

1901
 [*Mar. 22.
 *May 13.

MACDOUGALL, SONS AND COM- }
 PANY AND OTHERS (PLAIN- } APPELLANTS;
 TIFFS)..... }

AND

THE WATER COMMISSIONERS }
 OF THE CITY OF WINDSOR (DE- } RESPONDENTS.
 FENDANTS)..... }

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Municipal corporation—Water commissioners—Statutory body—Powers—
 Contract—37 V. c. 79 (Ont.)*

By 37 Vict. ch. 79 (Ont.) the Waterworks system of Windsor is placed under the management of a Board of Commissioners who are to collect the revenue, paying over to the city any surplus therefrom, and to initiate works for improving the system the city supplying the funds to pay for the same. The total expenditure is not to exceed \$300,000 and not more than \$20,000 can be expended in any one year without a vote of the ratepayers.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 566) that the Board is merely the statutory agent of the city in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, not authorized by by-law of the council, and incurring an expenditure which would exceed the statutory limit was not a binding contract.

Held also, that if an action could have been brought on such contract the city corporation would have been a necessary party.

Quaere.—Would not the city corporation have been the only party liable to be sued?

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

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

(Mr. Justice King was present at the argument but died before judgment was delivered.)

The action in this case was brought for the price of work done by the plaintiffs as contractors for the installation of a filtration plant in connection with the waterworks system of the City of Windsor under a contract with the Board of Water Commissioners, and the only question to be decided on the appeal was whether or not the Board could make a valid contract for the work without the sanction of a by-law of the City Council. The statute incorporating the Board is 37 Vict. ch 79, and the several sections material to the decision on the appeal are set out in the judgment of the court.

1901
 MAC-
 DOUGALL,
 SONS AND
 COMPANY
 v.
 THE WATER
 COMMISSIONERS OF
 THE CITY OF
 WINDSOR.

The Court of Appeal held that the contract was not binding reversing the judgment of the Chancellor in favour of the plaintiffs.

Riddell K.C. for the appellants. The commissioners could be sued notwithstanding no by-law was passed by the city council for raising the money. *In re Pickering's Claim* (1).

The fact that defendants could not satisfy a judgment against them is no reason why they could not be sued. *City of Ottawa v. Keefer* (2).

Aylesworth K.C. for the respondents. The commissioners could not enter into this contract without the previous sanction of the city council to the expenditure. *Mersey Docks Trustees v. Gibbs* (3); and see *Sanitary Commissioners of Gibraltar v. Orfila* (4); *Graham v. Commissioners of Niagara Falls Park* (5); *Bailey v. City of New York* (6).

The judgment of the court was delivered by:

GWYNNE J.—This action although for the recovery merely of the sum of \$892 is one of very considerable importance not only because this sum is claimed as a

(1) 6 Ch. App. 525.

(2) 23 Ont. App. R. 386.

(3) L. R. 1 H. L. 93.

(4) 15 App. Cas. 400.

(5) 28 O. R. 1.

(6) 3 Hill (N. Y.) 531.

