CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

THE TOWNSHIP OF SOMBRA AND PETER MURPHY (PLAINTIFFS) } APPELLANTS;

AND

THE TOWNSHIP OF CHATHAM (DEFENDANTS) ..... } RESPONDENTS.

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*June 1, 2.

*Nov. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—Assessment—Extra cost of works—Drainage —R. S. O. (1877) *c.* 174—46 *V. c.* 18 (*Ont.*)—*By-law—Repairs —Misapplication of funds—Negligence—Damages—Re-assessment— Intermunicipal works.*

Where a sum amply sufficient to complete drainage works as designed and authorized by the by-law for the complete construction of the drain has been paid to the municipality which undertook the works, to be applied towards their construction, and was misapplied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards by another by-law levy or cause to be levied from the contributors of the funds so paid any further sum to replace the amount so misapplied or wasted.

APPEAL from the judgment of the Court of Appeal for Ontario dismissing the plaintiff's action with costs

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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and reversing the decision of the trial judge in favour of the plaintiffs and ordering the defendants to complete certain drainage works at their own cost and enjoining them against assessing certain lands and roads for costs in connection with the same.

The facts of the case and questions in issue upon the present appeal are stated in the judgment now reported.

Aylesworth Q.C. for the appellants.

Wilson Q.C. for the respondent.

GWYNNE J.—The present action is one arising out of an action instituted in the year 1887 by the appellants against the respondents, and in which judgment was recovered by the plaintiffs therein, the present appellants. The questions raised in the present action differ from any which have been before the court in the various actions heretofore passed upon under the drainage clauses of the Municipal Acts of the Province of Ontario. Upon the 14th of October, 1881, the corporation of the township of Chatham, professing to act under the provisions of the drainage clauses of ch. 174 of the Revised Statutes of Ontario of 1877, passed a by-law for the construction of a drain along the northerly or Sombra side of the town line, between Sombra and Chatham, from the north branch of the River Sydenham on the east to a stream called the Channel Écarté on the west, according to a plan and specifications which were mentioned in the by-law, which was entitled :

A by-law to provide for draining parts of *the township of Chatham* by the construction of the Whitebread drain, and for borrowing on the credit of the municipality the sum of $6,109 for completing the same.

This sum was the contribution of the municipality of the township of Chatham and of the owners of lands therein to the construction of the drain. The municipality of the township of Sombra and the owners of

land therein contributed the sum of $6,042, which sum was raised by the township of Sombra and was paid over to the municipal corporation of the township of Chatham. By the by-law it was enacted that one W. G. McGeorge should be, and he was by the by-law, appointed commissioner of the township of Chatham to let the contract for constructing the said drain and works connected therewith by public sale to the lowest bidder (not exceeding the estimates), but that every such contractor with good and sufficient sureties should be required forthwith to enter into bonds for the due performance and completion of his contract according to said plans and specifications and within the time mentioned in such bond (unless otherwise ordered by the council) and that it should *be the duty of the said commissioner* to cause the said drain and works connected therewith to be made and constructed in accordance with such plans and specifications and not later than the 31st day of December, 1881, (unless otherwise ordered by the council), and it was enacted that *the drain when completed* should be kept in repair by the municipality of the township of Chatham, and at the joint expense of the municipality of the township of Sombra and of the lands in the said municipalities assessed for the construction of the drain, said municipalities and said lands paying in the same relative proportion as for construction.

The township of Chatham lies immediately south of the township of Sombra, and is a very low lying marshy township, the lands therein being lower than the township of Sombra, and so the natural fall and drainage of all water in Sombra flowing southerly is into the township of Chatham, where, by reason of that township being so low, there was a difficulty in providing an outlet for water flowing in and through it. Prior to the passing of the above by-law for the

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construction of the Whitebread drain there had been constructed in Sombra in the years 1877, 1878 and 1879, three drains, known as Grape run or Government drain No. 1, which was in a natural watercourse from 10 to 15 rods wide, the Pacific drain and Buckingham drain, which, after crossing the town line between Sombra and Chatham had their outlet in Chatham and there discharged their waters brought from various parts of Sombra; and the object of the said Whitebread drain was, and the scheme for the construction thereof as adopted by the above by-law was designed, for the purpose of *cutting off all waters* coming down from Sombra into Chatham by the said three drains so as aforesaid constructed, and in fact of preventing *any water whatever* from flowing either naturally or by artificial means from Sombra into Chatham. Now, this having been the object of the drain the township of Chatham appears to have been mainly interested in its construction and the corporation of that township having been the devisers and originators of the work, and having charge of its construction, must be held to have been bound to take care in its construction that the three drains above mentioned which had been previously constructed by the township of Sombra should not be cut off and their waters let into the Whitebread drain until it should be so constructed as to be able to carry off into the River Sydenham on the one side and into the Channel Écarté on the other all water coming down those drains into the Whitebread drain, the waters in which when completed were, by the scheme designed, to have a continuous easterly to westerly flow at the rate of from two to three miles per hour. In the month of November, 1887, the present appellants commenced an action in the High Court of Justice in Ontario against the respondents, the corporation of

the township of Chatham and, therein, after alleging the passing of the said by-law by that corporation and that they had commenced to construct the drain but had never yet completed it, and that they had proceeded so negligently and unskilfully in what work they did in the premises that while they dammed up the said three drains and let their waters into sections of the new Whitebread drain which they were constructing before that drain had been so constructed as to be able to carry such waters to the Sydenham River on the one side, or to the Channel Écarté on the other, whereby the waters coming down the said three drains respectively, having no outlet, were forced back, and were still kept forced back, and the waters of some or one of them overflowed on to the land of the plaintiff Murphy, in the statement of claim mentioned and on to the roads of the municipality of Sombra to the damage of the said Murphy, and of the said municipality respectively, and they prayed

that the defendants, the corporation of Chatham, might be restrained by injunction from interfering with or stopping up the outlets of the said three drains so as aforesaid previously constructed in Sombra, or any of them, and from causing the waters coming down by them to be penned back and thrown upon the roads and lands of the plaintiffs, and that the defendants in the action should be ordered to complete the said drain in accordance with the provisions of the said by-law, and that the said defendants should be ordered to pay to the plaintiffs and each of them damages for the wrongful acts complained of, and the costs for the action, and for further relief.

The defendants in their statement of defence to that action insisted that the drain was completed from end to end, from the River Sydenham to the Channel Écarté, in accordance with the provisions of the said by-law of the said defendants in that behalf,

the earth excavated therefrom being placed (as they alleged) upon the town line, forming thereby a road and preventing the waters of Sombra from flowing upon the lands in Chatham, as it was intended to do.

