

THE CANADA ATLANTIC RAIL- WAY CO. AND DANIEL C. LINS- LEY (PLAINTIFFS).....	}	APPELLANTS; *
		1887 <u>Nov. 25.</u> 1888 <u>June 14.</u>

AND

THE CORPORATION OF THE TOWNSHIP OF CAMBRIDGE AND OTHERS (DEFENDANTS).....	}	RESPONDENTS.
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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—By-law—Voting by ratepayers on—Casting vote by returning officer—R. S. O. (1877) c. 174 ss. 286-7.

In case of a tie in voting on a municipal by-law there is no authority to the returning officer to give a casting vote sec. 152 of R. S. O. (1877) ch. 174 not applying to such a vote (1).

APPEAL from a decision of the Court of Appeal for Ontario (2) reversing the judgment of the Common Pleas Division (3) in favor of the plaintiffs.

This was an action to procure delivery to plaintiffs of debentures granted by the township of Cambridge under a by-law passed in 1880. The defence was that the by-law was invalid.

The by-law was submitted to the ratepayers and a

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

(1) Sec. 299 of the act provides "That the proceedings at the poll (that is in voting on the by-law) and for and incidental to the same and the purposes thereof shall be the same, as nearly as may be, as at municipal elections, and all the provisions of sections 116 to 169 inclusive of the act, so far as the same are applicable, and except so far as is herein otherwise provided, shall apply to the taking of votes at such poll and to all matters incidental thereto.

(2) 14 Ont. App. R. 299.

Sec. 152. In case it appears upon the casting up of the votes as aforesaid (at a municipal election) that two or more candidates have an equal number of votes the clerk of the municipality whether otherwise qualified or not, shall, at the time he declares the result of the poll, give a vote for one or more of such candidates so as to decide the election.

(3) 11 O. R. 392.

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vote was taken which resulted in a tie. The returning officer on summing up the votes, and finding there was a tie, gave a casting vote in favor of the adoption of the by-law and reported it carried. It was subsequently confirmed by vote of the council and was supposed by the plaintiffs to be in force. The plaintiffs contend that under section 152 of the Municipal Act, R. S. O. ch. 174, the returning officer had power to give the casting vote; the defendants say that that does not apply to an election on a by-law.

Another objection was that the debentures to be issued under the by-law were not made payable within twenty years. It was provided in the by-law that the debentures should not issue until the railway was completed and were made payable twenty years after issue.

The plaintiffs having succeeded on the hearing and before the Common Pleas Division, the judgment in their favor was reversed by the Court of Appeal on the first of the above grounds of objection, and it was held that the by-law was not passed by a majority of the votes of the ratepayers. The plaintiffs appealed to the Supreme Court of Canada from the judgment of the Court of Appeal.

Chrysler for the appellants relied on secs. 299 and 152 of R. S. O. (1877) ch. 174, and cited *Bickford v. Chatham* (1); *Hammersmith, &c., Ry. Co. v. Brand* (2); *Commissioners Knox Co. v. Aspinwall* (3).

O'Gara Q.C. for the respondents referred to *Exchange Bank of Canada v. The Queen* (4); *Baroness Wenlock v. River Dee Co.* (5); *Tomkinson v. S. E. Ry. Co.* (6).

Sir W. J. RITCHIE C.J.—I think the by-law was not carried by a majority of the qualified electors voting to

(1) 14 Ont. App. R. 32.

(2) L. R. 4 H. L. 171.

(3) 21 How. 559.

(4) 11 App. Cas. 157.

(5) 10 App. Cas. 354.

(6) 35 Ch. D. 675.

pass the same within the said provisions of the Municipal Act; and I agree with the observations of Mr. Justice Osler of the Court of Appeal. I cannot add anything thereto with advantage. As this must settle the case of the appellants I deem it unnecessary to discuss or determine any of the other questions raised.

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STRONG J. concurred in the judgment of Mr. Justice Gwynne.

Strong J.

FOURNIER J.—I concur in the judgment of the court but am very sorry to do so. The township passed the by-law, but there is a doubt as to the right of the returning officer to vote in the way he did.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs for the reasons given by Mr. Justice Osler in the court below, and by my brother Gwynne in this court.

