

town and fire hall which was being erected for the corporation under a contract which contained a provision that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and corporation, the defendant agreeing to resign his seat (though this formed no part of his written contract), but which he afterwards refused to do on the ground that the corporation declined to accept him as a sub-contractor, and a resolution was passed by the corporation to that effect, whereupon the defendant refused to perform the contract.

*Held*, that the defendant, by his omission to resign, had not done all in his power to enable him to perform the contract, and was therefore precluded thereby from setting up the resolution of the Council as an answer to his non-performance of the contract, and was therefore liable for the damages sustained thereby.

*Shepley*, Q.C., for plaintiff. *Watson*, Q.C., for defendant.

Divisional Court.] *BUCHANAN v. INGERSOLL WATERWORKS CO.* [Feb. 27.

*Prescription—Riparian rights—Artificial channel—Agreement.*

About the end of the last century, an artificial channel or water race was built across a lot now owned by the plaintiffs for the purpose of carrying water from a stream above the plaintiff's land to a mill below, the water being diverted into the channel by means of a dam. The channel and the banks on either side of it never formed part of the plaintiff's land, having been excepted therefrom, so that their land was not contiguous to the water. In 1894 an agreement was entered into between the plaintiffs and defendants, whereby the defendants, a waterworks company, acquired the right to lay pipes across the plaintiff's land for their waterworks system, and to use, enjoy and maintain the same for all time for the purpose thereof, and by reason thereof the water, which had previously come down the channel or water race, was carried through the pipes, and the plaintiffs were thereby deprived of the use of the same for watering their cattle.

*Held*, that the plaintiffs were not riparian proprietors and could not claim any right by prescription to the use of the water, and in any event, if they had any such right, it was put an end to by the agreement.

*Aylesworth*, Q.C., for plaintiffs. *Nesbitt*, for defendants.

Ferguson, Rose and Robertson, J.J.]

[March 4.

RE GILES v. THE VILLAGE OF WELLINGTON.

*Mandamus—Inutility of—Unnecessary relief—Farm lands—Assessment of—Benefit of certain expenditure—Exemption—By-law—R.S.O., c. 224, s. 8, s.s. 2.*

A writ of mandamus will not be granted, when, if issued, it would be unavailing or when there is no necessity for the relief; and an application