

comes a trespasser *ab initio*, and this though his conduct may have been lawful in the first place: for the subsequent illegality is said to show that the party contemplated an illegality all along, and so the whole becomes a trespass. (1 Smith's L. C. 65; *Smith v. Eggington*, 7 A. & E. 167; *Reed v. Harrison*, 2 W. Blac. 1219). As to this difficult subject, the clause enacts in terms that a party distraining shall not be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but shall nevertheless be liable to make satisfaction for the special damage, so that acts originally justifiable remain unaffected by a subsequent abuse of authority.

The provisions contained in secs. 193 and 194 are similar to those in the first English County Courts Act, 9 & 10 Vic., ch. 95; and a variety of statutes, passed for the protection of persons who have public duties to perform, embody like enactments. The meaning of words and terms common to most of them have been fixed by frequent judicial interpretation.

Sec. 193 enacts that, "any action or prosecution against any person for any thing done in pursuance of this act shall be commenced within six months after the fact was committed, and shall be laid and tried in the county where the fact was committed, and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action." And sec. 194 provides that, "If tender of sufficient amends be made before action brought, or if the defendant after action brought, pays a sufficient sum of money into court, with costs, the plaintiff shall not recover, and in any such action the defendant may plead the general issue, and give any special matter in evidence under that plea."

In order to entitle a party to the protection of these sections, it is not necessary that the thing should be authorised by the act. A thing is done in pursuance of the statute when the person who does it is acting honestly and *bona fide*, either under powers which the statute gives or in discharge of the duty which it imposes, reasonably supposing that he has authority, though he may erroneously exceed the powers given by statute; but if he act *bona fide* in order to execute such powers or discharge such duties, he is to be considered as acting in pursuance of the statute and entitled to the protection conferred on persons whilst so acting.

In order to maintain an action or prosecution against any person for anything done in pursuance of the Division Courts Act, it is necessary, and these sections require:

1st. That a notice in writing of such action, and the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

2nd. That the action shall be commenced within six months after the fact committed, and

3rd. That the action shall be laid and tried in the county where the fact was committed.

And for their further protection, such persons have certain privileges under the sections named, that is to say:

1st. The defendant may tender amends before action brought.

2nd. After action brought he may pay into court a sufficient sum to cover the damages, which he has neglected to tender in due time.

3rd. The defendant may plead the general issue and give any special matter in evidence under that plea.

## UPPER CANADA REPORTS.

### ERROR AND APPEAL.

[Before the Hon. Sir J. B. ROBINSON, Bart., Chief Justice of Upper Canada, the Hon. W. H. DRAPER, C.B., Chief Justice of the Common Pleas, the Hon. V. C. ESTER, the Hon. Mr. Justice BURNS, the Hon. V. C. SPRAGGE, the Hon. Mr. Justice RICHARDS, and the Hon. Mr. Justice HAGARTY.]

ON AN APPEAL FROM A JUDGMENT OF THE COURT OF QUEEN'S BENCH.

(Reported by ALEX. GRANT, Esq., Barrister-at-Law, Reporter to the Court.)

### MOUNTJOY V. THE QUEEN.

*Grant from the Crown—Highway.*

On the 8th of January, 1836, a surveyor, in compliance with instructions from the government agent, laid out a road or street on the northern limits of the town of London, two chains wide, a portion of which was then, and had for some time been, in the actual possession of the Episcopal Church, to which body a patent subsequently, on the 18th of January, 1836, was issued, granting to them all that parcel or tract of land, "on which the Episcopal Church now stands, and containing four acres and two tenths of an acre or thereabouts." Upon an indictment for a nuisance in stopping up the highway, *Id.*, that this survey, although made after the grantees had gone into possession, must prevail against such possession.

[Hagarty, J., dissenting.]

[Error and Appeal, 1861.]

The appellant John Mountjoy was indicted for a nuisance for unlawfully and injuriously erecting a certain fence of the length of two hundred feet, and of the height of four feet, in a certain street in the city of London, called East North Street, being the Queen's common highway, whereby the same was and is straightened, narrowed and obstructed to the great damage of all Her Majesty's liege subjects, &c.

To this indictment the defendant pleaded "not guilty," and was tried before the Hon. Mr. Justice Richards in the month of March, 1860, when the jury returned a verdict of guilty. The effect of the evidence taken upon the trial is stated in the judgment.

A rule nisi for a new trial was subsequently obtained, which upon argument was discharged. His Lordship the Chief Justice in disposing of the case, saying: "The report of the case of the *Queen v. The Bishop of Huron* (8 U. C. C. P. 253) will explain the nature of the question presented by this case, which turns upon the same patent, and the same facts, though the evidence upon the two trials in some respects varies.

"The defendant in this case is an occupant of part of the land, which it is contended on the part of the prosecution is not included within the patent referred to in the case in the Common Pleas, and he has inclosed all the land up to the northern limit of East North Street, assuming that street to be 100 feet wide only, and not two chains, or 132 feet.

"The letters patent by which the Crown granted certain lands in and near the town of London, as an endowment for the Rectory of St. Paul's Church, in the said town, describes the land thus, of which the defendant is in possession of a part, 'all that parcel or tract of land, being part of the town plot of London, on which the Episcopal Church of England now stands, and containing four acres and two tenths, or thereabouts.' It is dated the 18th of January, 1836.