SUPPLEMENT TO

The Columbian.

BLOOMSBURG, PA., FRIDAY, JANUARY 25, 1884.

The Sewer Injunction.

JUDGE RICE'S OPINION.

COLUMBIA COUNTY, ss.

David J. Waller, *et. al.* Taxpayers, vs. George A. Herring, *et. al.* Presdt., and Town Council of the Town of Bloomsburg.

In the Court of Common Pleas sitting in Equity.

No. 1, February Term 1884.

Motion for continuance or dissolution of preliminary injunction.

I. If the present bill were rested upon a supposed right to compel the Town Council to specifically perform the contract with the Normal School and the county, it could not be sustained. The county commissioners expresly disavow any objection on the part of the county to the action of the Council in changing the route of the sewer, and the Normal School is not a party to the bill. But if it were, it is doubtful if its contract with the town would give it the right to appeal to a court of equity to restrain the corporate authorities from exercising their discretion in the location of the sewer, even though such action might involve a change in the route from that had in view when the contract was made, (see P. & R. R. R. Co. vs. City of Philadelphia, 8 Phila 112.) It would be manifestly improper for us to declare here what effect such change in the route will have on the contract. All that we decide is, that the rights of the Normal School under the contract, are private rights, and, so far as at present appears, must be adjudicated in another form.

II. For the purposes of the present motion, the averment that the defendants threaten to enter upon the lands of one of the plaintiffs in the bill, against his objection, for the proposed sewer is put out of the case by the denial of the defendants in their affidavits that such is their intention. Hence we need not inquire whether such fact, if uncontradicted, would constitute an equity upon which the bill by the present plaintiffs as *tax-payers* could be maintained.

III. The prayer of the bill therefore, so far as material, is for an injunction to restrain the defendants, the president and members of the Town Council of the town of Bloomsburg, from proceeding to construct a proposed common sewer over the route designated by the resolution of December 10, 1883. The resolution referred to proposes to materially change the route from that determined upon by a previous resolution adopted November 27th, 1883. The first ground of objection to the validity of the action of the council which we shall notice is, that the resolution was not passed by the number of votes required by the fourth section of the by-laws which provides as follows: "four members in Council shall constitute a quorum for the transaction or ordinary business, * * * but no resolution or vote * * * providing for any outlay of money by the town, or for authorizing or approving any contract, work, improvement or proceeding, creating or involving any pecuniary obligation or expenditure by the town shall be made or passed by less than four votes in Council." In connection with this by-law the fifth should also be considered. It reads as follows: "The yeas and nays upon any question to be determined in Council may be demanded by any member thereof, and thereupon the same shall be taken and entered in full upon the minutes." The minutes read as follows: Messrs. Sterling and Rabb moved the adoption of the following resolution, viz: Resolved, that the location of the main sewer as by resolution adopted Nov. 27th, be changed and the amended location be as follows; * * * * · The yeas and nays were called and resulted as follows: Yeas, Messrs. Rabb, Sterling and Hassert. Nay, Mr. Waller. The Presdt. declared the resolution adopted." If the yeas and nays had not been recorded in pursuance of a call the presumption would be from the declaration by the president of the result of the vote, that the resolution had been regularly passed and the burden would then be on the plaintiffs to show that less than the required number of votes had been cast in its favor. But in view of the fact that they were called and that in such case the by-law requires that they be recorded, we are compelled to start out with the proposition that the minutes on their face do not show that four votes were cast for the resolution. But it is asserted in the defendants' affidavit that the minutes are incorrect, that in fact the President cast his vote in the affirmative, thus making the four necessary votes. Two questions are therefore raised, first, was the President entitled to vote; second, is it competent for the defendant in the present proceeding to contradict or qualify their own record.

