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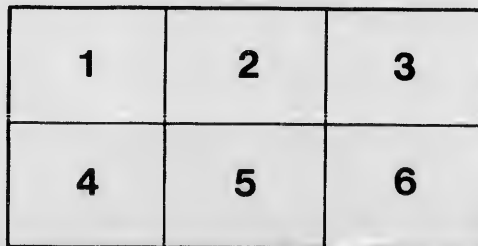
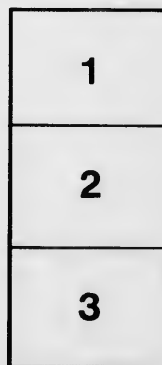
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IN THE
COURT OF APPEAL.

Appeal from the County Court of the County of Simcoe.

Between—

DAVID E. BUIST, (*Appellant*), PLAINTIFF.

—AND—

THOMAS McCOMBE, (*Respondent*), AND DONALD McDONALD, . . . DEFENDANTS.

ALEXANDER D. CAMERON,
Attorney for Appellant.

—AND—

MOBERLY & GAMON,
Attorneys for Respondent.

HAMILTON :

Ennis & Stirlon, Law Printers and Stationers, 16 Main St. East.

1882.

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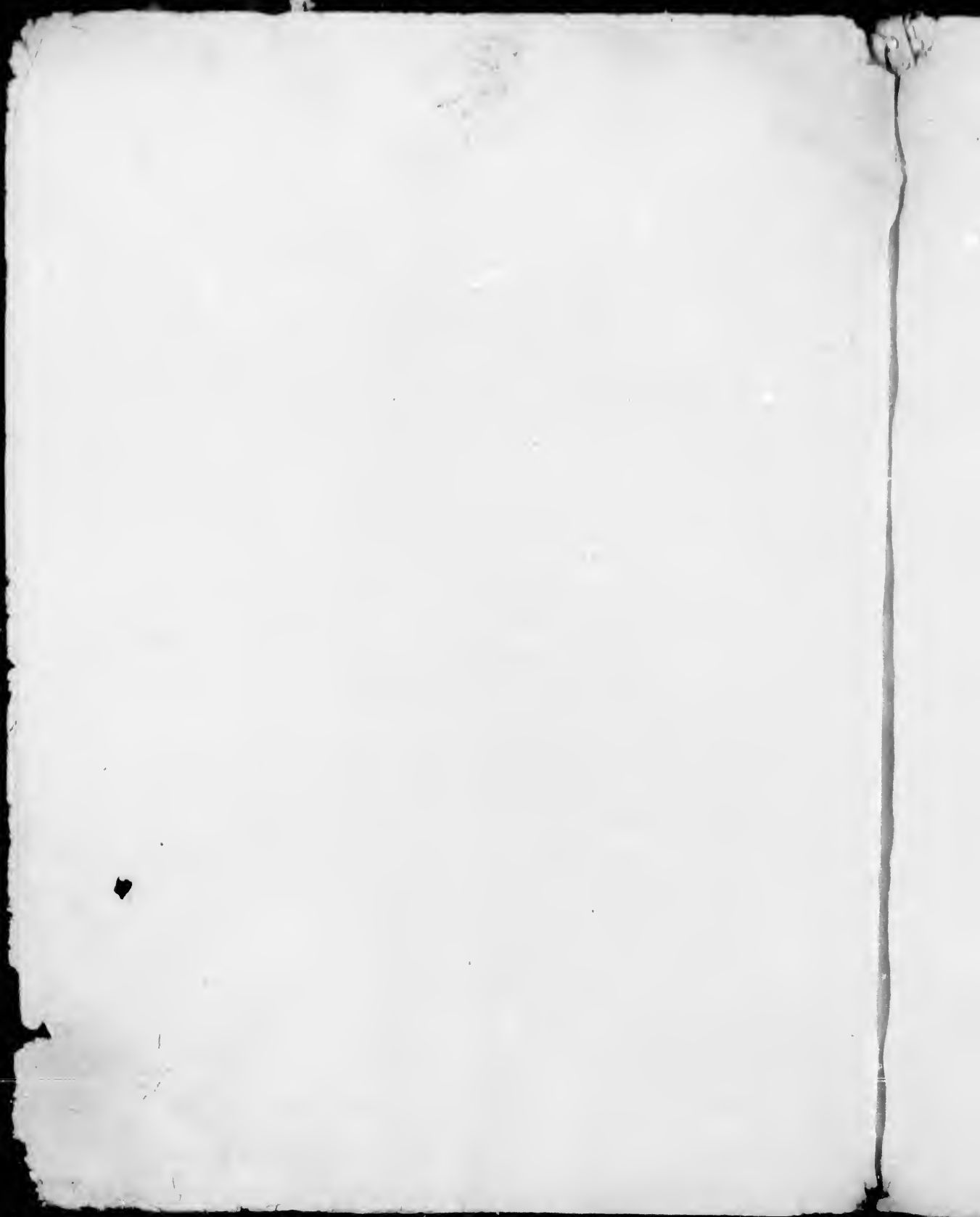
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In the Court of Appeal,

