

Co. Ct.]

RIDDELL V. MCKAY—CORRESPONDENCE.

direction, and on the land of McKay is a swampy or miry piece of ground. Evidence was conflicting as to whether the natural drainage of this piece flowed to the west, or easterly, towards the creek. McKay cut a drain eastward to drain the swamp, but to reach the ravine had to cross about five rods of Riddell's land. It was in respect of this five rods of ditching that the award was made. The evidence also showed that McKay could have drained to the west or south without crossing Riddell's land; and it was shewn that the drain was of no benefit to the latter.

DARTNELL, J.J.—I think the fence-viewers have misconceived the obvious meaning of the Act, and that they had no jurisdiction at all in the premises. The cases provided for under section are: (1.) The *making* of a ditch or drain. (2.) The *deepening* or *widening* a ditch or drain already made in a natural water-course. (3.) The *making, deepening, or widening* a ditch or drain for the purpose of taking off surplus water from swamps or low miry land. The section applies this to "adjoining lands which would be benefitted" in any of the above mentioned instances.

Now in this case the benefit is all on one side; and it seems to me not to be contemplated by this Act that B. should be called upon to pay for building a drain for the sole benefit of his neighbour A. I can well understand, that when a swamp or marsh lies partly on the land of A., and partly on that of B., that B. might fairly and properly be called upon to pay his fair proportion of the cost of a drain which would "benefit his land," although the whole of such drain might be on his neighbour's soil. This is not the case here. On the contrary, Riddell has no land which has benefitted by the drain in question, and it is manifestly unjust that he should be called upon, under these circumstances, to contribute anything to the cost of McKay's drain, and still less pay the costs of the award. The language of the 6th section, I think, is confirmatory of this view. In that section it is directed that "the fence-viewers in making their award shall regard the nature of the ditches or drains in use in the locality and generally the *suitableness* of the ditch or drain ordered to the wants of the parties." Now, however suitable the drain in question may be to the wants of McKay, I do not think it can be said to be suitable to Riddell's wants. In fact he takes the position that he does not want it at all, and that it is of no use or benefit to him whatever. It might be a just and convenient thing that a farmer should be

enabled to continue his own drain across his neighbour's land into its natural water-course, but I do not think the Act in question gives him that privilege, or confers on the fence-viewers the power of awarding it.

I made an order setting aside the award with costs to be paid by the respondent to the appellant.

N. F. Patterson, for appellant.

C. C. Keller, for respondent.

CORRESPONDENCE.

Mechanics' Lien Acts.

TO THE EDITOR OF THE LAW JOURNAL:

SIR,—I fully concur in your views upon these acts contained in your November number. More wretched specimens of legislative workmanship could not easily be found.

For example, the 4th clause of the Act of 1874, respecting mortgaged lands. The last six lines are clothed in extraordinary verbiage. I have no doubt the attempted meaning was that the claim of the mortgagee should be restricted to the value of the lands irrespective of the improvements made by the mechanic. The clause is too long for insertion, but if any of your readers will take the trouble to turn to the clause he will find the extraordinary method taken to confound the intention.

A decree was issued lately at the instance of a mechanic, for the sale of the lot on which the improvements had been made, on which a previous mortgage existed, and the consideration of the decree and of the acts caused a considerable bewilderment. To add to this the decree declared that the plaintiff should, in the first place, be paid his costs, and then his claims. It happened, however, that another mechanic had a lien, and under the 9th clause it is declared that all lien-holders in their class shall rank *pari passu*, and the proceeds of the sale be distributed amongst