations along, or contiguous to the line of their railway to grant aid by way of bonus to assist in the construction of the said railway, and it is expedient to grant the prayer of the said petitioners.

THE CORPORATION OF PETERBOROUGH.
 Gwynne, J.

Therefore it was enacted :

That the by-law numbered 233 passed by the corporation of the town of *Belleville*, granting \$100,000 to the Grand Junction Railway Co., should be and the same was thereby declared legal and binding on the said corporation. And although this by-law, and a by-law of the township of *Seymour*, were the only by-laws particularly mentioned in the petition for the act which the petitioner desired to have made valid, it was, nevertheless, enacted by the 2nd section :

That the by-law numbered 245 passed by the corporation of the township of *Seymour*, and intituled, "a by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway, and for the issuing of debentures therefor to the amount of \$35,000, to be given by way of bonus to the said Grand Junction Railway Co., by the municipality of the township of *Seymour*; also a certain by-law, intituled, a by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of \$100,000, to be given by way of bonus to the said Grand Junction Railway Co., and the said the *Peterborough* and *Haliburton* Railway Co., in the manner and proportion following; that is to say, \$75,000 to the Grand Junction Railway Co., and \$25,000 to the *Peterborough* and *Haliburton* Railway Co.", and which was approved of by a majority of the duly qualified voters in the county of *Peterborough*, on the 23rd day of November, in the year of Our Lord 1870, be, and the same is hereby declared legal, valid, and binding, as if the same had received the third reading of the county council of the said county of *Peterborough*; the said by-laws are hereby declared legal, valid, and binding upon the corporations respectively, and on all others whomsoever, and the said several

corporations above-mentioned shall respectively proceed to issue debentures and act upon said by-laws in all respects in the same manner as if the said by-laws respectively had been proposed after the passing of this Act.

1883
THE GRAND
JUNCTION
RAILWAY Co.

By the 43rd section, it was enacted :

That any by-laws passed after the 19th day of December, 1870, and before the passing of this Act by any municipal corporation, along or near the line of the said the Grand Junction Railway Co.'s proposed railway, and which have been voted upon by the people and sanctioned in the manner provided for in the municipal acts in force in this province, granting aid by way of bonus to the said railway company, shall be valid and binding upon the said corporations so passing the same as fully as if the said by-laws had been passed after the passing of this act.

v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Gwynne, J.

By the 4th sec., power was given to all municipalities along the line of, or near to, the said proposed railway, to grant aid by way of bonuses to the company.

By sec. 5, like power was given as regards portions of municipalities desirous of aiding the company.

By sec. 6 it was enacted that :

Whenever any municipality or portion of a municipality shall grant a bonus to aid the said company in the making, equipping, and completion of the said railway, the debentures therefor may, at the option of the said municipality, within six months after passing of the by-law authorizing the same, be delivered to three trustees, to be named, one by the Lieut. Governor in Council, one by the said company, and one by the heads of the municipalities granting such bonuses, or the majority of them, who shall attend a meeting for that purpose, to be held at such time and place as the said company may appoint for that purpose, notice of which shall be sent to each reeve, mayor or warden by mail, at least fourteen days before the day appointed ; all the trustees to be residents of the Province of *Ontario* : Provided that if the said reeves, mayor or warden shall refuse or neglect to name such trustee, or if the Lieutenant Governor in Council shall neglect or refuse to name such trustee within one month after notice in writing to him of the appointment of the other trustees, the company shall be at liberty to name such other trustee or trustees.

By the 7th sec., provision was made for the appointment of new trustees in the case of removal, death, or resignation of a trustee.

1883

By the 8th sec., it was enacted that :

THE GRAND
JUNCTION
RAILWAY CO.

v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Gwynne, J.

The said trustees should receive the said debentures in trust; firstly, to convert the same into money; secondly, to deposit the amount realised from the sale of such debentures in some one or more of the chartered banks having an office in the town of *Belleville*, in the name of the Grand Junction Railway Municipal Trust Account. and to pay the sum out to said company, from time to time, on the certificate of the Chief Engineer of the said railway, in the form set out in Schedule A. hereto, or to the like effect, setting out the portion of the railway to which the money to be paid out is applied, and the total amount expended on such portion to the date of the certificate, and such certificate to be attached to the cheque to be drawn by the said trustees.