BETWEEN

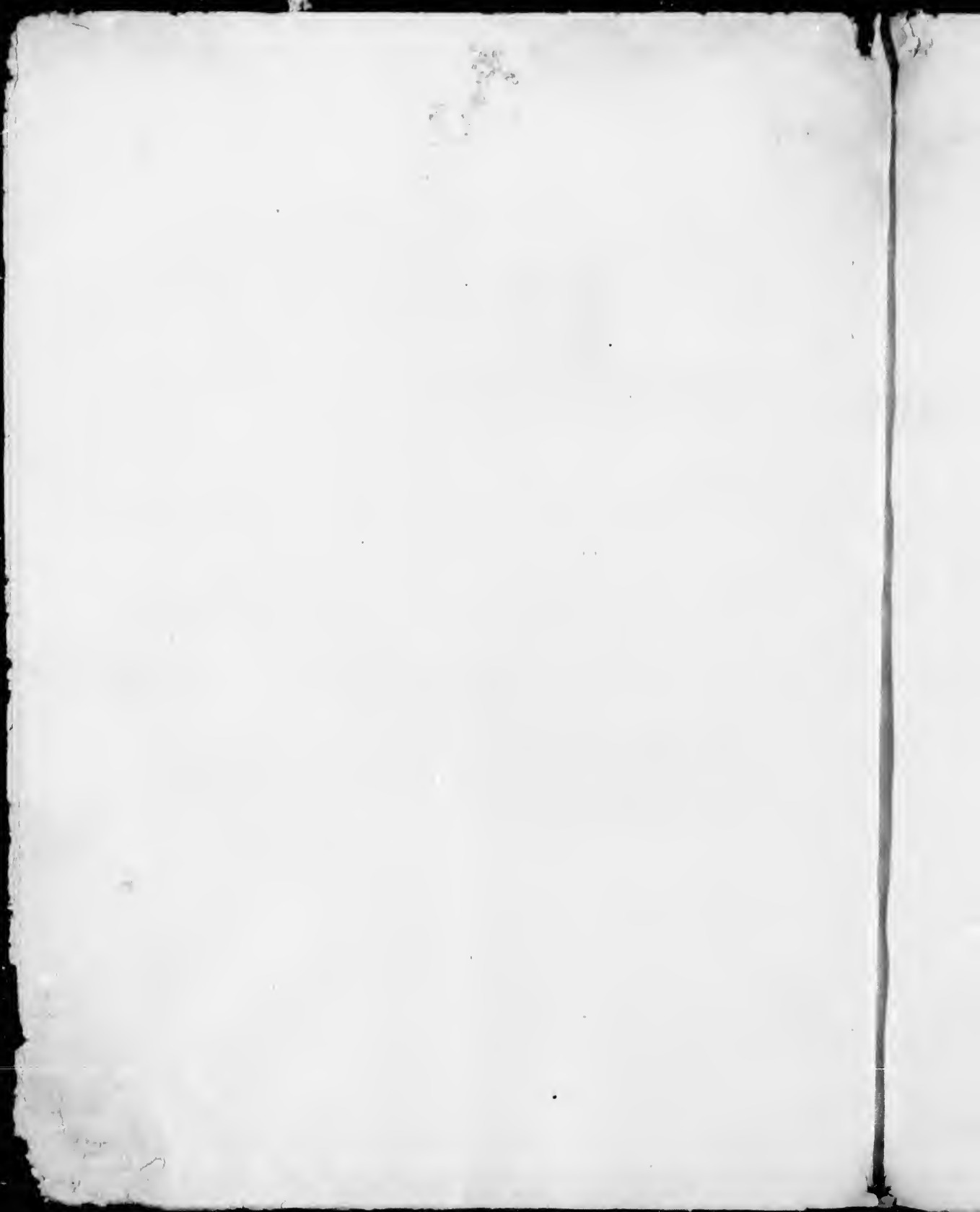
DAVID E. BUIST,(APPELLANT) *Plaintiff,*

AND

THOMAS MCCOMBE, (RESPONDENT) AND DONALD McDONALD,
Defendants.

STATEMENT OF CASE.

This is an appeal from the judgment of the Junior Judge of the County Court of the County of Simcoe, discharging the Rule *Nisi* granted in the April term, 1882, of the said Court, to shew cause why the verdict at the trial in favor of the defendant Thomas McCombe, should not be set 10
aside and a verdict entered herein against the said defendant Thomas McCombe, as well as
against the defendant Donald McDonald.



In the County Court of the County of Simcoe,

DAVID E. BUIST,*Plaintiff,*

—vs.—

THOMAS MCCOMBE AND DONALD McDONALD,*Defendants.*

Writ issued 16th September, 1881.

STATEMENT OF CLAIM.

Filed 14th October, 1881.

1. The Plaintiff and the Defendants are farmers, residing at the Township of Nottawasaga, in the County of Simcoe.

2. Up to and on the 11th day of July, 1881, the Plaintiff was the owner of a yoke of oxen, 10 which he used and employed in carrying on the business of his farm.

3. On the said 11th day of July, 1881, the Defendant, Thomas McCombe, wrongfully took and removed the said oxen from the farm and possession of the Plaintiff, and delivered the same to the Defendant Donald McDonald, who wrongfully took and detained the same.

4. Afterwards, and on the 22nd day of July, 1881, the Defendant Donald McDonald at the instance and instigation of the Defendant Thomas McCombe, and also acting on his own behalf and in his own interests, illegally sold the said oxen at auction whereby the same have become wholly lost to the Plaintiff and the Plaintiff has also lost the use of the same in carrying on his said farm.

The Plaintiff claims \$200 damages.

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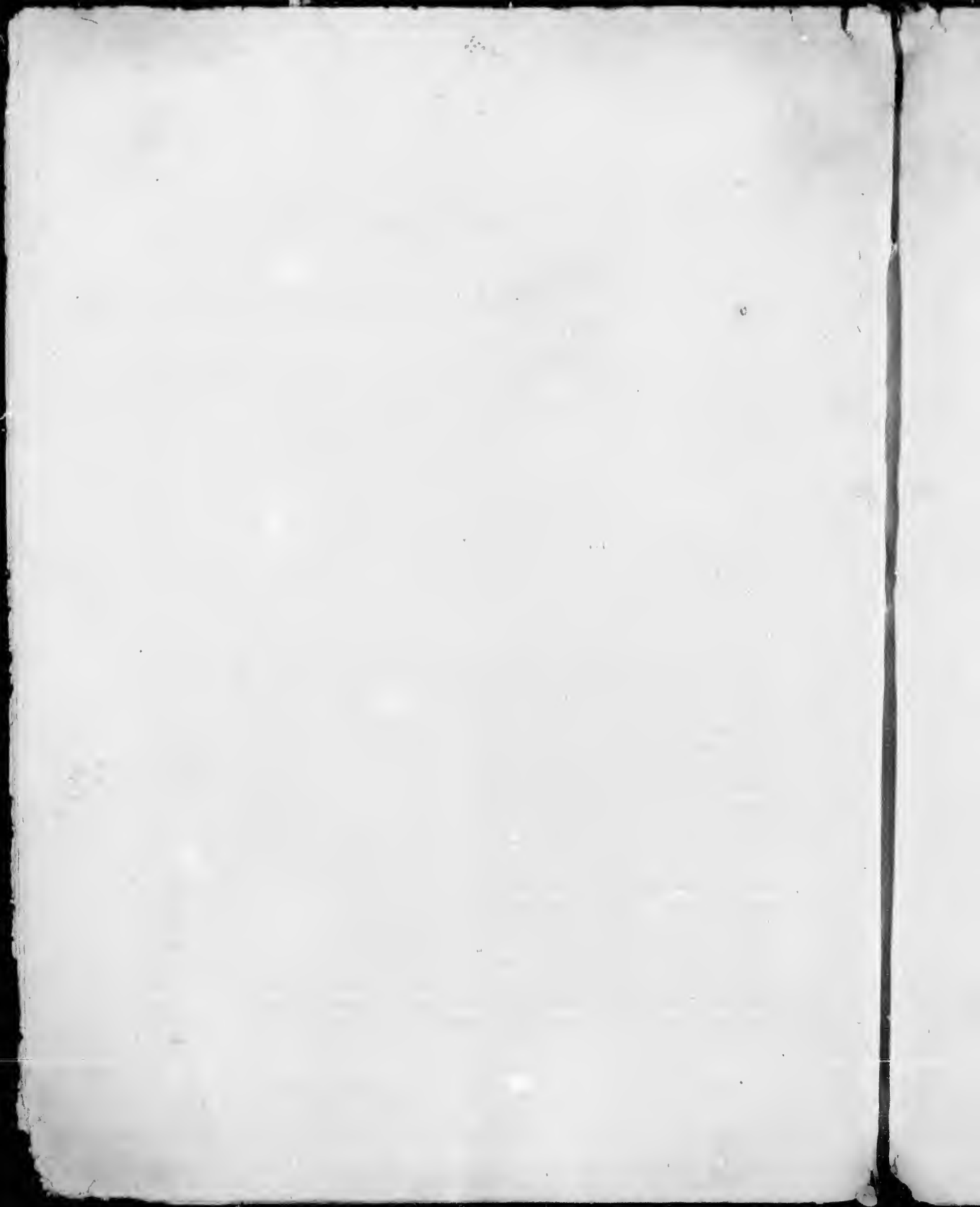
STATEMENT OF DEFENCE.

