Privy Council Appeal No. 62 *of* 1919.

John Mackay and Company - - - - - - *Appellants*

v.

The Corporation of the City of Toronto - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH AUGUST, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
MR. JUSTICE DUFF.

[*Delivered by* VISCOUNT HALDANE.]

The Appellate Division of the Supreme Court of Ontario has in this case affirmed a judgment of Middleton, J., which dismissed an action brought by the appellant to recover $42,546·50 for services alleged to have been rendered to the respondents and for disbursements in connection with such services. The appellant's firm carry on business at Toronto as accountants and advisers on business questions, and he claims to have been employed under a contract with the respondents, made by the Mayor and duly adopted and ratified by the respondents themselves, to report on a proposed purchase of the undertakings of the Toronto Electric Light Company and the Toronto Street Railway Company.

The respondents are a municipal corporation incorporated by the Municipal Act of Ontario, being Ch. 192 of the Revised Statutes of the Province. By section 10 of the Act the powers of a municipal corporation are to be exercised by the Council.

By section 249, except where otherwise provided, the jurisdiction of every Council is to be confined to the Municipality which it represents, and its powers are to be exercised by by-law. By section 258 every by-law is to be under the Seal of the Corporation, and is to be signed by the head of the Council, or by the presiding officer at the meeting at which the by-law is passed, and by the Clerk.

Early in 1913 the then Mayor of the City, Mr. Hocken, thinking it desirable that the City should acquire the undertakings of the Toronto Electric Light Company and the Toronto Street Railway Company, took steps, but without preliminary authority from the Council, to obtain advice and information as to the terms on which these undertakings could probably be acquired. In Toronto there is a Board of Control, established as provided by section 209 of the Municipal Act, to which the affairs of the Corporation are referred, but it cannot pass by-laws and can spend money only under the authority of the Council. Mr. Hocken, having in the month of April stated to the Board of Control that he had reason to believe that the City might acquire the two undertakings on favourable terms, the Council on the 18th June, 1913, upon the recommendation of the Board, resolved that $10,000 be appropriated to meet the cost of obtaining reports on the suggested transaction from three experts, named respectively Arnold, Moyes, and Ross. No discussion took place at this time about the employment of the appellant. But on the 22nd July the Mayor saw the appellant and intimated that he would like him to examine the books of the Electric Light Company and estimate the financial results if the City took over the Company's business and operated it. He asked the appellant for an estimate of the cost of his work and the time it would take. The appellant, according to his own evidence, replied in conversation that he seldom gave estimates of the cost of such work, and that his charge usually depended on three elements, time taken in the inquiry, expense involved, and his responsibility and the result of the inquiry. He went on to say that, while grateful for the Mayor's confidence, he was not an applicant for the patronage of the City, and that in a matter of such magnitude and importance, if the City had not sufficient confidence to entrust the inquiry to him without stipulating in advance what the fee should be, he did not want and would not accept the retainer. According to his account of the conversation the Mayor replied that he saw the reasonableness of this, but that he had the Board of Control to deal with, and that if the City acquired the properties there would be no disposition to look too closely at the bill, but that if the transaction did not go through the Bill would probably be thoroughly examined. The appellant's allegation is that he had stated the principles on which he fixed his charges, and that if the Mayor thought that was sufficient with which to go to the Board of Control, it was all right, but if not he did not want the retainer, and that, if the matter was intrusted to him but did not go

through, he was quite willing that any honest and capable man, for example the Mayor himself, should fix the amount. His account of the Mayor's reply is that the latter said that he was very anxious that the appellant should undertake the inquiry, and that his position as to terms would be satisfactory. According to the evidence of the Mayor himself, whom the trial Judge accepted as a satisfactory witness, he told the appellant that he could not possibly fix an exact figure, but that the appellant must keep his costs within what the City was paying to Ross and Arnold, and that he, the Mayor, protested against the notion that the charge for the work if completed should be greater than if it were not completed. The result of this evidence is to show that the appellant and the Mayor were not really *ad idem* as to the terms on which the appellant was to be remunerated, and that when the appellant went on with the investigation as, up to a certain point, he did, he must be taken to have done so at best on the terms of being paid on the footing of establishing a claim to reasonable remuneration. But even on this footing the question remains whether he could establish any contract at all for his employment against the Council.

It appears that on the 6th May, 1913, an Act, c. 125 of the Statutes of Ontario of 3 and 4 George V, had been passed enabling the City of Toronto to acquire by purchase all the rights and interests of the Toronto Railway Company in the street railway system, as well as those of all other companies and persons operating electric or street railways lying within the city. By the Public Utilities Act of the same year (c. 41 Ont.) the city is said to have been empowered to acquire *inter alia* any electrical undertaking in addition. But their Lordships are of opinion that even if these statutes conferred sufficient powers on the respondents to enter upon and to carry out the transactions as to which the appellant was instructed, the powers conferred were powers akin to those which, under sections 10, and 249 and 258 of the Municipal Act already referred to, could only be exercised by the Council itself, and by by-law under seal duly signed.