By the 11th sec., it was enacted that :

A majority of the provisional directors of the Grand Junction Railway Co. may at any time, at any meeting of which all the provisional directors shall have had notice, by resolution, add to the number of said provisional directors such persons as they may think proper, and such persons so added shall have all the rights and powers they would have had had they been named provisional directors in the Act incorporating the said company.

On the 9th November, 1871, the Secretary of the Grand Junction Railway Co. mailed to the address of the then warden of the county of *Peterborough*, a letter in the following terms :

DEAR SIR,

The Board of Trustees appointed under and in accordance with the provisions of Ch. 48, 34 *Vic.*, of *Ontario*, to wit: *John H. Allen*, Esq., of *Picton*, trustee appointed by the Government, *E. W. Holten*, Esq., trustee appointed by this company, and *Robert Cockburn*, Esq., of *Campbellford*, trustee appointed by the heads of municipalities granting bonuses to this company, having met and organized their Board by appointing *E. W. Holten*, Esq., of *Belleville*, chairman thereof, I do hereby, on behalf of the Grand Junction Railway Co., request that you will, with as little delay as possible, forward to the said *E. W. Holten*, Esq., Chairman of said Board, of *Belleville*, the debentures of the county of *Peterborough*, for the sum of \$75,000, in pursuance of by-law No. _____ of your municipality, granting aid to this company, intituled a by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peter-*

borough and Hailburton Railway, and for issuing debentures therefor to the amount of \$100,000.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.

Gwynne, J.

No notice appears to have been taken of this letter, if it was received. On the 27th day of June, 1872, the secretary of the Grand Junction Railway Co. was served with a notice, signed by the warden and county Clerk of the county of *Peterborough*, with the seal of the corporation attached, to the effect following:

To the Grand Junction Railway Company:—

This railway company having failed to comply with the conditions contained and set out in a by-law of the County Council of *Peterborough*, entitled a by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of \$100,000, to be given by way of bonus to the said Grand Junction Railway Co. and the *Peterborough* and *Haliburton* Railway in the manner and proportions following, that is to say, \$75,000 to the Grand Junction Railway Co. and \$25,000 to the *Peterborough* and *Haliburton* Railway Co., and for various other reasons, the Municipal Council of the Corporation of the County of *Peterborough* (without admitting that the said by-law ever was binding upon them) hereby gives notice to the said Grand Junction Railway Co. that the said corporation of the county of *Peterborough* claims and holds that the said by-law or so much thereof as relates to the said Grand Junction Railway Co. is effete and no longer binding or obligatory upon this corporation, and upon this and other distinct grounds the municipal corporation of the county of *Peterborough* will resist any action or proceeding on the part or behalf of the said Grand Junction Railway Co. to compel the issue of the debentures mentioned in the said by-law or any of them.

[L. S.]

Dated this 25th day of June, 1872.

(Signed,)

JOHN WALTON,

EDG. PEARSE,

Warden.

County Clerk.

By an act passed by the Legislature of the Province of *Ontario* on the 24th March, 1874, 37 *Vic. ch. 43*, after reciting that the Grand Junction Railway Co. have by their petition prayed that all the Acts relating to the

1883 said company should be consolidated and amended and reduced into one act, and that it was expedient to grant the prayer of such petition, it was enacted among other things that:

THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.
—
Gwynne, J.
—

1. All the rights, powers and privileges intended to be vested in the Grand Junction Railway Co. under the several Statutes passed by the Parliament of the late Province of *Canada*, by the Parliament of the Dominion of *Canada*, and by the Legislature of the Province of *Ontario* relating to the said company, are hereby declared to be vested in the shareholders of the said company under the name of the Grand Junction Railway Co.

2. The acts passed in the sixteenth year of the reign of Her Majesty Queen *Victoria* and chaptered 43, and the Act passed in the 33rd year of the said reign and chaptered 53, be and the same are hereby repealed, but any act or proceeding taken, done, or had under any of the said Statutes shall remain valid and binding as if said Acts had not been repealed.