Filed 25th October, 1881.

1. The Defendants admit the statements in the first and second paragraphs of the Plaintiff's claim.

2. The Defendant, Thomas McCombe, as to the third paragraph of the Plaintiff's claim, says that he did not take the said oxen from the farm and possession of the Plaintiff, but that the said oxen were on the said eleventh day of July, A. D. 1881, wrongfully trespassing on the cultivated portion of the farm of the said Defendant, Thomas McCombe, (adjoining the farm of the said Plaintiff) and doing damage to his crops, and that while so trespassing as aforesaid and doing said damage to the crops of the said Defendant, Thomas McCombe, he the said Defendant under and by virtue of the provisions of By-law No. 115, of the Township of Nottawasaga, in the County of Simcoe, where the said land is situate, took the said oxen and delivered them to the Defendant, Donald McDonald, with a statement in duplicate of his claim for damages against said oxen, and that the said Defendant, Donald McDonald, was at that time a properly appointed pound-keeper for the Township of Nottawasaga, and was the pound-keeper for the Division where the said oxen were so trespassing as aforesaid, and that he so delivered them to the said Donald McDonald to be dealt with by him according to law and in accordance with the provisions of said By-law No. 115. 10

3. The Defendant, Donald McDonald, as to the fourth paragraph of the Plaintiff's claim, says that he is a properly appointed pound-keeper in and for the Township of Nottawasaga, and that as such pound-keeper, the Defendant, Thomas McCombe, being a resident within the Division wherein the said Donald McDonald was such pound-keeper as aforesaid, did deliver, to him the said Donald McDonald, and he as such pound-keeper duly received from the said Defendant, Thomas McCombe, the said oxen for the purpose of being impounded and dealt with according to law and the provisions contained in By-law No. 115 of the said Township, and that the Defendant, Thomas McCombe, did at the same time deliver to him a statement in duplicate of the damages said to have been done by the said oxen during the said trespass, and that having the said oxen so impounded, he the said Defendant, Donald McDonald, gave the necessary notices required by law and by the By-laws of the said Township in such cases; and at the proper time, the said oxen not having been replevied, and no dispute of the said damages having been made, and neither the said damages nor costs having been paid, did duly, fairly, and in a legal and proper manner, sell the said oxen (in accordance with the notice so given as aforesaid) to the highest bidder at the sale; and that after the said sale he, the said Defendant, Donald McDonald, deducted from the amount realized at such sale his legal fees, together with the damages, costs and charges properly chargeable against the same; and no claim having been made for the overplus by the said Plaintiff, as owner of the said oxen, within three days after said sale, he, the said Defendant, Donald McDonald, paid the said overplus to the Treasurer of the said Township of Nottawasaga, in accordance with the requirements of the By-law of the said Township of Nottawasaga. 30



JOINDER OF ISSUE.

Proceedings at Trial, 13th December, 1881.

JURY EVIDENCE.

D. E. BUIST:—Live at Nottawa Village and own the South $\frac{1}{2}$ Lot 37, Concession 8 of Nottawasaga Township. Defendant McCombe owns and occupies the North $\frac{1}{2}$ of same Lot. I saw my oxen at 3 p. m. of the 11th of July, in my pasture field. I next saw them at the Defendant McDonald's, on the day of sale. I heard in the morning of the 12th of July, that my oxen were in McCombe's barn. I sent him notice, demanding them, by Alexander McEwan. McCombe would not give up the oxen. He was at the sale; said the oxen must be sold. The Defendant, McDonald, wanted to know if any one would give him advice, as he did not know how to act. I forbid the sale as it was illegal. Defendant, McCombe, then pressed that the oxen should be sold, saying, "Sell the the oxen; I will be responsible." They sold for \$80, to Little, a friend of McCombe's, who drove them away. I built most of the dividing fence between McCombe and myself, and no particular part was set apart to be kept up by either. I lived there before McCombe did. He built no part of the fence. 10

ALEXANDER MCEWAN:—I took a notice to McCombe, and gave it to him. It was the demand now produced to me. The oxen were not breachy.

