

HON. MR. JUSTICE KELLY.

FEBRUARY 12TH, 1914.

TOWNSHIP OF NIAGARA v. FISHER.

5 O. W. N. 881.

Way—Highway—Original Road Allowance—Impossibility of Ascertainment—By-law Defining and Accepting Highway—12 Vict. c. 81, s. 31—18 Vict. c. 156—Subsequent Declaratory By-law—Railway—Trespass—Injunction—Costs.

KELLY, J., *held*, that plaintiffs, a municipal corporation were entitled to restrain the obstruction of a 50 foot strip of land accepted as a public highway by by-law of the corporation but not a further 16 feet which had not become a public highway as aforesaid.

Action for an order restraining defendants from obstructing what they claim is a road allowance running between lots 8 and 9 in the township of Niagara, extending from the Queenston and Niagara road to the west limit of the road allowance between the first and second concessions; and requiring the defendants Fisher to give up possession of the same, and restraining the defendant company from continuing to maintain its fences across this road allowance and compelling their removal; and a declaration that this road allowance is a public highway.

A. C. Kingstone, for plaintiffs.

Armour, K.C., and F. C. McBurney, for defendant Fisher.

D. W. Saunders, K.C., for defendants Michigan Central Rv. Co.

HON. MR. JUSTICE KELLY:—The facts upon which the action rests date back to the year 1787, when that part of the township of Niagara was surveyed by Augustus Jones, a deputy Provincial Surveyor, under the superintendence of Phillip R. Frey, also a surveyor.

On October 31st, 1893, lot 9, above mentioned, was patented to James Durham, the description by metes and bounds in the patent shewing in effect that the lot ran from a line distant one chain from the Niagara river, westerly 50 chains, more or less, to within one chain of lot number 38 (a lot in the adjoining concession), with a width from north to south of 20 chains, more or less, no mention being made therein of a road or allowance for road.