

But I think that the Act 27 Vic. chap. 19, sec. 4, cures the error as regards the purchaser at the tax sale. That Act confirms the sale if any taxes in respect of the land sold had been "in arrear" for five years. Now this land was liable to taxes whether the proceedings of the assessor had been correct or not; for by the 116th section of the Consolidated Act even the omission of the lot from his roll would not exempt the land from taxation. That section provides that in case of such omission, the clerk is in the following year to enter the lot on the collector's roll "as well for the arrears omitted, as for the tax of that year." Therefore the taxes may be in "arrear," according to the legislative use of the term, though the lot had been wholly omitted by the assessor; and if so, they are certainly not less in "arrear" where the lot has been assessed and entered on the assessment roll, though under an irregular designation. I am of opinion that on this ground the decree should be affirmed and the appeal dismissed.

The other members of the Court concurring in the views expressed in these judgments,
Appeal dismissed with costs.

COMMON LAW CHAMBERS.

IN RE ROBERTS AND HOLLAND.

Fence-viewers—Watercourses—Contiguous lots.

To constitute a "joint interest" within the meaning of sec. 7, C. S. U. C. c. 57, it is not necessary that the lands occupied should be contiguous lots.

The question whether such interest exists is to be determined entirely by the fence-viewers, and their discretion cannot be reviewed if fairly and reasonably exercised.*

Semble, the absence of a demand under section 15, may be waived by the subsequent conduct of the parties.

[Chambers, March 19, 1871.—WILSON, J.]

A summons was taken out on the 26th of February, 1871, calling on Robert Dale, clerk of the seventh division court of the County of Lambton, and John Coulter, the bailiff of the said court, to shew cause why a writ of prohibition should not issue to prohibit the said clerk from issuing execution against the goods and chattels of Patrick Holland and Charles Holland, according to the determination of fence-viewers in a matter of dispute between the said James Roberts and the said Patrick Holland and Charles Holland, and why the execution of the said writ of execution, if issued, should not be restrained, upon the ground that the clerk of the court had no jurisdiction to issue the said execution; that the alleged award or determination of fence-viewers was void, and on grounds disclosed in affidavits and papers filed.

The proceedings shewed that on the 5th of June, 1870, Joshua Payne, a justice of the peace, summoned Patrick Holland and Charles Holland to attend, on the 11th of the month, on lot No. 27 in the 3rd concession of the township of Moore, then and there to meet three fence-viewers of the township, to shew cause why they, the said Patrick Holland and Charles Holland, refused or neglected to open up a fair portion of a regular watercourse running across the said lot.

The three fence-viewers, Peter Scott, John Maguire and Thomas Boulton, on the 14th June, made their award. The award recites that they,

the fence-viewers, had been summoned by James Roberts, on lot No. 28, in the 4th concession of Moore, to examine a watercourse running across the west half of lot No. 27, in the 4th concession, owned by Robert Cathcart, and also across lot 27, in the 3rd concession, owned by Patrick Holland and Charles Holland, and that they found on examining the said watercourse that "this is the proper course for the water running from James Roberts' land;" then they awarded that a ditch should be opened across the said lots—the ditch to be six feet wide on top, eighteen inches deep, and three feet wide at bottom, the earth to be kept four feet from the side of the ditch—commencing at a certain stake on the side line between lots 27 and 28, in the 4th concession, following the natural course of the water, as already marked out by the fence-viewers, measuring 320 rods from the said stake; and that the first 80 rods, next the side line, should be opened by James Roberts, the second 80 rods by Robert Cathcart, the third 80 rods by Patrick Holland, and the fourth 80 rods by Charles Holland—the whole to be finished by the 20th of August, 1870.

It was further awarded that if any of the said parties should neglect or refuse to open his share of the ditch allotted to him within the above date, any of the other parties might, after first completing his own share, open the share allotted to the party in default, and be entitled to receive not exceeding 40 cents per rod for the same from the party in default; and they awarded that all the costs of the fence-viewers should be paid by James Roberts.

On the 25th of November, 1870, Matthias Ross, Alexander Jenkins and John Reynolds, three other fence-viewers made an award, which after reciting that they had been required by summons issued by G. B. Johnston, a justice of the peace, to examine a ditch in dispute on lot 27, in the 3rd concession of Moore, between Patrick and Charles Holland, complainants, and James Roberts, defendant, stated that they had examined the ditch in dispute, dug by award of fence-viewers, made the 14th of June, 1870, and that they could see no benefit that complainants received or could thereafter receive from the ditch, for the following reasons:

1. The ditch had been carried on an angle across unimproved land, and nearly parallel with the main channel of the west branch of Clay Creek.

2. It has not been carried on direct to the main, most direct, or shortest channel to an outlet.

3. Had James Roberts turned easterly 188 rods from the present outlet, and at a stake put down by them (the last-named fence-viewers), and dug 50 rods, he would have had as good an outlet and have saved 88 rods of digging in the present ditch: both outlets in same creek.

They (the last-named arbitrators) therefore awarded that all expenses of digging the said ditch in dispute should be paid by Jas. Roberts, who was forcing the ditch for his own direct benefit, and that he should also pay all expenses attending this examination and rendering this award.

On the 5th of December, 1870, Mr. Payne, the magistrate, notified Patrick and Charles Holland to attend on lot 27, in the 3rd concession of Moore, and there meet the three fence-viewers on the 10th of December, at 11 A.M., and shew cause why they refused to pay their fair portion

*But see *Re Cameron & Kerr*, 23 U. C. Q. B. 533; *Re McDonald & Cattanach*, 5 Prac. Rep. 288; 30 U. C. Q. B. 432.—Eds. L. J.