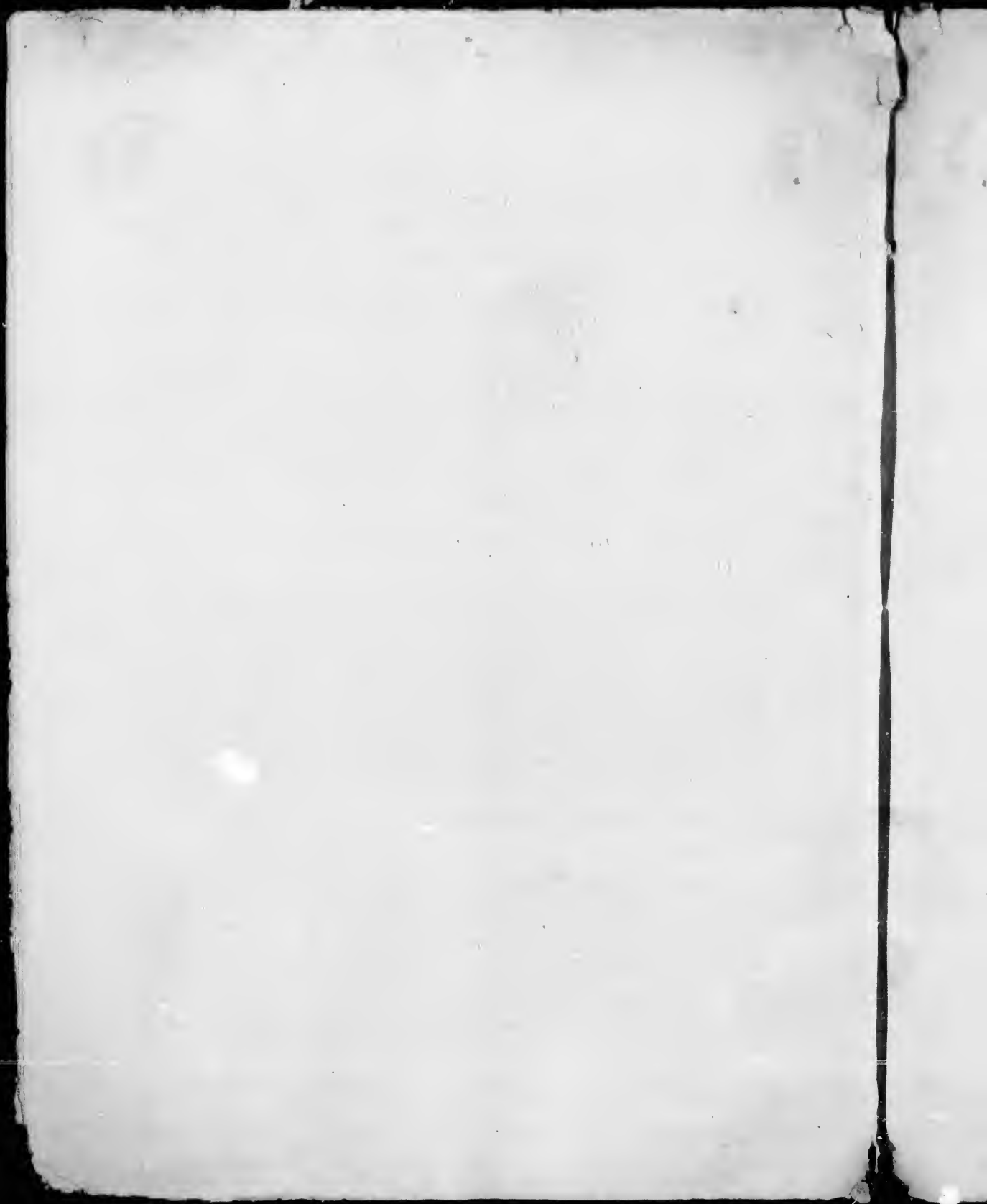
A. D. CAMERON:—Saw Defendant, McDonald, on the evening of 15th July, at Plaintiff's. I said seizure was illegal and that oxen should be returned. He said McCombe would not return them, as they had trespassed on his place and he had a claim for \$10 damages. 20

WILLIAM CANNON:—Worked for Plaintiff last summer. On the 10th of July, Plaintiff told me to put oxen in pasture. I suggested that we should keep them up for a day or two, as we would have a field ready to put them into without risk of injuring McCombe's wheat. Plaintiff said he had built the fence and kept it up from year to year, and McCombe might now keep it up if he wanted to protect his wheat. I went with McCombe, by Plaintiff's orders, to fix fence, and we did the best we could. We could not make a lawful fence of it. There was no water in the field I suggested putting the oxen into, except by pumping.

MR. MOBERLY submits there is no evidence.

Over-ruled.

THOMAS MCCOMBE:—The Plaintiff's oxen troubled me a good deal. On the 9th July they were in my meadow, and I asked Plaintiff to keep them out. He said Cannon could go with me to repair the fence. They were in again on the 11th of July. I took them to White's till I saw Plaintiff. I saw him and told him his cattle were in again, and wished he would keep them out. Plaintiff said I should keep up the half of the fence, and I said if he had made a lawful fence that I would pay him for the half of it, and if he would take away the log fence I would put up a rail fence. I said if he did not keep out the oxen I would look for a pound-keeper. I left the oxen on the road, near Plaintiff's gate. I never felled any trees over the 30



fence. The wind blew some over, but I removed them; but the tops still lie in Plaintiff's place. The oxen were in my meadow on the evening of the 11th. I then put them in the barn and next day handed them over to my co-defendant, McDonald. The meadow was not next the fall wheat. Plaintiff forbid sale, and I told McDonald to go on with it. Little bought the cattle. He said he had no use for them, so I bought them at the same price he paid for them, viz., \$80. I have put up my full half of the fence since. I called the fence viewers, and then learned my duty a month after the cattle were sold. Had I put up the fence before the cattle were sold, they could not get in. I claimed \$10 damages to wheat and hay. I only put in for wheat; I did not care for the hay.

DONALD McDONALD:—I am one of the Defendants, and nearest pound-keeper to Plaintiff. Oxen were impounded with me on the 12th July, by Wm. Beaupre, who told me they were so impounded on behalf of Defendant, McCombe. There was \$10 damages against them. I got a written statement to that effect. I saw Plaintiff two days afterwards, and I told him about the cattle being in the pound. I had the notices then with me ready to put up—three for Nottawa, and one at the Batteaux, and another copy besides. I told him I would have to put them up—the notices—after 48 hours. I put them up the same day. On the 22nd, the day of the sale, Plaintiff and others came, ten or twelve in all. The oxen were sold to Little. I gave no written notice to Plaintiff at any time of his oxen being in the pound. It was on the 15th I put up the written notices. 10

WILLIAM LITTLE:—Was at sale on 22nd July. Plaintiff was there and nine or ten altogether. I bought the cattle. I told McCombe that I would buy the cattle if I got them for what they were worth. I got the money from McCombe on that day, on the way down. He did not give it to me at his house, but on the road. 20

EXHIBITS.

