

Cham. Rep.]

IN RE ROBERTS AND HOLLAND.—DAY V. DAY.

[Eng. Rep.]

The fence-viewers are to settle what portion of the work shall be done, "according to their several interests," (sec. 7); and they are to decide all disputes between the parties "in regard to their respective rights and liabilities," (sec. 8); "and if it appears to the fence-viewers that the owner or occupier of any tract of land is not sufficiently interested in the opening of the ditch or watercourse to make him liable to perform any part thereof, and at the same time that it is necessary for the other party that the ditch should be continued across such tract, they may award the same to be done at the expense of such other party; and after such award, the last-mentioned party may open the ditch or watercourse across the tract at his own expense, without being a trespasser." (Sec. 12)

These enactments enable the fence-viewers fully and equitably to deal with all cases which are brought before them, and I cannot say they have not done so between these parties. It is not likely that Roberts would pay \$80 for doing the work he claims to be repaid for, when he can only get back and has been awarded only \$64 for it, if it were not a work beneficial for himself, at any rate; and it is not likely the fence-viewers would have awarded Patrick Holland to pay the sum if they had not thought the work to be beneficial to him.

I cannot interfere on this ground.

Thirdly, it is said no demand was made on Patrick Holland to do the work through his own land before Roberts did it for him.

Roberts swears Patrick and Charles Holland "neglected and refused up to and after the 20th of August, 1870, to do their portion of the work;" that the ditch was dug in October and November, 1870; "and both the Hollands were frequently at the ditch during the time it was being dug; and that Patrick Holland instructed the men as to the digging of the ditch."

The statute requires a demand in writing to be served on the party to do his work, and a refusal by him before the other party can do it for him—or make him pay for it. Patrick Holland says—"I told one John Walker, one of the parties digging the ditch, not to attempt to enter upon my lands to dig said ditch." It is quite clear, then, that Patrick Holland was determined not to allow Roberts to dig the ditch on his land, and I can quite believe, from this, that he refused to do the work, as Roberts swears.

I do not think I should, if I was quite certain of possessing the power, stay all proceedings because the demand had not been in writing, or even if no demand at all had been made on Patrick Holland to do the work, when it appeared he saw it done and gave directions for the doing of it, without any objection at that time. I do not interfere, then, on that ground.

The fourth ground is that Charles Holland swears that he attended at the time and place appointed on the 10th of December, 1870, to shew cause why he should not pay the sum demanded from him, "but did not meet the fence-viewers nor any person representing them."

Charles Holland had no one representing him on the return of the summons, though it seems he concurred and united in procuring it. That he was present is of no consequence, then, on this argument. Patrick Holland does not say he

was present, or if he was he does not say he did not meet the fence-viewers, nor does he say the fence-viewers were not present. Charles Holland himself does not say the fence-viewers were not present at the time and place. He says he "did not meet them nor any person representing them." That may have been because he *would* not meet them. The place of meeting is "on lot 27, in the 3rd concession."—rather a wide circuit. Charles lives on the west half of that lot, and he may never have left his own house, and yet have been able to make the affidavit he has made, that he *did not meet* the fence-viewers, though he may have seen them all the time they were upon the lot. He may not have met them because he was in his house or on another part of the lot than they were upon, and yet they may have been on the lot, and he may have seen them or known of them being there all the time.

I consider his affidavit as being intentionally so worded, in order to mislead. The difficulty has arisen, however, from the *whole* lot being specified as the place of meeting, instead of some determinate house or field, or other unmistakable locality.

As Patrick has made no affidavit on this point, I presume he did not attend, or that the fence-viewers did attend at the time and place appointed under section 16 of the Act, and that they did determine as they say they did, that Roberts had done the work for Charles and Patrick Holland, "being 160 rods awarded to them"—said Patrick and Charles Holland being defaulters to the aforesaid award."

This last objection fails also.

I must therefore discharge the summons with costs.

Summons discharged with costs.

ENGLISH REPORTS.

PRIVY COUNCIL.*

DAY V. DAY.

Land—Statute of Limitations (3 & 4 Will. 4, c. 27). ss. 2 and 7—Tenancy at will.

A tenant at will of land, to whom the management of the land was confided, underlet a portion of the land, and transferred his interest in another portion. The letting and transfer were with the knowledge and assent of the landlord of the tenant at will. The tenant at will had already been in possession of the land for ten years, and he and his tenant and transferee were in possession for a further period of twelve years and more.

The landlord, more than twenty-one years after the commencement of the tenancy at will, obtained possession of so much of the land as the tenant at will had remained in possession of or had let.

Ejectment was brought by the tenant at will.

Held, that the tenant at will was entitled to recover, the right of the landlord having been extinguished by the Statute of Limitations (3 & 4 Will. 4 c. 27), ss. 2, 7, 34, the statute running, upon the true construction of section 71 at latest at the end of the first year of the tenancy

*Present.—Sir JAMES W. COLVILLE, Sir ROBERT J. PHILIMORE, Sir JOSEPH NAPIER, Lord Justice JAMES, and Lord Justice MELLISH.

† 3 & 4 Will. c. 27, s. 7 [C. S. U. C. c. 88 s. 7], enacts that: "When any person shall be in possession . . . of any land . . . as tenant at will, the right of the person entitled subject thereto . . . to make an entry . . . or bring an action to recover such land . . . shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have been determined. . . ."