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They alleged further, that the drain did not at any point intersect the township of Chatham, or receive or carry any water from the lands of Chatham, and that it only benefited the lands and roads in the township of Chatham *by cutting off and carrying away waters brought down from Sombra upon the lands and roads in Chatham*, and they denied that the plaintiffs or either of them had sustained any damage through any defect in the construction of the drain, or negligence on the defendants' part, and finally, they submitted that having, as they alleged they had, constructed said work under the authority of the said by-law, the plaintiffs if entitled to any relief whatever, *should seek the same by arbitration under the provisions of the Acts in that behalf.* In this statement of defence the plaintiffs joined issue and the case came down for trial in the month of April, 1888. The only issues to be tried were whether or not the plaintiffs, or either of them had received damage *caused as they alleged by the wrongful, unskilful and negligent conduct of the defendants* in the construction of the drain, and by suffering the waters coming down from Sombra in the said three drains constructed in Sombra, or in any of them, to be penned back and let into the new drain before that drain had been constructed so as to carry off such waters to the River Sydenham or Channel Écarté as designed by the by-law, and whether the said drain had never yet been completed, as alleged by the plaintiffs. The learned judge who tried these issues after a long and exhaustive trial, found among other matters of facts as follows:

2nd. That *the said Whitebread drain was negligently, unskilfully and improperly constructed* and does not accomplish what it was intended for, *but on the contrary by reason of such negligent, unskilful and improper construction the waters which have a natural flow from and off Sombra into Chatham were prevented from passing off and are forced back and overflow lands in Sombra, amongst those of the plaintiff Murphy.*

3rd. That prior to the construction of the said drain there were and still are three other drains running in a southerly direction through Sombra into Chatham, known as Government drain No. 1, Pacific drain, and Buckingham drain, across which three drains the Whitebread drain has been dug and constructed on the county line between the two townships of Sombra and Chatham, whereby the original outlets of the above mentioned three drains have been stopped and the waters coming down the same made to flow into the Whitebread drain which I find has not sufficient capacity *in its unfinished state* to carry off said waters, whereby and by reason whereof the said waters are made to flow back on the Sombra lands, and among them on the lands of the plaintiff Murphy, as well as the roadways in Sombra.

4th. The said Whitebread drain was never completed according to the original plans and specifications, *owing to the negligence of the defendants or those employed by them to do and perform and superintend the work, and has been left in such a state of incompleteness* that the waters which flow into the same do not wholly flow out but back up and flow over the lands in Sombra, to the damage of the plaintiffs.

5th. That there was undue and unnecessary delay in the construction of the said drain, the same having been allowed to extend over several years, during which the ratepayers in Sombra and among them the plaintiff Murphy, were greatly injured pecuniarily by reason of the said Government drain, the Pacific drain, and the Buckingham drain being stopped during all that time, thereby preventing the waters of Sombra flowing away as they would have done, and of right should have done *had it not been for the unskilful and negligent manner* of constructing the said Whitbread drain.

6th. The learned judge found further, as matter of fact, that the proper bed of the Whitebread drain is indicated by the red line on the plan prepared by Mr. John Jones, Civil Engineer and P. L. S., put in by the plaintiff and marked exhibit 7.

And he ordered that judgment should be entered for the plaintiffs, and he assessed the damages sustained by the plaintiff Murphy *by reason of the negligence of the defendants in the premises* at the sum of $150, and he ordered that judgment for that sum with full costs of suit should be entered against the defendants. And he further ordered that the defendants be required to complete the said drain within the period of twelve calendar months in accordance with said plan marked exhibit 7. And the learned judge further found that

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the amount assessed for and levied for the construction of the said drain and paid for by several ratepayers in Sombra and Chatham who were liable to be assessed for the same, was sufficient to complete the said drain as originally intended, and would have done so had the construction thereof been properly attended to and managed by the defendants, and he therefore ordered and declared that the plaintiffs were entitled to a declaration that the said drain be properly and efficiently completed as aforesaid, at the proper costs and charges of the defendants, and not at the cost and charges of those of the ratepayers who had already by special assessment, as aforesaid, contributed funds sufficient to have so constructed the same, with liberty to the plaintiffs to move if the same be not completed within the said period of twelve months.

In pursuance of these findings and directions of the learned trial judge, formal judgment was pronounced by the court in which the said action was pending whereby it was ordered and adjudged by the court:

1st. That the defendants do forthwith pay to the plaintiff Peter Murphy the sum of $150 for his damages in respect of the injuries complained of by him in the proceedings mentioned.

2nd. That the defendants do within one year from the 23rd day of October, 1888, complete the Whitebread drain in the pleadings mentioned, to the width and depth and in the manner provided by the plans and specifications upon which the said work was undertaken, the depth being that indicated by the red line on the plan prepared by John Jones, provincial land surveyor, put in by the plaintiffs at the trial and numbered Exhibit 7, and with proper and sufficient outlets to carry off the waters which enter the same from time to time.

3rd. That the amount provided for by the by-law for the construction of the said Whitebread drain, and which came to the hands of the defendants, was sufficient to complete the said drain in accordance with the said plans and specifications, and would have so completed the same but for the want of skill, negligence and unnecessary delay of the defendants in proceeding with and carrying on the work, and the court did order and adjudge that the works necessary to the completing the drain as ordered in paragraph 2, be defrayed by

the defendants, and that they should not be at liberty to levy or assess the same, or any part thereof, as a special rate against the lands and roads by the said by-law assessed for the cost of the construction of the said drain.

4th. And the court further ordered and adjudged that the defendants do pay to the plaintiffs their costs of the action after taxation thereof.

5th. And the court further ordered and adjudged that the plaintiffs, in addition to any other remedy to which they might be entitled, should be at liberty in the event of the defendants failing to complete the said drain as directed by paragraph 2, within the time thereby limited to apply to the court for such other relief in the premises as the plaintiffs might be entitled unto.

From this judgment the defendants appealed to the Court of Appeal for Ontario.

That court regarded the claim of the plaintiff Murphy in the action to be one merely for the damages alleged to have been sustained by him by the alleged wrongful, unskilful and negligent conduct of the defendants and the judgment in his favour to be one for the recovery merely of the damages sustained by him by reason of such wrongful, unskilful and negligent conduct, and the residue of the judgment directing the completion of the drain in accordance with the plan and specifications adopted by the by-law, etc., they regarded as being the relief granted and adjudged in favour of the corporation of the township of Sombra, and as regarding the said judgments it was ordered and adjudged by the said court upon the said appeal that the appeal should be, and it was allowed, as to the relief granted to the plaintiffs the township of Sombra, and that the action as to the plaintiffs the township of Sombra should be dismissed, and that neither the said appellants nor the said respondents the corporation of the township of Sombra should pay to, or receive from the other of them any costs of the said action or of the said appeal.