1. Notice of Action.
2. By-Law No. 115, Township of Nottawasaga.
3. Demand by Plaintiff to Defendant McCombe for return of oxen.
4. Statement of Damages.
5. Advertisement.
6. Pound-keeper's Account.
7. Receipt of Auctioneer.
8. Receipt of Township Treasurer.

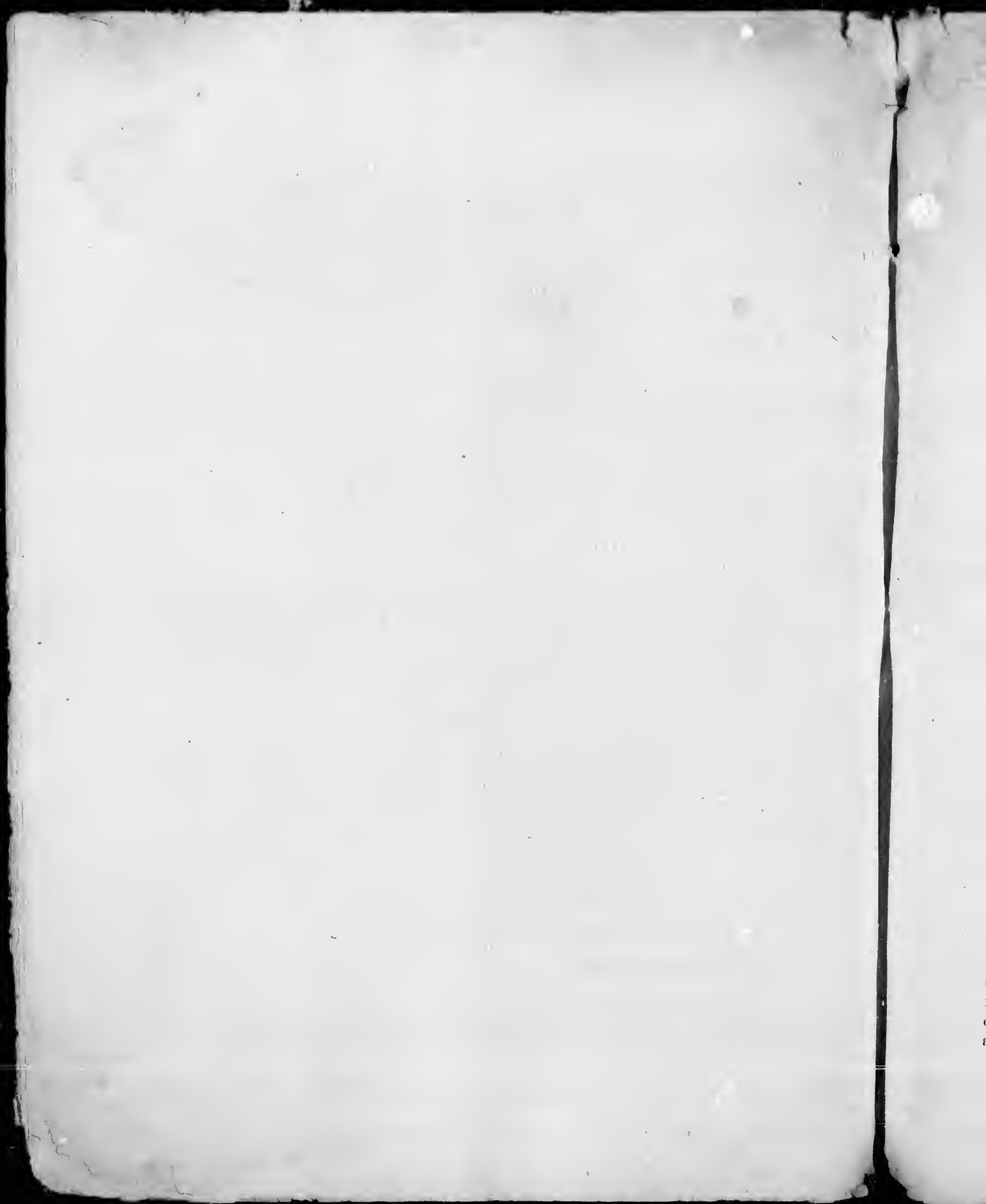
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Case withdrawn from jury by consent, all except the question of damages.

Jury found damages \$100.

Judgment on legal points reserved.

Judgment in term for Defendant McCombe, without costs, and for Plaintiff against Defendant, McDonald, with costs.



RULE NISI.

Easter Term, 45 Vic., April 4th, 1882.

It is ordered that the Defendants, upon notice to be given to them, their Attorney or Agent, do shew cause why the verdict entered in this cause by the learned judge in favor of the Defendant, Thomas McCombe, should not be set aside, and a verdict entered for the Plaintiff against the said Thomas McCombe along with his co-defendant, Donald McDonald for \$100, on the grounds that the said verdict entered in favor of the said Thomas McCombe was against law and evidence, and against the weight of evidence in this; that the evidence shewed that the said Defendant, Thomas McCombe, was liable to the Plaintiff on the grounds set out in the 3rd and 4th paragraphs of the Statement of Claim, or a new trial granted between the parties, and in the meantime that all proceedings be stayed on the motion of Mr. Lount or counsel for the Plaintiff. 10

By the Court,

(Signed,) JOHN STEVENSON, C. C. C. S.

DISCHARGE OF RULE NISI.

Easter Term, 45 Victoria.

Upon reading the Rule *Nisi* granted in this cause, and upon hearing William Lount, Q. C., counsel for Plaintiffs, and G. Moberly, Esquire, counsel for Defendants, it is ordered that the said rule be discharged without costs.

