notice of the second, and he might then have learned everything necessary to support a much earlier application to quash the by-law.

There remains only the second objection, which is pointed at the fourth section of the by-law, and this section has been abandoned on the argument as illegal. To this extent therefore the by-law must be quashed, and the question is whether the residue can be supported without it. I do not perceive that the statute makes it indispensable that the by-law should name the day on which either the debentures or the interest thereupon should become payable. The third section of the by-law distinctly authorises the raising the money by loan on debentures. It appears that the debentures themselves were issued in conformity to the statute, not in compliance with this illegal provision in the by-law. The other portions of the by-law are independent of the fourth section. And it would have been, as I think, a legal and effectual by-law if this fourth clause had not been introduced. We may, I think, lop off this rotten limb, and leave the tree to which it was attached in full vitality. It is unnecessary to its existence, and to its bearing the fruit it was intended to produce. To drop metaphor, it appears to me the defect is confined to the fourth section, and does not vitiate the rest: the fourth section must be quashed.

Upon the whole, though leaning in favor of the first objection which strikes at the whole by-law, yet when I consider the mischief or serious inconvenience which probably would result from quashing the by-law at this late period, I think we ought, as a matter of discretion, if we possess such discretion, rather to discharge than to make absolute this rule. It is true, a distinction has been well taken between objections extrinsic to the by-law, and such as appear on the face of it, as to the duty of the court on applications to quash; and this objection is not extrinsic, but the Consol. Stat. U. C., ch. 2, sec. 18, subs. 2, enables us to treat the word *may* "as permissive," not mandatory, and the 195 section of the municipal institution act says the court *may* quash a by-law in whole or in part for illegality. Treating the expression as conferring an authority, with a discretion to abstain from its exercise, I think this a fitting occasion to exercise that discretion.

I think, therefore, the rule should be made absolute to quash the fourth section of the by-law, and should be discharged as to the residue, without costs on either side.

Per cur.— Rule discharged.

SNARR v. BALDWIN ET AL.

Lease—Covenant for quiet enjoyment—Breach of, under superior authority not existing at execution of lease—How far lessor liable.

By letters patent, bearing date in the year 1840, certain lands situate on the water's edge in the city of Toronto, were granted to one "A.," the patent containing a condition for the erection of an esplanade according to a certain plan, within three years from the date thereof.

A., by indenture demised the said lands to plaintiff, with full covenants against all the world.

In 1853 the stat 16 Vic cap 219, enacted, that unless the owners and lessees should, within twelve months, erect the esplanade, the corporation of the city of Toronto should do it and impose a special rate to defray the expense thereof; and by stat. 20 Vic cap. 80 further powers were granted to the corporation with respect to the erection of the esplanade, among others to enter upon the water-lots, &c.

Under the above mentioned statutes the corporation, by their agents, entered upon the premises in question, and by filling up the space between the water's edge and the esplanade prevented the working of the plaintiff's mill, which was the damage complained of in this suit. *Held* that the act of the corporation being done under superior authority (the legislature) although the statute did not exist at the time of the execution of the lease, yet as the breach of covenant did not arise from the neglect, fraud or procurement of the lessor, but from the nonfulfilment by the lessee of his own covenants, the defendants were entitled to succeed.

The declaration set out a lease of certain premises in the city of Toronto, being a water lot, made by one Margaret Phœbe Baldwin to one John Mulholland. The plaintiff shewed the term (of 42 years from 1st November, 1844) to be vested in himself by assignments, and stated that all the estate and interests of the lessor became legally vested in the Hon. Robert Baldwin, that he died, and that the defendants are his executors, and set out a covenant in the lease for quiet enjoyment by the lessee, his executors and assigns, without the lawful let, suit, hindrance, denial, ouster, eviction, ejection or interruption of the lessor, her heirs or assigns, or any other person or persons whomsoever, having or lawfully claiming any estate, right, title, interest or demand of, in, or to the demised premises, by or through her or them, or by or through her or their acts, measures, consents, default, neglect, or procurement, or by, from or through any other person or persons whomsoever. Breach, that after plaintiff became assignee of the term, and possessed of the premises, and while the reversion was vested in Robert Baldwin, and in his lifetime, and during the term, the corporation of the city of Toronto had the lawful right and title (not derived under Mulholland, &c) to enter and to grant to others the right of entry upon the demised premises, and to retain possession and to disturb plaintiff in the enjoyment thereof; and afterwards and while plaintiff was possessed, the Grand Trunk Railway Company, and other persons, having lawful right from and under the corporation of the city of Toronto, (not derived under Mulholland, &c) and having full, just and perfect right to enter into the possession of the demised premises, by and with the consent and approbation of Robert Baldwin, in his life time, did enter and did rightfully put out the plaintiff from possession, and disturb and interrupt him in the enjoyment of the demised premises, and being in such possession the Grand Trunk Railway Company and other persons claiming title, and acting under the city corporation, and with the consent of the said Robert Baldwin, did fill up with earth the water-lot from the water's edge southwards to the northern limit of an esplanade, of 100 feet wide, built along the bay at the southern limit of the water-lot, and thereby, &c, stating the injury inflicted upon the plaintiff, and the damage.

Demurrer.—1. Because it is not shewn that the corporation of the city of Toronto claimed the alleged right, through Margaret Phœbe Baldwin, her heirs or assigns, or by her or their acts, consent, &c 2. That it is not shewn that such alleged right accrued before the making of the covenant. 3. That it is not shewn by what right the corporation, or the railway, or the other persons claiming under the corporation, entered.

Pleas — 1. That the entry, eviction, &c., in the breaches charged, were not occasioned by reason of any matter or thing contained in the covenant. 3. That Mulholland, in the said indenture of lease, covenanted, that he, his executors, administrators or assigns, should within the time, and in the manner appointed by provincial, municipal or other competent authority, at their own cost, erect, build, &c, all such buildings, matters or things on the demised premises, or in the immediate neighbourhood thereof, according to the provisions contained in certain letters patent from the crown, dated 21st February, 1840, granting, amongst other things, certain lands adjoining to the demised premises, to the city of Toronto, upon certain trusts, were or might be necessary to be erected on behalf of the said Margaret Phœbe Baldwin, her heirs or assigns, as proprietors of the demised premises, so as to entitle her or them to a conveyance of the said adjoining lands from the corporation of Toronto, according to the provisions of the letters patent. That by the letters patent, and by force of the statute 16 Vic. cap. 219, it became necessary, on behalf of the said Robert Baldwin, as proprietor of the demised premises, and in respect of the same, to entitle him to a conveyance of the adjoining pieces of land, as in the covenant mentioned, to build in front of and upon the demised premises, an esplanade, within twelve months from the 1st of January, 1853, and plaintiff did not build the same at any time, wherefore, and by authority of the said statute, and also by authority of the statute 20 Vic. cap. 80, the corporation of Toronto and the Grand Trunk Railway Company, and the said other persons for the purposes in the said acts authorized, entered upon the premises, and did the several acts in the said breach charged.

2nd Replication to 3rd plea, that, according to the provisions of the said letters patent, it was not necessary in order to entitle the said Margaret Phœbe Baldwin, or the said Robert Baldwin, as her assignee and proprietor of the demised premises, to erect, build, &c., any buildings, works, matters or things, either on the demised premises or in the immediate neighborhood thereof, but that by the letters patent the said adjoining lands, with other lands, were granted to the corporation of Toronto, in trust, to convey the same to the owners of the demised premises, subject to a charge thereon binding the lands; that the proprietors of the