

Mun. Case.]

RE THOMSON V. McQUAY.

Mun. Case.]

stockholders, by order of the court, for the payment of debts.

It is probable that an Insolvent Act will be passed during the present session of Parliament and we fear a large number of the stockholders will not be able to pay the call which will be required and might take the benefit of our Insolvent Law.

Please advise us when your fire loss happened—whether your claim has been admitted or disputed—and if your claim is disputed whether you propose to have the question of liability of the company decided by the master of the Supreme Court at Hamilton in a summary manner and at comparatively small expense, or whether you propose to apply to the Court for leave to proceed to trial in the courts.

We will be pleased on application by you to furnish any information in our power to enable you to judge of the state of affairs of the company and of the propriety of the course to be pursued.

REPORTS.

ONTARIO.

MUNICIPAL CASES.

RE THOMSON AND McQUAY.

Ditches and Water-courses Act, 1883—Inferior owner—Remedy against superior owner.

An inferior owner cannot invoke the aid of the Ditches and Water-courses Act to compel a superior owner to construct a ditch across the former's land. He is left to the common law remedies, or he may construct the ditch himself, and call in the township engineer to say in what proportion, if any, the other owner or owners should contribute towards its cost.

[Whitty, 1883.]

This was an appeal from the award of the township engineer made in pursuance of 46 Vict. ch. 27.

The arbitration in effect found that McQuay, being the owner of part of lot 8 in the 3rd concession of Pickering, constructed a tile drain thereon, leading in a south-westerly direction to the side road between lots 8 and 9, and across such road by a long established culvert, which side road and culvert furnished him with a sufficient, proper and lawful out-

let without requiring to trespass on the lands of Thomson (lot 9) therefor. That McQuay has placed the drain with a view to the most natural drainage of the land, and that the culvert appears to have been the original water-course. That the water flowing from lot 8 would, by natural drainage, flow, by reason of the existing slope, into lot 9, and it is not necessary to go upon lot 9 in order to secure an outlet to the drain.

Thomson's requisition to McQuay required him "to construct a drain through lot number 9 or such part thereof as will carry off the water from your part of lot 8 under the Ditches and Water-courses Act of 1883." Failing an agreement the township engineer was notified and evidence was given before him upon which he made his award, the operative words of which are "the construction of the drain asked for by the requisition is left entirely to Thomson."

He fixed his own costs at \$17 and directed them to be paid by Thomson, but made no provision for any other costs.

Thomson appealed from this award on the ground that it was "contrary to law and evidence, and in no way decides the matter in dispute, nor does it provide a remedy for Thomson from the water that illegally drains unto Thomson's land."

W. H. Billings appeared for the appellant, and cited *McGillivray v. Millin*, 27 U.C.R. 62; *Murray v. Dawson*, 19 C.P. 314; *Murray v. Dawson*, 17 C.P. 588; *Darby v. Crowland*, 38 U.C.R. 338.

J. E. Farewell for the respondent, cited *Kerr on Injunction*, 390; *Heward v. Banks*, 2 Burrs. 1114; *Smith v. Kendrick*, 7 C.B. 573.

DARTNELL, J. J.—I have carefully read and analyzed the evidence taken before the engineer. It has been fully and skilfully taken, and justifies the findings of fact in the award, which is very well drawn up. It in effect finds that to construct the drain asked for by the requisition would be entirely for Thomson's benefit. It remains for me to consider what is the full effect of this finding.

Mr. Billings relies upon the cases cited by him, as shewing that his client had no other forum in which he could assert his rights.

I do not think on examination of these cases