THE TOWNSHIP OF ELIZABETHTOWN (PLAINTIFF)..... } APPELLANT;

AND

THE TOWNSHIP OF AUGUSTA (DEFENDANT)..... } RESPONDENT.

1901
*Nov. 12.

1902
*Mar. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Drainage—Removal of obstruction—Municipal Act, 1883, *s.* 570 (*Ont.*) *Mun. Amendment Act*, 1886, *s.* 22—*Report of engineer.*

In 1884 a petition was presented to the Council of Elizabethtown asking for the removal of a dam and other obstructions to Mud Creek into which the drainage of the township and of Augusta adjoining emptied. The Council had the creek examined by an engineer who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each Township. The Council then passed a by-law authorizing the work to be done which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, sec. 570 of the Municipal Act, 1883. In 1886 the Act was amended and a fresh petition was presented to the Council of Elizabethtown which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval) but presented to the Council his former report, plans, specifications and assessment and another by-law was passed under which the work was done. In an action to recover from Augusta its proportion of the assessment :

Held, affirming the judgment of the Court of Appeal (2 Ont. L. R. 4) Strong C. J. dissenting, that the amendment in 1886 to sec. 570 of the Municipal Act, 1883, authorized the Council of Elizabethtown to cause the work to be done and claim from Augusta its proportion of the cost.

Held, further, reversing said judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment.

* PRESENT :—Sir Henry Strong C.J. and Sedgewick, Girouard and Davies JJ.

(Mr. Justice Gwynne was present at the hearing but died before judgment was given).

1901

TOWNSHIP OF ELIZABETHTOWN v. TOWNSHIP OF AUGUSTA.

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

The facts of this case are stated by Armour C. J. O. in the Court of Appeal, as follows:

Mud Creek flows from Mud Lake in the Township of Elizabethtown, in an easterly direction through lots 28 to 14, inclusive, and through part of lot 13 in the 8th concession of the said township, and thence through part of lot 13 and through lots 12 to lot A inclusive, in the 9th concession of the said township, and thence across the town line between the Townships of Elizabethtown and Augusta; thence through lot 37 in the 9th concession of Augusta and across the concession line between the 8th and 9th concessions, and thence through part of lot 37 and through lot 36 in the 8th concession of the last mentioned township, on which last mentioned lot was a mill-dam owned by one Bellamy, which penned back the waters of the said creek and caused them to overflow a large quantity of land in the said townships. Negotiations were had with the said Bellamy for the removal of the said dam, who agreed to do so for the sum of $5,000.

In 1884, a petition having been presented to the Council of Elizabethtown, for the removal of obstructions, the principal of which was the said dam, which prevented the free flow of the waters of the said creek, the Council acting in accordance, as they thought with the law as it then was - The Consolidated Municipal Act, 1883, section 570—procured one Willis Chipman, an engineer, to make an examination of the creek from which it was proposed to remove obstructions, and procured plans and estimates to be made of the work by such engineer and an assessment to be made by him of the real property to be benefited by such work,

(1) 2 Ont. L. R. 4.

stating, as nearly as might be in his opinion, the proportion of benefit to be derived therefrom by every road and lot or portion of lot, Thereafter, in April, 1885, the said engineer made his report to the Council of Elizabethtown with the said plans and estimates and the assessment made by him, and the Council of Elizabethtown thereupon passed a by-law for the aforesaid purpose and having served the Council of the Township of Augusta with a copy of the report, plans, specifications, assessment, and estimates, of the said engineer, the last mentioned council appealed and the arbitrators appointed determined that the law did not apply to the removal of an artificial obstruction, such as the dam above mentioned, and so the proceedings became abortive. And in order to remedy this difficulty, the Municipal Amendment Act, 1886, section 22, was passed amending section 570 of the Consolidated Municipal Act, 1883, by adding thereto subsections 18, 19 and 20, therein set forth.

Thereafter, on the 4th September, 1886, a petition was presented to the Council of Elizabethtown, purporting to be of a majority of the persons shown by the last revised assessment roll to be the owners of the property to be benefited by the work therein mentioned, setting forth that a stream known as Mud Creek, running through the Township of Elizabethtown, and from thence to the Township of Augusta, in the County of Grenville, was obstructed by a certain dam belonging to one John B. Bellamy, erected on lot number 36, in the 8th concession of the said Township of Augusta, then known as Bellamy's mill-dam, and by other obstructions which said dam and obstructions prevented the free flow of the waters of the said creek. That the said John B. Bellamy had agreed in consideration of five thousand dollars, to take down and remove said dam.

1901

TOWNSHIP OF ELIZABETHTOWN v. TOWNSHIP OF AUGUSTA.

