

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

property the discharge should not be vacated, excepting as to the private estate of Campbell.

*Held*, further, the assignee in insolvency was not a necessary party to the present suit, which was rightly brought in this Court.

*Held*, per PROUDFOOT, J., even if the amount received by the plaintiff at the time of the confirmation and discharge, must be taken to have been a compromise of the debt for a valuable consideration, it was sufficient for the plaintiff to show that it was entered into under a mistake caused by the defendants, as to the true amount of the assets, whether the defendants acted innocently or otherwise.

*S. H. Blake*, Q.C., (*Francis* with him) for the plaintiff.

*MacLennan*, Q.C., for the defendant Campbell.

*D. McCarthy*, Q.C., (*Foster* with him) for the defendant Cox.

*Rae* for the defendant Cassells.

Boyd, C., Ferguson, J.]

[June 29.]

HARDING V. CARDIFF.

*Municipal Act—By-law for opening road—R. S. O. ch. 174, sect. 509.*

There is nothing necessarily inconsistent in a plaintiff seeking cumulative relief by attacking a municipal by-law directing the opening of a road across his land, and also the award under it, fixing the amount of compensation to be paid to him.

The by-law impeached was passed on June 22nd, 1878, and was not attacked till this bill was filed on Nov. 20th, 1880. The plaintiff did not maintain that it was void on its face, or *ultra vires*, but he alleged that it was void on account of irregularities in the passing of it, and because it was not under seal, and was not properly registered, and because the defendants had themselves abandoned it. Nevertheless, although aware of its invalidity, the plaintiff, so far from moving against it within the year allowed by the statute, recognized its validity by naming an arbitrator to act for him in assessing compensation.

*Held*, under these circumstances, on authority of *Vandecar v. Oxford*, 3 App. 131, no court had any jurisdiction to interfere therewith, and the by-law became, by effluxion of time, absolute and incontrovertible.

*Held*, also, although under the Municipal Act such a by-law may not become effectual till it is registered, still that does not prolong the period within which, by the other sections of the statute, it may be quashed.

*Held*, further, when the by-law directs the opening of a road on a person's land, this in substance imports that the land may be entered upon for the purpose of making the road; and as held in *Stonchouse v. Enniskillen*, 32 U. C. R. 567, a municipality may, under R. S. O. ch. 174, sec. 509, enter upon and take or use the land before making compensation.

*C. Moss*, Q.C. (*Beck* with him) for the plaintiff.

*W. Cassels* (*Dickson* with him) for the defendant.

Wilson, C. J., Ferguson, J.]

[June 29.]

CUNNINGHAM V. CANADA SOUTHERN RY.

NORVELL V. CANADA SOUTHERN RY.

*Orders of Appellate Courts—Costs.*

In each of the above two suits, which were brought to enforce certain awards, the Court of Appeal, on appeal of the plaintiffs, gave judgment in their favour, and also gave each of the plaintiffs his costs.

On appeal to the Supreme Court of Canada, in both suits, that tribunal ordered, in the Cunningham case, a new trial without costs to either party.

*Held*, the meaning was that the parties should go back to a stage in the cause prior to the appeal to the Court of Appeal, and begin again; that neither party was to have any claim against the other for any costs that had been incurred after that step, and up to the time of the judgment of the Supreme Court; and that in this way the costs of appeal to the Court of Appeal were necessarily taken away.

In the Norvell case, the Supreme Court declared that the award was void, saying nothing about costs.

*Held*, inasmuch as the award in question was the sole foundation of the plaintiff's suit, and a formal entry of such a judgment would be a dismissal of the bill and a direct reversal of the Court of Appeal; therefore, as a necessary consequence, the plaintiff was deprived of the costs in question.

*Held*, consequently, as to both suits, the effect