By the Court,

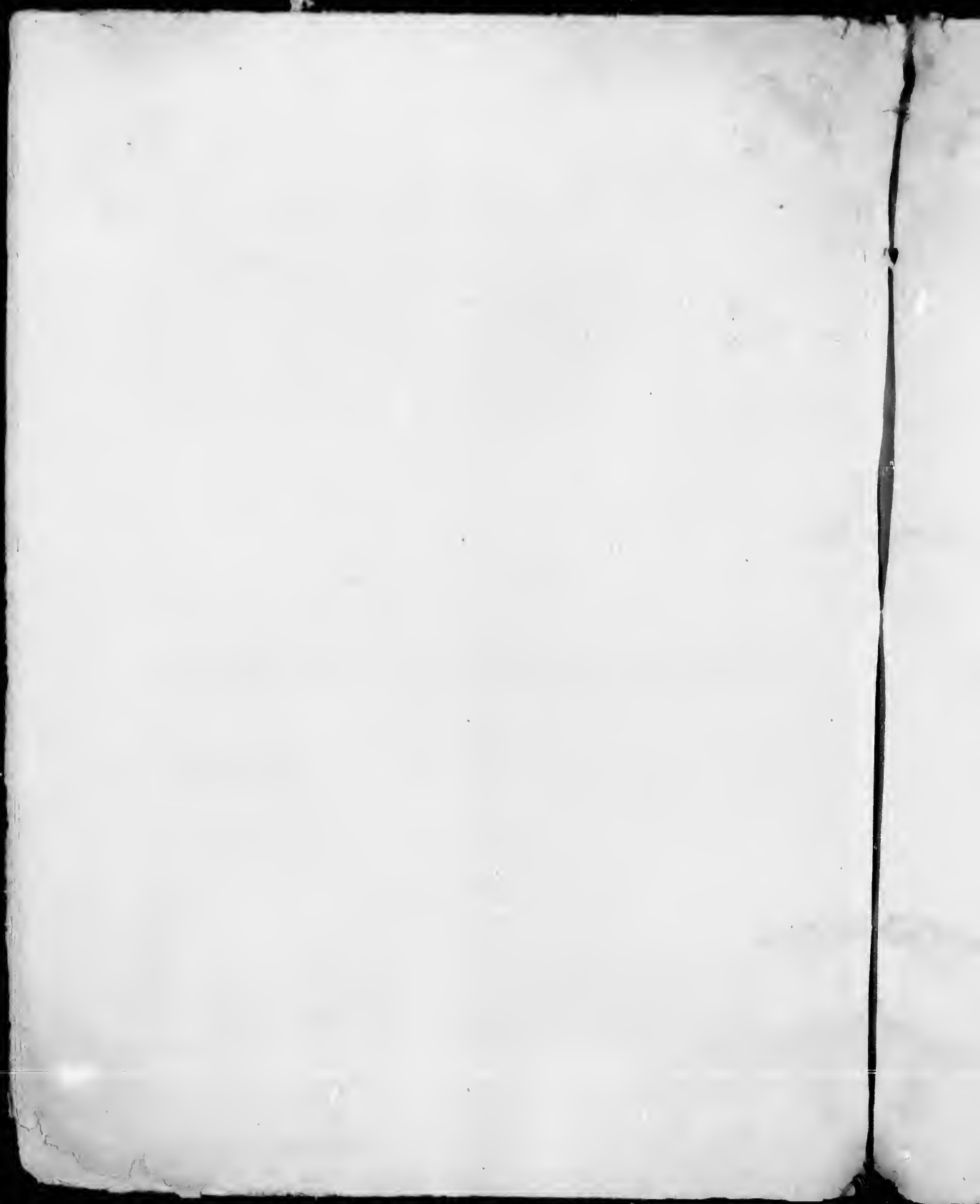
(Signed,) JOHN STEVENSON, Clerk. 20

Dated, June 10th, 1882.

JUDGMENT.

(DISCHARGING RULE.)

This was an action of trespass tried at the December sittings of this Court. The jury assessed the damages at \$100, that being the only point left to them upon which, in the term following, judgment was given against the Defendant, McDonald, for \$100 and costs, and in favor of the Defendant, McCombe, without costs. The Plaintiff now moves to have judgment also against McCombe for \$100, or for a new trial.



The facts shortly are these: Plaintiff and Defendant, McCombe, own adjoining farms, one the North half of the lot, and the other the South half; when Defendant, McCombe, bought his half Plaintiff was owner of the other half, and it appears had put up most if not all of the line of fence, part of which was built of logs. On the 11th day of July the Defendant, McCombe, seized the oxen, damage feasant, and after keeping them in his barn all night, took them next day to the pound. The pound-keeper was McDonald, the other Defendant, who after some days sold the oxen for \$80, out of which he paid Defendant, McCombe, \$10, the damage he claimed, and the balance, after deducting his costs and charges, he paid to the Township Treasurer, as Plaintiff refused to accept it. There is no doubt that the sale was not conducted according to law, as the notices were defective in several ways, and it was for this reason that judgment was entered 10 against McDonald but in-as-much as it was not shewn that the other defendant was cognizant of any defects in the proceedings by the pound-keeper, and that his, (McCombe's) acts as it seemed to me were proper and legal. I thought it only right there should be no judgment against him.

The Plaintiff now moves for judgment against the Defendant, McCombe, on the following grounds:

That the verdict entered in favor of the said McCombe was against law and evidence, and against the weight of evidence in this, that the evidence shewed that the said Defendant, McCombe, was liable to the Plaintiff on the grounds set out in the 3rd and 4th paragraphs of the Statement of Claim. The 3rd paragraph in the Statement is that on the said 11th day of July, 1881, the Defendant, Thomas McCombe, wrongfully took and removed the said oxen from the farm and possession of the Plaintiff, and delivered the same to the Defendant, Donald McDonald, who 20 wrongfully took and detained the same. The 4th paragraph of Plaintiff's statement is that afterwards and on the 22nd day of July, 1881, the Defendant, Donald McDonald, at the instance and instigation of the Defendant McCombe, and also acting on his own behalf and in his own interests, illegally sold the said oxen at auction, whereby the same have become wholly lost to the Plaintiff, and the Plaintiff has also lost the use of the same in carrying on his said farm. Mr. Lount in arguing the rule contended that by reason of McCombe's neglecting to keep up his share of the dividing fence, Plaintiff's cattle got in and did the damage complained of, so that Plaintiff is not liable for any damage done by them. This, I think, would be a fair argument if based on a reality, for it assumes that McCombe was liable to keep up a certain portion of the fence. That does not appear to be so. No arrangement as to how the fence was to be kept up was ever come to, nor 30 were the fence viewers ever called in. The fence remained in the same state as when McCombe took possession. Plaintiff says in his evidence that he told McCombe, he (Plaintiff) had built that fence at considerable cost, and it would have done very well if he (McCombe) had not felled trees across it. McCombe, he added, denied that, and they had hot words about it. McCombe's account of the felling trees across was that he never felled any trees, but that one tree was blown across, which he cut up and drew away several lengths of, though the top lay across him (Plaintiff) still, and that he (McCombe) also put up the fence. Now if McCombe had agreed or was ordered by the fence viewers to keep up a certain portion of the line fence and had neglected to do so, and the oxen made their way over the particular part, then he (McCombe) would have had no right to impound them. The view then I have taken, though it may not be a correct one, is this: 40 that where it is not the duty of either party to keep up any particular and defined portion of the line fence, either of them allows his cattle to graze near the line fence at his own risk, the risk of their straying across and trespassing on his neighbor's land. The proper course, if he could not agree as to keeping up this line fence, was to have called in the fence viewers. This McCombe



