

THOMAS V. RENNIE—CAMPBELL V. VAIL.

THE LINE FENCE'S ACT.

THOMAS V. RENNIE.

Excess of authority by fence viewers—Setting aside award.

The fence viewers having awarded that the appellant should remove a line fence already existing and sufficient, and replace it by another, the nature and cost of which they prescribed.

Held, that they exceeded their authority, and the award was set aside with costs.

[Whitby, December 22nd, 1886.]

The parties were owners of adjoining lands in the Township of Brock. They and the former owners of the land had, for some years, by mutual agreement, kept up one-half of the line fence between their lands. The appellant's portion consisted of cedar stumps and roots, built up into a fence. The evidence showed that it was reasonably fit to keep out cattle, and that similar fences were largely erected and maintained in the locality. The respondent, having erected a new fence upon his portion, called upon the appellant to remove his stump fence and erect one similar to his own. Upon Thomas' refusal he called in the Fence Viewers, who made an award in accordance with Rennie's demands. It was shown, on appeal, that apart from the cost of a new fence, the removal of the old fence would be both tedious and expensive.

DARTNELL, J.J.—Section 2 defines the duties of owners, and imposes upon such as are owners of adjacent lands the duty of keeping up a just proportion of the fence which marks the boundary between them.

By Section 3 it is provided that if such owners cannot agree, and there is a dispute between them respecting such proportions (that is, the just proportion spoken of in section 3), the aid of the Fence Viewers can be invoked in order to arbitrate in the premises; that is, to settle the just proportion.

There is nothing in the Act which seems to point out that it applies to any existing line fences. On the contrary, it appears to me only to apply where circumstances require the erection of a fence where none previously existed. The form of award given by the Act confirms this view, for it speaks of a fence to be made and maintained. The necessity may arise from a variety of circumstances, such as the clearing of bush land, or the sale of a portion of a lot, which would entail the erection of a line fence where none existed theretofore.

It might be that such a modification of surrounding circumstances would arise as to cause an agreement for the proportion of an existing fence

which would be just at one time not be so later on. In such case, perhaps, the dispute could be adjusted by the Fence Viewers; but not so in this instance. Rennie does not complain of the proportion, but that Thomas' fence is an eyesore to him; that his sheep might be injured in attempting to jump over it; and that it tended to gather noxious weeds, etc. The answer to this is that the fence existed when he bought, and it was purchased with full knowledge of its nature and form.

I am clearly of the opinion that the Fence Viewers had no authority to make the award they did: that it should be set aside; and as Rennie persisted in his proceedings after notice of Thomas' objection to their jurisdiction, he should be ordered to pay all costs of the appellant.

DOMINION ELECTION LAW.

DIGBY (N.S.) ELECTION CASE.

CAMPBELL V. VAIL.

Recount—Duties and jurisdiction of County Judge.

[Digby, N.S., March 4.]

The following judgment on a recount of votes in this case was delivered by

SAVARY, Co. J.:—The last three lines of section 56, "Dominion Election Act of 1874," enacting that the decision of the Deputy Returning Officer on an objection to a ballot, raised by an agent, shall be "final, subject only to reversal on petition questioning the election or return," suggest some doubt whether the judge, on a recount, can review any allowance or disallowance of the Deputy Returning Officer made after objection, or do more than correct any errors in the counting, strictly so called, of the ballots allowed for the respective candidates, and the allowances and disallowances the D. R. O. may have made of his own mere motion. Perhaps the better view is that those lines are repealed by implication by the provision for a recount. I have, therefore, not only corrected some errors simply of counting, but I have sustained one decision against a ballot, and counted two ballots, one for Mr. Vail at Meteghan, and one for Mr. Campbell at Salmon River, which were rejected by the D. R. O. The mark on the former, being across the candidate's name, is within his division of the ballot paper. The mark on the other, and a good mark in form, is higher up on the ballot paper than it should be, but there can be no doubt as to the candidate for whom it was intended. Single straight or oblique lines, without any line crossing them, or shewing an honest at-