Their Lordships are further of opinion, on scrutiny of the minutes of the Council which have been put in evidence, and of the oral testimony, that the trial Judge and the Court of Appeal were right in their finding that there was no by-law authorising the exercise of any power to employ the appellant. It is true that the appellant set to work, and that this work resulted in his furnishing an interim report, which was afterwards printed by direction of the Council; but that report was never completed, and the acquisition of the undertakings in question did not go through. Even if the appellant could be entitled to claim on a *quantum meruit* it does not appear that he could have claimed an amount approaching the sum which he claims in this action. On this point they see no reason to differ from what was said by the trial Judge, who put a contingent figure for his remuneration at $7,500.

The question which remains is whether the appellant has a legal claim to anything at all against the respondents. It is argued on his behalf that the contract in the present case was an executed contract, and that the principle enunciated by Wightman, J., in *Clarke* v. *The Cuckfield Union* (21 L.J.N.S., Vol. XXI, Q.B. 349) applies. What that learned Judge laid down in that case in 1852 was that whenever a corporation is created for particular purposes, which involve the necessity for frequently entering into contracts for goods or works essentially necessary for carrying the purposes for which the corporation is created into execution, a demand in respect of goods or works which have actually been supplied to and accepted by the corporation and of which they have had the full benefit may be enforced by action of assumpsit, and the corporation will be liable, though the contract was by parol only and not by deed under seal.

But their Lordships are of opinion that the case before them is outside the principle of law so laid down. Putting aside the difficulty that it is far from clear that the contract here can be regarded as fully executed, it is obvious that the Corporation of the City of Toronto was not created for the particular purpose of acquiring the undertakings to which reference has been made. At best it was endowed with special powers, independent of and subsequent in date to those which it originally possessed, of taking steps to acquire them. Again this Corporation is not the creature of charter and as such endowed with capacity by the common law, but it is the pure creation of a statute. It may be that the effect of the Interpretation Act of Ontario (R.S.O., c. 1, section 27), which gives to every corporation the power to contract, makes this power a general feature of its statutory equipment. But the section cannot affect the prohibition imposed by the Municipal Act of the exercise of its distinctive powers otherwise than by by-law under seal. Their Lordships do not desire to be understood as saying that the powers referred to in the context are to be taken as covering the whole field of the capacity of such a corporation to contract. It can hardly have been intended by the legislature that, for example, note paper cannot be bought for daily use except by a special by-law under seal; it may well be that the power to engage a servant is not a power *ejusdem generis* with the powers with which the Municipal Act is dealing when it imposes restrictions on their exercise. The language of section 398, which enables by-laws to be made for providing for such minor appointments and for the carrying into effect of the council's own by-laws, appears to indicate that the power to make such appointments is distinguished from the special powers as to which the statute imposes restrictive formalities. But it is enough to point out that the new powers to acquire the undertaking of the Toronto Railway Company and the Electric Light Company, specially added by the two statutes of 1913 already referred to, assuming that they were sufficiently conferred, as an addition to those already in existence, belonged to the latter class. If so the judgments in the House of Lords in *Young* v.

The Mayor of Leamington (8 A.C., 517) show that the principle of *Clarke* v. *The Cuckfield Union* has no application, inasmuch as there is an express statutory enactment prescribing conditions for the exercise of all powers of this nature.

The decision of the Supreme Court of Canada in *Waterous Engine Works Company* v. *Corporation of Palmerston* (21 S.C.R. 556), was cited at the bar, and their Lordships were invited to prefer the dissenting judgment of Gwynne, J., to those of the other learned Judges who took part in that decision. There a municipal corporation was given express power under the then Ontario Municipal Act to purchase fire apparatus. The Act provided that all the powers of the Council should be exercised by by-law unless (which was not done by the Act) the exercise of a special power was otherwise expressly authorised or provided for. The defendant Corporation, contracted with the appellants for the purchase of a fire engine and 550 feet of hose. No by-law was passed sanctioning the purchase. It was held by a majority in the Supreme Court, consisting of Strong, Taschereau and Patterson, J.J., that this contract was not enforceable in the absence of a by-law. As the power to purchase fire apparatus was one of the powers expressly conferred by the Act, this appears to have been right. Gwynne, J., dissented. He thought that it was firmly established that in the case of an executed contract which he held that before him to be, inasmuch as the fire engine had been delivered, it was established that the common law rule that Corporations can only contract under seal, did not apply. He agreed that if a by-law was a statutory requirement the possibility of contracting informally would be excluded. But he considered that the provision requiring a by-law contained in the then Municipal Act applied only to the governing or legislative powers conferred by it, and not to the ordinary executive capacity to enter into contracts, which was an ordinary common law incident of a Corporation.

Their Lordships see no reason to differ from the view taken by the majority of the learned Judges who decided the case, or to restrict the class of powers to which the statutory condition requiring a by-law applied to the class of legislative powers referred to by Gwynne, J. Nor do they find any reason to so restrict that class in the present case which is governed by the existing Municipal Act the terms of which have already been quoted.

For the reasons given they agree with the judgments in the Courts below, and will humbly advise His Majesty that this appeal ought to be dismissed with costs.

In the Privy Council.

JOHN MACKAY AND COMPANY

v.

THE CORPORATION OF THE CITY OF TORONTO.

DELIVERED BY VISCOUNT HALDANE.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.