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THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE TOWNSHIP OF CHATHAM (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Municipal by-law—Special assessments—Drainage—Powers of council as to additional necessary works—Ultra vires resolutions—Executed contract.*

Where a municipal by-law authorized the construction of a drain benefiting lands in an adjoining municipality which was to pass under a railway where it was apparent that a culvert to carry off the water brought down by the drain and prevent the flooding of adjacent lands would be an absolute necessity, the construction of such culvert was a matter within the provisions of sec. 573 of the Municipal Act (R.S.O. [1887] c. 184), and a new by-law authorizing it was not necessary. Taschereau J. dissenting.

APPEAL from the Court of Appeal for Ontario (1), affirming the judgment in the Common Pleas Division (2), which upheld the dismissal of the plaintiff's action in the court below.

Certain drainage works had been constructed under a by-law passed under the provisions of The Municipal Act, which benefited lands in an adjoining township, and after the completion of the works it was found absolutely necessary to construct a new culvert under the line of the Canadian Pacific Railway in order to carry off the increased flow of water brought down by the drain and prevent the flooding of the adjacent lands. The plaintiffs and defendants entered into a contract under seal by which the plaintiffs agreed to construct, and actually did construct, the

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 22 Ont. App. R. 330. (2) 25 O.R. 465.

necessary culvert at a cost exceeding two hundred dollars. When the works were completed they were inspected, accepted and used by the municipal corporation, and correspondence passed between the plaintiffs and certain officers of the corporation upon the subject of the works done, by which assurances were given to the plaintiffs that in case the funds provided by the original by-law for the drainage works proved insufficient to cover the additional cost of the culvert, the necessary funds would be provided to pay whatever difference there might be under the powers given in the Municipal Act. The municipal council passed resolutions approving of the work done by the plaintiffs and paid sums on account of the cost, but did not pass a new by-law or make any report or fresh assessment respecting the contract with the plaintiffs, or as to the works executed thereunder.

The special circumstances of the case and questions raised upon the issues appear more fully in the judgments reported.

*Moss* Q.C. and *MacMurchy* for the appellant. The culvert being essential for the efficient working of the drain, the case comes within sec. 573 of the Municipal Act. *In re Suskey and The Township of Romney* (1); *Attorney-General* v. *The Mayor of Newcastle* (2).

The work was constructed and accepted by the municipality, who cannot get rid of paying for it because there was no by-law. *Bernardin* v. *North Dufferin* (3).

*Wilson* Q.C. and *Pegley* Q.C. for the respondent. The municipality is only liable to the extent declared by statute. *Municipality of Pictou* v. *Geldert* (4); *Cowley* v. *Newmarket* (5).

(1) 22 O.R. 664.
(2) [1892] A.C. 571.
(3) 19 Can. S.C.R. 581.
(4) [1893] A.C. 524.
(5) [1892] A.C. 345.

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That a by-law was necessary see *Cross* v. *City of Ottawa* (1); *Waterous Engine Works Co.* v. *Town of Palmerston* (2).

Under the by-law passed debentures could not have been issued for the cost of the culvert. *Confederation Life Assoc.* v. *Howard* (3).

TASCHEREAU J. (dissenting).—I would dismiss this appeal. I cannot say that I see anything reprehensible in the respondents' refusal to pay this claim They are in duty bound to do so, and the appellants have no one else than themselves to blame if they suffer any prejudice. It was their duty, before entering into this contract, to ascertain whether or not this corporation was acting *intrâ vires*. *Bernardin* v. *North Dufferin* (4) has no application. The township at large gets no benefit from this drainage. I need not enter into a review of the sections of the Municipal Act that rule the case. That has been elaborately done in the three Ontario courts which have dismissed the appellants' claim. The question is, it seems to me, one largely of fact. Was this stone culvert contemplated when by-law no. 169 for this drainage was passed? With the three courts below, I say no. Was the work contemplated by the by-law fully completed when the agreement sued upon was entered into? With the three courts below, I say yes. This stone culvert was not thought of, or at all taken into consideration, when the by-law was passed. The assessment was levied in the two townships on an estimate for a drain through the cattle pass.

