

UPPER CANADA REPORTS.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law and Reporter in Chambers.)

IN THE MATTER OF A SUIT IN THE SIXTH DIVISION COURT OF THE COUNTY OF WENTWORTH, BETWEEN WALTER BRADSHAW, PLAINTIFF, AND EDWARD DUFFY, DEFENDANT.

Prohibition—Jurisdiction of Division Courts—Title to land.
—Fences.

A., intending to make a line fence between his land and that of B., by mistake made the fence on B.'s land. Afterwards, a correct line having been run, it was agreed that A. & B. should each make a portion of the fence on the correct line. B., in making his share, used the rails of the old fence made by A. A. sued B. in the Division Court for the price of the rails so used, and the judge having decided in his favour, B. applied for a prohibition, but held, that the judge had jurisdiction.

[Chambers, February 7, 1867.]

An action was brought in the Sixth Division Court for the county of Wentworth, for \$28, being amount awarded by Peter McLagan, Edmund Smith, and Eliza Mann, fence viewers of the township of Ancaster, as payable by said defendant to said plaintiff for share of line fence and rails between lots 33 and 34 of the 4th concession of said township.

The case was tried before his Honor Judge Logie, at Ancaster, and evidence given before him in substance as follows:

That the plaintiff had put up a line fence many years ago on what was supposed to be the line between his lot and an adjoining lot, which was subsequently purchased by Duffy, the defendant. Some time after the defendant had purchased the adjoining lot, he got a surveyor to run the line between him and the plaintiff, and the surveyor, in running this line, took in a triangular piece of land from the plaintiff, of which he had been in possession. In order to save litigation, the parties entered into an agreement to run the division line through the middle of the triangular piece of land, dividing it equally between them. Fence viewers were got to determine the portion of the fence which each party should erect and maintain, and each party erected his part of the fence on the line agreed upon. In doing so, Duffy, the defendant, used the rails of the fence which had been originally erected and maintained by Bradshaw, the plaintiff, but which fence by the agreement was upon the land taken in by the defendant. The plaintiff brought the suit for the value of the rails so taken by the defendant.

The learned judge reserved his judgment, which he subsequently gave in writing, in favor of the plaintiff, as follows:

"It is no doubt the case that, in general, erections put upon lands by a person not the owner cannot be removed, but become the property of the owner, as forming part of the freehold, and probably a fence would be considered part of the freehold. The law is however modified in favor of those who, in consequence of an unskilful survey, have made improvements upon lands as their own which, on a correct survey being made, turn out to belong to a neighbour. Section 53 of chapter 93 of the Consolidated Statutes for Upper Canada provides that, in such

cases, the owner of the land, in an action of ejectment, shall not recover possession until he pays for the improvements, the value of which are to be assessed by the jury.

It has been held, in *Campbell v. Fergusson*, 4 U. C. C. P. 414, recognized in *Hutton v. Trotter*, 16 U. C. C. P. 367, and *Morton v. Lewis*, 16 U. C. C. P. 485, that the act applies to private surveys made on the defendant's own account, as well as to public surveys; and in the last named case, *Morton v. Lewis*, it was held that fences were improvements within the meaning of the act.

In this case, supposing that no agreement had been made between these parties about the land, and that Duffy had brought an action of ejectment for the land, Bradshaw would have had a right under the statute to assess against Duffy the value of his improvements, including the value of the fences; and Duffy would have had to pay for the improvements before he could recover possession, and Bradshaw ought not to be placed in a worse position in consequence of the agreement settling the line, than he would have been in if an action of ejectment had been brought against him. I think, both legally and equitably, the plaintiff in this suit is entitled to recover for the value of the rails, which originally belonged to him, and which defendant used in the erection of his part of the fence. But I cannot allow him for old rails what new ones (which it may reasonably be expected would last much longer) would cost."

On the 28th January last, *O'Reilly*, Q. C., obtained a summons calling on the plaintiff, Bradshaw, and the Judge of the County Court of the County of Wentworth, to shew cause why a writ of prohibition should not issue to prohibit all proceedings in this matter, and upon an order for payment made by the said Judge of the County Court of the County of Wentworth, presiding in the Division Court, on the ground that the said judge had no jurisdiction to try or adjudicate upon the matters tried and adjudicated upon by him in the said suit in the said Division Court.

Spencer showed cause, and objected that the summons did not state the grounds upon which the application was made with sufficient particularity. That the title to lands did not come in question, the contention simply being whether a Judge of a Division Court could adjudicate upon the question, fixture or no fixture. If he can, and there is no doubt that he can, he had jurisdiction in this case, and there can be no prohibition. The question is as to the ownership of the rails, not of the land. Rails cannot, under the circumstances of this case, be considered as part of the realty.

O'Reilly, Q. C.—The summons is sufficient, and want of jurisdiction may be shown by affidavit. (This point was not pressed by the other side, the learned judge being against the objection.)

Fences are a part of the realty and go with the land, and the judge had no jurisdiction to try a case where the title to land came in question.—*Elwes v. Maw*, 3 East. 38; *Thresher v. E. London Waterworks Co.* 2 B. & C. 609; *Steward v. Lombe*, 1 B. & B. 506; *Colgrave v. Diosantos*, 2 B. & C. 76; *Bunnell v. Tupper*, 10 U. C. Q. B. 414; *Amos & Ferrard on Fixtures*, 9, 13.

Even if the judge had power to decide as to whether the fence was or was not a fixture, he