GWYNNE J.—The main question in this case is whether a proposed by-law for granting a bonus to the Canada Atlantic Railway Company introduced into the council of the municipality of the township of Cambridge; and there read a first and second time and submitted to the ratepayers qualified to vote thereon, and subsequently read a third time and purported to have been passed, is a valid by-law binding upon the municipality and its ratepayers, it appearing that upon the taking a poll of the votes of the ratepayers upon the proposed by-law a majority of the qualified voters voting thereat had not voted for the passing and adoption of the proposed by-law. However much it is to be regretted that the contractor for building the railway should be disappointed in receiving the benefit purported to be granted by the muni-

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cipality of the township of Cambridge, there cannot, I think, be any doubt that, for the reasons ably and fully given by Mr. Justice Osler when delivering the judgment of the Court of Appeal for Ontario, the instrument relied upon as a by-law has no validity. It appears that the council of the municipality in the year 1882, for the same reason by resolution in council repudiated the action of the council of 1880 in passing the by-law as *ultra vires*.

It is in the interest and for the protection of the ratepayers that the power which is conferred upon a municipality to incur a debt for granting a bonus to a railway company, is subjected to the express condition that the proposed by-law shall, before the final passing thereof, receive the assent of the ratepayers in the manner provided by the act.

The manner provided by the act is:—

1. Sec. 286. The council shall by the by-law fix the day and hour for taking the votes of the electors, and such places in the municipality as the council shall in their discretion deem best, and where the votes are to be taken at more than one place shall name a deputy returning officer to take the votes at every such place.

2. They shall publish a copy of the proposed by-law with a notice attached specifying the time and places fixed for taking the votes.

3. The votes at the polling shall be taken by ballot.

4. Sec. 307. Every deputy returning officer at the completion of the counting of votes after the close of the poll, shall in the presence of the persons authorized to attend, make up into separate packets sealed with his own seal and the seals of such persons authorized to attend as desire to affix their seals and marked upon the outside with a short statement of the contents of such packet, the date of the day of polling, the name of the deputy returning officer, and of the ward or polling sub-division and municipality containing among other things,

(a.) The statement of votes given for and against the by-law and of the rejected ballot papers.

Sec. 308. Every deputy returning officer shall at the close of the poll certify under his signature on the voters list in full words, the

total number of persons who voted at the polling place at which he has been appointed to preside, and shall before placing the voters list in its proper packet, make and subscribe before the clerk of the municipality, a justice of the peace, or the poll clerk his solemn declaration that the voters list was used in the manner prescribed by law, and that the entries required by law to be made therein were correctly made, which declaration shall be in the form of Schedule G to this act, and shall thereafter be annexed to the voters list, he shall also forthwith return the ballot box to the clerk of the municipality.

5. Sec. 310. The clerk after he has received the ballot papers and statements before mentioned of the number of votes given in such polling papers shall, at the time and place appointed by the by-law, in the presence of the persons authorized to attend, or such of them as may be present, without opening any of the sealed packets of ballot papers, sum up from such statements the number of votes for and against the by-law and shall then and there declare the result and forthwith certify to the council under his hand whether the majority of the electors voting upon the by-law have approved or disapproved of the by-law.

Now, by the law it was provided, as required by sec. 286, above quoted, that

The votes of the electors of the said municipality shall be taken on this by-law on the 26th February, 1880, commencing at 9 o'clock in the forenoon and closing at five o'clock in the afternoon of the same day, at the following places and before the following returning officers, that is to say, at polling sub-division No. 1, at the town hall, Onésime Lefrénce, deputy returning officer, and for polling sub-division No. 2, at the school house of section No. 5 in the said municipality, Peter Stewart, deputy returning officer.

The Onésime Lefrénce here named as deputy returning officer at polling sub-division No. 1 was also the clerk of the municipality, so that the duties by the act imposed upon a deputy returning officer presiding at a poll and upon the clerk of the township devolved upon him. He acted as the deputy returning officer presiding at the poll at sub-division number one and, at the close of the poll, in the presence of a Mr. Johnstone, acting for the railway company as agent for the by-law, and of a Mr. Cameron acting as agent against the by-law, he made the statement required by the act to be made by the person presiding as deputy returning officer at

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the taking the poll of votes, which he signed with his name as follows,

Statement of the returning officer for electoral division number one, municipality of Cambridge, at the voting held 26th February, 1880.

Number of votes for and against the by-law.