And it was further ordered and adjudged by the said court that as regards the plaintiff Murphy the

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said appeal should be and the same was dismissed with costs to be paid by the appellants to the respondent Peter Murphy forthwith after taxation thereof.

The Chief Justice of the Court of Appeal in giving his judgment used the language following :—

I think there was ample evidence of negligence in the execution of this public work sufficient to support the judgment in favour of Murphy. In the execution of an authorized public work a large amount of inconvenience and possible loss may result to individuals without any remedy.

If, *as a necessary result* a legal injury is caused, the only remedy would be the statutable compensation on reference.

But for *clear palpable negligence on behalf of those entrusted with its performance, for an absurd and unnecessary process of construction certain to cause injury and extending the inevitable inconvenience of property owners which need not extend over a year, to a period of four or five years and allowing the whole work to fall into a state of inefficiency, I cannot but think that a cause of action is given to the injured party.*

But the learned Chief Justice expressed himself as unable to agree with the learned trial judge in his direction as to levying the moneys required for completion or due execution of the work.

Mr. Justice Burton thought the judgment in favour of the Township of Sombra should be reversed, and the relief asked by them refused, and the action in so far as it related to the relief asked by them should be dismissed.

Mr. Justice Osler entered very fully into the facts as they appeared in evidence and in the findings of the learned trial judge. Dealing with the claim of the plaintiff Murphy, he draws attention to the fact that although the time limited by the by-law for the completion of the work was the 31st December, 1881, the contracts for construction were not made until some time into the year 1882, and that then the work was let *piecemeal* to several small contractors, farmers, along the line of the drain, and then adds :

The natural consequence was that the work instead of being promptly and expeditiously done, extended over a number of years, and the drain was not accepted by the commissioner until the fall of the year 1886; at this date, however, he certified it to be complete.

Again he says:

Much evidence was given as to the condition in which the drain had *been actually left* by the contractors *when accepted by the defendants, whether it had ever really been completed in accordance with the plans and specifications or whether its then condition was owing to its having got into a state of disrepair after actual completion.*

Upon this question he says:

There is, I think, abundant evidence in support of the learned judge's finding that the drain never was completed in accordance with the engineer's plan, report and specifications. In one part of it near the eastern end it had not been excavated to the depth required, by as much as three feet, and this for a distance of 47 feet. At the west end there was said to be a deficiency in depth of two feet. At other places in its course there were irregularities in the depth more or less serious, and the contractors had in some instances during the execution of the work left dams for the purpose of keeping water out of the cuttings which they omitted to remove.

Again he says:

The learned judge expressly finds that *it was in consequence of this unfinished and incomplete condition of the drain* that it proved of insufficient capacity to carry off the waters brought into it by the three Sombra drains, and that those waters were thereby caused to back upon and flow over the plaintiff's property. *In that state of things, and upon these findings the plaintiff is entitled to recover damages against the defendants in an action. They have obstructed the outlets of the drains which formerly carried water from his land, and have so negligently constructed the Whitebread drain in the execution of the work, and in not completing it to the original design and stipulated depth as to fail in providing another outlet for the waters thus obstructed by them.*

And again:

They have negligently failed to do what the by-law authorized them to do, and the result of their negligent interference was that the condition of things has been altered to the plaintiff's damage.

He then points out that the judgment is not for a mandamus under section 538 of the Act, chapter 174 R. S. O. of 1877, *but a judgment directing defendants*

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to complete the drain to the width and depth and in the manner required by the plans and specifications upon which it was undertaken. He then expressed the opinion that the plaintiffs were not precluded from contending that the drain had not been completed as required by the by-law, by the fact that the corporation of Chatham had accepted the work as completed upon the report to that effect by the commissioner appointed by the by-law to superintend the work. Upon this point he says:

> Though he was appointed commissioner by the by-law to superintend the construction, that was a mere matter of convenience. The council was not bound to appoint him. His legal position was simply that of a servant or agent of the corporation, and they cannot, as I respectfully think, be heard to say that *an incompleted drain* is the same thing as a drain which has become out of repair. *The drain never having been in fact completed the case does not come as one of non-repair within sub-section* 3 *of section* 583 *which is confined to the deepening, extending and widening of a work which has been fully made and completed in the language of that section.*

Then, in relation to the third paragraph in the judgment which relates to the mode of defraying the necessary expenses attending the completion of the work as directed by the judgment, he says:

> This limitation, imposed by this clause of the judgment, is of a most unusual character.

And again:

> This judgment casts the whole of the loss upon that part of the township which is outside of the drainage area and exempts the latter from sharing in it though quite as much a part of the corporation as the former.

For this reason and for others which it is not necessary to state here because they are the reasons upon which is rested the judgment against which the present appeal is taken and must needs therefore be considered later on, the court not only expunged from the judgment the said third paragraph but also the second

paragraph by which it was ordered that the defendants should complete the drain in accordance with the original plan and specifications notwithstanding that the court was of opinion that in truth, as had been found as a fact by the learned trial judge, the drain had never been completed as required by the by-law, and the judgment was by the said Court of Appeal rendered accordingly, as above set forth.

From this judgment the corporation of Sombra alone appealed to this court, and this court was of opinion that that corporation had good right under the facts appearing in the evidence and the findings of the learned trial judge thereon to maintain that learned judge's judgment for the completion of the drain, but that as there had been no issue raised upon the record as to the sufficiency of the amount which had been provided for the construction of the drain the corporation of the township of Chatham should not have been deprived as they were by the third paragraph of the learned trial judge's judgment of the power of availing themselves of the clauses of the statutes enabling them to raise further funds if the amount which had been raised was in truth insufficient for the purpose, and this court therefore maintaining the judgment of the trial judge as to the completion of the drain did by its judgment made the 28th June, 1892, order and adjudge that the defendants (the corporation of Chatham) should complete the said Whitebread drain in the pleadings mentioned to the width and depth in the manner provided for by the plan and specifications adopted by the by-law upon which the said work was undertaken, or do provide some substitution therefor under the provisions of the statute in that behalf, and that they should pay to the appellants, the corporation of Sombra, the costs incurred by them as well in the Court of Appeal at Toronto, as in this court.