3. All the provisions of the Railway Act, being ch. 66 of the Consolidated Statutes of the Province of *Canada* and amendments thereto, shall apply to the said company.

4. All contracts made heretofore, by or with the said company, and which are now legal and subsisting, and all the rights and liabilities of and against the said company, shall continue in all respects binding upon and in favour of the said company, and shall not be altered or affected by any provision of this Act.

5. All purchases made, deeds taken, proceedings had, and acts done in the location and construction of said railway by the said company, shall be held and taken to have been had and done under this act.

By the 7th sec. certain persons therein named as the then directors were declared to be directors until the next annual election to be holden under this act.

By the 19th sec. municipal corporations along the line of, or near to, the railway, were authorized to grant aid by way of bonus to the railway.

Sec. 21 and subsequent sections presented the manner in which the by-laws granting such aid in order to be valid, should be passed.

Sec. 34 provided for the delivery of the debentures to be issued in pursuance of such by-laws to trustees.

By an act of the Legislature of *Ontario*, passed on the 10th February, 1876, 39 *Vic.* ch. 71, it was enacted that the time for the completion of the Grand Junction Railway Co. should be extended to the 1st day of May, 1881, and that the several by-laws passed by the several municipalities on the line of the said proposed railway, granting aid by way of bonus to the said company, and which have not now lapsed, shall stand and have the same effect as if the time in this act fixed for the completion of said railway had been in the acts now in force respecting the said company named and fixed as the time for completion of the said company's railway, and that none of said by-laws shall lapse by reason of the said extension of time, or the said railway not being completed within the time heretofore fixed for the completion of the same.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.
 Gwynne, J.

On the 4th March, 1879, the secretary of the Grand Junction Railway Co. addressed a letter to *John Burnham*, Esq., warden of the county of *Peterborough*, in the following terms:

DEAR SIR,

I have been instructed to inform you that *E. W. Holten*, Esq., *Belleville, Ont.*, as Chairman of the Board of Trustees, appointed some years ago by the Government, the municipalities and the company, in pursuance of the statute to receive the debentures of the various municipalities granting aid to the Grand Junction Railway, and to pay them out in accordance with the conditions of the various bonus by-laws, some of the municipalities have handed in their debentures to the trustees, and it is very desirable that all should do so at once, so that our new contractors may thus have completed their monetary arrangements for the active prosecution of the work this year. I would therefore ask you, on behalf of your municipality, to have the necessary debentures prepared and forwarded to Mr. *Holten* without delay. If refusal is made to this request or unnecessary delay occurs in complying with it, I am instructed to say that steps will be taken to compel the issue and delivery of such debentures, and this letter will be used on such application. I may add that the other members of the Board of Trustees are, *J. H. Allen*, mayor of *Pictou*, and *Robert Cockburn*, Esq., of *Campbellford*, so

1883 that the municipalities can have every confidence that the various
 conditions and stipulations of the respective by-laws will have to be
 fully performed ere a single debenture is handed over.

THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.
 Gwynne, J.

This letter having been laid before the council was submitted by them to their solicitor for his advice, who, being of opinion that the debentures could not be legally called for, the county clerk informed by letter the secretary of the railway company that no action would be taken towards issuing debentures until the right of the company to the same should be established. Accordingly in November, 1879, the motion for this mandamus was made.

Among the points raised upon the argument of the rule *nisi*, which was issued calling upon the corporation of the county of *Peterborough* to shew cause why the mandamus should not issue was one that the Dominion Act 33 *Vic.* ch. 53 was void; and that the Local Legislature of the province of *Ontario* could alone give to the railway company its corporate existence and powers; another, that the *Ontario* Statute 34 *Vic.* ch. 48 had not the effect of validating the bonus; another, that assuming the bonus by-law to have been made binding, the company had forfeited all claim to the bonus by non-compliance with the terms and conditions upon which the bonus was granted; that there was no legal commencement of the road within the time specified in the by-law; that there could be no legal commencement of the road until the filing of the map and plan required by the Railway Act, which was not done, and, in fact, no right of way upon which to commence had been acquired within the county of *Peterborough* within the time limited by the terms of the by-law, namely, the 1st May, 1872, and that none of the *Ontario* acts had the effect of validating the by-law, and that the Legislature had not, within the provision and terms of the by-law in that behalf, appointed

any trustees, and that therefore the company could not call for the debentures unless nor until they should become entitled to payment within the terms of the 7th sec. of the by-law.

