

The defendants allege that it is not a public highway, but that it is their own property, and in assertion of their rights have placed obstructions upon it.

On 10th June last, some two or three months before the commencement of the action, a number of persons interested in having the road maintained as a public highway, and the defendants, appeared at a meeting of the council of the plaintiff corporation, and, after some discussion, a resolution was passed by the council under which Messrs. Sparham and McCue, solicitors, were authorized and empowered to thoroughly investigate the right of the township to use the road as surveyed and set out in a certain by-law passed in 1852, or the present travelled road, being the road in question, and to secure all possible evidence and make all searches they may think necessary and to report the result of their investigations to council, and to give their opinion, and if they felt doubtful on any vital question, to obtain advice from a Toronto counsel and report.

Pursuant to this resolution, the solicitors proceeded to obtain information, and secured a number of statutory declarations from different persons respecting the road in question, and upon such information the solicitors, on the 29th October, reported to the council that the road in question, in their opinion, is a public highway, and that the council had jurisdiction over it.

Shortly afterwards this action was commenced against the defendants, in consequence of their resisting the user of the road as a public highway, and the question involved in the appeal is whether these statutory declarations, for which in the affidavit on production a claim of privilege is made as "being part of the plaintiffs' case and prepared for the instruction of counsel and prepared specially for this litigation and in contemplation thereof, and contain the names of plaintiffs' witnesses and the evidence which such witnesses may give at the trial of this action," should be produced.

There was some evidence of conversations at and after date of said meeting between the reeve and the township solicitors, on the one hand, and defendants and their solicitors on the other, indicating a willingness at the time for the defendants to join in getting information, and that any information obtained would be open to all interested parties. Before the action was commenced, it does not appear that the defendants availed themselves of the privilege either of