

Q. B., Div.]

NOTES OF CANADIAN CASES.

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3. That although the municipality must be allowed a very large discretionary power to do or not to do such a work, it has not the sole and uncontrolled right to avoid doing it.

4. That if the claim made had been proved as stated, a new trial would have been granted, for the facts found by the jury were not warranted by the evidence.

Semble, if the evidence given will not warrant the court in granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Rule 321 of the Judicature Act.

Per ARMOUR, J., that the action would not lie, the matter in question being strictly in the discretion of the municipal council: that the verdict was not sustained by the evidence, and if necessary a new trial should be granted.

Per O'CONNOR, J., that the action was sustainable in law, and the verdict was supported by the evidence.

W. R. Meredith, Q.C., for motion,
McCarthy, Q.C., and *R. Meredith*, contra.

IN BANCO.

FROST V. HINÉS.

Action to recover land—1st and 2nd mortgagee—

Lease by mortgagor after mortgage—Mortgagee in possession.

C., owner of the premises in question, mortgaged them on 6th February, 1880, to the C. P. L. and S. Co. On 17th March, 1883, C. made a second mortgage to L., who assigned to plaintiff. On 5th October, 1883, C. leased the premises to defendant for ten years from 1st April, 1884, at \$175 for the first year, and \$165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees "as payments of interest on loan made by the lessor." H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at the defendant's request. The rent payable on 27th October, 1883, 1884 and 1885 was paid by defendant to H., who remitted the money to the company. H. gave defend-

ant receipts for the rent as agent for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease or of its provisions. The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage being in default. The defendant set up the lease, and the clause referred to, the payment of rent to the company, and that he was tenant to the company whose mortgage was in default.

Held, that plaintiff, as second mortgagee, was entitled to recover, unless it could be established that defendant was in possession as tenant of the first mortgagees, and not as tenant of the mortgagor.

Held, also, that as the company received the money sent them by H., not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possessor, and that defendant was not their tenant.

Held, also, that even if the company had been aware of the provision in the lease, and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor."

Lash, Q.C., for motion.

Hayles, contra.