

C. L. Cham.]

OROK V. GARVIN—THE QUEEN V. McLEOD.

[O. L. Cham.]

tended that his dam did not overflow plaintiff's land at all. He did not admit that he had not the right to keep his dam up to its then height, and pen back the water as it was then penned back, but contended that the right he exercised did not interfere with plaintiff's land. Surely this right was tried, and comes within the principle of the case referred to.

It is contended that this suit is of the proper competence of the Division or County Court. The action in form is not out of the jurisdiction of either of these Courts, and the amount given by the jury as damages does not put the case properly in a superior court. The plaintiff contends, and the jury have found, that the defendant has prevented the water of the stream passing through his land from flowing in its natural course, and has penned the same back on the land of the plaintiff. He contends, if this had been allowed to continue for twenty years, it would create a right, and therefore he was acting properly in bringing this action to prevent an encroachment prejudicial to him being acquired as to his property. And he was equally warranted in bringing the action in this court, on account of the difficult questions of law likely to arise in the course of the action, and the propriety of having the action in a superior court of record to prove the recovery when necessary.

In this particular case the defendant contended at the trial, and called witnesses to prove, that the plaintiff's land was not overflowed by the dam used by him. The jury, nevertheless, found against him on the facts brought out on the plaintiff's case. The defendant had refused to take a lease at a small rent, and both parties went down to try a case involving apparently important interests to them, and each called a large number of witnesses, including a surveyor on either side. Suits such as these are not usually tried in the inferior courts, and when commenced there would be bound to be removed into the superior courts almost as a matter of course, on the application of the defendant. If the plaintiff, however, went on in the inferior court, and the title to land was raised on the pleadings, or on the trial, the suit would at once stop. Whilst the law is in this state, I do not think it unreasonable that actions like the present, under the facts shewn, should be commenced in the superior courts.

If the law is changed so that when the question involving jurisdiction is raised in the inferior court the case can be readily transferred to the superior court, then the court and judges will feel less embarrassment in disposing of questions of costs when verdicts for an amount within the jurisdiction of the inferior court are ordered in cases tried in the superior court, when the excuse suggested for taking the cause into the superior court is that they feared the defendant might take a course not necessary to try the merits of the cause, to oust the inferior court of its jurisdiction.

Certificate granted.

THE QUEEN V. MURDOCH McLEOD

Change of venue in criminal cases—32, 33 Vic., cap. 29 sec. 11.

Held, that 32, 33 Vic., cap. 29, sec. 11, does not authorize any order for the change of the place of trial of a prisoner, in any case where such change would not have been granted under the former practice, the statute only affecting procedure.

[Chambers, Jan. 5, 1870.]

The prisoner in this case was under recognition to appear at the next Assizes, at Kingston, in the county of Frontenac, to answer a charge of manslaughter.

W. Mortimer Clark, on behalf of the prisoner, applied under the provisions of 32, 33 Vic., cap. 29, sec. 11, entitled "An Act respecting procedure in criminal cases, and other matters relating to criminal law," for an order to change the venue from the county of Frontenac, to the county of York, upon an affidavit in which the prisoner stated that he was informed and believed that all the witnesses intended to be examined on behalf of Her Majesty at his trial, resided at the City of Toronto: that any witnesses to be examined on his own behalf at his trial, resided at or near the City of Toronto, and that he was unable to pay the expense of the attendance of witnesses on his behalf, and the counsel he desired to retain at his trial, if it should take place at the City of Kingston.

Leith, shewed cause for the Attorney-General.

It would be a bad precedent to allow a change of venue on the grounds disclosed. The Act gives no jurisdiction to a judge to change the venue on these facts and the mere poverty of the prisoner is no sufficient reason.

The statute is not intended to give any new ground for changing the venue, but merely to simplify procedure, and to prevent the necessity of proceeding under the old and inconvenient practice of removing the case into the Queen's Bench by certiorari, and then moving to change the venue. The affidavit at all events is insufficient, as it does not shew the particulars as to witnesses, &c., required by the practice on applications to change the venue.

Clark, contra.

It is a mere matter of discretion with the judge, and owing to the poverty of the prisoner "it is expedient to the ends of justice" that the place of trial should be changed.

GALT, J.—Section 11, is as follows: "Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice, that the trial of any person charged with felony or misdemeanor should be held in some district, county, or place, other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court at which such person is, or is liable to be indicted, may at any term or sitting thereof, and any judge who might hold or sit in such court, may at any other time or order, either before or after the presentation of a bill of indictment, that the trial shall be proceeded with in some other district, county, or place within the same Province, to be named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereof caused to the accused, as the court or judge may think proper to prescribe."