THE SHAWINIGAN HYDRO-ELECTRIC COMPANY (DEFENDANTS) . . } APPELLANTS;

AND

THE SHAWINIGAN WATER AND POWER COMPANY (PLAINTIFFS) } RESPONDENTS.

1911
*Nov. 10.
1912
*Feb. 20.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Municipal corporation—Statutory powers—Electric light and power—Waterworks — Immovable outside boundaries — Purchase on credit—Promissory notes—Hypothec—By-law—Loans—Approval of ratepayers — Special rate — Sinking-fund — Construction of statute—(Que.) 8 Edw. VII. c. 95—R.S.Q., 1909, tit. XI.—"Cities and Towns Act."

The council of the Town of Shawinigan Falls, acting under a special Act of incorporation, 8 Edw. VII. ch. 95, and the "Cities and Towns Act," R.S.Q., 1909, Title XI., enacted a by-law authorizing the purchase by the municipality of the appellants' electric light and power plant, which was situated outside the municipal boundaries, but within twenty miles thereof, for the purpose of establishing a system of electric lighting and waterworks within the municipality The price was to be paid in part by annual instalments, to be secured by the promissory notes of the municipal corporation, and the balance, being the amount of a subsisting hypothec and interest thereon, was to be satisfied by the corporation assuming the hypothecary obligations. The by-law had not been approved by a vote of the ratepayers, and it did not impose a special rate to meet interest and establish a sinking-fund, as required by article 5668 R.S.Q., 1909.

Held, affirming the judgment appealed from, (Q.R. 19 K.B. 546), Anglin J. dissenting, that the by-law was invalid.

Held, per Davies, Idington and Duff JJ., that the municipal corporation had no power to establish such works outside the boundaries of the municipality. *Per* Anglin J. dissenting, that in view of the situation of the electric and power plant, the

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin J.

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peculiar circumstances of the case, and the special provisions of the Act incorporating the town, it was competent for the municipal corporation to acquire the property and to establish and maintain the works in question.

Per Davies J., Anglin J. contra, that the by-law was invalid for want of provision, either in itself or in another by-law contemporaneously enacted, fixing the necessary rate for the purpose of meeting interest and establishing a sinking-fund, as required by article 5668 R.S.Q., 1909.

Per Idington J., Anglin J. contra, that the by-law was one which required the approval of the ratepayers of the municipality, as provided by article 5783 R.S.Q., 1909, respecting loans, and, as their assent had not been obtained prior to enactment the by-law was invalid.

Per Anglin J.—The statutory obligation in respect of the imposition of a special rate to meet interest and establish a sinking-fund would be discharged by the levy of the necessary rates for those purposes from year to year until the debt to be incurred was extinguished.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of Three Rivers, and maintaining the plaintiffs' action with costs.

By the judgment appealed from the municipal by-law in question, authorizing the purchase of the electric light and power plant of the Shawinigan Hydro-Electric Co., was quashed and the municipal corporation of the Town of Shawinigan Falls and its officers were perpetually restrained from giving any effect thereto. The municipal corporation submitted to the judgment of the Court of King's Bench and the hydro-electric company took the present appeal.

The issues raised are stated in the judgments now reported.

Aimé Geoffrion K.C. for the appellants.

F. Meredith K.C. and *Holden*, for the respondents.

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THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs.

DAVIES J.—This was an action brought to annul a by-law passed by the council of the Town of Shawinigan Falls authorizing the purchase from the appellants of immovable property with a power-house and plant thereon for $40,750, the property being admittedly situated outside of and beyond the territorial limits of the town. The sum of $15,750, part of the purchase money, was to be paid the vendor company in certain specified yearly instalments for which promissory notes were to be given by the town to the company. The balance of the purchase money, $25,000, was made payable

> to the succession of the late William Burn to discharge the hypothec for that amount created by the company in favour of such succession.

In other words, the town proposed in its by-law to give its promissory notes in part payment of the purchase money and to assume an existing mortgage on the property for the balance. The by-law declared that the properties were being acquired by the town

> for the purpose of an aqueduct and for the establishment of a system of electric lighting,

for the town and its inhabitants.

The by-law was adopted without having been previously submitted to the town's electors for approval and without incorporating in it, or otherwise providing for, a special annual tax to meet interest on the purchase money and provide a sinking fund. There was no indication in the by-law as to who or what property would be taxed.

The trial judge dismissed the action holding the by-law to be valid. The court of appeal (Archam-

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bault and Lavergne JJ. dissenting) allowed the appeal and annulled the by-law, on the grounds that the manner and way of establishing such a system of electric lighting as that contemplated was either that specially indicated in the "Cities and Towns Act" (1903), consolidated in the Revised Statutes of Quebec, 1909, arts 5256 *et seq.*, namely, by the imposition of a special annual tax on certain specially designated properties to defray the annual interest and to provide a sinking-fund and pay off the principal, or by the general method, namely, a loan with the approval of the rate-payers, neither of which was adopted by the council. The court of appeal further held that the town had not the power to issue promissory notes in part payment of the purchase money of the power-house and plant, etc., nor to assume the payment of the Burn mortgage which they held to amount indirectly to contracting a loan without the approval of the ratepayers.