That the taking down and removal of said dam, and of the other obstructions in said creek from said dam to the east side line of lot number 30, in the 8th concession of the said Township of Elizabethtown, would benefit a large tract of land, to wit: lots numbers 5 to 29, inclusive, in the 8th concession of the said Township of Elizabethtown, and lots numbers 1 to 16, inclusive, in the 9th concession of the said Township of Elizabethtown, and lots 37 to 33, inclusive, in the 8th and 9th concessions of the said Township of Augusta. And the petitioners prayed that the said mill-dam and other obstructions in said creek might be removed (said mill-dam being removed by carrying out and completing said proposed arrangement with said John B. Bellamy) from the said dam of the said John B. Bellamy, up to the east side line of lot number 30, in the 8th concession of said Township of Elizabethtown, and that for that purpose all proper steps might be taken in pursuance of the Municipal Act, and the sections thereof relating to drainage, and all proper by-laws passed and surveys made. It was admitted that the last revised assessment roll of the Township of Elizabethtown at the time of the presentation of this petition was that of the year 1886, and that this petition was signed by a majority in number of the persons shown by that roll to be the owners, whether resident or non-resident of the property to be benefited in the Township of Elizabethtown. The owners to be benefited in the Township of Augusta were not taken into account. The Council of Elizabethtown thereupon instructed the said Chipman to make an examination of the creek from which it was proposed to remove the said obstructions, and procured plans and estimates to be made of the work by turn and an assessment to be made by him of the real property to be benefited by such work, stating as

nearly as might be, in his opinion, the proportion of benefit to be derived therefrom by every road and lot or portion of lot. Chipman did not proceed, under these instructions to make another examination of the creek, and fresh plans and estimates and a new assessment, but on the 19th May, 1887, made a new report, accompanying it with the plans, estimates and assessment he had previously made, and dating them as he dated the report. This report showed $4,986 to be assessable against lands and roads in Elizabethtown, and $764 against lands and roads in Augusta.

The Council of Elizabethtown thereupon passed the prescribed by-law in due form and on the 20th July, 1888, the Council of the Township of Elizabethtown served the head of the Council of the Township of Augusta with a copy of the report, plans, specifications and estimates of the said engineer which were not appealed from. The Council of the Township of Augusta never passed any by-law as required by section 581 of the said Act for raising the sum named in the report as assessable against the real property in that township benefited by the said work, nor did they pay over the same or any part thereof to the Township of Elizabethtown, and the Council of the Township of Elizabethtown having paid the whole cost of the work, seeks in this action to recover against the defendants the sum named in the report as assessable against the lands and roads in the Township of Augusta. The action was tried before Street J., at Brockville, on the 14th June, 1900, who dismissed the action with costs, His Lordship being of opinion that the proceedings were not authorized by the Municipal Act.

The plaintiffs appealed from the judgment to the Court of Appeal in which their Lordships unanimously held against the ruling of Mr. Justice Street as to the

1902

TOWNSHIP OF ELIZABETHTOWN v. TOWNSHIP OF AUGUSTA.

statute law, but were equally divided in opinion on a ground not previously taken, Osler and Leslie JJ. holding that the engineer should have made a fresh examination and prepared a new assessment before reporting to the council the second time, while Armour C.J.O. and Moss J. were of opinion that the plaintiff should succeed. The judgment at the trial therefore stood affirmed and the plaintiff appealed to the Supreme Court.

Watson K.C. and *H. A. Stewart* for the appellant.

J. A. Hutcheson for the respondent.

The CHIEF JUSTICE (dissenting) :—If we could accept the construction placed on the statute in question here by Galt J. in the case of *The Township of West Nissouri* v. *The Township of North Dorchester* (1), namely, that the jurisdiction of the County Council under section 598 of 46 Vict. ch. 18 was exclusive and that the case was not one falling within section 570 and the following sections of the same Act, there would be no difficulty in deciding the present appeal. But although that would have seemed to have been a much more reasonable provision and much more just and equitable in its results as regards landowners in the servient townships, yet such a construction cannot be adopted in the face of the permissive terms of section 598 especially when we find that section 570 and those sections which follow expressly include a case like the present, and however unfair and unjust the consequences we are, therefore, bound to follow the plain language of the statute. Consequently this view although concurred in by the Divisional Court in the case cited, cannot prevail.

Neither for the same reason can we adopt the ingenious interpretation of the learned Chancellor and

(1) 14 O. R. 294.

hold that the landowners benefited in the two townships are to be considered as forming for the purposes of the Act, one mass, or a quasi-municipality, and that a majority of the whole body of owners in both townships (not a double majority as suggested by Henry J. in *The Township of Chatham* v. *The Township of Dover* (1), but a majority of the whole) should be held to be necessary to put the machinery of the Act in motion. This again would have been an improvement upon the actual enactment, but it manifestly was not the intention of the legislature, and so to hold would be making the law and not merely construing the statute as we find it.

Mr. Justice Street was, however, bound by the judgment of the Divisional Court in the *West Nissouri Case* (2) and could not have done otherwise than follow it.