1901
 ~~~~~  
 MAC-  
 DOUGALL,  
 SONS AND  
 COMPANY  
 v.  
 THE WATER  
 COMMISSIONERS OF  
 THE CITY OF  
 WINDSOR.  
 Gwynne J.  
 ———

progress estimate of work which involves the outlay of \$20,000 if an instrument purporting to be a contract dated the 7th November, 1896, between the plaintiffs and the defendants is valid and binding, but also because it raises a much more important question namely, whether the corporate body called the Water Commissioners of the City of Windsor are agents only of the municipal corporation of the city and subordinate thereto in the performance and discharge of the duties and powers imposed upon and vested in them by the Act incorporating them or, on the contrary, are paramount to the municipal corporation of the city, and can compel the latter body to adopt a scheme or process of filtering suggested by a majority of the corporate body called The Water Commissioners, &c., which consists of only three persons, and to provide the money necessary to pay the expense of putting the scheme into operation although a by-law passed by the city council for the purpose of taking the opinion of the ratepayers upon the scheme was, in accordance with the provisions of the law in that behalf, submitted to the ratepayers in 1895 and was rejected by them. It is admitted that the municipal corporation of the city are the only persons by the statute incorporating the Water Commissioners made liable to pay for the works mentioned in the document of the 7th of November, 1896, if that constitutes a valid contract; the question really in issue therefore is whether the municipal corporation of the city was under an obligation to pay the \$20,000 mentioned in that document and which the corporate body called the Water Commissioners have therein undertaken to covenant to pay or cause to be paid to the plaintiffs. The details of the circumstances which led up to the execution of the document sued upon as a binding contract and the provisions of the statute in virtue of which alone

the Water Commissioners had any authority, and under which alone they purported to act, have been so fully dealt with by the learned judges of the Court of Appeal at Toronto that I do not propose to deal with those matters so fully dealt with by them further than to say that I entirely concur in their construction of the statute by which the defendants have been made a corporate body called the Water Commissioners of the City of Windsor, and that such corporation in the discharge of the duties imposed upon them, and in the exercise of the powers vested in them by the statute incorporating them, act as agents of, and not as paramount to, the municipal corporation of the city.

These Acts in the Province of Ontario which vest the management of waterworks in small corporate bodies seem to have been drafted by different persons employed by the several municipal corporations petitioning the legislature for the passing of the several Acts and so we find the form and frame of the Acts somewhat different, but these essential elements maintained in all of them namely, that all the works when constructed and all profits derived therefrom in excess of the money spent annually in maintenance are the property of the municipal corporations respectively, and that by-laws must be passed by the councils of the municipalities in the manner required by law to authorise the expenditure of any of the funds of the municipal corporations for the construction of the works contemplated to be constructed before any contract valid and binding upon the municipal corporation can be entered into by the commissioners. Thus in 1872 was passed the Act 35 Vict. ch. 79 incorporating the Water Commissioners of the City of Toronto. That Act was passed at the instance of, and upon the petition of the municipal council of the cor-

1901

MAC-  
DOUGALL,  
SONS AND  
COMPANY

v.  
THE WATER  
COMMISSIONERS OF  
THE CITY OF  
WINDSOR.

Gwynne J.

1901  
 ~~~~~  
 MAC-
 DOUGALL,
 SONS AND
 COMPANY
 v.
 THE WATER
 COMMIS-
 SIONERS OF
 THE CITY OF
 WINDSOR.

poration of the city. In the preamble it is recited among other things that

the Council of the Corporation of the City of Toronto have by petition declared that it is deemed necessary and advisable that the said Corporation of Toronto should have the power to purchase, construct, have and manage as to them shall seem meet certain waterworks on behalf of the City of Toronto, and it is expedient to grant the prayer of the said petition.

Gwynne J.

The Act then proceeds in its first section to enact

1. That the Corporation of the City of Toronto by and through the agency of commissioners and their successors *to be* elected and appointed as hereinafter provided may, and shall have power to, design, construct, build, purchase, improve, hold and generally maintain, manage and construct waterworks and all buildings, or other machinery and appliances therewith connected or necessary thereto in the City of Toronto and parts adjacent as hereinafter provided.

Section 2 then enacts that the commissioners and their successors should be a body corporate consisting of five members of whom the mayor for the time being shall *ex officio* be one—but the mode of selection of the other four is postponed to the 37th and 38th sections of the Act. Sec. 3 and the subsequent sections prescribe the duties and powers of the commissioners as such corporate body, and for the purpose of constructing the said waterworks and for meeting the payment of any other matter or thing contemplated or allowed by the Act, the Corporation of the City of Toronto are empowered to raise the money necessary by the issue of debentures not exceeding in the whole the sum of five hundred thousand dollars as is provided in section 29. Then by sec. 37 it is enacted that

this Act shall not have any force or effect until the Council of the Corporation of the City of Toronto shall pass a by-law authorising the construction of the said waterworks and on the said by-laws being finally passed it shall be lawful for the mayor of the said city and he is hereby authorised and required within fifteen days after the passage of the said by-law to issue his warrant under the corporate seal, &c.