A majority of the Court of Queen's Bench made the rule absolute for the writ to issue, being of opinion that it was not necessary to decide whether the Dominion Act, 33 Vic. ch. 53, was *intra* or *ultra vires*, and that the acts of the *Ontario* Legislature referred to, had the effect of recognizing the existence of the railway company as a corporation, and that the trustees named under the provisions of the *Ontario* statute, 34 Vic. ch. 48, were trustees within the contemplation and provision of the 8th sec. of the by-law. Mr. Justice *Cameron*, dissenting upon this latter ground, was of opinion that the rule *nisi* for the mandamus should be discharged. The case having been appealed to the Court of Appeal for *Ontario*, that court was unanimously of opinion that the rule *nisi* for the mandamus should be discharged upon the point upon which the judgment of Mr. Justice *Cameron* was rested in the Court of Queen's Bench, namely, that trustees appointed under *Ontario* statute 34 Vict. ch. 48 were not trustees within the terms of section 8 of the by-law. A majority of the court, however, also held, Mr. Justice *Proudfoot* not assenting, that the Dominion Statute 33 Vict. ch. 53 was *ultra vires*, and that consequently at the time of the passing of the by-law there was no Grand Junction Railway Co. in existence to whom the proposed bonus could be given, and that the *Ontario* statute 34 Vict. ch. 48 only had the effect of making the by-law as valid as if it had been read a third time, and as if there had been power to give a bonus, and did not cure the defect arising from there being no such company then in existence.

I agree with the opinion of Mr. Justice *Cameron* expressed in his judgment in the Court of Queen's

1883
THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.
Gwynne, J.

1883 Bench for Ontario, and which has been concurred in by the unanimous judgment of the Court of Appeal in that province, to the effect that the trustees appointed under the provisions of the *Ontario* statute, 34 *Vict.* ch. 48, do not come within the scope of, or supply the place of, trustees referred to in the 8th section of the by-law in question; no enactment such as that referred to in *Gwynne, J.* that section, within six weeks after the passing of which the corporation of *Peterboro* undertook by the by-law to deliver the debentures to trustees thereby appointed, has ever been passed. For this reason, and for others, which appear to me to be abundantly sufficient to have justified the Court of Queen's Bench in refusing to grant the prerogative writ of mandamus moved for, it is unnecessary that we should, and I therefore do not, express upon a motion of this character any opinion upon the point raised affecting the validity of the Dominion statute, 33 *Vict.* ch. 53, as unnecessary for the determination of the question before us. Whenever, if ever, that point shall necessarily arise, many cases in the American courts can be usefully referred to (1).

A point was also taken before us which does not appear to have been urged in the courts below, namely, that, as is contended by the corporation of *Peterboro*, the true construction of sec. 92, item 10, in connection with sec. 91, item 29 of the B. N. A. Act is, that the power to incorporate all railway companies, even those for the construction of railways wholly within the limits of any one of the provinces, is vested in the Dominion Parliament, the contention being that "railways" are among the local works, which, by sec. 92, item 10, are excepted from the jurisdiction of the local legislatures, and are by sec. 91, item 29, placed under the Dominion

(1) See 34 *New Hamp.* 372; 9 562; 83 *Ill.* 348; 10 *Pick.* 187-8; *Wendell* 381; 23 *Wendell* 193; 7 and 34 *Maryd.* 503. *Blatchf.* 391; 29 *Ill.* 242; 35 *Ill.*