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The defendants duly paid to the plaintiff Murphy the damages and costs recovered by the judgment in his favour in the former action, and they also paid to the plaintiffs, the corporation of Sombra, the costs adjudged to be paid to them, but they did nothing towards the completion of the said drain, as directed by the said judgment, until after the commencement of the present action. Upon the 27th day of February, 1894, notwithstanding the said judgment had conclusively adjudged and determined that the said Whitebread drain had never been completed in accordance with the plans and specifications as required by the by-law of the 14th October, 1881, and had ordered and adjudged that the same should be completed by the defendants in accordance with the said plans and specifications, the said corporation of Chatham by its municipal council purporting to act under the clauses in the Acts in force in relation to drainage which authorize municipal corporations to pass by-laws *for repairing and defraying the expense of repairing* a drain already completely constructed under the Act, provisionally passed a by-law intituled,

a by-law to provide for the repair of the Whitebread drain and for borrowing on the credit of the Township of Chatham the sum of $3,105.78 to defray that portion of the expense of such repairs, and of the damages and costs payable by the Township of Chatham.

The total amount specified in the by-law as necessary for making what the by-law called repairs, was the sum of $4,742.80, and the damages and costs mentioned in the by-law consisted of the damages and costs paid to the said plaintiff Murphy under the judgment recovered by him in the said action amounting to the sum of $2,102.76, and these two sums together made the sum of $6,845.56, of which amount the sum of $3,105.70 mentioned in the by-law, was appropriated as the contribution of the municipal corporation of

Chatham, and the lands assessed therein, and the balance or $3,739.86 was appropriated as the sum to be contributed by the municipal corporation of the township of Sombra and the lands in that township assessed as being by the said by-law to be chargeable therewith. The said by-law so provisionally passed recited the passing of the said by-law of the 14th October, 1881, and also (notwithstanding the said judgment) recited that the said drain *had been duly constructed and had become out of repair*; it then recites the judgment recovered in the said action as above set out, and that the damages and costs recovered therein amounted to the sum of $2,102.76, and then proceeds thus:

> And the said council desires to charge the same as provided by law, and for that purpose has desired the engineers to add the same to the cost of making said repairs, and to assess the same against the lands and roads liable for *the construction and repairs of the said drain.*

The by-law then purported to enact that the said sum of $4,742.80, as for repairs of the said drain, and the said sum of $2,102.76 as for said damages and costs so by the said judgment recovered, amounting together to the said sum of $6,845.56, should be assessed against the lands and roads specified in a schedule annexed to the said by-law, which schedule comprised all the lands and roads in the said townships of Chatham and Sombra which had been previously assessed for the construction of the said drain, and also certain other lands and roads in the township of Sombra which had not been assessed for the construction of the drain.

Upon the 11th day of April, 1894, the present action was commenced in the Chancery Division of the High Court of Justice for Ontario, and immediately thereupon the plaintiffs caused the defendants therein to be served with a notice of a motion to be made to the said court for an order

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to be made limiting the time within which the defendants should complete the said Whitebread drain as required by the said judgment in the said former action and for an order restraining the said defendants from proceeding to assess for the repair or maintenance of the drain any of the lands or roads assessed for the construction thereof until the said drain should be completed as required by the said judgment. An order was made upon the motion made in pursuance of such notice, by which order bearing date the 9th day of May, 1894, it was ordered by the court that the said motion should stand over to be heard and disposed of by the trial judge at or after the trial of the action in the Chancery Division so as aforesaid commenced on the 11th April, 1894, and that the costs of the application should be costs in the cause unless the new trial judge should otherwise order.

Thereupon the plaintiffs upon the 22nd day of May, 1894, filed their statement of claim and therein alleged the passing of the by-law of the 14th October, 1881, by the defendants, and the raising by them thereunder of the said sum of $6,109 as the contribution of that township towards the construction of the work in the by-law mentioned; and the contribution and payment by the corporation of Sombra of the sum of $6,042 to the corporation of the township of Chatham as the contribution of the township of Sombra towards the construction of the work. It then charged that the said two sums of $6,042 and $6,109 constituted a trust fund in the hands of the defendants for the purpose of the construction of the said work and that the plaintiffs and the other owners of lands assessed for the said work were and are interested therein and *cestuis que trustent* thereof and that the said moneys were amply sufficient to have constructed and completed the said drain in accordance with the plans and

specifications thereof and the terms of the said by-law. It then alleged the commencement of the work by the defendants, but that they had proceeded therewith so negligently and improperly that it had never yet been completed. It then alleged that the moneys in the hands of the defendants and applicable to the construction of the work *were more than sufficient to have completed the same, but that owing to the negligence and improper conduct of the defendants the same was wasted and misapplied.* It then charged certain acts of the defendants as constituting the negligence and improper conduct whereby the said funds were so wasted and misapplied. It then alleged the former action and the judgment recovered therein and claimed further damages as sustained by the plaintiff Murphy and the municipality of Sombra respectively since the recovery of the said judgment from the same cause as had been alleged in the said former action. It then alleged in the 14th paragraph as follows:

On or about the 1st day of December last past *the said defendants disregarding the said judgment and in contempt thereof* caused one W. G. McGeorge to make a survey of the said drain and an estimate of the *cost of alleged repair to be made thereof* and an assessment of the costs thereof upon the lands and roads assessed for the original cost of the said drain, and on the 27th day of February last provisionally passed a by-law adopting the said report and assessment imposing upon the lands and roads in the said two townships an assessment for the amount of the estimated cost of the *said pretended repairs* according to the said report, such cost amounting to the sum of $4,742.80, and they by the said by-law assumed to assess upon the said lands and roads the amount of the judgment recovered by the plaintiff Murphy against them, as aforesaid, and the costs of the said action.

And the plaintiffs in their said statement of claim submitted that until the defendants should complete the said drain in accordance with the said judgment they could not assess nor charge the roads and lands aforesaid with the cost of repairs to the said drain, and that no duty to repair was imposed by law until the

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drain should be fully made and completed, and further, that the damages and costs recovered in the said action having been recovered by reason of the negligent acts of the defendants could not be charged upon the said lands and roads within the area assessed for the cost of the costruction of the said work but must be borne by the defendants, and further, that the moneys provided for the construction of the drain having been sufficient to have completed the same but for the negligence and breaches of trust of the defendants as in the statement of claim set forth, the defendants could not assess or charge upon the said lands and roads the cost of completing the said work, and the plaintiffs claimed, if necessary, an account of the moneys so received by the defendants and of their application thereof, and the plaintiffs in their prayer for relief claimed amongst other things:

1st. Damages for the wrongs and losses in the statement of claim set forth.

2nd. That the defendants should be restrained from passing and adopting the by-law of the 27th February, 1894.

3rd. That the defendants should be restrained from assessing or charging on the roads or lands of the plaintiffs any moneys for repairs to the said drain until the same should be fully made and completed in accordance with the said judgment, and from charging the said roads and lands with the damages and costs recovered in the said action.

