

Cham. Rep.]

IN RE ROBERTS AND HOLLAND.

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Charles Holland confirmed Patrick's affidavit. G. D. Boulton showed cause.

The award is made in accordance with the statute. The directions have all been carefully followed. The clerk of the court was the proper person to issue the process. The merits cannot now be disputed. The fence-viewers were the proper judges of all such matters, and all that can now be done is to try whether the proceedings which are disputed were legal or illegal. He referred to C.S.U.C. c. 57, s. 7; *Siddall v. Gibson*, 17 U. C. Q. B. 98.

Harrison, Q. C., *contra*, appeared for Patrick Holland only.

1. Patrick Holland was not an adjoining proprietor of Roberts.

2. Patrick Holland had not a joint interest with Roberts in the making of the drain.

3. No demand was made on Patrick Holland to do his work according to secs. 14 & 15 of the Act, before the work was done.

4. Then it appears Charles Holland appeared to the magistrate's summons, under sec. 16, requiring him to attend on the 10th of December, but the fence-viewers were not present, and so he has never refused to pay, nor been a defaulter in any form: *Murray v. Dawson*, 17 U. C. C. P. 588; 19 U. C. C. P. 314; *Dawson v. Murray*, 29 U. C. Q. B. 464.

Wilson, J.—It appears that Roberts lives on lot 28, in the 4th concession of Moore. The drain "taps the side line ditch dug by the municipal council through the third and fourth concessions, and from there runs 120 rods to the boundary line of the east half of 27 in the 3rd concession." Robert Cathcart lives on 28, in the 4th concession, to the east of Roberts, and some one, not named, lives on 28 in the 3rd concession, to the south of Roberts. Charles Holland's land, the west half of 27 in the 3rd concession, comes at the north west angle, just opposite to the south east angle of Roberts' land, which is on the other side of the said line; and Patrick Holland's land, the east half of 27 in the 3rd concession, is all the width of Charles Holland's half lot distant from Roberts' land. From these facts it is said that the following words of the Act do not apply:

Sec. 7. "Where it is the joint interest of parties resident to open a ditch or watercourse for the purpose of letting off surplus water from swamps or low miry lands, in order to enable the owners or occupiers thereof to cultivate or improve the same, such several parties shall open a just and fair proportion of such ditch or watercourse according their several interests."

By sec. 8 three fence-viewers are to decide all disputes between the owners or occupants of adjoining lands or lands so divided or alleged to be divided as aforesaid, in regard to their respective rights and liabilities under the Act, and all disputes respecting the opening, making or paying for ditches and watercourses under the Act.

From the facts stated, it appears Roberts desired to have surplus water let off his land. It appears also that Cathcart, to the east, has a good deal of marshy land on his lot, and that it runs down southerly upon a good deal of the north east quarter of Patrick Holland's land.

Cathcart has paid for the work done through his lot. The two Hollands have not.

It must always happen, where there are more than two lots lying the one from the other as lots in the same concession, numbering 1, 2, 3, 4, &c., that there must be some of the lots which do not touch or abut upon the other or others of them, and yet all these lots may require to be drained, or to be so grouped together as to constitute an adaptable block for the purpose of draining some one or more of them, though the others may not require the proposed drainage in any way.

The statute does not restrict the question of drainage to the owner or occupier of only the two coterminous lots, as it does when provision is made for fences.

By section 1 the enactment as to fences is—"Each of the parties occupying adjoining tracts of land shall make, keep up and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof," every word of which shews that provision is made for the line fence between the immediate occupants on each side of it.

That enactment is very different from the language of sections 7 and 8, before quoted, and the nature of the subject required that it should be different.

In my opinion then, the statute, with respect to the provisions which relate to drainage, does not require that the rights or duties of coterminous occupants can be or shall be alone considered. The interests of all those who are affected by the work may and must, I should think, be jointly considered in the one reference and award.

So far, then, I have no doubt that Roberts, Cathcart, Charles Holland and Patrick Holland, each of them representing different lots, may be brought into the same project, and have their rights severally adjudicated upon in carrying out the joint or general scheme of drainage which the fence-viewers shall decide or do decide to be for their common interest, more or less, although Patrick Holland and Roberts are not between themselves coterminous occupants.

That disposes of the first objection.

The second objection is that Patrick Holland had not a joint interest with Roberts in the making of the drain. That is a question of fact with which I have properly nothing to do. The fence-viewers or arbitrators are to decide that. If they decided persons to be jointly interested in a work of this kind who were in no sense so interested, relief must be had in some way; I do not say by application to a superior court—though possibly the proceedings may be reviewable on *certiorari*,—but by action, if a case of fraud or corruption can be established.

Here it is not said they may not be interested in the work from the juxtaposition of property, but not interested because the drain made does not drain the land of the complainant, and because it has not been cut in the place where the natural flow of water is.

These are matter of detail for the fence-viewers, whose discretion I cannot supersede or control if fairly and reasonably exercised: and I see no reason to doubt it, though the complainant and some others for him deny it.