Parliament. To this it was answered that the 92nd sec. item 10, only referred to railways "connecting the province with any other or others of the provinces, or extending beyond the limits of the province," but to this it was replied that railways "connecting one province with another or extending beyond the limit of the province" would not be a local work, and that they plainly were local works which were intended; moreover, it was added that "lines of steam or other ships" which were by the section in question placed in the same position as "railways," could not be spoken of as "connecting one province with another or as extending beyond the limits of the province." The section certainly does not seem to be very felicitously expressed, if it was intended to refer only to lines of steam or other ships, or to railways as connecting one province with another, or as extending beyond the limits of a province; such works from their nature not being local, could not be excepted as such. It must be admitted, I think, that there is a point of some difficulty raised by the language of this section, and that it is of such a nature that unless absolutely necessary to the determination of the question before us, it should not be adjudicated upon by us on a motion like the present. When it does necessarily arise for adjudication it will also have to be considered, assuming that the exception as to railways must be read in connection with the words "connecting the province with any other of the provinces or extending beyond the limits of the province," whether the privilege conferred by section 7 of 33 *Vic.*, c. 53, of using the Grand Trunk Railway under arrangements with that company for the purpose of the transport of traffic from one line to the other, be or not a privilege which could be conferred by the local legislature, and whether in effect the company incorporated, or intended so to be, by 33 *Vic.* c. 53,

1883

THE GRAND
JUNCTION
RAILWAY Co.v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Gwynne, J.

1883 is not formed for the construction of a railway in connection with although not part of the Grand Trunk, but in connection with it, so as to be capable of having running powers over the Grand Trunk Railway, and so as not to be a local work within the jurisdiction of the legislature of Ontario.

THE GRAND JUNCTION RAILWAY CO.
v.
THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

Now, assuming the by-law to have been made legal and binding by 34 Vic. c. 48, and that the company had a corporate existence and had fulfilled the condition mentioned in the by-law as conditions precedent to the company acquiring a right to receive the bonus, there cannot be a doubt that the company could sue for and recover the bonus in an action of debt on the by-law. In *Hopkins v. Mayor of Swansea* (1) it was laid down that an action would lie against a corporation by a person who, by a by-law of the corporation, is intended to take a benefit under it. The by-law has the same effect within its limits and with respect to the persons upon whom it lawfully operates, as an act of Parliament upon the subjects at large; and the dictum of Lord *Holt* (1) that it would be absurd to say an act of Parliament should pass to give a man a benefit, and that he should not have an action for it, is equally applicable to the case of a by-law confining it to the persons on whom it is intended to operate. At the time that this motion was made it is admitted that, although nine years had elapsed, the work had not progressed so as to entitle such company to receive any part of the bonus, but it is said that now the work entitling the company to the whole is completed. If that be true the company has an action at law by which they can recover the whole amount. Upon the part of the corporation, however, it is contended that the bonus has been wholly forfeited by non-commencement within the prescribed time, a point which will necessarily arise

(1) 4 M. & W. 640, 3.

(1) 6 Mod. 27.

in an action brought by the company to recover the amount which they claim to be now due, and upon which the corporation to be affected should be allowed the opportunity of taking the opinion of a jury in an action instituted in the ordinary manner. Under these circumstances I cannot see what possible object would be served by now ordering the debentures to be delivered to the trustees named under the provisions of the act, even if they came within the description of the trustees referred to in the by-law, while the right of the company to recover at all is contested, and the more especially as the corporation in June, 1872, gave notice to the company that they claimed that the company by non commencement within the time prescribed had forfeited all claim, and the company who had then the same right to call for delivery of the debentures as they had when this motion was made upwards of seven years later, do not appear to have ever questioned the correctness of this view expressed by the corporation of *Peterboro*, who, relying upon their exemption from liability, have never levied any rate under the by-law regarding it as forfeited. But further : by-laws of this description granting bonuses to railway companies, upon the faith of which the companies enter into contracts for completion of their roads, seem to me to be in the nature of contracts made by the corporations expecting benefit from the construction of the roads with the railway companies, that upon certain conditions named in the by-law being fulfilled by the railway company, the corporation will give a certain sum of money to the railway company ; regarding the by-law in this light, and assuming the trustees named to be the trustees to whom by the by-law the corporation agreed to hand the debentures authorized to be issued by the by-law in advance of the performance by the company of the contemplated work, there does not appear to me to be any warrant in law for the

1883

THE GRAND
JUNCTION
RAILWAY Co.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Gwynne, J.