4th. That the said defendants should also be restrained from assessing or charging the said lands and roads with the cost of the said work, and that if necessary an account might be taken of the moneys which had come to the hands of the defendants and which were applicable to the construction of the said work, and of the amount thereof properly expended in such

construction, and of the amount remaining or which ought to have remained in their hands for that purpose.

5th. That the defendants might be decreed to make good so much of the moneys so received by them as had been wasted or misapplied by them, and for further relief.

The defendants in their statement of defence alleged that the amount raised under the by-law passed for the original construction of the said drain was not sufficient for the construction thereof, and they denied all the negligence with which they were by the statement of claim charged and averred that the work of constructing said drain was carried on with all necessary diligence and without unnecessary delay, and that all the funds raised for the construction of said drain were properly applied and expended by the defendants in the construction of the drain, and *that said funds were insufficient for that purpose*, and that the defendants were compelled to pay and did pay $300 over and above the amount raised for said drain in completing the same. They then pleaded and averred the institution of the said former action and the recovery of judgment therein by the plaintiffs, and they said that in pursuance of the said judgment they took the proceedings in the statement of claim mentioned and provisionally passed the by-law in the statement of claim mentioned, which they did for the purpose of raising the funds necessary to comply with the said judgment *by completing the said drain and paying the damages and costs ordered to be paid by the defendants which they contended that they had a right to do under the provisions of the Municipal Act.* They then alleged that the plaintiff had appealed from the assessment adopted by the by-law to the referee under the Drainage Act of 1891, who, as they submitted, has full power and authority to determine all questions

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and issues arising upon said appeal, and that the plaintiffs were estopped from proceeding with the trial of the present action pending the hearing and disposing of said appeal by said referee. They then denied that the plaintiffs had sustained damage, as alleged by them in their statement of claim, and they submitted as matter of law that the plaintiffs had not in their statement of claim shown any cause of action against the defendants. The plaintiffs upon the 9th June, 1894, joined issue upon this statement of defence and the case came down for trial upon the 20th April, 1895.

It thus appears that the defendants had provisionally passed the by-law of the 27th of February, 1894, as a by-law professedly for the purpose, in so far as the sum of $4,742.80 is concerned, of raising funds alleged to be required for making necessary repairs in the Whitebread drain, as a drain previously completely constructed under the provisions of the municipal Act in that behalf; whereas, in truth and in fact it had been conclusively adjudged and determined against the defendants by the judgment in the previous action that the drain had never been completed and the defendants were therefore adjudged and directed to complete it in accordance with the provisions of the by-law in that behalf; now in their statement of defence to the present action, abandoning the ground stated in the by-law in justification of it, they allege by way of justification for passing it that the amount raised for the construction of the drain was not sufficient for that purpose and upon this allegation *the only material issue of fact to be tried in the present action is joined.*

True it is that the defendants in their statement of defence deny that they had been guilty of any negligence or improper conduct in the construction of the work with which they were charged and that the

plaintiffs or either of them had sustained any damage occasioned by any negligence or improper conduct of the defendants, but upon these matters the judgment in the former action must be held to be conclusive against the defendants.

Upon this issue joined as to the sufficiency or insufficiency of the amount which had been raised for the construction of the drain much evidence similar to that given in the previous action was entered into, *not for the purpose* of establishing negligence and improper conduct of the defendants in the mode adopted by them for constructing the work, *but for the purpose* of establishing the contention of the plaintiffs that the funds raised had been abundantly sufficient for the complete construction of the drain in accordance with the by-law and that therewith the drain could have been completed but for the wrongful, negligent and improper mode of construction adopted by the defendant and not authorized by the by-law, whereby, as the plaintiffs contended, the defendants had wasted and misapplied funds raised and placed in their hands sufficient for the complete construction of the work.

It appeared in evidence at the trial and was found as matter of fact by the learned trial judge that upon the 21st day of December, 1885, the corporation of the township of Chatham passed a by-law professedly by way of amendment of the by-law of the 14th of October, 1881, whereby the lands and roads in Chatham which had been assessed by the by-law of 14th October, 1881, were assessed and charged with a further sum of $1,500 in addition to the $6,109 which had already been raised, as necessary to be provided by Chatham for the completion of the work; and wherein *it was recited that an agreement had been entered into between the said corporations that an additional sum should be raised and levied against the lands and roads in*

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Sombra settled at and limited to the sum of $300, *which the township of Sombra had agreed to pay*; and the learned trial judge further found that as matter of fact the corporation of the township of Sombra had paid to the corporation of the township of Chatham the said sum of three hundred dollars, and that the amount raised under the two by-laws of October, 1881, and December, 1885, was amply sufficient to complete the work; that the evidence before him upon this point was of the most conclusive character; that, as matter of fact nothing had been done by the township of Chatham towards carrying out the judgment of this court in the former action until after the present action had been commenced; that what was then done was to remove the small dams left by the several contractors between the different sections and to clean out the silt that had been washed down while the work was progressing; *that this removal of dams and clearing out of the silt was not work of repair but work which was necessary to the completion of the drain* namely, as to 47 rods near the eastern outlet that had never been dug out to within two feet of the bottom according to the plan as designed for the construction of the drain.

And he held that until the drain should be completely finished in accordance with the by-law authorizing its construction no by-law could be passed assessing the drainage area for repair of the drain. The evidence showed that the drain had never been completed in accordance with the original plan and specifications until about the month of January, 1895. Upon the 30th of that month one A. McDonell, C.E., acting as a provincial land surveyor for and on behalf of the township of Chatham, and one John H. Jones, C.E., acting in like capacity for and on behalf of the township of Sombra, gave their joint certificate signed by

them respectively and addressed to the municipal councils of the townships of Chatham and Sombra whereby they certified that they had made an examination of the drain from the Chenel Ecarté to the Bear Creek and that *said drain was then completed in accordance with the original design reported by Mr. McGeorge, C.E., in* 1882.

Upon the evidence as taken before the learned trial judge and his findings of matters of fact thereon he pronounced judgment in favour of the plaintiffs, and by a decree of the Chancery Division of the said High Court bearing date the 7th day of August, 1895, it was ordered and adjudged:

1. That the defendants be and they were thereby restrained from passing and adopting the by-law so provisionally passed by the defendants on the 27th February, 1894, and from proceeding with or prosecuting the appeal to the drainage referee from the assessment made in the said by-law.

2. That the defendants should be and they were thereby restrained from assessing against, or charging any of the lands in the township of Sombra with any moneys for repairs of the Whitebread drain in the pleading mentioned until the said drain should have been fully made and completed in accordance with the judgment in the pleadings mentioned.

