authorized a reference to arbitration; but that the refusal of the freeholders and householders to name an arbitrator did not enable the other two arbitrators to proceed, the proper course being to compel the appointment by mandamus.

Per Wilson, J., the difference of opinion must be as to the position of the new site, after a change has been agreed to by the rate-payers, not as to whether there shall be a change; and the arbitration therefore was unauthorized.—*The Corporation of the Township of Toronto* v. *McBride et al*, *Executors of William McBride*, 29 U. C. Q. B. 18.

ONTARIO REPORTS

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, ESQ., *Reporter to the Court.*)

IN RE LINDEN AND WIFE v. BUCHANAN, IN THE DIVISION COURT.

Division Court—Set-off of judgments—Married women's Act, C. S. U. C. ch. 73

L. and his wife, who had married in 1865, recovered judgment in the division court against B., for rent due to Mrs. L. on land which she had inherited from her father in 1852, and B. on the same day recovered a judgment against L. for a larger sum.

Held, that Mrs. L. being entitled under Consol. Stat. U. C. ch. 73, to the rent as her own, and her husband joined in the action for conformity only, there could be no set-off against it of B.'s judgment against L.

Such set-off having been directed in the division court, a mandamus was granted to the clerk, to issue execution on the judgment recovered by Mrs. L.

[29 U. C. Q. B., 1.]

This was an application for a mandamus to issue execution upon a judgment recovered in the division court.

The facts appeared to be, that on the 18th of December, 1868, Linden and his wife recovered a judgment in the division court of the county of Middlesex, against Buchanan, for $17, for the share of the rent due to Linden's wife, on land which she had inherited from her father, who died in 1852 intestate, leaving her and Buchanan's wife co-heiresses of his estate. She was married to Linden in 1859. On the same day Buchanan recovered a judgment in the same court against Samuel Linden for about $80, on a note of Linden's.

On the 19th December, William Horton, Esq., the deputy judge of the said court, addressed an order to the clerk, directing him to deduct the amount of the judgment obtained by Samuel Linden and his wife against James Buchanan, from the judgment obtained by Buchanan against him, and collect the balance. Application was made to the deputy judge for an order to issue execution on the judgment recovered by Linden and his wife, and he refused to grant it, or to rescind the order made by him; and the clerk of the court also refused to issue the execution on the judgment, in consequence of the order of the judge.

In Hilary term last, *Osler*, on behalf of Linden and his wife, obtained a rule calling on James Buchanan and William Horton, Esq., deputy clerk of the said division court, to shew cause, judge of the county court, and W. R. Bernard, Esq., on the first day of this term, why a rule for a mandamus should not issue, directing the said judge to order the said clerk of the said court to issue execution upon the judgment recovered in the said plaint, in favor of the plaintiffs therein against the said James Buchanan; or why a writ of mandamus should not issue, directed to the said clerk, to issue such execution upon such judgment; and why the said James Buchanan should not pay the costs of this application.

During this term *Crombie* shewed cause: Has this court any power to interfere in the matter? The question of setting off judgments is one within the jurisdiction of the judge of the division court, and though he may have decided erroneously this court will not interfere: *Donnelly* v. *Stewart*, 25 U. C. R., 398; *McPherson* v. *Forrester*, 11 U. C. R. 362; *Berkley* v. *Elderkin*. 22 L. J. Q. B. 281; *Read* v. *Wedge*, 20 U. C. R. 456; Con. Stat. U. C. ch. 19, sec. 134. The county court judge has died since this rule issued, and his deputy ceases to have any authority, so that the mandamus cannot now go to him.

Osler, contra: The judge of the county court being dead, the writ cannot go to his deputy, but the mandamus can go to the clerk of the court, who is the proper officer to issue the writ. These judgments being in different rights could not be set-off. They are not cross judgments *between the parties*; nor are they substantially between the same parties: *Ch. Arch.* 12th ed., 723, and the cases there cited: *Regina* v. *Fletcher*, 2 E. & B. 279. Mrs. Linden was married since the 4th May, 1859, and this property, for the rent of which she sued, she inherited from her father, and under the Con. Stat. U. C. ch. 73, she is entitled to enjoy it as real or personal property free from the debts of her husband. The deputy judge has endeavored to make this judgment; which is hers in her own right, applicable to satisfy a debt of her husband.

RICHARDS, C. J., delivered the judgment of the court.

The affidavits filed on behalf of Mr. Buchanan shew, that Linden was a man of idle and dissipated habits, was squandering his wife's and his own property, and was largely indebted to Mr. Buchanan, in addition to the note on which he had recovered judgment in the division court, and much of the indebtedness arose from necessaries supplied to him to support his family, and for indebtedness arising from becoming surety for Linden for goods he had purchased for his family; that Linden and his wife had sold their interest in the farm which had descended to her and others from her father, and unless he was able to set off the judgment which Linden and his wife had recovered against him, he would not be able to get anything from Linden from what he owed him.

In the affidavits filed on behalf of Buchanan, it is not denied that the verdict in the division court against him was for rent due on property inherited by Linden's wife from her father, or that he never had or pretended to claim any interest in the said rent, as alleged in the affidavits filed made by Mrs. Linden. But it is stated the amount was recovered against him, Buchanan,