Here follow provisions for procuring the election of the four other commissioners, who together with the mayor, constitute the corporate body. Now by this Act it is plain that the commissioners so made a corporate body are as such corporation subordinated to, and authorised to act merely as agents of, the municipal corporation assisting them in the construction, maintenance and management of the works authorised to be constructed by the by-law required to be passed before ever the corporate body for construction, maintenance and management comes into existence, and it is to works so authorised by by-law of the city corporation that the duties and powers vested by the Act in the subordinate body are limited. Upon the same day was passed the Act 35 Vict. ch. 80, whereby the mayor for the time being and one person elected for each ward by the citizens, as provided in the Act, were made a corporate body under the name of the Water Commissioners of the City of Ottawa. The preamble of that Act recited that the corporation of the City of Ottawa had passed a by-law for the construction of waterworks, and for raising by debentures the sum of \$400,000, and that the ratepayers of the city had assented thereto; that such sum was not sufficient for the purpose, and that the corporation had petitioned to be authorised to repeal the former by-law and to pass another for raising the sum of \$500,000 for the same purpose. This Act was plainly framed upon the model of the City of Toronto Act, 35 Vict. ch. 79, with which, including sec. 37, it is identical in every respect save that it omits the 1st section of the Toronto Act, which in my opinion was reasonably deemed unnecessary in view of the provisions of sec. 37, which are identical with those of sec. 37 of the Toronto Act. Then in 1874 was passed 37 Vict. ch. 78 entitled "An Act for the construction of waterworks for the

1901

MAC-
DOUGALL,
SONS AND
COMPANY

v.
THE WATER
COMMISSIONERS OF
THE CITY OF
WINDSOR.

Gwynne J.

1901
 MAC-
 DOUGALL,
 SONS AND
 COMPANY
 v.
 THE WATER
 COMMISSIONERS OF
 THE CITY OF
 WINDSOR.

Town of Peterborough.” This Act contains all of the sections of the Toronto Act, 35 Vict. ch. 79; which prescribe the duties and powers of the commissioners when incorporated, but it contains some more sections not important to be considered in the present case; its 38th section is *in pari materiâ* with sec. 37 of the Toronto Act, but is more precise in its provisions. It enacts sec. 38—

Gwynne J.

This Act shall not have any force or effect until the council of the corporation of the town of Peterborough shall pass a by-law authorizing the construction of the said waterworks,

but no by-law shall be so passed until first, estimates of the intended expenditure shall be published for one month and notice of a poll to be taken on the proposed by-law, and a copy of the by-law shall be also published for one month: nor secondly until such poll shall be taken and a majority of the electors voting at the poll are in favour of the by-law; nor thirdly, unless the by-law is thereafter passed at some meeting of the council of the corporation held not less than ten days nor more than one calendar month after the taking of such vote; and sec. 39 enacted that if the proposed by-law should be rejected at such poll no other by-law for the same purpose should be submitted to the electors for the current year. Upon the same day was passed the Act 37 Vict. c. 79, under which the defendants in the present action were incorporated. The preamble of that Act recites that the municipal corporation of the town (now the city) of Windsor had established waterworks at an expense of \$100,000, and that the municipal council of the corporation had by petition asked for *an Act to provide for the better working, management and extension of the said waterworks* and to legalize and confirm by-law No. 20 passed by the town council and approved by the ratepayers in aid of waterworks, and that it is

expedient to grant the prayer of the said petitioners.
The Act then enacted :

1. The waterworks already constructed or that may hereafter be constructed in the town of Windsor, or in any adjacent municipality, in extension thereof under the provisions of this Act shall be placed under the management of commissioners and their successors to be appointed as hereinafter provided, who shall have power to *design, construct, build, purchase, improve, alter, hold and generally maintain, manage and conduct waterworks and all buildings, matters, machinery and appliances therewith connected or necessary thereto in the town of Windsor or parts adjacent as hereinafter provided.*