The organization of the town of Bloomsburg differs in many material respects, from that of boroughs. There has been some contrariety of opinion as to the authority of the chief burgess of a borough, incorporated under the general law, to take part in and preside over the deliberations of the Council. The affirmative was held in the Common Pleas of Chester county by Butler P. J. (Price against Beale 6 Luz. Leg. Reg. 149,) and the negative was held in the Common Pleas of Schuylkill county, by Pershing P. J. (Com. vs. Kepner 10 Phila. 510.) Judge Conyngham also held the negative under the charter of the borough of Wilkesbarre in a case reported in 8 Luz. Leg. Reg. 113. But as to the authority of the President of the town of Bloomsburg, the act of incorporation has left little room for question. Section 11 of the act of incorporation reads as follows: "The electors of said town * * * shall * * * elect a *Town Council* to consist of a president and six members who shall severally hold their offices for the term of one year, and the said Council and the president thereof shall respectively possess all the powers conferred upon them by this act, and shall perform all the duties enjoined thereby." (Act 4th March 1870 P. L. 344) Section II of the Act of April 3d 1851 which is made a part of the charter reads thus: "The powers of the corporation shall be vested in the corporate officers designated in the charter. They shall have power &c.," and section III of the same act provides that a majority of the corporate officers shall constitute a quorum. The president therefore does not act in a distinct capacity from, but is a constituent part of, that body designated as the Town Council in which the corporate authority of the town is vested and at the same time is the person designated by law to preside over its deliberations. He is none the less a member of the body, because he is elected by the people, and not by the body itself. He is counted in making up a quorum, and there being no negative provisions in the act, we are of the opinion that upon a fair construction of the same, he is entitled to vote at least where his vote is necessary to decide a tie or to make up the number required by the by-law under consideration. If any other construction were to be adopted, it might be fairly questioned whether the by-law would not be inconsistent with that provision of the general law incorporated in the charter which makes a majority a quorum. For would not that provision be inoperative if after a quorum of four, the president being one, were assembled they could take no action, except on ordinary business? Would it not require a quorum for the transaction of other than ordinary business to consist of five including the president? A by-law must not be inconsistent with the charter. The latter is the fundamental law of the corporation.

We now come to consider the second question. The law requires the corporate officers to make full records of their proceedings, and to provide for the preservation thereof" (par. III. sec. 3. Act April 3 1851,) and "to appoint a * * * secretary" (par. V ibid). It is the duty of the secretary to "attend all the meetings of the corporation, keep full minutes of their proceedings, * * * certify copies of any book, paper, record, by-law, rule, regulation, ordinance or proceeding of the corporation under the seal thereof, which copies so certified shall be good evidence of the act or thing certified &c.," (sec. 8 ibid). The record therefore, kept by the officer designated by law to keep the same is the primary evidence. Whether it would exclude other evidence of unrecorded action, or evidence to explain an ambiguity need not be decided here. Neither of these things are attempted to be shown. The defendants undertake to justify their action by a regularly and lawfully adopted ordinance, but in order to overcome the effect of the averments of the bill, it seems to us, that they are obliged to contradict the primary evidence of the method of its adoption; in other words, to show by patrol that four members voted in the affirmative when their record shows that only three so voted. Can this be done? We think it cannot. Parol evidence may, if necessary, be admitted to apply a resolution or recorded vote of a town to its proper subject matter, but not, in general to explain, enlarge or contradict its terms or meaning in respect to matters, (as for example laying out a highway or street) regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of law." 1 Dillon Mun. Corp. 2 Ed 5235. The same learned author says: "Parol evidence in a collateral "action cannot be received to contradict the "records of a public corporation required "by law to be kept in writing, or to show "a mistake in the matters as therein re-"corded" ibid Sec. 236. School District vs. Atherton 12 Mel. 105. The case of Morrison Adair vs. City of Lawrence 98 Mass. 221 is in point and we quote at some length from the opinion of the court: "The only "authority conferred on a city by which "it can legally appropriate money to cele-"brate a holiday, is found in St. 1861, c. "165 * * * It can be exercised only in "pursuance of 'a vote of two-thirds of the "members of each branch of the "City Council present and voting by yea "and nay vote.' There was no competent "evidence on trial of this case that the city "of Lawrence had duly exercised any au-"thority under this statute for the celebra-"tion of the Fourth of July when the plain-"tiff was injured; or that any one was "duly empowered to purchase fire-works in "behalf of the city to be used in such cele-"bration. The only competent evidence "of any such authority is to be found in "the record of the proceedings of the City "Council kept according to the provisions "of law. By the act * * * * it is ex-"pressly provided that each board com-"posing the City Council shall keep a "record of its own proceedings and that a "city clerk shall be chosen who shall be "the clerk of the board of aldermen. "Parol evidence was inadmissible to prove any acts or proceedings of the city council or that the record of such proceedings as kept by the clerk was erroneous or defective." (See also Mayhew vs. Gayhead 13 Allen 129.)