3. That the said by-law provisionally passed on the 27th day of February, 1894, should be and the same was thereby quashed.

4. That the defendants should account to the plaintiffs for the moneys which came to the hands of the defendants, and which were applicable to the construction of the said Whitebread drain and as to the amount thereof properly expended in such construction, and as to the amount remaining or which ought to have remained in the hands of the defendants for the said purpose, and that it should be referred to the local master of the court at Sarnia to take the said account.

5. And the court reserved further directions until the taking of the said account.

6. And the court did further order and adjudge that the defendants should pay to the plaintiffs their costs of the action.

By an order bearing date the 8th day of August, 1895, made in pursuance of the order of the 9th of May, 1894, upon the motion in that behalf as

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aforesaid, it was ordered by the learned judge before whom the issues in the said action were tried that the defendants should on or before the 1st day of January, 1896, at their own costs and charges, complete the Whitebread drain to the width and in the manner provided for in the plans and specifications adopted by the by-law upon which the said work was undertaken, or provide some substitution therefor under the provisions of the statute in that behalf, and further, that the defendants should pay to the plaintiffs the costs of the said motion and the orders made thereon.

From the above decree and judgment so made in the said action upon the 7th day of August, 1895, and from the said order bearing date the 8th day of August, 1895, the corporation of the township of Chatham instituted an appeal to the Court of Appeal for Ontario, and upon argument thereof, it was ordered and adjudged by the said Court of Appeal as follows :—

That the said appeals should be and the same were allowed with costs of the said appeal in the action in the Chancery Division of the High Court of Justice, to be paid by the respondents to the appellants forthwith after taxation thereof, and it was further ordered that judgment should be entered in the court below dismissing the said action in the said Chancery Divison, with costs to be paid by the plaintiffs to the defendant, and that there be no costs to either party of the said order pronounced on the 8th day of August, 1895. or of the appeal therefrom.

From this judgment the plaintiffs in the action have instituted the present appeal.

In the argument before us the appeal was argued and rested upon so much only of the judgment of the Court of Appeal for Ontario as related to the disposition of the action.

As to the order of the 8th of August, 1895, it had been proved in the action and was admitted by the appellants that the drain had been completed in

January, 1895, in accordance with the original plans and specifications, so that the order of the 8th of August, 1895, that it should be completed in accordance with such plans and specifications on or before the 1st of January, 1896, was plainly erroneous, and could not be supported. When that order was made there was nothing then that could have been adjudicated upon by it but the costs of the motion and of the order of the 9th May, 1894, and incident thereupon, as to which the appellants did not press, and we do not think that under the circumstances it would be proper to make any variation from the disposition made by the Court of Appeal for Ontario as to those costs. The main question argued before us and which alone has to be disposed of, was the judgment of the Court of Appeal in respect to the action in the Chancery Division of the High Court.

The question so raised is a novel one and apparently of the gravest importance to all parties concerned. It is to be observed that the former action was not instituted by the plaintiffs for any injury alleged to have been sustained by them or either of them as consequential upon the construction of the drain as authorized by the by-law passed by the defendants for its construction. Had the action been framed claiming relief in respect to any such damage it could not have been maintained. The contention of the plaintiffs was that although the defendants had undertaken to construct the drain in the manner authorized by the by-law, yet that what they had done was done in such a manner as in point of fact to defeat the plan as designed and adapted by the by-law for its construction; that in point of fact the drain had never been completed, but that the defendants *in violation of the provisions of the by-law had committed acts of tortious misfeasance whereby instead of constructing the drain as*

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authorized by the by-law, they had created a public nuisance which caused to the plaintiffs the particular damage of which they complained, and had thereby given to the plaintiffs a good cause of action as for a wrong committed by the defendants for which no law afforded any justification, and the plaintiffs prayed compensation in damages for the injury already sustained, and that the defendants should be decreed to complete the drain and thereby to abate the nuisance they had created. The defendants on the contrary insisted that what they had done was authorized by the sections of the municipal Act relating to drainage, and that they had completed the drain in accordance with the provisions of the by-law. Issues having been joined upon the above matters of fact the learned trial judge determined those issues wholly in favour of the plaintiffs. The design of the work authorized by the by-law was to prevent any water entering the township of Chatham from the township of Sombra, although such was the natural course for Sombra waters to flow in, by the erection of a permanent dam or embankment on the Chatham side of the town line between Sombra and Chatham, to be constructed of the earth to be taken out in digging a continuous drain wholly on the Sombra side of the said town line and in the township of Sombra, whereby all the waters obstructed by the dam or embankment should be conveyed to the outlets specified in the by-law. Without such a continuous drain there was no justification whatever for obstructing, by the embankment, the waters flowing from Sombra into Chatham, but what the defendants in fact did was, that they constructed the embankment efficiently so as to prevent all waters from flowing from Sombra into Chatham, thereby accomplishing perfectly Chatham's object in passing the by-law, but they wholly failed in con-

structing the drain, as designed and adopted by the by-law which constituted the sole foundation in justification of the erection of the embankment, for instead of digging the drain as required by the by-law, and giving a continuous flow to the waters made to enter it to the outlets provided by the by-law, they dug it in sections with solid earth between the sections constituting dams which prevented the waters entering any section from flowing to the outlets, as designed by the by-law, and thereby forced all the waters flowing from Sombra into Chatham back upon Sombra, thus defeating the whole object of the by-law as regarded Sombra and creating a manifest nuisance, giving a good cause of action to all persons suffering particular injury therefrom. The learned trial judge held this mode of procedure to have been utterly unjustified by the municipal Act or by any law, and in this particular his judgment was sustained by the Court of Appeal for Ontario. The learned Chief Justice was of opinion that there was ample evidence to support the judgment of the learned trial judge in favour of the plaintiff Murphy. He was also plainly of opinion that the defendants in the discharge of the trust reposed in them for performance of the work specified in the by-law were guilty of clear palpable negligence, and that the process adopted by them for the construction of the work was *absurd, unnecessary and certain to cause injury*, as appears by the extract already quoted from his judgment.

The language of Mr. Justice Osler was equally emphatic and to the like effect. He was of opinion that there was abundant evidence in support of the learned judges finding that the drain never was completed in accordance with the original plans and specifications adopted by the by-law.

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The learned judge very plainly points out, what the evidence had clearly established and what the learned trial judge had affirmed by his judgment, that the plaintiffs had rested their cause of action upon the fact that the defendants in direct violation of the provisions of the by-law had erected the embankment which efficiently obstructed the waters whose natural flow was into Chatham and had thus effectually served the object which Chatham had in view without providing the drain designed by the by-law for the purpose of carrying off the obstructed waters, and the providing of which was the sole justification relied upon for the erection of the embankment and the prevention of the flow of water from Sombra into Chatham.