The town submitted to the judgment of the court of appeal and the vendors (defendants) appeal to this court.

The questions raised before us are of great general importance involving the proper construction of the "Cities and Towns Act" of the Province of Quebec, 1903, and the powers and limitations of the councils of the towns and cities which come under its operation.

The appellants deny the validity of each and all of the grounds invoked to annul the by-law, and contend that the council had full power to purchase as they did, and give the promissory notes and assume the hypothec for the purchase money.

The respondents, in addition to supporting the judgment of the court of appeal on the grounds stated

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in their judgment contended that the by-law was illegal because the property attempted to be purchased was beyond the territorial limits of the town and necessarily involved, if purchased for the purposes intended, the carrying on of business outside of the town's territorial limits.

I have given much consideration to the questions involved and have reached the conclusion that the by-law is invalid and that the appeal should be dismissed on the two grounds, 1st, that neither the Act of 1908, 8 Edw. VII. ch. 95, revising and consolidating the charter of the Town of Shawinigan Falls, nor the "Cities and Towns Act," 1903, to the operation of which the town, by the 2nd section of the Act of 1908, is expressly made subject, authorized the council to pass the by-law in question for the purchase of the power-house, plant and property outside of its territorial limits; and 2ndly, if the extra-territoriality of the property purchased was not a fatal objection, the absence of the statutory provision, either in the by-law itself or otherwise, for meeting the interest on the cost of the purchase and to establish a sinking-fund to liquidate the principal as provided for in the section 5668, R.S.Q., of the "Cities and Towns Act," was fatal.

These two clauses of the Act, R.S.Q., arts. 5667 and 5668, are so important and controlling that I set them out in full:—

5667. The council shall have all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light their houses, buildings or establishments.

5668. The council may, by by-law, in order to meet the interest on the sums expended in introducing a system of lighting and to establish a sinking-fund, impose on all the owners or occupants of houses, shops or other buildings, an annual special tax, on the assessed value of each such house, building or establishment, including the land.

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I do not think the general loan-clauses of the Act contained in para. 28, articles 5776 to 5789, could be invoked to borrow the purchase moneys required. If they could, any by-law under them would require the approval of a majority in number and in real value of the proprietors who are municipal electors and who have voted.

Of course no such approval was sought for in this case because no attempt to borrow money under the loan-clauses of the Act was resorted to; but it was strongly contended by Mr. Geoffrion that, if the council could resort to the general loan clauses of the Act to raise the money required and was not limited to the special method designated by article 5668, they could on similar reasoning resort to any other general power the Act gave and that the one they resorted to was, therefore, good.

It is true that article 5776 of these loan-clauses authorizes the council to "borrow moneys generally for all objects within its jurisdiction," but I do not think these general words could be construed to apply "to the establishment and management of a system of lighting" as given in article 5667 because the method of raising the necessary funds for that special purpose is pointed out and defined in article 5668 and involves a special annual tax to defray interest and provide for sinking fund upon a special class of ratepayers and a special class of property.

The "special annual tax" required to be levied to meet the interest and the sinking-fund, under the general clauses relating to loans, is to be levied upon all the ratepayers and the council is obliged to provide for such interest and sinking fund "out of the general revenues of the municipality" while the "special annual tax" required to be levied for the estab-

lishment and maintenance of a system of lighting is to be levied upon the special class of ratepayers who own or occupy houses, shops or other buildings, and upon this special class of property only. This would seem to my mind conclusive as against the right of the council to invoke these general loan clauses for the establishment of a system of lighting.

I do not agree with the contention that, because the legislature used the word "may" in this section of the Act and not "shall" that, therefore, the provision is to be construed as permissive only and not imperative. I think the intention of the legislature to authorize the establishment and management of a system of lighting is clearly expressed in article 5667 and the intention that the cost of such establishment and its maintenance should be imposed upon a specially designated class of citizens, and a specially designated class of property is equally clearly expressed in article 5668.

The exercise of the power to establish and manage the system necessarily involved resort to the special method prescribed of raising the necessary funds. It was not, in my opinion, open to the council to evade that expressed intention by adopting another and different system, such as borrowing the necessary moneys under the loan-clauses of the Act, or issuing promissory notes for the purchase money, and so throwing the burden off the special class and the special properties the Act said should bear it, upon the shoulders of the ratepayers generally.

Something might possibly be said in favour of the council's power to raise the necessary moneys by "loan" because such method involved the submission of the by-law to the ratepayers for their approval and, from that standpoint at any rate, might not appear

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as unjust, but for the reasons I have given I do not think resort could be had to an ordinary loan to establish the lighting system.

But I certainly cannot find any reason for so construing articles 5667 and 5668 as to justify the council's action in evading the expressed intention of the legislature by adopting a method of establishing a lighting system which, if sustained, would impose upon the town and the ratepayers generally a heavy debt with its necessary accompanying taxation, without either submitting a by-law, for the power to borrow the money necessary, to the municipal electors or imposing the special tax prescribed upon the owners or occupants of the property built upon for the payment of the interest and the sinking-fund.

