

MICHAEL DWYER (PLAINTIFF).....APPELLANT ;

1893

AND

*Mar. 14.

*June 24.

THE CORPORATION OF THE }
 TOWN OF PORT ARTHUR } RESPONDENTS.
 AND OTHERS (DEFENDANTS)..... }

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—By-law—Street railway—Construction beyond limits of municipality—Validating Act—Construction of.

The corporation of the town of Port Arthur passed a by-law entitled "a by-law to raise the sum of \$75,000 for street railway purposes and to authorize the issue of debentures therefor" which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, &c., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed but none was submitted ordering the construction of the work. Subsequently an act was passed by the legislature of Ontario in respect to the said by-law which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town * * * and for all purposes, &c., relating to or affecting the said by-law any and all amendments of the municipal act * * * shall be deemed and taken as having been complied with.

Held, reversing the decision of the Court of Appeal, Taschereau J. dissenting, that the said act did not dispense with the requirements of ss. 504 and 505 of the municipal act requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law.

Held, also, that an erroneous recital in the preamble to the act that the Town Council had passed a construction by-law had no effect on the question to be decided.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the plaintiff.

* PRESENT :—Sir Henry Strong C.J., and Fournier, Taschereau Gwynne and Sedgewick JJ.

(1) 19 Ont. App. R. 555.

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The facts of the case are sufficiently stated in the above head-note.

Mr. Justice Street granted an injunction until the trial restraining the Town Council from paying out any money for the building of the street railway and the contractors from proceeding with its construction. At the trial the interim injunction was, by consent of parties, made perpetual against the town subject to appeal and the action was dismissed against the other defendants, individual members of the council and the contractors. On appeal to the Court of Appeal the judgment of the trial judge was reversed, the injunction set aside and liberty was given to respondents to apply for a reference to ascertain the damages sustained by the continuance of the injunction after the validating act came in force. The plaintiff then appealed to this court.

Aylesworth Q.C., for the appellant.

Delamere Q.C., for the respondents.

The judgment of the majority of the court was delivered by

THE CHIEF JUSTICE.—The by-law no. 281 passed on or about the 5th January, 1891, was *ultra vires* of the corporation and void inasmuch as it made provision for the raising of a sum of \$75,000 “for the purpose of building, equipping, maintaining and operating a street railway connecting the municipality of Neebing with the business centre” of the town of Port Arthur. As the law then stood the municipal corporation of a town had no statutory authority to raise money for any such purpose. Had the by-law been restricted to the raising a fund for the construction of a street railway wholly within the limits of the municipality I am not prepared to say that it would have been void

merely because a by-law under sec. 504, subsec. 14 of the Municipal Act (as amended by sec. 25 of the Municipal Amendment Act of 1890) providing for the construction of the road upon such terms as the Lieut. Governor in Council should approve, had not been previously passed after a due compliance with the preliminaries and conditions required by section 505 of the Municipal Act. There is nothing in the statute indicating the order in which the by-law for construction and the by-law for raising money to be applied to that purpose are to be passed. The other objection that the by-law provided for a work of railway construction beyond the limits of the municipality was, however, a fatal one. Then there was a necessity for validating the by-laws as a financial ordinance, more especially as debentures appear to have been issued under it. This was done by the local act 54 Vic. ch. 78 passed on the 4th May, 1891, which was entitled "An Act to consolidate the debt of the town of Port Arthur." The preamble recites *inter alia* that the corporation had passed a by-law authorizing the construction and operation of the Electric Street Railway by a majority of the electors voting thereon on the 5th January, 1891, and that the corporation had petitioned that, for the purpose of removing all doubts as to the validity of the by-law, the same might be confirmed and legalized. Several other subjects besides this street railway matter were embraced in the act. Then the 15th section is that part of the enacting portion of the act which is material here; it enacts that "the said by-law," (that before referred to) "is hereby confirmed and declared to be valid, legal and binding on the town, notwithstanding anything in any act or law to the contrary. And for all purposes, matters and things whatsoever relating to or affecting the said by-law any and all amendments of the Municipal Act having force

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and effect on the 1st of August, 1891, shall be deemed and taken as having been complied with, and as having been made and been in full force and effect prior to, the passing of said by-law."

By 54 Vic. ch. 42 a subsec. (16) was added to sec. 504 of the Municipal Act by which city and town municipalities were authorized to construct street railways extending beyond their own limits.

This provision was, however, not to come into force until the 1st July, 1891.

The question in this appeal is whether the validating act before referred to had the effect of dispensing with the requirements of the Municipal Act that a by-law authorizing construction should be passed, or whether it was intended only thereby to confirm the by-law of the 5th January, 1891, as a money by-law.

The erroneous recital in the preamble that the Town Council had passed a construction by-law can, in my opinion, have no effect whatever on this question. It is well settled that an erroneous recital of a fact in an act of Parliament may be controverted, and that a mistaken assumption of law is not conclusive. I need not do more than to refer on this head to a well known text book where all the cases are collected (1). Then a reference to the by-law itself, set out in the schedule to the act, shows conclusively that it did not provide for construction but merely for the issuing of the debentures by means of which the fund for construction was to be raised.

The only other argument which it is necessary to notice is that founded on the provision that for all purposes, matters and things relating to and affecting the by-law, all amendments of the Municipal Act having effect on the 1st August, 1891, should be deemed and

(1) Hardcastle on Statutory Law, 2 ed. pp. 461 to 467.

taken as having been complied with, and as having been in full force when the by-law was passed.

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I am unable to see in this anything like a legislative dispensation with the requirements of the 504th and 505th secs. of the Municipal Act before adverted to, requiring a by-law providing for construction to be passed under the conditions therein enacted. The provisions in question are of great importance to the ratepayers giving them a control over the expenditure of their money, and I am decidedly of opinion that it is incumbent on the courts not to allow these rights of the ratepayers to be taken away by any ambiguous or uncertain expressions in a legislative enactment which might well have another object in view.

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I think it is the bounden duty of the courts to construe with the utmost strictness all retroactive legislation of this kind, and in the absence of express words to decline to enlarge by implication the terms in which such statutes are expressed.

I can find nothing in the validating act taking away the rights of the ratepayers to control the construction of the railway, and I must, therefore, express my adherence to the judgment of Mr. Justice Street, and the reasons he has given for holding the contrary.

The appeal should be allowed and the judgment of Mr. Justice McMahon should be affirmed with costs to the appellant in this court and in all the courts below.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed.

Appeal allowed with costs

Solicitors for appellant: *Wink & Cameron.*

Solicitors for respondents: *Keefer & Boyce.*