

LOUNT, J.

JANUARY 7TH, 1902.

WEEKLY COURT.

TOWNSHIP OF GLOUCESTER v. CANADA ATLANTIC
R. W. CO.

Highway—Made by Crown Surveyor becomes Road within both Municipal and Dominion Railway Act—By-law not Necessary to Enable Municipality to Exercise its Jurisdiction over—Direction to their Overseer Sufficient—Right of Railway to Cross Highway and Put Fence Across under sec. 90 (g) of Railway Act (D.) is Governed by secs. 183 and 194; and in Crossing must not Obstruct—Railway Committee has no Power to Deal with this Case, and the Court has—Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, and City of Toronto v. Lorsch, 24 O. R. 227, followed.

Special case heard at Ottawa. Action for an injunction to restrain defendants from obstructing the highway between the 5th and 6th concessions of the township of Gloucester, with fences, on either side of the tracks of defendants where they cross the highway, and for a mandatory order compelling the removal of the fences.

G. F. Henderson, Ottawa, for plaintiffs.

F. H. Chrysler, K.C., and C. J. R. Bethune, Ottawa, for defendants.

It was contended for defendants (1) that the highway in question, being a highway in law and not in fact—that is, an open public road used and travelled upon by the public—it is not a highway within the meaning of the Railway Act, 51 Vict. ch. 29 (D.); (2), that, as the road allowance where the fences cross, and for a mile on either side along the road allowance, has not been cleared and opened up for public travel and has not been used for a public road, it is necessary that the municipality should first pass a by-law opening it before the municipality can exercise any jurisdiction over it; (3) that under sec. 90 (g) of the Railway Act they had the right to construct their tracks and build their fences across the highway; (4) that the only tribunal having jurisdiction to deal with the questions in dispute is the Railway Committee of the Privy Council.

LOUNT, J., held as to contention (1), that the allowance for the road in question having been made by a Crown surveyor, it is a highway within the meaning of sec. 599 of the Municipal Act, and also within the meaning of the Railway Act; as to (2) that a by-law is not necessary; the council may direct the overseer or pathmaster to open the road, and such direction would be sufficient; as to (3) that this right is subject to sec. 183, which provides against any obstruction to the highway, and sec. 194, which provides for fences and