

C. L. Cham.]

IN RE BRADSHAW AND DUFFY.

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many years ago on what was supposed to be the line between his lot and an adjoining lot, which was subsequently purchased by Duffy, the defendant. Some time after the defendant had purchased the adjoining lot he got a surveyor to run the line between him and the plaintiff, and the surveyor, in running this line, took in a triangular piece of land from the plaintiff, of which he had been in possession. In order to save litigation, the parties entered into an agreement to run the division line through the middle of the triangular piece of land, dividing it equally between them. Fence viewers were got to determine the portion of the fence which each party should erect and maintain, and each party erected his part of the fence on the line agreed upon. In doing so, Duffy, the defendant, used the rails of the fence which had been originally erected and maintained by Bradshaw, the plaintiff, but which fence by the agreement was upon the land taken in by the defendant. The plaintiff brought the suit for the value of the rails so taken by the defendant.

The learned judge reserved his judgment, which he subsequently gave in writing, in favor of the plaintiff, as follows:

"It is no doubt the case that, in general, erections put upon lands by a person not the owner cannot be removed, but become the property of the owner, as forming part of the freehold, and probably a fence would be considered part of the freehold. The law is however modified in favor of those who, in consequence of an unskillful survey, have made improvements upon lands as their own which, on a correct survey being made, turn out to belong to a neighbour. Section 53 of chapter 93 of the Consolidated Statutes for Upper Canada provides that, in such cases, the owner of the land, in an action of ejectment, shall not recover possession until he pays for the improvements, the value of which are to be assessed by the jury.

It has been held, in *Campbell v. Fergusson*, 4 U. C. C. P. 414, recognized in *Hutton v. Trotter*, 16 U. C. C. P. 367, and *Morton v. Lewis*, 16 U. C. C. P. 485, that the act applies to private surveys made on the defendant's own account, as well as to public surveys; and in the last named case, *Morton v. Lewis*, it was held that fences, were improvements within the meaning of the act.

In this case, supposing that no agreement had been made between these parties about the land, and that Duffy had brought an action of ejectment for the land, Bradshaw would have had a right under the statute to assess against Duffy the value of his improvements, including the value of the fences; and Duffy would have had to pay for the improvements before he could recover possession, and Bradshaw ought not to be placed in a worse position in consequence of the agreement settling the line, than he would have been in if an action of ejectment had been brought against him. I think, both legally and equitably, the plaintiff in this suit is entitled to recover for the value of the rails, which originally belonged to him, and which defendant used in the erection of his part of the fence. But I cannot allow him for old rails what new ones (which it may reasonably be expected would last much longer) would cost."

On the 28th January last. *O'Reilly*, Q. C., ob-

tained a summons calling on the plaintiff, Bradshaw, and the Judge of the County Court of the County of Wentworth, to shew cause why a writ of prohibition should not issue to prohibit all proceedings in this matter, and upon an order for payment made by the said Judge of the County Court of the County of Wentworth, presiding in the Division Court, on the ground that the said judge had no jurisdiction to try or adjudicate upon the matters tried and adjudicated upon by him in the said suit in the said Division Court.

*Spencer* showed cause, and objected that the summons did not state the grounds upon which the application was made with sufficient particularity. That the title to lands did not come in question, the contention simply being whether a Judge of a Division Court could adjudicate upon the question, fixture or no fixture. If he can, and there is no doubt that he can, he had jurisdiction in this case, and there can be no prohibition. The question is as to the ownership of the rails, not of the land. Rails cannot, under the circumstances of this case, be considered as part of the realty.

*O'Reilly*, Q. C.—The summons is sufficient, and want of jurisdiction may be shown by affidavit. (This point was not pressed by the other side, the learned judge being against the objection.)

Fences are a part of the realty and go with the land, and the judge had no jurisdiction to try a case where the title to land came in question.—*Elwes v. Maw*, 3 East 38; *Thresher v. E. London Waterworks Co.* 2 B. & C. 609; *Steward v. Lombe*, 1 B. & B. 506; *Colgrave v. Diosantos*, 2 B. & C. 76; *Bunnell v. Tupper*, 10 U. C. Q. B. 414; *Amos & Ferrard on Fixtures*, 9, 13.

Even if the judge had power to decide as to whether the fence was or was not a fixture, he could not by deciding that question wrongfully thereby give himself jurisdiction, when in truth he had no jurisdiction. The equities of the case are with Duffy, who for the sake of a settlement gave up a strip of his land.

HAGARTY, J.—I am of opinion that I should not order a prohibition in this case, or interfere with the decision of the learned judge. I am not dissatisfied with his view of the facts; and with the powers vested in him by the statute, I cannot say he has decided erroneously. When the fence-viewers awarded that Duffy should maintain a specified portion of the boundary fence, and to do that he took away the rails formerly furnished by Bradshaw, to maintain what used to be a division fence on land now discovered to be Duffy's, I cannot say it was beyond the learned judge's power to decide that such rails so removed from the freehold to which they were perhaps in a manner annexed, should not be paid for by Duffy when used by him to erect the new fence, which he was bound by the award to maintain. They were originally Bradshaw's property, and put there for a special purpose, not to become part of Duffy's freehold in any view of the parties. By the new survey and agreement, that fence ceased to answer the intended purpose, and a new fence is to be erected instead. Duffy is bound to maintain part of the new fence, and he takes up these rails and uses them to fulfil his obligation.