We are now asked to add to it a sum nearly doubling it in amount. And, in defiance of the unquestionable policy of the statute that none but those benefited by drainage work should be assessed for the cost thereof,

(1) 23 U.C.Q.B. 288.
(2) 21 Can. S.C.R. 556.
(3) 25 O.R. 197.
(4) 19 Can. S. C. R. 581.

the appellants would charge every inch of property in this township for this piece of drainage. That, it seems to me, would be a fraud on the taxpayers. I adopt Chief Justice Hagarty's reasoning in the Court of Appeal, and Chief Justice Galt's as reported in 25 O. R. 465.

GWYNNE J.—The municipal council of the township of Chatham, prior to the year 1890, had constructed certain drains known as the Louisville Tap and Big Creek drains under by-laws passed for that purpose by the municipal council of the said township under the provisions of the Ontario Municipal Act. In the year 1890 these drains became in a measure insufficient for the purpose for which they were constructed, and it was deemed expedient to make a new and additional outlet therefor; accordingly the township engineer was instructed to take levels, make estimates and assessments and report on the most practicable outlet for the water of the said drains, and he thereupon made a report recommending the construction of a drain from the river Thames at a point in lot 23 in the 2nd concession of the said township of Chatham, to be continued northerly under the Canadian Pacific Railway as it crossed lot 23 in 3rd concession of said township, to the Big Creek drain as it ran through lot 23 in the 4th concession of the said township, upon a plan and profile accompanying the report which was also accompanied by an estimate, and an assessment of lands which in the engineer's judgment would be benefited by the proposed work, some of which lands were in the adjoining township of Camden. The plan and profile annexed to the report showed that the depth to which the proposed drain was to be dug was such that at the place where it was proposed to pass under the railway it was to be several feet below the bottom of the cattle

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pass there. Upon this report a by-law was passed by the municipal council of the township under the provisions of sec. 585 of the Municipal Act of Ontario, which authorized the township council to undertake and complete the work specified in the report under the provisions contained in secs. 569 to 582, inclusive, without the petition required in sec. 569. The by-law contained recitals :

1. The previous construction of the Louisville Tap and Big Creek drains under by-laws passed by the township council under the provisions of the Municipal Act.

2. That the better to maintain the said drains and to prevent damage to the adjacent lands, it was deemed expedient to make a new and additional outlet to the said drains.

3. That a number of ratepayers along the course of the said drains had petitioned the council praying that the said outlet might be made.

4. The report, plan, profile, estimate and assessment of the township engineer, and his recommendation that the proposed work should be undertaken, as it will be the means of doing "a vast amount of good, and will likely prevent expensive litigation."

It then enacted :

1. That the said report, plans and estimates be adopted, and that the said drain and the works connected therewith be made and constructed in accordance therewith. 2. That the reeve might borrow the sum of $2,839.61 to pay the estimated cost of the work as charged upon lands in the township of Chatham.

3. Enacted that special rates should be levied as directed upon the lots in the township of Chatham assessed by the engineer for the work.

Clause 4 provided for payment of the township's share for the benefit to its roads, and clause 5 appointed E. W. Haslett, one of the deputy reeves of the township and W. G. George (the township engineer) commissioners for the construction of the drain.

Upon the 18th November, 1890, the municipal council of the township of Camden passed a by-law for raising the amount assessed by the report and assessment of the engineer of the township of Chatham upon

lands in the township of Camden as benefited by the proposed work and for levying the amounts charged in such assessment upon the lots and roads in Camden.

The third recital in the above by-law of the township of Chatham is wholly irrelevant as the work was proposed to be constructed under the provisions of sec. 585 of the Municipal Act, and it is to be observed that the petition recited is not one within the provisions of sec. 569. As no petition was necessary the recital of there having been the one recited is wholly immaterial, and this case must be considered just as if there never had been the petition recited to have been presented or any petition.

Now the plan and profile adopted by the by-law clearly showed that the drain was contemplated to be constructed and that it must be constructed under the railway, and such being the case it was apparent that a properly constructed culvert sufficient to bear the weight of the superincumbent earth upon which the railway was laid was an absolute necessity. The bottom of the drain according to the design and profile and plan thereof was to be, when the drain should be constructed, 19 feet below the level of the rails. The engineer who designed the drain also knew, or was at least of opinion, that the plan of such a culvert should have to be approved by the railway company. In his evidence he says that the drain as designed would be absolutely useless unless carried under the railway by just such a culvert as has been constructed, and that the reason why he did not in his estimate of the work provide for the cost of the culvert through which the waters in the drain should pass was that when he made his report he did not know what kind of culvert the railway company would require. From about the time of the passage of the by-law continuously through the year 1891 until the making of