For the by-law.....	Fifty three	53
Against the by-law	Forty.....	40

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Mr. Stewart who was the presiding officer at polling sub-division No. 2 at the close of the poll in that sub-division prepared and signed a similar statement in the presence of a Mr. J. S. Castleman acting as agent for the by-law, and who appears to have been reeve of the township, whereby it appeared that the number of votes given for the by-law

were.....	(thirty-four)	34
and against the by-law.....	(forty-seven)	47

Now the polls having been closed and these statements signed and the ballot boxes placed in the hands of the clerk of the municipality, it is obvious that no change could be made in either of the statements otherwise than upon a scrutiny taking place under the provisions in that behalf contained in the act. The duty of the clerk of the municipality was expressly limited by the act to summing up the two statements, the one made by himself as presiding officer at polling sub-division No. 1, and the other by the presiding officer at sub-division No. 2, the number of votes given for and against the by-law and to declare the result and to certify that result under his hand to the council. Such summing up showed 87 votes to have been given for and 87 against the by-law, so that the result clearly was that the by-law had not been approved by a majority of the ratepayers voting at the polls and that the council had no power to read the by-law a third time and pass it. However four days after the close of the poll, namely, on the 1st March, 1880, he signed a paper

in his capacity of township clerk whereby he certified that a majority had voted in favor of the by-law. This certificate is attempted to be justified as in point of fact true upon the contention that the township clerk had a right to give, and that upon summing up the votes and finding them to be equal for and against the by-law, he did give, a casting vote in its favor. This right is claimed under sec. 152 of the act which upon an election for councillors gives to the clerk a casting vote in the case of a tie "to decide the election," and upon sec. 299 of the act which, as is contended, makes sec. 152 applicable to the case of a tie in voting upon a by-law. That sec. 299 enacts that at the taking of a poll upon a by-law which must be submitted to a vote of the ratepayers and approved by a majority before it can be passed

the proceedings of such poll and for and incidental to the same and the purposes thereof shall be the same as nearly as may be as at municipal elections and all the provisions of sections one hundred and sixteen to one hundred and sixty-nine inclusive of this act, so far as the same are applicable and except so far as herein otherwise provided, shall apply to the taking of the votes at such poll and to all matters incidental thereto.

The inapplicability of section 152 to the case of a poll taken upon a by-law for incurring a debt has been so clearly pointed out by Mr. Justice Osler that it may seem unnecessary to add any thing thereto; apart, however, from the absence of any analogy between an election of municipal councillors and a vote taken upon a by-law requiring approval by a majority of the ratepayers upon a poll of votes taken by ballot before it can be passed, it may be said that as the clerk's duty is expressly limited to summing up the votes *pro.* and *con.* as appearing on the statements signed by the officers presiding at the taking of the polls and thus ascertaining the result and certifying that result to the council, it is plain that special provision is made which

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in the terms of section 299 excludes the application of section 152. Moreover the giving a vote by the clerk, after the close of the polls, whether he be a ratepayer or not, as his right is contended to be, cannot, I think, be said to be "a proceeding at the poll and for and incidental to the same and to the purposes thereof," and it is only those provisions of sections 116 to 169 inclusive, which, so far as applicable, and except as otherwise provided by the act, are by section 299 made applicable to voting upon a by-law.

I concur in Mr. Justice Osler's judgment also that it is unnecessary now to decide whether promulgation of the by-law does or does not cure the otherwise manifest defect in it in professing to authorize the debentures to be issued under it to run, and the rate to pay them to be levied beyond the period of twenty years from the day prescribed for the by-law to take effect, that being the remotest period allowed and expressly prescribed by section 330 of the act in respect of a by-law, such as that in question here is, namely, "a by-law for contracting a debt (by borrowing money or otherwise,) for any purpose within the jurisdiction of the council." In the present case it is sufficient to say that the defect which has rendered the document in question utterly void, and, in fact, no by-law, cannot be cured by the promulgation clauses of the Municipal Institutions Act. These clauses apply only to by-laws which it was competent for the council of the municipal corporation to pass, as is provided by the 321st section. Now, by section 559 of the act it was not within the competency of the municipal corporation to give to the proposed by-law in question here, a third reading and to pass it as it had not received the assent of the rate payers in the manner provided by the act.

The appeal therefore must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Stewart, Chrysler & Godfrey.*

Solicitors for respondents: *O'Gara & Remon.*