jected, that I should only look to the matters brought before me on affidavit on this application.

I think there is sufficient before me on this application to determine the point: Simeon Cline making no affidavit himself, and his affidavit made in October, 1869, expressly states that he asserts title in himself, and that the defendant was only in possession as his tenant; and the affidavit of the attorney on the record admits, as I take it to admit, in effect, that his original instructions were from Ransom Cline, whose interest Simeon Cline acquired by a purchase made before appearance entered, and that since the 21st day of May, 1869, before ever Beadle attorned to Simeon, or took the lease for a year at $1 rent, he had taken his instructions from Simeon; I take it to be established beyond all doubt, that Beadle has been throughout only nominally a defendant, and that the defence has wholly been made by and in the interest of Simeon Cline.

The case which is established is, then, the common case for making the order asked for, unless the fact that the plaintiff by his attorney opposed Simeon's application to be admitted to defend as landlord, is subversive of his claim to have his present motion granted, and this, in fact, was the only ground upon which the rule was opposed.

No case has been cited to me in support of this contention, and upon reflection, I do not think that the fact of the plaintiff having opposed the former application, should prejudice the present one. He may possibly have thought that the alleged sale to Simeon Cline was a fraudulent contrivance, and that it was still Ransom who claimed the property, and he may have wished to retain a claim upon him; but it now appearing that it is Simeon who really defended in his own interest, he seeks to make him responsible. Simeon, by making the application to defend, admitted his liability for the costs of the defendant in right of the interest which he claimed in the property. Had he been admitted to defend, he would have been subject to the costs, and liable to pay them, because of such his alleged interest, and of the defence made upon behalf thereof.

Although not admitted to defend, Simeon's interest has remained the same, and he has had the benefit of asserting his claim to the property, to the same extent precisely as if he had been a defendant. The defence made to the suit has been no less his defence, and in his interest, than it would have been if he had been a defendant on the record. He has had the full benefit of the defence, as if he had been admitted a defendant on the record, and I cannot see any reason, why, having enjoyed this benefit, he should not also bear the burthen. He must be clearly liable to the plaintiff, unless the latter's opposition to his application operates as an estoppel to his making the present motion, and I cannot see that it should be held so to operate.

In justice therefore, I think the rule must be made absolute.

Rule absolute.

COMMON LAW CHAMBERS.

In re Roberts and Holland.

Fence-viewers—Watercourses—Contiguous lots.

To constitute a "joint interest" within the meaning of sec. 7, C. S. U. C. C. 57, it is not necessary that the lands occupied should be contiguous lots.

The question whether such interest exists is to be determined entirely by the fence-viewers, and

Their discretion cannot be reviewed if fairly and reasonably exercised.*

Semble, the absence of a demand under section 15, may be waived by the subsequent conduct of the parties.

[Chambers, March 19, 1871.—Wilson, J.]

A summons was taken out on the 26th of February, 1871, calling on Robert Dale, clerk of the seventh division court of the County of Lambton, and John Coulter, the bailiff of the said court, to shew cause why a writ of prohibition should not issue to prohibit the said clerk from issuing execution against the goods and chattels of Patrick Holland and Charles Holland, according to the determination of fence-viewers in a matter of dispute between the said James Roberts and the said Patrick Holland and Charles Holland, and why the execution of the said writ of execution, if issued, should not be restrained, upon the ground that the clerk of the court had no jurisdiction to issue the said execution; that the alleged award or determination of fence-viewers was void, and on grounds disclosed in affidavits and papers filed

The proceedings shewed that on the 5th of June, 1870, Joshua Payne, a justice of the peace, summoned Patrick Holland and Charles Holland to attend, on the 11th of the month, on lot No. 27 in the 3rd concession of the township of Moore, then and there to meet three fence-viewers of the township, to shew cause why they, the said Patrick Holland and Charles Holland, refused or neglected to open up a fair portion of a regular watercourse running across the said lot.

The three fence-viewers, Peter Scott, John Maguire and Thomas Boulton, on the 14th June, made their award. The award recites that they, the fence-viewers, had been summoned by James Roberts, on lot No 28, in the 4th concession of Moore, to examine a watercourse running across the west half of lot No. 27, in the 4th concession, owned by Robert Cathcart, and also across lot 27, in the 3rd concession, owned by Patrick Holland and Charles Holland, and that they found on examining the said watercourse that "this is the proper course for the water running from James Roberts' land;" then they awarded that a ditch should be opened across the said lots—the ditch to be six feet wide on top, eighteen inches deep, and three feet wide at bottom, the earth to be kept four feet from the side of the ditch—commencing at a certain stake on the side line between lots 27 and 28, in the 4th concession, following the natural course of the water, as already marked out by the fence-viewers, measuring 320 rods from the said stake; and that the first 80 rods, next the side line, should be opened by James Roberts, the second 80 rods by Robert Cathcart, the third 80 rods by Patrick Holland, and the fourth 80 rods by Charles Holland—the whole to be finished by the 20th of August, 1870.

*But see *Re Cameron & Kerr*, 25 U. C. Q. B. 533; *Re McDonald & Cattanach*, 5 Prac. Rep. 288; 30 U. C. Q. B. 432.—Eds. L. J.