

DECEMBER 1ST, 1902.

C. A.

REX v. MOYER.

*Criminal Law—Obstruction of Highway—Conviction for—Weight of Evidence—New Trial—Direction to Jury—Proof of Original Survey—Onus.*

Appeal by defendant, pursuant to leave, from his conviction by the Court of General Sessions for the County of Lincoln upon an indictment for that on or before the 1st day of June, 1901, in the township of Clinton, he did erect and build or cause to be erected upon the highway, a fence which encroached upon the highway. The case was tried with a jury.

E. E. A. DuVernet and J. H. Ingersoll, St. Catharines, for defendant, contended that the chairman's charge to the jury had the effect of wrongly influencing them, because he said that if defendant was found guilty he could not be severely punished; that evidence was improperly admitted; that the documentary evidence shewed that no road had ever been laid out by survey, and the proper inference to be drawn was that the land occupied by defendant and his predecessors in title from time immemorial had been fenced with reference to a roadway established by use and not survey.

W. M. German, K.C., for private prosecutor.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) on the 24th November gave judgment directing a new trial.

On the 1st December the following reasons were given by

OSLER, J.A.:—The verdict appears to me . . . to be against the weight of the evidence. Leave to appeal was granted by the learned Chairman of the General Sessions on this ground, and he would, I think, have been warranted in reserving a case for our consideration under sec. 743 of the Code, on which we might have been able finally to dispose of this particular indictment.

In more than one respect the case was submitted to the jury on rather narrow grounds. In cases of this kind, where an attempt is being made to straighten or widen an old and long established road by proof of an original survey, upwards of one hundred years old, by which the allowance is supposed to have been established, but in exact conformity with which the road has never been opened, laid out, or travelled, a jury should, as I have more than once had occasion to say,