Then, adopting the construction which all the judges of the Court of Appeal have placed upon the Act, namely, that section 570 and the following sections of the amended Municipal Act of 1883 (so amended by the Act of 1886 as to include obstructions caused by Mill Dams) applied, I am still of opinion that the appeal should be dismissed.

The very harsh operation of those sections as applied to the present case, by which not only are the landowners in Augusta supposed to be benefited though against their will and made liable for what they did not want, but all the ratepayers of the Township of Augusta are compelled to contribute to the expense of the removal of this dam though their properties were miles away from Mud Creek, alone make it incumbent on the court to see that the appellants have made out their case when tested in the strictest manner. In the first place I agree entirely with Mr. Justice Lister in

(1) 12 Can. S. C. R. 321 at p. 334. (2) 14 O. R. 294.

1902

TOWNSHIP OF ELIZABETHTOWN v. TOWNSHIP OF AUGUSTA.

The Chief Justice.

holding that the prerequisites to the respondents' liability have not been performed. I agree in the quotation from Mr. Justice Gwynne's judgment in *The Township of McKillop* v. *The Township of Logan* (1), when he says that these pre-requisites must be found to have been complied with "in the minutest particular."

Then, it is not proved that Mr. Chipman, the engineer, ever made the examination, prepared the plans and estimates or made any assessment of the properties to be benefited at any time after the statute of 1883 had been so amended by that of 1886 as to include obstructions caused by Mill Dams. What he had done some years before when no statutory provision applied to such a case cannot on any known principles of law be utilized as a compliance with the statute. It is enough to say the requirements of the legislature were never complied with. It is not, however, merely a dry technical objection but one which may be of great substantial importance to landowners for in the interval between the date of the actual survey made by Chipman and the passing of the second bylaw, ownerships might have changed, values altered and many other things have occurred making it material that there should have been a proper compliance with the Act by an actual examination, assessment and estimates subsequently to the amending Act.

Then, I do not agree with the learned Chief Justice that a debt obliging the municipality as a corporation was created. The duty of the municipality if it did not appeal was to enforce the assessment imposed on the landowners who profited by the supposed improvement. The statutory debt created was a burden upon these landowners and upon them alone. No words

(1) 29 Can. S. C. R. 702.

1902

TOWNSHIP OF ELIZABETHTOWN v. TOWNSHIP OF AUGUSTA.

The Chief Justice.

are to be found in section 580 or in any part of the Act imposing any duty upon the municipality beyond that stated. The case of *The Borough of Salford* v. *The County of Lancashire* (1), is in my judgment precisely in point to show that the only remedy against the respondents by way of action was one in the nature of the common law action upon the case to which the statute of limitations, which is pleaded, would be a bar.

As to a mandamus, the case is altogether too stale to warrant any interference in that way even if all the statute required had been complied with.

A further objection which appears to have been taken at the trial and which was also taken in the reasons of appeal and in the respondents' factum here, was that it nowhere appears in proof that a majority of the owners benefited in Elizabethtown alone joined in the petition. I can discover no evidence upon which an answer to this objection can be based, and as it goes to the very root of the proceedings it must be considered fatal.

In my opinion the appeal should be dismissed.

This judgment, however, is a dissenting one since my learned brothers, Sedgewick, Girouard and Davies differ from me. In their opinion the appeal should be allowed.

The judgment of the majority of the court, (Sedgewick, Girouard and Davies JJ.) was delivered by:—

DAVIES J.—Two questions only arose upon this appeal. One was of a substantive character and went to the root of the action. It was based upon the proposition that the proceedings taken by the Township of Elizabethtown for the removal of the dam in the Township of Augusta were *ultra vires* and were not covered

(1) 25 Q. B. D. 384.

1902

TOWNSHIP OF ELIZABETHTOWN v. TOWNSHIP OF AUGUSTA.

Davies J.

or cured by the amendment of 1886 to the Municipal Act, and that therefore the plaintiff could not recover from defendant any share of the expenditure incurred by it in the removal of that dam and other obstructions in such parts of Mud Creek as were situated in Augusta Township.

The other objection was as to the regularity of the proceedings, it being contended that the engineer had not made such a survey of the lands to be affected by the improvements as was required by the statute. It is upon this latter objection only that there appeared to be any difference of opinion in the Court of Appeal for Ontario.

We are of opinion, for the reasons given by Mr. Justice Moss, that the proceedings on the part of the engineer must be taken to have been legal and effective, and for the reasons given by Chief Justice Armour on the main ground we think that the amendments of 1886 to the Municipal Act gave the plaintiff ample authority to take the proceedings it did for the removal of the dam and other obstructions, and to maintain this action against the defendant (respondent) for the amount of the cost assessable against lands and roads in Augusta Township.

The appeal therefore will be allowed with costs in this court and in the Court of Appeal and judgment entered for the plaintiff in accordance with the judgment of Chief Justice Armour.

Appeal allowed with costs.

Solicitor for the appellant: *H. A. Stewart.*

Solicitors for the respondent: *Hutcheson & Fisher.*