This by-law, the annulment of which is sought for in this action, neither imposes the special tax required to be levied for the establishment of a lighting system nor provides for the raising of money by loan to pay for such establishment. The method adopted of giving the notes of the municipality for part of the purchase money and assuming the payment of the hypothec then upon the property for the balance of such money without either resorting to a loan which involved obtaining the approval of the electors, or to the prescribed taxation upon the house and building owners, was, in my judgment, a bold attempt to evade the expressed intention of the legislature.

It was sought to uphold the power to give the town's promissory notes for part and to assume the amount of the hypothec then upon the property for the balance of the purchase money under the general powers given to the council by article 5279, but, as I have already said, in my opinion, these general powers

are like the loan-clauses and have no application to the special power given to establish and maintain a lighting system which is coupled with a special and prescribed method of raising the moneys necessary for the purpose on special classes of ratepayers and property. This method and this alone, in my opinion, can be resorted to when carrying out the powers given to establish a lighting system and when the council formally determines to establish such a system the duty becomes imperative upon it to provide the means of paying the interest and the annual sinking-fund in the special manner prescribed by the Act. The word "may" in the section must be read as "shall" and when imposing a debt upon the town for the establishment of a lighting system the council must at the same time provide for the imposition of the taxes prescribed by article 5668 necessary to pay the interest and the sinking fund to discharge that debt.

It is contended that the council may yet do this and that the by-law under which the property was purchased and the debt imposed upon the town is not necessarily bad because neither in it nor otherwise concurrently with it was any attempt made to comply with these special provisions of the Act.

In my judgment it is entirely opposed to the scheme and objects authorized by the legislature that the council should in the first place establish the system and impose the debt upon the town and leave to the chapter of accidents the adoption of the methods of defraying the expenditure specially indicated by the legislature. The establishing of the system and the incurring of the liability for the necessary expenditure were made, by the statute, duties to be exercised contemporaneously with the imposition of the taxes specially authorized to meet that expenditure.

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Difficulties of one kind and another have been suggested as to the working out of the statutory scheme, but I do not see any that are insuperable, and if there are any such they can be met only by amending legislation and cannot affect the proper construction of the articles and clauses of the Act as they now stand.

The next reason why I hold the by-law to be illegal is that the property purchased by virtue of it and the business to be carried on and in connection with the power-house to generate the electricity required, is beyond the territorial limits of the town and not authorized by the Act.

Article 5667 of the "Cities and Towns Act," R.S.Q., 1909, which confers the power to establish and maintain a lighting system was amended by the special Act of 1908 revising and consolidating the charter of the Town of Shawinigan Falls, section 18, by adding words authorizing the council to sell

> the surplus power produced by the power generating the electricity which it may have acquired or established for such purpose to the municipality of the Village of the Shawinigan Falls or to its inhabitants and to the Grand'Mère Electric Company or its successors.

The village and the company alike are beyond the territorial limits of the Town of Shawinigan Falls, and it has been suggested that the amendment conferred upon the town other and broader powers than the article 5667 of the "Cities and Towns Act" gave. It certainly does so far as the sale of surplus power is concerned; but not otherwise. The legislature evidently thought that the right to sell surplus power outside the town's territorial limits required express words to confer it, while if the appellants' contention is sound that the general words of the section as amended authorized the establishment of power-houses to gen-

erate electricity outside the territorial limits of the towns, the lesser power of selling the surplus power to other towns or companies would be necessarily implied and the express power to sell outside unnecessary. The amendment, therefore, rather indicates that the legislature did not intend, in passing article 5668 of the "Cities and Towns Act," to confer the greater power upon the towns and cities of establishing power-plants for lighting purposes beyond their limits.

But, assuming the amendment not to have any effect upon the construction of article 5667 beyond the express powers the words of the amendment give — what is the true construction of this article 5667 of the "Cities and Towns Act" ?

The consolidated Act of 1909, by its first section, is made applicable not only to all cities and towns thereafter incorporated by statute or letters patent, but to all cities and towns under special Acts which shall be declared subject to the general Act and to all cities and towns which had become subject to the "Cities and Towns Act" of 1903.

It is, therefore, practically a general Act applicable to the towns and cities of the whole province brought within its operation and is to be construed as such and not with reference to any special local conditions of particular cities or towns.

No language of any kind is used indicating an intention that the powers given might be used outside of the territorial limits of the municipality, and to give such a construction to the section it would be essential to hold that the application of such powers extra-territorially was clearly intended because they were necessary to the exercise of the powers themselves.

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Reading the Act as a whole, I am drawn to the conclusion that general words conferring powers upon a municipality brought within its operation must be given a territorial limitation unless from the very nature of the power it must be held that it was to be exercised extra-territorially, and that where it is intended that general powers, not absolutely necessary to be exercised extra-territorially, should, nevertheless, be so exercised, apt language must be shewn to evidence such a legislative intention.

Read articles 5280 and 5281, R.S.Q., 1909, which are as follows:—

5280. The territory of the municipality shall be that specified by its charter.

5281. The corporation shall have jurisdiction for municipal and police purposes and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it.

