It was urged upon us by counsel very strongly at the trial, that the act was "maliciously," and even *vindictively* done, for which he pressed the enforcement of the penalty as well as the damages. He also urged that as it was not necessary to prove express malice, and that where an act was of such a nature as could spring from *no other than a bad motive*, and calculated to inflict injury without cause or justification, malice would be implied from the act itself. But it is just as broadly laid down that if there be some other than *a bad motive* for the doing the act, the necessary consequence of which is an injury to another person, it may be done under such circumstances as negative malice. Thus if an act injurious to another be done under a *bonâ fide* claim of right it will not come within the statute.

As the case was more a matter of fact for a jury than a question of law for the Court, we urged the parties to have a jury empanelled to try it on its merits—but the counsel for the respondent refused to have a jury, insisting that it was a matter which the Court ought only to decide; we therefore find ourselves unpleasantly called upon to decide the merits of a case which has evidently caused some heat between the parties from its very nature. When the appellant sought to remove the fence, it is evident to us from the evidence that his intention was only to remove it from over the grave of his child—not to break or destroy it. That he did break it in the process of removal, there can be no question, and that for breaking it, the respondent was entitled to damages against the appellant as a trespasser, but that belongs only to a civil court and not to a *quasi* criminal tribunal, for it does not follow that because destruction resulted from an illegal act, *malice* is to be implied; unless *malice* can be inferred from the inception of the matter, it cannot be imputed by the mere result, or after an act is accomplished; malice can only flow from the *animus* in which an act is conceived, and not from the consequences merely. In this case the appellant, when remonstrated with by the sexton for what he had done, insisted upon his right to do the act.

Rex v. *Reynolds, alias John Diel*, Russ & Ry. C.C. 465, was a case illustrating this principle, and we think must determine this case, *i.e.* whether in fact this act of the appellant was maliciously done. That was an indictment under 52 Geo. III, cap. 146, for shooting at a vessel of the Customs, and also at an officer of the same on the high seas. [The learned Chairman then cited the case at length]. It appears from this case that the surrounding circumstances (where it is essential to prove malice) must be examined and considered in all cases. The maxim, "*actus not facit reum nisi mens sit rea*," applies here, and we think that as in that case, so in this, the intention and not the result must be the point on which the case ought to be determined.

Although the appellant here was clearly a trespasser, and in the wrong, as regards this whole matter about removing the fence and the consequences which followed from his illegal act, still he insisted upon his right to do it. However mistaken he might have been, we do not see that express malice, within the meaning of the statute under which he was convicted, has either been proven, or that malice can be inferred from those facts, or that (as strongly urged upon us by the counsel for the respondent) the acts of the appellant exhibited either "vindictiveness" as he called it, or maliciousness. Had a jury been empanelled to try this case, we think that under a fair charge they might have reasonably been expected to find a verdict which would have had the effect of quashing this conviction on the merits. And we think that acting as a jury as well as a Court of law, we ought to do the same.

We therefore order that the said conviction shall be, and it is hereby quashed; and we also order the respondent to pay, on notice of this order, the costs of this appeal, amounting to and taxed at the sum of $25.60, to the Clerk of the Peace, to be by him paid over to the appellant forthwith, and that the sum deposited by the appellant instead of a recognizance, he repaid and returned to him—by the Police Magistrate.

The case having been removed by certiorari into the Court of Queen's Bench.

Hodgins, Q.C., moved (before a single Judge) for a rule *nisi* calling upon Bradshaw to shew cause why the judgment of the Court below should not be quashed. The Judge having reserved the case, on a subsequent day refused the rule.

Hodgins, Q.C., subsequently moved by way of appeal to the full Court.

Last Term the full Court refused a rule *nisi*.

INSOLVENCY CASES.

IN RE FREDERICK DANGERFIELD *Insolvent*, MATILDA DANGERFIELD, *Claimant*, AND MEIKLE ET AL, INSPECTORS, *Contestants*.

Wife of Insolvent proving claim.

The claimant was the wife of the insolvent, and claimed to prove against his estate for money lent and in-