

Cham. Rep.]

IN RE ROBERTS AND HOLLAND.

[Cham. Rep.]

It was further awarded that if any of the said parties should neglect or refuse to open his share of the ditch allotted to him within the above date, any of the other parties might, after first completing his own share, open the share allotted to the party in default, and be entitled to receive not exceeding 40 cents per rod for the same from the party in default; and they awarded that all the costs of the fence-viewers should be paid by James Roberts.

On the 25th of November, 1870, Matthias Ross, Alexander Jenkins and John Reynolds, three other fence-viewers made an award, which after reciting that they had been required by summons issued by G. B. Johnston, a justice of the peace, to examine a ditch in dispute on lot 27, in the 3rd concession of Moore, between Patrick and Charles Holland, complainants, and James Roberts, defendant, stated that they had examined the ditch in dispute, dug by award of fence-viewers, made the 14th of June, 1870, and that they could see no benefit that complainants received or could thereafter receive from the ditch, for the following reasons:

1. The ditch had been carried on an angle across unimproved land, and nearly parallel with the main channel of the west branch of Clay Creek.

2. It has not been carried on direct to the main, most direct, or shortest channel to an outlet.

3. Had James Roberts turned easterly 138 rods from the present outlet, and at a stake put down by them (the last-named fence-viewers), and dug 50 rods, he would have had as good an outlet and have saved 88 rods of digging in the present ditch: both outlets in same creek.

They (the last-named arbitrators) therefore awarded that all expenses of digging the said ditch in dispute should be paid by Jas. Roberts, who was forcing the ditch for his own direct benefit, and that he should also pay all expenses attending this examination and rendering this award.

On the 5th of December, 1870, Mr. Payne, the magistrate, notified Patrick and Charles Holland to attend on lot 27, in the 3rd concession of Moore, and there meet the three fence-viewers on the 10th of December, at 11 A.M., and shew cause why they refused to pay their fair portion of a ditch running on their lot, awarded by the said three fence-viewers on the 14th of June, 1870.

On the 12th December, 1870, the first fence-viewers, Scott, Boulton and Maguire, addressed a notice to Patrick and Charles Holland, to the effect that having been called by summons to appear on the lots of Patrick and Chas. Holland to examine the outlet running through lot 27, in the 4th concession, and lot 27 in the 3rd concession of Moore, the said outlet having been awarded by them on the 14th of June, 1870, they found that James Roberts had finished the whole of the outlet according to the award—eighty rods being his own share and eighty rods the share of Robert Cathcart; and that they found James Roberts had finished the shares of Patrick and Charles Holland, being one hundred and sixty rods awarded to them, they being defaulters in respect to the aforesaid award.

On the 13th of December, 1870, Mr. Payne, the magistrate, sent a notice to the clerk of the

seventh division court, to the effect that he had sent to the clerk the decision of the three fence-viewers on the ditch between James Roberts and Patrick and Charles Holland, and that the ditch was done according to their award.

Accompanying this notice was a minute of the costs of the award, amounting to \$6 68, and of the 160 rods of ditch at 40c. per rod, \$64, in all \$70.68, exclusive of bailiff's fees, for all of which it was said Patrick and Charles Holland were defaulters, and were to pay the whole expenses.

On the 17th December, 1870, Charles Holland was served with a copy of the award and costs, and on the 19th of the same month Patrick Holland was also served.

An execution was afterwards issued by the clerk of the division court against the goods and chattels of Patrick and Charles Holland, and delivered to the bailiff to be executed.

Mr. Francis, a surveyor, on 29th October, 1870, certified to Patrick Holland that in his opinion the water had not been taken down its proper channel according to the award, but diverted from it, and that lot 28 in the 4th concession, could, in his opinion, be drained cheaper and quicker than in the way proposed by the fence-viewers, and that it was not to the joint interest of the parties mentioned in the award to have the ditch made.

Charles Holland, on 30th January, 1871, made affidavit that he attended on lot 27 in the 3rd concession of Moore, on the 10th December, 1870, at the hour named in the notice, but did not meet the fence-viewers nor any person representing them. That the award ordering the money to be paid was made on the 12th of December, and that the ditch was not dug till the 14th of December, and was not finished up to the present time (the date of his affidavit, 30th January, 1871); and that the ditch runs about 8 rods through the west hundred acres of 27, in the 3rd concession, being that portion of the lot owned by him.

Patrick Holland, by his affidavit made the 21st of January, 1871, said he attended the arbitrators with his witnesses, but no evidence was taken to shew the proper course of the water. Feeling aggrieved by the award made by Scott, Maguire and Boulton, he got other three fence-viewers, Ross, Jenkins and Reynolds, and they made their award: that the defendant's land and the land of Charles Holland are not adjacent or adjoining to the land of Roberts: that the course which Roberts wishes to take is not the natural outlet for the water: that the ditch as dug is a direct injury to defendant, as it overflows his land: that no demand was made on him to dig the ditch: and that the ditch is not according to the award of the fence-viewers.

Benjamin Milligan, John Milligan and Charles Coyle also swear the ditch is no benefit but an injury to the Hollands: that the ditch is not eighteen inches deep through Holland's land, nor six feet wide at the top, and the clay is not four feet from the edge: that the ditch causes a large flow of water through the lands of the Hollands, brought from the side line ditch: and that the distance from the commencement of the ditch to the boundary line of the Hollands' lands is 120 rods.