Here is found an express declaration that not only for municipal and police purposes, but *for the exercise of all the powers conferred upon it the corporation should only have jurisdiction "beyond its territory in special cases where more ample authority is conferred upon it."* That declaration seems to me to impose upon a corporation, acting under the powers given in that Act, the duty of shewing either that the powers the exercise of which were challenged as illegal were exercised within territorial limits, or, if beyond those limits, were only carried beyond to an extent *necessary* for their exercise, and so fairly to be implied from the language conferring the power, or *that express power to exercise the challenged powers beyond territorial limits was given.*

Then article 5588 (section X.), under the heading or sub-title "Powers of the Council," repeats over

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again the statutory limitation as to territory in the exercise of the council's jurisdiction which article 5281 above quoted enacted. It says:—

> The council shall have jurisdiction throughout the extent of the whole municipality, and beyond the limits thereof in special cases where more ample authority is conferred upon it.

Now it is generally the case that special powers to act or carry on works extra-territorially are found in special charters given to municipalities and the general Act I am discussing in several analogous instances to the immediate one before us has conferred the "ample authority" required by article 5281 for special cases of extra-territorial work.

Take section X., para. 10, relating to "Water Supply" for the towns and cities. One would suppose that the necessity in obtaining such supplies of going beyond its limits and constructing the necessary water-works would, in such a case above any other, necessarily be implied, but in this section conferring the powers the legislature first in article 5645 gives in general terms the power to provide for the establishment and maintenance of water-works, reservoirs, etc., to supply water to the municipality and then takes special care in article 5646 to give the municipality power to "construct and maintain *in and beyond its limits for a distance of twenty miles the water-works,*" etc., authorized by article 5645; also in article 5647 power is expressly given the municipality to

> acquire and hold any land, servitude or usufruct, within its limits or *within a circuit of twenty miles thereof.*

Take also paragraph 15, relating to "Abattoirs." Article 5679 gives in express words power to

> establish, regulate and manage public abattoirs, either within or *without the municipality.*

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Here we find two instances at least of analogous powers conferred, one with respect to providing waterworks to supply the towns with water and the other with respect to abattoirs, which concerned the health of the citizens, and in both cases we find extra-territorial powers expressly given while with respect to lighting the town with electricity any such extra-territorial powers are absent and withheld.

Construing, therefore, these sections providing for the establishment of "a system of lighting by gas, electricity or otherwise" in the cities, and towns in which sections no reference whatever is made to the exercise beyond the municipality's limits of the powers conferred, with the sections relating to waterworks and water and to abattoirs where it is specially declared that the powers given may be exercised extra-territorially, and construing them in the light of article 5281, above quoted, which gives jurisdiction to the municipalities (*inter alia*) for the exercise of all powers conferred upon them over its territory and beyond when specially conferred, I have no difficulty in limiting the exercise of the lighting powers they confer territorially, nor have I for the same reasons any difficulty in construing the general article 5279 giving the municipality the power to acquire movable and immovable property and to draw promissory notes, etc., in the execution of any of the powers conferred upon it by law as being confined to the territorial limits of the municipality and not exercisable with respect to property beyond them unless in cases where express extra-territorial powers have been given or where they will be necessarily implied from the very nature of the power exercised.

No such express extra-territorial power is given

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with respect to the lighting contracts; it should not in my opinion be implied as existing and arising necessarily out of the power to establish a lighting system, and, therefore, does not exist at all.

I have referred to and read the authorities which the respondents cite in their excellent factum, but I agree with Mr. Geoffrion that the question we have to decide is not one upon which authorities will help us very much. It is one of the fair and reasonable construction of the powers conferred on the councils of cities and towns by a general Act of the Legislature of Quebec.

I do not understand Mr. Geoffrion to controvert or question the general rule that a municipal corporation can exercise its corporate powers only within its territorial limits.

What he contended was that the general powers of the "Cities and Towns Act" were expressed in terms amply broad enough on a fair and reasonable construction to vest the council with the power of purchasing this power-house and plant admitted to be outside of the municipality, and that the method adopted for its purchase was also within the council's powers.

For the reasons given I cannot agree to either of his contentions, but conclude that the by-law in controversy is *ultra vires* and illegal.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—This appeal is taken by a corporate body that claims to have entered into a contract with the municipal corporation known as the Town of Shawinigan Falls, in the Province of Quebec, for the purpose of selling to the latter corporation an electric

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plant, including therewith a real estate property beyond the limits of the town.

The council of the town passed an alleged by-law to carry out said purchase involving a price of about $40,000.

The respondent, the Shawinigan Water and Power Company, being ratepayers objected and instituted this suit to set aside such proceeding on the grounds, amongst others, that, unless and until the ratepayers had approved, the council could not make such a contract, and that, in any event, the municipal corporation had no power to buy such real estate beyond the limits of the town.

We must never forget that a municipal corporation is the mere creature of a statute and can only exercise such powers as the statute gives it and in the manner given thereby.

It is urged that power was given by statute to the council to establish a system of gas or lighting by electricity and a further power to sell the surplus product when established.

These powers pre-suppose that the purpose permitted must be exercised in the manner in and by which the council, by its general power of creating debt, is enabled to so act.

If the establishment of either system had been possible within the means of the taxing power the council possessed, it was quite competent for it to have installed such a system.

It is conceivable a small beginning of that kind might have been instituted, but this far exceeded such a thing.