Now, whether our courts would go to the extent of deciding that the corporation could set up against a third person or to affect rights which might have attached on the faith of the action of the corporate officers, a failure on their part to comply with their own by laws we are not prepared to affirm. Other principles would then be involved which might affect the question. But after careful consideration and examination of the authorities, we are clear that the corporate officers themselves may be restrained from proceeding to incur debt for a public improvement of this nature where their official record shows on its face that their action will be in contravention of the same. There is no hardship in such a ruling of which they can complain; for this leaves the general subject within their control, and the authority to correct their record, if it is erroneous, is with them and not with the court. Taking by-laws IV and V together we conclude that in a proceeding of this nature the minutes should show—the yeas and nays having been called—four affirmative votes, and that, as they now stand, the injunction should for the present be continued.

IV. A further objection urged by the plaintiffs is, that, as a meeting intervened between the adoption of the original resolution (Nov. 27th,) and the adoption of the present change in the same, the action of the Council was in violation of by-law VI. In this we cannot concur. Surely that by-law was not intended to tie the hands of the Council for all time, and to prevent it from repealing an ordinance, or adopting another in its stead even though a meeting may have intervened. This, as we view it, was not a reconsideration of a former order, vote, or resolution, but an independent act or resolution as much as if the Council had repealed the former ordinance or adopted an entirely new route.

V. Assuming that by the construction of the sewer over the proposed route the debt will be increased to the amount covered in the bill, we are still unable to conclude, from the evidence now before us, that the resolution is invalid on that account. According to the report of the committee made June 6th, 1883, two *per centum* of the last assessed value of the taxable property of the town is.....$16,189.00

The present debt is...$16,195 24

The debt in 1874 was $10,867 88 $5,327.36

Difference..... $10,852 64

We assume from this report that the amount of existing indebtedness incurred since the adoption of the constitution and the present proposed increase in the same taken together will not exceed two *per centum* of the last assessed valuation. If so, then the case is within the ruling in Pike Co. vs Rowland 13 Nor. 238. If we are incorrect in this assumption and have misapprehended the plaintiffs' position an opportunity will be afforded for correction.

VI. It is averred in the bill that the resolution of December 10th, 1883, was adopted at a special meeting. On the argument it was conceded that this was incorrect. It was a meeting held in pursuance of an adjournment from the regular monthly meeting of December 5th, 1883, and hence special notice to the two absent members of Council was not required. The learned author to whose work we have had frequent reference says:—"A regular meeting unless special provision is made to the contrary, may adjourn to a future fixed day, and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting of which it is indeed, but the continuation" 1 Dillon Mun. Corp. ss 225. This might not be conclusive on a court of equity, if it satisfactorily appeared that the bringing of the matter up for consideration at an adjourned meeting, when there was not a full attendance and when it was not expected was done for sinister and corrupt purposes or was the result of a trick to head off opposition and to prevent a full consideration of the matter by the whole Council. But however this may be, we find nothing in the affidavits which would warrant the court in annulling the action of the Council for the cause of complaint now under consideration. We may doubt the wisdom and expediency of a majority, in a matter so important as this, standing upon their strict legal right to proceed in the absence of members who have had no actual notice or knowledge of the meeting. But we are not authorized to say that they acted illegally, nor that their action was inspired by unworthy motives to prevent the minority from expressing their dissent, nor that it was not the result of their deliberate and honest judgment. It would establish a very dangerous precedent to infer either of these things from the fact that the action was taken at an adjourned meeting and in the absence of other members of the Council. For such a ruling, while designed to protect a minority in their rights, might become the subject of great abuse by a faction perversely refusing to attend the regularly adjourned meetings and thus obstructing the transaction of necessary and legitimate business.