This court, while concurring with the Court of Appeal for Ontario in their affirmation of the judgment of the learned trial judge in favour of Murphy, restored, upon the appeal of the corporation of Sombra, the relief which had been given by the learned trial judge but which had been expunged by the Court of Appeal for Ontario, by directing the defendants to complete the drain as originally designed and adopted by the by-law, thus decreeing the abatement of the nuisance of which the plaintiffs had complained as being particularly injurious to them. The right of the courts to make that adjudication in the exercise of their undoubted jurisdiction cannot be questioned and the judgment so rendered in the former action must now be taken to be a conclusive adjudication between the parties that the amount recovered by Murphy in the former action for his damages and costs was recovered in a cause of action against the defendants for their tortious misfeasance not justified in law, in their wrongful obstruction of the waters flowing from Sombra into Chatham, and not for damages arising from anything done by them under the authority of the by-law

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mentioned in the action, or of the drainage clauses in the municipal Act, ch. 174 Revised Statutes of 1877, the Act in force at the time of the passing of the by-law, and that the costs incurred by the unfounded defence set up to so much of the action as averred that the defendants had never completed the drain as authorized by the by-law, and prayed that they should be decreed specifically to execute and complete the work in accordance with the original design, and with the plans and specifications adopted by the by-law whereby alone the design and purpose of the by-law could be accomplished, were incurred wholly by the wrongful and untrue defence urged by the defendants in answer to the just and reasonable demand in the plaintiff's statement of claim in that behalf. These matters having been so conclusively adjudicated upon, there remains to be considered the present action which at the time of its commencement appears to have been well founded in every particular, but the work having been completed after the commencement of the action but before it came down for trial, and the plaintiffs having abandoned all claim for damages subsequent to the former recovery, all that remains now to be considered is the question whether or not the defendants have the right in law which they claim to have, to repay themselves by the by-law provisionally passed on the 27th February, 1894, the amount recovered against them in the former action for damages and costs which amount has been paid by them, or the sum of $4,742.80 alleged in the by-law to be for necessary repairs, but which in point of fact if expended were expended by them in removing the nuisance wrongfully erected by them by the construction of an embankment which cut off all waters lawfully flowing from Sombra into Chatham without constructing

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the drain designed by the by-law for the carrying off the waters so obstructed, which erection of the embankment in the manner aforesaid the judgment in the former action had conclusively determined to have been the wrongful act of the defendants, and which was not justified by any law.

The only question of fact involved in the present action is as to the sufficiency of the funds placed in the hands of the defendants for the construction of the drain by the contributors to the funds subscribed for that purpose, the plaintiffs alleging, and the defendants (notwithstanding the recitals in the provisional by-law that the drain had already been completed) denying, that the funds which had been provided for the construction of the drain and placed in the hands of the defendants were sufficient for the complete construction of the drain in accordance with the plan adopted by the by-law passed for its construction. Upon the issue joined between the parties upon this question the learned trial judge has found as matter of fact *that it was proved before him by the most conclusive evidence* that the amounts raised under the by-laws of October, 1881, and December, 1885, and placed in the hands of the defendants for the complete construction of the drain in accordance with the plan and specifications adopted by the by-law authorizing its construction were amply sufficient for that purpose. In effect he found that the deficiency, which the defendants alleged, arose wholly by the unjustifiable manner in which they, the defendants, had wasted those funds in the wrongful erection by them of the embankment obstructing the flow of waters from Sombra into Chatham without constructing the drain necessary to carry off the obstructed waters as designed by the plan and adopted by the by-law which alone authorized the construction of the embankment;

all of which wrongful conduct of the defendants had been the subject of and had been conclusively adjudicated upon in the former action. The correctness of the finding of the learned trial judge upon this matter of fact has not been called in question; we must therefore now regard it as a fact conclusively established that the amount placed in the hands of the defendants for the complete construction of the drain as authorized by the by-law passed for its construction was amply sufficient for that purpose, and that any deficiency, if any there was, arose by reason of the wrongful, wasteful, unjustifiable misappropriation by the defendants of the funds in a manner not authorized by the by-law or the statutes relating to the construction of drainage works, and the question becomes resolved into this, viz.: where a sum amply sufficient to complete the work as designed and authorized by the by-law for the complete construction of the drain was placed in the hands of the defendants to be applied by them in the construction of the drain and was wrongfully used and applied by them in a manner and for a purpose not authorized by the by-law which the defendants themselves had passed for the construction of the drain, whether the defendants can now by another by-law levy or cause to be levied from the persons who had contributed the sum so amply sufficient for the completion of the work a sum sufficient to reimburse to the defendants the amount supplied by them to replace the amount which they had so wrongfully wasted and misapplied.

The contention of the defendants is that they have by law such right, and the judgment of the Court of Appeal for Ontario has maintained such their contention. It is not contended that there is anything in support of this contention in chapter 174 R. S. O. of 1877, the Act in force at the time of the passing of the

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by-law of October, 1881, in virtue of which that by-law purports to have been passed, but the contention is rested wholly upon section 31 of the Municipal Amendment Act of 1886 whereby section 592 of the Consolidated Municipal Amendment Act of 1883 was repealed and in substitution therefor it was enacted that:

> Where, *on account of proceedings taken under this Act or the Ontario Drainage Act* or other Acts respecting drainage work and local assessment therefor, damages are recovered against the corporation or parties constructing the drainage works; or other relief is given by any judgment or order of any court, or any award, *made under this Act*, all such damages, or any sum of money that may be required to enable the corporation to comply with any such judgment, order or award made in respect thereof shall be charged *pro ratâ* upon the lands and roads liable to assessment for such drainage works; provided always that if to enable the corporation to comply with any such judgment, order or award it shall be necessary or expedient to change the course of any drain or to make a new outlet, or otherwise improve or alter any drain or drainage works, the same shall for all purposes and in all respects be dealt with, and all works and operations in respect thereof shall be executed and performed as if the same were alterations and improvements within the meaning of section 586 of this Act and all provisions of this Act applying to or in respect of any work, alteration or improvement provided for by said section 586 shall apply to any work, alteration or improvement intended to be provided for by this section.