It is entirely beyond the purview of the special and general statutes on which the council of this

municipal corporation rests for all its authority that it without the ratepayers' vote can make such a contract as herein is involved.

If the price to be paid had been such as to fall within the powers of the then existent council relative to the imposition of rates or taxes, it might by virtue of the authority given and exercised have contracted for an electric plant.

Indeed, had it been attempted to found the contract upon an exercise of the special taxing power given by article 5668, R.S.Q., 1909, relative thereto, I am not prepared to say it would have been absolutely impossible to bind such specially selected classes of ratepayers as there had in view. I have not fully considered what are the possibilities involved therein, for it is entirely another thing that is being attempted. The vendor is not, by the terms of the by-law or bargain, to look to any special class, but to the entire body of ratepayers. We must, therefore, consider it as seeking by this by-law to bind the entire body of ratepayers. It is not a mere question of making one by-law as to part of a project and another later on, as may occasionally happen, in order to complete the business. The attempt is to mortgage, once and forever, the whole ratepaying property of the town, and contract on that basis. It is no answer to say the town had another power even if it had in truth as to which I say nothing.

The truth is the whole business seems to have been gone about under a misapprehension of the powers of the council, or disregard thereof.

The price exceeded the taxing powers of the council for the then current year and the ordinary power to contract or which by any reasonable implication

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could extend to a contract covering the long term over which the payments to be made in liquidation were spread.

Cases have been cited where a town has been made to pay for a fire-engine when the sale had been fully executed by the delivery and use thereof by the corporation, even when a doubt existed as to the council having acted properly. In all these cases I have seen, no doubt existed of the power to enforce by sufficient levy the price in any given year.

Even of such like cases when, as in the case of *Waterous Engine Works Co.* v. *Town of Palmerston* (1), which came to this court, the transaction has been nipped in the bud, as is sought to be done here, it has been held null when the goods had not been fully delivered and accepted, and the necessary forms had not been gone through for so completing the contract as to make the town a debtor.

A clumsily worded section in question here seems to give ground for saying some one contemplated the extensive system of the town not only supplying its own wants and those of its inhabitants, but also undertaking to produce and sell to an unlimited extent to others. But the very words imply that the usual powers vested in the council for the legal establishment of such works must be resorted to. To permit the execution of such a remarkable scheme was going a long way, but for us to tack on to it the power to dispense with the sanction of the people to pay would be going still further.

The council never sought the proper means of referring the question to the ratepayers to pass upon it.

(1) 21 Can. S.C.R. 556.

Appellants should have got a further amendment to the charter, either imposing the imperative duty on the council to carry out the scheme which might have implied dispensation from consulting the people, or by express language dispensing therewith.

It is not merely the form of a loan that is in question, but the absence of any distinct power in the council enabling the creation of an indebtedness which has to be provided for over a term of years in the future. In the absence of any such power to create indebtedness the municipal council has no implied power.

Borrowing to pay any debt extending over a period of years is what the general power contemplates. Certainly the council cannot do that indirectly which the law does not permit to be done directly.

It is urged that the power of establishment having been given everything else is to be implied, including the power to buy real estate outside the town.

Where a duty had been imperatively imposed upon a municipality and had to be discharged in obedience to a statute things necessary to be done to obey the law have been held impliedly as within a council's absolute power. The case of *Pratt* v. *City of Stratford*(1), was such a case. The obligation of the city there rested on a statute imposing a duty, and similar cases are to be found cited in the argument or judgment in said case. No such duty had been imposed here. It was left entirely optional.

If every power a municipal council has entrusted to it, were to be held as carrying therewith every pos-

(1) 16 Ont. App. R. 5.

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sible implication of power needed to execute it and to create without regard to the ratepayers debts to be met in future years, I fear our municipal system would receive some severe strains. It is urged that the town had power to buy land outside the municipal limits for water-works. Such a power has existed ever since 1857 by statute. But this transaction does not proceed thereupon. And, indeed, that power could not be used for any indirect purpose of trying to produce something else.

The two purposes might well be executed together if the legislature had said so, but it has not. And the mere fact that such express power had to be given by statute to enable the town to acquire land outside, is evidence of what the law has ever been held to be.

Some American cases are cited to shew this power exists by implication.

Of those cited a number clearly give no countenance to the proposition, but rest on statutory powers expressly given.

I was surprised to hear it said that the late Judge Cooley had given his sanction to such a proposition in the case of *The Mayor of Detroit* v. *The Park Commissioners* (1). But, on reference to that case, page 605, I find his position entirely misconceived. He said in his judgment therein:—

> But if we were to concede all that respondents claim in this regard the case would be still undetermined. This is not the ordinary case of a city park. Belle Isle is outside the city limits, and it is not pretended that the city could have purchased, improved, and controlled the same as a public park except by virtue of special legislation. This legislation was obtained (Local Acts, 1879, p. 215), and it not only empowered the city to purchase and create a debt therefor, but to erect a toll-bridge across to the island, and to extend its police authority over the territory. Here were very important

(1) 44 Mich. 602.

franchises which the city could not pretend to claim except by this sovereign grant.