says he wished to do, to use his own words: "Plaintiff's oxen troubled me a good deal; on the 9th of July I took them to Plaintiff and said they had been in my meadow, and that I wished he would keep them out. He said Carter (his man) could go with me and help me. He did go, and I helped him all I could. That time I found them in the wheat on the 11th July, I took them to White's till I saw the Plaintiff. I saw him and told him the cattle were in again, and I wished he would keep them out. He said I should keep up the half (of the fence), and I said that if he had made a lawful fence I would have paid him for half the fence; I said if he would take away the log fence I would put up a rail fence. I said if he did not keep up the oxen I would look for a pound-keeper. I wanted to get on the fence viewers, and would pay them, but he refused."

On cross-examination he says:

"When I let them loose on the street, it was because I could not get a pound". "They were found in the hay in the evening." Upon this Mr. Lount argues as there was an abandonment of the seizure, McCombe could not afterward take them again as the right to impound was gone. No doubt the abandonment of a distress in ordinary cases takes away the right to distrain again for the same cause. Here, however, it seems to me there was such an inception of the distress as warranted McCombe, though he had turned them loose upon the highway, in seizing them again later on in the day, when found in his premises. The second time, McCombe says, he claimed \$10 damages to wheat and hay, though he only put in the wheat in the notice as he did not care for the hay.

Mr. Lount also argues that McCombe was notified of the sale being irregular and illegal, but he adopted it, and so became a trespasser *ab initio*. If McCombe had had notice of the irregular proceedings of McDonald before the sale commenced, I am inclined to think he would be jointly liable with McDonald. The evidence, however, does not go that length. Plaintiff says I then forbid the sale as it was illegal." If this means, which is doubtful, that he forbid the sale, saying it was illegal, it does not give McCombe any instruction as to how it was illegal.

Mr. Cameron, Plaintiff's Attorney, was called on his behalf. He says: "On the evening of the 15th of July (this was before the sale) McDonald called at Plaintiff's, and I had a conversation with him. I said the seizure was illegal, and that he ought to return them (the oxen). He said McCombe would not return them, as they had trespassed on his place, and he had a claim for \$100 for damages. The whole of this trouble seems to have arisen from the Plaintiff supposing that because he had kept the line fence for so many years he would run no risk of trespassing, as he considered McCombe ought to keep up the fence, or a certain portion of it. His own man, Mr. Cannon, called as a witness on his behalf, says on cross-examination: "On the 10th of July Plaintiff told me to put the oxen into his pasture; I suggested that he should keep them up for a day or two, as we would then have a field we could put them into without any risk of injuring McCombe's wheat. I said it would not be right to put them in as they would go in and destroy the man's wheat. He, (the Plaintiff) said he had built this fence, and kept it up from year to year, and McCombe might now keep it up if he wanted to protect his wheat. I went with McCombe by Plaintiff's directions to repair this fence, and we did so as far as the timber we had went. I only speak of the log fence. On re-examination he says, "we could not make a lawful fence of it as we had not timber." Where the tree had fallen over was repaired before I got there."



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There was evidence to shew that the oxen were breachy, as several witnesses said. "They jumped a seven-rail fence like deer," one witness said. As to why Plaintiff did not replevy and so prevent the sale of his oxen, I speak of further on. He says, "When I got the notice, I said I was going to replevy, but I concluded to let Defendant sell them. I gave notice I would replevy but I did not do so." I should judge that there must be a good deal of hard feeling between the parties.

McCombe says that before the sale he told Plaintiff he would give him the cattle free from all damage if he would keep them up for two weeks till his wheat was all in the barn; and that Plaintiff replied he would knuckle to no one. McDonald, speaking of the same occasion, says: "McCombe said to Plaintiff, he would pay all expenses of the cattle, if he would keep up the 10 cattle till he got his wheat off," when Plaintiff replied, "he did not want any of his blather."

Little's account is, "I tried to get a settlement from Plaintiff. I said McCombe would pay expenses, I thought, and let the cattle home. He (Plaintiff) seemed inclined to this till McCombe asked him for a guaranty that they would keep them up till he got his wheat in."