Now, whatever may have been the reasons for which the legislature made this alteration in the phraseology of this section 592, it is, I think, sufficient for the purposes of the present action to say, and I must say it appears to me to be very clear upon consideration of the frame of the former action and the proceedings and judgment therein as above detailed, that the damages and costs recovered therein were not damages which, within the meaning of the section so substituted by the Act of 1886, can be said to have been recovered *on account of proceedings taken under* any Act respecting drainage works, etc. Had the action been framed for the

purpose of recovering any such damages it could not, as already shown, and as appears by the extract taken from the judgments of the learned judges of the Court of Appeal for Ontario, have been maintained, but quite on the contrary the damages and costs recovered in that action were recovered *on account of acts done and proceedings taken* by the corporation defendants *in contravention of the by-law* which was the sole authority upon which they relied in support of their acts and proceedings, which acts and proceedings were of a nature plainly to constitute a nuisance causing to the plaintiffs the special injury of which they complained and were not justified by any act of the legislature; and the section cannot be construed so as to give to the corporation defendants power to indemnify themselves by assessing the property of persons injured by the nuisance for reimbursement of the damages recovered against the corporation for injuries occasioned by means of the nuisance.

It would have been quite sufficient for persons injured by the acts of the defendants which were the subject of the former action to have alleged in their statement of claim that the defendants had wrongfully obstructed the natural and lawful flow of the waters from Sombra into Chatham by erecting an embankment whereby all such waters were forced back and prevented from flowing in their natural and legal course and thereby caused the damages complained of. To an action so framed it is clear upon the evidence in the former action that the defendants could not have succeeded in establishing any justification under the section 592 or otherwise. The grounds of recovery in the former action were clearly the *tortious acts* of the defendants not justified by any law, and damages recovered upon such ground cannot be damages within the meaning of section 592 which the corporation can

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recoup themselves for, by levying the amount under the provisions of that section. So neither, and for the like reason, can the relief granted by way of compelling the corporation to abate the nuisance of *their* creation by constructing the drain in accordance with the provisions of the by-law of October, 1881 without which drain they had no authority whatever to construct the embankment which obstructed the natural and legal flow of the waters from Sombra into Chatham, be said to have been relief given *on account of proceedings taken under any act of the legislature*; it was, on the contrary, relief given in the exercise of the ordinary jurisdiction of the courts to redress a wrong for committing which the defendants had no justification whatever in law.

The judgment in the former action being conclusive that the conduct of the defendants which constituted the ground of that action was wholly wrongful and unjustified by any law, nothing contained in that judgment can be held to come within the section 592 of the Act of 1886. It has been argued that the policy of the clauses of the Acts relating to drainage works is that the lands assessed under the by-law authorizing the construction of such works should bear and pay all charges attending the construction and maintenance of the works. That undoubtedly is so, as shown by the judgment of the Court of Appeal for Ontario in the former action, *in so far as all necessary expenses* are concerned and all expenses which are required to compensate parties injured by the works from causes consequential upon and incidental to the construction of this work in accordance with the by-law authorizing its construction, but neither the policy of the law nor the language of any Act goes any further, and in the present case the acts of the defendants which constituted the ground of the former action were acts

which were not authorized by such by-law but were in fact acts done in actual contravention of it and upon no principle of law can those who, as has been conclusively found by the learned trial judge in the present action, supplied the defendants with all the money necessary to complete the work as authorized by the by-law be charged with the damages, costs and liabilities incurred by the defendants as wholly consequential upon their own wrongful acts. Upon the whole, therefore, it appears to be established that the by-law provisionally passed on the 27th of February, 1894, cannot be supported as a by-law for making repairs, as it purports on its face to be, in a drain then already completed, nor consistently with the findings of the learned trial judge, upon the issues joined in the present action could any by-law be maintained under the clause of the Act authorizing the corporation defendants to raise a further sum as necessary to complete a work when a sufficient sum for that purpose had not been raised under a previous by-law passed for the purpose, so neither can it be supported, as already shown, as a by-law for reimbursing the defendants for damages and costs recovered against them in the former action for injuries occasioned by their own wrongful acts. Under these circumstances the judgment of the learned trial judge of the 7th August, 1895, with the exception of what is contained in the 2nd, 4th and 5th paragraphs of this judgment, must be restored. The account directed, no longer insisted upon as the issue upon the question whether the funds which had been placed in the hands of the defendants for the completion of the work in accordance with the original design adopted by the by-law authorizing the construction of the drain, was sufficient for that purpose, has been conclusively found in the affirmative, and the drain has been completed since

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the commencement of the present action. The appeal must therefore be allowed with costs in this court and in the Court of Appeal for Ontario, and the judgment of the learned trial judge varied as above indicated must be restored.

It was not argued in the former action that the by-law of October, 1881, was *ultra vires* of the municipality of the township of Chatham. From the frame of the statement of claim in that action it was not necessary for the plaintiffs to raise any question upon that point, for their contention was that, assuming the by-law to be, as they no doubt did assume it to be valid, the defendants of their own wrong and without the by-law having conferred any authority upon them to act as they did, committed the injuries complained of. The point was, however, casually referred to by Mr. Justice Osler in his judgment, but no question having been raised upon the point no judgment has been given upon it in any of the courts. It may be well, however, for the parties to consider whether in October, 1881, or at any time the municipality of the township of Chatham had jurisdiction to pass a by-law which, as plainly now appears upon the record in the present case, and upon the evidence, was not passed for the purpose of constructing a drain at any point within the township, nor for draining thereby any lands in Chatham, but for the construction of a drain wholly within the township of Sombra and with the earth excavated from such drain of erecting on the Chatham side of the highway between the townships an embankment for the purpose of thereby preventing any water flowing naturally or in an artificial channel, from flowing into Chatham from Sombra. It may be open to question whether the sections 594–5–6 and 7 of the Act of 1883, referred to by Mr. Justice Osler, gave any jurisdiction to the

municipality of Chatham to initiate for such a purpose the construction of a drain wholly within the limits of Sombra. It is to be noted that in the by-law of October, 1885, which was passed, as appears on its face, for the purpose of raising further funds as necessary for the completion of the work designed under the by-law of October, 1881, the lands and roads in Sombra assessed under this latter by-law were not charged with the funds required for the completion of the work in the manner provided by the drainage clauses of the Municipal Act, but that in lieu thereof an agreement appears to have been entered into between the councils of the respective municipalities as to the amount to be paid by the municipality of Sombra by way of contribution to the further amount required to complete the work. We think it right to draw the attention of the parties to these points without pronouncing any opinion much less judgment upon them, our judgment being rested upon the grounds which have been taken throughout the litigation involved in the case, that the plaintiffs are entitled to the relief granted even upon the assumption of the by-law of October, 1881, being valid.

Appeal allowed with costs.

Solicitors for the appellants: *Kittermaster & Gurd.*

Solicitors for the respondents: *Pegley & Sayer.*