In the same case there is an expression in relation to some cases cited which to a hasty reader might suggest some such notion as advanced in argument. But an examination of the sentence does not warrant it and a reference to the cases in question shews clearly the learned judge spoke of something else and in no way related to this point.

Another of these cases illustrates how difficult another able judge felt it to maintain even a small contract to procure an outlet to a sewer. The contract only involved the expenses of procuring labour, so far as I can see. And the case might well have rested on the imperative statutory duty to avoid a nuisance. The head-note is entirely misleading in this latter case.

It is not necessary, as this case has been fully dealt with in the court below, again to analyze as has so well and exhaustively been done in the court appealed from, all the statutes bearing upon it. I do not bind myself to uphold every opinion on minor details expressed in course of that work, but reaching, in the main, the same results, I do not see fit to enter upon the repetition of what I approve.

I think the appeal should be dismissed with costs.

DUFF J.—I think the appeal should be dismissed on the short ground that section 18 of the special Act of 1908 (chapter 95) does not authorize the establishment or maintenance outside the municipal boundaries of the works to which that section refers. Article 5281, R.S.Q. (1909), which admittedly governs the municipal corporation in question, provides:—

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5281. The corporation shall have jurisdiction for municipal and police purposes and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it.

It seems to me to be indisputable that the "power to establish and maintain a system of lighting" by gas or electricity with which this municipality is invested by its special Act is one of the "powers" referred to in this article. Ambiguity, no doubt, lurks in the word "powers" and there are some corporate capacities and faculties commonly described as "powers" (the capacity to contract as suggested by Mr. Geoffrion is an instance of them), the exercise of which outside the municipal limits the legislature cannot have intended to prohibit. It is not necessary for the purposes of this case to define with precision the classes of powers which fall within the scope of the section in question. I see no reason to doubt that it does apply to all powers in respect of the establishment or operation of municipal undertakings which are *privilegia* in the strict sense. Wherever a corporation to which article 5281 applies is empowered by the legislature to construct or operate works which may in the construction or operation of them affect others prejudicially and where, by reason of such statutory authority, the responsibility of the corporation for harm caused by acts done in the course of exercising or professing to exercise such powers is determined by a rule which is not the same as that applicable to determine the responsibility of persons doing the like acts without statutory authority — then unless there be some legislative provision which expressly or impliedly provides to the contrary the powers so conferred are powers which under the terms of that article must be exercised within the municipal

limits. It seems to me to be incontestable that the powers conferred by section 18 are powers of this character. If the corporation were, for example, to establish a system of lighting by electricity under that section, it is not doubtful that their responsibility for harm arising from the operation of such a system would be governed by the principles of *Canadian Pacific Railway Co.* v. *Roy*(1), and *Dumphy* v. *The Montreal Light, Heat and Power Co.*(2), and not by articles 1053 and 1054 of the Civil Code. It was clearly not intended that the municipality should enjoy such a qualified immunity in respect of works established outside the municipal limits except in cases in which it is otherwise specially provided.

I should notice Mr. Geoffrion's contention that it is impracticable to establish within the municipal limits such works as those contemplated by section 18 and that, consequently, the authority to exercise the powers conferred by that section beyond those limits must be implied as necessarily incidental to the powers expressly conferred. Now such an implication is not permissible unless, on reading the relevant provisions of the Act as a whole, you find that they are not incompatible with the inference that the legislature intended to give the authority which is to be implied. It appears to me that article 5281 in terms forbids such an inference unless there is something in the language of the enactment by which the power is conferred indicating an intention that it is to be exercisable beyond the municipal limits. In the special Act there is in respect of the establishment and maintenance of a system of lighting (whatever may be

(1) [1902] A.C. 220. (2) [1907] A.C. 454.

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said respecting the authority to sell surplus power) nothing in the least degree indicating any such intention.

ANGLIN J. (dissenting). — In this action the validity of a by-law of the Town of Shawinigan Falls providing for the purchase of the plant and undertaking of the Shawinigan Hydro-Electric Co. (the appellants) is impugned by a rival company (the respondents).

The grounds of attack are:—

(1) That the plant to be purchased is situate outside the limits of the town.

(2) That the purchase involves the making of a loan by the corporation without the assent of the ratepayers required by law.

(3) That the by-law does not provide for an annual special tax on the owners or occupants of buildings to meet the interest on, and to provide a sinking-fund to repay, the debt to be incurred.

(4) That the scheme includes the giving of promissory notes by the town corporation for a considerable part of the purchase price.

Other grounds of attack were abandoned.

Without determining whether or not, if its powers depended solely on the general provisions of the "Cities and Towns Act" (R.S.Q. 1909, arts. 5256 *et seq.*), the acquisition by the Town of Shawinigan Falls of a power plant and electric light undertaking partly situate outside the town limits would be *ultra vires* (*vide* Dillon's Mun. Corporations (5th ed.), sec. 980, note 1), I am of the opinion that, having regard to the peculiar circumstances and to the special legislation enacted for the town, it was within its powers,

if otherwise properly exercised, to acquire this property beyond the municipal limits.

Article 5667 of the Revised Statutes of Quebec reads as follows:—

> The council shall have all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light their houses, buildings or establishments.