2. The commissioners and their successors shall be a body corporate under the name of the "Water Commissioners of Town of Windsor," and shall be composed of *three* members of whom the Mayor of the town of Windsor for the time being shall be *ex officio* one and the said commissioners shall have all the powers necessary to enable them to *manage the system of waterworks now established, to extend the same, to construct new or additional ones and to carry out all and every the other powers conferred upon them by this Act.*

Then from sec. 3 are inserted sections identical with these in the three Acts already mentioned containing provisions as to the duties imposed upon, and the powers vested in the commissioners as a corporate body and those which declare the whole property in the works mentioned in the Act and in the rent and profits accruing therefrom annually less the amount of necessary disbursements of the commissioners for management to be vested wholly in the municipal corporation for the general purposes of the municipality. The section which vests in the municipal corporation the power of raising all the funds necessary to be expended in construction and repairs is the 33rd which enacts that

for the purpose of acquiring the necessary lands, rights and privileges *for the extension and repairs of the said waterworks, or for the purpose of meeting the payment of any other matter or thing contemplated or allowed by this Act, the corporation of the town of Windsor shall have power*

to raise by debentures a sum not exceeding \$300,000

1901

MAC-

DOUGALL,
SONS AND
COMPANYv.
THE WATER
COMMISSIONERS OF
THE CITY OF
WINDSOR.

Gwynne J.

1901
 MAC-
 DOUGALL,
 SONS AND
 COMPANY
 v.
 THE WATER
 COMMISS-
 SIONERS OF
 THE CITY OF
 WINDSOR.
 Gwynne J.

including debentures for waterworks then already issued,

but every by-law for raising on the credit of the said municipality any money, additional to that already raised for waterworks purposes, shall, before the final passing thereof, receive the assent of the electors of the town of Windsor in the manner provided for in the 231st section of the Municipal Institutions Act, except that the municipal council of Windsor may raise by by-law or by by-laws without submitting the same for the assent of the electors of the town any sum or sums not exceeding in any one year \$30,000 for waterworks purposes.

This sum is by the Act of 1894, 57 Vict. ch. 87, reduced to \$20,000. Then the sec. 45 of 37 Vict. ch. 79 declares, as it appears to me, in clear terms, that in the exercise of the powers vested by the Act in the water commissioners incorporation, that body acts only as agents of, and as subordinate to, or concurrently with the municipal corporation in the matter of waterworks, for the whole cost of the construction and maintainance of which, as the property of the municipal corporation, they alone are liable, and therefore, as it seems to me, they should be made defendants, if not sole defendants, in every action brought to recover any sum of money made payable in respect of every valid contract for such purposes entered into by their agents the water commissioners incorporation.

In 1894 was passed the Act 57 Vict. ch. 87 in amendment of the Act 37 Vict. 79. By that Act it was enacted that

for the purpose of extending the water mains, constructing a new intake pipe, and repairing the waterworks of the City of Windsor, the corporation of the said city shall have power to issue debentures for the said city in addition to the debentures authorised to be issued by the town of Windsor under the provisions of sec. 33 of 37 Vict. ch. 79,

and it was enacted that every by-law for issuing debentures for raising money under the provisions of that Act should be submitted to the ratepayers under the provisions of the *Consolidated Municipal Act,*

provided always that the said corporation may issue by by-law or by by-laws without submitting the same to the ratepayers any sum of money not exceeding in any one year \$20,000

for the purposes mentioned in this Act. It has been argued that the rejection by the ratepayers of the by-law submitted in 1895 for raising a sum of money (I do not see the amount stated) for the purpose of putting into operation the filtering process spoken of must not be regarded as a rejection by the ratepayers of the principle of the filtering process as inefficient, but should be attributed to the fact that the application of the money of the municipality to instituting the filtering process was not authorised by that Act, the purposes thereof as therein mentioned being limited to *extending the water mains, constructing a new intake pipe, and repairing the waterworks of the city.* It may be admitted that the purposes named in the Act do not include the filtering process, but that is rather a question of law depending on the construction of the Act which naturally should have been considered before submitting the by-law to the ratepayers. The question as submitted to them, I think, was whether, assuming the by-law to be quite legal, the ratepayers approved of the outlay of the public money as proposed to the particular purpose named in the by-law. Assuming then an outlay of the public money for the purpose of putting the filtering process into operation not to be within the purposes specified in the Act of 1894 I do not well see how it can be said to be within the purposes of the Act of 1874. The municipality had expended the sum of \$281,700 of the \$300,000 authorised to be raised for the purposes of that Act, namely for extending and improving the waterworks previously established under by-laws or a by-law passed for the purpose by the council of the municipality as provided by the Act. Of the \$300,000