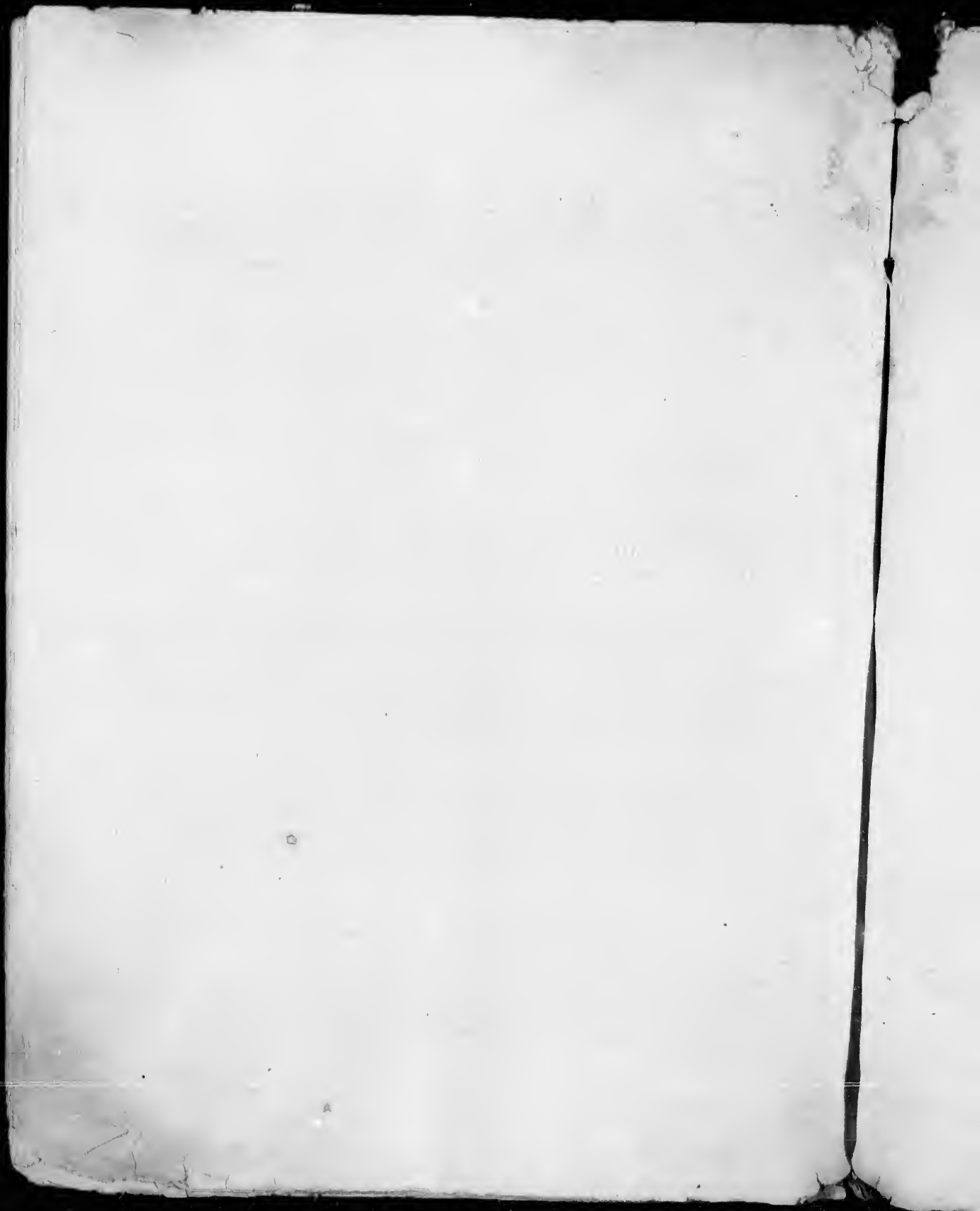
Plaintiff's story is that Little, a friend of McCombe's, asked him if would take back the cattle if they were left in as good condition at his place. That Little then went away and he came back, asked "if I would keep them up if I got them back." I said "I did not know about that." That afterwards he said he would take them back, but McCombe said they must be sold.

McDonald also says that he went to Plaintiff's house several days before the sale and told him he had better take the oxen out of pound, when Plaintiff replied "he did not want any 20 advice;" and, he adds, "he was perfectly determined to go on with the law, and would spend \$1,000 to have satisfaction."

The sale itself appears to have been conducted properly, and the best price that could be got obtained for the oxen, viz., \$80. One of Plaintiff's own witnesses only valued them at from \$90 to \$95.

The two points that impressed me most in Mr. Lount's argument were these, and they were such as made me think a new trial must take place as to one of them at least. That one was as to how far McCombe ratified and adopted the sale by McDonald. It is said there was notice to him (McCombe) of the irregularity of the proceedings by McDonald. If this point had been left to the jury I must have told them that the only evidence upon it was that Plaintiff said 30 before the sale that "he forbid the sale, as it was illegal."

Now, as Plaintiff's attorney (Mr. Cameron) says, he notified McDonald, the other Defendant after he had opportunity of knowing all the irregularities by him in advertising, &c., (it was on the 15th July) and before the day of sale, that the seizure was illegal, and that he ought to return the cattle. After this, it cannot be said that there was anything to intimate to McCombe, that McDonald's proceedings were irregular or put him upon enquiry about them. I may say that I conceived the opinion myself that the reason Plaintiff abandoned the idea of replevying and allowing the sale to go on was that his attorney had discovered the irregularity of McDonald's



proceedings and so thought he would have the "double barrel" shot, so to speak to depend on, viz., the illegality of the distress and the irregularity of the sale. Had he notified McCombe that a legal sale could not take place, owing to the irregularities of McDonald, and McCombe had gone on and authorized the sale, I think he would have been jointly liable with McDonald, though what course he could then have pursued it is hard to say. It appears to me that he would have been obliged to return the cattle as he could not keep them, and he dare not sell them; and thus McCombe would have been driven to bring an inexpensive suit in the Division Court for his \$10 damages.

The other point I alluded to was this: whether McCombe abandoned the seizure altogether after the trespass to the wheat, or whether by the cattle coming back again the same day into his premises it may be considered one continuing distress. I have not been referred to any authority or case on this head, and as it is a point of law only, there would be no use sending the case back to the jury on that ground. And I see no reason to change the opinion I formed at the trial, and so the judgment then given must stand.

The money paid to the Township Treasurer seems never to have been obtained by the Plaintiff. I may say here that since the trial the Plaintiff applied to me to help him to get this money from Mr. Hewson. I see no reason why it should not be paid over by him to the person rightly entitled. I do not know of any authority the Corporation has to pass a By-Law that all such moneys as were not claimed within six months should be forfeited to the use of the Township.

My reason for holding that McCombe was not answerable for McDonald's acts, was that McDonald was a public officer performing a public duty.

While the Rule will be discharged, it will be without costs, and for this reason it seemed only right that the Plaintiff should have an opportunity of speaking to certain points which did not occur to me till after I came to consider what judgment should be entered, and the argument which seemed only right and fair in order to a proper understanding of the case.



REASONS OF APPEAL.

1. The evidence shows that there was no trespass by the oxen, it being the duty of the landowner to fence out, and not of the owner of the cattle to fence in.

By-Law No. 115, Township of Nottawasaga.

Spofford vs. Hubbell, Mich. Term, 2 Vic.

2. The oxen were not distrained, damage *feasant* as the damage claimed to have been done and for which they were sold, was not the damage done at the time the cattle were distrained.

Evidence of McCombe.

3. The evidence shows that McCombe, after notice of the illegality of the Distress and Sale, was present and pressed on the sale, although the same was forbidden by the Plaintiff, and is 10 jointly liable with his Co-Defendant, McDonald, having adopted and ratified his wrongful act.

Evidence of Plaintiff.

Do. Little.

The evidence discloses a cause of action against the Defendant, Thomas McCombe, and the verdict should have been given against both Defendants for the damages as assessed.