VII. Finally, several considerations not directly affecting the legality of the action of the Council were urged upon the argument as reasons for restraining the defendants from proceeding. Chief of these reasons are: 1st, that the Sanitarium and the D. L. & W. R. R. depot will not be accommodated; 2nd, that the expense will be increased; 3rd, that by reason of the angles in the route as now proposed the sewer will be likely to become obstructed; 4th, that releases for the right of way over the new route have not been procured, while over the former route they have been; 5th, that the effect of the change will be to release the Normal School from its contract, and thus to cast an additional burden on the town. The defendants assert, on the other hand, that some if not all of these objections are in fact unfounded, and that the present plan has advantages over the former one, which we need not here enumerate. We are not prepared to say that all of the objections to the present plan can be sustained, nor that such as are well founded are not counterbalanced by other advantages which it will have over the former plan. However this may be, we feel constrained to say, that the grounds of objection to a change in the route as urged upon the argument are well worthy the consideration of the Council, and if they have not already been fully weighed it may not yet be too late for that body to consider them before proceeding farther.

But we are clearly convinced, that, for none of these reasons, nor for all taken together is the court authorized to interfere. This results from the nature of the extreme remedy here invoked and the principles which control its exercise, as well as from the independence of the Council from control by the court, in matters of discretion. In general a preliminary injunction will not issue in a doubtful case; and the equity power of the court, so far as it can be marked here, extends only "to the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community, or the rights of individuals." In adopting a plan and route for the public sewers in the first place and in modifying and changing the same the Council acts within the scope of its authority. To that body is delegated the discretion, and its judgment is not to be controlled by the court. We may restrain illegal acts, and may possibly interfere in a very clear case of abuse of discretion, and also where they transcend or misjudge their powers, but not otherwise. When a chancellor undertakes to pass upon the wisdom of their acts he enters their domain, and substitutes his judgment for theirs. Over the subject under consideration the legislature has given to the corporate authorities large powers, and their duty to the public and the municipality demand of them the exercise of discretion and vigilance. Presumptively they act for the public good, and if they err in judgment the corrective power is in the people and not in the court. Upon this subject Judge Dana pertinently says: "They may transcend their powers or fail in their duty and thus by acts of commission or of omission become amenable to the supervisory control of the court. But to warrant interference by injunction with the exercise by the defendants of the powers and discretion specially intrusted to them by the legislature, the case should be clear from doubt." Ford vs. the burgess &c., 6 Luz. Leg. Reg. 54. The authorities upon this subject are abundant and uniform. 1 Dill. Mun. Corp. 58; Carr vs. Northern Liberties 11 C. 329; Wharton vs School directors 6 Wr. 362 (opinion of Judge Woodward); Wain vs. Phila. 3 Out. 237; Rounfort vs. the Council 2 Pears. 101; Parrish vs. the city of Wilkes-Barre 11 Luz. Leg. Reg. 241.

Except for the reasons affecting the question of the defendants compliance with by-laws four and five we conclude that the court has no authority upon the present showing to interfere to control their action. But until the objections suggested in that connection are removed the injunction must be continued.

And now to-wit Jan. — 1884 the preliminary injunction heretofore awarded is continued until further order; subject, however, to the right of the town council to proceed in a lawful and regular manner in the adoption of any resolution or ordinance within their legitimate powers relating to the sewer question, or to validate and correct their former action and proceedings; and also with leave, on due notice to the plaintiffs or their solicitors, to move to dissolve or modify this injunction for cause shown.

Jan. 19th '84 CHARLES E. RICE.

Presdt. Judge 11 Jud. Dist. Presiding by virtue of the certificate of Hon. William Elwell Presdt. Judge filed Jan. 1st 1884.