

JOHN WILSON, J.—The defendant seeks relief on the ground of irregularity and on the ground of having a good defence on the merits. Mr. Wilkinson knew of the circumstances on the 31st of December, and should without any delay have taken steps to set aside any proceedings which were wrong. He did nothing, did not even watch whether the plaintiff entered his record for trial pursuant to his notice. The plaintiff had a right to proceed, for he found an appearance entered for all the defendants, and the mere suggestion of a mistake was nothing to him without the intervention of the court. The defendant, we think, is too late to move on this ground.

Then as to his having a defence on the merits. It is admitted the defendant lived in Fredericksburgh, Mr. Wilkinson's clerk says his residence is in North Fredericksburgh, his P. O. Napanee, but Whitman Smith swears the defendant told him that his residence and address were Fredericksburgh, and there the notice was addressed. We think his defence is more than doubtful on these grounds; besides, if he had a good defence, he was bound promptly to set it up, which he has not done.

The rule will therefore be discharged with costs.

Per cur.—Rule discharged.

THE QUEEN V. BROWN AND STREET.

Joint-stock company—Road of—Not public roads or highways—Duty of company to repair—22 Vic., ch. 54, sec. 336.

B. & S. having become the purchasers of the St. C. T. & S. B. Road Co.'s Road, at a sale ordered by the Court of Chancery, under 22 Vic., ch. 43, originally owned by that company, neglected and refused to keep that portion of said road lying within the limits of the corporation of the village of Thorold, on the ground that such portion of said road was not owned by them, but was established under the Joint Stock Company's Road Act, and vested in the corporation of said village by 22 Vic., ch. 54, sec. 336, which corporation, by sec. 337, are bound to keep it in repair.

On motion for a mandamus requiring B. & S. to repair said portion of said road, *held*,

That roads of joint-stock companies are not public roads or highways within the meaning of 22 Vic., ch. 54, sec. 336, and that the portion in question of said road was not vested in the corporation of the said village, but belonged to B. & S., the successors of the original joint stock company, and that B. & S. are therefore bound to keep it in repair.

But as the case of 12 A. & E. 427, is against the granting a mandamus in such a case as this, it is refused, the parties being left to their remedy by indictment if said road be not repaired.

In last Easter Term, *Freeman, Q. C.*, on filing the affidavits of William James and Samuel Black Freeman, and the papers attached thereto, obtained a rule calling upon John Brown and Thomas C. Street to shew cause why a writ of mandamus should not issue directed to them, and requiring them to repair that part of the road constructed and formerly owned by the St. Catharines, Thorold and Suspension Bridge Road Company, which lies within the corporation of the village of Thorold, which road is now owned and possessed by the said John Brown and Thomas C. Street.

The first affidavit of James shewed, that on the 18th day of March, 1851, a company had been formed at St. Catharines called "The St. Catharines, Thorold and Suspension Bridge Road Co.," under the provisions of the act to authorise the formation of joint-stock companies, for the construction of a macadamised and plank road from the Niagara Falls Suspension Bridge, in the township of Stamford, by the way of the village of Thorold, to the town of St. Catharines, in the township of Grantham.

He swore in that affidavit that the road was, by the assistance and permission of the corporation of the village of Thorold, constructed and finished from the Niagara Falls Suspension Bridge to the town of St. Catharines, so as to pass, and did pass through the village of Thorold, and toll-bars were placed thereon, and tolls taken on said road by the company. That on or about the 12th of March, 1862, the road had been sold by an order in Chancery, and that Brown and Street had become the purchasers, and took possession of it, and since the sale had taken tolls thereon at the toll-bars upon it. That a portion of the road lying within the limits of the corporation of the village of Thorold, was greatly out of repair, and was dangerous to the travelling community, and had been in a bad state of repair for several months then past; that the said Brown and Street had not repaired that part of the road, although they had maintained and repaired the other parts of the road lying out of the limits of the village of Thorold; and that

Brown and Street, as their reason for not repairing that part of the road, allege they are not under any legal liability to do so, and that they intend to abandon it.

In the second affidavit of James, he swears, that in the year 1850, when he was reeve of the village of Thorold, certain persons applied to the corporation of that village to unite with them and form a joint-stock company for the purpose of building the said macadamised and plank road; that the leading motive to induce the said corporation of the village of Thorold so to unite and form said company was, that the road should pass through said village, and that the part of said road so running through said village should be kept in repair by the company.

That at a public meeting called for the purpose of considering the proposition, at which he as reeve presided, it was advocated by the parties concerned, that great benefit would result to the said village by having the road kept in repair by the company.

That on condition that the road should pass through the village and should be kept in repair by the company, the meeting passed a resolution, that the corporation of the village of Thorold should unite with and assist in forming said company, and take stock therein, which was done accordingly, to the amount of £750. "That the council empowered the reeve to take stock in the company only on the foregoing conditions." That the corporation about the year 1853, aided the company to raise a further sum of money on the credit of the village of Thorold, to finish the road and extend its operations, with the understanding fully expressed, that the principle on which said corporation united in forming said company should be fully carried out, namely, the keeping that part of said road passing through the village in repair.

That the road had been completed, toll-bars erected thereon, and tolls taken. That in the year 1855 or 1856, a toll-bar had been erected by the company within the limits of the corporation of the village, and tolls taken thereat. A copy of the bill filed in Chancery in the proceedings in the suit in which the road was sold was put in, and it is not denied that Brown and Street sold the road, as the purchasers thereof at the sale, under the decree made in this suit in Chancery.

In Trinity Term, in shewing cause against the rule, Brown filed his affidavit denying that the leading motive to induce the corporation of Thorold to unite with the company was as is stated by James, denying that it was advocated at the public meeting mentioned by James that the road should be kept in repair by the company.

Denying that the resolution was passed by the corporation to take stock in the said road on condition that the said road should pass through the village of Thorold, and should be kept in repair by the company.

Denying that the council empowered the reeve of the village to take stock in the company on the conditions mentioned in the affidavit of James.

Denying that the corporation of Thorold aided the company as mentioned in the affidavit of James upon the understanding expressed or otherwise, that the principle on which the corporation united in forming the company, namely, the keeping that part of the road passing through said village in repair, should be carried out.

Denying that a toll-bar had ever been erected within the corporation of the village of Thorold.

Denying that when the corporation of Thorold assisted the company, as mentioned by James, in raising money, there was any such understanding as is mentioned by him.

Asserting that to secure the loan a mortgage was given on the road to the corporation of Thorold.

Asserting that in or about the year 1856, a toll-bar was erected, not within the corporation, but on the corporation line, where it remained a few months, and was removed; that the present corporation limits now extended over the place where the toll bar was erected, but the extension of the limits took place since the removal of the toll-bar.

That the corporation of Thorold for years past, and until lately, kept that portion of the road within its limits in repair, and assumed and exercised control of such portion of the road.

That in the year 1859 a flood of water, caused by the breaking of a lock-gate of the Welland Canal, extensively damaged a portion