1901
 MAC-
 DOUGALL,
 SONS AND
 COMPANY
 v.
 THE WATER
 COMMISSIONERS OF
 THE CITY OF
 WINDSOR.
 Gwynne J.

1901

MAC-

DOUGALL,
SONS AND
COMPANYTHE WATER
COMMISSIONERS OF
THE CITY OF
WINDSOR.

Gwynne J.

so authorised to be raised only the sum of \$18,300 remained unapplied. Granting it then to have been competent for the city municipality to have raised that sum for some waterworks purposes, it would seem, I think, that such purpose should be for some work *additional* to the works mentioned in the Act of 1874, which had been completed under the provisions of the by-laws or by-law passed for that purpose, and the council of the municipality alone could determine what the particular purpose should be to which such \$18,300 or any part thereof should be applied. Now at the time of the passing of the Act of 1894 that sum not having been applied to any waterworks purpose would seem, I think, to have come under the Act of 1894 *by which* \$200,000 *in addition to that sum* were appropriated to the purposes named in the Act. This expression in the 1st section, "in addition to the debentures mentioned," &c., &c., seems to me to appropriate the \$18,300 remaining unapplied under the Act of 1874 equally with the \$200,000, to the purposes mentioned in the Act of 1894.

This point not having been mentioned in the argument before us I do not rest my judgment upon it although it seems to me, I confess, to add some strength to the judgment of the learned judges of the Court of Appeal in which independently, however, of it I entirely concur. As no valid contract for any work in excess of \$20,000 could be entered into by the Water Commissioners Corporation until after the passing of a by-law by the council of the municipality assented to by the ratepayers authorising the construction of the work named in the by-law, so equally no valid contract can be entered into by them under the statute for the construction of any work to cost less than \$20,000 unless in virtue of a by-law previously passed by the council of the municipality authorising the construction of

such work. The water commissioners corporation are not by the Act made paramount to the city corporation, nor have they any power to compel the municipal council to pass a by-law, the principle of which they may utterly disapprove of as wasteful, extravagant, ineffectual for the purpose contemplated or of an experimental character, or the principle of which had been disapproved of and rejected by the ratepayers, or for the purpose of experimenting upon suggestions of the commissioners. The statute does not place the council of the municipality in subjection to the water commissioners of the city in any such manner. I am of opinion also that the city corporation were a necessary party if not the sole necessary party to be made defendants in the present action, for if the instrument sued upon constituted a valid contract under the provisions of the Act of 1874 the question really at issue was. Were the city corporation bound by the act of their agents, the water commissioners corporation? To an action raising such an issue the city corporation was the necessary party. The judgment condemning the water commissioners corporation to the payment of the sum demanded, \$892 with costs, has no force under the statute if it is not imperative upon the city corporation to fulfil and satisfy the judgment, and that question could not be adjudicated upon adversely to the city corporation in their absence, and there is no warrant for dividing such a claim against the city into two actions instead of determining the whole question in one action by making the city corporation the actual as they are the real defendants. For all the above reasons I am of opinion that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Murphy, Sale & O'Connor.*

Solicitors for the respondents: *Clarke, Cowan, Bartlet & Bartlet.*

1901
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 MAC-  
 DOUGALL,  
 SONS AND  
 COMPANY  
 v.  
 THE WATER  
 COMMISS-  
 SIONERS OF  
 THE CITY OF  
 WINDSOR.  
 \_\_\_\_\_  
 Gwynne J.  
 \_\_\_\_\_