

not appear to have been disputed at the trial that defendant was in fact acting *virtute officii*; for the damages given by the jury have been assessed by them without objection on plaintiff's part, not for the whole assault, but only for the excess of force or violence used in carrying out what defendant might properly have done using only necessary force or violence.

This being the case, it was unnecessary, in my opinion, for defendant to prove that the use being made of the market square was authorized by the city council. The market clerk was the official in charge of it for the city, and the constable, receiving his order to remove a person obstructing the actual use of it, was not bound to search the city by-law for the exact limitations of the market clerk's authority before acting upon his order. It was sufficient that he believed in good faith in the authority of the market clerk, the *de facto* representative of the city, to prevent the continuance of the obstruction: *Griffith v. Taylor*, 2 C. P. D. 194; *Gosden v. Elphick*, 4 Ex. 445; *Kelly v. Barton*, 26 O. R. 608.

Defendant, having been acting in his office of constable within the meaning of the Act, is brought within the protection of sec. 1 of R. S. O. 1897 ch. 88, and it was necessary for plaintiff to allege, as he has done, and to prove, as he has failed to do, that defendant had acted maliciously and without reasonable and probable cause. The jury have found expressly that he did not act maliciously, and the action, therefore, in my opinion, fails.

I think the judgment entered for plaintiff should be set aside, and that judgment should be entered for defendant with costs of the action and of this motion.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion, referring to *Bacon Abr.*, 7th ed., vol. 2, p. 171; *Staight v. Gee*, 2 Stark. 445; *Theobald v. Crickmore*, 1 B. & Ald. 227; *Gordon v. Elphick*, 4 Ex. 445.

IDINGTON, J., concurred, also giving reasons in writing.

BRITTON, J.

JULY 4TH, 1904.

TRIAL.

ANDREWS v. TOWNSHIP OF PAKENHAM.

Way—Highway—Establishment of—Evidence—By-law—Dedication—Statute Labour—Municipal Corporation.

Action for damages for obstructing an alleged highway and for a mandamus compelling defendants to open up this