The corresponding provision in the charter of the Town of Shawinigan Falls (8 Edw. VII. ch. 95, sec. 18) reads:—

> The council is vested with all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light up their houses, buildings or establishments, and for selling the surplus power produced by the power generating the electricity which it may have acquired or established for such purpose to the municipality of the Village of Shawinigan Bay or to its inhabitants, and to the Grand'Mère Electric Company or its successors.

The acquisition, as distinguished from the establishment, of a power development is clearly contemplated by this special article. It cannot have been the intention of the legislature to confine the town to the acquisition of a steam-power or plant in view of the many advantages of generating electricity by water-power, the general use now made of water-power for that purpose and the exceptionally favourable situation of the town for the utilization of such power. Moreover, the legislature would seem to have contemplated the acquisition of a power generating surplus energy. It provides for the disposition of the surplus power produced to another named municipality and to a named company. This provision obviously contemplates the acquisition of a water-power. It is most improbable that the legislature would

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authorize the town to embark in the business of producing power generated by steam in excess of its own requirements and selling the surplus to a neighbouring municipality and an electric company. The capacity of a steam-plant can be accurately gauged. But in order to secure a suitable or available water-power it might be necessary to acquire one which would produce considerable surplus energy. It would perhaps be too much to infer that the legislation of 1908 was enacted to enable the town to acquire the plant of the appellant company, which was actually supplying electric energy to the municipality and the company to which the town is authorized to sell its surplus power, although if this was not intended it is a little difficult to understand why these two bodies were named as prospective purchasers of the surplus. But it is certainly not unreasonable to assume that the legislature was informed of the situation at Shawinigan Falls in regard to water-powers: that it knew that no water-power within its limits was available to the town; that, by its ownership of the lands along the river bank, the respondent company was in a position to prevent the town acquiring any water-power within its limits; and that, if a water-power was to be acquired by the town, it must be in adjacent territory outside its limits. The evidence establishes these facts. When, therefore, the legislature specially provided for the acquisition by the town of a "power" and for the disposition to a neighbouring municipality and to a company of the surplus energy produced from such power, it seems a reasonable, if not a necessary inference, that it contemplated and intended to sanction the acquisition of a water-power situated outside the town limits. Of course

this purpose might have been more clearly expressed. Had it been, we probably should not have had this litigation.

Moreover, under the by-law, the property in question is to be acquired not merely for electric lighting purposes, but also for the establishment of water-works. Under the provisions of the "Cities and Towns Act," now consolidated as articles 5646-7, R.S.Q., 1909, the town had the right to acquire for water-works property situate within a radius of twenty miles beyond its limits. The property in question is within that radius. There is nothing in the record which warrants an inference that the town council did not *bonâ fide* intend to utilize it for the establishment and maintenance of water-works — nothing to justify the conclusion that the reference in the by-law to the establishment of water-works was introduced merely as a cloak to cover up any possible illegality in the acquisition of outside property for the purpose of an electric lighting system.

Articles 5281 and 5588 of the Revised Statutes of Quebec, bear upon the governmental authority of the municipality, not upon its right to own and use property. Dillon on Municipal Corporations, sec. 980, n. 1 (5 ed.).

For these reasons I think the first objection to the by-law fails.

Neither can I accept the view that a purchase of property by a municipality on credit involves the contracting of a loan within the purview of articles 5776 *et seq.*, R.S.Q. That it involves contracting an indebtedness is clear; but I think the distinction between the borrowing of money and the contracting of a debt as the result of a purchase on credit is equally

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clear. Dillon's Municipal Corporations (5 ed.), sec. 279(*n*). The "Cities and Towns Act," in article 5783, R.S.Q., marks the distinction between loan and other municipal indebtedness. A perusal of the articles 1762-1786 of the Civil Code, defining and dealing with loans, has satisfied me that the legislature did not intend to include under the term "loans" in the "Cities and Towns Act" debts incurred for purchases made on credit.

Nor does the fact that the property is acquired subject to a hypothec put the purchaser in the position of a borrower or give to the transaction any of the legal notes of a loan. True, the borrower obliges himself to pay to the hypothecary creditor the part of the purchase price represented by the amount secured by the hypothec; but he pays it as purchase money, not as the return of money borrowed. Of course, there might be a case in which a vendor had been induced to hypothecate his property on the eve of selling it to a municipality in order to enable the latter to evade the provisions of the law restricting its borrowing powers. When such a case is made out the court will, no doubt, find means to prevent an evasion of the law. This is not such a case. It is an ordinary purchase on credit of property subject to a hypothec with the result that part of the purchase price becomes payable not to the vendor, but to the hypothecary creditor to satisfy his charge.

I agree, however, with the majority of the learned judges of the Court of King's Bench that the provisions of article 5668, R.S.Q., should, notwithstanding the use of the word "may," be construed as imperative in the event of the exercise by the council of the power conferred by article 5667 in such a manner that it involves incurring a debt.

Money for the purchase or establishment of a municipal electric lighting system might, I incline to think, be raised by a loan contracted under the provisions of articles 5776 *et seq.*; and, in procuring money in this way, submission to the "proprietors who are municipal electors" would be requisite (art. 5782, R.S.Q.). Provision for re-payment of such a loan would, of course, be made under article 5777, R.S.Q. The money to pay it having been thus procured, no provision for future expenditure on account of the purchase price would be necessary and the duty imposed by article 5668, R.S.Q., would, in that case, not arise.

