

of a ditch running on their lot, awarded by the said three fence-viewers on the 14th June, 1870.

On the 12th December, 1870, the first fence-viewers, Scott, Boulton and Maguire, addressed a notice to Patrick and Charles Holland, to the effect that having been called by summons to appear on the lots of Patrick and Chas. Holland to examine the outlet running through lot 27, in the 4th concession, and lot 27 in the 3rd concession of Moore, the said outlet having been awarded by them on the 14th of June, 1870, they found that James Roberts had finished the whole of the outlet according to the award—eighty rods being his own share and eighty rods the share of Robert Cathcart; and that they found James Roberts had finished the shares of Patrick and Charles Holland, being one hundred and sixty rods awarded to them, they being defaulters in respect to the aforesaid award.

On the 13th of December, 1870, Mr. Payne, the magistrate, sent a notice to the clerk of the seventh division court, to the effect that he had sent to the clerk the decision of the three fence-viewers on the ditch between James Roberts and Patrick and Charles Holland, and that the ditch was done according to their award.

Accompanying this notice was a minute of the costs of the award, amounting to \$6 68, and of the 160 rods of ditch at 40c. per rod, \$64, in all \$70 68, exclusive of bailiff's fees, for all of which it was said Patrick and Chas. Holland were defaulters, and were to pay the whole expenses.

On the 17th December, 1870, Charles Holland was served with a copy of the award and costs, and on the 19th of the same month Patrick Holland was also served.

An execution was afterwards issued by the clerk of the division court against the goods and chattels of Patrick and Charles Holland, and delivered to the bailiff to be executed.

Mr. Francis, a surveyor, on 29th October, 1870, certified to Patrick Holland that in his opinion the water had not been taken down its proper channel according to the award, but diverted from it, and that lot 28 in the 4th concession, could, in his opinion, be drained cheaper and quicker than in the way proposed by the fence-viewers, and that it was not to the joint interest of the parties mentioned in the award to have the ditch made.

Charles Holland, on 30th January, 1871, made affidavit that he attended on lot 27 in the 3rd concession of Moore, on the 10th December, 1870, at the hour named in the notice, but did not meet the fence-viewers nor any person representing them. That the award ordering the money to be paid was made on the 12th of December, and that the ditch was not dug till the 14th of December, and was not finished up to the present time (the date of his affidavit, 30th January, 1871); and that the ditch runs about 8 rods through the west hundred acres of 27, in the 3rd concession, being that portion of the lot owned by him.

Patrick Holland, by his affidavit made the 21st of January, 1871, said he attended the arbitrators with his witnesses, but no evidence was taken to shew the proper course of the water. Feeling aggrieved by the award made by Scott, Maguire and Boulton, he got other three fence-viewers, Ross, Jenkins and Reynolds, and they

made their award: that the defendant's land and the land of Charles Holland are not adjacent or adjoining to the land of Roberts: that the course which Roberts wishes to take is not the natural outlet for the water: that the ditch as dug is a direct injury to defendant, as it overflows his land: that no demand was made on him to dig the ditch: and that the ditch is not according to the award of the fence-viewers.

Benjamin Milligan, John Milligan and Charles Coyle also swear the ditch is no benefit but an injury to the Hollands: that the ditch is not eighteen inches deep through Holland's land, nor six feet wide at the top, and the clay is not four feet from the edge: that the ditch causes a large flow of water through the lands of the Hollands, brought from the side line ditch: and that the distance from the commencement of the ditch to the boundary line of the Hollands' lands is 120 rods.

Charles Holland confirmed Patrick's affidavit.

G. D. Boulton showed cause.

The award is made in accordance with the statute. The directions have all been carefully followed. The clerk of the court was the proper person to issue the process. The merits cannot now be disputed. The fence-viewers were the proper judges of all such matters, and all that can now be done is to try whether the proceedings which are disputed were legal or illegal. He referred to C.S.U.C. c. 57, s. 7; *Siddall v. Gibson*, 17 U. C. Q. B. 98.

Harrison, Q. C., contra, appeared for Patrick Holland only.

1. Patrick Holland was not an adjoining proprietor of Roberts.

2. Patrick Holland had not a joint interest with Roberts in the making of the drain.

3. No demand was made on Patrick Holland to do his work according to secs. 14 & 15 of the Act, before the work was done.

4. Then it appears Charles Holland appeared to the magistrate's summons, under sec. 16, requiring him to attend on the 10th of December, but the fence-viewers were not present, and so he has never refused to pay, nor been a defaulter in any form: *Murray v. Dawson*, 17 U. C. C. P. 588; 19 U. C. C. P. 314; *Dawson v. Murray*, 29 U. C. Q. B. 464.

WILSON, J.—It appears that Roberts lives on lot 28, in the 4th concession of Moore. The drain "taps the side line ditch dug by the municipal council through the third and fourth concessions, and from there runs 120 rods to the boundary line of the east half of 27 in the 3rd concession." Robert Cathcart lives on 28, in the 4th concession, to the east of Roberts, and some one, not named, lives on 28 in the 3rd concession, to the south of Roberts. Charles Holland's land, the west half of 27 in the 3rd concession, comes at the north west angle, just opposite to the south east angle of Roberts' land, which is on the other side of the said line; and Patrick Holland's land, the east half of 27 in the 3rd concession, is all the width of Charles Holland's half lot distant from Roberts' land. From these facts it is said that the following words of the Act do not apply:

Sec. 7. "Where it is the joint interest of parties resident to open a ditch or watercourse for the purpose of letting off surplus water from