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the contract upon which this action is brought, the township council, through some or one of their councillors, their solicitor, and their engineer, appear to have been in communication with the railway company in relation to the construction of the necessary culvert; a letter has been put in evidence dated the 20th February, 1891, from the solicitor of the township to a Mr. Armstrong, an official of the railway company at Toronto, in which is the following passage:

> DEAR SIR.—The council of the township of Chatham have requested me to write you about putting in a culvert in the Big Creek Cut-off at Kent bridge. They say that last fall you agreed to do so in conversation with the Reeve, &c., &c.

Then we find that the commissioner on the Big Creek outlet was, by a resolution of the council of the 9th March, 1891, authorized to consult W. G. McGeorge in regard to the proposed culvert, which in the resolution is called a "brick" culvert, under the Canadian Pacific Railway and to take such steps as he might recommend in the matter. The commissioner here referred to was the Deputy Reeve, Mr. Haslett, who with Mr. McGeorge himself were the commissioners appointed by the by-law to construct the drain. Then we find the chief engineer of the company directing the divisional engineer, Mr. Henderson, by a letter dated the 16th March, 1891, to arrange a meeting with Mr. McGeorge upon the subject.

This meeting took place and Mr. Henderson testifies that Mr. McGeorge stated then that he wanted the bottom of the culvert to be a little lower than the proposed bottom of the drain, to which Mr. Henderson says that he replied that it should be placed as low as he wished. Mr. McGeorge as to this meeting, in answer to the question: "Did you tell him what depth you wanted?" said "we both agreed it should go two feet lower than the bottom of the drain."

That would be 21 feet below the rail on the track from which the 19 feet to the bottom of the drain was measured.

Then upon the 13th May, 1891, we find Mr. McGeorge addressed to Mr. Henderson a letter in the following terms:

DEAR SIR,—May we soon expect a copy of the drawings of the culvert at the Big Creek drain cut-off and your estimate of cost. Our council keep asking me about it and I tell them you are likely very busy but we will soon hear from you.

Then we find that upon the 5th June, 1891, the railway company furnished to the township corporation through their solicitor a plan and estimate for the proposed culvert. This plan was placed in the hands of Mr. McGeorge for his approval, and he transmitted it to the township clerk, with a letter dated the 20th June, 1891, wherein he said:

The structure will be admirably adapted to its place, and will be of a very permanent kind. The cost is estimated higher than we had expected, but no doubt the engineer of the company has gone into it very carefully, and knows as nearly as can be computed in advance the cost of such work.

Upon the 25th June this plan and Mr. McGeorge's report thereon, as contained in the above letter, were laid before the council of the township, who thereupon passed a resolution to the effect following:

That the plans for the arch culvert under the Canadian Pacific Railway at the Big Creek outlet as sent from the Canadian Pacific Railway office, and prepared by the railway engineer, be adopted, and that the matter of the cost of said culvert be referred to the reeve and first and second deputy reeves, with power to settle with said railway company to the best possible advantage.

Upon the 4th July, 1891, the solicitor of the township transmitted to the general superintendent of the railway company a copy of Mr. McGeorge's above letter to the township clerk, in a letter of that date in which he said:

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DEAR SIR,—I have submitted the plan sent me for this work to Mr. McGeorge, the township engineer, and I enclose you a copy of his letter to the township clerk, which will give you his views as to it.

I also enclose you a draft of a short agreement on the matter which you can revise, and I will have it engrossed in duplicate for execution.

Then after some observations in relation to the estimated cost, he closed his letter as follows:

The township is anxious to see the culvert put in this summer, so as to be ready for use when the fall rains come.

A lengthy correspondence then took place between the solicitor of the township and the solicitor of the railway company as to the frame of the agreement between the parties for the construction of the culvert by the railway company at the expense of the township, and as to the payment by the latter for the work. In the course of this correspondence the solicitor of the township, in a letter of the 17th August, says:

The drain in question is constructed under the Municipal Act, and if the funds assessed for construction are not sufficient in consequence of the culvert costing more than was anticipated, the council will have to amend the by-law under sec. 573, subsec. 1, Municipal Act ch. 184 R.S.O., 1887.