1883
 THE GRAND JUNCTION RAILWAY CO. v. THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

company obtaining specific performance of such a contract by means of the prerogative writ of mandamus. Whether such a remedy in such a case would or not be a convenient mode of obtaining redress is a question with which we are not concerned; it is sufficient that it never has been applied to such a purpose.

In *Rex v. The Bank of England* (1), it was held that mandamus would not lie to compel the Bank of England to transfer stock. In *Regina v. Turnpike Road Trustees* (2), it was held that a mortgagee of tolls and toll houses has only an equitable right to enforce payment of principal and interest, and is therefore not entitled to a mandamus for that purpose. The writ of mandamus was applied to enforce the performance of duties, for the breach of which there was no adequate relief at law, not to enforce obligations arising out of contract in respect of which, by decreeing specific performance of the contract, the Courts of Equity had adequate, and indeed exclusive jurisdiction, until by the administration of justice acts in the Province of Ontario the courts of common law had conferred upon them the like equitable jurisdiction as Courts of Equity, to be exercised, however, not upon motion, but in an action brought according to the ordinary practice of the courts.

Although by the *C. L. P.* Act the Legislature has extended the power of the courts in granting writs of mandamus, yet in *Benson v. Paul* (3) and in *Morris v. Irish Land Co.* (4) it has been held that the writ, as granted under the *C. L. P.* Act, does not lie to enforce the specific performance of duties arising out of personal contracts; and in *Bush v. Beaven* (5) the court, referring to these cases, says:

(1) 2 Doug. 524.

(3) 6 El. & Bl. 273.

(2) 17 Jur. 734.

(4) 8 El. & Bl. 525.

(5) 1 H. & C. p. 151.

In *Benson v. Paul* it was held that the right to a mandamus under C. L. P. Act does not extend to the fulfilment of duties arising from personal contracts, and though in the subsequent case of *Morris v. Irish Land Co.* it was held that the remedy is not restricted to cases where the old writ of mandamus would have lain, no case seems to have done away with, in respect of the action of mandamus, the doctrine which always applied to the writ of mandamus that it does not apply where there is any other remedy.

1883
 THE GRAND
 JUNCTION
 RAILWAY CO.
 v.
 THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.

True it is, that by force of the administration of justice acts in force in *Ontario*, which enabled the Common Law Courts to enforce an equitable claim equally as a Court of Equity could, specific performance of a contract might possibly perhaps have been obtained in an action for mandamus under the C. L. P. Act; but in that case the writ was obtainable only in an action brought for it, and not upon motion as the old writ of mandamus (call it "prerogative" or not signifies little) for which writ the motion in this case is, and as to which there has been no change whatever in the law in this respect. The *Ontario* statute 35 Vic. c. 14 provides a more speedy and summary method for procuring the issue of the writ, but it does not extend the area of the field of the application of the writ, or authorize the enforcement of contracts under it, by directing specific performance of them; that remedy can still, as formerly, be obtained only by suit, brought according to the ordinary proceedings of courts established for dispensing equitable relief.

Gwynne, J.

With great deference for the opinion of the late Chief Justice of the Court of Appeal for *Ontario*, I cannot concur in the opinion expressed by him in *Stratford v. County of Perth* (1) that the *Ontario* statute 35 Vic. c. 14 extends the power of the courts to apply the old writ of mandamus issuable on motion to a purpose to which the writ was not applicable before the passing of that act. It cannot now, any more than before that act, be

1883 applied to enforcing specific performance of contracts ;
 and, as it appears to me, that the undertaking entered
 into by a municipal corporation contained in these
 by-laws for granting bonuses to railway companies, is
 in the nature of a contract entered into with the com-
 pany for the delivery to it of debentures upon con-
 ditions stated in the by-law, the only way in which
 delivery of the debentures to trustees upon behalf of
 the company, before the company shall have acquired
 a right to the actual receipt and benefit of them by ful-
 filment of the conditions prescribed in the by-law, is in
 the province of *Ontario* by action at law or in equity
 under the provisions of the statute in force there regulat-
 ing the proceedings in actions, and not by summary
 process by motion for the old prerogative writ of
 mandamus, which the writ of mandamus obtainable
 upon motion without action still is.

