

3rd. Because monuments have not been placed at the front and rear angles of the lots in two concessions, as stated in the by-law.

4th. Because the sums levied to pay the expenses were not raised according to the statute: that is, not on the proprietors of land in proportion to their respective quantities of land in the two concessions, but on the assessed value of the land, thereby subjecting the persons assessed to a rate on the value of their buildings and improvements, and not on their land alone.

The by-law recited that there had been disputes about the boundaries of the 13th and 14th concessions of Burford; that with a view to settle them the municipal council had applied to the government, under the statutes 12 Vic., cap. 35, sec. 31, and 18 Vic., cap. 83, to have a survey made, and monuments placed and marked: that the survey had been made, and boundaries established: that the municipal council had caused an estimate to be made of the expense incurred, in order that the same might be levied on the proprietors in proportion to the quantity of land held by them respectively in the said concessions, and had ascertained it to amount to £62 10s.; and then the by-law enacted, that there should be raised, levied, &c., "from the proprietors of land in the said 13th and 14th concessions of Burford, in proportion to the quantity of land held by them in the said concessions, in the same manner as any sum required for any other purpose authorised by law may be levied, such a rate or sum of money (in addition to all other taxes rated on said property for the current year) as in the whole shall be equal to and defray the expense of such survey, and the establishment of such boundaries, amounting as aforesaid to £62 10s." And in the next clause it was enacted that the £62 10s. should be raised by means of a special rate of three-sevenths of a penny in the pound on the assessed value of the lands in the said 13th and 14th concessions of Burford.

It was sworn in affidavits filed by the applicant, who owned land in the 13th concession of Burford, that this by-law was then in full force and unrevoked; that he was informed by the township clerk that there was no record in the minutes of any application having been made to the Governor-General by the municipal council, as recited in the by-law: that in November, 1856, he searched for the monuments and boundaries which the by-law stated to have been planted, "and could find no such monuments," and from information he had received from other persons in a position to know, he believed that none such had ever yet been planted. In answer affidavits were filed, showing that the municipal council did pass a resolution on the 9th of October, 1852, for petitioning the Governor-General to "appoint Mr. William Wonham to survey the 13th and 14th concession lines, as also the West Town line: that Wonham was in consequence duly appointed to make the survey, and finished it in December, 1855, and reported the same to the municipal council and to the commissioner of crown lands on the 21st of January, 1856; and that in April, 1856, the commissioner of crown lands certified to the municipal council that the survey had been examined and found satisfactory, and made an order that the expenses should be paid.

There were also affidavits of two persons who assisted in the survey, and who swore that the survey was made and the monuments planted under the direction of Mr. Wonham.

M. C. Cameron showed cause.

The statutes referred to are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

It is explained that there was a misapprehension, which led to the statement that no application had been made by the council to the Governor-General. But it does appear that the application which they did make was not preceded by any application from the inhabitants, which it need not have been if it is to be looked upon as an application made under 12 Vic.

cap. 35, sec. 31, but which does seem to be necessary in regard to applications made under 18 Vic., cap. 83, sec. 8.

But what appears rather strange is, that this application was made in 1852, long before that act was passed, and required only the concession lines to be surveyed and marked as provided for by 12 Vic., cap. 35: but under it a survey has been made since the passing of 18 Vic., cap. 83, and monuments planted (if any were) to mark the boundaries of lots; as if it were upon an application made under that act, and not under 12 Vic., cap. 35, that the work was done.

We do not think this by-law can be sustained: for, first, the by-law recites, that an application was made under the statutes 12 Vic., cap. 35, and 18 Vic., cap. 83, to have the concessions surveyed, and monuments placed according to the acts.

Now the municipal council made only one application, which was in October, 1852, and that could not possibly have been made under the authority of 18 Vic. (1855.) So far as regards the placing monuments to mark the angles of lots in these concessions, the application did not ask for it, and could not legally have done so, at least not so as to make the proprietors liable for the expense if the lots have been marked by monuments, which we infer from the by-law.

And if the application could have been made under 18 Vic., it would clearly have required, by the terms of that act, to be preceded by a request from one half the resident landholders.

In fact an application legally made to the government for one purpose, and under one of the statutes, has been improperly made use of and acted upon, as if it had been made for another purpose and at a later time, under another statute.

It is only the later statute which could have authorised it at all, and the provisions of that act have not been followed and could not have been, because then (in October, 1852) there was no such act.

2nd. There can be no doubt that under either act it is only stone or other durable monuments that should be planted. We need not act upon that ground, however, as the other ground is clear; but it is true that while the applicant swears he can find no monuments, it is only stated in answer that monuments were placed, without saying of what kind. This is unsatisfactory.

3rd. Then as to the levying the rate: the 31st section of 12 Vic., cap. 35, requires that the survey shall be certified by the Commissioner of Crown Lands; but the commissioner has only certified to such a survey as the resolution called for, viz., surveying and marking the concession lines, not the marking the front angles of lots; and the by-law speaks of a survey made under both the acts, which, if it means anything, must mean that the angles of the lots were marked by permanent monuments; and if so, then the by-law authorised money to be raised for paying the expense of that operation. Whether the lots were in fact marked by boundaries is no where stated. In that respect the case is obscure. I only infer it from the recital in the by-law of the statute of 18 Vic., cap. 83.

The objection mainly relied upon against the manner of levying the rate is, that it makes the proprietors liable, not in respect of the quantity of land owned by them in either of the concessions, but according to the assessed value of such land, which would include buildings.

The council answer that they have followed the statute, and so they have literally (that is, the 12 Vic., cap. 35, sec. 31) in one respect and to a certain extent, in providing "that the amount shall be levied on the proprietors in proportion to the quantity of land held by them respectively in the said concessions, and in the same manner as any sum required for any other purposes authorised by law may be levied." But they provide in another clause for levying a rate of three-sevenths of a penny in the pound upon the assessed value of the land in the said 13th and 14th concessions.