But if, instead of borrowing the money for that purpose, the municipal corporation purchases its plant upon credit, thus incurring a debt — a course which the provisions of articles 5667-8, R.S.Q., clearly imply its power to adopt — the council is obliged to exercise the powers conferred by article 5668 to meet the interest on the debt and to establish an adequate sinking-fund to pay the principal. The "Cities and Towns Act" contemplates indebtedness being incurred otherwise than by loan (article 5783), but it contains no provision, such as is frequently found in municipal legislation, (*vide* "Ont. Mun. Act," 1903, sec. 389), prohibiting the raising on the credit of the municipality of any money not required for ordinary expenditure and not payable within the municipal year otherwise than under a by-law submitted to the ratepayers. The burden of the special tax for payment of the expenditure being imposed upon the "owners or occupants of houses, shops or other buildings" (article 5668), and the total debt of the town not amounting to twenty per cent. of the value of the

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taxable immovable property (article 5783), no reason exists for requiring the approval of other ratepayers or proprietors. Not only do articles 5667 *et seq.* contain no reference to an approval of the expenditure for establishing a lighting system by electors or taxpayers being required, but there is no means provided in the statute for obtaining the approval of "owners or occupants of houses, shops, or other buildings." If, without the authority of express legislation, such as we find in articles 5667 *et seq.*, a town council would possess the power to make such an extraordinary expenditure as is involved in the acquisition or establishment of an electric lighting system, it certainly would not have the still more extraordinary power to make such a purchase on credit and to impose the debt thus created as a burden upon present and future owners or occupants of buildings without their assent. That a town council has the latter powers is an implication from article 5668. It follows, I think, that in exercising them, while the assent of owners or occupants of buildings or of ratepayers or electors is not required, the provisions of article 5668 are obligatory.

But, must the council, in the same by-law which provides for the purchase, or concurrently with its passage, at the peril of its being held invalid and quashed should it omit to do so, provide for the imposition of the special annual tax directed by article 5668? I think not. The exercise of the power conferred by article 5667 entails the obligation to provide for interest on any debt thus created and for a proper sinking-fund. To create this obligation a declarative recognition of it by by-law is not required and would serve no purpose. The obligation arises out of the in-

curring of the debt. To provide when enacting the purchase by-law for the levy of the annual special tax to meet interest and sinking-fund seems to be both unnecessary and impracticable. Revenue from the system may provide the amount needed in whole or in part. That revenue will vary from year to year. The special tax to be imposed for the annual interest and the sinking-fund, or for so much of them as the revenue, if applied to that purpose, does not cover, is to be an annual tax. The value of the property assessable may also vary from year to year. If the council were obliged to provide at the time of the purchase for the annual rate of the special taxation to be levied in each year, a figure too large or too small might be named. It is the right of the creditor that adequate provision be made; it is that of the taxpayer that the tax shall not be excessive. The rate of the tax may, no doubt, be struck in advance in each year upon an estimate of the amount required to be raised and of the value of the assessable property. An annual by-law imposing it and directing its levy would seem necessary. The council may be restrained from paying any part of the debt, principal or interest, out of its general funds or revenues. In proper proceedings, it may be compelled, by mandamus, to impose in any year a special tax under article 5668, adequate to provide for the interest and a proper sinking-fund so far as they are not met out of the revenue. But I find nothing in the Act which requires the council, when enacting the by-law for the acquisition or establishment of a lighting system, to provide even for the imposition of the annual special tax for the first year — still less for imposing that tax during the whole term of the debt.

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The obligation to impose an annual and an adequate tax exists. The council may be compelled to discharge that duty from year to year. It may be restrained from diverting other funds or sources of revenue to that purpose. The interests of the creditors on the one hand and of the general ratepayers on the other being thus protected, I see no reason to hold the by-law in question invalid because the council has not by it, or by a by-law enacted concurrently, formally declared that interest on the debt incurred and a sinking-fund to meet it shall be provided for by the annual special tax mentioned in article 5668, or that owners or occupants of buildings in the town shall be liable to such tax when annually imposed. *Lex neminem cogit ad inutilia.*

The failure to provide, in the impugned by-law, for the imposition of the special tax under article 5668 is not alleged in the declaration as a ground of its invalidity. This point was raised for the first time in the judgment of the majority of the learned judges of the court of appeal.

If empowered to acquire the property in question and to incur a debt in acquiring it, the town would appear to have the right to give its promissory notes to evidence that debt (art. 5279, R.S.Q., pars. 2 and 4). The provision in it for the giving of such notes would not in any case suffice to render the by-law void although the notes themselves should be held invalid.

For these reasons I would with respect allow this appeal with costs in this court and in the Court of

King's Bench and would restore the judgment of the learned trial judge.

Appeal dismissed with costs.

Solicitors for the appellants: *Geoffrion, Geoffrion & Cusson.*

Solicitors for the respondents: *Meredith, MacPherson, Hague & Holden.*