I concur with Mr. Justice *Patterson* in thinking that
 the effect of the statute, 34 *Vic.* c. 48, apart from any
 effect it may have of recognising the existence of the
 railway company, was merely to make the by-law as
 valid as if it had been read a third time, and as if
 the municipality had had power to give a bonus to the
 company. The third section of the Act, I think,
 strengthens this view, for it shews that the Legislature
 had no idea of asserting a right to force contracts upon
 municipal corporations as made by them, unless the
 by-laws containing the contracts should be legally
 approved by the ratepayers under the provisions of the
 Municipal Corporations Act in that behalf. It has
 been decided in the *United States* that no act of assembly
 of a sovereign state could make valid a contract which
 was actually void, for that would be making contracts
 for individuals without their consent (1). If our Pro-
 vincial Legislatures have in this respect a power which

(1) *Illinois Grand Junction Ry. Co. v. Cook*, 29 Ill. 242.

the sovereign States of *America* have not the intention to exercise, it should, at least, be expressed in language clear beyond all controversy, I can conceive nothing more to be deprecated in a free State than legislative assumption of a right to interfere with contracts against the will of the contracting parties. If then there be anything in the suggestion that no legal vote was ever taken upon the by-law in question by reason of some unauthorized alteration in the by-law as read in the council as to the time of taking the poll of votes, or as to the advertisement thereof, that, if established by evidence, will be open to consideration in any action which may be brought to recover the amount of the bonus which the railway company alleges has now been completely earned.

1883

THE GRAND
JUNCTION
RAILWAY CO.
v.
THE CORPO-
RATION OF
THE COUNTY
OF PETER-
BOROUGH.

Gwynne, J.

For these reasons, without expressing any opinion as to the validity or invalidity of the Act, 33 *Vic.* c. 53, or of the several acts of the Legislature of *Ontario* professing to affect the Grand Junction Railway Company, I think the writ of mandamus applied for in the Court of Queen's Bench should have been refused with costs, and that therefore this appeal should be dismissed with costs.

In the view which I take, I consider it to be premature to express any opinion upon the question, whether by reason of any alteration in the by-law after its first reading, the Act in question did or not make the by-law good, because as I consider the proceeding by writ of mandamus to be, for the reasons I have given, wholly unauthorised, the evidence or matters rather contained in the affidavits cannot conclude either party, nor can the question of fact as to the alleged alteration of the by-law be determined so as to conclude the parties, and to become the foundation of a judicial decision until the matter of fact is found by a competent tribunal

1883 upon an issue joined between the parties in a duly
 THE GRAND instituted action or suit at law or in equity.
 JUNCTION

RAILWAY CO.

v.

THE CORPO-
 RATION OF
 THE COUNTY
 OF PETER-
 BOROUGH.

Gwynne, J.

Appeal dismissed with costs.

Solicitors for appellants : *Cameron, Appellbe and
 McPhillips.*

Solicitors for respondent : *Scott and Edwards.*

1883

*CONTROVERTED ELECTION OF THE WEST
 RIDING OF THE COUNTY OF HURON.*

*Mar. 20, 30.

*June 10.

JAMES MITCHELL.....APPELLANT ;

AND

MALCOLM COLIN CAMERON.....RESPONDENT

*Dominion Controverted Election—Ontario Judicature Act, 1881,
 effect of—Presentation of petition.*

The election petition against the election and return of the res-
 pondent was entitled in the High Court of Justice, Queen's Bench
 Division, and was presented to the official in charge of the office
 of the Queen's Bench Division, and filed and entered in the
 books of that office. A preliminary objection was taken that the
 High Court of Justice had no jurisdiction:

Held,—[*Henry and Taschereau, JJ.*, dissenting,] reversing the judg-
 ment of *Cameron, J.*, (1) that the *Ontario Judicature Act, 1881*,
 makes the High Court of Justice and its divisions a continuation
 of the former Courts merged in it, and that those Courts still
 exist under new names; and that the petition had not been
 irregularly entitled and filed.

*PRESENT—Sir W.J. Ritchie, Knt., C.J., and Strong, Fournier, Henry
 and Taschereau JJ.