

**QUEEN'S BENCH DIVISION.**

IN RE CLARK AND THE MUNICIPALITY OF THE TOWNSHIP OF HOWARD.

*Drainage by-law—46 Vic. ch. 18, sec. 588 (O.)—Validity of by-law—Costs.*

A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation is invalid. A by-law therefore defining the duties of inspectors of drains and (1) That obstructions wilfully placed in drains should be removed by the parties placing them there or at their expense, without regard to whether such parties owned the lands through or between which such drains were situated; (2) That if such obstructions were removed by the council, the costs should, on completion of the work, be paid by the council, instead of enacting that it should be so paid only in the event of the party chargeable with the obstruction failing to do so; (3) That if paid by the council the amount of such cost should be charged on the collector's roll against the lands of the party himself, instead of only against the party himself; (4) Because no appeal was provided for against such charging of such cost upon the collector's roll, was quashed with costs.

Aylesworth moved to quash "a by-law, entitled a by-law to define the duties of the inspectors of drains in the township of Howard," on the following grounds:

1. The said by-law is not supported by legal warrant or authority, and is wholly beyond the power of the municipal council of the said township to pass or enact.

2. The said by-law, so far as the same is a re-enactment to the statute 46 Vic. ch. 18, sec. 588, (O.) is wholly unnecessary and improper as municipal legislation and so far as the same departs from the said statute, or is contradictory thereto, is wholly illegal and void.

3. The said by-law does not profess to be limited in its application to drains constructed or opened up, under the provisions of the Ontario Drainage Act, but applies in terms to all drains whatever.

4. The said by-law enacts that obstructions wilfully placed in any drain shall be removed by the parties by whom such obstructions were so placed there, or at the expense of such parties without regard to whether such parties own the lands through or between which such drain is situated.

5. The said by-law provides that if such obstructions are removed by the council, the cost therefore shall in every case, on completion of the work be paid by the council to the party performing the work, instead of enacting that such cost be paid by the council only in the event of the party who placed the obstructions in the drain failing to pay such cost.

6. The said by-law directs that in the event of such cost being paid by the council the amount thereof be charged on the collector's roll against the lands of the party who should pay, instead of only against the party himself.

7. The said by-law makes no provision for any appeal from charging such cost upon the collector's roll.

The by-law was as follows:  
"A by-law to define the duties of inspector of drains in the township of Howard.

Whereas it is necessary and expedient to define the duties of inspectors of drains in the township of Howard.

Be it therefore enacted by the Municipal Council of the township of Howard, in Council assembled, as follows:

1st. That it shall be the duty of the drain inspector of each drain and its branches, when notified by the council of the municipality, or the head thereof, to have all obstructions removed from the said drain or of the branches thereof, which prevent the free flow of water, and if the said obstructions have been wilfully placed in such ditch, drain, creek, or water course, by any party or parties, the said inspector shall notify him or them in writing within two days to cause such obstructions to be removed, and if the said party or parties neglect or refuse to have the same removed, then the said inspector shall have the said obstructions removed without delay at the cost of the said party or parties, and when completed

the council shall pay the amount to the party performing the work, and the clerk of the municipality shall place the amount upon the collector's roll against the lands of the party or parties, with ten per cent. added thereto. And all drift wood or rubbish which may collect and impede the flow of the water the inspector shall cause to be removed and charged to the said drain."

September 8, 1885. O'CONNOR, J.—The first objection is general in its terms—points out nothing specific.

The fourth, fifth, sixth, and seventh grounds of objection are specific, and in my opinion well taken, and are cumulatively, if not severally, fatal to the by-law. It appears in some respects to have been intended to operate under section 588 of the Municipal Act (46 Vic. ch. 18), (O.) and in part corresponds with that section; but in other respects it seems to have been intended to be supplementary to and different from the statute.

At all events it varies from the provisions of the section and statute referred to. The section 588 is new, and I know of no other section of the same or any other Act giving even a semblance of authority for such a by-law. Its variance from the provisions of the statute, especially in matters of so delicate a nature as those affecting the rights of property, and of taxation, is decidedly fatal to its validity; nor can it be saved by the argument stoutly urged by Mr. Pegley, that its provisions in that regard are harmless inasmuch as the provisions of the statute are unaffected by the by-law. The statute is, indeed unaffected; but the by-law assumes to provide for a wider range of circumstances, and directs proceedings different from and apparently independent of those directed by the statute, and is, at least, misleading; likely to lead to confusion, and not unlikely to produce trouble; and for that reason alone should not be allowed to stand.

Besides, unless the by-law was intended to operate outside the statute, *ad extra*, it was and is wholly useless for then it would be a mere useless and a foolish confirmation or indorsement of the Act of the Legislature.

The enactment of the statute having been but a short time in force, there does not appear to be any case decided as regards the need or validity of a by-law under it; but amongst the older cases are some in which analogous questions as to validity have been decided; for instance *Bogart v. The Town Council of Belleville*, 6 C. P. 425; *In re Hagaman et al. and The Corporation of Owen Sound*, 20 U. C. R. 573; *In re Campbell and The Corporation of the City of Kingston*, 14 C. P. 285; and in the more recent case of *In re McLeod et al. and The Corporation of the Town of Kincardine*, 38 U. C. R. 617.

The by-law is composed of only one provisional clause, and though part of it is innocent, and might be allowed to stand, yet that and the vicious part are so blended that they cannot be separated; the whole must therefore be quashed, and with costs, as usual in such cases. An additional reason for allowing costs is that Reeve and council were notified in writing in January last, that unless the by-law was "repealed at once" proceedings would be taken to quash it, but they paid no attention to that warning.

*Order nisi absolute quashing by law.*

It is said that a New York scientist is devoting himself exclusively to the discovery of some means of making the shells of eggs transparent without injury to their membranous lining. His object is to make a study of the changes and processes by which life is developed from the ovum. From a utilitarian point of view, transparent eggs would be a desideratum for the purchaser.

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