

county for that which may roughly be described as running rights over a part of the road in question. Acquiescing, as I have said, in the order of the Board, the county for several years consented to the payment to the city of so much of the annual sum as was paid in respect of that part of the road in that part of the township of Barton which was annexed to the city; but now, having got new light upon the subject, they seek to recover, from the railway company, the whole of the annual sum for this year and also all those portions of it which were paid to the city. As to the former, they are entitled to succeed, but as to the latter, having consented to the payments made, obviously they cannot. Whether or not they have any right to recover the latter from the city is not a question raised in this action; and it is not proper that I should consider it; though it may be said that at first sight it seems to be a case of payments consented to under a mistake of law, not of fact; and that such cases as *Beauchamp v. Winn*, L.R. 6 H.L. 223, are not applicable. After payment of all the money the city have spent in improving that part of the road which it was thought was vested in them, it would be hard if they should lose too these payments. . . .

There will, accordingly, be judgment for the plaintiffs for the amount of the current year's rent, and the action will be dismissed in so far as the amount of the payments made to the city are claimed from the defendants the railway company. The amount of the current year's rent was paid into Court by the defendants the railway company, and so the judgment should contain an order for payment of it out of Court to the plaintiffs.

The defendants the railway company should be paid their costs of the action subsequent to the payment into Court by the plaintiffs; the plaintiffs, having failed in their claim against these defendants for any more than the amount paid into Court, should pay such costs; there should be no order as to costs of the action, up to the time of payment into Court, that is, no costs between these parties; the defendants the railway company are not blamable for the litigation; the vacillating course of the plaintiffs is, to some extent at all events. The defendants the city should pay to the plaintiffs all the plaintiffs' costs of the action referable to these defendants' contention that they are entitled to a share of the annual sum payable by the defendants the railway company under their agreement with the plaintiffs.

This opinion has been withheld until now in order that I might