Now although it was apparent, as indeed has been admitted by the township engineer, that the drain as designed would be absolutely useless without the construction of a proper culvert at the place in question, nevertheless the commissioners appointed by the by-law to construct the drain proceeded with the digging of the drain from the Big Creek to the railway, a distance of more than a mile and a quarter, before ever the contract for the construction of a necessary culvert was entered into. The natural consequence of this proceeding was that the lands lying between the railway and Big Creek became flooded, to the great damage of the land owners, and the railway itself was endangered to such a degree that it was deemed necessary to protect it with piles driven in to resist the violence

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of the descending waters and to avert the injury anticipated therefrom. Such a proceeding could scarcely be said to have been authorized by the by-law for construction of the work, and all damages arising therefrom would seem to be attributable to the negligence of the township authorities in proceeding with the opening of the drain from Big Creek before the necessary culvert was completed rather than to be necessarily incidental to, and consequential upon, the construction of the drain authorized by the by-law, so that if the culvert had not been a necessary part of the work contemplated and authorized by the by-law, the township corporation were placed in this dilemma, that they must, at whatever cost, carry off this water so brought down or pay all damages arising therefrom not only to the owner of the drowned lands, but also to the railway company. In such a state of facts there cannot, I think, be a doubt that upon the completion of the work under this contract the corporation would be bound to pay therefor as for a necessary work completely executed, the benefit of which they enjoy, and that they could not be permitted to set up the fraudulent defence that they had no power to enter into a contract for the construction of a work from the execution of which they derived such substantial benefit.

The defence to this action set up by the defendants is:

1st. That the charge made by the plaintiffs for the work is so much in excess of what was contemplated and estimated by the plaintiffs themselves, that the defendants have a right to insist upon the strictest proof of every item; and

2nd. That the contract was *ultra vires* of the corporation, and so not binding on them.

As to the first of these grounds of defence, the plaintiffs say that they constructed the work in every respect according to the dimensions and di-

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rections given by the township engineer and commissioner for the construction of the drain and according to the plan of the culvert approved by him and the township council, and they say that the cost was increased beyond what was anticipated and estimated by causes over which the plaintiffs had no control, namely, 1st the appearance of quick sand in the excavation to the depth required of which immediately upon its appearance the council of the corporation were informed and directed the plaintiffs to proceed with the work; and 2ndly by reason of the drain from the railway to the river Thames not having been dug to the depth required by the plan and profile of the work adopted by the by-law until after the completion of the culvert. However, these matters are unimportant at the present time, for the plaintiffs submit to a most searching inquiry into every item of their claim upon a reference to the proper officer in this action.

As to the second ground of defence, namely, that the contract is *ultra vires* of the defendants, it must, I think, be admitted to the credit of the defendants that this defence is entered at the instance of the corporations of the township of Camden who insist that the lands in Camden should not be held to be liable to contribute to the cost of the work constructed under the contract sued upon.

Whether the township of Camden should or should not contribute to the cost of the work to any, and if any to what, extent is a question with which we are not concerned in this action. The only question with which we have to deal is whether the contract into which the defendants have entered was *ultra vires* or on the contrary is binding upon them. If the latter with what may be the consequences we are not concerned. Now that the construction of a sufficient culvert at the place where the drain was designed to pass under the

railway was an absolute necessity in the construction of the work designed and authorized by by-law, and that it was in point of fact part of the work contemplated to be constructed under the by-law, cannot, I think, admit of a doubt. The residue of the work would have been of no use whatever without such sufficient culvert, its sufficiency consisting not merely in dimensions capable of carrying off the waters brought down to it from the Big Creek but in strength capable of supporting the weight of the superincumbent earth constituting the railway bed. We have the evidence of the engineer who designed the drain that the culvert as contracted for was just such a one and that it was an absolute necessity to the efficient completion of the drain. I am of opinion therefore that the case does, as the township council appear to have been advised, come within sec. 573 of ch. 184 R.S.O., and that the contract under which the work has been executed is binding upon the defendants.

The appeal must be allowed with costs and the case be remitted to the court below to be dealt with by that court by reference to the proper officer or otherwise as the court shall direct for ascertaining what amount if any remains due to the plaintiffs under the contract.

SEDGEWICK, KING and GIROUARD JJ. concurred.

*Appeal allowed with costs.*

Solicitors for the appellants: *Wells & MacMurchy.*

Solicitors for the respondents: *Pegley & Sayer.*